

L G B T  
**LAW NOTES**

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**What Will SCOTUS Do?**

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# Texas Federal Court Vacates Transgender Protection under Obamacare

By Arthur S. Leonard

Reed O'Connor, a federal trial judge in the Northern District of Texas, ruled on October 15 in *Franciscan Alliance v. Azar*, 2019 U.S. Dist. LEXIS 177871, 2019 WL 5157100, that the Obama Administration's regulation providing that the Affordable Care Act (ACA, a/k/a "Obamacare") prohibits health care providers and institutions from discriminating against patients because of "gender identity" or "termination of pregnancy" is invalid. The judge "vacated" the rule, effectively ordering the government not to enforce it, although he declined to issue an injunction to that effect.

Government agencies and courts in several states have relied on the regulation, "Nondiscrimination in Health Programs & Activities," 45 C.F.R. Sec. 92, in several important cases, ruling, for example, that state Medicaid programs and the insurance coverage that states provide to their employees had to provide coverage for medically necessary gender transition treatment. The regulation has also been invoked in lawsuits challenging the refusal of private employers to cover such treatment, and theoretically also could be invoked to challenge refusals by health care providers to perform abortions, although it is uncertain whether it could apply to such refusals.

O'Connor's ruling was not a real surprise, since he issued a "nationwide" preliminary injunction barring the government from enforcing the regulation on December 31, 2016, just as it was set to go into effect on January 1, 2017. Consequently, it is uncertain how federal enforcement proceedings would have fared in the courts.

The Department of Health and Human Services (HHS) formally adopted the regulation on May 16, 2016, as an official interpretation of the ACA's anti-discrimination language, which mentions neither gender identity nor abortions. Unlike most federal

anti-discrimination statutes that list the prohibited grounds of discrimination, the ACA instead listed four other federal anti-discrimination laws, and provided in Section 1557 that "an individual shall not, on the grounds prohibited under" the listed statutes, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance."

The statutes listed were Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin in programs that received federal funds, Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions that receive federal funds, the Age Discrimination in Employment Act, which prohibits discrimination against people aged 40 or older by companies that employ 20 or more people, and Section 504 of the Rehabilitation Act of 1973, which prohibits unjustified discrimination against people with disabilities by programs that receive federal funding. HHS interpreted Title IX's sex discrimination ban to include discrimination against an individual because of their "gender identity" or "termination of a pregnancy" in the context of the ACA.

Franciscan Alliance, an operator of faith-based health care institutions, and two other private sector plaintiffs, joined together with eight states to file a lawsuit in the U.S. District Court in Wichita Falls, Texas, shortly after the regulation was published, challenging HHS's adoption of the regulation under the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act (RFRA). Franciscan Alliance specifically alleged that providing gender transition treatment violated its religious beliefs, and that the regulation would require them to perform

abortions, also against their religious beliefs. The state plaintiffs, as well as Franciscan Alliance, argued that the regulation was not based on a legitimate interpretation of the discrimination prohibited by Title IX. They also raised constitutional arguments that the court didn't have to address, since it found the regulation to be invalid under these two federal statutes.

Concerned that the new regulations might be struck down, the American Civil Liberties Union of Texas (ACLU) and River City Gender Alliance (RCGA) filed motions in September 2016 to intervene as parties to help defend the regulation. Judge O'Connor reserved judgment on this motion pending the filing of answer to the complaint by the federal government, but allowed ACLU and RCGA to participate as amicus parties and file briefs on the pending preliminary injunction motion.

Judge O'Connor developed a reputation during the Obama Administration for his willingness to issue nationwide preliminary injunctions against Obama Administration initiatives, usually at the behest of conservative state governments or faith-based organizations. Because he is the only judge on the U.S. District Court for the Northern District of Texas who is assigned to sit several days a month in the satellite courthouse in Wichita Falls, Texas, a small city with a population of about 100,000 (roughly the size of South Bend, Indiana, for example), Judge O'Connor's judicial propensities help to explain why several cases of national importance were filed by conservative opponents of the Obama Administration in that rather obscure courthouse. Lawyers call this "forum shopping" – seeking out a particular court or judge because they are highly likely to rule in favor of the plaintiffs based on their past performance.

While this litigation was going on, Judge O'Connor became embroiled in a Title IX lawsuit brought by states



challenging the Obama Administration's interpretation guidance to school districts concerning their obligations to transgender students. In that litigation, he found that the plaintiffs were likely to prevail on their argument that Title IX did not apply to gender identity discrimination, issuing a nation-wide preliminary injunction barring the Education Department from requiring school districts to refrain from discriminating against transgender students.

When he issued his preliminary injunction in this case, O'Connor concluded that the plaintiffs were likely to succeed in showing that the ban on sex discrimination in Title IX did not extend to gender identity discrimination (as he held in the schools case), and that failing to incorporate religious exemption language from Title IX in the regulation violated the intent of Congress in its method of specifying prohibited grounds for discrimination under the ACA. He also ruled that it was likely that attempts by the government to enforce the regulation against faith-based health care providers would burden their free exercise of religion without sufficient justification under RFRA. If the agency exceeded its statutory authority, its adoption of the regulation would violate the APA.

Just weeks after O'Connor issued his preliminary injunction, Donald Trump took office and appointed new leadership for the various federal agencies that interpret and enforce the federal anti-discrimination statutes. On May 2, 2017, the new leadership at HHS filed a motion asking the court to "remand" the challenged regulation back to the agency, because the new administration was going to be reviewing all of the Obama Administration's regulatory actions and might make the case "moot" by rescinding the regulation. Judge O'Connor granted that motion on July 10, 2017, and said he would "stay" further proceedings in the case while HHS decided whether to revoke the regulation.

Surprisingly, in light of Attorney General Jeff Sessions' memorandum from the fall of 2017 opining that federal laws banning sex discrimination do not

ban gender identity discrimination, as well as the Trump Administration's repeatedly articulated hostility toward abortion, HHS has not yet undertaken the formal steps necessary under the APA to repeal or amend the challenged regulation, and evidently Judge O'Connor finally lost patience and decided to issue a ruling on the merits. Having received briefing by the parties on the legal questions involved, he determined that he could render a ruling on the government's motion for summary judgment, producing the decision published on October 15.

He referred back to his earlier preliminary injunction ruling, doubling down on his conclusion that when Congress passed Title IX in 1972, it knew that the EEOC and federal courts had been rejecting transgender individuals' sex discrimination claims under Title VII of the Civil Rights Act, so as of 1972 Congress would believe that passing a new federal statute outlawing sex discrimination would not outlaw discrimination because of gender identity.

Getting further into the RFRA analysis, he found that the government does have a compelling interest in prohibiting discrimination in health care, but that the regulation did not impose the "least restrictive alternative" as required by that statute. Because there are non-faith based health care providers who will provide gender transition treatment and abortions, he wrote, it is not necessary to burden faith-based providers in order to make it possible for individuals to get those treatments. They can just go elsewhere.

Thus, Judge O'Connor extended his earlier opinion to hold, as a final ruling on the merits, that the inclusion of "gender identity" and "termination of pregnancy" in the regulation exceeded the interpretive authority of HHS in violation of the Administrative Procedure Act, and that enforcement of those provisions against faith-based health care providers would violate their rights under RFRA.

Judge O'Connor found that because the defendants (the Trump Administration) was no longer affirmatively defending the regulation,

ACLU and RGCA were entitled as of right to intervene as co-defendants in order to provide a defense. This was an important step, since only an actual party can appeal a decision. However, Judge O'Connor pointed out that the intervenors will have to establish individual standing to do so if they want to take this case to the 5th Circuit Court of Appeals. The district court could just rely on their allegations that they have members who would be adversely affected by the regulation being struck down in order to grant their intervention motion, but their standing to appeal the ruling might be challenged in the 5th Circuit which, for example, has vacated a ruling against Mississippi's draconian anti-LGBT statute on grounds that the organizational plaintiffs did not have "standing" to challenge the law before it had gone into effect.

Judge O'Connor did not strike down the regulation in full, merely holding that the inclusion of "gender identity" and "termination of pregnancy" was not authorized by the statute and thus that those portions of the regulation are "vacated." He refrained from issuing a nationwide injunction, presumably because the defendant – formally, the Trump Administration – is clearly going to comply, since it is no longer arguing that the regulation is lawful in light of the Sessions memorandum and the position it is arguing in the Harris Funeral Homes case at the Supreme Court.

O'Connor's action immediately raises the question whether his ruling is binding outside the Northern District of Texas. Striking down the "unlawful" portions presumably does not just mean for purposes of one federal district. Normally, the government would appeal such a ruling, but in this case, it seems unlikely that HHS or the Justice Department is going to appeal this ruling, which leaves that determination up to the ACLU of Texas and RGCA, in light of all the circumstances, including a national election just a year from now. ■

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# Supreme Court Title VII Hearing Leaves Signs of Hope for LGBTQ Advocates

By Arthur S. Leonard

On October 8 the U.S. Supreme Court conducted arguments in *Bostock v. Clayton County, Georgia*, No. 17-1618, *Altitude Express, Inc. v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, No. 18-107, presenting the question whether the prohibition of employment discrimination because of an individual's sex contained in Title VII of the Civil Rights Act of 1964 can be interpreted to extend to claims of discrimination because of sexual orientation (*Bostock*, *Zarda*) or gender identity (*Harris Funeral Homes*).

Prof. Pamela S. Karlan of Stanford University Law School represented the plaintiffs below (petitioner in *Bostock*, respondent in *Zarda*) in the sexual orientation cases. David D. Cole, Legal Director of the ACLU, represented the charging party below (Aimee Stephens) in the gender identity case. Jeffrey M. Harris represented the employers in the sexual orientation cases. John J. Bursch, for Alliance Defending Freedom, argued on behalf of Harris Funeral Homes. Solicitor General Noel J. Francisco, nominally representing the Equal Employment Opportunity Commission, represented the government in both cases, presenting the current position of the Justice Department in opposition to the EEOC's position on the questions presented.

At present, twenty-three states, the District of Columbia, and more than 400 local governments (many located in jurisdictions where state law does not address the issue) forbid employment discrimination because of sexual orientation. Several of those states have not yet added gender identity to their list of prohibited grounds for discrimination. Public employees in all the states are theoretically protected from intentional employment discrimination because of their sexual orientation or gender identity under the 14<sup>th</sup> Amendment Equal Protection

Clause, and federal employees (apart from the armed services) theoretically enjoy similar equal protection guarantees under the 5<sup>th</sup> Amendment of the Bill of Rights. Executive orders of presidents and department heads extend administrative protection in the federal sector, and executive orders of governors and local government executives extend protection to public employees in many jurisdictions, including states that don't ban such discrimination by statute. The federal executive order and some state and local orders also require government contractors not to discriminate on these grounds. It is likely that a clear majority of workers in the United States are already covered in one or more of these ways with legal protection from employment discrimination. Furthermore, many large companies and non-profits have adopted formal non-discrimination policies covering sexual orientation and, in most cases, gender identity, and union contracts covering a portion of the private and public sector workforces also provide protection against arbitrary dismissal and discriminatory personnel decisions. These employer and union contract policies are also legally enforceable in various ways.

Despite this extensive coverage, however, there remain significant areas in the United States where LGBTQ employees enjoy no legal redress if they are denied employment or promotion, fired from a job, or subjected to hostile environment sexual harassment because they are LGBTQ. Outside of major cities, there are few protections for private sector employees in the Southeastern United States and significant portions of the Midwest and Rocky Mountain States. There remain several large states, such as Pennsylvania, Michigan, and Ohio, where state laws do not extend explicit protection. The question whether Title VII would apply to sexual orientation or gender identity claims is

crucially important for people living in these parts of the country. Additionally, because many people encountering discrimination try to sue on their own behalf without legal counsel and reflexively file their claims in federal court under the impression that such discrimination violates federal law, the lack of federal statutory coverage results in dismissals of potentially meritorious discrimination claims, as readers of this publication can see almost every month. The decisions by some federal circuit courts interpreting Title VII to cover these claims have provided important coverage, albeit temporary until endorsed by the Supreme Court.

Extension of coverage by interpretation of Title VII would significantly reduce the gaps in protection, although it would not eliminate the gaps entirely, because Title VII applies only to employers with 15 or more employees, leaving uncovered the small businesses that are a major engine of employment in the American economy. State and local laws tend to apply to smaller businesses, so a ruling by the Supreme Court upholding the discrimination claims by *Zarda*, *Bostock*, and *Stephens* would still leave much work for LGBTQ advocacy groups to attain protection through enactment of additional state and local laws. More importantly, however, in terms of the public impact of a Supreme Court ruling, the public is not generally tuned in to the legal nuances, and a defeat for the LGBTQ employees in these cases would send an unfortunate signal to the public that discrimination on these grounds is "legal" – even though in many parts of the country or types of employment it would remain illegal.

All this is preface to the possibility of a favorable Supreme Court decision. After reviewing the transcript of the oral argument, and listening to the audio recording (both of which are posted on the Supreme Court's very

user-friendly website), this writer holds out some hope for a favorable ruling, but not a prediction that such is certain or even probable.

The Supreme Court as presently constituted has a sharp ideological split along political lines. Four of the justices, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, who were appointed by Democratic Presidents Clinton and Obama, all have voted in favor of LGBTQ rights positions in the significant Supreme Court rulings of recent years – *United States v. Windsor*, *Obergefell v. Hodges*, and *Pavan v. Smith* – and have tended to be dissenters from the Court's rulings against employees in federal employment discrimination cases, many decided by 5-4 votes. Three of the justices, Chief Justice John Roberts, Samuel Alito, and Clarence Thomas, appointed by Republican Presidents Bush I and Bush II, were dissenters in those three LGBTQ rights cases, as was Neil Gorsuch in *Pavan*. Gorsuch and Brett Kavanaugh, both appointed by President Trump, are the major question marks on LGBTQ issues, since neither had an extensive record as court of appeals judges voting in LGBTQ-rights cases, although their general dispositions were more towards employers than employees in discrimination cases and their general judicial philosophies were, on first thought, unlikely to extend broad scope to the applicability of Title VII. Thus, predictions prior to the arguments were that Ginsburg, Breyer, Sotomayor and Kagan would probably agree with the EEOC's position that Title VII can be interpreted to cover such claims, and the five Republican appointees, making up a majority of the bench, were likely to follow the reasoning of former Attorney General Jeff Sessions' Justice Department memorandum from October 2017, stating the Trump Administration's position that sex discrimination laws do not apply to sexual orientation and gender identity claims.

However, Supreme Court decisions are not invariably predictable, and the Court's past rulings on the interpretation of Title VII in cases

involving sex discrimination give hope that one or more of the Republican appointees might cross over and join the four Democratic appointees in these cases.

After the argument, most of the speculation focused on Neil Gorsuch. Gorsuch is an ardent textualist, generally agreeing with the Justice whose seat he filled, Antonin Scalia, in the proposition that reliance on legislative history of statutes is generally not appropriate, although as an avowed "originalist" he is also publicly committed to the idea that words should be given the meanings that would be attributed to them by the legislature that adopted the statute. Both the EEOC and the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Circuits, in rulings that embraced the EEOC's broader interpretation of Title VII, have cited and quoted Justice Scalia's statement in a 1999 ruling on same-sex harassment claims under Title VII, *Oncale v. Sundowner Offshore*, that interpretation of a statute is not limited to the "evils" that the legislators might have had in mind, but could extend to "comparable evils" to the extent compatible with the words they used. Building on this, and on the 1989 *Price Waterhouse v. Hopkins* ruling, which applied the concept of sex-stereotyping and spoke of Title VII as applying to discrimination because of "gender," and noting the 1991 amendments to Title VII providing that a violation of the statute could be found if sex was a motivating factor in an employment decision even though other non-discriminatory factors were proven, the EEOC and the circuit courts noted above found that sexual orientation or gender identity discrimination did involve sex under various modes of analysis. The 2<sup>nd</sup> Circuit's *Zarda* decision described sexual orientation discrimination as a "subset" of sex discrimination, for example, and the 7<sup>th</sup> Circuit, in a decision that was not appealed to the Supreme Court but was referenced frequently during the oral argument on October 8, talked about how it would be difficult to disentangle sex from sexual orientation.

During the oral argument, Gorsuch's questioning and comments suggested that he might support the view that it was

legitimate to construe Title VII to cover these categories, strictly as a matter of textual interpretation, but he expressed concern about the "disruption" he feared might follow such a ruling. The best evidence against such concerns is the record of decades of experience under state and local laws banning these grounds of discrimination, which have not produced significant disruption. (On the other hand, these state and local laws were enacted in jurisdictions where it was politically feasible to do so, presumably due to the practical judgments of state and local legislators that there was public support for the measures; the hold-out states are the ones where some disruption might be anticipated were a federal mandate suddenly to fall upon employers there.) The other main argument by the employers and the government was that the lack of indication that Congress intended to outlaw these forms of discrimination in 1964 meant that the Court would be engaged in inappropriate "legislation" were it to rule for the employees. This argument loses salience when one reviews the decades of Supreme Court rulings construing the sex discrimination provision to cover various kinds of discrimination that clearly were not contemplated by the members of Congress in 1964.

Much of the discussion during oral argument centered on the bathroom access issues that have frequently been raised in gender identity discrimination cases. Surprisingly, the bathroom issue was broached during the sexual orientation argument – to which it is irrelevant – and, surprisingly, by Justice Sotomayor. A point repeatedly made by advocates for the employees was that this question was not really before the Court. Whether Title VII applies at all is the question at hand; bathroom access is a subsidiary question that is not presented in the three cases being reviewed by the Court, and it would be unfortunate if the Court were to be distracted by it in coming to a conclusion. There were worrisome signs that Justice Sotomayor's vote might be lost around this issue, at least in the gender identity case. On the other hand, it also seemed clear during oral

argument that some members of the Court found it easier to understand that discrimination against an individual because of their gender identity clearly implicates their sex.

When will the Court announce its opinion? The Court has no established timetable for deciding cases after oral argument, but the general rule of thumb is that cases likely to divide the Court and produce multiple opinions generally take longer to be announced. The Court holds a conference on Friday morning of each week during which it holds oral arguments. During those conferences, the justices discuss the cases argued that week and take their preliminary vote. If there is a majority for a particular disposition of a case, and the Chief Justice is in the majority, he will assign the writing of an opinion for the Court to one of the Justices in the majority or take the case for himself to write. Justices who disagree may produce dissents, and some in the majority may end up writing concurring opinions. Some Justices will end up concurring in part and dissenting in part. Sometimes during the course of opinion drafting and the circulation of drafts, minds will be changed and the eventual outcome may change as well. There were tantalizing signs in the opinion for the Court by Chief Justice Roberts in the case rejecting a constitutional challenge to the Affordable Care Act that this had happened. Before the Court made some revisions in the opinion prior to its final publication, the version first released to the public showed that Roberts began to write an opinion striking down the Act in full, but ultimately struck down only part of it and found a theoretical basis to uphold part of it, as a result of which he ended up casting the deciding vote in what were, in effect, two 5-4 decisions with a different line-up of Justices in each.

An early LGBT-related decision by the Court also demonstrates the fluidity of this process. On March 31, 1986, the Court heard arguments in *Bowers v. Hardwick*, in which the Attorney General of Georgia, Michael Bowers, was appealing a ruling by the 11<sup>th</sup> Circuit Court of Appeals that had revived a 14<sup>th</sup> Amendment challenge to

Georgia's criminal law against anal and oral sex, which had been dismissed by the trial court. In the conference after the argument, a majority of the Court voted to uphold the 11<sup>th</sup> Circuit's ruling that the statute could be challenged as a violation of the constitutional right of privacy, and Justice Harry Blackmun began writing an opinion for the majority of the Court (which did not include Chief Justice Warren Burger). According to Supreme Court lore, over the weekend Chief Justice Burger and a conservative clerk in Justice Lewis Powell's chambers went to work on persuading Justice Powell, who had been part of the majority, to change his vote. They were successful, and Justice Blackmun ended up writing one of two dissenting opinions in the case, while Chief Justice Burger and Justice Powell wrote brief concurring opinions to accompany the opinion for the Court by Justice Byron White. The other dissenting opinion, by Justice John Paul Stevens, advanced the analysis that Justice Anthony Kennedy adopted 17 years later when he wrote an opinion for the Court overruling *Bowers v. Hardwick*. The decision in *Bowers* was issued at the end of June 1986, three months after the oral argument. Justice Powell retired shortly thereafter, and in a subsequent appearance at NYU Law School, responding to an audience question as to whether he had come to conclude that any of his votes had been mistaken, singled out his vote in *Bowers*, saying he had come to believe that he should have voted the other way. If he had done so, seventeen years of intense litigation against sodomy laws in state courts could have been avoided.

Last term, the Court began hearing oral arguments on October 1, issued its first two decisions at the beginning of November, and then only one more opinion before the end of the year. It is possible that the delay in confirmation of Bret Kavanaugh for a vacant seat caused some delay in the early opinion-producing process. These three cases are likely to produce a divided Court and multiple opinions, so it seems likely that there will be no answer from the Court until sometime in the winter or early spring. ■

## Supreme Court Denies Review in Two LGBT-Related Cases on First Day of New Term

By Arthur S. Leonard

The Supreme Court announced on October 7 that it was denying review in two LGBT-related cases: *Frank G. v. Joseph P. & Renee P.F.*, No. 18-1431, a New York case, and *Calgaro v. St. Louis County*, No. 19-127, a Minnesota case from the 8th Circuit Court of Appeals. The more significant decision is to deny review in the *Frank G.* case.

In *Frank G.*, 79 N.Y.S.3d 45 (N.Y. App. Div. 2018), the New York 2nd Department Appellate Division upheld a decision by an Orange County Family Court judge to award custody of twin boys to the former same-sex partner of the children's biological father, and the New York Court of Appeals denied review.

The children's biological mother, Renee, is the sister of Joseph P., the former same-sex partner. Frank G., the biological father, had moved with the children to Florida without notifying Joseph P., who had a closely-bonded relationship with the children even though the fathers were no longer living together. Joseph P. sued to be appointed a guardian of the children, at a time when the Court of Appeals had not yet recognized the parental status of same-sex partners.

After the Court of Appeals ruled in *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (2016), that same-sex co-parents could be recognized as having the same parental rights and standing as biological or adoptive parents in certain circumstances, even if they were not married to the biological parent or had not adopted the children, Joseph P. amended his complaint to seek custody.

Orange County Family Court Judge Lori Currier Woods evaluated all the relevant circumstances and decided that



the children's best interest would be served by awarding custody to Joseph P. and according visitation rights to Frank G. She did not find that Frank G. was "unfit", but instead placed both fathers on equal standing and then considered which one would provide the preferable home for the twins. Relying on *Brooke S.B.*, the Appellate Division affirmed. Frank G. tried to appeal this ruling to the Court of Appeals, arguing that his Due Process rights under the 14th Amendment of the U.S. Constitution were violated by the lower courts' opinion, but the Court of Appeals refused to hear his appeal.

In past cases, the Supreme Court has recognized as a fundamental right the liberty interest of biological parents in the care and raising of their children. In his Petition to the Supreme Court, Frank G. argued that this liberty interest was violated when he was deprived of custody in favor of a co-parent based on a "best interest of the children" analysis without any finding that he was unfit or unqualified to have custody.

The Petition argued to the Supreme Court that the case had national significance and needed a Supreme Court ruling, because various state courts have disagreed about how to handle parental custody claims by unmarried same-sex partners of biological or adoptive parents. Since the Supreme Court is most likely to grant review in a case that presents important constitutional questions about which lower courts are divided, it seemed highly likely that the Court might decide to review this case. The likelihood was enhanced because Frank's petition was filed by Gene Schaerr, a former clerk of Chief Justice Warren Burger and Justice Antonin Scalia and a prominent anti-LGBT lawyer and partner in a Washington, D.C., firm that frequently litigates in the Supreme Court. Furthermore, several amicus briefs were filed in support of the Petition, urging the Court to reaffirm the traditional doctrine that biological parents who are not found to be "unfit" always have custodial preference over persons who are not

related to their children by biology or adoption.

Had the court taken this case, the current conservative majority might abrogate *Brooke S.B.* and similar decisions from other states that have been important precedents according equal standing to same-sex parents. The denial of review means the law can continue to develop in the lower courts for now without intervention by the Supreme Court, which is at least a temporary victory for LGBT rights advocates.

The denial of review in the other case, *Calgaro v. St. Louis County*, 919 F.3d 1054 (8<sup>th</sup> Cir. 2019), was expected, since the conservative 8th Circuit found no merit to Anmarie Calgaro's claim that she should be entitled to damages from individuals and institutions that had assisted her child, a transgender girl, when she decided to leave her unsupportive home before she had reached age 18 in order to transition. Calgaro argued unsuccessfully in the federal district court in Minnesota and before the 8th Circuit that her constitutional rights as a mother were violated when the county and its public health director, the local school district and high school principal, and other private institutions respected her child's wishes and kept Anmarie in the dark about where her child was living. She also objected to being excluded from decisions about her child's transition.

Of course, the case raises important issues, but the Supreme Court has shown great reluctance to get involved with cases that are effectively moot, and in this case E.J.K., the child in question, has long passed the age of 18, thus achieving adult status under Minnesota law and being entitled to emancipate herself from control by her parent. Calgaro is represented by the Thomas More Society, a Catholic lawyers group that generally focuses on religious free exercise cases, occasionally in opposition to LGBT rights. E.J.K. is represented by the National Center for Lesbian Rights. Two conservative groups filed amicus briefs urging the Court to take the case. ■

## Supreme Court to Hear Prisoner Case Involving Assessment of a "Strike" Where Suit Dismissed "Without Prejudice"

*By William J. Rold*

The Prison Litigation Reform Act ["PLRA"] provides that, absent a showing of "imminent danger of serious physical injury," a prisoner shall not bring a civil action if prior actions or appeals have been dismissed three or more times because they were "frivolous, malicious, or fail[ed] to state a claim." 28 U.S.C. § 1915(g). This is called the "three strikes" rule in *pro se* prisoner litigation; and it directly affects many LGBT inmate plaintiffs, as the Prisoner Litigation Notes section of *Law Notes* demonstrate.

There is a circuit split as to whether "without prejudice" dismissals for failure to state a claim count as "strikes," and the Supreme Court has agreed to resolve the dispute in *Lomax v. Ortiz-Marquez*, No. 18-8309, *cert. granted* (Oct. 18, 2019). The petitioner, Arthur James Lomax (sexual orientation and gender identity unknown) filed a suit challenging his removal from a program for sex offenders in Colorado. The district court dismissed on the grounds that: (1) Lomax had accumulated three strikes prior to bringing the instant lawsuit; and (2) the gravamen of the case involved a challenge to the fact or duration of Lomax's confinement, where he did not first successfully attack the conviction – *see Heck v. Humphrey*, 512 U.S. 477 (1994) (§ 1983 cannot be used to substitute for relief under habeas corpus). Lomax's petition sought certiorari on multiple issues, including the nature of his prior dismissals.

Most circuit courts have ruled that dismissal without prejudice count as a



“strike.” *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012); *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir. 2011); *O’Neal v. Price*, 531 F.3d 1146, 1154-5 (9th Cir. 2008); *Rivera v. Allen*, 144 F.3d 719, 731 (11th Cir., 1998), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007); *Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458, 463-4 (5th Cir. 1998). Only the Third and Fourth Circuits reject the majority rule and exclude dismissals “without prejudice” as “strikes.” *Michener v. Heath*, 866 F.3d 152, 163 (3d Cir. 2017); *McLean v. United States*, 566 F.3d 391, 396-7 (4th Cir. 2009). The Tenth Circuit had counted dismissals without prejudice as “strikes” for ten years – see *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) – when the current case was selected for review – almost as if the Court were waiting to pounce.

If a grant of certiorari itself has become increasingly rare with the Court’s burgeoning docket and shrinking caseload, certiorari on a pro se petition is “as rare as hen’s teeth.” Here, the Court directed the Colorado Attorney General to respond. The Attorney General asked the Court not to hear the case – after which counsel appeared for Lomax. The Court granted certiorari on the single sweeping question of whether dismissals “without prejudice” count as strikes.

The Court had already ruled that a dismissal counts as a “strike” notwithstanding the pendency of an appeal. *Coleman v. Tollefson*, 135 S.Ct. 1759, 1764 (2015). Writing for a unanimous Court, Justice Breyer said that a rule that does not count dismissals as “strikes” until the appeals are decided would make the PLRA a “leaky filter” for triage of prisoner cases that should not proceed. The Court observed in dicta in *Coleman*, that the harshness of the rule could be tempered by the availability of relief from judgment under F.R.C.P. 60(b) and possible modification regarding “third strikes.”

This writer submits that a rule saying that dismissals without prejudice must count clogs the filter. First, it is contrary to the general rule (adopted in

*Coleman*) that the statute means what it says. It does not say anything about with or without prejudice. If the judge does, it should be taken in its common meaning: that the plaintiff waives no rights and may sue again. Implying “with prejudice” as a matter of law distorts the judge’s ruling.

Second, since the statute is silent, the phrase “fails to state a claim” should be read in like fashion as the rest of the list in which it occurs; to wit: “frivolous, malicious, or fails to state a claim” – § 1915(g). This rule of construction (*noscitur a sociis*) requires that a word or phrase should be “known by the company it keeps.” *Gustafsa v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Since frivolous and malicious cases are usually dismissed with prejudice and count as strikes, dismissals for failure to state a claim should create strikes only when counting them prevents a similar wrong. They should never be counted when the district judge makes a finding that the dismissal in a particular case should be without prejudice.

Dismissals for failure to exhaust administrative remedies under the PLRA are generally without prejudice and do not count as strikes. *Booth v. Churner*, 532 U.S. 731, 735 (2001); cf. *Woodford v. Ngo*, 548 U.S. 81, 116 (2006) (Stevens, J., dissenting on other grounds). This is because failure to exhaust is an affirmative defense, and exhaustion need not be alleged in the pleadings. Sometimes, however, failure to exhaust is apparent on the face of the complaint – and most pro se prisoner complaint forms ask about it. Thus, there are many dismissals on this basis that should not be counted as strikes.

A final point is that district judges who dismiss without prejudice often believe (correctly) that the pro se inmate may be able to state a claim if given general guidance from the court as to the elements of the cause of action. The exercise of such discretion should not be ignored, and such dismissals should not be turned into strikes.

An example is taken from this writer’s recent experience in the Eighth Circuit case of *Butterfield v. Young*, 2019 WL 2304665 (D.S.D., May 30,

2019), appealed No. 19-2371 (reported in Law Notes, June 2019, at pages 41-2). After an unsuccessful grievance, the transgender pro se plaintiff sought a federal court order for hormones, which was denied based on *Reid v. Griffin*, 808 F.3d 119 (8th Cir. 2015) (granting summary judgment to prison officials in hormone case, where patient was not diagnosed with gender dysphoria). The case was dismissed without prejudice, but a strike was assessed, based on *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012). Butterfield continued in “therapy” for another year (and through another lost grievance) and sued again, resulting in a second dismissal without prejudice – and a second strike.

Counsel appealed the second dismissal, obtaining plaintiff’s medical records after her brief was filed. The records contained a recommendation to corrections officials from frequent defense expert in transgender cases Cynthia Osborne, who supported the claim for hormones. The state was never required to answer the Complaints, it never told Butterfield that its own expert supported her case, and it is not participating in the appeal. The Eighth Circuit granted this writer’s motion to enlarge the record and include the Osborne Report (and the state’s hiding of it) in the exhibits on appeal. There is no decision as yet.

Left to her own devices, Butterfield would most likely have appealed pro se and incurred her third strike when the dismissal was affirmed. The Court of Appeals would never had known about the chicanery before it and the district judge.

How many hundreds of such cases are there? Unknown. How many inmates could make a successful Rule 60(b) application to set aside a strike? Very few. The Lomax case needs some amicus realpolitik. Hopefully, someone is listening. ■

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*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.*

# U.S. Circuit Judge Dissents in 8th Circuit Denial of Liberian Man's Gay Asylum Claim

By Bryan Xenitelis

The U.S. Court of Appeals for the 8th Circuit has dismissed the Petition for Review of the Board of Immigration Appeal's decision to deny claims of asylum, withholding of removal, and protection under the Convention Against Torture of a Liberian man fearing persecution on account of being gay if returned, in *Samolu v. Barr*, 2019 WL 4949365 (October 8, 2019).

Petitioner, a lawfully admitted permanent resident to the United States, was convicted of violating protection orders against him by his mother and sister, and was placed in removal proceedings. He brought two separate *pro se* lawsuits: 1) that he was fearful of returning to Liberia for his membership in a political group, his assault and torture by the Liberian Drug Enforcement Agency, and as a gay man and gay rights activist; and 2) challenging his continued detention by Immigration and Customs Enforcement.

On the asylum claim, Petitioner testified about the threats and attacks against him, disclosed he had a girlfriend and child in Liberia, but considered himself a "swinger" who had relationships with men, and that he considered himself to be a gay activist. The Immigration Judge found, based on his "demeanor, responsiveness, his many inconsistent and contradictory statements, the totality of the circumstances, and the lack of corroborating evidence to support his claims," that he was "totally unreliable," and denied all claims stating that Petitioner "can't keep it straight" and "appeared to be making it up as he goes." The Board of Immigration Appeals affirmed the decision and the Petition for review was timely brought.

The 8th Circuit's per curiam panel decision noted that unless "any reasonable adjudicator would be compelled to conclude to the contrary" the Board's decision should stand. They agreed that adverse credibility determination was

sufficiently supported, and denied the Petition. The panel did find, however, that Petitioner's continued detention claim was not within their jurisdiction and remanded to district court "for its consideration in the first instance."

Judge Jane L. Kelly, dissenting, first agreed with the Per Curiam with respect to Petitioner's membership in the political group and past assault and torture by the Liberian Drug Enforcement Agency; however, she disagreed with the panel, stating: "I find the [Immigration Judge's] reasoning as to the [fear of returning] claim more troubling. She quoted testimony of Petitioner stating: 'As a gay in Africa, you can't open up who you are. You got to find a way to cover up your – you've got to find a way to cover up all your sexuality . . . [T]he easiest way is to have a kid and a wife – or a girlfriend living with you. And that way, they will not look as you as gay. They will not think of you as gay.'"

Judge Kelly noted that the statement was "consistent with a country report . . . stating that 'the law prohibits same-sex consensual activity' . . . that 'discrimination against LGBTI persons is prevalent throughout the society . . . LGBTI persons were cautious about revealing their sexual orientation or gender identities.'" Judge Kelly stated: "To the extent that the IJ found [Petitioner's] testimony incredible based on nothing more than his own view that a gay man could not be involved in a relationship with a woman, I cannot say that the IJ's conclusion was supported by 'specific, cogent reasons.'"

She further noted that the IJ made a mistake regarding Petitioner's testimony about a romantic partner, claiming he was inconsistent when in fact the record reflected he was not. For those reasons, Judge Kelly stated that she would have granted the Petition. ■

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*Bryan Xenitelis is an attorney and an adjunct professor at NYLS*

# Gay Princeton Grad Student Loses Appeal of His Title IX and Hostile Environment Harassment Lawsuit

By Filip Cukovic

On October 25, the U.S. Court of Appeals for the 3rd Circuit dismissed a gay plaintiff's appeal challenging the District Court's order which dismissed Plaintiff's Title IX claims against Princeton University. The claims arouse from a sexual misconduct investigation conducted by Princeton and the Plaintiff's subsequent dismissal from the University. Circuit Judge Patty Shwartz agreed with the District Court that the "John Doe" plaintiff did not allege sufficient facts to support any of his claims. *Doe v. Princeton University*, 2019 WL 5491561.

John Doe was a male graduate student at Princeton. Doe describes himself as homosexual, but, while at Princeton, his sexual orientation was not yet public. One spring semester, Doe met a male undergraduate student (Student X). Doe alleges that Student X sexually assaulted him during the following summer and when they returned to Princeton in the fall. After the second assault, Student X's friends allegedly created a hostile environment for John Doe, by publicly yelling out a gay slur at him and calling him a liar. Shortly after the second assault, Doe notified the University that he was sexually assaulted by Student X and that Student X's friends were harassing him. Student X filed a cross-complaint.

Pursuant to the University's rules, Princeton assembled a panel of administrators to investigate Doe's and Student X's complaints. Student X was charged with non-consensual sexual penetration and sexual contact, sexual harassment, and stalking. On the other hand, Doe was charged with sexual harassment, stalking, and

retaliation. Ultimately, the panel found both students not responsible for any charges.

However, during the ongoing investigations, Princeton banned Doe from attending the University's religious community center and it declined to provide Doe with a no-contact order against Student X's friends. Doe asserts that this made him felt isolated and depressed, and that he attempted suicide. Doe contacted clergy and student services administrators regarding his suicidal behavior but nobody took any action to help him.

Furthermore, Doe alleged that the significant stress caused by the sexual assault had a negative impact on his academic standing. At one point, Doe asked the Graduate School for an extension to take a midterm exam so he had time to submit evidence to the panel before it closed its investigation. The Graduate School did not grant the extension request, and his academic advisor provided no help. Princeton, however, offered him a leave of absence.

In the final semester of his program, Doe concluded that he would be unable to meet his degree requirements and requested re-enrollment for the following semester. Princeton notified Doe that he must maintain a B average in his courses for the spring semester to be eligible to enroll for the fall semester. Doe was unable to maintain a B average, and Princeton terminated his enrollment. Doe alleges that another male student in his program received his degree without completing his final semester.

That is when Doe decided to bring an action against Princeton. Doe asserted that Princeton (1) violated Title IX of the Education Amendments and (2) breached the enrollment contract between Doe and Princeton. Doe also sued for (3) estoppel and reliance, and (4) negligence. The U.S. District Judge Peter G. Sheridan dismissed Doe's complaint without prejudice, concluding that Doe had failed to allege sufficient facts to support his claims.

Doe offered several theories of liability under his Title IX claim. However, the Third Circuit held that all

of Doe's claims are without merit. The main problem was that neither of the theories advanced by Doe demonstrated that Doe faced disparate treatment "on the basis of sex." In relevant parts, Title IX provides that "no person in the United States shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Hence, the main requirement for proving disparate treatment on the basis of sex is the plaintiff's showing that similarly situated individuals of the other sex experienced different treatment than he did in comparable circumstances.

First, Doe asserts that Princeton is biased against male sexual assault complainants and that, had he been a female victim of sexual assault by a male assailant, the proceedings would have been different. The court rejected this theory on the basis that Doe's allegations were too "generalized" and "conclusory" to raise an inference of disparate treatment. Moreover, Doe alleged no facts reflecting that the disciplinary process and results for female victims are different from men. Secondly, Doe also alleged that Princeton has a "history of complaints regarding its mishandling of reports of sexual assault." He did not allege, however, that this "mishandling" involved any anti-male bias.

Additionally, the court held that Doe's Title IX claim separately failed because he has not alleged facts showing Princeton was deliberately indifferent to the alleged sexual harassment. The court said that the record shows that Princeton took Doe's allegations seriously, which is reflected in the fact that Princeton organized a committee whose only purpose was to investigate Doe's claims. Doe's claim that Princeton was deliberately indifferent to the allegedly hostile environment created by Student X's friends also failed. The court rejected this argument on the basis that the alleged harassment was neither severe nor pervasive, which meant that Princeton did not have a duty to step in and protect Doe. The court

held that one instance of being called a slur, while offensive, cannot on its own meet the high standard necessary for proving the hostile environment claim.

After dismissing all of Doe's Title IX claims, the court went on to also dismiss Doe's breach of contract claim. Doe alleges that Princeton breached certain provisions of the RRR, which is the University's guide that bans sexual misconduct and sex discrimination, and outlines the procedures for investigation and discipline for violations. Noting that courts have a limited role in reviewing contracts between private universities and their students, the court held that Doe's complaint is devoid of any allegations of misrepresentation, lack of candor, or a lack of transparency, and thus does not allege the Princeton substantially violated any promise to be honest and straightforward.

Second, the court held that the complaint does not reveal Princeton substantially violated any promise to protect the well-being of the Princeton community, because, even if there were procedural flaws in the investigation, Princeton gathered evidence about the charges of sexual harassment and provided reasons for its conclusion. Doe's promissory estoppel claim also was also seen as without merit. Doe alleges that Princeton promised, in return for Doe's acceptance of admission and tuition, that "Princeton would not tolerate and, [Doe] would not suffer" sexual assault by another student, unfair procedures, or an "arbitrary termination of his enrollment." However, to state a cognizable claim for promissory estoppel, a plaintiff must allege, among other things, a clear and definite promise. The court held that Doe did not meet this burden, because the promises he identified represent the general expectation a student has when attending a university, and not an actual promise to him.

Finally, the court also easily dismissed Doe's negligence claims against Princeton on the basis that Princeton is entitled to charitable immunity. Namely, the New Jersey Charitable Immunity Act provides that "no nonprofit corporation organized



exclusively for educational purposes shall be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation where such person is a beneficiary of the works of such nonprofit corporation.” Furthermore, the statute states that “an entity qualifies for charitable immunity when it . . . was promoting religious, charitable, or educational objectives and for non-profit purposes”. Considering that Princeton is a not-for-profit entity that promotes educational objectives, the University clearly falls within the scope of this statute and thus enjoys charitable immunity and cannot be held liable to respond in any damages. Thus, the Third Circuit held that the District Court was right when it dismissed each of Doe’s numerous claims.

Plaintiff was represented by Robert J. Fettweis, Esq. from Fleming Ruvoldt and Kimberly C. Lau, Esq. from Warshaw Burstein. ■

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



## Mississippi Supreme Court Unanimously Affirms Award of Custody of a Child to His Gay Uncle’s Surviving Husband

*By Arthur S. Leonard*

Read that headline more than once, as it almost sounds incredible. The Mississippi Supreme Court, without a dissenting vote on this issue, affirmed a decision by DeSoto County Chancery Court Judge Percy L. Lynchard to award custody of then-8-year-old “Andrew” (a pseudonym) to his Uncle David, the surviving husband of his Uncle Jason, in preference to the child’s mother, April Garcia, with visitation rights for April’s mother, Judi Garner. *Garcia v. Garner*, 2019 Miss. LEXIS 357, 2019 WL 4872501 (October 3, 2019) [Note: Westlaw titles the opinion *Garner v. Garner*, using Appellant’s maiden name.] The court found some problems with the Chancellor’s fee awards in the case, and rejected the Chancellor’s order of visitation rights for Judi Garner’s husband, Ronald Fox, who is April’s stepparent, but concluded that the Chancellor did not err in awarding custody to David, a now-single gay man with no biological relationship to Andrew. The only dissent worth noting is a partial one, in which two justices criticized the chancellor’s treatment of David’s homosexuality in his analysis of the best interest of the child factor, based on an outmoded precedent which they called upon the court to overrule, rejected the court’s formalistic reversed of visitation for the child’s step-grandparent, and argued that the chancellor should not have rested any of his decision on the undocumented status of April’s boyfriend and then husband.

Andrew was born in August 2009. When Andrew was 15 months old, in November 2010, April “voluntarily relinquished physical custody of Andrew to her brother Jason, who was then dating and living with David Smith.” A little less than two years later, Jason and David married (although not in Mississippi, obviously given the date. Shortly after the wedding, April

was granted supervised visitation with Andrew by agreement. In January 2013, Andrew began therapy with Dr. Peter Zinkus, a clinical psychologist, who diagnosed Andrew with separation-anxiety disorder due to the “alternating visitation” that began occurring due to this visitation agreement. The anxiety was because of being separated from David, his uncle’s husband, with whom he was tightly bonded.

On December 20, 2013, “by agreed order,” April regained legal and physical custody of Andrew, but the order stated that the parties “recognized that in order for Andrew to successfully handle his separation anxiety he must maintain a relationship with David and David must have a secure and regular place in the child’s life.” The order directed substantial visitation for David, and also required that Andrew’s therapy with Dr. Zinkus be continued. At some point during 2013, April had begun a relationship with Pablo Garcia, an undocumented alien, and their daughter was born on November 5, 2014. A few weeks later, April withheld visitation with Andrew from David. David moved to enforce the agreed order, which the chancellor upheld, so visitation resumed. But Jason became seriously ill with AIDS and died in September 2015, leaving David a widower. The court noted in a footnote that David is HIV-negative.

On September 16, 2016, David filed an “amended petition for emergency custody and to cite [April] for contempt,” alleging that April was unfit to care for Andrew, and that she had unilaterally discontinued Andrew’s counseling sessions with Dr. Zinkus, in direct disobedience to the chancellor’s 2013 agreed order. At the same time, April’s mother and stepfather filed a similar custody petition and joined David’s petition. A few days later, April

married Pablo (despite some domestic violence issues). April responded to David's petition by seeking modification of the 2013 order and termination of David's visitation rights. The chancellor appointed a Guardian ad litem (GAL) for Andrew, ordered to investigate the parties' allegations and make a recommendation, and ordered the parties to submit to drug testing. The chancellor ordered alternate weekly visitation between April and David, with the grandparents having visitation during the weeks Andrew was with David. (Clearly, the grandparents got along well with their gay son-in-law, and came to support his custody petition.) April subsequently tested positive for cocaine, leading the GAL to recommend that her visitation be supervised, which it was until February 3, 2017.

In the fall of 2017, while the case was pending, April claimed that David had sexually abused Andrew while bathing him. Andrew was then placed in foster care while the state's Child Protection Service investigated and found April's claims to be unsubstantiated, the report concluding that "there were no inappropriate actions on behalf of David." As David explained, Andrew had an ear infection and David had supervised his bathing – particularly washing his hair – to guard against getting bathwater in his ears.

The chancellor held a trial on February 22 and 23, 2018, and issued an opinion on April 4, 2018, finding that April had entered into a course of conduct since the December 2013 order that constituted a material change in circumstances adverse to Andrew's best interests and that made April "mentally and morally" unfit to have custody of Andrew. Following the multi-factorial analysis prescribed by Mississippi case law (called an *Albright* analysis), the chancellor awarded "full care, custody and control" of Andrew to David and visitation to April, with grandparent visitation as well for Judi Garner and her husband, Ronald Fox, April's step-father. The chancellor also granted David's motion to hold April in contempt for her unilateral termination of Andrew's therapy with Dr. Zinkus, and awarded

attorneys' fees and costs to David, while denying April's hardship petition for coverage of her attorneys' fees. The chancellor subsequently denied April's motion for reconsideration, and April appealed to the Supreme Court.

The opinion for the court by Judge Kenny Griffis reviewed in detail the chancellor's *Albright* analysis, finding no abuse of discretion in the determination that it was in Andrew's best interest for custody and full control to be awarded to David. The court also upheld the contempt finding against April, while reversing the award of visitation to April's step-grandparent, Ron, basically on the ground that step-grandparents are not specifically mentioned in the statute that authorizes grandparent visitation orders under particular circumstances.

Of most relevance to *Law Notes* readers is Griffis's treatment of the issue of David's homosexuality. One of the *Albright* factors is "moral fitness of the parents." The chancellor found this factor favored neither April nor David. "April argued this factor should have favored her over David, since she is a 'devout Christian' who 'no longer drinks alcohol, takes drugs, or smokes,' and David is an 'open homosexual' who 'does not attend church.'" Griffis noted that the record belied April's assertion, showing that "April has a pattern of recovery and then relapse due to her drug and alcohol problems. April herself acknowledged at trial that it had only been a few months since she last consumed alcohol. Additionally, David's sexuality is not, and has never been, a secret. April knew that David was in a same-sex relationship when she voluntarily relinquished custody of Andrew to her brother Jason who was dating David. Jason and David later married. If April had any concerns about David's moral fitness due to his sexuality, she should have addressed those concerns in 2010, before she voluntarily relinquished custody of Andrew, or in 2013, before she agreed to extensive visitation between Andrew and David. We simply do not accept April's attempt now to use against David something that was previously known to her to which she consented. Also,

although David does not attend church, he testified that he is a Christian."

Then Griffis responded to the dissent by Justice Leslie King, joined by Justice David Ishee, which objected to the court's failure to reject the chancellor's reliance on an old precedent to effectively treat David's homosexuality as a negative factor in the moral fitness evaluation by finding that this factor favored neither April nor David. "The dissent disagrees with the chancellor's findings that David's homosexual lifestyle called his moral fitness into question. The dissent relies on *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which legalized same-sex marriage. However, the record shows that although David is in a same-sex relationship, he is not married." (There was testimony that after Jason denied, David eventually began dating a man, with whom he was not living, and that he and the man had shielded Andrew from the nature of their relationship.) "Moreover, on appeal, David admits that there is support for the chancellor's finding on this factor. Specifically, David asserts that although he does not agree with the chancellor's determination of this factor, he 'cannot assign error to the chancellor's analysis of this factor as there is evidence to support this finding on the record.' David concludes that 'the chancellor did not commit manifest error in examining this factor.' Even assuming the chancellor did err in his examination of this factor," Griffis continued, "any such error was harmless, as the chancellor awarded custody to David. Clearly David's sexuality did not affect the chancellor's custody decision . . . ."

But this was not sufficient for Justices King and Ishee. They took issue with three significant aspects of the court's opinion. The chancellor held it against April that she was living with and eventually married an undocumented man, Pablo Garcia, which the dissenters disagreed should be a negative factor in the determination. The dissenters rejected the majority's literalistic interpretation of the statutory provisions on grandparent visitation to required overturning visitation for Ron, April's stepfather. And they called

for overruling of the 1999 Mississippi Supreme Court decision, *Weigand v. Houghton*, 730 So.2d 581, which had counted homosexuality as a negative factor by citation and quotation of the state's old crime-against-nature sodomy law. "The court's view of homosexuality is antiquated and clearly wrong," wrote King, quoting from the U.S. Supreme Court's opinion in *Obergefell*, and asserting that because the Supreme Court had held that same-sex couples have a right to marry, "the question of homosexual relationships, either married or unmarried, should have no greater detrimental weight than that of heterosexual relationships, married or unmarried. Instead, the majority finds that 'David's sexuality is not, and has never been, a secret.' I would find that the chancellor erred by concluding that David's sexuality negatively impacted his moral fitness and would find that *Weigand* should be overruled. As Justice McRae stated in his dissent [in *Weigand*], 'the morality of homosexuality, however, should not be at issue before this Court or the lower court.' Accordingly, I would hold that, due to April's drug and alcohol problems, this factor favors David." In summarizing his dissent, Justice King wrote: "I would find that David's sexuality had no bearing on his moral fitness as a parent."

Chief Justice Michael Randolph wrote a brief concurrence/dissent, agreeing with King and Ishee that the court should not have reversed the award of visitation to Ron, April's stepfather.

April's attorney is Jerry Wesley Hisaw. Attorney for David and the grandparents is Gordon C. Shaw, Jr. The opinion does not name the Guardian ad litem for Andrew. ■



## Kentucky Supreme Court Avoids Ruling on Clash between Free Speech and Anti-Discrimination Law in T-Shirt Case

By Arthur S. Leonard

In a case that drew 26 amicus briefs – an unusually high number for an argument in a Midwestern state high court, the Kentucky Supreme Court found an off-ramp from having to decide whether a small business that produces custom t-shirts has a right to refuse an order to print a shirt with whose message the business owner disagrees in *Lexington-Fayetteville Urban County Human Rights Commission v. Hands on Originals*, 2019 Ky. LEXIS 431, 2019 WL 5677638 (October 31, 2019). The court decided that the appellant, the local human rights commission that had ruled against the business, had no jurisdiction because the entity that filed the discrimination complaint in the case was not an "individual" within the meaning of the local civil rights ordinance.

The case originated in February 2012 when a representative of the Gay & Lesbian Services Organization (GLSO), an advocacy organization in Lexington that was planning for its fifth annual Lexington Pride Festival, came to Hands On Originals, the t-shirt business, with an order for t-shirts to be used in connection with the Festival. Hands on Originals is a small business with three owners, all of whom identify as Christians who operate the business consistently with their understanding of the Bible. Their website has a non-discrimination statement, which includes "sexual orientations", but says that "due to the promotional nature of our products, it is the prerogative of Hands on Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership." The design that GLSO presented bore the name "Lexington Pride Festival" with rainbow-colored circles around an enlarged number "5" in recognition of the 5<sup>th</sup> year of the Festival, and no other text. The employee who took the order reviewed it and quoted a price.

"The following month," wrote Justice Laurence V. VanMeter in the court's opinion, "a different GLSO representative contacted Hands On about the price quote and spoke with Adamson [one of the owners], who had not yet viewed the t-shirt design. Adamson inquired into what the Pride Festival was and learned that the t-shirts would be in support of the LGBTQ+ community. Adamson advised the GLSO representative that because of his personal religious beliefs, Hands On could not print a t-shirt promoting the Pride Festival and its message advocating pride in being LGBTQ+. Adamson offered to refer GLSO to another printing shop." In the event, after word about this got out, a Cincinnati business printed the t-shirts for GLSO free of charge. But GLSO's president filed a complaint on behalf of the organization with the local human rights commission, charging violation of the Lexington-Fayetteville Human Rights Ordinance, which forbids discrimination against any individual based on their sexual orientation or gender identity by public accommodations.

The commission ruled in favor of the complainants, but was overruled by the Fayette Circuit Court, which instructed the commission to dismiss the charges. The commission and GLSO appealed. The Court of Appeals affirmed the circuit court, but the panel split, producing three opinions, out of which a majority concluded that the anti-discrimination provision was not violated by Hands On engaging in viewpoint or message censorship as a non-governmental entity.

Justice VanMeter's opinion focused on the language of the ordinance, which provides that an "individual" claiming to be aggrieved by an unlawful practice can file a complaint with the commission. The court concluded, by examining both the context of the



ordinance and the contents of other states referenced in the ordinance, that “only an individual – being a single human – can bring a discrimination claim” under the ordinance. Although an individual, a representative of GLSO, had filed the original complainant with the Commission, it was not filed in his individual capacity but rather as a representative of GLSO. Thus, because “GLSO itself was the only plaintiff to file a claim” and “it did not purport to name any individual on whose behalf it was bringing the claim,” therefore GLSO “lacked the requisite statutory standing” to invoke the jurisdiction of the Human Rights Commission.

The court pointed out that Hands On “argued first to the Hearing Commissioner that GLSO, as an organization, did not have standing under the ordinance to bring a claim.” The Hearing Commissioner rejected that argument, reaching a conclusion that the court rejects in this opinion: that an “individual” as named in the ordinance could also be an organization. Hands On continued to push this argument through all levels of review, so it was not waived when the Kentucky Supreme Court agreed to review the lower court decisions.

“While this result is no doubt disappointing to many interested in this case and its potential outcome,” wrote Justice VanMeter, “the fact that the wrong party filed the complaint makes the discrimination analysis almost impossible to conduct, including issues related to freedom of expression and religion. Normally in these cases, courts look to whether the requesting customer, or some end user that will actually use the product, is a member of the protected class. And even when the reason for the denial is something other than status (conduct, for example), ways exist to determine whether the individual(s) (the requesting customer(s) or end user(s)) was actually discriminated against because of the conduct cited is so closely related to that individual’s status. But in either scenario (whether the person allegedly discriminated against is the requesting customer or some end user) the individual is the one who has filed the lawsuit, so the court can properly determine whether that person has been discriminated against.”

VanMeter insisted that the court finds “impossible to ascertain” in this case whether the organization that filed the discrimination charge is a “member of the protected class.” “No end user may have been denied the service who is a member of the protected class, or perhaps one was. If so, then the determination would have to follow whether the reason for denial of service constitutes discrimination under the ordinance, and then whether the local government was attempting to compel expression, had infringed on religious liberty, or had failed to carry its burden” under the law. “But without an individual . . . this analysis cannot be conducted.”

This reasoning strikes us as hair-splitting in the extreme, but is not surprising considering that courts prefer to avoid deciding controversial issues if they can find a way to do so. The Lexington-Fayetteville ordinance, by its terms, does not have protected classes. Like the federal Civil Rights Act of 1964, it is a “forbidden grounds” measure, not a “protected class” measure. Everybody, regardless of their race, is protected from race discrimination, for example. There are no “protected classes” who have an exclusive claim to being protected against discrimination on any of the grounds mentioned in the ordinance. Thus, VanMeter’s explanation is premised on a misconception of the ordinance. But, as a decision by the Kentucky Supreme Court on a question of state law, it is final unless or until it is overruled by the Kentucky Supreme Court or rendered irrelevant by an amendment to the ordinance. As it stands, however, it creates a large loophole in the coverage of the ordinance that was probably not intended by the local legislative bodies that enacted the measure.

Six members of the seven-member court sat in this case. Four members of the court concurred in VanMeter’s opinion. Justice David Buckingham wrote a separate concurring opinion. Although he agreed with the court that GLSO lacked standing to file the charge, he wanted to express his view that the “Lexington Fayette Human Rights Commission went beyond its charge of preventing discrimination in public accommodation and instead attempted to compel Hands On to engage in expression with which it disagreed.”

He found support in the U.S. Supreme Court’s 1995 decision overruling the Massachusetts Supreme Judicial Court’s ruling that the organizers of the Boston Saint Patrick’s Day Parade case had violate the state’s human rights law by excluding a gay Irish group from marching in the parade, and a ruling earlier this year by the 8<sup>th</sup> Circuit court of Appeals reversing a district court decision concerning a videographer who sought a declaration that his business would not be required under Minnesota’s civil rights laws to produce videos of same-sex marriages. In a lengthy opinion, Justice Buckingham cited numerous cases supporting the proposition that the government crosses an important individual freedom line when it seeks to compel speech. “Compelling individuals to mouth support for view they find objectionable violates that most cardinal constitutional command,” he wrote, “and in most contexts, any such effort would be universally condemned.” While reiterating his support for the ruling on “standing” by the majority of the court, he wrote, “if we were to reach the substantive issues, I would affirm the Fayette Circuit Court’s Opinion and Order,” which was premise in this First Amendment free speech argument.

Because the court’s decision is based entirely on its interpretation of the local ordinance and various Kentucky statutory provisions and avoids any ruling on a federal constitutional issue, it is not subject to appeal to the U.S. Supreme Court, which a straightforward affirmance of the Court of Appeals ruling on the merits would have been.

Most of the amicus briefs were filed by conservative and/or religious groups seeking affirmance of the Court of Appeals on the merits, and it is clear that the amici were determined to make this a major “culture wars” case in the battle against LGBTQ rights. One amicus brief was filed on behalf of ten states that do not forbid sexual orientation or gender identity discrimination in their state civil rights laws. There were also amicus briefs from progressive groups (including progressive religious groups) urging the court to reverse the Court of Appeals on the merits. The only LGBT-specific organizational brief was filed by Lambda Legal. ■

# North Carolina Court of Appeals Entertains Defendant's "Insanity" Defense in Murder of Gay Man after Meeting at a Local Gay Bar

By David Escoto

The Court of Appeals of North Carolina held that a defendant found guilty of both first-degree murder of a gay man and first-degree arson failed to demonstrate error by the trial court. Gary Joseph Gupton appealed his arson conviction, arguing that the court erred in denying his motion to dismiss the arson count because of insufficient evidence presented to satisfy an element of arson. Gupton also argued that the court erred in denying his motion to dismiss the murder charge, because the State did not present substantial evidence to rebut his insanity defense. Gupton murdered Steven White, a gay man he met at a gay bar, by attacking him and lighting him on fire in a hotel room. *State v. Gupton*, 2019 N.C. App. LEXIS 859, 2019 WL 5213009 (October 15, 2019). Similar to the trial court, in this opinion, the court of appeals continues to entertain Gupton's insanity defense instead of addressing it as a "gay panic" defense. Judge Lucy Inman wrote for the unanimous three-panel.

On November 8, 2019, Gupton went to Chemistry, a gay bar in Greensboro, North Carolina. Gupton had never been to a gay bar before this evening and proceeded to drink numerous alcoholic beverages and interact with numerous patrons. At approximately 2:00 a.m., Gupton was upset and crying at the bar and was approached by White. White comforted Gupton, and when the bar closed at 2:30 a.m., Gupton and White left in a taxi together.

Gupton and White arrived at the Battleground Inn at 3:00 a.m., where White booked a room for the two of them. It is there that Gupton claims he "started freaking out." In his testimony, Gupton alleges that he started hallucinating after White became sexually aggressive with him. Gupton struck White and then proceeded to

use the hotel room telephone cord to strangle White until he was not moving. Gupton then continued to strike White with the telephone receiver and then threw the television onto him. Then Gupton proceeded to light the hotel bed's comforter on fire and threw that on top of White as well.

Around 4:15 a.m., the front desk received a call from another guest reporting a man yelling on the fourth floor. Before the front desk attendant could investigate the report, Gupton entered the lobby yelling. Gupton proceeded to knock a computer monitor off the lobby desk and throw a cigarette lighter behind the counter. The attendant called 911 to report Gupton's behavior and then proceeded to the fourth floor. Seeing smoke emanating from the room, the attendant again called 911 to report the fire.

When police officers arrived at the hotel, they found Gupton on his hands and knees, exclaiming that "he was going to die tonight." Gupton stated that he hoped the officers were not going to "shoot him in the back of the head." Once in handcuffs, Gupton began to mumble that there were Jihadis inside the hotel with bombs. Firefighters and police officers began to evacuate the hotel. Firefighters found White in the smoking room, face down, and with all of the furniture on top of him. White's burns were still burning and smoking as he was evacuated from the building and taken to Wake Forrest Baptist Medical Center. Two weeks later, White died due to complications from his burns.

On December 15, 2014, Gupton was indicted for first-degree murder and first-degree arson. Gupton's case came to trial on October 2, 2017. At trial, Gupton presented expert testimony regarding his mental state and capacity during the time of the acts. The jury received instructions on

Gupton's insanity defense and found Gupton guilty of both first-degree murder and first-degree arson. The jury recommended life in prison without the possibility of parole for the first-degree murder conviction. Following the jury's recommendation, Gupton was sentenced to life in prison without parole for the murder conviction and a consecutive term of 64 to 89 months in prison for the arson conviction.

On appeal, Gupton first argued the sufficiency of the evidence regarding the arson conviction. Specifically, Gupton argues that the State only provided evidence that the carpeting in the hotel room was burned, and that the carpeting is not legally part of a "dwelling" in such manner as to constitute arson. The court then analyzes the carpet as a fixture, describing the carpet as something that originally may be considered a movable chattel, but by its "annexation to the land is regarded as part of the land." The court compares wallpaper, which previously was held to be a fixture for the purposes of arson, to the carpeting here. The fact that the carpeting was glued to the concrete floor indicated that it was permeant and part of the structure. Therefore, the court here upheld the arson conviction.

More troubling, however, is the court's handling of Gupton's insanity defense. Gupton argued that the State did not present substantial evidence of his sanity at the time of the commission of the crime. The court notes that Gupton acknowledges that insanity is an affirmative defense and defendant bears the burden of proving insanity to the satisfaction of the jury. However, Gupton persisted in addressing his insanity defense in the context of the sufficiency of the State's evidence. Further, Gupton argued that the issue was reserved for appellate review due

to the trial court's denial of his motion to dismiss the murder charge.

The court goes on to say that Gupton's "assertion that he was not guilty by reason of insanity was not preserved by his motion to dismiss the murder based on insufficient evidence" and therefore not preserved for appellate review in the instant case. However, the court elects to continue to review Gupton's argument regarding his insanity defense out of "an abundance of caution."

The court disagrees with Gupton, who argues that the expert testimony he presented at trial rebutted the presumption of sanity and that the State then carried the burden of presenting evidence that Gupton was not sane when he committed the acts charged against him. Gupton's argument was found to be unsupported by law, because once a defendant presents evidence of insanity, "the State may seek to rebut it." The State is not required to do anything as far as showing evidence of insanity. Instead, the issue is for the jury to weigh. In this case, after finding Gupton guilty, the jury concluded that in mitigation, Gupton "was under the influence of mental or emotional disturbance," and his capacity "to appreciate the criminality of his conduct" was thus impaired.

Despite Gupton's argument that the jury's determination implies that he proved his insanity to the satisfaction of the jury, the court points out that the evidence presented only pertains to factors that mitigate the severity of Gupton's crime for sentencing purposes. The jury was instructed on the proper standards regarding insanity and found Gupton guilty nonetheless. The court concludes that it is clear that the jury had considered Gupton's insanity defense, but had rejected it.

The court's decision here is problematic, not in its outcome, but in its failure to call a spade a spade and address Gupton's defense for what it is, an attempt to use a "gay panic" defense under the guise of insanity. As with other instances where courts entertain gay and LGBTQ+ panic defenses as a *means* to argue traditional defenses,

courts are legitimizing violent and often deadly acts against members of the LGBTQ+ community. "LGBTQ+ panic" defenses, in essence, find a basis for excusing the defendant's actions on the victim's sexuality or gender identity. Legitimizing a defendant's loss of control and the ultimate criminal act by excusing or mitigating a sentence based on the victim's membership in the LGBTQ+ community should have been addressed here. The fact that the court remains silent demonstrates that despite eight states passing legislation banning the use of these defenses, there is still a long way to go.

The State is represented by Attorney General Joshua H. Stein and Assistant Attorney General Teresa M. Postell. Gary Joseph Gupton is represented by Anne Bleymann. ■

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## U.S. District Court Uses Florida's Implied Preemption Doctrine to Strike Tampa's Conversion Therapy Ban

*By Vito John Marzano*

On October 4, 2019, Judge William F. Jung of the U.S. District Court for the Middle District of Florida issued an order granting plaintiffs Robert L. Vazzo and Soli Deo Glorida International, Inc d/b/a New Hearts Outreach Tampa Bay ("New Hearts") summary judgment striking down the City of Tampa's ban on conversion therapy for minors based on state preemption grounds. Judge Jung departed from numerous Florida and national rulings upholding similar bans.

For background, the City of Tampa sought to ban medical doctors and mental health professionals from practicing conversion therapy to change a minor's gender expression or sexual orientation by adopting Ordinance 2017-47 in April 2017. The preamble of the ordinance cited legal authority from the U.S. Third and Ninth Circuit Courts of Appeals that upheld similar bans against constitutional challenges, as well as several psychological and medical studies critical of conversion therapy.

Conversion therapy is defined as "counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same gender or sex." In other words, Tampa sought to protect adolescents under the age of 18 from being subjected to "therapy" to change their sexual orientation or to conform to the gender assigned to them at birth. The decision uses the term "Sexual



Orientation Change Efforts”, or SOCE, to mean an attempt to change gender expression or sexual orientation. This article uses the more conventional “conversion therapy.”

Under the ordinance, the City’s Department of Neighborhood Enhancement would enforce the ban through imposing a \$1,000 fine for the first offense and a \$5,000 fine for subsequent offenses. The Department’s Director testified that he would confer with the City Attorney before issuing a notice of violation. The Assistant City Attorney who would handle these issues had only been admitted to law practice for four years and had no training in counseling, therapy, or medicine. If a violation was contested, the City would employ a “special magistrate” to adjudicate the alleged violation. The ordinance did require a licensed medical provider to assist in evaluating potential violations.

Additionally, the ordinance only proscribed using conversion therapy, or speaking about it, to minor patients, but did not apply to other patients or other settings. The ordinance applied only to licensed practitioners, and not others such as ministers, lay providers, parents, unlicensed persons, or those outside of the City.

Robert L. Vazzo is a marriage and family therapist licensed in Florida. He practices conversion therapy on minors. Vazzo claimed to use only speech to help clients reduce or eliminate same-sex attractions, behaviors, or identity. He stated that he only provides this treatment after the client initiates and gives informed consent. New Hearts is a “Christian” ministry in Tampa. It refers individuals including minors, to mental health providers to receive conversion therapy. The ordinance, the court found, precludes Vazzo from administering conversion therapy to minors in the City of Tampa and precludes New Hearts from referring minors to conversion therapy in the City of Tampa.

Plaintiffs claimed that the ordinance violated free speech protections under the U.S. and Florida constitutions; breached Florida Statute § 381.026(04), the “Florida Patient’s Bill of Rights”;

and that State preemption renders the ordinance unenforceable.

Because the court struck the ordinance under the doctrine of implied preemption, it did not address the constitutional issues raised by plaintiffs. This tracks with the long-established legal axiom that federal courts should avoid reaching constitutional questions where other means to dispose of a matter are available.

Turning to preemption, the court noted the following. In Florida, the authority of municipal governments derives from the State constitution and a home rule statute. Article VIII, § 2 (b) of the Florida constitution empowers municipalities to exist and act unless otherwise proscribed by law. Florida statute § 166.21 reiterates the foregoing. The Florida Supreme Court notes that municipal governments may not enact an ordinance inconsistent with an act of the State legislature. Under express preemption, where the Legislature decides to adopt a statute in a particular subject area, a municipality cannot also act in that area.

Relevant here, the Florida Supreme Court also recognizes implied preemption, but a court should be mindful not to find implied preemption where it does not exist. According to the District Court, “the test is simple: implied preemption is found when the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme.” The scheme must be so pervasive as to evidence an intent to preempt, and that strong public policy reasons dictate a finding for preemption. Florida courts have declined to find implied preemption where a scheme is brief, or when the municipal ordinance is local in nature or tied to a situation unique to the locale.

Judge Jung found *Classy Cycles, Inc. v. Bay Cty. Fla.* (201 So 3d 779, 788 [Fla. 1st DCA 2016]) instructive. In *Classy Cycles*, the municipality imposed insurance requirements for tourist-style scooters. The county pointed to untrained and unruly tourists driving scooters and motorcycles in beach

areas as the basis for the ordinance. The Florida court rejected this because the Legislature did not grant municipalities authority regarding vehicle insurance, and rowdy tourists are not a local phenomenon to that county in Florida. As such, the Legislature’s scheme occupied the field to such a pervasive intent as to imply preemption.

Judge Jung carefully evaluates each part of the statute under Florida’s implied preemption doctrine, producing a lengthy and at times repetitive analysis. Nevertheless, the court finds at the outset that municipalities, under Florida law, lack any legislative grant of authority to substantively regulate health care treatment and professional discipline. Further, conversion therapy is not unique to the City of Tampa. Permitting the ordinance to remain would upset the statewide, uniform medical regulation scheme set up by the Legislature and result in a patchwork across various municipalities.

Turning to the public policy aspect support preemption, Judge Jung then identified five state-mandated areas upon which the ordinance encroaches.

First, article I, § 23 of the Florida constitution contains a broad right to privacy that extends to minors. Said privacy right enjoys a wider breadth than that the implied right to privacy under the U.S. constitution. Additionally, article X, § 22 of the Florida Constitution explicitly proscribes the Legislature from limiting or denying a minor’s privacy. Section 22’s drafts, the court noted, rejected the words “unreasonable” or “unwarranted” before the phrase “governmental intrusion.” In the court’s words, “[t]he Florida Constitution’s privacy amendment suggests that government should stay out of the therapy room. The Tampa Ordinance does not address this constitutional issue, and in doing so the City attempts to occupy a very private space, contrary to strong statewide policy.”

Second, the court looked at Florida law that parents hold responsibility for selecting the manner of medical treatment received by their children up to age 18. It reasoned that the ordinance eliminates the parental rights held to be

fundamental and protected by the state constitution. The ordinance would mean that parental rights vary in Hillsborough County, depending on whether someone was within City limits.

It should not escape the reader that these bans, in many instances, stem from parents forcing their children to engage in conversion therapy. This logic seems to have escaped the court, when on one hand it argued strenuously for a minor's right to privacy under the Florida constitution but diminished that right because of the parents' purported right to select what they think is the best medical treatment for the child.

Moving on, third, the court looked at the Florida Patient's Bill of Rights. Florida statute section 381.0264 (4) (d) (3) allows a patient to access any type of treatment in his or her own judgment and the judgment of the practitioner, provided it is in the patient's best interests. The ordinance encourages limiting the type of treatment and, under the court's logic, appears to displace the judgment of a patient and their provider with that of the City.

Fourth, the ordinance limits the Legislature's endorsement of alternative healthcare options under Chapter 456 of the Florida statutes. This law supplies practitioners with great leeway to recommend any mode of treatment without restriction. Only the applicable standard of care and proper treatment of patients, as regulated by the State Department of Health and the professional disciplinary boards, constrain that leeway. The ordinance removes patient choice or the unrestricted discretion of a practitioner.

Fifth, the Legislature has provided a complete and developed scheme for informed consent. The Informed consent process shows the Legislature's understanding that some medical procedures carry substantial risks and hazards inherent in the proposed treatment or procedures. The patient can give consent so long as they are given information associated with those risks that are "in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the

same or similar medical community." The court then engages in some flowery discussion about the right to informed consent being a bedrock of a free society, and that no right is more sacred than a person's ability to be in possession and control of their person.

Judge Jung finds that the ordinance simply ignores this concept. As he explains, the City determined that conversion therapy is too dangerous even for a patient fully informed of the risks but desires that treatment. As discussed further below, Florida's scheme proscribes such treatment as electroshock therapy. Hence, this raises the question of how proscribing one harmful treatment can be squared away with the Patient's Bill of Rights, alternative healthcare, and informed consent.

Having concluded the public policy aspect, the court looked to Florida's regulatory apparatus to determine whether the State intended to be the sole regulator of therapeutic speech in the fields of medicine, osteopathic medicine, psychology, and all types of licensed clinical counseling. The Legislature created the Department of Health to, among other things, regulate health practitioners for the preservation for health, safety, and welfare of the public within reason. This scheme encompasses all of the fields contemplated by the ordinance, and provides for an exhaustive disciplinary procedure. The scheme lacks any grant to a municipality to regulate medical providers or discipline them.

Regarding discipline, the court understood the statute's language as creating a uniform system of discipline for the state. For disciplinary proceedings, the State must prove an allegation by clear and convincing evidence, subject to investigation at several levels, and final review by a peer-reviewed board, trained in the field. A person found in violation by the Department of Health is entitled to an appeal of right to a Florida circuit court. To establish a violation under the ordinance, the City only need to establish a greater weight of the evidence, which happens to be prohibited under

Florida law for licensure disciplinary proceedings. The reviewing authority for the City was not required to be a medical provider. Additionally, under State law, discipline is penal in nature, but the City's ordinance rendered discipline civil in nature.

Given the foregoing, Judge Jung found that the Legislature clearly intended to occupy the field of disciplining medical providers and set forth the standards and procedure for disciplinary action. The ordinance encroached upon that scheme and imposed a lower standard of proof without judicial review. Further, the court concluded that by diverging from the statewide standard for punishing errant mental health therapy, the ordinance created a danger of conflict with an area pervasively regulated, for which the Legislature has stated a policy of statewide uniformity.

Next, Judge Jung summarizes the expert reports submitted by the City. He concluded that, although there is a growing consensus among medical professionals of gender fluidity in adolescents and that conversion therapy is harmful, there are little, if any, conclusive medical studies supporting either. In light of this fact, and that the State's disciplinary authority includes medical professionals trained in their respective fields, the court takes a shot at the City's "lay attempt at psychotherapy regulation" in any already crowded, complex, and evolving area.

The court then looks at regulations for each specific medical field. It is noted that the statutes regarding the discipline of medical doctors, osteopathic medicine, and licensed counselors set forth professional standards and disciplinary actions for uniform enforcement in the State. The Florida Administrative Code also sets forth additional guidance. Neither the statutes nor the Administrative Code supplies a locality with any authority to provide supplemental guidance. The court, generally, used this as the basis to find that, as it relates to regulating each profession covered by the ordinance, the State had impliedly preempted the area.

In an interesting discussion, the court noted that, as it relates to

medical doctors, committing medical malpractice is grounds for discipline. This is defined as the “failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure.” Under this definition, Judge Jung opines, if the City is correct that even non-aversive conversion therapy violates the prevailing treatment’s standard of care, and constitutes psychiatric, psychological, and counseling malpractice, then all the City need do is file a complaint with the Department of Health. Judge Jung surmises that the fact that the City has never reported a case of conversion therapy to the Department of Health is because it has yet to find an instance of it happening in the city limits.

As noted above, this decision is an outlier, given determinations by other Florida and national courts upholding bans on conversion therapy. The issuer here may be unique to Florida under its preemption doctrine, and that the court did not conclude that the conversion therapy ban violated the constitutional rights claimed by plaintiffs.

A different federal district judge rejected similar lawsuits attacking conversion therapy bans enacted by other Florida localities, and those cases are on appeal before the 11<sup>th</sup> Circuit. The city of Tampa announced that it will appeal this ruling as well. ■

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## Penn. District Court Rules on Transgender Grade-Schooler’s Restroom Use

*By Chan Tov McNamara*

Today, most agree that Title IX prohibits schools from preventing transgender students from using bathrooms in line with their gender. It is less clear, however, what Title IX requires of school events hosted at public facilities off-campus. Is a school required to allow transgender students to use gender-aligned facilities on a school-sponsored trip? According to District Judge Robert D. Mariani (M.D. Pa.), the answer is “yes.” The October 2 decision in *A.H. v. Minersville Area School District*, 2019 U.S. Dist. LEXIS 171379, 2019 WL 4875331, ultimately granted a permanent injunction prohibiting a school from restricting a transgender student from using the bathroom corresponding with her gender identity during off-campus field trips.

The student at the center of the case, A.H., is a transgender girl. When A.H. first enrolled in kindergarten in the Minersville Area School District in the 2014–2015 school year, she did so as a biological male. At some point during that year A.H. was diagnosed with gender dysphoria. Thereafter, A.H.’s mother, and the Plaintiff in the case, notified the District and asked whether A.H. would be allowed to dress in full girl’s uniform. The District obliged, and faculty immediately began using A.H.’s chosen name. Restroom use was not an issue since each kindergarten classroom contained a single-user, unisex bathroom.

On May 27, 2015, A.H. and her class attended a field trip to the Lehigh Valley Zoo. Without contacting A.H.’s parents, school administrators decided that on the trip A.H. would be required to use either a unisex bathroom, or if none were available, the men’s bathroom. During the trip, because no unisex restrooms were found, A.H. was in fact forced to use the men’s room. The rest of the trip occurred without incident.

Prior to the start of her first-grade year in 2015, A.H.’s mother met with administrators with concerns on her daughter’s restroom use. At the meeting, the District stated that they would set aside unisex bathrooms for A.H.’s use. Later, once the United States Department of Education issued a formal Guidance letter in May 2016, stating that transgender students be permitted to use the facilities in line with their gender identity, the District immediately allowed A.H. to use the female restroom.

Then, at the end of her first-grade year, A.H. attended another school field trip to Hershey, P.A. When the District stated that it would maintain its earlier policy of requiring A.H. use unisex or men’s restrooms on trips, A.H.’s mother elected to accompany the class in order to ensure that her daughter could use the women’s restroom. Troubled by her daughter’s treatment, A.H.’s mother sued the District, as well as the school’s supervisor and principal.

The Plaintiff brought two claims. First, she asserted that Defendants violated her daughter’s Title IX rights by treating her differently from other female students. Second, she alleged a violation of the Equal Protection Clause: that, by enforcing a policy of prohibiting A.H., a transgender girl from accessing female designated bathrooms, the District denied her the full participation in, benefits of, and the right to be free from discrimination in the educational opportunities on the basis of sex.

As a remedy, Plaintiff sought preliminary and permanent injunctions directing the District to clarify its anti-discrimination policies, and to provide training for administrators with respect to their obligations under Title IX and the Equal Protection Clause. Both Plaintiff and Defendants filed cross motions for summary judgment.

Judge Mariani first examined the Title IX claim, beginning by laying out



the standard for establishing a prima facie case of discrimination under Title IX: A plaintiff must allege that (1) he or she was subjected to discrimination in an educational program; (2) the program receives federal assistance; and (3) the discrimination was on the basis of sex. Further, to obtain damages, a plaintiff must also establish that the discrimination was intentional.

In support of its motion for summary judgment on this claim, Defendants made two interrelated arguments. First, they argued that the state of the law regarding the applicability of Title IX to transgender students' use of restroom facilities remains in flux. As such, they claimed they did not have sufficient notice to be held liable for their conduct. Second, Defendants argued that Plaintiff failed to demonstrate A.H. was actually discriminated against by the District.

Judge Mariani acknowledged that the state of the rights of transgender students has historically fluctuated. He recalled the Trump administration's 2017 retraction of 2016 Department of Education Guidance, and recounted seven cases involving Title IX challenges to the right of transgender students' use of school restrooms and locker rooms over the past four years. He noted, too, that the controlling Third Circuit ruling had itself stopped short of concluding that barring a transgender student from a restroom aligning with his or her gender, by itself, constitutes a Title IX violation. Instead, the Circuit found doing so would pose a "potential" Title IX violation.

For all this, however, he found the argument that the law with respect to Title IX and transgender students was undecided, without support. He pointed out that Title IX funding recipients have been on full notice that they could be subjected to private suits for intentional sex discrimination since at least *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Next, the court considered whether Plaintiff had demonstrated that the District discriminated against her daughter. In Judge Mariani's view, the discriminatory acts at issue were threefold: (1) the decision that A.H. would use the unisex bathroom when

she commenced first grade; (2) the decision that A.H. must use the men's room or a unisex bathroom on the zoo field trip while she was in kindergarten; and (3) the decision that A.H. must use the unisex bathroom on the zoo field trip in first grade, in the absence of a parent accompanying her.

Judge Mariani easily found A.H.'s use of restrooms on both field trips was indeed disparate treatment. As a first point, he found it beyond dispute that the decision by the District was intentional and made without consulting with or notifying A.H.'s parents. Moreover, the policy forced a parent or guardian to accompany A.H. on any field trips—a requirement to which no other student was subject.

He also rejected Defendant's argument that it had no control over restrooms off-school premises, and so should not be held liable. Mariani pointed out that there was no evidence that any staff member contacted the Lehigh Valley or Hershey Zoos to inquire whether the facilities had policies with respect to restrooms. Equally, if Defendants truly had no control over the public restrooms off-campus, then it would be equally true that it could not dictate which restroom a student could use. The fact that the District told A.H. what restroom she could or could not use, however, indicated that it was exercising control over the student and her actions. The judge therefore found the policy discriminated against A.H.

On the District's policy requiring A.H. to use unisex bathrooms during her first-grade year, Mariani was less sure. He found that triable disputes of fact remained as to whether A.H.'s mother consented to the District's approach. This material dispute, he reasoned, precluded a finding for either party that the District violated A.H.'s Title IX rights during her first-grade year.

The decision then turned to the claim of violation of the Equal Protection Clause of the Fourteenth Amendment. As an initial step, the court determined that the intermediate standard of review applied. Under such scrutiny, a party seeking to defend gender-based government action must demonstrate an "exceedingly persuasive justification"

that the challenged classification serves "important governmental objectives," and that the discriminatory means employed are "substantially related" to the achievement of those objectives.

In support of its motion for summary judgment, Defendants again recycled the argument that they did not have "the benefit of any formal guidance from the government" and so could not be held liable. And, again Judge Mariani rejected the argument, finding that a lack of formal guidance did not preclude liability on Plaintiff's Equal Protection claim.

Next, the Court outlined the discriminatory acts at issue: the decision that A.H. use unisex bathrooms during her first grade school year; and the unilateral decision by the District that A.H. must use either a unisex or men's restroom on school field trips, in the absence of her parent's attendance on the trip.

In support of the bathroom policy on field trips, Defendants claimed that the decision was based on a concern for A.H.'s safety. They explained that, because the school had no control over public facilities, they feared that allowing A.H. to use the female facilities might expose her to harm if "someone else in the bathroom . . . identified her as a biological male and created a safety concern."

Judge Mariani found this reasoning without merit for at least two reasons. First, under *United States v. Virginia*, justifications "must be genuine, not hypothesized or invented *post hoc* in response to litigation." 518 U.S. at 533. Here, the administrators were unable to explain what "problems" would arise if A.H. used the women's bathroom in anything other than generalized terms. Second, he found the administrators' safety concerns "deeply flawed." The argument that A.H.—dressed and presenting herself as female—would face more risk in a women's room, than when she entered the male restroom in female garb, rightly struck the judge as illogical. For these reasons he concluded that the District failed to demonstrate an exceedingly persuasive justification for its field trip policy, or that the challenged classification served any important

government objective. Thus, on this front he denied summary judgment as to the Defendants, but granted it to the Plaintiff.

On A.H.'s use of the unisex bathrooms for the majority of her first-grade year, however, the evidence was split. Plaintiff claimed that she was entitled to summary judgment since A.H. had been "required to use unisex or men's restrooms" while at school in first grade. But Judge Mariani did not agree. He found that whether A.H. was "required" to use unisex or men's restrooms while in first grade remained an open question. Indeed, though Plaintiffs argued Defendants made these decisions unilaterally, there was some evidence that A.H.'s parents were provided the option of using the unisex bathroom and decided it was the best course of action at the time. Also cutting against Plaintiff's claim, was the fact that when she explicitly requested that A.H. be permitted to use the restroom that corresponded with her gender identity, she was allowed to. Because the evidence was split, the judge found no party was entitled to summary judgment as to the alleged policy requiring A.H. to use the unisex bathroom in first grade.

Finally, the court considered Plaintiff's move for a permanent injunction preserving "the status quo"—that is, requiring Defendants to allow all transgender student to use facilities matching their gender identities. To be entitled to such recovery, Plaintiff was required to show that, (1) she suffered an irreparable injury; (2) there is no adequate remedy at law; (3) the balance of hardship tips in her favor; and (4) granting an injunction would not be against the public interest.

Judge Mariani found Plaintiff's request for injunctive relief far too broad. As an initial point, he noted that she failed to set forth any evidence of any other current transgender students at MASD, or the District's treatment of such students. Thus, any injunctive relief would have to be limited to A.H. Equally critical, Plaintiff's request that the court issue a permanent injunction to preserve the "status quo" erroneously conflated the purpose of a preliminary

injunction—which is requested to preserve the status quo pending the outcome of an action—with the purpose of permanent injunction.

For all this, however, the judge still issued a permanent injunction restraining Defendants from refusing or failing to permit A.H. to use the bathroom corresponding with her gender identity on field trips, even in the absence of her parent accompanying her. Weighing the various factors, the Judge found they all weighed in Plaintiff's favor: A.H. had suffered irreparable injury; there was no remedy at law which could cure A.H.'s injury; the burden on the District was minimal; and ensuring the enforcement of A.H.'s constitutional and statutory rights was in the public interest.

All told, the court granted Plaintiff's motion for summary judgment as to the claim that Defendant's policy preventing A.H. from using the women's restroom on school field trips violated Title IX and the Equal Protection Clause. On the claim that Defendant violated A.H.'s rights under Title IX and the Equal Protection Clause when A.H. was directed to use the unisex bathroom in first grade, the Court denied Plaintiff's motion for summary judgment. Defendant's motions were denied in full.

A.H. and her mother are represented by David L. Deratzian of Hahalis & Kounoupis, P.C., Bethlehem, PA. The school district is represented by Christopher J. Contrad and Nicole M. Ehrhart of Marshall Dennehey Warner Colemand and Goggin, Camp Hill, PA. Judge Mariani was appointed by President Obama in 2011. ■

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



## Federal Court's Grant of Summary Judgment against a Gay Plaintiff Tests the Boundaries of Anti-Discrimination Laws

*By Cyril Heron*

On October 4, Judge David S. Hurd (N.D.N.Y.) granted a motion for summary judgment against Steven Palencar's three complaints that were based on Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the New York State Human Rights Law (hereinafter NYSHRL) retaliation, as well as Title VII and NYSHRL sexual orientation discrimination. *Palencar v. New York Power Authority*, 2019 WL 4918426 (N. D. N.Y. 2019).

Steven Palencar, a gay man, has a storied history with his former employers, the New York Power Authority. He originally worked as a lineman, one who is tasked with maintaining the powerlines and towers, and he enjoyed a steady rise through the ranks from 1999 to 2008 for his technical skill. But in 2008 Palencar filed a lawsuit that alleged discrimination by colleagues and his supervisor, Andy Cline, that ranged from offensive language to vulgar pranks and other hostile expressions against homosexuality. That case, however, ended in settlement on December 31, 2010, with Palencar enjoying a promotion to Transmission Supervisor in July of that same year. In 2012 and 2013, Palencar's Performance Plus Report (PPR) included two critiques, one concerning his communication style and the other his ability to "foster a sense of teamwork," for which his supervisor recommended professional development training.

Soon the agency changed its organizational structure and consequently changed Palencar's role. His new duties included providing

technical support and consultation, reviewing completed work orders, sending Per Diem payment requests as necessary, and visiting the line crew to provide technical support “without providing direction or oversight of work.” Palencar reported to Philip Toia, an agency executive, that he was very unhappy in his new role. To Palencar’s mind, the 2013 PPR and the role change were both discriminatory and attacks on him. Cline saw this as Palencar portraying himself “as a victim.”

Luckily for Palencar, the antinomy of his new role came to the fore, and in May 2014, New York’s Public Employee Safety and Health Bureau conducted an inspection of NYPA’s policies relating to supervisors. The Bureau cited NYPA the following August, noting that the supervisory roles (i.e., Palencar’s role) “do not make it clear that the employee who is holding a clearance is in charge of the clearance as required by regulation.” Subsequently, Palencar received the power to hold clearance pursuant to the regulations. In a meeting in September 2014 with Toia and Cline, Palencar admitted to filing the original investigation-instigating complaint with the bureau. The next day, Toia sent Palencar a letter memorializing the interaction.

On October 22, 2014, NYPA informed all Transmission Supervisors that the agency would pay for travel expenses rather than a per diem; in addition, the company would no longer pay Transmission Supervisors overtime pay for travel to and from work sites. Palencar disagreed and inquired of Cline whether he was considered a non-exempt employee under the Fair Labor Standards Act, which would entitle him to overtime pay. In a meeting with Toia on October 31, Palencar received a letter clarifying his non-exempt status with reasons therefor. The letter and the meeting also served as an opportunity to counsel Palencar. In addition to mentioning his poor communication skills in the letter, Toia gave examples of Palencar’s inappropriate and threatening behavior. After the meeting, Palencar sent an email decrying the letter as retaliatory and a misrepresentation of his opposition to discriminatory and retaliatory conduct.

At the end of 2014, Palencar received his performance review, which echoed the same complaints from the previous performance reviews. The review also included Palencar’s refusal and lack of faith in the performance review process; his obstinate manner; and, Palencar’s nonfeasance where he documented safety violations but left them to lie follow.

In January 2015, Palencar found a journal that belonged to William Senior, a supervisor, on an unused meeting desk. In the journal, Palencar found notes on his movements, statements, and activities at work. He spoke to Senior, who allegedly admitted to orders coming from the supervisors to monitor Palencar. Palencar then emailed the company and asserted that this increased scrutiny is sufficient to establish a prima facie case of a retaliatory action. Toia refuted that they ordered Senior to monitor Palencar. The journal contained both positive and negative notes on Palencar and his work.

Two months later, Palencar’s line crew began playing pranks on him, such as moving his pamphlet, loosening light bulbs above the stove to prevent them from lighting, and, the final straw, tampering with the knob for the burner on the stove. On March 4, 2015, Palencar informed Senior of the burner prank, stating he could have been electrocuted if the burner knob had touched the metal frame of the stove. Senior filed a letter the same day and further informed Palencar to bring a formal complaint. On March 11, Palencar sent an email to NYPA to report the incidents, but that was not a formal complaint. That fact notwithstanding, CEC security began investigating the complaint and interviewed Palencar about the incidents on April 7, but stopped when they determined the pranks had stopped.

In fact, the pranks were a symptom of increasingly disgruntled line crewmen. On January 29, 2015, a line crewman complained in a letter to Senior of Palencar’s behavior. The letter stated that Palencar had berated them for leaving their post early when they went to find a dry spot and a hot beverage after logging in knee-deep snow. To his mind, Palencar was acting

in a continued pattern of intimidation, condescension, and criticism. At the same time Palencar was experiencing pranks in February, the union sent NYPA a letter. The letter lambasted Palencar for his “openly confrontational style of micromanaging,” intimidation and harassment, and condescension and arrogance. Finally, the letter asserted that Palencar was manipulating corporate policies and external regulations to his benefit. As the coup de grace, on February 3, 2015, another line crewman complained to Senior about Palencar ordering the crew to work in a snowstorm with visibility reduced to a quarter mile and at a temperature of eight degrees. The result was that Pollack, the director of Human Resources, began an investigation into Palencar.

In a meeting to determine proper procedure, an employee spoke up in defense of Palencar, believing the line crew to be blowing things out of proportion. Nevertheless, the investigation went forward. Pollack and another defendant, Bodolato, interviewed twenty-five employees who unanimously panned Palencar. They also investigated Palencar’s meal expense history and led to the conclusion that Palencar violated the policy. On June 24, allegations of Palencar specifically targeting Wiggins’ line crew resulted in a review of Palencar’s GPS up to four months in the past. Two employees complained about the optics and the fact that the agency does not track for anyone else; however, the agency pressed forward and found two unauthorized personal errands. At the end of the June 24 meeting, NYPA determined they had enough evidence to terminate Palencar.

Palencar was placed on administrative leave on July 6, 2015. Senior read Palencar his Final Warning Letter, which noted Palencar’s inability and unwillingness to accept supervisory directives; his unacceptable failure to implement Senior’s directives in a non-disruptive manner; and, his combativeness with his superiors. Seven days later, Palencar filed his first claim with the court on a claim for retaliation. On the recommendation of Pollack and Bodolato, Toia terminated Palencar’s



employment on September 11, 2015, by letter. Palencar appealed and lost.

A retaliation claim is reviewed under a tripartite burden-shifting framework: 1) plaintiff must establish a *prima facie* case of retaliation by showing a) participation in a protected activity, b) awareness by the defendant of the protected activity, c) an adverse employment action, and d) a but-for causal connection between the protected activity and the adverse employment action. 2) once the plaintiff has met his *de minimis* burden of establishing a *prima facie* case, the defendant must then provide legitimate, non-discriminatory reasons for the employment action. Finally, 3) should the defendant meet his burden, then the plaintiff must produce sufficient evidence to prove the legitimate reason is pretextual.

In Palencar's case, he alleged eight different protected activities: 1) the 2010 discrimination suit; 2) the 2014 PESH complaint; 3) Palencar's complaints regarding his FLSA status; 4) his filing of a second PESH complaint on Oct. 16, 2014, asserting that the company retaliated against him for his earlier PESH complaint; 5) his filing of charges on December 24, 2014 with the EEOC and New York State Division of Human Rights; 6) his filing of a second charge with the EEOC on March 2, 2015; 7) his email to NYPA to complain about the stove incident; and 8) his filing of his initial complaint in this case.

Palencar then asserted that NYPA retaliated against him through fourteen different means: 1) depriving him of his right to per diem payment; 2) defendants' lack of a response as to whether he was FLSA exempt; 3) not considering him for the position of Transmission Superintendent; 4) issuing the September 2014 memorandum; 5) issuing the counseling letter; 6) removing him from his duties; 7) rating him "partially meets expectations" in his 2014 PPR; 8) tracking him through Senior's journal; 9) the stove-tampering incident; 10) issuing the warning letter; 11) placing him on administrative leave; 12) investigating him; 13) terminating him; and 14) upholding his termination on appeal. The court dispensed with each claim of retaliation in turn.

To Palencar's loss of per diem, NYPA proffered evidence that every Transmission Supervisor was notified and subject to that change in policy. Absent evidence from Palencar that that reason was pretextual, the court found in favor of NYPA. Similarly, the court disposed of the assertion that the lack of response regarding Palencar's FLSA exempt status. In the counseling letter from NYPA issued October 31, 2014, NYPA include individualized reasons why they believed he was FLSA exempt.

Judge Hurd began his analysis by turning to the assertion that NYPA retaliated by refusing to interview Palencar for the position of Transmission Superintendent. NYPA's reasoning was that the position required a bachelor's degree, which Palencar and one other applicant did not have. Those two were the only ones NYPA did not interview. Palencar rebutted that legitimate reason with the argument that all NYPA employees lacked the requisite qualifications. Particularly, Senior, who obtained the job, lacked technical expertise that Palencar believed he had. That was unpersuasive to the court, which found that Palencar would have needed evidence that the company itself viewed Senior as lacking the technical expertise, as there is a great amount of subjectivity to that qualification. Absent that evidence, Palencar's third assertion failed.

The fourth and fifth assertions both relate to letters from NYPA to Palencar: the September 26, 2014 letter from Toia chastising him for photographing safety issues without resolving them, and the October 31, 2014 counseling letter. The court found those assertions to fail because it considered the letters to be written warning which are not considered adverse employment actions unless they lead to more. Equivocally, Palencar's loss of responsibilities was not supported by evidence that would prove pretext. The non-discriminatory reason for the reduction in Palencar's duties was his poor communication skills, as evidenced by the union letter. The court found that Palencar's disputation of his alleged poor communication skills still cannot prove pretext because the loss happened soon after NYPA's receipt of the union letter. Furthermore, Palencar

cannot assert that this was in retaliation to his suit from 2008 because he was promoted to Transmission Supervisor while that suit was still pending, and he settled that suit four years prior, which destroys the causal connection between the protected act and the adverse employment action.

Next, Palencar offered the 2014 progress review as evidence. The court found that the review's own terms, if true, would constitute a non-discriminatory reason, to which Palencar rebutted with a comparison to another employee's review. Jim Natale similarly had complaints of retaliation and threats to NYPA, but his review was unaffected. The court found evidence from NYPA that an investigation vindicated Natale's threats, which explains the behaviors' absence from the review. Moreover, the court noted the 2014 PPR was consistent with past reviews, and that the only point of concern was the temporal link between the PPR and Palencar's admission that he filed the PESH complaint. Despite that, the court found that was insufficient to establish NYPA's reason as pretextual.

Senior's Journal was not retaliatory, either. Palencar relies upon the journal for his claims, but that proved to be a double-edged sword. Senior's journal contained positive entries of Palencar as well as negative. Additionally, the journal does not exclusively mention Palencar; it mentions other employees as well. Therefore, the court believed that no reasonable jury could consider this an adverse action, where positive and negative interactions are listed, and the journal is not exclusively concerned with Palencar.

The ninth assertion, that the stove-tampering incidents were retaliatory, did not hold water either. First, the moving of the pamphlets to the center of the burner constitutes a petty slight or minor annoyance, which are not materially adverse. Second, the tampering with the knob, which could have caused electrocution, was not attributable to NYPA. In fact, Senior's immediate reaction to the problem and the subsequent cessation of the tampering proved to the court that this was not an adverse employment action. Better still, the decision of

NYPA to investigate, albeit on that only interviewed the plaintiff, in spite of the fact Palencar did not formally file a complaint is indicative to the court that there was no adverse action by NYPA.

For the tenth assertion of the warning letter, the letter itself provides legitimate reasons for its issuance. To prove pretext, Palencar argued that 1) Senior exaggerated the disagreement between Palencar and the line crew; 2) the company had not seen the signature page of the crew letter before issuing the warning letter; and 3) the company did not follow its performance improvement policy concerning his alleged communication difficulties. Senior's exaggerations, which are noted by the court to be sufficiently different, were only one of numerous incidents mentioned in the warning letter and thus is insufficient on its own to establish pretext. Second, the allegation of NYPA's management not personally seeing the signature page is meritless to the court because the letter was received by human resources which took the initiative and forwarded the letter without the signature page yet noted its existence. Finally, Palencar's final claim cannot stand because each performance review he received gave him ways to improve his communication skills. Moreover, Palencar was informed multiple times that his communication difficulties would not be tolerated any longer. Thus, the court found NYPA's legitimate reason undefeated. NYPA was asked to act from every actor who had anything to do with Palencar, and that evidence was enough for the court to find their non-discriminatory reason the overpowering argument. That same reasoning works doubly to defeat Palencar's eleventh assertion that his placement on administrative leave was retaliatory.

The court then reviewed the NYPA investigation, the conducting of which, Palencar argued, was retaliatory. Particularly, Palencar pointed to the disputes where employees voiced their discomfort with NYPA's treatment of Palencar. The court acknowledges that these are examples of pretext to defeat the legitimate reasons proffered by NYPA; namely, the account payable found comparators, which indicates

they did not treat Palencar differently, and NYPA investigated the GPS data to address Senior's concern that Palencar was traveling home during the work day to check on his home renovations. In making the final determination, the court relied on precedent that stated pretext for retaliation is proven by the falsity of the pretext and that retaliation was the real reason for the adverse action. Here, the court ultimately found that, notwithstanding the potential pretextual nature of the meal-policy and GPS-data investigation, the evidence of pretext was paltry. The evidentiary narrative revealed that Palencar had struggled with every level of the company and was unresponsive to progressive discipline, which left the agency no choice but to fire him. Furthermore, even though Judge Hurd agreed that Palencar's assertion of a temporal link between his complaints and disciplinary action can carry some of his burden, the evidence still weighs heavily in NYPA's favor.

Finally, assertions thirteen and fourteen by Palencar are addressed by the same reasoning from the court: i.e., the claim that Palencar's termination and the upholding thereof were retaliatory. He based his arguments on the evidence used in his other arguments plus an additional four: 1) the executive summary exaggerated the report of the line crew member who complained about being made to cut trees in the heavy snow; 2) his violations of the NYPA vehicle policy was *de minimis* and he did not violate the meal policy; and 3) comparator evidence demonstrated that his termination was pretextual because Natale was not fired for similar misconduct. The court summarily refuted all three. First, the exaggeration of the amount of snowfall in the report was deemed irrelevant in light of the array of evidence necessitating NYPA fire Palencar. Second, the court found that the violation of the vehicle policy was nonetheless a violation, and the evidence proffered by NYPA proved that Palencar did violate the meal policy when he bought a meal plus bulk food items or the times he bought two full meals. Third, and finally, Palencar's invocation of Natale, who faced similar misconduct allegations

and reviews of poor communication proved unpersuasive because Natale faced progressive discipline exactly like Palencar. Indeed, the court is sure to note that NYPA warned Natale that more incidents of misconduct would risk termination. In addition, Natale's case was different because he fell on his sword whereas Palencar denied his misconduct and alleged retaliation. For those reasons, the court could not agree that Palencar's termination and the upholding thereof were retaliatory.

The preceding rationale utilized to defeat Palencar's fourteen arguments of pretextual retaliation serve also to quash his cause of action based on section 740 retaliation under New York's Labor Law.

Finally, the court addressed Palencar's final cause of action for sexual-orientation discrimination. Like claims of retaliation, Title VII discrimination claims utilize a burden-shifting framework where the plaintiff must first allege 1) status as a member of a protected class; 2) possession of qualification for the position at issue; 3) denial of the position; and 4) an inference of discrimination that arises from the circumstances of the adverse employment decision. Once those four criteria are met, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for his action. Then, once again, it is up to the plaintiff to show pretext, and plaintiff need only prove that motive to discriminate was one of the employer's motives.

Palencar alleged four employment actions that prove Title VII discrimination: 1) his 2014 PPR; 2) the warning letter; 3) the investigation; and 4) his termination. Palencar was a gay man, and the evidentiary record is replete with NYPA executives noting Palencar's qualifications and technical skill. Satisfying whether an inference of discrimination can be made is tougher, but Palencar demonstrated this partly through the "common and especially effective method" of comparison with a similarly situated employee: i.e., Palencar relied on the comments directed towards him which formed the basis of the 2008 lawsuit; comparator evidence in the form of Natale and Wiggins; and the legal

department's expressed concern of the application of a different standard. The court, however, was unpersuaded by all of these arguments. The first allegation regarding the inappropriate comments were temporally distant from the 2015 action, having occurred, at the latest, in 2010. Second, the court found Natale an unsuitable comparator because of his mea culpa and the fact he was disciplined. Wiggins is equally an inapt comparator because he and Palencar occupy different roles in NYPA which does not amount to the status of "similarly situated in all material aspects." Nevertheless, the court determined, arguendo, that even if Wiggins were in the same role as Palencar, his discriminatory comments were addressed by the company. Meanwhile, Palencar was only subject to termination after numerous incidents, which was enough to also trounce Palencar's final argument concerning the comment that NYPA was applying a different standard to him. To double down, however, the court was sure to note that another employee refuted the claim that they were applying a different standard to Palencar by pointing to a similar violation that resulted in discipline. Therefore, to the court's mind, no reasonable jury could infer that Palencar's sexual orientation played a motivating role in his 2015 employment.

The court sifted through detailed facts with painstaking detail to provide a full picture of Palencar and NYPA's lengthy history. In this case, notwithstanding the few instances that raised doubts, the weight of the evidence lopsidedly leaned in favor of NYPA.

The plaintiff in this case was represented by Allen a. Shoikhetbrod and Erick D. Kraemer of Tully, Rinckey Law Firm; David A. Fallon of the Law Offices of David A. Fallon; and, Donald E. Kelly of the Kelly Law Center. The defendants of this case were represented by Johnathan B. Fellows, Liza r. Magley, Louis P. Dilorenzo of Bond, Schoeneck & King, PLLC, and Michael P. McCarthy of New York Power Authority. ■

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

## Iowa District Court Issues Ruling That Anti-Gay Advocates Might Use to Challenge Supreme Court Precedent Protecting LGBT Students from Discrimination

*By Matthew Goodwin*

On September 27, U.S. District Judge Stephanie M. Rose ruled that the University of Iowa unconstitutionally infringed on the First Amendment rights of a religious student group when it deregistered the group as a Registered Student Organization (RSO) for requiring its leaders to be Christian. *InterVarsity Christian Fellowship/USA v. The University of Iowa*, 2019 U.S. Dist. LEXIS 176634, 2019 WL 5059854 (S.D. Iowa).

The plaintiffs (InterVarsity) filed the lawsuit alleging that the University unequally and unfairly applied its Human Rights Policy to religious RSOs versus secular RSOs when it deregistered InterVarsity for requiring its leaders to share the organization's specific Christian faith beliefs. Broadly, InterVarsity is a Christian Fellowship that is found on approximately 700 campuses nationwide. InterVarsity's chapter at the University hosted weekly Bible studies, monthly meetings for prayer and worship, and religious discussions on current issues.

The *InterVarsity* decision, likely to be appealed, has alarmed LGBT advocates who are worried that it will open the door for a challenge to *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010). In *Martinez*, authored by Justice Ruth Bader Ginsburg, the Supreme Court held that colleges and universities may enforce their antidiscrimination policies even when student religious organizations claim those policies infringe on their beliefs. In that case, Christian Legal Society (CLS) sued the Hastings Law School, part of California's state university system, arguing that CLS was not

discriminating against homosexuals based on their "status" but rather based on their "conduct," which that group saw as fundamentally in conflict with the Bible and its teachings. Justice Ginsburg rejected the "status versus conduct" distinction stating it would be tantamount to allowing discrimination to parade as innocent conduct. The Court's ruling was premised on the understanding, to which CLS stipulated early in the lawsuit, that the University's policy was to require registered student organizations and their leadership ranks to be open to any student with no categorical exclusions, referred to in the opinion as the "all comers" policy.

The *InterVarsity* decision followed a related case from January of 2019 in the same court also involving the University of Iowa and another religious RSO, Business Leaders in Christ ("BLinC"). *BLinC v. University of Iowa*, 2018 WL 4701879, 2018 U.S. Dist. LEXIS 221969. There a student filed a complaint against BLinC alleging that he was denied a leadership position in the group because he was gay; BLinC claimed "he was denied a position because he disagreed with the group's religious beliefs, particularly that same-sex sexual activity was contrary to the Bible's teachings on sexual conduct."

The University sided with the student and found BLinC had violated the school's Human Rights Policy, which the University requires to be incorporated into each RSO's governing documents. In an attempt to maintain their status as an RSO, BLinC "... made various changes to its constitution. Relevantly, the group included therein a statement of faith—which endorsed the view that sexual activity should be limited to



that between a husband and wife, and that each person should embrace his or her ‘God-given sex’—and an express requirement that its leaders ‘accept and seek to live by’ the group’s religious beliefs.”

The University rejected BLinC’s proposed changes “on the grounds that the statement of faith and leadership affirmation would effectively disqualify individuals from leadership positions on the basis of sexual orientation and gender identity.” The University then de-registered BLinC and litigation followed. BLinC was granted a preliminary injunction prohibiting its deregistration by the University in large part because, according to the court, “the University created a limited public forum by allowing student organizations to register as RSOs; however, the record showed that at least one other RSO was permitted to limit membership based on religious beliefs.”

Following the BLinC preliminary injunction, the University undertook a review of all on-campus RSOs and this process that brought about InterVarsity’s lawsuit. Specifically, the University reviewed the RSO constitutions for compliance with the Human Rights Policy. The administrators tasked with the review instructed subordinates to review religious RSOs first and religious groups were then reviewed twice.

The University determined that InterVarsity was not in compliance with the Human Rights Policy because it required its leaders to be Christian. “Although [InterVarsity’s] general membership is open to all who wish to participate in the group’s activities, its leaders are required to affirm the group’s statement of faith . . . . As described in [InterVarsity’s] constitution, the statement of faith encompasses ‘the basic biblical truths of Christianity.’”

The court found that a number of RSOs were deregistered for failing to comply with the University’s policies for RSOs. Some RSOs were deregistered for failure to submit compliance documents or because of a failure to re-register. Several other

groups, however, were deregistered because they required their leaders to agree with their faith.

Given the nature of the claims, the court analyzed cross-motions for summary judgment using the strict scrutiny standard of review.

InterVarsity’s complaint contained seventeen counts which alleged, inter alia, that the University violated their First Amendment rights to free speech, expressive association, and free exercise of religion.

Examining limited public forum jurisprudence, the court held that the University’s Human Rights Policy was “reasonable and viewpoint neutral as written.” However, as applied to InterVarsity, the court found the Policy was not viewpoint neutral because the Policy was selectively applied to restrict the leadership of InterVarsity but not other RSOs, particularly those that limited members or leadership based on political beliefs.

The University argued that deregistration of InterVarsity was necessary to further its interest in “providing a safe environment for a great diversity of student voices, free of discrimination on the basis of protected characteristic[s], while allowing all students equal access to the public education for which they—and Iowa taxpayers—have paid.”

The court did not find this to be a “compelling” state interest when applied to InterVarsity because, wrote Judge Rose, the University was unable to point to any specific harm caused or posed by InterVarsity’s leadership requirements. Such “theoretical” harms “ . . . cannot meaningfully be distinguished from the theoretical harms created by the University’s exceptions to the Human Rights Policy.” Thus, because political groups were able to choose leaders based on political beliefs, the University’s stated interest in deregistering InterVarsity for limiting leadership based on religious beliefs could not be said to be compelling.

As to narrow tailoring of their policy to further this goal, the University stated it had “ . . . tailored

its application of the Human Rights Policy as narrowly as possible, in that it permits organizations to express their missions, goals, and beliefs . . . through their group constitutions and permits likeminded students to gather around any issue. All that the University asks is that students are not excluded from any group on the basis of protected characteristic[s].”

The court held this was not a narrow tailoring because it allows some RSOs to exclude students on the basis of protected characteristics while prohibiting others from doing the same. The University had opened a “limited public forum” and so if it was to use its Human Rights Policy to keep students out of such forum it had to apply that policy without selective enforcement.

Turning to the plaintiff’s free exercise claim, the court held that the “ . . . University’s secular exceptions to the Human Rights Policy undermine some of the policy’s goals.” The court again pointed to “[p]olitical student groups discriminating on the basis of creed” as undermining “the University’s interests in equal access and creating an environment for diverse viewpoints as much if not more than religious groups limiting leadership on the basis of religious belief.” For this proposition the court cited *Martinez*.

The court distinguished *Martinez*, which arguably might allow the University’s application of its Human Rights Policy to InterVarsity, by pointing to stipulation in that case that Hastings had an “all comers” policy, whereas the University of Iowa’s policy was a selectively enforced non-discrimination policy.

The court wrote, “ . . . by granting the exceptions it has to the Human Rights Policy and refusing to make a similar exception for InterVarsity, the University has made a value judgment that its secular reasons for deviating from the Human Rights Policy are more important than InterVarsity’s religious reasons for the deviation it seeks.”

The court also, strikingly, imposed personal liability for the damages of the student group on three of the administrators who carried out

the process by which InterVarsity was deregistered. It also left open the possibility that the University's president might be held personally liable for such damages.

InterVarsity is represented by attorneys from the Becket Fund for Religious Liberty, Washington D.C., local counsel from Whitaker Hagenow & Gustoff LLP, Des Moines, Iowa, and Matt M. Dummermuth from the U.S. Justice Department, representing the Trump Administration's position emphasizing free exercise of religion as second only to the right to bear arms as a fundamental right. Iowa Attorney General George A. Carroll represents the University. Amicus briefs were filed on behalf of the Jewish Coalition for Religious Liberty and Asma Uddin, a Muslim attorney who specializes in religious liberty issues. ■

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## U.S. District Court Disclaims Jurisdiction to Help Gay Spouse Stay in the United States

*By Filip Cukovic*

On October 18, the U.S. District Judge John F. Walter held that the court lacked subject matter jurisdiction to review a gay asylum seeker's motion seeking a preliminary injunction staying his removal from the United States. *Sheiko v. Giles*, 2019 U.S. Dist. LEXIS 1810518 (C.D. Calif.). Judge Walter held that 8 USC Sec. 1252(g) strips courts of jurisdiction in instances when an alien Petitioner seeks to enjoin the government's execution of a removal against him.

In this case, U.S. Immigration and Customs Enforcement (ICE) was allowed to proceed with deporting Daniil Sheiko, a Ukrainian gay man who is married to a US resident. What is particularly upsetting about Sheiko's case is that his deportation would have likely been avoided, had his previous attorney made different strategic decisions regarding Sheiko's permanent residence application. Paying attention to this decision is critical because it highlights the importance of people getting appropriate counsel to represent them, and the importance of doing things in the appropriate order.

Daniil Sheiko was born and raised in Ukraine. He initially entered the United States as a tourist, but soon decided to seek asylum. Sheiko argued that he was entitled to asylum based on his membership in a particular social group, i.e., persons with bisexual sexual orientation, and his political opinions. On October 2, 2017, Sheiko's original asylum claim was denied and an order of removal was entered against him. On October 30, 2017, Sheiko appealed the removal order to the Board of Immigration Appeals (BIA). When this appeal was dismissed, Sheiko further appealed the BIA decision to the Ninth Circuit. On June 27, 2019, the Ninth Circuit denied to review the BIA's dismissal.

As Sheiko was fighting to prove his asylum claim, his husband, Raul Silos, filed an I-130 Petition for Alien Relative indicating that Sheiko is in the United States and wished to apply for adjustment of status to that of a lawful permanent residence. On July 12, 2019, just a few weeks after the Ninth Circuit denied review of Sheiko's asylum appeal, the I-130 Petition for Alien Relative was granted, and Sheiko was instructed to submit a copy of the notice of approval with a Form I-485 Application to Register Permanent Residence or Adjust Status.

However, Sheiko did not submit his I-485 form, instead moving to reopen his BIA proceedings. Sheiko apparently attempted to reopen the proceedings on the belief that approval of the I-130 Petition entitled him to further proceedings on his asylum claim. Presumably he pursued this course on advice of counsel.

Only a few days later, on August 26, 2019, Sheiko was taken into ICE custody. He then filed an emergency motion to stay the enforcement of his removal order. However, on September 26, 2019, the BIA denied the stay of removal, on the ground that it was unlikely that Sheiko's motion to reopen would be granted. On that same day, Sheiko filed the instant Petition for Writ of Habeas Corpus. Furthermore, he filed motions for an Emergency Temporary Restraining Order and preliminary injunction staying his imminent removal from the United States while the BIA adjudicates his motion to reopen his asylum proceedings.

Sheiko's motions argue that he will face irreparable harm if he is removed while the BIA motion to reopen is pending, because his removal will result in the abandonment of his adjustment of status application, which he cannot continue to pursue from

abroad. In response, ICE and other respondents contended that the Section 1252(g) bars the District Court from assuming subject matter jurisdiction to grant a stay of execution of a removal order. In response, Sheiko admitted that 1252(g) generally bars the courts of jurisdiction over removal matters, but that the Petitioner should be entitled to equitable tolling based on the errors of his counsel. Furthermore, he asserted that the Suspension Clause of the U.S. Constitution precludes Section 1252(g) from stripping the court of jurisdiction because, in the absence of habeas relief in the form of a stay of removal, he would be deprived of the opportunity to effectively litigate his motion to reopen. On October 18, 2019, Judge Walter dismissed Sheiko's arguments and entered a decision in favor of ICE and other respondents.

First, Judge Walter held that section 1252(g) indeed strips the court of jurisdiction over Sheiko's matter. The provision states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Thus, the Respondents argued that the clear language of the statute indicates that Sheiko's claim is precisely rendered unreviewable, because it seeks to enjoin the government's execution of a removal order against him. Sheiko responded to this claim by arguing that his Petition falls outside the scope of Section 1252(g) because the Petition is challenging a due process violation—namely, counsel's alleged ineffectiveness in connection with the deportation proceedings—and not the government's authority to execute a final order of removal. However, Judge Walter dismissed Sheiko's argument on the basis that the Petitioner does not refer to any specific deficiencies of his prior counsel nor does he allege any due process violations in any of his motions to reopen. Instead, the judge found that the sole basis for the motion to reopen is Petitioner's

argument that he can establish *prima facie* eligibility for adjustment of status based on the approval of his I-130 Petition. Accordingly, the court found that Petitioner sought to litigate the merits of his removal order rather than to enforce his constitutional right to due process.

Furthermore, Sheiko asserted that the Suspension Clause of the United States Constitution bars 1252(g) from divesting the court of jurisdiction because, in the absence of habeas relief in the form of a stay of removal, Petitioner will be deprived of the opportunity to effectively litigate his motion to reopen. However, Judge Walter rejected this argument as well. First, the court explained that a Suspension Clause challenge is essentially evaluated under a two-step framework. The courts begin the Suspension Clause analysis by examining whether the Suspension Clause applies to the petitioner in question. After that, at step two, the courts examine whether the substitute procedure provides review that satisfies the Clause. At the case in bar, both the Petitioner and the Respondents agreed that the Clause applies to Sheiko, but they disagreed on whether Petitioner has access to judicial review or an adequate substitute.

In furthering his argument that he is entitled to judicial review, Sheiko relied on a district court precedent where the court found that if the execution of the removal order was not stayed, the petitioner — who was a native of Mexico which at the time was a subject of rapid change of country conditions — would be rendered unable to litigate his pending motion because of the serious threat posed to his personal security in Mexico. See *Diaz-Amezcu*, 2019 U.S. Dist. LEXIS 153244, 2019 WL 4261178, at \*3. However, Judge Walter found that the comparison between *Diza* and Sheiko's case is unfounded. Unlike in *Diaz*, Sheiko's motions do not assert that he would be unable to litigate his motion to reopen if he was deported back to Ukraine. Sheiko makes no mention of the country's changing conditions nor does he allege any serious personal security threats that he

may face in Ukraine. Instead, Petitioner merely alleges that, if he is removed from the United States while his motion to reopen is still pending, the motion will likely be denied. Thus, the judge held that Sheiko's claims are meaningfully different from the allegations in *Diaz*, where the petitioner would likely be physically unable to litigate following his removal, considering the threats to his personal safety in Mexico. The court then concluded that litigating the motion from another country is likely to be more difficult than litigating it from the United States, but that this difficulty alone does not render Petitioner without access to a meaningful opportunity to obtain review of the removal order. Thus, the Court denied and dismissed Sheiko's motions without prejudice.

Daniil Sheiko is now represented by Andres James Ortiz from Andres Ortiz Law, Long Beach, CA. Judge Walter was appointed by Judge George W. Bush and took the bench in 2002. ■



# Maryland U.S. District Court Partially Denies Summary Judgment to Defendant Police Officers Accused of Using Excessive Force against a Gay Arrestee

By Timothy Ramos

On October 3, 2019, Chief Judge James K. Bredar of the U.S. District Court for the District of Maryland granted in part and denied in part summary judgment to Sergeant Tyson Brice and Trooper First Class Kyle Braightmeyer against a number of federal and state law claims arising out of their arrest of the plaintiff, Edwin Krell, a gay man who was arrested in his home last year for a felony drug offense. *Krell v. Queen Anne's County*, 2019 WL 4888634, 2019 U.S. Dist. LEXIS 172377 (D. Md. Oct. 3, 2019).

Specifically, Chief Judge Bredar dismissed: (i) Krell's excessive force claims relating to his pre-existing shoulder injury under the 4<sup>th</sup> Amendment of the U.S. Constitution and Articles 24 and 26 of the Maryland Declaration of Rights; (ii) Krell's deliberate indifference claims under Articles 16, 25, and 26 of the Maryland Declaration of Rights; and (iii) Krell's state law claim for intentional infliction of emotional distress. However, Chief Judge Bredar refused to grant summary judgment to the defendants for: (i) their claim for qualified immunity with respect to Krell's constitutional claims; (ii) their claim for state statutory immunity with respect to Krell's state law claims; (iii) Krell's equal protection claim under the 14<sup>th</sup> Amendment's Equal Protection Clause; (iv) Krell's claims relating to his facial injuries under the 4<sup>th</sup> Amendment of the U.S. Constitution and Articles 24 and 26 of the Maryland Declaration of Rights; (v) Krell's deliberate indifference claim under Article 24 of the Maryland Declaration of Rights; and (vi) Krell's state law claims of negligence and gross negligence. This article will primarily focus on Krell's equal protection claim.

Although the opinion does not delve too much into the facts surrounding Krell's arrest, more information can

be found in Chief Judge Bredar's memorandum issued on December 12, 2018 in response to the defendants' motion to dismiss Krell's claims.

At approximately 9:00 A.M. on March 3, 2018, Krell was arrested in his home, pursuant to an arrest warrant, for distributing drugs. By the time that Brice and Braightmeyer made the arrest, Krell—who was only wearing boxer shorts—had already placed his hands behind his head and crouched down onto the floor; thus, as noted in the December 12, 2018 memorandum, Krell was clearly in a position from which he likely could not conceal a weapon and did not present a flight risk. In spite of this and the fact that the defendants were accompanied by other officers, Braightmeyer tackled Krell, pushed Krell's head into the ground with enough force to break the floor tile, handcuffed Krell behind his back, and lifted Krell off the floor by the handcuffs. When Krell asked for the defendants to move the handcuffs to his front because of the severe pain he suffered due to previous shoulder problems, Braightmeyer refused to do so and repeatedly called Krell a "faggot." Despite Krell's visibly red, swollen, and clearly deformed shoulder, the defendants continued to disregard Krell's pleas to move the handcuffs. Ultimately, Krell had to undergo surgery to repair a ruptured subscapularis tendon and a torn rotator cuff. Although the defendants continue to deny most of these facts, Krell's version of events is supported by his partner, Paul Ellwood, who also resided in the house and was present at the time of the arrest.

Krell's equal protection claim under the 14<sup>th</sup> Amendment's Equal Protection Clause asserts that he was unlawfully discriminated against due to his sexual orientation, as evidenced by Braightmeyer's homophobic remarks

during Krell's arrest. In order to prevail on an equal protection claim, a plaintiff must establish that he or she had been treated differently from others with whom he or she is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. *Morrison v. Garrahty*, 239 F.3d 648, 654 (4<sup>th</sup> Cir. 2001). If this showing is made, the court will then proceed to determine whether the disparate treatment can be justified under the requisite level of scrutiny.

In their motion for summary judgment, the defendants contended that Krell's claim failed as a matter of law because: (i) offensive language alone is insufficient grounds for an equal protection violation; (ii) Krell failed to show that Braightmeyer acted with discriminatory intent; and (iii) Krell offered no direct evidence that the defendants would have treated a heterosexual arrestee differently. In turn, Chief Judge Bredar rejected all three of the defendants' arguments. Firstly, the judge found that Krell's claim is not solely based on the use of offensive language and is adequately based on the defendants' conduct. Specifically, Krell adequately alleged that Braightmeyer's excessive force (which caused Krell's facial lacerations and broke the floor tile) and the defendants' deliberate indifference to Krell's serious shoulder injury (which aggravated his pre-existing injury) were motivated by Krell's sexual orientation. Secondly, the judge found that a reasonable jury could find that the alleged discrimination was purposeful, noting that courts routinely hold that derogatory remarks can provide evidence that the disparate treatment complained of was the result of purposeful discrimination. *See Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4<sup>th</sup> Cir. 1988). Lastly, Chief Judge Bredar held that it



was unnecessary for Krell to offer any direct evidence that the defendants would have treated a heterosexual arrestee differently. Here, there is an inference that the defendants' actions were discriminatorily motivated because Braitmeyer's homophobic remarks were closely tied and proximate to the defendants' impermissible conduct. *See Stout v. Reuschling*, No. Civ. No. TDC-14-1555, 2015 WL 1461366, at \*12 (D. Md. Mar. 27, 2015); *see also Harrison v. Prince William Cty. Police Dep't*, 640 F. Supp. 2d 688, 706 (E.D. Va. 2009). Because Krell adequately alleged his equal protection claim, Chief Judge Bredar found that the defendants' discriminatory actions may be reviewed under the requisite level of scrutiny.

Up until this point in his opinion, Chief Judge Bredar cited a number of racial discrimination cases—in which courts apply strict scrutiny—to uphold Krell's equal protection claim for sexual orientation discrimination. However, in determining which level of scrutiny to apply to Krell's claim, the judge ultimately decided to apply rational basis review. In doing so, Chief Judge Bredar cited precedent from *Bostic v. Schaefer*, 760 F.3d 352, 396-97 (4<sup>th</sup> Cir. 2014), which in turn cited *Romer v. Evans*, 517 U.S. 620 (1996). Yet, even when applying the most deferential level of scrutiny, the judge found that a reasonably jury could: (i) infer that the defendants' actions were done with discriminatory animus rather than a rational basis; and (ii) find that the defendants intentionally discriminated against Krell because of his sexual orientation. Thus, Chief Judge Bredar refused to grant summary judgment to the defendants with regard to Krell's equal protection claim under the 14<sup>th</sup> Amendment's Equal Protection Clause.

While this case touches upon a number of other legal issues including the procedural due process rights owed to an arrestee versus a pre-trial detainee versus a post-conviction detainee, the use of expert testimony in excessive force claims, and what constitutes extreme and outrageous conduct for a claim of intentional infliction of

emotional distress, it primarily serves as a reminder that not all forms of discrimination are treated equally even though they take on the same forms and result in the same injuries. Here, the court found that the most supportive arguments in favor of Krell's sexual orientation discrimination claim lay in precedent involving racial discrimination. Even so, sexual orientation discrimination continues to be scrutinized by this court under the most lenient form of review, lacking explicit 4<sup>th</sup> Circuit or Supreme Court precedent to the contrary.

Krell is represented by Justin Stefanon and Cary Johnson Hansell, III, of Hansel Law, P.C., Baltimore. Chief Judge Bredar was appointed by President Barack Obama in 2010. ■

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



## Fitting Status as Transgender In The Americans With Disabilities Act?

*By Corey L. Gibbs*

Mariah Lopez, filing pro se, sought injunctive relief in hopes that disabled people with service animals will be able to access the Albany (NY) area Capital District Transportation Authority (CDTA) without discrimination. She also sought monetary damages to compensate her for the emotional distress she suffered after alleged harassment by a bus operator. She filed her complaint against the City of Albany, CDTA, City of Watervliet, General Manager Jeremy Smith, and City of Albany County Executive Daniel P. McCoy in the U.S. District Court for the Northern District of New York. As a pro se complaint, it was referred to U.S. Magistrate Judge Christian F. Hummel for screening. On October 9, 2019, Judge Hummel recommended that Lopez's ADA Section 504 claims should proceed and that she be given the opportunity to amend her complaint renew her claims of discrimination based on gender identity under New York state law. *Lopez v. City of Albany*, 2019 U.S. Dist. LEXIS 176375.

Mariah Lopez boarded a CDTA bus on July 25, 2019. She alleged that the bus operator "began making statements challenging the validity of [her] Service Animal and status as a Disabled person." She claimed that the bus operator's challenge to her status as disabled and to her need for a service animal stemmed from her identity as transgender. The operator asked her to either exit the bus or produce documents proving the dog was in fact a service animal. Lopez refused to exit. In response to Lopez's refusal, the bus operator refused to proceed to the next stop. The operator's refusal to proceed caused passengers to become irate. Lopez claimed that passengers became verbally abusive.

While some passengers were abusive towards Lopez, others were defensive and intervened on her behalf. As the passengers engaged in the situation, the bus operator called the police and allegedly told them that Lopez had a weapon. The police arrived and Lopez began recording the incident on her phone. She claimed that the police bullied her and that her “identity as a Disabled individual who is also Transgender impacted how Watervliet police interacted with [her].” When she addressed the issue with the police, she claims that they did not take her complaints seriously.

The next day, Lopez attempted to board another bus. Coincidentally, the bus operator from the previous day pulled up and refused to open the bus door for Lopez. Lopez claimed that passengers sided with her when the operator exited the bus to stand with her. The bus operator called the police again and claimed that Lopez had made a threat with a weapon the day prior. The police arrived, and an officer informed Lopez that she would not be allowed on the bus because she had threatened the operator. She recorded this incident as well and decided to take legal action.

Because this complaint was filed pro se, Judge Hummel construed Lopez’s submissions liberally and interpreted them to raise the strongest arguments that they suggest. He began his analysis by examining Title II of the ADA, which applies to public transportation. The statute provided that, “No qualified individuals with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

The magistrate then turned to 42 U.S.C. § 12132(2) to define a “qualified individual with a disability.” The statute states that the individual is one, “Who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”

Next he turned to 42 U.S.C. § 12132(1) (A-B) to define “public entity”. The statute stated that a public entity is, “Any State or local government,” or an, “instrumentality of a State . . . or local government.”

Next, the magistrate stated the three elements that Lopez will have to establish. According to *Nicholas v. City of Binghamton*, in order to establish a violation under the ADA, Lopez must demonstrate: that she is a “qualified individual with a disability”; that the defendant is subject to the ADA; and that she was, “denied the opportunity to participate in or benefit from [d]efendant’s services, programs or activities, or was otherwise discriminated against by [d]efendant by reason of her disability.”

First, the magistrate determined whether Mariah Lopez was a “qualified individual with a disability.” He stated, “As such, at this early stage, plaintiff has adequately pleaded the first element.” Later, the court will determine whether or not Lopez suffers from a disability within the meaning of the ADA based on an individualized inquiry. Second, the magistrate determined whether the defendants are public entities described within the ADA. The City of Albany, Capital Region Transportation Authority, and Capital District Transportation Authority are public entities as defined in 42 U.S.C. § 12132(1)(A-B).

Third, the magistrate determined whether Lopez was discriminated against by the defendants by reason of her disability. He stated, “Plaintiff seems to set forth a reasonable accommodation theory by alleging that [CDTA] prohibited her from boarding the bus without proper documentation for her service animal.” Lopez claimed that the dog aided in managing her symptoms, and that was enough to adequately plead that her dog was a service animal under the ADA. Pursuant to 28 C.F.R. § 36.302(c)(1), “A public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” Federal regulations provided that

these public accommodations shall not require documentation regarding service animals. 28 C.F.R. § 36.302(c)(6). Magistrate Hummel stated, “By denying plaintiff the ability to board the bus with her service dog, defendants City of Albany, Capital Region Transportation Authority, and [CDTA] deprived plaintiff of access to public transportation.”

After determining that Mariah Lopez has sufficiently pleaded the violation under the ADA, the magistrate turned his attention towards her claim of retaliation based on her disability and status as a transgender person. Based on *Weixel v. Board of Education of City of New York*, 287 F.3d 138 (2<sup>nd</sup> Cir. 2002), in order to prove a retaliation claim under the ADA, Lopez must demonstrate: that she was engaged in protected activity; that the alleged retaliator knew that she was engaged in a protected activity; that an adverse course of action was taken against her; and that there is a causal connection between the protected activity and the adverse action. The magistrate stated that he recommended Lopez’s ADA retaliation claim against defendant City of Watervliet proceed. However, he recommended the retaliation claim against the defendants on the basis of her status as a transgender person or her gender dysphoria be dismissed, concluding that her gender identity falls outside the ADA. (This is a contested issue in federal courts, in light of an amendment that has received varying interpretations regarding whether gender dysphoria can be considered a disability.)

While the magistrate dismissed those ADA claims that were based on Lopez’s transgender identity, he offered another outlet for her to seek remedy. Magistrate Hummel pointed Lopez to a recent addition to the New York State Human Rights Law. “It shall be an unlawful discriminatory practice for any person, being the . . . agent or employee of any place of public accommodation . . . because of the . . . gender identity . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person

any of the accommodations.” *N.Y. Exec. Law § 296(2)(a)*. He recommended that Lopez’s federal disability retaliation claim be dismissed without prejudice with an opportunity to renew, so that she can, “Demonstrate that defendants prevented her from entering the bus due to her gender identity in violation of the New York State Human Rights Law.”

An important takeaway from this case is Magistrate Hummel’s refusal to allow Lopez’s ADA claim based on her status as transgender to proceed, despite the efforts he went through to help push her case to the next step. While we may want people like Mariah Lopez to succeed in their legal endeavors, we want them to succeed using the proper avenues. Using the ADA to fight transphobia could have been a quick solution to Lopez’s issue, but the risk it might pose to trans rights as a whole would be too great.

In 2019, the World Health Organization removed “gender identity disorder” from its list of mental disorders. These new guidelines were approved on May 25, 2019. Kyle Knight, a researcher in the LGBT rights program at Human Rights Watch, told TIME, “When you have a system that sets up someone’s very existence and identity in a diagnosis as a mental health condition, that feeds an enormous amount of stigma and drives people away.” Suyin Haynes, *The World Health Organization Will Stop Classifying Transgender People as Having a ‘Mental Disorder’*, TIME (2019).

While Mariah Lopez filed her complaint *pro se* and likely to the best of her abilities, it is important for those of us with legal knowledge and experience to be mindful of the consequences of our actions. Magistrate Hummel remained mindful and guided Lopez to an appropriate alternative statute to get around the ADA definitional problem. Judge Hummel noted that the parties had fourteen days within which they could file written objections to the report. ■

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

## Alabama Federal Court Allows Transgender Plaintiff to Pursue Title VII Claim, but Dismisses ADA Claim

*By Arthur S. Leonard*

U.S. District Judge C. Lynwood Smith, Jr., has allowed a plaintiff asserting a gender identity discrimination claim under Title VII to proceed past a motion to dismiss toward discovery, but has dismissed the plaintiff’s Americans with Disabilities Act (ADA) claim, finding that “gender dysphoria” claims are excluded from coverage as “disabilities” under that statute. *Doe v. Northrop Grumman Systems Corporation*, 2019 U.S. Dist. LEXIS 182435, 2019 WL 5390953 (N.D. Ala., Northeastern Div., Oct. 22, 2019).

The plaintiff is self-identified as “John Doe” at this stage in the litigation. Doe was on active duty in the U.S. Army when diagnosed with gender dysphoria in 2014, and had commenced hormone replacement therapy beginning in March 2016, even before Defense Secretary Ash Carter lifted the formal ban on transgender service at the end of that June. Doe claims to have been told then that transition to a female gender identity would not be an obstacle to deployment to an overseas posting.

The charge Doe filed with the EEOC in this case states: “I was a high-performing and well-respected member of my unit, and my performance impressed a field engineer who worked at Northrop Grumman Corporation (henceforth “NGC”). This engineer provided me with a recommendation and I was subsequently hired by NGC on November 28, 2017 as a level 2 field engineer for Air Defense Airspace Management Systems and Air and Missile Defense Planning and Control Systems. One of the reasons I wanted to work at NGC was their diversity policy” which specifically states that Grumman makes decisions without regard to, *inter alia*, sexual orientation or gender identity. The timing of Doe’s move to the civilian sector may

have also been motivated by President Trump’s July 2017 tweet proclaiming a ban on transgender military service, although that is not mentioned in Judge Smith’s opinion.

At first, Doe’s employment at Grumman was going smoothly, but as co-employees began to notice changes in Doe’s appearance and demeanor incident to hormone replacement therapy, Doe spoke with division manager Tim Cannon as well as a Human Resources representative, and was assured that Cannon would work with Doe to ensure that Doe’s transition “would not pose any impediment to Doe’s job duties.” Similarly, the HR person “went to great lengths in order to assuage his concerns and assure that neither his transitional state, his sexuality, nor his characteristics would be considered in employment decisions.” But as sometimes is the case, these were personal assurances that didn’t translate when Cannon was replaced by a new manager, Brian Walker, who “took a much more intransigent approach than did his predecessor regarding Plaintiff’s transition, his sexuality, and his developing female characteristics,” according to the complaint. Walker opposed Doe’s request to deploy to a foreign position within Grumman, “undertook efforts to hinder Plaintiff’s ability to deploy, derail his career and seek his transfer because of Plaintiff’s female sexual characteristics and/or his transitional state.”

Doe complained to the HR Department about Walker’s treatment, but subsequently the HR Department informed Doe that Doe would be laid off in two weeks, because deployment was a requirement of Doe’s job. Doe’s immediate emotional distress resulted in an unsuccessful suicide attempt that same evening and subsequent hospitalization for a week. Then



Doe filed charges with the EEOC, alleging violations of Title VII and the Americans with Disabilities Act (ADA). Doe sued after receiving a right-to-sue letter from EEOC.

Doe's pleading positions Doe as a biological male who is increasing showing female characteristic as a result of hormone therapy to assist transition. Thus, the factual pleading relates well to the rulings of many courts that transgender plaintiffs may bring sex discrimination cases using the gender stereotype there, representing themselves as men who encounter discrimination because of their non-masculine presentation.

Doe's pleading on the Title VII claim said Grumman discriminated "because of the perceived stereotypes regarding the female gender and subjected to both a subjectively and objectively hostile work environment, and to less-favorable working conditions including remuneration as a result." Doe claimed this was sex discrimination in violation of Title VII. As to the ADA claim, Doe alleged "gender dysphoria" as Doe's disability. Grumman moved to dismiss, pointing out that Doe's pleading fell far short of establishing a hostile work environment under the standards normally applied to such claims, and that "transgenderism" and "gender identity disorders" that were not due to medical conditions were expressly excluded from coverage under the language of the ADA.

In response to the motion, Doe conceded the failure to make the kind of factual allegations usually required to establish a hostile environment claim, but persisted in arguing that the pleading requirements for a sex discrimination claim had been met, and Judge Smith agreed with Doe, stating that the hostile environment claim would be stricken from the case but the sex discrimination claim under Title VII would survive the motion. Doe's gender stereotype-related factual pleading was sufficient to sustain his Title VII sex discrimination claim at this stage of the litigation.

However, Judge Smith found that the ADA does not apply to this case. When

the bill was pending in Congress, a specific amendment was added for the purpose of excluding from disability coverage individuals whose claimed disability was a homosexual orientation or a transgender status or "gender identity disorder." Doe's argument rested on the contention that gender dysphoria, a condition recognized in the Diagnostic & Statistical Manual published by the American Psychiatric Association, is a medical condition that should not be excluded from coverage as a disability, an argument that has found favor with at least two other federal district courts. *See Doe v. Massachusetts Department of Correction*, 2018 WL 2994403 (D. Mass. 2018), and *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. 2017). But these cases seem outliers in comparison to others taking the opposite tack, based on legislative history. Judge Smith found that the term "gender dysphoria" was not introduced into the medical lexicon until years after the relevant amendment was added to Title VII. When the measure was pending in Congress, the sponsors of the amendment used the terms in contemporary use – transgenderism and gender identity disorder – that were intended to exclude the argument that somebody had a disability under the ADA because they were transgender or transitioning. The APA substituted "gender dysphoria" for the earlier vocabulary in later editions of the DSM. But, wrote Judge Smith, the term was really referring to the same thing. They are "synonyms" for this purpose, he concluded. Congress adopted this amendment to prevent the ADA from being used as a de facto LGBT rights measure. The judge concluded that a condition of gender dysphoria that was not attributed to a physical impairment "is expressly excluded from the definition of disabilities covered by the ADA." Thus, this count of the complaint would be dismissed.

Doe is represented by Eric J. Artrip of Mastando & Airtrip LLC, Huntsville, AL. Judge Smith was appointed to the court by President Bill Clinton in 1995, just a few years after the ADA was enacted. ■

## Maryland Court of Special Appeals Orders Further Proceedings in Dispute Between Former Same-Sex Partners Over Proceeds from Sale of House They Jointly Owned

By Arthur S. Leonard

A dispute between Michael J. Bobbitt and Craig Hanna, former same-sex partners, about the proceeds from the sale of the house whose deed identified them as joint tenants with right of survivorship, will get another look from the Montgomery County Circuit Court, whose initial decision finding that Mr. Hanna was sole owner of the house entitled to all the proceeds from sale was vacated by the Court of Special Appeals in *Bobbitt v. Hanna*, 2019 WL 5405649, 2019 Md. App. LEXIS 903 (Oct. 22, 2019).

Bobbitt and Hanna began their "romantic relationship" in Washington, D.C., in 1996. Hanna owned a townhouse, and Bobbitt had been living with a roommate. Hanna had a substantial annual salary, but Bobbitt had a "piecemeal income working odd jobs and trying to land acting jobs when he could." He moved in with Hanna, who carried all the expenses of the townhouse and never asked Bobbitt to reimburse him for any living costs associated with the house. In 2002, they decided to adopt a child and, in anticipation, decided to relocate to the Maryland suburbs, where they purchased a house as joint tenants in Glen Echo. Hanna used the proceeds from sale of his townhouse and some savings for the downpayment of \$210,000, with the remaining \$365,000 of the purchase price financed by a



mortgage with Hanna as sole payor. The deed identifies both men as joint tenants with rights of survivorship. As in their previous home, Hanna assumed all financial obligations of the house, with Bobbitt's occasional expenses characterized as *de minimus*. Hanna testified that Bobbitt had asked to be added to the deed as a joint tenant so "if anything should happen to me, since we were unmarried, for the sake of the child, that he would then have to go through probate, and I agreed to put him on the deed." Hanna testified that he had not intended to make a gift to Bobbitt of an ownership interest in the property, and had viewed it as his property. They lived together in the house as a couple with their child for the next 14 years, during which Hanna assume virtually all expenses of the property

As first D.C. and then Maryland achieved marriage equality, Bobbitt proposed marriage, but Hanna declined, testifying in this case that he "did not feel comfortable cementing [their] bond," and it "was more of a political statement than about [them]." However, Hanna had purchased several sets of wedding bands for the men over the years, which Bobbitt interpreted as "an expression of their committed relationship."

In 2016 they "began to experience unresolvable 'relationship difficulties,'" and separate in December. Hanna moved out, Bobbitt remaining in the house with their son, but they agreed the house should be sold "as quickly as possible." Hanna continued to make payments on the house, ignoring Bobbitt's offer to make the payments. At first, Hanna was inclined to split the proceeds of a sale, but "during a very aggressive back and forth regarding the child support, settlement, I ultimately decided that I would not make that division." This ultimately became a sticking point, since Bobbitt's authorization of sale was needed before the house could be sold. In a dramatic confrontation (which Hanna characterized as coercive, which Babbitt denied), Babbitt agreed to authorize the sale if Hanna would agree to split the proceeds. This was

memorialized in a subsequent email from Hanna to Babbitt. But after the house was sold for \$600,000, leaving proceeds of \$279,000, Hanna reneged and filed a suit seeking a declaration he was entitled to the proceeds, placing them in escrow pending the outcome.

The theory of Hanna's suit was that he was entitled to "contribution" from Bobbitt for half of all the payments he made for maintenance and upkeep of the property over the years," which would be credited against Bobbitt's claimed share of the proceeds. This might wipe out Bobbitt's share or at least substantially reduce it, depending how the court figured the allocation. However, at trial, the court determined that despite the deed naming the men as joint tenants, Hanna, who had made all the payments, was the sole owner and entitled to all the proceeds. He found that naming Bobbitt on the deed was merely an "accommodation" to Bobbitt's request to avoid probate if anything happened to Hanna. The judge stated, from the bench that he was "not persuaded that a contract was formed" and reiterated his finding that Hanna had not intended to gift Bobbitt with joint ownership of the property.

The Court of Special Appeals (opinion by Judge Kathryn Grill Graeff) found that the trial judge erred on both counts.

A deed is a deed, and a joint tenant is a joint owner, so the determination that Hanna was sole owner of the property was incorrect as a matter of law. However, since Hanna had paid everything, he was entitled to some contribution from Bobbitt to be paid out of the proceeds noting that prior decisions of the Maryland Court of Appeals have discussed "two acceptable methods to calculate a contribution amount" in similar circumstances, but in those cases the dispute was how to deal with the fact that one of the joint tenants had made the full down payment, while they had subsequently shared the costs of the mortgage and other costs. This case is different. "A co-tenant cannot be held liable for contribution costs for mortgage payments if he was not

an obligated party to the mortgage," wrote Judge Graeff. "Here, there is an unresolved issue regarding whether Mr. Bobbitt was personally obligated on the mortgage. As indicated, he is listed as a borrower on the deed of trust, but Mr. Hanna testified that the mortgage was solely in his name. And Mr. Hanna has taken conflicting positions in this litigation regarding whether Mr. Bobbitt was liable on the mortgage. Therefore, further findings need to be made with respect to the contribution analysis. It may be that, after the proper analysis, the court determines that Mr. Hanna is entitled to the full amount of the proceeds in contribution. Without that analysis, however, we cannot say that the trial court reached the 'right result for the wrong reasons.' Accordingly, we vacate the judgment of the circuit court and remand to the circuit court to make the necessary factual determinations regarding contribution, and if appropriate, the proper amount."

The court also decided that the trial judge's brief statement from the bench on the contract issue was inadequate, and that it was necessary for the trial court to undertake a proper analysis of the issue. On its face, the email represented a written agreement to share the proceeds. Contrary to Hanna's argument that it was unenforceable due to lack of consideration, the Court of Special Appeal found that Bobbitt's consent to sell the property could serve as consideration – while acknowledging that Hanna could have instituted a legal partition proceeding. However, his urge to sell the property and get the proceeds quickly was facilitated by Bobbitt's agreement, so his agreement could be a valuable consideration. "Although Mr. Hanna would have been entitled to sale if it was shown that the Property could not be divided without loss or injury to the parties, he would have had to persuade a circuit court judge in this regard, and this process undoubtedly would have prolonged the time it would take to sell the Property. Mr. Bobbitt's agreement to sell the Property, therefore, arguably constituted consideration. We further

note that Mr. Bobbitt testified that he did not understand at the time that Mr. Hanna had the option as a joint tenant to attempt to force the sale of the house by filing a partition action. The circuit court made no factual finding whether Mr. Bobbitt's agreement not to oppose the sale in exchange for half the proceeds was made in good faith." And, of course, given its conclusion, the trial court made no mention of Hanna's argument that his agreement to split the proceeds was procured by duress, although the court's summary of the testimony on that issue suggests it would have been a losing argument. "Accordingly," wrote Graeff, "because the court failed to state the basis for its finding that there was no contract, we remand for the court to explain its rationale, including any requisite factual findings."

The court did find that the trial court adequately explaining its finding that Hanna did not intend to make a gift to Bobbitt when he agreed to listing Bobbitt as a joint tenant on the deed. However, in a footnote, the court stated: "Depending on its ultimate ruling [on the contract question], the court may need to address Mr. Hanna's duress argument."

Surprisingly, neither the Westlaw nor the Lexis reports of this decision showed the names of counsel as of the end of October.

Interesting note: As reported above, when Hanna and Bobbitt met, Hanna had a substantial salary but Bobbitt pieced together income from odd jobs, including acting. Subsequently, Bobbitt went on to a distinguished theater career in the D.C. metro area, being nominated for prestigious awards for his work as playwright, director, choreographer, and performing arts leader, leading the oldest children's theater operation in the area, and in August 2019 was to become artistic director of New Repertory Theater in the Boston area. An online search found a variety of men named Craig Hanna employed in a range of professional and business occupations, but we could not determine which one would have been the plaintiff-appellee in this case. ■

## Magistrate Judge Recommends That Transgender Arrestee Who Stated Claim Against Abusive Officer Be Allowed to Join Bystander Officer as Defendant, but Procedurally Defaulted on Claims Against the Abuser Due to Failure to Re-Allege Claim in Amended Complaint

By William J. Rold

Transgender inmate plaintiff Paul Anthony Lynch, *pro se*, filed a civil rights case after officers used excessive force against her in the course of an arrest in San Diego in *Lynch v. Burnett*, 2019 WL 2537825, 2019 WL 5558826 (S.D. Calif., June 20, 2019), reported in *Law Notes*, "Transgender Woman Assaulted by Police During Arrest May Pursue Constitutional Claims" (July 2019 at pages 32-3). Lynch sued an officer (Botkin) who uttered slurs and applied a "carotid hold" (which caused Lynch to lose consciousness), bystander officers who did not prevent it, and defendants who delayed her medical care.

U.S. Magistrate Judge Jill L. Burkhardt recommended that the case proceed against Botkin for excessive force and be dismissed with leave to replead against the bystander officers. She also recommended dismissal of the medical claims because an ambulance was called promptly. U.S. District Judge Dana M. Sabraw adopted the recommendations.

Lynch filed a "Second Amended Complaint" [SAC], in which she made additional allegations against one of the bystander officers (Burnett), who was at her side and held her arm immobile while Botkin applied the "carotid hold." Burnett moved to dismiss.

Now, in *Lynch v. Burnett*, 2019 U.S. Dist. LEXIS 187496 (S.D. Calif., Oct. 29, 2019), Judge Burkhardt recommends that the claims against Burnett proceed, reviewing Ninth Circuit law on this point. In summary, "police officers have a duty to intercede when their fellow officers violate the constitutional

rights of a suspect or other citizen." *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), *rev'd in part on other grounds sub nom.*, *Koon v. United States*, 518 U.S. 81 (1996). "[T]he constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows . . . . Thus[,] an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights." *Id.* Here, Burnett was at Botkin's side, and there is a claim that he had an opportunity to intervene under *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000), but he declined to do so.

Here, the rub begins: Lynch did not re-allege her claims against Botkin in the SAC. Nothing in the first recommendations, the order adopting them, or the order allowing the amended complaint advised Lynch that the SAC would "supersede" the first amended complaint. [Boilerplate to this affect is usually included in *pro se* instructions on amending, to avoid any question about advising the plaintiff about possible preclusion, but it is absent here.]

A review of the SAC suggests that Lynch understood that she was supplementing her original pleadings with "additions" about one of the bystander officers (Burnett, who was the one who should have been most able to help her). She noted in the SAC that she

was “not amending” her medical claims in “Count 2” because of the court’s prior ruling (which dismissed them). Judge Burkhardt’s original recommendations said that Lynch could “add additional allegations” and “allege additional facts.” [PACER, 3:18-cv-01677; Docket #23, page 11.] They did not say that Lynch must re-allege pleadings already sustained against F.R.C.P. 12(b)(6), or they would be waived. When the City of San Diego moved to dismiss Burnett’s claims, they asked for dismissal of the SAC but did not raise the ramifications of the absence of Botkin or any other defendants from the SAC.

Judge Burkhardt deals with the issue in a footnote, but it warrants quoting in full: “The Court notes that, although Plaintiff refers to Botkin as a defendant in her Opposition, Botkin is no longer a defendant in this case because Plaintiff did not name him as a defendant in the SAC. The SAC superseded (*i.e.*, replaced) Plaintiff’s prior complaint. *See Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (“It is well-established in our circuit that an amended complaint supersedes the original, the latter being treated thereafter as non-existent.”); *see also CivLR 15.1a* (“Every pleading to which an amendment is permitted as a matter of right or has been allowed by court order, must be complete in itself without reference to the superseded pleading.”) Plaintiff may have intended to include Botkin in the SAC or she [may] be under the misapprehension that she did so, but she did not.”

Wow! So, unless Judge Sabraw does something about it, Lynch stands to lose the “carotid hold” defendant she has stated claims against from the beginning and be left with only the bystander for failing to intervene.

This rule of strict preclusion by amendment of pleadings, known in the Ninth Circuit as the “*Forsyth Rule*,” has long been a bit of an “outlier.” It is no longer strictly applied. The “*Forsyth Rule*” was over-ruled by *Lacey v. Maricopa County*, 693 F.3d 896, 925-28 (9th Cir. 2012) (*en banc*). The old rule is mentioned in *Ramirez* (cited by Judge Burkhardt), but *Ramirez*

recognized that *Lacey* gutted its most sweeping applications. *Lacey* called them “formalistic and harsh.” *Ramirez* dealt with the old “rule” in a different context: whether an amended complaint filed by stipulation counts as the “free” amendment allowed “as a matter of course” under F.R.C.P. 15(a).

It is difficult to see how Lynch could have seen this coming. She has been ambushed by the “*Forsyth Rule*” after the Circuit thought it had tempered its preclusive affect. This writer cannot reconcile the *en banc* decision in *Lacey* with the “pre-*Lacey*” application of the rule in this case. Southern District of California Rule 1.1 stresses application of the Local Rules for “just” resolution of cases, and it allows judges to waive strict application of succeeding rules “in the interest of justice.” ■



## Federal Judge Allows Transgender Inmate to Proceed Past Screening; Widely Divergent Applications of 8th Circuit Precedent by District Court Judges

By William J. Rold

In *Hansen v. Badure*, 2019 U.S. Dist. LEXIS 178716, 2019 WL 5213320 (D. S.Dak., Oct. 16, 2019), U.S. District Judge Karen E. Schreier allowed all of *pro se* transgender prisoner Jason (Jenna) Hansen’s claims to proceed past screening. Hansen’s *pro se* complaint is comprehensive and paints a vivid picture of her difficulty coping as a transgender prisoner. She has been requesting hormones and feminizing items since 2000. She has attempted suicide and self-castration.

Hansen was formally diagnosed with gender dysphoria in 2017. She was evaluated at South Dakota officials’ request by transgender consultant Cynthia Osborne (of Johns Hopkins), who supported the diagnosis and the provision of both hormones and feminizing items, according to the Complaint. Corrections, through its “Gender Non-Conforming Committee,” nevertheless denied this treatment, prompting the lawsuit. According to Hansen, South Dakota officials falsely told her at first that the Osborne Report did not address gender dysphoria. They denied her all access to it because it was part of her “mental health” record. Later, officials admitted to Hansen that the Report confirmed gender dysphoria, and they allowed her to read it – but they refused to let her take notes from it or copy it, and the Committee did not implement it.

Hansen has been denied testosterone blockers, estrogen pills, a bra and other female undergarments, close shaving



equipment, hair products, and shower and search accommodations. She has received disciplinary tickets for wearing make-up and home-made underwear. Although South Dakota has only three prisons for adult men, Hansen has been transferred seven times since her incarceration (but never to the sole women's prison).

Judge Schreier's opinion details Hansen's efforts to obtain relief administratively. Despite her record and the recommendations of defendants' own expert, the Committee has not authorized treatment.

Judge Schreier allowed Hansen to proceed on First and Fourteenth Amendment theories. The First Amendment claim is based on defendants' denying Hansen the expressive right to present as a woman, without a "legitimate penological interest," under *Turner v. Safley*, 482 U.S. 78, 89 (1987); and *Pell v. Procunier*, 417 U.S. 817, 822 (1974). At this stage – before service and defendants' answer/motion – no penological interest has been stated to justify the denials – and the court declines to hypothesize one at the screening stage. As to Equal Protection, Judge Schreier says that, for pleading purposes, there is no rational basis to treat transgender women differently than cisgender women, citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) and class-of-one theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Judge Schreier also cites *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994). In this writer's view, *Klinger* is questionable – perhaps a "*but cf.*" citation – since it held that an Equal Protection claim was not sustained by female Nebraska prisoners who sought access to the same programs, services, and the like as those available to male inmates.

Judge Schreier allowed Hansen to proceed on her Eighth Amendment claims under *Reid*. In *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015), the court sustained summary judgment for prison defendants who refused hormone treatment for a transgender patient, writing that the plaintiff did

not have a right to hormones "as a matter of law" where the: (1) there is no diagnosis of gender dysphoria; (2) some treatment is given (psychotherapy); and (3) the case presents merely a dispute between doctor and patient as to the best treatment. Noting that screening is not summary judgment, Judge Schreier distinguished *Reid* on all three grounds, since the allegations show that Hansen has a diagnosis, that hormones were recommended, and that such treatment was blocked.

Supervisors remain in the case, based on their alleged participation in the constitutional violations. Judge Schreier relies on *Parish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010); and *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985).

Earlier, Judge Schreier declined to dismiss on screening in the *Caskey* litigation: *Caskey v. South Dakota Penitentiary*, 2017 U.S. Dist. LEXIS 5198191 (D.S.D., Nov. 9, 2017); and 2017 U.S. Dist. LEXIS 117815 (D.S.D., July 27, 2017) – although *Caskey* eventually lost on summary judgment after extensive discovery. *Caskey v. Dooley*, Index No. 4:17-cv-4070 (D.S.D., Aug. 24, 2018, *rep't and rec. adopted* (D.S.D., Sept. 20, 2018).

In another South Dakota case, *Butterfield v. Young*, 2019 WL 2304665 (D.S.D., May 30, 2019), *appeal pending*, No. 19-2371 (reported in *Law Notes*, June 2019, at pages 41-2), U. S. District Judge Roberto Lange dismissed the transgender inmate's *pro se* civil rights case seeking hormones and feminizing treatment at the South Dakota State Penitentiary in Sioux Falls (where Hansen is also incarcerated) for failing to state a claim on the relatively bare-bones Complaint. The dismissal occurred on the pleadings prior to service. *Butterfield* engaged in "therapy" for a year, and sued again, with the same result, again by Judge Lange. The second dismissal is on appeal to the Eighth Circuit. [Note: there is also an Osborne Report in *Butterfield* recommending hormones and feminizing items that South Dakota officials tried to hide from the inmate.]

*Reid* also resulted in dismissal on the pleadings in *Prowse v. Kelley*,

2019 WL 2608896 (E.D. Ark., June 10, 2019), *rep't and rec. adopted*, 2019 U.S. Dist. LEXIS 105883 (E.D. Ark., June 25, 2019), *appeal pending*, No. 19-2569. In *Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 2151556, 2018 WL 806764 (E.D. Mo., Feb. 9, 2018), the Court issues a preliminary injunction against Missouri's denial of transgender treatment, notwithstanding *Reid*.

A motion has been filed to consolidate the appeals from South Dakota and Arkansas in the Eighth Circuit for consideration by the same panel. There is need for clarification of *Reid* when it is interpreted with such disparate outcomes. In constitutional adjudication, it should not matter so much which judge is assigned or how articulate the *pro se* plaintiff is, but unfortunately it seems to matter all too often.

Judge Schreier was appointed by President Bill Clinton and took the bench in 1999. ■





# CIVIL LITIGATION *notes*

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## CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

**U.S. COURT OF APPEALS, 3RD CIRCUIT** – A 3<sup>rd</sup> Circuit panel issued a *per curiam* decision on October 25 in *Deer v. Attorney General of the United States*, 2019 U.S. App. LEXIS 32062, 2019 WL 5491563, finding that the Petitioner, a Jamaican man who claimed to be gay, had not met the pleading requirements to raise an ineffective assistance of counsel claim with regard to his original deportation proceeding. The court refused to review the BIA's affirmance of an IJ's conclusion that he was not entitled to withholding of removal, having been convicted on a firearms possession charge for which he was sentenced by a New Jersey court to seven years in prison. However, the IJ granted Deer's application for deferral of removal under the Convention against Torture, finding sufficient support for his claim that he would be tortured in Jamaica because of his sexual orientation! He was trying to appeal the withholding denial and the Board's refusal to reconsider his ineffective assistance claim, arguing that the Board had "misapprehended the facts" concerning the gun charge, but the court said it lacked jurisdiction to consider the arguments he was making.

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**U.S. COURT OF APPEALS, 9TH CIRCUIT** – The 9<sup>th</sup> Circuit issued a Memorandum in *Akopian v. Barr*, 2019 WL 4858268 (Oct. 2, 2019), rejecting a petition for review of the Board of Immigration Appeals' denial of the lesbian petitioner's motion to reopen removal proceedings as untimely and unexcused by changed country conditions in the Republic of Georgia. The court found no abuse of discretion,

stating that petitioner had "presented insufficient evidence of qualitatively changed country conditions to fall within the exception. "At the time of Akopian's previous hearing in 2010, there was a strong social stigma against homosexuality in Georgia, same-sex couples had no right to marry, and there were reports of violence against the LGBTQ community. The BIA did not abuse its discretion in concluding that Akopian's newly submitted evidence of the acquittal of those who incited violence at a gay rights rally, the proposal of a constitutional amendment to preclude same-sex marriage, and ongoing hostility towards the LGBTQ community is not qualitatively different from the evidence presented at her initial asylum hearing." The court also rejected a claim that BIA violated petitioner's due process rights by taking administrative notice of the State Department's 2015 Country Report on human rights conditions in Georgia without giving her advance notice and an opportunity to respond. The court found that petitioner failed to demonstrate prejudice because the information in the country report was similar to that proffered by Akopian. Petition is represented by Ruben Neshan Sarkisian, Glendale, CA.

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**U.S. COURT OF APPEALS, 11TH CIRCUIT** – An 11<sup>th</sup> Circuit panel denied a *pro se* appeal by a Haitian national from a decision by an immigration judge, affirmed by the Board of Immigration Appeals, that he should be removed from the United States, despite his petitions for asylum, withholding of removal, or protection under the Convention against Torture (CAT), grounded in his claim that his family's past involvement in Haitian politics or his sexual orientation would subject him to persecution or torture or serious harm were he removed back to Haiti. *Isidor v. United States Attorney General*, 2019 U.S. App. LEXIS 32339 (11<sup>th</sup> Cir. Oct. 28). Petitioner, proceeding *pro se*, had

also sought leave to proceed in forma pauperis. As to that the court found that he qualified financially for such status, but since it concluded that he had no non-frivolous claims on appeal, leave should not be granted. Petitioner entered the U.S. without a visa in 1989, and over the next ten years accumulated two drug-related convictions and a conviction for "high-speed flight and elusion" in violation of Florida law. His criminal record eventually brought him to the attention of Homeland Security, which charged him as removable because of convictions of crimes involving moral turpitude, his presence without being lawfully admitted or paroled, his lack of a valid entry document, and his conviction under state law involving a controlled substance offense. The Petitioner did not contest that he was removable on these grounds, but argued he was qualified for protection, a contention rejected by the IJ and the BIA. As to asylum, he clearly missed the deadline of one year after arrival for filing an asylum petition. His criminal convictions meant that he was not qualified for withholding of removal. And, as to protection under the CAT, the court found itself without jurisdiction to review the factual findings of the IJ. "The IJ found Mr. Isidor's credibility at issue because he had previously assumed the name of a U.S. citizen during criminal proceedings. The IJ advised Mr. Isidor that he needed to provide corroborating evidence for his claims." As to the persecution claims, "the IJ found that he failed to establish that he was related to persecuted individuals and failed to provide substantiating evidence regarding the causes of death of those individuals who he claimed were killed for their political activity." As to the sexual orientation issue, "the IJ found that he failed to prove his sexual orientation and that the evidence did not show that he would be tortured by the Haitian government because of his sexuality." He had also sought a U-Visa since he was the victim of a shooting in the U.S. in 2007, but the IJ ruled that he

# CIVIL LITIGATION *notes*

did not have jurisdiction to issue a visa and instructed Petitioner to apply to the Department of Homeland Security. The court reiterated this advice, noting that it did not have jurisdiction to order the issuance of a visa either. The opinion is by U.S. Circuit Judge Beverly B. Martin, which seems unusual in that most pro se appeals of BIA denials of protection are labelled *per curiam*. Judge Martin was appointed by President Obama.

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**CALIFORNIA** – Chief U.S. District Judge Lawrence J. O’Neill ruled on October 30 that Poverello House, a non-profit organization that provides meals, social services, and temporary shelter to people in the Fresno area, and specifically to single, homeless women in its facility called Naomi’s House, is not a “business establishment” within the meaning of California’s Unruh Civil Rights Act, and thus the court granted summary judgment against a group of four women who brought suit under that statute, claiming that they suffered discrimination because of sex at Naomi’s House when the facility provided services to D.N., identified by the plaintiffs in their complaint as a “purported transgender” and, from the factual allegation, appears to be a transgender woman who has not undergone surgical transition. *McGee v. Poverello House*, 2019 U.S. Dist. LEXIS 189586, 2019 WL 5596875 (E.D. Cal.). The particularly touchy point, according to plaintiff’s complaint, is that the rules of Naomi’s House require that those who wish to use the overnight shelter facility are required to shower, which logistically requires the women who are showering to be naked together. They allege that D.N., male genitalia intact, was allowed to shower with the plaintiffs and allegedly made “sexually inappropriate comments” and engaged in “sexually harassing activities,” as well as making “sexual advances” to the plaintiffs. They say that they repeatedly complained to Naomi House’s staff, but

were told that the facility was required to respect “D.N.’s decision to identify as a woman” under the HUD Equal Access Rule that requires facilities such as Naomi’s House that receive federal funding through HUD to allow transgender women to use women-designated facilities. They claim they were told that any woman who refused to take showers with D.N. could be expelled from the House, and that staff refused to “take appropriate disciplinary action against D.N. or make any reasonable accommodations to protect the rights and privacy of all parties.” They sued under both the Unruh Civil Rights Act and the California and Federal housing discrimination laws. Judge O’Neill was ruling only on defendant’s motion to dismiss the Unruh Civil Rights Act part of the complaint. The opinion is devoted to explaining and applying a list of factors that California courts have used to determine whether a particular non-profit entity can be characterized as a “business establishment” subject to the public accommodations non-discrimination requirement, and concluded that the defendant is not such an establishment. Plaintiffs are represented by Peter N. Kapetan of Kapetan Brothers LLP, Fresno. Defendants are represented by Sims, Lawrence & Arruti, Roseville CA, and William E. McComas of Thornton Law Group, P.C., Fresno. In a “Preliminary Statement to Parties and Counsel,” Judge O’Neill commented that the judges in the Eastern District of California “carry the heaviest caseload in the nation” and the court is “unable to devote inordinate time and resources to individual cases and matters.” He urges the parties to contact California’s U.S. Senators about the need to “address this Court’s inability to accommodate the parties and this action,” and that they should reconsider their prior unwillingness to consent to having a Magistrate Judge conduct “all further proceedings” in this case, since Judge O’Neill “must prioritize criminal and

older civil cases.” Clearly, he foresaw that this lawsuit is going to generate lots of pretrial motion practice and court supervision, as well as time-consuming hearings on contested material facts, and he wants to keep it from cluttering his docket. Could there be a clearer signal from the judge that “I really don’t want to have to deal with this case”?

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**CALIFORNIA** – The 4<sup>th</sup> District Court of Appeal has decided that San Diego County Superior Court Judge Gary M. Bubis did not abuse his discretion when he terminated the *de facto* parental status of a lesbian married couple who had been foster parents for a teenage boy, based in part on the boy’s preference to be placed with foster parents that would include a father. *In re Jason B.*, 2019 Cal. App. Unpub. LEXIS 7133, 2019 WL 548326 (Oct. 25, 2019). In March 2017, the San Diego County Health Human Services Agency filed a petition in Superior Court on behalf of Jason, then 13 years old, alleging that he was “suffering, or at substantial risk of suffering, serious emotional harm; had no parent or guardian willing or able to care for him; and needed mental health treatment.” At the time, the agency had removed Jason from the home of his single mother and several siblings. With the approval of the court, Jason was placed with a married lesbian couple, S.K. and T.S., who were designated to be his *de facto parents* and ultimately were given authority by the court to make the usual parental decisions concerning education and health care. This situation seemed to work for a while, and the agency was supporting the desire by S.K. and T.S. to formally adopt Jason. But Jason had reservations about the adoption, and his relationship with his foster mothers (referred to in the decision as his “caregivers”) had deteriorated significantly toward the end of the school year. The agency filed a “notice of intent to remove child” on June 21, 2018, citing several reasons: “Jason had

# CIVIL LITIGATION *notes*

had highly emotional arguments with caregivers surround the topic of his adoption; he was stressed and disturbed by these and other events; and he no longer wanted to live with caregivers.” In response, “caregivers indicated in a court filing that they did not object to Jason’s removal because they respected his wish not to be placed with them, but caregivers did object to the agency’s stated basis for removal.” Jason, by now 14, was removed from the caregivers’ home and placed with a new set of foster parents, a married heterosexual couple, in north San Diego County. On August 1, 2018, Jason’s appointed counsel filed a motion to terminate the caregivers’ status as *de facto* parents, as Jason was no longer living with them, he did not want to live with them anymore, and there was no reason for them to stay involved in his case. They objected, feeling they had a bond with Jason and wanted to stay involved. After a hearing, however, during which Jason testified about his desire to terminate his connection with the women, Judge Bubis concluded that given the changed circumstances, “it was in Jason’s best interests to terminate caregivers’ *de facto* parent status and education rights. The court expressed that it was giving strong consideration to Jason’s stated wishes, due to his age, prior life challenges, and the court’s desire not to inflict more emotional harm than what he had already suffered.” The judge said he was making no judgements about why the placement with the caregivers had “failed.” But now, Jason preferred that they not be involved in his life. “That’s got to be exceptionally painful for the past caregivers,” said Judge Bubis. In light of the evidence, the court of appeal found no abuse of discretion in this decision. The women had argued that the court gave undue weight to Jason’s preferences. Wrote Court of Appeal Justice Patricia D. Benke, “The changed circumstances were apparent – Jason had an emotional falling out with caregivers, he no longer trusted

them, they were not meeting his daily needs, and he refused to have further contact with them. The basis for the initial grant of *de facto* parent status was gone and rapidly diminishing in consequence. Ample evidence supports that any bond between caregivers and Jason was broken, he would not share further information with them, and any unique information caregivers possessed at some time would be of limited relevance in the future.” The court of appeal found that Judge Bubis had Jason’s best interests in mind. “The court’s comments reflect a desire to protect Jason from emotional trauma and provide him with some semblance of control over his life.” Justice Benke commented in a footnote, “Importantly, we see no indication in the record that the court made, or the Agency advocated, any of the challenged orders on the basis of the caregivers’ sexual orientation. Nor are we persuaded by caregivers’ assertion that the Agency was somehow biased against them due to their sexual orientation. The record shows that the Agency was highly supportive of caregivers and their adoption efforts until Jason himself became uncomfortable with the proposed adoption.” And, from looking through all the references to Jason’s expressed views, it appears that one reason he wanted a different placement was because he was looking for a father figure in his home life. The court noted that by all reports Jason’s placement with his new foster parents was working out very well. S.K. and T.S. represented themselves in the proceedings before the courts.

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**ILLINOIS** – The 1<sup>st</sup> District Appellate Court of Illinois reversed a circuit court decision that had ordered the reinstatement of a tenured middle school teacher at Gwendolyn Brooks Middle School, who had been dismissed by the Board of Education for classroom conduct that the board considered

objectionable, including negative statements the teacher made about homosexuality and marriage equality that had nothing to do with the lesson of the Social Studies class. *Conway v. Board of Education of Harvey School District Number 152*, 2019 IL App (1<sup>st</sup>) 190548-U (Oct. 28, 2019) (unofficially published). Among the list of allegations contained in the Board’s notice to Mr. Conway was that Conway had responded to a student’s report that “someone had written a comment on the boys’ bathroom wall about a male student who allegedly engaged in fellatio” by stating something to the effect that “Men marrying men, and women marrying women, is what marriage is becoming in the United States,” and that when students asked Conway if he watched the TV show “Empire,” he had said that he did not watch that show because it had “gay” scenes in it and that homosexuality is “why America is messed up.” There was also an allegation that Conway had “advised the class against getting involved in same-sex relationships.” There were plenty of other comments about sensitive issues in the Board’s allegations. Although a hearing officer recommended against terminating Conway, the Board overruled the hearing officer, but subsequently the circuit court reversed the Board’s decision. The Appellate Court granted the Board’s appeal and reinstated the termination decision, finding that under the appropriate standard of review, the Board’s factual findings and its conclusion that Conway had engaged in irremediable conduct meriting termination should be upheld. One of the grounds the Board had cited in its final termination decision was “immorality,” and the opinion for the court by Justice Mary K. Rochford devotes some discussion to how “immorality” should be defined in this context. In its final written decision, the Board had found some of the allegations against Conway not substantiated, stating that “it finds that Conway did not

# CIVIL LITIGATION *notes*

tell his class that ‘homosexuality is the reason that America is so messed up’ and that ‘he did not have a discussion with his class concerning writing on a bathroom wall related to fellatio,’ so it appears that student informants to the school’s principal may have been embellishing some things. However, the Board did uphold the other allegations relating to Conway’s comments about homosexuality and same-sex marriage. It seems likely that Conway will appeal this ruling to the Illinois Supreme Court.

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**INDIANA** – A three-judge Court of Appeals of Indiana panel unanimously reversed a decision by Hancock Superior Court Judge Terry K. Snow, who had granted a transgender man’s name change request but denied his request to order the Indiana Department of Health to change the gender marker on the man’s birth certificate. *In re Name Change of Clemmer*, 2019 WL 5382509, 2019 Ind. App. Unpub. LEXIS 1313 (Oct. 22, 2019). Dawson Clemmer submitted a hand-written petition on January 4, 2019, requesting a change of name and gender marker, including a proposed order providing findings and conclusions of law. As required by Indiana Code section 16-37-2-10 and a 2014 ruling by the Court of Appeals providing guidance for trial courts about transgender name change cases, *In re Petition for Change of Birth Certificate*, 22 N.E.3<sup>rd</sup> 707, Clemmer averred that “he was changing his name and gender marker in good faith and not for a fraudulent or unlawful purpose;” and that “he wanted to make these changes to accurately reflect his gender identity and presentation.” After a hearing on April 5, Judge Snow “took the matter under advisement pending resubmission after concluding that the proposed order was not properly completed because ‘[it didn’t] have the names in there, and [the court would] like to have it uh, typed out so it’s legible.’” After Clemmer resubmitted his petition, Judge Snow

granted the name change but “the change of gender marker remained pending.” On April 22, Clemmer moved for a final order regarding his petition for the gender marker change and submitted a third proposed order, but Snow immediately denied the motion, stating: “The court did not rule on gender change because the petitioner did not include that in the proposed order. Motion for gender marker change is denied.” Clemmer appealed, represented by Kathleen Cullum and Megan Stuart of Indiana Legal Services, Inc. The court of appeals applied the clearly erroneous standard of review, and reversed Judge Snow’s denial of the motion. Judge Cale J. Bradford, writing for the panel, pointed out that the court’s 2014 decision concluded that the statute “gives authority to grant petitions for gender-marker change” and that in deciding on “what evidence was required to support a petition for gender-marker change, we concluded that the ‘ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose.’” “Here,” continued Bradford, “the record contains no evidence to suggest fraudulent or unlawful purposes . . . . We conclude that Clemmer’s petition was made in good faith and should not have been denied because of formatting errors on a proposed order.” The court instructed Judge Snow to “enter an order granting Clemmer’s petition for gender-marker change within thirty days after certification of this decision.” And, implicit in the reversal as “clearly erroneous,” the implicit message to Judge Snow to get with the program and treat transgender name and gender-marker change petitioners, who usually, as in this case, are filing *pro se*, with appropriate respect.

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**IOWA** – In an opinion that can best be described as pettifogging and formalistic and completely out of harmony with the underlying purposes of the civil rights

fee awards provisions in question, the Court of Appeals of Iowa ruled in *Good v. Iowa Department of Human Services*, 2019 Iowa App. LEXIS 968, 2019 WL 5424960 (Oct. 23, 2019), that Eerieanna Good and Carol Beal, transgender women who had successfully sued the Iowa Department of Human Services challenging exclusion of coverage under the state’s Medicaid program for gender transition expenses, were not entitled to an award of attorney fees and costs as the prevailing parties in the litigation. The women had both applied for preapproval of expenses in connection with medical procedures for transition and, when denied approval, appealed those decisions within the Medicaid appeals system of the Department, losing before administrative law judges and the Departmental Director. Then they filed suit in the District Court seeking to overturn the denials, ultimately winning a victory in the Iowa Supreme Court. *See Good v. Iowa Department of Human Services*, 924 N.W.2 853 (Iowa 2019). Their challenge was premised on the argument that the exclusion from coverage violated the Iowa Civil Rights Act’s ban on gender identity discrimination as well as the Equal Protection Clause. The Supreme Court decided the case under the CRA and followed the well-established principle of refraining from a constitutional decision when the matter could be resolved in favor of plaintiffs on statutory grounds. The district court had also ruled in their favor, but had not ruled on fees while the case was on appeal, so the Supreme Court had not addressed that issue in its opinion. Going back to the lower courts seeking an award of fees, the plaintiffs encountered an unexpected denial, which the Court of Appeals upholds in this opinion. There were two potential sources of authority to award fees, the CRA and the Iowa Equal Access to Justice Act. But the court determined that the CRA’s fee awards provision was, by its literal terms, restricted to cases that



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had been litigated under the procedures of the CRA, and this case was litigated administratively under the Medicaid appeal procedures. Turning to the Equal Access to Justice Act, which generally authorizes fee awards to prevailing plaintiffs in actions for judicial review of administrative decisions brought against the state, the court found that one of the statutory exceptions in the fee award provision applies to this case, which precludes a fee award when “the action arose from a proceeding in which the role of the state was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent or to adjudicate a dispute or issue between private parties or to establish or fix a rate.” The petitioners argued that this litigation had a broader scope than the individual refusals to pre-approve procedures that precipitated the litigation. But the court insisted on a narrower characterization. In this case, wrote Judge Amanda Potterfield, “the question was whether their membership in Medicaid allowed them to receive medical assistance payments for the specific procedures for which they requested authorization,” and pointed out that a prior Iowa Supreme Court ruling “determined the exception was met when the party appealing to DHS asked it to determine whether he was entitled to reimbursement payments under a statute. The action Good and Beal requested DHS to undertake, to determine whether they were entitled to medical assistant payments for specific procedures, is similar enough that we do not believe we need specific definitions of the terms in dispute to decide” that the exception applies. Thus, the court concluded that the district court properly denied the fee request in this case. The court does not mention the amount that was requested, but it is undoubtedly substantial inasmuch as the case had to be litigated up to the Supreme Court to overrule the Department’s rejection of coverage in an opinion that will affect many people beyond the petitioners and

had become public interest litigation beyond the denial of coverage for these individual petitioners. The court’s approach strikes us as an unduly stingy interpretation of the fee provisions under both statutes, but particularly the Access to Justice Act, and sets up another appeal to the Iowa Supreme Court. Petitioners are represented by Seth A. Horvath, F. Thomas Hecht, and Tina B. Solis of Nixon, Peabody LLP (Chicago), Rita Bettis Austen of the ACLU of Iowa Foundation (Des Moines), and John Knight of the ACLU Foundation LGBT & HIV Project (Chicago).

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**MASSACHUSETTS** – A Jane Doe plaintiff, identifying herself as a transgender Muslim woman of Hispanic origin who holds a Bachelor of Science degree from a midwestern university, submitted applications in 2017 to three graduate programs at Harvard University. Her applications were denied. She alleges that while her applications were pending, she attended several Harvard admissions events. At one even, she claims a male admissions officer “forcibly kissed her” and that at another, a business school admissions officer told her that Harvard “had not admitted any transgender students in the last three admissions cycles.” She claimed to have reported these incidents to Harvard with no result, although she does not specify when, to whom, or what she reported. She filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), which investigated and then dismissed the complaint for lack of probable cause that Harvard had violated the statutory prohibition against gender identity discrimination. Then she filed suit in federal court, alleging violations of Title IX (sex discrimination) and the Massachusetts anti-discrimination law. In an October 17 ruling in *Doe v. Harvard University*, 2019 U.S. Dist. LEXIS 180365 (D. Mass.), Senior District Judge Rya W. Zobel granted

Harvard’s motion to dismiss. Absent a statement of the theory of the Title IX case in plaintiff’s complaint and briefing in response to the motion, Judge Zobel characterized it as “a disparate treatment claim in the admissions context,” and found that Doe had failed to allege facts supporting an inference that “her exclusion was on the basis of her gender.” “Beyond conclusory rhetoric,” wrote the judge, the complaint is devoid of any facts supporting a claim that Harvard rejected plaintiff *because* of her transgender status.” The judge also found no basis in the complaint to support a contention that Doe’s applications were denied because she complained to the University about the kissing incident or the comment about lack of transgender admissions, if such a complaint was actually made. As to the state law claims, Zobel faulted the complaint for lacking an allegation that Doe was qualified for admission to the programs or that similarly situated non-transgender applicants were treated more favorably in the admissions process. Doe had also invoked the state’s Fair Employment Act, which the court found irrelevant because Doe had not applied for employment with Harvard. (One suspects Doe intended to argue that if admitted to a graduate program, she might have gained employment as a teaching assistant.) Jane Doe is represented by Cynthia E. MacCausland, Boston.

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**MICHIGAN** – The #metoo phenomenon in a gay context is playing out in *Lipian v. University of Michigan*, 2019 U.S. Dist. LEXIS 184020 (E.D. Mich., Oct. 24, 2019), in which Andrew Lipian, who was training to be a vocalist at the University of Michigan School of Music, claimed that famed out gay countertenor David Daniels, who was hired by the University as a professor in the Fall of 2015, sexually harassed Lipian throughout his training and raped him on one occasion. Lipian alleges that the

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University and several of its employees and officials ignored warnings about Daniel's aggressive sexual behavior, causing injuries actionable under 42 USC 1983 and Title IX of the Education Amendments. On October 24, Senior U.S. District Judge Arthur J. Tarnow issued an order concerning various objections to discovery rulings by U.S. Magistrate Judge Mona K. Majzoub. One of the issues raised by Lipian was seeking to compel the University to disclose the identity of student witnesses to Daniels' alleged misconduct. Magistrate Majzoub had found that the Family Education and Privacy Rights Act (FERPA) "bars the disclosure of personally identifiable information in an education record," and that the University should give students an opportunity to object to disclosure of their names to the Plaintiff. Lipian argued that FERPA should not apply in this context. The court overruled Lipian's objection, ordering that the University disclose only the names of students who "are willing to participate in this litigation. If the information these students provide is not sufficient," he wrote, "and if Plaintiff has grounds to believe that proving essential elements of his case requires testimony by the remaining students, the Court will revisit the applicability of FERPA as to the students who do not wish to be contacted by Plaintiff's attorney." The Magistrate had overruled Daniels' objection to discovery of the contents of his cellphone. The court cut down the scope of the discovery, but did support having a neutral expert undertake a forensic examination to provide the records of all text messages involving Daniels currently in the University's possession, but restricting the examination to a narrow band of time surrounding the alleged rape incident. The court overruled objections by Daniels and his husband, Scott Walters, to the Magistrate's refusal to issue protective orders regarding their depositions. The Magistrate had

ruled that they could interpose Fifth Amendment objections to specific questions, but they were not entitled to forego depositions altogether, a ruling sustained by Tarnow. In his complaint, Lipian contended that Daniel's sexual advances were unwarranted because Lipian "is a heterosexual and married." Lipian objected to being deposed about his sex life, but the Magistrate ruled that he was putting that issue in play by the allegations in his complaint. Then Lipian stipulated to the removal of all mention of his heterosexuality and marital status in his third amended complaint, which led Plaintiffs to object to being blocked from exploring these subjects in discovery. Wrote Judge Tarnow, "As long as Plaintiff does not bring his own sexual orientation or history into controversy, Defendants will not be entitled to ask questions about Lipian's sexual history with people unconnected to the allegations in this case. Any relationship he may have had with Scott Walters, however, may pertain to allegations in this case. Defendants are entitled to discovery on whether or how communications and conduct between Lipian and Walters affected or illuminated Lipian's relationship with Daniels. This line of inquiry will be limited, however. Questions presented to Lipian regarding Walters on matters not connected to Daniels must be of a generic and abstract nature. Probing questions into specific acts or speech are precluded. On events or communications where Daniels was either present or discussed, however, questions can be more detailed and specific, but only where calibrated to produce information on Lipian's interactions with Daniels." After complaints about Daniel's conduct with students came to light, his appointment at the University was suspended. In addition to the civil suit by Lipian directed against the University, Daniels and his husband were indicted in Texas on charges that they had together sexually assaulted another man. Their

defense is that the sexual encounter was consensual. Daniels and Walter were married in a ceremony conducted by Supreme Court Justice Ruth Bader Ginsburg, an ardent opera fan. Daniels' musical reputation is based largely on his appearances as a countertenor in opera performances, but his performing career has been curtailed as a result of the sexual harassment charges.

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**MICHIGAN** – On October 22, U.S. District Judge Robert Jonker denied a request by Michigan Attorney General Dana Nessel and the state's Department of Health and Human Services to stay his ruling in *Buck v. Gordon*, 2019 U.S. Dist. LEXIS 165196, 2019 WL 4686425 (W.D. Mich., Sept. 26, 2019), which had allowed a Catholic adoption agency to continue its practice of refusing to perform certifications of same-sex couples to be adoptive parents. The state plans an appeal and wanted to have the ruling stayed pending appeal, but Jonker said that their application for a stay had "offered nothing new" and "failed to come to grips" with the factual basis for his decision: a finding that same-sex couples who sought to adopt would be referred by the Catholic agency to another agency willing to do the necessary study and certification. Jonker had also found that once a couple was certified by another agency, the Catholic agency was willing to provide all of its support services. The agency had argued that it and its clients would be irreparably injured if its status was terminated.

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**MISSOURI** – A jury in St. Louis County has awarded damage of nearly \$20 million to Police Department Sergeant Keith Wildhaber, who was turned down for a promotion after more than 15 years on the police force. Wildhaber said that after he applied, he was told there was one thing standing in the way of promotion to lieutenant: that he was gay.

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He alleges that a member of the St. Louis County Board of Police Commissioners told him in February 2014 that “the command staff has a problem with our sexuality,” and a jury believed him and concluded it was unlawful. Reacting to the verdict, County Executive Sam Page released a statement saying that an overhaul of the police administration would take place. The jury’s decision came at the end of a week-long trial, during which Department management denied that Wildhaber’s promotion was denied because of his sexual orientation. One juror told the St. Louis Post-Dispatch, “We wanted to send a message. If you discriminate you are going to pay a big price . . . You can’t defend the indefensible.” *Washington Post*, Oct. 28.

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**NEW HAMPSHIRE** – In *Burnap v. Somersworth School District*, 2019 N.H. LEXIS 219, 2019 WL 5493370 (Oct. 25, 2019), the Supreme Court of New Hampshire affirmed a ruling by Superior Court Justice Mark Howard that the Somersworth School District’s reason for terminating Amy M. Burnap – sexual harassment – were not a pretext for unlawful sexual orientation discrimination, as she had claimed. The trial court had granted summary judgment to the School District based on affidavits from the nine Board of Education members who were involved in the termination decision, swearing that they did not consider Burnap’s sexual orientation in making their decision. They claimed to be acting based on an investigation sparked by complaints about Burnap’s comments that were reported by colleagues to the administration. The administration had concluded that her comments violated board policy by “engaging in unwelcome conduct, inappropriate behavior, and communications of a sexual nature.” Justice Patrick Donovan wrote for the Supreme Court: “Nothing in the record suggests that the Board’s sexual

harassment finding was not genuine and thus pretextual. The plaintiff also failed to identify any evidence suggesting that the Board harbored a discriminatory animus towards her based on her sexual orientation. To the contrary, every Board member averred that he or she did not consider the plaintiff’s sexual orientation in reaching a decision, and the plaintiff has not offered contradictory evidence. There is thus insufficient evidence from which a jury could conclude that the Board itself used sexual harassment as a pretext for sexual orientation discrimination.” Justice Donovan devoted a substantial part of the opinion to refuting Burnap’s contention that this was actually a “cat’s paw” case, in which the decision made by the Board was tainted by animus on the part of staff members who had complained, testified or participated otherwise participated in the investigation. The court found that these contentions were just not supported by the factual record. The court also rejected Burnap’s contention that the investigation that was the basis of the Board’s decision was a “sham” investigation.

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**NEW JERSEY** – In *Doe v. Princeton University*, 2019 WL 5587327 (D.N.J. Oct. 30, 2019), U.S. Magistrate Judge Tonianne J. Bongiovanni granted a motion by the plaintiff to proceed anonymously as “John Doe” and for various non-parties in the case to be identified pseudonymously in litigation papers and opinions. Doe sued Princeton University and various university officials under Title IX and state law “for their actions surrounding the investigation and subsequent adjudication of Plaintiff’s involvement in sexual assault,” both as an alleged perpetrator and an alleged victim. The charges involved sexual contact with other male students at the University. Plaintiff and “Alex Roe” dated on and off for a two-year period. One incident giving rise to this litigation occurred on

November 4, 2017, when Roe alleged that Doe sexually assaulted him in Doe’s dorm room. The two men’s accounts of what happened that night differed dramatically, Doe claiming he had no further contact with Roe when they returned to the dorm from a party, Roe claiming that he went to Doe’s dorm room to retrieve his toothbrush, which he had left there the previous night, and was then sexually assaulted by Doe. The disciplinary proceeding conducted by Princeton concluded that Doe was guilty of “non-consensual sexual contact” and his degree was withheld for some period of time as punishment. This lawsuit challenges the disciplinary process, alleging that Doe’s own allegations of sexual assault were not fairly addressed. Thus, there were allegedly both incidents in which Doe was charged with being a perpetrator and those in which he portrayed himself as a victim. In this case, the defendants and witnesses did not oppose the use of pseudonyms, probably as eager to avoid public identification in court documents as the plaintiff was, but the court deemed it appropriate to engage in an extended, multi-factorial analysis before granting the motion, reviewing all the factors, pro and con, that might be considered in deciding whether it was appropriate to allow this litigation to proceed without identification of the individuals involved. The judge granted the motion, although it was not because the plaintiff and many of the witnesses and alleged victims are gay, although the court noted in passing that there have been cases in which courts have authorized anonymity because of the sexual orientation of parties. In this case, the sensitivity was about being identified as a sexual predator or a victim of sexual molestation, and the judge pointed out that a fair amount of #metoo litigation in the current situation is conducted using the real names of parties. However, on balance, the court deemed the factors favoring the motion outweighed the factors opposing it.

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Those who are interested in the multifactorial analysis are directed to the court's opinion, which is too lengthy to summarize here. [Because of the anonymity of the parties and differences in the factual accounts, we are uncertain whether this case bears any relation to the other *Doe v. Princeton University* decision by the 3<sup>rd</sup> Circuit, reported elsewhere in this issue of Law Notes.]

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**NEW YORK** – U.S. District Judge Naomi Buchwald granted a motion by the NYC Board of Education to grant summary judgment on a constructive discharge claim brought by Rosanne Kaplan-Dinola, a former teacher in the NYC public schools for 14 years who resigned after formal charges were lodged against her by her building principal. *Dinola v. Board of Education*, 2019 U.S. Dist. LEXIS 188320, 2019 WL 55983286 (S.D.N.Y. Oct. 30, 2019). Kaplan-Dinola filed the lawsuit on October 15, 2015, while still employed at P.S. 207, alleging various claims of discrimination based on her sexual orientation by the previous and current principals of the school. After she received notice on May 12, 2016 that charges were filed against her alleging that she “failed to adequately plan and/or execute separate lessons on a number of dates spanning from October 2013 through May 2016,” she resigned on May 20, 2016, citing her need “to escape the discrimination and retaliation I continue to experience on a daily basis.” She then amended her complaint to add a constructive discharge count. Judge Buchwald agreed with the Board of Education's contention that having resigned rather than contest the charges, she could not rely on them to support a claim of constructive discharge, and that the specific allegations in her earlier-filed complaint were not sufficient to support a constructive discharge claim. While granting the motion, of course, Judge Buchwald rendered no judgement as to the other pending charges, and directed the parties to appear for a

pretrial conference on December 2 to discuss the issue remaining for trial. Plaintiff is represented by Megan Sarah Goddard and Gabrielle Vincie of Nesenoff & Miltenberg, LLP, New York.

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**TENNESSEE** – Writing for the Court of Appeals of Tennessee in *Sullivan v. Sullivan*, 2019 WL 4899760 (Oct. 4, 2019), a divorce/custody appeal, Judge Carma Dennis McGee quotes the opinion by Williamson County Chancery Court Judge James G. Martin, III, who had disclaimed having based his custody-visitation decision on the husband's sexual orientation, but the quoted paragraph does not seem entirely consistent with that disclaimer. The Chancery Court's order gave the mother residential custody and sole discretion as to many things, and limited the father's contact with the two children to fewer than 100 days per year. Judge Martin wrote, “The Court is very concerned about Mr. Sullivan's moral, mental, and emotional fitness as it related to his ability to parent the children. The Court's concern has nothing to do with Mr. Sullivan's sexual orientation. Throughout the course of the trial, Mr. Sullivan was very emotional. He was emotional in discussing his dishonesty. He was emotional in discussing the children. Yet, Mr. Sullivan did not seem to engage in the same kind of emotional struggle when he lied in his answers to interrogatories. He was not concerned when he lied in his responses to questions at his deposition or when he lied to his mother about his infidelity, and when he lied on numerous occasions during his trial testimony. He was not bothered when he engaged in sexual activity that might expose him or potentially expose his wife to HIV by engaging in sexual relations with her without disclosing his prior conduct. He did not fret when he started taking medication to prevent HIV without disclosure to his wife . . .” Judge Martin also expressed concern about Mr. Sullivan leaving “his sex

toy where [Son] could find it and start playing with it” and that “Mr. Sullivan watched sexually explicit movies easily accessible by the children on Netflix,” accusing Sullivan of having “no moral compass to aid in his desire to be the primary residential parent and/or role model for the parties' children.” The court of appeals affirmed the trial court's ruling, rejecting Mr. Sullivan's appeal. Mr. Sullivan's questions presented on appeal, as quoted by the court, did not expressly refer to issues involving his sexuality, but alluded to them by asking “whether the trial court abused its discretion by awarding Husband less parenting time as a form of punishment for Husband's dishonesty.” Mr. Sullivan is represented by Stanley A. Kweller, Nashville.

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**TEXAS** – In a custody dispute between Jeffrey Younger and Dr. Anne Georgulas over their child James, whose gender identity is in question, Judge Kim Cooks of the 255<sup>th</sup> Family District Court in Dallas, overruled a jury verdict that would have awarded custody to Georgulas. Instead, the judge opted to continue a joint custody arrangement under which neither parent can make health care decisions unilaterally. Georgulas had demanded that her ex-husband recognize James's female identity, but Younger claimed that the child identifies as a boy. Georgulas, who had residential custody, was ready to authorize gender transition treatment for the 7-year-old, but Younger objected and went to court. The judge's ruling makes it likely that any transition will be delayed so long as James is a minor. The original jury verdict caused outrage among some Texas government officials who spoke about intervening. *LGBTQNation.com*, Oct. 25.

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**WASHINGTON** – The Washington Court of Appeals ruled on October 21 that a law firm retained by the state



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Attorney General's Office (AGO) was not immunized by the state's Anti-SLAPP statute, RCW 4.24.510, from possible civil liability to a gay former government employee who is asserting claims against the law firm in connection with the report it made to the AGO concerning discrimination claims by the former employee. *Leishman v. Ogden Murphy Wallace, PLLC*, 2019 Wash. App. LEXIS 2665, 2019 WL 5304641. Roger Leishman, a lawyer, began working with the AGO as Chief Legal Advisor for Western Washington University in July, 2015. He soon began exhibiting "serious trichotillomania, anxiety, and other symptoms," which he disclosed to AGO as well as "his prior history of managing mild anxiety." In November 2015, his doctor diagnosed PTSD and "serious co-dependency." Leishman informed the AGO of this, and submitted a formal request for a reasonable accommodation of his disability in February 2016. In March 2016, he filed a complaint with the AGO, claiming his supervisor made homophobic comments about him. He felt that his PTSD triggered the supervisor's comments and her "micromanagement" of his work. During a meeting on March 1 to discuss his accommodation request, he claims, her comments led him to become aggressive, raising his voice and pounding his fists. She then complained to the AGO, which placed Leishman on home assignment and retained the law firm, Ogden Murphy Wallace (OMW), to conduct an independent investigation of Leishman's discrimination claim, as well as the supervisor's claim that Leishman was "inappropriate" at their meeting. OMW submitted a report that concluded that "Leishman has not established support for his complaint of discrimination against him based on sexual orientation as prohibited by AGO policies," and that "Mr. Leishman's conduct during the March 1 meeting violated expected standards of conduct for his position as reflected in his job description."

AGO terminated Leishman, who submitted a tort claim against the State for employment-related claims, and the parties settled. In the settlement agreement, Leishman "released his claims against the State, including the AGO, and any officers, agents, employees, agencies, or departments of the State of Washington." He then filed suit against OMW for negligence, violation of the Consumer Protection Act, negligent misrepresentation, fraud and discrimination. He alleged that OMW was not acting as the AGO's agent and so his claims were not barred by the settlement agreement. OMW filed for judgment on the pleadings, contending that the anti-SLAPP statute granted it immunity for communicating its report to the AGO. Leishman argued that there was no Washington judicial precedent concerning the potential applicability of that statute to "ordinary vendor-customer communications where the customer happens to be a government agency," and such immunity was not intended by the statute to extend to a law firm hired by the AGO to conduct an investigation. The trial judge, John R. Ruhl, agreed with OMW, granted the motion and entered an order for attorney fees and costs, and Leishman appealed. The court of appeals, in a decision by Judge David Mann, agreed with Leishman's argument that the anti-SLAPP statute was intended to protect private citizen whistleblowers and not to immunize government contractors from civil liability for their work done under contract with the government. Prior case law had already determined that the word "person" used in the statute did not apply to government agencies, and, by extension, the prior case law and the "legislative intent" behind the statute, led the court to the conclusion that "a government contractor is not immune from liability for providing paid communications to a government agency." The statute was "meant to protect a citizen's right to advocate to government agencies and public

participation in governance," wrote Judge Mann. "Insulating government contractors from civil liability for injury caused by their contracted submissions to government agencies does not meet the intent behind [the statute]. When a government contractor is hired to conduct an internal investigation and report its findings to the government agency, it is not exercising its right to petition the government on its own behalf, advocating to the government, or attempting to have effect on government decision making. Instead, the government contractor is performing the work of a government agency. The contractor benefits from being paid for its services and any communication to the government agency as a result of the services rendered is not the type of communication that [the statute] was intended to protect." In a footnote, the court made clear that it was not ruling on the question whether Leishman is precluded from seeking relief under the terms of the settlement agreement, since that issue was not litigated on OMW's motion. Leishman represents himself in this proceeding. One expects that OMW, which hired another law firm to represent it in this case, may seek review in the Washington Supreme Court.

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**WASHINGTON** – Christian Djoko, a Cameroonian who is under federal indictment for cyberstalking a gay Cameroonian and subjecting him to harassment and perhaps physical assault, nonetheless won his battle not to be kept in detention while awaiting trial. *United States v. Djoko*, 2019 U.S. Dist. LEXIS 170496, 2019 WL 4849537 (W.D. Wash. Oct. 1, 2019). According to the factual summary in District Judge John C. Coughenour's Order, for two months in 2018, Djoko and two co-defendants allegedly conducted a campaign of harassment against John Doe, "a gay man from Cameroon who lives in Seattle." The charges against Djoko allege that he disseminated information

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about Doe's sexual orientation – "including nude images of John Doe and his husband" – to members of the Cameroonian community and provided false information the U.S. Citizenship and Immigration Services "in an attempt to have John Doe deported." There is also an allegation that Djoko and a co-defendant assaulted Doe, although the court cast doubt on the veracity of these allegations, in light of conflicting evidence concerning Djoko's personal involvement in the physical harassment incident. The Seattle police arrested Djoko and a charge of malicious harassment was lodged against him under state law. He was released pending trial and avoided getting into trouble, making all his scheduled court appearances over the next nine months. He was indicted by the federal grand jury on August 1, 2019, and the government advised his attorney, who notified him to surrender to federal officials, which he did. The day he surrendered to the feds, the state prosecutor dismissed the malicious harassment charge. The federal prosecutors then moved to detain Djoko pending trial, arguing that he posed a flight risk and a serious risk of obstruction of justice. Pretrial services recommended that Djoko be released with standard and special conditions, and a detention hearing was held, in which a magistrate judge concluded that "no conditions could assure Mr. Djoko's appearance and the community's safety," ordering his detention pending trial. Djoko appealed to the district court, and Judge Coughenour rejected the magistrate's ruling, finding that Djoko's family ties in Seattle and his student status, which was the basis for him being in the U.S., undermined the conclusion that he would be a flight risk, especially in conjunction with the conditions that would be imposed. They included restriction of his travel to western Washington and his located being restricted to his residence (his brother's home) except for approved reasons, like attending classes;

participation in the local monitoring program with Active Global Positioning Satellite Technology; surrender of all current and expired passports and travel documents; and maintaining his residence as directed. The judge found these conditions sufficient to assure that Djoko would appear as required and not flee the jurisdiction. As to the allegation of obstruction of justice, this was premised in part on evidence that Djoko deleted incriminating text messages from his cellphone, as demonstrated by the fact that the messages from appeared on his co-defendants phone, discussing their plans concerning Doe, but did not appear on his phone. The court suggested Djoko was no longer in a position to engage in such obstruction, and concluded that these restrictions, as well as Djoko's ties to the community and his eagerness to attend classes to attain his professional accounting degree, would "reasonably assure the safety of John Doe and the community." Djoko is represented by Federal Public Defender Jennifer Elizabeth Wellman.

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## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard*

**U.S. SUPREME COURT** – Lawyers representing Charles Rhines, a gay man sentenced to death by a South Dakota jury in a capital trial concerning a 1992 murder, were fighting a failing last-ditch effort during October to forestall his execution so they could put before a court on the merits evidence that homophobia tainted the jury's sentencing deliberations. Rhines had stabbed to death a 22-year-old former co-worker who walked into a Rapid City doughnut shop that Rhines was in process of burglarizing, a few weeks after being discharged from his job. News reports suggested that the jury was strongly influenced by an audio recording of Rhines laughing while confessing his acts to a police

detective. We previously reported on his unsuccessful attempts to interest the Supreme Court in his case last Term. On October 25, the 8<sup>th</sup> Circuit Court of Appeals ruled that Rhines's only hope rested with the Governor of South Dakota, Kristi Noem, a conservative Republican who took office in January 2019, who had received his petition for clemency. In its *per curiam* opinion in *Rhines v. Young*, 2019 U.S. App. LEXIS 32284, 2019 WL 5485274, the court explained: "As briefed to this court in the fall of 2018 and argued to our panel in September, this appeal raises the question whether the district court erred in concluding that it has no authority under 18 U.S.C. sec. 3599 and the All Writs Act, 28 U.S.C. sec. 1651(a), to order South Dakota prison officials 'to allow Rhines to meet with mental health experts retained by appointed counsel for purposes of preparing a clemency application.' Following oral argument, a majority of the panel tentatively concluded that we should affirm the district court. However, circumstances underlying the issue have changed, and we conclude that a decision on this narrow issue is no longer needed. We were advised by counsel for appellee earlier this year (i) that the South Dakota Board of Pardons and Paroles denied Rhines's petition for clemency in December 2018, and (ii) that the Circuit Court for the 7<sup>th</sup> Judicial Circuit of South Dakota has issued a warrant for Rhines's execution during the week of November 3-9, 2019. Whether Rhines deserves clemency is now properly in the hands of the Governor." The court, with one judge concurring in a separate brief opinion, pointed out that the Governor has the authority to order that the execution be delayed and that Rhines be allowed to meet with the mental health experts. But counsel quickly followed up on the court's decision by filing a Petition for a Writ of Habeas Corpus with the Supreme Court on November 1, posing the following question: "Should this Court exercise its original habeas

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jurisdiction to transfer this petition to the district court for a hearing regarding Petitioner's substantial evidence that at least one capital sentencing juror relied on anti-gay stereotypes and animus to sentence him to death?" The petition pointed out that Rhines has been trying for years to get this evidence before a court for consideration on the merits, but had been stymied by the multitude of jurisdictional and procedural barriers that Congress erected. No federal judge had actually considered on the merits whether the jury verdict was tainted, and at least two jurors had provided statements confirming that various prejudicial remarks about Rhines's sexual orientation and presumed desires were made during jury deliberations. They argued that because it was not until 2017 that the Supreme Court established in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, that a challenge of this type could be mounted against a jury verdict, Rhines had not had a fair opportunity to get this information before a court. They also filed petitions asking the Court to consider Rhines' contention that the method of execution being used was 'cruel and unusual punishment' under the 8<sup>th</sup> Amendment and asking the Court to stay the execution and direct the state to allow him access to the mental health experts who might attest to a mental condition that would forestall his execution. These arguments apparently did not impress the Court, which rejected all three filings seeking some form of relief for Rhines on November 4, after which the state executed him by lethal injection early in the evening.

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**CALIFORNIA** – In an opinion released on October 30, U.S. Magistrate Judge Carolyn K. Delaney recommended denial of a motion by Phillip J. Colwell to vacate, set aside, or correct his sentence after he pled guilty to all three counts of an indictment against him for using the mail or a facility of interstate commerce to induce a minor to engage in unlawful

sexual conduct, transmitting obscene materials to a minor, and producing visual depictions of a minor engage in sexually explicit conduct. The charges involved two underage males to whom Colwell had either sent "graphic images of his male anatomy or photographed in sexually explicit poses" back in 2011. Colwell came to the attention of police when the parents of one of the victims, who had confiscated his cellphone for misbehavior, "received sexually explicit graphic text messages" on the cellphone. They turned the cellphone over to the police, who then used it to initiate an investigation which involved a police detective responding to the text messages from Colwell and arranging an assignation, which led to Colwell's arrest. Then Colwell's cellphone was confiscated, as well as his home computer and a Kodak camera. Examination of these items surfaced text messages and images of another teenage boy, who was interviewed by the police and recounted a meeting in which Colwell "tied [the boy] to his bed, poured hot wax on his body, and sodomized him." Colwell also took photos of this boy that were later located on Colwell's computer, which were taken with the camera that was seized from his car when he was arrested. Colwell was represented by a series of public defenders through arraignment, guilty plea, and sentencing, ultimately receiving a sentence of 360 months imprisonment and lifetime supervised release thereafter. He entered his guilty plea in April 2012, had new counsel appointed to represent him in the sentencing process, and was sentenced on July 10, 2014. He appealed his conviction, but the appeal was dismissed by the 9<sup>th</sup> Circuit in 2015, when the court found that his right to appeal was waived by his plea agreement. In this new action, filed *pro se*, he claimed that ineffective assistance of counsel should void his plea and give him a chance at a trial. Part of the stimulus for this *pro se* filing seems to be his learning

about the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), holding that law enforcement officers may not search an arrestee's cell phone incident to his or her arrest without first obtaining a warrant. Colwell maintains now that his conviction stemmed from a violation of his constitutional rights in this connection, but Magistrate Delaney observed that at the time of his trial and sentencing, an attorney within the 9<sup>th</sup> Circuit could not be faulted for failing to object to the cellphone search because at the time 9<sup>th</sup> Circuit precedent did not require a warrant for such cellphone searches, and Riley was not applied retroactively to render counsel's conduct at the time ineffective for this purpose. The judge found that many of Colwell's arguments were waived by his guilty plea or by his assertions on the record during the case, that his attorneys had actually done many of things that he had faulted them for not doing, and that many of his contentions about flaws in the proceedings were contradicted by the record. The judge recommended that the district court deny his motion. *Colwell v. United States*, 2019 WL 5608808 (E.D. Calif. Oct. 30, 2019).

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**GUAM** – The Supreme Court of the Territory of Guam found in *People v. Asprer*, 2019 WL 5549938 (Oct. 25, 2019), that the Superior Court erred in allowing certain testimony leading to the imputation that the defendant was a gay man, which may have swayed the jury to convict him on several charges of criminal sexual conduct with a 17-year-old boy. The court found that the victim's testimony was shaky, and was challenged by the defense demonstrating inconsistencies between what the boy told detectives and what he testified, which were not completely cleared up by other testimony, leading to the possibility of some coaching and fabrication by the witness. Subsequent questioning of male friends of the defendant about his relationship with

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various men was seen as prejudicial – an attempt by the prosecutor to prejudice the jury against the defendant, and his possible romantic relationships with men not clearly relevant to the charge of sexual contact with the minor. As a result, the court vacated the defendant's conviction on the sexual conduct charges. However, it upheld the conviction on various drug-related charges, including child abuse in forcibly getting the minor victim to inhale a controlled substance.

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**NEW YORK** – In *People v. Yegutkin*, 2019 WL 4846296 (App. Div., 2<sup>nd</sup> Dept., Oct. 2, 2019), the court modified a judgement finding the male defendant guilty of seventy-five counts of inappropriate sexual activity with underage boys. The court vacated the convictions in a handful of the cases, finding that the evidence of actual sexual contact was insufficient to sustain the verdict, but otherwise affirmed the convictions. The opinion does not mention the sentence imposed. The opinion is interesting in its discussion of the defendant's contention that the trial court (Kings County Supreme Court Justice Dineen Ann Riviezzo) erred in permitting the prosecutor to present rebuttal evidence from an adult male witness who testified that the defendant had previously propositioned the witness to engage in sexual contact with him, since this would not be relevant to the charge of sexual contact with underage boys. Rejecting this claim, the Appellate Division panel said that the trial court “providently exercised its discretion in permitting the prosecutor to introduce this testimony for the purpose of rebutting evidence elicited by the defendant that, because of his religious beliefs, he would not engage in any of the acts of sexual abuse that he was accused of, which involved, among other things, mutual masturbation with male victims.” Defendant contended that he is a “very observant” Orthodox Jewish person, who followed “strict standards,”

and that, in the Orthodox Jewish religion, masturbating, or “wasting your seed” in any form, was a “sin” for which “there would be a punishment coming from heaven, from God.” He testified that on a scale of one to ten, from the most minor to the most major sins, masturbation was a “10.” And he called two Orthodox Rabbis as witnesses to testify to his serious and committed observance. “One of the Rabbis, who was deemed an expert in Jewish laws, customs and practices, also testified that masturbation was forbidden “by the law of Judaism.” Consequently, said the court, the prosecutor was appropriately allowed to provide a rebuttal witness to testify under oath that the defendant “previously attempted to persuade him to participate in mutual masturbation,” as this was “highly probative to rebut the defendant’s defense that he would not engage in any of the charged conduct because of his religious beliefs.” Furthermore, the judge was careful to instruct the jury about the limited purpose of this testimony. The defendant is represented on appeal by Richard E. Mischel of Mischel & Horn, P.C., New York.

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*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.*

**UNITED STATES COURT OF APPEALS – NINTH CIRCUIT** – In September 2019, *Law Notes* reported that the Ninth Circuit had affirmed the injunction requiring Idaho to provide gender confirmation surgery to transgender inmate Andree Edmo, in *Edmo v. Corizon*, 2019 WL 3978329, 20-19 U.S. App. LEXIS 27171 (9<sup>th</sup> Cir. Aug. 23, 2019) (reported September 2019 at pages 1-3). At that time, the

Circuit said that it expected the state to act expeditiously and that it would not grant further delays. On September 9, 2019, the appellants (both the state defendants and Corizon, who was dismissed except for one of their doctors) filed petitions for rehearing *en banc*. Edmo then petitioned to have the stay lifted in part (which had been in effect to halt the District Court’s injunction during the pendency of the expedited appeal). Readers may remember that the Circuit had to address whether Edmo could see her surgeon for pre-operative evaluation during the appeal. The court modified the stay to allow it, and the doctor saw Edmo last April. At that time, he directed that certain pre-surgical procedures had to occur in the months leading up to the surgery as a condition to its success. After winning affirmance of the injunction, Edmo asked Idaho defendants to provide her access to these pre-surgical procedures. The state refused, despite the August Circuit decision. Hence, Edmo had to seek a partial lifting of the stay to permit these pre-surgical events to occur. The state opposed the lifting of any stay until after the disposition of its *en banc* application. Now, in *Edmo v. Corizon, Inc.*, 2019 U.S. App. LEXIS 30419 (9<sup>th</sup> Cir., Oct. 10, 2019), the Court of Appeals (same panel as August: Circuit Judges M. Margaret McKeown and Ronald M. Gould and District Judge – by designation from the W.D. Wash. – Robert S. Lasnik, lifts the stay to allow the pre-surgical preparations to proceed. The petitioners have failed to show “irreparable harm” or “a substantial case on the merits” (after the affirmance), or a balance of hardships tipping “sharply” in their favor.

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**ALABAMA** – This case concerns application of the exception to the “three strikes” limitation of the Prison Litigation Reform Act, which prohibits a prisoner from filing a civil action if the prisoner has on three prior occasions



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had cases dismissed for failure to state a claim, unless the prisoner is currently in “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). In *Payne-Bey v. Ivey*, 2019 U.S. Dist. LEXIS 181530, 2019 WL 5304919 (N.D. Ala., Oct. 21, 2019), U.S. District Judge Madeline Hughes Haikala found that the claims of *pro se* inmate Darrow Bernard Payne-Bey did not meet the “imminent danger” exception. Payne-Bey claimed that conditions in the prison posed an imminent threat to his health and safety. The opinion has extensive discussion of the “imminent danger” exception in the Eleventh Circuit (and a survey of rules in other circuits), the leading case being *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004). In *Brown*, the inmate was allowed to proceed despite three prior strikes because he alleged that interruption of his medication regimens for HIV and hepatitis placed him at serious risk of adverse reactions and longer-term deterioration of his conditions. Taking the Complaint “as a whole,” the “alleged danger of more serious afflictions if he is not treated constitute imminent danger of serious physical injury. That Brown’s illnesses are already serious does not preclude him from arguing that his condition is worsening more rapidly as a result of the complete withdrawal of treatment.” *Id.* at 1349-50. By contrast, Payne-Bey raises conditions of confinement generally and personal deprivations that are sometimes years old. He does not allege “imminent danger” that is current or that is uniquely his. As such, his attempt to invoke the exception to three strikes fails. Mr. Payne-Bey may replead regarding his current complaints of retina tear and “white flashes of light,” but he fails to explain them in his current pleading. The dismissal is without prejudice.

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**CALIFORNIA** – It could have been taken from the scene in *The Shawshank Redemption* (Warner Brothers 1994),

where the corrupt warden threatens to punish inmate Andy Defresne (played by Tim Robbins) by throwing him “in with the Sodomites.” *Pro se* inmate Jesse Willard essentially protests the same fate in *Willard v. California Department of Corrections and Rehabilitation*, 2019 WL 5596387 (E.D. Calif., October 30, 2019). U.S. Magistrate Judge Stanley A. Boone rejected Willard’s case on first screening and gave him 30 days to refile. He did not, and Judge Boone both defaults him and explains his reasoning for screening out the claims. On three occasions, Willard was placed in California’s “central hub for the housing of homosexual inmates,” where he was subjected to “overzealous body searches” and “peculiar comments by staff” – which he learned had “homosexual reference.” Willard claims rumors were spread “that he was homosexual” and “booty.” He was celled with men whom the officers “knew participated in sexually perverse acts.” He was celled “next to a homosexual and a transgender inmate was . . . in the cell directly beneath.” His food tray had “booty boy” carved into it, and food arrived with feces or “bug spray.” Medical staff gave him “lubricant” for a complaint of a scalp condition. Judge Boone recites allegations occurring over the course of seven years, but he notes that those more than two years old are subject to dismissal on limitations grounds. Judge Boone finds no constitutional violation in falsely calling Willard “a homosexual” or housing him “with other homosexual inmates,” because no harm came to Willard. Quoting a Ninth Circuit case that says that the Eighth Amendment does not require that food be “tasty or aesthetically pleasing,” *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993), Judge Boone says it is okay if food is infested with maggots or causes food poisoning, so long as such incidents are “isolated.” *Islam v. Jackson*, 782 F.Supp. 1111, 1114-15 (E.D. Va. 1992); *Bennett v. Misner*, 2004 WL 2091473 at \*20 (D. Ore., Sept.

17, 2004). Verbal harassment and slurs (even false ones) do not state claims for constitutional violations. *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987); *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987). Judge Boone also dismisses on the merits claims about medical care, legal mail, loss of personal property, loss of privileges, transfers, and a challenge to Willard’s criminal sentence. One wonders why Judge Boone includes all of this *dicta* in a case mostly barred on its face by the statute of limitations and defaulted under the prior screening order per *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000). The use of language by the Court seems a couple of decades out of date.

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**CALIFORNIA** – Transgender inmate Rickelldrick White, *pro se*, brought a lawsuit against several corrections officers for excessive force in *White v. Perez*, 2019 U.S. Dist. LEXIS 171420, 2019 WL 4858614 (S.D. Calif., Oct. 2, 2019). U.S. District Judge William Q. Hayes screens her complaint and allows her to proceed. White pleaded a sequence of escalating events. Defendant Officer Perez conducted a “pat down” of White, following by another (more intrusive) clothed search. Perez then demanded that White submit to an unclothed search, and she asked for a sergeant to witness the search, since Perez had become increasingly aggressive. White says the search was more intrusive because she is transgender. [Note: In general, regulations under the Prison Rape Elimination Act require that non-exigent strip searches be conducted by an officer of the same gender as the transgender inmate’s identification. 28 C.F.R. § 115.15. What happened here seems to violate the regulations.] White says that Perez began to “manhandle” her in his third “search.” He then “twisted” her from “side to side,” “slammed” her into the wall, and threw her to the concrete floor. She protested

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that her leg was broken. White said she did not resist at any time. Perez' partner (Rodrin) called in a personal alarm and a team (including a nurse) arrived. White was handcuffed, placed in leg irons, and positioned prone on the ground. She said her leg was "obviously swollen, painful, and deformed." Another officer (Chat) forced her to walk on it after lifting her from the ground and slamming her into the wall again. Several officers on the team and the nurse observed but did not intervene. White says she was dragged to a vehicle and taken to the hospital. After x-rays showed multiple leg fractures, White had emergency surgery. Her leg required a 10" metal plate and 13 pins. She was in the infirmary for 3 ½ months. Judge Hayes found her claims, with attached affidavits, supported a federal lawsuit for excessive force under *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). The bystander officers (and the nurse) remain in the case as defendants for failing to intervene, under *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995). Judge Hayes ordered the defendants to reply to the Complaint, and he directed the Clerk of Court to serve a copy of it on the California Corrections Secretary. If the ER records confirm that this patient arrived at the hospital with a broken leg shackled in irons, there may be more than hell to pay in this case.

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**COLORADO** – The question in *Janny v. Harford*, 2019 WL 4751761 (D. Colo., Sept. 30, 2019), was whether two deputy sheriffs were entitled to qualified immunity for failing to protect jail inmate Mark Janny from assault from another inmate in a holding pen. Chief U.S. District Judge Philip A. Brimmer held that they were, and he granted them summary judgment. Janny's sexual orientation and gender identification are unknown. Janny self-describes as 160 pounds; and the assailant, three inches taller and 150 pounds heavier. The assailant also had a psychiatric

history known to the jail, although it did not involve assaults on other inmates. Nevertheless, the assailant's jail records say that he "could be a threat to the safety and security of the facility as he might hurt someone if placed in an enclosed area with other inmates." The pleadings indicate no emergency room visit, and the damages sought (\$15,000) are relatively small. Janny did not allege asking to be moved or the defendants' ignoring prior threats from the assailant that Janny reported. Judge Brimmer does not address whether Janny's constitutional rights have been violated, electing to proceed on the second arm of qualified immunity: whether the law clearly established Janny's right to be protected under these circumstances. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (judge may proceed under either test first). While there need not be a prior controlling case directly on point for the law to be clearly established, the legal question cannot be addressed on "too high a level of generality." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Judge Brimmer found that Janny sought to rely too much on "generalized" law and that the absence of prior assaultive behavior or threats from the assailant was fatal, notwithstanding the file note that "he might hurt someone." The decision has a survey of Tenth Circuit law, but Judge Brimmer primarily relies on in *Perry v. Durborow*, 892 F.3d 1116, 1124 (10th Cir. 2018). *Perry* involved whether the sheriff could be liable for a male officer's raping a female inmate, because his management of the jail made this more likely. The Tenth Circuit reversed a district judge's denial of qualified immunity. Although Judge Brimmer's opinion is probably not reversible, in this writer's view the decision could have gone either way. It is unfortunate that Judge Brimmer does not differentiate between cases involving excessive force and those claiming failure to protect – or those suing line defendants versus supervisory ones. Each are derived from separate authority with different state

of mind requirements that the plaintiff must show. Full exposition is beyond the scope of this article – but, in general, excessive force cases often involve admitted conduct with a justification defense based on the need to take split-second action – by contrast, failure to protect usually occurs over time, and the facts (like here) are often sharply disputed. LGBT prisoners often face bullying or worse in prisons and jails. Advocates for their safety should read this case carefully. Unlike the facts in *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), where the transgender plaintiff was a small person and an "obvious" target that justified an inference of deliberate indifference, Janny did not seek to base the failure to protect here on group membership or obvious vulnerability. The prescient warning about the assailant was not enough. Janny was represented by Hassan & Cobler, LLC, Boulder.

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**ILLINOIS** – *Pro se* inmate Caleb Charleston alleges that he was stabbed by other inmates in the yard who used concealed shanks, that he was abusively cuffed after he was injured, and that he was denied medical care for his injuries – in *Charleston v. Jones*, 2019 U.S. Dist. LEXIS 171149 (S.D. Ill., Oct. 2, 2019). Senior U.S. District Judge Philip G. Reinhard (of the Northern District of Illinois, sitting by designation) allows Charleston to proceed on three claims (which, following usual S.D. Illinois practice, he organizes in his opinion). The first claim is for deliberate indifference to Charleston's safety by failing to protect him. Judge Reinhard finds that allegations that the shanks slipped undetected into the yard fail to state a claim because there is no allegation that John Doe defendants were indifferent to this risk. It amounts to no more than negligence under *Grieverson v. Anderson*, 538 F.3d 763, 777 (7th Cir. 2008); *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir.

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2006). Claims against John Does 1-6 are therefore dismissed. Claims against John Does 7-10 (and against the warden) remain, because Charleston alleges that he told them about the shanks when he was threatened with them, and they remained behind a fence. They laughed at him and “taunted him with racial and homosexual slurs.” Charleston plead that he was stabbed while the officers and the warden watched. The judge provides a good survey of Seventh Circuit law on failure to protect. The second claim involves named defendants who, despite his stab wound to his arm, directed to “cuff him extra tight” behind his back. “Because security measures as ordinary as handcuffs can still be used in ways that violate the constitution, Count 2 survives screening. *See Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding that prisoner’s allegations, including that he suffered unnecessary pain while handcuffed for seven hours, were sufficient to state Eighth Amendment violation).” The third claim involves failure to treat his arm injury. Charleston alleges that he was never seen by a doctor, although his arm continued to bleed for over a week, with numbness, pain, swelling, immobility, and discoloration. The warden and John Does 11-12 remain on this count. Judge Reinhard dismisses claims without prejudice against the contractual provider (Wexford), since Charleston does not explain these claims in the body of the Complaint. As to the John Doe defendants, Charleston is to be given “the opportunity to engage in limited discovery to ascertain their identity,” citing *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 832 (7th Cir. 2009). The current warden of the subject correctional facility is to be made a party for this purpose, in his official capacity only. Defendants are to accept process, or the warden is to provide their home addresses to the Clerk of Court *in camera*. Perhaps Judge Reinhard will take the Southern District of Illinois’ organizations skills home with him when he returns to Chicago.

**LOUISIANA** – Wow! A *pro se* transgender inmate wins an emergency TRO in federal court to keep The Farm from cutting her hair in *Clark v. LeBlanc*, 2019 U.S. Dist. LEXIS 176781, 2019 WL 5085425 (M.D. La., Oct. 10, 2019). In one terse swoop, U.S. District Judge Brian A. Jackson grants a restraining order against the Louisiana DOC and its Angola Warden, James LeBlanc, to enjoin them from cutting the hair of Robert Clark unless she consents. They were going to hold her down and cut her hair involuntarily and then send her to segregation for violating prison rules. The TRO was issued without prior notice or service. Judge Jackson’s very brief opinion begins rather quaintly: “Plaintiff has been diagnosed with a medical condition known today as ‘gender dysphoria.’” He writes that he cannot ascertain from the pleadings whether the state has provided a “standard of care” for Clark, but he notes that she has been trying to obtain hormones and feminizing treatment since 2016, with multiple attempts at suicide and auto-castration. Louisiana has a gender dysphoria treatment team, but it is unclear whether they have addressed Clark’s needs, which Judge Jackson finds to be serious under the DSM-V. He said counseling cannot be the only treatment under the Fifth Circuit’s recent decision in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019). [Note: Although most transgender prisoner advocates see *Gibson* as a loss because it affirmed denial of an injunction for confirmation surgery on a bad record, it is used here to compare the care being received by Gibson with that being denied to Clark. Point taken: Some of these institutions are truly backwaters for transgender inmates in the first and second triads of care, who can access almost nothing.] Judge Jackson notes that an injunction against cutting Clark’s hair preserves the status quo for her, at almost no burden for the state. Even considering the state’s interests, the threat of irreparable injury to Clark from cutting her long hair

substantially “outweighs” any harm to the state by allowing her to maintain it. “Furthermore, there is no indication that allowing Plaintiff to maintain long hair will disserve the public interest. The Court does not contemplate that any monetary costs will be incurred at this time, and public interest weighs in favor of providing Plaintiff with treatment within the acceptable standards of care. As such, these factors weigh in favor of granting Plaintiff’s Request.” A hearing at the federal courthouse in Baton Rouge, with Clark to be present, was set for October 22, 2019. The Louisiana DOC was served with the TRO by federal marshals on October 17, 2019. *Law Notes* will follow this one with close scrutiny.

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**MISSOURI** – U.S. District Judge Henry Edward Autrey dismisses transgender prisoner Dwayne Robison’s *pro se* complaint as being “duplicative” of other litigation and as failing to state a claim for deliberate indifference to her mental health needs in *Robison v. McIntyre*, 2019 U.S. Dist. LEXIS 174998, 2019 WL 5066724 (E.D. Mo., Oct. 9, 2019). This case is one of twelve civil actions that Robison has filed about her treatment since May of 2019. Judge Autrey finds it duplicative and subject to dismissal under *Durbin v. Jefferson Nat’l Bank*, 793 F.2d, 1541, 1151 (11th Cir. 1986). To the extent there are some new claims, they relate to earlier lawsuits and can be litigated in them. *Aziz v. Burrows*, 976 F.2d 1158, 1159 (8th Cir. 1992). Robison does not specify what mental health treatment is being denied, although she complains about assignment to a single cell. She attached the paperwork from several grievances to her complaint, which Judge Autrey considers, to her detriment. According to the documents, Robison was seen by a psychiatrist three times and by a “qualified mental health professional” thirty times over a seven-month period. Judge Autrey finds such frequency inconsistent with “deliberate

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indifference” (the 8th Amendment standard) without specific examples of denials of care. Moreover, the grievance responses indicate that after considering Robison’s “history of mental health issues, suicide attempts, self-reported sexual activities, and safety and security concerns,” staff determined that it was in her “best interest and for [her] own safety and security” that she be single-celled. Judge Autrey found Robison’s allegation that the single cell decision was based on transphobic animus to be speculative, despite the use of verbal slurs by some defendants. The dismissal is without prejudice.

**OHIO** – *Pro se* prisoner William H. Evans, Jr., is a white supremacist, who claims Ohio correctional officials are harassing him by celling him with black gay prisoners, thereby violating his freedom of religion and failing to accommodate his “disability.” U.S. District Judge Benita Y. Pearson dismissed his federal claims in *Evans v. Larose*, 2019 U.S. Dist. LEXIS 189147 (N.D. Ohio, October 31, 2019), and she sent whatever state law claims he may have back to state court, where the case was originally filed. Judge Pearson dismissed claims under the Americans with Disabilities Act and the Rehabilitation Act because Evans does not specify his “disability” or how he has been discriminated against “because of” it. *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015). His constitutional claims are likewise not “plausible” on their face. While Evans’ white supremacy views caused him to be classified as a member of a correctional “threat group,” this was not an “atypical and significant hardship” and he has no right to a specific security classification. *Harbin-Bey v. Rutter*, 420 F.3d 571, 577 (6th Cir. 2005). As to double-celling, a prisoner “has no constitutional right to choose who he shares his cell with based on another prisoner’s race, religion, or sexual orientation” [annotated string

citations omitted]. As to protection from harm, there is no evidence that a risk of serious harm actually existed “other than the perceived danger conjured up by [plaintiff’s] blatant racism,” quoting *Curtician v. Kessler*, 2009 U.S. Dist. LEXIS 69239, 2009 WL 2448106, at \*8 (W.D. Pa. Aug. 7, 2009). Finally, there is no claim for First Amendment “retaliation,” because Evans has not shown that he was chilled in, or punished for, exercise of any constitutionally protected activity.

**PENNSYLVANIA** – HIV-positive jail inmate William Johnakin, *pro se*, sued for violation of his civil rights in *Johnakin v. Berringer*, 2019 U.S. Dist. LEXIS 170314, 2019 WL 4857850 (E.D. Pa., Sept. 30, 2019), for claims arising out of revocation of parole and denial of HIV medication in the county jail. U.S. District Judge Petrese B. Tucker dismisses the case on screening, without prejudice as to some claims. Johnakin pleaded guilty to time served for a felony, and he was placed on parole, after which he failed a drug test. As a result of the test results, his parole officer directed him to enroll in drug counseling. Johnakin protested, saying that his health insurance plan did not cover such counseling. The parole officer told Johnakin to change health plans or to pay for counseling out of pocket – or the officer would find a violation of his parole. When Johnakin did neither, his parole was violated and he was confined in the county jail. His lawsuit challenged the authority for imposing these conditions and for denial of HIV medication once inside the jail. (Judge Tucker notes that Johnakin may have incurred new charges leading to a violation of parole, but this point is not material to his disposition.) Judge Tucker dismisses with prejudice Johnakin’s claim that delegation of authority to parole officers to direct a change in a parolee’s health care plan is deliberate indifference to his serious needs. Judge

Tucker finds no allegation of pattern and practice sufficient to keep the county or its supervisors in the case. Moreover, it does not appear that the parole officer directed that Johnakin change health plans, merely that he obtain counseling. The jail’s private vendor for health care (PrimeCare) is also dismissed because there is no allegation that any denial of HIV meds in the jail was part of a pattern and practice, citing *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 583-83 (3d Cir. 2003). Johnakin named no individual health care provider defendants in the jail. The pattern and practice claims against the county and the private vendor under *Monell v. New York City Dept. of Soc. Services*, 436 U.S. 658, 694 (1978), are dismissed without prejudice. Johnakin also sought to hold the parole officer individually liable. Judge Tucker dismisses the deliberate indifference to serious health care needs argument with prejudice as “implausible.” The officer did not deny HIV care, either during parole or after reincarceration. At most, the claim is that the officer was indifferent to insurance coverage, which is not actionable. [Note: From the opinion, one cannot untangle Johnakin’s argument that he had to drop coverage for HIV to obtain drug counseling; why he could not obtain free drug counseling in the community or find a source acceptable to his parole officer; how changing his plan would solve this “problem”; or why a new plan would also not cover HIV, since pre-existing condition rules are still banned by Obamacare.] Judge Tucker dismisses without prejudice Johnakin’s claim that the parole officer committed a constitutional tort by maliciously revoking his parole, since this appears to amount to a challenge to fact or duration of confinement, which can be brought only by a petition for habeas corpus and not under 42 U.S.C. § 1983, citing *Heck v. Humphrey*, 512 U.S. 477 (1994); *Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006). Johnakin can try to replead.



# PRISONER LITIGATION *notes*

**TENNESSEE** – Transgender inmate Teddy King Salse, Jr., *pro se*, was assaulted by another inmate, and she sued multiple defendants for failure to protect her in *Salse v. Phillips*, 2019 U.S. Dist. LEXIS 180334, 2019 WL 5310213 (W.D. Tenn., Oct. 18, 2019). Senior U.S. District Judge James D. Todd dismissed all but one of the defendants (officer Decker). According to the allegations, inmate Brown had been stalking Salse, and Salse had complained to Decker, asking him not to tell Brown because Salse was afraid of Brown. Decker told Brown, but he did not move Brown off Salse's unit. Brown threatened Salse, and the threats escalated to violence. Salse informed Decker, who said he would "take care of it." Brown responded by trying to choke Salse, who reported this to Decker. By the fourth day, with Salse and Brown still housed in the same unit and Decker aware of the claimed risk, Brown stabbed Salse repeatedly. Salse was taken to the local emergency room, which transferred her to a higher-level trauma facility in Memphis, where she had intestinal surgery to close internal wounds. Judge Todd found that Salse failed to "allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right" under *Marcilis v. Twp. of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012). Thus, all defendants are dismissed, except for Decker, against whom a claim is stated under *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994); and *Carico v. Benton, Ireland, & Stovall*, 68 F. App'x 632, 639 (6th Cir. 2003). Judge Todd declined Salse's request to amend her complaint to add Brown as a defendant, since Brown, as an inmate, is not a "state actor" for purposes of § 1983. There is no discussion of joining him for pendent claims of assault and battery under Tennessee law – or of supplemental jurisdiction under 28 U.S.C. § 1367(a). Finally, Judge Todd denied counsel. Noting Salse's argument that she was about to be released and would likely

become homeless and not have access even to jailhouse lawyers, Judge Todd said she could renew her application for counsel at that time.

**WISCONSIN** – Gay and black *pro se* inmate Will Haywood claims discrimination by a civilian food services employee (Chef Streekstra) because Streekstra allegedly: (1) pushed a food tray toward Haywood in a way that "hurt" his hand; and (2) suggested that Haywood and another inmate were "with" each other, implying that they were sexually involved. U.S. District Judge Pamela Pepper dismissed all claims in *Haywood v. Streekstra*, 2019 U.S. Dist. LEXIS 178954 (E.D. Wisc., Oct. 16, 2019). The food tray incident does not meet the "unnecessary" and "wanton" infliction of pain standard for staff assault on an inmate under *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *DeWalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 2000). While "significant injury" is not required, the alleged "assault" with the food tray does not pass the *de minimis* test. As to the comments, "even assuming the defendant was verbally harassing the plaintiff because he is gay," the verbal abuse "alone" does not constitute cruel and unusual punishment or violate the equal protection clause. [Note: The Seventh Circuit has a "verbal abuse plus" test, making actionable remarks that cause concrete harm, such as placing the recipient of the remarks in danger. See *Beal v. Foster*, 803 F.3d 356, 357 (7th Cir. 2015).] Judge Pepper assesses a "strike" under the Prison Litigation Reform Act.

**WISCONSIN** – *Pro se* transgender inmate Anastasia S. Jackson sued prisons officials for denying her "adequate" transgender medical treatment and for refusing to assign her to a single cell or to a cell with other transgender inmates in *Jackson v. Kallas*, 2019 U.S. Dist. LEXIS 176164 (W.D. Wisc., Oct. 10,

2019). She sued under the Eighth and Fourteenth Amendments, the latter claims sounding in Equal Protection. U.S. District Judge Barbara B. Crabb stayed proceedings pending resolution of an interlocutory appeal in a different case (*Campbell*) raising similar issues. In *Campbell*, the Seventh Circuit found that the defendants were entitled to qualified immunity on damages claims for refusing gender 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) (*Law Notes*, September 2019 at page 5). [Note: Dr. Kevin Kallas seems to be ubiquitous in Wisconsin transgender prisoner litigation. Last year, he was denied qualified immunity for refusing hormone therapy under a "blanket rule" in *Mitchell v. Kallas*, 895 F.3d 492 (7th Cir. 2018).] Given the procedural turns in *Campbell*, Judge Crabb determined that a stay of Jackson's case was no longer appropriate. She then considered Jackson's request for appointment of counsel, and she found that counsel should be appointed under the standards of *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). Jackson had made reasonable (but unsuccessful) efforts to find counsel, and her case is "likely to be too complex for plaintiff to handle on her own."



# PRISONER LITIGATION *commentary*

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## Protecting Transgender Rights in Prison Cellblocks and Military Barracks – A Commentary

By William J. Rold

We tend to use as test plaintiffs in prison and military transgender cases the most self-destructive dysphoric inmates and the most well-adjusted soldiers. The law, as it has developed, forces these choices. If not carefully managed, however, there could be an unfortunate collision.

In the military, we oppose the transgender ban by challenging the arguments about readiness, emphasizing that trans soldiers are fully able to serve. In prison, we argue that trans inmates' serious medical needs are neglected by denying them hormones, emphasizing their dysfunction without them.

In short, by stressing the healthy trans soldier and the sick trans inmate, we approach securing their rights from opposite directions. Perhaps this is inherent in what some call the compromise in the DSM-V – saying that trans people are not inherently sick but baking anxiety and dysfunction into the diagnosis of gender dysphoria.

As advocates, we seek to justify an injunction in prison by proving acute anxiety, self-harm, and inability to function, because there is no middle ground of accommodation for a mostly well-adjusted transgender person in prison. While “many transgender people may be perfectly at ease and even rejoice in their own skin” – *Keohane v. Jones*, 328 F.Supp.3d 1288, 2194 (N.D. Fla 2018) – the Eighth Amendment guarantees them no rights. Plaintiffs therefore seek the dysphoria diagnosis as a means of obtaining any medical/mental health services – or a safe environment – or just the ability to present one's self in everyday life.

In the military, the Trump Administration's latest iteration of the

transgender ban uses the diagnosis to swallow up the transgender person. In a redux of “don't ask; don't tell” for trans soldiers, it assumes that anyone who is in transition must be dysphoric under the DSM-V and therefore unfit.

These two approaches create a Venn Diagram overlap of severely dysphoric people who are likely to be miserable prisoners and bad soldiers. We should not allow defendants to place transgender people in this scissors or accept this “worse of both worlds” fate for our clients.

There are key differences between prisons and the military. We no longer draft people, so military service is optional; prison is not. Moreover, transgender people with a military calling likely accept the notion of some degree of regimentation in their lives. Prisons are inherently coercive institutions; and acceptance is irrelevant, because misbehavior can result in solitary confinement.

In addition to remembering these distinctions, we should refocus correctional arguments to include the healing model, not just the disordered one. Currently, this works better in the military cases than it does in the prison cases. Eighth Amendment litigation focuses on the elimination of suffering, not on accommodating differences. But, we can start.

It is important to include First Amendment and Equal Protection arguments in prison cases along with Eighth Amendment claims, even if they are not yet widely accepted. The screening decision in *Hansen v. Badure*, 2019 U.S. Dist. LEXIS 178716 (D.S.D., Oct. 16, 2019) (article this issue of *Law Notes*), allows the transgender prisoner to proceed on all three theories. In *Lucas v. Chalk*, 2019 U.S. App. LEXIS 24561 (6<sup>th</sup> Cir., Aug. 19, 2019) (reported last issue of *Law Notes*), the court found that denial of mental health care to a bisexual inmate after two rapes stated claims under both the Cruel and Unusual Punishment and the Equal Protection Clauses.

In prison cases, as we have in military cases, we need to get judges to think about transgender *people*, not just disorders and dysfunction. We need to normalize transgender identification. Under the Equal Protection Clause, why should states be permitted to create “transgender treatment committees” for these patients and not for patients with diabetes, renal failure, heart disease, etc.? Why should the First Amendment not support transgender expression? Forcing defendants to articulate justifications for facial violation of the First and Fourteenth Amendments will smoke out bias and pretext in a way the disorder-obsessed Eighth Amendment cannot. ■



# LEGISLATIVE & ADMINISTRATIVE *notes*

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## LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

**UNITED STATES DEPARTMENT OF STATE** – The Trump Administration began denying visas to the unmarried same-sex partners of foreign diplomats and officials and employees of the United Nations beginning on September 30, making marriage a requirement for obtaining a spousal visa. The Obama Administration had authorized issuance of visas to non-married partners, a practice that was continued until the end of this September. The change was detailed in a memo that was circulated in United Nations headquarters. Under the policy, those now in the country on partner visas must marry before the end of 2019 to retain their visas, even though their home countries may not recognize the marriage. (Local residence and citizenship is not required to marry within the United States.) In a briefing on October 1, the State Department said the policy would affect about 105 families in the United States, 55 of which have links to various international organizations. Only 12% of the 193 U.N. member countries represented at U.N. headquarters in New York allow same-sex marriages. The Trump Administration said this policy is consistent with the Obergefell decision, pointing out that unmarried heterosexual partners of foreign diplomats and U.N. employees are also not eligible for U.S. visas. On October 4, 120 Democratic House of Representatives members sent a letter to Secretary Pompeo asking the administration to reverse this decision and restore the prior policy. *USA Today*, October 2 and 5.

**CALIFORNIA** – Governor Gavin Newsom has signed into law on October 2 SB 159, which will authorize pharmacies to furnish PrEP medication

with a prescription, as a key step in California's efforts to curtail the spread of HIV. PrEP, taken according to directions, has been shown to sharply reduce the risk of transmission, even without the use of barrier contraceptives, although PrEP users are encouraged to continue using condoms to avoid transmitting other STDs, which continue to be present in epidemic proportions. The measure passed both chambers of the legislature with nearly unanimous bipartisan support. Needing to get a prescription from a doctor had proved a significant barrier to attaining a high level of PrEP use among sexually active men. The measure was co-sponsored by out gay legislators Scott Wiener (Senator from San Francisco) and Todd Gloria (Assemblymember from San Diego).

**CHINA – HONG KONG** – The Court of First Instance rejected a challenge to the ban on same-sex marriage in Hong Kong, which is a semi-autonomous part of the People's Republic of China. Wrote Judge Anderson Chow, in response to a legal challenge by a woman who sought to marry her same-sex partner, "The evidence before the court is not, in my view, sufficiently strong or compelling to demonstrate that the changing or contemporary social needs and circumstances in Hong Kong are such as would require the word 'marriage' in Basic Law Article 27 to be read as including a marriage between two person of the same sex." He also indicated that there is no requirement for the government to adopt a civil union regime for same-sex couples. *GayCityNews.com*, Oct. 18.

**GEORGIA** – State Representative Ginny Ehrhart (R-Powder Springs) announced plans to introduce a bill called the "Vulnerable Children Protection Act," which would make it a felony to change a child's gender through surgery or drugs. She issued a news release on

October 30 to announce her sponsorship of the bill, for consideration during the Georgia legislative session that begins in January. The bill would prohibit all forms of "drug" treatment, including administration of medication that cause infertility or block or delay "normal" puberty, according to the news release, as well as any administration of sex hormones for the purpose of gender transition. It would also prohibit the surgical removal of any healthy body part. Ehrhart insisted that she did not intend to deprive any adult of the right to transition, but wanted to protect minors, claiming that such "child abuse" is "becoming a serious problem in Georgia and is evolving into a national crisis. While not citing any data, she claimed that she "knows several parents and families in Georgia who have aided gender changes or transitions for their children under the age of 18 and had a hard time of it." She also claimed to know of some doctors in Georgia who are willing to provide such surgical and medical treatment. *Marietta Daily Journal*, Oct. 30.

**KENTUCKY** – Versailles's city council passed a Fairness Ordinance by a vote of 3-2 on October 1 that prohibits sexual orientation or gender identity discrimination in employment, housing and public accommodations. Versailles became the fourth Kentucky city to adopt such a measure during 2019, and became the 14<sup>th</sup> city in the state to do so. A state Fairness Law has been pending in the legislature for twenty years.

**MISSISSIPPI** – Holly Spring, Mississippi, is the fourth city in the state to include sexual orientation and gender identity as part of a city-wide anti-discrimination ordinance covering housing, public accommodations and employment. Other cities providing similar protection are Jackson, Magnolia, and Clarksdale. The city has

# LAW & SOCIETY/INTERNATIONAL *notes*

a population of almost 8,000 residents, nearly 80 percent of whom are of African descent. *Targeted News Service*, Oct. 18.

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**PENNSYLVANIA** – Philadelphia Mayor Jim Kenney signed into law on October 31 a bill requiring youth organizations to implement policies that protect young people who are transgender, according to a report by the *CBS Philadelphia* affiliate.

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**UTAH** – The state's Commerce/Division of Occupational and Professional Licensing proposed a new rule on Unprofessional Conduct, providing that among violations that can incur professional sanctions would be "engaging in, or attempting to engage in the practice of sexual orientation change efforts or gender identity change efforts with a client who is less than 18 years old." The proposed rule was filed on September 3 and opened to comments until October 15.

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**VIRGINIA** – The Loudoun County school board on September 24 approved a resolution condemning white supremacy, hate speech, and hate crimes against many designated minority groups, including LGBT people, according to an October 3 report by the *Washington Blade*.

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

**HUMAN RIGHTS CAMPAIGN**, a national LGBTQ rights advocacy organization that was originally founded as Human Rights Campaign Fund to do lobbying, support legislative efforts, and encourage LGBT-supportive political candidates, has announced that it is expanding its mission to include legal advocacy, in partnership with major law

firms. HRC's new president, Alphonso David, is a lawyer who was a staff attorney at Lambda Legal and served for many years in the administration of New York Governor Andrew Cuomo, most recently as Counsel to the governor. He played a leading role in coordinating efforts for successful enacting of New York's Marriage Equality Act. In the announcement, David said: "By adding domestic and international impact litigation to our approach, we will wield a critical tool to fight against oppressive legislative and policy measures through the courts." The October 4 announcement listed Akin Gump Strauss Hauer & Feld, BakerHostetler, Linklaters, Sidley Austin, Steptoe & Johnson LLP, and Winston & Strawn as partners with HRC for domestic litigation, and Clifford Chance for international litigation. The announcement noted that these firms had been participating amicus briefs in major LGBTQ rights cases including Obergefell, Gloucester County School District (Gavin Grimm), Masterpiece Cakeshop, and the Title VII cases now pending in the Supreme Court. HRC claims to be the largest LGBTQ civil rights organization in the world

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## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**BRAZIL** – The Bolsonaro Administration had halted funding for about 80 films, including a few with LGBT themes, but a lawsuit brought an order from a federal judge requiring that the funds that had been designated in grants be released. Judge Laura Carvalho granted an injunction against the government, writing: "Freedom of expression, equality and non-discrimination deserve the protection of the Judiciary power." This follows on a ruling in June by Brazil's Supreme Court that homophobia and transphobia are criminal, according to the article reporting this development, *openlynews.com*, October 8.

**COLOMBIA** – Out lesbian Claudia Lopez was elected mayor of Bogota, the largest city in the country, on October 27. This position is considered second in importance only to the president of the country, according to a CNN on-line report. She won election with 35.21% of the vote, edging second-place finisher Carlos Galan, who received 32.5% of the vote.

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**MAURITIUS** – A complaint was filed in court in the island of Mauritius, an island republic off Africa's southeast coast, challenging the colonial-era law against gay sex. Under the criminal code, consensual sodomy can be punishable by up to five years in jail. The application for a declaration of unconstitutional was filed in the Supreme Court on September 6 by four plaintiffs alleging a violation of their constitutional rights and freedoms, and stating that the law is inconsistent with the country's equal opportunity act, which prohibits sexual orientation discrimination. *Reuters*, Oct. 1.

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**MEXICO** – On October 4, State Congressmembers in Puebla State, which has had marriage equality de facto since the Supreme court ruled its ban unconstitutional in 2017, have refused to codify this into statutory law, which may cause problems with couples applying to civil-registry officials for licenses to marry.

**Taiwan** – LGBT rights advocates in Taiwan are arguing to expand the scope of the marriage equality law recently enacted. Under the law, Taiwanese nationals can marry only nationals of countries that recognize same-sex marriages, which has already resulted in denial of the right to marry to several transnational couples. *Macaubusiness.com*, Oct. 6.



# PROFESSIONAL *notes*

**UGANDA** – On again, off again? The draconian “Kill the Gays” bill was back, according to headlines early in October. The bill, which drastically increased penalties for homosexual activity, including the death penalty in some cases, had been approved by the legislature but was stricken five years ago by the country’s highest court, which found flaws in the enactment procedure (not with the substance). Ethics and Integrity Minister Simon Lokodo told Thomson Reuters Foundation’s reporter, “Homosexuality is not natural to Ugandans, but there has been a massive recruitment by gay people in schools, and especially among the youth, where they are promoting the falsehood that people are born like that. Our current penal law is limited. It only criminalizes the act. We want it made clear that anyone who is even involved in promotion and recruitment has to be criminalized. Those that do grave acts will be given the death sentence.” Press coverage of the announcement, including quotations of support from the bill from several of the usual voices, stimulated panic but also invoked a clarification from the government that Minister Lokodo’s comments did not have official authorization, and there was some doubt whether the bill as previously enacted was going to be reintroduced, according to a spokesperson for President Yoweri Museveni, saying “We have the penal code that already handles issues of unnatural sexual behavior so there is no law coming up.” But just a few weeks later, the *Guardian* reported on Oct. 24 that authorities announced the arrest of 16 LGBT activists “on suspicion of gay sex,” which is punishable by up to life imprisonment. The mainly young men were taken into custody on October 21 “at the office of a sexual health charity where they all worked and lived,” according to the news report. A police spokesman said that the men had been subjected to medical examinations. “Based on the medical examination

report, it was established that the suspects were involved in sexual acts punishable under the penal code,” and the state attorney was considering whether to bring formal charges.

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## **UNITED KINGDOM – SCOTLAND**

– A law went into effect on October 15 under which gay and bisexual men who were prosecuted for consensual same-sex activity will receive an automatic pardon. The law will cover anyone convicted for activity that is no longer illegal. Those affected can apply to have their former police records “disregarded” or “wiped clean.” However, the law provides no compensation. First Minister Nicola Sturgeon offered a public apology to those convicted for a “historic wrong” when the draft law was first published in 2017. It was enacted by unanimous vote of the Scottish Parliament in 2018. *Openlynews.com*, Oct. 15.

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## **PROFESSIONAL NOTES**

*By Arthur S. Leonard*

**LAMBDA LEGAL**’s board of directors decided to go outside the legal profession for their new executive director: **KEVIN JENNINGS**, who is president of the Tenement Museum in New York City. Jennings is a founder of the Gay, Lesbian and Straight Education Network (GLSEN), and has had a distinguished public interest and public service career as an organizational leader and chief executive. He served as Assistant Secretary of Education during the Obama Administration and then became head of the Arcus Foundation, the world’s largest foundation for LGBTQ rights. He is the author of seven books and has been actively engaged in non-profit and community causes, as present or past board member and or chair at the Ubunye Challenge and Muslims for Progressive Values, the

Harvard Alumni Association, Union Theological Seminary, Marjorie’s Fund, You Can Play Project, Tectonic Theater Project, and the Pride Fund of the Connecticut Community Foundation. He is a graduate of Harvard College, and holds a Masters of Education from Columbia University’s Teachers college and an MBA from NYU’s Stern School of Business. Jennings will start at Lambda on December 2. Lambda’s Interim CEO, Richard Burns, will stay on through January 2020 to ensure a smooth leadership transition.

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The **ASSOC. OF AMERICAN LAW SCHOOLS SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES EXECUTIVE COMMITTEE** announced that the inaugural recipient of the Section’s LGBTQ+ Inclusive Excellence Award will be given to **SUSAN HAZELDEAN** of Brooklyn Law School, so founded and directs the LGBT Advocacy Clinic at Brooklyn Law School, which has achieved some historic results in representing LGBTQ people in legal disputes.



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2. Bilotta, Isabel, Abby Corrington, Saaed A. Mendoza, Ivy Watson, and Eden King, How Subtle Bias Infects the Law, 5 Ann. Rev. L. & Soc. Sci. 227 (2019).
3. Chiarello, Elizabeth, Law, Morality, and Health Care Professionals: A Multilevel Framework, 15 Ann. Rev. L. & Soc. Sci. 117 (2019) (includes discussion about treatment of transgender patients).
4. Clarke, Jessica A., How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong, 98 Tex. L. Rev. Online 83 (2019).
5. Fetter-Harrott, Allison, Janet R. Decker and Suzanne Eckes, Sex Discrimination in Schools: Has Change in Administration Meant Change in Protections for Transgender Students and Educators?, 44 U. Dayton L. Rev. 455 (Summer 2019).
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8. Gerber, Paula, and Claerwen O'Hara, Teaching Law Students about Sexual Orientation, Gender Identity and Intersex Status within Human Rights Law: Seven Principles for Curriculum Design and Pedagogy, 68 J. Legal Ed. 416 (Winter 2019).
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11. Kochman, Randi W., and Marissa A. Mastroianna, Free to Discriminate? The Intersection of Law and Religion Within Religious Institutions, 320-OCT N.J. Law. 44 (Oct. 2019).
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14. Nelson, Robert L., Ioana Sendroiu, Ronit Dinovitzer, and Meghan Dawe, Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace, 44 Law & Soc. Inquiry 1051 (Nov. 2019).
15. Sciallo, Nick J., Queer Phenomenology in Law: A Critical Theory of Orientation, 39 Pace L. Rev. 667 (Summer 2019).
16. Sungaila, Mary-Christine, and Marco A. Pulido, LGBT Rights After Justice Kennedy: A Preview of the Three Title VII Cases Slated for the October 2019 U.S. Supreme Court Term, 61-OCT Orange County Law. 36, Orange County Lawyer (October, 2019).
17. Tapu, Ian F., and Rebecca A. Copeland, Cultural Competency in Hawai'i: Affirming Gender Identity and Expression, 23-OCT Haw. B.J. 20 (Oct. 2019).
18. Trowbridge, David L., Engaging Hearts and Minds: How and Why Legal Organizations Use Public Education, 44 Law & Soc. Inquiry 1196 (Nov. 2019).
19. Waldman, Ari Ezra, Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities, 44 Law & Soc. Inquiry 987 (Nov. 2019).
20. Walker, Lindsey M., Genital Exceptionalism Has No Place in the Law: Improving Transgender and Intersex Rights in the 21st Century, 97 Wash. U. L. Rev. 245 (2019).
21. Zafran, Ruth, and Daphna Hacker, Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study, 44 Law & Soc. Inquiry 1141 (Nov. 2019).

## EDITOR'S NOTES

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

