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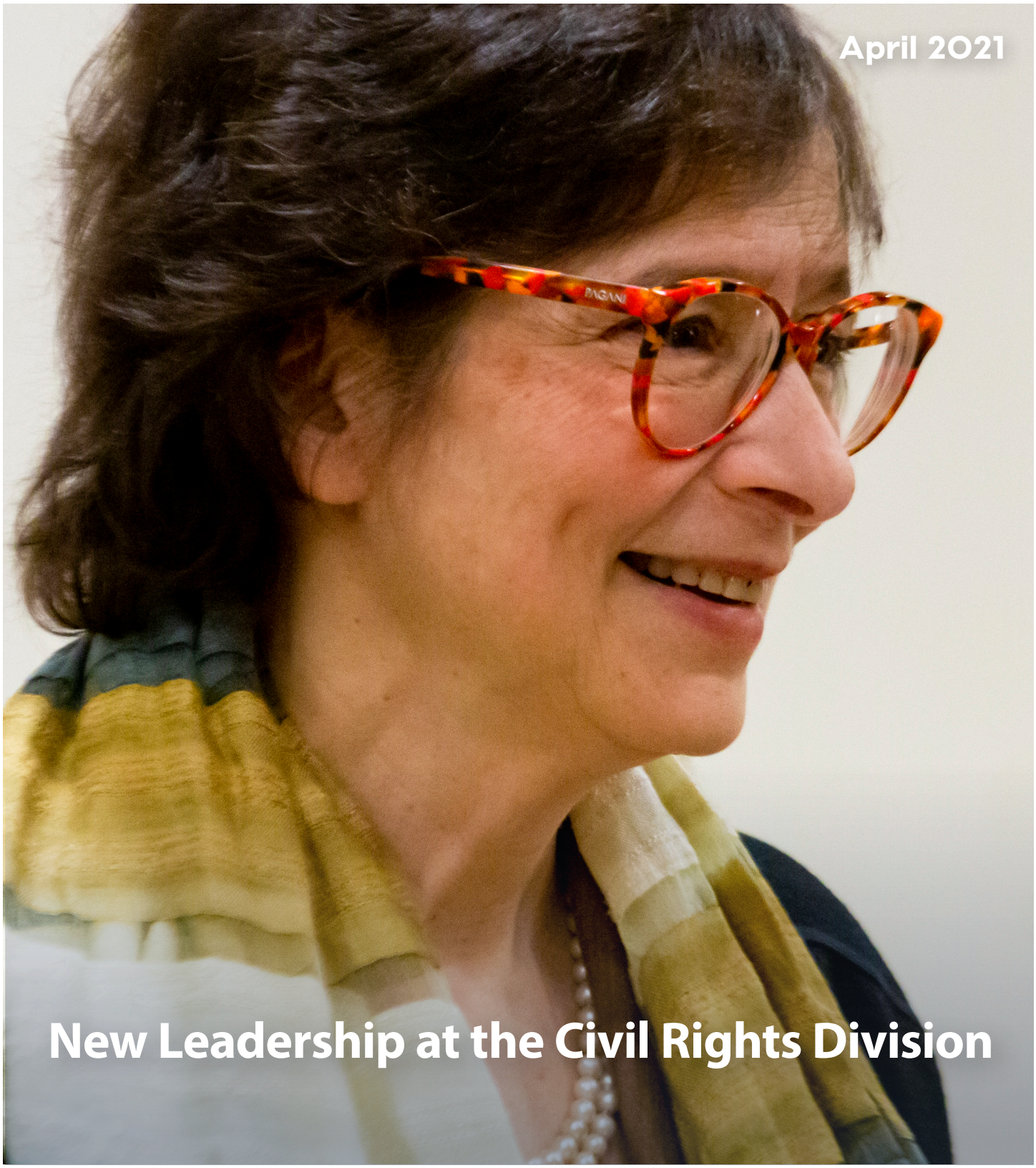

April 2021

New Leadership at the Civil Rights Division

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LAW NOTES

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EXECUTIVE SUMMARY

Justice Department Explains That *Bostock* Ruling Informs Interpretation of Federal Sex Discrimination Laws Beyond Title VII

By Arthur S. Leonard

Principal Deputy Assistant Attorney General Pamela S. Karlan of the U.S. Justice Department's Civil Rights Division issued a memorandum to Federal Agency Civil Rights Directors and General Counsels on March 26, 2021, explaining how the Supreme Court's decision from last June 15 in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), affects Title IX of the Education Amendments of 1972, and providing a general approach for determining how the ruling affects the interpretation of other federal sex discrimination laws.

The memo explains the general statement by President Joe Biden on January 20 in Executive Order 13988 that "laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972 . . . along with their implementing regulations – prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."

Title IX provides that educational institutions that receive federal funding may not discriminate "on the basis of sex" in their educational programs. During the Trump Administration, both the Department of Education and the Department of Justice rejected the argument that Title IX extends to sexual orientation or gender identity discrimination claims. The Education Department issued a regulation to that effect, rescinding a contrary interpretation that had been issued by the Obama Administration, just days after the Supreme Court's *Bostock* ruling last June.

In *Bostock*, President Trump's appointee, Justice Neil Gorsuch, wrote for a 6-3 majority that the ban on discrimination "because of sex" in Title VII of the Civil Rights Act of 1964 extends to such claims because, in the view of the Court, it was impossible for an employer to discriminate against an employee because they are gay or transgender without discriminating because of their sex. In dissent, Justice Samuel Alito protested that the reasoning of the majority's ruling could apply to a list of about a hundred federal statutory provisions that prohibit discrimination because of sex, which he helpfully appended to his dissent. Title IX is on that list.

Despite the *Bostock* ruling, the Trump Administration Education Department, which had stopped investigating discrimination claims by transgender students, persisted in arguing that such claims were not covered by Title IX. The Justice Department issued a memorandum on January 17, 2021, just days before the end of Trump's term, reiterating this position. Shortly after the Biden Administration began, the Justice Department's Civil Rights Division issued a letter withdrawing the January 17 memorandum because of its inconsistency with Biden's Executive Order 13988 (January 20, 2021) and indicated that a new directive would be coming from the Division. Secretary Karlan's Memorandum is that new directive.

There is poetic justice in Karlan issuing the Memorandum because she successfully argued in the *Bostock* case in the Supreme Court in 2019, representing the LGBT plaintiffs asking the Court to interpret Title VII in their favor. Now, as a recently appointed Biden Administration official in the Civil Rights Division of the Justice Department, she gets to articulate the Administration's interpretation of the Supreme Court's decision in her case!

The Memorandum added more detail to President Biden's assertion that Title IX applies to sexual orientation and gender identity cases. She pointed out that because of the similarity in wording of Title VII ("because of sex") and Title IX ("on account of sex"), courts in Title IX cases "consistently look to interpretations of Title VII to inform Title IX," so "*Bostock*'s discussion of the text of Title VII informs the Division's analysis of the text of Title IX."

Secretary Karlan gave several reasons why the Division concluded that Title IX covers these categories of discrimination. First, both Title VII and Title IX apply to "sex discrimination against individuals." Second, the terminology used could be considered "interchangeable," and courts explaining Title VII's ban had even used the phrase "on the basis of sex" in doing so. Third, the reasoning underlying the *Bostock* decision applies equally to Title IX, which she found to be "consistent with the Supreme Court's longstanding directive that 'if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'"

Karlan also noted that after the *Bostock* decision, two federal appeals courts had applied its reasoning to rule in favor of transgender litigants under Title IX, and two other circuit courts of appeals had reached similar conclusions prior to *Bostock*, as long ago as 2016.

Thus, the Civil Rights Division concluded that "the best reading" of Title IX would apply it to sexual orientation and gender identity claims. The Division found "nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's test broadly."

She concluded by stating her hope that this memorandum would provide a "starting point" for the various agencies involved to ensure "the consistent and robust enforcement of Title IX, in furtherance of the commitment that every person should be treated with respect and dignity." Of course,

since the memorandum went to all federal agencies, not just the Education Department, it provides guidance for determining the application of *Bostock*'s reasoning to all the other federal provisions banning sex discrimination. Of particular importance is Sec. 1557 of the Affordable Care Act, which forbids discrimination by health insurers on grounds specified by reference to other federal statutes, one of which is Title IX. Thus, it is a logical inference that Secretary Karlan's conclusion about the coverage scope of Title IX would also apply to the Affordable Care Act's non-discrimination requirement. At least one Trump-appointed district judge disagrees at this point. See "Arizona Federal District Court Refuses to Preliminarily Enjoin Arizona Medicaid Refusal to Cover Gender Confirmation Surgery for Minor Boys," below. ■

Arthur S. Leonard is the Robert F. Wagner Prof. of Labor and Employment Law at New York Law School.

2nd Circuit Finds Vimeo Immune from Liability for Kicking SOCE Promoter Off its Internet Platform

By Arthur S. Leonard

James Domen, a self-described "former homosexual" who formed an organization called "Church United" as a non-profit religious corporation in California to promote conversion therapy, has lost his lawsuit against Vimeo, which cancelled Church United's account and deleted its videos. The Manhattan-based U.S. Court of Appeals for the 2nd Circuit ruled on March 11, in a decision on a question not previously decided in the 2nd Circuit, that Section 230(c)(2) of the federal Communications Decency Act (CDA) protects the right of internet service providers to decide whom to host on their platforms, preempting state anti-discrimination laws. Vimeo has a policy barring the promotion of conversion therapy (which its practitioners call "sexual orientation change efforts," or SOCE) from its platform. *Domen v. Vimeo, Inc.*, 2021 WL 922749, 2021 U.S. App. LEXIS 7101 (2nd Cir., March 11, 2021).

Circuit Judge Rosemary Pooler wrote for the court that Vimeo's policy "fell within the confines of the good-faith content policing immunity that the CDA provides to interactive computer services."

Domen describes himself as the president and founder of Church United, claiming that he "was a homosexual" for three years but "because of his desire to pursue his faith in Christianity, he began to identify as a former homosexual." He started Church United in 1994, intending to "equip pastors to positively impact the political and moral culture in their communities," and he claims to have 750 "affiliated pastors."

Church United created a Vimeo account in 2016 and began uploading videos to the site, eventually upgrading to a "professional account" to get more bandwidth. Vimeo emailed Domen in November 2018, informing him that a moderator for the site had flagged the Church United account for "review" because "Vimeo does not allow videos that promote SOCE."

Domen was warned that if he did not remove five offending videos within 24 hours of the email, Vimeo might not only remove them but also the entire Church United account. Domen was also warned to download his videos if he didn't have a copy, in case his account was deleted. About two weeks after sending the email, Vimeo deleted Church United's account, with the explanation that "Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech."

Five specific videos were flagged as violating the policy against promoting SOCE. Church United, arguing that the videos were protected political speech, claims that it posted the videos on the site as "part of an effort by Church United to challenge a California Assembly bill proposing to expand the state's ban on SOCE to talk therapy and pastoral counseling."

Domen's lawsuit is based on California's public accommodations law (the Unruh Act) and the New York State Human Rights Law, claiming under both statutes that Domen and Church United were the victims of discrimination because of religion and sexual orientation. They also made a freedom of speech claim under the California Constitution, which they did not pursue on appeal.

U.S. Magistrate Judge Stuart D. Aaron granted Vimeo's motion to dismiss the case, finding that Domen's claims were all preempted by the CDA. Although the 2nd Circuit had not yet ruled on this precise situation, "where the plaintiffs sought to hold the defendant liable for removing content as opposed to permitting content to exist on its platform," he looked to cases decided in other parts of the country with similar

results. In any event, because Section 230 of the CDA preempts state statutory and constitutional claims, he concluded that "the entire case was statutorily barred."

In upholding Judge Aaron's ruling, Circuit Judge Pooler explained, "Section 230 [was] enacted to 'provide immunity for interactive computer services that make "good faith" efforts to block and screen offensive content,'" and the federal courts have generally held "that Section 230 immunity is broad."

Specifically, the statute says that interactive computer service providers are immune from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Thus, concluded Judge Pooler, "Vimeo is statutorily entitled to consider SOCE content objectionable and may restrict access to that content as it sees fit."

The court rejected Domen's argument that Vimeo was acting in bad faith because it continued to host other videos on its site which, based on their titles, Domen claims were similar to his videos that had been removed. Judge Pooler rejected this argument, stating that "the mere fact that Appellants' account was deleted while other videos and accounts discussing sexual orientation remain available does not mean that Vimeo's actions were not taken in good faith. It is unclear from only the titles that these videos or their creators promoted SOCE." And, "given the massive amount of user-generated content available on interactive platforms, imperfect exercise of content-policing discretion does not, without more, suggest that enforcement of content policies was not done in good faith."

Due to the virtual unanimity of federal courts in finding that Section 230 broadly immunizes interactive service provides from liability for their decisions about what to allow or prohibit on their sites, it is unlikely that Domen would be able to get the Supreme Court to review this decision. ■

School Censorship of 4th Grader's Essay on LGBTQ Rights Upheld by Federal Appeals Court

By Matthew Goodwin

A unanimous three-judge panel of the U.S. Court of Appeals for the 4th Circuit in Richmond, Virginia upheld a District Court ruling dismissing a mother's lawsuit alleging, *inter alia*, violations of her daughter's First Amendment rights by the student's elementary school principal who initially refused to publish the girl's essay on LGBTQ rights. *Robertson v. Anderson Mill Elem. Sch.*, 2021 U.S. App. LEXIS 602, 2021 WL 786631 (March 2, 2021).

Fourth graders at Anderson Mill Elementary in Spartanburg, South Carolina were assigned to write an "essay to society" during the 2018-2019 school year. The essays were then to be compiled into a booklet to be sent home with the students for their families to read.

One student, identified in the opinion only by her initials, R.R.S., wrote an essay on transgender rights. R.R.S. was 10 years old at the time she wrote her essay; her grandfather is identified in the opinion as "a member of the LGBTQ community," and R.R.S. is described in the complaint as a "proud advocate of LGBTQ rights." Her essay (unedited) reads as follows:

"To society, I don't know if you know this but peoples view on Tran's genders is an issue. People think that men should not drees like a women, and saying mean things. They think that they are choosing the wrong thing in life. In the world people can choose who they want to be not being told that THEIR diction is wrong. I hope people understand that people can hurt themselves from others hurting their feelings. People need to think before they speak because one word can hurt someone's feelings. We need to fix this because this is getting out of hand!"

The school principal, Elizabeth Foster, declared the subject matter of the essay to be age-inappropriate. R.R.S.'s teacher was instructed to inform R.R.S. and her family the essay would not to be included in the compilation booklet. R.R.S. then submitted a revised essay on the topic of bullying which was nearly identical to the first essay except for the first two sentences, which read: "I don't know if you know this but peoples view on bullying is an issue. People think that saying mean things is ok and saying mean things."

The complaint alleges that in early March of 2019, the principal provided R.S.S.'s mother, Hannah Robertson, with the rationale for her decision not to include the "LGBTQ-themed essay" in the booklet " . . . through 'a series of increasingly abusive, harassing, emotionally distressful and/or clearly unwarranted communications" with the mother, according to the Complaint. The principal claimed "the original paper would make other parents upset" and "would create a [sic] undesirable situation at the school"; "the original paper 'was not acceptable'"; "it was not age-appropriate to discuss transgenders, lesbians, and drag queens outside of the home"; "due to the type of school this is, the people that work here and the students and families of the students who go here, the topic would be disagreeable"

Nevertheless, the principal reversed course and despite her previous communications wrote to Robertson that R.R.S's essays would be included in the booklet after all. Robertson, concerned at this point about R.R.S.'s privacy, asked that neither of her daughter's essays be included in the booklet.

Five days after requesting the essays be removed, Robertson filed suit in the District Court for the District of South Carolina. An amended complaint interposed a constitutional claim brought pursuant to 42 U.S.C. § 1983, alleging that principal Foster "violated R.R.S.'s First Amendment right to free speech 'by forcing [] R.R.S.

to change the topic of [the] paper." Robertson interposed state law claims for intentional infliction of emotional distress and negligent infliction of emotional distress over which she asked the District Court to exercise supplemental jurisdiction. Named as defendants were the elementary school, the school district, and principal Foster – individually and in her official capacity as principal (collectively "Defendants").

The Defendants moved to dismiss almost all of the claims in the amended complaint except they did not move to dismiss the First Amendment constitutional claim against the school district. In response, Robertson sought to file a second amended complaint.

The District Court granted Defendants' motion to dismiss in its entirety and *sua sponte* dismissed the constitutional claim brought against the school district on the grounds " . . . Appellant failed 'to allege any constitutional violation based on official policy or custom." As to principal Foster, the District Court dismissed all claims as to her on qualified immunity grounds. Based on dismissal of the constitutional claims, the District Court declined to exercise supplemental jurisdiction over Robertson's state law claims. Robertson's appeal challenged the granting of dismissal as to principal Foster in her individual capacity and the *sua sponte* dismissal of the constitutional claim brought against the school district. The 4th Circuit panel affirmed in a decision written by an appointee of President Obama, the Circuit Judge Stephanie Thacker.

The opinion's legal analysis first lays out the law of qualified immunity as guided in a school censorship case by the U.S. Supreme Court opinion *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988).

"Qualified immunity is a defense that 'shields government officials from personal liability when their conduct does not violate clearly established rights of which a reasonable person would have known . . . In other words, 'in gray areas, where the law is unsettled or murky, qualified immunity affords protections to government officials who take 'action[s] that [are] not clearly forbidden.' There is a two-prong test for determining whether qualified immunity shields a government official from liability. Immunity will attach ' . . . unless (1) the allegations underlying the claim, if true, substantiate [a] violation of federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known.'"

The opinion observes that it is discretionary as to which of the two prongs of the analysis are addressed. The court chose to start with the first prong and stated that no consideration of the second prong was necessary " . . . because the allegations underlying Appellant's amended complaint, even if true, do not substantiate a violation of R.R.S.'s constitutional rights."

To assess whether R.R.S.'s – or any public-school student's – First Amendment rights have been infringed by school censorship in written materials requires consideration of the "*Hazelwood* framework." As summarized by the Judge Thacker, in *Hazelwood* the high school students claimed violation of their First Amendment rights by their school district when their school refused to publish articles about divorce and teenage pregnancy that the students had written for the school newspaper.

The Supreme Court held that no constitutional violation had occurred in *Hazelwood*, stating "school officials 'do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.'"

Here the 4th Circuit found that *Hazelwood* applies because the speech at issue is " . . . contained in [a] 'school-sponsored publication . . . that students, parents, and members of the public might reasonably perceive to bear the imprimatur of [a] school." Judge Thacker's opinion observes "[i]t would be reasonable . . . for the students' families to view the essay booklet as bearing the imprimatur of Anderson Mill Elementary School and the School District . . . " because " . . . it was school officials – most notably, R.R.S.'s fourth grade teacher – who decided to compile the fourth-grade students' essays into a booklet and send copies of that booklet home with the students for their families to read."

Next the court looked at whether the principal's regulation of speech in this case was "reasonably related to legitimate pedagogical concerns." It held in the affirmative, concluding this was so because principal Foster's refusal to include R.R.S.'s first essay was motived " . . . at least in part by her concern that the essay topic was 'not age-appropriate' for fourth graders."

" . . . [M]aintaining the age-appropriateness of school-sponsored expressive activities is a pedagogical concern that passes muster under *Hazelwood* . . . *Hazelwood* itself elucidates that schools 'must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.'" The court concludes this point by stating " . . . it is the school board, whose responsibility includes the well-being of the students, that must make . . . " determinations as to age-appropriateness.

Robertson had argued that principal Foster's initial refusal to include R.R.S.'s essay was impermissible "viewpoint-based discrimination." As the court observed, "[n]either the Supreme Court nor [the 4th Circuit] has decided whether restrictions on school-sponsored speech must be viewpoint neutral under *Hazelwood*, and other circuits are split on this question."

But the court refused to take up this issue. Judge Thacker wrote: "[w]e need not pick a side in this debate today. . . Appellant has not plausibly alleged that Principal Foster's restriction on R.R.S.'s speech violated [a viewpoint neutral] principle." Instead, the she wrote that the principal objected to any essay on the topic of LGBTQ rights being included in the booklet, rather than objecting to the content of R.R.S.'s essay.

Finally, the court took up the District Court's *sua sponte* dismissal. Judge Thacker wrote that the District Court had not complied with certain procedural fairness requirements before issuing the *sua sponte* dismissal of

the First Amendment claim against the school district. However, the court elected not to reverse on these grounds because, in their view Robertson had not been prejudiced by the dismissal. In this connection, the court opined that advance notice of the *sua sponte* dismissal to Robertson of the First Amendment claim as to the school district would not have altered the outcome, because Robertson had already argued unavailingly in her brief that the school district had violated R.R.S.'s constitutional rights.

Eric Chalmers Poston, Esq. of Columbia, South Carolina, was counsel for R.R.S. while the Defendants were represented by Jasmine Rogers Drain, Esq. and Thomas Kennedy Barlow, Esq., also of South Carolina. There was no immediate announcement whether *en banc* review of Supreme Court review will be sought. ■

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

8th Circuit Panel Rules on Qualified Immunity Claim by Public University Officials in Dispute Over Christian Student Group's Challenge to Human Rights Policy

By Arthur S. Leonard

A unanimous 8th Circuit panel found that the individual named defendants, officials of the University of Iowa, were entitled to qualified immunity from monetary damages in a free-exercise challenge by Business Leaders in Christ against the defendants' enforcement of the University's Human Rights Policy for their exclusionary policy governing who can be officers of the group. Business Leaders in *Christ v. University of Iowa*, 2021 WL 1080556, 2021 U.S. App. LEXIS 8256 (March 22, 2021). However, the panel, in an opinion by Circuit Judge Lavenski Smith, held that the district court erred in granting qualified immunity on the student group's free-speech and expressive-association claims, finding that the group's free speech and expressive association rights were "clearly established," but the free-exercise claim was not. The district court had issued an injunction in favor of BLinC but had decided not to subject individual University officials to monetary damages. BLinC appealed the qualified immunity ruling.

The University registers student organizations, according to them various benefits including student fee subsidies, campus meeting spaces, and similar privileges. The school's Registered Student Organization (RSO) policy requires the organizations to "adhere to the mission of this University, its supporting strategic plan, policies and procedures," including the Human Rights Policy, which prohibits discrimination because of a long list of characteristics, including creed, religion, sexual orientation, gender identity, and associational preferences. The University's published policy does recognize that student organizations should "be able to exercise free choice of members on the basis of their merits as individuals without restriction in accordance with the University Policy on Human Rights. The University acknowledges the interests of students to organize and associate with like-minded students, therefore any individual who subscribes to the goals and beliefs of a student organization may participate in and become a member of the organization." However, the Human Rights Policy rules out denying membership or participation to any student on the basis of sexual orientation, gender identity, or associational preferences, as noted above.

The court found that "the University has approved constitutions of at least six RSOs that expressly limit access to leadership or membership based on race, creed, color, religion, sex and other characteristics that the Human Rights Policy protects." Among them were organizations requiring students to affirm certain lifestyle beliefs and practices, such as a group called House of Lorde that holds membership interviews to maintain "a space for Black Queer individuals and/or the support thereof," and The Chinese Students and Scholars Association, that limits membership to "enrolled Chinese students and scholars." There is a "liberal" Christian student group that requires leaders to sign a "gay-affirming statement of Christian faith." The University evidently didn't object to any of these.

But when it came to Business Leaders in Christ (BLinC), which requires members to affirm a faith statement that rules out homosexuality (or any sex outside of heterosexual marriage), and also to affirm that "every person should

embrace, not reject, their God-given sex," the University had a problem. A gay Christian business student who wanted to become an officer of BLinC was screened out because he refused to affirm that he would refrain from engaging in sex with other men, and he filed a complaint with the University, which initiated an investigation, leading Associate Dean of Students Thomas Baker to tell the leaders of BLinC that their denial of an officer position to the gay student violated the Human Rights Policy and "that BLinC could remain a registered organizations in good standing if it understood the Human Rights Policy and was willing to comply with it going forward."

BLinC argued that it was not discriminating based on sexual orientation, but rather based on the gay student's unwillingness to "embrace the group's mission," as it claimed a privilege to require under the policy on RSOs. University officials told BLinC that in order to function as an RSO, it would have to "commit to ongoing compliance with the University of Iowa Human Rights Policy at all times in the future," submit a list of qualifications for leaders "designed to prevent future disqualifications based on protected categories and to ensure that persons who identify as non-heterosexuals are not categorically eliminated from consideration," and also submit an "acceptable plan for ensuring that group officers who interview leaders will ask questions relevant to the vision statement that are not presumptive of candidates based upon their sexual orientation."

In response, BLinC revised its constitution to incorporate a "Statement of Faith" to which leaders would have to subscribe, which effectively ruled out homosexual activity or gender transition. The University rejected this revised constitution, giving BLinC an ultimatum if it wanted to remain a registered student organization. While acknowledging that technically a gay student who publicly acknowledged being gay would not be ruled out for a leadership position if the student was willing to sign the "Statement of Faith," it "qualified" this admission by stating that "the 'openly gay' individual would have to regard his or her innate attraction to members of the same sex as 'sinful' in order to participate as a member of BLinC's leadership team." On this basis the University's Assistant Vice President and Dean of Students formally revoked BLinC's registered student organization status, leading to this lawsuit.

The district court, and ultimately the 8th Circuit panel, concluded that the University violated BLinC's right to free speech and expressive association under the 1st Amendment, and that these rights are "clearly established." Judge Smith, writing for the panel, cited Supreme Court precedents upholding student organizational rights in the contest of opposition to the Vietnam War, for example, and also found Supreme Court precedent supporting the right of Christian student groups to engage in religious worship and discussion on campus. The court subjected university regulations to "strict scrutiny" under the 1st Amendment when they "singled out religious organizations for disadvantageous treatment." This included a case requiring a university not to discriminate in funding of student organizations and activities against a student publication that discussed issues from a religious perspective. The court also cited prior 8th Circuit precedents including, ironically, *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (1988), in which the court held that a state university in Arkansas could not refuse to fund a gay student organization. "More recently," wrote Judge Smith, "we held that a university engaged in viewpoint discrimination by denying the use of the university's trademarks to a student group that advocated for the reform of marijuana laws."

The court distinguished the Supreme Court's ruling in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), because the university in that case was found to have a general policy that no student could be excluded from any registered student organization on any categorical basis – the so-called "all comers" policy – and found that this was not true of the University of Iowa, which recognized that organizations could limit their membership to like-minded students, as exemplified by the organizations with selective policies that were recognized by the University without protest.

The court found that it was "clearly established . . . that the University's recognition of RSOs constituted a limited public forum," and that prior precedents "recognized the legal principle that a nondiscrimination policy neutral on its face violates a student group's rights to free speech and expressive association if not applied in a viewpoint-neutral manner." The court concluded, "we are satisfied that Supreme Court precedent, existing Eighth Circuit precedent, and 'a robust consensus of cases of persuasive authority,' 'squarely governed the individual defendants' conduct in the specific circumstances at issue" and, as a result, "we hold that the district court erroneously granted the individual defendants' motion for summary judgment based on qualified immunity on BLinC's free-speech and expressive-association claims.

However, when it came to BLinC's free exercise claim, the organization came up against the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), holding that the Free Exercise Clause does not prohibit the enforcement of an otherwise valid facially neutral regulation of general applicability that incidentally burdens religious conduct. In the Martinez case, cited above, the Supreme Court said that the Christian Legal Society's request for "an exemption from [the school's] across-the-board all-comers policy" was a request for "preferential, not equal treatment; it therefore [could not] moor its request for accommodation to the Free Exercise Clause."

"None of these cases make clear that that BLinC would have a free-exercise claim – as opposed to a free-speech claim – against the University defendants for selectively enforcing its nondiscrimination policy against BLinC in a limited public forum," wrote Judge Smith, noting that prior precedents relied on by BLinC had declined to "inquire into the extent, if any, to which free exercise interests are infringed by the challenged University regulation." The court decided against BLinC's attempt

to rely on prior cases because that would define "clearly established" at too high a level of generality to meet the Supreme Court's dicta on the question.

"Because the law was not clearly established at the time that the individual defendants' conduct violated BLinC's free-exercise rights," wrote Smith, "we hold that the district court did not err in granting qualified immunity to them in BLinC's free-exercise claim," even though the district court ruled on the merits against the University on the free-exercise claim in this case.

The majority of the panel, Judges Smith and William Benton, were both appointed by President George W. Bush. The third member of the panel, Jonathan Kobes, was appointed by Donald Trump, and he wrote a separate opinion, dissenting on the free-exercise point. Consistent with the general approach to free-exercise issues taken by the Trump Administration, Judge Kobes would find that any action against the BLinC because of their religious practices would be clearly established as a constitutional violation.

"What the individual defendants did to BLinC has been done before," wrote Kobes, citing to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeach*, 508 U.S. 520 (1993). In that case, the city targeted a practice central to the Santeria faith. "The Court held that the underinclusive ordinance violated the Free Exercise Clause because it specifically exempted slaughtering animals for secular and some religious reasons – commercial operations and kosher food preparation – but not for the Santerians. The Court concluded that a law is not generally applicable [and thus governed by *Employment Division v. Smith*] and violates the Free Exercise Clause 'when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." And, he concluded, "what the city council could not do in Lukumi, the individual defendants cannot do to BLinC."

In this case, Judge Kobes argued, "the individual defendants decided that student groups with leadership qualifications based on race, gender, or political ideology were not subject to the Human Rights Policy, but BLinC was. That kind of 'value judgment in favor of secular motivations, but not religious motivations . . . must survive strict scrutiny,'" he wrote, quoting from a unanimous opinion by Justice Samuel Alito in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999). He argued that Lukumi and Fraternal Order had clearly established that "granting secular but not religious exemptions from a neutral policy violates the Free Exercise Clause," and thus the individual defendants in this case were not entitled to qualified immunity against monetary damages.

"The individual defendants may pick their poison: they are either plainly incompetent or they knowingly violated the Constitution," he concluded. "Either way, they should not get qualified immunity."

Interestingly, the only counsel listed for the Respondents on the court's opinion are attorneys from the U.S. Justice Department, not private or University counsel. The Trump Administration was in there arguing that the individual University officials should not get qualified immunity since they were revoking registered status from a Christian student organization. ■

6th Circuit Panel Says University Professor May Have 1st Amendment Right to Misgender Transgender Students

By Arthur S. Leonard

Nicholas Meriwether, a philosophy professor at Shawnee State University in Portsmouth, Ohio, was very concerned in 2016 when the University announced that its ban on gender identity discrimination would require professors to respect students' gender identity by using appropriate pronouns to refer to them. Meriwether, a devout Christian who rejects the idea that people can have a different gender identity than their genetic sex, protested to his department chair, who ridiculed his religious beliefs and told him to comply with the rule. Now a federal appeals court panel has ruled that the Meriwether could have a 1st Amendment right to insist on misgendering transgender students based on his religious beliefs. *Meriwether v. Hartop*, 2021 WL 1149377, 2021 U.S. App. LEXIS 8876 (6th Cir., March 26, 2021).

According to his federal court complaint, Meriwether says that the department chair exhibited hostility toward him and his beliefs during their meeting, stating that "adherents to the Christian religion are primarily motivated out of fear"; "the Christian doctrines regarding hell are harmful and should not be taught"; "anyone who believes hell exists should not be allowed to teach these doctrines"; "faculty members who adhere to a certain religion should be banned from teaching courses regarding that religion"; and "the presence of religion in higher education is counterproductive" because "the purpose of higher education is to liberate students" and "religion oppresses students."

Meriwether, who had taught at Shawnee for 35 years, confronted the issue up-close in January 2018 when he returned from a semester on sabbatical leave and discovered, undoubtedly to his chagrin, that there was a transgender woman in his class, who is identified in the litigation as "Doe." Meriwether, believing Doe to be male, addressed Doe as "sir" in response to a comment Doe made in class discussion. After the class, Doe approached Meriwether and advised him that Doe was a woman and should be addressed accordingly. Doe threatened to file a complaint against Meriwether if he did not address her as female.

This led ultimately to the University putting a disciplinary note and warning in Meriwether's file when he failed to abide by instructions to consistently address Doe as a woman or to just to use her last name when calling on or referring to her. He tried to restrain himself from addressing Doe incorrectly, but slipped up on occasion, quickly correcting himself. He told one administrator that he would be willing to comply with the rule by referring to Doe consistently as female if he could put an explanatory statement in his course Syllabus setting forth his religious views, but he was told that would itself violate the anti-discrimination rule.

Doe filed at least two complaints with University administrators against Meriwether, leading to findings that he had created a hostile environment for Doe, which he tried to refute by claiming that Doe had participated actively and well in class discussion and earned a high grade in his course. Meriwether appealed these rulings and claimed that when his union representative tried to explain Meriwether's religious freedom argument to the University President, that official just laughed and refused to listen.

U.S. District Judge Susan J. Dlott referred the University's motion to dismiss Meriwether's 1st Amendment lawsuit to a Magistrate Judge, Karen L. Litkovitz, who issued a Report and Recommendation in 2019 concluding that the case should be dismissed, because Meriwether's failure to comply with the University's rule did not involve constitutionally protected speech. *Meriwether v. Trustees of Shawnee State University*, 2019 WL 4222598 (S.D. Ohio, Sept. 5, 2019). In January 2020, Judge Dlott issued a brief opinion agreeing with Litkovitz's recommendation and dismissing the case. *Meriwether v. Trustees of Shawnee State University*, 2020 WL 704615 (S.D. Ohio, Feb. 12, 2020). Meriwether, represented by Alliance Defending Freedom, a staunchly anti-LGBT religious litigation group, appealed to the U.S. Court of Appeals for the 6th Circuit, which reversed Judge Dlott's ruling on March 26, reviving the lawsuit and sending it back to the District Court for trial.

Judge Dlott's decision adopting Judge Litkovitz's recommendation to dismiss the case was based heavily on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a Supreme Court ruling that held, by a vote of 5-4, that when government employees speak or write as part of their job, their speech is "government speech" that is not protected by the 1st Amendment. As Justice Anthony Kennedy interpreted the Court's free speech precedents, an individual is protected by the 1st Amendment's freedom of speech when they are speaking as a citizen on a matter of public concern, but not when they are speaking as a government official. The case concerned a prosecuting attorney who claimed to have suffered unconstitutional retaliation for an internal memo he wrote and some testimony he gave in a criminal court hearing that met with disapproval from his supervisors. The Supreme Court held that neither his memo nor his testimony enjoyed 1st Amendment protection because he was speaking as part of his job as a government official.

In dissent, Justice David Souter raised the specter of censorship of public university professors who are employed to engage in scholarship and teaching and who would theoretically be deprived of academic freedom under such a rule. Justice Kennedy responded in his opinion by acknowledging the academic freedom concern and observing that the Court was not deciding that issue in the *Garcetti* case. Lower federal courts have been divided about the impact of *Garcetti* in cases involving educators seeking 1st Amendment protection for their speech.

In her opinion, Judge Litkovitz found that Professor Meriwether's use of inappropriate terminology to refer to Doe was not protected speech, relying in part upon the *Garcetti* reasoning, and Judge Dlott accepted her conclusion. But the 6th Circuit panel (which included two judges appointed by President Donald J. Trump) decisively rejected that view.

Writing for the unanimous panel, Circuit Judge Amul Roger Thapar, one of the Trump-appointed judges, seized upon Justice Souter's *Garcetti* dissent and Justice Kennedy's acknowledgement that academic freedom concerns could create an exception to the *Garcetti* rule and insisted that Professor Meriwether's claim that the University violated his 1st Amendment rights by disciplining him for his use of words in dealing with Doe should not have been dismissed. Thapar also relied on pre-*Garcetti* 6th Circuit precedents.

"Under controlling Supreme Court and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors," wrote Judge Thapar. "Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed." The court insisted that the words Meriwether used reflected his religiously-based beliefs about gender, and as spoken in the classroom were part of his teaching and were thus communicating his point of view about a hotly debated and controversial subject of public concern. As such, they enjoy 1st Amendment protection under the free speech provision.

Furthermore, pointing out the hostility with which Meriwether's department chair and the University president had responded to his religiously based arguments, the court relied on *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S.Ct. 1719 (2018), to find that his right to free exercise of religion also came into play in this case. If speech on an issue of public concern enjoys 1st Amendment

protection, then the University's disciplinary action of placing a warning letter in Meriwether's personnel file and threatening him with more severe sanctions for future violations would be subject to "strict scrutiny," which means the University and those officials named as individual defendants would have the burden to show that there is a compelling justification for their actions and that the "accommodations" that Meriwether had suggested would defeat the University's attempt to achieve its compelling goal.

In this case, the University's justification lies in Title IX of the Education Amendments of 1972, which provides that schools receiving federal funding may not deprive any individual of equal educational opportunity because of sex. In 2016, reacting to Gavin Grimm's lawsuit against the Gloucester County, Virginia, School District, the Obama Administration informed the educational community that it interpreted that language to ban gender identity discrimination, and published a guidance document that instructed, among other things, that transgender students have a right to be treated consistent with their gender identity, including appropriate use of language in speaking to and about them.

The University argued that the 6th Circuit's decision in *E.E.O.C. v. Harris Funeral Homes*, 884 F.3d 560 (2018), which later became part of the *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), had confirmed its compelling interest in preventing discrimination against transgender students pursuant to Title IX. In that case, the 6th Circuit, and ultimately the Supreme Court, held that the ban on sex discrimination in employment under Title VII of the Civil Rights Act of 1964 applied to an employer's discharge of a transgender employee when she announced her transition.

Judge Thapar rejected the argument. "*Harris* does not resolve this case," he insisted. "There, a panel of our court held that an employer violates Title VII when it takes an adverse employment action based on an employee's transgender status. The panel did not hold – and indeed, consistent with the First Amendment, could not have held – that the government always has a compelling interest in regulating employees' speech on matters of public concern . . . . [It] would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law. Purportedly neutral non-discrimination policies cannot be used to transform institutions of higher learning into 'enclaves of totalitarianism.'"

Furthermore, he wrote, "a requirement that an employer not fire an employee for expressing a transgender identity is a far cry from what we have here – a requirement that a professor affirmatively change his speech to recognize a person's transgender identity."

"At this stage of the litigation," wrote Thapar, "there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits. Without such a showing, the school's actions 'mandate orthodoxy, not anti-discrimination,' and ignore the fact that '[t]olerance is a two-way street.'" He also rejected the argument that how Meriwether addressed Doe in the classroom deprived her of educational opportunity, pointing out Meriwether's claim that Doe was an active participant in class discussion and earned a "high grade" in his course.

Thapar supported this view by noting that University President Jeffrey A. Bauer, in confirming the disciplinary decision, had conceded that Meriwether did not create a hostile environment for Doe, instead resting his decision on the assertion that Meriwether discriminated against Doe by addressing cisgender students consistent with their gender identity but not address Doe consistent with her gender identity. Thus, Judge Thapar concluded, disciplining Meriwether was not necessary to effectuate Title IX's policy of protecting educational opportunity.

The court's opinion lacks any discussion or understanding concerning the concept of "misgendering" and the harm that inflicts on transgender individuals. In the court's view, the victim here is Professor Meriwether, not Doe. This reflects the same cavalier attitude towards misgendering recently displayed in a 5th Circuit decision denying a request by a transgender prisoner that she be referred to consistent with her gender identity in court papers, also treated dismissively by a Trump-appointed appeals court judge. And it calls to mind a recent ruling by the 11th Circuit striking down on 1st Amendment free speech grounds an attempt by Florida municipalities to protect LGBT youth from the practice of conversion therapy, yet another opinion by a Trump-appointed judge. The Trump Administration may technically be at an end, but it lives on in his appointment of a third of the active federal appeals court judges.

The only point on which the 6th Circuit panel affirmed Judge Dlott's ruling was in her conclusion rejecting Meriwether's argument that the University's rule was too vague to meet Due Process standards. The 6th Circuit panel found that Prof. Meriwether was clearly advised of the rule and was accorded Due Process, while finding fault with the lack of neutrality towards religion exhibited by his department chair and President Bauer. The court ordered that Judge Dlott's ruling dismissing the lawsuit be vacated, and that the case be sent back to the district court for proceedings consistent with the 6th Circuit's opinion. ■

Supreme Court Allows Nominal Damages to Save Civil Rights Case from Mootness

By William J. Rold

Sometimes, civil rights injunctive cases become moot when a constitutional tort-feasor ceases the illegal action with little likelihood of its recurrence. If the deprivation is difficult to monetize, nominal damages can save the case from mootness.

This can happen with LGBTQ civil rights cases under the First Amendment and Equal Protection Clauses – sometimes, even under the Eighth Amendment. This writer lost a transgender prisoner case in the Eighth Circuit that the court found to be moot because the state decided to start hormones, and the court declined to consider nominal damages. *See* "Eighth Circuit Dodges Broad Ruling on Hormones for Transgender Prisoners," (*Law Notes* (Jan. 2021, pages 6-7), reporting *Prowse v. Payne,* 2021 WL 68065 (8th Cir., Jan. 8, 2011). The Eleventh Circuit did the same thing with hormones in *Keohane v. Fla. DOC,* 952 F.3d 1257, 1276-78 (11th Cir. 2020).

The Supreme Court has made it a little easier to keep such cases alive even when the government stops its unconstitutional action. In *Uzuegbunam v. Preczewski,* No. 19-968 (March 8, 2021), eight justices agreed that nominal damages are sufficient, even without proof of actual compensatory damages, to defend against a motion to dismiss. Justice Thomas wrote the opinion; Chief Justice Roberts dissented.

The case involved the First Amendment and access to a public forum. Religious proselytizers at a state college were confined to a tiny area of campus – "free speech expression areas," which together made up just 0.0015 percent of campus. After they sued, the college permanently enlarged the public speaking area and claimed the case was moot. Adhering to the Eleventh Circuit rule that nominal damages were not enough under Article III to keep such a case alive, the District Court dismissed. 378 F.Supp.3d 1195 (N.D. Ga., 2018), and the Circuit affirmed, 781 Fed. App'x 824 (11th Cir. 2019). The Supreme Court reversed, 592 U.S. ___ (2021).

"[A]n award of nominal damages by itself can redress a past injury," said the Court. Compensatory damages need not be plead. Justice Thomas found that nominal damages were available at common law and survive as redress for past injury, however slight, despite the statutory creation of the Declaratory Judgment to augment injunctive relief, if F.R.C.P. 65 requirements for an injunction are not met.

The majority opinion and the single dissent trace nominal damages from King's Bench decisions in the early 1700s. They continue the debate about the meaning of Justice Story's famous "a wrong creates a right" theory of the 19th century. *See Whipple v. Cumberland Mfg. Co.,* 29 F.Cas. 934, 936 (CC Me. 1843) ("well-known and well-settled" that "whenever a wrong is done to a right," at a minimum "nominal damages will be given"). Justice Thomas finds ample authority for nominal damages in modern civil rights cases. *See Farrar v. Hobby*, 506 U.S. 103, 111, 113 (1992) (nominal damages are "relief on the merits of [the] claim"); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (nominal damages "affec[t] the behavior of the defendant towards the plaintiff"); *Carey v. Piphus,* 435 U.S. 247, 266–267 (1978) (nominal damages are a proper redress for a violation of procedural due process without showing compensatory injury).

This writer is litigating a gay-bashing of a prisoner in Florida, in *Brown v. GEO Group,* 2018 U.S. Dist. LEXIS 68819 (S.D. Fla., April 23, 2018), reported in *LawNotes* (June 2018, pages 323-4). Obviously, inmate Brown has actual compensatory damages (as do many transgender prisoners denied medical care), but discovery has shown that Brown is also subjected to a kind of a gay "apartheid" – where he and other gays are forced (with staff knowledge and complicity) to the back of lines for sick call, meals and haircuts – and required by their "peers" to sit at separate tables in the mess hall and at separate bleachers in the recreation yard. The proof shows that investigation of inmate-on-inmate assault involving gays remains unreported, although they are covered by Florida's hate crimes law. The investigators are not thorough, evidence is lost, and prosecutions are rare. Trans inmates face similar (or worse) ostracization. These Equal Protection claims are difficult to monetize, but there is constitutional injury.

Justice Thomas wrote: "Despite being small, nominal damages are certainly concrete." It is undisputed that "Uzeugbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him." Because "every violation [of a right] imports damage," (quoting Justice Story again), "nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms."

Chief Justice Roberts' solo dissent is a rarity for him. He writes, in summary: "If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar. Because I would place a higher value on Article III, I respectfully dissent."

The case does not resolve issues of particularized injury (here, others said they were "chilled" by what happened to Uzuegbunam), nor does it discuss qualified immunity or individual versus official capacity. That will be for other cases. But the religious petitioners who reversed the Eleventh Circuit here breathed life into the civil rights cases of many plaintiffs they undoubtedly never had in mind. ■

William Rold is a civil rights attorney in NYC and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

Nebraska Supreme Court Construes Old Adoption Statute to Allow Joint Adoption by Married Same-Sex Couple

By Arthur S. Leonard

Embracing a textualist interpretive approach, the Nebraska Supreme Court found that the "plain language" of the state's Adoption Statute would allow a court to grant an adoption of a child to a married same-sex couple, even if that was not necessarily what the legislature intended when it adopted the statute. *In re Adoption of Yasmin S.; Kelly H. and Maria V. v. State of Nebraska*, 308 Neb. 771, 2021 Neb. LEXIS 49 (March 26, 2021).

Kelly H. and Maria V. married in California in 2008 during the five-month period between the California Supreme Court's marriage equality opinion and the initiative adopting Proposition 8, which amended California's Constitution to forbid same-sex marriages. The California Supreme Court subsequently ruled that marriages contracted during that five-month period remained valid. Sometime after marrying in California, the women moved to Nebraska, a state that did not then allow or recognize same-sex marriages. Maria's sister bore a child, Yasmin S., out of wedlock in 2017, and signed a relinquishment and consent to adoption. (The putative father was out of the picture and never filed any objection or intent to obtain custody.) Yasmin has lived in Kelly and Maria's home since her birth.

In May 2020, Kelly and Maria petitioned to adopt Yasmin jointly. Dixon County Court Judge Douglas L. Luebe denied their petition, raising a concern that the petition referred to "wife and wife" rather than "husband and wife." Judge Luebe claimed that the court did not have authority to proceed under the Adoption Statute, observing that "wife" was not defined in the statute but that a legal dictionary that the judge consulted defined the term as "a woman who has a lawful husband." Kelly and Maria filed an appeal, and ultimately the Nebraska Supreme Court granted a petition to bypass the Court of Appeals and bring the case directly up. In their petition to bypass the Court of Appeals, the petitioners asserted that the case "is one arguably 'involving the federal or state constitutionality of a statute." Since the U.S. Supreme Court's decision in *Obergefell v. Hodges* provides that legal same sex marriages must be treated as equal in every respect to different-sex marriages, they argued, the statute to the extent it gets in the way of their adoption violates the 14th Amendment.

Justice William B. Cassel's opinion for the court finds no need to decide constitutional issues, however, because a literal reading of the statute would not pose a barrier to this adoption. The provision in question, Sec. 43-101, provides that "any minor child may be adopted by any adult person or persons and any adult child may be adopted by the spouse of such child's parent in the cases and subject to sections 43-101 to 43-115, except that no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor. If the husband or wife so joins in the petition therefor, the adoption shall be by them jointly, except that an adult husband or wife may adopt a child of the other spouse whether born in or out of wedlock."

"Kelly and Maria argue that the statute's plain language allows a same-sex married couple to adopt a minor child," wrote Cassel. "We agree. In the language of the statute, Yasmin is 'any minor child,' while Kelly and Maria are 'any adult person or persons.' A wife is commonly understood to be '[a] married woman,'" continued Cassel, citing to the *Oxford English Dictionary*. "Based on the understanding of the word in current usage, Kelly is a 'person having a . . . wife.' So, too, is Maria. Under Sec. 43-101(1), 'no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor.' Here, the wife joined in the petition for adoption. The plain language allows a same-sex married couple to adopt."

Judge Luebe had "reasoned that definitions of 'husband' and 'wife' from when Sec. 43-101 was 'last enacted/amended by Nebraska's legislature' should control," explained Justice Cassel, citing to a 2019 U.S. Supreme Court case stating that defining words in statutes should be done with reference to the time the statute was adopted, and so Luebe had cited to an entry in an old edition of *Black's Law Dictionary* which obviously predated *Obergefell*.

"But using the definitions articulated by the county court does not lead to a different result," wrote Cassel. The statute says that a minor child may "be adopted by any adult person or persons" and does not use the word "married" in that phrase. The only "caveat" is that if a person has a "husband or wife," they must join in the adoption; married people cannot adopt singly. Since Judge Luebe was referring to an old dictionary under which neither of the women would be deemed a "wife" because they were not married to a "husband," then the caveat *didn't* apply. "If the Legislature believes that the statutory language is somehow disrespectful to same-sex couples, that body is free to amend the statute," Cassel commented. "But whether one uses the current meanings of 'husband' and 'wife' or their respective meanings at the time of enactment, the statutory text permits Kelly and Maria to adopt a minor child."

Furthermore, this interpretation avoids any constitutional issues. "Where a statute is susceptible to two constructions, one of which renders it constitutional, and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, would rend it valid." Construing the statute to allow this married same-sex couple to adopt Yasmin jointly achieves this result. "The plain language of Sec. 43-101 permits a same-sex married couple to adopt a minor child," concluded Justice

Cassel. "Accordingly, we reverse, and remand to the county court for further proceedings." Since the county court held that it did not have authority to grant a joint adoption by a married same-sex couple, it never got to determining the central question in any adoption case: whether approving the adoption is in the best interest of the child.

Kelly and Maria are represented by Matthew M. Munderloh, of Johnson & Mock, P.C., L.L.O., Oakland, and Adam J. Sipple, Oakland, and Sara E. Rips, of ACLU of Nebraska. The state did not appear in the case. ■

Can "Open Door Legal Services" Slam Its Doors on LGBTQ Attorneys?

*By Ezra Cukor**

In *Woods v. Seattle's Union Gospel Mission*, 2021 WL 821959, 2021 Wash. LEXIS 148 (March 4, 2021), the Washington Supreme Court revived a bisexual attorney's employment discrimination suit challenging the Washington Law Against Discrimination (WLAD) exemption for religious non-profits. The majority opinion, concurrence, and partial dissent, all agreed to remand the case for the trial court to evaluate the applicability of the ministerial exception. Justice Barbara Madsen wrote the opinion for the majority of the court.

The QLaw Foundation of Washington represents the plaintiff, Matthew Woods. The ACLU and a handful of local LGBTQ-serving organizations, as well as the Greater Seattle Business Association and the Washington Employment Lawyer's Association, weighed in as *amici* for Woods. Prominent anti-LGBTQ organizations including the Christian Legal Society and the Alliance Defending Freedom submitted *amicus* briefs supporting the defendants.

When Woods was a law student, he volunteered at Open Door Legal Services, a clinic run by Seattle Union Gospel Mission (SUGM) that provides free legal services to homeless people regardless of their faith. Woods is a Christian and to volunteer signed a statement of faith that was silent as to sexual orientation. SUGM later encouraged past volunteers to apply for an open attorney job. His interest piqued but also concerned about whether he would be accepted, Woods shared with the legal director that he is bisexual and could see himself marrying a man someday. The director responded that Woods could not apply for the job because SUGM's employee handbook commands employees to "live by a Biblical moral code" that prohibits "homosexual behavior." Woods applied anyway. After SUGM rejected his application, Woods sued for discrimination in violation of the WLAD.

The WLAD forbids employers from discriminating because of sexual orientation but it exempts religious non-profits by excluding them from the definition of employer. Woods challenged the WLAD exception, asserting it violated the privileges and immunities clause of Washington's constitution. The trial court granted SUGM's motion for summary judgment based on the exception. Woods appealed to the Washington Supreme Court. On appeal, SUGM argued that Open Door Legal Services attorneys "minister" to clients.

Washington's constitution, like many state constitutions, includes protections against favoritism. The privileges and immunities clause forbids laws that grant citizens or corporations a privilege or immunity implicating a fundamental right and not afforded equally to all unless there is a reasonable basis for the distinction.

The majority of the court held that WLAD's exception is not facially unconstitutional. Relying on both state constitutional protections for religious freedom and the existence of the WLAD exception itself, the majority determined that "avoidance of state interference with religion" provided a reasonable basis for WLAD to treat religious and secular non-profits differently. In other words, the majority concluded that protections for religious freedom could justify permitting non-profits to discriminate. The majority held that the WLAD exception would be constitutional as applied to Woods if the position he sought fell within the ministerial exception and remanded the case to the trial court to consider applicability of the exception.

The ministerial exception is an affirmative defense to discrimination

claims available to religious employers. In 2012, the United States Supreme Court first acknowledged the exception, which it rooted in the First Amendment concerns raised by courts' involvement in the suits that impede religious institutions' control over their leadership. *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012). The ministerial exception insulates religious employers from liability for discrimination against ministers at the very least in hiring and firing and may apply even more broadly. *Our Lady of Guadalupe School v. Morissey Berru,* 590 U.S. ___ (2020).

Determining whether someone is a minister within the meaning of the exception requires an assessment of all circumstances of their employment. *Hosanna-Tabor,* 565 U.S. at 190. The exception is capacious. Its reach is not limited to employees who the religious institution endows with the title minister or its equivalent. Moreover, the ministerial exception can apply to employees who spend most of their time on secular work. The Supreme Court has thrice held that the exception bars suit by teachers in religious schools, even female Catholic school teachers, whom the church bars from the pulpit because of their gender.

The ministerial exception accounts only for the employer's First Amendment rights. It does not take into account the fundamental rights of the employees. As for Woods's case, the majority noted that the WLAD's religious non-profit exception implicated his fundamental rights to marry, citing *Obergefell v. Hodges,* 576 U.S. 664 (2015), and to his sexual orientation, which the majority rooted in *Lawrence v. Texas,* 539 U.S. 558, 577-578 (2003). The majority did not, however, meaningfully weigh those rights in its privileges & immunities clause reasonableness analysis. Instead, the majority gave them mention in passing = in rejecting a facial challenge and treated the ministerial exception as dispositive of Woods's as-applied constitutional claims. Thus, the majority accounts for the constitutional rights of the corporation privileged by the WLAD but not the fundamental rights of employees disadvantaged thereby.

The concurrence by Justice Mary Yu took a similar approach. It agreed with the majority's decision to remand to determine the applicability of the ministerial exception but concluded that there was no reasonable basis under the privileges and immunities clause to exempt SUGM from the WLAD wholesale, because SUGM lacked a free-exercise right to discriminate against employees who performed non-religious duties. In other words, according to the concurrence, the WLAD's exemption for religious non-profits passes state constitutional muster insofar as it is coextensive with the ministerial exception.

The concurrence asserted that the decision was not a blanket license to discriminate, but instead reflected a balancing of free-exercise and anti-discrimination principles. Even so, the concurrence's plea that religious organizations "embrace the choice" to apply the ministerial exception to employees when only "absolutely necessary and grounded in sound reason and purpose" belied the power afforded to religious institutions.

The concurrence also opined that the ministerial exception likely did not apply to an Open Door Legal Services staff attorney. They noted the role required neither significant religious training nor commissioning and did not hold greater responsibility for advancing SUGM's religious mission than other SUGM employees. Moreover, the concurrence hypothesized that there was an enormous potential for conflicts of interest if attorneys bound by the rules of professional conduct to advance the client's interest were also ministers and presumptively obliged to advance SUGM's religious mission. The concurrence cautioned that there was an especially high potential for conflicts of interest because Open Door Legal Services serves clients of all religions who are vulnerable by virtue of being homeless and in dire need of legal help.

The partial dissent by Justice Debra Stephens concluded that the WLAD's blanket exception for religious non-profits violates the privileges and immunities clause of Washington's constitution. It reasoned WLAD privileged religious non-profits over other employers by giving them carte blanche to discriminate. That, the dissent reasoned, both frustrates rather than advancing WLAD's purpose to eradicate employment discrimination and undermines the fundamental constitutional right to be free from discrimination based on one's sexual orientation.

The dissent asserted two reasons that a desire to advance religious freedom did not save the exception for religious non-profits. First, there was no indication that WLAD's purpose was to advance religious freedom. Second, even if it were, completely exempting religious non-profits from the law, even for their secular activities, would still violate the privileges and immunities clause by favoring religious non-profits "over *all* other employers who might also hold sincere religious beliefs."

The dissent opined that the defendants could avail themselves of the ministerial exception as an affirmative defense. It thus concurred as to the majority's result – reversing the trial court's grant of summary judgment for SUGM and remanding for the trial court to determine the applicability of the ministerial exception.

The dissent rejected SUGM's bid for state or federal religion clause affirmative defenses broader than the ministerial exception. Under the First Amendment, the WLAD is both neutral and generally applicable because it restricts discriminatory practices broadly, not just discrimination motivated by religious belief. Therefore, citing to *State v. Arlene's Flowers,* 193 Wash.2d 469 (2019) *cert pet. filed,* No. 19-333 (2019), the dissent applied rational basis review and found WLAD to be rationally related to the legitimate government interest of "elimination and prevention of discrimination in employment" and therefore constitutional.

Drawing on *Arlene's Flowers,* and Justice Alito's opinion in *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014), the dissent also denied SUGM a state constitutional exemption beyond the ministerial exception. The dissent assumed strict scrutiny applied and that

the application of the WLAD to SUGM burdened SUGM's sincerely held religious beliefs. The dissent reasoned that even so, WLAD was constitutional, except as applied to ministers, because prohibiting discrimination is the least restrictive means to advance the compelling government interest in eradicating discrimination. The alternative, "to carve out a patchwork of exceptions" would fatally undermine the law's "broader societal purpose" of "eradicating barriers to the equal treatment of all citizens." ■

**The views contained in this article are my own and do not represent the opinions of my employer*

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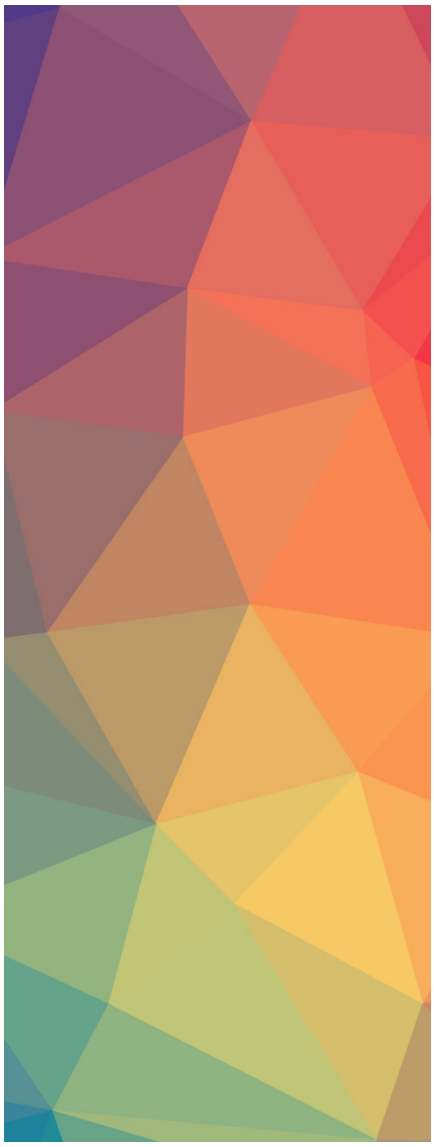

Second Circuit Remands Gay Jamaican's Torture Claim on Government Acquiescence Issue

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the Second Circuit has remanded to the Board of Immigration Appeals the Convention Against Torture (CAT) claim of a gay Jamaican man, who alleged that the government of Jamaica would acquiesce to his torture as an LGBT individual, while simultaneously denying Petitioner's motions to reopen his proceeding, in *Golding v. Garland*, 2020 WL 1016423, 2021 U.S. App. LEXIS 7742 (2nd Circuit, March 17, 2021).

Petitioner sought CAT relief as a gay man alleging that he would face torture by the government of Jamaica or by private individuals whose actions were acquiesced to by the government. The Immigration Judge denied his request and on appeal the Board affirmed the Immigration Judge's decision. Petitioner sought review of the decision and also filed motions to reopen, challenging his detention, alleging that subsequent caselaw required reversal of the administrative decisions, and further alleging that he had a claim to U.S. citizenship.

The Court of Appeals consolidated the petitions for review. A panel of three circuit judges issued a decision granting remand of the case for further consideration but denying the motions to reopen.

The panel reviewed both the Immigration Judge and the Board decisions "for the sake of completeness" and found that "the agency misapplied the acquiescence standard by discussing only whether the evidence showed that the Jamaican government was directly involved in torturing LGBT individuals," ruling that the reliance on Department of State Country Reports that report of only one incident directly involving a police officer "does not foreclose the possibility that the police would acquiesce or be willfully blind to violence against LGBT individuals by non-state actors." The panel remanded for the Board to further consider "the totality of the country conditions evidence and to reconsider or further explain its decision."

With respect to Petitioner's motions to reopen, the panel found Petitioner made "no plausible challenge" to the Board's denial of reopening. With respect to Petitioner's motion regarding his detainer, the panel found the claim moot as Petitioner was no longer in ICE custody. With respect to his *in forma pauperis* claim of ineffective assistance of counsel, the panel found Petitioner had failed to file a complaint against his former attorney. The panel found that the case the Petitioner cited alleging a "purported change in law" – a California case – was not an exception to the filing deadlines regarding motions to reopen. Finally, the panel found the record "does not reflect a plausible claim of citizenship" as petitioner had not "identified how or when he could have obtained U.S. citizenship."

Accordingly, the panel consolidated all petitions for review, granted Petitioner's request for a remand on the CAT government acquiescence issue, and denied and vacated all remaining motions and applications. ■

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Massachusetts Supreme Judicial Court Reins in Ministerial Exception for Religious Institutions

By David Escoto

On March 5, 2021, Justice Scott L. Kafker of the Supreme Judicial Court of Massachusetts wrote for the court that just because a private Christian college defines the role of its faculty as ministers, those faculty members do not necessarily fall within the ministerial exception. The ministerial exception works in conjunction with the Free Exercise and Establishment Clauses of the First Amendment to give deference to religious organizations in certain employment discrimination actions. However, there are limits to this exception, and there is the need for a fact-intensive inquiry into whether an individual faculty member falls into the role of minister. *DeWeese-Boyd v. Gordon College*, 2021 WL 841932, 2021 Mass. LEXIS 147 (Mar. 5, 2021).

Gordon College is a private, nondenominational Christian liberal arts college in Wenham, Massachusetts. Gordon's self-proclaimed mission is aimed at preparing students to live a life of service and leadership through an education that instills a strong Christian foundation. The focus of the curriculum is to explore the liberal arts and sciences from a Christian perspective.

Gordon hired Margret DeWeese-Boyd in 1998 as an assistant professor. DeWeese-Boyd had experience in the mission field and received a Master of Arts degree in theological studies and a Master of Social Work from two schools in the St. Louis area. When Gordon hired her, she was pursuing doctoral degrees in political science and social work. Included in her application was a curriculum vitae, which highlighted her teaching philosophy. In the application, she detailed her Christian faith's impact on her scholarship and her view on the role faculty play in Christian higher education institutions. Specifically, DeWeese-Boyd felt that as a Christian academic, she could mentor students in a way to enlighten them on how Christianity impacts her area of study.

In 2004 DeWeese-Boyd was promoted to associate professor, and in 2009 she was approved for tenure. In 2016, she applied for a full-time professor position. For this application, she highlighted the development of Gordon's social work program, her scholarly publications, and her institutional service. The faculty senate unanimously recommended her for the promotion. Still, in 2017, Gordon's president, D. Michael Lindsay, and Janel Curry, Gordon's provost, rejected the promotion, noting "a lack of scholarly productivity, professionalism, responsiveness, and engagement."

In September 2017, DeWeese-Boyd commenced a civil action against Gordon, Lindsay, and Curry. DeWeese-Boyd alleged in her complaint that Gordon unlawfully retaliated against her by denying her application for a full-time professor because of her vocal opposition to Gordon's policies regarding the LGBTQ+ community. The parties cross-moved for summary judgment on whether the ministerial exception, which prohibits government involvement with the employment relationships between a religious institution and their ministerial employees, applied. The Superior Court ruled in favor of DeWeese-Boyd's motion but later granted Gordon's motion to report the question of whether the Superior Court erred to the Appeals Court.

When Gordon hired DeWeese-Boyd, the employee handbook noted that the institution saw the faculty as teacher-scholars who were "committed to imaging Christ in all aspects of their educational endeavors." However, Curry testified that the employee handbook did not require faculty to lead prayers or attended regular chapel services on campus. Lindsay, who was hired after DeWeese, testified that he equates employment at Gordon to joining a religious order.

Lindsay's view seems to have made its way into the employee handbook because, in 2016, Gordon added that "faculty members are both educators and ministers" to the students. The faculty, including DeWeese-Boyd, did not respond well to the addition of this language. At a faculty meeting in response to the addition to the employee handbook, it was disclosed that Gordon's legal counsel added the language to ensure deference is given to the institution when First Amendment issues arise.

The Gordon chapter of the American Association of University Professors issued a formal statement disagreeing with Gordon's inclusion of the word "minister" to describe their responsibilities for the sole purpose of bringing the faculty within the ambit of the ministerial exception. To include DeWeese-Boyd within the ministerial exception would be to include someone who was not ordained by any church or religious body nor held herself out to be a minister. Further, she did not teach any biblical studies or lead prayers or frequently attend chapel services.

On appellate review, Justice Kafker noted a bit of friction between the history and purpose behind religious freedom and laws that protect against employment discrimination for certain classes of individuals. On the one hand, Supreme Court precedent identified the significance of a religious institution's ability to shape its own faith and determine without government interference who can proselytize. On the other hand, there is a consequence that broadening the ministerial exception allows overt employment discrimination based on forbidden grounds other than religion.

Justice Kafker relied on two recent U.S. Supreme Court cases when holding that the Superior Court did not err when it determined that the ministerial exception did not apply to DeWeese-

Boyd. First, Judge Kafker noted *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opportunity Comm'n*, 565 U.S. 171 (2012), which involved a teacher at an Evangelical Lutheran church and school. The teacher had a formal title of "Minister of Religion, Commissioned," and held herself out as a minister. The teacher in *Hosanna-Tabor* led her students in prayer three times a day. Justice Kafker noted that the Supreme Court focused on these facts when determining that the teacher fell within the ministerial exception.

Next, Justice Kafker discussed *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), which involved two teachers who initiated actions against Catholic schools for demotions and discharges. In *Our Lady of Guadalupe*, the teachers were obligated to provide instruction about Catholicism and pray with their students. The teachers were key in getting their students ready for religious activities. The Supreme Court in *Our Lady of Guadalupe* stressed that an inquiry into whether someone falls within the ministerial exception is based on the facts and circumstances of what the employee in question does.

DeWeese-Boyd first and foremost taught social work. Justice Kafker distinguished Supreme Court precedent by noting that DeWeese-Boyd was never required to teach religious doctrine or lead students in prayer. Even though her job required her to incorporate the Christian faith into the way she taught, she was never required to teach religion or religious text, nor did she lead students in prayer. Kafker did not think that these facts suggest that DeWeese was a religious mentor to students or guided them in any religious ritual.

Further, Justice Kafker found that DeWeese-Boyd's job title and training are decisive in determining whether she falls inside the ministerial exception. Her job title as "associate professor of social work" does not indicate a religious position. Also, when DeWeese-Boyd was hired at Gordon, her role was defined as a teacher-scholar. It was not until later in her employment that her role was defined as a minister, a change which she (and other faculty members) explicitly opposed. Justice Kafker noted that just because an employer identifies its employee as a minister, under *Our Lady of Guadalupe*, it is insufficient when analyzing whether an employee would fall within the ministerial exception.

Once Justice Kafker analyzed all the relevant facts and circumstances surrounding DeWeese-Boyd's employment, the court concluded that DeWeese-Boyd is not a minister within the ministerial exception. Kafker noted that designate her a minister would be a huge expansion of the ministerial exception and could have a significant impact on civil protections against discrimination. The concerning part of this case is that a religious institution whose mission is to integrate the Christian faith into liberal arts studies actively tried to change the way they defined their faculty, in order to be able to wield the 1st Amendment to discriminate with impunity. Luckily, it appears that there are judges willing to place parameters around the ministerial exception to dissuade religious institutions from discriminating under the guise of religious freedom.

DeWeese-Boyd is represented by Hillary Schwab of Fair Work, P.C. in Boston, Massachusetts. Gordon is represented by Eric S. Baxter of Becket Law in Washington, D.C., a religious freedom advocacy organization, which may well seek U.S. Supreme Court review based on some of the expansive language in Justice Samuel Alito's opinion for the Court in *Our Lady of Guadalupe*. ■

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

Federal Court in Alabama Allows a Discharged Gay Tenured Professor to Proceed on His Title VII Claim

By Filip Cukovic

Dr. Edward Jones, a former tenured professor at Alabama A&M University, sued the Board of Trustees for the university and the university's president, provost, and the dean of the College of Education. Dr. Jones alleged that the Board violated Title VII by discriminating against him based on his sexual orientation and that the individual defendants discriminated against him in violation of 42 U.S.C. § 1983. After Jones amended his complaint for the third time, on March 3, 2021, Judge Madeline Hughes Haikala of the U.S. District Court for the Northern District of Alabama, Northeastern Division, issued a decision granting the individual defendants' motions to dismiss, while allowing Dr. Jones to proceed with his Title VII disparate treatment claim against the Board. *Jones v. Bd. of Trustees for Alabama Agric. & Mech. Univ.*, 2021 WL 913411 (N.D. Ala. Mar. 10, 2021).

Dr. Jones taught at Alabama A&M University for more than two decades. In 2015, when he was placed on administrative leave, he was a tenured professor in the College of Education, Humanities, and Behavioral Science. At that time, Dr. Curtis Martin was the dean of the College of Education, while Dr. Andrew Hugine was the president of the university. Dr. Daniel Wims served as the provost.

In October of 2015, Dr. Jones received a letter from Dr. Wims, in which he was notified that as of October 13 of that year, Dr. Jones was placed on paid administrative leave. This leave was recommended by Jones' immediate supervisor, Dr. Martin. The letter stated that serious administrative compliance

issues were identified by Dr. Martin, but the letter did not contain any further explanation.

Later that day, university officials confiscated Dr. Jones's computer and changed the locks on his office door. When Dr. Jones' attorney contacted counsel for the university to request additional information, the attorney was advised that the administrative leave was because Dr. Jones posed a threat to the College of Education's accreditation.

In January of 2016, Dr. Wims wrote another letter to Dr. Jones, notifying him that the Board intended to fire him for gross professional misconduct. The letter also stated that Jones was charged with both using University resources to view obscene material and with the production or creation of obscene material. Although Jones denied these allegations, he was officially terminated on March 10, 2016.

At first Jones initiated a lawsuit only against Alabama A&M University. However, in his amended complaint, he asserted claims against the individual defendants as well, including Dr. Hugine, Dr. Wims, and Dr. Martin. In his third amended complaint, Dr. Jones substituted the Board of Trustees for Alabama A&M University as the employer defendant for his Title VII claim. After reviewing Dr. Jones's third amended complaint, the trial court ruled *sua sponte* that Dr. Jones did not allege a viable retaliation claim. However, the court then stayed the deadlines in the case pending the outcome of the Supreme Court's decision in in *Bostock v. Clayton County*. Following the Supreme Court's June 15, 2020 decision in *Bostock*, the court permitted Jones to proceed with his claims for discrimination based on sexual orientation. The defendants then filed the motion to dismiss for failure to state a claim.

In a nutshell, Dr. Jones alleged that the defendants fired him for sexual misconduct which, according to him, "is synonymous or code language for the plaintiff's sexual orientation." Dr. Jones asserted that other employees of the university who have been charged with sexual misconduct have been reprimanded, not fired. Moreover, Jones explained that since the University fired him, at least two sexual scandals have arisen at the university, but both were heterosexual in nature and neither reached the public domain.

Judge Hughes Haikala first analyzed Jones' claims against individual defendants. The individual defendants, who argued that they were entitled to qualified immunity from Dr. Jones's § 1983 claim against them because the act of terminating Jones falls within the umbrella of their discretionary authority. The court first explained that for a qualified immunity defense to work, the defendants must prove that the act in question indeed fell within the scope of their discretionary authority. To do this, defendants had to allege that they performed a legitimate job-related function (that is, pursued a job-related goal), and that they pursued such a goal through means that were within their power to utilize.

Drs. Hugine, Wims, and Martin argued that termination of tenured university employees fell within their discretionary authority. The defendants contended that as the president of A&M, Dr. Hugine had the authority to fire Dr. Jones; as provost, Dr. Wims had the authority to recommend that Dr. Hugine fire Dr. Jones; and as the dean of the Department of Education, Dr. Martin was Dr. Jones's immediate supervisor. The court found this argument to be supported by the Alabama law.

Alabama Code § 16-49-23 outlines the responsibilities of Alabama public university presidents, including a president's authority to remove an instructor. ALA. CODE § 16-49-23. Moreover, in an important Alabama case, the Alabama Supreme Court concluded that "[e]mployment decisions are clearly within the job description of the president of the University, and the provost is specifically designated to help the president in making such decisions. Likewise, dismissal is among the tools available to the president in making employment decisions." *Ex parte Hugine*, 256 So. 3d 30, 47 (Ala. 2017). Consequently, it follows that when Dr. Jones' employment was terminated, Drs. Hugine, Wims, and Martin were engaged in a discretionary function as that concept is understood for purposes of the doctrine of qualified immunity.

To overcome this complication, Dr. Jones argued that Drs. Hugine, Wims, and Martin are not entitled to qualified immunity because "[t]he question at issue in this case . . . is not merely related to whether President (Dr. Hugine) and those who he appoints (Drs. Wims and Martin) with certain circumscribed authority, could terminate Dr. Jones; but whether Drs. Hugine, Wims, and Martin could do so based upon his sexual orientation; and moreover, whether the defendant Drs. could engage in other discriminatory actions in contravention of the University's policies and procedures and Alabama law." Because employment discrimination based on sexual orientation violates university policy, Dr. Jones argued, the officials' conduct could not possibly fall within the scope of [their] discretionary authority.

However, the court dismissed this argument as well. First, Jones failed to back up his claim with any citations and the court wasn't able to find any cases that would support Jones' position. Instead, the court assumed that Jones actually attempted to make an argument that even if the defendants engaged in a discretionary act, such discretionary act violated the law because the act interfered with Jones' constitutional rights. The court recognized that would as potentially valid theory. However, for the theory to work, Jones would have to show that defendants violated his constitutional rights that were recognized either by the Supreme Court or the Eleventh Circuit Court of Appeals at the time when the violation in question occurred.

The problem for Jones is that at the time when an alleged violation occurred, the Supreme Court case which recognizes that Title VII protects against discrimination on the basis of sexual orientation was not yet decided. *See Bostock v. Clayton Cty. Ga.*, 140 S.Ct. 1731 (2020). Moreover, the relevant Eleventh Circuit precedent as of 2016 also undermines Jones' theory. Namely, in 2016, there was no case law in the Eleventh Circuit that recognized that

Title VII protects employees against discrimination because they are gay. For these reasons, the court held that Drs. Hugine, Wims, and Martin were entitled to qualified immunity on Jones's § 1983 sexual orientation employment discrimination claim.

The court then considered Jones' Title VII disparate treatment claim against the Board. Namely, Title VII prohibits employers from discriminating against any individual with respect to his conditions of employment, because of such individual's race, color, religion, sex, or national origin. Moreover, pursuant to *Bostock*, Title VII also prohibits employers from discriminating against individuals on the basis of their sexual orientation.

To establish that the Board treated Jones differently from others because of his sexual orientation, Jones pointed to several documented sexual scandals that have occurred on the University campus, including scandals involving the highest level of leadership. Jones asserted that none were involving homosexual activity, and that none were publicized. Moreover, he asserted that based on his time serving on A&M's Grievance Committee, he had first-hand knowledge of the manner in which prior matters involving inappropriate heterosexual activities on campus were handled. Specifically, Jones alleged that Dr. Wims himself has had several sexual misconduct charges filed against him, but that he has been protected by the University's administration.

The court held that these allegations were vague examples of the Board's alleged handling of sexual misconduct involving heterosexual employees and that they fell short of the comparator standard in the 11th Circuit. However, the court was persuaded by other circumstantial evidence that Jones put forth in his third amended claim.

Jones also asserted that Kevin Rolle, A&M's COO and a heterosexual man, was indicted by a grand jury for theft of property but that during the entire pendency of the State's case against Rolle, the University did not terminate him. In comparison, Jones contended that when A&M decided to investigate his alleged criminal conduct, the Board placed him on administrative leave and locked him out of his office with no discussion or warning. Jones also pleaded that the reasons that Dr. Wims gave for placing him on administrative leave on October 13, 2015, were vague and inconsistent with the rationale for termination provided in his January 14, 2016, notice of intent to terminate. Recognizing that in order to survive a motion to dismiss, the plaintiff must only plead enough facts to state a claim that is plausible on its face, the court held that Jones' comparison to Kevin Rolle's case could allow a jury to infer discrimination on the basis of sexual orientation. Thus, Dr. Jones's Title VII disparate treatment claim against the Board was allowed to proceed.

The plaintiff is represented by Amardo Wesley Pitters from A. Wesley Pitters PC, Montgomery, AL, and Stanley Bernard Stallworth from The Stallworth Legal Group LLC, Evergreen, AL.

Defendants Andrew Hugine, Daniel Wims, and Curtis Martin are represented by William R. Lunsford from Maynard Cooper & Gale PC, Huntsville, AL.

The Board of Trustees for Alabama Agricultural and Mechanical University are represented by A. Redmond Debro, Roslyn Crews, Alabama A&M University, Normal, AL, and Matthew B. Reeves and William R. Lunsford from Maynard Cooper & Gale PC, Huntsville, AL. ■

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FerryTales: Connecticut District Court Allows Discrimination Claims to Proceed

By Corey L. Gibbs

Carlton Wilcox claimed to have suffered from discrimination based on his sexual orientation while employed by Fishers Island Ferry District (Fishers). He alleged that his former employer violated both Title VII and the Connecticut Fair Employment Practices Act, breached a contract, and intentionally inflicted him with emotional distress. Fishers moved to dismiss the complaint. On March 2, 2021, Judge Michael P. Shea of the U.S. District Court for the District of Connecticut granted the motion in part and denied it in part. *Wilcox v. Fishers Island Ferry District*, 2021 WL 798259; 2021 U.S. Dist. LEXIS 38524.

Fishers Island Ferry District, Wilcox's former employer, operates a ferry service between New London, Connecticut and Long Island, N.Y., as a public corporation established by New York State legislation.

Wilcox alleged that he was subjected to harassment and unwanted comments by Fishers employees due to his sexual orientation. A co-worker called him a faggot. A Senior Captain hit Wilcox's car in the parking lot and made overtures to convert him into a heterosexual. The partner of a co-worker propositioned him for sex. His co-workers even joked that a fairy wand would urge him to dance. Despite all of this being brought to Fishers' attention, no corrective action was taken.

Then Wilcox sought a new position within the company. Fisher's Director informed Wilcox that if he got the position, he would have to accept terms and conditions that were inferior to similarly situated employees. Following the discussion with Wilcox, the Director allegedly told another employee that he wanted Wilcox to feel

pain. He told a separate employee that he was homophobic and that was why he treated Wilcox in such a manner.

Wilcox decided to file a complaint and request an accommodation for his Crohn's Disease. Then the Director placed him on leave pending a disciplinary investigation. However, no misconduct was identified. Following the investigation, Fishers informed Wilcox that his discrimination claims were unsubstantiated. Fishers terminated Wilcox's employment shortly after his return to work on January 28, 2019.

Wilcox filed discrimination charges against Fishers, leading to the current lawsuit asserting discrimination claims under Title VII and the Connecticut Fair Employment Practices Act, and a claim for intentional infliction of emotional distress. His former employer moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim for which relief could be granted.

First, Judge Shea analyzed Fishers' argument that the court lacked personal jurisdiction over Fishers. Under Connecticut law, all foreign corporations could be subject to suits in Connecticut when brought by a resident. *See Connecticut General Statutes § 33-929(f)*. Fishers claimed that Connecticut's long-arm statute for "foreign corporations" did not apply to it because it was a New York municipal entity. In a previous lawsuit against a Rhode Island town, the Connecticut Appellate Court determined that the long-arm statute could not extend to foreign municipalities. *Reale v. State*, 192 Conn. App. 759 (2019).

However, Wilcox argued that the statute applied because Fisher was a district corporation. New York General Construction Law § 66(3) defines a district corporation as divisions of the state "other than a municipal corporation." Fishers failed to address the relevant provisions of the New York law. By applying New York's definitions, the judge agreed with Wilcox that Fishers was more akin to a foreign corporation under Connecticut law than a municipality. Judge Shea did not address subject matter jurisdiction because Fishers conflated the issue with the merits of the plaintiff's claim in its motion.

Second, the judge analyzed Fishers' argument that it is not an employer for the purposes of the Connecticut Fair Employment Practices Act because it was a political subdivision of the State of New York. Wilcox argued that the definition of employer within the statute includes corporations such as Fishers. The judge agreed with Wilcox.

Third, the judge discussed Fishers' argument that the Title VII claim failed due to Wilcox's failure to obtain a right-to-sue letter from the Equal Employment Opportunity Commission. While Wilcox did produce a right-to-sue letter, it was produced *after* the initiation of the litigation. However, Wilcox obtained the letter and added the Title VII claim promptly after the U.S. Supreme Court decided *Bostock v. Clayton County*, holding that Title VII's ban on sex discrimination applies to sexual orientation discrimination claims. Judge Shea wrote, "Under the circumstances, I find that Wilcox's subsequent receipt of the right-to-sue letter has 'cured any defect caused by the premature filing of [his] claim.'" The judge denied this motion to dismiss as well.

Fourth, the judge turned to Fishers' argument that there was no breach of contract. Wilcox claimed that his former employer breached a collective bargaining agreement between the Civil Service Employees Association (CSEA) and Fishers, by discharging him without providing any reason or review. In 1997, the Connecticut Supreme Court began applying the Restatement (Second) Conflict of Laws test to issues involving contracts. Thus, the District Court would apply the law chosen in the contract or the law of the state with the most significant relationship to the transaction.

The agreement in this case provided, "The Board's or designee's decision [regarding disciplinary action] will be final and non-grievable, subject to the employee's right to appeal it pursuant to CPLR Article 78," a New York procedural statute authorizing suits challenging decisions by administrative agencies, public bodies, or officers in state court. The judge agreed with Fishers, because Wilcox was only afforded the right to appeal the decision pursuant to Article 78 of New York's Civil Practice Law and Rules, based on the agreement.

Finally, the judge focused on Wilcox's Intentional Infliction of Emotional Distress claim. Wilcox had to prove that Fishers intended to inflict emotional distress by acting in an outrageous manner that actually caused severe distress to Wilcox. Despite all the claims made by Wilcox, Judge Shea did not believe they plausibly alleged a claim for intentional infliction of emotional distress. He wrote, "[Fishers'] alleged conduct does not rise to the level of atrocious, intolerable conduct exceeding all possible bounds of decency." The motion to dismiss the claim was granted.

Wilcox's discrimination claims will proceed, but his claims of intentional infliction of emotional distress and breach of contract were dismissed. Wilcox is represented by Bryan P. Fiengo. Fishers Island Ferry District is represented by Channel M. Rogers and David S. Monastersky. Civil Service Employees Association Local 1000 is represented by Leslie C. Perrin and Patricia Johnson Cardin. ■

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Arizona Federal District Court Refuses to Preliminarily Enjoin Arizona Medicaid Refusal to Cover Gender Confirmation Surgery for Minor Boys

By Arthur S. Leonard

U.S. District Judge Scott H. Rash denied the plaintiffs' motion for a preliminary injunction in *Hennessy-Waller v. Snyder*, 2021 WL 1192842, 2021 U.S. Dist. LEXIS 61383 (D. Ariz., March 30, 2021), a lawsuit challenging the Arizona Health Care Cost Containment System (Arizona Medicaid Program) regulation that excludes gender reassignment surgery from coverage and to "order AHCCCS to cover male chest reconstruction surgery for [co-plaintiffs] D.H. and John."

D.H. and John are transgender teenage boys under 18 who have been receiving testosterone for at least a year and who seek top surgery at the recommendation of their health care providers. They receive their health care financing through the Medicaid program, but the program excludes coverage for "gender reassignment surgeries." They are claiming violations of the Medicaid Act, the Affordable Care Act, and the Equal Protection Clause of the 14th Amendment. The ultimate remedy sought in the case is a holding that the regulation is invalid and that the plaintiffs are entitled to coverage of the procedures they are seeking. The motion for preliminary injunction seeks to bar enforcement of the coverage exclusion and to direct coverage of the desired treatments for the two plaintiffs while the case is pending.

Judge Rash produced a detailed analysis of the standards for mandatory injunctive relief, having rejected the plaintiffs' argument that they are seeking a prohibitory injunction. The way the motion is structured, plaintiffs are seeking two things: to preliminarily enjoin the Medicaid program from enforcing the exclusion from coverage of "gender reassignment surgeries," and an order that the Medicaid program finance 'male reconstructive chest surgery" for the co-plaintiffs while the case is pending. Thus, rather than seeking to preserve the *status quo* pending a ruling on the merits, the judge concluded that the plaintiffs are seeking the ultimate relief as to them – payment for their surgery – and a change in the coverage parameters of the Medicaid program. Rash pointed out that the standard for a mandatory injunction is much higher than for a prohibitory *status-quo* type of injunction, and given the sharp disagreement of the expert witnesses, the court finds that this standard of a high likelihood of success on the merits is not met at this stage of the litigation.

In the course of his opinion, Judge Rash makes some assertions that could be sharply contested. For example, he rejects the relevance of the Supreme Court's *Bostock* decision to interpretation of the sex discrimination prohibition in the Affordable Care Act. Several courts, both before and after *Bostock*, have ruled that the reasoning of that case supports finding that gender identity discrimination violates other federal sex discrimination laws, including Section 1557 of the ACA, although, it is true, the holding of *Bostock* strictly speaking applies to employment discrimination. But the ACA sex discrimination rule is derived from Title IX of the Education Amendments of 1972, which has been construed to apply to gender identity discrimination by several courts of appeals, even predating *Bostock*. On March 26, the Justice Department issued a memo to all federal agencies and general counsels asserting that Title IX's sex discrimination ban includes sexual orientation and gender identity discrimination claims, explaining the reasoning behind President Biden's January 20 Executive Order which asserted that the reasoning of *Bostock* applies to Title IX.

Judge Rash also seems to echo a dissenting opinion from the 9th Circuit's denial of *en banc* review in *Edmo v. Idaho Department of Corrections* in retailing Senior Circuit Judge Diarmuid O'Scannlain's attack on the bona fides of the World Professional Association for Transgender Health (WPATH), which O'Scannlain and Rash both characterize as an advocacy organization rather than as an exponent of a widespread medical consensus on appropriate health care for transgender people.

Rash appears to accept as valid the Defendants' argument that performance of a form of gender confirmation surgery on minors would be premature because some proportion of minors "outgrow" a transgender identity and would come to regret having lost through surgery the organs that cannot be replaced should they reclaim a gender identity congruent with their genetic sex. He also distinguishes some of the cases ruling against Medicaid exclusions of transgender health care by pointing out that the Arizona Medicaid program has been paying for hormone therapy for both plaintiffs for a year, the ban applying only to surgery. And, he notes, one of the plaintiffs' experts has not even examined the plaintiffs, so he discounts that expert's contention that they are appropriate candidates for the surgery, noting as well that no medical doctor has yet determined that plaintiff John is a suitable candidate for the surgery.

On the requirement that the plaintiffs show irreparable injury if deprived of preliminary relief, Rash observes that they can obtain the surgery with funding from other sources while the decision whether they should be able to get it from Medicaid is pending, so it is not necessary, strictly speaking, for them to get preliminary injunctive relief in order to proceed with their transitions. Of course, this assumes without evidence that transgender teens who are dependent on Medicaid to finance their health care have access to alternative financial resources.

While this is not a ruling on the merits, the opinion strongly signals the likelihood that the court would find no violation of the Medicaid Act, the ACA, or the Equal Protection Clause in this case, since the judge appears to favor the argument that the comparators suggested by plaintiffs in their discrimination analysis are not really comparable. But given who the district judge is – a Trump appointee who joined the Federalist Society the year before his nomination – this is not unduly surprising, as the opinion recycles many of the standard talking points of conservative critics of transgender rights. This case ultimately will have to be won or lost at the 9th Circuit. The Supreme Court's surprising denial of the petition for certiorari in the *Edmo* case from the 9th Circuit last October reflects the usual wariness of that Court about taking on transgender issues. Their grant of cert in *Harris Funeral Homes v. EEOC* was their first case involving a transgender litigant sine *Farmer v. Brennan* in 1994.

Plaintiffs are represented by Abigail K Coursolle, of the National Health Law Program – Los Angeles, CA, Los Angeles, CA; Andrew J Chinsky and Brent P Ray, of King & Spalding LLP – Chicago, IL; Catherine Anne McKee, of the National Health Law Program, Chapel Hill, NC; Daniel Clayton Barr and Janet Marie Howe, of Perkins Coie LLP – Phoenix, AZ, Phoenix, AZ; and Asaf Orr, of the National Center for Lesbian Rights, San Francisco, CA. ■

In Rare Transgender Victory, Fifth Circuit Reverses Dismissal of Lawsuit Challenging Booking of Transgender Inmates at Dallas County Jail

By William J. Rold

"If you are going to shoot the king, don't miss." This quotation is attributed to many sources, but the earliest seems to the one translated from the Italian in Niccolò Machiavelli's *The Prince* (1505). As applied here, transgender plaintiff Valerie Jackson tried to recuse allegedly transphobic U.S. District Judge Brantley David Starr (N.D. Tex.) in her lawsuit about violation of her civil rights at booking into the Dallas County Jail. In *Jackson v. Valdez,* 2021 WL 1183020 (5th Cir., Mar. 29, 2021), the Fifth Circuit upheld the refusal to recuse, but it reversed the dismissal of the civil rights claims – and it remanded to the same judge.

The opinion is an unsigned not-for-publication *per curium,* with a panel composed of Circuit Judges Leslie H. Southwick (George W. Bush), James E. Graves Jr., (Obama), and Senior Circuit Judge Rhesa H. Barksdale (George H.W. Bush). All three judges are from Jackson, Mississippi.

The court spends nearly half of its opinion on the recusal motion, which Jackson filed after her case was reassigned to Judge Starr following his appointment by President Trump in 2019. Jackson argued that Judge Starr was personally biased against transgender people (28 U.S.C. §144) and had the appearance of same (28 U.S.C. § 455(a)). She relied on a history of anti-LGBTQ positions Judge Starr had taken in representing various clients, including: defense of the Texas "bathroom bill"; opposition to marriage equality; objections to adoption by same-sex couples; religious exemptions to public accommodation protections, etc. Jackson also relied on Starr's refusal to answer some of the LGBTQ-related questions on his confirmation questionnaire, except to say he would apply binding precedent fairly to everyone.

Judge Starr wrote a twelve-page opinion declining to recuse. He responded to each allegation. The 5th Circuit affirmed on an abuse of discretion standard, but it "admonished" Judge Starr. It was enough to say that Judge Starr was representing clients' views in the instances cited by Jackson and not necessarily his own. He should not have defended them. Confirmation issues were for the Senate. Jackson failed to show personal bias or the appearance of it in Jackson's own case.

Jackson has lived as a woman for years, and her gender change has been legally recognized by a state court. Both Judge Starr and the 5th Circuit use female pronouns in referring to her. When she was arrested on a weapon charge in 2016, she was taken to the Dallas County Jail, where she was identified as a woman because of her attire. Officers demanded that she remove her bra and show her breasts, and she complied. Later, defendants demanded that she expose her genitalia so that she could be classified male (if she had a penis) or female (if she had a vagina). After a lengthy period of refusal and demand, she relented to avoid further humiliation. She was then moved to the men's unit.

This happened at least two more times in subsequent arrests. She was told it was the policy to classify prisoners at the jail based on genitalia and that she must strip each time. She was not free to refuse, and she was told she could "take it up with the Sheriff" if she had a complaint. She was told "everybody goes through this." Officers said: "[O]ur policy is we have to verify that you've had a sex change. It's not uncommon for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. You aren't the first and you won't be the last." Each time she was put in

the "male" unit, where she was forced to shower with male inmates. She endured harassment, but there are no allegations of assault.

Jackson sued Dallas County and the Sheriff (and his successor) officially, and she also sued a number of defendants individually. Judge Starr found no pattern and practice sufficient to satisfy *Monell* liability against the County or the Sheriff in their official capacities. [The reference is to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978), concerning liability of the government entity.] He entered separate judgment in their favor, which is the subject of the appeal. [The Prison Rape Elimination Act forbids the conduct at issue. 28 C.F.R. § 115.15(e) states: "The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status." The 5th Circuit panel does not mention PREA, adjudicating the case on the merits under § 1983 and the Due Process Clause of the Fourteenth Amendment, since the plaintiff was a pre-trial detainee.]

While the *Monell* claim was on appeal, the defendants who were sued individually moved for summary judgment as a matter of law. Jackson asked for discovery to defend against the motion, but Judge Starr denied it. Apparently, this came up during oral argument on the appeal because the panel asked for an update about the defendants still in district court. Jackson's attorneys sent the Circuit a one-sentence letter as follows: "This letter is to inform the Court that, after ruling in the District Court denying Plaintiff the ability to conduct any discovery and ordering that Plaintiff respond to a summary judgment without the benefit of discovery, Plaintiff voluntarily dismissed all Defendants not on appeal from the case currently pending in the District Court." The dismissal was without prejudice. This turn of events is not mentioned in the decision.

On the merits, the Circuit reversed on the *Monell* claims under the standards for stating a claim under F.R.C.P. 12(b)(6). Jackson had two theories of unconstitutional pattern and practice: (1) a practice of strip-searching transgender detainees for the sole purpose of determining the detainee's gender and classifying them solely on their biological sex, and (2) the failure to train and supervise employees to prohibit strip searches and the classification of transgender inmates based solely on their sex assigned at birth. The 5th Circuit panel found that Jackson stated a claim on both theories.

A pattern can provide proof of a policy where there are "sufficiently numerous prior incidents" as opposed to "isolated instances." *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009). Jackson offered proof of other transgender inmates having the same experience, in addition to her own multiple experiences. While the frequency was a "close question" in establishing a policy, Jackson states a claim under Rule 12(b)(6) standards. "We also acknowledge Jackson's point that the population of transgender detainees is relatively small, so the number of similar incidents alleged or possibly discovered later in litigation will likely be less than those in other municipality liability cases," observed the court.

The frequency, the generalized statements about "policy," and the suggestion that Jackson "take it up" with the sheriff prompt the Circuit to find the sheriffs (and county) knowledgeable about the unconstitutional conduct. Judge Starr "erred in concluding that Jackson failed to plead that the county policymaker had actual or constructive knowledge of a policy of strip searches and sex-based classifications of transgender detainees."

As to training, it was sufficient for Jackson to plead that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violations in question. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 (5th Cir. 2009). While there was a "pattern" alleged here, even a single incident can support a training claim. "Absent proof of pattern, deliberate indifference can still be inferred in a limited set of cases, where 'evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, [can] trigger municipal liability,'" quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409-10 (1997).

Jackson was ably represented by Sean R. Cox (Dallas) and Scott H. Palmer (Addison, TX). Perhaps they will find a chastened Judge Starr on remand. ■

Tennessee Federal Judge Slams Door on Claims by Bisexual Inmate for Post-Rape Counselling and Protection after Remand from Sixth Circuit

By William J. Rold

Two and one-half years ago, U.S. District Judge James Dale Todd dismissed a *pro se* claim by bisexual prisoner Chase Edward Lucas, who had been denied counseling after being raped twice in Tennessee DOC prisons privately operated by CoreCivic. The mental health coordinator said Lucas was lying about the rapes, and he "probably liked" them because he is bisexual. *Lucas v. Chalk*, 2018 WL 5622290 (W.D. Tenn., Oct. 30, 2018). Lucas found counsel and appealed to the Sixth Circuit.

Full disclosure: This writer was that counsel, along with co-counsel Jane Becker Whitaker (San Juan, PR); and John W. Cleveland, Sweetwater, TN). An amicus brief supporting Lucas was filed by Lambda Legal (New York, NY, and Washington, DC), joined by the Center for Constitutional Rights (New York, NY) and Just Detention International (Los Angeles, CA, and Washington, DC).

The Court of Appeals vacated and remanded, in *Lucas v. Chalk*, 2019 U.S. App. LEXIS 24561 (6th Cir., August 19, 2019), with instructions to allow Lucas to amend his complaint. The signed opinion, not for full publication, was written by Circuit Judge Joan L. Larsen (Trump). Circuit Judge John K. Bush (Trump) and Senior Circuit Judge John M. Rogers (George W. Bush) joined.

The 6th Circuit first noted that the use of the word "unsubstantiated" to refer to the rapes is a "term of art" under the Prison Rape Elimination Act [PREA] and its regulations, meaning that, after investigation, it was not possible to determine whether or not the rapes occurred. 28 C.F.R. § 115.5. Thus, the inference that Lucas was lying was inappropriate because the investigation did not find that the allegations were "unfounded." The court further observed that inmates whose claims were "unsubstantiated" still qualified for treatment under §§ 115.83(a) and (c).

The court had little trouble finding that a survivor of two rapes may have a serious medical need for counseling, citing *Nelson v. Shuffman*, 603 F.3d 439, 448-49 (8th Cir. 2010). The court also cited Congressional findings in 34 U.S.C. §§ 30301(1) and (14)(d) ("Victims of prison rape suffer severe physical and psychological effects[,] . . . [including] post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses.").

Similarly, the refusal to treat because of sexual orientation does not survive "even rational basis review," under *Davis v. Prison Health Servs*., 679 F.3d 433, 438 (6th Cir. 2012). The court found the allegation that Chalk said Lucas "probably liked" being raped because he is bisexual to be "shocking" and would be "potent evidence in support of such a claim." [Note: This is close to adoption of "verbal abuse plus" theory, allowing comments that are not by themselves actionable to cast light upon – and therefore reveal – another underlying constitutional tort.]

On remand, the case was reassigned to Senior U.S. District Judge J. Daniel Breen, assisted by U.S. Magistrate Judge Charmaine G. Claxton. Judge Claxton was not assigned for general pre-trial purposes – only for issues as they arose: to make pre-trial rulings on discovery, or reports and recommendations ["R & R"] on potentially dispositive motions.

During the pendency of the appeal, Lucas was raped two more times. Once more, at a CoreCivic facility, and again after transfer back to prisons operated by Tennessee DOC. He filed a 245-paragraph, 45-page amended complaint, including these two rapes and alleging a broader pattern and practice of failure to: (1) protect LGBT and mentally ill inmates (including Lucas specifically) from victimization; and (2) provide mental health services, including inmates with demonstrated history of self-harm, like Lucas. The amended complaint named Wardens and the Tennessee DOC Commissioner ["state defendants"]. This pleading included Corizon as a private mental health services contractor with Tennessee DOC.

The state defendants moved to dismiss for lack of supervisory liability. Judge Breen referred the motion to Judge Claxton for an R & R. She recommended denial of the motion to dismiss. More about this later.

Meanwhile, the vendor defendants sought dismissal for Lucas's alleged failure to exhaust administrative remedies before filing suit, as required by the Prisoner Litigation Reform Act [PLRA]. Judge Breen wrote that the Sixth Circuit should have ruled on this issue, which he found dispositive on the face of the *pro se* complaint. He said that the 6th Circuit should never have permitted Lucas to amend his complaint. Because this issue could not now be resolved on the facts of the amended complaint (which contained no "admission" on exhaustion), Judge Breen converted these motions to ones for summary judgment. But he kept them and did not refer them to Judge Claxton for an R & R.

Lucas moved for discovery of his investigative files on the exhaustion issue under F.R.C.P. 56(d), claiming that he had exhausted, and that the Tennessee DOC Inspector General investigation of the rapes would show it. Judge Breen referred the discovery motion to Judge Claxton, who granted it. The vendor defendants did not produce the investigative files, saying Tennessee DOC had them – whereupon Judge Claxton ordered Tennessee

DOC to produce them. All defendants appealed the orders to Judge Breen, who never ruled. Instead, Judge Breen granted summary judgment to the vendor defendants on exhaustion grounds, without the production of discovery relating to exhaustion that Judge Claxton ordered.

Judge Breen again criticized the 6th Circuit for not addressing exhaustion on the appeal, and he said that Lucas's "discovery argument" was "without merit, as he filed no motion to compel." In fact, he did. Judge Breen knew this, and he referred the motion to Judge Claxton, who granted it. Nevertheless, with the vendor defendants dismissed, the state defendants became the only defendants left in the case.

Returning to the state defendants' motion to dismiss, they filed objections to Judge Claxton's R & R that the motion to dismiss be denied. Lucas responded to the state defendants' objections (Docket No. 68, filed Mar. 5, 2020), and he attached a 232-page audit from the Tennessee Comptroller criticizing the Commissioner's management of the DOC and the Wardens' operation of the subject prisons in the areas of protection from sexual assault and mental health services. Specifically, the audit found that executive failures prevented recording of "inmate-on-inmate" assaults at the Tennessee DOC level and at Whiteville and Northwest facilities, where two of Lucas' rapes occurred. These prisons reported zero rapes for all of the subject period when Lucas was raped. Tennessee DOC recorded no rapes systemwide (at any of its fourteen prisons) for the entire fiscal year. The audit found that PREA investigations were not thorough and often not even concluded. The audit said there was inadequate mental health staffing and that vendors, including Corizon, did not maintain adequate mental health records.

Lucas' response to the state defendants' objections to the R & R stated that the Comptroller's Report was issued after the R & R, so it was "new" evidence. It was also an update of a document referred to in the pleadings and was judicially noticeable as an official state agency document.

Judge Breen over-ruled Judge Claxton's R & R and granted the motion to dismiss in *Lucas v. Chalk*, 2021 WL 794436 (W.D. Tenn., Mar. 2, 2021). In the first paragraph of his opinion, he makes the following untrue statement: "Plaintiff has not responded to Defendants' objections, and the time to object and/or respond has expired." He ignores the response to the objections; worse, he ignores the audit.

Judge Breen writes an 8,000-word opinion that recites valid Sixth Circuit law on pattern and practice and supervisory liability. In fact, the opinion holds together if one knows nothing about the case or the prior proceedings. The problem is that the foundation is cracked, eroded by the state's own non-party auditor on the very points of supervision at issue. This writer will not dignify Judge Breen's opinion by presenting his analysis. If that lacks a certain objectivity, so be it – so does the opinion. It would be too meek to say that this writer is "disgruntled." "Outraged" would be more descriptive.

Chase Lucas was raped again (for the fifth time) in May of 2020. He has been in solitary since then. Tennessee DOC insists it lacks other options, and Lucas will be released in about a year. At that point, his injunctive claims will be moot.

A motion for Judge Breen to reconsider seems pointless. He has exhibited hostility to this case (or to counsel, or to both) from the 6th Circuit's reversal of Judge Todd's decision. An appeal will likely take longer than a year, and another remand (even if the Circuit directs the case to be reassigned) will start the case again at the beginning of discovery. Lucas will still face PREA motions (hopefully with the benefit of exhaustion discovery), to be followed by merits discovery and other pre-trial hurdles.

A year and a half after the Circuit remanded the case – and after three more rapes – Lucas has still been unable to obtain the investigative files from the Tennessee DOC. Tennessee's one-year statute of limitations for civil rights cases runs on the most recent rape in May of 2021. If there are new counsel or groups out there who are able to pick up this case, the files are available. ■

Texas Appeals Court Finds Texas Anti-Discrimination Law Forbids Sexual Orientation in Line with *Bostock* Ruling

By Arthur S. Leonard

Rejecting a motion by Tarrant County College District to dismiss a discriminatory discharge claim by a lesbian former employee of Tarrant County College District, a panel of the Court of Appeals of Texas sitting in Dallas ruled on March 10 that the Texas law banning employment discrimination because of sex should be interpreted to extend to a sexual orientation claim, in light of the U.S. Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), because "the court does look to federal law for guidance in situations where the [Texas Commission on Human Rights Act] and Title VII contain analogous statutory language." *Tarrant County College District v. Sims*, 2021 WL 911928, 2021 Tex. App. LEXIS 1781.

Amanda Sims claimed that she was discharged from employment because she is a lesbian. She had been an employee for three years, received above-average performance evaluations, and received the Chancellor's Excellence Award for her work. But after she revealed her sexual orientation while serving as a member of a TCCD committee addressing diversity issues, things went downhill. Her supervisor expressed religious views "that held homosexuals in a negative light" and told Sims that "she had to 'overlook [my] bias' when it came to Sims." Sims claims she was eventually discharged for pretextual reasons.

Here is the problem she faced: at the time she filed suit in November 2019, it was clear within the federal 5th Circuit and under Texas statutory law that she had no protection under federal or state laws from discrimination

because of her sexual orientation. She attempted to obtain redress through the state's Whistleblower Act and the state Constitution. TCCD moved to dismiss, arguing that the Texas Commission on Human Rights Act was the only vehicle for raising a discrimination issue, and that the Texas Constitution would not apply to Sims' claim. The trial judge denied TCCD's plea to the jurisdiction. The trial judge considered that because the TCHRA did not cover sexual orientation, it could not preempt the Whistleblower Act, and also rejected a sovereign immunity claim by the TCCD.

The majority of the Court of Appeal panel, in an opinion by Justice Craig Smith, found that in light of *Bostock*, which was issued by the Supreme Court after the trial court had ruled in this case, the TCHRA should be construed to cover sexual orientation discrimination claims. That being the case, the Whistleblower Act would be out of the picture, as the TCHRA would be the exclusive statutory mechanism for challenging employment discrimination by a public employee. Sims should have an opportunity to amend her complaint to plead a claim under the TCHRA. Furthermore, no sovereign immunity claim could be raised to be Sims's claim under the TCHRA or the state constitution. Wrote Justice Smith: "Sims' constitutional claims established the existence of a genuine issue of material fact to overcome TCCS's challenge to the trial court's subject matter jurisdiction."

Justice David J. Schenck, while concurring in the result, argued that it was inappropriate for the court to "make new law" by applying *Bostock* when "the district court did not have an opportunity to consider whether our state law was affected by the United States Supreme Court's decision in *Bostock*, and no party before us presents the issue in an adversarial posture . . . " He continued, "The parties nevertheless urge us to reach the merits and to presume that the legislature intended the TCHRA's 'general guidance" provision to have the effect of incorporating the *Bostock* holding four decades after the enactment of its text." He disagreed and spelled out his disagreement at length in his dissenting opinion. He would prefer just to hold that the district court had jurisdiction of Sims' discrimination claim under the TCHRA and leave it to the trial court to deal with interpretation in the first instance in response to adversarial presentation by the parties.

As a practical matter, since *Bostock* is a textualist ruling of Title VII, this means that Sims' sexual orientation claim would be actionable under Title VII even though her discharge took place well before *Bostock* was decided. She could move the district court to amend her complaint to add a Title VII claim, and it would then be up to TCCD to decide whether to remove to federal court or to leave the case where it is. There is also some controversy about venue, and there is a reference to Sims seeking to invoke Fort Worth's anti-discrimination ordinance, although one suspects that a local ordinance might not apply to an instrumentality of the state, as TCCD appears to be. The Court of Appeal concluded that venue was appropriate in Fort Worth.

Jason C.N. Smith, of Fort Worth, represents Amanda Sims. ■

Massachusetts Federal District Court Allows Part of Lesbian Hispanic Police Officer's Discrimination and Harassment Suit Against Former Police Chief to Proceed

By Wendy C. Bicovny

In *Roman v. Town of Tisbury,* 2021 WL916803 (D. Mass., March 13, 2021), U.S. District Judge Indira Talwani denied in part and granted in part Defendant Mark Saloio's motion to dismiss a complaint by Kindia Roman, a lesbian Hispanic Police Officer, alleging discrimination and harassment in violation of her civil rights.

Roman alleges that while she served as a police officer for the Town of Tisbury, Defendant Max Sherman and other members of the Tisbury Police Department subjected her to discrimination and harassment. Roman further alleged that when she pursued a discrimination claim against Sherman and the Town of Tisbury with the Massachusetts Commission Against Discrimination (MCAD) Saloio, who was then Chief of the Tisbury Police Department, attempted to coerce a key witness, Roman's then Supervisor, Lieutenant Erik Meisner, into providing untruthful testimony in order to obstruct Roman's prosecution of the discrimination claim. Roman brought seven causes of action against the Town of Tisbury, Sherman, and Saloio. Only Claims One through Three, specific to Saloio, remained in contention. The complex facts are best understood in Judge Talwani's analysis of each Claim in turn.

As to Claim One, Saloio first contended that Roman has failed to state a 42 USC § 1983 claim against Saloio because "there were no facts showing Saloio engaged in any 'conduct or inaction amount[ing] to a reckless or callous indifference to the constitutional rights of others.'" Saloio's argument rested on the assertion that "[b]y the time Saloio was hired as Chief of Police, Roman had already left her employment with Tisbury; applied for, and was allegedly denied, positions with police departments in Walpole, Wellesley, Concord, and Westwood; and she had already sought, and was allegedly denied, reinstatement of her position with [Tisbury Police]." Saloio's argument misapprehended Roman's claims against him and failed to address specific factual allegations included in the Complaint. Roman's claims against Saloio are not based on the actions taken by either Sherman or the Town for the period before Saloio became Chief of the Tisbury Police Department. Instead, Roman alleged that Saloio deprived Roman of her rights guaranteed by the federal Constitution by attempting to coerce, intimidate, or threaten Meisner into obstructing the Town's investigation of Roman's MCAD complaint.[1] Because the allegations as to Saloio's conduct after his appointment as Chief of Police state a claim for relief pursuant to § 1983, Claim One was not subject to dismissal.

As to Claim Two, Saloio raised two arguments for why Roman's Massachusetts Civil Rights Act (MCRA) claim must be dismissed. First, Saloio correctly complained the claim was brought against Saloio in both his personal and official capacities, where the MCRA only establishes liability for officers acting in their individual capacities. Massachusetts's courts have not extended MCRA liability to municipal employees acting in their official capacities. Accordingly, to the extent Roman's MCRA claim alleged that Saloio was liable in his official capacity, Claim Two was subject to dismissal. Saloio's second argument was that Roman's MCRA complaint must be dismissed where "the Complaint is devoid of any assertion that Saloio threatened, intimidated, or coerced *Roman*." Namely, Saloio argued that while there were allegations that Saloio attempted to threaten, intimidate, or coerce Meisner, there were no allegations that Saloio did the same directly to Roman. By its plain terms, the MCRA does not require that the threats, intimidation, or coercion necessarily be directed at Roman, so long as they have the effect of interfering with Roman's exercise or enjoyment of her civil rights. Thus, to the extent Claim Two was against Saloio acting in his individual capacity, it was not subject to dismissal.

Last, in Claim Three, Saloio challenged Roman's *Mass. Gen. Laws ch. 151B (ch. 151V)* claim on essentially the same grounds as both Claims One and Two, above. Again, Saloio argued that "[t]he Complaint did not include any allegation that discriminatory or harassing conduct occurred on or after the time when Saloio became Chief of Police, nor that any such conduct was reported to Saloio." As before, Saloio overlooked the allegation that Saloio attempted to interfere with Roman's MCAD petition against Sherman and the Town of Tisbury. Namely, Roman alleged that Saloio knew of the harassment and discrimination that Roman faced from Sherman and others in the department and that Saloio threatened Meisner in order to interfere with Roman's attempts to remedy the discriminatory harassment through MCAD. These allegations state a claim under ch. 151B, Section 4(4A) of which prohibits interference with the exercise or enjoyment of any right granted or protected by ch. 151B, and that while retaliation "may also constitute interference under the second clause of § 4(4A), retaliation was not required to establish a claim of interference." Accordingly, Claim Three against Saloio was not subject to dismissal on the pleadings. ■

Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City.

Ohio Appellate Court Affirms Child Abuse and Criminal Endangering Convictions for a Father's Violent Reaction to Discovering Son's Sexuality

By Joseph Hayes Rochman

In August 2019, Lavell Taylor discovered that his ten-year-old son questioned his sexuality. Taylor berated both his son and, later, his son's mother verbally. Taylor repeatedly called his son a faggot, threw him to the ground, and whipped him. He told his son he would no longer be part of his family. Taylor brought his son back to the mother's house and started a fight with her over the issue. Shortly after the altercation, the mother reported the incident to the police.

On September 3, 2019, Taylor was charged in violation of local and state law, for (1) misdemeanor domestic violence for endangering children, (2) abusing a child under the age of 18, and (3) criminal damaging or endangering a child. The Cleveland Municipal Court found Taylor guilty of endangering children and criminal damaging, but not guilty of domestic violence. The Ohio Court of Appeals, Eighth District, Cuyahoga County affirmed both convictions in *Cleveland v. Taylor*, 2021 WL 833535, 2021 LEXIS 605 (March 4, 2021).

Taylor, represented by attorney James Anzelmo, appealed citing five reasons: (1) The Cleveland Municipal Court lacked jurisdiction to convict him of child endangerment, (2) the court erred when it allowed the son's statements to his mother about the altercation into evidence, violating Taylor's right to confront witnesses under the Sixth Amendment of the United States Constitution, (3) the convictions were based on insufficient evidence, (4) the convictions are against the manifest weight of the evidence, and (5) the trial court erred by ordering Taylor to pay his son's mother back $400 for destroying the boy's cell phone. The court found none of Taylor's challenges to have merit.

After not seeing his son for a month, Taylor picked up his son from his mother's house and brought him to his brother's restaurant. At the restaurant, Taylor discovered homosexual pornography on his son's cell phone. He grew angry about what he found and confronted his son about the content on his phone. The son, in tears, told his mother what happened next. His father threw him on the ground and said, "he does not have a fag in his family."

Taylor testified that he whipped his son because he was lying to him, not because he discovered his son may not be heterosexual. He also suggested that the altercation with the mother was because she would not let him visit with his son. The court did not find Taylor's testimony compelling.

The mother, on the other hand, testified that she was sitting outside with her two-year old when Taylor brought their son home. She stated that Taylor immediately approached her using profanity. He was yelling at her and calling his son a faggot. She told him to calm down, that she had already discussed the content on the phone with their son and with Taylor's mother. She said she had not discussed it with him because she knew how he would react.

The boy sat on the porch crying over his father's words when his mother asked him to go inside with her younger child. She repeatedly asked Taylor to leave but he refused. Eventually she poured water on him and threw an empty bottle at him in an effort to drive him off. The altercation escalated when Taylor pushed her into the house. She eventually chased him off with a hammer that she found in her kitchen.

Taylor argued that his endangering children and criminal endangering convictions were not supported by sufficient evidence. He contended that his son did not sustain injuries or seek medical attention and that he had a right to discipline his children.

Finding the evidence at trial was sufficient for the convictions and not against the manifest weight of the evidence, the court emphasized that Taylor's son was directly involved in the ongoing altercation started by Taylor and that the son's sexuality was the subject of the altercation. Taylor created a substantial risk to his son's emotional and mental health or safety.

Judge Frank Celebrezze, Jr. wrote that "[r]ather than inquiring about the issue and protecting or supporting his son, [Taylor] . . . became angry, berated his son, and led his son to believe he would no longer be a part of appellant's family or life . . . [he] made [his] son feel scared, ashamed, and embarrassed."

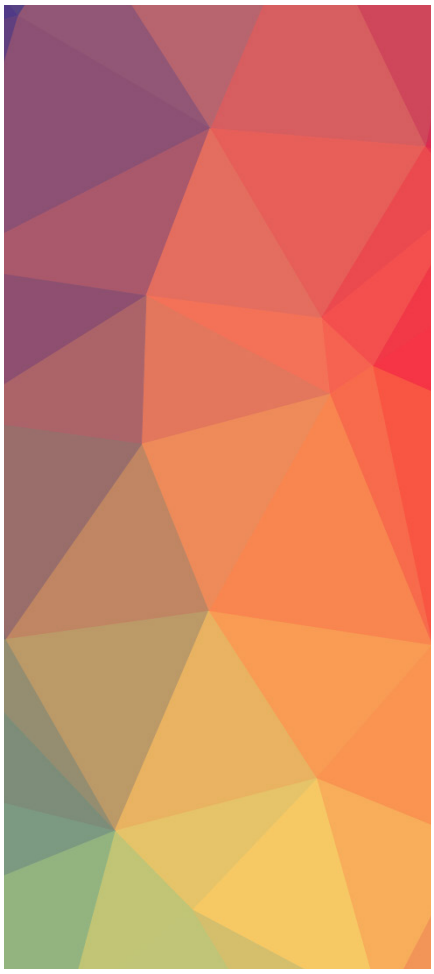
The Cleveland prosecutors relied on state and local statutes for child endangerment to hold Taylor accountable for his actions. The boy was lucky to have a mother who sought to enforce legal protections. Still, many LGBTQ youths are forced from their family homes after coming out to their family and suffering from abuse, leading child welfare organizations to support a disproportionate amount of LGBTQ youth.

Compared to heterosexual youth, LGBTQ youth experience significantly higher rates of physical and sexual abuse. A 2014 study from the Williams Institute and True Colors Fund found that of youth accessing homeless services, service providers reported: "20% identify as gay or lesbian, 7% identify as bisexual . . . 2% identify as questioning their sexuality . . . 2% identify as transgender female, 1% identify as transgender male, and 1% identify as gender queer." The Williams Institute and True Colors Fund, Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness 4 (2015). 78.2 percent of LGBTQ youth respondents stated they were forced out or ran away because of their sexual orientation or gender

identity/expression and 84.5 percent of transgender respondents cited that reason. Id. at 12.

While LGBTQ youth make up a disproportionate share of homeless youth, the child welfare system has not adequately met their needs. In April 2019, Senator Tim Kaine from Virginia and Senator Tammy Baldwin from Wisconsin introduced The Protecting LGBTQ Youth Act to amend the Child Abuse Prevention and Treatment Act. Among other initiatives, the bill sought to direct the Secretary of Health and Human Services to research, document, and find ways to protect LGBTQ youth experiencing child abuse and neglect. However, the bill did not end up receiving a vote. S. 1073, 116th Cong. Protecting LGBTQ Youth Act (2019). Cases such as *Cleveland v. Taylor* demonstrate the urgent need to pass legislation protecting LGBT youths. ■

Joseph Hayes Rochman is a law student at New York Law School (class of 2021).



CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City. Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

U.S. COURT OF APPEALS, 3RD CIRCUIT – A 3rd Circuit panel rejected a petition for withholding of removal or protection under the Convention Against Torture (CAT) by a gay Jamaican who pleaded guilty to one count of conspiracy to commit racketeering in response to an indictment for drug trafficking, robbery, and murder. *Bent v. Attorney General*, 2021 U.S. App. LEXIS 8052, 2021 WL 1054118 (March 19, 2021). Circuit Judge Patty Shwartz wrote for the unanimous panel. Petitioner was admitted to the U.S. as a lawful permanent resident in 1997 but became caught up in criminal activities and upon sentencing receiving a notice to appear in Immigration Court. Because of his felony conviction, he could not then seek asylum, and as an Immigration Judge concluded that his conviction involved a "particularly serious crime," he also was ineligible for withholding of removal. (The 3rd Circuit panel rejected his argument that the determination about whether he was guilty of a particularly serious crime should be limited to the scope of his guilty plea, finding precedent supports the IJ's examination of all the crimes for which he was charged.) His only hope to stay in the U.S. would be to show that he was entitled to protection under the CAT, which he argued in reliance on State Department country reports on Jamaica, but neither the IJ nor the Board of Immigration Appeals found that evidence showed he would be at serious risk if removed back to his home country. Reports in LGBT media about Jamaica emphasize the perils faced by LGBT people there, including widespread discrimination and occasional violence, and some courts have actually granted CAT protection for gay Jamaicans, but in those cases, there is usually some personalized threat to the individual that tips the balance. Wrote Judge Shwartz, "Here, [Petitioner] presented country condition reports indicating that homosexual acts are illegal in Jamaica and that there have been instances of discrimination and violence against gay men. These general reports, however, do not establish a threat of torture meriting CAT relief. [Petitioner] did not provide any evidence of specific threats against him, arguing only that other Jamaicans he met while incarcerated in the United States used slurs against him when they found out he is gay. Additionally, [Petitioner] failed to demonstrate that he would face torture with the consent or at the acquiescence of public officials." The court stated that the record showed that Jamaica's sodomy law was not actively enforced except for cases of sexual assault and child molestation, and that Jamaica's police force has "adopted a Policy on Diversity, which includes guidelines on dealing with sexual minorities as a protected group." Thus, the court found substantial evidence to support the IJ's and BIA's decisions denying protection under the CAT, another triumph for Jamaican government public relations. Petitioner is represented by Wendy R. Barlow of Cohen & Tucker, New York. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Stephens v. Attorney General*, 2021 WL 1169822 (3rd Cir., March 29, 2021), a 3rd Circuit panel issued a *Per Curiam* decision granting a petition for review of the Board of Immigration Appeals' rejection of a claim for protection under the Convention Against Torture (CAT)

for a bisexual man from Jamaica. The Petitioner entered the U.S. as a non-immigrant in 1999 but became a legal permanent resident in 2004. In 2011 he pleaded guilty to federal drug and weapons charges and was targeted for removal. Due to his convictions, he was not eligible for asylum or withholding of removal, but he claimed relief under the CAT. The Immigration Judge and the BIA decided that the key evidence he introduced, a letter by a fellow prison inmate with whom he had formed a romantic relationship, had inconsistencies that destroyed its credibility. The inmate, a transgender woman, was writing both to verify that Petitioner is bisexual but also to communicate that other Jamaicans in the prison who learned of their relationship had spread word to friends and family members outside of the prison and in Jamaica and that actual threats had been made against the Petitioner should he be removed to the island. The court found problems with the alleged "inconsistencies" on which the IJ relied, which the court did not deem to be actual inconsistencies or particularly relevant to the question of danger to the Petitioner from homophobic Jamaicans. Furthermore, wrote the court, "inconsistency" found by the IJ between Petitioner's testimony and the danger mentioned in the letter was not really inconsistency, either, and the assertion that Petitioner's testimony did not support his claims about the danger to him in Jamaica was not supported by the record. "Because neither of the IJ's bases for determining that [the partner's] letter was inconsistent with [Petitioner's] testimony is adequately supported by the record," wrote the court, "the Agency erred in discounting it. And because it is unclear how the Agency may have weighed the letter in determining whether [the Petitioner] had met his burden of proof on the CAT claim, the error is not harmless. We accordingly will remand to the Board so that it may reevaluate this CAT claim in light of this opinion." However, the court rejected Petitioner's alternative argument that he might face torture because he was allegedly an ICE information. The court found that the record did not compel disagreeing with the IJ's conclusion that the Petitioner had failed to provide evidence to support this claim. The Petitioner represents himself *pro se* in this appeal, so, the court stated, "the need to construe his claims broadly is accentuated." Circuit Judges McKee, Shwartz and Restrepo comprised the panel. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 8TH CIRCUIT – An 8th Circuit panel unanimously affirmed a decision by the district court to deny preliminary injunctive relief to Cory Sessler, who – along with a band of his co-religionists – was asked by police officers to move away from a street festival which is an annual event coinciding with a major bicycle race in Davenport, Iowa. *Sessler v. City of Davenport*, 2021 WL 1032838, 2021 U.S. App. LEXIS 7902 (March 18, 2021). Sessler and his group crashed the festival carrying street signs preaching against sin – including homosexuality – and telling people they were going to go to hell. "Sessler and his colleagues had signs on extendable poles with messages such as: 'Hell is enlarged for adulterers . . . homosexuals . . . abortionists . . . . '; 'Fake Christians . . . don't . . . smoke, vape, and get high . . . and think they're saved'; and 'Warning: if you are involved in . . . sex out of marriage, homosexuality, drunkenness, night clubbing . . . you are destined for a burning hell. Sessler preached similar messages using a microphone and speaker." The festival was a permitted event under the city's Special Events Policy, and police were assigned to maintain order. Vendors who had paid for space at the Festival complained that Sessler's activity was interfering with their operations, and so police told Sessler and his group to move on. In this action, Sessler, who plans to conduct similar activities again in Davenport, wants the court to order the police department to let him carry out his mission "in public spaces" in the city. The opinion for the court by Circuit Judge Michael J. Melloy affirms the district court, finding Sessler's allegations insufficient to justify preliminary injunction relief. "To justify prospective injunctive relief in this context," wrote Judge Melloy, "Sessler must, at minimum, establish he will suffer irreparable harm in the face of the City's Policy without the court's intervention. The failure of a movant to show irreparable harm is an 'independently sufficient basis upon which to deny a preliminary injunction.' Sessler's argument for preliminary relief is impaired by his inability to show with any likelihood that the Policy will be applied to him in the future. To establish the need for a preliminary injunction, the movant must show more than the mere possibility that irreparable harm will occur." Clearly, the relief Sessler was seeking was too broad, as the court pointed out: "The facts as alleged by Sessler show that he was allowed to continue preaching in the City's public sidewalks and streets, just not those demarcated and secured for use by Street Fest in July 2018. And, although Sessler's Complaint is based on his removal from a festival governed by the City's Policy, Sessler does not provide any concrete plans to share his messages at future festivals in the City. Although his statement that he intends to preach in 'Public Spaces' could, in certain situations, include public property for which a private entity obtained a permit, it is too speculative as to whether any location on which Sessler preaches in the future would be subject to the City's Special Events Policy." – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Lopez v. Garland*, 2021 WL 1157949 (March 26, 2021), a 9th

Circuit panel issued an unpublished decision concerning refugee claims by a Salvadoran woman and her three sons. The court upheld the Board of Immigration Appeals' affirmance of the Immigration Judge's determination that the "particular social groups" described by the petitioners did not come within the definition of that term as described in the case law but determined by a 2-1 vote that the petition for protection under the Convention against Torture should be sent back for reconsideration. Among other grounds for so ruling, the majority of the panel found that the BIA should reconsider the claim by one of the sons that he had grounds to fear serious harm from homophobic gangs who perceived him to be gay. The panel's memorandum opinion explained: "As the Board recognized, gang members 'used sexual orientation . . . as a means to degrade and harass [Petitioner].' And [he] presented ample evidence that gang members targeted him on account of his perceived sexual orientation, including that gang members regularly used homophobic slurs when attacking him and that they sexually molested him while stating 'they knew it was what [he] liked since [he] liked men.' According to Dr. Boerman [an expert witness on Salvadoran gangs], gang members often sexually molest individuals they perceive to be gay. Thus, the record compels the conclusion that [petitioner's] perceived sexual orientation was both 'a central reason' and 'a reason' for his persecution." This assertion drew a dissent from Circuit Judge Kenneth Lee, who was appointed by President Trump to fill the seat opened by the death of liberal stalwart Stephen Rheinhardt. Lee insisted that the evidence in the record supported the BIA's conclusion that gangs use homophobic taunts against men who refuse to join them, not because the man are gay or perceived to be such but because they refuse to join. He observed that the petitioner testified that "the gang 'said all this because to them, you were gay if you would not join a gang and that was how gay men would be treated.' This testimony suggests that the gang members – in a fit of misguided machismo – used homophobic slurs because they believed such degrading name-calling would pressure [the petitioner] into joining the gang. Similarly, on direct examination, the eldest son was asked, 'And how often would they approximately call you these [homophobic] names?' Answer: 'Every time I refused to join the gang.' Indeed, in front of the IJ, petitioners argued that gang members targeted [petitioner] 'because of his unwillingness to join the gangs.' The IJ/BIA's conclusion flows naturally from [petitioner's] own testimony. We are therefore not compelled to find otherwise." The petitioners are represented by Raymond Stockstill, IV, of Paul Hastings LLP, Costa Mesa, CA. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Niwagaba v. Garland*, 840 Fed.Appx. 215 (Mem), 2021 WL 981451, 2021 U.S. App. LEXIS 7604 (9th Cir., March 16, 2021), it appears that the Immigration Judge and the Board of Immigration Appeals did such a negligent job in handling the refugee claims of the Petitioner, a gay man from Uganda, that the government agreed the case should be remanded. The court found well taken the Petitioner's argument challenging the adverse credibility determination of his testimony on the ground that it sounded "rehearsed and memorized," the failure of the agency to address his explanation for certain facts central to his claim, and the agency's failure to consider why – as some circuits have found – an applicant may not reveal his past harm and sexual orientation during a visa interview at the consulate in a foreign country. Furthermore, the government requested remand for the agency to determine whether "gay men in Uganda" is a "cognizable social group," whether the Petitioner established "that his membership in such group was 'a reason' for the harm he experienced," and "the import" of the Petitioner's claim that "it was the chairman of the local council who targeted him," which would be significant in relation to his claim for protection under the Convention Against Torture that he would be targeted by the government. "We grant the government's request for remand on the credibility determination as well as the alternative merits grounds," said the court. The Petitioner is represented by Niels W. Franzen, of the USC Law School Immigration Clinic, and students from the Clinic: Jean Elizabeth Reisz and Leila Alemi. – *Arthur S. Leonard*

CALIFORNIA – A lesbian couple employed by the San Francisco Police Department suffered summary judgment of their claims against the City under the Fair Employment and Housing Act (FEHA), and the 1st District Court of Appeal affirmed the summary judgment in *Russell v. City and County of San Francisco*, 2021 Cal. App. Unpub. LEXIS 1912, 2021 WL 1115504 (March 24, 2021) (not officially published). Sergeant Josey Russell and Officer Nadia Mohamed were not "out" in the Department about their sexual orientation or their relationship until they were questioned as a result of a complaint by an officer whose son received adverse ratings from Mohamed, who was the son's field training officer (FTO). Complaints from the son's family (which included several other relatives employed by the SFPD) led to an investigation and subsequently the Department relied on a policy of transferring officers who were serving in the same station as their romantic partners to transfer Mohamed to a station where despite retaining her rank and FTO designation she made less money on training assignments. Once Russell and Mohamed were "outed" as such, they both claimed being subjected

to occasional harassment and adverse actions, eventually filing suit under the FEHA alleging discrimination because of gender and sexual orientation, unlawful retaliation, and hostile environment harassment. The trial judge granted summary judgment to the City, concluding that the evidence submitted on the motion did not support their claims of discrimination, retaliation or harassment. The court of appeal agreed, in an opinion by Justice Alison M. Tucher. Although the court found that various adverse comments placed in the personnel files of Russell and Mohamed could be considered "adverse actions" for purposes of deciding whether there was a prima facie case, ultimately the court of appeal agreed that this was that rare discrimination case that should be disposed of through summary judgment. Even if the narrative advanced by the two plaintiffs was taken as true, the court found that it wouldn't support a conclusion that their gender or sexual orientation were the causes of the problems they were having in the Department, or that the "stray comments" upon which they grounded their hostile environment claims were sufficient to support that cause of action. Justice Tucher observed as to their retaliation claim that "Plaintiffs must produce nonspeculative evidence to support a reasonable inference of discriminatory motive or to create a triable issue of a causal link between the protected activity and the adverse action," but that in this case "the links Plaintiffs seek to draw between the allegedly adverse actions and either retaliation or discrimination are too tenuous to support their claims." The court acknowledged that there was evidence that "caused Plaintiffs to believe they were being targeted unfairly for refusing to give special treatment to a 'legacy recruit.' But however reasonable these concerns may have been, they have not shown the requisite connection between adverse employment action and conduct protected by the FEHA." As to the investigation into their relationship sparked by the father's complaint, Justice Tucher wrote, "It is not surprising that Plaintiffs found these inquiries into their personal lives, and into matters they had sought to keep private, distressing. But we have already concluded the Department could reasonably investigate the suggestion of an undisclosed conflict of interest that had been raised. And the remaining comments do not rise to the level of actionable harassment." The opinions do not list counsel for the plaintiffs. – *Arthur S. Leonard*

COLORADO – In *Porter v. 1st Choice After School*, 2021 WL 810104, 2021 U.S. Dist. LEXIS 39552 (D. Col., Mar. 3, 2021), U.S. District Judge Raymond P. Moore granted discharged employee Audra Porter's default judgment motion against former employer 1st Choice After School. According to the complaint, 1st Choice is an after-school program for which Porter served as the executive director from September 2016 to May 2017. The complaint alleged that 1st Choice's president, Bill Black, harassed and discriminated against Porter based on her sex in violation of the Colorado Anti-Discrimination Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964. Based on 1st Choice's conduct, Porter sought damages totaling $229,505.69. The court first found that the well-pleaded allegations in Porter's complaint constituted a legitimate basis for entry of a judgment. It was clear from the complaint that Porter was female, placing her in a protected group. The discriminatory behavior outlined in the complaint concerned Porter and another female and an openly transgender employee. In her supervisory role for 1st Choice, Porter was asked to re-interview the transgender employee after she transitioned from male to female. Black instructed Porter to tell the employee that would not hire more females. Porter refused to comply with this directive because she felt it was discriminatory. In addition, Black made inappropriate comments regarding this employee to Porter, stating that transvestites were not welcome, and that this employee needed to "pull up her big girl panties and grow up." Porter reported Black's conduct to Human Resources. Porter next alleged she was subjected to inappropriate touching when Black hugged her, slid his hands down her back and grabbed her buttocks. Other female employees were victims of similar harassment and Black even "smacked the transgender employee on the rear end." Additionally, Porter and another female employee were exposed to pornographic material while training a male employee, and when this was brought to 1st Choice's attention, it refused to take any action. Porter further alleged that after she filed a charge against 1st Choice with EEOC, Black began threatening Porter and plotted to terminate her employment. Last, Porter was diagnosed with anxiety and a stable heart angina in April 2017. Porter subsequently requested workplace accommodations for her disability, which 1st Choice denied. Black then verbally threatened Porter and her family, stating that he was going "to come at her with a double barrel shotgun." This culminated in 1st Choice terminating Porter. These allegations are supported by affidavits and exhibits attached to Porter's complaint. Construing the facts alleged in the complaint as true, 1st Choice violated Title VII. In establishing a hostile work environment claim, Porter showed (1) she is female; (2) she was subjected to verbal and physical harassment; (3) that this harassment was based upon her sex; and (4) that this constant harassment caused Porter to feel unsafe, unwelcome, and to be in constant fear of losing her job or physical harm. Likewise, in establishing a retaliation claim, Porter showed that (1) she reported discrimination she experienced and witnessed; (2) 1st Choice threatened to terminate her

and eventually terminated her for her opposition; and (3) as a direct result of 1st Choice's actions, Porter suffered economic and emotional harm. Having found the well-pleaded facts support a judgment on the claims against 1st Choice, the only remaining issue for the court to address was damages to which Porter was entitled for 1st Choice's violations, a discussion of which is mathematically complex and well beyond the parameters of *Law Notes*. In sum, Judge Moore detailed calculations and reasons and determined that Porter was entitled to damages as follows: Back pay $89,057.05 and Out of pocket $1,080, Front pay 0, Compensatory and punitive 0. Based on the forgoing, the Court granted Porter's motion for default judgment and ordered (a) judgment in favor of Porter and against 1st Choice for the sum of $90,137.05; (b) that on or before March 31, 2021, Porter may file a motion for attorney fees; (c) that Porter was awarded costs and within 14 days of the date of this Order file a bill of costs, and which shall be taxed by the Clerk of the Court; and (d) close this case. – *Wendy C. Bicovny*

ILLINOIS – In *Williams v. Human Rights Commission*, 2021 IL App (1st) 200785-U (Ill App. Ct, 1st Dist., March 23, 2021), a lesbian tenant whom her landlord in low-income housing was moving to evict unsuccessfully represented herself *pro se* on her claims under the Illinois Human Rights Act. The tenant claimed to be the victim of sexual orientation discrimination (and harassment by another tenant) but was unable to provide any evidence that her controversy with the landlord over renewal of her lease had anything to do with her sexual orientation. Although from reading the opinion it sounds at least possible that Ms. Williams did not understand the terms of a settlement agreement of a prior discrimination claim she had asserted, the court concluded that the landlord had not erred in seeking to evict her for non-payment of rent. Williams kept insisting that it was illegal for the landlord to collect rent from her without sending her a written copy of her lease, but she was unable to come up with any authority for her proposition that it was illegal for a landlord to collect rent if it did not give the tenant a written lease. The case seems to have boiled down to her lack of cooperation with the landlord's efforts to get the information needed from her to recertify her eligibility for low-income housing so that they could renew her lease. As she was non-responsive to their requests, they did not send out a renewal lease and because she hadn't received a renewal lease, she had stopped paying rent – a bad move. The court upheld the Human Rights Commission's determination that the landlord had not discrimination based on sexual orientation and had appropriately dismissed her charge for lack of evidence. – *Arthur S. Leonard*

KENTUCKY – Nicholas Breiner was the Director of Vocal Music and Director of the Theater Department at McNabb Middle School in Montgomery County, Kentucky. He was dismissed not long after revealing his bisexual identity in a social media posting. In this lawsuit he accuses the Board of Education of discrimination and Jon Ledford of defaming him. Shortly after Breiner's social media disclosure, Mr. Ledford went as a court-designated worker (CDW) to attend a confidential meeting regarding a student at the middle school. He was in the meeting for the purpose of observing on behalf of the court and reporting back to the court. Breiner alleges that "before or during the meeting, Ledford made several comments about Breiner's interactions with students related to his sexual orientation. Specifically, Breiner alleged Ledford accused him of improperly 'openly pushing the 'gay' agenda on students and trying to turn them 'gay.' Breiner contends Ledford's alleged statements were defamatory." Not long thereafter, Breiner was dismissed from his position. He was told it was for budgetary reasons, his performance, and "protocol," but he learned that a heterosexual woman was hired for the position two months later. In *Breiner v. Ledford*, 2021 WL 840356 (Ct. App. KY, March 5, 2021), the court affirmed the trial judge's decision to grant Ledford's motion to dismiss the defamation claim against him on the ground of quasi-judicial immunity. Wrote Judge Pamela Goodwine for the appeals court, "Breiner argues Ledford was not entitled to quasi-judicial immunity because his alleged defamatory statements about Breiner were not within the scope of his employment as a CDW. In response, Ledford argues he was entitled to quasi-judicial immunity because he acted in his official capacity when making the alleged statements." Ruling in favor of Ledford, the court relied on *Horn by Horn v. Commonwealth*, 916 S.W.2d 173 (Ky. 1995), in which the Kentucky Supreme Court laid out the parameters of this immunity. Judge Goodwine explained, "There is no question Ledford attended the confidential meeting to perform his statutory duties as a CDW. As in *Horn*, despite Ledford's motives in making the alleged statements about Breiner, Ledford would not have been permitted to attend the confidential and statutorily required meeting were he not employed as a court designated worker. Breiner requests we examine Ledford's alleged defamatory statements in a vacuum, arguing the statements themselves were not made within the scope of his employment. We refuse to engage in 'hair splitting' in determining whether a party is entitled to quasi-judicial immunity as *Horn* requires this Court to consider 'the totality of [the CDW's] function as a court designated worker . . . rather than the happenstance' of Ledford making an alleged defamatory statement during his appearance as a CDW. Ledford acted as

a factfinder for the court in attending the meeting, which is a discretionary act. Although we do not condone the content of Ledford's alleged statements, Ledford was working in his capacity as a CDW when he allegedly made a defamatory statement against Breiner, so Ledford is entitled to quasi-judicial immunity." This does not let the Board of Education off the hook, however. Although Kentucky's civil rights law does not forbid sexual orientation discrimination, Title VII now does, and of course the School Board is also bound by 14th Amendment Due Process and Equal Protection principles. This case is not over. Breiner is represented by Edward E. Dove, Lexington, Kentucky. – *Arthur S. Leonard*

LOUISIANA – The New Orleans Civil Service Commission found that Lt. Jimmie Turner of the New Orleans Police Department was subject to discipline for violating the Department's anti-harassment policy, meting out 5-day suspensions for each of five incidents, and ordering a reduction in rank to sergeant for three other incidents. In *Turner v. New Orleans Police Department*, 2021 WL 816773 (March 3, 2021), a three-judge panel of the Louisiana 4th Circuit Court of Appeal upheld the 5-day suspensions unanimously but voted 2-1 to reverse the reduction in rank. Much of the harassment found by the Commission to have occurred was homophobic in nature, including, regarding the incidents for which suspensions were imposed, making "inappropriate comments" to two officers under his command about their "sexual preference," making "direct statements" to two of the male detectives "ridiculing them and implying they were lovers," asking a female employee if she was sleeping with one of the men in the division, and making a racial comment to another employee. The demotion was based on the finding that Turner had approached one of the male officers from behind and kissed him on the top of the head, placed his hands on another male officer's neck and began massaging him, saying "you are going to give [an officer] a ride on [the other officer's] motorcycle," and embracing the first officer from behind. Regarding these three findings, a majority of the panel said, "While we believe that the actions described above did take place and that they bore a real and substantial relationship to the efficient operation of the appointing authority, we do not believe that the disciplinary action imposed was commensurate with the infraction." The court opined that these incidents did not seem dissimilar from the incidents for which the 5-day suspensions were imposed, so the department should have ordered Turner to serve 5-day suspensions for those and not demoted him. On the face of it, however, this writer sees the distinction. The former incidents involved words only, while the three for which a demotion was ordered involve touching in a sexual manner (even if they were not intended to be sexual as such). The court ordered that Turner be restored to Lieutenant and be given any backpay and other "emoluments" he lost as a result of the demotion, but that he be ordered to serve three additional 5-day suspensions. A partially dissenting judge disagreed that there was an absence of rational basis for the demotion and argued that the court should not "second-guess an appointing authority's decisions," and would have affirmed the Commission's decision *in toto*." Chief Judge James F. McKay wrote the opinion for the panel. – *Arthur S. Leonard*

MARYLAND – U.S. District Judge Paul W. Grimm granted defendant's motion for summary judgement in *Marley v. Kaiser Permanente Foundation Health Plan*, 2021 U.S. Dist. LEXIS 45926 (D. Md., March 11, 2021). Roberto Marley, a Maryland resident, sued under Title VII and the Family and Medical Leave Act, claiming he was wrongfully put on a Performance Improvement Plan and then terminated, citing various incidents involving his direct supervisor which could indicate a homophobic reaction to his "apparent sexual orientation." He claimed that some of the employer's actions were retaliating for his threat to file a Title VII charge, and for his use of FMLA leave for an injury he suffered. The problem he had in combatting the employer's summary judgment motion was that his immediate supervisor was not the decision-maker on the actions Marley was challenging, and that Judge Grimm was convinced by the summary judgment record that the employer's placement of Marley on an improvement plan and subsequent discharge of him was justified by problems with his job performance. Although Marley claimed in his complaint that he actually received awards from the company for his work from 2012 to 2014, he transferred to a new role in August 2014 bringing him under the supervision of the allegedly biased supervisor. The bias claim is based on the supervisor's remarks about his accent, his non-citizenship status, and his "apparent sexual orientation." But the company evidently did a good job in documenting his work deficiencies in response to this lawsuit. Although the court found that Marley had actually made out a prima facie case for his Title VII retaliation claim, it was effectively rebutted by the employer's evidence of work deficiencies. Indeed, the judge concluded that "no reasonable juror could find for Marley on any of his claims." Marley is represented by Andrew Nyombi of KNA Pearl, Silver Spring, MD, and Ikechukwu K. Emejuru of Emeguru Law LLC, also Silver Spring. Judge Grimm was appointed by President Barack Obama. – *Arthur S. Leonard*

MARYLAND – Allesandro Gravina, a gay man from Venezuela, was fired from a job as a Health Communication

Specialist at the U.S. Department of Health and Human Services towards the end of his one-year probationary period. He claimed to be the victim of discrimination because of race, national origin, sex and sexual orientation, both respecting the discharge and alleged hostile environment. U.S. District Judge Paula Xinis granted the Defendant's motion for summary judgment in *Gravina v. Azar*, 2021 U.S. Dist. LEXIS 46843 (D. Md., March 12, 2021). According to the court's summary of the record, Gravina, who was hired to develop, edit, improve, and monitor content for the website of the Office of Disease Prevention and Health Promotion, had just proved incapable of doing an acceptable job. The supervisor who hired him in April 2016, Dr. Linda Harris, tried to work with him, counsel him, and help him improve, but eventually gave up on it as a lost cause. Gravina was not "out" in the hiring process. Gravina claimed that Harris learned he was gay "in September 2016 when Gravina "pulled up a Facebook page in Harris's presence that depicted an advertisement for a 'Gay Cruise.' According to Gravina, Harris exclaimed 'Oh! All boys!' upon seeing the advertisement with a 'group of males standing together in close proximity.'" Gravina claimed that "without detail, after this incident, his working relationship took a '180-turn.'" But the lack of detail was telling, because this was the only incident he could allege towards either of his Title VII claims concerning sexual orientation. He also claimed that Harris made him uncomfortable by referring to news reports from his home country and comment on his lack of English language facility. But that was essential to his job. EEOC investigated his claim by interviewing former co-workers who described Harris as "supportive" and "professional" and "reaffirmed Gravin's difficulty 'writing in plain language and keeping sentences concise," a major problem since the website was supposed to be explaining health issues in plain language to members of the public. A contractor to the agency who supplied material for the website also complained about Gravina's editing of submitted copy. Judge Xinis pointed out that Gravina's complaint could simply be dismissed because he missed the 90-day deadline to file suit after EEOC issued his right-to-sue letter, but went on to address the merits, concluding that "significant evidence demonstrates that Harris reduced Gravina's duties and ultimately terminated him because of his poor job performance. Furthermore," she continued, "no evidence exists Harris took such measures on account of his race, national origin, sex, or sexual orientation." Gravina claimed that an adverse six-month review was "fabricated" shortly after Harris learned he was gay, but "the court finds no evidence tying Harris's adverse actions to her learning of Gravina's sexual orientation," wrote the judge. "Rather, the record demonstrates that within two months of his hiring – and well before Harris learned Gravina was gay – Harris had identified significant shortcomings in Gravina's skills." The court also found that Gravina had pointed to nothing in the record that "reflects that he was subjected to a harsh or abusive discriminatory environment," and that "Gravina's pronouncements of feeling 'uncomfortable,' no matter how sincere, do not alone generate sufficient evidence to save the [hostile environment] claim." Gravina is represented by Dionna Maria Lewis, District Legal Group PLLC, Washington. Judge Xinis was appointed by President Barack Obama. – *Arthur S. Leonard*

MARYLAND – In this case the anonymous John Doe plaintiff, an out gay man who is married to another man, was recruited to fill a technology position at Catholic Relief Services (CRS). The job offer included an employee benefits package with health insurance. The summary plan description Doe received indicated that spouses could be covered as dependents but left it up to CRS to determine whether somebody was qualified for coverage as a dependent. Doe specifically inquired about this point and was assured by the recruiter that a same-sex spouse would be covered. Given the identity of the employer, however, the reader knows by now where this is going, so the subsequent filing of *Doe v. Catholic Relief Services*, 2021 WL 1164227, 2021 U.S. Dist. LEXIS 58258 (D. Md., March 6, 2021), should not be a total surprise. Doe accepted the job offer and moved with his husband to Baltimore (from where, the opinion says not), and signed up his husband for insurance coverage as part of the onboarding process. The insurance went into effect and it was only after many months of employment and insurance coverage that somebody at CRS woke up and decided that as a Catholic agency, it would be inconsistent with their religious doctrine to provide health insurance to a same-sex spouse, so they notified Doe that coverage for his husband (who was in the middle of a course of dental treatment covered by the insurance plan) would terminate. Doe protested, appealed, argued, and was cautioned that if he pushed this point too far, he could lose his job. Ultimately, Doe and his husband desisted and purchased separate coverage for the husband, but Doe filed this lawsuit just 10 days after receiving a right-to-sue letter from the Equal Employment Opportunity Commission. His suit alleges discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act; the Maryland Fair Employment Practices Act (MFEPA), and the Maryland Equal Pay for Equal Work Act (MEPWA). He also asserted state law claims of breach of contract, negligent misrepresentation, and detrimental reliance (in essence, promissory estoppel). There is no plausible claim that Doe is a ministerial employee, but CRS had some other

arguments that scored with District Judge Catherine C. Blake, who granted in part and denied in part CRS's motion to dismiss most counts of the complaint. CRS successfully argued that because Doe was an at-will employee, the employer could freely change the terms of his employment, and such changes would be ratified as part of his employment contract if he continued to work after receiving notice of them. Judge Blake agreed with this argument, as well as arguments against the tort claims, and dismissed those parts of the case. CRS also argued that the Supreme Court's *Bostock* decision, which is crucial to Doe's Title VII and EPA counts, is irrelevant to the interpretation of Maryland's laws, which expressly cover both sex and sexual orientation discrimination claims as distinct categories, so his sex discrimination claims should be dismissed. Judge Blake did not agree, at least for now. There is no state court precedent yet on how or whether the *Bostock* decision will affect interpretation of Maryland law, but Judge Blake noted that Maryland courts have traditionally followed Title VII precedents in interpreting their state anti-discrimination law. The judge also put off at this point having to determine whether this case falls within the scope of religious organization exemptions under the Maryland law, where it appears that the legislature had, as part of the deal to pass the sexual orientation anti-discrimination amendment, carved out a larger than usual religious organization exemption in a proviso that has yet to be interpreted by the Maryland courts. These things were left to a later point in the litigation. But for now, clearly, Doe's federal discrimination claims, which were not the target of CRS's motion to dismiss, remain alive, and he can continue to make arguments under the Maryland statutory provisions as well. John Doe is represented by Shannon Clare Leary, of Gilbert Employment Law, P.C., Silver Spring, MD; and Anthony J May, Eve Lynne Hill, and Regina Kline, of Brown Goldstein & Levy, LLP, Baltimore, MD. – *Arthur S. Leonard*

MARYLAND – In *Bozarth v. Maryland State Department of Education*, 2021 WL 1225448 (D. Md., March 31, 2021), U.S. Magistrate Judge Deborah L. Boardman dealt with a motion to dismiss a complex employment discrimination case that is most relevant to *Law Notes* readers because the plaintiff, a heterosexual woman, alleged that there was a clique of lesbian employees and supervisors in her department that were looking out for each other and by comparison were not treating her well. Judge Boardman, granting the motion to dismiss this claim, acknowledged that in light of the Supreme Court's *Bostock* decision finding that sexual orientation discrimination claims may be pursued under Title VII, it is possible for a heterosexual employee to bring what might be called a "reverse discrimination" sexual orientation claim under Title VII. However, Judge Boardman found that Ms. Bozarth's factual allegations were not sufficient to support such a claim, due to her failure to identify an appropriate comparator employee whose experience compared to her experience would make Bozarth's claims plausible. – *Arthur S. Leonard*

MICHIGAN – Larry Lee, the plaintiff, is described by Senior U.S. District Judge Arthur J. Tarnow as "a 42-year-old transgender individual who is biologically male and often presents as female by wearing long wigs and makeup." The court used non-binary pronouns to refer to Lee throughout the opinion in *Lee v. Washtenaw County*, 2021 WL 92737, 2021 U.S. Dist. LEXIS 45700 (E.D. Mich., March 11, 2021). Lee claims that "a man who worked for their landlord forced Plaintiff to move out by physically attacking Plaintiff and calling them the n-word. Plaintiff's belongings were thrown out in the process." After several weeks of couch surfing and experiencing mental health problems, plaintiff was sexually assaulted by a man while sleeping in a friend's garage and sought treatment at the University of Michigan psychiatric ward, where she was sent to the Washtenaw County Community Mental Health (CMH) agency for treatment and help finding temporary housing. Lee rejected all the housing alternatives that CMH staff suggested, because Lee did not want a situation where they would be housed with men without adequate security. Ultimately, when nothing else acceptable to Lee seemed to be available, a social worker suggested that Lee sleep temporarily in a nearby parking garage. The social worker thought this would be alright since another client of CMH had slept there without incident and the garage was generally not used at night. But Lee claims to have been sexually assaulted at gunpoint while sleeping in the parking garage. Lee sued the county and CMH for "causing the assault" and Lee's subsequent mental decline. Lee asserted unsuccessful claims of Equal Protection, Fair Housing Act (FHA), Americans with Disabilities Act (ADA), and some state common law and statutory claims. Judge Tarnow determined that the federal claims were without merit and declined to exercise supplemental jurisdiction over the state law claims. He concluded that the Equal Protection claim failed because "there is no evidence of discrimination against them on the basis of their gender identity and/or mental illness." He explained: "Plaintiff's only allegation of differential treatment is that Defendants ignored Plaintiff's accommodation requests and sent them to sleep in a parking garage." This was "insufficient," however, because Lee "has not shown evidence that Defendants treated similarly situated non-transgender individuals or individuals without mental illness differently," and Lee did not allege that Defendants "displayed any contempt

in regard to Plaintiff's mental illness." He also noted that the record before him showed no discussion of Lee's gender identity or any expression of animus against Lee because of it." The Defendants were not themselves providers of housing, so FHA was inapplicable, and the ADA claim failed because, "even when looking at the facts in the light most favorable to Plaintiff by assuming that [housing options] were not presented, there is no evidence that Defendants sent Plaintiff to sleep in a parking garage *because* of their mental illness." Further, even assuming that Lee established a prima facie case under the ADA, Lee's responsive brief to the s.j. motion "does not attempt to present an argument of pretext in light of Defendants' legitimate reasons for not accommodating Plaintiff's requests." Lee is represented by Issa G. Haddad, of Bingham Farms, MI. Judge Tarnow was appointed by President Bill Clinton. – *Arthur S. Leonard*

MICHIGAN – In *Boshaw v. Midland Brewing Company*, 2021 WL 1192916, 2021 U.S. Dist. LEXIS 60621 (E.D. Mich., March 30, 2021), U.S. District Judge Thomas L. Ludington granted a motion by the employer, a restaurant, for summary judge, finding the evidence to be so one-sided that no reasonably jury could find that Ryan Boshow was terminated because he was gay. Of most consequence about this decision is that the federal judge decided, despite a body of case law showing that Michigan courts generally follow Title VII precedents when interpreting the Elliott-Larsen Civil Rights Act, the state's anti-discrimination statute, the Michigan courts would not necessarily follow the *Bostock* decision by the U.S. Supreme Court when interpreting the sex discrimination provision of that law. The ELCRA does not expressly ban sexual orientation discrimination, so is in that sense similar to Title VII. Although the state's civil rights agency took the position that the law covered sexual orientation claims well before *Bostock*, Judge Ludington found that Boshaw's sexual orientation claim was viable under Title VII but not under ELCRA, although their remained a sex discrimination Claim under ELCRA. Boshaw enjoyed a meteoric rise after being hired as wait staff at Midland, being promoted several times until he was manager of the Front of the House. But his relationship with his immediate supervisor waxed hot and cold, and he claimed having a conversation, relatively early in his employment, in which she advised him to act and look more masculine if he wanted to be promoted. As a result of this conversation, he claims he had changed his hairstyle to be more masculine and removed earring and an ear stud. And he was promoted. And when he received an offer from a competitive restaurant and took it to his supervisor and the owner, they prevailed on his to remain with the company by throwing more money at him. But there were criticisms of his work, and when he missed a high-level staff training meeting as well as a work shift without notice, the owner of the restaurant fired him. Judge Ludington found that the "masculinity" conversation (which the supervisor disavows having taken place) was not enough to make out a sex stereotype claim, and noted that the supervisor was not involved in making the decision to fire Boshaw. Finding that a reasonable jury could not find for Boshaw, the judged granted summary judgment for the employer, although he declined to award attorneys' fees and costs to the defendants. Ryan Boshaw is represented by Collin H. Nyeholt, Law Offices of Casey D. Conklin PLC, Okemos, MI. – *Arthur S. Leonard*

MINNESOTA – Plaintiff's co-counsel Gender Justice, The American Civil Liberties Union of Minnesota, and Stinson LLP announced a $300,000 settlement in *N.H. v. Anoka-Hennepin School District*, 950 N.W.2d 553 (Minn. Ct. App. 2020), in which their transgender plaintiff won trial and appellate court rulings that the school district illegally discriminated against him by not allowing him to compete with the boys' swim team or to use single-sex facilities consistent with his male gender identity. He had begun competing with the team when he was suddenly yanked from the program and subjected to discriminatory treatment. Minnesota's civil rights law forbids sexual orientation discrimination, which includes coverage for gender identity claims. – *Arthur S. Leonard*

NEW HAMPSHIRE – U.S. District Judge Landya McCafferty denied a motion for summary judgment by Hannaford Brothers Co., the former employer of Timothy Record, as out gay man, who resigned his job after a newly hired manager subjected him to a hostile work environment because of his sexual orientation and the company took inadequate steps to address the situation, as Record alleges. *Record v. Hannaford Brothers Co.*, 2021 WL 1090042, 2021 U.S. Dist. LEXIS 52790 (D. N.H., March 22, 2021). Record had been working in the meat department of Hannaford's grocery store for almost ten years when Bruce Grover was hired to be the new manager of the department. Grover evidently thought it was acceptable to razz the gay employee, make nasty comments at his expense, and generally humiliate him. Record complained, and a supervisor investigated and told Grover to knock it off and apologize to Record, which he did. But the company did not impose any discipline on Grover or record this in his personnel file. And Grover was not deterred, according to Record, resuming his hostile ways thereafter. Record then found a position at another company and announced he would resign from Hannaford. As a valued employee of many years, the supervisor

wanted to keep him, and investigated his new complaints. At this point, Record learned about the failure of the company to discipline Grover on his earlier complaint, even though the company's written policy said that any employee who engaged in "illegal discrimination, including harassment of any kind toward another associate . . . will be subject to appropriate disciplinary action." Record felt that he was being discriminated against because he had been wrongly accused of inappropriate conduct on one occasion in the past and was written up for it despite his denials. At any event, Hannaford tried to lure Record back, and there were talks about the terms on which he was willing to return, but ultimately, he ended up going to a third grocery store and filing his Title VII and New Hampshire discrimination claims against Hannaford, which then moved for summary judgment. In denying the motion, Judge McCafferty found that a reasonable jury could find based on Record's factual allegations that the conduct to which he was subjected constituted an actionable hostile environment, that a reasonable jury could find the company liable for failing to deal with it appropriately, and that Record might even prevail on a constructive discharge claim, so the company's motion was denied. Record is represented by Christopher J. Fischer and Tyler Smith, of Libby O'Brian Kingsley, L.L.C. – *Arthur S. Leonard*

NEW JERSEY – In *The Matter of Brandi L. Hunt, Mountainview Youth Correctional Facility, Department of Corrections,* 2021 WL 942526, 2021 N.J. Super. Unpub LEXIS 410 (N.J. Super. Ct., March 12, 2021), a two-judge panel affirmed the Civil Service Commission (CSC) final decision dismissing Brandi Hunt's appeal and adopted the ALJ's findings and conclusions as not arbitrary and capricious. Hunt, a thirteen-year veteran Senior Corrections Officer (SCO) with the Department of Corrections (DOC) at the Mountainview Youth Correctional Facility, was terminated from her employment after an administrative hearing for alleged conduct unbecoming an employee, among other disciplinary charges. The CSC upheld the termination. On December 15, 2017, DOC internal affairs received information from a confidential informant reporting Hunt was in an inappropriate relationship with inmate M.D. The informant stated that M.D. had attempted to terminate the relationship, but that Hunt continued to call him from a specific telephone number the informant was able to identify. During the investigation, Hunt admitted to contacting M.D. outside of work via calls and text messages, and that the calls were personal. Hunt also admitted she knew M.D.'s parole status when she first communicated with him and was aware of DOC policy prohibiting staff contact with parolees, but she failed to report the communications to the DOC. She acknowledged she had received a copy of the DOC policy related to staff/inmate overfamiliarity. During the investigative process, Hunt eventually revealed that many of her calls to M.D.'s two phones were made to his girlfriend April, not to him, because she had started a phone sex relationship with April. DOC suspended Hunt with pay for multiple DOC policy violations. A departmental hearing on the preliminary notice of disciplinary action charges resulted in a recommendation by the hearing officer to terminate Hunt's employment. On April 24, 2018, Hunt was served with a final notice of disciplinary action removing her from employment, effective immediately. Hunt appealed. The hearing took place before an administrative law judge (ALJ). DOC witnesses included investigator Patrick Sesulka, and Major Michael White, a twenty-one-year employee with expertise in DOC policies and procedures. Hunt testified, as did her longtime girlfriend, Asha Jones, and her Mountainview supervisor, Jeffery Scott. Hunt admitted to conducting a phone sex relationship with April, was aware that April was M.D.'s girlfriend when she began the relationship, and that M.D. was a parolee. The phone sex relationship lasted approximately two months and ended when April demanded to meet Hunt in person and Hunt declined. After Hunt attempted to end the relationship, April became hostile and threatening. Even when she was threatened by April, Hunt did not report those conversations to the DOC as required. Hunt testified that one reason she did not report the conversations was her concern about not revealing her sexual orientation to co-workers or inmates at her workplace, which she perceived to be hostile to lesbians. A second reason Hunt gave for not disclosing the relationship was her desire not to reveal it to her longtime girlfriend, Jones. Presumably to explain her lapse in judgment, Hunt testified to being overwhelmed, as she held a second job, cared for her sick and elderly parents, and visited an incarcerated brother once a month. After an extensive hearing, the ALJ made credibility determinations and found the following salient facts: 1) Hunt admitted to numerous improper calls and texts with parolee M.D. and/or his girlfriend; 2) Hunt's conduct was governed by the DOC's personnel policy; and 3) Hunt received training on the DOC's "undue familiarity" policy, which listed conversation with an inmate on a non-work-related issue as an example of "undue familiarity." The ALJ balanced the mitigating factors Hunt offered at the hearing and concluded Hunt's conduct outweighed the mitigating factors she presented. The ALJ's initial decision recommended termination. On February 20, 2019, the CSC issued a final decision adopting the ALJ's findings and conclusions and affirmed Hunt's removal in a thorough written opinion. There was, the Panel stated, sufficient credible evidence in the record to support the Commission's final disciplinary actions. Hunt

admittedly engaged in an inappropriate relationship with the girlfriend of a parolee, in violation of several DOC policies. She placed herself, her co-workers, and her employer in jeopardy by exposing herself to potential retaliation at a DOC facility, where safety of the inmates and employees must remain paramount. Her conduct jeopardized order and discipline within the facility. The court, relying upon the Commission's independent evaluation of the record, as well as its review and adoption of the ALJ's thorough initial decision, affirmed, noting that any additional arguments raised by Hunt that were not specifically addressed lacked sufficient merit to warrant discussion in a written opinion. Hunt is represented by Annette Verdesco of The Pope Law Firm, Newark, N.J. – *Wendy C. Bicovny*

NEW JERSEY – U.S. District Judge Kevin McNulty, rejecting Gilead Science's preemption claims, denied a motion to dismiss a products liability suit by Anthony Gaetano, who suffered chronic pain after using Gilead's drug Truvada, an HIV prophylactic. *Gaetano v. Gilead Sciences, Inc*., 2021 WL 1153193, 2021 U.S. Dist. LEXIS 57978 (D.N.J., March 26, 2021). According to the complaint, Geatano's pain is traceable to one of the ingredients in Truvada, tenofovir disoproxil fumarate (TDF), which Gilead allegedly knew to cause bone and kidney problems from its previous experience marketing other drugs that included TDF. Before Gilead introduced Truvada to the market, it discovered a feasible alternative ingredient, tenofovir alafenamide fumarate (TAF), which would not cause the same problems. But rather than hold back from marketing Truvada with TDF, Gaetano alleges, Truvada decided to market the TDF version, holding back a version with TAF to introduce at a later date when the patent on the TDF version would expire after 14 years. The label for the TDF version that the Food & Drug Administration approved for sale of Truvada in the U.S. does not mention the possible bone and kidney complications, although warnings as to that were given by Gilead in the label used to market Truvada in Europe. Several years later, allegedly as planned by Gilead, it secured FDA approval for the TAF version of Truvada in 2015 and introduced it to the market as generics would become available of the TDF version. In this lawsuit, Gaetano brings two products liability claims under New Jersey consumer law: failure to warn and defective design. Gilead argues that these state law claims are preempted by the FDA's approval of the TDF version of Truvada as well as of the contents of its label. Judge McNulty finds the claims are not preempted because Gilead could have added a warning to the TDF label without securing FDA approval, and because it could have switched to the TAF version before submitting Truvada for FDA approval in the first place. Thus, as to neither claim would it have been impossible for Gilead to comply with both federal and state law. McNulty's opinion is not a ruling on whether Gilead violated the New Jersey, focusing only on whether the state law claims would have to be dismissed due to federal preemption. McNulty's analysis of preemption precedents sounds convincing, but in light of the financial interests at stake, Gilead can be expected to appeal to the 3rd Circuit. Gaetano is represented by Ari G. Bernstein of Landel, Bernstein & Kalosieh, LLP, Wyckoff, NJ. – *Arthur S. Leonard*

NEW YORK – *GayCityNews* reported March 23 that Danny Hart, a transgender military veteran, settled his discrimination case against Apex Technical School for $25,000. Hart alleged that he was outed as trans and then subjected to an extreme hostile environment after he enrolled in the school, hoping to pursue a trade as an electrician. Among other things, the school insisted that he register under his former name, a staff member outed him as trans in front of his class, and he was denied appropriate restroom access. He filed a gender identity discrimination claim with the New York City Commission on Human Rights in December 2016, which ultimately led to settlement negotiations after the Commission issued a probable cause determination. After he withdrew from the school, he returned to the Army for a brief stint and is now managing a bar. – *Arthur S. Leonard*

NEW YORK – An opinion by Senior U.S. District Judge Frederick J. Scullin, Jr., granting all defendants' motions to dismiss in *Rys v. Grimm*, 2021 U.S. Dist. LEXIS 40519, 2021 WL 827671 (N.D.N.Y., March 4, 2021), never presents a coherent narrative of the underlying events alleged by the plaintiff concerning her discharge by Clinton Central School District, but from what we can tease out, it appears that she was a teacher and women's sports coach in the district who was investigated for an alleged relationship with an "openly gay" student on a team she was coaching, and was ultimately discharged. The lawsuit alleges constitutional and statutory violations of the 14th Amendment Due Process and Equal Protection Clauses, 1st Amendment Freedom of Speech and Association, 4th Amendment (for initiating malicious prosecution without probable cause), and Titles VII and IX. Judge Scullin found that the factual allegations of the complaint were too vague and generalized to state the legal claims asserted but dismissed without prejudice to the filing of a complaint that might meet the federal pleading standards. The opinion never states the plaintiffs' sexual orientation, although noting that among other things she complains about an investigator hired by the school district having questioned her about her sexual orientation and

asked whether she had ever kissed a woman, and she alleges that she was instructed to treat openly gay students differently from other students, leading to her submitting a grievance through her union representative that she claims led to a retaliatory discharge. The lack of coherent narrative in the opinion may result from the pleading failings pointed out by the court; the decision to dismiss without prejudice to the right to file an amended complaint may signal the judge's belief that it is possible that a more factually detailed complaint filling the gaps identified by the judge in Rys's causes of action could withstand a new motion to dismiss, although some of the dismissals (i.e., claims against individual school board members or district employees under Titles VII and IX) were premised on circuit precedent that only the employer entity, not individual state actors, can be sued under the relevant statutes. (The individual defendants are amenable to suit under the Constitution, however, although the court found the allegations against them were insufficiently specific to ground a cause of action.) Marissa Rys a/k/a Marissa Treen is represented by counsel: A. J. Bosman of Blossvale, NY. Judge Scullin was appointed by President George H. W. Bush in 1992 and was chief judge of the district court before taking senior status. – *Arthur S. Leonard*

NEW YORK – Mark Cooper worked as a doorman at The Town House, a gay club on the East Side of Manhattan. He brought a civil rights claim against the corporate owner of The Town House – Upstairs, Downstairs of New York, Inc. – and three individual co-owners of the establishment, Robert De Benedicits, Paul Galluccio, and his direct supervisor at work, Michael Grummons, alleging discrimination because of his perceived sexual orientation. *Cooper v. Upstairs, Downstairs of New York, Inc.*, 2021 WL 1172477, 2021 U.S. Dist. LEXIS 59679 (S.D.N.Y., March 29, 2021). According to the opinion by U.S. District Judge Sidney H. Stein, "Cooper alleged that while employed as a doorman at the Townhouse Bar, Grummons repeatedly sexually harassed him in violation of federal, New York State, and New York City anti-discrimination laws. He claimed that both Grummons and Upstairs, Downstairs created and maintained a hostile work environment based on their perception of his gay sexual orientation and that that orientation was a motivating factor in the decision of Grummons and Upstairs, Downstairs to discharge plaintiff. He also maintained that Grummons ordered him to mop floors, vacuum, and wash windows – duties not normally assigned to the doorman – in retaliation for Cooper having rejected Grummons' repeated and explicit sexual advances. Cooper sought such statutory damages as lost wages, back pay, and front pay, as well as $8 million in compensatory and punitive damages." The corporate defendant offered Cooper $50,000 to settle the case, which he refused. Ultimately the jury awarded him $6500 in punitive damages under the New York City Human Rights Law, but no compensatory damages. Cooper moved the court for a new trial limited to the issue of damages, arguing that if the jury had concluded he was entitled to punitive damages, then he should also be entitled to compensatory damages, but Judge Stein didn't buy that argument, and denied the motion for new trial. He did award attorneys' fees and costs to Cooper, but he significantly reduced the amount from Cooper's demand to reflect Cooper's refusal of the $50,000 settlement offer, which had far exceeded his recovery. In the end, the judge awarded Cooper only $5,350 in attorneys' fees and $1,833 in costs. The defendants were also looking for fees and costs, since they had successfully defended against Cooper's Title VII charge and prevailed on their argument that Cooper was not entitled to compensatory damages, but the court pointed out that prevailing defendants do not normally get fee awards. However, he did award defendants some of their claimed litigation costs involved in defending the case after Cooper rejected the settlement offer. The opinion contains a detailed review by the court of the rules governing fee awards in situations where the plaintiff rejects a settlement offer and then receives a much smaller damage award from the jury. Cooper is represented by Alexander Gabriel Cabeceiras, of Derek Smith Law Group, PLLC, New York, NY. Defendant Grummons is represented by Thomas D. Shanahan of New York. – *Arthur S. Leonard*

NEW YORK – An HIV-positive man defeated his former employer's motion for summary judgment in *Saborit v. Harlem Hospital Center Auxiliary*, 2021 WL 1063241, 2021 U.S. Dist. LEXIS 52312 (S.D.N.Y., March 19, 2021). The plaintiff began working as assistant personnel director at the defendant hospital in November 2018. He claims he informed the Human Resources Director in December 2018 that he was HIV-positive and asked for some accommodations, mainly to cope with side effects of the medication he was taking, including permission to lie down in his office when dizzy, permission to change clothes due to excessive perspiration as a side-effect of his meds, and easy restroom access, again due to issues with his meds. He claims that soon after this conversation he began to suffer discrimination and retaliation, including relocating him to a different floor of the hospital, restricting his restroom access (and requiring him to notify his "team" whenever he needed to use the restroom), and receiving reprimands for minor matters as to which he claimed other employees were not reprimanded, such as an occasional personal phone call when he was on worktime. He claims nobody criticized

the quality of his work until he was given a four-month performance review (the normal timing for a new employee would be six months) which had an overall rating of "needs improvement," and then he was discharged. He sued under the Americans with Disabilities Act and the New York State and City Human Rights Laws. The hospital purported to justify its actions, but it came down to a "he said" and "they said" dispute. For example, the HR Director claimed she didn't know plaintiff was HIV-positive until after he was discharged, denying the conversation he said he had with her in December 2018. The hospital argued that "plaintiff's self-serving testimony is insufficient to create a disputed issue of fact," but District Judge Lewis J. Liman strongly countered this argument. "Plaintiff has opposed summary judgment here with testimony of concrete particulars and with testimony that is not subjective," he wrote. "For example, he has testified with specifics as to when he told Nedd [the HR Director] of his disability and what he said, the specifics of the adverse actions taken against him, and the basis on which he claims that the asserted reasons for those actions are pretextual. Each element of Plaintiff's testimony is hotly disputed by testimony from Defendants. But that does not eliminate the need for a trial; it creates the need for a trial. For example, Defendants' denials that Plaintiff told Nedd of his disability is no less self-serving than Plaintiff's claim that he reported the disability. On the record before the Court, each party has an interest in the outcome of the case and no party's testimony should be assumed to be more self-serving than another's." The plaintiff is represented by Susan Karolina Crumiller, of Chloe Lederman, Crumiller P.C., New York. – *Arthur S. Leonard*

NORTH CAROLINA – In the ongoing litigation challenging the denial of coverage for transitional care under the health plan provided for teachers and state employees in North Carolina, U.S. Magistrate Judge L. Patrick Auld has granted plaintiffs' motion to amend the complaint to add another plaintiff and to lodge new Title VII claims against the state health plan and the state universities that employ the plaintiffs in light of the *Bostock* decision. *Kadel v. Folwell*, 2021 WL 848203, 2021 U.S. Dist. LEXIS 41528 (M.D.N.C., March 5, 2021). An appeal is pending by certain defendants from a prior decision rejecting a sovereign immunity claim for some of the defendants. The district judge had previously denied a motion to dismiss the lawsuit. Judge Auld decision includes an intricate analysis of jurisdictional issues raised by some of the defendants, including a claim by the Health Plan that it is not amenable to suit on some of the causes of action. – *Arthur S. Leonard*

OREGON – In *Hunter v. U.S. Department of Education*, a federal lawsuit filed in the Oregon district court late in March, several dozen LGBT students at religious colleges are challenging the constitutionality of a provision in Title IX of the Education Amendments of 1972 that exempts religious colleges from complying with the statutory obligation not to discriminate on the basis of sex, which would otherwise apply since they receive federal funds. They claim that this violates the 1st Amendment obligation imposed by the Establishment Clause not to favor religion. The claim is enhanced by last year's *Bostock* decision, the reasoning of which would suggest that discrimination because of sexual orientation or gender identity in a program receiving federal funding is a form of discrimination because of sex, raising Equal Protection issues under the 5th Amendment. This runs up against the recent Supreme Court cases finding that under the religion clauses of the 1st Amendment the government may not exclude religious organizations from government programs for which they would otherwise be qualified, such as tuition assistance programs or infrastructure subsidy programs that are on their face neutral with respect to religion. The lawsuit asks the court to find that the compelling interest in providing equal educational opportunity and combatting discrimination should take priority in the constitutional balance. – *Arthur S. Leonard*

PENNSYLVANIA – In *Doe v. Commonwealth of Pennsylvania*, 2021 WL 1212574 (M.D. Pa., March 31, 2021), the anonymous John Doe plaintiff, a transgender man whose gender confirmation surgery was delayed almost two years because of an exclusion for coverage of such treatments under the employee benefits plan provided to him as an employee of the state's Department of Human Services, sued for damages in federal court under Title VII and the Pennsylvania Human Rights Act, the Americans with Disabilities Act, Section 504 of the Vocational Rehabilitation Act, Section 1557 of the Affordable Care Act, and two provisions of the Pennsylvania Constitution. His named defendants are the state and the Department of Human Services (the Commonwealth Defendants), the Pennsylvania Employee Benefits Trust Fund, a separate entity established to provide health insurance to state employees, and Highmark Health Insurance Company, which is the "third-party administrator" of the state's employee benefits plan. In this decision, District Judge Christopher C. Connor dealt with motions to dismiss various of the claims by the Commonwealth Defendants and the insurance company. Judge Conner rejected defendants' claim that various causes of action were time-barred, siding with those courts that have determined that the statute of limitations for allegations of violation of the ACA Section 1557 anti-

discrimination provision is four years. The judge did find that certain state law claims against the Commonwealth Defendants were barred from federal court by sovereign immunity, however. And he found that claims under Title VII and the Pennsylvania Human Rights Act, employment discrimination statutes, could only be brought against Doe's employer, not against the insurance company. The Pennsylvania Employee Benefits Trust Fund, which sets the terms of the employee benefits plan, is left standing as the main defendant on the federal claims, with the insurance company still in the case under the ACA Section 1557. When Doe first inquired about coverage for gender affirmation surgery in 2016, he was told it was excluded under the benefits plan, but if he waited until 2017, it would be covered then. When 2017 came along and he sought coverage again, he was told that the coverage was on hold pending resolution of a lawsuit in Texas (undoubtedly referring to the case where a federal district court in N.D. Texas had issued a preliminary injunction in litigation challenging the coverage of gender identity discrimination under the ACA). Ultimately the Texas case was dismissed on the representation by the Trump Administration that it was withdrawing the Obama Administration's interpretation of the ACA on the issue of gender identity discrimination coverage, and Doe was informed that the plan would finally cover his procedures, which were performed in March 2018, covered by the Plan except for a deductible. In this case, Doe asserts claims for various damages allegedly caused by the delay. According to the court's summary of his allegations, "After the denial, Doe experienced 'severe emotional distress in the form of body dysmorphia and immense psychological trauma.' Doe felt compelled to take sick leave, his social life suffered, and he avoided otherwise-pleasurable activities such as visiting the beach and going to the gym. Doe alleges that the "unequal terms and conditions" of his employment continued until January 1, 2018, when the GCS coverage exclusion was removed." Doe is represented by Justin Frederick Robinette and Graham F. Baird, of The Law Offices of Eric A. Shore, P.C., Philadelphia, PA. – *Arthur S. Leonard*

TEXAS – Adrian Petgrave, a bisexual man from Jamaica, presented a complicated set of issues to U.S. District Judge Diana Saldana (S.D. Tex., March 29, 2021), in *Petgrave v. Aleman*, 2021 WL 1220939. Petgrave was attending college in the U.S. on a student visa in 2004, and his wife is an American citizen, as are their two children. He did not complete his college studies and was convicted of felony burglary and theft in 2006 after stealing some projectors from a classroom. He overstayed the student visa and was eventually put into removal proceedings, but he was allowed to depart voluntarily to Jamaica in 2011. There he was the victim of homophobic attacks, and fled back to the U.S., swimming across the Rio Grande River but soon apprehended near Brownsville, Texas, by the Border Patrol, which classified him as an "inadmissible" noncitizen and processed him for expedited removal. However, he expressed fear of persecution or torture if returned to Jamaica and was given a hearing before an Immigration Officer, who concluded that he had demonstrated a credible fear of persecution, which then got him a hearing before an Immigration Judge. His past criminal conviction disqualified him for asylum or withholding of removal, and the IJ also said he was barred from protection under the Convention Against Torture. He appealed to the Board of Immigration Appeals, where his appeal is pending as of the date of this decision. In this *habeas corpus* suit, he claims he should be released to rejoin his family because the immigration officer found that he had a credible fear of persecution or torture, but the government wants to keep him in DHS detention while the case is pending, due to the past criminal convictions and the belief he would be a flight risk. An immediate issue is whether he has any 5th Amendment Due Process rights in this situation, and the current state of Supreme Court precedent, *Department of Homeland Security v. Thuraissigam*, 140 S. Ct. 1595 (2020), as well as the risk of contracting COVID-19 while in detention, complicates the issue. However, "after carefully reviewing the applicable statutory structure, *Thuraissigiam,* binding Supreme Court precedent, and other relevant caselaw," writes Judge Saldana, "the Court holds that Petitioner's detention, even without a bond hearing, comports with due process. Moreover," she adds, "the Court concludes that Petitioner's conditions of confinement claim is not cognizable in *habeas*." Petgrave is representing himself *pro se*, and the complicated issues in his case cry out for assistance of counsel. –*Arthur S. Leonard*

VIRGINIA – Senior U.S. District Judge Claude M. Hilton (E.D. Va.) concisely relates the factual allegations underlying Robert Updegrove's lawsuit challenging the provision of the Virginia Values Act (VVA) that prohibits discrimination because of sexual orientation by places of public accommodation: "Plaintiff Robert Updegrove operates a photography business that provides photography services for anything from weddings to conservative political events. Plaintiff offers his services to the public, but he also uses his business to promote his own ideas and beliefs. One of the beliefs Plaintiff communicates through his photography is that marriage is intended to be between one man and one woman. Plaintiff uses his wedding photography as an opportunity to promote his own religious message about marriage, 'that God designed

marriage as a permanent institution that symbolically points people to Jesus' sacrificial death and covenantal relationship with His Church.' Because of Plaintiff's beliefs about marriage, he will not offer wedding photography to marriages that he believes contradict his religious message. This includes same-sex marriages. Plaintiff offers his photography services to members of the LGBTQ community but will not photograph a same-sex wedding, regardless of the sexual orientation of the person who hires him." In *Updegrove v. Herring*, 2021 WL 1206805, 2021 U.S. Dist. LEXIS 62307 (E.D. Va., March 30, 2021), Judge Hilton grants Virginia Attorney General Mark Herring's motion to dismiss Updegrove's lawsuit on standing grounds. The judge notes that Updegrove has never been asked to photograph a same-sex wedding, and that since the VVA was enacted, the state has not affirmatively enforced it against anybody. Updegrove claims he would like to be able to state on his website that he does not photograph same-sex marriages, and to include an explanatory statement about his religious views, but that he is "chilled" from doing so for fear of prosecution, creating standing to bring a 1st Amendment freedom of speech challenge to any application of the law to his business. (The statute forbids not only discriminating but advertising that one intends to discriminate.) Judge Hilton is skeptical and finds that this argument is not sufficient to create Article III standing for Mr. Updegrove. One suspects that this is a set-up case to try to get the wedding photographer issue up to the Supreme Court. Although the opinion lists no organizational affiliation for Updegrove's counsel, C. Douglas Welty, his lawsuit drew amicus briefs in opposition to the motion to dismiss from attorneys for The North Carolina Values Coalition, The Institute for Faith and Family, The Family Foundation, Founding Freedoms Law Center, and The National Legal Foundation, all socially-conservative stalwarts. Supporting the motion to dismiss were briefs from the ACLU of Virginia and Americans United for Separation of Church & State. Somebody wants to make a federal case out of this, but Judge Hilton (who was appointed to the court by Ronald Reagan) is not ready to take it up on the merits. – *Arthur S. Leonard*

WASHINGTON – Ina Percival and Laina Poon were registered domestic partners until they divorced in December 2018, relates District Judge John C. Coughenour in *Percival v. Poon*, 2021 WL 962701, 2021 U.S. Dist. LEXIS 47724 (W.D. Wash., March 15, 2021). Their relationship had sharply deteriorated by October 15, 2018, the date on which Percival alleges that "Ms. Poon pushed her into a closet and forced her to stay there by threatening to harm her and their children." Percival alleges that the next day Poon "audio recorded Ms. Percival in her home and later publicly disseminated the recording." While the narration of events is not totally clear from the opinion, it appears that this recording was subsequently used by Poon to disparage Percival and affect her claims in the divorce proceeding (which was concluded in 2019). Two years later, Percival filed suit in federal court alleging a violation of the Electronic Communications Privacy Act of 1986 (ECPA) and appended eight state law claims. Poon moved to dismiss, claiming lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Among other things, Poon claimed that Percival was trying to use this lawsuit to get federal judicial review of the ruling by the state court in the divorce action, but the judge rejected that argument, refusing to dismiss under the *Rooker-Feldman* Doctrine. He did find that some of the state law claims did not arise from the facts underlying the federal statutory claim, and thus must be dismissed as outside the court's supplementary jurisdiction. Then he focused on the federal claim, finding that Percival was trying to stretch the ECPA to a set of facts that did not support a cause of action under the statute. ECPA is concerned with unauthorized interception of electronic communications through electronic means. The court found that the factual allegations fell outside the scope of the statute, since there is no allegation that Poon made the recording by planting a recording device in the home; as far as the factual narrative in the complaint goes, it appears that there was no "interception" taking place, and that Percival knew she was being recorded. Thus, the federal claim fell apart, and the court, as per the normal practice, declined to exercise jurisdiction over the remaining state law claims. Counsel are Edward C. Chung, of Chung Malhas & Mantel PLLC, Seattle, for Ina Percival, and Noah Christian Davis, IN PACTA PLLC, Federal Way, WA, for Laina Poon. – *Arthur S. Leonard*

WASHINGTON – Washington trial courts recognize cohabiting unmarried couples as being in a legally cognizable relationship – described as a "committee intimate relationship" (CIR) – for the purpose of making distributions of property when such a relationship terminates. In *Matter of Dewitt v. Estate of Hannan*, 2021 WL 982588 (Wash. Ct. App., Div. 2, March 16, 2021) (unpublished opinion), Leonard Dewitt appeals the trial court's ruling that he and Hannan were not in such a relationship. Dewitt claimed the relationship extended from 2002 to 2018. At the time the suit was filed, Hannan was alive and owned a house in which Dewitt was living. Hannan wanted Dewitt to leave the house, but Dewitt refused, filing this suit. Hannan testified that the only "relationship" he had with Dewitt during the relevant time period was as an intermittent sexual partner. The complete story is

too complicated to describe in detail in this short litigation note. Suffice to say that in affirming the trial court's decision against Dewitt, the court stated that the evidence did not meet the test for a CIR established in *Connell v. Francisco*, 898 P. 2d 831 (1995), thus the trial court was not required to equitably distribute Hannan's property, and that trial court did not err in ordering Dewitt to vacate the premises. Furthermore, the court of appeals found no abuse of discretion in the trial court awarding attorney fees as a discovery sanction and denying various additional motions by Dewitt. The court affirmed the grant of summary judgment in favor of Hannan, a post-judgment order stating that Dewitt was not entitled to legal possession of the house, and various other trial court rulings. More factual details can be found in the court's opinion, which should be useful to Washington practitioners dealing with CIR claims. Hannan passed away while the appeal was pending, so his Estate was substituted as respondent on the appeal. Dewitt represented himself *pro se* – always a winning strategy in complex cases (sarcasm here). Judge Bradley A. Maxa wrote the opinion for the unanimous panel of the Court of Appeals. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, 8TH CIRCUIT – Shawn Kelly Thomason was convicted of stalking a woman, identified in the opinion as JNS, after she had broken off their relationship. There was voluminous evidence of Thomason planning to potentially abduct her, including women's clothing found in his car by the police. Thomason pleaded guilty to one count of interstate stalking under 18 U.S.C. § 2261A (1). The district court sentenced him to 45 months' imprisonment, followed by a three-year term of supervised release, and ordered him to pay restitution to the victim. Judge Steven Colloton wrote for the 8th Circuit panel in *United States v. Thomason*, 2021 WL 966844 (8th Cir., March 16, 2021), considering and rejecting Thomason's arguments on appeal. The one aspect of the appeal worth comment about in *Law Notes* is Thomason's claim of being prejudiced in the sentencing proceeding by the prosecution misgendering them. Thomason claimed to have a gender dysphoria diagnosis and that the women's clothes found in their car were not for JNS as part of an abduction scheme, but for Thomason, who occasionally wore female dress. Thomason also asked to be referred to by gender-neutral language, which the court and counsel tried to do but occasionally slipped up, with a prosecutor noting that Thomason's request came late in the case and they had a habit of referring to Thomason using masculine language which was hard to alter consistently. Ultimately the Court of Appeals rejected this ground of appeal. Wrote Judge Colloton: "There is no basis for resentencing either. By signing a plea agreement that used masculine pronouns, acknowledging that his own sentencing letter would use masculine pronouns for the sake of clarity, and using masculine pronouns through counsel at the sentencing hearing, Thomason waived any claim of misconduct by opposing counsel. And even if we assume forfeiture rather than waiver, there is no plain error warranting relief. Thomason cites no authority for the proposition that litigants and courts must refer to defendants by their preferred pronouns, and the only cited authority is to the contrary. *See United States v. Varner*, 948 F.3d 250, 254 (5th Cir. 2020). Nor is there any showing that the use of pronouns affected the outcome of the proceeding." *Varner*, of course, is the notorious 5th Circuit ruling where the majority of a panel absolutely refused to refer to a transgender prisoner using her preferred pronouns in court papers. Thomason's counsel on appeal are David J. Kramer, Novi, MI, Liisa R. Speaker, Lansing, MI.

CALIFORNIA – In *In re D.N., a Person Coming Under the Juvenile Court Law; The People v. D.N.*, 2021 WL 1102310 (Cal. 5th Dist. Ct. App., March 23, 2021), D.N., a 14-year-old boy, was found to have sexually abused his cousin, a 7-year-old girl. From the court's recounting of the trial record, it sounds like petting, but no actual intercourse occurred, and the girl's testimony was somewhat vague. Fresno County Superior Court Judge Gary D. Hoff sentenced D.N. to a lengthy probationary term, one of the requirements of which was submission to HIV testing. Over many years we have reported sexual abuse or assault cases in which California trial judges have ordered HIV testing reflexively without making the statutorily required factual findings on the record that the defendant had engaged in conduct that was likely to transmit HIV, the standard being "probable cause." D.N's appointed counsel did not object to the testing order at the time of sentencing, which waived the right to appeal the failure of the trial judge to make factual findings on the record. However, wrote Court of Appeal Judge Donald R. Franson, Jr., review of the trial record did not reveal evidence sufficient to justify the testing order. "Appellant argues he never ejaculated, and neither blood nor other bodily fluids capable of transmitting HIV transferred from him to the victim. Without filing a request for judicial notice, appellant provides a hyperlink to a website for the Centers for Disease Control and Prevention in support of his argument that saliva is incapable of transferring HIV. In contrast," wrote Franson, "respondent notes our Legislature has recognized that oral copulation can result in a transfer of bodily fluid capable of transmitting HIV. Respondent argues that appellant orally copulated the victim, so this probation condition should be

affirmed. In the alternative, respondent notes that, if this court finds insufficient evidence of probable cause, the proper remedy is to remand this matter for further proceedings." The court found that it was improper to go outside the record to take account of the content of the CDC website, but agreed with the appellant. "The victim testified during the jurisdictional hearing that appellant tried to orally copulate her, but she could not remember if he actually did. However, during her forensic interview, the victim reported that appellant had on one occasion licked her 'private' but the licking only lasted one second. Although our Legislature recognizes that oral copulation can trigger the necessity for an AIDS test, we cannot declare that the facts in this case 'would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV' was transferred from appellant to the victim," wrote the judge, citing *People v. Butler*, 31 Cal.4th at p. 1127. "Based on the current record, substantial evidence does not exist to make an implied finding of probable cause. We will strike this probation condition but remand this matter to give the prosecution the opportunity to present additional evidence on this issue." Sangeeta Sinha is D.N.'s appointed counsel.

UTAH – Trolling for sex on a gay adult social media site, Aaron D. Rosen connected with a guy who claimed to be 18 years old, and they set up a date. The guy (called "The Victim" by the court) was actually 16 years old. When Rosen, in his mid-40s, arrived at the apartment, they went right to it and were busily engaged when Victim's father "unexpectedly arrived." At Victim's urging, Rosen fled by jumping off a balcony, but the father heard him land and as Rosen tried to drive away followed in hot pursuit, managing to read Rosen's license plate number which police used to arrest Rosen, who was subsequently convicted on one count of unlawful sexual conduct with a 16- or 17-year-old, a third-degree felony, and one count of unlawful sexual conduct with a minor, a class A misdemeanor. Under Utah law, Rosen was too old to be able to make a mistake-of-age argument, as the statute would only allow that if Rosen was fewer than ten years older than the Victim. On appeal, he claimed that trial counsel was ineffective for not raising a constitutional challenge under the under the uniform-operation-of-laws provision of the Utah Constitution. He struck out with the Utah Court of Appeals, which noted that such challenges had been made in past cases, but the courts had always concluded that the legislature had a rational basis to limit the ability of make a mistake of age defense to people who were less than ten years older than the minor, as an older man was likely to hold greater sway over a minor and would more appropriately be held culpable. Judge Gregory K. Orme pointed out for the Court of Appeals panel that the issue before the court wasn't the underlying constitutional contention, but rather whether the failure to raise it showed ineffective assistance of counsel. As to that, failure to raise an argument that had been uniformly rejected by other courts could not be considered ineffective assistance. *State of Utah v. Rosen*, 2021 WL 1034804, 2021 UT App 32 (March 18, 2021). Rosen's appellate counsel are Emily Adams, Freyja Johnson, and Cherise Bacalski.

WASHINGTON – In *In re Personal Restraint of Evans*, 2021 Wash. App. LEXIS 620 (Wash. Ct. App., Div. 2, March 16, 2021), the court rejected an attempt by a man serving prison time for molesting young boys to get released with "community conditions." The opinion by Judge Linda Lee for the unanimous appellate panel found that the record before the court fully supported a decision by Indeterminate Sentence Review Board (ISRB) to extend Evans' minimum prison sentence by an additional three years. After a detailed review of the record, Judge Lee writes: "Evans showed very minimal insight into his offending behavior and did not fully acknowledge his crimes or acknowledge any deviant sexual attraction to young male children, but rather blamed his behavior on his sexuality. And the ESRC determined that Evans displayed a high risk of re-offense. Further, the ISRB stated that 'the Board does find by a preponderance of the evidence that Mr. Evans is more likely than not to commit a sex offense if released on conditions.' Therefore, Evans has not met his burden to show that the ISRB abused its discretion, and Evans' argument fails." Evans, a married man who also admitted having molested his sons when they were young (although he was acquitted in a prosecution several years before the incidents giving rise to his current incarceration), claimed that during therapy in prison he finally came to accept his sexual orientation as a gay man and would not need to seek sex with young boys to satisfy his sexual needs. But he also admitted that he had sex with gay men during the same time period he claimed that he was molesting boys to satisfy his need to "be with a man." Jeffrey Erwin Ellis, Law Office of Alsept & Ellis, Portland, OR, represented Evans on this appeal.

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.

IDAHO – U.S. District Judge B. Lynn Winmill presided over the litigation involving an Idaho transgender prisoner for whom he ordered gender confirmation

surgery, which occurred last year. The Ninth Circuit affirmed, and the Supreme Court denied *certiorari*. *Edmo v. Idaho Department of Corrections*, 358 F. Supp. 3d 1103 (D. Idaho 2018), *aff'd*, 935 F.3d 757 (9th Cir. 2020); *cert. denied sub. nom. ID DOC v. Edmo*, ___ U.S. ___, 141 S. Ct. 610 (2020). Now, in the *pro se* case of Daisy Meadows, which Judge Winmill had allowed to go to discovery, he grants summary judgment to defendants in *Meadows v. Atencio,* 2021 WL 829698 (D. Idaho, Mar. 4, 2021). Meadows is now incarcerated in Nevada, so her injunctive claims in Idaho are moot. She still sought damages on claims of deliberate indifference to her safety arising from an attack by her cellmate and for deliberate indifference to her health care needs by denial of confirmation surgery. Judge Winmill dismisses the safety claim because Meadows failed to exhaust her administrative remedies under the Prison Litigation Reform Act before filing. There is nothing new here. On the surgical claim, Meadows failed to present a triable issue, because she could not point to a written recommendation by a physician for such surgery. The best she could offer was a statement made to her by a vendor doctor (who denied it) that he would have recommended surgery if he had the "authority." Without something in writing, Judge Winmill declines to find a jury issue based on this alleged statement alone, in light of the voluminous medical records and ongoing hormone treatment while Meadows was in Idaho that show no surgical recommendation by anyone.

FLORIDA – *Pro se* inmate Kentarkius Jamel Morgan filed claims for excessive force and failure to protect him, arising from three incidents in *Morgan v. Thorton,* 2021 WL 795501 (M.D. Fla., Mar. 2, 2021). For simplicity, they are referred to as the November, March, and May incidents. U.S. District Judge Brian J. Davis granted the defendant officers summary judgment in part and denied it in part, sending the surviving claims to trial, for which he asked the Clerk to seek counsel for Morgan. In the November incident, other inmates attacked Morgan, and officers responded by slamming Morgan to the ground, breaking his jaw, for which he required oral surgery. They also uttered slurs based on his sexual orientation. In March, Morgan alleges that the same officers retaliated against him for filing an administrative complaint and assaulted him while he was in restraints, again threatening him because of his sexual orientation. In May, Morgan – "because of his sexual orientation" – was in "house alone" status (meaning other inmates should not be allowed to enter his cell), when officers knowingly left his cell unlocked and "watched" as inmates assaulted him. Two defendants alleged Eleventh Amendment immunity, claiming Morgan said in his papers he was only suing them "officially." Judge Davis rules this is technically correct, but he dismisses claims against them "only to the extent Defendants are entitled to Eleventh Amendment immunity as to any damages claims against them in their official capacities." It appears that Judge Davis declines to hold them harmless in their "individual" capacities, notwithstanding the pleading. This is not common in this writer's experience, and hopefully counsel will be found who can make the most of it. Defendants also alleged that Morgan failed to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA], as to the March and May incidents. (Exhaustion was conceded as to the November incident.) For Florida practitioners, the FDOC grievance system is concisely described. A two-step analysis is used under *Turner v. Burnside,* 541 F.3d 1077, 1082-83 (11th Cir. 2008); *see also Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015) (same). If the plaintiff's pleadings and responses to the motion to dismiss on exhaustion show a failure to exhaust, the court must dismiss the claims. If they do not, the court proceeds to resolve material issues on exhaustion through specific findings. Here, Morgan insists he exhausted, and Judge Davis proceeds to step two: Morgan loses on the March incident, but he wins on the May incident. Morgan alleged that he filed a grievance on the March incident, but he received no response, and the grievance was neither acknowledged nor returned. Morgan's failure to appeal the non-response was fatal to his exhaustion, since the Florida regulations permitted him to do so. Morgan received a reply to a grievance about the May incident that said: "You are currently housed alone." Judge Davis rules that no appeal was required. This response showed that the defendants were on notice of the claim and in practical terms the grievance was "approved," not "denied." This was exhaustion. Defendants claimed that Morgan failed to identify them by name, but there is no such requirement in the PLRA – *Jones v. Bock,* 549 U.S. 199, 217 (2007) – and none in Florida. *Parzyck v. Prison Health Servs.,* 627 F.3d 1215, 1218 (11th Cir. 2010) (Applying Florida exhaustion rules: "A prisoner need not name any particular defendant in a grievance in order to properly exhaust his claim.").

MICHIGAN – *Pro se* transgender inmate Joshua Snider's case for deliberate indifference to her health care was dismissed for failure to state a claim by Senior U. S. District Judge Janet T. Neff in *Snider v. Davis,* 2021 WL 940589 (W.D. Mich., Mar. 12, 2021). Snider has identified as trans since she was 16, and she was classified as such by Michigan DOC and placed on hormones by defendant Dr. Schmidt, whom Snider calls a "transgender specialist." Snider developed marble-sized lumps in her breasts, and she was told her hormones and lab work were out of balance. Snider asked repeatedly to be seen by Dr. Schmidt, but other defendants told her that Dr. Schmidt was not examining

PRISONER LITIGATION *notes*

inmates during the COVID-19 pandemic but that she (Dr. Schmidt) would review Snider's chart and lab work and consult with providers who examined Snider. Snider was told that Dr. Schmidt was "aware," and that Dr. Schmidt would "see" her via tele-medicine, but this did not occur. One defendant told Snider that she would be put in the "hole" if she did not stop complaining, but this never happened, either. This continued for months, while Snider was seen by other providers, who were not "transgender" specialists. Snider has been released from prison, and she seeks damages, alleging weight loss, anxiety, depression, and panic attacks. Judge Neff found that the "subjective" half of the Eighth Amendment deliberate indifference test was not met, because defendants did not deny all care and were responsive, albeit not in the way Snider wanted. Judge Neff cites several 6th Circuit cases for the proposition that disagreements about care are not actionable under the Eighth Amendment. *Sanderfer v. Nichols*, 62 F.3d 151, 154–55 (6th Cir. 1995). Judge Neff quotes: "[T]he right to adequate medical care does not encompass the right to be diagnosed correctly. . . ." *Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005); and cites *Jones v. Muskegon County*, 625 F.3d 935, 944–45 (6th Cir. 2010) (same). In addition to dismissing the Eighth Amendment claim, Judge Neff dismissed a First Amendment retaliation claim against the defendant who threatened Snider with the "hole," because it was an isolated remark with no follow-up that would not have deterred an "objective person." This summary dismissal before service strikes this writer as too harsh. The patient was having physically discernable side effects and abnormal lab work from powerful drugs. The medical staff should have been served and required to respond in some way.

MICHIGAN – Plaintiff Michael Salami, *pro se,* self-describes as ". . . feminine small-build, white, gay, transgender [and] medically detailed as Gender-dysphoria . . . ." Another inmate (Davis) became obsessed with her. He sent her dozens of notes hitting on her, which eventually escalated to threats of assault, rape, and murder. Salami complained repeatedly. The two inmates were separated, Davis was charged and punished for sexual harassment for sending notes, and Salami was put in protection with Davis in another part of segregation, where he had no means of direct contact with Salami. Davis continued to send notes to Salami, however, using other inmates as couriers. An investigation under the Prison Rape Elimination Act [PREA] concluded "insufficient evidence" of "predatorial" conduct, even though Salami produced the notes. [Note: the word "predator" (or its variants) does not appear in the PREA statute, 34 U.S.C. §§ 30301, *et seq*., or in the implementing regulations, 28 C.F.R., Part 115.] The statement of facts here indicates that defendants were aware of the continuing harassment, but they argued that, once the two were separated, Corrections had done enough to satisfy the Eighth Amendment, even if Davis continued to manage to communicate with Salami. U.S. District Judge Hala Y. Jarbou agrees, in *Salami v. Neimiec,* 2021 WL 1037681 (W.D. Mich., Mar. 18, 2021), and she dismisses the case for failure to state a claim. Judge Jarbou analyzed the case as one of protection from harm under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). As she sees it, once the inmates were separated, "Plaintiff's only allegation involving Defendants has to do with their allegedly insufficient investigation into the unspecified number of raunchy notes sent by prisoner Davis, by way of other prisoners. . . ." Salami is not presently "at risk": "She instead suggests that changes to prison placements that may occur in the future could place her at risk from Davis." Such harassment as Davis's notes does not rise to an Eighth Amendment violation under *Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir. 2004), according to the judge. Judge Jarbou then cites inexplicably to Sixth Circuit cases finding no violation when the harassment is "isolated, brief, and not severe." *Maben v. Thelen*, 887 F.3d 252 (6th Cir. 2018); *Jackson v. Madery*, 158 F. App'x 656, 662 (6th Cir. 2005). But Davis' fixation is not "one-off" behavior. Judge Jarbou distinguishes *Rafferty v. Trumbell County,* 915 F.3d 1057 (6th Cir. 2019), because it involved officer verbal abuse, where an "inherently coercive power relationship exists" between guards and prisoners, which is "wholly distinguishable." *Id*. at 1096. Yet, *Rafferty* also said that: "Federal courts have long held that sexual abuse is sufficiently serious to violate the Eighth Amendment. This is true whether the sexual abuse is perpetrated by other inmates . . . or by guards . . . ." (internal citations omitted). *Id*. at 1095. Nevertheless, Judge Jarbou declines to issue an order that defendants preclude Davis from ever being housing near Salami again, saying she cannot enjoin deliberate indifference to a "presently nonexistent risk" to prevent "a hypothetical risk in the future." Judge Jarbou assesses a "strike," but she declines to certify an appeal as frivolous – meaning Salami may appeal *in forma pauperis,* unless she has already accumulated "three strikes" under 28 § 1915(g). Judge Jarbou was appointed by President Trump in 2020.

NEBRASKA – Plaintiff Gene Allen, presumably heterosexual, a Nevada prisoner, sues *Black and Pink* magazine and its editor, for continuing to send him issues of the magazine in prison, which he has not requested and after he asked them to stop sending them. Nevada corrections officials say they have no control over incoming mail [*Really*?], and they told Allen to write the publisher in Omaha, which did not work. Invoking diversity jurisdiction, Allen sues in *Allen v. Black and Pink,*

2021 WL 1060340 (D. Nebr. Mar. 18, 2021), for injunctive relief and $225,000 in damages, alleging he has been "stigmatized" as gay or transgender in the Nevada prison system by the continuing receipt of the publication and "you can't un-ring that bell." Senior U. S. District Judge Richard G. Kopf screens the case and finds that the case should continue to service of process because "Plaintiff has alleged sufficient facts to state a plausible state-law tort claim based on diversity jurisdiction . . . ." He denied injunctive relief at this time. Judge Kopf does not explain what "state law tort" he has in mind. As a threshold issue, he does not resolve the conflict of laws issue as to what law controls: either Nebraska law (home of the Omaha publisher) or Nevada law (where the "injury" from the tort occurred). Nebraska conflicts law looks to the law of the place where the tort occurred. *Crossley v. Pacific Employees Ins. Co.,* 251 N.W.2d 383, 386 (Nebr. 1977). Both states require specific pleading of damages for defamation and narrow exemptions for defamation *per se*. This writer has found no cases anywhere applying defamation *per se* rules to imputation of sexual orientation by sending someone an unsolicited magazine. The closest case involved a caption of a photograph that suggested the plaintiff was gay in *Albright v. Morton,* 321 F.Supp.2d 130, 138 (D. Mass. 2004). The plaintiff lost. Unlike Nevada, Nebraska has a tort of "invasion of privacy by placing in false light," but it only applies if defamation is not available. *Moats v. Republican Party of Nebraska,* 796 N.W.2d 584, 597-99 (Nebr. 2011). It is impossible to tell if Judge Kopf had this theory in mind. Many courts that have addressed the issue seem reluctant to include imputation of sexual orientation as actionable *per se,* noting that the underlying theory of "loathsomeness" or "illegality" belongs in the dustbin of homophobia and should not be countenanced by the courts. *See Albright, supra; Storm v. Cosby*, 645 F.Supp. 2d 258, 273 (S.D.N.Y. 2009); *Boehm v. American Bankers Ins. Group, Inc.,* 557 So.2d 91, 94 (Fla. DCA 3d 1990). There are older cases, as well – *Moricoli v. Schwartz,* 361 N.E.2d 74 (Ill. 1977) ("faggot" not slanderous *per se);* – but one does not have to dig very deep to find historical bias – *see Boy Scouts of America v. Teal,* 374 F.Supp. 1276 (E.D. Pa., 1974) (telling father of "reputation" of scout leader as "homosexual" is not slander since it was widely thought to be true and therefore scouting leaders had "qualified privilege" when they sought to "protect" youth). This writer believes that Allen will not get past a motion to dismiss on defamation theory, but there may be some claim of abuse of mail or harassment arising from the publication's refusal to take him off their mailing list. Finally, if the institution is letting this publication past the literature committee, it should be engaging in LGBT education about non-harassment of the recipients. This writer has seen cases where genuine subscribers in prison to *Black and Pink* have been harassed and would not be surprised if lower-level staff find the situation "hilarious" and are egging it on.

NEVADA – *Pro se* inmate Douglas E. Shields alleges that he and other LGBTQ inmates were denied access to chapel services at a Nevada prison and that defendants retaliated against Shields by removing him from his job as a chapel clerk, instigating discriminatory disciplinary charges against him, and transferring him after he complained. In *Shields v. Baker,* 2021 WL 863194 (D. Nev., Mar. 8, 2021), Chief U.S. District Judge Miranda M. Du granted summary judgment to defendants in part and denied it in part. Judge Du found a triable issue on banning LGBTQ inmates from the chapel under the First Amendment Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act, and the Equal Protection Clause. Shields submitted numerous affidavits confirming the practice of some of the guards – who banned LGBTQ inmates from the chapel, uttered slurs, and showed bias: "Gay Jesus . . . is on someone else's shift." Most of the opinion focussed on Shields' claim of retaliation. Judge Du found that Shields does not state a claim for violation of procedural due process, because he received the procedures of notice and hearing that he was due. Shields was charged with rules violations for: (1) carrying a reusable Trader Joe's shopping bag disguised as a regular paper bag, with other bags inside it; (2) possessing chapel office supplies and religious compact discs in his cell; (3) having a picture of himself and two other inmates with the chaplain, which "compromised" staff; and (4) concealing a mummified corpse of the Lindberg baby. [Number 4 was not charged – this writer is just seeing if the reader is paying attention]. The disciplinary committee gave Shields a year of confinement for charges (1) through (3), and the institution transferred Shields to another prison. The warden reversed the decision as to the picture, because it just showed the four men standing fully clothed in a normal arrangement; he cut the punishment to 6 months; but he sustained the transfer. [Note: the defendants filed the disciplinary exhibits under seal, but Judge Du unsealed them, finding no basis to seal them, citing *Debarr v. Carpenter*, 2017 WL 424860, at *1-*4 (D. Nev. Jan. 30, 2017) (denying motion to seal disciplinary hearing transcripts and recordings).] Judge Du found a triable issue on the transfer itself, observing that she could not tell at the summary judgment stage what prompted the investigation leading to the disciplinary charges and the transfer. Shields will be allowed a trial on his retaliation theory of "selective enforcement – that he was targeted for violating rules that others also violated, but were not punished for violating, because he had been filing grievances about being denied access to the chapel." Although it is not

completely clear, Judge Du seems to be allowing Shields to try four things as retaliatory: the decision to investigate, the initiation of charges, the punishment (except for the procedural challenge to it), and the transfer. Judge Du never refers to retaliation as a violation of the First Amendment's Petition Clause; she confines her First Amendment analysis to Free Exercise. Judge Du cites *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) (holding that prohibition of retaliation for "protected conduct" is clearly established in the Ninth Circuit), and *Rhodes* relies on the First Amendment. Other cases make the point more clearly. *See Austin v. Terhune,* 367 F.3d 1167, 1170-71 (9th Cir. 2004) (prisoner states a First Amendment retaliation claim where he alleged that a guard exposed his genitalia to him and the guard then filed a false disciplinary report against him after he complained); followed in *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1021 (9th Cir. 2020).

NEVADA – One cannot tell from the brief opinion in *Salazar v. Calderin*, 2021 U.S. Dist. LEXIS 49081 (D. Nev., Mar. 15, 2021), whether or not the case warrants reporting. A quick review in PACER puts it in some context. Plaintiff, Anthony Salazar, *pro se*, is transgender, and she sues over denial of congregate religious services. U. S. Magistrate Judge Brenda Weksler first grants an unopposed motion to conform the pleadings to Salazar's gender identity. It is notable, however, that a minute order in the file reflects a conference at which this was discussed at length, and Judge Weksler ordered defendants to refer to Salazar as "she/her" and to cease using "he/him." Next, Salazar seeks an order directing Nevada DOC to grant her greater access to the law library, because she needs to do research, and she is being assisted by the prison law clerk. Judge Weksler characterizes this as a motion for injunctive relief and declines to grant it because: (1) Salazar's case does not present access to court issues; (2) the court is not persuaded to interfere with prison adjustments during the pandemic; and (3) Salazar's submissions do not show prejudice from the current access. [Note: the first reason is probably wrong as a "stand-alone" under *Bounds v. Smith*, 430 U.S. 817, 828 (1977), but the other reasons likely support the discretion to deny preliminary relief.] The court also directs the Clerk to send Salazar a copy of the compact disc recording of a recent lengthy conference where she granted in part Salazar's motion to compel discovery (documents and interrogatories from the prison chaplain) on Salazar's requests for accommodation of her religion, the standards for recognizing faiths, and how "mainstream" religions are treated differently in the prison. There are four Nevada assistant attorneys general appearing to defend this *pro se* case.

NEVADA – There is no explanation for what happened here. U.S. District Judge Robert C. Jones dismisses *pro se* transgender inmate Jamee Deirdre Hundley's civil rights case with prejudice on screening in *Hundley v. Aranas,* 2021 WL 1181175 (D. Nev., Mar. 29, 2021). Just a month earlier he entered a very different decision allowing Hundley to proceed on hormone, surgical evaluation, and equal protection claims – and he dismissed other claims without prejudice and sent the case to mediation. The only docket entry in between was a Clerk's notice that "per Chambers" the earlier order was "rescinded" as "entered in error." No defendant has ever been served. [Note: This writer looked at the docket for curiosity as to why it took Judge Jones nineteen months to screen this injunctive case. There is no apparent explanation, except that screening was "deferred."] Hundley has a long history as a transgender woman. She was on hormones in Nevada DOC. Her dispute raises four questions: hormone dosage; gender confirmation surgery, access to feminine clothing, and retaliation. Judge Jones finds that Hundley did not state a claim about hormones, since her dispute was about type and level of medication. She alleges that physicians' decisions to deny her high-level hormone medication was a violation of her rights, because she signed a waiver of any risks from overmedication. Judge Jones says the "waiver" does not provide a right to have medical judgment over-ridden by a court. (He dismissed this claim without prejudice a month earlier.) As to surgery, in February, Judge Jones allowed a claim to go forward for Hundley to be "evaluated for treatment beyond hormone therapy," while dismissing a claim for surgery at this time. The extant decision dismisses surgical claims with prejudice, even while acknowledging that individualized factual assessment is required by *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769-70 (9th Cir. 2019). The judge allowed a claim to proceed under the Equal Protection Clause earlier, as to female garments, but he dismisses it with prejudice now. Judge Jones dismisses claims of retaliation with prejudice (now) – but without prejudice (then). Judge Jones writes that an appeal now would not be taken in good faith. Since the first screening was on an amended complaint, Ninth Circuit precedent should have allowed at least one chance to amend a case like this before dismissal with prejudice for a *pro se* plaintiff. *Akhtar v. Mesa,* 698 F.3d 1202, 1212 (9th Cir. 2012); *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir. 2000) (*en banc*). Judge Jones was appointed by George W. Bush.

NEW JERSEY – *Pro se* prisoner Filiberto Feliciano sues an officer (May) at the Essex County (New Jersey) Jail for violating his right to privacy by revealing his HIV status to other inmates in *Feliciano v. May,* 2021 WL 1171638 (D. N.J., Mar. 29, 2021). May denies she violated Feliciano's privacy, maintaining

she did not know of Feliciano's HIV status until he sued her. Feliciano did not respond to May's motion for summary judgment. PACER reveals he is in custody in North Carolina. U.S. District Judge Kevin McNulty grants defendant summary judgment. As Judge McNulty sees it, Feliciano's "sole argument" for adjudication is whether § 1983 gives him a right to proceed for violation of the Health Insurance Portability and Accountability Act (HIPAA), because that is the only claim Feliciano raised. HIPAA does not create a private cause of action according to numerous 3rd Circuit decisions. "This is dispositive" – so, end of case. Judge McNulty does not mention the Third Circuit decision of *Doe v. Delia,* 257 F.3d 309, 311 (3d Cir. 2001), which recognizes a prisoner's limited right to privacy regarding medical information.

OHIO – HIV-positive inmate Derek Lichtenwalter sought immediate release through a writ of *habeas corpus* due to COVID-19 risks in his Ohio State prison in *Lichtenwalter v. Warden,* 2021 WL 843162 (S.D. Ohio, Mar. 3, 2021). U.S. Magistrate Judge Kimberly A. Jolson issued a Report and Recommendation [R & R] that the case be dismissed. Although Lichtenwalter also has hypertension and a history of collapsed lung and punctured diaphragm, his individual medical risk is not a focus of the R & R, unlike federal prisoner cases involving compassionate release and resentencing. Rather, Judge Jolson focuses on the risk to inmates by the actions taken (or not taken) by Ohio correctional officials to lower risk of COVID-19 transmission through social distancing, masking, disinfecting, etc. While Judge Jolson scheduled a hearing last summer, correction officials and Lichtenwalter's counsel both asked for delays; eventually, Judge Jolson decided that she could issue an R & R on papers without a hearing, finding that a lot more is known about risks of transmission and COVID-19 and how courts should decide prisoner claims than was known nine months ago. She finds that social distancing is not fully compatible with an institutional setting and that even "the CDC's own guidance 'presupposes that some modification of its social-distancing recommendations will be necessary in institutional settings.' " *Blackburn v. Noble*, 479 F. Supp. 3d 531, 541 (E.D. Ky, 2020), *quoting Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020). Lichtenwalter objected to dormitory housing with 140 other inmates, communal showering and toilets, limited handwashing, and failure to enforce masking by staff or inmates. Basically, Judge Jolson found that a "we're doing the best we can" defense defeated the subjective arm of Eighth Amendment deliberate indifference. Underlying it is the unstated (but this writer believes present) concern that, if Lichtenwalter prevails in *habeas* on this record, the federal courts will be asked to enter massive release orders of inmates in state prisons. No such case has succeeded to date for federal or state prisoners, although the litigation against ICE in *Fraihat v. ICE,* 2020 WL 1032570 (C.D. Calif., Apr. 20, 2020), comes closest in creating a presumption of release from immigration detention for certain highly at-risk detainees who do not have criminal charges pending. Lichtenwalter has filed objections to the R & R with the district judge. So has the warden. The latter objections address whether this case was properly filed as a *habeas* claim in the first place. Most of the opinion is devoted to this and related issues: should this have been a § 1983 case; if *habeas* was proper, which section?; can Lichtenwalter raise issues not presented to the Ohio courts?; how do state *habeas* exhaustion rules apply to "new" evidence as COVID-19 continues to unfold? All of this is considered thoughtfully (and may be again in the district court). For those advocates who have a client in a "COVID-19 petri dish" state prison, particularly in the Sixth Circuit, this is useful reading – but it is beyond the scope of this reporting.

OHIO – This case has the feel of counsel and judge just going through the motions. In 2008, Defendant Latosha Mathis (then called ShaHanna Byrd) plead guilty to carjacking with serious bodily injury and firearms charges. It appears from the context, use of pronouns, and the testosterone she is taking as shown in her medical records that she may be transgender. This is not mentioned in the opinion. When she filed her petition, she was at FCC Hazelton (West Virginia), a U.S. Bureau of Prisons facility for women; but she says she is about to be moved to FCI Tallahassee – a low security facility for women. She was sentenced to 230 months, and she is due to be released in 2024. She is HIV-positive, and she filed a *pro se* motion for compassionate release due to COVID-19. U.S. District Judge Edward A. Sargus, Jr., appointed counsel, but he denied Mathis' motion in *United States v. Mathis,* 2021 U.S. Dist. LEXIS 53950; 2021 WL 1099594 (S.D. Ohio, Mar. 23, 2021). Mathis is 47-years old, and her HIV is apparently controlled with medication. Judge Sargus recognizes his discretion in the Sixth Circuit, says it is nevertheless "very limited" under *United States v. Ruffin*, 978 F.3d 1000, 1003-04 (6th Cir. 2020), and finds no special circumstances here warranting relief. He notes the absence of Sentencing Commission Guidelines on point, despite the First Step and CARES Acts. [Note: Appointment to fill the six vacancies (of seven) on the Commission is a task left for President Biden by the Trump Administration – and also an opportunity.] Mathis's petition focuses on her HIV and the incidence of COVID-19 as a risk to people in prison. Judge Mathis writes that controlled HIV is not a sufficient potential complication to justify Mathis' release, even if she contracts COVID-19. There is no prison-specific analysis. The BOP website

does not list Hazelton as a COVID-19 "hotspot," but it shows FDC Tallahassee as having 442 prisoners "recovered" COVID-19 of an inmate population of 863 – or 51% seropositivity, excluding transfers. As has now become typical, the government's papers opposing compassionate release are sealed. This was justified for Mathis's privacy, the privacy of the victim of the carjacking, and the confidentiality of the pre-sentence report after trial. Judge Sargus just sealed the whole thing without objection – even though Mathis waived her medical privacy by filing medical records about her HIV. The details about the victim and probably portions of the pre-sentence report are valid reasons for sealing parts of the government's papers. Their reports about COVID-19 at the subject prisons should not be shielded from the public.

OKLAHOMA – *Pro se* prisoner Daniel L. Johnson, managed to keep his case alive for longer than most inmates who are the victims of verbal anti-LGBT abuse from staff. The case involved calling Johnson "punkchaser," because he had a perceived pattern of seeking gay cellmates. The 10th Circuit reversed an earlier dismissal on statute of limitations basis, holding that the limitations period was tolled during the pendency of exhaustion of administrative remedies under the Prisoner Litigation Reform Act [PLRA]. Here, this involved an investigation of a Prison Rape Elimination Act [PREA] complaint arising from the grievance. On remand, although the investigation had determined the PREA complaint to be "unfounded," the district judge was not bound by this. The DOC investigator said there was "no evidence." But the statements of Johnson and another inmate that staff made homophobic statements created disputed facts when defendants denied making the statements. Summary judgment was therefore improper if the disputed facts were material. Chief U.S. District Judge Ronald A. White found the disputed facts were not material in *Johnson v. Garrison*, 2021 WL 982313 (E.D. Okla., Mar. 16, 2001), because verbal abuse alone is not actionable under the Eighth Amendment. Johnson had grieved that, under PREA, "I have the right to be safe from sexually abusive behavior, jokes about sex or gender specific traits while incarcerated." Even if defendants were "bombarding [Johnson] with foul language, racial slurs, and homosexual epithets . . . it does not warrant relief. Mere use of threatening or abusive language or other verbal harassment by prison officials does not amount to a constitutional violation," under *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979). There is also no private cause of action under PREA. Judge White recites the usual platitudes about such language being "deplorable and unprofessional" before dismissing the case for failure to state a claim.

OKLAHOMA – Transgender prisoner Johnny L. Hardeman, (a/k/a Lo'Re Pink) *pro se,* loses all of her claims to motions to dismiss or for summary judgment granted by U.S. District Judge John F. Heil, III, in *Hardeman v. Smash,* 2021 U.S. Dist. LEXIS 56498 (E.D. Okla., Mar. 24, 2021). [Note: Hardeman's name was legally changed to "Pink" in an Oklahoma court, and the new name is used hereafter.] Pink alleged that she was denied proper examination and diagnosis for gender dysphoria, suffered retaliation, and denial of equal rights. Pink alleged that an officer (Sanders) forced her to perform oral sex on him and that she was placed in segregation for filing a complaint about it under the Prison Rape Elimination Act [PREA]. [Pink did not sue Sanders in this case – just the retaliators.] Pink also alleged that she was found to have "suspected" gender identity disorder (applying the outdated DSM-IV-R in 2015) by one doctor with an order to "follow up." A psychologist then saw Pink briefly, and she diagnosed "histrionic personality disorder," with strong female gender identification but with insufficiently severe dysphoria to meet the DSM-V criteria for gender dysphoria. Pink seeks another gender dysphoria evaluation, arguing that the second evaluation was brief and perfunctory. She alleges she has received "no treatment" for her mental health needs. The case was filed in April of 2019, but there were no substantive proceedings until October of 2019, when the Oklahoma DOC filed a "Report" with multiple exhibits under *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). The psychologist's evaluation and all medical records are under seal. The case was re-assigned to newly appointed Judge Heil in the Fall of 2020. Judge Heil found that Pink failed to serve two of the defendants despite multiple opportunities (her motions to DOC to produce addresses had been denied). Judge Heil then found that Pink filed to exhaust administrative remedies under the Prisoner Litigation Reform Act [PLRA] for all but her claim of lack of treatment for gender dysphoria. [It is noteworthy that the court allowed mental health records to be filed under seal but that, when Pink tried to grieve retaliation for the sexual assault as a "sensitive matter" that qualified for skipping the first step of exhaustion, her grievance was returned as "not a sensitive matter" – and Judge Heil accepted this characterization as failing to exhaust. Also, the exhibits Pink tried to submit as new evidence showed that she was put in segregation for filing "multiple unfounded PREA complaints." This writer has never seen this explicit admission. Judge Heil does not rule on this proffer. He does say that Pink was found "non-culpable" in relation to a PREA complaint. [This is a characterization of a PREA assailant's status, not of a victim's complaint.] Judge Heil found that the only claim that has been exhausted under the PLRA was one that amounted to a demand

for a third gender dysphoria evaluation, which Judge Heil found was essentially a right to "break the tie." He found no such right under the Eighth Amendment. His dismissive characterization makes little of Pink's allegation that the second evaluation was perfunctory. Worse, it ignores the fact that the second psychologist made a diagnosis of a treatable condition, and Pink alleges that she is receiving no mental health treatment at all. By treating the case as a demand for a "third opinion," Judge Heil misses the failure to provide any treatment for a serious condition – a classic Eighth Amendment violation.

PENNSYLVANIA – Last month, *Law Notes* published a full article, "Federal Judge Allows Gender Non-Binary Inmate to Proceed on Their Claims under Eighth Amendment, Privacy, Disabilities Act, and Rehabilitation Act," reporting on *Doe v. Pa. Dep't of Corr.,* 2021 U.S. Dist. LEXIS 31970 (W.D. Pa., Feb. 19, 2021), in which U.S. Magistrate Richard A. Lanzillo allowed a gender non-specific inmate to proceed on civil rights claims. Two of the defendants filed objections, which are addressed by U.S. District Judge Susan Paradise Baxter in *Doe v. Pa. DOC,* 2021 WL 1115373 (W.D. Pa., Mar. 24, 2021). [Note: Judge Lanzillo used "they, them, theirs" fluidly in his opinion. Judge Baxter does the same when she uses pronouns, but mostly she refers to Doe as "Plaintiff."] One defendant, a physician, objected that he was not authorized to approve certain requests by Doe (changes in hormone dosage; surgery). Judge Lanzillo ruled, however, that the claim against this physician was much broader and includes all aspects of transgender care, as to which the physician was implicated. Judge Baxter overruled the objections. The other objections were tendered by a defendant who showed that he was not working at the subject prison when Doe filed their grievances. As such, even assuming that Doe's grievances were sufficient to exhaust under the Prison Litigation Reform Act [PLRA], by naming this defendant as the "medical director," he was not the medical director when the grievances were filed – so Judge Baxter sustains his objection and dismisses as to him. There is no discussion as to whether this defendant could stay in the case for injunctive relief or substitution of parties under F.R.C.P. 25(d). This seems wrong and contrary to the purpose of PLRA exhaustion: putting the defendants on notice with an opportunity to cure. *See Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017) (holding once a grievance about the discontinuation of Rastafarian services had been pursued, appointment of a new chaplain did not require filing of a new grievance); *Halpin v. David*, 2009 WL 10697969, *3 (N.D.Fla., July 9, 2009) (holding a prisoner need not re-grieve an injunctive claim where a new official is substituted pursuant to Rule 25), *report and recommendation adopted in part*, 2009 WL 2960936 (N.D. Fla., Sept. 10, 2009). The rule applied to the medical director seems particularly inappropriate here, since Doe had grieved, and then filed the case, and the new medical director was not on staff to be grieved in the meantime. A grievance as to the future successor was not "available" within the meaning of PLRA exhaustion.

WISCONSIN – HIV-positive inmate Walter Williams managed to combine factors into a perfect storm and convince U.S. District Judge Brett H. Ludwig to grant him "compassionate release" in *United States v. Williams,* 2021 U.S. Dist. LEXIS 57947 (E.D. Wisc., Mar. 26, 2021). Williams presented expert evidence that, despite HIV treatment, he remains "chronically immunocompromised," thereby distinguishing his case from those involving "well-controlled" HIV. Judge Lutwig includes a useful comparative string cite for those in the Seventh Circuit. While Judge Lutwig did not rely solely on Williams' sentence (600 months – or 50 years – for drug offenses), he did observe that serving 28 of these years was enough to satisfy concerns about taking the charges seriously and reinforcing respect for the law. The topper was undoubtedly that the government did not oppose release. Judge Lutwig ordered federal probation to set a release plan within thirty days, with five years' supervised release to follow. Williams was given appointed counsel and was represented by Federal Defender Services, Milwaukee. Judge Lutwig was appointed by President Trump in September of 2020. One of his first cases was *Trump v. Wisconsin Election Commission,* 20-cv-1785 (E.D. Wisc.). Judge Lutwig wrote a scathing dismissal with prejudice, which was affirmed without much ado by the Seventh Circuit, No. 20-3414. The Supreme Court denied *certiorari,* No. 20-883, on March 8, 2021.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

WHITE HOUSE – Human Rights Campaign reported that on February 23, 2021, President Biden directed the Department of Veterans Affairs to review its policies to ensure they are inclusive of all gender identities and gender expressions. An existing ban on performing gender-affirming surgery for veterans is likely to be rescinded as a result. * * * On March 31, President Biden formally recognized the Transgender Day of Remembrance by issuing a formal proclamation and announcing that the Defense Department will shortly be issuing its detailed new policies concerning military service by transgender individuals, following up on an Executive Order issued by the President during the first days of the Administration. The policy goes beyond the status quo ante that President

LEGISLATIVE & ADMINISTRATIVE *notes*

Trump overruled in his notorious July 26, 2017, twitterstorm imposing an across-the-board outright ban on any form of military service by transgender people. Under the forthcoming policy to be announced by Defense Secretary Lloyd Austin, transgender people may enlist and may serve in the gender with which they identify, will be provided with appropriate healthcare (including transitional care), and will be covered by an express non-discrimination policy with respect to gender identity and expression. This will effectively moot elements of the five pending lawsuits seeking prospective equitable relief challenging the constitutionality of the Trump Administration policy that went into effect in April 2019 after the Supreme Court stayed preliminary injunctions that had been issued against implementation of the announced policy in the four court cases then pending. Secretary Austin also indicated that efforts will be made to identify people whose careers were disrupted by the policy to set things right, and some people who resigned from the service rather than comply with the discriminatory policy requirements may be invited to re-enlist if they remain interested and remain qualified.

CONSUMER FINANCIAL PROTECTION BUREAU – On March 8, the CFPB issued a new rule "clarifying" that the ban on discrimination because of sex in access to credit and financial services includes discrimination because of sexual orientation and gender identity, consistent with President Biden's direction in his January 20 Executive Order that federal branch agencies should follow the Supreme Court's ruling in *Bostock* in interpreting and enforcing sex discrimination policies.

U.S. DEPARTMENT OF EDUCATION – *InsideHigherEd.com* reported on March 17 that although President Biden issued an EO on March 8 making clear that Title IX's ban on denial of equal educational opportunity on account of sex includes "sexual orientation and gender identity," as per the reasoning of the Supreme Court's *Bostock* decision, there was no clear signal from DOE yet about whether it was abandoning the Trump Administration's position that transgender women may not compete as women in college-level sports competition. The Trump Administration had challenged Franklin Pierce University's transgender policy under which a transgender woman had won a women's competition at the 2019 NCAA Division II Outdoor Track & Field Championships, prompting Concerned Women for America to file a complaint with the Department. According to the IHE March 17 article, Franklin Pierce had withdrawn its written transgender policy in response to the DOE investigation. The tenor of the article is an expectation that the Biden Administration will repudiate the Trump Administration's position, especially since the Justice Department withdrew its statement of interest in the pending litigation by some cisgender female high school athletes challenging Connecticut's policy of letting transgender girls compete in high-school level competition as girls. According to critics of allowing transgender women to compete, such competition is unfair to cisgender women, on the ground (unproven) that transgender women who have met the NCAA qualifications in terms of transition still retain a strength advantage from the years before they began hormone treatment for transition. In sports where it theoretically makes a difference, critics also point out the alleged height and reach advantages, with most of the attention there being focused on tennis and basketball.

U.S. DEPARTMENT OF LABOR – *BloombergLaw* reported on March 24 that the Office of Federal Contract Compliance Programs is going ahead with a plan to roll back a rule issued by the Office of Federal Contract Compliance Programs in the final weeks of the Trump Administration, expanding on religious exemptions from anti-discrimination requirements of federal contractors. The report indicated that OFCCP had sent a final version of a proposed new rule to the White House on March 23 for final approval before proposing it publicly.

ARKANSAS – On March 25, Governor Asa Hutchinson signed legislation that prohibits transgender women from competing in women's sports at all educational levels in both public and private schools, colleges and universities in the state. On March 26, the governor signed a bill that allows health care providers to refuse to provide care if they have religious or moral objections to doing so. The governor and legislature of Arkansas are determined to make the state as hostile to LGBT people as possible, probably because of a desire to encourage LGBT youth to leave the state when they grow up, thus impoverishing the life of the jurisdiction. On March 29, the legislature sent to Gov. Hutchinson a bill that would "ban access to gender-affirming care for transgender minors, including reversible puberty blockers and hormones," according to an *NBC News* report. The bill, which the governor eventually vetoed on April 5, was called "Arkansas Save Adolescents from Experimentation Act." "If House Bill 1570 becomes law, then we are creating new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters involving young people," Hutchinson said. The governor said the bill "would be and is a vast government overreach" and cited opposition to the legislation from leading Arkansas medical associations. But the next day the Republican-controlled legislature overrode the veto, making

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Arkansas the first state to prohibit health care workers from providing medically necessary care to transgender youth. The ACLU was preparing to sue to block the measure, which would not take effect until sometime during the summer. *Associated Press*, April 6.

KENTUCKY – On March 22, the city of Crescent Springs enacted a Fairness Ordinance that includes sexual orientation and gender identity. The measure covers employment, housing, and public accommodations. The city council's vote was unanimous, making their city the 21st municipality in Kentucky to ban discrimination on these grounds. The state legislature continues to resist expanding state law protections to LGBTQ people. *Fairness Campaign Press Release*.

MASSACHUSETTS – On March 8 the city of Cambridge enacted a multi-partner domestic partnership ordinance. The ordinance is based on a draft produced by the Polyamory Legal Advocacy Coalition and was said to be more flexible than an ordinance enacted last year in Somerville.

MISSISSIPPI – Governor Tate Reeves signed into law the measure barring transgender girls and women from competing in women's sports, whose legislative passage we reported in the March issue of *Law Notes*. Because discrimination against transgender people is considered to be "fair" in Mississippi, the measure is called the Mississippi Fairness Act. Said the Governor, "I proudly signed the Mississippi Fairness Act to ensure young girls are not forced to compete against biological males." *New York Times*, March 11. This, of course, reflects the rejection by social conservatives of gender identity claims, as these people conceptualize transgender women as biological males masquerading as women. (Refer back to the way the funeral homeowner in *R.G. & G.R. Harris Funeral Homes v. EEOC* characterized Aimee Stephens.) There is no proof that transgender girls and women have a categorical advantage over cisgender women in athletic competition when the transgender girls and women have transitioned through hormone treatment and (in the case of adults) gender confirmation surgery, but this is a frequently-recited trope by advocates of barring transgender girls and women from competing as women, dating back to the 1970s when Renee Richards won her litigation against the U.S. Tennis Association in a Manhattan trial court. The phobics who lost out on the marriage equality debate have shifted their main attention to getting transgender girls and women banned from athletic competition, with bills introduced in dozens of states.

NEW JERSEY – On March 3, Governor Phil Murphy signed into law the so-called "LGBTQ Senior Bill of Rights," a measure intended to address the particular issues faced by LGBTQ seniors in long-term care facilities. Discrimination because of LGBTQ or HIV status is outlawed, same-sex couples have a right not to be separated, and various other frequently encountered difficulties are addressed. The measure will be codified in Title 26 of the Revised Statutes, and goes into effect 180 days after enactment.

NEW YORK – The State Senate has approved S78A, a bill introduced by out Senator Brad Hoylman (D-Manhattan), which would designate older LGBTQ people and seniors living with HIV/AIDS as among persons "of greatest social need" under the Older Americans Act of 1965, a federal statute that channels funding to state programs for the elderly. The federal law specially seeks to identify individuals whose access to services has been impeded for social or cultural reasons and to make special efforts to identify and provide services to such people. The measure now goes to the Assembly. The affirmative vote in the Senate was overwhelming, with only five Republicans voting no. *Gay City News*, March 19. * * * A group of non-binary New York residents has filed suit against the state in an attempt to have it modify all application forms for state benefits or services to provide the possibility for applicants to have a "third choice" besides male or female when requested to identify their gender. Filed by the New York Civil Liberties Union and Legal Aid of New York, the complaint names as lead defendant the state's Office of Temporary and Disability Assistance (OTDA), and several other agencies, as well as Governor Mario Cuomo. An Associated Press report of March 29 says that New York City officials have been asking the state to make such modifications.

NORTH CAROLINA – The North Carolina Department of Public Instruction notified school districts on March 12 that the Department's "PowerSchool student information system will be modified to show a "preferred name" that will be used on most documents generated by the Department but not, unfortunately, on official student transcripts. This is an advance in the sense that it will allow students to be identified in the system by the name they prefer rather than the name on their birth certificate. But it falls short of being fully supportive, since transgender graduates need to have official transcripts in the name in which they are living, in accordance with revised birth certificates, legal name changes, driver's licenses and passport. The main reason one needs a transcript is to support a job application. What will potential employers think

when somebody presents a transcript bearing a different name from all their other legal identification? This will "out" them to potential employers. The education folks need to think this through more fully.

SOUTH DAKOTA – South Dakota followed Mississippi's lead (see above) in banning transgender girls and women from participating in women's sports. The legislature passed a bill that would prohibit such participation from K through college. Governor Kristi Noem, a Republican (of course), was unhappy with how the measure dealt college, fearing the NCAA would boycott the state, so she sent the bill back to the legislature. When the Republican-controlled legislature refused to modify the bill, she took matters into her own hands, issuing two executive orders on March 30 ordering that transgender girls be barred from participating in women's sports. The question whether the governor can do this by executive order is likely to be challenged in court by the state's ACLU chapter. * * * On March 13, Governor Noem signed Senate Bill 124, a Religious Freedom Bill that frees South Dakota residents and businesses from the obligation to comply with state and local laws based on their "purported religious beliefs." *HRC Press Release*, March 13. Since South Dakota's civil rights law does not ban discrimination against LGBT people, the measure does not really change things for LGBT people denied housing, employment, or public accommodations in South Dakota, with the exception of the city of Brookings, which adopted a comprehensive civil rights ordinance in 2018. Because of the U.S. Supreme Court's *Bostock* decision, however, employers subject to Title VII of the Civil Rights Act of 1964 may not discrimination because of sexual orientation or gender identity, and the state's Religious Freedom Law has no effect on that. But we wait for the other shoe to drop on the federal Religious Freedom Restoration Act's effect on LGBT discrimination claims.

TENNESSEE – Governor Bill Lee signed into law on March 26 a measure that prohibits transgender girls from competing in women's sports competition, although as of present there are no transgender girls in Tennessee asking to engage in such activities. * * * The legislature is considering a bill that would grant cisgender students the right to refuse single-sex facilities with transgender students, and to demand accommodations from their schools. One opponent of the measure estimated that it would cost Tennessee school districts as much as $1.5 billion to undertake the construction of single-user restrooms, locker rooms, etc., in order to accommodate cisgender students who seek to exercise their rights under the measure. *Nashville Tennessean*, March 10. Rep. Jason Zachary, R-Knoxville, and Sen. Mike Bell, R-Riceville, are sponsors of the measure, which was approved by a House subcommittee on March 9. The legislature is also considering a measure that would require schools to give parents at least 30 days' notice of any instruction mentioning LGBT issues, so that the parents can demand that their children opt out of such instruction. Ignorance is definitely bliss in Tennessee.

VIRGINIA – On March 31, Governor Ralph Northam signed into law House Bill 2132, sponsored by Delegate Danica Roem, which effectively abolishes the so-called "gay panic defense" in Virginia, joining a dozen other states that have passed similar legislation. Under this defense, defendants argue that they should not be held liable (or the liability should be excused) because of the actual or perceived sexual orientation of the victim of their actions.

LAW & SOCIETY NOTES

By Arthur S. Leonard

The **UCLA WILLIAMS INSTITUTE** reports: "A new analysis of data from the U.S. Citizenship and Immigration Service (USCIS) finds an estimated 11,400 applications for asylum on the basis of LGBT status were filed in the U.S. between 2012 and 2017. Three out of four LGBT asylum seekers were male, and more than half were from the Northern Triangle region of Central America: El Salvador, Honduras, and Guatemala."

During February 2021, the **AMERICAN PSYCHOLOGICAL ASSOCIATION** published a formal statement concerning purported therapies to change a person's gender identity (Gender Identity Change Efforts, or GICE). At the heart of the statement was the following: "any behavioral health or GICE effort that attempts to change an individual's gender identity or expression is inappropriate."

DR. RACHEL LEVINE made history on March 24, becoming the first openly transgender person to be confirmed by the United States Senate as a presidential appointee. She will serve as Assistant Secretary for Health in the Department of Health and Human Services, after having played a leading role in Pennsylvania's response to the COVID-19 pandemic as Secretary of Health, and she had previously served as that state's Surgeon General. She is a graduate of Harvard College and Tulane Medical School and is a professor of pediatrics and psychiatry at Penn State College of Medicine. Dr. Levine won the votes of all 50 Democrats & Independents as well as two Republican Senators, Susan Collins and Lisa Murkowski. All the male Republican

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Senators voted against her despite her sterling credentials, but that does not surprise anybody.

RODRIGO HENG-LEHTINEN will become Executive Director of the National Center for Transgender Equality this summer, upon the retirement of founding executive director **MARA KEISLING**. NCTE serves as a political voice for the transgender community in Washington. Heng-Lehtinen, a transgender man, has been serving as deputy Executive Director of the organization. He is the son of former Representative Ileana Ros-Lehtinen of Florida, one of the few Republican members of Congress who had co-sponsored the Equality Act and spoken out in support of the legal rights of LGBT people.

The White House announced that **REGGIE GREER** has been appointed to be the president's Director of Priority Placement at PPO and Senior Advisor on LGBTQ Issues in the Office of the President. Greer was Director of Constituent Engagement at Victory Institute until joining the Biden presidential campaign in March 2020. Greer will by the Administration's top liaison to the LGBT Community with responsibility to oversee implementation of the pro-LGBTQ rights agenda of the Biden Administration.

INTERNATIONAL NOTES

By Arthur S. Leonard

CHINA – A student was appalled to find a psychology textbook stating that homosexuality is a "mental disorder," and decided to do something about it. She used the publisher, but the district and appeals courts both found that there was a difference of opinion, not a factual error, in the textbook, ruling in favor of the publisher. The student, Ou Jiayong, is now employed as a social worker in Hong Kong, and has vowed to keep up pressure to try to get this reference eliminated from a textbook that is used in many Chinese educational institutions. *South China Morning Post*, March 2.

EUROPEAN PARLIAMENT – On March 11 the European Parliament voted by a ratio of about 2-1 to declare the entire European Union to be an "LGBT Freedom Zone." This is in response to moves by Polish municipalities to declare themselves to be LGBT-free zones (implausibly, of course, since LGBT people are everywhere, regardless of what local laws might proclaim). *Associated Press*, March 11.

EUROPEAN UNION – Reuters (March 22) reported that the European Union has imposed sanctions on two Russian in connection with the persecution of LGBT people in Chechnya. Reuters reported: "The EU blacklisted Aiub Vakhaevich Kataev, a senior official at the Russian Internal Affairs Ministry in Chechnya, and Abuzaid Dzhandarovich Vismuradov, deputy prime minister of the Chechnya region and the commander of a special security unit that the EU said was responsible for persecution." The article also noted Vismuradov had previously been sanctioned by the United States for this activity, while Katev had been sanctioned for other activities.

HUNGARY – When Hungary passed a law in May 2020 prohibiting the recognition of gender change, it made the measure retroactive, purporting to cancel any recognition of people whose gender had changed prior to the enactment of the law. But on March 12, Hungary's Constitutional Court ruled that such retroactive invalidation was unconstitutional. *Reuters*, March 12.

INDIA – A lesbian woman forced by her family to marry a man managed to escape their home on March 7, obtain the services of a non-governmental organization, and obtain an order on March 10 from Justice Mukta Gupta of the Delhi High Court, directing that she be protected and be able to obtain a dissolution of her marriage. "An adult woman cannot be forced to stay with her marital or parental family against her wishes," wrote Justice Gupta. *LiveLaw.In*, March 10.

ITALY – While not issuing merits rulings in favor of LGBT parental rights, the Italian Constitutional Court declared that the Parliament needs to address the status of LGBT parents on March 2. According to a report by Agence France-Presse, "The court issued rulings in two separate cases, relating to a lesbian couple who had children using medically-assisted reproduction abroad, and to two men in a civil partnership who had a child via surrogacy in Canada." The court opined that "the children's rights were not sufficiently protected, and that parliament needed to pass a law to rectify the situation." *AFP*, March 3.

JAPAN – Groups of same-sex couples have filed lawsuits in several major Japanese cities, challenging the refusal of the country to allow same-sex marriages. On March 17, they achieved their first victory in Sapporo District Court, with a ruling that refusing to allow same-sex marriages violates the constitutional rights of LGBT people. Although the court declined to award damages demanded by the plaintiff couples, the ruling throws down the gauntlet to the government and may be persuasive to judges in the other pending lawsuits. Judge Tomoko Takebe

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wrote: "Legal benefits stemming from marriages should equally benefit both homosexuals and heterosexuals." The court said that "sexuality, like race and gender, is not a matter of individual preference, therefore prohibiting same-sex couples from receiving benefits given to heterosexual couples cannot be justified," reported the Associated Press, based on an English-language summary of the decision. Reported AP: "Chief Cabinet Secretary Katsunobu Kato told reporters that the government disagreed with Wednesday's ruling. He said the government seeks to achieve a society more tolerant to diversity but did not say how it would respond to the ruling, except that it will watch pending court cases." Presumably, the government could appeal this ruling, or sit back and wait to see what other courts say.

MEXICO – Journalist Rex Wockner reported on April 1 that a judge in Baja California issued an injunction on March 30 ordering state officials to "proceed with the adoption" of a child by Victor Manuel Aguirre Espinoza and Victor Fernando Urias Amparo, the first same-sex couple to be married in Baja California. The petition for adoption had been pending before the state's System for the Integral Development of the Family for several years without a decision.

POLAND – The government announced on March 11 that single adults who apply to adopt children will be investigated to determine that they are not gay or living with a same-sex partner. Under Polish law, opposite-sex couples (regardless of whether married to each other) and single people an adopt children. The announcement puts Poland on a collision course with the European Union, but then all of Poland's policies regarding LGBTQ people are inconsistent with European law and regulations. *Reuters*, March 11.

PROFESSIONAL NOTES

By Arthur S. Leonard

The Honorable **PAUL FEINMAN,** age 61, retired from the New York Court of Appeals effective March 23, 2021 for undisclosed health reasons, and passed away on March 31. No immediate announcement was made of the cause of death. The Court of Appeals is New York's highest court. Judge Feinman was the first out gay person to serve on that court, having been appointed by Governor Andrew Cuomo in 2017 after qualification through a merit screening process. He had previously been a law secretary to a Supreme Court Justice, an elected Judge of the New York City Civil Court, an Acting and then an elected Justice of the New York Supreme Court, serving as a trial judge in New York County, and then served as a Justice of the Appellate Division, First Department, by designation of Governor David Paterson. He was a former president of the LGBT Bar Association of Great New York and served as president of the International Association of LGBT Judges from 2008 to 2011. He was a brilliant jurist and a warm and caring human being and will be greatly missed by many.

SPECIALLY NOTED

'They Certainly Don't See Trans People as People': Trans Lawyers Discuss Their Fight for Acceptance in the Legal Industry [VIDEO], By Law.com Contributing Editors, March 11, 2021. Law.com and its affiliated on-line publications posted an hour+ video about the experiences of transgender people in the legal profession, including judges, practitioners, and legal academics.

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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. 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.