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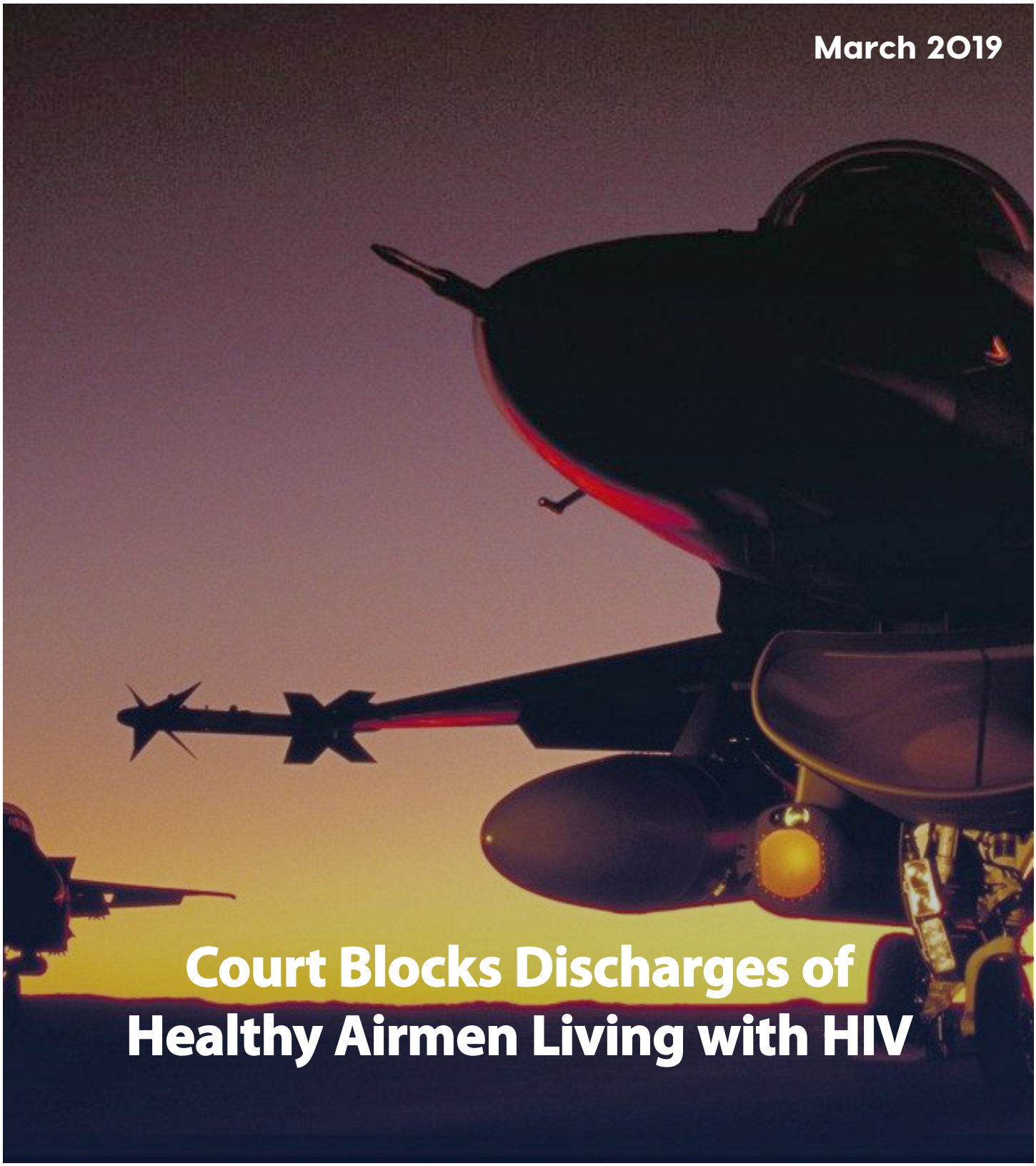

March 2019

Court Blocks Discharges of Healthy Airmen Living with HIV

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ISSN

8755-9021

Cover photo by Lockheed Martin

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EXECUTIVE SUMMARY

Federal Court Blocks Discharges of Healthy Airmen Living with HIV

By Arthur S. Leonard

U.S. District Judge Leonie M. Brinkema refused to dismiss a lawsuit challenging the Air Force's refusal to allow healthy Airmen living with HIV to deploy to combat zones and continue serving, and issued a preliminary injunction blocking discharges pending a final ruling on the merits in a pending lawsuit. Brinkema's February 15 ruling in *Roe v. Shanahan*, 2019 U.S. Dist. LEXIS 25419, 2019 WL 643971 (E.D. Va.), found that the plaintiffs – two Airmen living with HIV and OutServe-SLDN, an organization for LGBT service members and veterans representing other service members living with HIV – have "made a strong preliminary showing that the deployment policy applied to asymptomatic HIV-positive servicemembers cannot withstand rational basis review."

The preliminary injunction prohibits the defendants "from separating or discharging from military service Richard Roe, Victor Voe, and any other similarly situated active-duty member of the Air Force because they are classified as ineligible for worldwide deployment or deployment to the United States Central Command ('CENTCOM') area due to their HIV-positive status."

Soon after Donald Trump took office and James Mattis became Secretary of Defense, it became clear that the Pentagon was going to reverse course and systematically dismiss uniformed personnel who were living with HIV, regardless of the state of their health. Although a literal interpretation of Defense Department regulations would suggest that those who are thriving on anti-retroviral regimens should be able to serve virtually without limitation, the new regime in the Defense Department hierarchy began rendering seemingly inexplicable decisions, determined to discharge highly functioning personnel. Although this reason was not openly advanced by the defendants or alluded to by the judge, one suspects that the decision may well have been motivated, at least in part, by a desire to avoid the costs of providing expensive medications to the servicemembers involved.

The cases of the two plaintiffs, proceeding anonymously as Richard Roe and Victor Voe, well illustrate the bizarre situation. Both men enlisted in the Air Force during President Barack Obama's first term, after the "Don't Ask, Don't Tell" policy had been repealed. Both had very successful careers until they were diagnosed as HIV-positive in 2017. Although both men, complaint with their treatment regimen, have undetectable viral loads and no measurable impairments, their careers have been side-lined and their hopes for promotions and overseas deployments stymied.

Both men had been deployed overseas prior to their diagnosis. The military screens all active-duty personnel periodically for HIV, and will not enlist HIV-positive individuals, so it is clear that both men contracted HIV while in the service. Despite the strongly positive recommendations of their commanders and colleagues, the Pentagon's internal review process has rejected their attempts to remain in the service and both were scheduled for discharge. But Judge Brinkema's preliminary injunction will keep them in the service while this case plays out, and depending on compliance with her preliminary injunction, these highly trained individuals should be treated as available for overseas deployment.

The Defense Department's motion to dismiss the case focused on three arguments. First, they claimed that the plaintiffs had failed to exhaust administrative remedies because, despite encountering a categorical refusal at multiple levels of internal decision-making, they decided not to appeal once more to the Air Force Board for the Correction of Military Records (AFBCMR), which would be futile under the circumstances.

Judge Brinkema rejected defendants' suggestion that this required dismissal of the lawsuit. "Roe and Voe did not seek judicial review without having given the Air Force a meaningful opportunity to examine its policies and decisions," she wrote. "To the contrary, they presented their claims to a complex, tiered administrative review process – one that involved medical evaluations, written submissions, and formal hearings – culminating in an extensive administrative record and final written decisions by the [Secretary of the Air Force Personnel Council]," which was "acting on the authority delegated by the Secretary of the Air Force." The AFBCMR would not have authority to issue a binding recommendation in any event, and its recommendation would go to the very Secretary of the Air Force on whose authority the plaintiffs' appeals had been denied.

Secondly, the Defense Department argued that its personnel decisions based on medical concerns are "altogether immune from judicial scrutiny," effectively the same argument the government has been making in defense of Trump's ban on transgender military service. Judge Brinkema pointed out that military personnel decisions are not wholly free from judicial scrutiny, and that under precedents of the 4th Circuit Court of Appeals binding on her, she found that the factors to be considered tipped in favor of allowing the case to continue, particularly since "at this preliminary stage, [the plaintiffs] have made a strong showing that defendants' policies are irrational, based on a flawed understanding of HIV epidemiology, and inconsistently applied." She also noted that with OutServe-SLDN as a co-plaintiff representing a class of similarly situated HIV-positive personnel facing unjustified discharges, "the far-reaching nature of these claims surely counsels in favor of judicial review."

Finally, the Defense Department argued that the individual plaintiffs lack standing because they have not actually been discharged. "Defendants' argument that plaintiffs lack standing is, as is often the case, a matter of characterization,"

wrote Brinkema. "In their view, the Article III injury on which plaintiffs rely is that 'they have been prevented from continuing to serve in the Air Force.'" Because their terms of enlistment had expired during this dispute, in some sense, the case could be characterized as being about their ability to re-enlist. But their terms of service had been extended while the lawsuit is pending. The defendants argued that because there is no guaranteed right to re-enlist, the plaintiffs have suffered no injury if they leave the military at the end of their extensions of service. However, the judge observed, "Plaintiffs label this argument a 'Catch-22,' arguing that Roe's and Voe's 'terms have expired only because Defendants' illegal policies forced them into the medical discharge process and prevented them from reenlisting."

Furthermore, Brinkema wrote, because their terms of service were extended, a "favorable decision would be likely to remedy their injury" and, furthermore, OutServe, representing numerous HIV-positive service members, continues to have associational standing on behalf of those members who are at various stages of their terms of enlistment. Thus, she rejected all three arguments and denied the dismissal motion.

As to the preliminary injunction motion, expert medical testimony submitted in support of the motion convinced Brinkema that plaintiffs are likely to win their claim on the merits that the defendants' approach to the issue runs afoul of the 5th Amendment and the Administrative Procedure Act (APA). Even though, in the context of a challenge to the military policy, she found that it is likely that the case will have to be decided using the lowest level of judicial scrutiny – rational basis review – the way the Air Force is implementing its policies as described in the Complaint would fail to meet even that test. "At least at this stage," she wrote, "plaintiffs have made a strong and clear showing that defendants' policies are irrational, outdated, and unnecessary and their decisions arbitrary, unreasoned, and inconsistent."

In essence, the Defense Department has been proceeding as if treatment for HIV-infection were still mired in the futility of the 1980s, when HIV infection usually led to severe debility and death. The decision to discharge Roe and Voe was based on their classification as "non-deployable," which in turn was based on the mischaracterization of their health as presenting unacceptable risks to themselves and others were they deployed overseas. Under inflexible regulations, people living with HIV cannot be deployed without a "waiver" of the general restriction on deploying personnel overseas who have serious medical conditions, and the record before Judge Brinkema includes a statement by the official in charge of the "waiver" process that they would never issue a waiver for somebody living with HIV.

Judge Brinkema's opinion takes a deep dive into the medical testimony, and concludes that the Air Force's application of its regulations is inconsistent with the facts. "To be sure," she wrote, "HIV remains incurable, and Roe and Voe must take daily medication to ensure that their viral loads remain suppressed. But that fact does not justify the categorical prohibition at issue here. Although HIV-positive individuals who suddenly stop antiretroviral treatment are vulnerable to 'viral rebound,' appreciable physical effects are not immediate." According to the expert testimony in the record, it "often takes weeks for an individual's viral load to return to clinically significant levels, and even then, the virus enters a period of clinical latency that can last years, often with no symptoms of negative health outcomes. What is more," she continued, "plaintiffs have identified several serious medical conditions treated with daily medication that do not subject servicemembers to the same categorical denial of deployability."

She found that "there appears to be no reason why asymptomatic HIV is singled out for treatment so different from that given to other chronic conditions, all of which are subject to worsening upon disruption of daily medication." She also noted the latest evidence that those with undetectable viral load "cannot transmit the virus to another," obviating the Defense Department's argument that deployed troops must be able to source blood transfusions. Roe and Voe's "risk of transmitting HIV during military service remains vanishingly low," she observed, pointing out that "Defendants have not identified a single recorded case of accidental transmission of HIV on the battlefield, which is unsurprising given the uncontroverted evidence that even without effective treatment, the risk of transmission through non-intimate contact such as blood splash is negligible."

The judge also found that the defendants had totally failed to counter the plaintiffs' expert medical evidence. They cited a report to Congress that asserted that "HIV infection has the potential to undermine a Service member's medical fitness and the readiness of the force," but she found that this was just a summary of the Defense Department's policy position: "It contains no evidence, whether anecdotal or otherwise, of the effect of HIV on a servicemember's medical fitness or the military's readiness."

"In sum," wrote Brinkema, "While plaintiffs have presented considerable evidence in support of their arguments, defendants rely on little more than ipse dixit." Thus, she found, the defendants' position on deployability was not supported.

As to the discharge decisions themselves, the court found the argument that these men were evaluated on a "case by case" basis and found to be non-deployable mandating discharge, to be unsupported as well. She wrote that "the evidence in this record clearly establishes that HIV seropositivity alone is not inconsistent with ongoing military service, does not seriously jeopardize the health or safety of the servicemember or his companions in the service, and does not impose unreasonable burdens on the military when compared to similar chronic conditions." Both men's commanding officers recommended retention, which even the Secretary of the Air's Force's Council recognized in its opinion on their appeals. But the Council's decision failed to make an assessment that had any relationship to the individual situations of these men.

This, Brinkema found, makes the discharge decisions "contrary to the APA" for two reasons. First, reliance on the nondeployability policy for HIV-positive service members is not based on an individualized assessment, but rather a categorical ban, which "renders

the decision to discharge them arbitrary and capricious." Due to the lack of any relationship to a legitimate interest of the military, the Council "violated agency policy mandating that HIV status alone is not a permissible ground for separation. A decision in direct conflict with the agency's own standards, and one based on a failure to consider key aspects of the problem, cannot stand under the APA."

Further, she found that the other factors relevant to awarding preliminary relief were all present. The men's military careers would be irreparably damaged by an unjustified discharge, which would also deprive them of continued coverage of military health care. The Defense Department argued that an improper discharge could be remedied after the fact by an award of damages, but Brinkema strongly rejected the idea. "Roe and Voe, along with other similarly situated HIV-positive servicemembers, face a particularly heinous brand of discharge, one based on an irrational application of outmoded policies related to a disease surrounding which there is widespread fear, hostility, and misinformation," she wrote. "In their cases, the 'stigma of being removed from active duty and being labeled as unfit for service' is coupled with the indignity suffered because the reason for their discharges bears no relationship to their 'ability to perform their jobs.'"

Furthermore, the reason for a military discharge can have secondary consequences, forcing the individuals to "real their condition," thus subjecting them to discrimination in civilian life as well. "This is precisely the type of harm that back pay or reinstatement cannot remedy and for which status quo-preserving preliminary relief is designed." The judge found that the remaining equitable factors also cut in favor of plaintiffs, and especially the public interest. She found that these men, dedicated to service with excellent records, were rendering valuable public service that would be interrupted or ended if she did not issue the preliminary injunction.

Because her analysis of the case focused specifically on the practice of the Air Force, Judge Brinkema did not grant plaintiffs' request to make her injunction apply to the entire Defense Department, but on the other hand she rejected the government's request that it apply only to Roe and Voe and not to the other similarly situated Air Force personnel.

Shortly after the opinion was issued, OutServe-SLDN filed a motion to amend the preliminary injunction to remove the term "active-duty," so as to deal with the situation faced by one of its members, Q.S., a senior airman in the Air National Guard whose enlistment was to expire just days later (February 19) and who had been denied re-enlistment because of his HIV-positive status. In an Order issued on February 19, Judge Brinkema denied the motion. She point out that there was no evidence before the court concerning the health of Q.S., so there was no basis to determine whether he was "similarly situated" to Roe and Voe, the individual plaintiffs references in the preliminary injunction. Furthermore, the judge noted that in her opinion she had narrowed the score to the Air Force precisely because the record contained no information about other military services, and specifically no information about the policies and decision-making about personnel in the Air National Guard. She also pointed out that Q.S. was "not selected for reenlistment," presenting a different issue from that of the plaintiffs, whose service had been extended while their internal appeals were pending, but who were facing discharge. Brinkema concluded that "the Court may leave for another day the questions whether a non-active-duty ANG member is similarly situated to an active-duty member of the Air Force and whether the decision to preclude a servicemember from reenlisting based on HIV-related deployability restrictions is irrational or arbitrary."

Judge Brinkema was appointed to the bench by President Bill Clinton.

Lambda Legal joined with OutServe-SLDN to represent the plaintiffs. Appearing in the district court were cooperating pro bono attorneys from the Washington office of Winston & Strawn LLP, Laura Joy Cooley and Andrew Ryan Sommer. ■

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

Conversion Therapy Practitioners Lose First Round in Attack on Boca Raton & Palm Beach County Ordinances

By Chan Tov McNamarah

In recent years, opposition to so-called "conversion" or "reparative" therapies have built to a crescendo. These pseudo-scientific practices, collectively labelled "sexual orientation change efforts" (SOCE), were the subject of twin 2018 cinema blockbusters: *Boy Erased* and *The Miseducation of Cameron Post*. And, on January 15, 2019, New York State joined 15 other states and over 45 counties and municipalities that have banned conversion therapy for minors. And yet, despite a virtual medical consensus on the psychological ill effects of SOCE, not everyone is supportive of these legal protections for LGBT youth; SOCE practitioners have unsuccessfully challenged New Jersey and California bans on the performance of such therapy on minors in the Third and Ninth Circuits. *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *cert. denied*, 573 U.S. 945 (2014); *Doe v. Christie*, 783 F.3d 150 (3rd Cir. 2015), *cert. denied*, 136 S. Ct. 1155 (2016).

With the recent Supreme Court decision *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018), however, the validity of the reasoning used to stave off prior constitutional challenges to SOCE bans has been called into question. Writing for the majority in that case, Justice Clarence Thomas cited directly to *Pickup* and *Doe v. Christie*, and openly suggested the cases were wrongly decided, as the Court in *NIFLA* rejected the contention that "professional speech" represents a separate category of speech that has lesser constitutional protection. In so doing, *NIFLA* further complicated the

intersection of notoriously complex First Amendment jurisprudence, and the protection of the LGBT community's most vulnerable individuals.

It is against this backdrop that a new challenge to SOCE prohibitive ordinances in Boca Raton and Palm Beach County, Florida, arose. To be sure, the February 13 decision, *Hamilton v. City of Boca Raton*, 2019 U.S. Dist. LEXIS 23363, 2019 WL 588645 (S.D. Fla. 2019), is a victory for opponents of the "therapy": it ultimately rejected Plaintiffs' motion for preliminary injunction against both ordinances. Still, to this writer's mind, *Hamilton* is equally important for its nuanced analysis. The resulting opinion by U.S. District Court Judge Robin L. Rosenberg is artfully detailed, and is in many ways a defining treatise on First Amendment law as applied to the regulation of medical practices carried out through speech, although it leaves some answers indeterminate.

The Plaintiffs, Robert W. Otto, and Julie H. Hamilton, both licensed therapists with practices in Boca Raton and Palm Beach County, brought the initial challenge on June 13, 2018, aimed at permanently enjoining the ordinances. While the original complaint contained a total of eight claims, Plaintiffs' subsequent motion for preliminary injunction, and the focus of the present decision, contained only four claims. Plaintiffs contended that the ordinances: (1) unconstitutionally infringe on their First Amendment rights to Free Speech; (2) constitute unconstitutional prior restraints on constitutionally protected speech; (3) were unconstitutionally vague; and (4) were passed outside of Defendants' authority, and therefore void.

The opinion began by reciting the standard of review for a motion for preliminary injunction. That is, most importantly, Plaintiffs have the burden to establish a *substantial* likelihood of success on the merits, irreparable injury will be suffered unless the preliminary injunction issues to bar enforcement of the challenged measure while the case is being tried on the merits. Judge Rosenberg's opinion then evaluated the likelihood of success on each of the four claims individually.

PLAINTIFFS' FREE SPEECH CLAIMS

For their first ground, Plaintiffs' argued that the ordinances violate their Free Speech rights under the First Amendment. Finding the constitutionality of SOCE prohibitions a question of first impression in the Eleventh Circuit, and recounting the effects of *NIFLA*, Rosenberg conceded that the "landscape of relevant First Amendment precedent is a morass." What followed was an extensive review of First Amendment jurisprudence aimed at determining the appropriate level of scrutiny to analyze the regulation of medical practices carried out through speech.

1) Determining the Appropriate Standard

Judge Rosenberg's threshold determination was whether the ordinances regulated speech or conduct. In a previous challenge to California's SOCE prohibition, *Pickup v. Brown*, the Ninth Circuit had concluded that the law restricted conduct and was subject to rational basis review. But Judge Rosenberg found such an approach inapplicable in the present case, given the Eleventh Circuit's *en banc* opinion in *Wollschlaeger v. Governor of Florida*. 848 F.3d 1293 (11th Cir. 2017). There, considering the constitutionality of Florida's Firearms Owners' Privacy Act (FOPA)—a law which prohibited doctors from inquiring into their patients' firearm ownership—the Eleventh Circuit panel held that the law limited doctors' speech; that is, their ability to speak on the ownership of firearms, raising First Amendment concerns. And, despite failing to conclude whether intermediate or strict scrutiny applied, the Eleventh Circuit held that it was entirely inappropriate to "subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review."

To be certain, the ordinances in Palm Beach County and Boca Raton regulated "therapies," not speech *per se*. However, as applied to Plaintiffs, the laws clearly impacted speech. Indeed, as Plaintiffs alleged that speech was the *only* tool they used in counseling minors in an attempt to modify their sexual orientation, the therapies regulated by the ordinances were entirely speech. In consequence, the instruction of *Wollschlaeger* seemed to foreclose rational basis analysis.

Whether to apply intermediate or strict scrutiny was a thornier question. On one hand, some factors suggested the court should apply strict scrutiny, yet on the other, some intimated intermediate review. As Judge Rosenberg described them, laws that target speech based on its communicative content are subject to strict scrutiny, whereas those that are content-neutral are scrutinized under intermediate scrutiny. To test whether the ordinances were content-based, the judge considered whether the laws targeted speech *because of* the topic discussed or the idea or message expressed. Because the ordinances identified speech based on its message—that is, its aim at changing minor patients' sexual orientation—this suggested the ordinances were content-based restrictions and pointed toward strict scrutiny.

Still, reasoned Judge Rosenberg, talk-based conversion therapy, as both a treatment to be provided and an utterance to be said, might not fit neatly into the content/content-neutral dichotomy. Looking to *Casey v. Planned Parenthood of Eastern Pennsylvania*, 505 U.S. 833 (1992), Rosenberg observed that the Supreme Court had peripherally addressed whether the mandatory abortion disclosures at issue implicated the doctors' right to Free Speech. In *Casey*, the Supreme Court concluded that physician's First Amendment rights were only "implicated . . . as part of the practice of medicine, subject to reasonable licensing and regulation of the State." 505 U.S. 833, 884 (1992). Rosenberg viewed this to mean that regulations of doctor's speech that

was incidental to a "treatment" or that restricted the effectuation of a treatment do not offend the First Amendment. Analogizing the ordinances in the present case to the regulation at issue in *Casey*, the judge stated that intermediate scrutiny would be the most suitable for medical treatments effectuated through speech. This level, she maintained, would "strike the appropriate balance between recognizing that doctors maintain some freedom of speech . . . and acknowledging that *treatments* may be subject to significant regulation under the government's police powers." (emphasis in original).

But for all this extensive and nuanced reasoning, the court still cautioned that it was undecided what standard of review applied in the current case. Though Judge Rosenberg was certain that the ordinances were subject to more than rational basis review, beyond that the result was unclear. For that reason, she evaluated the ordinances under *all three* levels: rational basis, intermediate, and strict scrutiny.

2) Applying the Standards

Pivoting to the analysis, the opinion then laid out the requirements under each level of review: under rational basis review, Plaintiffs would have to show that there was no legitimate interest in passing the ordinances; to survive intermediate scrutiny, the governments had the burden to show they had a "substantial interest" in passing the ordinances; and if subject to strict scrutiny, the governments had to establish they had a "compelling interest" in passing the ordinances.

On this point, Defendants asserted a compelling interest "in protecting the physical and psychological well-being of minors . . . and in protecting . . . minors against exposure to serious harms caused by sexual orientation and gender identity change efforts." To bolster this point, they pointed to numerous studies concluding that SOCE can cause a battery of harms. During oral argument, Plaintiffs attempted to dismiss the cited authorities, characterizing them as "no evidence at all." But after quoting two pages of scientific findings and position statements documenting the ill effects of conversion therapy, it was easy to see that the court was unconvinced by this portrayal. Despite admitting the quoted findings might differ as to degree, Judge Rosenberg declared the studies all pointed towards one incontrovertible conclusion: "conversion therapy is harmful or potentially harmful to all people, and especially to minors." As a result, she held that Defendants had met their burden as to this factor under all three levels of scrutiny.

Next the court examined the relationship between the ordinances and the governments' interest in protecting minors. Here too the opinion explained the requirements for each level of review: under rational basis review Plaintiffs would have to show that there was no "rational relationship" between the ordinances and the government's interest. Intermediate and strict scrutiny, in contrast, required Defendants to show that the ordinances directly advanced the interest, or were narrowly tailored, respectively.

Plaintiffs argued that the governments had not sufficiently considered alternative less restrictive means to achieve their interests. To this point, they offered *McCullen v. Coakley*, a case striking down a thirty-five-foot buffer zone around abortion providers in Massachusetts. 573 U.S. 464 (2014). After finding that Massachusetts had not seriously considered less intrusive avenues, or examined methods other jurisdictions had found effective, the Supreme Court struck down the buffer zone law as insufficiently narrowly tailored. Judge Rosenberg was unpersuaded by this argument. First, she emphasized that the Defendants rightly believed no other regulation would effectively prevent the harms associated with conversion therapy. Second, looking to the ordinances' legislative history, she found that the present bans mirrored those enacted by fifteen state legislatures and dozens of local governments. What is more, noted the judge, Palm Beach County had actually relied on the language of other jurisdictions' existing prohibitions. Seen in this light, it was clear that Defendants had examined the methods of other jurisdictions.

In the alternative, Plaintiffs maintained that informed consent protocols could equally protect minors from coerced SOCE. But this argument also failed. As Defendants established, some minors' desire to eliminate same-sex attraction was not of their own volition—but rather the desire of their parents—and, therefore, informed consent requirements would not necessarily prevent coercion. And, even assuming that minors could consent to such treatment, Rosenberg pointed out that medical consensus warns against providing interventions that "have the potential for harm, *despite client requests*." (emphasis in original). Hence, here too plaintiffs' arguments failed.

Having analyzed the ordinances' relationship to Defendants' purported interests, Judge Rosenberg concluded that the ordinances passed both rationality review and intermediate scrutiny. Strict scrutiny, however, gave her pause. The court admitted that whether the ordinances survived the "least restrictive means" analysis was "a close question." Nonetheless, the facts before the court were sufficient to conclude that Plaintiffs had failed to meet their burden of demonstrating substantial likelihood of success.

To the final point of Plaintiffs' Free Speech claim, the opinion returned to the argument that the ordinances were viewpoint discriminatory. Specifically, the therapists contended that the ordinances discriminated against the viewpoints of those who believe that "it is possible to change a person's sexual orientation or attractions." Relying on *R.A.V. v. City of St. Paul*, Rosenberg stated that "when the basis for the content discrimination consists *entirely* of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." 505 U.S. 377, 388 (1992) (emphasis in opinion). And, looking to the ordinances, it was easy for the court to find that SOCE was

being regulated not because of the speaker's viewpoints or beliefs, but because of the harm of the treatment itself. In other words, it was the *practice* of SOCE that was being proscribed, not viewpoints related to it. Indeed, as the judge affirmed, at any time Plaintiffs were free to recommend conversion therapy, they simply couldn't practice it. Hence, this claim failed as well.

All told, the court ended its examination of Plaintiffs' Free Speech claim by reaffirming its hesitation to announce a definite standard of review. While the ordinances were likely subject to a higher level of scrutiny than the least demanding standard of rational basis review, Rosenberg remained unconvinced that the most demanding standard, strict scrutiny, was appropriate for evaluating a regulation of licensed professional's treatment of minor patients. Bracketing that question, she concluded that when applying either rational basis or intermediate review, the ordinances would survive constitutional challenge. In addition, though the result under strict scrutiny was a closer call, the judge was unconvinced that Plaintiffs had demonstrated that they are *substantially* likely to succeed on the merits.

PLAINTIFFS' PRIOR RESTRAINT CLAIM

The Plaintiffs argued that the ordinances were unconstitutional prior restraints on protected speech. As the opinion clarified, a law can be said to constitute a prior restraint when it forbids "certain communications when issued in advance of the time such communications occur." *Alexander v. United States*, 509 U.S. 544 (1993). Judge Rosenberg swiftly rejected this ground. Writing that Plaintiffs' claim ignored the key distinction between a prior restraint and the penalization of past speech, she explained that in no way did the ordinances enable the government to forbid speech in advance. Rather, both the City and County ordinances only penalized providers after they had practiced conversion therapy. Here again, Plaintiffs having failed to demonstrate a substantial likelihood of success on this ground, Rosenberg declined to issue a preliminary injunction based on their prior restraint claim.

PLAINTIFFS' VAGUENESS CLAIM

Next, Plaintiffs argued that the ordinances were unconstitutionally vague. Specifically, they argued that because "sexual orientation and gender identity are fluid and changing concepts," medical professionals and officers charged with enforcing the ordinances would be uncertain as to what they prohibit. Under Supreme Court precedent, a law is considered unconstitutionally vague if it: (1) fails to provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited; or (2) authorized or encourages arbitrary enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). But to Judge Rosenberg, these ordinances did neither.

Writing that "perfect clarity and precise guidance have never been required," she believed it was clear what the ordinances as a whole prohibit. While the court acknowledged that the language of the ordinances did not define the terms 'sexual orientation' and 'gender identity,' it found that any person of ordinary intelligence would understand the meaning of the laws. Further, looking to case law, the judge cited to several instances where the Supreme Court and the Circuit Courts of Appeals had used the terms 'sexual orientation' and 'gender identity' "with no apparent difficulty in understanding the . . . meaning." Thus, she declined to issue a preliminary injunction on the ground of unconstitutional vagueness.

PLAINTIFFS' ULTRA VIRES CLAIM

For their final ground, Plaintiffs contended that Defendants had overstepped their bounds by preempting the regulation of mental health professionals, and conflicting with Florida law. The thrust of their argument was that during the pendency of the case, Plaintiffs would face financial injury because they might lose current and future clients seeking SOCE. Characterizing the remedy of preliminary injunction "extraordinary," Rosenberg xqfelt Plaintiffs' injuries were not sufficient to justify issuing a preliminary injunction. Moreover, because monetary injuries are not considered irreparable, insofar as Plaintiffs' injuries were loss of clients, they too were inadequate to entitle them to a preliminary injunction. Consequently, finding that Plaintiffs had failed to meet their burden of demonstrating an irreparable injury, the judge declined to issue a preliminary injunction on their *ultra vires* claim.

In total, finding that the Plaintiffs had not demonstrated a substantial likelihood of succeeding on the merits of their Free Speech, Prior Restraint, Unconstitutional Vagueness, and Ultra Vires claims, Judge Rosenberg declined to grant the motion for preliminary injunction.

Plaintiffs are represented by Liberty Counsel, a conservative religiously-oriented legal organization that frequently challenges LGBT-rights statutes and ordinances in the courts. ■

Chan Tov McNamarah is a law student at Cornell Law School (class of 2019).

5th Circuit Panel Affirms Summary Judgement Under Title VII Against Transgender Plaintiff, Avoiding Underlying Question Whether Gender Identity Discrimination Violates the Statute

By Timothy Ramos

Circuit Judge James C. Ho, a Trump-appointee and conservative exponent, has developed quite the reputation ever since he joined the 5th Circuit Court of Appeals last year. In July 2018, National Public Radio commented that Judge Ho has "shaken up the staid world of appellate law by deploying aggressive rhetoric in cases involving guns, abortion rights and campaign finance regulations." Critics also say that Judge Ho writes political op-ed columns rather than legal opinions; for instance, he tends to harshly criticize the size of government rather than focus on the laws at issue in a given case. Thus, it should come as no surprise that, when faced with a Title VII case involving a transgender woman, Judge Ho's opinion for the three-judge panel focused on an issue that *neither* party raised on appeal, and improperly conflated gender identity discrimination with sexual orientation discrimination in referring to circuit precedent. *Wittmer v. Phillips 66 Co*mpany, 915 F.3d 328 (5th Cir. Feb. 6, 2019). It should also come as no surprise that Judge Ho felt compelled to write separately *for himself* in a concurring opinion, going on at length to criticize other circuits for their analysis of these issues.

Last year, we reported on *Wittmer v. Phillips 66 Co*., 304 F. Supp. 3d 627 (S.D. Tex. Apr. 4, 2018) in the May issue of *Law Notes*. The case marked the first time that a Texas-based federal district court interpreted Title VII to prohibit gender identity discrimination as a form of sex discrimination. Nicole Wittmer alleged that Phillips 66 Company (Phillips) rescinded its offer of employment to her on September 8, 2015, after the company learned about her transgender status. However, Phillips plausibly contended that it rescinded its offer to Wittmer because an independently-run background check of her application revealed that she had falsely claimed that she was still employed by Agrium, her prior employer, at the time of her interview with Phillips in August 2015. Phillips did not learn about Wittmer's transgender status until after rescinding its offer, when Wittmer sent an unsolicited email accusing Phillips of transgender discrimination.

Although the parties did not dispute whether Title VII prohibits discrimination on the basis of transgender status, Chief U.S. District Judge Lee H. Rosenthal assumed so based on the persuasiveness of the 6th Circuit's decision on transgender status in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 884 F.3d 560 (6th Cir. 2018) (petition for certiorari pending), and the 2nd and 7th Circuits' respective decisions on sexual orientation in *Zarda v. Altitude Express, Inc*., 883 F.3d 100 (2d Cir. en banc 2018) (petition for certiorari pending) and *Hively v. Ivy Tech Cmty. Coll. of Ind*., 853 F.3d 339 (7th Cir. en banc 2017); these three recent rulings overruled decades-old circuit precedents that established arbitrary reasons as to why Title VII's definition of "sex" excludes claims of gender identity or sexual orientation discrimination. Despite this assumption, however, Chief Judge Rosenthal granted summary judgment to Phillips because Wittmer failed to provide evidence showing that: (i) the company treated non-transgender applicants better; and (ii) the company's proffered legitimate, non-discriminatory reason for not hiring her was pretextual. Thus, Wittmer's Title VII discrimination claim did not survive the *McDonnell Douglas* burden-shifting analysis.

Now, in *Wittmer v. Phillips 66 Co*., 915 F.3d 328 (5th Cir. Feb. 6, 2019), a three-judge panel affirmed summary judgment for Phillips *based on the same two evidentiary reasons discussed by the district court*. Rather than let the case end there, however, Judge Ho went on to discuss whether Title VII recognizes gender identity discrimination as a form of sex discrimination, even though neither party raised the issue. What results is a majority opinion primarily packed with erroneous dicta. Judge Ho lambasted the district court for its failure to cite the 5th Circuit's decision in *Blum v. Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979). Yet, in doing so, Judge Ho wrongly conflated gender identity with sexual orientation. In a one-sentence dictum, *Blum* stated: "Discharge for *homosexuality* is not prohibited by Title VII or Section 1981." *Id*. at 938. The *Blum* court did not mention gender identity or transgender status. Thus, even if *Blum* remains binding precedent in the 5th Circuit, it does *not* address claims of gender identity discrimination. Later, in his *short* concurring opinion, Circuit Judge Patrick E. Higginbotham chided Judge Ho for harping on the unraised issue and for applying *Blum* to the gender identity discrimination claim at hand. Judge Higginbotham also seemed to imply that, in light of more-recent LGBT-related developments like *Lawrence v. Texas*, an *en banc* panel might decide differently on *Blum*'s vitality.

Still, Judge Ho had yet more to say. In a separate concurring opinion, the judge continued to criticize the pro-LGBTQ trend among other circuits and to defend *Blum* as the correct statutory interpretation of Title VII. According to Judge Ho, there are currently two competing schools of thought regarding the interpretation of "sex" under Title VII: (i) the anti-favoritism theory, under which Title VII simply prohibits employers from favoring men over women, or vice versa; and (ii) the blindness theory, under which Title VII mandates employers must be blind to a person's sex. As expected, Judge Ho is a proponent of the anti-favoritism theory, which has been continuously invoked

by anti-LGBTQ litigants to attack Title VII claims of gender identity and sexual orientation discrimination.

In support of his stance, Judge Ho focused on a hypothetical regarding separate bathrooms for men and women. He argued that under the blindness theory separate bathrooms would be deemed unlawful because they are clearly not blind to sex; meanwhile, the anti-favoritism theory would uphold separate bathrooms because they do not favor one sex over the other. Without delving too much into Judge Ho's extremely literal interpretation of the blindness theory—which crosses the line into absurdity—this writer notes that the judge appears to ignore the Supreme Court's holding in *City of Los Angeles v. Manhart*, 435 U.S. 702, 709 (1978). In *Manhart*, the Supreme Court appeared to adopt the blindness theory by holding that, in enacting Title VII, Congress: (i) decided that classifications based on sex, like those based on national origin or race, are unlawful; and (ii) sought to make sex irrelevant in employment decisions, unless the defendant proved that sex was a bona fide occupational qualification for the job in question.

To further support the anti-favoritism theory of "discrimination because of sex" under Title VII, Judge Ho went on to deploy a number of statutory tools of construction frequently invoked by anti-LGBTQ litigants, including: (i) ordinary meaning; (ii) original public meaning; and (iii) the elephant-in-the-mousehole doctrine. As stated time and time again, the ordinary meaning argument contends that "sex" is not normally understood or used synonymously with "sexual orientation" or "gender identity," and if Congress had meant to prohibit sexual orientation or gender identity discrimination, it would have explicitly added them to the list of classifications protected under Title VII. The original public meaning argument goes on to contend that, at the time of enactment, the public meaning and understanding of Title VII did not include sexual orientation or gender identity discrimination; furthermore, courts had uniformly relied on this meaning for the past four decades. Lastly, the elephant-in-the-mousehole doctrine argues that Congress does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions; thus, significant policy issues must be expressly decided by Congress, and not by judges engaged in statutory parsing. Even so, this writer notes that: (i) the Supreme Court unanimously held in *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998), in an opinion by Justice Scalia, an "original meaning" enthusiast, that "statutory prohibitions often go beyond the principal evil . . . and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"; and (ii) unless bound by a Supreme Court decision, a circuit court of appeals can revisit circuit precedent through an *en banc* hearing.

Next, Judge Ho attacked the 6th, 2nd, and 7th Circuit's determinations that sex stereotyping is *per se* unlawful under the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989). Under this interpretation of *Price Waterhouse*, the three circuit courts held that: transgender discrimination is unlawful under Title VII because such discrimination targets transgender men and women because they do not conform with sex stereotypes as to how their employer or co-workers believe they should identify themselves; and sexual orientation discrimination is similarly unlawful because such discrimination targets gay men and lesbian women because they do not conform with the sex stereotypes that men should only be attracted to women, and vice versa. Instead, Judge Ho contended that *Price Waterhouse* sex stereotyping is actionable only to the extent that it provides evidence of favoritism of one sex over the other. Again, the judge's reliance on the favoritism theory rejects the blindness theory implicitly adopted by the Supreme Court in cases such as *Manhart* and *Oncale*.

Lastly, Judge Ho criticized the 7th and 2nd Circuit's determination that, because Title VII forbids employers from discriminating against employees for being in an interracial marriage or relationship, Title VII must also prohibit such discrimination against same-sex marriages or relationships. In support of his argument, Judge Ho explained that the Supreme Court analyzed interracial marriage differently from same-sex marriage. Under *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court stated that miscegenation laws are purely racist; however, the court did not state in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) that traditional marriage laws are sexist. This writer notes that, although this contention has yet to be further argued in the courts, it once again flies in the face of a growing pile of scientific and sociological research showing that sexual orientation and gender identity implicate biology. Thus, sexual orientation and gender identity discrimination are sexist because they perpetuate sexual inequality between cisgender and transgender individuals, and heterosexual and homosexual individuals.

This case once again demonstrates that while sexual orientation and gender identity discrimination claims remain distinct under the law, they are often analyzed similarly because they reflect sex-derived prejudices and hierarchies. Thus, in regard to Title VII, any distinctions between sex, sexual orientation, and gender identity remain in place to justify disparate treatment and bias-based decision-making.

Plaintiff Nicole C. Wittmer is represented by Alfonso Kennard, Jr., of Kennard Miller Hernandez P.C., Houston, Texas. The case attracted amicus support from the Equal Employment Opportunity Commission, which as of the time when briefs were filed continued to support its holding in *Macy v. Holder* that Title VII prohibits gender identity discrimination, and from a coalition consisting of all the major national LGBT rights public interest firms. In addition to attorneys from Phillips 66 Company's counsel, Norton Rose Fulbright US, LLP, defendant-appellee enjoyed amicus support from Adam K. Mortara, who had also participated in the 2nd Circuit's *Zarda* case. ■

Timothy Ramos is a law Student at New York Law School (class of 2019).

Liberty Counsel Seeks to Revive Assault on New Jersey Conversion Therapy Ban with Certiorari Petition

By Arthur S. Leonard

Usually the U.S. Supreme Court's refusal to review a lower court decision puts an end to the case, but Liberty Counsel, a right-wing religious group that represents psychologists in New Jersey who want to provide conversion therapy to "change" people from gay to straight, has seized upon an opening created by a U.S. Supreme Court decision from last June to revive their constitutional attack on New Jersey's law prohibiting licensed professional counselors from providing such therapy to minors. On February 11, the organization petitioned the Supreme Court to effectively reopen the case. *King v. Governor of New Jersey & Garden State Equality*, No. 18-1073 (docketed February 15, 2019). The petition names as respondents both the state government's relevant officials and Garden State Equality New Jersey, which was granted intervenor status in the lower courts to help defend the statute.

Governor Chris Christie signed the measure into law on August 19, 2013. Liberty Counsel promptly filed suit on behalf of two psychologists and their patients, as well as the National Association for Research and Therapy of Homosexuality (NARTH), and the American Association of Christian Counselors, claiming that the measure violated the constitutional rights of plaintiffs.

U.S. District Judge Freda L. Wolfson granted the state's motion for summary judgment, finding no constitutional violation (see 981 F. Supp. 2d 296), and the plaintiffs fared no better before the U.S. Court of Appeals for the 3rd Circuit, based in Newark, which upheld Judge Wolfson's ruling on September 11, 2014 (see 767 F. 3d 216).

Wolfson found the measure to be a regulation of professional conduct, only incidentally affecting speech. As such, she held that the challenge should be rejected as long as the legislature had a rational basis for enacting the law. She found that the legislative record about the inefficacy and harm of such therapy was sufficient to meet the test.

On appeal, the three-judge panel disagreed with Judge Wolfson to the extent of finding that the ban as applied to "talk therapy" is a content-based regulation of speech, not just a regulation of conduct with an incidental effect on speech. But the appeals court unanimously rejected the plaintiffs' argument that the statute was consequently subject to the strict scrutiny test, under which it would be presumed to be unconstitutional unless New Jersey could prove that it was narrowly tailored to achieve a compelling state interest.

Instead, wrote Circuit Judge D. Brooks Smith for the panel, the speech involved in providing conversion therapy is "professional speech," subject to state regulation. As such, the court ruled, the state could prevail under the less demanding "heightened scrutiny" test by showing that the ban substantially advanced an important state interest, and that the legislative record was sufficient to uphold the law.

Liberty Counsel petitioned the Supreme Court for review the 3rd Circuit's ruling. That petition was denied on May 4, 2015 (see 135 S. Ct. 2048). The Supreme Court also denied a petition to review a similar decision by the San Francisco-based 9th Circuit Court of Appeals in a case brought by, among others, Dr. David Pickup, in which that court rejected a similar challenge to California's ban on conversion therapy. (Dr. Pickup is also a plaintiff in the case challenging a conversion therapy ban in Tampa, Florida, about which we reported last month.) *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Judge Wolfson relied on the 9th Circuit's ruling in finding that conversion therapy statutes can be upheld as within the traditional state power to regulate the conduct of licensed professionals.

More than a dozen jurisdictions have since passed such bans, and attempts to challenge them in the courts have similarly been unsuccessful. But the Supreme Court may have upset this trend by its ruling on June 26, 2018, in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361. NIFLA challenged a California law that required licensed pregnancy-related clinics to inform their clients about the availability of publicly-funded family-planning services, including contraception and abortions, and non-licensed facilities to provide notices stating that they were not licensed by the state. The Supreme Court agreed with NIFLA that the statute violated the 1st Amendment protection for freedom of speech by compelling the plaintiffs to speak the government's message.

In defending the statute, California relied on the conversion therapy decisions from the 3rd and 9th Circuits. This provoked Justice Clarence Thomas, writing for the 5-4 majority, to reject the idea that "professional speech" in the context of regulated, licensed professions, was entitled to any lesser constitutional protection than other speech. After summarizing these and other cases, Thomas wrote: "But this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.' This court has 'been reluctant to mark of new categories of speech for diminished constitutional protection.'"

Thomas went on to write that there were only two circumstances in which the Supreme Court had provided lesser protection to "professional speech": "First, our precedents have applied more deferential review to some laws that require professionals to disclose

factual, noncontroversial information in their 'commercial speech.' Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech."

Thus, at least by implication, a majority of the Supreme Court ruled last June that states passing conversion therapy bans will have to meet the demanding strict scrutiny test when they are challenged under the 1st Amendment. Unless, of course, they can show that this is really a regulation of professional conduct with incidental effect on speech, an approach that worked in the 9th Circuit. Although Thomas's comments in *NIFLA* suggest this may be a difficult task, it is not necessarily impossible.

Reacting to the Supreme Court's *NIFLA* ruling, Liberty Counsel jumped into action to try to revive its challenge to the New Jersey law. First, it filed a Motion with the 3rd Circuit Court of Appeals, demanding that it recall the Mandate it had issued to the District Court in 2014 to dismiss the challenge to the statute. Liberty Counsel argued that the Supreme Court's ruling had "abrogated" the 3rd Circuit's decision, thus the 3rd Circuit should acknowledge that its 2014 ruling was erroneous and correct the situation by "recalling" its Mandate. Although Liberty Counsel does not explicitly state what would come next, presumably this would mean reversing the District Court's grant of summary judgment to the state and resetting the case for argument under the strict scrutiny test. The 3rd Circuit denied this Motion without a hearing or a written opinion.

Undaunted, Liberty Counsel then sought rehearing *en banc* (by the full 3rd Circuit bench), which was also denied, on November 13, 2018.

Liberty Counsel petitioned the Supreme Court on February 11, arguing that the 3rd Circuit "abused its discretion" by refusing to take action based on the Supreme Court's "abrogation" of the 3rd Circuit's prior opinion. Liberty Counsel cites numerous cases in which it claims federal courts of appeals have "recalled" their mandates from lower courts after a Supreme Court decision in a similar case has rejected the reasoning underlying their earlier decision. Liberty Counsel argues that the current situation is particularly stark because the Supreme Court has not only rejected the reasoning of the earlier case, but has cited and quoted from the earlier decision while doing so.

On the other hand, Justice Thomas did not use the term "abrogate" and his opinion in NIFLA recognizes that there may be circumstances in which state regulation of professional speech may be constitutional. The 9th Circuit's reasoning in the Pickup case, focused on the regulation of professional conduct rather than speech, may be such an instance, and the 3rd Circuit's case could be reconsidered under such a standard. In this case, Liberty Counsel may be following the lead of West Publishing Company, which operates the Westlaw legal research system. If one finds the 3rd Circuit's decision in Westlaw, one sees, in bold red above the citation of the case, the phrase "Abrogated by *National Institute of Family and Life Advocates v. Becerra*, U.S., June 26, 2018" and the characterization "Severe Negative Treatment."

Liberty Counsel's petition, a bit disingenuously, assumes that this means that the New Jersey law is unconstitutional, but all it really means is that the 3rd Circuit may have applied too lenient a standard in ruling on the case, and should have applied the strict scrutiny test to be in line with the Supreme Court ruling in NIFLA, unless the court reconsiders its analysis and decides, after all, that the measure is really a regulation of medical conduct, only incidentally involving speech as the mechanism for providing "therapy."

In its argument to the Supreme Court, Liberty Counsel contends that failing to grant the petition and to require the 3rd Circuit to "recall" its mandate will have harmful rippling effects throughout the nation. It points to the steady progression of new state and local laws that have been enacted in reliance on the "incorrect" decisions by the 3rd and 9th Circuits, which it asserts will "chill" the ability of conversion therapy practitioners to "offer" this "cure" to their patients.

In January, U.S. Magistrate Judge Amanda Arnold Sansone relied on the Supreme Court's *NIFLA* decision in her report recommending that the U.S. District Court issue a preliminary injunction against the application of the Tampa, Florida, conversion therapy ban to practitioners who provide "talk therapy." *Vazzo v. City of Tampa*. The complaint filed in federal court in Brooklyn last month by Alliance Defending Freedom in *Schwartz v. City of New York*, challenging New York City's ordinance, is devised to raise the same arguments. And it is predictable that either ADF or Liberty Counsel will file suit in an attempt to block the new state law enacted last month in New York raising similar arguments.

Although Liberty Counsel couches its petition as an attempt to have the court settle a dispute among lower courts about the proper way to respond when one of their decisions is substantially undermined in its reasoning by a subsequent Supreme Court ruling in a similar case, it is at heart an attempt to relitigate the question whether conversion therapy practitioners have a 1st Amendment right to ply their trade free of government restrictions. It is a blatant attempt to get the issue of conversion therapy back before the Supreme Court now that Trump's appointments have solidified the conservative majority. And, at that, it is a test of science against homophobia and transphobia.

The petition was docketed by the Clerk on February 15, giving Respondents until March 18 to file a response. Within weeks, both Respondents had filed notices with the Court waiving their right to file a response, signaling confidence that the Court will not succumb to any temptation presented by this belated attempt to relitigate the case. If by some chance the Court does grant review, the case would be argued next term. ■

U.S. District Court Finds Child Born in Canada Through Gestational Surrogacy to Same-Sex Couple Entitled to U.S. Citizenship at Birth

By Arthur S. Leonard

U.S. District Judge John F. Walter ruled on February 21 that a child born through gestational surrogacy to a male same-sex couple then living in Canada was entitled to U.S. citizenship at birth, despite his lack of a biological tie to the father who is a U.S. citizen. Construing a statute governing the citizenship status of children born abroad to married parents, one of whom is a U.S. citizen, Judge Walter found that the U.S. State Department's internal Foreign Affairs Manual (FAM), which requires that the child have a biological link to a U.S. citizen father, is not a valid interpretation of the statute. *Dvash-Banks v. Pompeo*, 2019 WL 911799, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal., Feb. 21, 2019).

Andrew Mason Banks and Elad Dvash met in Israel in 2008, where Andrew was attending a master's degree program. Andrew is an American citizen who resided continuously in the U.S. from his birth until October 2005. Elad is an Israeli citizen. The coupled moved to Canada in 2010 and married there. They decided to have a family using gestational surrogacy, each of them donating sperm for insemination of eggs from an anonymous donor that were implanted in a surrogate, who bore twin sons for them, E.J. and A.J. At the time, they did not want to know who was the biological father of each child, so the insemination was carried out without the fathers being informed of this. Andrew, Elad, E.J. and A.J. have resided together continuously as a family since the birth of the twins. On September 28, 2016, a week after the birth, they petitioned the Superior Court in Toronto to declare them to be the legal parents. The court granted the application and directed that the birth be registered showing Andrew and Elad as parents of both children.

Four months later they went to the U.S. Consulate in Toronto with applications for documents showing U.S. citizenship for both children and to get them U.S. passports, preparing to move to the U.S.. They disclosed all aspects of the conception of the children, the citizenship status of their fathers, and brought the requisite documentation. In addition to passports, they were seeking documents for their sons called Consular Report of Birth Abroad (CRBA). They were informed by the Vice Consul that these documents could not be issued for the boys without proof of their biological ties to Andrew. They then had DNA testing done, which showed that A.J. was Andrew's biological son, and E.J. was Elad's biological son. The Consulate then said that A.J. could get the CRBA and passport, but E.J. could not. When they moved to the U.S. a few months later, Elad was able to enter as the spouse of a U.S. citizen, but E.J. had a visitor's visa, and since that expired he has been "undocumented" pending the outcome of this case.

This decision by the Vice Consul was based on the State Department's interpretation of 8 U.S.C. Section 1401 (Section 301 of the Immigration and Nationality Act), which provides in subsection (g) that a person born outside the United States to married parents "one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States not less than five years, at least two of which were after attaining the age of fourteen" shall be considered a U.S. citizen at birth. A different section, dealing with children born abroad "out of wedlock," provides that proof that the child's biological father is a U.S. citizen will be required for the child to be considered a U.S. citizen at birth. In attempting to deal with the interpretive challenges posed by assisted reproductive technology, and in default of any action by Congress to amend the statute to account for such situations, the State Department decided administratively to impose the biological relationship test for children conceived through donor insemination when married parents, one of whom is a U.S. citizen, have children abroad. The Department did not follow the requirements of the Administrative Procedure Act in adopting this policy, since it was not embodied in a regulation, but merely added it to the internal FAM, a reference guide for Department policies relied upon by consular personnel.

Andrew and E.J. (through his guardian ad litem, Elad) filed suit in January 2018, challenging the Department's decision. Their amended complaint, filed January 14, 2019, asserted a Declaratory Judgement Act claim alleging a due process violation, a claim for violation of the Administrative Procedure Act, and a claim under 8 U.S.C. section 1503 seeking an order that E.J. is a U.S. citizen under federal law. Section 1503 provides a cause of action for U.S. citizens who are being denied their rights as U.S. nationals to get a determination of their rights. The court faced cross-motions for summary judgment, and ultimately decided the case under Section 1503.

At the end, this came down to a question of statutory interpretation, and the plain language of the statute determined the outcome. Section 301(g) says nothing about biological relationships, and Judge Walter found several prior rulings by the 9th Circuit that rejected the argument that a biological relationship to a U.S. national parent was required to establish citizenship. He noted that if Congress wanted to establish such a biological tie as a prerequisite, it knew how to do so, as evidenced by Section 309, which deals with

overseas births "out of wedlock," and contains specific language concerning the requirement to demonstrate the U.S. citizen father's biological tie to the child in such circumstances. Furthermore, he wrote, "concluding that Section 301 does not impose a biological relationship requirement is consistent with the legislative history of the INA, which 'clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united,'" citing to H.R. Rep. No. 85-1199, at 7 (1957).

The court decided that the declaratory judgment claim was moot, as full relief could be provided under the Section 1503 claim. Furthermore, the court dismissed the Administrative Procedure Act claim, noting that actions are not authorized for APA violations when there is another statute that can provide the necessary relief – a role served in this case by Section 1503. Thus, the court granted summary judgment to plaintiffs on their third claim, to the government on the second claim, and the first claim was dismissed as moot. Judge Walter order the parties to "meet and confer and agree on a joint proposed Judgment which is consistent with this Court's order" and to "lodge the joint proposed Judgment with the Court on or before February 28, 2019." In case the parties could not agree on a joint order, each was to submit a proposed order by the same date. Of course, the government might appeal this to the 9th Circuit, the president's favorite venue for defending lawsuits against the government, but that would be a waste of time, since Judge Walter relied on 9th Circuit precedents directly supporting his interpretation of the statute. No word yet from Immigration Equality about the current status of the case.

Plaintiffs are represented by Alexa M. Lawson-Remer, of Sullivan & Cromwell LLP, Los Angeles, with numerous other Sullivan and Cromwell attorneys listed as co-counsel, and Aaron C. Morris, Executive Director of Immigration Equality, New York. ■

Missouri Supreme Court Revives Sex Discrimination Law Suits by Gay and Transgender Plaintiff

By Arthur S. Leonard

The Missouri Supreme Court issued a pair of rulings on February 26, reversing circuit court dismissals of sex discrimination lawsuits by gay and transgender plaintiffs. *Lampley v. Missouri Commission on Human Rights*, 2019 WL 925557, 2019 Mo. LEXIS 52; *R.M.A. v. Blue Springs R-IV School District,* 2019 WL 925511, 2019 Mo. LEXIS 54. In both cases, the court was sharply split, and in neither opinion did the Court hold that sexual orientation or gender identity discrimination claims, as such, may be brought under the state's Human Rights Law. However, at least a majority of the seven judges agreed in both cases that being gay or transgender does not bar an individual from making a sex discrimination claim under the statute, which it least allows them to survive a motion to dismiss for failure to state a claim.

The decision is significant because Missouri is a conservative state that has not amended its Human Rights Act to ban discrimination because of sexual orientation or gender identity, and Missouri's federal courts are in the 8th Circuit, where the federal court of appeals has not yet ruled on a pending appeal posing the question whether the federal Civil Rights Act's ban on sex discrimination can be interpreted to cover such claims.

The first of the two decisions, *Lampley v. Missouri Commission on Human Rights*, involves discrimination claims by two employees of the Missouri Department of Social Services Child Support Enforcement Division. Harold Lampley filed a discrimination charge with the Commission, checking off on the charge form that he was a victim of discrimination because of "sex" and "retaliation." A heterosexual co-worker of Lampley, Rene Frost, also filed a charge, claiming she suffered "retaliation" because of her association with Lampley.

In the narrative portion of his charge, Lampley stated that he is a gay man who does not exhibit the stereotypical attributes of how a male should appear and behave, as a result of which he was treated differently from "similarly situated co-workers" who were not gay and who exhibited "stereotypical male or female attributes." Lampley claimed he was subjected to harassment at work, and that in retaliation for his complaints, he was "grossly underscored" in a performance evaluation.

In her narrative, Frost described her close friendship with Lampley. Frost had complained about a performance review, the result of which was publicly announced to her co-workers in a departure from practice, and after which she claimed the employer moved her desk away from Lampley and the other co-workers with whom she collaborated. She was told she and Lampley were not allowed to eat lunch together, as they customarily did. She also claimed that, unlike other employees, both she and Lampley were docked for pay for the time they met with their union representative about these issues, and that she continued to be subjected to verbal abuse, threats about her performance review, and "other harassing behaviors" as a result of her friendly association with Lampley.

The Commission's investigator decided that Lampley was really trying to assert a sexual orientation discrimination claim, and that Frost's claim was really that she was discriminated against for associating with a gay person. In both cases, the investigator determined that the Act did not cover these charges, and the Commission terminated its proceedings, stating that both claims did not involve a category of discrimination covered by the law. The cases were "administratively closed," and the Commission did not issue either Lampley or Frost the usual "right to sue" notice that would authorize them to go to court.

Thus stymied, Lampley and Frost filed petitions with the circuit court for administrative review, or, alternatively, for a writ of mandamus – an order from the court to the Commission to issue them right-to-sue notices. The circuit court granted the Commission's motion for summary judgment, citing a 2015 Missouri Court of Appeals decision, *Pittman v. Cook Paper Recycling Corporation*, 478 S.W.3d 479 (Mo. App. W.D. 2015), that stated that sexual orientation claims are not covered by the statute.

The Supreme Court judges were divided over how to characterize this case and whether the Supreme Court even had jurisdiction to decide it, finding procedural problems with the Lampley and Frost lawsuits, but ultimately a majority concluded that they could address these appeals on the merits.

As to that, three members of the seven-member court, joining in an opinion by Judge George W. Draper, III, concluded that it was appropriate to follow federal precedents stemming from the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding that the denial of a promotion to a female employee who was criticized as being too masculine in her dress and demeanor violated the rule against discrimination because of sex. The Supreme Court accepted the argument that reliance on sex stereotypes in making personnel decisions was evidence of employment discrimination because of sex.

Turning to this case, Judge Draper wrote that it was wrong for the Commission to drop its investigation and close the case, because Lampley did not allege in his charge that he was a victim of sexual orientation discrimination. Although he mentioned more than once in his narrative that he is a gay man, his claim was that he was a victim of sex discrimination because he did not exhibit stereotypical attributes of males. Thus, he was entitled to an investigation of his claim, and similarly Frost was entitled to an investigation of her claim of retaliation against her based on her association with Lampley. Draper emphasized that sexual orientation discrimination claims, as such, are not covered by the statute. But he pointed to several opinions by federal courts, interpreting Title VII, that allowed gay plaintiffs to pursue sex discrimination claims using the sex stereotype theory.

Furthermore, wrote Draper, since the statutory time for investigation of a claim had long since expired, the appropriate remedy was for the circuit court to issue a writ of mandamus ordering the Commission to issue right-to-sue notices to Lampley and Frost so they could pursue their discrimination claims in the circuit court.

One member of the Supreme Court concurred, but on a narrower ground. Judge Paul C. Wilson, who wrote the opinion for a majority of the court in the R.M.A. case, discussed below, wrote that this case "should be analyzed and disposed of entirely on the basis of whether the facts alleged by Claimants assert sex discrimination claims covered by the MHRA," which, he wrote, "they plainly do." However, he wrote, "the principal opinion does not stop there. Instead, it proceeds to opine on whether 'sex stereotyping,' as discussed in the Title VII context in *Price Waterhouse v. Hopkins*, is a type of sex discrimination under the MHRA." But, referring to his opinion in R.M.A., Wilson argued that the MHRA "does not provide for 'types' of sex discrimination claims." Either a claimant is alleging sex discrimination or not. If he or she is alleging sex discrimination, they are entitled to have their claims investigated and, ultimately, to present them to a court if they can't be resolved by the Commission.

Judge Wilson would leave to a later stage in the litigation, when the matter is before the circuit court on the merits, the question whether the facts proven by the plaintiff in the lawsuit would amount to sex discrimination in violation of the law. Thus, he saw the discussion of sex stereotypes as premature at this stage of the litigation.

Wilson agreed with Judge Draper's opinion that the MHRA does not forbid sexual orientation discrimination as such. His concurring vote, however, provided Draper with the majority to hold that the circuit court should not have granted summary judgment to the Commission, because Lampley was not claiming sexual orientation discrimination.

Chief Judge Zel Fischer agreed with Draper and Wilson that the state law does not forbid sexual orientation discrimination, but Fischer concluded for procedural reasons that the appeal should be dismissed. Judge W. Brent Powell, in a separate dissent, while agreeing with Fischer that the court should dismiss the appeal on procedural grounds, said that otherwise the circuit court's decision should be affirmed because "mandamus cannot be used to control the administrative agency's executive director's discretionary determination that Lampley's and Frost's complaints alleged discrimination based on sexual orientation rather than sex stereotyping." If that decision was reviewed under an "abuse of discretion" standard, wrote Powell, "the executive director did not abuse her discretion in closing Lampley's and Frost's complaints because the determination that the complaints alleged discrimination based on sexual orientation rather than sex stereotyping was not unreasonable, arbitrary, or clearly against the logic of the circumstances considering the allegations contained in the complaints."

The footnotes of the opinions by Draper and Powell battle over how to characterize the narrative portions of the charges filed with the Commission. Draper emphasizes that both Lampley and Frost claimed to be victims of sex discrimination because of sex stereotyping, while Powell emphasizes that Lampley's extended narrative, not quoted in full in the plurality opinion, could clearly support a conclusion that he was the victim of sexual orientation discrimination, thus making the Commission's conclusion rational and not arbitrary.

In the R.M.A. case, the teenage student filed suit claiming that the school's refusal to let him use boys' restrooms and locker rooms was discrimination because of sex. The plaintiff's claim to the Commission and Complaint in the Circuit Court stated that his "legal sex is male" and that by denying him "access to the boys' restrooms and locker rooms," the school discriminated against him in the use of a public accommodation "on the grounds of his sex."

R.M.A. filed his charge with the Commission in October 2014, and the Commission issued him a right-to sue notice in July 2015. He filed suit against the school district and board of education in October 2015. The defendants move to dismiss the complaint on two grounds: that the Act does not cover gender identity discrimination, and that the public schools are not subject to the public accommodations provisions. The circuit court granted the motion to dismiss in June 2016, "without explanation," and R.M.A. appealed.

Writing for give members of the court, Judge Wilson, as noted above in his concurring opinion in the Lampley case, asserted that it was unnecessary for the court to deal with the question whether R.M.A. had a valid sex discrimination. Since it was dealing with an appeal from a motion to dismiss, he wrote, the court should focus on what R.M.A. alleged in his Complaint. There, he stated that he was legally a male, and that the school's denial of his access to the boys' facilities discriminated against him because of his sex. To Wilson, this was straightforward. R.M.A. was claiming sex discrimination, and denial of access to school facilities because of his sex. At this stage of the litigation, that should be enough to survive a motion to dismiss, and it was not necessary to address the question whether gender identity discrimination claims can be brought under the statute, because R.M.A. made no such claim in his Complaint. Furthermore, Wilson saw no merit to the argument that the school's restroom and locker room facilities were not subject to the ban on sex discrimination in public accommodations under the MHRA.

One can easily imagine what Judge Powell thought about this. In his vehement dissent, joined by Chief Judge Fischer, Powell insisted that the term "sex" as used in the Act could not be construed to allow gender identity discrimination claims, and he insisted that this is what R.M.A. was trying to assert.

"The MHRA does not define the word 'sex,'" wrote Powell. "When there is no statutory definition, the plain and ordinary meaning of a statutory term can be derived from the dictionary." Quoting from Webster's 3rd New International Dictionary (1993), the word "sex" means "one of the two divisions of [organisms] esp. human beings respectively designated male or female." A secondary definition from Webster's is the "sum of morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination . . . that is typically manifested as maleness or femaleness." And a third definition: "The sphere of interpersonal behavior esp. between male and female," and the "phenomena of sexual instincts and their manifestations," and "determining the sex of an organic being." Powell characterized these as boiling down to the concept of "biological sex," asserting: "The MHRA, therefore, prohibits discrimination based on the biological classifications of male or female and does not extend to the separate concept of transgender status."

Consequently, Powell concluded, "the petition survives a motion to dismiss only if it alleges that, as a biological female, R.M.A. was deprived of a public accommodation available to biological males. R.M.A. makes no such allegation," Powell continued. "Instead, R.M.A. alleges he is a female who has transitioned to living as a male, and that the Defendants discriminate against him based on his sex by preventing him from using the boys' restrooms and locker room. R.M.A. does not allege that, as a biological female, he was barred from any public accommodation afforded to biological males. Instead, R.M.A.'s allegation of discrimination distills to an acknowledgment that the Defendants excluded him from the boys' restrooms and locker room because he is biologically female. If, as the principal opinion reasons, the relevant allegation is that R.M.A.'s 'legal sex' is male, then the majority will have ignored the crux of the petition while discarding the substance of the MHRA. The logical upshot is that the majority is presumably willing to hold the MHRA prohibits schools from maintaining separate restrooms and locker rooms for male and female students. The alternative, of course, is to accept all of R.M.A.'s allegations as true, apply the plain language of the MHRA, and hold R.M.A.'s petition fails to state a claim of sex discrimination."

Powell concluded that the question whether the statute should cover this kind of case was a policy question for the legislature, not the court. "The General Assembly has spoken, and R.M.A.'s petition fails to state a claim of unlawful sex discrimination under the MHRA," stated Powell, declaring that the judgment of the circuit court should be affirmed. To Judge Wilson, speaking for a majority of the court, Judge Powell's arguments were irrelevant on the motion to dismiss, since R.M.A. had met the minimal pleading requirement of articulating a claim of sex discrimination.

Given the voting dispositions in these two cases, it is difficult to predict the future course of sex discrimination claims by gay and transgender plaintiffs in Missouri. While they may survive motions to dismiss their claims, and a reluctant Human Rights Commission may be able to conciliate with the parties and obtain settlements in some cases, ultimately the questions posed by Judge Powell will come right back when the cases are litigated on the merits. Since Judge Draper's analysis was supported by only a minority of the court, it is uncertain whether his use of the sex stereotype theory would prevail in a ruling on the merits of a gay plaintiff's sex discrimination claim. And the limited nature of Judge Wilson's ruling in R.M.A.'s case gives no hint of how a majority of the court would deal with a transgender student's claims to restroom and locker room access. Looming over all these questions is the pending 8th Circuit appeal under Title VII, and the possibility that the U.S. Supreme Court may hear cases next term concerning gay and transgender rights under federal sex discrimination laws.

Lampley and Frost are represented by Jill A. Silverstein, D. Eric Sowers, Ferne P. Wolfe and Joshua M. Pierson of Sowers & Wolf LLC in St. Louis. R.M.A. is represented by Alexander Edelman and Katherine Myers of Edelman, Lisen & Myers LLP in Kansas City, and Madeline Johnson of the Law Offices of Madeline Johnson in Platte City, Missouri. ■

Federal Court Refuses to Stay Order to Issue 'X' Passport Pending Appeal

By Arthur S. Leonard

U.S. District Judge R. Brooke Jackson denied a motion by the State Department to stay his order that it issue a gender-appropriate passport to plaintiff Dana ZZYYM, a non-binary individual, pending appeal to the 10th Circuit, find that the defendants' arguments as to the harm to the government of having to issue the passport were not sufficiently weighty and that the government had not demonstrated a substantial likelihood of success on the merits of its appeal. *ZZYYM v. Pompeo*, 2019 WL 764577, 2019 U.S. Dist. LEXIS 27647 (D. Colo., Feb. 21, 2019).

Plaintiff Dana ZZYYM, who does not identify either as male or female, declined the State Department's offer to issue them a passport with F or M in the gender mark space, insisting that a gender-neutral X be used, as several other countries now do on their passports, and as their home state of Colorado has now done on their driver's license. The State Department has resisted, asserting that it would be expensive and time-consuming to adjust their passport system software to accommodate ZZYYM (and, presumably, other non-binary individuals who may request X passports in the future), and urges the court to stay its order pending appeal so that the Department will not have to undertake this onerous process and expense unless it is ordered to do so in a final and definitive appellate ruling. In a prior ruling on the merits, Judge Jackson concluded that the Department's insistence upon passport applicants identifying as either male or female violated the Administrative Procedure Act, since no statutory provision requires this (indeed, the statute governing passports does not expressly require that a passport indicate the gender of the individual to whom it was issued, and for much of U.S. history passports have not included gender information) and the Department has never gone through the necessary procedure to adopt a formal regulation on point. Indeed, in light of the statutory language on passports, it is possible that even a properly-adopted regulation would be struck down on grounds of statutory interpretation and due process rights, since under the Supreme Court's ruling on personal autonomy (such as *Lawrence v. Texas*), a person who identifies as non-binary probably has a constitutional right to government recognition of that status. *See ZZYYM v. Pompeo*, 341 F.Supp.3d 1248 (D. Colo. 2018), for the court's ruling on the merits.

Staying a decision while the losing party appeals is not lightly done. The court noted the Supreme Court's statement in *Nken v. Holder*, 556 U.S. 418 (2009), that a "stay is an intrusion into the ordinary process of administration of judicial review, and accordingly is not a matter of right, *even if irreparable injury might otherwise result to the appellant*." [Emphasis supplied] However, the judge does have discretion to issue a stay, and the party seeking the stay "bears the burden of showing that the circumstances justify an exercise of discretion."

As far as irreparable injury goes, the court pointed out that ZZYYM has been suffering irreparable injury for several years as this litigation has slowly ground along, being unable to travel outside the U.S. without the certainty of being able to return without a currently valid passport. They had planned to attend various conferences overseas during the pendency of this litigation, but had to cancel their travel for lack of a passport.

In its attempt to persuade the court that the government would suffer irreparable harm if it were to comply with the court's order (which has already been substantially delayed because the motion to stay was promptly filed, and briefing on both sides has stretched out over several months), the Department provided testimony estimating that it would incur an expense of approximately $11 million dollars to modify its ePassport system to issue and accept for identification purposes a passport with a gender designation other than M or F. Further, the government claims that such an alteration would not be fully effective because, for identification purposes, the State Department's computers must interact with state and local computers in exchanging and compiling data relevant to identification and restrictions on exit or entry, and most state and local computer systems are limited to M and F gender identifications. Furthermore, the Department argues, even issuing ZZYYM a "one-off" special passport would pose problems. Since the Department's system would not recognize such a passport as currently programmed, it would cause problems and delays at security whenever ZZYYM would present such a passport at a port of entry, either in the U.S. or in a foreign country whose system does not recognize X gender identification. Furthermore, the Department claims that either issuing a one-off special passport or altering its system to generally recognize X gender designations would undermine the status of U.S. passports as an international "gold standard" easily acceptable for identification anywhere in the world, since all but a handful of other countries use only M and F designations in their systems.

Judge Jackson was not convinced. He related evidence from the plaintiff that the amount in question to alter the system would be about .03% of the State Department's annual budget. (Also, surprisingly not mentioned by Judge Jackson, this alteration is an investment in upgrading software, not a lost expenditure, since ZZYYM is hardly the only non-binary person who

will request such a passport, and as the number of other nations that issue X passports gradually expands, the U.S. security system will inevitably have to adjust in order to deal with foreign nationals seeking entry to the U.S. holding X passports!) The best the Department could do as a counter-argument is to claim that the appropriate cost comparison is to the annual budget allocated to the Department's Office of Consular Systems and Technology specifically for systems development, operations and maintenance relating to its passport function, not the entire State Department, thus increasing the expense to 4.7% of that annual budget. This did not impress Judge Jackson, who commented, "The Department does not argue that an expenditure that amounts to 4.7 percent of the budget allocated to consular systems and technology . . . would impair its ability to perform these technological tasks related to the Passport function. Because the Tenth Circuit has held that economic loss by itself is not irreparable harm, I cannot conclude that updating its software systems would cause irreparable harm to the Department."

Judge Jackson also accepted the plaintiff's argument that the government's contention that issuing them an X passport would "impair national security" was speculative at best. Although he found that it was a legitimate concern, of course, it could be cured by informing other countries about the change to the U.S. passport and appropriately educating U.S. security personnel. Incidentally, Judge Jackson noted, ZZYYM's most imminently-contemplated foreign travel was to a conference in New Zealand, a country that issues X passports to its non-binary citizens! Jackson also rejected the government's suggestion that it should be able to issue ZZYYM an M or F passport to use while the case is pending, having previously rejected such a suggestion in his ruling on the merits in response to the government's contention that Dana's case was without merit because they could get a passport anytime they want by bowing to the government's insistence on having an M or an F on every passport. "Dana has missed travel opportunities for four years throughout the course of this litigation," wrote the judge, "and Dana would continue to miss travel opportunities if a stay is granted."

As to the government's contention that it was likely to succeed on the merits, that's not really a winning argument when seeking a stay from the court that decisively ruled against them in granting judgment to the plaintiff. The government raised some arguments in support of its motion "that they argue they did not have an opportunity to brief prior to this Court's judgment," wrote Jackson, without mentioning any of those specific arguments. "After reviewing the briefings, I respectfully conclude that this factor also does not weigh in the defendants' favor," Jackson wrote. The court was too polite to mention that a consistent feature of the government's defense in this case has been its inconsistency; over the course of the litigation, the Department kept "discovering" new reasons for denying ZZYM's request, only coming up with the cost and reputational arguments after its original position ("because we say so") was clearly a loser.

ZZYYM is represented by a small army of litigators, including attorneys from several offices of Lambda Legal and a host of cooperating attorneys. ■

Gender Non-Conforming Maine Student's Title IX Claim Survives

By Ryan Nelson

In *McCann v. York Sch. Dep't*, 2019 U.S. Dist. LEXIS 21466, 2019 WL 542284 (D. Me., Feb. 11, 2019), Chief U.S. District Judge Jon D. Levy (appointed by President Obama) considered the case of a gender non-conforming teenager with attention deficit hyperactivity disorder and anxiety who was allegedly repeatedly bullied and harassed by his classmates in middle and high school because of his perceived nonconformance with conventional gender norms and stereotypes. Plaintiffs Michael and Erin McCann, filed suit on behalf of their minor son, J.M. (collectively represented by Clifford & Clifford, LLC) against York School Department (represented by Drummond Woodsum), as well as several individual defendants not at issue in this opinion, alleging violations of Title IX of the Education Amendments Act of 1972, Section 504 of the Rehabilitation Act, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The School Department moved to dismiss for failure to state a claim.

J.M.'s parents allege several incidents of bullying and harassment. First, they allege that, on a school field trip, their son's classmates "defil[ed] J.M.'s pillow with their genitalia," threw water on him, and threatened to beat him up if he reported them, which J.M. did despite the threat. Second, they allege that J.M. was physically assaulted by a classmate and that the assault was videotaped. Third, they allege that J.M.'s iPad was destroyed by classmates, leading J.M.'s parents to withdraw J.M. from that school because they felt that the School Department had failed to adequately address the bullying issues; after this incident, they allege that J.M. began seeing a mental

health counselor. Fourth, J.M.'s parents allege that, after J.M. began attending a new high school, he was threatened, taunted, and called names like "b****" and "c***" by a group of classmates, after which J.M. left school early and walked home, leading his parents to report the incident to the school. Fifth, they allege that, on another day, J.M. told the school counselor that a specific student planned to attack him, but the school took no action. Later that day, the student beat J.M., threw him against a locker, and pounded his head against it several times, causing J.M. to lose consciousness and suffer a major concussion with several contusions and a dislocated jaw, all of which led J.M. to develop post-traumatic stress disorder and severe emotional distress and miss three months of school.

Regarding the Title IX claim, the court correctly noted that a recipient of funding from the U.S. Department of Education (like the York School Department) may be liable for damages if its deliberate indifference to peer-on-peer sexual harassment subjects its students to harassment. To succeed on such a claim, a plaintiff must show that: 1) he was subjected to severe, pervasive, and objectively offensive sexual harassment by a school peer that caused him to be deprived of educational opportunities and benefits, and 2) the funding recipient knew of the harassment but was deliberately indifferent to it.

Notably, the court—citing First Circuit precedent—recognized that gender stereotyping is a "variation of sex-based discrimination," so it found that the facts in the complaint sufficiently alleged objectively offensive sexual harassment (e.g., the defiling of J.M.'s pillow "could reasonably be considered an assertion of masculinity by adolescent boys reacting to J.M.'s perceived failure to conform to a gender stereotype," the terms "b****" and "c***" could reasonably be viewed as derogatory terms that debase femininity and were levied against J.M. because other students viewed him as effeminate). Further, J.M. having to withdraw him from middle school and miss three months of high school qualified as deprivation of educational opportunities and benefits. Finally, Judge Levy cited the multiple examples of J.M. and his parents escalating issues to York School Department—all to no avail—as evidence that the School Department allegedly knew of J.M.'s harassment but was deliberately indifferent to it. Indeed, the only action that the School Department allegedly took in response was to convene an emergency meeting to discuss modifying their plan to accommodate J.M.'s disabilities and then modifying that plan to identify a safe place and trusted adult to seek out when J.M. felt anxious. As such, the court denied the School Department's motion to dismiss the Title IX claim.

Regarding the Section 504 claim, the court first considered and rejected the School Department's argument that the claim must be dismissed because it should have been pursued as a claim under the Individuals with Disabilities Education Act ("IDEA"), which requires states that receive federal funding under IDEA to provide a free, appropriate public education to students in their jurisdiction with qualifying disabilities. Because the complaint does not challenge the adequacy of educational services that J.M. received, the court rejected the School Department's argument. Having resolved that threshold issue, the court progressed to lay out the elements of a Section 504 claim—the complaint must allege that: 1) J.M. is an individual with a disability; 2) J.M. is otherwise qualified to receive the benefits of a program; 3) J.M. received federal financial assistance; and 4) J.M. was denied the benefits of the program solely by reason of his disability, meaning a) there is a causal connection between his disability and the discriminatory action, and b) his disability was the only cause of the discriminatory action. All parties conceded that the only disputed element was the fourth. More specifically, J.M.'s parents allege that the School Department repeatedly failed to intervene to stop the alleged bullying and harassment because J.M.'s heightened, disability-related anxiety around bullying and harassment caused the School Department not to take his reports seriously. Based on these allegations, the court concluded that the complaint had alleged a sufficient causal connection between J.M.'s disability and the actions that discriminated against him and that his disability was the only cause of that discrimination. As such, the court dismissed the School Department's motion to dismiss the Section 504 claim.

Finally, the complaint alleges that the School Department infringed J.M.'s rights to substantive due process and equal protection under the Fourteenth Amendment by failing to comply with or enforce anti-bullying and harassment laws and internal policies and failing to adequately train or supervise employees regarding their obligation to investigate and address incidents of bullying and harassment. At the outset, the court noted that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" unless the state created that danger in the first place and the alleged state action shocks the conscience of the court, meaning the state's actions must be "intended to injure in some way" and be "unjustifiable by any government interest." Here, the court held that York School Department is not alleged to have acted with the *intent* to injure J.M. Rather, it is alleged only to have failed to take reports of bullying and harassment seriously. Accordingly, the court granted the School Department's motion to dismiss the Due Process claim.

With respect to the Equal Protection claim, the court explained that a plaintiff must allege facts showing that: 1) the plaintiff, compared with others similarly situated, was selectively treated, and 2) such selective treatment was based on impermissible considerations. The court then dismissed this claim, noting only that the complaint does not allege that J.M. was treated differently from other similarly-situated students with disabilities or that the School Department's actions were based on any

type of impermissible consideration. It remains to be seen how the court may have handled the Equal Protection claim had the complaint alleged that J.M. was denied equal protection because of his perceived nonconformance with gender norms and stereotypes.

In sum, *McCann* reached all the right results for all the right reasons. Most significantly, this case is an example of how public school students who do not conform to conventional gender norms and stereotypes are legally entitled under Title IX to a school that will not sit idly by when it receives complaints of severe, pervasive, and objectively offensive bullying and harassment that deprive the student of educational opportunities and benefits. Title IX guarantees to students a public school that will take such sex-based bullying and harassment complaints seriously. ■

Ryan Nelson is corporate counsel for employment law at MetLife in New York City.

Federal Court Upholds Denial of Marriage License to Same-Sex Inmate Couple

By William J. Rold

None of the marriage equality cases leading up to *Obergerfell v. Hodges,* 135 S.Ct. 2071 (2015), used same-sex prisoner couples as test plaintiffs. Wisely so, but it was bound to happen: two prisoners of the same sex seeking a license to marry each other after *Obergefell*. U.S. Magistrate Judge David W. Christel's Report and Recommendation [R & R] finds no constitutional violation in Washington State's prohibition of such licenses in *Sandoval v. Oberland,* 2019 WL 688876 (W.D. Wash., January 29, 2019).

This case was reported earlier when U.S. District Judge Robert J. Bryan overruled a recommendation that it be dismissed for mootness after the plaintiff's release, in *Sandoval v. Oberland,* 2018 WL 3629311 (W.D. Wash., July 31, 2018), reported in *Law Notes* (September 2018 at pages 497-8). Washington State prohibits the marriage of two inmates, regardless of their gender or sexual orientation. The R & R thus rejects the Equal Protection challenge that was part of the *Obergefell* decision.

Marriage, however, is a fundamental right, subject to the balancing of interests for prisoners under *Turner v. Safley,* 482 U.S. 78, 89 (1987). Here, the R & R finds the balancing of correctional interests sustains the prohibition justifying summary judgment, "entertain[ing] a presumption that prison officials have acted within their 'broad discretion' when enacting prison policy." *Shaw v. Murphy*, 532 U.S. 223, 232 (2001), quoting *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

The R & R finds that Bernadino Gino Sandoval, *pro se,* is not similarly situated to other prisoners claiming a right to marriage under *Turner* because the object of his affections is another inmate. After marriage, they might want to have sex (*Quelle horreur!*), and inmates are not allowed to have sex with other inmates. More generally, they might have already been having sex contrary to prison rules (and despite the known fact that prisons have long adopted a "don't ask; don't tell" approach to such behavior so long as there is no fuss). But a prison cannot allow *de jure* conjugal visits between inmates who are married! What if Leopold and Loeb had had such an option!? More aggressive inmates might also coerce more passive inmates into marriage, which poses a security interest.

Although Judge Christel does not mention it, Sandoval's partner did not join as a co-plaintiff; and this writer could not find his name or a statement from him in a cursory review of the complaint, the docket, and the objections to the R & R. Sandoval did ask for permission to obtain an affidavit from another incarcerated inmate, which was denied for procedural reasons; but it is not clear this was to be from his otherwise unmentioned lover. The earlier opinion found that the state was prohibiting their contact.

The R & R found: "Defendants have provided evidence that the prohibition on fellow prisoners marrying each other is related to cost and safety concerns surrounding housing assignments, financial arrangements, visitation, and other contact between prisoners that is usually restricted . . . . Thus, Defendants have provided ample evidence that the prison regulation prohibiting fellow prisoners from marrying each other is reasonably related to legitimate penological interests."

Sandoval objected to the R & R's findings on sexual misconduct and coercion as "speculative" and unsupported by the record. The R & R also upheld Sandoval's transfer and placement in segregation after he applied for the license. Judge Christel found that the application for permission to marry was not

constitutionally protected activity, so no retaliation claim could follow. He found that Sandoval had not shown a retaliatory motive and that the "more likely" motive was defendants' desire to separate the two inmates to keep them from having sex. This does not explain why Sandoval was not only moved but placed in segregation after the move.

U.S. District Judge Robert J. Brian adopted the R & R in a one-sentence order, without reciting whether he reviewed the objections *de novo*, as required by F.R.C.P. 72(b). ■

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.

Marine's Sexual Assault Conviction Set Aside by Military Appeals Court When Record Failed to Support Finding that Victim Was "Otherwise Unaware" of the Assault

By Bryan Xenitelis

The U.S. Navy-Marine Corps Court of Criminal Appeals has set aside with prejudice the sexual assault conviction under the Uniform Code of Military Justice of a marine who was tried for engaging in anal sex with another marine, Sgt W, who claimed that he had taken four Percocet pills and was asleep during the assault. *United States v. Washington*, 2019 CCA LEXIS 47, 2019 WL 510070 (U.S. Navy-Marine Corps Ct. of Crim. App, February 8, 2019) (not reported in M.J. Rptr.). Judge Angela J. Tang wrote the opinion for the Court of Criminal Appeals.

Appellant Washington and the victim, identified in the opinion as Sgt W, were both stationed in Okinawa, Japan, and connected through Grindr. The victim is identified in the opinion as "openly homosexual and married, but his husband did not accompany him to Okinawa." He testified that he sought a platonic friendship and used Grindr "because he wanted to make friends who could relate to him, explaining that it was difficult for him to meet other homosexual men in the Marine Corps." He had been suffering "excruciating" pain from a recent leg surgery. Appellant offered him a leg massage, as he had done in the past. The victim had previously taken two Percocet pills and shortly before meeting Appellant took two more. He claims that he fell asleep on his side wearing gym shorts and awoke the next morning with pain in his anus and a "dark-red-in-color" stain on his comforter. He texted Appellant, who confirmed that they had sex but also asked "was that not okay?" The victim sought medical attention and a week later filed a restricted report of sexual assault.

Appellant initially stated that he and the victim had sex and that the victim was awake and masturbating, but eventually underwent a polygraph examination and admitted that the victim was asleep during sex but that the victim did awake several times during sex – one time to lubricate Appellant's penis with saliva, twice to put his hand on Appellant's stomach, and once to mumble: "It's in and out, not up and down." Charges were brought against Appellant for sexual assault and for making false official statements. Expert witnesses testified that while Percocet can cause drowsiness and slowed reaction times, it does not put a person to sleep and could not have "such severe side effects that [a person] could be made to sleep so soundly that they would not notice a non-consensual penetration of their anus by a penis." The military judge instructed members in the proceeding that to find Appellant liable, they must find he penetrated the victim's anus with his penis and should have known that the victim was "asleep, unconscious, and otherwise unaware that the sexual act was occurring," and that they must all agree as to whether the victim was asleep or unconscious or otherwise unaware. The jury returned a guilty verdict and checked the box for "otherwise unaware." They acquitted Appellant of the false statement charges.

On appeal, the Appellant made several arguments as to why his conviction should be overturned. Judge Tang's opinion rendered all other arguments moot by finding that the conviction was factually insufficient. Judge Tang discussed the history of the statutory construction and meaning of

"otherwise unaware," citing case law holding that "asleep," "unconscious," and "otherwise unaware" constitute three separate theories of liability and that the theories are mutually exclusive ("a victim cannot simultaneously be asleep and 'otherwise unaware,' nor can a victim be simultaneously unconscious and 'otherwise unaware.'").

Conducting a *de novo* review of the facts, Judge Tang wrote that the conviction could only be confirmed if the panel was "convinced beyond a reasonable doubt that [Victim] was unaware of the sexual act for a reason other than sleep or unconsciousness." Since the victim's testimony was that he was asleep, Judge Tang found his testimony "yields no reason to believe he was 'otherwise unaware.'" Going to the Appellant's own statements, the first statement that the victim was awake and participating provided no support that the victim "was ever in a state of 'otherwise unawareness.'" The second statement admitting that the victim was asleep but awoke several times "described five points in time just before and during the sexual act when [victim] was awake . . . even though these actions may demonstrate a withdrawal of consent or lack of consent, they also demonstrate awareness. And that awareness, at all points when [Victim] was not asleep, renders the Appellant's conviction unsustainable."

With respect to Sgt W being under the influence of Percocet, Judge Tang found "'alertness' to be different from 'awareness,'" explaining that "an unalert person is aware of his or her surroundings but lacks mental sharpness," and noting that the victim never testified that he suffered from a lack of alertness, but rather that he was asleep.

Judge Tang rejected affirming a finding of a lesser included offense of attempted sexual assault, ruling that it would be impossible to find Appellant specifically intended to commit the assault and moreover that he did so with the intent to do it while the victim was "otherwise unaware." Judge Tang distinguished an unpublished decision cited on appeal in which a person who was not convicted of sexual assault was instead convicted of the lesser-included offense of attempted sexual assault where the perpetrator believed the victim to be asleep when the victim was actually awake, noting that here there was no evidence that Appellant knew the victim was "otherwise unaware" and that therefore Appellant could not have intended every element of the "attempt" offense.

Noting that court members had a "full opportunity" to convict the Appellant under the "asleep" theory but did not do so, Judge Tang set aside and dismissed the findings and Ap pellant's sentence, and ruled that the rule against double jeopardy bars retrial under the two rejected theories of liability and further bars convictions on attempts based on those theories. The two other judges on the appellate panel concurred without writing separate opinions. ■

Bryan Xenitelis is a New York attorney addition and adjunct professor at New York Law School, where he teaches "Crime & Immigration."

Federal District Court in 8th Circuit Dismisses Fair Housing Act Claim by Married Lesbian Couple

By Arthur S. Leonard

The U.S. Court of Appeals for the 8th Circuit has yet to repudiate its 1989 precedent holding that "Title VII does not prohibit discrimination against homosexuals," so Senior U.S. District Judge Jean C. Hamilton concluded that she was bound to dismiss a sex discrimination claim under the Fair Housing Act (FHA) brought by a married lesbian couple denied admission to a senior group home because their marriage was not recognized as "biblical." *Walsh v. Friendship Village of South County*, 2019 WL 233149, 2019 U.S. Dist. LEXIS 7630 (E.D. Mo. Jan. 16, 2019). Although the question whether "discrimination because of sex" extends to sexual orientation discrimination is pending before the 8th Circuit, it is possible that the circuit will delay issue a ruling while the Supreme Court continues to consider whether to grant certiorari petitions in several Title VII and Title IX cases.

According to the allegations of the complaint filed on behalf of Mary Walsh and Beverly Nance by the National Center for Lesbian Rights and the ACLU of Missouri Foundation, the two women, ages 72 and 68 respectively, have been a couple for almost 40 years, and married in Massachusetts in 2009. They decided it was time to move out of their single-family home into a senior living community, and in the spring of 2016 began investigating the possibility of moving to Friendship Village, which had opened in 1978 and offers senior apartments, as well as assisted living and skilled nursing facilities. They visited the facility several times, "had extensive conversations about pricing and floorplans" with the organization's

residence director, and submitted a deposit and signed a wait list agreement on July 25, 2016. The residence director then called Walsh, asking her what was the nature of her relationship with Nance. Walsh said they were married. The residence director called back the next day, informing Walsh that the organization's "Cohabitation Policy" would not permit the women to share a residence at Friendship Village. Although that policy states that married couples can share a residence, it defines the term "marriage" as "the union of one man and one woman, as marriage is understood in the Bible." Friendship Village claims its policy is "consistent with its long-standing practice of operating its facilities in accordance with biblical principles and sincerely-held religious standards." There is no indication in the court's opinion that Friendship Village is a non-profit religious corporation or owned by a religious entity. It is probably best characterized as a business whose owners and operators wish to operate it in accordance with their religious principles, and claim a right under the 1st Amendment Free Exercise Clause to do so free of interference by state or federal anti-discrimination laws. But the court didn't have to get to that question, as it found that the FHA did not apply to the case.

In October 2016, Walsh and Nance filed a discrimination complaint with the U.S. Department of Health and Human Services, alleging unlawful housing discrimination because of sex. HUD referred the claim to the Missouri Civil Rights Commission, which passed on the case and bucked in back to HUD. This is not surprising, since the Missouri courts have rejected the contention that the state's civil rights law (which does not mention sexual orientation) cannot be interpreted to cover sexual orientation claims. Unfortunately for Walsh and Nance, their timing put them up against a changing of the guard at HUD. During the Obama Administration, HUD came to regard sexual orientation discrimination as a violation of the FHA ban on sex discrimination, but the Trump Administration has generally disavowed such interpretations of sex discrimination laws, and their complaint languished at HUD until June 7, 2018, when they voluntarily withdrew their complaint so that they could sue Friendship Village directly. Their initial federal complaint under the FHA asserted sex discrimination, and also asserted a supplementary claim under the Missouri Civil Rights Act, which they eventually abandoned. Friendship Village moved for judgment on the pleadings, which Judge Hamilton granted on January 16, 2019.

Judge Hamilton rejected various arguments advanced by the plaintiffs, which had proved successful in Title VII litigation in the 2nd and 7th Circuits, finding that, at bottom, their claim is discrimination because of their sexual orientation, and the 8th Circuit's precedent, *Williamson v. A.G. Edwards & Sons, Inc*., 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089 (1990), stands unless reversed en banc or effectively overruled by the Supreme Court. Things on this front are in a state of suspended animation at the federal appellate level, however, with petitions for certiorari pending in *Altitude Express v. Zarda*, No. 17-1623, and *Bostock v. Clayton County Board of Commissioners*, No. 17-1618 (both Title VII sexual orientation cases), *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107 (Title VII gender identity discrimination), and *Doe v. Boyertown Area School District*, No. 18-658 (Title IX gender identity discrimination). As of the end of February, the Supreme Court had conference the first three of those cases numerous times, and was about to conference the Title IX case, but had yet to announced whether it would grant or deny certiorari, thus leaving a lingering circuit split amidst continuing discontent among district court judges, as we reported last month in *Law Notes*.

In addition to rejecting as precluded by circuit precedent the argument the sexual orientation discrimination is a form of sex discrimination, Judge Hamilton also rejected an associational discrimination claim (i.e., that each of the women was being discriminated against because of the sex of the person with whom they are associated) and a sex stereotyping claims (i.e., that they are being discriminated against because they fail to conform to the defendant's stereotyped view that women are supposed to be romantically attracted to men, not other women). Commented Hamilton, quoting from an earlier district court decision within the 8th Circuit from Arkansas confronted with the stereotyping argument, "This Court 'need not struggle with exactly where to draw the line between actionable discrimination based on what is alleged to gender non-conforming behavior and non-actionable discrimination based on sexual orientation' The issue is not presented here, because with their allegations Plaintiffs make clear their theory of sex-stereotyping is based solely on their sexual orientation. 'Sexual orientation alone cannot be the alleged gender non-conforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory,' as 'to hold otherwise would be contrary to well-settled law that Title VII does not prohibit discrimination on the basis of sexual orientation.'" Circular, what? And "biblical marriages"? How many wives did King Solomon have?

Of course, this case squarely brings forward the question whether the operator of a public accommodation such as a senior living community is entitled to a religious free exercise exemption from a federal law banning housing discrimination because of sex – but in this case only, of course, if the 8th Circuit decides to follow the example of the 2nd and 7th and rule that discrimination because of sex includes discrimination because of sexual orientation, adopting one or more of the theories that Judge Hamilton rejects in this case.

Judge Hamilton was appointed to the district court by President George H. W. Bush in 1990, and took senior status in 2013.

Attorneys on the case for NCLR are Amy E. Whelan and Julie H. Wilensky. Attorneys for ACLU of Missouri include Anthony E. Rothert, Jessie M. Steffan, and Gillian R. Wilcox. Arlene Zarembka of St. Louis is local counsel, and Joseph John Wardenski and Michael Gerhard Allen, of Relman and Dane PLLC, are also assisting with the case. ■

Texas District Court Tosses Title VII Sexual Orientation Suit Against KFC but Leaves Door Open to Gender Stereotyping Liability

By Matthew Goodwin

On February 5, 2019, Senior U.S. District Judge Gray H. Miller dismissed Eric Senegal's Title VII sexual orientation discrimination lawsuit against the parent companies of Kentucky Fried Chicken "KFC). *Senegal v. Yum! Brands, Inc. et al.*, 2019 WL 448943; 2019 U.S. Dist. LEXIS 17821 (S.D. Texas). Judge Miller's opinion dismissed all of Senegal's claims without prejudice, but his analysis suggested repleading a claim of discrimination based on sexual orientation under Title VII would be futile absent a change in Fifth Circuit precedent or a contrary ruling from the Supreme Court.

Senegal filed suit against Yum! Brands, LLC and TAS Foods, LLC (respectively Yum and TAS) in May 2018, based on events that occurred in Jan. 2016 and apparently after obtaining a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC).

Senegal, a gay man who lives in Houston, Texas, alleged that he applied for and was offered a job at a KFC restaurant along with three other individuals. Thereafter, Senegal attended an orientation with an expectation that he would start work at the KFC. Following the orientation, though, the restaurant never placed Senegal on its regular schedule. Senegal learned from other employees that the manager at the orientation referred to him as a faggot and said he "needed to change his voice."

In response to the initial EEOC inquiry, Yum stated that Senegal was hired as a cleaning captain in January 2016. The KFC manager in question, Vickie East, claimed she never scheduled Senegal because the position for which he was hired was on an "as-needed" basis and that Senegal nevertheless "kept coming to the store being very rude and demanding to be put on the schedule." The manager also stated, "while out on company business she saw [Senegal] participating in drug trafficking."

TAS never appeared in the case and Yum filed its motion to dismiss based on three grounds: (1) Senegal's complaint contained insufficient factual allegations to conclude Yum is an employer within the meaning of Title VII; (2) no employer-employee relationship existed between KFC and Senegal; (3) Senegal failed to exhaust administrative remedies as required by Title VII; and, (4) Title VII does not protect against sexual orientation discrimination.

Title VII, which prohibits discrimination by an "employer" on the basis of "race, color, religion, sex, or national origin" defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day . . . " The court held that Senegal did not plead facts sufficient to satisfy this element of the statute even though, as Senegal's opposition pointed out, Yum and TAS own KFC, Taco Bell and other companies around the globe, making it self-evident they have more than 15 employees. On the other hand, the fact Senegal alleged he had been offered a job at KFC allowed the court to "reasonably infer that an employment relationship existed between Senegal and the Defendants."

The court found Senegal's pleadings sufficiently averred the condition precedent: his exhaustion of administrative remedies. Yum argued Senegal could not sue because Yum was not named in the pre-requisite EEOC charge. The court rejected this argument under the "identity-of-interest exception,"—i.e. if there is clear identity of interest "between the [party sued] and the party named in the EEOC charge, then a plaintiff may proceed." Specifically, the court did not find that there was sufficient identity-of-interest between Yum and the party named in the EEOC charge; rather, the Court noted that no discovery had been conducted and in the context of the motion to dismiss the court lacked sufficient information to conclude as a matter of law that identity of interest was lacking.

Finally, the Court addressed the parties' arguments concerning Title VII's applicability to claims of sexual orientation discrimination. Judge Miller wrote: ". . . under Fifth Circuit precedent, Title VII does not protect against sexual orientation discrimination . . . [w]hile Senegal urges this court to adopt other circuits' approaches to this issue, Fifth Circuit authority forecloses this argument." In a footnote the court recognized the recent rulings of the Second and Seventh Circuits—respectively, *Zarda v. Altitude Express, Inc.* and *Hively v. Ivy Tech Cmty. Coll.*—both of which held that sexual orientation is a prohibited ground for discrimination under Title VII.

Senegal's opposition to dismissal in this regard pointed to another, recent Texas Southern District case—*Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627 (S.D. Tex. 2018)—citing it for the proposition that other district courts in the 5th Circuit had adopted the reasoning of *Zarda* and *Hively* and found sexual orientation discrimination actionable under Title VII. In a footnote, the court disagreed with Senegal's reading of *Wittmer*, finding that *Wittmer* merely "assumed without deciding, that sexual orientation was a protected class under Title VII, because the [*Wittmer*] plaintiff's case failed on other grounds."

Though the case was dismissed, the court's analysis appeared to treat favorably Senegal's Title VII claims of discrimination based on gender stereotyping, and so dismissed *without prejudice*, granting Senegal's request for leave to file an amended complaint. It is widely speculated that the current circuit split (exemplified by Senegal's case) as to whether Title VII encompasses sexual orientation discrimination will eventually reach the Supreme Court, which has been considering several petitions for certiorari raising the question. Subsequent to this decision, a 5th Circuit panel affirmed the dismissal in *Wittmer*, without ruling on the underling question whether sexual orientation claims are actionable under Title VII. See 2019 WL 458405 (Feb. 6, 2019), *reported above*. ■

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Zero-Sum: If a Public University Desires to Prohibit Certain Conduct, It Must Do So Even-Handedly

By Vito John Marzano

On February 6, 2019, U.S. District Judge Stephanie M. Rose (S.D. Iowa) weighed in on First Amendment protections and nondiscrimination policies set by a public university. *Business Leaders in Christ v. The University of Iowa*, 2019 U.S. Dist. LEXIS 22181, 2019 WL 460401. The court cautioned against those who would "overinflate" the issues presented. This matter, as the court explained, did not concern some "fundamental conflict between nondiscrimination laws and religious liberty." Civil rights laws and policies "reflect a broad consensus as to the evils of discrimination and the benefits of equal opportunity." Nondiscrimination protections, however, require an even-handed application.

To summarize the facts of this case, the University of Iowa permits non-registered and Registered Student Organizations (RSO) to operate on campus. RSOs receive certain benefits, including eligibility to use campus meeting facilities and outdoor spaces and receive funding. An RSO must comply with, among other things, the University's Human Rights Policy, which prohibits depriving an individual from leadership or membership consideration based on certain forbidden grounds, including race, ethnicity, sexual orientation, and religious views. However, the University acknowledges that some RSOs exist to provide like-minded individuals with a safe space to enhance the learning experience and provide a space for historically discriminated-against minorities. As such, some exceptions to the Human Rights Policy are permitted.

Business Leaders in Christ (BLinC) was formed in spring 2014 and registered as an RSO that fall. BLinC believes that "God's design" does not include homosexual relationships, "and that every person should embrace, not reject, their God-given sex." BLinC claimed that it screened prospective officers to assure that they agree with and can represent the group's religious beliefs. In spring 2016, BLinC member Marcus Miller met with the group's then-president Hannah Thompson to discuss serving on the group's leadership board. He disclosed his attraction to men and was open about his desire to engage in same-sex relationships. Thompson relayed that information to the BLinC board, which concluded that Miller fundamentally disagreed with the group's faith and could not lead their members with "sound doctrine and interpretation of Scripture." Thompson conveyed the foregoing to Miller and stated that he could serve if he would forego romantic same-sex relationships. Miller declined to do so, and Thompson informed him that he could not join the group's executive leadership.

In February 2017, Miller filed a complaint with the University, stating that BLinC denied him a leadership position in violation of the Human Rights Policy because of his status as an out gay man. BLinC contended that it denied Miller a leadership position because he "disagreed with, and would not agree to live by, BLinC's religious beliefs." The investigation concluded in Miller's favor. BLinC appealed.

BLinC and University officials met in September 2017. Defendant Dr. William Nelson, the Associate Dean of Students who was responsible for registering student groups on campus, and Associate Dean Thomas Baker, represented the University. They informed BLinC that it could retain its RSO status if it agreed to certain conditions, including revising its constitution to comply with the Human Rights Policy and ensuring that future candidates would not be denied a position based on their status as a non-heterosexual. BLinC thereafter submitted revisions to its constitution to Nelson. The revision included a "Statement of Faith" that all leaders would need to sign. In the Statement of Faith, a new section titled "Doctrine of Personal Integrity" reiterated the group's belief that God's intention for sexual orientation only contemplates sex between a husband and a wife, that rendering every other form of sexual intimacy outside of that design and "God's original plan for humanity" was included. BLinC formalized the leadership selection process, which required a candidate to sign a copy of the Statement of Faith. Nelson rejected the changes because the "Statement of Faith, on its face, does not comply with the Human Rights Policy."

BLinC then appealed to defendant Dr. Lyn Reddington, then-Assistant Vice-President and Dean of Students. Reddington affirmed Nelson's decision and repeated that the Statement of Faith failed to comply with the Human Rights Policy because it resulted in disqualification of individuals from leadership positions based on sexual orientation or gender identity.

In December 2017, BLinC filed a 21-count complaint against the University, also naming Redington, Baker, and Nelson in their individual and official capacities. BLinC asserted various claims under 42 U.S.C. § 1983 for violations of its First Amendment protections, namely—free speech and expressive association, freedom of association, freedom of assembly, and free exercise of religion. Separately, BLinC included claims sounding in the First Amendment's Religion Clauses. Not subject to this motion, BLinC also claimed violations of the equal protection clause of the Fourteenth Amendment, the federal higher Education Act, and a litany of state constitutional and statutory protections. Shortly thereafter, BLinC moved for a preliminary injunction to restore BLinC's RSO status for a

period of 90 days, which was extended until the court renders judgment in this matter. The court granted the motion for preliminary injunction.

In January 2018, the University began to review all RSO constitutions to ensure compliance with the Human Rights Policy. Reviewers were to look for, among other things, "any language that might contradict the Human Rights clause, including language that requires leaders or members to embrace certain beliefs/purposes." Although a group's purpose may be related to specific classes or characteristics identified in the Human Rights Policy, membership or leadership may not "be contingent on the agreement, disagreement, subscription to, etc., of the stated beliefs/purposes which are covered in the" Human Rights Policy. Of the 30 groups that were deregistered, many were either defunct or did not file a timely response.

Referenced RSOs that ostensibly violated the Human Rights Policy and remained registered include "Love Works," in which leaders must sign a "gay-affirming statement of Christian faith"; "House of Lorde," which requires membership interviews in order to maintain "a space for Black Queer individuals" and their supporters; and "the Chinese Students and Scholars Association," which limited membership to "enrolled Chinese students and scholars."

After discovery, BLinC moved for summary judgment on its free speech, expressive association, free exercises, and Religious Clauses claims. BLinC sought nominal damages and to permanently enjoin the University from enforcing the Human Rights Policy against the group based on its Statement of Faith and leadership selection policies. BLinC also sought to hold the individually named defendants, Nelson, Baker, and Reddington, personally liable for the alleged constitutional violations. The individual defendants moved for partial summary judgment on the grounds of qualified immunity. At the outset, public universities are considered government officials in this context.

The court assessed BLinC's free speech and expressive association claims together. BLinC and defendants agreed that the University created a limited public forum. A university may impose reasonable and viewpoint-neutral restrictions on a limited public forum.

BLinC argued that the Human Rights Policy constitutes an "on-its-face" violation of the group's First Amendment rights. Further, using the Human Rights Policy to revoke the group's RSO status based on the Statement of Faith and leadership requirements constituted an "as-applied" violation. Defendants countered that the evidence does not support a conclusion that the University intended to discriminate against or disadvantage BLinC because of its views.

Regarding the "on-its-face" argument, the earlier preliminary injunction order had concluded (1) the Human Rights Policy constituted a reasonable restriction in light of the intended purposes of the forum; and (2) the Human Rights Policy is viewpoint neutral as written. Accordingly, the court saw no reason to revisit that issue. Nevertheless, if defendants did not apply the Human Rights Policy in a viewpoint neutral manner, then the court must determine whether defendants' conduct was viewpoint neutral.

The Supreme Court has held that viewpoint discrimination arises when "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The party asserting an as-applied challenge for viewpoint discrimination must establish a pattern of unlawful favoritism by showing that they were prevented from expressing a viewpoint on a subject while another was permitted to express their viewpoint on the subject. Religious views are protected equally to secular views on a subject matter. A public university that allows a secular organization to express certain views while prohibiting a religious organization the same ability has engaged in viewpoint discrimination. The court goes on to distinguish this from an instance of a university applying an "all-comers policy." Under such a policy, the school equally requires all organizations to permit all students, regardless of status or beliefs, to be a member or hold a leadership role without any exceptions. The Supreme Court recognized this as an appropriate viewpoint-neutral restriction in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

Defendants admitted that the University allows some exceptions to the Human Rights Policy for an RSO and does not have an all-comers policy. Even if these exceptions resulted from an administrative oversight, there would not be a genuine issue of fact that the Human Rights Policy applied to groups differently. By selectively applying the Human Rights Policy, held Judge Rose, the defendants violated BLinC's constitutional rights and engaged in impermissible viewpoint discrimination. Next, BLinC was prevented from expressing its viewpoints, namely as it relates to same-sex relationships, while other groups were permitted to do so. For instance, Love Works, the functional inverse of BLinC, retained its RSO status even though it required its leaders to sign a gay-affirming statement as part of its Christian beliefs (defendants argued that the status of Love Works was pending the outcome of this litigation, but the court noted that there was nothing in the record to support this assertion). The court then held that defendants' argument that these exceptions are justified to ensure that historically discriminated-against minorities have a safe space, speaks to whether the restriction can withstand strict scrutiny, not to the nature of the action.

Turning to the Free Exercise claims, BLinC argued that defendants targeted the group for its religious beliefs and targeted BLinC based on a policy that is not generally applicable. Defendants countered that the Human Rights Policy is a permissible neutral policy of general application. However, the court

concluded that the individual evaluation process for allowing exceptions does not signal a neutral prohibition. Hence, the restrictions must survive strict scrutiny, which requires a narrowly tailored restriction to accomplish a compelling interest.

Although defendants did not directly address strict scrutiny, the court said that they asserted that student organizations "play an important role in developing student leadership and providing a qualify campus environment." Further, student groups ensure academic growth, access to educational opportunities, and a safe environment in which to do so. The court held that these were compelling interests. However, because the restrictions apply only to conduct protected by the First Amendment and defendants allow similar conduct by other RSOs, the restriction was not compelling. The court must focus on comparative harms, not the benefits, caused by the restrictions. BLinC was targeted because its anti-LGBT views contravene the Human Rights Policy. However, other groups, such as LoveWorks, House of Lorde, and the Chinese Students and Scholars Association, each of which have polices that contravene the Human Rights Policy, were permitted to retain their statuses as RSOs. BLinC suffered harm while the other groups benefited. Even though those exceptions benefited historically discriminated against students, that benefit does not outweigh the harm suffered by limiting BLinC's speech.

Additionally, revoking the RSO status was not narrowly tailored to achieve the University's interest. The court reiterated that an all-comers policy, which the University disclaimed having, would dramatically promote defendants' goals of diversity and equal access to academic opportunity. Hence, defendants failed to satisfy the strict scrutiny burden.

Turning to the Religious Clauses claims, BLinC asserted claims based on the "ministerial exception" and "internal autonomy" but did not address them separately. As such, the court considered both together. BLinC argued that the University could not interfere with a religious organization's leadership selection. However, this argument has only applied as a defense to claims asserted against a religious organization, not as the basis for a cause of action. Accordingly, the court denied summary judgment on those claims.

Having concluded that BLinC is entitled to summary judgment for the free speech violation, the court held that BLinC is entitled to nominal damages of $1. Further, the court concluded that a permanent injunction is appropriate provided that (1) BLinC does not materially alter its Statement of Faith or leadership selection; (2) the University continues to allow other RSO exceptions; and (3) BLinC otherwise maintains its eligibility for RSO status. Put another way, if the University adopts an all-comers policy, the permanent injunction would no longer be in effect.

The court next addressed whether qualified immunity protects the individual defendants from personal liability. Qualified immunity protects officials from personal liability where the violated constitutional or statutory rights are not clear and would not have been known by a reasonable person. Put another way, qualified immunity applies to all but the "plainly incompetent or those who knowingly violate the law."

The court reasoned that this case presented a close call. While the evidence suggested that University officials were aware that some constitutional rights may be implicated, there were not any directly analogous cases that would have informed the individual defendants that their conduct violated BLinC's constitutional rights. The parties themselves described the matter as "unusual" and "difficult." Absent certainty, the immunity defense should not be denied. Accordingly, the individual defendants were entitled to qualified immunity for personal liability as its relates to monetary damages and only as to the free speech, expressive association, free exercise, and Religious Clauses claims (the individual defendants only moved for partial summary judgment on those claims).

As previously discussed, this case does not present another instance of LGBT civil rights brushing up against so-called religious liberties. Rather, it is an instance where a group that happens to be religious was discriminated against because of its viewpoint on LGBT issues. The court endeavored to apply the law and consistently advocated for an all-comers policy, which present a zero-sum system—either all can engage in a type of speech or none can engage in a type of speech.

The fact that this matter happened to involve some LGBT issues is incidental and not the court's focus. One should consider that the reasoning in this decision also protects LGBT student organizations—a public university could not prohibit an organization advocating for LGBT civil rights while allowing a Christian group to advocate against those civil rights.

Some might wish to draw comparisons to *Masterpiece Cakeshop*, where, similarly, the Supreme Court included nice language about antidiscrimination but ultimately favored discrimination. Dissimilarly, however, the court in this case kept to the facts and did not engage in overt revisionism, as the Supreme Court arguably did in *Masterpiece Cakeshop*.

Nevertheless, this does not mean that advocates should ignore the big picture. Although the court rightly distinguishes this case from others where LGBT rights brush up against religious freedom, one should not ignore that so-called Christian groups seek to use religious exceptionalism to create a legal loophole to anti-discrimination policies and laws. Given the current political climate, the onus must fall to our religious allies to assert that adhering to Scripture does not foreclose supporting LGBT persons or serve as an excuse to discriminate. ■

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Federal Court Grants Summary Judgement against Sex and Sexual-Orientation Discrimination Claims Based on Insufficient Evidence

By Cyril Heron

On February 6, 2019, U.S. District Court Judge James D. Peterson granted Mayo Clinic's motion for summary judgment, disposing of discrimination and retaliation claims by a gay former employee, Timothy J. Blumentritt, whose Title VII and Americans with Disabilities Act suit alleged dismissal based on his sex, sexual orientation, HIV and Hepatitis C positive status, and in retaliation for filing a complaint of discrimination against the Clinic. *Blumentritt v. Mayo Clinic Health System*, 2019 U.S. Dist. LEXIS 19392, 2019 WL 469315 (W.D. Wis.). In response to the motion, Blumentritt had conceded that the evidence was insufficient to uphold the claim of discrimination based on his HIV and Hepatitis C status. Indeed, Blumentritt seemingly conceded the Title VII claims as well, for he failed to state his version of the facts or to cite to evidence that supports his version of events with sufficient particularity to satisfy the court. Judge Peterson found that Blumentritt merely asserted that a fact was disputed and cited generally to his affidavit, proposed findings of fact, and brief without indicating supporting evidence as required by court procedure. Therefore, the court could not establish the presence of a genuine dispute, which Judge Peterson hyperbolically relayed as, "even if the court scoured the record, Blumentritt has not adduced evidence that would raise a genuine dispute as to the facts."

Blumentritt's tenure at the Mayo clinic began in 1990, when the clinic hired him to be a case manager who coordinates mental health services for patients. Some of his duties included filling out admission and discharge papers, patient treatment plans, and, most importantly, filling out other documents that went into patient charts. Fifteen years later, in 2005, Blumentritt was promoted to be a supervisor who reported to the director of behavioral health and the department manager, Bob Hillary and Julie Conway, respectively. While Blumentritt was working as a supervisor, Conway made several comments regarding his sexual orientation – from speculation on which colleagues were gay as well to her suspicion that her son was gay based on his penchant for the arts and his perceived sensitivity. Conway's specific statement was, "I wonder if my son is gay. He's artistic and he's sensitive. Well, if he was gay, I guess, I would have no choice but to deal with it."

In addition to Conway's conduct, Blumentritt had an altercation with an employee whom he supervised. Julie Blakeman approached Blumentritt and said, "[a]nyway, I'm sorry about it. I wanted to let you know I know you're gay. I'm okay with it (pause), but my religion isn't." Blumentritt reported the incident to Hillary and Conway, but neither of them took action.

It is undisputed that Blumentritt was a fine supervisor, apart from the complaint that he did not consistently keep patients' charts up to date. The court notes with particularity that up-to-date charts are requisite for the running of the Mayo Clinic because the charts maintain the quality of patient care and establish compliance with the state's licensing requirements.

In 2010, Blumentritt voluntarily gave up his position as a supervisor to return to work as a case manager. Notwithstanding this, Blumentritt seemingly remained incapable of keeping up to date with patient charts, and his bosses took notice. An audit in November 2011 indicated that Blumentritt had accrued 40 incomplete patient charts. In December, Conway and Gretchen Scharringhausen (who replaced him as supervisor) put Blumentritt on a schedule to complete one to two patient charts a day. Blumentritt signed a "coaching agreement" to complete the charts by mid-January, to prevent Mayo from falling into noncompliance with state regulations. Blumentritt regrettably was unable to stick to the agreement, and, by February 9, 2012, he still had 15 outstanding incomplete charts. Conway and Scharringhausen placed Blumentritt on "formal performance counseling" until he completed his charts nearly a month later.

In November of the same year, an investigation into a breach of Mayo Clinic policy revealed that Blumentritt had failed to include a progress update for a patient chart for which he was responsible, and he had knowledge of the the violative conduct and did not intervene. For these reasons, Conway and Scharringhausen placed Blumentritt on performance counseling again with an improvement plan. Blumentritt needed to write a document explaining the chain of command, due November 9; meet with Scharringhausen to clarify his role and responsibilities, and submit a written summary of them by November 16 and 21, respectively; and, write a document explaining how the Clinic's "five safe behaviors" could have been applied to the incident. Failure to adhere to the improvement plan or further documentation errors carried the punishment of termination.

Blumentritt completed his first written assignment on time, but he was unable to meet with Scharringhausen until November 27. Conway and Scharringhausen executed an updated plan which included turning over the written summary of his responsibilities on December 17 when he attended another meeting with Scharringhausen. Scharringhausen

sent a reminder to Blumentritt five days before the assignment was due, but he failed to complete it. Despite the previous warning, Blumentritt received no punishment. In fact, it was not until he had once again fallen behind in his patient charts that he was finally told to meet with Human Resources. It is unclear what was discussed at that meeting. Specifically, Blumentritt allegedly brought up a complaint that he felt his sexual orientation was a bone of contention for a long time that went unaddressed by the Mayo Clinic. On March 15, 2013, Conway and Scharringhausen met with Blumentritt and gave him a last chance to update his charts. He said he complied, but an audit in April revealed he was missing a document that was due back in January. Scharringhausen asked about the document, and Blumentritt recalled it and offered to complete it immediately. Nevertheless, Blumentritt did not complete the document fast enough, because the next day Scharringhausen did not find the document in the patient record. Finally, Conway and Scharringhausen met with Blumentritt and terminated him after the meeting where he admitted to not completing the January document.

At the outset, Judge Peterson affirms Seventh Circuit precedent that Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation. Judge Peterson then elucidates the standard that Blumentritt had to adduce evidence that as a whole would lead a reasonable jury to find he was fired for his sexual orientation—sexual orientation need not be the exclusive reason, merely a motivating factor. Blumentritt introduced three types of evidence through which Judge Peterson methodically works: (1) preferential treatment of others; (2) expression of discriminatory animus; and (3) evidence that the treatment was unfair.

Addressing the preferential treatment, Judge Peterson held that Blumentritt's evidence of a heterosexual woman, Marti Boerner, who fell behind in her documentation was insufficient to prove she was similarly situated due to Blumentritt's failure to provide evidence of the extent of Boerner's documentation problem. In addition, Blumentritt provided that as a supervisor he did not punish anyone for charting infractions, and it was common in his department for employees to fall behind in charting. On both accounts, Judge Peterson refutes their probative value because they both fail to establish the existence of similarly situated employees: a similarly situated employee requires comparison of treatment by the same decisionmaker and details of actual performance.

To prove discriminatory animus, Blumentritt referred the court to Conway's statements about potential homosexual employees, her son's presumed homosexuality, and Hillary and Conway's failure to act upon his complaint regarding Julie Blakeman's comment. Judge Peterson dismissed this evidence as well. In his opinion, Conway and Blakeman's comments may be disrespectful, uncouth, or insensitive, but they are not evidence of animus. Furthermore, Judge Peterson noted that even if a jury found differently, the comments were made between 2005 and 2010, years before Blumentritt was placed on performance counseling. Moreover, the existence of information of Blumentritt's yo-yoing performance and multiple opportunities to rectify his deficiencies made Judge Peterson skeptical of animus: to his mind, why would Blumentritt get so many chances and so much leeway and time?

Judge Peterson concludes his analysis of the Title VII claim with a foray into Blumentritt's evidence of unfair treatment. This, too, is insufficient, because Blumentritt's evidence does not support his claim that he was discharged due to his sexual orientation. The evidence included that he had a good reason for not completing his work; the April 2013 audit was incorrect; and, Scharringhausen lacked a good-faith effort to execute his performance plan because she took a second job. Judge Peterson concluded that the first two contentions, respectively, were irrelevant, and the third contention failed to state how Scharringhausen's schedule disadvantaged him. Even under the McDonnell burden-shifting framework, Blumentritt could only prove that he is a member of a protected class who suffered an adverse employment action.

Finally, Judge Peterson considered the Title VII retaliation claim. Blumentritt needed to show three elements: (1) he engaged in a statutorily protected activity; (2) Mayo Clinic took materially adverse action against him; and (3) there is a causal connection between the activity and the adverse action. Mayo Clinic argued that Blumentritt's failure to proffer evidence going to the third prong is enough to defeat the claim, and Judge Peterson seemingly agreed, for he only analyzed whether Blumentritt met his burden to show that he would not have been fired had he not complained to Human Resources. Judge Peterson pointed out that there was no evidence whether Conway or Scharringhausen knew of the complaint, learned of the complaint from the head of HR, or whether the complaint was documented. The only evidence available to Judge Peterson was the timing of events surrounding Blumentritt's termination, which Judge Peterson finds is neither suspicious nor enough to "create an inference of a retaliatory motive."

Due to the lack of evidence by Blumentritt, it is unclear whether his claim of sexual-orientation discrimination would have been more convincing. As it stands, the case is, oxymoronically, about sexual orientation yet not.

Blumentritt is represented by Ross Allan Seymour of Seymour Law Office, LLC. Mayo Clinic is represented by Michael J. Modl of the firm Axley Brynelson, LLP of Madison, Wisconsin. ■

Cyril Heron is a law Student at Cornell Law School (class of 2019).

Minnesota Appeals Court Orders Trial Court to Grant Gendered Name Change to Felon

By Arthur S. Leonard

On February 19 a three-judge panel of the Minnesota Court of Appeals ruled in *Application of Boone*, 2019 Minn. App. LEXIS 72, 2019 WL 661658, that a Nicollet County District Court judge erred by not granting a name-change application filed by a felon, despite the lack of opposition from the prosecutor. The opinion for the court by Judge James B. Florey does not identify the trial judge, and does not reveal the new name sought by Bradley Stephen Boone, but notes that at oral argument, Boone's counsel indicated that Boone uses she/her pronouns, so the court refers to her throughout accordingly.

Boone has felony convictions from 1994 and 1996 which were prosecuted in Stearns County. Before applying for her name change in Nicollet County, she complied with applicable statutory requirements by serving a notice of her name-change petition to the Stearns County Attorney's office, and that office sent a letter to the Nicollet County District Court, stating that it had "no objection" to Boone's request. Boone then filed her formal application in Nicollet County District Court in November 2017, and a hearing was set for December. At the hearing, Boone called two witnesses who testified to her identity, her residence in the county and the state for at least six months (as required by statute), and their opinion that she was not seeking the name change to defraud anybody. Boone also testified, stating that she did not own real estate (a matter of concern under the statute), and that she is "civilly committed in St. Peter as part of the Minnesota sex offender program, and that she has felony convictions from the 1990s." The court took the application under advisement, but did not issue a decision until February 2018.

Minnesota's name change statute has a specific provision dealing with applications for name changes by felons. Under the general name-change provision, the district court is directed to grant a name-change request unless "it finds that there is an intent to defraud or mislead." Under the special provision for felons, Section 259.13, a prosecuting authority has the right to file an objection to a felon's name-change application within 30 days of receiving required notice if an of the following factors exist: "(1) the name-change request aims to defraud or mislead, (2) it is not made in good faith, (3) the name change will cause injury to a person, or (4) it will compromise public safety." Wrote Judge Florey, "If the prosecuting authority objects, the district court may not grant the applicant's request, unless the applicant files 'a motion with the court for an order permitting the requested name change,' and the applicant proves by clear and convincing evidence that the name-change request is not based on any of the aforementioned concerns."

The district court's decision, issued in February 2018, denied the application, reasoning that although Boone had met the first three of the four factors listed in Section 259.13, "she had not shown by clear and convincing evidence that her application would not compromise public safety.

The Court of Appeals found that because the prosecuting authority from Stearns County had been properly service with notice of the application and had communicated to the court in writing that it had "no objection," the four factors listed in 259.13 were not called into play, and Boone had no burden under the statute to provide evidence to show that granting her application would not compromise public safety. Indeed, no evidence was introduced on that question one way or the other.

Foley wrote that "a court's analysis of the four factors in section 259.13 . . . is warranted only if there has been an objection by the prosecuting authority. Here, because there was no objection from Stearns county, it was improper for the district court to independently consider these factors." Furthermore, he wrote, the statutory language was unambiguous on the point, so "plain meaning" controls. "The court's treatment of Boone's unobjected-to name-change application runs counter to the plain language of the statute." The court also found that Boone's right to due process was violated by subjecting him to a proof burden without any warning. Having secured the letter from Stearns County, Boone had no reason to believe that she was required to offer some proof on the four factors.

And, as the trial court did find, there was no evidence that her application was intended to defraud or mislead anyone, so the more general statutory provision would mandate that the trial judge grant the application. Indeed, the trial court's opinion specifically found that Boone had satisfied the first three factors listed in the provision on felon applications, so the lack of objection from Stearns County meant that granting her application was mandatory in the circumstances.

Boone is represented by two attorneys from Mid-Minnesota Legal Aid/Minnesota Disability Law Center, Justin Perl and Eren Sutherland. ■

Federal Judge Awards $4.5 Million for Inmate's Sexual Encounters with Sergeant that Began Consensually and Turned Coercive

By William J. Rold

Former correctional sergeant Alex Wouts is a convicted sexual predator, one of whose victims was inmate Aquilla Jessie, whom U.S. District Judge James D. Peterson describes as a "vulnerable young man who has been incarcerated since age 18." For reasons which the opinion does not elaborate, Judge Peterson dismissed claims against all defendants except Wouts, who then defaulted. Judge Peterson held an inquest on damages, at which Jessie and other victim testified. In *Jessie v. Wouts*, 2019 U.S. Dist. LEXIS 15388; 2019 WL 403711 (W.D. Wisc., January 31, 2019), Judge Peterson awarded $1.5 million in compensatory damages and $3 million in punitive damages. This is the largest award in a case like this that this writer has seen.

Judge Peterson begins by noting that under Wisconsin law an inmate cannot consent to sexual relations with a prison guard. Thus, each of the more than 50 incidents of sexual relations constituted an assault, "regardless of the amount of coercion." The relations were "substantially consensual at first," but they were not "truly voluntary." Judge Peterson found that the incidents continued over six months and that Wouts, as a sergeant, had "enormous authority over Jessie from the beginning." When Jessie began to resist, Wouts became increasingly threatening about Jessie's safety, classification, and release date. Judge Peterson notes that Wouts had other inmate victims and that Jessie was one of five about whom Wouts was criminally charged.

Judge Peterson received briefing and summaries of awards in similar cases. Interestingly, he wrote that he did not give them much weight, observing that he was acting like a jury as trier of fact at the inquest and that a jury would not receive such summaries. He relied instead on pattern jury instructions in the Seventh Circuit and what he considered to be just compensation, leaving comparisons with other cases to "review" on any appeal, citing *Joan W. v. City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985).

Without citing authority or the Prisoner Litigation Reform Act by name, Judge Peterson finds that Jessie is entitled to damages for emotional distress even without physical injury, writing: "Because Jessie has suffered injury as a result of the 'commission of a sexual act,' Jessie would be entitled to damages for mental or emotional injury without showing any physical injury. 42 U.S.C. § 1997e(e). This issue is currently on appeal to the Sixth Circuit in *Lucas v. Chalk*, No. 18-6272, reported in *Law Notes* (December 2018, pages 620-1).

Judge Peterson heard from Jessie, from his ex-wife, and from the corrections captain who investigated the allegations against Wouts. He found that Jessie had suffered severe emotional damages that have lasted already for four years. He is still in "acute distress," which is likely to continue for the foreseeable future, even if not permanent. His anxiety is increased by Wouts' HIV-positive status, even though Jessie has tested negative past the window period for likely registration of exposure in a blood test. Judge Peterson did not include an award for future medical expenses or for psychotherapy, although he noted the need for it. [In this writer's view, a plaintiff's appeal on this point is not particularly likely, given the size of the award. In the event of an appeal by the defendant – the state attorney general appeared as an "interested party" despite dismissal of other defendants – a cross-appeal on this point should be considered, as well as challenge to dismissal of the deep-pocket defendants.]

Jessie's emotional damages, distress, and anxiety continued after his release from prison. Judge Peterson found Jessie has been unable (so far) to reconcile with his wife, fears sexual activity, and is at risk of self-harm, with at least one suicide attempt. His alcohol consumption and emotional distress has been "severely exacerbated" by Wouts' actions. The emotional damages include compensation for "loss of normal life activities."

On punitive damages, Judge Peterson found that Wouts had to know that "coercing and threatening Jessie into sex violated his civil rights." He found that "Wouts' conduct is particularly awful, even within the awful category of correctional officers who exploit their authority over the inmates they are supposed to protect . . . . [A] strong message of deterrence should be sent to Wouts and any correctional officer who would so exploit his position of authority for his own gratification."

Jessie is represented by Judge Lang & Katers, LLC; and by Gende Law Office, S.C., of Wauwatosa and Pewaukee, Wisconsin, respectively. ■

Pro Se Prisoner Complaint Alleging Eighth Amendment Violations for Denied Access to Estrogen Dismissed by Federal District Court

By Joseph B. Rome, Nan Wang, and Paddy Gavin

On January 29, 2019, U.S. Magistrate Judge M. Page Kelley granted a motion to dismiss a transgender inmate's *pro se* claims that the medical director at her correctional facility violated her civil rights by refusing to prescribe her estrogen for gender dysphoria while incarcerated. *Collymore v. Suffolk Cty. Sheriff Dep't*, 2019 WL 358678, 2019 U.S. Dist. LEXIS 14036 (D. Mass.). Plaintiff Steven "Shelby" Collymore had sued under 42 U.S.C. § 1983, alleging that the Suffolk County Sheriff's Department and the Director of Medical Services at the South Bay House of Correction violated the Eighth Amendment and the Massachusetts Civil Rights Act., Judge Kelley held that Colleymore had not alleged sufficient facts to support these claims and dismissed the complaint.

Anatomically male, Collymore alleged that she was suffering from gender dysphoria and requested estrogen from the medical director while serving a one-year sentence. The medical director refused. No doctor had prescribed estrogen to her before her imprisonment. However, prison officials did prescribe her a new high blood pressure medication during her incarceration. Therefore, Collymore alleged that this differing treatment of providing one medication and denying another demonstrated discrimination.

The Magistrate Judge held that to state a claim for violation of the Eighth Amendment, a plaintiff inmate must allege prison officials displayed (1) a deliberate indifference to (2) a serious medical need. The court found that Collymore failed to overcome either hurdle.

A serious medical need is a need either "diagnosed by a physician as mandating treatment" or one so obvious that "even a layperson would easily recognize the necessity for a doctor's attention." While acknowledging that the First Circuit held that gender dysphoria can be a serious medical need, *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), Judge Kelley held that Collymore did not allege that she had actually been diagnosed with gender dysphoria or prescribed estrogen before her incarceration, nor did she allege that hormonal therapy was medically necessary at the time she filed her lawsuit two months into her incarceration. On this basis, the Magistrate Judge found that Collymore's allegations amounted only to a "disagreement" with the defendants' medical recommendations, and that a mere disagreement on the course of treatment did not create a "serious medical need" that would support an Eighth Amendment claim.

Turning to the deliberate indifference prong of the test, Judge Kelley observed that the medical director would have to have known and disregarded an "excessive risk to inmate health and safety," or acted with "purposeful intent," or "wanton disregard," or to punish Collymore by refusing to provide estrogen. However, Collymore had not alleged any facts to support such disregard for her health and safety, nor had she raised any concerns regarding affirmative intent by the defendants to harm her. Therefore, Judge Kelley concluded that Collymore had failed to demonstrate "deliberate indifference" on the part of the medical director. In a short addendum, the Magistrate Judge acknowledged that Collymore's complaint fell similarly short under Massachusetts civil rights legislation, given the lack of allegations of threats, intimidation, or coercion.

While highlighting the two-prong test of "serious medical need" and "deliberate indifference" in Eighth Amendment claims regarding transgender inmates' rights, this case demonstrates that a court may not give any weight to a plaintiff's opinion, standing alone and without factual support, on the medical necessity of a course of treatment related to gender reassignment. Without particular allegations of specific or potential harm, a court may be unwilling to consider the plaintiffs' unilateral conclusions on the necessity of hormone therapy. ■

Joseph B. Rome and Nan Wang are attorneys at Kobre & Kim LLP; Paddy Gavin is an analyst at Kobre & Kim LLP.

Transgender Prisoner's Civil Rights Claim for Sex Reassignment Surgery Dismissed by Federal District Court

By Joseph B. Rome, Nan Wang, and Paddy Gavin

On February 8, 2019, the U.S. District Court in Massachusetts dismissed a prisoner's pro se claims that doctors contracted by the Massachusetts Department of Corrections (DOC) violated her Eighth Amendment rights and committed medical malpractice by denying her sex reassignment surgery. *Wittkowski v. Levine*, 2019 U.S. Dist. LEXIS 20844, 2019 WL 499342 (D. Mass.). District Judge Nathaniel Gorton found that the inmate, Alyssa Wittkowski, could not provide sufficient evidence to overcome the defendant's summary judgment motion asserting that doctors working for the DOC were not purposefully indifferent to the plaintiff's serious medical need.

Judge Gorton noted that Alyssa Wittkowski had a history of treatment for bipolar disorder well before her incarceration in Massachusetts in 2005, and was diagnosed with gender dysphoria in August 2012. According to Wittkowski, she first expressed suicidal thoughts and thoughts of self-mutilation to her DOC-assigned primary care physician in September 2012. The DOC's Gender Dysphoria Treatment Committee eventually approved a course of hormone replacement therapy that began in January 2015. Wittkowski then requested sex reassignment surgery in August 2015. The Committee denied the request. The Committee did, however, approve electrolysis for facial hair removal in October 2015. Defendants asserted that Wittkowski only began to report suicidal thoughts and desire to self-harm after April 2017.

Wittkowski filed a complaint against her DOC-appointed doctors, the DOC Commissioner, and others, asserting federal civil rights claims under 42 U.S.C. § 1983 and a medical malpractice claim under Massachusetts law. All defendants other than the doctors were dismissed from the case. Wittkowski amended her complaint in September 2015, demanding compensatory damages for inadequate medical care as well as an injunction ordering the defendant doctors to provide her with hormone replacement therapy, electrolysis, and sex reassignment surgery. Specifically, Wittkowski alleged that defendants' refusal of sex reassignment surgery constituted deliberate indifference to her serious medical needs under the Eighth and Fourteenth Amendments and put her at risk of suicide and self-mutilation.

To show an Eighth Amendment violation, Wittkowski had to show that (1) she had a serious medical need, and (2) the prison officials were deliberately indifferent to that need. The court stated that Wittkowski could demonstrate a serious medical need either by (i) showing that a physician diagnosed a particular need as mandating treatment, or (ii) that the need was so obvious that even a lay person would easily recognize the necessity for a doctor's attention. The court noted that the standard for measuring "deliberate indifference" was the same used for "criminal recklessness," i.e., that the prison official was aware that a substantial risk of serious harm existed and that the official nevertheless disregarded that substantial risk of harm.

The court held that Wittkowski failed to show a serious medical need, because no physician had determined sex reassignment surgery, the only treatment left in dispute, to be medically necessary, and her current course of treatment—including psychiatric therapy, hormone therapy, electrolysis, and access to feminine clothing and cosmetics—was not so lacking that a lay person would recognize it as insufficient.

Judge Gorton further held that, far from disregarding Wittkowski's requests for treatment, the record demonstrated that her doctors considered her conditions on numerous occasions and approved substantial forms of treatment. The court rejected Wittkowski's assertion that her doctor's failure to provide sex reassignment surgery put her at substantial risk of suicide or self-mutilation because her medical records—upon which the Committee relied to evaluate her request—demonstrated that her thoughts of suicide or self-mutilation, even if subjectively experienced, were not made known to defendants. Even if her doctors were aware of the possibility of self-harm based on the treatment notes submitted to them, the court held that the evidence did not show a strong likelihood of such harm. Relying on *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014), Judge Gorton held that simply because Wittkowski disagreed with the treatment proposed by the doctors did not mean that the doctors were deliberately indifferent to her medical needs.

Turning to the medical malpractice claim, the court observed that a plaintiff must typically proffer expert testimony to establish the applicable medical standard by which to consider the claim. Wittkowski had failed to designate an expert, and Judge Gorton denied her motion for funds to hire an expert as untimely and incomplete. Having already determined that the defendants had provided adequate medical care, Judge Gorton dismissed the malpractice claim.

While not binding precedent in any court, this case suggests that an inmate demanding sex reassignment surgery on the basis that without it the prisoner will self-harm must provide evidence that the inmate's potential actions are known to the defendants, and show a strong likelihood of such harm specifically attributable to the failure to obtain sex reassignment surgery in order to pursue an Eighth Amendment violation claim predicated on willful indifference. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. SUPREME COURT – The parties in *Glen St. Andrew Living Community v. Wetzel*, No. 18-626, filed a stipulation of settlement with the Court on February 13, agreeing to Glen St. Andrew's withdrawal of its petition for certiorari. The case concerned harassment of an out lesbian resident by co-residents and discrimination by management, allegedly in violation of the Fair Housing Act. The petitioner did not question the application of the Fair Housing Act to the case, even though the statute does not explicitly mention sexual orientation. * * * On February 19, the Court announced that it had denied a petition for certiorari in *Kerr v. Marshall University Board of Governors*, No. 18-780. The petitioner was contesting her treatment as a graduate student by the university, contending that she was the victim of sexual orientation discrimination in violation of Title IX. Petitioner was *pro se,* and the main issues in her petition to the Court were procedural and jurisdictional, so the case was not a particularly good vehicle to get a merits ruling on the application of Title IX to sexual orientation discrimination by educational institutions. * * * Briefing is completed, and the Court's agenda for its March 15 conference will include consideration of the petition for certiorari in *Klein v. Oregon Bureau of Labor and Industries*, No. 18-547, another "gay wedding cake" controversy, presenting the same 1st Amendment issues on behalf of petitioner, a bakery known as Sweet Cakes by Melissa, as were presented last term in the *Masterpiece Cakeshop* dispute. * * * Also on the conference agenda for March 15 is *Aloha Bed & Breakfast v. Cervelli*, No. 18-451, in which Hawaii and the complainants filed their responses to the petition for certiorari on February 1. The petitioner was found to have violated Hawaii's public accommodations law by refusing to accommodate a lesbian couple. * * * Respondents in *King v. Governor of New Jersey & Garden State Equality*, No. 18-1073, but as of the beginning of March it was not yet listed for conferencing. See story above. * * * Although the Court's conference list for March 1 included five petitions in LGBT-related cases, the Order list released on March 4 mentioned none of them, and the docket entries as of then indicated that consideration of the petition in *Boyertown* had been rescheduled, without indicating a date. Thus, as of the beginning of March, the Court had taken no action on at least seven certiorari petitions pending before it in LGBT-related cases, and has yet to add an LGBT-related case to the cert grants for the October 2019 Term.

U.S. COURT OF APPEALS, 2ND CIRCUIT – In a "summary order" that will not be published in F.3d, a 2nd Circuit panel affirmed a decision by Judge Andrew Carter (S.D.N.Y.) to deny a recusal motion and dismiss a lawsuit against NYU Law School and Professor William Nelson, brought *pro se* by Louis Anthes, who describes himself as an NYU graduate from two decades ago who would hold the defendants liable "for his inability to sustain employment and pay back his student loans after graduation." *Anthes v. Nelson*, 2019 U.S. App. LEXIS 6397, 2019 WL 990803 (Feb. 28, 2019). Judge Carter had denied the recusal motion. In a footnote, the court stated, "For the first time on appeal, Anthes also alleges that the district judge should be recused because he may be biased against Anthes based on Anthes's sexual orientation. Anthes provides no evidence of such bias, and identifies no reason to question Judge Carter's impartiality." The dismissal had been premised on all but two of Anthes's causes of action being clearly time-barred, and pleading insufficiency to state a claim as to the others. Omitting explanation, the court stated: "We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issue on appeal." From some comments by the court in a portion of the brief opinion upholding the district court's denial of a motion to join Anthes's spouse and loan service provider as parties, the court gives a hint as to what brought this case on: the loan service provider is after Anthes to pay off remaining balances on his student loans. The court points out that Anthes "fails to state a cognizable claim on behalf of his spouse against the loan service provider" as the complaint alleges only that the provider is seeking payment from Anthes. Anthes sought to premise his spouse's involvement on the claim that his spouse "is part of the marital community," but the court points out that "the two did not marry until long after Anthes's claims against defendants arose." The court also noted Judge Carter's statement that because Anthes is an attorney licensed in California, "he is not entitled to the special solicitude and latitude courts traditionally afford to *pro se* litigants."

U.S. COURT OF APPEALS, 3RD CIRCUIT – A man from Guatemala applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAN). In that proceeding, he claimed that he "feared persecution because he is young and he and his family own property," but the Immigration Judge and the Board of Immigration Appeals (BIA) turned him down, deciding that he was removable. But the wheels grind slowly sometimes, and he was still in the country a year later, when he filed a motion to reopen on the ground that he had come out as gay and feared returning to Guatemala as a gay man. The BIA declined to exercise its discretion to reopen the case, and he

appealed to the 3rd Circuit. Luck of the draw here; he drew a panel of two circuit judges (one appointed by George W. Bush, the other by Donald Trump) and a district judge sitting by designation, also appointed by George W. Bush. The Trump appointee, Stephanos Bibas, wrote for the panel. "Aliens may try to reopen their removal proceedings," he wrote, "but there is a time limit" and the Petitioner "missed it. So he must identify an exception to the time limit. He invokes only one: that the conditions in his home country have changed since his prior proceeding. But he offers no evidence of this." Indeed, what the case comes down to is that Petitioner's circumstances changed in that he came out. Petitioner "offers no evidence that conditions in Guatemala have grown worse for him," wrote Bibas. "While he claims that he came out only recently, that does not show a change in Guatemala. We are conscious that this process may have been difficult for him. But he has to show that *country* conditions have changed. He has not. So the time limit applies, and his motion is time-barred." Furthermore, the court noted that the BIA's discretion to decide whether to reopen a case is "typically unfettered, so as a rule we lack jurisdiction over it. To be sure, we would retain jurisdiction if the Board relied on an incorrect legal premise or limited its discretion by rule or a settled course of adjudications. But [Petitioner] points to none of these grounds, and we see no support for them. So we lack jurisdiction. We will thus deny the petition in part and dismiss it in part." *Salguero-Galdamez v. Attorney General*, 2019 WL 581556, 2019 U.S. App. LEXIS 4406 (3rd Cir., Feb. 13, 2019).

U.S. COURT OF APPEALS, 7TH CIRCUIT – A bisexual man from Guinea lost his claim for protection under the Convention Against Torture in *Barry v. Barr*, 2019 U.S. App. LEXIS 5211, 2019 WL 851016 (Feb. 22, 2019). The opinion for the panel is by Trump appointee Michael Brennan. Mr. Barry, brought to the United States as a child age 10 by his mother, has lived in this country for about twenty years. They were admitted as temporary visitors and have overstayed, not having filed asylum petitions, although at the time they may have had grounds to seek political asylum, inasmuch as Barry's father was a political activist on the outs with the Guinea regime, and Barry and his mother had been terrorized and abused by soldiers seeking to discover the location of his father, who was in hiding. Barry discovered his bisexuality in the U.S. as a teenager. Although he is married to a woman, he had sexual experiences with several men prior to his marriage and continues to seek men for sex. He alleges that a school friend who is gay and had more recently arrived from Guinea had told him that civilians in that country have tortured and beaten to death gay men there. A State Department report from 2016 also suggests that there is strong cultural disapproval of gay people in Guinea, although there are no reports of torture or prosecution of gay people by the government. Gay sex is illegal there. "Around 2009," wrote Judge Brennan, "Barry committed various crimes, including robbery, controlled substances offenses, and possession of a firearm. He was convicted and sentence for an aggravated felony conviction of conspiracy to commit robbery." This, of course, led to Homeland Security issuing an order for his removal, and the felony conviction means he can't seek withholding of removal under the Immigration and Nationality Act. His only hope for staying in the U.S. is the Convention Against Torture (CAT), but there is a very high bar for obtaining relief under the CAT, and the Immigration Judge, the Board of Immigration Appeals, and the 7th Circuit panel all concurred that Barry did not meet that high bar. One of the main reasons for his failure is the stale information on which he relies. His burden is to show that if removed to Guinea now he will be tortured, either because of his political and familial affiliations or his sexual orientation. But the political regime that was after his father is long since out of power, and, as noted, the testimony that he and his mother gave about the danger to him as a bisexual man is based on second-hand, generalized and outdated information. Neither of them has been in Guinea for more than twenty years, and the court found that the information they provided did not prove that Barry was likely to be tortured by the government or forces the government would not control. The court of appeals cannot overturn the BIA and Immigration Judge unless the evidence "compels" the court to do so, and the court felt no such compulsion in this case absent stronger evidence of a particularized threat to Barry if he is removed to Guinea. Barry is represented by Afshan J. Khan of Loves Park, Illinois. The panel composition shows how the 7th Circuit has been altered by the current administration. The three judges included two Trump appointees, Brennan and Scudder, and one senior judge (Bauer) who was appointed by Gerald Ford during the Neolithic Period. Four of the eleven active judges on the 7th Circuit are Trump appointees. Only Chief Judge Wood and Judge Hamilton remain from among the Democratic appointees (and during eight years in office, Barack Obama was able to put only Judge Hamilton on the court, as the Republican Senate leadership blocked his other appointments, generating the opportunity for Trump to quickly nominate several judges during his first two years, filling all the vacancies on the court). Which means that the *en banc* court that decided just two years ago that sexual orientation discrimination claims are actionable under Title VII has been substantially changed since then. The window of opportunity for LGBT progress in the 7th Circuit is probably closed for now.

CIVIL LITIGATION *notes*

U.S. COURT OF APPEALS, 8TH CIRCUIT – A gay man from Bangladesh who came to the U.S. on a student visa and stayed in the country after dropping out of school lost his bid to remain in the United States in *Lesum v. Barr*, 2019 U.S. App. LEXIS 4584, 2019 WL 638013 (8th cir., Feb. 15, 2019). Lesum's legal status in the U.S. was conditioned on his continued enrollment. However, after his father died in August 2016, he dropped out of school. (He claims that this was for both psychological reasons – depression – and financial reasons, but provided no medical verification for his claimed depression). He eventually filed an asylum claim, but more than six months after he dropped out of school, and he also sought withholding of removal and protection under the CAT, arguing that as a gay man he would suffer persecution, perhaps amounting to torture, in Bangladesh. He urged, unsuccessfully, that the statute of limitations for asylum claims be waived due to his circumstances. (By statute, asylum claims need to be filed within one year of arrival in the U.S., but for people arriving under student visas, the time is extended by administrative rulings to six months after somebody's legal status expires.) Lesum did present some credible evidence of what might be persecution during his younger days in Bangladesh, including sexual assault by a cousin and being tormented by fellow-students, who locked him in a dormitory room (but he escaped through a window). But the court said a criminal sexual assault by a family member did not amount to "persecution" within the meaning of refugee law. He also pointed to incidents of name-calling against him, and State Department Country reports on Bangladesh which, according to the opinion for the court by Judge Bobby Shepherd, "reveal discrimination, harassment, and sometimes violence against the LGBT community," but, concluded the Board of Immigration Appeals (BIA), "the reports do not support his claim that he will more likely than not suffer torture with government acquiescence." His appeal of the Immigration Judge's ruling against him to the BIA was hobbled by his failure to present certain arguments, which the court then held had been waived, need not have been considered by the BIA, and could not be considered by the court. Although the opinion lists counsel for him – Michael Sawers, of Faegre & Baker, Minneapolis, MN – it doesn't indicate whether he first acquired counsel after lodging his appeal with the BIA, or perhaps in seeking judicial review of the BIA's decision. The court saw nothing "compelling" in the record to justify overturning the BIA's affirmance of the IJ's decision. (Deference to administrative decision-making limits judicial review to situations involving a violation of law or where the record presents compelling evidence that the administrative decision is wrong.) Despite plenty of evidence that life is difficult and dangerous for gay men in Bangladesh, that is not enough to win refugee status in the United States, where the evidentiary bar to prove likelihood of persecution and torture is set very high. We noted, when checking for data on Judge Shepherd, that of the eleven active judges on the 8th Circuit, only one is a Democratic appointee, from 2013. Four of the eleven active judges were appointed by Trump, the remainder by the first and second presidents Bush. Thus, the 8th Circuit, where an appeal is now pending on the question whether sexual orientation discrimination claims are actionable under Title VII, seems the most unlikely venue in which to secure a pro-LGBT ruling.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A 9th Circuit panel rejected a claim for relief under the Convention Against Torture by a native and citizen of Honduras seeking relief based on his HIV-positive status. *Coello v. Barr*, 2019 U.S. App. LEXIS 4650 (Feb. 15, 2019). The court found that substantial evidence supported the Board of Immigration Appeals' determination that the petitioner had failed to establish that is was "more likely than not" that he would be tortured by – "or with the consent or acquiescence of" – Honduran government officials because of his HIV status. The BIA also found no evidence in the record that the government would prevent Coello from receiving his medication, and he did not prove that his HIV medication is unavailable in Honduras. Thus, the court found the BIA's decision impervious to review under the substantial evidence rule. There was also some dispute about the IJ's refusing to allow Coello's proposed expert witness about conditions in Honduras to testify as an expert. "the IJ did not violate Coello's due process rights by 'refusing to allow Mr. Sonnenberg to be question as an expert witness," wrote the court. The IJ had allowed Sonnenberg to testify, but warned Coello that because Sonnenberg was not a qualified expert, his testimony would be given little weight. Furthermore, the IJ granted a "lengthy continuance" for Coello to find a qualified expert, but he evidently was unsuccessful. Nonetheless, the court concluded that Coello received "a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." Coello is represented by Elizabeth Torres of Los Angeles.

U.S. COURT OF APPEALS, 10TH CIRCUIT – Disgruntled former federal employee? Want to assert your constitutional rights in a federal court action against your former boss? Well, think again, Kevin Franken. Yes, we mean you. And your crack team of lawyers . . . Franken worked for Yellowstone National Park, a division of the Department of the Interior. In accordance with "common practice," he took advantage of his government-provided computer to store lots of

personal files – thousands of personal files. He filed a discrimination and retaliation charge with the EEOC (sexual orientation, advocacy of marriage equality), which was settled in January 2013, with the agreement that Franken would be transferred to a different agency in California in a month and, he claims, that he could have access to all his personal computer files. Resting on his understanding about the personal files, he put off to his last day of work at Yellowstone the drudgery of downloading all his personal files to take with him and, what do you know? He showed up to work that day and was *locked out of his account*!! After he left, he got in touch with his former supervisor, who made "two purported attempts" to return his personal files to him, but the first was totally unsuccessful and the second yielded only a portion of the files. So Franken decided to sue, asserting violation of his 1st and 5th Amendment rights (*theft of property*!!!), and threw into the case his grievance that upon parting from Yellowstone his supervisor failed to bestow on him the "symbolic wooden arrow" customarily given to departing employees. A great deprivation of his rights!! Well, that's an obvious constitutional violation, right there, the sacred wooden arrow . . . . How could they think they would get away with that?? But U.S. District Judge Alan B. Johnson (D. Wyoming), a former Chief Judge of the District Court appointed by Ronald Reagan, would not play along, and granted the government's motion to dismiss. Judge Johnson found that the lawsuit was preempted by the Civil Service Reform Act. And a unanimous panel of the 10th Circuit agreed with Judge Johnson! Senior Circuit Judge Monroe G. McKay wrote for the court: "The CSRA preempts claims arising directly out of a federal employment relationship, even when the plaintiff has no remedy under the CSRA." Evidently, in the 10th Circuit, if you are a government employee with a beef against your employer, you file a grievance within the agency and you *don't* go running to court. Oh, by the way, Senior Circuit Judge McKay was appointed by President Jimmy Carter and recently celebrated his 90th birthday. *Franken v. Bernhardt*, 2019 U.S. App. LEXIS 4041, 2019 WL 519459 (10th Cir. Feb. 11, 2019). Franken is represented by Micah D. Fargey, Fargey Law, Portland, OR, and James Kent Lubing and Nathan Rectanus, Lubing Law Group, Jackson, WY.

CALIFORNIA – The State of California Commission on Judicial Performance imposed sanctions on a retired judge, Steven C. Bailey, based on a dozen charges, most of which were found to have been substantiated, and ordered that he be barred from sitting in a judicial capacity in the future. *Inquiry Concerning Former Judge Steven C. Bailey*, 2019 Cal. Comm. Jud. Perform. LEXIS 1 (Feb. 27, 2019). One of the charges was summarized as follows: "commenting in the courthouse to a member of court staff and two judges that he knew his shirt was nice because he bought it from a 'gay guy' in Paris, and 'gays only have nice clothes . . . gays really know how to dress.'" He also commented, found the Commission, that gay men are "snappy" dressers. "This conversation took place in an open office area where other county employees would have been able to overhear the conversation," wrote the Commission, which reported that the conversation occurred after one judge complimented Judge Bailey on his attire, and a court staff member and another judge in the vicinity of the conversation were "offended by the comments." The Commission also noted testimony that "the tone of the conversation was lighthearted." The Commission agreed with the conclusion that the judge violated Canons 2, 2A and 3C(1) (judge to behave impartially in the performance of administrative duties and shall not engage in speech that would reasonably be perceived as bias or prejudice). The Commission agreed with the special masters appointed to investigate this case that "an objective observer would not view the remarks as prejudicial to public esteem for the judiciary, and thus the remarks constitute improper action rather than prejudicial misconduct," because they "did not perpetuate invidious or hateful stereotypes." However, wrote the Commission, "This does not mean that such remarks are proper. As observed by the masters, the judge's comments 'reflect stereotypical attitudes about gay men.' It is improper for a judge to make remarks that reflect stereotypes based on sexual orientation, whether negative or positive. We agree with the masters that 'such remarks indicate that the speaker has preconceived ideas about a particular group, a characteristic that is contrary to the qualities of impartiality and propriety required of judges by our Code of Judicial Ethics." We would note that the final sanction imposed reflects judgments on a dozen accumulated charges, most of which are much more serious. On the other hand, this decision stands as a caution to judges everywhere: don't assume that gay men are always authoritative arbiters of sartorial taste, or you may be sorely disappointed. At the very least, if you think it, don't say it aloud!! Anybody have a First Amendment problem with that?

CALIFORNIA – *Health Policy & Law Daily* (2019 WLNR 6160117) reported on February 26 that Judge Carolyn B. Kuhl of Los Angeles County Superior Court largely rejected Gilead Sciences' motion to dismiss pending lawsuits seeking to hold Gilead accountable in connection with allegations by HIV Litigation Attorneys and Rutherford Law that the pharmaceutical company promoted drugs that cause permanent damage to kidneys and bones. The pending cases are *Lujano v. Gilead*

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Sciences, Inc., Case No. BC702302, and *Martinez v. Gilead Sciences, Inc.*, Case No. BC705063, both filed in May 2018. The first asserts personal injury claims for two named plaintiffs, the second seeks to initiate a class action on behalf of a different pair of named plaintiffs "and on behalf of all others similarly situated." The first case is a products liability action, the second a consumer fraud action.

DISTRICT OF COLUMBIA – U.S. District Judge Colleen-Kollar-Kotelly granted a motion to dismiss Tanga Payne's sexual orientation employment discrimination claim against the D.C. Department of Youth Rehabilitative Services in *Payne v. Dep't of Youth Rehab. Services,* 2019 U.S. Dist. LEXIS 27511, 2019 WL 804898 (D.D.C., Feb. 21, 2019). Payne claimed that her being twice denied a position as a Supervisor Youth Development Representative was attributable to her gender, age and sexual orientation, the former in violation of the Age Discrimination in Employment Act and Title VII, the former in violation of the D.C. Human Rights Act (which expressly covers sexual orientation discrimination claims). Payne made a strategic mistake when filing her charges; she went to the Maryland EEOC office in the state of her residence, not the D.C. EEOC office. As her result, her charge was not administratively cross-filed with the D.C. Human Rights Office in time to toll the statute of limitations, and the filing in Maryland would not troll the local D.C. statute of limitations. Thus, the court found her D.C. law sexual orientation claim to be time-barred. Payne is represented by Natalie LaJoyce Jones, of Washington, D.C. However, the court found that Payne had alleged facts sufficient to support her two federal claims, although she will have to file a new complaint, because the agency, as such, is not an entity amenable to suit, so an amended complaint will be needed naming appropriate agency officials as defendants.

FLORIDA – The heart sinks reading pro se employment discrimination cases. Kenny Luster, who was a Wal-Mart employee, undertook to sue on his own, apparently, even though his hand-written complaint did mention that he had a lawyer at some point. His *pro se* complaint was referred to U.S. Magistrate Judge Lauren Louis, to recommend a ruling on plaintiff's motion for leave to proceed in forma pauperis and for Referral to Volunteer Attorney Program. However, because it is a *pro se* complaint, Judge Louis subjected it to screening and found that it fell woefully short of pleading standards, even for a liberally construed *pro se* complaint. Based on Judge Louis's summary, it sounds like Luster was diagnosed HIV-positive, required medication, sought but was refused some unspecified accommodation, that "Walmart settlde out of court with me and my lawyer and took the blame when my condition took a turn for the worst," and that he was subsequently fired "when he had to go on a different medication." This was the extent of Luster's factual allegations. His complaint lacks an articulation of a theory of recovery, an invocation of a statute, or even a prayer for relief, evidently. With all good will, Judge Louis decided it must be dismissed without prejudice, and recommended same, as well as to deny plaintiff's motions as moot. Luster really needs a lawyer. *Luster v. Wal-Mart Stores*, 2019 U.S. Dist. LEXIS 23578 (S.D. Fla., Feb. 11, 2019).

IOWA – Jesse Vroegh, a transgender man, won a jury verdict of $120,000 on February 13, according to a report from the ACLU, which represented him in suing for discriminatory access to facilities and health care coverage. Presenting as a woman, Vroegh was hired as a staff nurse at the Iowa Correctional Institute for Women. Vroegh subsequently transitioned. He was barred by supervisors from using the men's restrooms and locker room, and the state's public employee health plan refused to cover hi transition-related health care. This even though Iowa law bans employment discrimination because of sex and gender identity and expression . . . The verdict breaks down at $100,000 on the discriminatory access to facilities claim and $20,000 for the denial of health care coverage. The case is *Vroegh v. Iowa Department of Corrections*, Case No. LACL138797 (Iowa Dist. Ct., Polk County, McLellan, J.).

IOWA – Despite the lack of explicit authorization in governing civil practice provisions, the Court of Appeals of Iowa ruled February 6 in *Doe v. Gill*, 2019 Iowa App. LEXIS 111, that HIV-positive co-plaintiffs in a breach of privacy suit against a person alleged to have wrongfully disseminated information about their diagnoses may proceed anonymously as John and James Doe. They filed their lawsuit asking for monetary damages and alleging that Sally Gill had invaded their privacy, intentionally inflicted emotional distress, interfered with their business relations, and violated a state statute mandating HIV confidentiality. "At the same time," wrote Judge Amanda Potterfield, "they also filed a protected information disclosure form, which provided their real names and the necessary identification information." But Gill filed a motion to require them to prosecute the case in the names of the "real parties in interest," as mandated by Iowa Rule of Civil Procedure 1.201. Woodbury County District Judge Jeffrey L. Poulson granted Gill's motion, stating that no procedure exists under the Iowa rules for the filing of plaintiff John Doe petitions in the Iowa courts. The Court of Appeals reversed, finding that Iowa

law treats HIV-related information as confidential, and that Rule 1.201 is not the last word. The plaintiffs pointed to the Iowa Rules of Electronic Procedure, which requires the filers of electronic documents "to ensure that protected information is omitted or redacted from documents before the documents are filed," and noted that the IREP expressly supersedes other rules. The main issue for the court, then, is whether the names of plaintiffs in a case like this would constitute confidential information, and that was not a difficult conclusion to reach, pointing that in *State v. Musser*, 721 N.W.2d 734 (Iowa 2006), the state's supreme court had recognized the confidential nature of an HIV diagnosis. While the court said that it did not believe that the HIV confidentiality statute (Sec. 141A.9) was directly on point, "we are convinced their HIV-positive status is information that is generally excluded from public access and thus falls within protected information that is prohibited from being disclosed in electronic court documents." The legislative determination that HIV-positive people should be able to sue health care providers for wrongful disclosure of such information reinforced the point. Furthermore, the court agreed with plaintiffs that the confidentiality statute's authorization of lawsuits for breach of confidentiality would be "less meaningful if the party seeking a remedy for the wrongful disclosure of their status is forced to further broadcast this private information in order to obtain relief." The court also pointed out that Gill had not provided any reason why it was necessary for the plaintiffs' names to be public in order for this case to be litigated. She knew who they were. Thus, the court concluded, "John and James should be allowed to fashion a procedure that allows the case to proceed without undermining their right to confidentiality." Plaintiffs are represented by Dean A. Fankhauser of Fankauser Rachel, PLC, Sioux City.

KENTUCKY – Saved by the statute of limitations! In *Carroll v. Carroll*, 2019 WL 489623 (Ky. Ct. App., Feb. 8, 2019), the Kentucky Court of Appeals affirmed a ruling by Hardin Family Court Judge M. Brent Hall that Kali Carroll, the biological mother of a child born during her marriage with Jessica Carroll, had waited much too long to assert that the Hardin Family Court was defrauded by misrepresentations given when that court originally granted Kali and Jessica's petition for joint custody of the children. Kali and Jessica were married in Cook County, Illinois, on March 20, 2014, after the Illinois legislature, seeing the writing on the wall, voted in favor of marriage equality. At the time, Kali was pregnant, and the child was born on August 30, 2014. In October, Jessica and Kali filed a petition for joint custody in Hardin (Kentucky) Family Court Family Court, stating that the biological father of the child was unknown (as to which both filed sworn affidavits), and that Kali waived her right to seek separate representation by counsel as well as her superior right, as biological mother, to sole custody. (This was happening in Kentucky, where the Illinois marriage would not be recognized at that time, which is why this proceeding was necessary to secure Jessica's parental rights.) The family court granted joint custody in an order entered on March 20, 2015. The marriage deteriorated thereafter, culminating in a dissolution decree entered by the Grayson County Court on December 14, 2017, deferring until later a ruling on contested custody. Jessica filed a motion on February 6, 2018, seeking a final hearing on custody. Meanwhile, however, Kali filed a motion in Hardin Family Court, seeking to set aside the March 15, 2015, joint custody order, claiming that the parties had lied to the court in their sworn affidavits that the identity of the biological father was unknown, and Kali also alleged she did not knowingly and voluntarily waive her right to separate counsel in that proceeding. Hardin Family Court denied Kali's motion as untimely, and she appealed. The appellate court found that this issue was governed by Civil Rule 60.02, which sets a one year statute of limitations on seeking relief from a court order on grounds of perjury or false testimony, and a "reasonable time" for seeking relief from an order on the ground of "fraud affecting the proceedings, other than perjury or falsified evidence." While it might be hard to classify the grounds here as falling completely under one or the other, Kali's motion is clearly time-barred under either, as the court found that waiting almost three years was not a "reasonable time," particularly since the grounds for seeking relief asserted by Kali were known to her at the time the joint custody order was issued. To an outside observer, this looks like a desperate attempt by Kali to find some mechanism to deprive her former wife of custody, along the lines of "all's fair in love and war," but this motion does not look like fair play on her part. Kali is represented by Ronald E. Hines of Elizabethtown. Jessica is represented by Zanda L. Myers, of Leitchfield.

KENTUCKY – *Straits Times* (Singapore) reported February 27 that U.S. District Judge Danny Reeves (E.D. Ky.) granted a temporary restraining order requested by Singapore's Ministry of Health against Mikhy Farrera Brochez, an American implicated in an HIV database leak in Singapore that exposed the confidential HIV-related information of numerous Singapore nationals. The order was first granted on February 19, two days before Brochez was arrested. The TRO was then extended by 14 days to run to March 8. Brochez, who lived in Singapore from 2008 and was jailed in 2017 for fraud and drug-related offences and lying to the Manpower Ministry about his own HIV status to get an employment pass, was released from prison last April and deported. In January, the Ministry of Health identified him as

the mysterious culprit who had leaked online the personal information of 14,200 individuals with HIV, but he has denied the allegation. According to the news report, Brochez "sent government authorities and multiple media agencies e-mails warning that he would continue to embarrass the Singapore Government until it ended the HIV Registry and released his Singaporean partner, Ler Teck Siang," a public employee who had access to the Registry in connection with his work. "Ler was convicted in 2016 of helping Brochez give false information to the authorities, and has also been charged under the Official Secrets Act." He is appealing these charges.

LOUISIANA – Darius Brown worked for Transdev Services for several months as a driver until he was terminated while still in a probationary period. The employer claimed he was fired for excessive absences and being involved in a preventable accident. Brown claims the absences should not be held against him, because he notified the employer in advance concerning medical absences and the documentation he submitted to a dispatch clerk for a medical absence indicated that he was HIV-positive, although he never mentioned this directly to any supervisor or manager. He also notes that the police found he was not reasonable for the accident. Brown sued under the ADA, and suffered summary judgment against him on February 13, U.S. Senior District Judge Ivan R. Lemelle finding credible the company's claim that it could not have fired Brown because of his HIV status, since the decision-makers on the discharge were unaware that Brown had HIV. In a previous ruling on a motion, Judge Lemelle set out the substantive allegations more fully, and it sound as if Brown had a plausible case to make about the absences and accident, as Judge Lemelle pointed out. His major stumbling block is that the only document he submitted identifying him as HIV-positive was to a depot clerk whose name he does not recall, and there is no evidence the clerk took note of anything beyond his name and the date he expected to miss work. In countering the argument that the employer did not know he was HIV-positive, Brown suggests they could have googled the names of his medications for which he was covered under the health plan. The court mentions this argument without analysis. Ultimately, Judge Lemelle found Brown's arguments about the facts beside the point when, as far as the judge was concerned, the record did not provide any solid evidence to support Brown's argument that the company decision-makers know he had HIV when they fired him. From their perspective, he was a probationary employee who quickly accumulated five absences and got into an accident, and that was enough to justify discharge. Lemelle agreed. *Brown v. Transdev Services, Inc*., 2019 U.S. Dist. LEXIS 23334, 2019 WL 585295 (E.D. La., Feb. 13, 2019).

MASSACHUSETTS – U.S. District Judge Nathaniel M. Gorton granted the employer's motion for summary judgment on a Title VII sexual orientation discrimination and retaliation claim by a gay former employee in *Martinelli v. The Bankcroft Chophouse LLC*, 2019 U.S. Dist. LEXIS 28523, 2019 WL 858630 (D. Mass., Feb. 22, 2019). Assuming for purposes of the summary judgment motion that Martinelli "is a member of a protected class and was subjected to sexual harassment," wrote Judge Gorton, his allegations were not sufficient to survive the motion. (Gorton had to "assume" because the 1st Circuit has yet to issue a decision clearly holding that sexual orientation discrimination is actionable under Title VII.) Martinelli worked as a server at the restaurant for five months beginning in May 2014 before quitting to take a job elsewhere. He was evidently not "out" on the job until September 13. His first few months were uneventful, but then on September 13, when he was scheduled to work as a "closing server" on the last shift of the day, he noted his manager, Colleen Seznec, speaking with one of his co-workers, Angela Michaels. "Shortly thereafter, plaintiff alleges that Seznec approached him and told him that she and Michaels had been discussing which employee they would like to sleep with. She then told Martinelli that he would be her choice. Martinelli responded that he was 'gay and, basically, you have a better chance of seeing a unicorn than that ever happening' and she just laughed it off." Martinelli conceded that he did not consider Seznec's comment to be offensive at the time and she never said anything else to him then or later that he considered offensive. However, later in the shift Seznec approached him and criticized his "failure to perform all of his work responsibilities and his over-concentration on music." He considered this to be "uncharacteristically aggressive" on Seznec's part. She asked him to come to work the next day, Sunday, which was his scheduled day off. He considered this a reprimand. That evening, he and Michaels left early without checking with the other servers, and when he showed up the next day he was immediately told that he was suspended for leaving early the previous day without finishing his duties, and that he would have to speak to the General Manager, who suspended him for a full shift. During that meeting, Martinelli complained about the incident with Seznec the day before, but she contradicted his account of what happened, while apologizing to him for her comments. After that, he claimed that he had "an overall uncomfortable feeling" when he was in the restaurant, including a feeling of being ostracized by managers, although he conceded that "no member of management, other than Seznec, ever said anything sexually offensive to him," and he never complained to the General Manager or HR or spoke to anyone in management

about being treated differently after his complaint about Seznec. Shortly thereafter, Martinelli quit to take a job at another restaurant and filed his Title VII charge. Ruling on the employer's motion, Judge Gorton found that Martinelli's factual allegations fell far short of meeting the test for a hostile work environment or quid pro quo harassment by Seznec. Furthermore, the feeling of being "unwelcome" that he described was not solidified by any serious incidents, certainly nothing that would amount to retaliation against him by management. Although Martinelli had not claimed constructive discharge, Judge Gorton briefly discussed that, finding that "a reasonable person in Martinelli's position would not have felt that the alleged ostracism and general uncomfortable atmosphere was so severe and oppressive as to compel him . . . to resign." Consequently, the motion was granted. Martinelli is represented by John S. Day of Duxbury, Mass.

MINNESOTA – Shannon Miller, a lesbian who was the longtime women's hockey coach at the University of Minnesota, was told that her contract would not be renewed after the 2014-2015 school year. She filed suit under Title VII and Title IX, claiming hostile environment, discrimination, and retaliation. Although U.S. District Judge Patrick J. Schiltz granted summary judgment to the University on some of her claims (including the sexual orientation claims, as the 8th Circuit hasn't ruled that sexual orientation claims are actionable under federal civil rights statutes), the sex discrimination and retaliation claims went to the jury, which ruled in Miller's favor, awarding $744,832 in back pay and benefits and $3 million in other "past damage." Miller moved the court for an award of front-pay. In this decision dated February 13, 2019, Judge Schiltz made a substantial front-pay award of $461,278, bring the total damage award to over $4.2 million. Presumably the University will threaten to appeal the damage award in order to spur a settlement for a smaller amount. Judge Schiltz's opinion does not say much about the underlying discrimination suit, being focused on the criteria for front-pay as a compensatory remedy subject to mitigation of damages. (Schiltz mentions that Miller had landed a part-time job coaching a professional hockey team.) While he rejected the University's attempt to minimize any front pay, he rejected Miller's suggestion that she be awarded front-pay to extend to her long-off retirement date. Instead, seizing upon certain elements in the record suggesting that Miller had been hoping to land a five-year contract extension, he awarded five years of front pay. *Miller v. Board of Regents of the University of Minnesota*, 2019 WL 586674, 2019 U.S. Dist. LEXIS 23107 (D. Minn., Feb. 13, 2019). Miller is represented by Sharon L. Van Dyck, Donald Chance Mark Jr., and Andrew T. James of Fafinski Mark & Johnson, P.A., and Dan Siegel and Jane Brunner of Seigel, Yee & Brunner.

NEW YORK – In *Rothbein v. City of New York*, 2019 WL 977878, 2019 U.S. Dist. LEXIS 32358 (S.D.N.Y., Feb. 28, 2019), U.S. District Judge Valerie Caproni disposed of various pretrial motions in a lawsuit against the City, the Education Department, and various individual officials, in connection with her termination from employment as a licensed occupational therapist at a city school. She initially grieved her complaints, but the union declined to take them to arbitration. The complexities of the multiple counts and defendants is beyond the scope of this brief note. Rothbein describes herself as "openly gay" and includes among her claim a violation of the New York State and City Human Rights Laws when she was discharged based on charges that she had falsified her specification of services she provided to students. Judge Caproni faulted the complaint for not providing sufficient factual allegations necessary to survive a motion to dismiss a sexual orientation discrimination claim, finding that the complaint "fails to raise a plausible inference of discriminatory motive on account of Plaintiff's sexual orientation. The Complaint is entirely devoid of any facts directly evidencing a discriminatory motive on the part of any Defendant – a homophobic slur, for instance, or any other remark or conduct relating to Plaintiff's sexuality . . . Plaintiff implicitly acknowledges as much, contending that she has stated a plausible discrimination claim under the NYCHRL (and the NYSHRL, for that matter) not because she has pleaded any direct evidence of discriminatory motive but because she has alleged the existence of a similarly situated DOE therapist who was not openly gay and who was not investigated or terminated for falsifying SESIS entries." One point of contention is defendants' claim that they could not have discriminated against Rothbein because of her sexual orientation because they weren't aware she was gay. In a footnote, Caproni casts doubt on this argument in light of plaintiff's allegation that she was open about her sexual orientation. Judge Caproni found, however, that plaintiff's comparative disparate-treatment theory "is not plausible as pleaded" since Rothbein failed to allege facts necessary to determine that the other therapist in question was "similarly situated in all material respects" including being accused of conduct of "comparable seriousness." However, having found the pleadings defection, thus justifying dismissal of this count, the judge granted leave to amend, so if Rothbein can come up with the necessary facts, she will have a second shot at her discrimination claim. And the court refused to dismiss Rothbein's retaliation claim, based on alleged conduct by agents of the employer after she complained about her treatment. Rothbein is represented by

CIVIL LITIGATION *notes*

Keith Michael Szczepanski of Beldock Levine & Hoffman LLP, New York, NY.

NEW YORK – Jillian Weiss has filed suit on behalf of Cicilia Gilbert against Dell Technologies in the U.S. District for the Southern District of New York, alleging violations of Title VII of the Civil Rights Act of 1964, Title I of the Civil Rights Act of 1991, and the New York State and City Human Rights Laws. *Gilbert v. Dell Technologies, Inc*., Case No. 1:19-cv-1938 (filed Feb. 28, 2019). The nine-count complaint alleges that Ms. Gilbert, a highly educated and very experienced computer engineer, was discharged after she told her employer that she is transgender and would be pursuing gender transition. The discharge did not follow immediately upon her announcement, but instead resulted from a course of harassment and increasing isolation over a period of fifteen months, according to the complaint, which invokes as the grounds for discrimination sex, gender, gender expression, gender identity and gender transition. The complaint alleges both outright discrimination and retaliation, and notes that although Dell's HR office "initially expressed support for Ms. Gilbert's gender transition," it failed to make good on its promises about how should would be dealt with by the company. The complaint seeks declaratory and injunctive relief aimed at Dell's employment policies, as well as make-whole relief for the plaintiff, but does not seek reinstatement.

NORTH CAROLINA – It is difficult to sort out what is happening in a decision when the court does not provide a clear chronological narrative of the alleged facts. What one might glean from U.S. District Judge Thomas D. Schroeder's opinion is that plaintiff Hunter Nance, a gay student at South Rowan High School, was subjected to harassment and bullying by fellow students and was treated dismissively, even perhaps callously, by some teachers and school officials, in particular a school resource officer who is a named defendant. Nance sought professional help for his emotional distress, and attempted suicide unsuccessfully several times. Plaintiff, suing individually and through his parents, sought vindication of his rights and compensation in a Title IX action, asserting that the school board and the high school administrators, as well as individual defendants (teachers and resource officer), should be held liable to him under Title IX's ban of sex discrimination in educational institutions that receive federal funding. *Nance v. Rowan-Salisbury Board of Education*, 2019 U.S. Dist. LEXIS 31930 (M.D.N.C., Feb. 27, 2019). Judge Schroeder granted the school board's motion to dismiss the Title IX claim, as well as a motion for judgement on the pleadings by the school resource officer. The opinion states without specifying that the court had previously granted in part and denied in part earlier motions to dismiss by the School Board and other individual Defendants. Judge Schroeder found it unnecessary to rule on whether harassment due to the plaintiff's sexual orientation is actionable under Title IX – a point contested by defendants – because he found the factual allegations in plaintiff's complaint were insufficient to state a Title IX claim in any event. The test, wrote Schroeder, is whether the school was deliberately indifferent to Hunter's plight, and he found Hunter's allegations about discipline meted out to some of the bullying students sufficient to show that the high bar of deliberate indifference had not been pleaded. "Deliberate indifference is only found where the school board's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances," he wrote, referring to earlier cases, and to the Supreme Court's "caution" that "courts should refrain from second-guessing disciplinary decisions made by school administrators" and "noting" that "the possibility of imposing Title IX liability on school boards 'does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.'" (References are to *Davis Next Friend Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999)). The judge also found qualified immunity prevented liability on Hunter's equal protection claim against the school resource officer, finding that his factual allegations of discriminatory treatment against him because of his sexual orientation were "wholly conclusory" – "a formulaic recitation of the elements" that "are not entitled to the assumption of truth" in deciding the motion. "None of the facts supports a plausible claim that Hunter was discriminated against based on his sexual orientation," wrote Schroeder, "or that a reasonable person in [the resource officer's] shoes would have deemed such conduct a violation of a clearly-established right against discrimination based on sexual orientation." (Actually, an assertion, at this late date, that it is not "clearly-established" that adverse treatment against somebody because he is gay violates equal protection, sounds a bit strange after *Romer v. Evans* (1996)). We would have thought that a school resource officer would be charged with knowing that treating a gay student's complaint differently from bullying complaints by non-gay students could subject them to liability would not be permissible, although the court is correct that there isn't a Supreme Court or 4th Circuit precedent precisely on point. In any event, Schroeder found that Nance did not plead an equal protection violation with sufficient specificity as to comparators. And he rejected Nance's argument that school officials have an affirmative obligation to protect a gay student from harassment by other students. He also found no allegations sufficient to meet

the standard for intentional infliction of emotional distress, rejecting plaintiffs' argument that "to submit a teenager to years of bullying and harassment, to the point where the teenager has tried to take his own life three times, and has been diagnosed with post-traumatic stress disorder exceeds all bounds of decency." They alleged that the resource officer's "perpetuation of toxic masculinity and laughing at [Hunter] who was unable to defend himself," "as well as his threat to file charges for filing a false report if Hunter were to call 911 for his classmate's conduct evidences [the resource officer's] 'discriminatory intent.'" Schroeder was not persuaded: "Even if his alleged laugh at Hunter's predicament of being chased by other boys was insensitive, his actions, including his alleged directive to Hunter regarding the making of a 911 report for his classmates' conduct, fall within the ambit of a reasonable school resource officer," citing an unpublished 4th Circuit opinion in a case that did not involve a teenage plaintiff in a school setting. In which universe does Judge Schroeder live where it is alright for school officials to laugh at gay students when they seek assistance against bullying? This is the professional standard of conduct in public schools? Perhaps the only explanation is that this is taking place in the anti-gay state of North Carolina. Plaintiffs are represented by Karen L. Vaughan of K Legal Services, Mooresville. One hopes this opinion can be appealed to the 4th Circuit.

OREGON – Sometimes one learns new stuff reading judicial opinions. For example, before reading U.S. District Judge Michael H. Simon's opinion in *Kowitz v. City of Portland*, 2019 U.S. Dist. LEXIS 21481, 2019 WL 542271 (D. Or., Feb. 11, 2019), this writer was unaware of the phrase "Canadian Tuxedo" to refer to an ensemble consisting of jeans and a denim jacket. (We sincerely hope any Canadian readers are not offended by this reference – it is straight reportage from footnote 4 of Judge Simon's opinion, sourced from the unimpeachable DICTIONARY.COM!) This was *pro se* plaintiff Heather Kowitz's only specific evidence of anti-lesbian bias by her supervisor. Wrote Judge Simon, "Plaintiff cites a comment her supervisor made referring to her clothing as a 'Canadian Tuxedo' as evidence of 'lesbian-baiting.' The term, however, is generally understood to be gender-neutral. In fact, the media has recently praised the style as a fashion-forward trend." Be that as it may . . . Kowitz was hired as a journeyman electrician for the city in November 2013, and by August 2014 was complaining to HR that she was experiencing workplace discrimination because of her gender, sexual orientation, and veteran status. She was not happy with the HR investigator assigned to look into her complaints, accusing him of asking her "trick questions." When she submitted a formal complaint to the state agency, the Bureau of Industry and Labor (BOLI), a different HR staffer took over the investigation. "Throughout the investigation," wrote Judge Simon, "Plaintiff's co-workers voiced concerns about Plaintiff's intimidating and inappropriate behavior in the workplace. They reported that they observed Plaintiff walking directly at them in narrow hallways without moving to the side and making animal-like grunting noises while walking in circles." Uh, oh, this isn't looking good . . . . "One co-worker complained that Plaintiff yelled at him over the telephone in the middle of the night because she could not find the job to which she was assigned. Another reported that Plaintiff formed a 'finger gun' gesture with her hand, pointed at him, and mimicked pulling the trigger." There ensued suspensions, a mandated "fitness for duty" psychological exam, and other difficulties, which the opinion recites in detail, culminating with a discharge and this *pro se* lawsuit. A major part of Kowitz's retaliation claim depends on linking the actions against her to the two formal complaints she filed with BOLI, but Judge Simon was not convinced, especially given the timing, and he also noted that apart from the "Canadian Tuxedo" comment there was no evidence in the record suggesting that Kowitz suffered adverse personnel actions because of her sexual orientation.

PENNSYLVANIA – A gay man who was a student at Mansfield University claims to have been subjected to sexual harassment by a male maintenance worker, including verbal comments and solicitations and nonconsensual touching. He waited too long to complain to some of the individual defendants, but could survive a motion to dismiss his action against the University's chief of police for not following up on the complaints when he did make them. Statute of limitations problems also led to dismissal of his charges that the University, and particularly two professors, had violated his rights by failing to accommodate his disability – clinical depression, evidence by doctor's notes – but the court ultimately concluded that the plaintiff's allegations were not sufficient to sustain hostile environment charges. The opinion issued on February 28 by U.S. District Judge Sylvia H. Rambo in response to the summary judgment motions brought by the university, the state system of higher education, the university president and the chief of university police, is too complicated to set out here in full, and those who are interested are referred to the court's opinion, which unfortunately omits to give a detailed review of the facts, noting that they are continued in other documents. The bottom line is the most of plaintiff's federal claims are washed out on limitations and pleadings grounds, but his federal claim against the university chief of police survives, and

there are still supplementary state law claims that might be addressed as the litigation progresses. The case is *King v. Mansfield University of Pennsylvania*, 2019 U.S. Dist. LEXIS 31972 (M.D. Pa., Feb. 28, 2019). Plaintiff Patrick King is represented by Ralph B. Pinskey, Pinskey & Foster, Harrisburg.

SOUTH DAKOTA – Rigid statutory interpretation will come around back to kill you every time! In *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, 2019 WL 740452 (S.D. Supreme Court, Feb. 20, 2019), Debra Lee Anderson, the surviving widow of Deborah Cady, was appealing the denial of survivor spousal benefits to her under the South Dakota Retirement System. Cady had been an employee of the Rapid City Police Department, and thus covered by the retirement system. Cady retired in May 2012. Although the women had been committed partners for many years, both working for the police department, they did not marry until a few weeks after the *Obergefell* decision, in July 2015. (They could have married in one of the neighboring states allowing same-sex marriage before *Obergefell,* such as Iowa, but the marriage would not then have been recognized in South Dakota, and the court's opinion intimates that they had deferred marrying because they were concerned about causing trouble for their employer, the police department.) Cady passed away in 2017, and Anderson applied for survivor benefits. The benefits were denied by the South Dakota Retirement System Office of Hearing Examiners (OHE), because the two women were not married when Cady retired, and thus did not meet the definition of "spouse" in the governing statute, which provides that a spouse is "a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member." Of course, when Cady retired in 2012, the women weren't married. Should *Obergefell* be projected backwards to find that the cohabiting women should be treated as having been married when Cady retired in 2012? No, said the court, in an opinion by Chief Justice David Gilbertson. Although the parties "do not seem to contest the retroactive application of *Obergefell*," wrote Gilbertson, "in its brief . . . . SDRS claims that the question of retroactivity is not controlling, here, because, as both the OHE and the circuit court reasoned, the only question in this case is whether Anderson or this Court may 'create a marriage *post hoc* despite the fact that Anderson and Ms. Cady never availed themselves of the marriage laws of another state that recognized same-sex marriage." At the heart of retroactive application cases are claims that the only reason why a same-sex couple was not married at a particular time is because the possibility to marry was not available. Since same-sex marriages became available in other states, including neighboring Iowa, well before 2012, this argument was really not available, according to the court. "The OHE reasoned that in order for *Obergefell* to apply retroactively, there must have been a previously *unrecognized marriage* between the couple that would have been recognized but for the law against same-sex marriages." The circuit court agreed, and so did the Supreme Court. "Anderson and Cady's commitment to one another and honorable intentions are not disputed by the parties," wrote Gilbertson. "But the fact remains that neither Anderson nor Cady made any actual attempt to marry before the date of Cady's retirement. Anderson's argument therefore, in essence, boils down to an attempt to establish a common-law marriage between her and Cady. South Dakota, however, does not recognize common-law marriage, requiring that a marriage 'be solemnized, authenticated, and recorded.'" Thus, wrote Gilbertson, this is a matter of statutory interpretation, and the statutory definition of "spouse" for benefits purposes is clear. The court rejected Anderson's claim that this result constituted a violation of her Equal Protection rights; but the court said no, referring to an old South Dakota Supreme Court ruling, *State Division v. Prudential*, 273 N.W. 2d 111 (S.D. 1978), which held that the denial of employer-administered benefits on the basis of marital status did not constitute discrimination. Cady was not married to Anderson when Cady retired. "This is still true despite Anderson and Cady's honorable views that getting married when same-sex marriage was not recognized in South Dakota would somehow reflect poorly on themselves or the RCPD [their employer, the police department]. Anderson was denied survivor benefits because her application did not entitle her to such benefits under South Dakota law. There was no discrimination on the basis of Anderson's gender or sexual orientation." Yeah, right . . .

TEXAS – It's not over until it's over. A lawsuit filed by two Houston Republican activists, Jack Pidgeon and Larry Hicks, challenging an action by Annise Parker, then the Mayor of Houston, to extend benefits rights to same-sex spouses of city workers after the Supreme Court struck down Section 3 of the Defense of Marriage Act, is – amazingly – still alive, at least partly because of an egregious misinterpretation of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), by the Texas Supreme Court in *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. June 30, 2017), *cert. denied*, 138 S. Ct. 505 (U.S. Dec. 4, 2017). In that decision, issued just days after the U.S. Supreme Court's ruling in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), a *per curiam* summary ruling holding that under *Obergefell* marriages of same-sex couples validly concluded under state law are equal in every respect to marriages for different

sex couples under the 14th Amendment, the Texas Supreme Court held that *Obergefell* did not answer the question whether the city of Houston would have to treat the same-sex marriages of its employees identically to the different-sex marriages of its employees for purposes of benefits – a rather incredible assertion, which seemed derived from Justice Neal Gorsuch's dissent in *Pavan*. The Texas Supreme Court returned the case to the Harris County District Court, to give both parties a "full and fair" opportunity "to litigate their legal positions in light of *Obergefell*," wrote Judge Sonya L. Heath in a new ruling issued on February 18, 2019. Responding to cross-motions for summary judgment, she dismissed "all of Plaintiffs' claims" with prejudice, but without any substantive explanation, merely stating that she had considered "the plea/motion and the summary judgment evidence filed by Defendants." No mention of having specifically considered anything filed by Plaintiffs, and no written reasoning or explanation. Of course, these plaintiffs promptly signified their intent to appeal (not withstanding an action several years ago by the Texas Court of Appeals effectively rejecting their claim), as reported by the *Texas Tribune* online on Feb. 21. Judge Heath's unreported decision may be cited as *Pidgeon v. Turner*, Cause 2014-61812 (Texas 310th Judicial District, Feb. 18, 2019). One expects the Court of Appeals will have some difficulty carrying out judicial review of a trial court ruling that lacks any explanation. Perhaps this case will go on forever. In the meantime, however, an early injunction granted by the Harris County court against the benefits policy was quickly countermanded by the Court of Appeals, and so the policy of providing the benefits remains in effect while the litigation drags on. Pidgeon and Hicks' litigation expenses (they are represented by attorney Jared Woodfill) are undoubtedly being met by determined foes of LGBT rights who hope to use the case as a vehicle to get a ruling from the All-Republican Texas Supreme Court and, ultimately, the U.S. Supreme Court, cutting back on *Pavan v. Smith* and *Obergefell* now that the U.S. Supreme Court majority that decided *Obergefell* has been lost through Trump's appointments Brett Kavanaugh to replace Anthony Kennedy, the author of the *Obergefell* decision.

TEXAS – The Texas 5th District Court of Appeals in Dallas has affirmed a decision by the Dallas County Probate Court rejecting a claim that decedent Linda Jean Whetstone had a common law marriage with claimant Deanine Reed. *In re Estate of Linda Jean Whetstone*, 2019 Tex. App. LEXIS 1232, 2019 WL 698090 (Feb. 20, 2019). Whetstone died intestate on April 13, 2016, according to the opinion by Justice Ada Brown, and her house in Dallas was sold in a foreclosure sale in December 2016. In February 2017, Reed filed an application for determination of heirship and for letters of administration, claiming to have been Whetstone's common law spouse, which was news to Whetstone's surviving sister, Nancy Rhodes, who moved to set aside the application, claiming that Reed lacked standing because the women were not married. The probate court held a hearing, since Texas does recognize the possibility of "informal marriage" in an estate dispute. Reed presented her story, but failed to persuade the probate court. In order to prevail, Reed would have to show three things: she and Whetstone agreed to be married, after the agreement they lived together in Texas as spouses, and they represented to others that they were married. Reed and two other women sworn as witnesses testified to a "marriage ceremony" held on June 27, 2015, which was the day after the U.S. Supreme Court announced the *Obergefell* decision (at which time Texas was not yet issuing marriage licenses, awaiting a ruling from the 5th Circuit on its appeal of a marriage equality ruling that came down several days later). One of the witnesses said that Reed and Whetstone made "a commitment vow" on that occasion. This witness, Michelle Skyers, said she met Whetstone in the spring of 2015 at a music festival, at which time Whetstone invited her to attend Whetstone's "wedding" in June. Skyers had no further contact with Whetstone until the event, at which she met Reed for the first time, "and that was the only time Skyers was at Whetstone's house," wrote Judge Brown. Skyers assumed that Reed was living with Whetstone after the ceremony, but had no personal knowledge of that, having no further contact with Whetstone. A neighbor, Connie Brenners, claimed that Reed and Whetstone "were together a lot" and that Reed moved in with Whetstone and lived with her about a year before Whetstone died, but that the women kept to themselves. Also, Reed went to alcohol rehab, and was actually in the hospital when Whetstone died. Whetstone was found dead in her home (the opinion does not say who found her), and police were given the name of her stepmother as a contact. Reed could not be contacted because she was in rehab, and at the time of trial, Reed was living with Brenners. Reed testified that women lived together in Whetstone's house after the wedding, and she lived various places after getting out of the hospital, ultimately moving back in Whetstone's house until she was evicted as a result of the foreclosure sale. She claimed that testimony for others that she was living elsewhere was incorrect. As to the "holding out" as a married couple, Reed demurred, indicating they were living in a conservative community and kept to themselves. No photos from the wedding ceremony were entered into evidence, and there were no photos showing the two women together. Of course, there was no written evidence of the alleged marriage. There was contrary evidence from relatives of Reed as to where she as living at

particular times, and from people in the neighborhood testifying that Whetstone lived alone during the relevant time. Whetstone's sister Nancy testified that she "did not know about Reed while Whetstone was alive," and "first learned Reed was claiming to be Whetstone's spouse from the attorney appointed as *ad litem* for Whetstone's unknown heirs." She looked for evidence at the house to substantiate Reed's claim, and found none. The court of appeals found that there was conflicting evidence in the case on all three elements of an informal marriage claim, and thus there was no basis to overturn the probate court's findings of fact.

WASHINGTON – U.S. Magistrate Judge James P. Donohue reversed and remanded to the Commissioner of Social Security a decision denying disability benefits to a transgender woman, finding that the Social Security Administrative Law Judge (ALJ) erred by entirely omitting from discussion in the opinion the issues raised by the plaintiff's gender dysphoria and associated post-traumatic stress disorder, and by rejecting the opinions of all the treating and examining physicians in favor of the non-examining state agency physicians, and failing to heed the ALJ's own suggestion that expert medical testimony might be needed to evaluate plaintiff's combination of impairments. *Tabby L. v. Commissioner of Social Security*, 2019 U.S. Dist. LEXIS 14075 (W.D. Wash., Jan. 29, 2019). Judge Donohue found that the evidence in the record "supports that PTSD and transsexualism were severe impairments that needed to be considered and discussed by the ALJ at step two" of the disability analysis. "Given the significant evidence of record supporting limitations related to PTSD and the plaintiff's lifelong transsexualism, the Court declines to assume that the ALJ adequately accommodated (without comment) all the limitations resulting from these severe impairments in the [residual functional capacity] assessment. As a result, this case must be remanded for the ALJ to reevaluate and discuss plaintiff's diagnoses of PTSD and transsexualism at step two. In addition, the ALJ should discuss what additional limitations result from these impairments." The judge also commented, "As a matter of law, more weight is given to a treating physician's opinion than to that of a non-treating physician because a treatment physician 'is employed to cure and has a greater opportunity to know and observe the patient as an individual' . . . If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is." In this case, among other things, the ALJ relied heavily on the opinions of the government's non-treating physicians, even though they predated and, necessarily, did not include review of, more recent opinions submitted by the treating physicians, and the judge implicitly criticized the ALJ's methodology, stating, "The ALJ should not, however, continue to cherry-pick the record by focusing on plaintiff's 'intact memory and concentration on mental status exam in February 2015,' and use a single normal test result to disregard all the abnormal results and diagnoses in the record. Because it was improper to rely upon the State agency psychologists' opinion in formulating plaintiff's RFC, the ALJ's assessment was not supported with substantial evidence or free of legal error." Judge Donohue also criticized the ALJ's failure to respond in the opinion to plaintiff's counsel's argument that her neurodevelopmental disorder meets Listing 12.11, without any discussion of why the ALJ concluded that plaintiff did not meet this listing, "apart from a general statement that plaintiff's mental impairments do not 'meet or medically equal the Listings in section 12.00.'" And, even though the ALJ commented several times that this may be a case where a supplemental hearing would be necessary "in order to have a medical expert testify regarding plaintiff's combination of impairments," the ALJ did not conduct such a hearing or solicit testimony from a medical expert. Plaintiff's counsel if Christopher H. Dellert, Dellert Baird Law Offices, Lakewood, Washington.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, 3RD CIRCUIT – Recently-seated Trump Court of Appeals appointee David Porter wrote the salacious opinion for the court in *United States v. Chip*, 2019 U.S. App. LEXIS 3209, 2019 WL 364295 (Jan. 29, 2019), affirming the conviction of a then-26-year-old man who was convicted under the federal enticement statute for arranging a rendezvous with an undercover law enforcement agent posing as a teenager on the Jack'd app. In March 2017, defendant Sanny Chip accessed Jack'd, described in the record as "an app where men meet to have quick sexual contact with each other," and initiated contact with "Henry," whose Jack'd profile listed him as 18. "Early in the conversation," wrote Porter, "Henry asked Chip how old he was. Chip reported that he was 26 years old. Henry revealed that even though his Jack'd profile listed his age as 18, he was really only 14. Despite this revelation, Chip continued messaging with Henry – first on the Jack'd app, and later on Kik, another messaging app that anonymizes user information." The opinion contains a detailed discussion of the conversation and events leading up to Chip's arrest when he showed up at the agreed time and place to meet "Henry." The transcript of their messaging was introduced in evidence and led the jury to convict Chip under 18 U.S.C.

2422(b), which makes it a federal crime if someone "knowingly persuades, induces, entices or coerces" a minor in criminal sexual activity, "or attempts to do so." None of these terms are defined in the statute. Chip argued on appeal that a careful review of the transcript shows that he did none of these things. The undercover posing as "Henry" and initially representing himself in his Jack'd profile as 18 presented himself as willing and eager, argued Chip, despite some cautious questions, to have a sexual experience. Although some of his messages were reassurances intended to respond to the concerns that "Henry" raised, Chip argued that he was not persuading, inducing, enticing or coercing "Henry" to meet him for sex. The court of appeals rejected the argument, subjecting the transcript of the conversations to minute and sexually-explicit analysis. Indeed, one might repurpose Judge Porter's opinion with minor emendations as gay porn. This reader was rather astounded to read some of the sentences that this judge saw fit to include in an official court of appeals opinion (although noting that it will not be published in F.3d, but rather will have an F.Appx. cite, but of course full text is available on electronic databases). Most judges would stick to generalities and euphemisms rather than to use vocabulary that would get one tossed off of facebook.com, for example. In his conclusion, Porter wrote, "Even were we to accept Chip's standard – holding enticement impossible when a minor independently shows interest in sexual activity – Henry's occasional hesitation means that Chip would fail his own test. Chip describes Henry's interest in a sexual encounter as unwavering, but the record paints a more complicated picture. While Henry exhibited curiosity about sex, he also expressed concern about meeting a 'creeper,' feared that anal sex could be painful, and threatened to break off communications at certain points. This does not qualify as unwavering interest; rather, it shows that Chip had to continue pursuing Henry to induce him to go forward with the planned encounter. In sum, Chip's conviction stands if a rational juror could have found him guilty under Sec. 2422(b), and the messages at issue provide a basis for the jury's guilty verdict. Chip's argument to the contrary is undercut by both the record and other decisions upholding Sec. 2422(b) convictions on similar facts." Based on Judge Porter's selective quoting from the transcript, his characterization does sound plausible. Thus, a cautionary note here, especially for men in Pennsylvania, where the Attorney General's office has maintained an active program of entrapping gay users of hook-up apps into setting up dates with individuals posing at first as adults and then revealing themselves as minors: don't fall for it!! Appointed counsel for Chip are Keith M. Donoghue and Mark T. Wilson, Federal Community Defender Office for the Eastern District of Pennsylvania, Philadelphia.

U.S. ARMY COURT OF CRIMINAL APPEALS – When initiating a sexual advance, don't assume that silence equals consent. This seems to be the message to Sergeant Travis Hernandez, a gay man who was convicted by a court martial jury of one specification of "maltreatment" and one specification of "abusive sexual contact" apparently based on his incorrect reading of a situation involving a gay subordinate with whom he was friendly. The consequences for Sgt. Hernandez were severe: dishonorable discharge, confinement for 90 days, forfeiture of $1,566.90 pay per month for three months, and reduction in grade to E-1. *United States v. Hernandez*, 2019 WL 451220 (Army Ct. Crim. App., Jan. 31, 2019). Perhaps because of the graphic description of the appellant's misconduct in the opinion by Senior Judge Paulette Burton, this was designated as an unpublished opinion. It seems that Hernandez and Private First Class PR (PFC PR) became friends once they figured out that they were both gay, and socialized together. According to Hernandez, wrote Judge Burton, "they cuddled, watched movies together, shared intimate details about previous relationships, and had seen each other naked." In a footnote, Burton writes, "Private First Class PR denies these interactions." On February 11, 2016, they were roommates in a training exercise. "After a cookout, PFC PR went into the restroom to take a shower. Appellant subsequently entered the restroom to urinate and started a conversation with PFC PR. During this conversation, appellant believed it was time to make his move. According to appellant, he entered the shower uninvited and touched PFC PR's penis. When PFC PR pushed appellant's hand away and exited the shower, appellant did not attempt to touch him again. When PFC PR texted appellant about his actions in the shower, appellant apologized, and he explained, 'Because I was like, "My bad . . . I thought we were on the same page."' Presumably PFC PR reported the incident, leading to Hernandez's prosecution and conviction. Hernandez did not object to the charge to the jury at the time, but on appeal contended that the military judged failed to instruct the panel on the proper *mens rea* for the offense of abusive sexual contact. The offense, as described in the Uniform Code of Military Justice, would include contact "done with an intent to arouse or gratify the sexual desire of any person" without consent. There is also an instruction on "mistake of fact as to consent" that the military judge gave to the jury, which included the statement that "ignorance or mistake cannot be based on the negligent failure to discover the true facts," defines "negligence" in terms of "absence of due care," and defines "due care" as "what a reasonable careful person would do under the same or similar circumstances." Thus, wrote

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Judge Burton, "This instruction required the panel to consider appellant's state of mind and the reasonableness of his belief about the victim's consent." One element of the offense is causing "bodily harm." Judge Burton explained, "In appellant's case, the sexual contact – grabbing PFC PR's penis with his hand – was also the bodily harm, and the military judge followed the *Benchbook* in instructing the panel on this element." Contrary to Hernandez's assertion on appeal, the court found that the military judge gave an appropriate charge to the jury, and even assuming the judge did not, Hernandez did not object to the charge at the time, so the standard of review would be "plain error based on the law at the time of appeal." The court decided there was no plain error here. Based on Hernandez's account, one could find the necessary elements. The judge wrote: "In discussing the night in question, appellant testified that PFC PR did not invite appellant to get undressed, join him in the shower, or touch his penis. Instead, appellant was sexually aroused and believed it was a good time to make his move. According to appellant, 'with gay guys . . . you just pretty much go straight to it.' Simply put, appellant chose to take the matter into his own hands [*aha!*], and his actions consciously disregarded a substantial and unjustifiable risk that PFC PR did not consent. In light of this uninvited and unrequested conduct, we find a lack of material prejudice from the alleged error." The court affirmed the conviction.

LOUISIANA – In *State of Louisiana v. Whitaker*, 2019 La. App. LEXIS 330, 2019 WL 945630 (La. 2nd Cir. Ct. App., Feb. 27, 2019), the court vacated the life without parole sentence that had been imposed on Breonne Whitaker, who had murdered 23-year-old Frederick Henderson, a gay man, in connection with an apparently unsatisfactory sexual experience. There is no doubt that Whitaker committed the murder and had no valid claim of self-defense, but the court of appeal found that since he was a minor when the crime was committed, there were constitutional constraints on sentencing him to life in prison without the possibility of parole. As required by U.S. Supreme Court precedents and state law, that trial was obligated to articulate on the record the reasons for imposing this maximalist sentence on a minor, and had not done so. The remand is for the purpose of allowing the trial judge, Caddo Parish District Judge Ramona L. Emanuel, "an opportunity to conduct a hearing to articulate her reasons for sentencing."

MINNESOTA – In *United States v. Schmitz*, 2019 U.S. Dist. LEXIS 24275 (D. Minn., Feb. 14, 2019), U.S. District Judge Susan Richard Nelson rejected a motion to vacate a plea agreement made by defendant Joel Conrad Schmitz, who pled to charges of production of child pornography with an understanding that he could withdraw from the agreement and seek to have it vacated if he was sentence to more than 180 months. The trial judge sentenced him to exactly 180 months, but he filed this motion, nonetheless, claiming that the prosecution against him was motivated by his sexual orientation and was vindictive. Judge Nelson reviewed the evidence presented on behalf of Schmitz, and concluded that it was not sufficient to establish either discrimination or vindictiveness. In the course of her analysis, she acknowledged the 6th Circuit's twenty-two-year-old precedent, *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.1997), holding that "the proposition that the state may constitutionally discriminate by enforcing laws only against homosexuals . . . is not now, and never has been, the law." However, she found that Schmitz was unable to show that he was singled out for prosecution because of a bias by the U.S. attorney's office in prosecuting gay men involved in the pornography production trade. The judge also noted that the federal prosecution was actually sparked by statements by a defendant in another case who named Schmitz as a violator of the child pornography statute, and was not the result of some crusade initiated against gay men by the U.S. Attorney. Schmitz had aimed his fire at a state prosecutor who was going after him on other charges at the time he was notified that he was the target of a federal investigation, but the court found he was mistaken in thinking that the local prosecutor had turned him in to the feds; actually, it was after the federal prosecutor learned about him from another defendant that the federal prosecutor then contacted the state prosecutor with a suggestion to consolidate the prosecution in federal court. Schmidt's motion to vacate was filed *pro se*. In addition, Judge Nelson denied as moot Schmidt's motion to appoint counsel for him and his request for a subpoena to collect additional evidence.

NEW JERSEY – U.S. District Judge Clare C. Cecchi found that a Social Security Administrative Law Judge erred in determining the disability onset date for a transgender woman whom she found to be entitled to disability benefits. *Gonzalez v. Commissioner of Social Security*, 2019 U.S. Dist. LEXIS 17510 (D.N.J., Jan. 31, 2019). The plaintiff, born in 1985, is a high school graduate who was employed as a cosmetic manager in a retail store. She was terminated from her job in 2009, and has not worked since then. She claims that she was terminated because she is transgender, and she had difficulty finding a new job on that account, which led her to become severely depressed with comorbid psychological impairments. Indeed, she developed such a fear of other people, and particularly a belief that she was a constant subject of ridicule, that she

became virtually housebound in her mother's house. The ALJ determined, based on a psychologist's report from an examination that took place in 2016, that plaintiff was disabled beginning then, and ordered that benefits be awarded from that date. But, argued plaintiff, her disability extended much earlier. The ALJ had relied on the fact that a report from the medical doctor who was supervising her transition back in 2012 had not indicated that she was unable to work. But, wrote Judge Cecchi, the determination of the date of disability must be based on evidence in the record, and the 2016 psychologist report did not opine as to when plaintiff's disability began. Wrote the judge, "ALJ's are always obliged to select an onset date that is supported by substantial evidence of record. Although an ALJ may sometimes infer an onset date different from a claimant's alleged date, it is crucial that such inference be based on medical evidence. Since no evidence in the record here specifically supports an onset date of February 12, 2016 and not prior, the court cannot find that the ALJ's determination of Plaintiff's onset date is supported by substantial evidence . . . On remand, the ALJ should determine if sufficient medical evidence exists currently from which an onset date can be inferred, or if the testimony of a medical expert is required. The ALJ should then take the appropriate steps to determine Plaintiff's onset date on the basis of substantial evidence." The plaintiff is represented by James Langton of Langton & Alter, Rahway, N.J.

WASHINGTON – The Supreme Court of Washington affirmed a decision by the state's court of appeals to reverse the superior court's summary judgment in favor of an employer, who had been sued on a strict liability theory based on an employee's sexual harassment of a customer. The Supreme Court, agreeing with the court of appeals, rejected the trial judge's reliance on the standard used for liability to employees. *Floeting v. Group Health Cooperative*, 434 P.3d 39 (Wash., Jan. 31, 2019). The plaintiff had been a member and patient of the defendant, Group Health, for over 35 years. He alleged that beginning in July 2012, he was repeatedly sexually harassed by a Group Health employee during his medical appointments. He filed a complaint with Group Health, which investigated and terminated the employee in question. Then he sued Group Health under the Washington Law Against Discrimination, alleging that this was sex discrimination in a place of public accommodation. Group Health moved for summary judgment, arguing that the standard governing employment discrimination should apply under which an employer that is unaware that a non-managerial or supervisory employee is harassing another employee is not liable for the harassment unless the employer was shown to be negligent in some way. The Court of Appeals reversed, holding that under the anti-discrimination law, a business should be held strictly liable for discriminatory conduct towards customers or clients, even if the business did not know about the harassment until the client complained. Justice Steven Gonzalez, rejecting Group Health's argument, wrote, "We treat employment discrimination claims differently from public accommodation discrimination claims because WLAD treats them differently. An employee alleging employment discrimination must show that the misconduct affected the 'terms or conditions of [their] employment.' The employment discrimination statute is limited to unfair practices by an 'employer' by operation of the language 'It is an unfair practice for any employer [ ] to . . . ' In contrast, WLAD provisions prohibition discrimination in a public accommodation do not limit themselves to the 'terms or conditions' of a public accommodation. Discrimination by 'any person or the person's agent or employee' is an unfair practice in a public accommodation; i.e., in this context, the person subject to WLAD broadly includes, among others, individuals, corporations, owners, proprietors, managers, and employees. Floeting's claim is more of a consumer claim than a claim between an employee and employer, and his claim is not limited by the employment discrimination statute." Dissenting, Justice Barbara Madsen wrote, "I see no reason to treat instances of discrimination differently, nor do I believe the legislature intended to distinguish them – their intent is to eradicate discrimination wherever it occurs. I write separately because the majority erroneously subjects employers to a strict liability standard for the discriminatory actions of nonsupervisory employees – a far higher standard than in the workplace setting – without justification and based on language that does not support such a result." She would limit the statute's requirement to require business to take action when they know, of should know, of discriminatory conduct towards a customer by an employee. The plaintiff is represented by Medora Marisseau and Celeste Mountain Monroe of Karr Tuttle Campbell, Seattle.

PRISONER LITIGATION NOTES

By William J. Rold

William J. Rold is a Civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

U.S. COURT OF APPEALS – 10TH CIRCUIT – This is an appeal of *Hardeman v. Smith*, 2018 U.S. Dist. LEXIS 51236 (E.D. Okla., March 28, 2018), reported in *Law Notes* (May 2018 at pages 262-3), in which this writer called the District Court's dismissal of the case a "hatchet job." The Court of Appeals completes the "job" by

affirming, but it includes an interesting sidebar. Proceeding *pro se*, transgender inmate Johnny Hardeman, a/k/a Lo're Pink, challenges her conditions of confinement, particularly medical care, in Oklahoma, where she is serving a life sentence for homicide. In *Hardeman v. Smith*, 2019 U.S. App. LEXIS 5163, 2019 WL 856585 (February 22, 2019), U.S. Circuit Judge Carolyn B. McHugh, writing for herself and Senior Circuit Judges Bobby R. Baldrock and Terrence L. O'Brien, issued a "non-published" opinion that is not binding precedent but may be cited as noted in F.R.A.P. 32.1. It affirmed the dismissal for failure to exhaust administrative remedies under the Prison Litigation Reform Act. This is not notable, but the dicta that follows (should Hardeman find a way to exhaust and renew the case after dismissal without prejudice) takes some of the harshness away from 10th Circuit cases involving transgender health care for prisoners. As previously reported in *Law Notes*, the 10th Circuit authorizes the use of a "*Martinez* Report" (from *Martinez v. Aaron,* 570 F.2d 317, 318-19 (10th Cir. 1978) *(per curiam)*) in which correctional defendants may present a summary of their position for use in screening the case under the Prison Litigation Reform Act. Here, however, the court observed that the medical records attached to the *Martinez* Report were missing the even-numbered pages, and U.S. District Judge Ronald A. White (E.D. Okla.) appeared not to notice. The Court of Appeals criticized his reliance upon an "incomplete" record. More substantively, the Court of Appeals observed that Judge White "inaccurately characterized" the record as not supporting deliberate indifference in two respects. First, he credited segregation rounds during which notations were made that Hardeman wanted a meeting about her health care as a "series of sick calls, examinations, diagnoses, and medication" inconsistent with deliberate indifference, citing *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976). The court said that these brief in-cell meetings did not substitute for the kinds of encounters found adequate in *Smart*, particularly when some of the notations included Hardeman's requests for longer encounters that never occurred. There was a material issue as to whether the "rounds" satisfied the requirement of medical "treatment." Secondly, Judge White's application of *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir. 2018) – which characterized denial of certain transgender treatment as a disagreement about type of medical care, which is not actionable under the Eighth Amendment – was "overly ambitious." Judge White found that medical treatment occurred, despite the skeletal notes and Hardeman's insistence that she was not receiving *any* treatment at all [*emphasis by the court*]. The court said that Lamb recognized four types of treatment: (1) changes in gender expression and role; (2) hormone therapy to make the body feminine or masculine; (3) surgery to change primary or secondary sex characteristics; and (4) psychotherapy. Here, a reasonable jury could conclude that Oklahoma was providing Hardeman with none of them. This is the first crack in the otherwise relative hostility to transgender prisoners' rights in the 10th Circuit – and the court volunteered it.

CALIFORNIA – U.S. Magistrate Judge Barbara A. McAuliffe dismissed *pro se* transgender inmate Maxine M. Solomon's first amended complaint with leave to file a second one in *Solomon v. Torres,* 2019 WL 528800 (E.D. Calif., February 11, 2019). Solomon alleged that an officer wrote a false disciplinary ticket against her because of her believed romantic association with another inmate, who was also ticketed. Solomon says she has a tape recording in which the defendant officer admitted the ticket was falsified. Solomon's first amended complaint contains the following allegations under "Eighth Amendment" claims: "I feel that his false violation report was written purely by his prejudice and hatred towards transgender and gay people . . . . I was punished by the state for homosexual." Judge McAuliffe ruled that writing a false inmate disciplinary report was not actionable, citing a number of unpublished district court decisions and the more than 30-year-old opinion in *Hernandez v. Johnston,* 833 F.2d 1316, 1319 (9th Cir. 1987). Citation to *Hernandez* is silly. In that case, the court found that the plaintiff's constitutional rights were not violated because the prison refused to remove a "violent" characterization from his classification records, when a "Rap Sheet" showed a record of two convictions for battery, one for attempted forcible rape, and one for assault with a deadly weapon. False charges are not actionable when there is "some evidence" to support a disciplinary committee's finding of guilt. *Superintendent v. Hill,* 472 U.S. 445, 455 (1985). The deferential *Hill* standard ("some evidence"), however, does not apply to the writing of a ticket by an officer, if the motivation for the ticket is to violate other constitutional rights, such as freedom from retaliation. *Hines v. Gomez,* 108 F.3d 265, 268 (9th Cir. 1997). None of this case law is cited by Judge McAuliffe. Yet, arguably, if Solomon's allegations are credited, not even the "some evidence" *Hill* test was met – and the more exacting scrutiny of *Hines* may be required by the act of ticketing an inmate for having romantic feelings toward another inmate. The state can penalize behavior but not thoughts. Judge McAuliffe does not address this notion or any residual First Amendment right of association between Solomon and the other inmate that is short of rules violations. Judge McAuliffe does mention an Equal Protection claim, and the heightened scrutiny that applies to classifications based on sexual orientation under *SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471, 481 (9th Cir. 2014). She writes that the

Ninth Circuit in *SmithKline* held that *United States v. Windsor*, 570 U.S. 744, 774 (2013), "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline* is appropriately more nuanced, because the Supreme Court assiduously avoided holding that in *Windsor*. Nevertheless, Judge McAuliffe recognized the Equal Protection elements of Solomon's argument, despite usual deference to prison discipline. Why she required a second amended complaint before defendants can be served, however, escapes this writer.

CALIFORNIA – This writer has read this brief screening decision four times and still cannot understand it. In *Neal v. Borders*, 2019 U.S. Dist. LEXIS 25278, 2019 WL 632955 (C.D. Calif., February 14, 2019), U.S. Magistrate Judge Kenly Kiya Kato decides that *pro se* bisexual inmate Robert W. Neal, who is also developmentally disabled, had not pleaded a case for violation of his civil rights, arising out of a disciplinary proceeding. Neal alleges that although he was found "innocent" of charges of sexual misconduct at a disciplinary hearing, he was nevertheless reclassified to a higher level of security, endangering him and denying him use of the "Special Needs Yard." He said that these steps also took away good time (which lengthened his sentence) and placed him in danger in the general population yard, since his prior special needs classification was revealed. Judge Kato spends a part of the decision discussing the impropriety of a complaint against defendants in their official capacities under the Eleventh Amendment. The remainder of the opinion addresses Equal Protection for bisexual prisoners, applying a rational basis standard under *Turner v. Safley*, 482 U.S. 78, 89 (1987). Neither the Supreme Court not the Ninth Circuit has applied the *Turner* balancing tests to Equal Protection claims of prisoners, and Judge Kato cites no authority for it. Judge Kato fails to mention contrary authority of *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 474 (9th Cir., 2014) (applying heightened scrutiny to pre-emptory juror challenges based on sexual orientation). He does not mention a failure to protect claim under *Farmer v. Brennan*, 511 U.S. 825, 837-8 (1994), or even the Eighth Amendment. Judge Kato also omits reference to the unavailability under § 1983 of restoration of good time credits that shorten a sentence. *Heck v. Humphrey*, 512 U.S. 477, 486-7 (1994). Judge Kato grants leave to replead without stating what Neal needs to correct, while warning him that a failure to replead properly could lead to a dismissal with prejudice (without explaining that). Finally, he directs the clerk to offer Neal papers to voluntarily dismiss now without repleading, which would be without prejudice (again, no explanation). Neal began his case in Superior Court in California, and defendants removed it. There is no discussion of remand of the state law claims if the federal claims fall out. This writer notes that it is unlikely that a developmentally disabled plaintiff could follow all of this legalese.

FLORIDA – Pro se gay inmate Djun E. Wilson's fourth amended complaint was dismissed after service in *Wilson v. Holland*, 2018 WL 7019056 (N.D. Fla., December 18, 2018), for failure to exhaust administrative remedies. U.S. Magistrate Judge Charles A. Stampelos' Report and Recommendation ["R & R"] finds that, although Wilson filed a grievance, it did not include allegations relating to the failure to protect claims he was trying to raise in federal court. Judge Stampelos finds that the grievance dealt primarily with failure to prosecute Wilson's attacker, not with failure to protect him prior to the attack. Wilson, known to be gay, was extorted by gang members to traffic in drugs. His request for protective custody was denied. Subsequently he was beaten, requiring emergency room treatment. He was placed in administrative segregation on his return, in a unit where a gang member was an inmate orderly, causing Wilson fear. Wilson was raped by his cellmate and moved to another institution. Judge Stampelos found that Wilson did not include allegations that he was in danger in administrative segregation in his grievance, and the R & R recommended that the complaint be dismissed on this basis. He filed only one grievance before he was raped. He failed to grieve "that anyone failed to protect him or that a failure to protect led to the beating or the subsequent rape while in administrative confinement." The R & R recommended dismissal without prejudice, but it does not explain what Wilson should do to survive on a fifth try. Judge Stampelos cites *Jones v. Bock*, 549 U.S. 199, 204-09 (2007), several times – but not for its central holding; that exhausted claims go forward while unexhausted claims must be dismissed. No effort is made here to parse Wilson's fourth amended complaint in this respect.

ILLINOIS – U.S. District Judge Staci M. Yandle organizes the *pro se* complaint of transgender inmate Kaabar Venson into four distinct claims and then dismisses each one for failure to state a claim in *Venson v. Gregson,* 2019 WL 570611, 2019 U.S. Dist. LEXIS 21860 (S.D. Ill., February 11, 2019). Venson alleges that she renounced membership in a gang when she began her transition and that she reported that she was thereafter subject to a "k.o.s." ["kill on site"] "order" from the gang at Illinois' Menard facility, the state's largest maximum security prison. Venson requests "safety" and monetary damages for an assault from another inmate after she left the gang. The assault occurred while she was being escorted, when another inmate grabbed her hair and banged her head on cell bars, refusing an order from the escorting officer to cease. Venson alleges that she received

nursing treatment, but she alleges that the nurse falsified a "refusal" of an appointment made for her with a doctor. Venson continues to be taunted, and an officer called her a "faggot ass snitch" in front of other inmates. Venson has attempted suicide on multiple occasions. Judge Yandle analyzes the following: (1) failure to protect Venson from assault after she renounced gang affiliation and announced her transgender transition; (2) failure of the officer to intervene adequately in the inmate-on-inmate assault; (3) inadequate medical care; and (4) failure to protect Venson from self-harm. The problem here is primarily one of pleadings. In some cases, Venson names people only in the caption of the case; in others, she talks about them in the body of the complaint without making them parties. Either deficiency is fatal on screening. Venson fails to say what each defendant knew and did or failed to do to protect her from harm. Judge Yandle does not specifically discuss the officer, if known, who allegedly called Venson a "faggot snitch." The behavior ascribed to the escorting officer was not deliberately indifferent because he ordered the assailant to stop and managed to quell the attack within 90 seconds. Venson fails to allege that the nurse's treatment was deliberately indifferent, and the allegation that the nurse forged a "refusal" of the doctor visit was "mere speculation." Finally, as to self-harm, Venson fails to allege any defendant who knew of her risk and was deliberately indifferent to it. Judge Yandle allows Venson leave to amend, and she provides a road map on how to do it, if Venson can follow it. Judge Yandle treated the request for "safety" as a demand for injunctive relief at the close of the case. Should Venson require earlier intervention, she must file a motion under F.R.C.P. 65 for a preliminary injunction.

LOUISIANA – Louisiana jail inmate Antonio Thomas was classified as a "High Risk Sexual Victim" under the Prison Rape Elimination Act [PREA] due to his age (18), size (5'10" and 138 pounds), and mental health problems caused by fetal alcohol syndrome. He was placed in a dorm with a mixed population and promptly assaulted, causing a broken nose (among other injuries) that sent him to the hospital. On his return, Thomas was placed in a double cell with an inmate named Eisley, who had been one of his assailants in the dorm and who was himself classified under PREA as a "High Risk Sexual Predator." Within two weeks, Eisley raped Thomas, who again required hospitalization and incurred a fractured bone in his rectal area. In *Thomas v. Grimes,* 2019 U.S. Dist. LEXIS 21749 (M.D. La., February 11, 2019), U.S. District Judge John W. deGravelles denied defendants' motion to dismiss on qualified immunity. The lengthy opinion sets forth the parties' allegations at length, but it boils down to the application of PREA's classification system of predator and victim and the obvious risks that can be inferred from it under *Farmer v. Brennan*, 511 U.S. 825 (1994). Judge deGravelles declined to dismiss claims arising from either sexual assault, under *Farmer* and the Eighth Amendment as applied to jails through the Fourteenth Amendment. While the first assault may present a tougher jury question, it presents one. As to the second assault: "No reasonable prison official would think it was acceptable to send a prisoner like plaintiff into a two-man cell with a predator like Eisley, especially after the May 4th attack on plaintiff." Plaintiff is free to seek a variety of damages for his physical and mental injuries, including punitive damages and attorneys' fees. The danger to Thomas was serious, *Farmer,* 511 U.S. at 834; and a jury could find that it was "obvious." 511 U.S. at 837. The law was therefore clearly established for qualified immunity purposes. This case is a good example of the affirmative use of the evidentiary lodestar created by PREA, whether or not it creates a separate cause of action. Thomas is represented by Joseph Jerome Long, Baton Rouge.

MAINE – Transgender inmate Walter William Moore, a/k/a Nicki Natasha Petrovickov, pro se, sued various Maine corrections officials in 2016 for failure to provide her with hormone and other treatment in *Moore v. Maine DOC*, 2019 U.S. Dist. LEXIS 8979 (D. Maine, January 18, 2019). This case shows that, if correctional officials can string a case along long enough, it may be possible to allege as grounds for dismissal both non-exhaustion of administrative remedies under the Prison Litigation Reform Act and mootness. Although she received hormone treatment from Massachusetts prior to her incarceration in Maine and hormones while under psychiatric care in Maine, the Maine DOC "committee" for transgender prisoners determined that Moore did not meet the "criteria" for gender dysphoria and denied her hormones, resulting in this lawsuit. By 2017, however, Maine DOC had changed its mind and provided hormones. Although it appears that Moore never filed a grievance, this case percolated along for three years. U.S. Magistrate Judge John C. Nivison finally recommends granting summary judgment to defendants in 2019, finding no excuse on the record for failing to exhaust administrative remedies under the exceptions in *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016). While normally a failure to exhaust would result in a dismissal without prejudice, here Judge Nivison recommends summary judgment. To make matters more bizarre, he then continues with an advisory opinion about future injunctive relief, whether or not summary judgment should issue for failure to exhaust. Judge Nivison finds that any claim for prospective relief is moot because Moore is now receiving the hormones she sought. He rejects

the "voluntary cessation" defense to mootness, finding no "reasonable expectation that the challenged conduct will be repeated following dismissal of the case," citing *Town of Portsmouth, R.I. v. Lewis*, 913 F.3d 54, 59 (1st Cir. 2016). "[T]he record lacks any evidence to suggest that Defendants, having an established transgender policy and having determined that Plaintiff has a genuine medical need, would cease providing treatments after termination of this case."

MARYLAND – U.S. District Judge Richard D. Bennett granted summary judgment for defendants in a civil rights case brought *pro se* by transgender inmate Rosalyn Alyssa Rodriguez in *Rodriguez v. Kopp,* 2019 WL 568877 (D. Md., February 12, 2019). Rodriguez seeks protection from harm, treatment for gender dysphoria, access to female undergarments and hygiene items, access to an "outside specialist," and damages. Judge Bennett notes that Rodriguez had filed a similar suit without relief in 2016 before a different judge. The current opinion, over 8000 words with 21 footnotes, contains misleading findings and obvious loose ends. Judge Bennett begins by holding that Rodriguez has not exhausted administrative remedies under the Prison Litigation Reform Act, although she has filed numerous grievances. Nevertheless, Judge Bennett rules on the merits in granting summary judgment. On the issue of protection from harm, Judge Bennett notes that Rodriguez has one "documented" assault, which he characterizes as "spontaneous" (although it involved "Bloods" gang members) because the assailants were not on Rodriguez' "enemies list." Moreover, Rodriguez is not now in danger because she has been in disciplinary segregation since 2017 and will remain so through much of 2019. On the issue of treatment for gender dysphoria and access to feminine items, Judge Bennett finds that Rodriguez has never been diagnosed with gender dysphoria. She had no prior treatment. Although Rodriguez alleges Maryland has an illegal "freeze frame" policy that denies treatment if it had not occurred prior to incarceration, defendants' papers in summary judgment deny this and state that a psychiatric social worker evaluated Rodriguez and determined that she does not meet criteria for gender dysphoria. Judge Bennett relies on this "evaluation," despite the fact that the social worker and the state's "dysphoria committee" referred Rodriguez to an "outside" specialist at Johns Hopkins in 2017. The prison's internal medicine physician also filed an affidavit stating he did not consider himself qualified to diagnose gender dysphoria. This specialist referral has apparently never occurred in two years – or at least Judge Bennett makes no further mention of it. Judge Bennett does find that Rodriguez has had five "extensions" to file opposition to summary judgment. This is extremely misleading. Judge Bennett wrote on February 12th: "The Court granted Rodriguez five extensions of time to do so (ECF No. 28, 30, 31, 32, 33), but to date an opposition Response has not been received." In fact, if one reviews the PACER docket, it shows that Rodriguez filed five requests for extension of time, noting her confinement in disciplinary segregation with no access to a library or legal materials and requesting help with formulating discovery. She sent them every six weeks or so, the last one asking for an extension of time until February 5th. Judge Bennett ignored them all until February 6th, when he granted all five at the same time "*nunc pro tunc*" in docket Order 34 – at which time the latest request had already expired. Six days later, on February 12th, he noted Rodriguez' failure to oppose summary judgment. Obviously, no damages were available on this opinion. It appears to this writer that the failure to provide specialist consultation to Rodriguez, as ordered, constituted deliberate indifference under *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (refusal to evaluate transgender inmate). It is impossible to tell from this record without exhaustive sifting (which Judge Bennett did not do) whether this point was administratively exhausted, allowing it to proceed on its own. It does appear that this transgender patient's confinement in disciplinary segregation has deprived her not only of keys to the doctor but of keys to the courthouse as well. Representation by competent counsel might have averted this outcome.

MASSACHUSETTS – The *Boston Globe* reported on January 25, 2019, 2019 WLNR 2528921, that a transgender female inmate has been transferred to the women's prison in Framingham, Massachusetts. The move occurred in September, but it was only disclosed publicly in a court filing this year. The case, in which the plaintiff is proceeding anonymously, can be found in PACER at *Doe v. Massachusetts DOC*, 17 -cv-12285 (D. Mass.) (RGS). Doe, 54 years old, has been receiving hormones for over 40 years. She is serving four years for a non-violent drug offense and is due to be released in June. Doe's counsel is quoted as saying it is the first time a transgender women prisoner has been transferred to a conforming prison in the United States. Although *Law Notes* reported last month, in *Hampton v. Baldwin*, 18-cv-550 (S.D. Ill.) (reported February 2019 at page 35), that Strawberry Hampton had been transferred to the Illinois women's facility, such transfers are indeed rare at this point. The Globe also reported that the Federal Bureau of Prisons has on occasion placed transgender inmates in a gender appropriate facility as an initial classification determination. The Trump Administration has curtailed this practice, stating that it should be invoked "rarely," according to the

Globe, which also cited the "high vulnerability" of transgender inmates to assault. "A survey conducted in 2011 and 2012 by the Bureau of Justice Statistics found that about 30 percent of transgender prisoners reported being sexually victimized by other inmates or guards – 10 times the rate for the general prison population." Massachusetts officials declined to comment on Doe in particular, but they referenced a new state statute (Massachusetts Criminal Justice Reform Act) that requires individualized consideration of environmental and safety concerns for transgender inmates. The law, signed by Governor Charlie Baker last April, says that transgender inmates in jails and prisons in Massachusetts must be housed according to their gender identity, unless officials certify in writing that the placement would harm the prisoner's health or safety or create "management or security problems." The law also says transgender inmates must be addressed by prison guards according to their gender identity, provided with clothing and other personal items consistent with their identity, and strip-searched by guards matching their gender identity. Before her transfer, Doe claimed she was forced to expose her breasts to the taunts of male prisoners and suffered "humiliation, shame, degradation . . . , extreme anxiety, depression, nightmares, sleeplessness, and a constant fear of being harassed and physically harmed or raped." The case was brought under the civil rights acts and the American with Disabilities Act. A motion for a preliminary injunction was pending at the time of the transfer. U.S. District Judge Richard G. Stearns suspended proceedings on the motion after the transfer and scheduled a conference for March after a report on remaining issues. Doe is represented by Goodman Proctor, LLP, Boston and Washington, D.C.; and by GLBTQ Legal Advocates and Defenders, and Prisoners Legal Services, both of Boston.

MICHIGAN – This *pro se* prisoner plaintiff tried to make a federal case out of denial of permission to urinate during the count, and U.S. District Judge Victoria A. Roberts dismissed the case with prejudice in *Williams v. Kik*, 2019 U.S. Dist. LEXIS 21276 (E.D. Mich., February 11, 2019). Unfortunately, it is not that simple. First, although plaintiff Lester Williams-El made the spelling of his name clear throughout the pleading, Judge Roberts omitted the suffix "-El" from the name, as did the clerk of court. Although it is unclear from the record, it is likely the suffix has religious significance to a Jewish or Muslim inmate, and its omission was not excusable. Judge Roberts then criticizes Williams-El for writing "vividly" and with "excruciating detail" about his problem waiting for the bathroom. While what is "excruciating" is in a beholder's eye – this writer has the same reaction to trying to decipher the tax code – Judge Roberts' recitation of facts leading to Williams-El's urinating on himself and his inability to clean himself afterwards leaves out important details. Williams-El is HIV-positive, with hepatitis-B and obstructive pulmonary disease, and he uses a wheelchair and walker. Judge Roberts does not mention that he is also 63 years old and he takes medication with water that causes urinary frequency. She states that Williams-El is assigned to a room without a toilet or sink, but she does not mention that possession of a plastic urinal or bed pan is considered contraband. She also omits details in Williams-El's three-page description of events about pain that caused him to double-over and his feeling that his bladder would explode. He had been permitted to urinate just before the count, and the count cleared in less than an hour, when he again had untimely access to a bathroom. Williams-El sued the officer who would not let him out of his room to use the bathroom during the count and for retaliation when Williams-El was given a disciplinary ticket after he complained about it. Addressing first the Eighth Amendment claim, Judge Roberts finds that "temporary deprivations, especially during a prison count, do not rise to the level of a violation of constitutional rights." She cites four cases about bathroom privileges, relying on two cases from the Sixth Circuit and distinguishing a contrary Sixth Circuit case and a Supreme Court case. Shen then finds the claim to be frivolous, writing: "An inmate's right to file grievances is protected only insofar as the grievances are non-frivolous, i.e., legitimate or more than *de minimis,*" citing *Maben v. Thelen*, 887 F.3d 252, 264 (6th Cir. 2018). This writer wonders if Judge Roberts' chambers read *Maben*. Maben was complaining about a skimpy portion of food he received at the chow line. The Sixth Circuit ruled the grievance to be *protected activity*: "Whether there is in fact a *de minimus* exception to prisoner grievances is irrelevant to the disposition of this case. Maben was complaining about the adequacy of his food. We refuse to say that a complaint about one of the major requirements of life is a frivolous or *de minimus* grievance." 887 F.3d at 265. Finally, what is most distressing is that Judge Roberts' dismissal with prejudice of this *pro se* complaint is contrary to Sixth Circuit practice, which allows at least one chance to amend – *see EEOC v. Ohio Edison Co.,* 7 F.3d 541, 546 (6th Cir. 1993) (one chance to amend); and *Moore v. City of Paducah,* 790 F.2d 557, 562 (6th Cir. 1986) (abuse of discretion to deny third amendment in civil rights case). Amendment would not have been futile, since there is a viable claim staring right through the papers: failure to accommodate under the Americans with Disabilities Act. Williams-El is plainly disabled, urination is a major life activity, and he needs an accommodation (a portable urinal) for frequency. It is shameful that he was thrown out of court with no consideration of this solution. Perhaps

representation by competent counsel could have averted this unfortunate outcome.

NEW JERSEY – Senior U.S. District Judge Robert B. Kugler (currently appointed by Chief Justice John Roberts as Judge of the Foreign Intelligence Surveillance Court), allowed one claim to survive screening by an inmate who was "outed" by mail room officers after receiving "homosexual materials" in the prison mail. In *Saleem v. Bonds,* 2019 WL 413533, 2019 U.S. Dist. LEXIS 16081 (D.N.J., January 31, 2019), *pro se* plaintiff Abdul Wali Saleem was mailed materials depicting "homosexuals," and an unknown mail room officer forwarded them to the Islamic Imam (defendant Yusef), who told other Muslim inmates about them and banned Saleem from congregate Muslim services. Judge Kugler found that Saleem had no expectation of privacy in his mail and no Fourth Amendment expectation that non-legal mail would not be opened, under *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). There is no discussion of what security or administrative interests were served by turning the mailed documents over to the Imam after the mail was inspected for contraband, or by the Imam's disseminating the contents to other inmates, both of which are alleged in the complaint. There is no finding that the "homosexual depictions" were themselves unprotected under the First Amendment. Judge Kugler never directed service, so Corrections never had to justify itself, and Judge Kugler makes no attempt to proffer any justification. As to defendant Yusef, Judge Kugler notes that it is fundamental to determine whether the Imam was a "state actor" in order to assess his liability. Nevertheless, because there has been no briefing and the question of whether prison chaplains are state actors has divided the courts, Judge Kugler decides to punt on this issue and allow Saleem to proceed past screening on his claim of unconstitutional denial of congregate religious services by the Imam. Judge Kugler criticizes Saleem for not saying whether he is still being denied such services, but it is Judge Kugler who sat on screening for 9 months, not Saleem. The only injunctive relief Saleem sought about religious services was the initiation of separate congregate services for Shiite Muslims. Neither the complaint nor Judge Kugler's opinion explains how this would help Saleem or why he might be entitled to it. This case is another example of a *pro se* complaint that languished only to receive superficial treatment from a judge whose attention appears to have been elsewhere.

NEVADA – *Pro se* inmate Rickie L. Hill self-describes himself as a "black gay Jewish sex offender." He filed a federal civil rights case claiming that failure to provide him with protective custody violated his right to safety under the Eighth Amendment and the Equal Protection Clause. He also argued that failure to move him to protective custody was retaliation for his complaints, in violation of the First Amendment. In *Hill v. Filson,* 2019 WL 759280 (D. Nev., February 1, 2019), U.S. Magistrate Judge Carla Baldwin Carry recommended granting summary judgment to defendants on all claims. While Hill is not in "protective custody" *per se,* Nevada officials maintain that his classification of "Close Custody Protection Level II" suffices to remove him from general population or interaction with white supremacist gangs in the yard, mess hall, and cell block tiers – and provides for escort for other movement. Hill does not allege that he has been assaulted. Rather, a new warden has sent a notice to the inmate population that he intends to "open up" the facility and allow intermixing on the cell blocks. Apparently, this has not yet occurred for inmates like Hill, and defendants insist that Hill's classification will remain unchanged. Judge Carry's recommendation found that defendants were not deliberately indifferent to Hill's safety. This response also satisfies any argument that denial of protective custody violates Hill's Equal Protection and First Amendment rights, since he is already in *de facto* protective custody. U.S. District Judge Miranda M. Du adopted Judge Hill's report and recommendation in its entirety. Let's hope they are right.

PENNSYLVANIA – *Pro se* transgender inmate Kareen Hassan Milhouse seeks a preliminary injunction in the form of a transfer for her safety in this four-year-old case. U. S. Magistrate Judge Karoline Mehalchick recommends that it be denied in *Milhouse v. Heath,* 2019 U.S. Dist. LEXIS 16584 (M.D. Pa., January 31, 2019). Milhouse alleges that she has been labelled a "rat" and is receiving taunts and threats from other inmates, but there is no allegation of actual assaults. Apparently, the defendants who could effectuate such transfer have been dismissed as defendants, but Judge Mehalchick finds it unnecessary to consider whether they are enjoinable as acting "in concert" with existing defendants for purposes of F.R.C.P. 65, since the prerequisites for a preliminary injunction have not been met. Primarily, Milhouse has not shown imminence or irreparable harm from mere taunts and threats. Milhouse has not shown a "presently existing actual threat" under *Continental Group, Inc. v. Amoco Chemicals. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980). On this point, Judge Mehalchick relies primarily on commercial cases. She also finds Milhouse unlikely to succeed on the merits (another prerequisite) because of the deference due to prison officials on inmate classification decisions. Judge Mehalchick also faults Milhouse for failing to identify those who threaten her and for not describing physical

manifestations of her fear, comparing *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 777 (M.D. Pa. 2016), where the physical and emotional deterioration of an inmate kept in solitary for thirty years warranted an injunction sending him back to general population. [Really? If that is the test, few are likely to meet it. A narrower decision focusing on Milhouse's failure to explain what has suddenly become imminent after four years would be more reassuring.]

TENNESSEE – *Pro se* inmate Kenny D. Phillips did rather well on his own in *Phillips v. Shelton*, 2019 U.S. Dist. LEXIS 17482 (M.D. Tenn., February 4, 2019). As a pre-trial detainee in the Cumberland County (Tennessee) Jail, he sued a nurse, the jail administrator, and the sheriff for refusing to give him HIV and hepatitis C tests and dental care, after they told him they were trying to save money and he could wait until he was in state custody for such services. Chief U.S. District Judge Waverly D. Crenshaw, Jr., screened the case and found constitutional claims sufficient to allow the pleading to proceed. Judge Crenshaw applied Eighth Amendment law to medical claims for jail detainees covered by the Due Process Clause of the Fourteenth Amendment, citing *Garretson v. City of Madison Heights*, 407 F.3d 789, 795 (6th Cir. 2005). First, although Phillips' condition had not been diagnosed, Judge Crenshaw found it serious because Phillips explained his needle exposure to HIV and hepatitis C. He also plainly needed dental evaluation and was underweight, noticeable *even* to a law enforcement officer (128 pounds at 5'9"). Judge Crenshaw found that the possibility of HIV infection was a serious medical need under *Doe v. Wigginton*, 21 F.3d 733, 738-39 (6th Cir. 1994). He also judicially noticed that sharing needles is commonly known to pose risk of HIV transmission. While the refusal of specific tests or treatment that is the result of a *medical* judgement (emphasis by the court) is often not actionable, here the allegation is that the judgment was fiscal and not medical. This was sufficient to raise a constitutional claim at least at the pleading stage. Interestingly, while allegations against the sheriff for denial of the medical services were dismissed because there was no claim he knew about Phillips' requests for same, Judge Crenshaw found that the allegations that defendants blatantly cited cost-savings as the reason for their denial of medical care was sufficient basis to proceed against the sheriff and the county under pattern and practice allegations at this stage. Judge Crenshaw cited *Ceparanov. Suffolk Cnty. Dep't of Health*, 485 F. App'x 505, 509 n.7 (2d Cir. 2012) ("the basis for the claim of liability is the County's alleged policy of denying medical care to inmates at the SCCF in order to reduce costs"); and he compared *Stevens v. Gooch*, 48 F. Supp. 3d 992, 1002-03 (E.D. Ky. 2014), aff'd, 615 F. App'x 355 (6th Cir. 2015) (finding no municipal liability based on custom because "[t]here is no evidence before the Court that other inmates were denied medical care in order to minimize costs at the jail"). Phillips also sued defendants for stating that he had HIV, alleging slander and violation of constitutional privacy. Judge Crenshaw found that state tort law elements for slander were not met. He also said that the Sixth Circuit does not recognize a right to medical information privacy for inmates, citing *Lee v. City of Columbus*, 636 F.3d 245, 261 (6th Cir. 2011); and *Doe v. Wigginton*, 21 F.3d at 738-39. While he notes the unpublished case of *Moore v. Prevo*, 379 F. App'x 425, 428 (6th Cir. 2010) (which distinguishes *Wigginton* where the medical disclosure is made to other inmates); he finds that the contrary published cases are controlling.

VIRGINIA – This is the second Law Notes report on this transgender prisoner at Virginia's Red Onion prison on the far western slope of the Virginia Smoky Mountains. See "Federal Judges Issue Mixed Decisions on Transgender Inmate's Physical and Mental Health Care Claims; Ignore Issues of Unreasonable Restraints," in *Morris v. Carey*, 2018 U.S. Dist. LEXIS 23952 (W.D. Va., February 14, 2018), reported in *Law Notes*, April 2018 at pages 182-3). Now, in *Morris v. Cary* [spelling corrected by the Court at the defendant's request], 2019 U.S. Dist. LEXIS 28880 (W.D. Va., February 25, 2019), U.S. Magistrate Judge Pamela Meade Sargent issues another Report and Recommendation [R & R] that Morris' remaining claims be dismissed on summary judgment for failure to state triable issues on deliberate indifference under the Eighth Amendment. The recommendation is prolix, containing over 17,000 words, with 24 of 27 pages devoted to recitation of affidavits from defendants' ten witnesses, including so-called "experts." *Pro se* plaintiff Terrah C. Morris did not have a chance, and the court never appointed counsel to help her address this onslaught, despite the fact that Morris apparently also suffers from serious psychiatric problems. Duplication of the presentation of the medical defense is beyond the scope of this report; but it is clear that, if defendants had devoted even a modicum of their efforts to controlling Morris' psychiatric co-morbidity and gender dysphoria as they spent defending against her lawsuit, there might have been a different outcome. One outside expert (Boyd) said that Morris met some criteria for gender dysphoria that could be addressed by allowing her some female items of clothing and hygiene to see if that brought relief. Judge Sargent found this was partially done and that it was sufficient in light of all the other "efforts" presented, which strike this writer as much ado without substantive result and an attempt at a spaghetti defense to see what sticks. Judge Sargent does not find the need for evaluation for

hormones to be ripe yet, and she does not cite the leading Fourth Circuit case of *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) – which she also failed to cite in the earlier disposition allowing the case to go to discovery. Judge Sargent uses correct female pronouns and the correct DSM-V references, but she seems to have learned little else – including the difference between gay and transgender and the handling of co-morbidity – in the year since her prior decision.

WISCONSIN – A series of bad choices resulted in dismissal of *pro se* inmate Christopher M. Fisher's civil rights complaint for First Amendment retaliation in *Fisher v. Douma*, 2019 WL 343254 (W.D. Wisc., January 28, 2019). U.S. Magistrate Judge Stephen L. Crocker, who apparently had the case for all purposes, analyzed claims that Fisher was removed from his job in food services and reclassified from medium to maximum security for complaining about sexual harassment (gay) at the workplace. Fisher filed a Prison Rape Elimination Act complaint after inmates spread what he called false rumors about his relationship with another inmate, who also worked in food services. Fisher complained of stress from taunts and comments but not of assaults, although he said he feared it would escalate to that. A PREA investigation found the charges "unsubstantiated," and Fisher was returned to general population, where he was in proximity to some of the same inmates who were harassing him. Judge Crocker recounts inappropriate comments by defendants, such as that harassment was "normal for gay inmates" and Fisher's claim was "unsubstantiated" because he "swallowed all the evidence." Nevertheless, Judge Crocker found that defendants properly investigated the PREA complaint. Meanwhile, Fisher was charged with poor performance in the kitchen and with stealing property from the kitchen. He admitted the last charge. Frustrated by his lack of success on his PREA complaint, Fisher reported that the inmates who had been harassing him were gathering weapons and were planning to take staff as hostages. This triggered an immediate and extremely serious investigation, after which Fisher admitted his allegations were false. He was then reclassified and transferred. Judge Crocker found that Fisher had "pled himself out of court" on both the job termination and reclassification/transfer by admitting in his pleadings that he had possessed stolen property and had fabricated a hostage situation. There is no discussion of "verbal abuse+" under *Beal v. Foster*, 803 F.3d 356, 357 (7th Cir. 2015), or of mixed motive for adverse actions – presumably because the gravity of Fisher's conduct. In this writer's experience, false allegation of plans for hostage-taking of staff is probably the most serious kind of verbal misconduct in which an inmate can engage because of the staff response it triggers. Fisher's case was dismissed with prejudice and Fisher was assessed a "strike" under the Prison Litigation Reform Act.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. CONGRESS – Members of Congress have introduced bipartisan legislation intended to protect transgender military service members from the discrimination that the Trump Administration is determined to impose on them. The lead sponsors are Democrats Kirsten Gillibrand and Jack Reed (N.Y. and R.I.) and Republican Susan Collins (Maine). A similar bill was introduced in the last congress, also co-sponsored by the late Senator John McCain (R-Arizona). Companion legislation has been introduced in the House of Representatives. Only the House measure has a real chance of passing, of course. There is no way that Senate Majority Leader Mitch McConnell would allow such a measure to come to the floor for a vote. * * * February 28 saw the introduction of the Do Not Harm Act, which would amend the Religious Freedom Restoration Act to make clear that RFRA does not provide a defense to discrimination claims, and may not be used to seek religious exemptions from laws guaranteeing equal rights in employment, child labor, wages and collective health care, public accommodations and social services provided through government contracts. It won't be enacted as long as Republicans control the Senate, but repeated introduction and possible passage in the House is symbolic.

ALASKA – On February 25, the Fairbanks City Council voted 4-2 to approve a measure that would forbid discrimination in the city because of sexual orientation or gender identity, but at the end of the week Mayor Jim Matherly sent word to the local newspaper, the *Fairbanks Daily News-Miner*, that he had vetoed the measure because he thought the question should be decided by the city's voters in a referendum. According to a report in the *Anchorage Daily News* (March 1), the measure was "hotly debated." It covered employment, housing, and public accommodations, and provided a private right of action in local courts for those alleging discrimination. Matherly did not state any personal objection to the measure, who said he made the decisions "after much soul searching, research, and examination of all facets of the issues." Noting that many of those who testified before the Council did not live in Anchorage, he wrote: "While I value the opinion of our neighbors in the surrounding communities and visitors from farther out, I want the citizens of Fairbanks to chart their own course and decide how we move forward as a city."

LEGISLATIVE & ADMINISTRATIVE *notes*

The Council would need 5 votes to override the veto, which is unlikely. The public vote would take place in October. The state's capital and its largest city – Juneau and Anchorage, respectively – ban discrimination based on sexual orientation and gender identity, but the measure required a referendum vote to be enacted. State law does not expressly forbid such discrimination.

ARKANSAS – State legislators are hot to expand the circumstances in which a person can be required to submit to mandatory HIV teting. The state's HIV Shield Law, passed in 1991 and amended in 1999, allows for non-consensual testing when a health care worker has "direct skin or mucous membrane contact with the blood or bodily fluids" in a way that could transmit HIV. A 2009 law allows similar non-consensual testing for any life-threatening airborne or blood-borne disease, including tuberculosis and hepatitis B and C. Now HB 1365 was unanimously approved by the State Senate on February 20; it would allow for non-consensual testing when law enforcement officers or other emergency workers are at risk of exposure to HIV. The measure had already passed the House, but was sent back for a new vote because of an amendment approved in the Senate. *Arkansas Democrat Gazette* (Feb. 21).

CALIFORNIA – Out California State Senator Scott Wiener, a San Francisco Democrat, has introduced SB 201, a measure intended to "ensure that intersex babies can provide informed consent before undergoing medically unnecessary surgeries that can effectively assign them a gender (before they can decide for themselves) and that can irreversibly harm them." The measure does not prohibit treatment or surgery when it is medically necessary, but prohibits cosmetic surgeries on babies that are not medically necessary, but rather based on a desire to "normalize" a child's genitals. The goal is to delay such treatments until the individual is old enough to give informed consent on his or her own, and to block parents or legal guardians from being able to give consent in their place, as is currently the practice.

FLORIDA – On March 5 residents of Tampa will be voting on charter revision, including a proposal to expand the prohibited grounds of discrimination in the city to include sexual orientation and gender identity.

GEORGIA – The House Judiciary Non-Civil Committee has approved HB 426, which is intended to rehabilitate the state's hate crimes law, which the Georgia Supreme Court ruled unconstitutional as unduly vague because it did not specify the grounds of prohibited discrimination. The new bill is intended to cure that problem by specifically listing race, color, religion, national origin, sexual orientation, gender, mental disability or physical disability. *Brunswick News*, Feb. 27. Query whether the reference to gender will be interpreted to include gender identity, as Tennessee Attorney General Slatery state in a formal opinion construing that state's law recently?

ILLINOIS – On February 1, Governor J.B. Pritzker signed an executive order to re-establish state funding for testing and treatment programs in an effort to eliminate HIV-transmission, which he said former Gov. Bruce Rauner had discontinued. "The order also directs the Departments of Public Health and Health Care & Family Services to work with Medicaid managed care organizations to develop a data-sharing plan that would allow the state to ensure that Illinois residents living with HIV are receiving adequate health care," reported *Daily Southtown* (Chicago) on Feb. 3.

INDIANA – A Democratic representative's proposal to deny state funding to private and charter schools that discriminate on the basis of sexual orientation or gender identity crashed and burned in the Republican-controlled House, where Republican legislators inveighed against burden free exercise of religion. *Greensburg Daily News*, Feb. 16.

MARYLAND – On February 20, the State Senate gave initial approval to a measure that would allow gender-neutral driver's licenses. Five other states and the District of Columbia, as well as eleven other countries, allow such licenses. Applicants could identify as male, female, or unspecified. *Washington Post*, Feb. 21.

MICHIGAN – Michigan's new attorney general, out lesbian Dana Nessel, has responded affirmatively to a request from the state's Civil Rights Commission to reconsider a formal opinion issued by her predecessor, which had contradicted the Commission's vote to recognize sexual orientation and gender identity discrimination claims as discrimination because of sex under the state's civil rights law. Nessel, who is a Democrat, told the Commission that she will accept the request and review Republican Bill Schuette's opinion. *Detroit News*, Feb. 2.

MINNESOTA – A consumer-fraud style conversion therapy bill was approved by the Health and Human Services Committee of the Minnesota House during February. *University Wire, University of Minnesota Daily*, Feb. 27.

MISSISSIPPI – HB 1494 and SB 2163, which would have added sexual orientation, gender identity and disability to the state's hate crime law died in committee when they weren't taken up for consideration before the annual

deadline for reporting out new bills to the legislature. *AP State News*, Feb. 5.

NEW JERSEY – On February 19 Governor Phil Murphy signed into law a new family leave statute that expands the availability of paid leave in such a way as to possibly extend to close friendship networks, such as those formed by some LGBT people who friendship circles take the place of biological or legal families that have rejected them. The measure goes into effect on June 30, and expands coverage to companies with 30 or more employees (20 fewer than the level set by existing regulations). *Morristown Daily Record*, Feb. 20.

NEW YORK – The New York City Commission on Human Rights has adopted new rules addressing discrimination based on gender identity or expression under the city's Human Rights Law. The rules go into effect on March 9. They have two primary purposes: to provide examples of behavior that the Commission will deem to be in violation of the Human Rights Law, and to establish definitions for a number of gender-related terms. The rules can be found on the Commission's website. * * * The New York State Unified Court System has responded to passage of the Gender Identity Non-Discrimination Act (GENDA) by allowing people to use restroom facilities in the courthouses based on their gender identity rather than their sex-identified-at-birth. *Syracuse Post Standard*, Feb. 26.

NORTH DAKOTA – Both houses of the North Dakota legislature have defeated attempts to amend the state's Human Rights law to protect LGBT people. The House voted 70-22 against a measure that would have added sexual orientation to the existing law, but only regarding employment and housing. In January, the Senate had rejected a broader bill that would have included gender identity as well as sexual orientation. Given the "bathroom" panic that ensues when the issue gender identity discrimination is raised, it is unsurprising that these measures do not include public accommodations. The North Dakota Human Rights coalition, which had supported the Senate bill, opposed the House measure because it did not include gender identity. *Associated Press*, February 19.

SOUTH DAKOTA – Freedom for All Americans reported on February 26 that four pending anti-transgender bills in the South Dakota legislature had failed to win enactment. The measures – HB 1205, SB 49, HB 1108, and HB 1225 – "targeted transgender kids' access to basic medical care, accurate health education, and their ability to participate in school sports."

TENNESSEE – Nashville Mayor David Briley issued an executive order to help LGBT-owned businesses on February 11. The intent of the order is to modify procedures to enhance the ability of LGBT-owned businesses to compete for city contracts. *AP State News*, Feb. 11. * * * Tennessee Attorney General Herbert H. Slatery III issued Opinion No. 19-01 on February 8, titled "Sentence Enhancement for Hate Crimes Against Transgender Individuals." Responding to a request from a state legislator, the A.G. opined that Tennessee Code Annotated Sec. 40-35-114(17) should be interpreted to authorize courts to enhance a defendant's sentence if "the defendant selects the person against whom he commits a crime because the person is transgender." Although the state in question does not expressly reference transgender or gender identity or expression, it refers to selecting the victim "in whole or in part because of the defendant's belief or perception regarding the gender of that person." The A.G. cited *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018, and cases cited therein, holding that discrimination because of gender identity is sex discrimination. * * * As they have done in several previous sessions, some Tennessee Republican state representatives have filed legislation intended to keep Tennessee from permitting same-sex marriages, called the "Tennessee Natural Marriage Defense Act." Co-sponsors are Sen. Mark Pody (R-Lebanon) and Rep. Jerry Sexton (R-Bean Station). It declares the US Supreme Court's decision in *Obergefell v. Hodges* to be void in Tennessee, because the state has its own law and constitutional amendments limiting marriage to one man and one woman. It would prohibit government officials from issuing marriage certificates to same-sex couples or from recognizing any court ruling that affirms same-sex unions, and would protect them from being arrested for failing to comply with court orders that they do so, requiring the state's attorney general to defend the law on marriage in any court challenge. The avowed aim of the proponents is to invite a court to challenge of the law which can be appeal to the U.S. Supreme Court in a bid to get the new majority there to overrule *Obergefell*.

TEXAS – Always at the forefront of retrogression in civil rights, the Texas Senate State Affairs Committee has approved SB 15, which would preempt local control of paid leave policies for employees while making local anti-discrimination ordinances unenforceable to the extent they go beyond the state's civil rights law, effectively ending protection for LGBT people that is currently extended in several cities, including Austin, Dallas and Fort Worth. (Similar protection in Houston was repealed in a bathroom panic voter referendum years ago.)

LAW & SOCIETY / INTERNATIONAL *notes*

* * * The Austin School Board voted unanimously on February 25 to revise the district's sex education curriculum to include coverage of sexual orientation, gender identity, and sexually transmitted diseases. *Austin American-Statesman*, Feb. 26.

VIRGINIA – A legislative proposal to ban conversion therapy was defeated, but the *Richmond Times Dispatch* (Feb. 26) reported that the stat's "health professional boards have started the process of discouraging licenses professionals from practicing conversion therapy on minors by issuing a guidance document, which outlines professional best practices. The Virginia Board of Psychology's new guidance document, which says that licensed professionals found to have practiced conversion therapy on a minor could face disciplinary action, is open for public comment through March 20." The newspaper reports that other professional boards are also working on proposed regulatory change, but in Virginia that requires ultimate approval by the governor and the General Assembly and could take more than a year.

LAW & SOCIETY NOTES

By Arthur S. Leonard

TRUMP GLOBAL CAMPAIGN AGAINST SODOMY LAWS – Many reacted with astonishment to an announcement that the Trump Administration is launching a global effort to shame countries that still maintain criminal laws against consensual sodomy – 71 countries, by one count. This seems inconsistent with the Administration's numerous anti-LGBT actions, especially a concerted effort by federal agencies to roll back LGBT-affirmative administrative efforts by the Obama Administration and the Administration's dogged pursuit of implementing the president's decision to reverse the Obama Administration's policy allowing transgender people to serve "in any capacity" in the military. Perhaps it was not surprising that when Trump was questioned directly about this in a spontaneous encounter with a reporter, he professed no knowledge of it. This appears to be an initiative started by U.S. Ambassador to Germany Richard Grenell, one of Trump's few openly-gay appointees, who spoke with London's *Daily Mail*, which broke the story on-line "exclusively" on February 19. An anonymous Trump Administration official was quoted by the Daily Mail as stating that Trump "deserves credit for green-lighting an effort that will ruffle feathers abroad." This struck us as bizarre, since Trump seems to spend an inordinate amount of time transmitting tweets that are intended to "ruffle feather abroad," so what else is new? The anonymous official also stated, "This is one of the most important things any president has done for LGBT rights in the history of America, period. Every country should move in America's direction on that." The "anonymous official" has clearly channeled Trump's habit of describing everything he has done in superlatives. But, as Trump usually says when asked what is going to happen about just about anything, "We'll see what happens."

CALIFORNIA – California Governor Gavin Newsom and California National Guard Adjutant General David Baldwin held a joint press conference on February 11 to announced that the California National Guard will not follow the lead of the Defense Department to implement President Trump's ban on service by transgender individuals. Newsom said that California has "clear authority" to let transgender people serve in the State and Local Reserve forces. Baldwin said the Reserves already have regulations allowing transgender people to serve, and commented: "Our preference is that the Department of Defense sees the light and transgender people should be allowed to continue to serve alongside all of their other fellow soldiers and airmen because they bring value to our force." *Bloomberg Law*, Feb. 12.

UNITED METHODISTS SAY NO TO THE GAYS – On February 26, an international conference of the United Methodist Church meeting in St. Louis, Missouri, voted 449-374 against a proposal to abandon the Church's official anti-gay policies and allow regional and local church bodies autonomy to decide whether to allow LGBT clergy and same-sex marriages. According to press reports, the defeat was heavily attributed to overwhelming opposition from overseas delegates – about 43% of the convention – mostly from Africa, where the church is staunchly anti-gay. Follow-up media reports suggests that many regional and local church bodies in the United States were unhappy about the vote and looking for ways to work around it in their continuing outreach to LGBT congregants. *New York Times*, Feb. 26.

INTERNATIONAL NOTES

By Arthur S. Leonard

EUROPEAN PARLIAMENT – On February 14 the European Parliament adopted a Resolution on the Rights of Intersex People. According to an announcement by ILGA-Europe (Feb. 14), this "sets a clear standard within the European Union for the protection of intersex people's bodily integrity and human rights" and "complements the ground-breaking 2017 intersex resolution 'Promoting the human rights of and eliminating discrimination against intersex people' adopted by the Parliamentary Assembly of the Council of Europe."

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BRAZIL – The new regime of President Jair Bolsonaro is firmly opposed to LGBT rights, a sharp turnabout from its predecessors. The *Washington Post* (Feb. 18) devoted a substantial article to describing the changes that have occurred since the new regime took power on January 1. The new Minister of Women and Family, an evangelical pastor, proclaimed, "There will be no more ideological indoctrination of children and teenagers in Brazil," referring to official recognition for transgender people and stating that henceforth in Brazil "girls wear pink and boys wear blue." The new minister of education "shut down a section of the ministry devoted to diversity and human rights," saying that he is "against the discussion of 'gender theory' – which studies gender identity – in the classroom." In January, the nation's only out gay congressman, Jean Wyllys, fled to Europe "amid death threats and hateful messages." "Under Bolsonaro," reported the *Post*, "the new Ministry of Women, Family and Human Rights declined to add the LGBT community as a group explicitly protected by its mandate. [In January] the health official who headed the nation's HIV-prevention task force was fired, apparently for authorizing a campaign aimed at educating transgender Brazilians." LGBT rights campaigner have expressed fear that major gains achieved under the prior administration will be wiped out . . . . Needless to add, Bolsonaro has a big fan in Donald J. Trump.

CANADA – The National Post reported on February 28 that the British Columbia Supreme Court ruled on February 27 in favor of a transgender boy whose father was refusing to give consent for hormone therapy to initiate the boy's transition. The 14-year-old plaintiff won the sympathy of Justice Gregory Bowden, who said he was satisfied that the boy understood what was involved in the treatment and had been evaluated and diagnosed by experts. A.B. had previously attempted suicide, and transitioning was found to be a way to alleviate the severe gender dysphoria that had driven him to that attempt. The father sought to block any medical treatments until a more extensive hearing could be conducted on the implications of gender transition, producing affidavits from anti-transgender "experts,", but Justice Bowden rejected this, saying he would give them little weight since neither commented on the facts of A.B.'s particular case, merely stating general opposition. The court said the boy could change is legal name without the consent of his parents, and that he was "exclusively entitled" to consent to medical treatment for gender dysphoria. Furthermore, the judge said that attempts to dissuade him or to refer to him with female pronouns could be considered "family violence" under the Family Law Act. The father announced he would appeal to the B.C. Court of Appeal, and would ask the court to delay treatment pending appeal, but it was unlikely this would be granted.

CUBA – A referendum campaign culminating on Feb. 24 resulted in overwhelming support for a proposed new constitution which, among other things, provides protection against discrimination for LGTQ people living in Cuba – quite a turnabout from the days of the Mariel boatlift and mass deportations of LGBT people, many of whom were living in prison. However, the new constitution disappointed those who hoped that it would open up marriage to same-sex couples, a question which is being reserved for later legislative consideration. *Reuters*, Feb. 25.

REPUBLIC OF CHINA (TAIWAN) – With a May 24 deadline set two years ago by the nation's highest court looming, the cabinet approved a proposed bill to open up marriage to same-sex couples, but without exactly calling it marriage and without providing the absolutely identical rights and benefits that seem to be required by the spirit of the court's equality-based opinion. LGBT activists in the island nation were divided, some thinking enactment would put the LGBT community in a better position to advocate for more change, others seeing the bill as a missed opportunity to achieve true equality. Some were rooting for no legislation to be enacted, in which case, it seems, marriage equality would be a fait accompli regardless of lack of statutory authorization, as a result of the court's order, which was phrased in ultimatum terms. The measure will be placed on the legislative agenda beginning March 5. *Taipei Times*, Feb. 25; *Taiwan News*, Feb. 26.

GERMANY – Health Minister Jens Spahn announced that legislation to ban conversion therapy could be ready for legislative consideration by mid-2019. He said on February 15 to a Berlin newspaper: "Homosexuality is not an illness and therefore does not need therapy. I do not believe in these therapies, mainly owing to my own homosexuality." He told the newspaper that "from a legal point of view, these services today can be a form of assault, and not only against minors." Spahn said the Health Ministry wanted to commission a study on the legal processes needed to achieve the ban, and would look to legislation that has been enacted in Malta, New York, and Australia. "Based on the findings," he said, "we will then decide what we can implement in Germany. But we also still have to convince colleagues from other ministries." Spahn represents the right-wing of Chancellor Angela Merkel's conservative Christian Democratic Union (CDU) party. In a news article in English about these developments circulated online by *Thai*

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News Service on February 18, it was reported that the European Parliament adopted a non-binding resolution in March 2018 calling on member states of the European Union to outlaw such practices, but so far only Malta and some Spanish regions have done so within the Union.

ISRAEL – *Huffington Post* reported Feb. 28 that a Jerusalem Small Claims Court awarded damages equivalent to about $4,500 to Sammy Kanter, a gay American rabbinical student, who was denied services in a Jerusalem pizzeria. Kanter is in Jerusalem for a year-long rabbinical studies program. He wrote on facebook.com that he entered the pizzeria, Ben Yehuda 2, wearing a t-shirt with "Cincy" (short for his home town of Cincinnati), printed in rainbow colors. When an employee saw the shirt, related Kanter, "The guy behind the counter said 'Atah homo (are you gay)?' I said 'yes'. He said 'out' and pointed to the door. My jaw dropped." Kanter filed his lawsuit with the assistance of Religious Action Center, the social justice arm of the Jewish Reform Movement in Israel. Sexual orientation discrimination by businesses is illegal in Israel.

JAPAN – On February 27, Tokyo District Court rejected damages claims filed against Hitotsubashi University by the parents of a graduate law student who died after another student outed him in 2015. The parents claimed the school failed to respond properly to the outing of the student, who was exposed as gay by the other student to a group of about 10 "peers" in a messaging app in June 2015. Two months later, said a news report in *Kyodo News* (Feb. 27), "the student suffered a panic attack in class and left before fatally falling from a university building." The parents charged that the university "failed to understand the case as a human rights issue and create a harassment-free environment for its students by properly educating them that mocking sexual minorities comprises sexual harassment." The university successfully defended, arguing that it is impossible to prevent specific acts of harassment. Responding to publicity about this case, the city of Kunitachi, where the university is located, enacted an ordinance that states that people should not disclose other people's sexual orientation or gender identity against their will.

KENYA – The highest court of Kenya was supposed to rule on a pending challenge to the nation's laws against gay sex on February 22, and people had gathered in front of the court hoping to hear the news, but instead they got an announcement that the court was postponing its decision to May 24. Justice Chacha Mwita announced "to a packed courtroom" that "some of the judges in the case were busy. He added that the challenge also involved the huge volumes of files sent to the three-judge bench in soft copy. 'You may not like the news I have today, we have worked so hard to deliver the judgment but it is not ready due to the challenges we are facing. We are also sitting in other benches which consume our time but we will endeavor to have the decision in May.'" Under current law, people convicted of engaging in gay sex face a possible sentence of up to 14 years in prison, even though the Kenyan Constitution provides explicit protection against discrimination because of sexual orientation or gender identity! *StandardDigital,* Feb. 22.

MEXICO – In the continuing story of gradual progress for marriage equality throughout Mexico, the country's supreme court issued a new decision in February, extending marriage equality to Nuevo Leon state. Unlike the U.S. Supreme Court, Mexico's Supreme Court does not have the authority to make a ruling that binds the entire country on this issue, but must rule on a state-by-state basis as the issue comes before it. Nuevo Leon borders Texas, and includes Monterrey, Mexico's third-largest metropolitan area. The court ruled that articles 140 and 148 of the Civil Code of Nuevo Leon violated the rights of equality and non-discrimination in articles 1 and 4 of the Mexican Constitution by denying the right to marry to same-sex couples. The court's vote was unanimous. Journalist Rex Wockner, who has been closely tracking developments in Mexico, reported on his blog, *RexWockner.com*, that 14 of Mexico's 31 states and Mexico City, the federal district, have marriage equality. In the other 17 states, same-sex couples need to go to court to get an amparo, an order to the local authorities to allow them to marry, which, reported Wockner, "is expensive and time-consuming but cannot be denied by the judge."

POLAND – Warsaw Mayor Rafal Trzaskowski has signed a declaration affirming LGBTI rights in the city. This was described as "the first ever LGBT+ Declaration in central-eastern Europe" and "the first document recognizing LGBTI rights in Poland," where the national government has not been LGBT-friendly. When he signed the declaration, Mayor Trazaskowski stated: "In my election campaign, I promised Warsaw for everyone. Warsaw is a city for everyone that does not discriminate against anyone. Warsaw for everyone is a plcae where everyone feels safe and absolutely everyone can count on support regardless of sex, color, religion, origin, sexual orientation or views." Among the "features" of the declaration are an LGBT+ hostel (shelter) and community center, the introduction of a local crisis intervention system, and access to anti-

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discrimination and sex education in city schools. The measure was worked out in negotiations between the mayor's office and the LGBTI Coalition, "Love does not exclude." *Gaystarnews.com* (Feb. 27).

SWITZERLAND – The House of Representatives Legal Affair Committee voted in favor of a draft law to allow same-sex couples to marry and to adopt children. The proposal has been "sent out for consultation." Another proposal to allow same-sex couples access to sperm donation to have children was narrowly defeated. The marriage/adoption measure received positive coverage in Swiss media, and a public opinion as long ago as October 2016 found about 70% support for letting gay couples marry. A 2005 referendum led to the establishment of civil unions for same-sex couples in Switzerland, at a time before any countries in the European Union had marriage equality. *Swissinfo.ch*, Feb. 15.

PROFESSIONAL NOTES

By Arthur S. Leonard

LGBT BAR ASSOCIATION OF GREATER NEW YORK – At its Annual Dinner on March 7, the LGBT Bar Association of Greater New York will present its Community Vision Awards for 2019 to: **U.S. SENATOR TAMMY BALDWIN** (D-Wisconsin), the first out lesbian to be elected to the United States Senate; **SHANNON MINTER**, Legal Director of the National Center for Lesbian Rights; and **N.Y STATE SENATOR BRAD HOYLMAN**, the only out gay member of the State Senate and Chair of the Judiciary Committee.

CHAI FELDBLUM, formerly a Commissioner of the Equal Employment Opportunity Commission, has joined Morgan Lewis & Bockius as a partner. The firm has also hired Feldblum's chief of staff from the EEOC, **SHARON MASLING**. Together, they will be part of the firm's team conducting investigations and cultural assessment at companies, continuing work that they had begun at the Commission of promoting corporate compliance with anti-discrimination law through training and adoption of policies. Feldblum, who had previously worked at the ACLU and Georgetown University Law School, was the first out lesbian to be a commissioner at the EEOC, which enforces federal anti-discrimination laws. *National Law Journal*, Feb. 19.

LAMBDA LEGAL announced that **BRIAN J. RICHARDSON** will be its new Midwest Regional Director, based in the Chicago office. Richardson is the former Deputy Commissioner of the City of Chicago Department of Health. He previously was a communications manager for Google, press secretary for U.S. Senator Mary Landrieu (D-La.), and Director of Specialty Media for the Democrat National Committee. He also served on the senior leadership team for Chicago's LGBT community center and on the board of the ACLU of Illinois. Richardson is a graduate of University of Chicago and has an MBA from UC-Berkeley. The Regional Director position at Lambda is an administrative position, frequently filled by non-lawyers with strong management credentials. *Lambda Press Release*, March 1.

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4. Barker, Paul, Religious Exemptions and the Vocational Dimension of Work, 119 Colum. L. Rev. 169 (January 2019).
5. Beery, Brendan, Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World, 82 Alb. L. Rev. 121 (2018-2019).
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7. Conkle, Daniel O., Animus and Its Alternatives: Constitutional Principle and Judicial Prudence, 48 Stetson L. Rev. 195 (Winter 2019).
8. Crowell, Courtney, Anti-Gay Sex Education: A Lasting Tool for Discrimination?, 28 Tulane J. L. & Sexuality 45 (2019).
9. Dawson, Kameron, Teaching to the Test: Determining the Appropriate Test for First Amendment Challenges to 'No Promo Homo' Education Policies, 13 Tenn. J. L. & Pol'y 435 (Winter 2019).
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11. Flanders, Chad, and Sean Oliveira, An Incomplete Masterpiece, 66 UCLA L. Rev. Discourse 154 (2019) (critique of what is missing from the *Masterpiece Cakeshop* decision).

12. Glenz, Amanda, *Bringas-Rodriguez v. Sessions*: The Ninth Circuit Brings Sense Back to Evidentiary Requirements of Asylum Applications for Gay Children, 28 Tulane J. L. & Sexuality 89 (2019).
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16. Kinnear, Olivia, Legal Relationships, Illegal Marriage: Examining Plural Marriage and a Legal Inconsistency, 28 Tulane J. L. & Sexuality 59 (2019).
17. Lamm, Emily Maxim, Bye, Bye, Binary: Updating Birth Certificates to Transcend the Binary of Sex, 28 Tulane J. L. & Sexuality 1 (2019) (Winner, National LGBT Bar Association Michael Greenberg Writing Competition).
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22. Note, Equal Dignity—Heeding Its Call, 132 Harv. L. Rev. 1323 (Feb. 2019) (Student Note sketching a theory of "equal dignity" grounded in Justice Kennedy's opinions, especially in LGBT rights cases).
23. Rose, Katrina C., Reflections at the Silver Anniversary of the First Trans-Inclusive Gay Rights Statute: Ruminations on the Law and Its History – and Why Both Should Be Defended in an Era of Anti-Trans 'Bathroom Bills', 14 U. Mass. L. Rev. 70 (Winter 2019).
24. Ryznar, Margaret, Robot Love, 49 Seton Hall L. Rev. 353 (2019) (People marrying robots? Why not?).
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26. Strauss, Greg, What's Wrong with *Obergefell*, 40 Cardozo L. Rev. 631 (December 2018).
27. Sykes, Honorable Diane S., Our Newest Justice: Some Thoughts on Justice Gorsuch's Debut Opinions, 69 Case W. Res. L. Rev. 1 (Fall 2018) (written before Kavanaugh became "our newest Justice," includes discussion of Gorsuch's dissent from the summary reversal in *Pavan v. Smith*).
28. Virelli, Louis J., III, Symposium Introduction, 48 Stetson L. Rev. 173 (Winter 2019) (Symposium on the role of animus in equal protection law, responding to book by Prof. William Araiza).

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.

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