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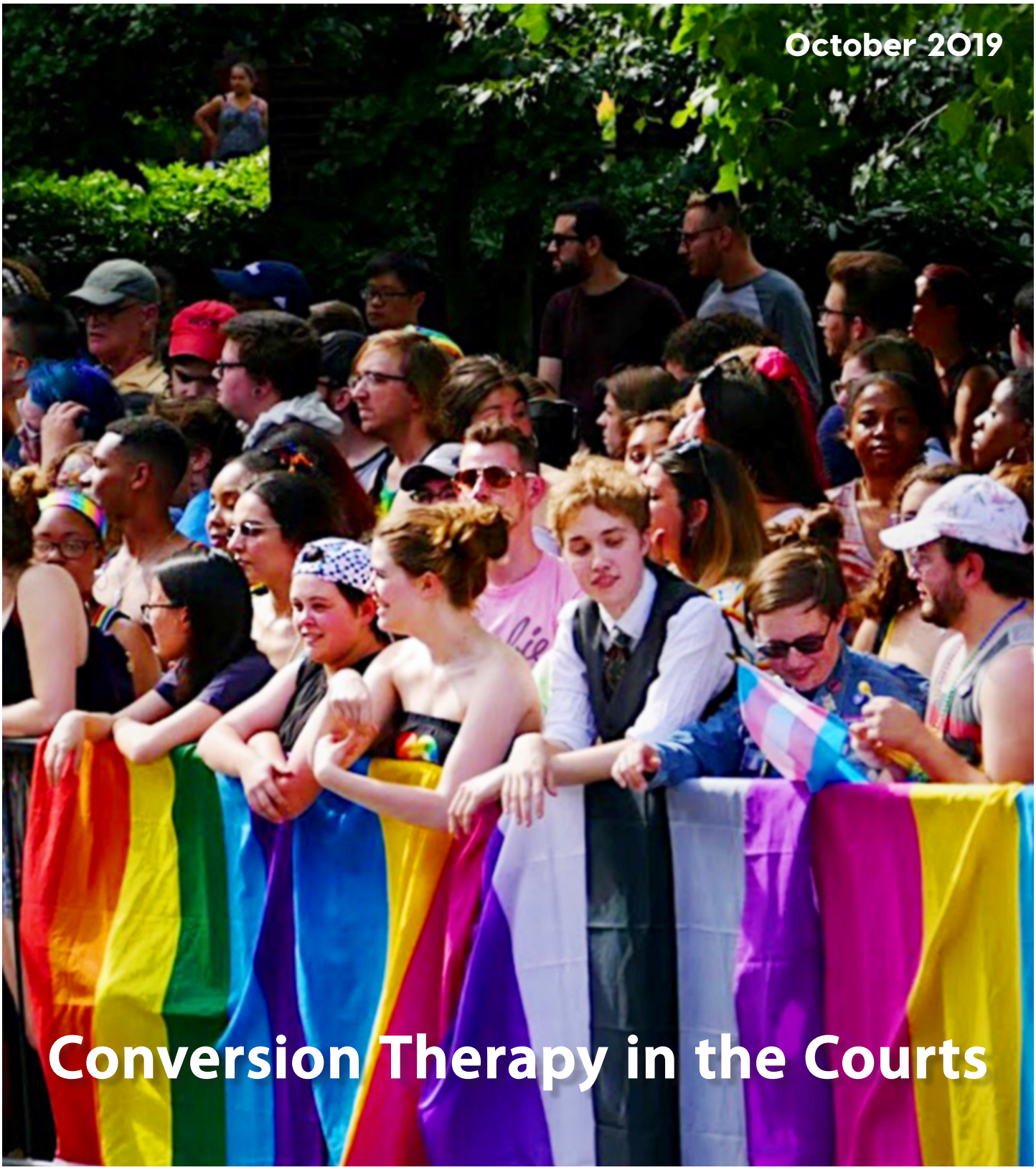
LAW NOTES



October 2019

Conversion Therapy in the Courts

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LAW NOTES

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Federal Court Dismisses Challenge to Maryland Law Against Conversion Therapy for Minors

By Arthur S. Leonard

On September 20, U.S. District Judge Deborah K. Chasanow of the federal district court in Maryland granted that state's motion to dismiss a lawsuit brought by Liberty Counsel on behalf of a conversion therapy practitioner who was challenging the state's recently enacted law that provides that "a mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor." The ban is enforceable through the professional licensing process enforced by the Department of Health and Mental Hygiene. The named defendants are Governor Larry Hogan and Attorney General Brian Frosh. The case is *Doyle v. Hogan*, 2019 WL 4573382, 2019 U.S. Dist. LEXIS 160709 (D. Md., Sept. 20, 2019).

The plaintiff, Christopher Doyle, argued that the law violates his right to freedom of speech and free exercise of religion, seeking a preliminary injunction against the operation of the law while the litigation proceeds. Having decided to dismiss the case, however, Judge Chasanow also denied the motion for preliminary relief as moot. Liberty Counsel immediately announced an appeal to the U.S. Court of Appeals for the 4th Circuit, which has yet to rule on a constitutional challenge against a conversion therapy ban.

Several U.S. Circuit courts have rejected similar challenges. The New Jersey statute, signed into law by Governor Chris Christie, was upheld by the 3rd Circuit Court of Appeals, which ruled that the state has the power to regulate "professional speech" as long as there was a rational basis for the regulation. *King v. Governor of New Jersey*, 767 F. 3d 216 (3rd Cir. 2014). The California statute, signed into law by Governor Jerry Brown, was upheld by the 9th Circuit, which characterized it is a regulation of professional conduct with only an incidental effect on speech, and thus not subject to heightened scrutiny by the court. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2015). Liberty Counsel is also appealing a similar ruling by a federal court in Florida to the 11th Circuit.

The task of protecting statutory bans on conversion therapy against such constitutional challenges was complicated in June 2018 when U.S. Supreme Court Justice Clarence Thomas, writing for the Court in a 5-4 decision involving a California law imposing certain notice requirements on licensed and unlicensed pregnancy-related clinics, wrote disparagingly of the 3rd and 9th Circuit conversion therapy opinions. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). The California statute required the clinics to post notices advising customers about pregnancy-related services, including family planning and abortion, that are available from the state, and also required non-licensed clinics to post notices stating that they were not licensed by the State of California. The clinics protested that the statute imposed a content-based compelled speech obligation that violated their free speech rights and was subject to "strict scrutiny." Such speech regulations rarely survive a strict scrutiny constitutional challenge.

The Supreme Court voted 5-4 to reverse a decision by the 9th Circuit, which had ruled that the notices constituted "professional speech" that was not subject to "strict scrutiny." In so doing, Justice Thomas rejected the idea that there is a separate category of "professional speech" that the government is free to regulate. He asserted that "this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'"

"Some Court of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules," Thomas observed, citing among examples the 3rd Circuit and 9th Circuit conversion therapy cases. "These courts define 'professionals' as individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.' 'Professional speech' is then defined as any speech by these individuals that is based on '[their] expert knowledge and judgment,' or that is 'within the confines of [the] professional relationship,'" this time quoting from the 3rd Circuit and 9th Circuit opinions. "So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny," again citing the 3rd and 9th Circuit cases.

After reiterating that the Supreme Court has not recognized a category of "professional speech," Thomas does concede that there are some circumstances where the court has applied "more deferential review" to "some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech," and that "States may regulate professional conduct, even though that conduct incidentally involves speech." But, the Court concluded, neither of those exceptions applied to the clinic notice statute.

As a result of Justice Thomas's comments about the 3rd and 9th Circuit cases, when those opinions are examined on legal research databases such as Westlaw or Lexis, there is an editorial indication that they were "abrogated" by the Supreme Court. Based on that characterization, Liberty Counsel sought to get the 3rd Circuit to "reopen" the New Jersey case, but it refused to do so, and the Supreme Court declined Liberty Counsel's request to review that decision.

Liberty Counsel and other opponents of bans on conversion therapy have now run with this language from Justice Thomas's opinion, trying to convince courts in new challenges to conversion therapy bans that when the practitioner claims that the therapy is provided solely through speech, it is subject to strict scrutiny and likely to be held unconstitutional. The likelihood that a law will be held unconstitutional is a significant factor in whether a court will deny a motion to dismiss a legal challenge or to grant a preliminary injunction against its enforcement.

Liberty Counsel used this argument to attack conversion therapy ordinances passed by the city of Boca Raton and Palm Beach County, both in Florida, but U.S. District Judge Robin Rosenberg rejected the attempt in a ruling issued on February 13, holding that despite Justice Thomas's comments, the ordinances were not subject to strict scrutiny and were unlikely to be found unconstitutional. She found that they were covered under the second category that Justice Thomas recognized as being subject to regulation: where the ordinance regulated conduct that had an incidental effect on speech. *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019).

Liberty Counsel argued against that interpretation in its more recent challenge to the Maryland law. It argued in its brief, "The government cannot simply relabel the speech of health professionals as 'conduct' in order to restrain it with less scrutiny," and that because Dr. Doyle "primarily uses speech to provide counseling to his minor clients, the act of counseling must be construed as speech for purposes of First Amendment review."

The problem is drawing a line between speech and conduct, especially where the conduct consists "primarily" of speech. Judge Chasanow noted that the 4th Circuit has explained, "When a professional asserts that the professional's First Amendment rights 'are at stake, the stringency of review slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional conduct' on the other," continuing: "Because the state has a strong interest in supervising the ethics and competence of those professions to which it lends its imprimatur, this sliding-scale review applies to traditional occupations, such as medicine or accounting, which are subject to comprehensive state licensing, accreditation, or disciplinary schemes. More generally, the doctrine may apply where 'the speaker is providing personalized advice in a private setting to a paying client.'"

And, quoting particularly from the 3rd Circuit New Jersey decision, "Thus, Plaintiff's free speech claim turns on 'whether verbal communications become 'conduct' when they are used as a vehicle for mental health treatment."

Judge Chasanow found that the Maryland statute "obviously regulates professionals," and although it prohibits particular speech "in the process of conducting conversion therapy on minor clients," it "does not prevent licensed therapists from expressing their views about conversion therapy to the public and to their [clients]." That is, they can talk about it, but they can't do it! "They remain free to discuss, endorse, criticize, or recommend conversion therapy to their minor clients." But, the statute is a regulation of treatment, not of the expression of opinions. And that is where the conduct/speech line is drawn.

She found "unpersuasive" Liberty Counsel's arguments that "conversion therapy cannot be characterized as conduct" by comparing it to aversive therapy, which goes beyond speech and clearly involves conduct, usually involving an attempt to condition the client's sexual response by inducing pain or nausea at the thought of homosexuality. She pointed out that "conduct is not confined merely to physical action." The judge focused on the goal of the treatment, reasoning that if the client presents with a goal to change their sexual orientation, Dr. Doyle would "presumably adopt the goal of his client and provide therapeutic services that are inherently not expressive because the speech involved does not seek to communicate [Doyle's] views."

She found that under 4th Circuit precedents, the appropriate level of judicial review is "heightened scrutiny," not "strict scrutiny," and that the ordinance easily survives heightened scrutiny, because the government's important interest in protection minors against harmful treatment comes into play, and the legislative record shows plenty of data on the harmful effects of conversion therapy practiced on minors. She notes references to findings by the American Psychological Association Task Force, the American Psychiatric Association's official statement on conversion therapy, a position paper from the American School Counselor Association, and articles from the American Academy of Child and Adolescent Psychiatry and the American Association of Sexuality Educations, Counselor, and Therapists. Such a rich legislative record provides strong support to meet the test of showing that the state has an important interest that is substantially advanced by banning the practice of conversion therapy on minors.

Having reached this conclusion, the judge rejected Liberty Counsel's argument that the ban was not the least restrictive way of achieving the legislative goal, or that it could be attacked as unduly vague. It was clear to any conversion therapy practitioner what was being outlawed by the statute, she concluded.

Turning to the religious freedom argument, she found that the statute is "facially neutral" regarding religion. It prohibits all licensed therapists from providing this therapy "without mention of or regard for their religion," and Liberty Counsel's Complaint "failed to provide facts indicating that the 'object of the statute was to burden practices because of their religious motivation.'" She concluded that Doyle's "bare conclusion" that the law "displays hostility toward his religious convictions is not enough, acting alone, to state a claim" that the law violates his free exercise rights. She also rejected the argument that this was not a generally applicable law because it was aimed only at licensed practitioners. Like most of the laws that have been passed banning conversion therapy, the Maryland law does not apply to religious

counselors who are not licensed health care practitioners. Because the law is enacted as part of the regulation of the profession of health care, its application to those within the profession is logical and has nothing to do with religion. As a result, the free exercise claim falls away under the Supreme Court's long-standing precedent that there is no free exercise exemption from complying with religiously-neutral state laws.

Having dismissed the First Amendment claims, Judge Chasanow declined to address Liberty Counsel's claims under the Maryland Constitution, since there is no independent basis under the court's jurisdiction to decide questions of state law.

Joining the Office of the Maryland Attorney General in defending the statute were FreeState Justice, Maryland's LGBT rights organization, with attorneys from the National Center for Lesbian Rights and Lambda Legal. Also, the law firm of Gibson Dunn & Crutcher of Washington, D.C., submitted an amicus brief on behalf of The Trevor Project, which is concerned with bolstering the mental health of LGBT youth.

Senior District Judge Chasanow was appointed to the court by President Bill Clinton in 1993. ■

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D.C. Federal Court Narrows Discovery in Trans Military Case, But Rejects Government's Broad Privilege Claims

By Arthur S. Leonard

U.S. District Judge Colleen Kollar-Kotelly, ruling in the first of four pending lawsuits challenging the current version of the military policy on transgender service, issued a wide-ranging ruling on September 13 attempting to settle some of the remaining problems in deciding what information the plaintiffs are entitled to obtain through discovery as the case continues. The case, renamed since President Trump was removed as a defendant and James Mattis quit as Defense Secretary, is now called *Jane Doe 2 v. Mark T. Esper*, 2019 WL 4394842, 2019 U.S. Dist. LEXIS 156803 (D.D.C., September 13, 2019). Judge Kollar-Kotelly's ruling came just ten days after U.S. District Judge George L. Russell, III, issued a ruling addressing similar discovery controversies in another of the challenges to the transgender ban, *Stone v. Trump*, 2019 U.S. Dist. LEXIS 149918, 2019 WL 4168889 (D. Md., September 3, 2019), which is reported separately in the following article.

The decision makes clear that the court has rejected the government's argument that the so-called "Mattis Plan," implemented in April 2019 after the Supreme Court voted to stay the preliminary injunctions that had been issued by the district courts, is entitled to virtually total deference from the court, thus precluding any discovery into how the Mattis Plan was put together, allegedly by a task force of experts convened by Defense Secretary James Mattis in response to the president's request for a plan to implement the total ban on transgender service that he announced by tweet in July 2017. The government has rejected that characterization, contending, without proof, that the expert panel derived from a decision by Secretary Mattis in June 2017 to reconsider the entire issue of military service by transgender people, and thus ordinary deference to military decision-making should govern the court's decision on the merits of the challenge.

When Trump came into office, transgender people were serving openly in the military as a result of a policy announced at the end of June 2016 by President Obama's Defense Secretary, Ashton Carter. The Carter policy lifted the existing ban on open transgender military service, but delayed lifting the ban on enlistment of transgender people for one year. The first move by the Trump Administration concerning this policy was Secretary Mattis's announcement at the end of June 2017 that he would not lift the enlistment ban until January 2018 in order to make sure that all necessary policies were in place to evaluate transgender applicants for enlistment.

A few weeks later, catching just about everybody by surprise, President Trump tweeted his announcement of a total ban on transgender people serving in uniform. A White House memorandum issued in August 2017 amplified the policy statement, delaying enlistment of transgender people indefinitely, but allowing those already in the military to continue serving until March 2018 while Secretary Mattis came up with an "implementation plan" to recommend to the president.

Starting in August 2017 and continuing into the fall, four lawsuits were filed in federal district courts around the country challenging the constitutionality of the ban as announced by the President. Federal district judges issued preliminary injunctions in all four lawsuits while denying the government's motion to dismiss the cases, setting the stage for discovery to begin. Discovery is the phase of a lawsuit during which the parties can request information, testimony and documents from each other in order to build a factual record for the decision of the case, and under federal discovery rules, anything that may be relevant to decide the case may be discoverable, subject to privileges that parties may

assert. Discovery was delayed, however, as the government filed appeals of the preliminary injunctions and the denial of its dismissal motions. Furthermore, the government was clearly stalling on discovery in anticipation of the Mattis implementation plan, which it expected could be crafted in ways that might undermine the plaintiffs' legal claims.

In February 2018, Secretary Mattis released a report, purportedly compiled by a task force of senior military personnel and experts whom Mattis did not identify, discussing transgender military service and recommending a policy that differed in many respects from the absolute ban Trump had announced. Those familiar with transgender legal issues, especially as they have been discussed in policy papers and journal articles produced by conservative opponents of transgender rights, noted that the anonymous report seemed to be recycling many arguments contained in such publications, leading to the suspicion that the conservative think-tanks had played a role in producting the report, and making it understandable that the government was opposing attempts to discover how the report was compiled and by whom.

Under this policy described in the report, the enlistment ban would be relaxed for transgender people who have not been diagnosed with gender dysphoria and who are willing to serve in their gender as identified at birth. The policy would allow transgender people who were serving to continue doing so, with certain restrictions. Those who were transitioning as of the date the policy was implemented would be allowed to complete their transition and serve in their desired gender. Otherwise, transgender personnel would have to serve in their gender as identified at birth, and would be separated from the service if they were diagnosed with gender dysphoria. Nobody would be allowed to initiate transition while in the military once this policy was implemented. There was no guarantee that transgender personnel would be allowed to re-enlist at the end of their enlistment terms unless they met the same standards as new applicants. In short, the proposed policy would allow some transgender people to serve, but not all who were otherwise qualified, and would place certain restrictions on those who were allowed to continue serving. Various aspects of the policy had some resemblance to the "don't ask, don't tell" policy regarding service by gay people that was in effect from 1993 through 2011, which it was lifted by the Defense Department after the lame-duck Congress passed the DADT Repeal Act late in 2010. Once again, a class of individuals, this time defined by their gender identity, would be allowed to serve as long as they did not insist on living consistent with their gender identity, just as gay people were allowed to serve so long as they conducted themselves in such a way that the military could pretend that they were straight.

Trump's response to the report was to follow Mattis's recommendation that he revoke his prior policy announcements and authorize Mattis to implement what became known as the Mattis Plan. However, as all the preliminary injunctions were still in place, the government concentrated on moving to get the preliminary injunctions dissolved or withdrawn, and trying to convince the district judges to dismiss the cases on the ground that the policy they were attacking no longer existed (and had never actually been implemented due to the injunctions). The district judges resisted this move, finding that the new plan appeared on its face to continue discriminating against transgender people, some appeals were taken to the courts of appeals, and ultimately the Mattis Plan was implemented more than a year after it was proposed, when the Supreme Court cut through the procedural difficulties and ruled, without a written opinion, that the Mattis Plan could go into effect while the lawsuits continued.

The focus of the lawsuits now switched to challenging the constitutionality of the Mattis Plan through amended complaints, and the parties went back to battling about discovery after it was clear that the district courts would not dismiss these lawsuits merely because one discriminatory plan had been substituted for another. Although some transgender people can serve under the Mattis Plan, the Plan still discriminates both against transgender people who have been diagnosed with gender dysphoria and against those who have not been so diagnosed, by requiring them to forego obtaining a diagnosis and transitioning if they want to enlist or continue to serve.

One of the issues for Judge Kollar-Kotelly was deciding whether the government was correct to argue that because the Mattis Plan resulted from a Task Force study and recommendation process, it was therefore entitled to standard military deference, under which courts disclaim the power to second-guess the personnel policies that the military adopts. The government focused particularly on a concurring opinion by Judge Stephen Williams in the D.C. Circuit panel opinion that had quashed the preliminary injunction in this case. Williams argued that the plaintiffs were not entitled to discovery of documents and testimony related to the "deliberative process" by which the Mattis Plan was devised, because the Plan was a military policy entitled to deference from the court.

The judge responded that whether the Mattis Plain is entitled to standard military deference remains the open question in the case, rejecting the contention that any plan adopted by the military is automatically entitled to deference. She found that Judge Williams was alone in his view, as the other two members of the D.C. Circuit panel, faithful to Supreme Court precedents, had not opposed discovery, finding that the deference question turned on whether the Mattis Plan is "the result of reasoned decision-making" that relates to military readiness concerns. If, as the plaintiffs suspect and have argued all along, Trump's motivation in banning transgender military service was motivated by politics, not by any evidence that the Carter policy had harmed the military by allowing unqualified people to serve, it would not be the result of "reasoned decision-making" and thus not entitled to deference.

Agreeing with the plaintiffs, Judge Kollar-Kotelly wrote that she could not decide the appropriate level of deference (or non-deference) without access to information about how the Mattis Plan was devised. Thus discovery should continue, focusing on that. However,

she rejected the plaintiffs' argument that they should be allowed to conduct discovery on Mattis's initial decision to delay enlistments for six months, or on the process by which Trump formulated the July 2017 total ban announced in his tweet and elaborated in the White House's August 2017 memorandum. Those, she found, are no longer relevant when the focus of the lawsuit has shifted to the constitutionality of the Mattis Plan.

As to that, however, the judge ruled that the government's attempt to shield access to relevant information under the "deliberative process privilege" was not applicable to this case. Just as the current state of the record is inadequate to determine the level of deference, discovery of the deliberative process by which the Mattis Plan was devised is necessary to determine whether it is the "result of reasoned decision-making."

The judge reviewed a checklist of factors created by the D.C. Circuit Court of Appeals in earlier cases to determine whether the deliberative process privilege should be set aside in a particular case, and found that the plaintiffs' requests checked all the necessary boxes. The information is essential to decide the case, it is not available otherwise than from sources controlled by the government, and the court can use various procedures to ensure that information that needs to be kept confidential can be protected from general exposure through limitations on who can see it, known as protective orders and controlled access to the lawyers litigating the case. Furthermore, the parties can apply to the court for a determination of whether any particular document need not be disclosed in discovery on grounds of relevance or executive privilege.

The government was particularly reluctant to comply with the plaintiffs' request for "raw data and personnel files." The plaintiffs sought this in order to determine whether the claims about negative aspects of transgender service made in the Task Force Report are based on documented facts, especially the claims in the Report that allowing persons who have been diagnosed with gender dysphoria to serve will be harmful to military readiness because of limitations on deployment during transitioning and geographical limitations on deployment due to ongoing medical issues after transition. Critics have pointed out that the Report seems to be based more on the kind of propaganda emanating from anti-transgender groups than on a realistic appraisal of the experience in the military since Secretary Carter lifted the former ban effective July 1, 2016. Since transgender people in various stages of transition have been serving openly for a few years, there are medical and performance records that could be examined to provide such information, but the government has been refusing to disclose it or provide evidence that such data was seriously examined by the task force, claiming both that it raises privacy concerns and that disclosure is unnecessary because the Mattis Plan is entitled to deference as a military policy.

The judge found that it should be possible for these records to be disclosed to plaintiffs' counsel by redacting individually identifying information and imposing limitations on who can see the information and how it can be used. Thus, the privacy concerns raised by the government should not be an impediment. This information, once again, is obviously very relevant to the question whether the statements about the service qualifications of transgender people are based on biased opinions rather than facts, thus discrediting the claim that the policy is the result of reasoned decision-making. And this information goes to the heart of the equal protection challenge being posed by the plaintiffs, which has already survived multiple motions to dismiss because of its obvious plausibility.

The Trump Administration's strategy in this, as in many other ongoing lawsuits concerning controversial policy decisions, has been to fight against discovery at every stage and to appeal every ruling adverse to them, including trying to "jump over" the courts of appeals to get the Supreme Court to intervene on the government's behalf, now that Trump has succeeded in fortifying the conservative majority on the Court with the additions of Justices Gorsuch and Kavanaugh. It would not be surprising if the government seeks to appeal Judge Kollar-Kotelly's ruling to the D.C. Circuit once again to put off (perhaps permanently) the day when they will have to give up the identities of the Mattis Task Force members and open the books on how this policy – obviously political in its conception and implementation – was conceived. One of their grounds for appeal might be that there are differences in the latest discovery orders in this case, in *Stone v. Trump*, pending in the U.S. District Court in Baltimore, Maryland, and *Karnoski v. Trump*, pending in the U.S. District Court in Seattle, Washington, meaning some of the materials being requested by the plaintiffs could be discoverable in one of the cases but not in the others. Actually, it would probably make practical sense for all four pending cases to be consolidated into one, with one unified discovery process, but that may not be feasible in light of the amount of litigation that has already occurred in each of the cases over the past two years.

If the White House changes hands in January 2021, a Democratic president could reverse the ban in any of its forms with a quick Executive Order restoring Secretary Carter's policy from 2016. As the four lawsuits continue to be bogged down in discovery disputes, as the Justice Department continues to seek interlocutory appeals in order to put off disclosing any documents that could be used to discredit the process by which the Mattis Plan was devised, that may be the way this story eventually ends. If Trump is re-elected, the story continues to drag out while the Mattis Plan stays in place, and eventually there may need to be a Supreme Court decision parsing the issues of the deliberative process privilege as it may apply in the context of a constitutional challenge to facially discriminatory military personnel policy, in which determining whether the policy was a function of politics rather than facts about military readiness goes directly to the question of whether courts should defer to the government in determining the constitutional question.

The plaintiffs in this case are represented by a growing army of volunteer big firm attorneys and public interest lawyers from GLAD (GLBTQ Legal Advocates & Defenders) and the National Center for Lesbian Rights. ■

Baltimore Federal Court Reaffirms Magistrate's Findings in Trans Military Case, but Revises Approach to Deliberative Privilege Evaluation of Plaintiffs' Discovery Requests

By Arthur S. Leonard

U.S. District Judge George L. Russell, III, issued a new ruling in *Stone v. Trump*, 2019 U.S. Dist. LEXIS 149918, 2019 WL 4168889 (D. Md., Sept. 3, 2019), which seems likely to prolong the discovery process even further than had already been the case. At issue is the standard for evaluating deliberative privilege claims by the Defendants regarding several categories of discovery demands by the plaintiffs, seeking evidence concerning the government's motivation in adopting the ban on transgender military service. The ultimate issue in the case is whether the transgender ban, first tweeted by Trump in July 2017 and subsequently modified along lines recommended by Defense Secretary Mattis in February 2018, violates the constitutional rights of transgender people serving in the military or seeking to enlist. Since the main doctrinal contention is intentional discrimination because of gender identity in violation of the 5th Amendment, the government's reason for adopting the ban are the central issue in the case. The ban went into effect in April 2019 after the Supreme Court granted a motion by the government to stay the preliminary injunctions issued by the district courts pending a final resolution of the merits, but the litigation continues in the district courts as to the unconstitutionality of the ban.

The district court assigned the task of evaluating challenged discovery requests in the case to a magistrate judge, A. David Copperthite, on May 4, 2018. The plaintiffs subsequently filed a discovery demand seeking deliberative materials regarding (1) President Trump's July 2017 Tweets and the August 2017 Memorandum; (2) the Panel set up by Defense Secretary Mattis pursuant to the August 2017 Memorandum to devise an implementation plan; and (3) the Implementation Plan and President Trump's acceptance of the Implementation Plan. The plaintiffs also sought a judicial determination of the various privilege claims asserted by the defendants concerning an Army PowerPoint presentation that had been "inadvertently produced" and that defendants sought to "claw back" on the theory that it was protected by deliberative process privilege. The magistrate issued an Opinion and Order largely granting the plaintiffs' motion to compel, rejecting deliberative process privilege on the ground that government intent "is at the very heart of this litigation." At the same time, the magistrate granted a protective order as to the President but not as to individuals with whom the President communicates. (This protective order was later clarified to apply to documents both from and to the President.) The magistrate ordered the Defendants to produce the three categories of documents Plaintiffs had demanded, but stayed discovery pending the court's resolution of Defendant's motion to dismiss Trump as a party. The Defendants filed objections to the order, of course, and sought a stay of discovery pending the trial court's ruling on the objections. The parties jointly sought a suspension of various discovery deadlines pending resolution of these contested issues.

On November 30, 2018, the court overruled the Defendants' objections, approving the magistrate's conclusion that the deliberative process privilege did not apply to documents that plaintiffs requested "because the government's intent is at the heart of the issue in this case." The court also overruled Defendants' objections to key factual findings by the magistrate judge: (1) the Panel would not have existed but for President Trump's Tweets (thus rejecting Defendants' argument that Mattis had taken steps to completely reconsider the issue of transgender service policy before Trump tweeted his ban), (2) the circumstances surrounding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy, and (3) the Implementation Plan bans transgender persons from military service. The court found that these were reasonable findings and supported by evidence in the record. However, the court decided to stay enforcement of this order pending a ruling by the U.S. Court of Appeals for the 9th Circuit on similar contested discovery issues in *Karnoski v. Trump*, another of the trans military cases. At the time, it was expected that a ruling would be forthcoming in *Karnoski* shortly. But the 9th Circuit panel in *Karnoski* apparently struggled with the issues, as it did not announce its ruling until June 16, 2019, see 926 F.3d 1180. In that ruling, the 9th Circuit panel rejected the district court's approach of applying a uniform analysis to all the materials sought by plaintiffs, suggesting that each category, and in some cases each document depending upon its source, required a separate analysis of the balancing factors to determine whether privilege claims were overcome by the Plaintiffs' legitimate litigation needs.

Then the Defendants filed a motion with Judge Russell arguing that he should reconsider his November 30, 2018, discovery ruling in light of the 9th Circuit's *Karnoski* decision. In his September 3, 2019, ruling, Russell agreed with Defendants that reconsideration was merited, and sent the discovery issues back to the magistrate judge, with orders to undertake a more "granular" privilege analysis along the lines prescribed by the *Karnoski* court in its remand to the federal district court in Seattle. He wrote, "the Court will amend its November 30, 2018 Order to sustain Defendants' Objections to the USMJ's conclusion regarding the deliberative process privilege . . . The USMJ shall give due consideration to whether a document or category of documents requires greater deference depending on who is involved." Such a granular

analysis of a large quantity of documents is likely to be very time-consuming.

At the same time, however, Judge Russell gave the Defendants a setback by refusing to reconsider the three factual findings that he had affirmed when he overruled the Defendants' earlier objections. This is significant because it goes directly to the relevance of the requested documents, a key factor in the privilege analysis. First, the government has been arguing that the Mattis Plan shifts the basis for the ban from gender identity to gender dysphoria, thus from a status to a medical condition, which would change the tenor of the equal protection analysis. "While the Implementation Plan may not ban all transgender persons from military service," wrote Russell, "it does ban individuals based on their transgender status. Thus, the Implementation Plan does indeed ban transgender persons from military service." Russell also reiterated his approval of the finding that there was no showing of changed circumstances regarding military readiness and deployability between 2016 and 2018 that would warrant the creation of a new transgender service policy, and found "no reason to disturb" the magistrate's finding that the Panel that produced the Mattis Plan would not have been formed if not for Trump's unilateral tweets of July 2017, keeping in play the question of Trump's intention as relevant to evaluating the constitutionality of the Mattis Plan. (By contrast, D.C. District Court Judge Colleen Kollar-Kotelley has acceded to the government's request to limit discovery to devising of the Mattis Plan, in the absence of a finding in her case that the Panel would not have exited but for Trump's July 2017 tweets.)

The Defendants also demanded a further stay of discovery until all issues are resolved regarding privilege claims. Rather than grant an open-ended stay, Russell gave Defendants 48 hours to seek a stay from the 4th Circuit pending any petition for a writ of mandamus. Meanwhile, the case docket reflects considerable filings since the September 3 order, suggesting that some sort of activity is going forward in the case.

The ACLU and cooperating attorneys from Covington and Burling are representing the plaintiffs. ■

Fifth Circuit Evades Answering Whether Sexual Orientation Is Protected Under Title IX In Light Of Straight Student's Suicide After University's Disciplinary Actions

By David Escoto

The U.S Court of Appeals for the 5th Circuit affirmed a district court's grant of summary judgment in favor of the University of Texas at Arlington (UTA). This case arises out of a Title IX dispute regarding the disciplinary action against Thomas Klocke, a straight student who, before taking his own life, was accused of harassing Nicholas Watson, a gay student in his class. Plaintiff, the father and administrator of the estate of Thomas Klocke, contends that UTA pre-judged Klocke's guilt of harassing Watson based on Klocke's status as a straight male aggressor. *Klocke v. Univ. of Texas*, 2019 U.S. App LEXIS 27242, 2019 WL 4263499. In this opinion, Circuit Judge Stephen A. Higginson dodges the issue of whether discrimination on the basis of sex under Title IX includes discrimination on the basis of sexual orientation.

In May 2016, Klocke and Watson were both enrolled in an accelerated two-week summer course at UTA. On May 14, Watson reported to UTA administrators that he felt threatened by Klocke and would not return to class if Klocke were present. According to Watson's account of events, the two students were sitting next to each other in class when Klocke typed on his computer "gays should die," and showed it to Watson. Watson typed back, "I'm gay," to which Klocke verbally responded, calling Watson a "faggot." Watson told Klocke, "I think you should leave." Klocke said, "I think you should consider killing yourself." Klocke changed seats about an hour later.

Heather Snow, Dean of Students, referred the issue to Student Conduct Officer Dan Moore. Moore reached out to Klocke informing him that Moore was investigating whether Klocke violated UTA's Student Code of Conduct. Moore barred Klocke from attending class and contacting other students in the class. Klocke requested more information and that he be allowed to return to class. However, when Moore and Klocke spoke over the phone on May 20, Klocke did not dispute the allegations. Moore spoke with Watson and Watson informed Moore that he relayed the events to his professor, Dwight Long, in an email and passed a note to a fellow classmate. Moore confirmed that the same series of events had been conveyed to both Long and the student.

On May 23, Klocke and Moore met in person. At this meeting, Klocke denied Watson's series of events and alleged his own. Klocke said that Watson called him "beautiful" in a flirtatious manner and he responded by typing, "Stop-I'm straight." Watson persisted by glancing at Klocke; Klocke again told Watson to stop. Klocke confirmed that it was Watson who told Klocke to leave, and he changed seats sometime later. However, Klocke claimed that the reason for the move was because Watson was laughing and using his phone in a distracting way.

Moore noted that during this meeting with Klocke, Klocke would repeatedly reference what appeared to be a script or an outline. Further, Klocke would pause for a long period of time to reference his outline or script when asked follow-up questions. The court notes an example, where Klocke said he feared his accuser, but when Moore asked why, Klocke could not elaborate beyond saying he was just scared. Moore found that Klocke's responses lacked substance. At the end of their meeting, Moore told Klocke that he could work with other students in a group project capacity and arrangements would be made for him to take an upcoming exam in a separate room, however, Klocke would still be barred from attending class.

Moore then interviewed the classmate who was sitting closest to Watson. The classmate did not hear the conversation but noted that both students looked tense. Also, contrary to Klocke's account, the classmate had not noticed Watson being a distraction. The classmate also noted they had asked Watson what occurred when Klocke moved seats. Watson wrote a note to the classmate that lined up with Watson's account of events.

Moore concluded Watson's account of events was "more believable" and Klocke should be held responsible for harassment. Moore contacted Long to make accommodations for Klocke to finish the course without attending class. At their final meeting, Moore explained to Klocke that he was being held responsible for the harassment, would not be allowed to attend class, but would be allowed to complete the course with Long's accommodations. Klocke and Watson were also mutually prohibited from contacting each other. Klocke was informed that his disciplinary record would reflect Moore's conclusion, but his academic transcript would be unaltered. For the next week, Klocke completed assignments despite not going to class, worked on a group project with other classmates, and met individually with Long. Klocke killed himself on June 2, 2016, with a gun he had purchased on May 20.

Wayne Klocke, Klocke's father and the administrator of his Estate, filed a Title IX claim alleging that UTA's disciplinary actions were motivated by gender bias. Specifically, Klocke was presumed guilty of harassment based on his gender and sexual orientation. The Estate sought damages for the "suffering and anguish" Klocke experienced before his death. The district court granted UTA's motion for summary judgment, concluding that the Estate failed to identify any evidence pointing to intentional discrimination that would warrant a private Title IX claim for damages.

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or setting receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX is enforceable through an implied private right of action where monetary damages are available. The court notes that there are generally two categories in which a plaintiff contending a university's disciplinary actions on gender-based discriminatory grounds will fall. First, is that the disciplinary action had an "erroneous outcome" and that a gender bias was a motivating factor in the erroneous finding. The claims in the second category allege "selective enforcement." This means that regardless of the guilt or innocence of the accused, the accused's gender affected the decision to initiate the investigation and/or severity of the punishment.

To succeed in alleging an erroneous outcome, a plaintiff must point to particular facts that sufficiently cast articulable doubt on the disciplinary proceeding's outcome. Additionally, a causal connection between the flawed outcome and the gender bias must also be demonstrated. The Plaintiff argues that Moore's conclusion was based on an acknowledged lack of evidence. Moore sent Snow emails that do show reservations about the situation. Specifically, the emails indicate that the adjacent student only overheard "I think you should leave," the disparities between the two accounts, and whether this was enough to keep Klocke out of class. Despite these reservations, the court found that Moore considered several other aspects of the issue, making his statements about reservations "insufficient to raise a triable issue as to erroneous outcome."

Moore's other considerations included Watson's consistent story told to Moore, Long and the other student, the perception of Watson's genuine fear in their meetings, and Klocke's reliance on a script and inability to meaningfully answer follow-up questions. The court also points to Moore's common sense, suggesting "that a person whose flirtation is rejected would not tell the other person to leave and then fabricate and widely circulate a story about being threatened by that person." Lastly, there was no information that Moore uncovered that corroborated Klocke's version of events nor did the Estate point to any leads that Moore should or could have persued. The court found that Moore's conclusion followed his development of a meaningful record.

The court went on to discuss whether a gender bias motivating the outcome existed. As noted above, the Estate argues that gender bias can be inferred from the fact that Watson was gay and received preferential treatment over Klocke, who was straight. The court then evades a discussion of whether discrimination on the basis of sexual orientation is included in the protection of discrimination on the basis of sex because "no such bias can be inferred." The court then cites to *Wittmer v. Phillips*, 66 Co. 915 F.3d 328, 330 (5th Cir. 2019), for this proposition. *Wittmer* is a peculiar case to draw an inference from because it involves a transgender employee's failure to establish a prima facie case of discrimination under Title VII; a separate statute. In *Wittmer*, the 5th Circuit evades expanding Title VII to protect against discrimination based on transgender status because Wittmer failed to provide evidence that any non-transgender employees were treated better, and the employer provided a non-discriminatory reason for their actions, which Wittmer failed to show was pretextual.

The court's evasiveness here, regardless of the facts and outcome, is indicative of their reluctance to expand protections under Title VII or Title IX. In both *Klocke* and *Wittmer*, the 5th Circuit never reaches the issue of whether sexual orientation or transgender status falls under the protection from discrimination on the basis of sex because "no bias can be inferred." Specifically, with *Klocke*, it is unclear whether the court is saying no gender bias can be inferred because sex and sexual orientation are unrelated, or under the specific facts, Plaintiffs did not provide enough evidence to show a sexual orientation bias existed. The lack of clarity is quite worrisome.

The court in *Klocke* then goes on to find that UTA had reasonable and non-discriminatory reasons to exclude

Klocke from class instead of Watson. For one, Klocke was alleged to have made derogatory and physically threatening remarks. Despite allegedly making Klocke uncomfortable, Watson's alleged conduct was neither of those. The Estate argues that Watson sexually harassed Klocke. However, absent actions that "unreasonably interfere with that individual's education . . . or participation in University activities or create an intimidating hostile, or offensive environment," Moore reasonably concluded that calling someone "beautiful," with glances, did not amount to sexual harassment under UTA's policy. The Estate further contends that Moore's treatment of Watson's allegations as harassment and not sexual harassment robbed Klocke of the procedural benefit of a hearing before a neutral decision maker. As noted, UTA's distinction between sexual harassment and harassment led Moore to reasonably conclude that sexual harassment was not at issue.

The court concludes its opinion quickly dismissing the "selective enforcement" claim. The court notes that the Estate's evidence pointing to female students who were investigated for misconduct but still allowed to attend class did not convince the court that similarly situated females were treated more favorably than Klocke. UTA's statistics regarding men and women found to be responsible for harassment did not establish a systematic gender bias; the percentages were relatively close together. The court also does away with the Estates' retaliation claim because no further evidence was presented that would support a retaliation claim.

Wayne M. Klocke is represented by Kenneth B. Chaiken of Chaiken & Chaiken, P.C., in Plano, Texas, and Jonathan Tad Suder of Friedman, Suder & Cooke, P.C. in Fort Worth, Texas. UTA is represented by Sean Pattrick Flammer, Assistant General Counsel at the University of Texas System, and Assistant Attorney General Henry Carl Myers. ■

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

Federal Court Enjoins Michigan Policy Requiring Faith-Based Adoption Agencies to Certify Same-Sex Couples as Suitable Adoptive or Foster Parents

By Arthur S. Leonard

Chief U.S. District Judge Robert J. Jonker ruled that a faith-based adoption and foster care agency should not be endangered with loss of its license to function as a certified child placement agency under contract with the state of Michigan while a lawsuit proceeds challenging the state's current interpretation of its non-discrimination law resulting from the settlement agreement between the state and some same-sex couples in a separate case. *Buck v. Gordon*, 2019 U.S. Dist. LEXIS 165196, 2019 WL 4686425 (W.D. Mich., Sept. 26, 2019).

The ruling follows a complicated series of events and is based on a detailed review by the court of the systems and procedures in place for adoption and foster care in Michigan.

According to Judge Jonker's opinion, a Michigan regulation and the federal law under which financial assistance is channeled to Michigan to support the state's adoptive and foster-care system requires that people seeking to be certified as qualified to be adoptive or foster parents not be subjected to discrimination because of sexual orientation or gender identity, among many prohibited grounds of discrimination.

Because some of the private agencies under contract with the state to provide these services are "faith-based" agencies whose religious views would prevent them from certifying single people or same-sex couples as qualified, and the state legislature did not want to see such agencies abandon the field, the state enacted a statute in 2015 allowing faith-based agencies to refer applicants to other agencies to perform the evaluation process and issue the certifications if the agency's religious beliefs would prevent them from being able to certify an applicant or couple.

Some same-sex couples challenged this "religious freedom" statute as violating their constitutional rights in *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich., filed Sept. 20, 2017). The state defended the statute, and St. Vincent Catholic Charities, a long-time faith-based provider of such services, was drawn into the case, because the same-sex couples had approached St. Vincent and were referred elsewhere for their home study and certification. After out lesbian Dana Nessel was elected Attorney General, during a campaign in which she criticized the state law which, which she said was authorizing discrimination against LGBT people, she changed the state's position, and her office negotiated a settlement under which the state undertook to enforce the anti-discrimination rules without any exception for faith-based agencies.

St. Vincent, whose contract with the state covering adoption services expires September 30, 2019, was warned that unless it dropped its policy of referring same-sex couples to other agencies, its contract might not be renewed, which would mean not only the loss of state money but the loss of its status as a contracted services provider, which meant it could no longer function in the adoption placement service. Its contract for foster care services runs through September 30, 2021, so is not in immediate danger of non-renewal.

In this lawsuit, St. Vincent and some of the foster and adoptive parents who have worked with it in the past brought suit challenging the state's action, seeking the protection of the statute that was challenged in the earlier case, and a declaration that any requirement for St. Vincent to drop its objection to examining and certifying same-sex prospective adoptive or foster parents would violate the 1st and 14th Amendments. In addition to naming state officials, the lawsuit

names the U.S. Secretary of Health and Human Services, as federal non-discrimination regulations are also implicated. As a result, the lawsuit also rests on the federal Religious Freedom Restoration Act.

As Judge Jonker describes the system, although St. Vincent routinely refers same-sex couples to other agencies for certification, once an individual or couple are certified to be adoptive or foster parents, they may adopt or foster through St. Vincent. St. Vincent has placed children with same-sex couples, and opens the various supportive services it provides to adoptive and foster families of such couples. The only issue as to which there is disagreement between St. Vincent and the state, according to their Complaint, is the issue of evaluating the prospective parents and certifying them.

Judge Jonker concluded that in light of these facts, St. Vincent should be entitled to a preliminary injunction while the case is being litigated, with the pressing deadline of September 30 for renewal of their current contract as an adoption service provider looming just days after the injunction was issued.

The first essential test for injunctive relief is whether St. Vincent is likely to be successful in their claim of a constitutional violation. Finding that this test was met, the judge said that this case is not covered by Supreme Court precedents holding that no religious exemption is required when a challenged law is neutral with respect to religion and is of general applicability, of which the leading case is *Employment Division v. Smith*, 494 U.S. 872 (1990). Taking account of the historical background to the challenged policy here, the judge found that "the historical background, specific series of events, and statements of Defendant Nessel all point toward religious targeting."

Reviewing the sequence of events described above, he found that "the 2018 campaign for Michigan Attorney General and General Nessel's statements create a strong inference that the State's real target is the religious beliefs and confessions of St. Vincent, and not discriminatory conduct." He based this conclusion on St. Vincent's allegation that it "has never prevented a same-sex couple from fostering or adopting a child." If St. Vincent was required to accept applications from same-sex couples and carry out its evaluation, it would be put to the task of stating whether the couple should be certified to be adoptive or foster parents, a determination that it would want to make in accord with its religious principles, which would mean denying the certification. Instead, St. Vincent makes referrals of such couples to other agencies, knowing that those agencies will certify the couples if they meet the objective criteria specified by state regulations.

Furthermore, he appointed out, under the system in Michigan, children who need an adoptive or foster placement are referred to contracted agencies through the Michigan Adoption Resource Exchange (MARE) and, he found, "St. Vincent has actually placed children though the MARE system with same-sex adoptive parents." Once a prospective couple has been certified, St. Vincent avows, they are treated the same as any other certified couple with regard to all its adoption and fostering placements and services.

"The State is willing to prevent St. Vincent from doing all this in the future simply because St. Vincent adheres to its sincerely held religious belief that marriage is an institution created by God to join a single man to a single woman," he wrote. "Because of that religious belief, St. Vincent says it cannot in good conscience review and certify an unmarried or same-sex parental application. St. Vincent would either have to recommend denial of all such applications, no matter how much value they could provide to foster and adoptive children; or St. Vincent would have to subordinate its religious beliefs to the State-mandated orthodoxy, even though the State is not compensating them for the review services anyway." St. Vincent makes referrals of single folks and same-sex couples to other agencies to avoid being put into this quandary.

The court notes that until Attorney General Nessel took office, the state had been defending this practice in the prior litigation, and Nessel's rhetoric during the campaign convinced the judge that the settlement of the *Dumont* lawsuit and the agreement to enforce the non-discrimination policy against all contracting agencies showed that the new policy is targeting religion even though it appears neutral on its face.

Judge Jonker determined that this is a "strict scrutiny" case because it targets religious belief, and that under this demanding test, the new policy is likely to be held unconstitutional. He also found that this case was materially distinguishable from the Philadelphia case decided by the 3rd Circuit Court of Appeals earlier this year, *Fulton v. City of Philadelphia*, 922 F.3d 140 (2019), because of differences in the facts: the Catholic agency in Philadelphia was refusing to deal with same-sex couples at all, while St. Vincent refers them to other agencies for certification, and once they are certified, will place children with them and provide supportive services.

The court also determined that the balance of harms as between issuing or not issuing the injunction weighed in favor of issuing it, against both the state and the federal government, because of the possibility (remote, it would seem) that the Trump Administration would cut off funds to a state that has passed a law allowing faith-based agencies to abstain from providing some services based on their religious beliefs. As to the public interest, the court found that it is in the interest of the public not to shut down any adoption or foster care agencies in light of the significant number of children in Michigan that need placements and the supportive services that St. Vincent provides, including to same-sex couples and their adoptive or foster children.

The court rejected the state's argument that these issues had already been decided in *Dumont* in favor of applying the non-discrimination policy to all agencies. The judge pointed out that *Dumont* was settled by the parties after Nessel changed the state's position. There was no judgment on the merits by the court, so there was no final judgment determining the underlying legal issue and no reason to find the issue *res judicata*.

The court's use of the Supreme Court's *Masterpiece Cakeshop* ruling in rendering this decision is noteworthy. In *Masterpiece*, the Supreme Court refrained from ruling on the underlying

constitutional question whether a baker has a 1st Amendment right to decline to produce custom wedding cakes for same-sex couples, instead ruling for the baker based on the Court's detection in the record of overt hostility to religion by some of the members of the Colorado civil rights commission that was deciding that case at the administrative level. Since then, several lower courts have focused on the Supreme Court's "hostility to religion" language, and Judge Jonker does in this case, finding that Nessel's "hostility to religion" expressed during her election campaign feeds into the question whether the state's current position targets religion, even though the policy is facially neutral, applying the non-discrimination policy to all adoption and foster care services, not just faith-based ones.

Judge Jonkin prefaced his opinion with a careful statement about what was not at issue. "This case is not about whether same-sex couples can be great parents," he wrote. "They can. No one in the case contests that. To the contrary, St. Vincent has placed children for adoption with same-sex couples certified by the State." To the judge, this case was about whether St. Vincent can continue to operate in a way consistent with the religious creed to which it subscribes, or whether it must violate those religious beliefs if it is to continue providing adoption and foster care services.

The Becket Fund for Religious Liberty of Washington D.C. provided legal representation to the plaintiffs and St. Vincent. Michigan's Department of the Attorney General represented the state defendants, and the U.S. Justice Department represented the federal defendants. The plaintiffs in *Dumont v. Gordon*, Kristy and Dana Dumont, were represented as amici by attorneys from the ACLU and *pro bono* counsel from Sullivan & Cromwell LLP.

Although this was just a ruling on a preliminary injunction, it signals quite clearly that Judge Jonker's final ruling on the merits is likely to go the same way. The State could appeal the ruling to the 6th Circuit Court of Appeals. Judge Jonker, who is the chief judge for the Western District of Michigan, was appointed by President George W. Bush in 2007. ■

Ninth Circuit Denies Asylum and Torture Convention Relief to Gay Haitian Man

By Bryan Xenitelis

The U.S. Court of Appeals for the Ninth Circuit has denied the petition for review of the denial of a gay Haitian man's asylum and Convention Against Torture ("CAT") claims in *Geffrard v. Barr*, 2019 U.S. App. LEXIS 27687, 2019 WL 4391227 (9th Cir., September 13, 2019).

Petitioner claimed he was visiting with a friend when an angry mob "murdered his boyfriend by stoning him and hitting him with batons" and later attacked him with a knife before he fled Haiti. He sought refuge in the United States. As noted (but not explained) in the decision, it would appear that the Petitioner had firmly resettled in a third country after leaving Haiti but before arriving in the United States to seek asylum. Upon his entry to the United States, he stated to Customs and Border Officials that he did not fear returning to Haiti, but he later sought asylum, withholding of removal and CAT relief.

An Immigration Judge ruled that his claims were unfounded based on three inconsistencies: 1) his testimony regarding the date of his attack; 2) whether he and his boyfriend were "out"; and 3) the fact he initially stated he was unafraid to return to Haiti. The Board of Immigration Appeals affirmed the denial and Petitioner timely filed a petition for review with the Ninth Circuit Court of Appeals.

A 2-1 majority of a 9th Circuit panel denied the petition for review. The panel noted that the standard of review demanded reversal of the lower decision only if "the evidence not only supports a contrary conclusion, but compels it." Citing agency deference, the panel found Petitioner's inconsistencies about the date of the attack and that he initially told a Customs and Border Patrol officer he did not fear persecution if returned to Haiti supported the Immigration Judge and Board's decision. The panel further found that while the Department of State Report for Haiti did mention abuses towards the LGBTI community, it did not "compel the conclusion that Petitioner would more likely than not be tortured" if returned to Haiti.

In a partial concurrence and partial dissent, Circuit Judge Mary H. Murguia noted that she agreed Petitioner was properly denied asylum, based upon having firmly resettled in a third country prior to entering the United States. However, with respect to the CAT claim, she found that Petitioner's written testimony regarding the date he was attacked versus his oral testimony was only four days apart, an inconsistency that she considered to be "trivial." She stated: "Other than mixing up the dates, Petitioner's rendition of the horrifying events leading to his flight from Haiti is consistent: Petitioner was visiting with a friend when an angry mob murdered his boyfriend . . . the mob found Petitioner at his mother's home and attempted to cut him with a knife; Petitioner survived because he fled to his brother's house." She asserted that "victims of abuse 'often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion.'" As per her dissent, Judge Murguia would have granted the CAT claim, but as the other two members of the panel denied all relief, the petition for review was denied.

Petitioner is represented by Esteban Martin Estrada, of Munger, Tolles & Olson LLP, Los Angeles, CA, and Paula M. Mitchell, of Loyola Law School, Los Angeles, CA. ■

Bryan Xenitelis is an attorney and an adjunct professor at NYLS

Alliance Defending Freedom Asks Supreme Court to Revisit Religious Exemption Issue

By Arthur S. Leonard

Alliance Defending Freedom (ADF), a religious freedom litigation group, is asking the Supreme Court to take a second look at *Arlene's Flowers v. State of Washington*, No. 19-333 (Docketed September 12, 2019), in which the Washington Supreme Court held that a florist who refused to provide her usual custom floral design and installation wedding services for a same-sex couple had violated the state's anti-discrimination law, and did not have a valid 1st Amendment defense. The Washington court's original decision was vacated by the Court in June 2018 for reconsideration in light of the Court's ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), but the Washington Supreme Court reiterated its earlier holding, 441 P.3d 1203 (Wash. 2019), finding that the record of proceedings in the Superior Court and the Supreme Court in the earlier litigation showed no evidence of hostility to religion and thus was not affected by the Supreme Court's ruling in *Masterpiece*.

The Petition proposes two questions for review: 1. Whether the State violates a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs; and 2. Whether the Free Exercise Clause's prohibition on religious hostility applies to the executive branch.

In the first question, the Petitioner asks the Court to take up the underlying constitutional issues in *Masterpiece Cakeshop*, which the Court evaded in its opinion, and to resolve them once and for all, pointing to litigation from around the country in which small businesses had declined to provide goods or services for same-sex weddings, based on the religious beliefs of the proprietors, and had been hauled into state human rights commissions or courts on charges of violating anti-discrimination laws. There have been mixed results in these cases. Beginning with a recalcitrant wedding photographer in New Mexico and continuing with cases involving bakers, florists, commercial wedding venues, stationers and videographers, administrative agencies and courts consistently ruled against allowing religious belief exemptions from generally-applicable anti-discrimination laws covering sexual orientation. However, more recently, there has begun what may be a pendulum swing in the opposite direction, sparked in part by persistent appeals by ADF from adverse administrative and trial court rulings in affirmative litigation seeking declaratory judgments to establish religious exemptions.

In *Masterpiece*, the Court found several grounds taken together upon which to reverse the Colorado Court of Appeals' ruling against the baker, most notably characterizing some public comments by Colorado commissioners that the Court found to evidence open hostility to the baker's religious views. The Court also noted an inconsistency in the Colorado Commission's dismissal of complaints against bakers by a religious provocateur who sought to order cakes decorated to disparage same-sex marriages and was turned down. The Court also noted that at the time the couple approach the baker, same-sex marriage was not yet legal in Colorado, so the baker could have believed he had no obligation to make such a cake. While reasserting the general principle that businesses do not enjoy a religious freedom exemption from complying with public accommodation anti-discrimination laws, the Court observed that litigations raising religion freedom claims are entitled to a "neutral" forum to decide their cases, not one evidencing hostility to their religious views.

In Arlene's Flowers, ADF had filed a statement with the Court after Masterpiece suggesting that evidence of hostility could be found in that case, and the Washington Supreme Court took the remand as a charge to scour the record for signs of such, which it did not find. The Washington court read Masterpiece to be focused solely on the hostility or non-neutrality of the forum deciding the case. That case did not involve a hearing before an administrative agency, as the first decision was by the trial court.

In its second proposed question, ADF argues that this was error by the Washington Supreme Court, contending that while the Masterpiece ruling was based on open hostility by commissioners, it could not properly be read to impose a ban on governmental hostility only on government actors performing the function of adjudicating cases. ADF argues that the Attorney General of Washington evinced hostility and discrimination against religion by seizing upon news reports to come down hard on the florist, threatening litigation if she did not certify that in future should would provide her services to same-sex couples for weddings, making public comments criticizing religious objection to providing such services, and failing to bring similar action based on news reports about a coffee-shop owner expelling "Christians" from his establishment "based on religious views they expressed on a public street." ADF also criticized as "unprecedented" the Attorney General's action in suing under the state's Consumer Protection Law as well as the anti-discrimination law.

The Petition's statement of facts is artfully written to suggest a saintly woman who loves gay people and happily sells them flowers for a variety of occasions, but just balks at providing custom weddings services based on her sincerely-held religious beliefs. It argues that there is no evidence in the record of hostility toward gay people by the florist, emphasizing the long relationship she had selling floral goods to the men whom she turned down for wedding-related services, and maintaining that she had not turned down their business because they were gay but rather due to her religious objections to their wedding, and trying to draw that

distinction as requiring dismissal of the discrimination complaint entirely.

The Petition argues that the Washington Supreme Court took too narrow a view of the Supreme Court's doctrine concerning the obligation of the government to refrain from hostility towards religion, pointing to cases where the Court had found legislatures as well as adjudicators to have violated the 1st Amendment, and argued that executives, such as the Attorney General, were no less bound by the First Amendment. The Petition builds on a recent ruling by the 8th Circuit in the videographer case reported last month, *Telescope Media Group v. Lucero*, 2019 WL 3979621 (Aug. 23, 2019), and seeks to position the Petitioner, a florist, in the same category of First Amendment expression. In effect, the Petition asks the Court to hold that any business that engages in creative expression for hire cannot be compelled to provide its services for an activity of which it disapproves on religious grounds.

Without making it a central part of the argument, the Petition notes several instances in which various members of the Court have suggested a need to reconsider its long-standing precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990), intimating that this is the ideal case to do so. That was the case that reversed decades of 1st Amendment free exercise precedents to hold that religious objectors do not enjoy a privilege to refuse to comply with religiously-neutral state laws of general application that incidentally may burden their free exercise of religion. *Employment Division* prompted Congress to pass the Religious Freedom Restoration Act, applying the pre-*Employment Division* caselaw to the interpretation of federal statutes, and leading many states to pass similar laws. A ruing overruling *Employment Division* and reinstating prior would law would, in effect, constitutionalize the Religious Freedom Restoration Act, making it more difficult in many cases for LGBTQ people suffering discrimination to vindicate their rights through legislative action, since the state and federal legislatures cannot overturn a Supreme Court constitutional ruling. ■

Federal Court Dismisses Parent's Constitutional Challenge to California Statute Banning Performance of Conversion Therapy in Licensed Community Care Facilities

By Arthur S. Leonard

U.S. District Judge John A. Mendez has dismissed a First and Fourteenth Amendment lawsuit against California Attorney General Xavier Becerra and State Department of Social Services Director William Lightbourne by Carlton Williams, the "custodial parent" of a child enrolled at River View Christian Academy (RVCA), in *Teen Rescue v. Becerra*, 2019 U.S. Dist. LEXIS 161130, 2019 WL 4511622 (E.D. Cal., Sept. 18, 2019).

Teen Rescue, a California-based religious organization, established and runs RVCA. Williams seeks declaratory and injunctive relief to bar the state from requiring RVCA to comply with the provisions of the California Community Care Facilities Act (CCFA). The CCFA was intended to establish "a coordinated and comprehensive statewide service system of quality community care for mentally ill, developmentally and physical disabled, and children and adults who require care or services by a facility or organization issued a license or special permit." Prior to 2016 amendments, RVCA was not subject to the CCFA, but the 2016 amendments changed the definition of a covered entity so as to extend to RVCA and other institutions providing similar services.

The state takes the position that RVCA is now subject to the CCFA, which requires that RVCA submit to the state a staff training "plan of operation" that includes training in "cultural competency and sensitivity in issues relating to the lesbian, gay, bisexual and transgender communities. It also gives students in such institutions a right "to be free from acts that seek to change his or her sexual orientation."

Judge Mendex focused on whether Carlton Williams has standing as a parent to challenge the application of the CCFA to RVCA on First Amendment free exercise and Fourteenth Amendment Due Process grounds, and concluded that he did not.

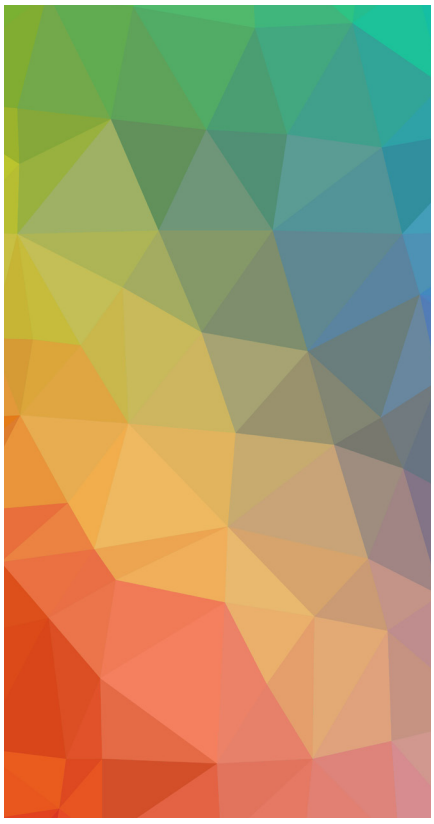
"Merely developing a plan to train RVCA staff . . . does not invade the First Amendment rights of RVCA parents," wrote Mendez, pointing out that the plan is to educate the staff, and does not require the staff "to teach students about these issues." Thus, this provision "does not affect Williams' child, let alone Williams himself, in a personal and individual way," wrote the judge.

Mendez also asserted that preventing a community care facility from practicing sexual orientation change efforts on its students "is not an invasion of the parents' First Amendment rights. The First Amendment gives Williams the right to believe and profess whatever religion he desires. If sending his child to an exclusively faith-based educational institution is an important part of Williams' faith," Mendez continued, "there is nothing in the CCFA that prevents him from doing so. The provision in the CCFA that bars conversion therapy applies only to facilities that are subject to the CCFA. Williams is free to enroll his child at a CCFA-exempt religious boarding school." In light of this, "any invasion of his First Amendment rights is too abstract to amount to an 'injury in fact." Further, Mendez found that the complaint as worded makes clear that application of the CCFA is directed at the institution, not at the parents of its students.

Williams also asserted a 14th Amendment Due Process right concerning his liberty interest in raising his child. Williams sought to bring

this case within the scope of *Meyer v. Nebraska*, 262 U.S. 390 (1923), which struck down a state law enacted during World War I banning teaching in the German language in any school in the state, whether public or private or religious, which the Court said could not be applied to a parochial school when parents who sent their children there sought to have them instructed in German. Judge Mendez said that CCFA did not apply to all child residential programs in California, just those requiring licenses for the provision of certain services by licensed practitioners, so its "application to RVCA does not meaningfully interfere with Williams' ability to raise his child in the way he sees fit," again depriving him of the injury in fact necessary to maintain his standing to sue. The court also dismissed some of the hypotheticals posed by Williams in support of his claim as unrealistic.

Williams is represented by Pacific Justice Institute, Sacramento, a non-profit religious advocacy group. Judge Mendez was appointed to the district court by President George W. Bush in 2008. ■



Federal Court Issues Preliminary Injunction against Enforcement of NYC Adult Establishment Zoning Regulations

By Arthur S.Leonard

Continuing litigation efforts that date back a quarter of a century, a group of "gentlemen's cabarets" (which the court alternatively describes as "strip clubs") and adult bookstores located in Manhattan have brought suit to challenge the constitutionality of 2001 Amendments to the NYC Zoning Resolution as applied to "adult establishments." Numerous prior assaults on this measure, first passed during the Giuliani Administration in an attempt by the City to sharply reduce the number of adult establishments and to relocate them away from residential districts or close proximity to religious institutions, schools and other places where minors tend to congregate, were largely unsuccessful once they proceeded to the appellate level. Surprisingly, however, given the City's earnest attempts to beat back all challenges, U.S. District Judge William H. Pauley III relates that the City has not actively enforced the Resolution for eighteen years – effectively since the end of the Giuliani Administration. Mayors Bloomberg and De Blasio turned their attentions elsewhere. But the plaintiffs are concerned with the measure still on the books and the possibility it might be enforced against them in the future – thus this lawsuit. *725 Eatery Corp. d/b/a "Lace" v. City of New York, 2019 WL 4744218, 2019 U.S. Dist. LEXIS 169873* (S.D.N.Y., Sept. 30, 2019).

In this ruling, Judge Pauley grants the plaintiffs' motion for a preliminary injunction against enforcement of the measure while the litigation goes forward on the merits. This is in some sense largely symbolic, in light of the City's prolonged failure to enforce the measure.

The list of counsel accompanying the opinion goes on for two pages, and the judge mentions that in connection with the pending motions, "the parties have offered a Homeric record of affidavits, documentary evidence, and stipulations." Most significant among the objections, perhaps, is that the Resolution was purportedly justified by a 1995 study of 'secondary effects' attributable to the presence of adult establishments, especially when several were located close together. The reality is that, as a result of early enforcement efforts during the Giuliani Administration together with economic, residential and commercial development activity in the City over the past twenty years, the studies are clearly out-of-date and no longer easily support the Council's conclusion that the rather drastic restrictions on the siting of adult establishments is still necessary in terms of public order and impact on property values. Enforcement under Giuliani reduced the number of adult establishments and led to many of them significantly modifying their activities to try to avoid being labeled as adult establishments.

As Judge Pauley explains: "Tracing its origins to the City's early 1990s crusade against adult entertainment businesses, this litigation has been ensnared in a time warp for a quarter century. During that interval, related challenges to the City's Zoning Resolution have sojourned through various levels of the state and federal courts." A major portion of the opinion is devoted to reciting in great detail the history of that litigation, from the initial 1995 enactment through the consequential 2001 amendments and a series of judicial decisions which culminated in a 2017 ruling by the New York Court of Appeals holding that the most recent version of the measure is constitutional, which was stayed until the Supreme Court denied review early in 2018. *For the People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340, 57 N.Y.S.2d 69, 79 N.E.3d 461 (N.Y. 2017).

This new law suit was brought by Manhattan establishments that would not be considered "adult establishments" under the 1995 Regulation (which was construed by the courts to exempt

establishments that devoted less than 40% of their space or stock to adult uses) but would be considered "adult establishments" under the 2001 amendments (which broadened coverage to deal with alleged "sham" reconfigurations that the City claimed had resulted in adult establishments continuing to operate while evading coverage). In this case, the plaintiffs alleged deprivations of their 1st and 14th Amendment rights, arguing that if the 2001 Amendment were actively enforced, they "would decimate – and have already dramatically reduced – adult-oriented expression." The plaintiffs pointed out, restricting themselves to Manhattan numbers, that "the fifty-seven adult eating or drinking establishments existing at the time the City adopted the 2001 Amendments have now been culled to as few as twenty such establishments. And for their part, the bookstore plaintiffs claim that of the roughly forty adult bookstores with booths that existed at the time of the 2001 Amendments, only twenty to twenty-five bookstores currently exist." They also pointed out that of these bookstores, virtually none are located in "permissible areas" under the 2001 Amendments. The bookstore plaintiffs also pointed out that if the City were to actively enforce the 2001 rules, there would be very few places in the City, much less Manhattan, where such businesses could operate, essentially reduced to "undeveloped areas unsuitable for retail commercial enterprises, such as areas designated for amusement parks or heavy industry or areas containing toxic waste." They also noted yet again that the study of "secondary effects" conducted by the City prior to enactment of the 1995 measure has never been updated, never been validated in light of the 40% rule, and had addressed a Cityscape radically different from what exists today.

In deciding whether to grant a preliminary injunction – and noting that the City is not actively enforcing the current regulations – the court addressed several crucial factors: whether enforcement would inflict an irreparable injury on the plaintiffs, the likelihood the plaintiffs would succeed on their constitutional arguments, the balance of hardship on the plaintiffs and the City, and the Public Interest.

First, Judge Pauley concluded, "assuming that the 2001 Amendments – which purportedly impose a direct limitation on speech – violate the Constitution, Plaintiffs have demonstrated irreparable harm." This conclusion was based on many court opinions finding that monetary damages are insufficient to compensate somebody for a loss of their constitutional rights.

Turning to likelihood of success on the merits, the judge found that the weak link in the defendants' opposition was the reduction of the number of locations where adult establishments could operate if the 2001 Regulations were enforced. Precedents require that any regulation of adult uses must, because of its impact on freedom of speech, leave "reasonable alternative channels" for the speech to take place and be heard. In other words, the zoning rules must allow enough appropriate locations so that adult businesses can operate and members of the public can access their goods and services. "On this preliminary record," wrote Pauley, "this Court is skeptical that the 2001 Amendments leave open sufficient alternative avenues of communication. With respect to the outer boroughs, the DCP [Department of Consumer Protection] generated a map for each borough identifying the areas allowing and prohibiting adult establishments as of October 31, 2019 . . . . Compared to the maps the DCP created in connection with the 1995 Regulations, the 2019 maps appear to offer slightly less available space for adult entertainment. But the City's maps do not seem to indicate how the amount of available land would be affected by the requirement that adult establishments be located at least 500 feet from sensitive receptors or other adult establishments." After a critical analysis of the evidence presented, Pauley concluded that "plaintiffs have sufficiently demonstrated at this stage that the enforcement of the 2001 Amendments will deny them adequate alternative channels to offer their adult expression."

Finally, the court determined "that the balance of hardships weighs in favor of Plaintiffs, and the issuance of preliminary injunctive relief would not disserve the public interest." The plaintiffs submitted affidavits showing that enforcement would cause them to lose their businesses, breaching contracts and leases, having to lay off employees, and suffering the financial and time costs of relocation. Furthermore, since the City has not been actively enforcing these rules for eighteen years, according to the court, a preliminary injunction would not result in any harm to the City. "While this Court credits Defendants' contention that the 2001 Amendments are designed to abate the pernicious secondary effects of adult establishments," wrote Pauley, "it also recognizes that the City 'does not have an interest in the enforcement of an unconstitutional law.'"

Pauley's concluding remarks leave little doubt about his skepticism about the further need for the adult zoning rules as last amended in 2001. "The adult-use regulations that are the subject of these now-revived constitutional challenges are a throwback to a bygone era," he wrote. "The City's landscape has transformed dramatically since Defendants last studied the secondary effects of adult establishments twenty-five years ago. As Proust might say, the 'reality that [the City] had known no longer existed,' and 'houses, roads, avenues are as fugitive, alas, as the years,'" quoting from *Remembrance of Things Past* (1913). But, the judge was careful to caution that this was not a final ruling on the merits, and that issuing the preliminary injunction "says nothing about whether Plaintiffs will in fact succeed on the merits of their claims." He set a status conference for October 31, and directed the parties to file a "joint status report" by October 24 "detailing their respective positions on how to proceed with the balance of this action." He also directed that they confer on a discover plan as the case moves forward. Of course, in light of the passage of time and the changes in the City, what would make sense would be for the City to negotiate a settlement that would involve substantial revisions to the adult-use zoning provisions to reflect the changed situation.

The number of law firms with a piece of this case is altogether too long to list here. ■

Federal Judge Denies HIV-Positive Inmate Protection of Medical Privacy

By William J. Rold

Davenport v. Nussbaumer, 2019 U.S. Dist. LEXIS 163808, 2019 WL 4678776 (E.D. N.C., Sept. 25, 2019), involves two consolidated cases about the medical privacy of HIV-positive inmate Travis Lamont Davenport, *pro se*. U.S. District Judge Louise Wood Flanagan grants summary judgment to defendants on all claims.

Davenport sought damages and injunctive relief. Judge Flanagan denies injunctive relief as mooted by Davenport's release from prison. The underlying facts supporting claims for damages arise from two clusters of events.

First, Davenport suffered chronic intestinal problems and diarrhea from his condition, and he went to sick call frequently. He alleges that medical staff told him to stop reporting "loose stools." One weekend, when nursing staff was short, a nurse posted a sign outside his jail cell asking, "in bright red handwriting," that guards "please document any reports of loose bowel movements." Davenport says that he was thereafter subjected to harassment and ridicule by staff and other inmates that lasted for months.

The second issue arose from the insistence of defendants that he complete a questionnaire detailing his medical complaints as a condition of going to sick call. Three of the defendants said that this was required, according to Davenport's affidavit. This resulted in communication of his HIV status to corrections officers, who then ridiculed him and subjected him to harassment. Davenport claimed that he became so upset from the harassment that he "jumped," injuring himself and resulting in a hospital emergency room visit.

Before turning to the merits, two procedural points:

Judge Flanagan denied Davenport's request for a subpoena for the hospital ER records, saying that it was not timely and that Davenport could request the records for himself, since they were about him. The case had already been delayed by both sides at this time. On Davenport's "right" to request his own records, Judge Flanagan cites no authority. Under HIPAA, hospitals treating prisoners at the behest of Corrections need *not* provide these patients with copies of their records under many circumstances. 45 C.F.R. § 164.524(a)(1)(ii). It also seems illogical that Davenport would file a motion on the docket if he could have obtained the records from Corrections or the hospital without a court order.

The second procedural point is that Judge Flanagan faulted Davenport for not filing "Exhibits 1 through 6" to his affidavit. He explained in his affidavit that they were grievance documents about the subject incidents and that *the prison would not let him copy them for filing*. He said they were available upon "direction of the court." Judge Flanagan does not comment on this statement, but she considered medical records submitted by defendants and other documents about the incidents, along with their affidavits in support of summary judgment.

It is not clear whether these procedural errors (if they were) made any difference in the qualified immunity analysis supporting summary judgment, but they are unfortunate.

On the merits, Judge Flanagan found no clearly established law on inmate privacy, so the government officer defendants are entitled to qualified immunity. She said there was no Fourth Circuit case on point and compared conflicting rulings from other circuits, citing *Powell v. Schriver*, 175 F.3d 107, 109, 112 (2d Cir.1999), and *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994). She also found that the Fourth Circuit has not recognized a cognizable claim for verbal abuse, citing *Jackson v. Holley*, 666 F. App'x 242, 244 (4th Cir. 2016); *Henslee v. Lewis*, 153 F. App'x 178, 180 (4th Cir. 2005).

Other defendants were employed by a private entity, and thus they are arguably not entitled to qualified immunity, citing *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018) (discussing circuit split on the issue). Under "balancing" of privacy and penological interests, however, Davenport loses his privacy claim on the merits, even assuming it is of constitutional status. Although the Fourth Circuit has not addressed the issue, balancing of rights is required by *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984).

Judge Flanagan quotes at length from the Seventh Circuit case of *Anderson v. Romero*, 72 F.3d 518, 524 (7th Cir. 1995), which held that revealing HIV status to prison officers was not actionable. In *Anderson*, Judge Posner engages in what can only be called a "rant" about the public health risks from HIV and its disproportionate prevalence in prisons. (Remember that this opinion is almost a quarter-century old.) In the surrounding paragraphs, he writes that guards need to know inmates' HIV status so that they can avoiding having sex with them [*he actually says that*] – and he muses that verbal disclosure is less "barbarous" than public "branding." *Id*. at 523-4. More recently, the Seventh Circuit has rejected the sweep of this decision, calling inmate privacy a "qualified" right under Anderson in *Coffman v. Indianapolis Fire Dept*., 5678 F.3d 559, 566 (7th Cir. 2009); and saying that Anderson relied on "doctrinal ambiguity" in *Big Ridge, Inc. v. Federal Mine Safety Comm*., 715 F.3d 631, 648 (7th Cir. 2013).

Judge Flanagan says that the privacy interests here – revelation of HIV status and "loose bowels" – involved "minor, non-stigmatizing medical issues." She cited *Powell* for this point. 175 F.3d at 111. This is a mischaracterization of *Powell*, which said that the privacy interest "is at its zenith in the context . . . of a person's HIV status." *Id*.

That prison sick call can be accomplished without disclosing the

substance of a medical complaint to Security has long been accepted by other courts. Security staff should be present only when the patient "poses a probable risk to the safety of the health care professional." National Commission on Correctional Health Care, *Standards for Jails*, J-A-09 (2008). The risk from confidential completion of a questionnaire is non-existent.

Finally, Judge Flanagan finds that the private vendor's policy is that the completion of the sick call questionnaire is "voluntary," despite Davenport's affidavit swearing to the contrary based on what staff repeatedly said to him. If the staff departed from that policy on a single occasion, that would not create a "pattern and practice" to hold the vendor liable, and the staff were, at most, negligent. In this writer's view, there was a jury question on the issue of whether these defendants acted negligently or deliberately in requiring the medical disclosures.

This entire opinion lacks empathy – for the inmate litigator; and for the HIV-positive prisoner. Patients who are not incarcerated would never have to endure the government's posting of a sign about their bowel movements on their door for their neighbors to see – or the government's demanding that the police screen their medical complaints before they can access health care. ■

William 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.

Preliminary Report and Recommendation Rejects Professor's Faith-based Excuses for Misgendering Transgender Student

By Chan Tov McNamarah

Pronouns, honorifics, and titles have become the latest flashpoint in efforts to discriminate against transgender Americans. Rather than simply respecting trans persons by using the correct language, some refuse to acknowledge their gender at all. In the pending Harris Funeral Homes, for instance, the Department of Justice's 110-page brief painstakingly refused to refer to plaintiff, Ms. Aimee Stephens, with feminine pronouns.

The DOJ is not alone. Striking a similar chord, the present case arises out of an Ohio Professor's stubborn refusal to address a transgender student with female titles. *Meriwether v. Trustees of Shawnee State University*, 2019 U.S. Dist. LEXIS 151494; 2019 WL 422598 (S.D. Ohio Sept. 5, 2019). Taking his cue from *Masterpiece Cakeshop v. Colorado Civil Right Commission*, 138 S. Ct. 1719 (2018), the Professor claimed that having to address the transgender woman with female pronouns and titles stood at odds with his evangelical Christian views.

The September 5 preliminary ruling by Magistrate Judge Karen L. Litkovitz didn't buy that argument. In a thorough 37-page report on the Defendants' pending motions to dismiss, she recommended the Professor's lawsuit be entirely discharged.

Plaintiff Nicholas K. Meriwether, a tenured professor at Shawnee State University in Ohio, had a custom of referring to students by their last names and a title (i.e., Mr., Ms., Mrs.) or as "Sir" or "Ma'am." In line with this practice, on January 9, 2018, he responded to a question from a student (referred to as "Doe" in the report), by saying "Yes, sir." After class that day, Doe approached Plaintiff, disclosed that she was transgender, and requested he address her with female terms. Plaintiff refused and Doe reported this conduct to the University's Deputy Title IX Coordinator.

A series of four meetings with various University administrators followed. Throughout, administrators advised Plaintiff to either address Doe as "Ms.", or eliminate all sex-based references by referring to all students by only their last names. Plaintiff rejected both suggestions. The first, he asserted, would violate his sincerely held religious beliefs that "God created human beings as male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed." The second, he found "impossible, impractical, and unreasonable." Instead, he began addressing Doe by only her last name, while continuing to use gendered titles for all other students.

When Plaintiff addressed Doe with the title "Mr." a second time, the Dean of Students formally warned that his conduct was in violation of the University's nondiscrimination policy. After yet another complaint, the University initiated a formal investigation. It concluded that Plaintiff's conduct violated the policies. Based on these findings the University President placed a written warning in Plaintiff's personnel file.

Unhappy with the warning, Plaintiff sued the University trustees (who had adopted the nondiscrimination policy), the administrators who conducted the investigation, and the University President. Continuing his pattern of flagrant disrespect, in his Original Complaint Plaintiff used Doe's birth name and referred to her with male pronouns. After Doe intervened and filed a Motion to proceed pseudonymously, Plaintiff filed a redacted Amended Complaint. He is represented by lawyers from Alliance Defending Freedom, a religious freedom litigation group that relentlessly targets LGBT rights.

The Amended Complaint contained a total of nine claims: Five were asserted under the First Amendment: (1) violation of the First Amendment right to free exercise of religion; (2) retaliation

in violation of freedom of speech; (3) content and viewpoint discrimination; (4) unconstitutionally compelled speech; and (5) unconstitutional conditions. Two were based on the Fourteenth Amendment: (6) violation of due process; and (7) violation of the Equal Protection Clause. The complaint also included two attendant State law claims: (8) violation of the Ohio Religious Freedom Restoration Act; and (9) breach of contract. As remedy, Plaintiff sought a declaratory judgment against the University policies applied to his situation, as well as an injunction purging his file of the warning letter.

In response, Defendants moved to dismiss for failure to state a claim. The Shawnee State trustees separately sought dismissal, arguing that they were sued in their official capacities, and therefore covered by Eleventh Amendment immunity.

At the onset, U.S. Magistrate Judge Karen L. Litkovitz rejected Defendants' claim of immunity from suit. She then turned to the substance of Plaintiff's Amended Complaint:

1. First Amendment Retaliation

To be successful in his claim of First Amendment retaliation, Plaintiff had to establish he engaged in First Amendment protected speech, and that he suffered an adverse employment action as a result. Additionally, in *Garcetti v. Ceballos*, the Supreme Court adopted a two-pronged test to determine when a government employee's speech receives First Amendment protection: when it is made "as a citizen" rather than in their capacity as an employer, and "address[es] a matter of public concern." 547 U.S. 410 (2006).

Pivoting to analysis, the judge evaluated whether Plaintiff's speech was made as a citizen or as a government employee. All factors pointed to the latter: The speech at issue (the pronouns and titles he used to address Doe); the setting of the speech (a university classroom); the audience (students in Plaintiff's class); and the impetus and subject matter (to address said students), compelled the finding that the speech occurred pursuant to Plaintiff's official duties. If the District Court adopted this finding, wrote Judge Litkovitz, it would not need to move to the second step of analysis—considering whether his speech touched a matter of public concern.

Conversely, even if the District Court assumed Plaintiff was speaking as a citizen, Judge Litkovitz was skeptical that his speech involved a matter of public concern. Though Plaintiff proposed all in-class speech was "presumptively a matter of public concern," Litkovitz reported that he failed to cite any supporting authority because, simply, no case sustained that view. Instead, she found the correct test was whether the speech could "be fairly considered as relating to any matter of political, social, or other concern to the community." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

Here Plaintiff stated that his refusal to address Doe as female was meant to convey his personally held view that "it was not possible for Doe to undergo a change of gender." This, he argued, touched a matter of public concern since it was meant to express his broader views on the topic of gender identity.

To Judge Litkovitz, the connection appeared tenuous. She indicated that no reasonable person would interpret Plaintiff's misuse of titles and pronouns as conveying any beliefs about gender identity. But even accepting Plaintiff's portrayal, she observed the speech did not advance a viewpoint that informed or influenced public debate. Rather, it sought to impose Plaintiff's personal beliefs on Doe. Such speech could not implicate any broader social concerns. Accordingly, finding neither the "official duties" nor "public concern" prong of Garcetti met, Litkovitz recommended Plaintiff's First Amendment retaliation claim be dismissed.

2. First Amendment Compelled Speech

For his next claim Plaintiff alleged that the University's nondiscrimination policies amounted to unconstitutional compelled speech. He maintained that they forced him to communicate "messages about gender identity that he does not hold, that he does not wish to communicate, and that conflict with (and for him violate) his religious beliefs."

Judge Litkovitz made short work of this argument. She correctly noticed that no one forced Plaintiff to express a view that he disagreed with, or for that matter, any view at all. Instead, Defendants explicitly advised Plaintiff to avoid all gender-based terminology to prevent any conflict with his religious convictions. It was Plaintiff who declined to follow this solution. From there Litkovitz had no difficulty recommending dismissal; without any compulsion Plaintiff could not sustain a claim of compelled speech.

3. First Amendment Content and Viewpoint Discrimination

Plaintiff maintained the University nondiscrimination policy is unconstitutionally overbroad on its face and as applied. He argued that the policy chilled his right to free speech, and underscored the policy's expansiveness by noting that it was not confined to speech inside the classroom.

This did not convince Judge Litkovitz. Her analysis found the policy was constitutional both facially and as applied. First, the claim that it was applied unconstitutionally failed, since it required Plaintiff's speech to enjoy First Amendment protection. As the judge had already concluded otherwise, she found Plaintiff failed to state a claim based on the enforcement of an allegedly overbroad policy.

Second, Judge Litkovitz dismissed Plaintiff's reasoning that the policy was facially overbroad because it covered behavior and speech that occurred outside the classroom. She pointed out that, as a practical matter, the University's interest in creating an educational environment free from harassment and discrimination was not limited to classroom speech. And, looking to the policy's text, she concluded that it was completely viewpoint-neutral. Accordingly, she recommended Plaintiff's content and viewpoint discrimination claim be dismissed.

4. "Unconstitutional Conditions"

Plaintiff fared no better on his claim that Defendants subjected him to

"unconstitutional conditions." He asserted that Defendants conditioned his employment on a willingness to surrender various constitutional rights. Then, in a curious move, Plaintiff cited two Supreme Court cases—neither of which supported his position.

Based on the latter, Litkovitz easily recommended dismissal. Looking to the cited cases, Litkovitz found that at no time had the Supreme Court mentioned "unconstitutional conditions" or even recognized the validity of such a claim in a case involving public employee speech. Indeed, Plaintiff did not cite any authority demonstrating such claim even existed, or what elements it would contain.

5. First Amendment Right to Free Exercise of Religion

The most striking part of Meriwether was Judge Litkovitz's rejection of Plaintiff's free exercise claim. Alleging that his views on gender were motivated by sincerely held religious beliefs, Plaintiff insisted the University's nondiscrimination policies "trampled" his religious freedom by forcing him to communicate views that violated his beliefs. Then, citing *Masterpiece Cakeshop* as proof that even neutral government actions are prohibited from interfering with religious exercises, he creatively asserted the policies interfered "with his right to communicate with others consistent with his faith."

Judge Litkovitz was utterly unmoved. She noted that, despite Plaintiff's misinterpretation, the Free Exercise Clause allows the enforcement of neutral rules even if they burden faith-based conduct. In fact, a generally applicable law will be upheld unless the court can determine its objective is to deliberately target religious practices. To make that determination, the court employed a three-part test considering whether the policy is: (1) generally applicable; (2) is aimed at particular religious practices; and (3) contains a system of particularized exemptions that undercuts its neutrality. *Kissinger v. Bd. of Trustees of Ohio State U.*, 5 F.3d 177, 179 (6th Cir. 1993).

A straightforward application of this test found against Plaintiff. First, Litkovitz concluded the nondiscrimination policy was facially neutral, since it applied to all university employees and students. Second, contrary to Plaintiff's accusation of anti-religious bias, the Judge found University administrators took pains to apply the policy in an impartial manner. Last, Plaintiff could not find any exemptions in application that revealed the policy was a cover for the suppression of religious beliefs. Simply put, none of his allegations could show the policies were discriminatory or anti-religious.

6. Fourteenth Amendment Right to Due Process

Plaintiff contended that the University's nondiscrimination policy was unconstitutionally vague, and therefore infringed his right to due process. He explained that, because the policy did not give fair notice of prohibited conduct or contain explicit standards, it gave the Defendants unbridled discretion to restrict faculty speech.

By this point, Judge Litkovitz's conclusion came as no surprise. Here again, she ruled for the Defendants. In the first place, she found the language of the policy sufficiently clear. More telling, however, were Plaintiff's own Amended Complaint and supporting documents: They identified at least eleven instances in which Plaintiff was informed of the policy's requirements or that his conduct violated them. To Litkovitz, the notice Plaintiff received was not only fair, it was "ample."

Equally, she rejected the argument that the policy allowed for Plaintiff's arbitrary punishment for discussing "issues related to gender identity and transgenderism [sic]." In Litkovitz's view there was a vast distinction between refusing to acknowledge Doe's gender and discussing substantive issues surrounding the topic of gender identity. Any reasonable person, she noted, could also discern this difference. As a result, Plaintiff's "avowed fear of engaging in protected speech" was irrational. Unsurprisingly, Judge Litkovitz recommended Plaintiff's due process claim be dismissed.

7. Fourteenth Amendment Equal Protection

Plaintiff stated Defendants violated his rights by applying the nondiscrimination policy in a discriminatory and unequal manner. His first argument was based on the "class of one theory" – that any irrational difference in treatment between employees violates the Equal Protection Clause. His second argument was based on disparate treatment: he claimed University officials sanctioned him for expressing his transgender denialist views, when they would not punish a similarly-situated professor who expressed pro-transgender views.

Judge Litkovitz found these arguments flawed. She began by pointing out that class of one theory is not recognized in the public employment context. Then, she also rejected the disparate treatment argument, since no facts demonstrated Defendants applied the policy inequitably. In her view, the argument that trans-denialists and persons who did not violate the nondiscrimination policy were similarly- situated was completely without merit. Thus, because Plaintiff could not show the policies were applied differently to different classes of persons, she recommended this claim be dismissed as well.

8. State Law Claims and Final Recommendation

Finally, Judge Litkovitz advised the District Court decline to exercise supplemental jurisdiction over Plaintiff's state law claims. And, having ultimately recommended that all seven of Plaintiff's federal claims be dismissed as well, she ended her report by urging the District Court to grant Defendants' motion to dismiss in the case in its entirety.

While the final conclusion is welcomed, Meriwether's outcome is still unsettled. First, the District Court is now free to accept or reject Magistrate Judge Litkovitz's findings and report. Since the opinion's release, ADF has announced that Plaintiffs plans to file objections to the Magistrate's recommendations. ■

Chan Tov McNamarah earned a J.D. from Cornell Law School in 2019.

California Court of Appeal Reverses Dismissal of Transgender Patient's Discrimination Claim Against Catholic Health Care Institution

By Cyril Heron

Evan Minton's appeal of the dismissal of his complaint caused Division Four of California's First Appellate District Court of Appeal to act yet another battleground for the tug-o'-war between anti-discrimination laws and religious exemptions. In this instance, LGBT rights won when the court reversed Dignity Health's demurrer on the self-described narrow grounds that its "failure to rectify its denial of medical services immediately did not extinguish Minton's cause of action." *Minton v. Dignity Health*, 2019 Cal. App. LEXIS 883; 2019 WL 4440132 (September 17, 2019).

The complaint begins with Minton's assertion that he is a transgender man diagnosed with gender dysphoria. Pursuant to the ample supporting medical research, Dr. Lindsey Dawson, Minton's physician, scheduled him for a hysterectomy on August 30, 2016, at Mercy San Juan Medical Center (Mercy), a constituent part of Dignity Health's hospital network. Dr. Dawson and two mental health professions who counseled Minton attested to the fact the hysterectomy was medically necessary for treatment of Minton's gender dysphoria.

Two days before his scheduled hysterectomy, Minton mentioned that he was transgender to one of Mercy's nurses. The next day, Mercy cancelled Minton's hysterectomy, and Mercy's President, Brian Ivie, informed Dr. Dawson that she would never be able to perform a hysterectomy at Mercy specifically to treat gender dysphoria. He continued by stating that a hysterectomy is available for patients with a range of other diagnoses, just not gender dysphoria. For Minton, this cancellation was more than just an imposition; it was a source of great anxiety and grief, particularly because his hysterectomy had to be completed three months prior to his phalloplasty, which was scheduled for November 23 of the same year.

Minton's amended complaint describes that on August 29, 2016, Dr. Dawson began making calls after notice of the denial arrived that morning. She spoke with Mercy's President Ivie who informed her of Mercy's hard refusal to allow the surgery. That afternoon, Dr. Dawson and Minton contacted local media agencies and had their story aired. Dignity Health responded by citing the "Ethical and Religious Directives for Catholic Health Care Services" that is promulgated by the U.S. Conference of Catholic Bishops. Simultaneously, Minton's attorney reached out to Mercy about the cancellation. Amidst the support provided to Minton, Dr. Dawson and Ivie finally began discussing the option of having the surgery performed at another of Dignity Health's hospitals — pursuant to the Catholic Directives, which allows for arrangement to be made to have the prohibited service performed at another location. Three days later, on September 2, 2016, Dr. Dawson was given emergency surgical privileges at Methodist Hospital and performed Minton's hysterectomy.

The lower court dismissed Minton's matter with prejudice, however, explaining that Minton's facts are insufficient to prove Dignity Health's breach of their obligation under California's Civil Code § 51(b). To the court's mind, Dignity allowed Minton to receive his hysterectomy at one of its hospitals, notwithstanding the fact that it was not the hospital where Minton wished to receive the surgery or on the date when it was scheduled. Thus, the court found Minton's complaint was incapable of alleging a deprivation of full and equal access to the procedure, even with the demurrer-aided assumption that Dignity Health's original decision was motivated by Minton's gender identity.

The appellate court disagreed. Under its standard to review the trial court's actions *de novo* and exercise its own judgment as to whether a cause of action exists, and its abuse of discretion standard for reviewing refusals to allow leave to amend, the appellate court still found that Minton's complaint alleged sufficient facts to sustain a claim of intentional discrimination under the Unruh Act.

The Unruh Act states, "A policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class." Civil Code §51 (c). Relying thereon, Dignity Health asserted in the demurrer that its Directives forbid direct sterilization of men or women, thus claiming that its policy was neutral with respect to the forbidden grounds of discrimination. The appellate court held that such a contention is a proper defense but an improper resolution to a demurrer because evidence of disparate impact can be admitted in Unruh cases to show intentional discrimination. Dignity Health allows hysterectomies to treat other ailments; therefore, its refusal to perform the procedure to treat Minton's gender dysphoria, which only afflicts transgender individuals, supports the inference of discrimination against transgender persons.

Pivoting to the lower court's assertion that Minton was unable to allege a deprivation of full and equal access to the procedure when he received it three days later by the same doctor he chose, the appellate court held that the lower court fundamentally misconstrued Minton's pleading. The appellate court notes that Minton's contention is not that the violation of the Unruh Act was providing access to an alternative hospital. No, Minton's contention was that the violation occurred on August 29, 2016, when Mercy cancelled his scheduled procedure, and the appellate

court found that that was when Minton's complaint alleges a denial of full and equal access to health care treatment.

Additionally, the court found that, notwithstanding the relatively short period of time within which alternative facilities were made available, Mercy initially gave Minton an absolute and unqualified explanation absent any indication that alternative facilities would be provided. The appellate court affirmatively established that full and equal access requires avoiding discrimination, not merely remedying it after the fact. Therefore, as Minton argued in the hearings on the demurrer, the appellate court agrees that it cannot constitute full equality under the Unruh Act for Mercy hospital to cancel a procedure for a discriminatory purpose, wait to see if his doctor complains, and only then attempt to reschedule the procedure at a different facility after being contacted by a lawyer for the patient.

Finally, the appellate court dispenses with Dignity Health's argument that Minton's claim is barred by religious freedom and freedom of expression guarantees in the Californian and federal Constitutions, even if it alleges an Unruh Act violation. To the court's mind, upholding Minton's claim does not violate Dignity Health's Religious principles if it can provide all person with medical services at comparable facilities unburdened by the same religious restrictions. The court finished by citing the California Supreme Court's holding that any burden the Unruh Act places on the exercise of religion is justified by the state's compelling interest to ensure full and equal access to medical treatment for all its residents. *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 44th 1145, 1158 (2008). Moreover, the argument that compelling doctors to perform a procedure infringes on their rights of free speech and free exercise of religion similarly was rejected by the appellate court with California Supreme Court precedent: "For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as statement of support for the law or its purpose." *North Coast*, 44 Cal. 4th at 1157.

This appeal is more than a win in the struggle for LGBT rights. What the Court of Appeal did was to demonstrate adjudication using a baseline standard of respect for LGBT parties. The appellate court never misgendered nor utilized the dead name of Evan Minton. Moreover, the appellate court tacitly recognized that the discriminatory harm to one's dignity is not a question of length of time, but about the instant the adverse reaction is tied to one's differentiating characteristic.

Dignity Health was represented by Barry S. Landsberg, Harvey L. Rochman, Joanna S. McCallum, Craig S. Rutenberg, and David L. Shapiro of Manatt, Phelps & Phillips, LLP; and, Stephen J. Green, Jr. of Greene & Roberts LLP. Evan Minton was represented by Christin Haskett and Lindsey Barnhart of Covington & Burling LLP; Elizabeth O. Gill and Christine P. Sun of the ACLU of Northern California; Amanda Goad and Melissa Goodman of the ACLU Foundation of Southern California; and, Lindsey Kaley of the ACLU Foundation. ■

Cyril Heron earned a J.D. from Cornell Law School in 2019.

Claim of Retaliation for Assisting Employee with a Sexual Orientation Discrimination Claim Survives Motion to Dismiss

By Filip Cukovic

On September 3, Judge Paul Engelmayer of the U.S. District Court for the Southern District of New York denied NYU Langone Hospital's (NYUH) motion to dismiss its ex-employee's claim that she was terminated in retaliation for assisting another employee with her Title VII sexual orientation discrimination lawsuit. Judge Engelmayer held that the employee pleaded sufficient facts to state a claim that the hospital retaliated against her in violation of Title VII, the New York Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL). However, the court granted the motion to dismiss the claims raised against all individual defendants. *Gonzalez v. NYU Langone Medical Center*, 2019 WL 4194313, 2019 U.S. Dist. LEXIS 149902 (S.D.N.Y., Sept. 3, 2019).

NYUH is a New York City hospital located in the Kips Bay neighborhood of Manhattan. Aida Gonzalez worked at NYUH as a host associate in the food services department from 1998 to February 2017, when she was terminated. In that role, she prepared trays of food for thousands of patients. Problems started to arise around March 2014, when Gonzales accompanied two other NYUH employees, Aura Troche and Carlos Aria, to a meeting with Ms. Pacina, who served as manager in the Human Resources Department. Troche and Arias spoke little English, so Gonzales acted as a translator on their behalf. At this meeting, Gonzalez presented a letter, on behalf of Troche and Arias, accusing NYUH of harboring a hostile workplace. Gonzalez claimed

that she believed Troche was being treated unfairly because Troche was perceived to be a lesbian. According to Gonzalez, Troche informed her that her supervisors told her things such as "if you want to be a man, we are gonna work you like a man."

Considering that harassment towards Troche did not subside, on October 18, 2016, Gonzalez accompanied Troche to the Law Offices of Kareem Abdo, Esq., to discuss the possibility that Troche was being treated differently from her co-workers because of her perceived sexual orientation, national origin, or gender. Gonzalez performed such services for Troche on multiple ensuing occasions. Sometime in late November 2016, Gonzales informed Rosa Perez, who is a non-supervisory employee, that Troche was likely to sue the hospital. Perez later shared this information with Rebecca Ortiz, an assistant director in the food services department. Perez informed Ortiz both that Troche was considering taking legal action against the hospital and that Gonzalez was aiding her in bringing that lawsuit.

On January 27, 2017, Troche filed a complaint in New York State Supreme Court alleging that NYUH violated the NYSHRL and NYCHRL. On February 7, 2017, the day after NYUH was served with Troche's complaint, NYUH terminated Gonzalez's employment. The stated reason for her termination was that she had not been present for work at an assigned time. Gonzales countered that claim by presenting payroll records reflecting that she was paid for that time. Gonzales alleged that the actual reason for her termination is the hospital's anger with the fact that she assisted Troche in bringing a lawsuit against the hospital, for being unfairly treated on the basis of her perceived sexual orientation.

On May 16, 2019, Gonzalez brought Title VII claims against NYUH and NYSHRL and NYCHRL claims against both NYUH and individual employees of NYUH, including Ms. Pacina and Ms. Ortiz. On June 12, 2019, defendants filed a motion to dismiss, arguing that Gonzales failed to state a claim. On September 3, Judge Engelmayer dismissed NYUH's 12b (6) motion and ordered for discovery to commence. At the same time, the judge granted the motion to dismiss the claims against all individual defendants.

Title VII prohibits employers from discriminating against an employee because that employee has opposed any unlawful employment practice or because she has made a charge, testified, assisted, or participated in any investigation, proceeding, or hearing. Thus, Title VII is violated when a retaliatory motive plays a part in adverse employment actions toward an employee. To establish a prima facie case of retaliation, a plaintiff must show that: (1) she participated in a protected activity; (2) participation in the protected activity was known to the employer; (3) the employer thereafter subjected her to a materially adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. Claims brought under NYSHRL are analytically identical to claims brought under Title VII.

Defendants claimed that Gonzales failed to satisfy elements for proving retaliation in that (1) she never engaged in any protected activity. Furthermore, (2) even if the court is to find that she engaged in such activity, defendants had no knowledge of it. Defendants also claimed that (3) there was no casual nexus between protected activity and Gonzales' termination, and that (4) NYSHRL and NYCHRL claims fail as to the individual defendants. The court was persuaded only by defendants' fourth argument.

The court held that Gonzales engaged in protected activity when she accompanied and assisted Troche in meeting her lawyer in anticipation of bringing a discrimination suit, and when she helped Troche file a complaint in New York state court. The court dismissed defendants' argument that because Gonzalez was a third party to Troche's state-court lawsuit, Troche's filing of that complaint did not constitute a protected activity that Gonzales could use as a basis for relief. Considering that both the Supreme Court and the Second Circuit identified this scenario as an open question, Judge Engelmayer relied on holdings from the Sixth and Eleventh Circuit, which held that actions by a third-party can serve as the basis of a plaintiff's retaliation claim. Considering a continuing pattern of collaboration between Troche and Gonzalez in Troche's action of bringing a discriminatory lawsuit against NYUH, the judge found it plausible that an outsider such as NYUH could attribute Troche's grievances in part to Gonzalez, making Gonzalez's action of helping Troche a protected activity.

Likewise, the court dismissed defendants' "lack of knowledge" argument, on the basis that it was sufficient for Gonzales to merely establish the presence of "general corporate knowledge" of her protected activity. By putting two NYUH officials (Ms. Pacina and Ms. Ortiz) on notice of her assistance to Troche, Gonzalez communicated enough information to the hospital itself that she engaged in a protected activity.

The court also dismissed defendant's argument that the passage of time between Gonzalez's October 18, 2016 law office visit with Troche and Gonzalez's termination on February 7, 2017 is too great to support a causal link between her protected activity and the adverse employment action she suffered. This argument was easily dispatched. The more relevant comparison in determining whether an inference of retaliatory motivation is warranted was between the date when NYUH was served with the lawsuit and the date of the adverse employment action taken against Gonzalez. Gonzales was fired only one day after NYUH was served with Troche's complaint. The court held that such short temporal proximity between these two events naturally gave rise to an inference of causation. Considering that NYUH's challenges to sufficiency of Gonzales's complaints were dismissed, the court held that Gonzales pleaded sufficient facts to raise a claim for retaliation under Title VII. Since claims brought under NYSHRL and NYCHRL are analytically identical to claims brought under Title VII, Gonzales successfully prevailed against NYUH under these two statutes as well.

However, the Court dismissed Gonzalez's claims brought against individual defendants, including Ms. Pacina and Ms. Ortiz. The court held that such dismissal is appropriate considering that Gonzales failed to allege that any individual defendant was Gonzalez's employer. Furthermore, Gonzalez failed to set out with specificity any discriminatory conduct on the part of any individual defendant against Gonzalez or her co-worker Troche. Accordingly, the court granted the motion to dismiss the NYSHRL and NYCHRL claims against the individual defendants.

Kareem Abdo is representing Gonzalez. ■

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

Minnesota Court of Appeals Denies Custody to Lesbian Co-Parent and Blames State Legislature

By Corey L. Gibbs

Terri Ann Bischoff and Linda J. Vetter were in a romantic relationship for approximately eight years, during which Vetter gave birth to three children. While Vetter was the biological mother, the children recognized Bischoff as their other parent, but Bischoff did not adopt the children. Once Bischoff and Vetter ended their relationship, the children lived with Vetter. Bischoff sued to establish parentage, custody, and parenting time, but lost in the trial court. The Court of Appeals affirmed the lower court's decision on September 16. *N.S.V. v. Vetter*, 2019 WL 4412722; 2019 Minn. App. Unpub. LEXIS 911.

Vetter and Bischoff established an informal parenting schedule after their break-up, and Bischoff paid Vetter $500 every month to help her support the children. While the children lived with Vetter, Bischoff was listed as a parent contact on the children's records. When Bischoff began dating A.S., Vetter expressed concern because she believed that A.S. had a history of violent behavior. Vetter eventually removed Bischoff from the children's records, and Bischoff commenced this action.

Bischoff made three arguments. First, she claimed, "She qualified as a parent and had standing to pursue custody and parenting time under the parentage act because she had received the children into her home and held them out as her own." Second, she claimed that if she has no standing under the parentage act, then the act is unconstitutional. Finally, she argued in the alternative, "She was an interested third party entitled to custody and parenting time." The district court rejected all of her claims. Judge Jill Halbrooks wrote the opinion of the Court of Appeals, affirming the district court.

First, the court assessed Bischoff's claim that she qualified as a parent under the parentage act. Judge Halbrooks cited Minnesota Statute § 257.52, "The act defines the 'parent and child relationship' as 'the legal relationship existing between a child and the child's biological or adoptive parents' and provides that the relationship 'includes the mother and child relationship and the father and child relationship.'" Because Bischoff is not the biological mother, she contended that a provision in the paternity section of the statute applied to her case. "[A] man is presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child." Minn. Stat. § 257.55 subd. 1(d). Clear and convincing evidence can rebut this presumption.

The statute provided that one can establish a mother and child relationship using the provisions which establish the father and child relationship. Bischoff argued, "The holding-out provision applies to her because she welcomed the children into her home and held them out as her own." She claimed that the purpose of the statute was to create a pathway to legal parentage that was neither biological nor adoptive. The Court of Appeals disagreed. The court declared that the statute was meant to point to a likely father. The court placed blame for its decision on the legislature, noting changes in family life, "But the legislature has not amended the parentage act to redefine the parent-child relationship other than a biological or adoptive one."

Second, the court assessed the constitutionality of the parentage act. Bischoff claimed that the statute discriminated against her based on both her gender and marital status. As for gender, the statute distinguished discovery of the biological mother from other relationships. Judge Halbrooks referenced Minnesota Statute § 257.54(a), "[In] most cases, the biological mother is easily identified

because she gave birth to the child." Furthermore, the court noted that the statute serves the governmental interest of establishing parent and child relationships. The Court of Appeals refused to strike down the parentage act on the ground of gender-based discrimination. Then, the court turned to Bischoff's argument that the statute discriminated against her based on her marital status. Because the statute has provisions meant for unmarried individuals, the court rejected her claim.

Finally, the court assessed Bischoff's third argument: that "she is entitled to third-party custody of the children because she qualifies as an interested third party." The court acknowledged that third party custody was allowed in extraordinary circumstances, such as when the custodial parent had "abandoned, neglected, or otherwise disregarded the child's well-being." Because Bischoff could not prove any danger to the child or other extraordinary circumstance, the court rejected her final claim.

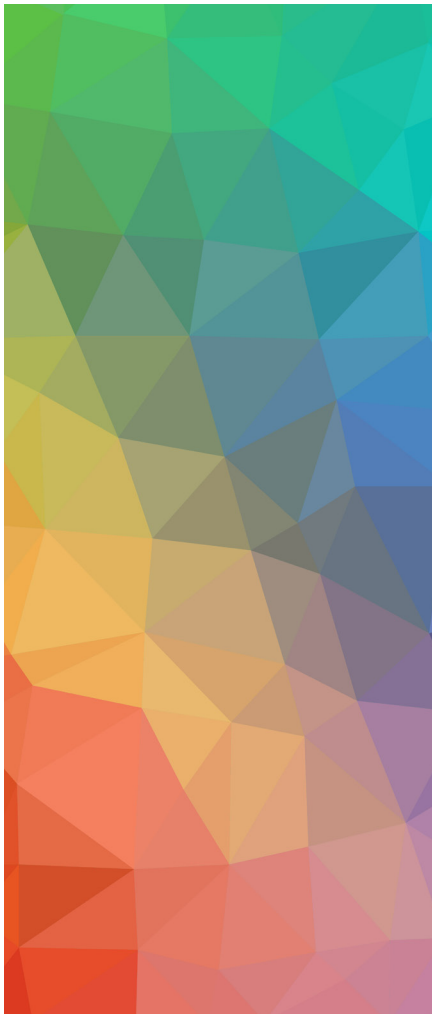
While the court did not agree with any of Bischoff's arguments, the court did suggest seeking visitation. During the analysis of her Bischoff's final argument, Judge Halbrooks wrote that Bischoff's facts are more consistent with the requirements to establish third-party visitation. Although the Court of Appeals denied Bischoff's appeal from the district court decision, there is a possibility that she could have a legal role in her children's lives. Just not the one she sought.

This case may appear to be about nothing more than a custody battle, but there is something else that Judge Halbrooks wrote into the opinion. In the court's analysis of Bischoff's first argument, she wrote about the legislature. Judge Halbrooks's words were, "This court urged the legislature to 'remove these traces of the original lodestar of the parentage act—that is, biological.' But the legislature has not amended the parentage act to redefine the parent-child relationship to include a relationship other than a biological or adoptive one."

This case is a reminder that courts are here to interpret statutory law, but it is the legislature that is empowered to make the law. As many, including the Minnesota Court of Appeals, may notice, families come in many forms. If the public wants laws to reflect and work for the families in their communities, then the public needs to hold those elected to state legislatures accountable. Remember the importance of state and local elections, because we cannot expect the courts to save us when we are not taking steps ourselves, such as voting.

Terri Ann Bischoff was represented by John DeWalt and Melissa Chawla of DeWalt, Chawla + Saksena, LLC. Linda J. Vetter was represented by Gary A. Debele of Messerli & Kramer P.A. The case was considered and decided by Judge Halbrooks, Judge Hooten, and Judge Klaphake. ■

Corey L. Gibbs is a law student at New York Law School (class of 2021).



Florida Appeals Court Affirms Dismissal of Lesbian Co-Parent's Bid for Legal Recognition and Visitation

By Morgan Nelson

On July 19, the Florida Second District Court of Appeal affirmed a trial court's decision to dismiss Christy Dale Springer's claim of parental rights for a child she co-parented with her former partner, Nicole Ann Springer, in *Springer v. Springer*, 2019 Fla. App. LEXIS 11402; 44 Fla. L. Weekly D 1855; 2019 WL 3242195. The opinion for a three-judge panel by Judge Morris Silberman describes a dispute created "as society and medicine create new factual situations" about what it means to create a family.

Nicole Ann Springer and Christy Dale Springer had begun their relationship in Ohio and, in 2013, decided to start a family. Nicole eventually became pregnant through alternative insemination, for which Christy Dale Springer provided monetary assistance, but no DNA. Before the birth of their child, the Springers entered into a "co-parenting agreement," in which they referenced "our child" and their intention to share "jointly and equally" in child-rearing responsibilities.

After the birth of the child, the couple moved their growing family to Florida. While in Florida, the couple separated. Upon separation, Christy Dale Springer sought legal recognition as a parent and time-sharing rights.

Florida law, however, has not come to recognize the rights of non-biological/non-adoptive parents the way many states, including New York, now do, and does not enforce co-parenting agreements between a biological parent and a non-biological parent. Relying on the trial court's "thorough analysis" that these types of agreements were

not valid under Florida law, the Court of Appeal upheld Pinellas County Circuit Judge Jack Helinger's decision to dismiss Christy Dale Springer's case, despite "concerns that 'the law is slow to address' changes in this area."

Unless there is a successful appeal to the Florida Supreme Court to redress this increasingly common situation for families, Christy Dale Springer and other non-biological parents in Florida cannot assert any legal right to their children.

Christy Dale Springer is represented by Carrington Madison Mead, and Nicole Ann Springer is represented by Stephanie M. Willis. ■

Morgan Nelson earned a J.D. from the University of Southern California in 2019.

Federal Judge Allows Transgender Inmate's Civil Rights Pleading to Proceed Against Medical Staff "Who May Have Been Involved in Decision" to Deny or Delay Treatment

By William J. Rold

United States District Judge Paul L. Maloney allowed pro se transgender inmate Joshua Snider's complaint to proceed against multiple individual defendants for denial and delay of transgender treatment in *Snider v. Unknown Schmidt*, 2019 U.S. Dist. LEXIS 161784 (W.D. Mich., Sept. 23, 2019). Snider had received hormone therapy prior to incarceration and for a period while in the Wayne County (Detroit) Jail during her state imprisonment. She was denied hormones and feminizing items for two years in state custody in five different prisons.

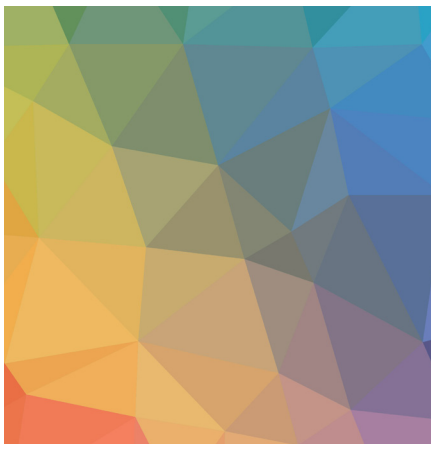
Defendants told Snider that, although she was "transgendered," she could not receive hormones and that female undergarments "were not approved." Apparently, this violated Michigan DOC written policies for evaluation of needs of transgender inmates.

Judge Maloney wrote: "The Court is satisfied that Plaintiff has alleged a serious medical need for hormone treatment, especially considering that Plaintiff received hormone treatment before, and for a brief period during, her incarceration." *Estelle v. Gamble*, 429 U.S. 102, 103-04 (1976); *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001).

If Michigan DOC policies had been followed, the named defendants (medical and mental health employees of Michigan DOC and the private vendor, Corizon) "are the ones most likely to have been responsible for the denial of hormone treatment or the delay in providing it . . . . They all met with Plaintiff at one time or another in response to her requests for treatment, yet she did not receive treatment until long after those meetings took place."

This is one of the more sweeping screenings of a pro se transgender inmate's complaint this writer has seen. Judge Maloney concludes: "Because all of the foregoing Defendants appear to have had some connection to evaluating Plaintiff for treatment, were allegedly aware of her need for treatment, and may have been involved in the decision about whether to provide treatment, or may have been responsible for the delay in necessary treatment, the Court will allow the Eighth Amendment claims against these Defendants to proceed."

Judge Maloney dismisses the claims against private vendor, Corizon. In the Sixth Circuit claims against such defendants must satisfy municipal liability standards of pattern and practice. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Fox v. DeSoto*, 489 F.3d 227, 238 (6th Cir. 2007). Further, the vendor's "policy or custom must be the source of the alleged injury." *Perry v. Corizon Health, Inc.*, 2018 WL 3006334, at *1 (6th Cir., June 8, 2018). Here, Corizon denies it has any transgender policies. That this lacunae alone may be an unconstitutional absence of policy, custom, or training is not addressed. Judge Maloney concludes: "Plaintiff fails to state a claim against Corizon." ■



Federal Judge Grants Summary Judgment against Transgender Inmates' Showering Privacy Claims

By William J. Rold

Mark A. (Nicole Rose) Campbell and Steven Miller are transgender inmates, who were allowed to proceed *pro se* as co-plaintiffs in challenging lack of showering privacy in a Wisconsin prison. U.S. District Judge James D. Peterson entered summary judgment against them in *Campbell v. Bruce,* 2019 U.S. Dist. LEXIS 168251, 2019 WL 4758367 (W.D. Wisc., Sept. 30, 2019).

Last month, *Law Notes* reported that the Seventh Circuit had reversed Judge Peterson's denial of qualified immunity in another case involving Campbell's rights to sex confirmation surgery. *See* "Split Seventh Circuit Decision Allows Qualified Immunity for Denial of Inmate's Gender Confirmation Surgery," reporting *Campbell v. Kallas,* 2019 U.S. App. LEXIS 24655 (7th Cir., August 19, 2019) (September 2019 at page 5).

Here, although Campbell and Miller both claimed that invasions of their privacy placed them at substantial risk of sexual assault, neither claimed that an assault had occurred so far. Their factual backgrounds vary slightly, but these differences are not material to the legal issues discussed in this report. Corrections officials had twice modified the shower stalls to increase privacy during the litigation, and Judge Peterson took the unusual step of including before-and-after photographs of the shower stalls in the body of his opinion.

The plaintiffs' primary complaint was that the shower fronts, although blocked in part, still allowed cisgender inmates on the tier to look over the top of the privacy screen and see their breasts. There was a dispute as to how often this actually occurred, because defendants said cisgender inmates were supposed to leave the shower area before the transgender inmates arrived for showers, but the plaintiffs said other inmates sometimes remained. The state contended that privacy was "adequate" in any event.

An audit of compliance with regulations under the Prison Rape Elimination Act [PREA] cited the medium security prison for violation of rules regarding showering privacy – *see* 28 C.F.R. § 115.42(f) – and this apparently prompted the modifications to the stalls. Thereafter, the state submitted proof of conformity, but there was no decision on compliance at the time Judge Peterson granted the state summary judgment under the Eighth Amendment.

Prison officials offered to let the plaintiffs shower at different times, but the plaintiffs insisted on being permitted to shower "during the count," when other inmates were locked down. Officials denied this request, saying that no inmates were permitted to shower "during the count." According to Judge Peterson, officials offered to move the transgender inmates to an area that had shower curtains, but the plaintiffs objected because this area had greater "restrictions"; officials also offered to set a specific time for transgender showers, but the plaintiffs "rejected that option because they wanted to be able to shower on their own schedules."

Judge Peterson assumed the risks cited by the plaintiffs were serious, but he found that the risks had not been "consciously disregarded" in violation of *Farmer v. Brennan*, 511 U.S. 825, 838-40 (1994). He found that the plaintiffs had been offered "a separate time" to shower "that would not complicate the inmate count process" and they declined it. He wrote, "Nothing in the record suggests that [the prison's] stated separate-shower-time policy is a sham, or that plaintiffs couldn't take advantage of it if they wanted to . . . . [R]efusal to allow [plaintiffs] to shower during count does not violate the Eighth Amendment."

Plaintiffs are not entitled to damages, because there was no constitutional violation, and (in any event) the law was not clearly established [discussion omitted], a prerequisite for liability against public officials who enjoy qualified immunity. No injunctive relief is appropriate because there is no violation to correct, and defendants have taken reasonable steps to protect privacy, although (in what seems to be *dicta*) they could do a better job of enforcing the bar against general population inmates milling about the shower area.

Even if the plaintiffs had not been offered accommodations on showering times, Judge Peterson indicates that he would find that the stalls themselves satisfied the constitution. They had been modified twice. Moreover, defendants' "concerns for safety and security in the shower area are plainly justified." "Plaintiffs' desire for shower doors that completely obscure them from view does not outweigh the prison's countervailing interest."

Finally, plaintiffs do not state an equal protection claim, because they do not belong to a protected class entitled to intermediate scrutiny. By framing the class for equal protection purposes, Judge Peterson defines plaintiffs out of it. He says: "[S]hower facilities conceal from view the genitalia of cisgender male inmates but not the breasts of transgender female inmates. This is not a conventional discrimination claim, because plaintiffs are challenging the constitutional adequacy of shower facilities that afford roughly the same degree of body coverage to all prisoners, regardless of gender identity. Because plaintiffs have female breasts, they feel exposed in the showers in a way that their cisgender counterparts probably don't. But to prevail on an equal-protection claim under this theory, plaintiffs would need to adduce evidence that defendants decided on the height of the shower stall doors "not for a neutral . . . reason but for the purpose of discriminating on account" of plaintiffs' gender identity", quoting (and changing the final wording of) *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

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CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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UNITED STATES SUPREME COURT – The Supreme Court received three reply briefs on behalf of the employees in the Title VII cases to be argued on October 8: *RG. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission and Stephens*, No. 18-107; *Bostock v. Clayton County, Georgia*, No. 17-1618; and *Altitude Express, Inc. v. Zarda*, No. 17-1623). The briefs all revolve around the same point: that each of the employees suffered discrimination because of their sex, and that recognizing their claims as such does not, as Petitioners charge, involve the Court "rewriting" Title VII's ban on discrimination because of sex. In each case, the briefs demonstrate how the employer's decision to fire an employee because they are gay or transgender necessarily involves taking account of their sex in making the decision, and that various theories can support this conclusion, drawing upon the Supreme Court's sex discrimination precedents under Title VII developed since 1965 when that statute went into effect. Among the particularly telling points: The employers argued that by not expressly addressing the issue of sexual orientation or gender identity discrimination in 1991 when it passed several important amendments to Title VII, Congress had effectively ratified the "unanimous" ruling of courts of appeals that these grounds were not included in the statute. The reply briefs demonstrate that the legislature history of the 1991 amendments givens no indication that Congress gave any consideration to this issue, having no mention to the cases cited by the employers or the issues they raised, and also pointed out that there were at best three court of appeals decisions that were pertinent at the time. To put the shoe on the other foot, the reply briefs point out that some of the cases that they are relying upon – most particularly but not solely *Price Waterhouse v. Hopkins* – were decided before 1991 and were not overruled in those amendments either. Furthermore, *Price Waterhouse* would itself vitiate the reasoning of some of the pre-1991 cases that the employers were citing. The reply briefs also point out that many of the arguments advanced by the employers about the potential consequences of ruling for the employees are besides the point, as well as purely hypothetical and in many cases far-fetched. For example, Harris Funeral Homes' brief tries to reinstate a question posed in its cert petition but specifically not included among the questions on which cert was granted – to wit, the Funeral Homes' dress code. Also, the reply briefs show how the reasoning of the employers' briefs founders under logical dissection. Anybody interested in reading some very effective legal argumentation is encouraged to access these briefs from the Supreme Court website. This leaves the question, however, of how much the briefs will matter in a case in which the political predilections of the Court are likely to exert a heavier weight than legal argumentation. * * * The Supreme Court rejected a request by the employees that the argument time in the two consolidated sexual orientation cases be divided between counsel for Zarda and counsel for Bostock. The request was based on the contention that the two cases arose in different factual and procedural contexts, but the Court evidently feels that they both devolve to the same question of statutory interpretation. The Court will hear only one advocate on the employees' side in the sexual orientation cases: Professor Pamela Karlan of Stanford Law School, who was selected by Zarda's counsel to present their Supreme Court argument, and who has argued in the Supreme Court before. She is a former clerk for Supreme Court Justice Harry Blackmun. (We apologize for misspelling her name in the September issue.) Arguing for Aimee Stephens in the gender identity case will be David Cole, Legal Director of the ACLU. David Bursch of Alliance Defending Freedom will argue for Harris Funeral Home. Solicitor General Noel Francisco will represent the EEOC in the funeral home case, but will argue that the 6th Circuit's ruling in favor of the EEOC was incorrect. Francisco also will appear as amicus for the employers in the sexual orientation cases, representing the Trump Administration's position that Title VII does not forbid sexual orientation discrimination. Jeffrey Harris, a partner at Consovoy McCarthy, a conservative litigation boutique firm, will argue on behalf of the employers in the sexual orientation cases. He is a former clerk for Chief Justice John Roberts during the October 2008 Term.

U.S. COURT OF APPEALS, 4TH CIRCUIT – On September 27 the 4th Circuit declined a request by Gloucester County School District to hold in abeyance its appeal of District Judge Arenda L. Wright Allen's ruling in *Grimm v. Gloucester County School District*, 2019 WL 3774118 (E.D. Va., Aug. 9, 2019), pending a ruling by the U.S. Supreme Court in the Harris Funeral Home Case. Judge Wright Allen found that the school district's treatment of Gavin Grimm, a transgender man, when he was a student at the school violated his right to be free of gender identity discrimination under Title IX of the Education Amendments of 1972 and the Equal Protection Clause. In the Harris Funeral Home case, argued on October 8, the Supreme Court may decide later this term whether Title VII's ban on discrimination because of sex extends to gender identity discrimination claims. Courts construing Title IX usually consult Title VII precedents, as did Judge Wright Allen. The School District suggested that the 4th Circuit should

wait until the Supreme Court has ruled on the Title VII issue before taking up this appeal, but the 4th Circuit insisted that the school board meet its briefing schedule, noting that when the Supreme Court issues a decision in Harris, it may ask for additional briefing from the parties.

U.S. COURT OF APPEALS, 6TH CIRCUIT – An organization of anonymous students, calling themselves Speech First, filed suit in the U.S. District Court for the Eastern District of Michigan, challenging on First Amendment grounds the University of Michigan's policy prohibiting bullying and harassing behavior and its Bias Response Team initiative. Speech First sought preliminary injunctive relief, which District Judge Linda V. Parker denied, based in part on her finding that Speech First lacked standing to challenge the Bias Response Team initiative and that its claims challenging the policy were moot because the University had modified its definition of prohibited conduct to be more narrowly focused in response to the filing of the lawsuit. On September 23, a 6th Circuit panel reversed in a 2-1 decision, rejecting the district court's conclusion on standing and mootness, and remanding for the district court to consider the merits of the motion for a preliminary injunction. *Speech First, Inc. v. Schlissel*, 2019 WL 4582834 (Sept. 23, 2019). The University's policy specifically prohibited bullying or harassment based on the victim's sexual orientation or gender identity. The basic thrust of plaintiffs' claims was that the policy was too broad and vague, potentially extending to speech and expressive conduct protected by the First Amendment, and would chill protected speech in which the plaintiffs' members might wish to engage. All three members of the 6th Circuit panel were appointed by President George W. Bush.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Spencer v. Barr*, 2019 U.S. App. LEXIS 28985, 2019 WL 4676010 (9th Cir., September 25, 2019), the Petitioner, *pro se*, sought review of the Board of Immigration Appeals' order that dismissed his appeal from an immigration judge's decision denying relief under the Convention Against Torture (CAT). The petitioner, a gay man, is a native and citizen of Jamaica. The panel wrote, "In denying [Petitioner's] deferral of removal under CAT claim, it is unclear from the record whether the agency considered the risk of torture by actors other than the individuals who previously attacked [him], where [he] testified that he will be tortured or killed by anyone who learns of his sexual orientation in Jamaica, including the police, and where there is potentially dispositive record evidence supporting [his] testimony." The court cited to earlier 9th Circuit decisions, including mention of U.S. State Department country reports showing the "gay men are victims of beatings, killings, and other forms of torture." The court granted the petition for review and remanded the CAT claim to the agency "for further proceedings consistent with this disposition." The court ordered that the government bear the costs for this petition for review. Since petitioner was *pro se*, the expenses are not likely to be large, but could be important for the petitioner.

ALABAMA – Senior U.S. District Judge Myron H. Thompson accepted a Magistrate Judge's recommendation to dismiss a lawsuit by Coral Ridge Ministries Media (Coral), a media ministry with strong worded views condemning homosexuality and people who practice homosexuality based on the religious beliefs of its founder, Rev. D. James Kennedy, accusing the Southern Poverty Law Center (SPLC) of defaming Coral Ridge by designating it as a "hate group," which had the effect of disqualifying Coral Ridge from receiving charitable donations through Smile.Amazon.Com, which donates 0.5% of sales to charities designated by Amazon's customers from a list of charities selected by Amazon. Under the criteria established by Amazon, any organization designated as a "hate group" by SPLC is not qualified to participate in the program. *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 2019 WL 4547064, 2019 U.S. Dist. LEXIS 159685 (M.D. Ala., Sept. 19, 2019). Judge Thompson's lengthy opinion takes deep dives into defamation law under the First Amendment and public accommodations law under Title II of the Civil Rights Act of 1964, which forbids discrimination because of religion by places of public accommodation. As to Coral's defamation claim, the court rejected plaintiff's contention that in order to be a hate group it must advocate or engage in "crime or violence against others based on their characteristics." Coral disclaims any such advocacy or activity. Thompson rejected this definition, finding that a review of a variety of sources suggests that the meaning of "hate group" is generally broader and, at the same time, so variable that the label cannot be conclusively proved to be false in a judicial proceeding. That being the case, the defamation claim falls apart. As Coral, which engages in largescale media activities, is clearly a "public figure," to succeed in a defamation claim it would have to prove that SPLC listed it intentionally knowing or having reason to know that the label was probably false, and this, wrote Thompson, is not possible in light of the ambiguous meanings attached to the label. Furthermore, SPLC's freedom of speech comes into play as well on matters of public interest as a counterweight to the defamation claim. Thompson also rejected Coral's argument that listing SPLC alongside such organizations as the KKK or white supremacy groups on SPLC's

"hate map" on its website had tarred Coral by false association. Thompson rejected Coral's attempt to summon federal trademark law (the Lanham Act), finding that SPLC's use of Coral's name could not be considered "false advertising" or mislead the public into believing Coral had some commercial relationship with the other organizations listed as hate groups. In terms of Title II, Thompson expressed doubt that Smile.Amazon.com is a "place of public accommodation," but even if it is, he wrote, Title II was intended to protect customers from discrimination, and Coral as a potential charitable donee is not a customer of Amazon. Furthermore, Amazon's use of SPLC's designation of an organization as a hate group as disqualifying for participating in the program was not shown by SPLC in its factual allegations to cause a statistically determinable disparate impact on the basis of religion (while noting that federal courts are divided over whether disparate impact claims can even be brought under Title II), and there is no credible assertion that Amazon chose this criterion in order to discriminate against religious non-profits who were seeking to participate in the program, thus ruling out a disparate treatment claim. Thompson also found, under the doctrine of avoiding statutory interpretations that bring into play significant constitutional rights claims, that interpreting Title II as Coral argued would implicate fundamental First Amendment rights of Amazon by compelling it to donate to organizations that it did not desire to support. The court rejected Coral's argument that the donations come from the customers of Amazon with Amazon merely being a vehicle for the transmission, referring to the language on Amazon's website describing the program that makes clear that the donations come from Amazon, which selects the charities that can participate. Plaintiffs are represented by Charles Edward Hall, Jr., of Dadeville, AL, David Charles Gibbs III, of Bartonville, TX, and Paul Scott Miller from the conservative litigation group, The National Center for Life and Liberty, also of Bartonville, TX. Judge Thompson was appointed to the court by President Jimmy Carter in 1980, and is among the longest-serving federal district judges.

ALASKA – In the September issue of *Law Notes* we reported on *Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage*, 2019 WL 3769623 (D. Alaska, August 9, 2019), in which the court determined that a faith-based homeless shelter operating in Anchorage was not a place of public accommodation or a housing accommodation within the meaning of Anchorage's civil rights ordinance that prohibits discrimination because of sexual orientation or gender identity. Downtown Hope Center brought suit seeking a declaratory judgment, claiming that its constitutional rights had been violated when a complaint about turning away a transgender woman led to an investigation by the city's human rights agency, and alleging a violation of its free exercise of religion rights. On August 9, the district court issued a preliminary injunction against the civil rights agency, having concluded that the agency did not have jurisdiction over the complaint against the shelter. The city decided to settle the case rather than appeal, according to a report in LGBTQNation.com/news on October 1. The city will pay $100,000 to the shelter to make the case go away.

CALIFORNIA – The 2nd District Court of Appeal affirmed a ruling by Superior Court Judge Michael E. Whitaker removing two young boys from the custody of L.C., who together with her (former) partner, D.C., had been given custody of the boys as prospective adoptive parents after the court had terminated their biological mother's parental rights. *In re Micah T.*, 2019 Cal. App. Unpub. LEXIS 6193, 2019 WL 4440141 (Sept. 17, 2019). L.C. contended on appeal that the trial court had abused its discretion when it summarily denied her writ petition under Section 388 of the Welfare and Institutions Code. The trial court held a contested hearing on August 1, 2018, and ordered that L.C.'s custody be ended, confirming an alternate placement made by the L.A. County Department of Children and Family Services. L.C. filed a petition seeking writ relief under Section 388 three weeks later, two weeks *after* the statutory deadline, which was cited by the Court of Appeal as the first reason to deny her petition. But, the court also went extensively into the merits, finding that the trial court's decision was not an abuse of discretion in light of the history of the placement of the boys with L.C. and D.C. The women split up during the course of the placement, and there was evidence that the boys were sometimes left by L.C. in the custody of persons not approved by the Department. Social workers who visited the home encountered resistance, noticed an odor of marijuana, and observed that the home was messy. Data about the employment history of L.C. and D.C. was sketchy. Furthermore, one of the boys had a medical issue that L.C. put off attending to, and interviews with the boys by social workers at their school elicited information that they were not happy in the placement. There was also a contention that there was domestic violence in the home until L.C. and D.C. split up. All in all, reading the court's summary of the evidentiary record, it seemed that the trial court's disposition had some basis in the record, especially noting that the boys reacted positively to their new placement and expressed fears prior to a visitation with L.C. L.C. represented herself *pro se* on this appeal. It would be unusual for an appellate court to upset a custody ruling that appears to draw support from a detailed factual record. L.C. and

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D.C. had claimed that social workers had criticized them because they were a same-sex couple, but there was no evidence along these lines apart from L.C.'s assertions.

CALIFORNIA – The California 4th District Court of Appeal affirmed a decision by Orange County Superior Court Judge Layne H. Melzer that a civil marriage between a transgender man and a woman was null and void on grounds of fraud in *In re the Marriage of Alex and Sawsan Esmail*, 2019 WL 4149355 (Sept. 3, 2019). After some quibbling, both parties agreed that their marriage had never been consummated sexually. Sawsan (the wife) claimed that she did not know that Alex was a transgender man until after the marriage, but the court was persuaded by Alex's evidence that Sawsan, an attorney for the Palestinian Authority in Jordan, was well aware of the fact, since she offered to assist Alex in obtaining a passport amendment. Alex proved to the court's satisfaction that while he and Sawsan worked together to obtain the amendment of Alex's passport, he developed romantic feelings for Sawsan, and she "ostensibly reciprocated those feelings." They agreed to marry upon Sawsan's immigration to the United States. Ultimately, the trial court concluded, Sawsan was apparently feigning romantic interest in Alex in order to facilitate her immigration to the U.S., and never intended to consummate the marriage. (Her stated reason for not having sex with Alex after they married was that she could not submit to sex until they obtained a marriage "according to Islamic Shariah laws.") Judge Melzer found Alex to be the more credible witness. Appeals Court Judge Thomas Goethals wrote, "Because the court disbelieved Sawsan's claim that she had been unaware of Alex's gender reassignment before the marriage, it concluded that her reliance on that fact as a justification for later 'refusing to proceed with the religious ceremony which for her was a necessary precursor to complete marital relations' strongly 'supported the inference that Sawsan never intended to have sexual relations with Alex and was never prepared to fully embrace marital relations with him.' Consequently, the court concluded Alex as entitled to a judgment of nullity based on fraud." Of course, Sawsan would be preferred a divorce, to help maintain the lawfulness of her residence in the United States. Sawsan was represented on this appeal by Zulu Ali and Geoffrey W. Sorkin, Law Offices of Zulu Ali. Alex represented himself as respondent on the appeal.

COLORADO – The Colorado Supreme Court has agreed to review a decision by the Colorado Court of Appeals in *In re Marriage of Hogsett and Neale*, 2018 WL 6564880 (Colo. App., Dec. 13, 2018), cert. granted, 2019 WL 4751467 (Sept. 30, 2019). The court of appeals, ruling on a question of first impression in Colorado, ruled that *Obergefell v. Hodges* applied retroactively to give same-sex couples the same right as opposite-sex couples to prove a common law marriage, at least for purposes of considering a petition for marriage dissolution for a lesbian couple who had never been formally married. However, that court, applying factors it considered appropriate, determined that the parties did not have a common law marriage. The petition for certiorari specified several issues, but the Supreme Court limited its consideration to two: (1) What factors should a court consider in determining whether a common law marriage exists between same-sex partners, and (2) Whether the court of appeals erred in affirming the trial court's conclusion that no common law marriage existed between the same-sex couple here. For a complete account of the court of appeals decision, see the January 2019 issue of *Law Notes*.

COLORADO – In June, *Law Notes* reported on the U.S. District Court's decision in *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147 (D. Colo., May 17, 2019), in which Senior U.S. District Judge Marcia S. Krieger held that plaintiff, a business that creates custom wedding websites, did not have standing to challenge Colorado's public accommodations statute for a declaration that it did not have to serve same-sex couples because of the proprietor's religious objections to same-sex marriage. The plaintiff had not been approach to create such a website or turned any couples away. However, plaintiff wanted to put on the website a statement advising of her policy and the religious reasons for it. As to that, the court found standing but rejected all her constitutional arguments, and denied plaintiffs' motion for summary judgment, noting, based on the undisputed facts, that it appeared the state was entitled to judgment in its favor on the plaintiff's claims. The court invited plaintiffs to submit any further briefing and argument it sought to present before the court ruled on the defendants' summary judgment motion. In a new opinion issued on September 26, Judge Krieger rejected the new arguments advanced by plaintiffs, and granted summary judgment to the defendants. *303 Creative LLC v. Elenis*, 2019 U.S. Dist. LEXIS 165391, 2019 WL 4694159 (D. Colo.). Plaintiffs tried to build on *Masterpiece Cakeshop* by arguing that the Colorado Civil Rights Commission members whose comments were cited by Justice Kennedy in Masterpiece showed the Commission was hostile to religion. That was irrelevant, of course, because this is not an appeal from an enforcement action, but rather a straightforward case of statutory interpretation. In this case, the Commissioners are defendants but have taken no action. The court also found distinguishable and not relevant various other cases cited by plaintiffs, who are represented by attorneys from Alliance

Defending Freedom, also known as "Alliance Defending the Freedom to Discriminate against LGBT People."

CONNECTICUT – A Hispanic self-identified heterosexual man employed by the Danbury, Connecticut, Fire Department, can proceed on Title VII and constitutional claims that he was subjected to hostile environment discrimination because of his race, national origin and sex, surviving in part the defendants' motion for summary judgment in *Rodriguez v. City of Danbury*, 2019 WL 4806032, 2019 U.S. Dist. LEXIS 171650 (D. Conn., Sept. 30, 2019). Of particular relevance for *Law Notes* is plaintiff's surviving constitutional claim against Deputy Chief Bernard Meehan, who allegedly subjected him to persistent, pervasive homophobic harassment. Although both men identify as straight, Rodriguez alleged that Meehan's harassment, although undoubtedly partially directed at Rodriguez because of his Puerto Rican heritage, also involved homophobic name-calling, nicknames and insults, as well as unwanted touching, sometimes in the presence of other firefighters. Reading the allegations as summarized by District Judge Robert N. Chatigny, one surmises that the Danbury Fire Department was resistant to efforts by the City to push it toward racial, ethnic, and sexual diversity, and that the handful of minority firefighters were subjected to intense pressure by their white colleagues and supervisors. Although the court found that Rodriguez's allegations were not sufficient to sustain a *Monell*-type "official policy" claim, he could maintain a Title VII hostile environment claim, relying on the continuing violation doctrine to extend the focus to events occurring earlier than the running of the statute of limitations, and, in particular, that Chief Meehan's qualified immunity claim against constitutional liability was unavailing on the summary judgment motion. "A jury might well find that Meehan's conduct was not motivated by sexual desire," wrote Chatigney, "But my role at this stage is not to resolve issues of fact one way or the other or try to predict what a jury will do; my role is limited to determining whether a factual issue is genuinely disputed so as to warrant submission to a jury. In making this assessment, I must view the evidence most favorably to the plaintiff and give him the benefit of all reasonable inferences. At this stage of the litigation, Meehan also cannot sustain a qualified immunity defense with regard to sexually harassing actions after 2003 . . . . It has long been established in this Circuit that sexual harassment can constitute an equal protection violation. It has been clear since at least 2003 that sexual harassment equal protection section 1983 claims borrow standards from Title VII." Thus, as a result of the Supreme Court's Title VII *Oncale* same-sex harassment ruling and subsequent 2nd Circuit case law, "as of 2003, it was clearly established in this Circuit that same-sex sexual harassment could give rise to an equal protection claim under Section 1983." While Meehan conceded the applicable law, he claimed the factual allegations were insufficient, but that factual dispute awaits trial. Rodriguez is represented by Elisabeth Ann Seieroe Maurer and Christopher S. Avcollie, of Maurer & Associates, PC, Ridgefield, CT.

CONNECTICUT – U.S. District Judge Janet Bond Arterton granted summary judgment to the employer in *Jones v. Natchaug Hospital*, 2019 U.S. Dist. LEXIS 164716 (D. Conn., Sept. 25, 2019), in which gay plaintiff Franklin Jones, an African-American man, claimed that he was a victim of race and sexual orientation discrimination in a promotion decision and also suffered retaliation when a job offer was withdrawn from him by another hospital owned by the defendant's parent company after he filed the complaint in this case. On paper, Jones appeared to have better educational and experiential credentials than the man who was awarded the Nurse Manager position for which he applied. The management officials making the decision decided that the other candidate's attributes outweighed Jones' credentials. Both men had previously worked at the hospital, and the managers decided that the other applicant had shown more initiative and follow-through on projects, thus more of the leadership skills needed for the position. Jones' apparent reasoning was that because he was black and gay, the awarding of the position to the white, straight applicant must be put down to race and sexual orientation discrimination. However, he gave disastrous deposition testimony quoted by the court, in which he stated that he had never heard either of the management decision makers make comments about gay employees or patients, and that he had no reason to believe that the two decision-makers would discriminate against him on the basis of his sexual orientation, other than the fact that he was an "open gay male." Judge Arterton observed: "In describing Mr. D'Eliseo as 'not qualified' and himself as 'highly qualified,' Mr. Jones focuses only on the objective requirements for the Nurse Manager job posting. Plaintiff ignores that while he was better qualified with regard to education and years of experience, Ms. Sullivan determined that Mr. D'Eliseo was better qualified in terms of the "other" requirements listed equally as "Qualifications" on that job posting. Plaintiff offers no evidence to suggest that Ms. Sullivan's conclusions about the candidates' subjective qualifications were inaccurate or motivated by discrimination. The record lacks any evidence which might call into question Ms. Sullivan's conclusion that Mr. D'Eliseo demonstrated stronger leadership skills or better initiative

during his time at Natchaug." As to the retaliation claim, the court found nothing in the record to support a claim that the employer had anything to do with a decision by another hospital to withdraw a job offer to Jones, after it learned he had resigned from Natchaug while under investigation on charges of taking medications due to their "high street value," as reported by a co-worker. Jones' union representative had advised him to resign from his position rather than await the results of the investigation. Jones is represented by John R. Williams, of New Haven, and Rose Long-McLean, Mr. Williams' associate.

DISTRICT OF COLUMBIA – A lesbian security police officer formerly employed by a security contractor for the federal government suffered a mixed ruling on her employer's motion for summary judgment on claims of violation of Title VII and the District of Columbia Human Rights Act in *Thomas v. Securiguard, Inc.*, 2019 U.S. Dist. LEXIS 169175 (D.D.C., Sept. 30, 2019). The extended and complicated factual allegations were related in considerable detail in the opinion by District Judge Amy Berman Jackson, who had to grapple with the difficult case in which the alleged bad actor and harasser was a federal official, not a supervisory or managerial employee of Kalisha Thomas's employer, defendant Securiguard. Officer Thomas had been assigned to the Thurgood Marshall Federal Judiciary Building, but her repeated complaints about harassment by an employee of the Administrative Office of the U.S. Courts who had oversight responsibilities for security at federal buildings, led Securiguard to seek to transfer Thomas to the Library of Congress at no loss of pay, even though the security officers at the LoC were generally paid less than those at the Marshall Building. When Thomas declined the transfer, her employer told her that rejection of the assignment would be considered a resignation, but actually it put her on unpaid leave while her various complaints were sorted out, although ultimately she was terminated. In dismissing several counts of her complaint, Judge Jackson found that the employer had offered non-pretextual, non-discriminatory reasons for several of its contested actions, but not for all, leaving material fact disputes for some aspects of the complaint. The court definitely rejected the employer's contention that the D.C. Human Rights Act, which expressly forbids sexual orientation discrimination, did not apply to the case because Thomas was assigned to work in federal buildings. Although the D.C. City Council has no jurisdiction to legislate about the employment conditions of federal workers, it can address discrimination issues involving federal contractors. The employer also noted that the D.C. Circuit has not ruled in favor of allowing sexual orientation discrimination claims under Title VII, but the court noted that numerous D.C. district courts have allowed sex stereotyping claims under Title VII in cases involving LGBT plaintiffs, and that Thomas's factual allegations were sufficient to ground a stereotyping claim. The case relies in part on a "cat's-paw" theory, in that Thomas alleges that the harassing federal supervisor's bias led him to make statements that caused adverse personnel actions against her by supervisors who were not themselves shown to be biased against her due to her sexual orientation. Indeed, one of the employer's managers involved in the personnel decisions credibly claimed she did not know that Thomas was a lesbian when some challenged decisions were made. Significatly, Thomas will be allowed to move forward on her hostile environment sexual harassment claim. Thomas is represented by Leslie David Alderman, III, and Savanna Lee Shuntich, of Alderman, Devorsetz & Hora PLLC, Washington.

FLORIDA – U.S. Magistrate Judge Mark A. Pizzo ruled in *Hymes v. Commission of Social Security*, 2019 WL 4565466, 2019 U.S. Dist. LEXIS 160364 (M.D. Fla., Tampa Div., Sept. 20, 2019), that an HIV-positive man was entitled to have new evidence concerning his disability claim considered by an ALJ, reversing the prior ALJ decision and remanding the case back to the Commissioner. After the initial ALJ ruling, which determined that the plaintiff was capable of performing work available in the national economy despite the debilitating effects of his HIV status and other medical problems, the plaintiff requested Appeal Council review, submitting additional evidence, a two-page Mental Residual Functional Capacity Assessment, a six-page report, and IQ test results from a psychologist, dated six months after the ALJ's unfavorable decision. The Appeals Council denied review, stating that the additional evidence did not relate to the period at issue, and therefore did not affect the decision about whether he was disabled on the date of the decision. Judge Pizzo found this reasoning erroneous, finding the new evidence to be "chronologically relevant" because the diagnosis regarding cognitive defects, verbal skills, and intellectual disability related back to the period before the ALJ's decision, as in an earlier case in which the 11th Circuit had dealt with a similar proffer of new evidence after the ALJ decision, *Washington v. Commissioner*, 806 F.3d 1317 (11th Cir. 2015). "Given that plaintiff's HIV diagnosis preceded the relevant time period," wrote Pizzo, "I find the new evidence is chronologically relevant here. Dr. Marone explained in his report that 'rapid progression of the neurocognitive impression is often uncommon' and opined that 'vocationally, I suspect that obtaining and sustaining even part-time employment may be extremely difficult for him, and limited to unskilled, nonstrenuous activities allowing flexible

breaks and positioning.' Dr. Marone's Mental Residual Functional Capacity Assessment buttresses his opinions. The assessment form indicates Plaintiff had severe limitations in several areas and moderate limitation in many areas." Further, the judge noted that the ALJ's discussion of plaintiff's mental capacities was based on long-outdated information. Finding a "reasonable probability" that the additional evidence "could lead to a different outcome," Pizzo asserted that it should be for the ALJ to decide on the merits, taking the new information into account. The plaintiff is represented by Suzanne Lynn Harris of Harris & Helwig, P.A., Lakeland, FL.

FLORIDA – The Florida 4th District Court of Appeal ruling in *J.H. v. Department of Children & Families*, 2019 Fla. App. LEXIS 13658 (Sept. 11, 2019), is painful to read. J.H. and B.D., lesbian partners, had two children, one related to each of them. One of the children sustained injuries that a medical specialist identified as Shaken Child Syndrome, apparently inflicted while the children were in the custody of the two women. J.H. contended that her partner was responsible for the injuries, and noted that the other child had sustained no injuries. The Department of Children & Families concluded that the home was not safe for the children, and got the Broward County Circuit Court to terminate the parental rights of J.H. and B.D., finding that J.H. had failed to protect her child, even if her explanation that B.D. inflicted the harm were to be believed. In affirming, the Court of Appeal found the record evidence supported the trial court's conclusions and upheld the termination of parental rights, at the same time upholding the trial court's refusal to award custody to one of the grandmothers, noting that she had seen the same signs of abuse but had taken no steps to protect the child.

ILLINOIS – Teri Davis filed suit against Penn Aluminum International LLC, her employer, claiming she was subjected to disparate treatment, gender discrimination and sexual orientation discrimination by the employer after "a consensual sexual relationship with a supervisor ended in August, 2015." Summary judgment was granted in favor of Penn on March 8, 2019, on the basis that Davis presented no evidence demonstrating she was discriminated against on account of her gender or sexual orientation. Penn's counsel filed a motion for attorneys' fees, the sole basis for which was "Davis' purported failed attempt to establish a claim of hostile work environment/ sexual harassment." Davis had not alleged hostile work environment/ sexual harassment in her complaints, either original or amended, but in her deposition she "allegedly attempted to raise a hostile work environment claim." Penn then addressed that "claim" in its memorandum in support of its summary judgment motion, which led Davis to address the issue in her response to the motion. Penn then devoted about 40% of its reply brief to this issue, pointing out that Davis had not alleged a hostile work environment in her complaint and that she could not support such a claim. Judge Michael J. Reagan found that Davis could not assert the claim in her response and that she had presented no evidence that she was subjected to a hostile work environment or sexual harassment. Judge Reagan retired after granting the s.j. motion and the matter was re-assigned to District Judge Staci M. Yandle, who received Penn's motion for fees, which argued that the hostile work environment claim was frivolous, lacked supporting in the evidence and should not have been pursued, seeking fees to cover the work it did in getting s.j. on this issue. Employers are not automatically awarded fees, a fee award being up to the discretion of the court and then only in exceptional cases, where there is a finding that plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," citing the civil rights fee award statute. "Here," wrote Judge Yandle, "Penn clearly baited a hook and now is crying foul. Davis did not assert a hostile work environment or sexual harassment claim in her complaint. By preemptively arguing against such a non-existent claim in its Memorandum . . . , Penn took it upon itself to raise the issue and address the claim on the merits. Had it not done so, the issue would not have been addressed by the Court and the result would have been the same – judgment for Penn. To be sure, Davis took the bait and bundled sexual harassment arguments with her discrimination claim arguments. But Penn gave the claim life by addressing it on the merits in the first instance. Under these circumstances, this Court does not find Davis' pursuit of the same wholly unreasonable." The judge denied the fee motion. Given the small amount of money claimed as a fee – $5,876.50 – it is surprising that the motion would have been filed, unless it was intended to "zing" Davis for having the temerity to file a discrimination claim against her employer. *Davis v. Penn Aluminum International, LLC,* 2019 U.S. Dist. LEXIS 164394 (S.D. Ill., Sept. 25, 2019). Teri Davis is represented by George O. Suggs of Schuchat, Cook et al., St. Louis, MO.

ILLINOIS – Tim Jon Semmerling, a gay man, was hired by the defense team of a man – who claims to be a member of al-Qaeda – who is detained at Guantanamo Bay by the U.S. military. Semmerling is a "mitigation specialist." Semmerling alleges that Cheryl T. Bormann, the lead attorney on the defense team, who at first agreed to keep Semmerling's sexual orientation confidential from the client because as an al-Qaeda member he would likely object to a gay man working on his case, suddenly did a turnabout and told the client that Semmerling

was "infatuated" with him and was "pursuing a homosexual interest" with the client. Semmerling alleges that this caused the client to insist that Semmerling be fire. Semmerling sued Bormann and the federal government in U.S. District Court in Illinois. For some reason not explained in the slip opinion from the court, Illinois law applied to the question whether the suit against Bormann for defamation, negligence, and intentional infliction of emotional distress, is barred under Illinois's absolute litigation privilege. U.S. District Judge Robert W. Gettleman decided that it was barred, noting that Illinois treats as absolutely privileged against tort claims "anything said or written in the course of a legal proceeding" by an attorney for a party, regardless whether it is true or false. Gettleman concluded that Bormann's alleged statement to the client is covered by this privilege. He rejected, however, the government's sovereign immunity claim, but held that Semmerling's factual allegations were not sufficient to state actionable claims of negligence or intentional infliction of emotional distress against the government. *Semmerling v. Bormann*, Case No. 18 CV 6640 (N.D. Ill, slip opinion filed 9/11/19).

INDIANA – A gay man who thinks he suffered discrimination because of his sexual orientation, files an EEOC charge and then a complaint in federal court *pro se*, strikes out with the judge because he doesn't understand the necessity to plead facts showing that his sexual orientation was a reason why he was denied promotions for which he applied. Amazingly, in addition to being a pilot suing an airline, the plaintiff is a lawyer! *Coomes v. Republic Airline Inc.*, 2019 WL 4572800, 2019 U.S. Dist. LEXIS 1603009 (S.D. Indiana, Indianapolis Div., Sept. 20, 2019). Judge Tanya Walton Pratt found John Coomes' complaint sufficient to withstand a motion to dismiss as to age discrimination, since he alleged he was 50 and that the men selected for the positions he sought were all in their 20s or 30s. But he missed the boat on his sexual orientation claim by asserting that the men hired for the positions he sought were of "varying sexual orientations," which leads to the obvious inference that Republic hires men of "varying sexual orientations" so is unlikely to be discriminating based on sexual orientation. In its motion to dismiss, Republic argues that Coomes did not allege facts giving rise to an inference that he was a victim of sexual orientation discrimination. In reply, he asserted that his claims were specifically directed at a particular Republic manager and that "discovery will make clear how Plaintiff's gender and sexual orientation was the reason behind the discrimination perpetuated by [this person]." Not good enough, wrote Judge Pratt, since neither his Complaint nor his EEOC charge were at all specific about this. Judge Pratt agreed with Coomes rather than Republic on the question whether he had to identity himself as gay in his EEOC charge in order to bring a sexual orientation discrimination claim. "Nevertheless, Coomes' comlaint doesnot give rise to an inference that his gender or sexual orientation were factors in his not receiving certain jobs at Republic," she wrote. "The Complaint is so vague that it gives the impression that Republic is offering jobs to men with a variety of sexual orientations, and thus implies that Republic does not discriminate based on sexual orientation. The facts as pleaded in the Complaint give rise to an inference that Republic hires men of various sexual orientations. They do not give rise to the opposite inference, which would create a nexus between Coomes' sexual orientation and Republic's refusal to offer him certain jobs." However, Judge Pratt dismissed these claims without prejudice, giving Coomes leave until October 21, 2019, to file an amended complaint to cure these pleading problems. One hopes he has secured counsel, who will know how to frame the complaint properly, since the factual allegations he offered in response to the dismissal motion suggest that he should be able to frame an amended complaint that can state a sexual orientation discrimination claim under Title VII, at least for now. (Of course, if the Supreme Court reverses *Zarda,* his sexual orientation claim would ultimately be dismissed as not justiciable under Title VII, but one holds out hope . . .)

KENTUCKY – District Courts within the 6th Circuit are divided over the degree to which the Circuit's decision in *Harris Funeral Homes*, upholding gender identity discrimination claims under Title VII, may have abrogated, at least in part, the Circuit's leading precedent rejecting sexual orientation discrimination claims, *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), respecting its approach to the issue of gender-stereotyping claims by gay plaintiffs. In *Johnson v. CC Metals & Alloys, LLC*, 2019 WL 4577110, 2019 U.S. Dist. LEXIS 160699 (W.D. Ky., Paducah Div., Sept. 20, 2019), Senior U.S. District Judge Thomas B. Russell rehearses the controversy, but finds that it does not make much difference in deciding whether to grant summary judgment in this case, because he found evidence of sex stereotyping slim at best. From the court's description of the factual allegations, it appears that David Johnson was not an "out gay man" in the workplace, but that some of his coworkers sensed that he was gay, subjected him to teasing, and eventually made things too hot for him in that workplace. The court was persuaded by the employer's argument that what harassment Johnson suffered was due to his perceived sexual orientation. Furthermore, the court noted, Johnson's resignation email "specifically stated that his resignation was due to discrimination based on his sexual orientation,"

wrote Russell. "Moreover, Johnson discussed CCMA's failure to remove Forsythe from his shift after making 'homophobic remarks' about Johnson's 'orientation.' Finally, Johnson claimed that CCMA did not legally support him despite knowledge of 'harassment because of his sexual orientation.' This initial email clearly shows that Johnson perceived the harassment was a result of his sexual orientation, not his gender non-conforming appearance and mannerisms." The court cited other factual assertions in the complaint generally supporting this conclusion. As to a possible same-sex harassment claim, the court mechanically applied the three proof methods listed by Justice Scalia in his opinion for the Supreme Court in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), and found that Johnson's complaint failed as to all there: (1) no evidence his harassers made sexual advances to him out of sexual desire; (2) no evidence harassers were motivated by general hostility to the presence of men in the workplace; (3) no direct comparative evidence about how the alleged harassers treated members of both sexes in a mixed-sex workplace. Furthermore, even if the court was to accept Johnson's factual contentions, Judge Russell found, the incidents alleged by Johnson did not rise to the level of "severe or pervasive" as to constitute a hostile environment, especially in light of Johnson's admission that there was lots of casual horseplay among the men in that workplace and he generally joined right in until things turned sour for him. Johnson is represented by Wes Sullenger of Paducah, KY.

LOUISIANA – Virginia Gayle Norris filed suit in federal court against her former employer, an AIDS services organization, claiming violation of her rights under Louisiana's Whistleblower statute and asserted various discrimination claims under the federal Age Discrimination in Employment Act (ADEA). *Norris v. Acadiana Concern for AIDS Relief Education and Support*, 2019 WL 4805847, 2019 U.S. Dist. LEXIS 170406 (W.D. La., Lafayette Div., Sept. 30, 2019). District Judge Robert R. Summerhays, a former U.S. Bankruptcy judge who was appointed to the District Court by President Donald Trump, denied the employer's motion to dismiss. Norris was employed as a 'field surveillance epidemiologist' for Acadiana, in a program administered by the State of Louisiana. Her job was to obtain information regarding individuals who tested positive for HIV. She was employed from 2001 until her termination in August 2018. Her claim is that a new supervisor began requesting that she obtain similar information about individuals who had submitted to HIV testing but had tested negative. She consistently refused to gather such information, believing that its collection would violate a federal health care confidentiality statute, HIPAA, as well as a Louisiana regulation, Title 51 of the Sanitary Code. She reported this to various state officials, and alleges that the employer retaliated against her, putting her on a "Supervision plan" and then discharging her. She also made numerous factual allegations to support her claim that she suffered harassment because of her age. In rejecting the motion to dismiss, Judge Summerhays found, contrary to the defendant's argument, that a non-profit health care organization is covered by the state's Whistleblower law, that its operation is not limited to violations of Louisiana statutory law but could extend to federal law and state regulations, and that Norris's factual allegations were sufficient to state claims under ADEA. Norris is represented by Jill L Craft and William Brett Conrad, of the Craft Law Firm, Baton Rouge, LA.

MARYLAND – Opinions dismissing *pro se* lawsuits are dismaying to read, especially when it becomes clear that the plaintiff has no idea how to plead a claim that can survive a motion to dismiss, and has no knowledge of the limits of existing law. In this case, James Alston, an employee of the Maryland Department of Health, sued under Title VII and a Maryland Executive Order that forbids sexual orientation and sex discrimination within state employment, challenging the Department's selection of women rather than him for promotion to two positions for which he had applied. He named as defendants not only the employer-agency but also various persons, supervisors and managers, in their individual and official capacities, as well as the governor. *Alston v. State of Maryland, Department of Health*, 2019 U.S. Dist. LEXIS 158048 (D. Md., Southern Div., Sept. 17, 2019). He did not assert a claim under Maryland's anti-discrimination statute, which covers sex and sexual orientation claims. He did not specify in his complaint or his EEOC charge either his sexual orientation or the sexual orientation of the women who received the positions he sought. He did allege that he was better qualified for the positions than they were, but his EEOC charge only describes the first promotion application; he filed suit after receiving his right to sue letter and asserted both promotion denials in his complaint. District Judge Paul W. Grimm explained that Title VII runs against the employer entity, not individual supervisors and managers, and that the Executive Order does not provide a private right of action, being enforceable only through administrative proceedings. Thus, the court granted the motion to dismiss with respect to the individual defendants and with respect to the E.O. claim. Furthermore, because Alston identified neither his own sexual orientation nor that of the women who received the positions specified in his complaint, his factual pleadings failed to state a claim of sexual orientation discrimination, because they did not give rise to an inference that his sexual orientation had anything to do with the

denial of either promotion. The second promotion decision falls out of the case entirely because it was not mentioned in the EEOC charge, thus failing to exhaust administrative remedies. What was left was his sex discrimination claim, and Judge Grimm found that his allegations were minimally sufficient to survive the motion to dismiss as to that claim. Perhaps this experience will persuade Alston that if he wants to get anywhere with his sex discrimination claim, he should get counsel. Since Title VII authorizes attorneys' fees for prevailing plaintiffs, he should be able to find counsel who will represent him if they evaluate his sex discrimination claim as potentially meritorious. He also should be filing an amended complaint to add a claim under the state's antidiscrimination law if he wants to pursue the sexual orientation claim, with appropriately amended factual pleadings. The court dismissed his sexual orientation claim without prejudice, so he could reassert it in an amended pleading, although there is no binding 4th Circuit precedent recognizing sexual orientation discrimination claims under Title VII, so it would be prudent to add the state claim, against the possibility that the Supreme Court will rule against the plaintiffs in the pending Title VII sexual orientation cases. He'd better hurry up, since putting together an amended complaint and going into discovery unrepresented is setting himself up for a loss on a summary judgment motion. The court ordered the Department to file an answer to the sex discrimination claim by October 21, which would start the clock running on discovery.

MICHIGAN – U.S. District Judge Nancy G. Edmunds accepted a Magistrate Judge's report and recommendations concerning a discovering dispute arising from the Karnoski litigation in the U.S. District Court in the Western District of Washington, which challenges the constitutionality of Trump's transgender military ban, in its current iteration usually referred to as the Mattis Policy or Plan. *Karnoski v. Trump (In re Subpoena of Center for Military Readiness),* 2019 U.S. Dist. LEXIS 167467 (E.D. Mich., Sept. 28, 2019). In its continued stonewalling of discovery requests under the banner of Executive Privilege and Deliberative Privilege, the government has encouraged third parties to fight subpoenas to product documents and other materials related to the process by the which the Mattis Plan was formulated and recommended. Center for Military Readiness is a conservative think-tank that is believed to have provided materials to Mattis's Task Force (whose membership has not been revealed) that was charged with coming up with an implementation plan to recommend to the president during the fall and early winter of 2017-18. The Magistrate Judge recommended that the Court order CMR to provide various materials dated from June 16, 2015 through March 23, 2018 (the date when Secretary Mattis submitted the report and recommendations to the president), and rejected objections by CMR and the government. Judge Edmunds backed up the magistrate judge, specifically rejecting the claim by the government that Executive Privilege or Deliberative Privilege would shield against discovery the documents in question, prepared by a third party for submission to the government. The ultimate issue in the case is the motivation behind the recommended policy, and the court rejected an attempt to stonewall as to relevant information about that. The opinion is worth reading for its recitation of the ridiculous arguments advanced to try to shield primary source material that may be exceedingly relevant to the main issues in the case.

MICHIGAN – Senior U.S. District Judge Robert H. Cleland denied Wayne State University's motion to dismiss almost all the claims asserted by InterVarsity Christian Fellowship, a student group on the Wayne State campus that is a chapter of a similarly-named national association, which had been denied official recognition by the University, cutting it off from student activity fees and free use of on-campus facilities. *InterVarsity Christian Fellowship/USA v. Board of Governors of Wayne State University*, 2019 U.S. Dist. LEXIS 160351, 2019 WL 4573800 (E.D. Mich., Southern Div., Sept. 20, 2019). For those who thought the Supreme Court's ruling in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), effectively relieves state universities and colleges from any requirement to grant official recognition to religiously-based student organizations, think again. Judge Cleland's opinion cites several rulings by other courts that have distinguished Martinez factually and allowed recognition lawsuits to proceed past motions to dismiss. The crux of the matter is InterVarsity's allegation that (1) Wayne State's policy for student group recognition is not an "all comers" policy similar to that at issue in *Martinez* and (2) IntraVarsity credibly alleges that Wayne State's enforcement of its non-discrimination policy is riddled with exceptions, subjecting IntraVarsity to unequal treatment because of the religious belief rules it imposes on membership and leadership. In *Martinez*, the Supreme Court ruled that a public university can maintain a policy that recognized student organizations must open their membership and leadership positions to any student who wants to join them, where the parties had stipulated that this was the policy (even though it was not apparent in light of the categorical anti-discrimination policy formally adopted by the university). Since few schools have an "all-comers" policy, Martinez has proved to be of limited relevance in continuing disputes over recognition of student organizations. The court observed that it is possible that IntraVarsity will not

ultimately prevail on the merits, but that its factual allegations are sufficient to survive a motion to dismiss. At the same time, because material facts with respect to all of Intravarsity's legal theories are contested by Wayne State, the court denied IntraVarsity's motion for summary judgment. Wayne State's antidiscrimination policy specifically includes sexual orientation, and a leadership policy that would effectively disqualify from leadership roles in IntraVarsity gay people who were unwilling to subscribe to a creed that condemns their sexuality was obviously a factor in the Wayne State's denial of recognition to the Christian group. Judge Cleland was appointed by President George H.W. Bush in 1990, and took senior status in 2013. The Becket Fund for Religious Liberty represents InterVarsity. The only amicus brief filed with the district court was from Jewish Coalition for Religious Liberty, a conservative advocacy organization that regularly files amicus briefs in support of religious campus groups denied recognition because of their membership policies, and Asma Uddin, who was formerly affiliated with the Becket Fund.

MINNESOTA – A federal trial jury found that the University of Minnesota (Duluth) had unlawfully discriminated against Shannon Miller, the lesbian head coach of the women's hockey team, by refusing to renew her employment contract, in violation of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. (The ground of the discrimination claim was sex, not sexual orientation, the evidence going to the point that Miller's superiors had trouble accepting a powerful, assertive woman.) The jury awarded Miller $744,832 in back pay and benefits and $3 million in other past damages, and the judge later awarded Miller front pay and benefits in the amount of $461,238. *Miller v. Board of Regents*, 2019 WL 433906 (E. Minn., Sept. 6, 2019). UMD filed a post-trial motion for judgment as a matter of law, arguing that the decision not to renew a contract does not constitute an "adverse employment action" within the meaning of the discrimination statutes and that insufficient evidence supported the verdict. U.S. District Judge Patrick J. Schiltz stood by his earlier decision in ruling on a summary judgment motion that refusing to renew an employment contract is an adverse employment action, without going into further explanation. As to the evidence issue, UMD argued that dissatisfaction with Miller's performance in light of her high salary was the reason for the decision not to renew the contract. "This was indeed UMD's story at trial," wrote Schiltz, "and a reasonable jury could have credited it. But a reasonable jury could also have found that UMD's story was pretextual, and that the real motivation for UMD's decision was discrimination and retaliation. The evidence at trial left no doubt that Miller was a world-class hockey coach and that UMD's decision not to renew her contract shocked many people familiar with the world of Division 1 women's hockey." The court found that this provided "context for other evidence in the case," which, "taken together, provided a sufficient basis for the jury's findings of discrimination and retaliation." Thus, the court denied UMD's motion for a new trial on the merits. However, the court found convincing UMD's argument against the $3 million "other past damages" award and concluded that remittitur was required. After reviewing the evidence again, the judge concluded that if Miller wanted to avoid a new trial on damages, she should accept a reduction of the $3 million to $750,000, finding this amount to be comparable to the highest amounts the 8th Circuit had upheld in similar cases where the damages mainly related to emotional distress (or, as UMD argued, "garden variety" emotional distress). However, the court rejected UMD's argument to limit the front-pay award to two years, rather than covering the period up to the date of the verdict. That Miller had planned to seek a two-year renewal was not preclusive on the issue of how long she would have continued to coach at UMD were she not discriminatorily non-renewed. * * * A few days earlier, the Court of Appeals of Minnesota affirmed a ruling by the Hennepin County District Court putting an end to related discrimination claims filed in the state court by Miller and two other lesbian coaches, finding them barred by the statute of limitations, and that a Whistleblower Act claim they were trying to assert was preempted by the Minnesota Human Rights Act. *Miller v. Board of Regents*, 2019 WL 4164898, 2019 Minn. App. Unpub. LEXIS 844 (Minn. Ct. App., Sept. 3, 2019).

NEW JERSEY – Ruling on defendant's motion to dismiss Title VII and Americans with Disabilities Act (ADA) claims brought by a transgender woman in *Cunningham v. Burlington Coat Factory Warehouse Corp.*, 2019 WL 4786016, 2019 U.S. Dist. LEXIS 169658 (D.N.J., Sept. 30, 2019), U.S. District Judge Noel L. Hillman allowed the plaintiff's retaliation claim under the ADA to go forward, but found that the plaintiff's unwillingness thus far to disclose on the record the nature of her claimed disability required dismissal of her discrimination and failure to accommodate claims, as the civil pleading standard had not been met. There were not sufficient factual allegations in the complaint to permit a determination whether Cunningham has a disability as defined in the ADA. However, the dismissal was without prejudice, the court granting plaintiff's request for permission to file a second amended complaint to satisfy the pleading requirement. As to the gender identity sex discrimination complaint under Title VII, the judge noted that the

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Harris Funeral Home case is pending before the Supreme Court, and directed the parties to "show cause why the decision on Defendant's claim that Title VII does not protect transgender individuals should not be stayed until the Supreme Court decides, presumably this term, the case of *R.G. and G.R. Harris Funeral Homes v. EEOC*, 884 F.3d 560, 575 (6th Cir. 2018), cert. granted, in part sub nom, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019)." Charlize Cunningham is represented by David M. Koller, Koller Law LLC, Philadelphia.

NEW YORK – Last month we reported a Report and Recommendation by Magistrate Judge Wang recommending dismissal of a complaint by a transgender woman about the housing placement she received under the auspices of the NYC Department of Homeless Services. See *Lopez v. NYC Dep't of Homeless Services*, 2019 WL 3531955 (S.D.N.Y. Aug. 2, 2019). On September 23, U.S. District Judge Valerie Caproni accepted the magistrate's recommendation, finding the plaintiff's objections to be without merit, in *Lopez v. N.Y. City Dep't of Homeless Services*, 2019 U.S. Dist. LEXIS 162222, 2019 WL 4593611 (S.D.N.Y.). The main problem with the pro se complaint was that it named the wrong defendants. The court found that suing the housing unit where Lopez was assigned was inappropriate, as the housing assignment was made by the city department, and neither the institution nor its leadership had the authority to change the plaintiff's housing assignment. The court did give the plaintiff leave to amend her complaint, and instructed the clerk to terminate the listing of the institution – Women in Need, Inc. – and its executive director, former NYC Council President Christine Quinn, from the docket entries in question. For details, the reader should consult the September issue of *Law Notes*.

NEW YORK – In *Dollinger v. New York State Insurance Fund*, 2019 U.S. Dist. LEXIS 165180, 2019 WL 4689267 (N.D.N.Y., Sept. 26, 2019), U.S. District Judge Mae A. D'Agostino granted summary judgment against Robert A. Dollinger, a *pro se* plaintiff asserting claims of discrimination, retaliation, and hostile work environment based on his sexual orientation and disability. Dollinger was no his third go-around, earlier Title VII complaints being dismissed because they arose prior to the *Zarda* opinion by the 2nd Circuit. (In a footnote, the court mentions that *Zarda* will be argued at the Supreme Court on October 8.) This opinion provides a case study of how a *pro se* plaintiff can utterly fail to present a convincing case, even though it sounds like he was probably subjected to a hostile environment. He submitted to depositions for which he was totally unprepared, and competent employment counsel could probably have educated him about the kind of testimony that is required to sustain a hostile work environment claim and pushed him to compile the necessary information. He was pressed in the deposition for concrete examples of the vague, general claims he was making, but he failed to respond with the level of detail that would both lend credibility to his allegations and support the necessary claim of unlawful motivation. His strategy appeared to boil down to the implicit assertion that everything that happened to him that he deemed offensive must be due to his sexual orientation. As Judge D'Agostino summed things up: "In sum, what is clear from the record is that, over the course of many years, Plaintiff has had an acrimonious relationship with a number of his coworkers. What the record fails to support, however, is that this acrimonious relationship had anything to do with Plaintiff's sexual orientation or that it was sufficiently severe and pervasive to support his claim. Even though many of the allegations that fall within the 300 day window could be deemed as unrefined or uncivil, Title VII simply 'does not set forth a general civility code for the American workplace.'" Accordingly, the court grants defendant's motion for summary judgment.

NEW YORK – A psychiatric hospital inmate who disclosed his HIV status during an altercation with hospital staff cannot later maintain a cause of action for violation of his constitutional right of privacy when a staff member later mentioned his HIV status to other patients, held U.S. District Judge Alison J. Nathan in *Hernandez v. Kirby Forensic Psychiatric Hospital*, 2019 U.S. Dist. LEXIS 163471, 2019 WL 4640054 (S.D.N.Y., Sept. 24, 2019). While acknowledging that individuals have a due process privacy right regarding information about their HIV status, and thus "Plaintiff's HIV status is information that would ordinarily receive strong constitutional protection," Judge Nathan wrote that "an individual cannot expect their constitutional right to privacy to protect them against the disclosure of medical information that had already previously been disclosed to the public . . . In this case, Plaintiff's public disclosure of his HIV status is fatal to his claim. At the time Plaintiff alleges that Daniels told others on the ward about Plaintiff's HIV status, Plaintiff had already loudly broadcast this information to the rest of the ward. Plaintiff's threats that he would infect Kirby staff with HIV could be heard 'throughout the ward,' including in the day room where 'most of the patients' were located. Given this public disclosure, Plaintiff had no reasonable expectation that his HIV status would be kept private from his fellow patients and Kirby staff." The court emphasized that it was the "public nature of the disclosure in this case" that was "dispositive," not the mere fact of a disclosure. Furthermore, the disclosure was voluntary and knowing,

not compelled, and it was not made in confidence. The court granted summary judgment to the defendants. Hernandez sued *pro se*.

OHIO – The 6th Circuit has yet to rule that sexual orientation claims can be asserted under Title VII's ban on discrimination "because of sex," so U.S. District Judge Walter H. Rice held that he was obligated to grant the employer's motion to dismiss Sandra Vigil's sex discrimination claims in *Vigil v. STS Systems Integration LLC*, 2019 U.S. Dist. LEXIS 164453, 2019 WL 4674562 (S.D. Ohio, Western Div., Sept. 25, 2019). Vigil, an out lesbian, made factual allegations that would strongly support a sexual orientation discrimination claim, but unfortunately Ohio's anti-discrimination statute does not cover sexual orientation, and the district court was not persuaded that it could buck circuit precedent on this issue under Title VII. Furthermore, Vigil's attempt to preserve her sex discrimination claims based on a sex-stereotyping theory did not fly, either. The court found that all her relevant assertions along these lines were contained in her opposition to the motion to dismiss, not in her complaint. As to retaliation, in order to maintain a valid claim, the plaintiff must prove that "she took an 'overt stand against suspected illegal discriminatory action,'" but the court found her pleadings short on factual support for such a claim. "Vigil cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint," wrote Judge Rice, quoting circuit precedent derived from the Supreme Court's *Iqbal* ruling. There remains a breach of contract claim that was not dismissed. Furthermore, the court dismissed without prejudice, leaving the possibility that Vigil could come back with a complaint tailored to meet the court's objections if she can assert facts with sufficient specificity. Vigil is represented by Elizabeth Asbury Newman and Kelly Mulloy Myers, of Freking Myers & Reul, LLC, Cincinnati, and Jeffrey Michael Silverstein of the same firm's Dayton office.

PENNSYLVANIA – After the 3rd Circuit refused to reverse the district court's denial of a preliminary injunction in *Doe v. Boyertown Area School District*, 897 F.3d 518 (2018), *cert. denied*, 139 S. Ct. 2636, May 28, 2019), action reverted back to the District Court. The issue is whether Boyertown Area School District's policy of letting transgender students use restroom facilities consistent with their gender identity violates the privacy rights of cisgender students, either as protected by the constitution or state law. In rejecting the preliminary injunction motion, the district court and the court of appeals both agreed that plaintiffs had not shown a likelihood of success on the merits of their claims. After the Supreme Court scheduled argument in three Title VII cases concerning discrimination because of sexual orientation or gender identity under Title VII, plaintiffs in this case moved to stay proceedings pending a Supreme Court decision in those cases. They argued that the Supreme Court may decide issues pertinent to resolving the issues in this case, noting that one of the factors specified in the court's analysis of their preliminary injunction motion was the possibility that excluding transgender students from the restroom might violate those students' rights under Title IX. The plaintiffs argued that if the Supreme Court rules in favor of Harris Funeral Homes, finding that Title IX does not extend to gender identity discrimination claims under Title VII, that factor could disappear from their case. The court found this too attenuated to justify staying the proceedings. In a lengthy footnote to his Order denying the motion to stay issued on September 5, District Judge Edward G. Smith wrote: "While the court is appreciative of all parties' desire to responsibly allocate resources, the court does not find that judicial economy favors a stay. It is unclear (and seemingly unlikely) that the Supreme Court's decision in the Pending Cases will have any impact on this case. The court cannot discern how the Pending Cases will impact the plaintiffs' constitutional right to privacy claim. In addition, the Pending Cases do not appear to affect the Title IX claim, especially as, inter alia, this court and the Third Circuit determined that BASD policy could not rise to a Title IX claim because it targeted both sexes equally. The court also disagreed with the plaintiffs' assertion that a Supreme court decision that 'sex' means sex at one's birth would substantially change the Third Circuit's decision," pointing out that the 3rd Circuit did not purport to decide the question whether excluding transgender students from restrooms would violate Title IX, it just noted the claim. The court also noted that the pending Title VII cases would not affect the plaintiff's state law tort claim.

SOUTH DAKOTA – A man attempting to open a sexually-oriented business in Rapid City, South Dakota, ran into local opposition and significant delays in opening his business due to a municipal code provision on sexually-oriented and adult businesses, combined with political blowback from local religious leaders and the temporary occupancy of nearby space by a "Karate for Kids" business that was claimed to be an educational facility. *Eliason v. City of Rapid City*, 2019 WL 4774364, 2019 U.S. Dist. LEXIS 167953 (D.S.D., Western Div., Sept. 30, 2019). Smooth sailing marked the permitting process until it ascended from the city enforcement bureaucracy up to the political level, where a public hearing provided a venue for the local religious community to weigh in negatively, leading to an adverse city council vote. Also, the local law prohibited siting sexually-oriented businesses within 1,000 feet of

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an educational facility. The occupancy of nearby space by the Karate program, accompanied by a claim that it was an "educational facility," delayed the issuance of a temporary permit, although the Karate program moved to another location during the pendency of this case. Although David Eliason was eventually able to open his business in the space he had rented, he claimed that the City's process had substantially delayed the opening, resulting in lost profits, and that the municipal code provisions were unconstitutional on their face and as applied. Chief District Judge Jeffrey L. Viken permanently enjoined the city from enforcing certain of the provisions against Eliason and his business, and because of vagueness issues regarding the classification of "educational facilities," found that part of the regulation to be facially unconstitutional. The court said that the move out by the Karate program did not moot the issue of vagueness, because it was possible that if Eliason's business was successful he might want to move it to a larger store, in which case these issues could surface again. On the issue of damages, the court found that material facts were disputed about when the business would have opened in the absence of unconstitutionally imposed delays, so damages could not be determined on the summary judgment motion. The court also found that Eliason had personal standing as a plaintiff in addition to his business, because the local laws authorized criminal liability for individuals for operating an unlicensed sexually-oriented business. Plaintiffs are represented by Matthew J. Hoffer, of Shafer & Associates, P.C., Lansing, MI; and Roger A. Tellinghuisen and Michael V. Wheeler, of DeMersseman Jensen Tellinghuisen & Huffman, LLP, Rapid City, SD.

TEXAS – U.S District Judge Gray H. Miller ruled on September 26 that an HIV-positive man who applied for a position with a company that had previously employed him could not defeat a summary judgment motion against his disability discrimination claim because he failed to provide any evidence that the man who made the decision to hire a different applicant for the position knew that the plaintiff was HIV-positive. *Lee v. Accenture LLP*, 2019 WL 4694144 (S.D. Texas, Houston). Robert Lee worked for Accenture as an account for about a year, during which he disclosed to the managing director of the employer's resource group that he was HIV-positive, and at her suggestion applied for an accommodation in terms of his work schedule. His job ended on October 11, 2016. Early in 2017, Accenture posted an opening for a position for which Lee was qualified, and he applied for the position, indicating on the applicant form that he is HIV-positive. During the hiring process, the manager who was a "Principal Director" in the department to which Lee applied removed Lee from consideration and hired another applicant. Lee brought suit under the Americans with Disabilities Act, claiming he was denied the job because he was HIV-positive. But the man who made the decision claimed not to know about Lee's HIV-status when he ruled Lee out of contention, and Lee provided no evidence that the man was aware of that fact. "Although Lee disclosed his HIV status on his employment application," wrote Judge Miller, "the evidences shows that Browne never saw the form on which Lee made his disclosure. Indeed, Lee admits that his belief that Tom Browne know about his accommodation request is just that – his belief. Lee points to no evidence to refute Browne's lack of knowledge of his HIV status." Asserting a belief would be good enough, likely to get past a motion to dismiss, but not a motion for summary judgment. Miller quoted a 5th Circuit ruling, *Little v. Liquid Air Corp.*, 37 F.3d 1069 (1994), which stated: "We do not in the absence of any proof assume that the nonmoving party could or would prove the necessary facts." The court decided that whether Browne knew of Lee's HIV status was a "material fact," and in order to avoid summary judgment, Lee had to provide evidence putting that fact into dispute, but he proffered none. Lee's original complaint alleged retaliation and breach of contract claims, but they were withdrawn prior to summary judgment. Lee is represented by Daryl J. Sinkule, Kilgore & Kilgore, PLLC, Dallas.

VIRGINIA – A high school French teacher who refused to use male pronouns when speaking to and referring to a transgender boy in his class was discharged by the West Point School Board and is suing, claiming a violation of his right to free speech and free exercise of religion under the Virginia Constitution. The school board claims he was fired for violating the district's anti-discrimination policy and for insubordination by refusing to comply with the demands of school administrators that he not misgender the boy. The suit filed in King William County Circuit Court by Peter Vlaming on September 30 alleges that the district refused to accommodate his sincere religious belief that sex is immutable or to come to some sort of compromise with him over the issue of pronoun use. Mr. Vlaming claims that he has respected the student's request to be referred to by his new male name, but Vlaming refuses to use male pronouns for the boy. What has happened, according to the complaint and the school board's letter to Vlaming and his counsel setting out the reasons for his decision, is that Vlaming has tried to avoid any pronouns at all when speaking to or of the student, but has "slipped up" several times, referring to the student as "she" or "her." Vlaming argues that requiring him to use male pronouns unconstitutionally burdens his religious freedom and constitutes compelled speech by the government.

CRIMINAL/PRISONER LITIGATION *notes*

Filing his suit in state rather than federal court appears strategic: the U.S. Supreme Court has ruled, in *Garcetti v. Ceballos*, 547 US 410 (2006), that government employee speech within the scope of employment is not protected by the First Amendment, because it is the speech of the government, not the individual, although the Court's opinion in that case did acknowledge that some exceptions might be made for claims of academic freedom. However, the case law is mixed and confusing about how to apply *Garcetti* to speech by teachers, especially in the classroom or when carrying out duties as a teacher, particularly on school grounds (in the hallways, the lunchroom, etc.). Apparently, Vlaming's counsel, Shawn A. Voyles of McKenry Dancigers Dawson, P.C., and J. Caleb Dalton of Alliance Defending Freedom, hope to avoid these complications by grounding the claim solely on the state constitution, although they do attempt to distinguish *Garcetti* by claiming that the teacher's use or avoidance of pronouns is not "government speech." They argue that requiring Vlaming to use male pronouns is coercing him to articulate a position on a controversial issue.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

LOUISIANA – The Louisiana 1st Circuit Court of Appeal affirmed a sentence of three years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, imposed by District Judge Peter J. Garcia on Sean Taylor Bass, who was convicted by a jury of video voyeurism. *State of Louisiana v. Bass*, 2019 La. App. LEXIS 1657, 2019 0320 (La. App. 1 Cir., Sept. 27, 2019). Early in 2017, J.G. (the male victim) met Bass on Grindr and they agreed to meet for sex. J.G. went to a house in Mandeville as directed by Bass, where they had sex. "Unknown to J.G.," wrote Judge Toni M. Higginbotham, "the defendant had recorded their sexual encounter with a laptop that was near the bed. The defendant than uploaded a video of the encounter to Pornhub, a pornographic website. J.G. discovered the video on the site and contacted the police. J.G. testified at trial that while the sex was consensual, he never consented to being recorded by the defendant, and he never consented to having a video of his encounter with the defendant being uploaded to Pornhub." At trial, Bass testified that he was "pretty confident" that he and J.G. had agreed to his recording their sexual encounter, but on cross-examination he conceded that he did not have J.G.'s consent to upload the video to Pornhub. He also claimed that he was high on drugs at the time, and that he unsuccessfully tried to delete the recording from Pornhub. On appeal, he argued that the trial court erred by denying his post-trial motion to reconsider the sentence, and that it was unconstitutionally excessive. The appeals court rejected his argument, finding that the sentence fell in the middle of the range of potentially applicable sentences for this offense, and noting that although the statute authorized a fine of not more than $10,000.00, the trial court had not imposed a fine. Furthermore, it seems that Bass had prior drug-related conviction, as well as being subject to pending charges in another state in a similar video voyeurism case. At trial, Judge Garcia stated to Bass at sentencing that "your remorse may have been reflected somewhat by your attempt to remove this, but it's certainly belied by your position in the trial of this matter in which you allege it was consensual." The court said that the standard of review on the sentence was whether it was "grossly disproportionate to the severity of the offense," using an abuse of discretion standard, and found that Bass's assignments of error were without merit. Bass was represented on appeal by Lieu T. Vo Clark of the Louisiana Appellate Project.

MASSACHUSETTS – Protesters showed up to demonstrate against a "Straight Pride" parade that had obtained a license from the Commonwealth of Massachusetts. In the course of the demonstration, police arrested a demonstrator, Roderick Webber, who was charged with disorderly conduct. The prosecutor asked the Municipal Court judge to enter a *nolle prosequi* and to expunge the records of the case, but the Municipal Court judge refused. The prosecutor filed an emergency petition, which was referred to Justice Frank Gaziano of the Supreme Judicial Court. He ordered that the trial judge accept the *nolle prosequi* and grant the expungement request. In a short opinion explaining this ruling, *Commonwealth v. Webber*, 2019 WL 4263308 (Sept. 9, 2019), the court explained that the decision whether to prosecute a case is up to the discretion of the prosecutor, and absent any indications of corruption or the like, should be routinely granted. Furthermore, Justice Graziano pointed out, a statute specifically authorizes expungement of all traces of the case from the records in appropriate circumstances. Sound like a "Straight Pride" event was worth protesting. The Court also issued a ruling a few days later in a similar case involving protester Rachael Rollins.

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.

NATIONAL – When Judge Richard Posner retired from the United States Court of Appeals for the Seventh Circuit, he publicly expressed frustration about how *pro se* plaintiffs were treated by the federal courts. He founded (and lent his name to) the "Posner Center for Justice

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for Pro Se's." The Board of Directors of the Posner Center dissolved the not-for-profit on July 23, 2019. Its website said that the Center "was receiving many more requests for assistance from pro se litigants than it could handle . . . on the order of 100 requests for assistance for every staff member." The statement continues: "Since the lawyers and non-lawyers of the Posner Center were assisting the pro se litigants free of charge, perhaps it was inevitable that the demand would greatly exceed the supply. Thus this experiment in assisting pro se litigants with their ongoing court cases has sadly come to an end." *Law Notes* is replete with examples of *pro se* LGBT litigants whose cases failed – often due to lack of counsel. This affects prisoners, employees, immigrants, families, victims of government abuse and discrimination – and folks who do not meet strict standards of poverty but cannot afford to hire a litigation attorney. The fact that the Posner Center was overwhelmed highlights the problem of the unrepresented. In this writer's view, judges' dismissal of *pro se* cases on technicalities only trained lawyers would understand is the heart of the problem. The fact that the Posner Center viewed its foray into *pro bono* work as an "experiment" may have contributed to its failure. Representing poor people is more than an "experiment"; it is serious stuff, sometimes deadly serious. That said, *pro bono* work can be not only satisfying but also excellent training for litigation, particularly for new attorneys. If every firm having readers of *Law Notes* would take just one *pro bono* case a year, LGBT plaintiffs would experience a major infusion of legal counsel.

UNITED STATES COURT OF APPEALS – FOURTH CIRCUIT – In a five-sentence, *per curiam* opinion, the Fourth Circuit affirms the summary judgment granted to state prison officials in the gender dysphoria treatment claims of Virginia transgender inmate Terah C. Morris. The panel on *Morris v. Cary,* 2019 U.S. App. LEXIS 29244 (4th Cir., Sept. 27, 2019), consisted of Circuit Judges James A. Wynn, Jr. (Obama), Pamela A. Harris (Obama) and Senior Circuit Judge William B. Traxler, Jr. (Clinton). *Law Notes* previously critically reported the decision of Senior District Court Judge Norman K. Moon in *Morris v. Cary,* 2019 U.S. Dist. LEXIS 54731 (W.D. Va., March 29, 2019), reported (May 2019 at pages 45-6). Finding "no reversible error," the court affirms "for the reasons stated by the district court." These reasons included analysis that failed to distinguish between sexual orientation and gender identity by suggesting that Morris must be "malingering" because she has female fantasies. The affirmed decision also tacitly approved Virginia's "freeze frame" policy regarding transgender treatment by faulting Morris for lack of documented pre-incarceration medical history of gender dysphoria.

UNITED STATES COURT OF APPEALS – SEVENTH CIRCUIT – *Law Notes* has been following the litigation of transgender inmate John H. (Melissa) Balsewicz for over three years. There is another report on her case involving protection from harm in the Eastern District of Wisconsin, below. The case in this appeal, *Balsewicz v. Blumer,* 2019 U.S. App. LEXIS 28519, 2019 WL 4566895 (7th Cir., Sept. 20, 2019), concerns her treatment for gender dysphoria; it has been reported twice previously. U. S. District Judge J. P. Stadtmueller dismissed her claims for deliberate indifference to her transgender medical needs under the Eighth Amendment and her claim of retaliation under the First Amendment. The Seventh Circuit, in an unsigned Order – the panel consisting of Circuit Judges Frank H. Easterbrook (Reagan), Ilana Diamond Rovner (G.H.W. Bush); and Amy C. Barrett (Trump) – affirmed. Balsewicz' Eighth Amendment claims concerned extensive and repeated delays in treatment of her dysphoria and of her suicidality. The court indicated it was reviewing the summary judgment record in the light most favorable to Balsewicz to determine if there were a triable issue, and it found none. Health staff acted reasonably in delaying hormonal treatment because of her unstable mental health condition. Her referral to the gender dysphoria committee was "delayed" for five months, when the referral was lost, but the medical staff forwarded it as soon as they noticed it. They also responded reasonably to her suicide attempts, providing treatment after each one. The attempts were sufficiently disparate in time to find no subjective intent that amounted to reckless indifference. That mental health staff should have anticipated that she would fashion a noose out of clothing when she had not done so previously amounted to no more than negligence; likewise, with her overdose on pills, which they did not know she had been hoarding. Her monitored lithium levels were "elevated but still within normal range." The retaliation claim concerns a social worker, whom Balsewicz accused of sexual harassment. After her complaint, Balsewicz was removed from a "dialectical" therapy group. Her only causation link between her complaint and the removal of her from group was "suspicious timing," which is not enough by itself to establish a First Amendment retaliation claim under *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1021 (7th Cir. 2016). In any event, Balsewicz said that group was not helping her with her dysphoria. In this writer's view, this is a case where the plaintiff's co-morbidity made expert testimony essential if her case were to survive summary judgment.

CALIFORNIA – *Pro se* transgender prisoner Kenneth Lopez fails to obtain a

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preliminary injunction from the District Court for her protection after she was transferred from a prison where she was allegedly extorted for sexual favors and beaten repeatedly. U.S. Magistrate Judge Sheila K. Oberto recommended denial of preliminary injunctive relief because of Lopez's transfer, and U.S. District Judge Dale A. Drozd adopted the recommendation in full in *Lopez v. Medina*, 2019 U.S. Dist. LEXIS 150749 (E.D. Calif., September 4, 2019). The transfer made likelihood of success on the merits questionable, and Judge Drozd found the pleadings were too specific about the prior institutions to generalize a need for protection, at least so far as preliminary injunctive relief is concerned. Review of Judge Oberto's recommendations on PACER shows two notable things. First, Judge Oberto pulled Lopez's case from the queue of prisoner cases awaiting review to look at it, because of the seriousness of the allegations. This suggests that a kind of triage is occurring in the Eastern District of California regarding *pro se* prisoner cases awaiting screening. Secondly, Judge Oberto directed that, while her recommendations are pending before the District Judge, the Clerk of Court send a copy of her recommendations to the warden of Lopez's current institution "to facilitate safe housing for Plaintiff." Both steps are unusual in this writer's experience. The second effort (regarding "safe" housing), taken before any defendant was served, can literally save lives. Yet, this step is rarely taken by a federal magistrate judge.

FLORIDA – Gay inmate Cleon Edward Major, *pro se,* was assaulted while a federal detainee in the Monroe County Jail (Florida Keys). He had been placed in a cell area with an "extremely violent and dangerous homophobic prisoner," whose propensities were on a notice on his cell. The area deputy (identified as defendant "Doe") walked away, leaving Major unprotected, whereupon the violent inmate attacked him with a bunch of pencils. In *Major v. Ramsey,* 2019 U.S. Dist. LEXIS 160786, 2019 WL 4564734 (S.D. Fla., Sept. 20, 2019), U.S. District Robert N. Scola, Jr., adopted the recommendations of U.S. Magistrate Judge Lisette M. Reid in *Major v. Ramsey*, 2019 U.S. Dist. LEXIS 121688 (S.D. Fla., July 18, 2019). The judges allowed Major to proceed against Doe (whom he must assist in identifying) on federal failure to protect and Florida state law claims. "Based on the allegations regarding the signs posted on the violent prisoner's cell, Deputy Doe should have known that he was dangerous and that leaving [Major] . . . alone with this dangerous prisoner was not safe." While "should have known" is not enough for a failure to protect claim under *Farmer v. Brennan,* 511 U.S. 825, 834 (1994) (which oddly is not cited by Judge Scola), on these facts the subjective component of knowledge of risk can be inferred from its obviousness – something often overlooked. The other defendants (including the federal marshals, the county sheriff and the sheriff's other deputies) are dismissed. Major failed to allege any wrongdoing by federal defendants except for one marshal, who responded to Major's attorney's alert by saying Major would be protected at the jail – but Major was not able to show causation by any of these parties for the assault. Similarly, the federal government was dismissed under the Federal Tort Claims Act, because the Act does not cover constitutional torts; and there is no individual federal defendant whose acts allegedly constituted negligence under Florida law, citing *Knous v. United States*, 683 F. App'x 859, 862-63 (11th Cir. 2017). Recovery against Doe awaits his/her identification and probably also Monroe County's indemnification.

ILLINOIS – Transgender prisoner Carl ("Tay Tay") Tate has two lawsuits pending in the Southern District of Illinois, filed three years apart. The first one (in 2016) challenges denial of necessary health care and includes a private vendor defendant, Wexford Health Services. The second case (in 2019) raises her conditions of confinement in a male facility and alleges discrimination. In *Tate v. Wexford Health Sources,* 2019 U.S. Dist. LEXIS 152254 (S.D. Ill., September 6, 2019), Chief U.S. District Judge Nancy J. Rosenstengel denied Tate's motion to consolidate the two cases. Judge Rosenstengel noted that, although both involve Tate's treatment as a transgender woman, the suits involve different time periods and defendants (except a warden), and they are at different stages of litigation (without a responsive pleading in the newer case). Under F.R.C.P. 42(a), the court has "broad discretion" to decide a motion to consolidate – *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) – and "different allegations and time frames" justify denial of such a motion. *King v. Gen. Elec. Co.*, 960 F.2d 617, 626 (7th Cir. 1992). In denying the motion, Judge Rosenstengel questions whether an unstated motive for the motion may have been to try to extend discovery in the earlier case. In any event, she is sympathetic to the argument by Wexford, the private vendor who is not named in the later case, that it is entitled to proceed to litigate the claims against it without being saddled with the broader discrimination case. Notably, Judge Rosenstengel sets preliminary injunction hearings for the same day in both cases, without consolidating them. Tate ("Tay Tay") is represented by MacArthur Justice Center, Northwestern University Law School (Chicago).

ILLINOIS – Being a double agent in prison is a risky business for an inmate. Gay plaintiff Charles Dent, who worked in the law library, agreed to become a confidential informant for an Internal Affairs officer (with the pot-boiler name

of Nick Nally), reporting on inmates' grievances and trying to deter them. Through his position, Dent learned that Nally and Internal Affairs were involved in introducing contraband into the prison and in shaking down inmates – corruption that reached at least as high as a lieutenant. Dent reported it, and a series of retaliatory actions were taken against him – for which Dent sued in *Dent v. Nally,* 2019 U.S. Dist. LEXIS 158427; 2019 WL 4439820 (S.D. Ill., Sept. 17, 2019). Chief U. S. District Judge Nancy J. Rosenstengel appointed counsel. One retaliatory action was assigning Dent to a cell with a violent, homophobic inmate, who assaulted him. Another was conspiring with a prison psychologist (Wallace) to issue reports that Dent was unfit to work in the library, causing him to lose his job. One of the issues in this case (which has percolated since 2016) has been whether Dent had properly exhausted administrative remedies before filing suit. Illinois exhaustion procedures apparently forgive following each level of exhaustion under certain circumstances. Counsel who have an issue of exhaustion contemporaneously with allegations of corruption by those who consider grievances may wish to review this case more closely on this point in PACER. Some of the defendants withdrew their affirmative defense of failure to exhaust. Most of the opinion deals with Wallace, who argued that his disclosures about Dent were protected breaches of confidentiality under state law as communications by a mental health worker treating a prisoner. Judge Rosenstengel finds that such a state privilege is narrow – citing 740 ILCS §§ 110/1, *et seq.; Norskog v. Pfiel*, 197 Ill. 2d 60, 72, 755 N.E.2d 1, 10 (2001); *Sassali v. Rockford Memorial Hosp.*, 296 Ill. App. 3d 80, 84-85, 693 N.E.2d 1287 (1998). The statue otherwise provides a private cause of action for the patient in instances of improper disclosure. So does the First Amendment, if the disclosure is retaliatory, under *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). Judge Rosenstengel found that the allegations here take Wallace outside the protection of the Illinois statute because he was allegedly not providing "treatment" or properly disclosing information learned for that purpose. Rather, he allegedly conspired against Dent and engaged in a "ruse" to deprive Dent of his employment and expose him to risk of abuse. Dent has been transferred, but that may not be the end of his risks. He is represented by Thompson Colburn, LLP, St. Louis.

LOUISIANA – More tales from "The Farm," a/k/a the Louisiana State Penitentiary in Angola, home to some 6000 inmates. In June, *Law Notes* reported "Family's Prison Visits Suspended After Transgender Sister's Penis Showed on Security Screening; Federal Judge Stays Discovery Pending Qualified Immunity Determination" (pages 24-5, covering *Nelson v. La. Dep't of Public Safety & Corr.,* 2019 U.S. Dist. LEXIS 78560 (M.D. La., May 9, 2019)). Now, in *Nelson v. LeBlanc,* 2019 WL 4345985 (M.D. La., Sept. 12, 2019), the Louisiana Corrections Secretary has been substituted for the state agency as a defendant in the case. As a reminder, Nelson, the transgender sister of a prisoner, was denied a visit and her future visits were suspended because she refused to strip after her penis showed on a security scanner. In the May decision, U.S. Magistrate Judge Erin Wilder-Doomes stayed discovery while the Secretary sought qualified immunity. Now, Chief U.S. District Judge Shelly D. Dick, finds that Nelson fails to state a claim against the Secretary, without reaching qualified immunity. Judge Dick first addresses whether the court has Article III jurisdiction on two issues that are closely related on these facts: ripeness and standing. The Secretary argued that plaintiff's inmate brother took no administrative appeal from the denial of his sister's visits (ripeness) and that the sister could not assert visiting rights on her own behalf (standing). On ripeness, the Prison Litigation Reform Act does not apply to require exhaustion, because the plaintiff is not an inmate but the inmate's sister. While the inmate could exhaust, the administrative procedures are not required of his sister. On standing, Judge Dick finds that Nelson is harmed in the constitutional sense by denial of visits unless she strips, regardless of whether her brother would also have standing. But wait. Nelson still does not state a claim against the Secretary. There is no allegation that the Secretary took any part in the denial of her visits, and his name on the letterhead is not enough to go forward. The allegations are also insufficient to plead that he approved of an unconstitutional policy. Nelson is granted leave to amend, and she is directed to address qualified immunity in responsive papers. The events underlying this case occurred more than two years ago, and Nelson is still left with mostly "John Doe" defendants. Nelson still seeks injunctive relief – and why the qualified immunity "stay" was wrong as a matter of law is addressed in the earlier Law Notes report. Nelson is represented by Scott, Vicknair, Hair & Checki, LLC; and AIDSLaw of Louisiana, New Orleans.

MARYLAND – Transgender prisoner Joseph Lewis (Jasmine Lynn) Tetlow, *pro se*, sues for hormone treatment and feminizing items in *Tetlow v. Md. Dep't of Pub. Safety & Corr. Servs.*, 2019 U.S. Dist. LEXIS 164356, 2019 WL 4644271 (D. Md., Sept. 24, 2019). U.S. District Judge Theodore D. Chuang dismisses her case, some of it without prejudice. Maryland has a transgender policy requiring it to "diagnose, treat, and manage inmates with GD, consistent with treatment, custody, and security standards" – whatever that means. Tetlow requests that her care be evaluated per World Professional

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Association for Transgender Health Standards, but Judge Chuang does not use them as a yardstick. He described the Maryland centralized bureaucracy on transgender care. After self-presentation, patients are referred to mental health for a "provisional" diagnosis at their prison. If they receive one, the case is sent to a "regional treatment team," then to a "contractual psychiatrist," then back to the regional team, then back to the prison clinician. At this point, if the green light is given by all levels, the prison clinician is free to refer the patient to endocrine, urology, and gynecology – which "may result in recommendation for hormone therapy" – and the patient "may be permitted to purchase and retain clothing items authorized by females at a female facility . . . , consistent with her security level." Judge Chuang does not question if this obstacle course is reasonable. Tetlow was also transferred several times, resulting in her having to re-start the referrals anew after transfers – a process she began two years ago (in September of 2017). Judge Chuang declines to hold the medical defendants at each facility responsible for the delays: "[T]he fact that the transfers necessarily interrupted, and effectively required a restart of, the process of securing a GD evaluation and hormone treatment cannot fairly be attributed to any of the three individual Medical Defendants." He reserves decision as to the supervisory liability of executive defendants at the "motion to dismiss" stage, but he dismisses them without prejudice for failure to exhaust administrative remedies under the Prison Litigation Reform Act, because Tetlow did not appeal her "failure to treat" claim to the highest DOC level. He also dismisses the contractual vendor (Wexford) because it said it did not have any policies about transgender care separate from the state's policies. The contractual vendor was also dismissed by the Ninth Circuit on this ground in the decision affirming the gender confirmation injunction in *Edmo v. Corizon*, 2019 WL 3978329, 2019 U.S. App. Lexis 27171 (9th Cir., Aug. 23, 2019), reported last month in *Law Notes* (September 2019 at 1-3). Edmo did not involve seriatim transfers of the patient among various prisons, however. Here, Tetlow was forced to start over repeatedly. The Maryland DOC (either directly or through Wexford) makes its transgender inmates endure redundant referrals for determination of care when transferred. Failure to provide continuing care after transfer presents pattern and practice issues that are systemic in nature. See Standards P-E-03 and P-E-12, National Commission on Correctional Health Care (Prisons 2008) (essential standards for "transfer screening" and "continuity of care"). Under the standards, the responsibility of the managing doctor at the receiving prison is to assure that the new patient's chart is reviewed within 12 hours for continuity of care issues. If the court accepts a policy requiring centralized "team" approval of treatment plans for transgender patients, it should not permit the individual medical directors to balkanize their responsibilities. Presumably, these are Wexford doctors, because Wexford provided medical care at all Maryland prisons from 2013 through 2018. Beginning in 2019, Maryland issued a new contract to Corizon for over $600 million. See "Maryland Awards Big Contract for Inmate Health Care . . . " *Baltimore Sun* (12/19/18). If Wexford, and now Corizon, does not have a continuity of care policy for transferred inmates, that alone is a pattern and practice sufficient to state a claim for corporate liability on the pleadings. The lesson of *West v. Atkins*, 487 U.S. 42, 51, 55 (1988), which imposed "color of state law" scrutiny on private vendors providing prison health care, is not only that states cannot contract out their Eighth Amendment responsibilities, but also that vendors, by contracting with the state, subject themselves to § 1983 liability.

NEBRASKA – In *Mack v. Melvin*, 2019 U.S. Dist. LEXIS 157962 (D. Nebr., September 17, 2019), transgender and gay inmate Nathanial Gerald Serrell Mack, pro se, challenged her failing evaluations in a sex offender program on numerous grounds. Senior U.S. District Judge Richard G. Kopf dismissed all of them, but he allowed Mack to replead her Equal Protection claim based on discrimination because she alleged that defendants had cited her transgender status and "homosexual lifestyle" as one of the reasons for her poor ratings. Judge Kopf now dismisses that claim as well. Mack fails to show class of one discrimination under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), or intentional class-based animus. The record shows that Mack's poor ratings satisfied a rational basis test because she was not forthcoming about her sexual history in interviews, not because she is gay or transgender. She was given an opportunity to elaborate and show that she was rated because of her sexual orientation or gender non-conformity, but she failed to do so. Judge Kopf gives her the benefit of Nebraska Local Federal Rule 15.1(b) (which allows an amended pleading to be considered "as supplemental to, rather than as superseding, the original pleading"), but the amended complaint still fails. Judge Kopf denies further leave to amend.

NEW JERSEY – According to reporting in the *Newark Star Ledger*, a pre-surgical transgender inmate, proceeding by pseudonym, has sought transfer to the woman's prison. 2019 WLNR 27693480 (Sept. 12, 2019). A press release from the ACLU Foundation of New Jersey (Newark, Jeanne LoCicero, lead counsel) indicates that the complaint was filed in New Jersey Superior Court, Mercer County, and has the caption: *Doe v. New Jersey DOC, et al.*, No. 001586-19. According to the complaint, Doe has been "shuttled" for more than a year

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among men's prisons, but the state was preparing to move her to Edna Mahan Correctional Facility for Women, when the correction officers' union filed suit to block the move (or to keep Doe out of general population), alleging that the state had not adequately prepared for her arrival through training of officers on housing, search, safety, and other procedures, putting them at risk. The officers contend that the state's seven-page policy on transgender inmates is insufficiently detailed and has not been promulgated through formal rule-making. Attorney LoCicero indicates that Doe will seek to intervene in the officers' lawsuit. No further information about the legal status of this issue is available as of press time. *Law Notes* will continue to follow it.

NEW YORK – *Pro se* gay inmate Joshua Sheffer brought a civil rights case alleging various theories of liability arising out of a sexual assault by his bunkmate in *Sheffer v. Fleury,* 2019 U.S. Dist. LEXIS 158842 (N.D.N.Y., Sept. 18, 2019). U.S. District Judge Lawrence E. Kahn earlier dismissed claims against some of the defendants. Here, he denies a motion to dismiss by several others. The first issue is whether Sheffer had exhausted administrative remedies prior to suing. While New York's grievance system ordinarily requires two levels of appellate grievances, sexual assault complaints under procedures promulgated in Directive 4040 after the Prison Rape Elimination Act [PREA], do not require appeals. Complaints can be made at any time, in one of four ways: to officials at the facility where the sexual claim arose; to the department's Central Office; to an outside agency approved to receive such complaints; or to the department's Inspector General. Sheffer made such complaint, but the defendants argued that the "failure to protect" claims against them are not within this separate "grievance" system under PREA – both on its face, and as applied in this case. Judge Kahn, adopting in full the recommendations of U. S. Magistrate Judge Daniel J. Stewart, rejected both arguments. He found that the PREA grievances are "necessarily intertwined" with the "failure to protect" claims on a plain reading of the regulations, which includes: "not only the acts of sexual abuse by an inmate or a Corrections officer, but also other events which are necessarily intertwined with such a claim, such as a physical assault during the course of the abuse; the failure of correctional staff to intervene to stop the rape; or acts or failures to act making a jail official legally accountable for the sexual abuse." Such a construction also "comports with [the regulation's] purpose in attempting to prevent [sexual assault]." On the facts here, where Sheffer reported his fears about his bunkmate, the "intertwining" is also apparent, as applied. As to most of the defendants, Sheffer complained or asked for protection on at least four occasions. This is more than enough for exhaustion. It also satisfies the more exacting element of placing the defendants on subjective knowledge of the risk required to state a protection from harm claim on the merits. While Sheffer may not have said he feared sexual assault, he did state that he feared assault because of his bunkmate's homophobia and his own sexual orientation. This is likewise enough to state a claim under the liberal standards for review of *pro se* complaints. Finally, a supervisory defendant sought dismissal for failure to allege her personal involvement sufficiently. Sheffer said he wrote to her on two occasions expressing his fears. This is sufficient to keep her in the case at the pleading stage. Deliberate indifference can be pleaded by alleging that a supervisor "fail[ed] to act on information indicating that unconstitutional acts were occurring or would occur." *Vincent v. Yelich*, 718 F.3d 157, 173 (2d Cir. 2013) [internal citations and Second Circuit string cites omitted]. This is a good overview of practice regarding motions to dismiss "failure to protect" claims on the pleadings in New York.

NEW YORK – This long opinion (more than 10,000 words) includes analysis of First Amendment retaliation (including sexual assaults) and denial of visits to gay, disabled inmate Daniel Miller, *pro se*. In greatly condensed summarization for purposes of this report, Miller alleges that he was subjected to harassment at Franklin and Upstate Correctional Facilities after he complained about conditions for handicapped and gay inmates at Franklin. He says that he was thrown from his wheelchair, sexually assaulted, and raped with an object, while officers uttered homophobic slurs, called him a "fag," and said: "Don't you queers like it in the ass?" Miller says he was falsely accused of sexual activity with another inmate and transferred to Green Haven Correctional Facility, where he was denied visitation, mail, and telephone calls with his mother – who is a co-plaintiff. In *Miller v. Annucci,* 2019 WL 4688539, 2019 U.S. Dist. LEXIS 165759 (S.D.N.Y., Sept. 26, 2019), U.S. District Judge Kenneth M. Karras transfers the claims arising from Franklin and Upstate prisons to the Northern District of New York under 28 U.S.C. §§ 1404 and 1406. He does so without addressing exhaustion under the Prison Litigation Reform Act or whether Miller states claims about these events. [Note: New York has specific exhaustion rules for claims that implicate the Prison Rape Elimination Act – *see Sheffer v. Fleury,* 2019 U.S. Dist. LEXIS 158842 (N.D.N.Y., Sept. 18, 2019), this issue of *Law Notes*. Judge Karras does not mention this, but perhaps the Northern District Judge will do so.] Judge Karras finds the complaint "on its face" not to resolve whether Miller has exhausted as to the claims arising at Green Haven. He orders discovery to proceed, limited to

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exhaustion. He notes that allegations about events that occurred after the filing of a lawsuit and raised in an amended or supplementary complaint – F.R.C.P. 15(a) and F.R.C.P. 15(d) — cannot be "exhausted" prior to the filing of the original lawsuit – but failure to exhaust can be "cured," citing *Snider v. Melindez*, 199 F.3d 108, 111–12 (2d Cir. 1999); and *Anderson v. Spizziota*, 2016 WL 11480707, at *29 n.21 (E.D.N.Y. Feb. 12, 2016). Judge Karras finds no independent cause of action under PREA, citing *Morgan v. Shivers*, 2018 WL 618451, at *7 (S.D.N.Y. Jan. 29, 2018); and *Abreu v. Brown*, 2018 WL 565280, at *9 (W.D.N.Y. Jan. 22, 2018). Moreover, claims about denial of visitation by Miller with his mother (and his mother's separate claim in this regard) fail on qualified immunity grounds. There is a very limited right of First Amendment association for inmates under *Overton v. Bazzetta,* 539 U.S. 126, 131 (2003). While the Second Circuit has cited *Overton* and assumed, in *Mills v. Fischer,* 497 F.App's 114, 116 (2d Cir. 2012), that "inmates and their families have a right to visitation protected by the First Amendment," the "hypothetical assumption" in an unpublished case "does not create clearly established law." It is not clear what remains in the Southern District, but it appears the homophobic conduct continued, should claims about it survive exhaustion.

NORTH CAROLINA – Transgender prisoner Jennifer Ann Jasmaine challenges *pro se* her classification as a gang member, with assignment to a dangerous gang unit, in *Jasmaine v. Aaron,* 2019 U.S. Dist. LEXIS 168587, 2019 WL 4780872 (W.D.N.C., Sept. 30, 2019). Chief U.S. District Judge Frank D. Whitney dismisses her case on screening. Jasmaine alleged that her classification as a gang member was caused by a tattoo on her forearm depicting the hip hop musical group "Insane Clown Posse." She further alleged that this group has been misclassified as a gang and had won litigation on this point. Finally, she alleged that her classification would subject her to danger in any prison in North Carolina, because her placement as a transgender person in a gang unit makes her "unusually vulnerable." She does not allege any assaults, and she has been transferred since she filed suit. Judge Whitney found that she had no right to a particular classification under *Sandin v. Conner*, 515 U.S. 472, 484 (1995) [string citations omitted]. Ironically, in that he cites a transgender medical case for this proposition, Judge Whitney finds that Jasmaine fails to meet the "very high standards for cruel and unusual punishment under the Eighth Amendment," citing *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003). Judge Whitney relies on Jasmaine's transfer in dismissing her case, although Jasmaine alleges: "Any prison she goes to she will have to go to a unit full of gang members." Moreover, Jasmaine's argument that fans of "Insane Clown Posse" have won lawsuits has some merit. In *Parsons v. U.S. Department of Justice,* 801 F.3d 701, 718-9 (6th Cir. 2015), the court found that a classification of "Insane Clown Posse" fans as a gang by the FBI's National Gang Intelligence Center could be challenged by members. Later, in *Parsons v. USD DoJ,* 878 F.3d 162, 171 (6th Cir. 2017), the case was before the 6th circuit again, which this time affirmed a dismissal under the Administrative Procedure Act, because the classification was not yet a final agency action. The court reserved the issue of whether the classification violated any constitutional rights under § 1983.

OHIO – Gay inmate Joshua Dexter Byers brought a *pro se* civil rights case alleging that an officer (Kyle Moody) denied him recreation on one occasion, while uttering homophobic slurs, in *Byers v. Ohio Dep't of Rehab. & Corr.*, 2019 U.S. Dist. LEXIS 154259 (S.D. Ohio, Sept. 10, 2019). He also alleged that Moody had a pattern of homophobia toward and biased treatment of GBT inmates. U.S. Magistrate Judge Stephanie K. Bowman recommended dismissal of the case with prejudice. Following the usual condemnation of homophobic slurs as "unprofessional" and the like, she finds that language alone is insufficient to state a constitutional claim under 6th Circuit precedents. Although she does not say this, Judge Bowman, in effect, finds no allegation of discriminatory treatment – implicitly finding that denial of recreation on one occasion is of insufficient moment to state a claim under the Equal Protection Clause. Finally, Judge Bowman finds that Byers cannot sue on behalf of other inmates. She recommends that the District Judge certify that any appeal would not be taken in good faith.

PENNSYLVANIA – U.S. Magistrate Judge Maureen P. Kelly denies transgender prisoner Alexander Welter a preliminary injunction for medical care in *Welter v. Correct Care Sols.*, 2019 U.S. Dist. LEXIS 156868 (W.D. Pa., September 13, 2019). Welter sought orders requiring: an independent medical evaluation, facial hair removal, and transfer to a women's facility. Judge Kelly held a hearing and determined that Welter was receiving hormones and mental health treatment and that she was awaiting evaluation for surgery and for special housing. Her evaluation was "halted" because she started a fire in her cell, which she admits doing. Judge Kelly finds that the showing fails to demonstrate the need for immediate relief for irreparable injury required by *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Welter's treatment for dysphoria has not been terminated, and she is not in "obvious" danger.

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PENNSYLVANIA – HIV-positive federal prisoner Rateek Allah filed a pro se lawsuit against multiple defendants for violation of various rights in October of 2018, claiming his disease was advanced and that he had less than a year to live. His allegations range from the serious (transfer to a medical facility for nursing care) to the frivolous (poor television program selection and no desert at lunch). U.S. District Judge A Richard Caputo screened his complaint almost a year later, and he dismissed all claims in *Allah v. Warden Beasely*, 2019 U.S. Dist. LEXIS 159830 (M.D. Pa., Sept. 19, 2019). He denied injunctive relief, because Allah had been transferred to federal prison in Florida. This report discusses only two of Allah's claims: deliberate indifference to his serious health care needs; and retaliation for complaining about it. Judge Caputo finds that Allah has not stated a claim for deliberate indifference to his health because he only disputed the location (FCC Allenwood) of his health care. Judge Caputo analyzes the nursing home level claim as basically a demand for a transfer and a disagreement about the level of care, noting Allah admits to "dementia" and: "According to Mr. Allah, his physicians believe he is 'faking' the severity of his medical limitations and is non-compliant with his medication." Judge Caputo finds that this "disagreement" does not rise to the level of an Eighth Amendment claim – although it might be retaliation (but this would not be actionable). Mr. Allah satisfies Judge Caputo that he has a claim of denial of a urinal by his bed (without which he soils himself), because it was taken from him after he admitted in answer to a question that he was suing the provider. Such a claim against a federal officer (like the transfer claim) would have to sound under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). First Amendment retaliation, however, would be a "new" application of *Bivens*, which is foreclosed (as to both the transfer and the taking of the urinal) by the Supreme Court's restrictions of new applications of *Bivens* in *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017), relying on *Bistrian v. Levi,* 912 F.3d 79, 96 (3d Cir. 2018) ("the Supreme Court has never recognized a Bivens remedy under the First Amendment"); and *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017) ("recognition of a cause of action under a constitutional amendment does not mean that such an action can vindicate every violation of the rights afforded by that particular amendment") [extended discussion omitted]. So, what the right hand giveth, the left hand taketh away. In like fashion, Judge Caputo gives Allah leave to amend (except as to the retaliation claims) – so he may try again to state a claim of deliberate indifference to his serious health care needs.

TEXAS – HIV-positive prisoner Terry Matthew Davis sued *pro se,* claiming that Texas medical defendants refused to provide him with medication on two occasions over two months. U.S. District Judge Alfred D. Bennett dismissed the case under the "three strikes" rule of the Prison Litigation Reform Act [PLRA – 28 U.S.C. § 1915g)], finding that Davis did not show that he was in "imminent danger" and entitled to proceed despite his prior strikes in *Davis v. Cox,* 2019 WL 4689167 (S.D. Tex., September 26, 2019). Holding that allegedly missing two doses of medication fails to meet the threshold of imminent danger (without more) seems reasonable. Judge Bennett goes further, however, and writes that the case, as a whole, reflects Davis's "disagreement with the medical care being afforded him," which is not actionable. This seems both wrong and unnecessary. Deliberately withholding prescribed medicine on two occasions does not strike this writer as a "disagreement," because the allegation is that the medicine was withheld without a medical reason. The opinion includes a warning of future sanctions if Davis persists in filings in violation of the PLRA. Judge Bennett directed the Clerk to send a copy of the decision to the "Manager of the Three-Strikes List for the Southern District of Texas," who apparently has her own website.

VERMONT – Not infrequently, victims of police brutality are accused of assaulting a police officer. In Corrections, when two prisoners fight, they are often both charged with misconduct. Here, transgender inmate David Cammie Cameron, was the alleged victim of a beating by another inmate (Lajoice), after she had been placed in general population in a men's prison in a cell next to Lajoice. She had also complained to defendants about Lajoice's threatening her. Cameron, however, had pled *nolo contendere* in Vermont state court to assault arising from her altercation with Lajoice. In *Cameron v. Menard,* 2019 WL 4674821 (D. Vt., Sept. 25, 2019), Chief U.S. District Judge Geoffrey W. Crawford adopted in full the recommendations of U.S. Magistrate Judge John M. Conroy that: (1) Cameron's motion to exclude evidence of her plea be granted; (2) she be allowed to proceed as stating a claim for failure to protect; and (3) defendants' motion to dismiss training and "supervision" claims be granted. This 37-page recommendation is the most considered treatment of the first issue this writer has seen. Ultimately, Judge Conroy finds that a *nolo* plea is inadmissible under F. R. Evid. 410(a)(2). Moreover, he finds that the facts "revealed" at allocution in a *nolo* plea are not subject to judicial notice under F.R. Evid. 201(b). He finds that *nolo* pleas and related allocutions are not admissions under federal or Vermont law and should be excluded, relying on *Thomas v. Roach,* 165 F.3d 137, 144 (2d Cir. 1999) (*nolo contendere* plea of assaulting an officer not admissible in civil rights case about excessive police

force). He recommends that reference to them be stricken – in effect granting a motion *in limine*. On the merits, Judge Conroy finds that the right to be free of deliberate indifference to safety is too well-established to allow a defense of qualified immunity in light of the long history of the progeny of *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). Here, Cameron's characteristics make her risk "obvious," and defendants were also aware of the specific risks posed by Lajoice. Moreover, defendants had participated in name-calling and harassment of Cameron. In this regard, Judge Crawford judicially notices Vermont DOC policy on safe housing of transgender inmates, which was apparently not followed. Judge Crawford finds the pleadings inadequate to allow Cameron to proceed on training and "supervision." As to training, the connection between an alleged lack of training and the assault at issue is not clear. As to "supervision," Judge Crawford finds the use of the word to be a bit of a misnomer [thus the use of quotation marks in this reporting], because "supervision" claims are really a shorthand for various types of executive liability, for which it must still be shown that the defendants were personally involved – or it would be unlawfully imposing *respondeat superior* liability. Here, the "supervision" claims collapse into either *Farmer* "failure to protect" claims or they are training claims, for which inadequate nexus is shown to the assault. Cameron is represented by Dramer & Vangel, Brattleboro, Vt.

WISCONSIN – In 2018, U.S. District Judge J. P. Stadtmueller allowed pro se transgender prisoner John H. (Melissa) Balsewicz, to proceed on a claim that prison defendants failed to protect her against assault from other inmates, in *Balsewicz v. Pawlyk*, 2018 U.S. Dist. LEXIS 111566 (E.D. Wisc., July 5, 2018). Now, in *Balsewicz v. Pawlyk*, 2019 U.S. Dist. LEXIS 159821, 2019 WL 4539015 (E.D. Wisc., September 19, 2019), Judge Stadtmueller grants summary judgment to the defendants. In the decision allowing her to proceed, allegations that an officer had failed to document her claimed danger and the first assailant's history were enough to survive screening, given its "low bar" under *Mayoral v. Sheahan*, 245 F.3d 934, 938 (7th Cir. 2001). Now, however, there is no jury question, because there was no material evidence on which a trier of fact could conclude that the defendants were on sufficient notice of the risk of the assaults prior to their occurrence. The first assault occurred two days after an incident in the shower, when the assailant threatened Balsewicz. She complained, but there was little evidence to show that what Judge Stadtmueller characterizes as a "spat" had not been resolved. There was a "mountain" of evidence after the fact, when Balsewicz tried to be separated from her assailant; but this is insufficient to establish the subjective element of the deliberate indifference test under *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), prior to the first assault. Judge Stadtmueller finds that the deficiencies in following protocol did not relate to future risk but applied only to the shower event about which Balsewicz complained. There was a second attack, about a year later, as to which Judge Stadtmueller finds even less evidence of defendants' advance notice of risk. The opinion contains the usual nod to prisons being dangerous places and not every assault being actionable under the Eighth Amendment. Whether this case should have been taken from the jury because no reasonable trier of fact could find subjective advance knowledge of risk seems a stretch of *Farmer,* in this writer's view. [Note: The day after this decision was issued, the 7th Circuit Court of Appeals issued an opinion in a separate lawsuit brought by Balsewicz asserting 8th Amendment claims in relation to her medical treatment needs. This decision is discussed separately above.]

WISCONSIN – Rufus West, *pro se* (and presumably heterosexual and cisgender), sues various officials at Wisconsin's Green Bay prison because he was subjected to strip searches by or in the presence of a transgender male officer in *West v. Kind,* 2019 U.S. Dist. LEXIS 157958 (E.D. Wisc., September 17, 2019). This decision, by U.S. District Judge Pamela Pepper, deals mostly with discovery-related, non-dispositive, motions by West. Defendants' motion for summary judgment will be handled separately. Judge Pepper denies all of West's motions. She had originally allowed him to proceed on claims under the Religious Land Use and Institutionalized Persons Act based on allegations that defendants had "burdened" his exercise of religion without a compelling reason by their search policy involving transgender officers. West seeks discovery about the sexual identity history of the individual officer at issue. But West had been transferred from the Green Bay facility, rendering moot his injunctive claims as to that officer. Further, the argument that West could be returned to Green Bay or subjected to search by a trans officer in the future was too speculative. As to damages, West could not point to any decision establishing an inmate's right to avoid a search by a trans officer – let alone clearly establishing one – so the defendants would be entitled to qualified immunity. Finally, discovery is denied because the officer admitted he was born female in defendants' motion for summary judgment, and further details about the officer's sexual identity history (and his anatomy) are not material to the legal issues. West also sought sanctions because the officer denied that she was female, which he characterized as a "lie." Judge Pepper writes: "[I]n the plaintiff's mind, the fact that [the officer] was born a female means that he is, and always will be, a female. The plaintiff has a right to believe what he believes. But it is not a lie for a transgender male to identify himself as a male, or for his

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lawyers to do so. There is no reason for the court to impose sanctions . . . ." West also claimed that he suffered retaliation at his new prison because of this lawsuit. The retaliation consisted of changing his cell blocks (where he no longer had ready access to jailhouse lawyers who were helping him), forcing him to shower with men who were naked, and comments by officers to be sure to spell their names correctly when he sued them. Judge Pepper did not find these things sufficiently serious or connected to the Green Bay litigation to satisfy retaliation claims under the First Amendment.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS – A Trump Administration proposed regulation that would allow federal contractors to make employment decisions based on their faith without penalty, drew the largest number of comments about a proposed regulation since the electronic commenting process was instituted in 2003, according to a report in Bloomberg Law (Sept. 17). As of the final day for submitting comments, the proposal had drawn 107,295 comments. Under the Administrative Procedure Act, the agency is supposed to review all the comments and take them into account in deciding whether to public a final regulation. *Bloomberg Law*, Sept. 17.

CALIFORNIA – At the end of August, Governor Gavin Newsom signed into law a measure that requires public schools to update the records for transgender and nonbinary students so they match their legal name and gender identity.

KENTUCKY – Georgetown has become the 13th municipality in Kentucky to adopt a Fairness Ordinance that prohibits discrimination because of sexual orientation or gender identity. The City Council voted 5-3 to approve the ordinance on September 9. *Louisville Courier-Journal*, Sept. 10.

MAINE – Opponents of the statutory ban on conversion therapy recently passed by the legislature failed to secure sufficient signatures to force a repeal referendum, and the law went into effect on September 19. The law prohibits performance of conversion therapy on minors by licensed medical and mental health providers. Also going into effect on September 19 was an amendment to the Maine Human Rights Act adding gender identity as a prohibited ground of discrimination, a ban on use of the gay and trans "panic defenses" in criminal cases, and a requirement that all public single-occupancy restrooms be designated as gender neutral. Maine Equality, Sept. 19.

MICHIGAN – East Lansing, which was one of the first municipalities to pass a "gay rights law" in the early days of the gay civil rights movement, has passed an ordinance banning performance of conversion therapy on minors. The City Council voted 3-2 to approve the measure on September 10. *Religion Clause Blog*, Sept. 12. 2019.

NEW YORK – Out gay New York City Council Speaker Corey Johnson announced that the New York City Council would take up a measure to repeal the ordinance banning conversion therapy within the city. The measure is under judicial challenge and ranges more widely than the more-recently adopted state law, which focuses only on performance of such therapy on minors. Johnson said, "The courts have changed considerably over the last few years, and we cannot count on them to rule in favor of much-needed protections for the LGBTQ community, noting that gay youth are already protected by the state law. *Gay City News*, Sept. 12.

VIRGINIA – The Stafford County School Board approved policy changes to add sexual orientation and gender identity to the list of prohibited grounds for discrimination within the school district. Stafford is the 13th Virginia school district at adopt such a formal policy, but the vote was close: 4-3. Reported *The Free Lance Star* (Fredericksburg, VA) ono September 12, "The policies do not include any specifics about how they would be implemented or how they would apply to bathrooms, locker rooms and showers." The superintendent of schools, Scott Kizner, was charged with devising an enforcement policy, which are to be submitted to the board for "input and review."

LAW & SOCIETY NOTES

By Arthur S. Leonard

LGBTQ TOWN HALL – For the first time in the history of presidential primary election campaigns, a major network, CNN, was to co-host a presidential town hall focused solely on LGBT issues, allotting half an hour to the candidates with more than negligible standing in public opinion polls. The event was to be broadcast the evening of October 10. Human Rights Campaign is a co-sponsor.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – A change in political control in the House of Assembly of Tasmania is endangering the continued

existence of a progressive transgender rights law that was enacted by the previous administration, according to a Sept. 13 report in *Australian*, 2019 WLNR 27714173. The measure authorized gender-neutral birth certificates, gender change by affirmation (without need for gender confirmation surgery), and extending hate speech protections to the category of "gender expression."

BERMUDA – LGBT rights activists charged that the government's delay in filing its appeal against marriage equality as ruled by the highest local court was a stalling tactic to delay a decision about marriage equality. The government preserved its right to appeal by posting a notice with the Privy Council on July 12, right up near the deadline for doing so. The result was put off a likely hearing until sometime in 2020, delaying finality in a case where the local courts had ruled in favor of marital rights for gay Bermudans. *Royal Gazette*, Sept. 5.

CANADA – British Columbia – The Court of Appeal, the highest court in the province, issued a bench ruling on September 6 rejecting a claim by a father to have the right to prevent his teenage child from receiving gender confirmation treatment. The court has kept the names of the parties confidential, but said it would eventually issue a written opinion. The trans boy, now 14, was identified as female at birth, but has identified as male since age 11. He began hormone therapy, after a suicide attempt led him to meet with medical professions who diagnosed gender dysphoria. In an affidavit, he stated that if hormone therapy was discontinued, as his father is demanding, "I will be stranded between looking and sounding feminine and looking and sounding masculine. I would feel like a freak." He also stated that since beginning the treatment in March he feels "amazing" and no longer has suicidal thoughts. Although activists alleged the father was acting out of his personal conservative views on gender ideology, he argued in court that a minor should not make the decision to transition on hiw won, because "too little is known about the treatment's effects." The boy's legal name and birth certificate have been changed to reflect his male gender identity, and the lower court ordered the father to use the child's chosen pronouns. The father had characterized the trial court's ruling in favor of the boy to amount to "totalitarian interference" with his parental rights.

FRANCE – The National Assembly, the lower house of the Parliament, voted 55-17 on September 27 to approve a "controversial" bioethics measure that would expand the right to access medically-assisted reproductive measures, such as in vitro fertilization, which is currently limited to heterosexual couples. Lesbians have been agitating for this measure for some time. The passage in the lower house sparked public demonstrations against the measure. Passage in the Upper House is required before it can be signed into law. *France24.com*, Sept. 27.

GIBRALTAR – When Gibralter adopted a marriage equality law in 2016, it included a provision to allow Deputy Registrars who did not wish to conduct same-sex marriages to be able to opt out, provided an alternative registrar was assigned to onduct the marriage. On September 5, the government published a proposal to delete this provision, observing that no Deputy Registrar has raised as objection to performing a same-sex marriage. Although the measure was subjected to extended debate in parliament, it seems not to have been a provision that upset members of the public. *The [Gibralter] Chronicle*, Sept. 5.

JAPAN – A same sex couple, identified by the press as Kosuke and Masahiro, has filed suit in the Fukuoka District court, seeking damages from the Japanese government for non-recognition of their legal marriage. The men are 30 and 31. They have been partners since May 2017, living together beginning in June. They attempted to file a marriage recocognition document at a ward office in Fukuoka, but were told that a marriage application for two men was not legal. Fukoka Municipal Government does have a "partnership oath system" under which same-sex couples have formed a relationship, but it is not sufficient to provide all the benefits that go with a recognized marriage. The couple charge in their complaint that the refusal to recognize same-sex marriages has encouraged discriminatory views and that their lives are "abnormal and inferior compared to heterosexual couples" as a result of the government's action. *The Mainichi*, Sept. 5. * * * On September 12, U.S. national Andrew High sued the Japanese government for recognition of his marriage with his same-sex partner in the United States. The object of the suit is the grant of a long-term resident visa, as the men wish to live together in Japan, but were repeatedly turned down. The plaintiffs, who married in 2015, are seeking damages in their suit filed in Tokyo District Court, claiming that it is discriminatory if the marriage is not recognized in Japan for at least this purpose.

KAZAKHSTAN – A man posted on Facebook a video clip of two women kissing each other on January 30, 2018, with a caption stating, in pertinent part, "Perhaps, someone's children, sisters or friends, make a REPOST, let them

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talk [to them], may be not too late to explain, to correct, or at least to shame (emojis – followed by Cyrillic text). P.S. for making namaz in public there is a fine and oi-bai [reprimand], but for the pink [lesbian], for the blue [gay] it's total freedom." Although the man deleted this the following day, it had already been viewed by 60,000 users, had attracted "a lot of comments," and had "spread over other social media such as YouTube, Instagram, VKontakte, etc." The Supreme Court, overturning an intermediate appellate ruling that had reversed the trial, said: "The said actions of the defendant have placed the applicants in the focus of public attention, their private life having become public against their will. Besides, they have experienced spoiled relations with colleagues and relatives. The first instance court, having invoked article `45 of the Kazakhstan Civil Code, declared unlawful the distribution by the defendant of the video depicting the plaintiffs' images. The appeals court dismissed those arguments, found the plaintiffs' behavior, as depicted in the video and distributed in social media, immoral and obscene, and ruled that the applicants shall not be entitled to claim rights protection under article 145 of the Civil Code." The Supreme Court, in a ruling issued on July 30, said that the appeals court's conclusions "are erroneous." "The defendant has violated the plaintiffs' right to privacy, they having found themselves in the focus of public discussion," wrote the Supreme Court, finding that they were entitled to claim damages for "moral damage." The Supreme Court restored the trial court's decision, which awarded monetary damages to the plaintiffs.

MEXICO – Despite numerous Supreme Court rulings, many of Mexico's states have not yet enacted marriage equality. Under existing law, same-sex couples who want to marry may go to one of the state that allow same-sex marriage and their marriages will be recognized throughout the country. Otherwise, if their home state has not altered the statutes to authorize same-sex marriage, they have to sue for a court order, called an amparo, and if they are otherwise qualified to marry apart from being a same-sex couple, the court must grant the order, which is binding on local marriage officials. In Yucatan, a gay rights NGO has sued Mexico's President, Andres Manuel Lpoez Obrador, for failing to respond to a petition asking the government to present a constitutional case to the Supreme Court against the Yucatan Congress, which had voted down a marriage equality measure.

NORTHERN IRELAND – Pursuant to an action of the U.K. Parliament exercising legislative powers in the absence of a functioning local parliament in Northern Ireland due to a political deadlock that has blocked the formation of a government, it is likely that marriage equality will finally arrive in Northern Ireland, beginning February 14 (St. Valentine's Day). In July, Parliament passed an amendment extending marriage equality to Northern Ireland if by October 21 the Northern Ireland Assembly has not resumed functioning with a working coalition majority. As of the beginning of October, it looked like this condition would not be met, but anything could happen at the last minute. Marriage equality is actually one of the sticking point issues that has prevented the formation of a governing coalition, in the absence of any of the contending parties to achieve a majority of seats. **LGBTQNation.com**, Sept. 10.

PHILIPPINES – The Supreme Court dismissed a plea to legalize same-sex marriage, stating that the issue is for the legislature, not the courts. The court also stated that the petition filed by a lawyer must be dismissed due to lack of standing and filing to raise "an actual, justiciable controversy." The court found contemptuous an attempt by some lawyers to bring this suit with have as plaintiffs individuals who had been denied marriage licenses. *CNN Philippines, Sept. 3.*

RUSSIA – Andrei Vaganov and Yevgeny Yerofevev, a same-sex couple who are raising two children, are seeking asylum in the United States as a result of credible threats that the Russian state will seek to take their children away under the law forbidding "promotion of homosexuality" to minors. Their children were adopted by one of the men, as Russian law does not allow adoptions by same-sex couples. Their living situation came to the attention of authorities after one of the children was brought to the hospital for a stomach problem and mentioned his two fathers to the personnel there. Investigations were begun, warnings were intimated, and disciplinary proceedings were instituted against the adoption officials who had approved the adoption of their children. *Radio Free Europe*, Sept. 26.

SINGAPORE – A retired physician and long-time LGBT rights advocate, Dr. Tan Seng Kee, better known as Roy Tan, has filed a new court challenge against Section 377A of the Penal Code, a law criminalizing gay sex between men, which is derived from a Victorian era criminal law imposed by the British when Singapore was their colony. (The similarly-numbered Section 377 of many British Commonwealth countries has been repealed in some, and declared unconstitutional in India, but still applies in many Commonwealth countries.) The lawsuit relies on several articles of the Singapore Constitution relating to personal liberty, equality, and freedom of speech and expression. *Straits Times*, Sept. 25.

PROFESSIONAL *notes*

SOUTH AFRICA – The Equality Court of the Western Cape issued a groundbreaking ruling on September 23 in the ase of "Ms September," a transgender woman serving in a male prison, who had sued for the right to express her gender through hairstyle, dress and make-up. She alleged that she had been subjected to verbal abuse and harassment from prison officials, and had been placed in segregated confinement for attempting to express her gender in violation of prison rules. According to a September 25 news release issued by a coalition of groups that rallied in support of her claims, the court held that "refusal to allow a transgender person to express their gender identity is unfair discrimination that violates both the right to equality and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act, which is held to apply to prison inmates as well as civilians. The court also ordered the Department of Correctional Services to provide sensitivity training for current and new employees. It ordered prison officials to allow the plaintiff and others similarly situation to wear female underwear, keep their hair long and wear make-up. It also ordered that corrections officers address her as a woman and use female pronouns when referring to her. The right to dignity, protected by South Africa's Constitution, includes the right to express one's gender identity, said the court. The press release makes no mention about whether the prison is providing hormone therapy or would provide gender affirmation surgery. But one step at a time, evidently.

UNITED KINGDOM – *The Guardian* (Sept. 2) reported that the U.K. Home Office has refused at least 3,100 asylum claims of people from countries that outlaw gay sex, including at least 1,197 from Pakistanis making asylum claims between 2016 and 2018. The article reported that 640 Bangladeshis and 389 Nigerians were turned away as well. There were also denials from Cameroon, Ghana, Iran, Uganda, Iraq, Jamaica and Malaysia, despite the evidence of severe persecution of LGBT people in those countries. The commonly cited ground is that the authorities do not believe the applicants' claims to be lesbian, gay, bisexual or transgender. As an example, one immigration tribunal judge actually stated at an asylum hearing that the male applicant lack a gay "demeanor." The judge openly embraced a stereotype that gay men would act in an effeminate manner and perhaps wear lipstick. The Home Office stoutly denied charges that its judges were failing to accord fair hearings to LGBT applicants.

UNITED KINGDOM – Freddy McConnell, a transgender man who is a journalist for The Guardian, gave birth to a child in 2018 and sought to be registered as the child's father, but the authorities insisted that a person who bears a child must be registered as its mother. McConnell, who is legally recognized as male under the U.K.'s Gender Recognition Act, had been living as a male for years when he gave birth. He took legal action against the General Register Office, arguing that requiring McConnell to be registered as the child's mother violated both his rights and his child's rights to appropriate and equal recognition of his gender. The Family Division of the High Court ruled against him on September 25. Sir Andrew McFarlane, president of the family division bench, wrote: "There is a material difference between a person's gender and their status as a parent. Being a 'mother,' whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognized in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male,' their parental status, which derives from their biological role in giving birth, is that of 'mother'." McConnell said that he had decided to bear his own child after he had transitioned by before any internal surgery to remove female reproductive organs. He paused taking testosterone and waited for his monthly menstrual cycle to return before undergoing IVF treatment using a sperm donor, becoming pregnant on the second attempt. *Sky.com* (Sept. 25).

PROFESSIONAL NOTES

By Arthur S. Leonard

JUSTICE ROSALYN RICHTER, an out lesbian elected New York Supreme Court Justice who was elevated to the Appellate Division, First Department, in March 2009, has announced her plan to retire from the court, most likely during the summer of 2020 to give time to Governor Andrew Cuomo to select a Supreme Court justice to fill her position. Cuomo has been behind schedule on filling vacancies in the Appellate Division, and there is a shortage of judges to form panels to decide cases in the First Department as a result of several recent retirements. The Presiding Judge of the First Department, Rolando Acosta, thanked Justice Richter for making her announcement long in advance. Justice Richter, who has served in the state courts for more than 30 years, will continue her work as an adjunct professor at Columbia University Law School. She was first elected to the Supreme Court in 2002, after having served as an Acting Supreme Court Justice presiding over felony prosecutions in Manhattan from 2000 to 2002. She had previous experience

working as NYC administrative judge, a prosecutor in the Brooklyn District Attorney's Office, and as Executive Director and Special Project Attorney at Lambda Legal, back at a time when Lambda's paid staff consisted at one point solely of her.

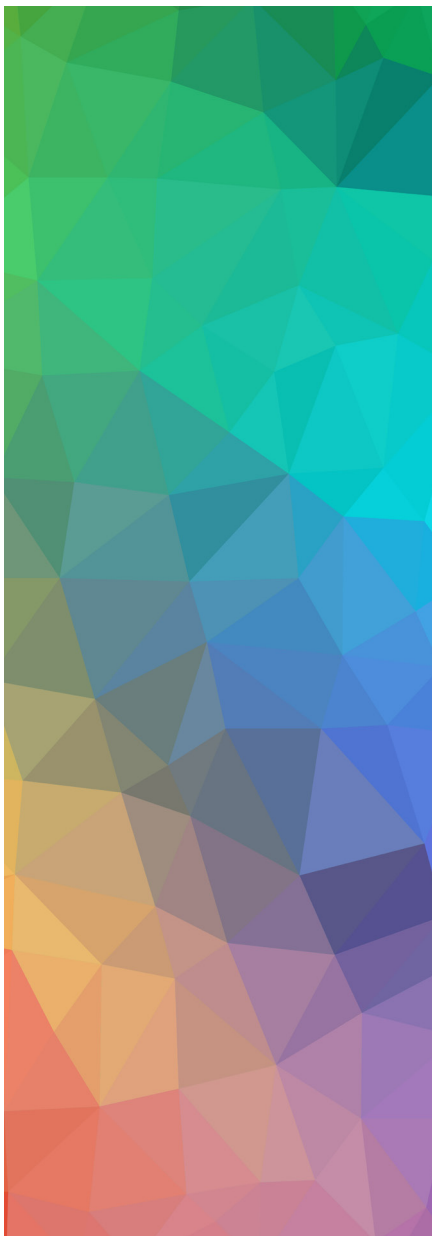
President Trump is taking a second run at putting **PATRICK BUMATAY**, an out gay conservative Republican prosecutor, on the 9th Circuit Court of Appeals, according to a White House announcement on September 20. Bumatay, based in San Diego, has also served in the Trump Administration at main Justice in D.C. Two current judges of the 9th Circuit had informed the president that they would take senior status as soon as nominees are confirmed for their seats. Prior to working as a federal prosecutor, Bumatay clerked for Judge Timothy Tymkovich on the 10th Circuit and District Judge Sandra Townes in the Eastern District of New York. If these and other pending nominations comes through, Trump will have appointed more than one-third of the active sitting judges on the 29-member 9th Circuit.

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers. All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor via e-mail to info@le-gal.org.

"Federal Judge" cont. from pg. 26

In this writer's view, the equal protection analysis is unfortunate because it calls to mind the thoroughly debunked argument from the 1970s that pregnancy discrimination is not sex discrimination because it reaches only people based on on pregnancy, not based on gender. It would have been enough to hold that these transgender plaintiffs' interest in equal protection was satisfied by the offered accommodation and that the defendants' insistence on the sanctity of their "count" procedures met a heightened governmental interest. ■



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