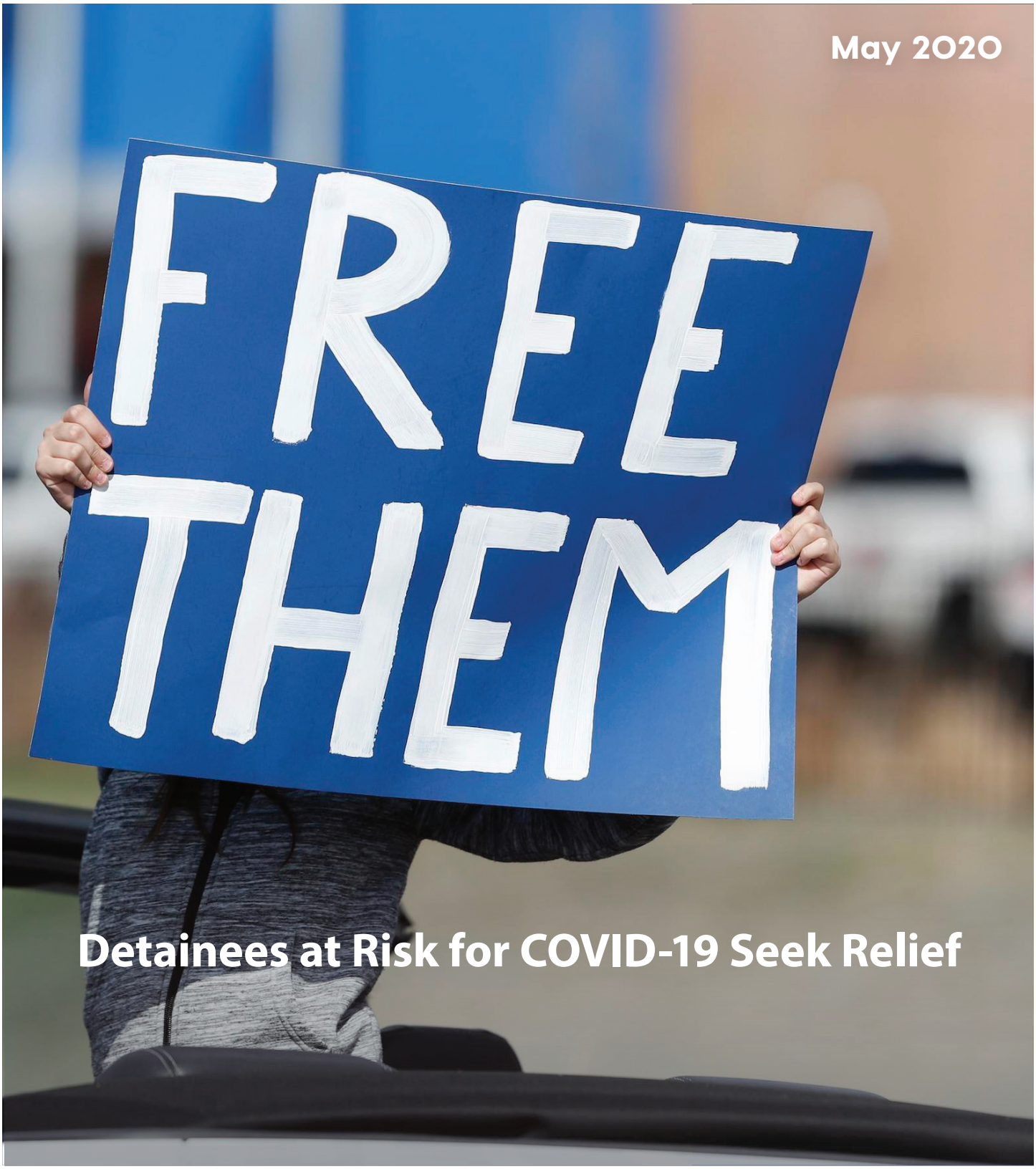
# LGBT LAW NOTES

May 2020




## Detainees at Risk for COVID-19 Seek Relief

L G B T
# LAW NOTES

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## EXECUTIVE SUMMARY

# Federal Judge Issues Nationwide Injunction to Screen ICE Detainees at High Risk for COVID-19; ICE Detainee Released in Ohio; Plaintiffs Fail in Georgia and Kansas

*By William J. Rold*

COVID-19 has been a tsunami over the last two months, and *Law Notes,* published monthly, cannot follow every legal turn. This article attempts to update the reader on some developments of COVID-19 rulings in the courts affecting detainees and prisoners seeking reduced risk and possible release.

U.S. District Judge Jesus G. Bernal provisionally certified two nationwide sub-classes of detainees in the custody of Immigration and Customs Enforcement [ICE]. The certification, under F.R.C.P. 23(b)(2), applies to detainees who have either (1) "heightened risk of severe illness and death" from COVID-19; or (2) disabilities that place them at such risk. *Fraihat v. ICE,* 2020 WL 1932570 (C.D. Calif., Apr. 20, 2020). The risk factors include age and chronic health conditions (such as heart failure, hypertension, respiratory disease, diabetes, cancer, liver or kidney disease, and HIV/AIDS). He also issued a nationwide preliminary injunction requiring ICE to identify all such detainees and to provide them with individualized screening and continuing custody determinations. *Id*. at Docket No. 132.

*Fraihat* was filed by fifteen individual named complainants and two organizational plaintiffs, concerning conditions in ICE detention facilities. In March of 2020, the plaintiffs sought preliminary emergency relief, due to COVID-19. Judge Bernal's 39-page, single-spaced, "minute order" is the most comprehensive judicial treatment this writer has seen about COVID-19 and institutionalized patients.

Noting that more than 25 ICE facilities had COVID-19 positives among inmates and staff, Judge Bernal applied the preliminary injunction to all ICE facilities and its contractors. His findings included facilities in Alabama, California, Colorado, Georgia, Louisiana and Texas. Organizational plaintiffs provided additional information from Florida, Illinois, Indiana, Kentucky, New Jersey, New Mexico and Wisconsin.

Judge Bernal declined to exempt detainees who had filed individual petitions. The statistics in the opinion are out of date, since they were from early April, ICE was not then counting infected staff from its contractors and vendors, and COVID-19 has expanded all month. He found that "testing" understated the outbreak among ICE's 36,000 inmates.

Judge Bernal noted that social distancing was "often impossible" in ICE facilities due to the congregate setting, with detainees held in "cohorts." There were also inadequate isolation facilities, hand sanitizer, and masks.

ICE does not make individual determinations about detainees and risk, and its "current policy does not allow the exercise of discretion to release those subjected to medical determination at high risk for COVID-19" – even though half of all ICE detainees have no convictions or charges pending.

Judge Bernal found that ICE's "guidelines" about testing consisted of a reference to CDC as to what constituted "best practices," which it does not consider binding or "even performance standards." ICE delegates screening to staff "who are not medical professionals." While ICE has "many tools available" to reduce population density and release "medically vulnerable individuals," it does not use them.

Plaintiffs are likely to succeed on the merits of their Fifth Amendment claims of deliberate indifference to their serious medical care needs. [Note: The Eighth Amendment does not apply to detainees, who are not convicted. Likewise, the PLRA does not apply. *See* 42 U.S.C. § 1997e(h) (definition of "prisoner"); and *Agvena v. INS.*, 296 F.3d 871, 886 (9TH Cir. 2002).] Judge Bernal finds ICE's behavior to be "reckless" and therefore actionable under *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070-1 (9th Cir. 2016); and *Lemire v. California DOC,* 726 F.3d 1062, 1075-6 (9th Cir. 2013). He also found a likely Fifth Amendment violation of the sub-classes' conditions of confinement. There is a serious question going to the merits of a preliminary injunction: whether ICE's reliance on "non-binding" recommendations is an "objectively reasonable response to a pandemic, given the high degree of risk and consequences of inaction."

At least as to the "disabled" sub-class, Judge Bernal found a likely violation of § 504 of the Rehabilitation Act. "It is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing restrictions." The sub-class is being denied the "benefit" of participating in the "removal process" from custody and the "accommodation" of "disability tracking and related life-preserving" directives.

Both sub-classes were "likely denied" identification of their "COVID-19 vulnerabilities" and detained without a proper consideration of "alternative to detention." Judge Bernal ordered ICE to identify all members of the sub-classes within ten day and to make timely custodial determination of their risk factors, "regardless of the statutory authority for their detention." His decision does not order the release of any detainee at this time, but ICE is further ordered to revise its standards to conform to the decision and to train staff accordingly.

The *Fraihat* plaintiffs are represented by Orrick, Herrington & Sutcliff, LLP (San Francisco and Los Angeles); Disability Rights Advocates (Berkeley and New York); Civil Rights Education and Enforcement Center (Denver and

Los Angeles); and the Southern Poverty Law Center (New Orleans, Miami, Tallahassee, and Decatur, GA).

Individual ICE detainees who filed petitions for release are considered in *Amaya-Cruz v. Adducci,* 2020 WL 1903123 (N.D. Ohio, Apr. 18, 2020), by U.S. District Judge Dan Aaron Polster. Of four plaintiffs, Judge Polster determined that only one warranted consideration as at high risk for COVID-19. Amaya-Cruz is severely immunocompromised. Although ICE argued the HIV was stable with a low t-cell count, Amaya-Cruz presented evidence of a high viral load and multiple opportunistic problems, including toxoplasmosis, encephalitis, and brain lesions. Although the action was filed as both a habeas corpus petition and a civil rights action, Judge Polster granted an injunction only on the civil rights claim, finding that keeping Amaya-Cruz in ICE detention likely violated the Fifth Amendment.

In this writer's view, the outcome of this case was influenced at least in part by the ridiculous position ICE took about Amaya-Cruz' HIV, seemingly not even talking about the same medical record. Moreover, ICE argued that Amaya-Cruz was a danger to the community because of drunk driving convictions ten years ago and because he allegedly entered the country illegally. Judge Poster released him to live with his sister and self-quarantine in her residence for 14 days. Should he abscond or not appear at the next immigration hearing, he will be deemed to have forfeited his liberty and his asylum claim.

Another group of ICE of detainees failed to convince U.S. District Judge Lisa Godbey Wood in Georgia in *Benavides v. Gartland,* 2020 WL 1914916 (S.D. Ga., Apr. 18, 2020. The plaintiffs are a 27-year old transgender woman with bipolar disorder and HIV since 2015, a 45-year old insulin-dependent diabetic, and a 24-year old man with lupus (an auto-immune disease). They allege that their conditions and the practices at their ICE facility (lack of social distancing, poor access to soap and cleaning materials, lack of masks and gloves) present a high risk to them of contracting COVID-19. They also claim inadequate medical isolation and remoteness from a hospital. They claim an "outbreak" of COVID-19 at the facility is "imminent."

The Georgia plaintiffs are confined at a "private" ICE detention center in Folkston, Georgia, run by GEO. Infections in such institution have not been counted. *See* "Federal Officials Say They Will Begin Reporting Coronavirus Cases in Private Prisons," *Charlotte Observer* (April 21, 2000).

Judge Wood finds that none of the three is likely to prevail sufficient to warrant a preliminary injunction. Their claims, even if true, "could be remedied with internal facility changes, such as more vigilant screening measures, increased availability of cleaning supplies, and greater efforts to create distance between detainees . . . . Petitioners have not shown a likelihood of success in proving that release is the only means of remedying the conditions of which they complain." "[T]he Constitution does not require that detention facilities reduce the risk of harm to zero," and "even if detainees were released, they—like all people—would still face some risk of exposure to COVID-19." Finally, she further finds that habeas is not appropriate for a "conditions" case. [String cites omitted.]

A sex offender in Kansas also loses a bid for release – this time, as he awaits sentencing on a federal conviction in *United States v. Duncan,* 2020 WL 1700355 (D. Kan., Arp. 8, 2020). U.S. Magistrate Judge Angel D. Mitchell denied him temporary release pending sentencing, noting that his record showed five petitions to revoke probation and two allegations of failure to appear, plus a third event where he jumped from a third-floor window trying to escape arrest for the instance offense.

Duncan has HIV, but Judge Mitchell found that he provided no information about his HIV condition, such as t-cell count, viral load, retroviral therapy, co-morbidities, and the like. He cannot rely just on CDC references, when they refer to HIV that is not well-controlled, as posing higher risk for COVID-19.

Judge Mitchell also finds that Duncan's plan for release is inadequate, as it provides for him to relocate to rural Missouri with his 78-year old mother (who has underlying health problems). She also credits the burden put on location monitoring during the COVID-19 epidemic as limiting options for release.

Because Duncan is subject to "mandatory" detention pending sentencing under 18 U.S.C. § 3142(f)(1)(A)-(C), due to his conviction and criminal history, he must show "exceptional circumstances" by clear and convincing evidence to obtain bail at this point. *United States v. Kinslow*, 105 F.3d 555, 557 (10th Cir. 1997). He has failed to do so, since his child porn history (which can be considered under the legal test for release pending sentencing) makes him a community danger.

Echoing a theme found in Judge Woods' opinion, Judge Mitchell writes: "Unquestionably, incarcerated individuals do not have the opportunity to avoid crowds or adhere to social distancing guidelines, and therefore they may be at a greater risk of infection in that respect. Mr. Duncan's specific concerns about inmates' lack of access to soap, hand sanitizer, personal protective equipment and other measures may also be valid, but many of these problems and shortages are being experienced by society generally." She declines to fault CoreCivic's steps to contain the virus, and notes that there is not a case at the facility where Duncan is incarcerated. [According to the Leavenworth County, Kansas, website, there are, as of this writing (April 26, 2020), 177 COVID-19 cases in the county, 62 among inmates.] Judge Mitchell concludes: "Mr. Duncan's proposed release plan would significantly increase COVID-19 risks to others."

The judicial response to COVID-19 in the criminal justice system, particularly in prisons, jails, and detention (including ICE) facilities is evolving. The risks to the public in general from poor leadership are exacerbated for those who are incarcerated. ■

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

# Massachusetts SJC Rules Probate Court Has Jurisdiction Over Complex Gestational Surrogacy Petition

*By Filip Cukovic*

In this interesting case that mostly involved an issue of statutory interpretation, the Massachusetts Supreme Judicial Court had to decide whether under Mass. G. L. c. 210, § 1, the Norfolk Division of the Probate and Family Court Department has jurisdiction over a petition for adoption, where the petitioner, who is the child's biological father and is named as the child's parent on her birth certificate, lives outside the United States with the child and his same-sex partner, and where the child was born outside of marriage to a gestational surrogate who lives in Massachusetts. Justice Elspeth Cypher wrote for the court in *Adoption of Daphne*, 2020 WL 1616808 (April 20, 2020).

On three different occasions the Probate Court held that it lacked subject matter jurisdiction to hear this case, dismissing with prejudice. The issue of jurisdiction turns on the "domicile" of the child, since the petitioner is not a resident of the state. The trial judge took the view that because the father took the child outside the United States, it was no longer domiciled in Massachusetts, depriving the court of jurisdiction. On January 8, 2020, the Supreme Judicial Court issued an order vacating the Probate Court's judgment and instructing the Probate Court to accept the petition for immediate filing, with the court's reasoning explained in the April 20 opinion.

This case highlights legal complications that have befallen a gay man (father) who entered into a gestational carrier agreement with a woman who lives in Massachusetts. Although it is unclear where exactly this man lives, based on Justice Cypher's summary of the facts, it is clear that he resides somewhere outside the United States, where he lives with his same-sex partner.

Everything started in 2017, when the father and his partner entered into a gestational carrier agreement with the mother, a resident of Massachusetts. The child was conceived as the result of an *in vitro* fertilization procedure. During the procedure, eggs were retrieved from an egg donor selected by the father and his partner, and then fertilized with the father's sperm. One of the resulting embryos was transferred to the uterus of the mother on June 28, 2017. The embryo transfer procedure resulted in a successful clinical pregnancy, and the child was born on February 17, 2018, in Weymouth, Massachusetts.

Shortly after the child's birth, the father and the birth mother executed a voluntary acknowledgement of paternity recognizing that the father is the genetic father of the child. The child's birth certificate lists both the father and the birth mother as the child's parents. For the child to become a citizen of the father's home country, the father would have to submit a birth certificate listing him as the father as part of the child's application for registration. Therefore, the mother agreed to forgo a pre-birth determination of parentage, and instead agreed to allow the father to pursue a post-birth adoption of the child in Massachusetts to terminate the mother's parental rights and responsibilities and to establish the father as the child's sole legal parent.

In April of 2018, the mother signed a surrender form, and by the end of April the father had filed the first petition in the Norfolk Probate and Family Court to establish his status as the child's sole legal parent. On May 22, 2018, the petition was rejected on the ground that in accordance with G. L. c. 210, § 1, the Probate Court did not have jurisdiction to approve the adoption of the child. Then in June 2018, the father, his partner, and the child returned to their home country. The birth mother previously consented to the child traveling to this country with the father and his partner.

In July of the same year, the father filed a second petition in the Probate and Family Court, attaching a memo of law addressing the jurisdictional issue previously raised *sua sponte* by the Probate Court. On August 9, 2018, the petition was returned again, as the father had not used the most updated petition form. Soon the father submitted another form, for the third time. Finally, on March 8, 2019, Probate Judge Patricia A. Gorman dismissed the adoption petition with prejudice, holding that the court lacked jurisdiction over the case. The father filed a notice of appeal on March 26, 2019 and the case was then transferred *sua sponte* from the Appeals Court to the Supreme Judicial Court.

Justice Cypher determined that the father's claim on appeal is ultimately an issue of statutory interpretation, which is why the Probate Court's decision was reviewed *de novo*. The court's decision centered around the issue of whether the plain language of G. L. c. 210, § 1 grants subject matter and personal jurisdiction to the Probate Court to hear this complicated type of adoption case.

To better understand the court's reasoning, it may be helpful to first read the statutory provision at issue. Namely, G. L. c. 210, § 1 provides the following: "A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood. . . . If the petitioner has a husband or wife living, competent to join in the petition, such husband or wife shall join therein . . . If a person not an inhabitant of this commonwealth desires to adopt a child residing here, the petition may be made to the probate court in the county where the child resides."

Thus, it is clear that the section establishes five jurisdictional requirements before the final provision allowing for adoption by an out-of-state resident. Namely, a petitioner must be (1) of "full age" adopting (2) a

child younger than the petitioner, and (3) the child cannot be in one of the familial relationships to the petitioner as enumerated by the statute. If the petitioner has a husband or wife, and he or she is competent, (4) the spouse must join the petition. The petitioner also must file (5) the petition in "the probate court in the county where he resides," unless the petitioner is "not an inhabitant of this commonwealth," in which case the petition must be filed in the probate court in the county where the child "resides."

In this case, the father was 39 years old; the child was eight months old; and none of the relationships prohibited by the statute applied. Although he had a partner, the father was unmarried; and because the father is not a Massachusetts resident, the petition had to be filed in the Probate Court in the county where the child "resides". Therefore, the only ambiguities were in the definitions of the words "residing" and "resides."

In order to properly understand the meaning of the word "resides", Justice Cypher mostly relied on an older Massachusetts case where the court defined residency under G.L.c. 210, as the child's "domicile". *See Krakow v. Department of Pub. Welfare*, 326 Mass. 452, 454 (1950). In that case, the court determined that the child's domicile was the domicile of his mother, considering that in *Krakow*, the father had abandoned the child and considering that the baby was born outside of marriage. Such interpretation was also supported by the Restatement (Second) of Conflict of Laws, where the domicile of the child was defined "the same as the domicile of their parent who has lawful custody of them." Furthermore, under the Massachusetts statute governing the custody of children born outside of marriage, "[p]rior to or in the absence of an adjudication or voluntary acknowledgement of paternity, the mother shall have custody of a child born out of wedlock." In this case, the child was born to an unmarried gestational carrier, the birth mother, domiciled in Weymouth. Because the child's birth mother is domiciled in Weymouth, the child's domicile *at birth* was also Weymouth.

However, in order to affirm such conclusion, Justice Cypher had to answer three following questions: (1) whether the mother's post-birth surrender affected the child's domicile; (2) whether the father's post-birth acknowledgement of parentage changed the child's domicile; and (3) whether the father's removal of the child to his home country changed the child's domicile.

On the first issue, court held that the mother's post-birth surrender would not cause the child to acquire a new domicile, as this would frustrate the primary purpose of the adoption statute and as this would not be in the child's best interest. Additionally, although the father's signing of the acknowledgement, which occurred before the mother's surrender, granted him "a constitutionally protected right to parent and maintain a relationship with his child," this, without more, did not change the child's domicile under Massachusetts' established precedent. *See Smith v. McDonald*, 458 Mass. 540, 545 (2010). Finally, on the issue of whether the father's removal of the child from Massachusetts changed the domicile of the child, the court held that the temporary abode of the minor with the [out-of-State] petitioner does not change the child's domicile because "no decree granting the [adoption] petition could have been entered unless the minor had lived with the petitioners for at least six months." Thus, because the child was "residing" in Weymouth, Massachusetts, as defined under G. L. c. 210, § 1, the court held that the Probate and Family Court had subject matter jurisdiction to conduct a hearing on the father's petition.

The issue of personal jurisdiction over the parties required much less analysis, primarily because the father consented to the court's personal jurisdiction by filing the petition in that court and because the petition in question was not opposed by any other party.

The father was represented by Kathleen A. DeLisle. Patience Crozier & Mary L. Bonauto, for GLBTQ Legal Advocates & Defenders, amicus curiae, also submitted a brief. ■

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

# Court of Appeals of Michigan Decrees New Trial in Custody and Visitation Dispute Between Lesbian Mothers

*By Arthur S. Leonard*

The three-judge panel of Michigan's Court of Appeals, reversing the trial court's award of sole custody to the birth mother of AB, ordered that a new trial be held, finding that the trial court had inappropriately discounted the parental role of the child's other mother, mainly because she worked full-time while the birth mother was the stay-at-home mom. *Bridget Bofysil v. Sarah Bofysil*, 2020 WL 1968642, 2020 Mich. App. LEXIS 2960 (April 23, 2020).

Bridget and Sarah married in 2014 and decided to have a child with Bridget providing the egg and Sarah being the birth mother. Their child, AB, was born in January 2016. The mothers had agreed that Bridget would remain employed full time as a campus police officer at Eastern Michigan University and Sarah would remain at home as a full-time mother for AB. Both women functioned as parents, sharing responsibilities, and because of her usual late shift schedule, Bridget was able to spend considerable time with her family, and was frequently the parent who prepared lunch.

Unfortunately, the relationship of the women began to deteriorate after the birth of their child, resulting in frequent arguments and increasing tension, until Bridget filed for divorce in June 2018. Sarah moved out and took AB with her to live with her parents, which facilitated her continuing to be a stay-at-home mother to the young toddler. During the first month after the separation, Sarah afforded no contact with AB to Bridget. Thereafter, a Friend of the Child (FOC) appointed by the court facilitated a

visitation schedule, although things did not always go smoothly.

In the divorce proceeding, the trial judge awarded sole custody to Sarah, with less frequent visitation for Bridget than had prevailed while the case was in progress, and Bridget appealed. According to the opinion for the Court of Appeals by Judge Elizabeth Gleicher, the trial judge concluded that AB "had an established custodial environment only with defendant Sarah Bofysil, largely because Sarah 'was the stay at home mom while the parties were together' and the child 'is with her the majority of the time.'" Based on that conclusion, the trial judge allocated to Bridge the burden of showing by clear and convincing evidence that it was not in the best interest of the child to award sole custody to Sarah. This was an error, held the appeals court.

Judge Gleicher prefaced her opinion with some facts of life about working families in America. "A recent Pew Research study reports that in 2016, 18% percent of parents in America stayed home to raise their children," she wrote. "Twenty-seven percent of mothers elected stay-at-home parenting. Livingston, *Stay-At-Home Moms and Dads Account for About One-In-Five U.S. Parents,* FactTank: News in the Numbers, September 24, 2018, available at <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/> (accessed April 10, 2020). For one parent to stay home to raise the children, the other must go out into the world and generate an income to support the family. Does working outside the home compromise a parent's ability to forge and maintain a strong, healthy relationship with her children? What if both parents work outside the home? Is the child essentially without a parent truly committed to parenting and all that the job entails?"

Judge Gleicher quickly communicated the court's answer to these questions. "It was error to discount the role of the child's other parent, plaintiff Bridget Bofysil, simply because Bridget worked outside the home to support her family. This error influenced the applicable burden of proof and permeated the court's assessment of the child's best interests. Accordingly, we affirm in part the judgment of divorce, but vacate the custody award and remand for further proceedings."

The opinion goes into great detail about the factual evidence concerning Bridget's parenting of AB, and concluded that the trial judge's bias against the working mother had manifested itself in a serious misbalancing of the evidence. "The evidence preponderates against the circuit court's established-custodial-environment finding," wrote Gleicher. "Both parties agreed that from AB's January 2016 birth until Sarah left the home with AB in the middle of June 2018, both parents shared in the care of AB. Although Bridget worked outside of the home, she arranged her schedule to maximize her time home during AB's waking hours. Even Sarah conceded that Bridget was usually the one to make lunch for the family and that the whole family often would be present when Bridget took on side jobs training dogs. AB clearly had a homelife in which both of her parents provided for her care and needs. Although AB may have looked to her parents to fulfill different needs and likely understood at some level their distinct household roles, both provided her with 'security, stability, and permanence.'"

The court of appeals found that the trial court "perpetuated its erroneous approach to the working parent throughout the judgment, faulting Bridget for her full-time employment outside the home by treating her as less than a full parent." This was manifest in the trial court's application of the statutory factors for determining the best interests of the child in a custody dispute. Judge Gleicher's opinion went through the list of factors, showing how the trial judge's bias against the working mother affected its conclusions as to several of the key factors. In particular, she noted the weight the trial judge gave to the fact that after the break-up, Bridget had formed a romantic attachment with another woman who is married, and pointed out that this was an inappropriate consideration under Michigan precedents. "Given the circuit court's improper reliance on Bridget's relationship with a married woman and its bias against Bridget's role as a working parent," wrote Gleicher, "we cannot hold that the court acted within its discretion in awarding sole physical custody to Sarah with such limited parenting time to Bridget. Further proceedings with up-to-date information will be required to consider the custodial arrangement that best serves AB's best interests."

As to the sole custody award, the court of appeal rejected the trial court's view that the tensions between the women precluded a joint custody award, finding no evidence that it would be impossible for the women to agree on major parenting issues. "The larger concern in this case," wrote Gleicher, "was the parties' ability and willingness to communicate. Evidence established that the parties' direct communications were not civil. Accordingly, the parties agreed to communicate about issues relevant to AB in a notebook. Sarah did believe this method was inadequate. However, it is not uncommon for the FOC to recommend or courts to order parents to use a computer program or notebook system to share information or to otherwise communicate. Through these indirect communication methods, parents can interact without danger of hostility, easing their ability to cooperate and agree on major issues. The incivility present in this case ran both ways. Under such circumstances, socially distancing parental interactions may be an appropriate method for maintaining a safe and efficient approach to shared parenting responsibilities."

The court remanded the case, instructing that the trial court "must also reconsider its award of legal custody based on up-to-date information and must take into account alternative communication methods, if feasible."

Bridget is represented by Lisa R. Speaker. Sarah is represented by Judith A. Curtis. ■

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

# Transgender Man in the U.K. Cannot Be Listed as Father on Child's Birth Certificate

*By Eric J. Wursthorn*

Alfred McConnell, a transgendered male, gave birth to a child and sought to be listed on the child's birth certificate as "father." However, he was informed by the U.K. Registry Office that he would have to be registered as the child's "mother." McConnell appealed that decision and on April 29, 2020, the U.K. Court of Appeal denied his application, in *R. (McConnell and YY) v. Registrar General*, [2020] EWCA Civ 559).

McConnell seemed to do everything necessary to get the relief he sought. He transitioned when he was twenty-two years old. Thereafter, he began taking hormones and in 2014 underwent a double mastectomy. He also obtained a gender recognition certificate under the Gender Recognition Act 2004 (GRA) which confirmed that he was legally recognized as male. The legal effect of a certificate is that the gender of the person to whom the certificate relates "becomes for all purposes the acquired gender" (GRA Section 9[1]).

Meanwhile, in September 2016, McConnell suspended testosterone treatment and thereafter commenced fertility treatment "to achieve the fertilization of one or more of his eggs in his womb." In April 2017, McConnell underwent intrauterine insemination and became pregnant. In January 2018, McConnell gave birth to a son. McConnell's journey from conception to the birth of his son is the subject of a documentary called "Seahorse", which the court noted had been shown at film festivals and broadcast on the BBC.

Upon attempting to register his son's birth, McConnell learned that he would have to be listed as the child's mother but could use his current (male) name. He challenged that decision on two grounds. First, "as a matter of domestic law he was to be regarded, and hence entitled to be registered as [the child's] 'father' or otherwise 'parent' or 'gestational parent'." Alternatively, McConnell that the "domestic regime is incompatible with his and/or YY's Convention rights under Articles 8 and 14 of the European Convention on Human Rights."

McConnell's biggest hurdle appeared to be a provision of the GRA entitled Parenthood, which provides: "[t]he fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child" (Section 12). GRA Section 9(2) further provides that a full gender recognition certificate obtained thereunder "does not affect things done, or events occurring, before the certificate was issued . . . "

The court read the relevant sections of the GRA as excluding McConnell from obtaining the relief he sought. It noted that had Section 12 been retrospective only, Parliament would have "made that clear thorough express language" and contrasted that omission with other portions of the GRA. The court otherwise rejected McConnell's argument that the court should interpret the GRA based upon "contemporary moral and social norms."

The court unsympathetically characterized McConnell's application to be an attempt to construe the word "dog" as "cat" and rejected the argument that "mother" should be replaced with "parent" or "gestational parent" as improper judicial legislation.

The court next addressed whether UK law was incompatible with McConnell or his son's Convention rights. The court did this against the backdrop of case law from the European Court of Human Rights (ECHR), starting with *Goodwin v. UK*, (2002) 35 EHRR 18, which found that the UK's refusal to recognize gender change was incompatible with the Convention thus leading to the enactment of the GRA. The court also relied on subsequent ECHR caselaw by which that court declined to set rules regarding legal recognition of transgender persons with respect to their children, noting a lack of consensus on the issue in Europe. Therefore, member states have a "margin of appreciation" to set the parameters of such legal recognition (see *Request No P16-2018-001*).

The court ultimately found that McConnell's and his son's rights under the Convention were interfered with, but that the interference was justified. The court reasoned that children are entitled "to know who gave birth to them and what that person's status was." Further, the court noted that Parliament's view "that every child should have a mother and should be able to discover who their mother is" was appropriate and in the child's best interest. It seems that until there is a European consensus or a decision from the ECHR contrary to UK law, a transgender man who gives birth to his child, such as McConnell, will have to settle for being the child's mother on the birth certificate.

The court also sidestepped McConnell's claim that he was treated differently by the Registry Office than prior similarly-situated persons. The respondent Register denied McConnell's claim, but according to the court, "It was accepted that there may been erroneous decisions made in the past." In any event, the court viewed this issue as a non-starter, stating "this debate cannot affect the true issues which arise for this court to determine, which are issues of law."

McConnell's solicitors for the appeal are Hannah Markham QC and Miriam Carrion Benitez. Solicitors for his son, identified in the opinion as YY, were Michael Mylonas QC, Susanna Rickard, and Marisa Allman. ■

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# Idaho Federal Judge Rejects Transgender Inmate's Medical and Other Claims, Despite Ninth Circuit Ruling in *Edmo v. Corizon*

*By William J. Rold*

Chief U.S. District Judge David C. Nye rules against transgender inmate Kay Dana on all but one of her causes of action in *Dana v. Tewalt,* 2020 WL 1545786, 2020 U.S. Dist. LEXIS 59258 (D. Idaho, Apr. 1, 2020). At over 15,000 words (and 24 footnotes), this opinion is much longer than Chief Judge Nye's other transgender inmate dismissal in *Peterson,* also in this issue of *Law Notes* (see Prisoner Litigation Notes, below).

Originally *pro se,* Dana requested a preliminary injunction, arguing that she could not obtain a gender dysphoria diagnosis from the Idaho Department of Corrections (IDOC) or from Corizon, its health care contractor. She was allowed to proceed by then Chief Judge B. Lynn Winmill, who also presided at trial over the transgender inmate confirmation surgery case of *Edmo v. Corizon,* 935 F.3d 757 (9th Cir. 2019).

After Dana obtained counsel, IDOC modified her diagnosis to include gender dysphoria, and it provided hormone referral and feminizing items. Dana obtained expert assistance from Dr. Randi Ettner, which Judge Nye says "may have contributed to (IDOC's) eventual reevaluation of Dana." Defendants moved to dismiss, and Judge Nye ordered supplemental briefing in light of *Edmo*.

As an initial matter, Judge Nye rules that the IDOC Deputy Director (who was sued in his official capacity) is no longer a proper party because he resigned. Judge Nye rules that no party substitution can be made under F.R.C.P. 25(d) because the position is "currently vacant." He therefore dismisses "all claims" against this officer. Rule 25(d), however, provides that, when an official capacity defendant resigns, the action "does not abate" and that the court "may order substitution at any time."

Judge Nye first addresses medical claims, finding that treatment of gender dysphoria is a serious medical need. The defendants were not deliberately indifferent, however, because: (1) there was a professional disagreement about diagnosis when they were denying treatment; and (2) once IDOC determined gender dysphoria to exist, they provided necessary care. This ruling is based on the pleadings, after a lengthy discussion of Eighth Amendment standards in the Ninth Circuit, including *Edmo*. Judge Nye holds that Dana's filing of an Amended Complaint supersedes her initial complaint and Judge Winmill's original screening order, citing *Forsyth v. Humana, Inc*., 114 F.3d 1467, 1474 (9th Cir. 1997). Moreover, Dana was given access by IDOC to a "competent" physician who ultimately agreed with Dana's expert. Dana's Eighth Amendment medical claim is dismissed without prejudice.

Dana claims that an officer used excessive force in an incident in which she was cuffed behind her back and then pushed forcefully down a hallway "in a malicious and sadistic" manner. Judge Nye rules that the allegations are too conclusory, writing: "The obvious alternative explanation is that [the officer] inadvertently, negligently, or recklessly caused Dana harm while escorting her."

Judge Nye also rejects a claim of failure to protect Dana based on an assault from another inmate and an alleged violation of the Prison Rape Elimination Act (PREA). Dana fails to allege which defendants made housing decisions for her or who had advance knowledge of her risk of assault. Judge Nye wrote that he could not "connect the dots" and that Dana's report of concerns is not by itself sufficient to allege a protection from harm claim. He further finds that Dana had not alleged facts sufficient to sustain a PREA violation, even assuming one were actionable.

Judge Nye rules that Dana fails to state a claim for denial of equal protection based on sex. Dana argued that defendants disciplined her "based on sex-based stereotyping about the ways in which Dana should appear, act, or express herself based on her sex assigned at birth" and refused to allow her access "to feminine items that would normally be provided to similarly situated female prisoners." It is unclear what standard of scrutiny the judge applies; he says, without citing authority, that the level of scrutiny is not relevant to whether a claim is stated. He begins with rational basis, then balances under *Turner v. Safley*, 482 U.S. 78, 89–81 (1987), then applies "quasi-suspect" "heightened" scrutiny, citing *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144 (D. Idaho 2018) ("to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning").

Again, from the pleadings (presumably only Dana's), he finds that defendants' actions were not "patently arbitrary" and accepts defendants' argument that "they had a legitimate penological interest in everything they did: Dana's safety." Dana further failed to identify which defendants disciplined her for "sex-based behaviors" or "what the alleged disciplinary conduct was." Judge Nye purports to apply *Turner* balancing, citing *Walker v. Gomez,* 370 F.3d 969, 974 (9th Cir. 2004), but he fails to note that *Walker* reversed a grant of summary judgment on prison justifications – in part because of the level of scrutiny to be applied.

On a claim of discrimination under the Americans with Disabilities Act (ADA), Judge Nye rules that Dana could not qualify because she was not diagnosed with gender dysphoria at the time the alleged discrimination occurred. He writes: "[B]ecause Dana had not been diagnosed with GD at the time she filed her Amended Complaint, it is difficult to determine how, if at all, IDOC discriminated against her on the

basis of a disability that she was not diagnosed with." This appears to be a fundamental misunderstanding of the ADA, which protects plaintiffs who "are regarded as" disabled, even if they do not have a diagnosis – or even a disability in fact. *See, generally, Nunies v. HIE Holdings, Inc.*, 908 F.3d 428 (9th Cir. 2018) (explaining ADA "regarded as" disabled protection and strengthening of this clause by the 2008 amendments to the ADA, 42 U.S.C. § 12102(3)(A)).

Judge Nye rules that Dana's ADA claim is "legally foreclosed . . . in light of the *Simmons* case." He does not provide a full caption or citation – or mention it anywhere else in the opinion. Although it is a surmise on this writer's part, perhaps he meant *Simmons v. Navajo County,* 609 F.3d 1011, 1022 (9th Cir. 2010) (holding that the ADA cannot be used by a prisoner to challenge denial of medical care, because the ADA protects against discrimination because of medical conditions – it does not assure treatment for them). This misses Dana's point that she was discriminated against under the ADA by being forced to present as a man because that is how IDOC "regarded" her.

Judge Nye allows Dana to proceed on one claim: that she suffered retaliation by a defendant because she filed complaints under PREA. Alleging threats of solitary confinement and confiscation of feminine items, she may proceed under the First Amendment against "the only individual she specifically identified being associated with the threat," under *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005).

Dana also alleged four torts under Idaho state law. Judge Nye rules that all of them are insufficiently plead or subject to state law immunity defenses.

The health care contractor, Corizon, also moved to dismiss. Judge Nye found that Dana "failed to make any specific factual allegations against it" and that her inclusion of Corizon with other defendants was insufficient "group pleading." Although Judge Nye dismisses claims against other defendants with leave to move to amend, if she can show good cause, Corizon's motion is granted with prejudice. Dana has had two chances to state a claim against the private vendor.

Judge Nye finds Dana's request for a preliminary injunction to be moot, because the medical claims have been dismissed and she is not likely to prevail on the merits since she has been granted the diagnosis, hormones, and feminizing items she sought. There follows an extended discussion of whether there even remains Article III standing.

That Judge Nye would do all of this on the pleadings strikes this writer as inappropriate. He substitutes verbosity for the terse treatment of the trans inmate in *Peterson*, but he does not necessarily improve upon it – and both decisions have substantive and technical errors not expected from a federal district court. Judge Nye was part of the first wave of Trump appointments to the federal district courts in 2017, filling the seat formerly occupied by Judge Winmill, from whom he evidently inherited this case. Idaho's Republican senators had recommended him to President Obama, who nominated him in 2016, but the Senate was not confirming Obama's judicial nominees in 2016 and the nomination died at the end of that session. The Idaho senators then recommended him to Trump, who re-nominated him. He had served as a state court judge for a decade.

Dana is represented Conor C. McNamara, Fredric Charles Nelson, and Matthew A. Richards, Nixon Peabody LLP, San Francisco, CA; and Seth D Levy, Nixon Peabody LLP, Los Angeles, CA. ■

# Italian Lawyer Who Made Homophobic Comments on Radio Loses Before European Court of Justice

*By Eric J. Wursthorn*

On April 23, 2020, Italian lawyer Carlo Taormina was handed an unfavorable ruling by the European Court of Justice (ECJ) arising from antigay comments he made on a radio show called "La Zanzara". According to Wikipedia, La Zanzara, which means "the mosquito", is known for "giving space to controversial topics[,] for being politically incorrect" and for prank calls. *NH v. Associazione Avvocatura per I dirittie LGBTI – Rete Lenford*, Case C-507/18 (ECJ, April 23, 2020).

Taormina's comments were made in 2013, when he stated that "[h]omosexuals are abnormal, they have physical and genetic anomalies," and he would never hire a gay person to work at his law firm. In turn, Rete Lenford, an Italian LGBTI advocacy nonprofit organization, sued Taormina for sexual orientation discrimination in District Court, Bergamo, Italy.

In 2014, the Bergamo District Court found that Taormina had violated EU and Italian law barring sexual orientation discrimination and ordered, *inter alia*, Taormina to pay €10,000 to Rete Lenford in damages. After the Court of Appeal in Brescia, Italy, dismissed his appeal, Taormina went to the Supreme Court of Cassation, Italy, which then stayed the proceedings and referred two questions to the ECJ for a preliminary ruling: [1] did Rete Lenford lack standing to bring an action under EU Council Directive 2000/78/EC a/k/a the Employment Equality Framework Directive?; and [2] were Taormina's statements actionable opinion made in his capacity as a private citizen rather than an employer "where no recruitment procedure has been opened, nor is

planned, by the interviewee?" The ECJ's April 23, 2020, decision answered both questions in the affirmative.

With respect to the former, the ECJ found that Rete Lenford had standing and could obtain damages against Taormina under Directive 2000/78, which prohibits employment discrimination based upon religion or belief, disability, age and sexual orientation. The ECJ explained, since Rete Lenford's objectives include "the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons", it "automatically . . . has standing to bring legal proceedings for the enforcement of obligations under [D]irective [2000/78]".

As for the second issue, namely whether Taormina's statements were actionable, the ECJ relied on prior precedent that statements concerning conditions for access to employment or occupation include those made about recruitment policy even when made by a person who does not define that policy or cannot hire employees. Thus, "the fact that no negotiation with a view to recruitment was under way when the statements concerned were made does not preclude the possibility of such statements falling within the material scope of Directive 2000/78."

Taormina's efforts to hide behind his argument that the challenged statements were mere opinion were also rejected. Instead, the ECJ stated that Taormina's statements violate Directive 2000/78 if they are found to relate to "the employer's intention to discriminate" on the basis of sexual orientation.

In that vein, even if he was not actually hiring anyone, Taormina could be liable under the directive because he "may be perceived by the public or the social groups concerned as being capable of exerting [] influence [on recruitment policy]". Nor did it matter whether Taormina's statements were made amidst an ongoing recruitment process because "discriminatory opinions in matters of employment and occupation by an employer or a person perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post."

Finally, the court held that there was no conflict between the application of Directive 2000/78 and Taormina's right to freedom of expression. Directive 2000/78 is an appropriate limitation on the exercise of freedom of expression necessary to guarantee equal treatment in employment and occupation. To hold otherwise would render "the protection afforded by that directive in matters of employment and occupation [] illusory."

The ECJ notably limited its holding, however, and reserved to the Supreme Court of Cassation the factual issue of "whether the circumstances characterizing the statements at issue in the main proceedings establish that the link between those statements and the conditions for access to employment or occupation within the firm of lawyers concerned is not hypothetical . . . " Thus, a determination that Taormina was merely speaking hypothetically would seemingly obviate a finding that his statements were an unlawful violation of Directive 2000/78.

On its website, Rete Lenford lauded the ECJ decision. According to twitter, Taormina has taken issue with any characterization that the ECJ ruled against him, characterizing such statements and/or press releases as "falsa comunicazione" or fake news and pointing to that part of the ECJ decision which directs the Supreme Court of Cassation to determine whether Taormina's statements were hypothetical.

Attorney A. Guariso represented Rete Lenford in opposing the appeal. ■

# Ohio Lesbian Highway Patrol Officer's §1983 Action against Supervisors Allowed to Proceed

*By Matthew Goodwin*

U.S. District Judge Edmund A. Sargus, Jr., has ruled that Stacey Yerkes's discrimination suit against her supervisors under 42 U.S.C. § 1983 has survived a motion to dismiss. *Yerkes v. Ohio State Highway Patrol*, 2020 WL 1905126 (S.D. Ohio, April 17, 2020). Judge Sargus found that the plaintiff had, indeed, stated a claim upon which relief could be granted in alleging discrimination on gender and sexual orientation grounds, and that qualified immunity did not protect her supervisors from liability.

Yerkes joined the Ohio State Highway Patrol (OSHP or Patrol) in 1994 and rose from cadet to sergeant of the Patrol's criminal interdiction training unit. The complaint—the facts of which were necessarily treated as true at this stage in the litigation—detailed numerous awards Yerkes received over the years for her work performance. Plaintiff was consistently if not always rated as having met or exceeded expectations in her annual OSHP performance evaluations.

The allegations undergirding Yerkes's claims arose in significant part from a period shortly after the birth of her and her wife's first child in 2017, when she requested and was denied leave under the Family and Medical Leave Act (FMLA). However, the suit lays bare a pattern of homophobic discrimination and mistreatment against her by co-workers and supervisors stretching back to the beginning of her employment with the Patrol.

Referring to the leave for which she applied, Yerkes was told that, because she is gay, "it's not the same" as it is (presumably for heterosexuals) for the birth of her and her wife's son. After the

FMLA denial, Plaintiff filed a grievance under her labor contract, which was also denied. After denial of the grievance in April of 2017, her supervisors began "aggressively criticizing" her work performance even though her performance was the same, according to Yerkes, as it had been during the years when she received excellent performance reviews and accolades from peers in her field.

Yerkes further alleges that she was disciplined and reprimanded for actions and behaviors that male colleagues, who engaged in the same conduct, were not. For example, Yerkes was criticized by supervisor-Defendants for "arriving at her assigned patrol post at 8:01 a.m. instead of 8:00 a.m. Male heterosexual patrol officers often did the same, or worse, and were not criticized or disciplined." Further, "Defendants reprimanded Plaintiff allegedly for leaving her shift early. Male heterosexual patrol officers often left work before their shift had ended and were not criticized or disciplined."

Yerkes filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC). Less than a week later, one of her supervisors (a Defendants in the suit) accused her of violating the OSHP policy requiring employees to conceal tattoos when wearing uniforms. Yerkes alleges she always abided by the policy and that male, heterosexual colleagues who did not comply with the policy and showed tattoos while wearing their uniforms were not disciplined.

Yerkes was placed on administrative leave for her alleged violation of the tattoo policy. At that point in the disciplinary process, her union stepped in and offered her what is termed a Last Chance Agreement (LCA). The LCA required Yerkes to accept a demotion from sergeant back to trooper; prohibited her from working in criminal interdiction any longer even though she had done so for 26 years; required her to surgically remove her tattoo within one year; required her to provide "monthly progress reports from her physician/ treatment provider and monthly progress photos of the removal process;" and required her to waive any potential legal claims against Defendants and withdraw her EEOC discrimination complaint.

Rather than accept the LCA, Yerkes resigned and added retaliation claims to her EEOC complaint.

Once Plaintiff was issued a "right-to-sue" letter by the EEOC, she commenced her action, which stated that the foregoing discriminatory actions were taken against her because she is female and gay, and "culminated in termination by virtue of the doctrine of constructive discharge in violation of the Equal Protection Clause of the Fourteenth Amendment."

Judge Sargus's analysis began with a discussion of the law of qualified immunity which, in his words, generally shields "[g]overnment officials, including law enforcement officials … from civil liability when performing discretionary functions, unless their conduct violates a clearly established statutory or constitutional right such that a reasonable officer would have known that his or her conduct was unlawful." In other words, it was Yerkes's burden at this stage to allege facts showing that "(1) the [Defendants] violated a constitutional or statutory right based on the facts alleged, and (2) the right was clearly established."

The Defendants' "primary argument of [their] motion to dismiss [is] that none of the [Defendants] were her 'employer' who could 'terminate' her employment, or support a claim of constructive discharge against them. Thus the [Defendants] posit (a) Plaintiff was not terminated," (because she retired voluntarily), "and that they are not employers with the authority to terminate her, and (b) Title VII is not an independent basis for § 1983 liability."

Judge Sargus's opinion detailed all the ways in which Defendants' arguments missed the mark. First, the Defendants "misapprehend[ed] the nature of constructive discharge." "A constructive discharge is not the employer's overt action of firing the employee, rather it is the individual personnel's conduct attributable to the employer that resulted in working conditions that were so difficult or unpleasant that a reasonable person would have felt compelled to resign."

The court concluded, based on Yerkes's allegations—belittling and offensive name-calling she had endured by Defendants (e.g. "c*nt, f**cking c*nt, "butch"), as well as the fact that she was required to have her tattoo surgically removed if she wanted to keep her job— "[t]he combined effect of these alleged facts, taken as true . . . lead this Court to conclude Plaintiff has stated a plausible claim under § 1983 that, based on anti-gay and anti-female animus, the [Defendants] intentionally made her working conditions so difficult and unpleasant that it was reasonable for her to feel compelled to retire."

Judge Sargus also disabused Defendants of the notion that Yerkes was trying to improperly back-door a Title VII claim through a § 1983 action. He wrote, "Plaintiff correctly points out, discrimination based on sex is both a violation of Title VII and, because this is a public sector employment case against state actors, a violation of the Equal Protection Clause of the Fourteenth Amendment."

As to the "Clearly Established" prong of the qualified immunity analysis and sex based discrimination, Judge Sargus wrote " . . . [Defendants] do not, nor could they successfully, argue that there is no clearly established law that guarantees female employees the right to be free from arbitrary sex discrimination in the workplace. The Sixth Circuit and Supreme Court have found in multiple decisions that the Fourteenth Amendment's Equal Protection Clause guarantees female employees the right to be free from arbitrary sex discrimination in the workplace."

Concerning sexual orientation discrimination and whether the law is "Clearly Established" to prohibit same, Judge Sargus found "'a robust consensus of cases of persuasive authority' of sufficient clarity to have placed the 'constitutional question' of whether homosexuality is an identifiable group entitled to protection under the Equal Protection Clause of the Fourteenth Amendment 'beyond debate.'" In support of this proposition that "homosexuals do constitute an 'identifiable group' for equal protection

purposes," Judge pointed to, among other U.S. Supreme Court precedent: *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Romer v. Evans*, 517 U.S. 620 (1996); and *Lawrence v. Texas*, 539 U.S. 558 (2003).

Finally, Judge Sargus turned from the question of qualified immunity, which Defendants in his opinion do not enjoy, to whether Yerkes plead a cause of action sufficient to survive Defendant's 12(b)(6) motion to dismiss. Here again his analysis pointed to a flaw in Defendant's reasoning as to what the relevant inquiry was and pointed to the terms of the LCA, the fact Defendants approved same, engaged in sexist and homophobic conduct, and disciplined her in a manner male heterosexual colleagues were not in order to deny this branch of Defendant's motion.

Judge Sargus was appointed by President Bill Clinton in August of 1996. Yerkes is represented by Jason E. Starling, of Willis, Spangler, Starling, Hilliard, OH, and John C. Camillus, Columbus, OH. ■

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# Eschewing Title VII, Embracing Privacy, Transgender Plaintiff Survives Motion to Dismiss

*By Ezra Cukor**

A transgender worker's constitutional privacy and state law claims survived his employer's removal to federal court and motion to dismiss. Judge Gary Feinermen of the U.S. District Court for the Northern District of Illinois issued the decision on April 23, 2020. *Logan Grimes v. County of Cook et al.*, 2020 WL 1954149 (N.D.I.L. 2020).

The plaintiff, Logan Grimes, a transgender man, endured years of mistreatment by his co-workers and supervisor at the Cook County Jail. Grimes's colleagues shunned him, called him a "girl," and threatened that being transgender is "how people get killed." They also degraded and were violent to transgender people detained in the jail. At the end of September 2018, Grimes's direct supervisor informed his co-workers that Grimes is transgender. Fearing for his safety and deeply harmed, he took unpaid medical leave.

Grimes alleged that his supervisor violated his Fourteenth Amendment right to medical privacy. The Due Process clause has been interpreted to protect against unwanted disclosure of "medical, sexual, financial, and perhaps other categories of highly personal information" that most do not wish to share with strangers except when there is a strong public interest in disseminating the information. The court's opinion lists the medical steps Grimes took to make his body more typically male but does not turn on disclosure of these specific procedures. Rather, Grimes asserted that sharing his transgender status itself breached his medical privacy. Grimes only shares the information that he is transgender with close friends, not with "neighbors, acquaintances, or co-workers." He had been living as a man and was recognized as one by others for years prior to working at the jail. The crux of his claim is that because his appearance is unambiguously male, disclosing that he is transgender is tantamount to disclosing that he has gender dysphoria which he has treated with significant medical interventions.

The court concluded that precedent establishes that gender dysphoria is a medical condition that most people are reluctant to disclose and that "anyone informed of his transgender status" would necessarily know Grimes has gender dysphoria. The court's conclusion that gender dysphoria is a medical condition was rooted exclusively in cases brought by transgender prisoners. Cook County did not argue that there was a strong public interest in sharing Grimes' transgender status. The court rejected defendants' argument that Grimes had to allege how his supervisor knew he was transgender and that the supervisor's behavior shocked the conscience to sustain his constitutional claim.

Under § 1983, public officials are immune from suit unless they violate a clearly established statutory or constitutional right. The supervisor argued he had qualified immunity in this case because a reasonable official in his position would not know that disclosing Grimes's transgender status violated the Fourteenth Amendment. The court denied this defense at the motion to dismiss stage, finding that the "substantive due process right to medical privacy" was well established in September 2018 and that Grimes's pleadings make clear that his transgender status and gender dysphoria were private information.

The court also found that Grimes stated various claims under the Illinois Human Rights Act (IHRA), which prohibits discrimination against transgender workers via its protections against sexual orientation discrimination. (Illinois is not alone in taking this approach. Even though one's gender identity – one's knowledge of one's own gender- is distinct from sexual

orientation – one's emotional or physical attraction based on gender- a handful of states similarly prohibit discrimination against transgender people via sexual orientation protections.) The IHRA prohibits severe or pervasive workplace harassment. The court found that Grimes's allegations that his co-workers shunned and verbally harassed him on a daily basis at least for a period of months was sufficiently pervasive to state a hostile work environment claim under the IHRA.

Grimes's remaining IHRA claims were for job segregation, discrimination and retaliation. He alleged that his employer engaged in unlawful segregation when it removed him from the division of the jail where transgender people were detained. His employer argued that this was not an adverse employment action and so his claim must fail. The court concluded that if job segregation claims require an adverse employment action, Grimes met it by alleging that assignment to the division in question was desirable because it had fewer inmates and could improve his resume. The court also concluded that being forced to take unpaid leave was an adverse employment action sufficient to support his discrimination and retaliation claims.

In addition to his state and federal civil rights claims, Grimes also brought tort claims for breach of privacy and intentional infliction of emotional distress (IIED) against his supervisor. To the breach of privacy claim, the supervisor responded that Grimes being trans was not private information. In support he pointed to the fact that Grimes alleged his co-workers harassed him even before the supervisor broadcasted that Grimes is transgender. The court rejected this argument for two reasons. First, only a few co-workers had harassed Grimes, so it remains a permissible inference that many people in the jail did not know he was transgender. Second, Grimes assert that his harassers perceived him to be to transgender, but not necessarily that they knew him to be.

Under Illinois law, IIED claims encompass conduct so "extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community" that the defendant intends, or at least knows has a "high probability" to cause severe emotional distress and actually does so. The court concluded that Grimes's allegations that his supervisor maliciously shared that he is transgender, which put his life, as well as his family's safety, at risk resulting in severe emotional upset, inability to sleep and hypertension, stated a claim for IIED.

The defendant-supervisor raised and the court rejected the argument that the IHRA preempts Grimes's tort claims. The IHRA preempts only tort claims that are inextricably tied to the IHRA. In other words, torts actionable absent the IHRA are not pre-empted. The court reasoned that Grimes's tort claims were not preempted because, unlike IHRA claims, they do not turn on the defendant being motivated by grounds covered by the IHRA, that is Grimes's gender identity. The court also declined to resolve defendant's assertion of immunity under state law at this stage.

The decision is also notable for what it does not discuss—Title VII of the Civil Rights Act of 1964. The Seventh Circuit Court of Appeals, along with the First, Sixth, Ninth, Eleventh Circuits, and a multitude of district courts, agree that discrimination against someone for being transgender is a form of sex discrimination prohibited by federal law. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (Title VII) ; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act); *see e.g. EEOC v. Rent-a-Center East,* 264 F.Supp.3d 952 (C.D.Il.. 2017). These nearly two decades of precedent create crucial means for transgender workers to seek relief from discrimination. The Supreme Court is considering a trio of cases that raise the question of whether Title VII protects LGBTQ workers and is expected to rule this Term. However, Grimes did not press Title VII claims, and no part of the decision relies on the meaning of sex discrimination within federal statutory law. Therefore, a decision declining to recognize Title VII coverage for LGBT workers should not have negative ramifications for Grimes's case going forward.

Even absent uncertainty regarding the Supreme Court, there is an urgent need for tools to stop anti-transgender discrimination. Transgender people face appalling rates of discrimination at work. *See generally,* James, S. E., et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016). Constitutional medical privacy and state tort claims are creative ways to address workplace treatment that could, in theory, be deployed in jurisdictions that lack state or local civil rights protections. However, they are no substitute for robust anti-discrimination protections. Constitutional privacy protections cannot aid private sector employees. Moreover, many transgender employees do not have the option to keep their transgender status private, for example because they transitioned on the job or are visibly transgender. Others are open about being transgender for many reasons, including to educate, to serve as a role model, or simply because they celebrate being transgender. Some people may balk at bringing a claim premised on the assertion that disclosing their transgender status is offensive or should be done with reluctance. It is, after all, a fact about gender no more salacious and no less inherent to one's self than being a cisgender man or woman. These realities could complicate, if not foreclose, bringing privacy claims. As long as workplace discrimination remains devastatingly common, however, transgender people will need to deploy existing laws, even if imperfect, and also to push for expanded legal protections. ■

*The views contained in this article are my own and do not necessarily reflect the positions of my employer.

*Ezra Cukor is a staff attorney at the Center for Reproductive Rights.*

# Gay HIV-Positive *Pro Se* Plaintiff in Housing Case Survives Motion to Dismiss in New York District Court

*By Arthur S. Leonard*

U.S. District Judge Paul G. Gardephe accepted most of the recommendations by Magistrate Judge Debra Freeman concerning a motion by the employees of a building management company to dismiss a lawsuit by an HIV-positive gay man who was turned out of an apartment that he was subletting with management's consent from the tenant of record. *Hannan v. Rose*, 2020 WL 1903282, 2020 U.S. Dist. LEXIS 68436 (S.D.N.Y., April 17, 2020). The court dismissed some of the plaintiff's claims, but allowed others to continue.

Matthew Hannan is suing *pro se*. He came up with a laundry list of federal, state and local law claims to assert against Rose Associates' CEO and two employees, without naming the management company as a defendant. His suit names as defendants Amy Rose, CEO of Rose Associates, building guard Kevin Rodriguez, and Yamile Zarzuela, the Senior Low-Income Housing Tax Credit Compliance Administrator for Rose Associates. H claims that Rose Associates gets money from the federal government to manage this low-income rental housing, according to the complaint.

Hannan struck a deal with his friend Jimmie Orr, the "tenant of record" of the apartment, on February 1, 2018, to pay $700 a month to Orr, who gave him a key. He registered at the front desk and was thenceforth treated like a resident by building staff (who helped him move his things into the apartment), receiving mail there and not being required to sign in as a guest when he entered the building. According to Judge Gardephe's description of Hannan's allegations, "In late February 2018, building security personnel began to 'harass' Plaintiff by barring him from the gym and rejecting his mail; they also 'screen[ed]' him as a guest at the front desk. In a March 7, 2018 letter to Orr, Zarzuela noted that Plaintiff had been living in Orr's apartment and must 'vacate immediately.' On March 17, 2018, Orr informed Plaintiff that Rose Associates 'didn't want [Plaintiff] back in [the apartment].' When Plaintiff attempted to retrieve his belongings from the apartment, security guards refused to let him in the building, stating that they would 'drag [Plaintiff] out . . . and get [him] arrested.' Plaintiff returned several times, 'but was not allowed entry by the security guards' except on one occasion – 'almost seven months later' – when he was allowed to retrieve his belongings."

Hannan first sued Orr and Rose Associates seeking possession of the apartment in New York City Housing Court, but struck out before Judge Ann Katz, whose brief opinion issued after a hearing in July 2018 stated: "Service on Jimmy Orr was not proper. A doorman is not a person who can accept service for a tenant. As for the Landlord, they had nothing to do [with] either the letting or the alleged lockout. Furthermore, movant has been out since March 17, 2018. For all these reasons there is no basis to restore petitioner to possession."

Then Hannan brought suit in federal court in October 2018, asserting the following claims: (1) a 42 USC Section 1983 claim premised on Defendants' violation of Plaintiff's constitutional rights; (2) family size, gender, and disability discrimination under the federal Rehabilitation Act of 1973 (Section 504) and the Fair Housing Act (FHA); (3) violation of Plaintiff's rights under Article 1 of the New York State constitution; (4) eviction without a court order, in violation of New York City Administrative Code § 26-251; (5) failure to provide "a 10-day Notice to Quit," in violation of New York City Administrative Code § 713; and (6) false advertising in violation of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 41 et seq. His Administrative Code claims were premised on his having resided in the apartment for more than 30 days. Surprisingly, he did not allege any violations of the state or city human rights laws, which forbid discrimination because of disabilities or sexual orientation. His Section 504 claim is premised on being an individual with a disability because of his HIV-positive status.

Magistrate Judge Freeman recommended that certain causes of action be dismissed, but would allow Hannan to sue under two federal statutes, the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act, as well as New York City Administrative Code, Section 26-251, based on his factual allegations about his residency in the building. She rejected the defendants' argument that the court lacked jurisdiction under the doctrine that losing parties in state court cannot relitigate their claims in federal court. She found that the relief sought by Hannan in this action was different from what he sought in housing court.

Judge Gardephe agreed that the court had jurisdiction, and also agreed as to the Fair Housing Act and NYC Administrative Code claims, but disagreed as to Section 504, finding that Hannan's allegations did not meet the requirement under that statute that the defendant be a "program" receiving "federal financial assistance." Judge Freeman had recommended that the Section 1983 and state constitutional claims be dismissed with prejudice, rejecting Hannan's argument trying to conceptualize Rose Associates and its employees as state actors, but Judge Gardephe dismissed those claims without prejudice, giving Hannan another shot at trying to come up with facts supporting an argument that state action could somehow be found.

At this point, Hannan could benefit from the services of a lawyer who can conduct discovery and conceive a strategy for prevailing on the remaining claims, and perhaps framing an amended complaint to add in human rights law claims. ■

# Gay Inmate's Dispute over Television Volume Leads to First, Eighth, and Fourteenth Amendment Claims

*By William J. Rold*

Gay inmate Lloyd George Morgan, Jr., who has diagnosed mental health problems, alleged that officers deliberately turned up the prison day room television's volume to deprive him of sleep. When Morgan filed a grievance, a back-and-forth escalation ensued, eventually resulting in officers and supervisors calling Morgan a "snitch," "rat," "pedophile," and "faggot." U.S. District Judge Victor A. Bolden parses each claim and defendant, and allows Morgan to proceed on several causes of action against a motion to dismiss in *Morgan v. Semple,* 2020 WL 1974381 (D. Conn., Apr. 24, 2020).

The harassment occurred on multiple occasions, including officers' urging other inmates to "fuck [Morgan] up and get his ass off of the unit." They allegedly issued false disciplinary reports (which were dismissed), and the retaliation was allegedly known by supervisors, deputies, and the warden. Officers told Morgan that they had killed one of his sisters and assaulted another sister. After Morgan was placed in segregation, officers told him that they put acid in his food. They allegedly told other inmates in protection that Morgan "liked little pee pees," meaning boys. Morgan says that defendants threatened to castrate him and slice his throat. Already psychologically vulnerable, Morgan alleges he suffered "extreme emotional distress, anguish and anxiety" as a result of this pattern of behavior. He was placed on suicide watch.

While in close confinement, Morgan alleges that defendants placed "listening devices" in his cell and interfered with his legal work, access to attorneys, and this case. It is not possible to ascertain from the opinion at this stage (motion to dismiss) what (if any) part of all these allegations may be fanciful – and Judge Bolden does not try to do so.

Judge Bolden begins by determining whether some claims in the second amended complaint should be permitted to "relate back" for statute of limitations purposes under F.R.C.P. 15(c). There is a good discussion of Supreme Court and Second Circuit law on this point. Judge Bolden dismisses some added claims as posing an "undue" prejudice to the defense, given the stage of discovery.

Finding that Morgan's claims about interference with his legal work boil down to two legal phone calls, Judge Bolden dismisses these claims. This dismissal is separate from the analysis of retaliation for exercising First Amendment rights by filing grievances.

Morgan is permitted to proceed on his retaliation claims. "The filing of prison grievances is a protected activity." *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019). The question is whether the conduct "would deter a similarly situated individual of ordinary firmness from exercising . . . constitutional rights." *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003). The plaintiff "is not required to show that he was actually deterred." *Brandon,* 938 F.3d at 40. Here, the allegations (calling Morgan a snitch, pedophile, anti-homosexual slurs, threats, stomping on his grievances in front of Morgan and others) are sufficient. Judge Bolden found the complaint alleged a "concerted effort" to retaliate. Retaliation claims against supervisory defendants for failure to act are dismissed as inadequately connected, under *Poe v. Leonard,* 282 F.3d 123, 140 (2d Cir. 2002).

Even though Morgan was never actually assaulted, Judge Bolden allows him to proceed on his claim of deliberate indifference to his safety. "Intentionally exposing an inmate to the risk of harm . . . with no penological purpose is indicative of deliberate indifference" at this stage of the proceedings, under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). There is a lengthy national survey of circuit law on this point – including *Charles v. Orange Cty*., 925 F.3d 73, 87 (2d Cir. 2019) (serious risk of psychological harm to jail detainees released without adequate discharge planning) – as well as case law from the Fourth, Seventh, Ninth, and Tenth Circuits.

Morgan's claims of sexual orientation discrimination under the Equal Protection Clause also remain at this point under the "quasi-suspect scrutiny" required by *Windsor v. U.S*., 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013). Morgan will have to show at summary judgment that he received adverse treatment substantially because of his sexual orientation, citing *Vega v. Artus*, 610 F. Supp. 2d 185, 209–10 (N.D.N.Y. 2009).

Judge Bolden dismisses Morgan's state law claims. He finds no private cause of action under the sexual orientation protections of Connecticut's Human Rights Law, Conn. Gen. Stat. § 46a-58. Tort actions against prison officials are remitted to state administrative claims and state courts under Conn. Gen. Stat. § 4-165(a).

Defendants argued that Morgan's damages claims should be dismissed under the Prison Litigation Reform Act [PLRA] because he did not claim "physical injury" in support of emotional damages, as required by the PLRA. While this may bar compensatory damages, it does not preclude nominal or punitive damages for the constitutional torts, the court found, citing *Toliver v. City of N.Y*., 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (even if plaintiff could not establish his injuries "stemmed from an incident in which he suffered physical injuries" he could still recover damages for injuries to his First Amendment rights and nominal and punitive damages for other constitutional violations).

Morgan is represented by Updike, Kelly & Spellway, P.C. (Hartford). ■

# Idaho District Court Partially Stays *Edmo* Order as State of Idaho Prepares Petition for *Certiorari*

*By William J. Rold*

*Law Notes* has been covering *Edmo v. Corizon*, Inc., a case about gender confirmation surgery for Adree Edmo, an Idaho transgender prisoner, for three years. U.S. District Judge B. Lynn Winmill's preliminary injunction (converted to a final injunction) for the surgery was affirmed by the Ninth Circuit last year, in *Edmo v. Corizon,* 935 F.3d 757 (9th Cir. 2019). Rehearing *en banc* was denied over multiple dissents, as reported in *LawNotes* (March 2020 at pages 3-5). The Ninth Circuit issued its mandate about March 1, 2020, also denying a stay pending petition for a writ of *certiorari*.

Jurisdiction in the case is now back before Judge Winmill. Defendants IDOC and Corizon (contractual provider, who was dismissed from claims for injunctive relief by the Court of Appeals) requested a stay from Judge Winmill pending the petition to the Supreme Court. Plaintiff's counsel offered to agreed to a stipulated stay, if defendants would give Edmo access to her medical records in the interim, agree to preserve all evidence pending final resolution of the case, and participate in depositions of people who left government service during the litigation. Defendants refused on all counts, arguing there would be no prejudice by granting a full stay.

Judge Winmill granted a stay pending the filing of a petition for *certiorari,* which is due May 11, 2020, in *Edmo v. Idaho DOC,* 2020 WL 1907560 (D. Idaho, Apr. 17, 2020), under the general standards of *CMAX, Inc., v. Hall,* 300 F.2d 265, 268 (9th Cir. 1962). He also ordered that: (1) defendants give Edmo access to her medical and custodial records so long as this case is in litigation; and (2) defendants retain such records regardless of their default retention practices on deleting or destroying records. (Incredible this took a federal court order.) Judge Winmill denied the depositions for now, stating that Edmo failed to show that delaying them until after the Supreme Court acts on the petition would create irreparable injury, since the most pressing injunctive issues are going forward. Judge Winmill wrote that he was referring to the pre-surgical visits and consultations, which are proceeding per his order of October 2019, which is not being stayed, subject to unavoidable delays due to COVID-19. "Defendants must continue to comply with the order by providing all necessary presurgical treatments while the Supreme Court considers whether to take up the appeal."

It is unfortunate but it is *realpolitik,* that plaintiff's counsel probably acceded to the stay to keep jurisdiction in the District of Idaho as long as possible and avoid defendants' moving for an unqualified stay under Supreme Court Rule 23. The latter, in practical terms, if not in theory, could commit justices to a tentative opinion or a dissent on gender confirmation surgery for prisoners without benefit of full briefing or oral argument – or decrease the likelihood that Supreme Court review of the issue could be deferred for now by denying *certiorari* until more Courts of Appeals have addressed the matter on the merits. ■

# Transgender Inmate Denied Confirmation Surgery in Fifth Circuit Also Loses Claim for Retaliation

*By William J. Rold*

In *Gibson v. Collier*, 920 F.3d 212 (5th Cir.), *cert. denied,* 140 S. Ct. 653 (2019), the Fifth Circuit ruled that the Eighth Amendment did not require Texas to provide gender confirmation surgery for transgender inmate Scott (Vanessa) Lynn Gibson. Now, in *Gibson v. Jean-Baptiste,* 2020 WL 2078307 (5th Cir., April 29, 2020), a different panel rules that qualified immunity defeats her claims for retaliation. The *per curiam* and not-for-publication decision of Circuit Judges Edith H. Jones (Reagan) and Leslie H. Southwick (Geo. W. Bush) and Senior Circuit Judge E. Grady Jolly (Reagan) affirms the dismissal by U.S. District Judge Alan D. Albright (Trump) of the W.D. of Texas.

The retaliation allegedly began while Gibson's appeal was in the Fifth Circuit. The Texas Observer, a bi-monthly progressive/humanist publication in Austin, published an article on Gibson's district court case and her appeal on September 15, 2016. Within a day, a correction officer, defendant Francois Jean-Baptiste, commented on the article, writing: "Really, he's still going to fight it[?]." Another officer (Dakota Hoffman) responded: "Let the f[ . . . . . ] suffer" – to which Jean-Baptiste replied: "One to the back of the head."

These comments were echoed by a third officer (Susan Johnson-Dias, who posted a picture of herself in uniform), with the comment: "give him a state razor and a bandaid . . . do it yourself sex change." The comments of these officers, who self-identify as "Texas Correctional Employees," are still on-line by a "shared link" from Hoffman, along with a picture of Gibson.

The story was picked up by KWTX-TV, a CBS affiliate in Waco, which showed a picture of Gibson along with the comments. It was also covered by the Houston Press, in an article of October 13, 2016, "Texas Jailers Make Crude Remarks about Transgender Inmate Online." A spokesman for the TDCJ said the comments were "not appropriate," but he indicated that the department did not have a policy about officers' on-line chats.

Gibson sued Jean-Baptiste, accusing him of retaliation and threatening her life. The Court of Appeals wrote that it questioned "whether the comments demonstrate an intent to retaliate" but that Gibson failed to show "a retaliatory adverse act," so qualified immunity was upheld.

The Court observed that the "comments were not addressed to Gibson; Gibson learned of them after the fact and indirectly." The Court said: "Apparently, a reporter that had worked on the [Observer] piece subsequently contacted Gibson and brought the comments to his attention." While this may be literally true, it overlooks the sensation created by the remarks, on-line, on television, and in the print media. This writer found full text and pictures within less than a minute.

The Court relies on a series of its prior cases (mostly unpublished, like this one) that hold that verbal threats to prisoners "alone" are not constitutionally actionable. *See, e.g., Hudson v. Univ. of Tex. Med. Branch*, 441 F. App'x 291, 292–93 (5th Cir. 2011) (officer's threat to dilute inmate's insulin with water after he filed a grievance) [string cite omitted; Hudson is the strongest case for point]. The Court found the "severity" of the threat, alone, to be insufficient without a retaliatory act.

Gibson tried to plead a retaliatory "act," by seeking to amend her complaint to allege transfer from low security in a protected setting to general population in a maximum-security prison. The district court refused to allow the amendment, because the new facility was in the Northern District of Texas, and her claim had to be brought there. The Fifth Circuit appears not to have addressed venue for claims of retaliatory transfer, but see *Twitty v. Ashcroft*, No. 04-CV-410, 2008 WL 346124, at *2 (D. Conn. Feb. 4, 2008) (finding that a claim of retaliatory transfer arose at the prison from which the plaintiff was transferred); cf *Olin v. Wakinekona*, 464 U.S. 238, 241 (1983) (challenge to prisoner's transfer from Hawaii to California brought in Hawaii). The Fifth Circuit did not address the transfer, but it found the absence of a "retaliatory act" to be fatal to Gibson's claims against the officers.

Judge Albright also observed in the district court that the officers may have been engaging in protected First Amendment speech. He found it unnecessary to wade into the public employees' free speech doctrine under *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). The Fifth Circuit does not address the officers' "free" speech.

The Fifth Circuit used masculine pronouns throughout its short opinion, citing to TDCJ "policy" and its prior decision in Gibson affirming denial of confirmation surgery. This seems gratuitous bias masquerading as evenhandedness. TDCJ's briefing did not use gender pronouns (something that any writer knows is intended). They called Gibson "plaintiff" or "offender Gibson." Judge Albright used feminine pronouns in the district court.

The Court of Appeals used masculine pronouns in its first opinion in Gibson, 920 F.3d at 217 n.2. The Supreme Court cases it cited do not support such usage. In *Farmer v. Brennan*, 511 U.S. 825 (1994), Justice Souter's opinion for the Court assiduously avoids use of gender pronouns throughout. The Fifth Circuit's jump cites to the Court's opinion supposedly using "him" or "his" to refer to transgender inmate Farmer (511 U.S. at 832, 851) are to quotations from the Respondents' Brief, not language from the Court. The reference by Judge Ho in Gibson I to Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (overturning gender-based definition of military dependent spouse), contains the quotation: "[S] ex . . . is an immutable characteristic determined solely by . . . birth."

The quotation is both out-of-context and distorted by ellipses. Justice Brennan compared gender discrimination to discrimination based on race at a time when sex discrimination was in legal infancy. Judge Ho also changed the meaning of the phrase "determined solely by an accident of birth" by deleting the words "an accident of" from the quotation. If such is possible, Justice Brennan must be turning in his grave. The altered quotation is also a swipe at Justice Ginsburg, who is still on the Court and was lead counsel in *Frontiero*.

There are now five judges in the Fifth Circuit (Judge Barksdale dissented in Gibson I) who have shown open hostility to transgender prisoner claims. By allowing officers to threaten transgender inmates with impunity, the culture of harassment can only grow. ■

# Louisiana Court of Appeal Affirms Medical Malpractice Award of $45,000 Against Doctor and Clinic for Failing to Inform Patient of Their HIV Status for Fifteen Months

*By David Escoto*

On April 15, 2020, the Louisiana Fourth Circuit Court of Appeal affirmed a trial court's medical malpractice judgment and award of $45,000 against a doctor and specialty clinic who failed to inform a patient of their HIV-positive status. Dr. Jeffrey Wayne Coco, an infectious disease specialist at Internal Medicine Specialist, Inc.(IMS), argues that he did not breach the applicable standard of care when he did not inform Thomas C. Dufreche of his HIV-positive status. Fifteen months passed between Dr. Coco receiving the results and Dufreche learning of his status from a social worker of the Louisiana State Department of Health. *Dufreche v. Coco*, 2020 WL 187608 (La. Ct. App. April 15, 2020). Judge Dale N. Atkins affirms every misstep Dr. Coco and IMS took when handling Dufreche's case and confirms the outrageousness of their conduct.

Dufreche would regularly obtain HIV testing before 2012. Before seeing Dr. Coco, Dufreche would regally consult his primary care physician, Dr. Alan Bowers, for testing. In May 2012, Dufreche went to Dr. Bowers and tested negative. A few weeks later, Dufreche went into the emergency room at Touro Infirmary Hospital, and another HIV test came back negative. The medical providers at the emergency room performed other diagnostic tests but were unable to diagnose Dufreche's illness. Dufreche's symptoms persisted, and Kevin Adams, his friend and neighbor who worked at Touro, suggested that he seek follow-up treatment from Dr. Coco at IMS. Adams assisted Dufreche in securing an appointment on June 12, 2012.

The appointment lasted forty-five minutes, and according to Dufreche, Dr. Coco stated not to worry because he believed that the symptoms were a result of a virus that would run its course. Despite this, Dufreche requested an HIV viral load test. The results of this test took a few weeks to get back. According to Dufreche, at the end of the appointment Dr. Coco informed him that he would be notified when the results came in.

Dr. Coco received the results of Dufreche's test on June 19, 2012 and reviewed them on June 21, 2012. The test showed that Dufreche was HIV-positive and a very high viral load. Dr. Coco never notified Dufreche that he received the test results, nor did he notify anyone at IMS. As a result, Dufreche never had a follow-up appointment to learn of his results.

Dufreche went fifteen months without knowing the results of his test and HIV status. In September 2013, Dufreche went to Dr. Kenneth Combs for small spots on his leg, sinus issues, and a flu shot after he was unable to make an appointment with Dr. Bowers. At Dufreche's request, an HIV test was administered and revealed he was HIV-positive. However, before Dr. Combs could notify Dufreche of his status, Dufreche received a call from a social worker at the Louisiana State Department of Health to assist him in finding medical care due to a blood test that had been reported to the state. It was not until Dufreche met with the social worker a few days later that he discovered the blood test that the social worker was referring to was the test conducted by Dr. Coco at IMS. Dufreche subsequently sought treatment from Dr. Bowers.

After a unanimous decision from a medical review panel that there were issues of material fact bearing on Dr. Coco and IMS's liability, Dufreche filed a petition for damages on April 26, 2017, with the Orleans Parish Civil District Court. The petition alleged that Dr. Coco and IMS deviated from the applicable standard of care in mismanaging Dufreche's case by failing to inform Dufreche of his HIV status. Dufreche also alleged that he suffered emotional distress as a result of the delay of his HIV prognosis and treatment, and from not knowing whom he may have infected during the fifteen months he was unaware of his status.

At a bench trial held in April 2019, the court held Dufreche met his burden for a medical malpractice claim and that Dr. Coco and IMS had breached the applicable standard of care resulting in negligent infliction of emotional distress. The trial court awarded Dufreche $45,00 in damages.

On appeal, Dr. Coco and IMS allege four assignments of error on the trial court's determination. First, they allege that the court erred in finding a breach of the applicable standard of care by expecting Dufreche to follow up himself with IMS. Second, they allege the court erred in not assessing comparative fault and Dufreche's failure to mitigate his own damages. Third, they allege error in the court refusing to allow cross-examination of Dufreche into his safe-sex practice to demonstrate a lack of credibility. Lastly, the court erred in holding Dr. Coco and IMS responsible for negligent infliction of emotional distress because there is no evidence they acted outrageously.

Dr. Coco and IMS contend that it is standard practice to require patients to return for in-person disclosure of their HIV test results because of the sensitive nature of the tests. Center for Disease Control (CDC) guidelines, and expert testimony at trial, indicates the validity of Dr. Coco and IMS's argument. However, Dufreche and IMS produced no evidence that the policy regarding follow-up appointments was ever disclosed to Dufreche. Further, Dufreche directly testified that he was never informed of the policy and was told that he would be notified when the results came in. The court does not find

Coco and IMS's argument convincing. The court agrees with the trial court's determination that the policy itself was not the breach of the applicable standard of care, but the fact that the policy was never communicated to Dufreche was. Further, Dr. Coco testified himself that he has a duty as an infectious disease physician to prevent the spread of HIV, a duty he did not meet by failing to notify a patient of their HIV-positive status.

Regarding Dr. Coco and IMS's comparative fault argument, the court is not convinced. Dr. Coco and IMS contend that Dufreche had a duty to follow-up on the test he had requested. Further, they allege that Dufreche's failure to practice safe-sex exacerbated the damages related to the emotional distress of possibly unknowingly transmitting HIV. However, in reviewing the trial court's record, the court finds there was no error in the allocation of fault. Absent a manifestly erroneous determination, great discretion is given to the trier of fact in the allocation of fault. The court does not find any manifestly erroneous decision here. In addition to not being informed of the policy, the court notes that this was Dufreche's first and only time at IMS. There would be no way of learning of the policy other than from Dr. Coco or an IMS employee. These facts support the trial court's conclusion that the responsibility was entirely on Dr. Coco and IMS to contact Dufreche regarding his test results.

Dr. Coco and IMS argue that cross-examination of Dufreche was required to establish that he was not being genuine and truthful about the impact of the fifteen-month delay on his emotional distress. The court does not buy the argument that had they been allowed to cross-examine about Dufreche's safe sex practices after learning his diagnosis, they would have been able to show his lack of credibility. Trial court's admission for evidence is viewed through an abuse of discretion standard of review. Similar to the standard of review of comparative fault, this is very deferential to the fact-finder. The court here finds that the trial court record supports Dufreche's credibility. Dufreche testified to lost sleep and a lack of appetite. Further, the court notes that Dufreche's testimony about learning of his HIV-status through a social worker enhancing his distress is in line with the reasoning behind the CDC guidelines, and IMS's own alleged practices.

In their final attempt to assign error on the trial court's holding, Dr. Coco and IMS allege that there should not have been an award for negligent infliction of emotional distress because there was no evidence in the record that they had acted outrageously. The court does not find this argument has any merit either. Instead, the court agrees with Dufreche that receiving the results and then not informing him of the results for fifteen months meets the standard of outrageous conduct. The court again notes that the fact that Dr. Coco, as an infectious disease physician, testified to having a duty to prevent the spread of HIV and then did nothing when he received the results adds to the level of outrageousness. The record reflects credible testimony that the delay caused Dufreche's emotional distress. The court concludes that there is nothing in the record that would indicate the emotional distress was unreasonable.

Every single one of Dr. Coco and IMS's assignments of error failed, and the court affirmed the $45,000 award against them. The court did not find any of the deferential standards given to the fact-finder were violated in any way.

Thomas C. Dufreche is represented by T. Carey Wicker, III, James Alexander Watkins, Vincent E. Odom of Capetelli & Wicker. Jeffrey Wayne Coco and Internal Medicine Specialist, Inc are represented by Kathryn M. Caraway, Ann Marie LeBlanc, Erica L. Andrews of Caraway Leblanc, L.L.C. ■

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

# Arkansas Appeals Court Affirms Grant of Custody of Child to Straight Father of Son with Lesbian Mother

*By Bryan C.J. Xenitelis*

The Court of Appeals of Arkansas has ruled that the father of a 7-year-old child was correctly granted custody by a lower court, ruling against his former partner who is now in a lesbian relationship and married to a woman, in *Pelayo v. Sims*, 2020 Ark. App. 268 (Court of Appeals of Arkansas, April 22, 2020).

The facts of this case are far too numerous for a detailed exposition in *Law Notes*. But to summarize: The parents were never married to each other. The mother had another child five years before the child in question was born. The child in question was the result of a relationship where the mother and the father lived together until three months before the child was born. The father had a limited role in the boy's life for quite some time. During the child's lifetime, the mother went through several relationships and was convicted of a shoplifting crime and a traffic violation for rear-ending a vehicle. She dated a man who was transitioning to female – a relationship that ended with abuse and criminal action against her (the partner). Then she met her now-wife within a month of ending the last relationship, got engaged only weeks later, and married less than a month after that. The male child exhibited certain behaviors, including liking to wear pink shoes and playing with dolls, and after the time the father was awarded custody and the child left his mother and older sibling, it was alleged that the child would cry often.

The mother's most important claims (she made nine separate ones to the lower court that were now on the appeal) for why she should have custody

were that the father was not part of the child's life for most of his life and provided no support, that she and the father live in different states and so a change of custody would result in her total separation from the child, that she is a good mother, and that the child's separation from his older sibling would be damaging.

The father argued that he had proof of stability in his life (same address, same job, healthy relatives nearby to assist), that he could provide for the child, that he showed a lot of concern that the mom was emotionally damaging the child with her rapid changes in relationship and with the idea of the child having to deal with the very complicated idea of his mother's sex transition at his age.

In her opinion, Judge Meredith B. Switzer noted that the appeal court is permitted to review all facts *de novo*, but to overturn the lower court's decision it must determine that the court was "clearly erroneous." Addressing all of the mother's concerns after an extremely long and detailed fact pattern, Judge Switzer went through each of the mother's issues. She stated that "we recognize and give deference to the… court to evaluate the witnesses, their testimony, and the child's best interest." She found the father had provided some amount of child support; that the father had a plan for where the child could go to a good school; that while an *ad litem* recommended the mother have custody, the trial court was not bound by that recommendation; that the court didn't have jurisdiction to hear a child support issue that was not raised previously; and that the mother's new evidence of the child crying and other issues was not unreasonably refused by the lower court in her request to grant a new hearing.

Finding no clear error or abuse of discretion in the decision below, Judge Switzer affirmed the decision of granting custody to the father.

Mother is represented by Dee Anna Weimar; Father by Derick Allison of Walters, Gaston, Allison & Parker. ■

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*Bryan Xenitelis is an attorney and an adjunct professor at New York Law School.*

# Texas Appeals Court Allows Adoptive Parent's Former Same-Sex Spouse to Adopt the Child They Were Raising Together Before They Were Divorced

*By Arthur S. Leonard*

A three-judge panel of the Texas Court of Appeals in Texarkana has ruled in *In the Interest of T.E.R.*, 2020 WL 1808869, 2020 Tex. App. LEXIS 2964 (April 9, 2020), that the former same-sex spouse of a lesbian adoptive parent has standing to seek to adopt their child, based on the all the circumstances under which the child was adopted and jointly raised by the women prior to their divorce. Justice Ralph K. Burgess wrote the opinion for the panel.

Lisa Sullivan and Mandy Roberts, Texas residents, began dating in 2008. Lisa legally changed her surname to Mandy's in August 2009. In November 2009, the women travelled to Connecticut to get married, and then returned to Texas, where they lived as a married couple, although their marriage would not be recognized in Texas until 2015, when the state's constitutional and statutory ban on same-sex marriage were declared unconstitutional by the 5th Circuit shortly after the Supreme Court issued its ruling in *Obergefell v. Hodges*.

After marrying, they decided to adopt a child. Lisa's petition to adopt T.E.R., an infant, was granted on January 22, 2014. In the summer of 2017, Mandy filed for divorce. In the final divorce decree, the trial court found that Lisa was T.E.R.'s sole legal parent under the adoption decree. The trial judge gave Mandy and Lisa joint managing conservatorship of the child, with Lisa having the exclusive right to determine T.E.R.'s primary residence within Texas. "The decree also stated, under the heading 'Mutual Release,' that the 'release did not include any future claims of adoption."

The relevant Texas statute does not treat standing to adopt as categorical based on status, but rather provides for a factual inquiry as to whether somebody should be allowed, because of their "substantial past contact" to a child, to be able to petition for adoption. Whether somebody has standing is a mixed question of fact and law, and the role of the appellate court in reviewing the issue of standing is to determine whether the trial court contained sufficient evidence on the quality and quantity of the petitioner's past contact with the child to meet the "substantial past contact" test.

In this case, the evidence before the trial court was overwhelming that the women, already married, had together decided to adopt and raise a child. Mandy had first met the birth parents, who agreed that they would give up their yet-to-be-born child for adoption. The evidence showed that Mandy and Lisa were both intended to be parents of T.E.R., and in fact at the time of the adoption Lisa told Mandy's mother that she was going to become a grandmother. When the child was born, but prior to the legal adoption, they made up a celebratory certificate naming both of them as parents, and they sent out announcements about the birth in both their names. They decided to give T.E.R. Mandy's surname, just as Lisa had taken Mandy's surname even before the women had married. "In 2013, Lisa filed a petition for adoption of T.E.R. In January 2014, the trial court terminated the parental rights of T.E.R.'s biological parents and found that it was in T.E.R.'s best interest for Lisa to adopt him. Among other things, the trial court ordered that T.E.R. would retain Mandy's surname."

"When Mandy was asked why the couple had decided that Lisa should be the party to legally adopt T.E.R.," wrote Justice Burgess, "she responded that they had been discussing the financial

aspect of adopting T.E.R. and that 'Lisa had a legal plan, like Legal Aid or whatever the program was called.' She continued, 'Instead of asking my parents for five grand or whatever else monetary amount, we chose to go with Lisa's legal plan that ended up $750 for an adoption.' In addition to Lisa, Mandy's mother and father were present in the courtroom the day T.E.R. was adopted. Mandy explained that she was not present because she was required to work that day."

Mandy provided extended testimonial evidence about her involvement in raising T.E.R., while Lisa tried with her testimony to minimize the extent of Mandy's role. The trial judge found Mandy's testimony to be more credible. "According to Mandy, she could not recall a time when Lisa considered Mandy to be anything other than T.E.R.'s mother. Likewise, Mandy said that she had never considered herself anything but his parent. She also said that Lisa never discouraged T.E.R. from referring to Mandy's parents as 'Nana' and 'Pawpaw.' Mandy testified that it had always been her intent to adopt T.E.R. She said she had exercised all of her visitation rights with T.E.R. [after the divorce] and that she had always been a constant figure in his life. When T.E.R. got older, Mandy enrolled him in St. Mary's school. She signed a contract with the school so that she could pay his tuition, which she did. Mandy said that she did not receive any "backlash" from Lisa for enrolling him in St. Mary's or for signing the contract with the school."

After the trial court held its hearing, the judge appointed Tracy Brown, a licensed clinical social worker, to perform an adoption evaluation. Brown's report confirmed Mandy's testimony about the loving relationships she had with T.E.R., and Brown supported the adoption.

"When we consider only the evidence that supported the trial court's findings—and disregard all contrary evidence and inferences unless the trial court could not have done so—we conclude that there was legally sufficient evidence to support the trial court's findings of fact," wrote Justice Burgess.

Lisa's argument on appeal was that there was not sufficient evidence of "substantial past contact," focusing on the time since the divorce. "Lisa erroneously narrows our consideration of Mandy's relationship and contacts with T.E.R. to the time period following Lisa and Mandy's divorce, while completely ignoring their relationship prior to that time," observed the judge. "The record is replete with evidence demonstrating that Mandy had substantial contact with T.E.R., beginning with the day he was born. Mandy fed him, clothed him, rocked him, bathed him, gave him his medications, and, in general, took care of his everyday needs. The evidence also showed that Mandy continued to care for T.E.R. when he was a toddler and during his early childhood years. She attended all of his birthday parties and spent time with him during holidays. Mandy was present when T.E.R. learned to walk and talk, and she had helped him achieve those milestones. Mandy was involved in T.E.R.'s education and paid for much of his school tuition, his school supplies, and his school lunches. Mandy accompanied T.E.R. to his doctor's appointments, and she attended his extracurricular activities, such as soccer practices. And, significantly, Mandy did all of these things at a time when she, Lisa, and T.E.R. lived together as a family unit." Thus, Lisa's objection on this ground was rejected.

The court next turned to the "best interest of the child" issue. "Specifically" wrote Burgess, "Lisa maintains that Mandy's adoption of T.E.R. would not be in his best interest for the following reasons: Mandy agreed to skirt Texas family law prohibitions concerning same-sex marriage by traveling to Connecticut to marry Lisa. Mandy has been unable to show any stability in her life after the divorce from Lisa. She has married and then divorced, Kelly Ryan. Mandy's testimony concerning her divorce from Kelly so concerned the judge that he gave her precautionary Miranda warnings. She has continuously brought litigation concerning, and vows on the record to continue to be a vexatious litigant until she gets her way. Mandy has treated [T.E.R.] as a "prize" that she wants to win. And someday [T.E.R.] will read this record and ask Mandy, 'WHY?'"

At this point, the court summarized Social Worker Brown's report, and wrote, "When we consider the testimony from the hearings, along with the results of Brown's evaluation, we find that (1) the court had sufficient information upon which to exercise its discretion and (2) it did not err when it found that it was in T.E.R.'s best interest for Mandy to adopt him."

Mandy is represented by Jessica Kroscher. Lisa is represented by Ebb B. Mobley. ■

# Magistrate Judge Rejects Transgender Plaintiff's Motion to Proceed Anonymously

*By Arthur S. Leonard*

Despite widespread media reporting of horrific violence against transgender people in the United States, U.S. Magistrate Judge Michael G. Gotsch, Sr., believes that a transgender plaintiff and his female companion should not automatically be allowed to undertake civil litigation – in which the plaintiff's gender identity is an issue – under pseudonyms or initials instead of their legal names, even though the defendant, who is represented by counsel, did not oppose their motion for permission to proceed anonymously. *Doe v. Gray*, 2020 WL 1545887, 2020 U.S. Dist. LEXIS 56595 (N.D. Indiana, April 1, 2020).

Judge Gotsch's opinion says nothing about the nature of this lawsuit, other than to indicate that plaintiff's transgender identity is "the subject of this suit." Thus, if plaintiff had to proceed under his legal name and the legal name of his female partner, who shares his surname, he would be "outed" as transgender to anybody who read any of the litigation documents or subsequent rulings by the court and, if the case attracted media attention, this "outing" could be on a broader scale. The court's decision to deny the motion confronts the plaintiff with a decision whether to proceed at the possible expense of incurring public hostility and perhaps even violence.

The judge began by asserting that even though the verified motion filed by plaintiff's counsel is unopposed, "The Court cannot, however, summarily grant Plaintiffs' Verified Motion based solely upon Defendants' lack of objection." He goes on to insist that because FRCP 10(a) requires that the complaint name the parties and that a case be "prosecuted in the name of the real party in interest," the plaintiffs needs to justify their request for anonymity. The court notes 7th Circuit precedent that "[t]he presumption that parties' identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the plaintiff . . . exceeds the likely harm from concealment." *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004). "Another court identified a common thread running through cases where anonymity was deemed warranted as 'the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.'" *Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981).

"Through the instant motion," Gotsch continued, "Plaintiffs suggest that John Doe's transgender identity—the subject of this suit—is just such a trait. Plaintiffs contend that if John Doe were forced to disclose his legal name, he would be 'disclos[ing] information of the utmost intimacy' and 'subject[ing] him[self] to undue harassment, embarrassment and would put him at risk of suffering injury.' Plaintiffs also contend that disclosing A.B.'s legal name, which includes John Doe's last name that she shares with him as his significant other, would also subject John Doe to "the same harassment, embarrassment and risk of injury.'"

In this case, Gotsch faulted plaintiffs for failing to present any "authority" for the proposition that a generalized possibility of future harm from public disclosure of plaintiff's gender identity would adequately rebut the presumption that parties' identities are public information. "In the cases where this Court has granted leave to proceed with anonymity," wrote Gotsch, "the relator has cited the appropriate rule, relevant case law, and has provided information about prior incidents or potential threats with sufficient specificity to allow this Court to draw an appropriate legal conclusion." Among the cases he cited against granting the motion was the *Hively* case, in which a lesbian challenged the denial of a faculty appointment at a community college under Title VII.

Gotsch concluded that "Plaintiffs have not provided the Court with sufficient information to balance Plaintiffs' private interests in privacy with the public's interest in all proceedings before this Court," and denied the motion. But the judge never discusses why there is a public interest in knowing that a particular individual is transgender.

Ironically, the lawsuit is pending in the South Bend Division of the federal district court. Former out gay presidential candidate Pete Buttigieg was mayor of South Bend for two terms, and during his administration that city enacted a ban on gender identity discrimination. However, Indiana's state law provides no particular protection for transgender people against discrimination or hate crime, and there is no indication in the opinion whether and where the plaintiffs live within the federal district. Many municipalities in the state do prohibit gender identity discrimination. More to the point, however, Indiana's peculiar hate crime law, enacted in 2019, does not specify particular grounds, leaving it up to courts in individual cases to decide whether a generalized prohibition against bias-motivated crime can be prosecute in the particular case.

The District Court judge assigned to the case is Damon R. Leichty. Perhaps an appeal to Judge Leichty would produce an opinion more sensitive to the general safety concerns of transgender litigants, but since he is a relatively recent Trump appointee, all bets are off.

The plaintiffs are represented by Russell W. Brown, Jr., King Brown & Murdaugh LLC, Merrillville, IN, for Plaintiffs.

For a contrasting opinion concerning a gay HIV-positive plaintiff, see *Doe v. Brennan*, 2020 WL 1983873 (E.D. Pa., April 27, 2020), discussed below in *Civil Litigation Notes* under Pennsylvania. ■

# South Carolina Students Topple Anti-LGBTQ Law

*By Ezra Cukor*

David C. Norton, U.S. District Judge for the District of South Carolina, entered a consent decree on March 11, enjoining enforcement of a decades old state law erasing LGBTQ people from health education. *GSA v. Spearman*, No.2:20-cv-00847-DCN (D.S.C., 2020).

Since the 1980s, South Carolina law has prohibited public schools from teaching any "discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases" as part of their health curriculum. S.C. Code § 59-32-30(A)(5). Educators who violated the law faced dismissal. S.C. Code § 59-32-80. Four other states have similar so called "no promo homo" laws on the books. *See,* Ala. Code § 16-40A-2; La. R.S. § 17:281; Miss. Code § 37-13-171; Tex. Health & Safety Code §§ 85.007, 163.002.

The Gender and Sexuality Alliance (GSA), Campaign for Southern Equality, and South Carolina Equality Coalition challenged the South Carolina law, represented by Lambda Legal. GSA is a student organization at Charleston High School for the Arts. On February 18, 2020, South Carolina Attorney General Alan Wilson opined that a court would likely find § 59-32-30(A)(5) served no legitimate state interest and in turn violated the equal protection clause. Plaintiffs filed suit on February 26, 2020.

The plaintiffs asserted that § 59-32-30(A)(5) violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against students who are lesbian, gay, bisexual, transgender, or queer. They alleged that the law prevented any mention of LGBTQ lives except stigmatizing discussion of the spread of sexually transmitted diseases. Plaintiffs alleged that in practice the law also foreclosed discussion of transgender lives, even though transgender people can be any sexual orientation, including heterosexual. They also asserted the law fostered a climate that placed LGBTQ youth at risk of bullying and suicidal ideation, among other harms. They described how LGBTQ youth faced bullying by their peers and indifference instead of positive intervention from staff. The peers of one student member bullied him even going so far as to call him "diseased" and kick him.

The court entered a consent decree declaring S.C. Code § 59-32-30(A)(5) "is not rationally related to any legitimate state interest, and thus cannot satisfy any level of judicial review under the Equal Protection Clause." *GSA v. Spearman,* No.2:20-cv-00847-DCN, 4 (D.S.C., 2020). The decree permanently enjoins officials from implementing § 59-32-30(A)(5) throughout the state. It requires the defendant superintendent of schools to take several affirmative steps to that end including insuring that school policies (curricula and the like) do not apply § 59-32-30(A)(5), notifying the superintendents of all school districts of the consent decree, and notifying them that they shall not apply § 59-32-30(A)(5) on paper or in the classroom. The superintendent must also maintain notice of the consent decree on her agency's website so long as § 59-32-30(A)(5) remains on the books. The court retained jurisdiction to enforce the consent decree.

Unfortunately, "No promo-homo" laws are not just a vestige of the 1980s and 1990s. A bill pending in the Alaska legislature forbids sex-education about LGBTQ and transgender people while requiring schools to teach "abstinence" until marriage and that "unborn life begins at conception." Alaska H. 7. (2019). Moreover, ongoing legislative efforts in numerous states seek to criminalize health care for transgender youth or exclude them from athletics. American Civil Liberties Union, *Legislation Affecting LGBT Rights Across the Country* (last updated March 9, 2020), https://www.aclu.org/legislation-affecting-lgbt-rights-across-country. ■

*The views contained in this article are my own and do not necessarily reflect the positions of my employer.

# Hawaiian District Court Allows Truvada Products Liability Case to Proceed Against Gilead Sciences

*By Corey L. Gibbs*

Brian Evans alleges that he developed irreversible diffuse arterialgia and was unable to work due to ingesting Truvada, a prophylactic drug to prevent HIV infection. Representing himself, he asserted product liability claims against Gilead Sciences, Inc., which manufactures and markets Truvada. Screening an amended *pro se* complaint, U.S. District Judge Derrick K. Watson found that Evans had alleged sufficient facts to support his claims, and ordered that his complaint be served on defendant to initiate the litigation. *Evans v. Gilead Sciences, Inc.*, 2020 U.S. Dist. LEXIS 60700; 2020 WL 1694344 (D.Hawaii, April 7, 2020). The court had previously dismissed Evans' first *pro se* complaint without prejudice, giving him an opportunity to reframe the complaint so it could pass screening.

Evans asserts the following product liability claims under theories of strict liability and negligence: (1) failure to warn; (2) negligence; (3) design defect; (4) fraud; and (5) breach of express and implied warranty.

Studies from 1997 showed a link between tenofovir disoproxil fumarate (TDF) and damage to bones and kidneys. However, the Food and Drug Administration (FDA) approved the use of TDF in 2001. Gilead made Truvada, a pre-exposure prophylaxis (PrEP) medication, with TDF and knew that consumers must take the medication in high doses for it to be effective in protecting them from HIV infection if they were exposed to the virus.

In 2002, a Gilead sales representative claimed TDF was benign and safe. The company failed to mention the potential harms to consumers' kidneys and bones. Following these claims, the FDA issued Gilead three warnings regarding the deceptive comments.

Scientists published research showing that tenofovir alafenamide fumarate (TAF) was more effective and less toxic than TDF. Gilead began testing TAF. However, the company did not disclose the results from the tests and abandoned TAF by 2004. Evans claimed that Gilead chose not to use TAF because it would make more money selling Truvada until the expiration of the Truvada patents. The FDA approved TAF in 2015. By 2018 multiple lawsuit were filed against Gilead due to the adverse effects of Truvada.

Judge Watson had to determine whether Evans's complaint sufficiently stated facts, if accepted as true, for which relief could be granted. The court found that the complaint was sufficient to pass screening, and Evans can proceed to have thxe defendant served. The court explained that Evans must complete forms sent to him by the Clerk's office and submit them to the U.S. Marshal in Honolulu, Hawaii. Next, the U.S. Marshal will mail the Complaint and Summons to Gilead Sciences, Inc., retaining copies. If the company does not return a Waiver of Service of Summons, the U.S. Marshal shall serve Gilead and later file the return of service for the company.

Evans must then serve Gilead, or its attorneys, with copies of all other documents submitted to the court. Finally, Evans should wait until after service and a notice to appear is filed by Gilead before he files any motions or other documents. Evans's failure to comply with the order may result in dismissal.

PrEP medications, like Truvada, act as a method of preventing HIV. You may have seen advertisements for PrEP on your morning commute, your television, dating apps, or even heard about it from your doctor. Do you recall any potential side effects? Companies should be forthcoming with the potential consequences of consuming their products, but sometimes it is left in the hands of our courts to hold these companies accountable. While courts are often balancing potential risks against potential benefits, we as consumers must do the same. However, in order to properly weigh the risks and benefits of our personal consumption, companies must disclose potential side effects. ■

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

# 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. COURT OF APPEALS, 3RD CIRCUIT** – Our lead story in the April issue of *Law Notes* was *Sumaila v. U.S. Attorney General*, which reversed a ruling by the Board of Immigration Appeals and an Immigration Judge, holding that a gay man from Ghana was entitled to a grant of asylum in the United States. On April 16, the court republished the decision as *Doe v. Attorney General of the United States* with a new citation from Westlaw, 2020 WL 1886282, and an indication that the case will be published in F.3d. Furthermore, the republished decision now identified the Immigration Judge who produced the original decision denying relief that the 3rd Circuit found not to be supported by the record evidence: Leo Finston. Otherwise, the republished opinion apparently replicates the original decision issued at the end of March.

**U.S. COURT OF APPEALS, 3RD CIRCUIT** – In *Idris v. Attorney General of the United States*, 2020 WL 2043432 (April 28, 2020)(*per curiam*), the 3rd Circuit rejected an appeal by a man from Nigeria, whose name was given five different ways in the caption of the case. The petitioner on appeal sought withholding of removal due to fear of persecution in Nigeria because of his sexual orientation. The case is procedurally complicated, but ultimately it turns on an adverse credibility determination by the Immigration Judge, which was upheld on appeal by the Board of Immigration Appeals. The petitioner, a native and citizen of Nigeria, spent several years in the United Kingdom before arriving in the U.S. in 1993 under the Visa Waiver Program, holding a U.K. passport whose provenance was questionable. He was subsequently convicted three times in the U.S., twice on forgery charges and once on a fraud charge for using a fake Nigerian passport at a bank. Homeland Security then moved to remove him and he sought asylum, withholding of removal and protection under the Convention against Torture, but the asylum and CAT claims fell away in the course of his journey through the administrative system. His initial claims, formulated when he was *pro se*, did not mention his sexual orientation as an issue, but he was able to confer with a lawyer before representing himself in the hearing before an Immigration Judge, and for the first time presented his story about persecution in Nigeria by gangs and by his parents. The IJ resolved credibility issues against him, however, particularly noting his failure to mention his sexual orientation in his filings. The asylum petition was dismissed as untimely, and the withholding and CAT claims were dismissed on credibility grounds. He appealed, *pro se*, to the 3rd Circuit. The court agreed with the government that there was really nothing to review, remarking that "even if we review the issue [i.e. the adverse credibility determination] we cannot find a compelling basis for disagreeing with the credibility analysis offered by the agency. The BIA homed in on the IJ's finding that Idris failed to include sexual orientation as a ground of persecution in his asylum application. The BIA characterized this as a 'critical omission,' and we agree. Idris' sexual orientation, and the attacks and injuries sustained from it, formed the centerpiece of his persecution claims (in fact, he ultimately abandoned the religious and ethnic grounds on appeal to the BIA). Coupled with the material inconsistencies and omissions highlighted in the IJ's decision, and Idris' criminal convictions for forgery and fraud and his many aliases, the adverse credibility finding is supported by substantial evidence." The court noted that Idris was removed to Nigeria last year, while this appeal was pending.

**U.S. COURT OF APPEALS, 9TH CIRCUIT** – A panel unanimously rejected a Mexican transgender individual's appeal from the Board of Immigration Appeals' affirmance of an Immigration Judge's denial of withholding of removal or protection under the Convention Against Torture (CAT) in *Gonzalez-Marciel v. Barr*, 2020 U.S. App. LEXIS 10877, 2020 WL 1686138 (April 7, 2020). The court found that "despite his credibility and past persecution for being a transgender male, the record supports the BIA's finding that with relocation to Mexico City he has not shown a probability of future persecution or torture." Contrary to the petitioner's argument that the Immigration Judge (IJ) had wrongly placed the burden on him to show that it would be unreasonable for him to have to relocate to Mexico City to avoid persecution, the court found that the IJ had followed the appropriate procedure, first finding that the presumption in favor of awarding withholding of removal which was created by the IJ's finding of past persecution had been rebutted by the government's proof about conditions for transgender women in Mexico City, thus making it appropriate to place on the petitioner the burden to show that relocation there would not be reasonable. "Gonzalez-Marciel contends that the BIA relied on changes in Mexican law designed to protect LGBT people, without verifying if those laws were effective," wrote the court. "However, the IJ, as instructed by the BIA, looked beyond mere changes in the law. The IJ cited multiple reports of tangible improvements in the treatment of the LGBT community in Mexico City. The BIA agreed that it would be 'substantially safer' for Gonzalez-Marciel to live in Mexico City than

in his home state, a finding that is supported by substantial evidence." The court also affirmed denial of relief under the Convention Against Torture, finding that the petitioner's evidence did not show any government involvement or awareness of the mistreatment he experienced at the hands of family members. The petitioner is represented by Leila Alemi and Niels W. Frenzen, University of Southern California Law School, Immigration Clinic, Los Angeles, CA, and Jean Elizabeth Reisz, Immigration Clinic, Gould School of Law, University of Southern California, Los Angeles, CA.

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**CONNECTICUT** – In *Deprey v. Fedex Freight, Inc*., 2020 WL 1702335, 2020 U.S. Dist. LEXIS 61754 (D. Conn., April 8, 2020), U.S. District Judge Michael P. Shea denied a summary judgment motion by the employer in a Title VII sexual harassment case brought by Jonathan Deprey, who is represented by counsel, James V. Sabatini, of Newington, Ct. Deprey's complaint and deposition testimony provided the court with detailed factual allegations about the way that Deprey's male co-workers at Fedex's Winsor Locks facility subjected him to sexually charged harassment on a daily basis, that much of this took place in the presence of supervisors who just chuckled along, that attempts to get the company to investigate Deprey's complaints produced a fruitless investigation in which an HR employee appears to have uncritically accepted denials by the employees who were questioned about Deprey's allegations. Deprey, whose sexual orientation is not discussed in the opinion, is presumably a straight man who was not of a mind to put up with what some courts tend to dismiss as ordinary "horseplay" in a predominantly male workplace. From Deprey's description, the male harassers, at least one of whom is an out gay man, seemed intent on embarrassing him with brazen sexual solicitations (of the "come here and suck my cock" variety) and he was called, among other things, a "faggot," suggesting to Judge Shea that a jury could conclude that some of Deprey's co-workers considered him to fall short of their image of acceptable heterosexual masculinity. In evaluating the employer's summary judgment motion, Judge Shea found that on every critical legal point that turned on facts, Deprey's allegations and deposition testimony had created issues of material fact that turn on credibility and require trial to resolve. The judge found that a jury that believed Deprey's allegations could conclude that the Title VII factors for a hostile environment case had been met, that supervisors were aware of what was going on and did nothing to stop it, and that the company's response was so ineffectual that its formal policies and training activities were insufficient to insulate itself from corporate liability. The judge also denied a motion for summary judgment on the supplementary claim Deprey asserted under Connecticut's anti-discrimination statute. Since Deprey is not challenging his discharge in this lawsuit, just the hostile environment to which he was subjected while employed, he is not after reinstatement, just compensation, which suggests that in light of the judge's ruling, the company is likely to offer a settlement.

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**FLORIDA** – The 4th District Court of Appeal affirmed a ruling by Palm Beach County Circuit Judge Donald W. Hafele dismissing a negligence claim against G4S Secure Solutions, the former employer of the Pulse Nightclub shooter, Omar Mateen. The complaint alleged that Mateen's employer's negligence contributed to his ability to obtain and use the weapons with which he perpetrated his homophobic slaughter of numerous individuals. *Abad v. Gas Secure Solution (USA), Inc*., 2020 WL 1546443 (April 1, 2020). The Court of Appeals, an opinion by Judge Burton C. Conner, agreed with the trial judge that plaintiffs, survivors of the event and family members of victims, had not sufficiently alleged a legal duty owed to them by the defendant employer. The complaint alleged: "The G4S D[efendants] have a duty to make an appropriate investigation of their prospective employees prior to, and use due care in, hiring them, providing them with firearm training, retaining them as employees, or obtaining/maintaining their Class G firearms licenses, but failed to do so with regard to M[ateen]." The court disagreed, finding that neither Florida precedent nor general common law principles would extend an employer's reasonable care duties in hiring to the extent argued by the plaintiffs, and questioned how such a duty could be reasonably defined. The court also rejected the plaintiffs' attempt to build their case based on a case in which a court found a duty on a government laboratory to safeguard anthrax toxin in its possession in a suit brought by an individual who received a letter with anthrax powder in it. The court put anthrax in an entire different category from guns: "The comparison of the deadliness of firearms with the deadliness of anthrax is not appropriate for two reasons. First, as the trial court noted, guns are "ubiquitous," and weapons training is an "intangible" that cannot be traced to the training provided by G4S. Second, firearms are frequently viewed as beneficial to society as instruments designed for protection, whereas anthrax is generally viewed as harmful to society as an instrument solely designed for terrorist purposes." One supposes that the National Rifle Association frequently views guns as beneficial to society, but many do not. Be that as it may, this lawsuit was a stretch from day one. Plaintiffs are represented by Kristoffer R. Budhram of the Law Offices of Conrad J. Benedetto, Jacksonville, and Andrew A. Harris of Burlington & Rockenbach, P.A., West Palm Beach, and Diana L. Martin of

# CIVIL LITIGATION *notes*

Cohen Millstein Sellers & Toll, PLLC, Palm Beach Gardens.

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**FLORIDA** – U.S. District Judge Beth Bloom has decided that three Lauderhill, Florida, police officers are not entitled to qualified immunity from a suit by a *pro se* plaintiff challenging the constitutionality of their behavior toward him when they took him into custody for a mental health evaluation. The ruling in *Watkins v. Bigwood*, 2020 WL 2084859 (S.D. Fla., April 30, 2020), is one of numerous rulings in this case that has bounce back and forth between the district court and the 11th Circuit Court of Appeals. We've reported on the case numerous times. In December 2014, some joggers called the police to complain about a man – Eric Watkins – in a city park who was loudly signing a song with homophobic lyrics and brandishing a knife at them. The three police officers arrived and determined that the guy appeared to be disturbed, took him into custody, and brought him in for some sort of mental health evaluation. That's at least one version of the story. Watkins has been suing the police and the town ever since. In this opinion, Judge Bloom deals with a motion by the police officers to dismiss the constitutional claims against them on qualified immunity grounds, but Judge Bloom concludes, taking as true Watkins' factual allegations (which the police officers hotly dispute), that grounds for qualified immunity do not exist. Of course, that's assuming Watkins' allegations are true. Since the parties have highly conflicting stories, and at this point the district court is on record that Watkins' story would raise plausible constitutional claims, this might have to go to a trial unless the defendants are willing to buy off Watkins.

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**LOUISIANA** – Lambda Legal reports a victorious settlement in their lawsuit against the Iberia Parish Sheriff's Office on behalf of William "Liam" Pierce, whose offer of a position as a deputy sheriff evaporated when a medical evaluation revealed that he was HIV-positive. Under the terms of the settlement, Pierce gets $90,000 for withdrawing the case, and the Sheriff's Office will change its policy regarding HIV-positive applicants and officers. The office staff will get training on HIV-related issues, and the office's non-discrimination policy will be amended to include a ban on discrimination because of HIV status.

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**GEORGIA** – In *Benavides v. Gartland*, 2020 WL 1914916, 2020 U.S. Dist. LEXIS 69182 (S.D. Ga., April 18, 2020), U.S. District Judge Lisa Godbey Wood rejected a petition by several individuals in ICE detention seeking release because they have medical conditions which they contend place them at high risk should they contract the coronavirus. Of particular interest for *Law Notes* readers is the situation of plaintiff Jenner Benavides. Summarizing the complaint, Judge Wood writes, "Petitioner Benavides is a 27-year-old transgender detainee who has been in ICE custody since approximately May 2019. Benavides purports to have been diagnosed with HIV in 2015 and high cholesterol in 2019. She also reports occasional high blood pressure and suffers from certain psychological conditions, including bipolar disorder and severe depression. Benavides is currently on medication for each of these conditions and receives treatment from healthcare providers for HIV and the mental health conditions." (One can question use of the word "purports" when the next sentence says that Benavides is receiving treatment from health care providers for HIV and the mental conditions. Detention facilities generally don't provide treatment for conditions that have not been diagnosed.) The complaint points out how conditions in the detention facility make it impossible for detainees to observe the social distancing and disinfecting precautions necessary to prevent transmission of the virus. But Judge Wood asserts that they have not stated a legal claim that would justify release from detention. "The conditions in the Folkston Facility that Petitioners allege contribute to an increased risk of the spread of COVID-19—assuming these claims are true—could be remedied with internal facility changes, such as more vigilant screening measures, increased availability of cleaning supplies, and greater efforts to create distance between detainees . . . At bottom, Petitioners have not shown a likelihood of success in proving that release is the only means of remedying the conditions of which they complain. Moreover, even to the extent that some aspects of detention necessarily increase the risk of exposure to contagious diseases, the Constitution does not require that detention facilities reduce the risk of harm to zero . . . . Indeed, even if detainees were released, they—like all people—would still face some risk of exposure to COVID-19." Judge Wood was appointed by President George W. Bush. A large team of pubic interest and pro bono lawyers represent the various plaintiffs.

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**NEW YORK** – In *Bharrat v. New York City Board of Elections*, Index No. 700008/20, N.Y. Supreme Court Justice Edgar G. Walker (Kings Co., April 29, 2020), turned back an attempt by a group of plaintiffs who do not identify either as male or female to challenge the constitutionality of the Board of Elections' rejection of their petitions for a place on the New York State Democratic Primary ballot for election as members of the Kings County Democratic Committee. Pursuant to a state constitutional provision, the County Committee seeks male/female parity on the Committee by designating half the seats for men and half the seats

for women, and requiring that candidates indicate on their Petitions whether they are contending for a male seat or a female seat. The plaintiffs here would not so designate themselves, instead insisting that they be listed on the ballot simply as candidates to be members of the County Committee. They claim that their Petitions, otherwise valid in every respect, were wrongfully rejected, and that the insistence that each candidate designate their sex as male or female discriminated against them in violation of the 14th Amendment's Equal Protection Clause. They sought an order that they be listed on the ballot. Justice Walker, while expressing sympathy for their plight, found that this was not an appropriate proceeding in which to address the constitutional merits. He pointed out that this special proceeding, right at the deadline for filing challenges to primary election petitions, was not intended to take on underlying questions about the constitutionality of the New York State Constitution's requirements regarding county committee membership. He observed that plaintiffs could obtain a ruling on their constitutional claim by filing a declaratory judgment action well in advance of the next round of petitioning.

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**OHIO** – In *Amaya-Cruz v. Adducci*, 2020 WL 1903123 (N.D. Ohio, E.D., April 18, 2020), U.S. District Judge Dan Aaron Polster ordered that an HIV-positive man with other underlying health factors being held in detention by Immigration Control and Enforcement (ICE) should be released due to his high risk of medical complications if he is infected with the novel coronavirus. Amaya-Cruz was one of four detainees who jointly sued for release from detention for fear of contracting the virus, but Judge Polster found that the others had not demonstrated relevant medical reasons to justify release. In Amaya-Cruz's case, however, the judge noted ICE's argument that HIV-positive status alone should not be a basis from ordering release, especially for a detainee who is receiving anti-retroviral treatment and is in good health. But Polster found that Amaya-Cruz had presented evidence of pertinent medical complications. "The record shows, and Defendants do not dispute, that in addition to Amaya-Cruz' HIV status, he suffers brain lesions (bleeding on the brain), toxoplasmosis (a parasitic infection), and toxoplasmosis encephalitis (swelling of the brain caused by toxoplasmosis). He suffers chronic headaches and neck pain," wrote the judge. "And while Amaya-Cruz's CD 4 cell count is within normal range, the record shows that since entering the Geauga facility, he has had a heightened level of HIV present in his body. He states that is impossible to maintain adequate social distance in the facility and in the last two weeks, numerous people have been transferred into and out of his pod – some of whom have coughs and all of whom are relegated to the general population." Taken together, the judge concluded that continuing to detain him "during the COVID-19 pandemic with his severely tenuous, immunocompromised health, violates the Fifth Amendment." However, the release is conditional: "Romel Amaya-Cruz must stay with his sister who resides in Cleveland and self-quarantine in her residence for 14 days. Furthermore, he may not drive any vehicle. Should he abscond from his sister's residence and/or fair to appear for his immigration hearing scheduled on April 29, 2020 or any future hearings, he will be deemed to have forfeited his asylum claim and any right to contest immediate removal from the country." Freda J. Levenson, ACLU of Ohio, represents the petitioners in this case. Judge Polster was appointed to the district court by Bill Clinton in 1998.

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**PENNSYLVANIA** – In *Doe v. Brennan*, 2020 WL 1983873 (E.D. Pa., April 27, 2020), U.S. District Judge Joseph F. Leeson, Jr., granted the plaintiff's motion to proceed anonymously. The plaintiff, an HIV-positive gay man, claims he was discriminatorily discharged by the U.S. Postal Service because of his sexual orientation and HIV status. He began working as a letter carrier in 2007. He was discharged in 2019. He was the only out gay man at the branch where he worked, and he was known by his co-workers and management to be gay and HIV-positive. He claims that the stated reason for his discharge – a "physical altercation with a coworker" – never took place and was fabricated by the co-worker "as a result of her animus due to his sexual orientation." Although he was prosecuted for harassment based on this alleged incident, he was found not guilty and the case was dismissed, according to Judge Leeson's opinion. The judge noted the federal rules on pleading requiring that the plaintiff be named, as well as the case law showing that plaintiffs may proceed anonymously in the discretion of the court if extraordinary circumstances are found. Judge Leeson quoted lists of factors from other cases, and found that it was appropriate to allow the plaintiff to proceed as John Doe in all the litigation documents, while noting the defendants' two requests: "1) that Plaintiff be directed to conduct depositions and trial using his actual name; and (2) that the Court's grant of Plaintiff's motion be without prejudice to any Defendant's future ability to challenge the basis to permit Plaintiff to proceed anonymously." "The Court finds that based upon the alleged facts in this case, and in light of the factors set forth in *Provident Life and Acc. Ins. Co.* and *Megless*, Plaintiff has satisfied his burden of showing both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable. *Megless*, 654 F.3d at 408. As such, he is entitled to the extraordinary relief of being permitted to proceed in this action anonymously," subject to the conditions requested by the defendants. The plaintiff is

represented by Justin F. Robinette, The Law Offices of Eric A. Shore, P.C., Philadelphia, PA. Judge Leeson was appointed by President Barack Obama in 2014.

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**PENNSYLVANIA** – U.S. Magistrate Judge Martin C. Carlson denied the employer's motion for summary judgment in *Bonson v. Hanover Foods Corporation*, 2020 WL 1550590 (M.D. Pa., April 1, 2020), finding that disputed issues of material fact in this Title VII sex discrimination, hostile environment, and retaliation case preluded judgment before trial. The plaintiff, Tyler Bonson, alleged a severe hostile environment in which he was repeatedly referred to as "queer," "fag" and "fairy," and that he was criticized for the way he groomed, dressed, and smelled. He alleged in his complaint that he was discriminated against because of his "gender identification," but there is no indication in the opinion that Bonson identifies as transgender. Rather, he alleges that he was perceived as gender-nonconforming, or that's how the judge construed his factual allegations. Magistrate Carlson rejected the employer's argument that Bonson had failed to allege membership in a "protected class" under Title VII, finding that under the *Price Waterhouse* precedent this could be treated as a gender stereotype case. Bonson alleges that he was eventually discharged for a pretextual reason having to do with not showing up to work on Labor Day without advance notice to the employer; he claims he was told several days before Labor Day that it was optional to show up, and he assumed he didn't have to give notice. The judge rejected the argument that Bonson could not bring a retaliation claim because he did not file an EEOC charge before the alleged retaliatory conduct occurred. Judge Carlson pointed to case law upholding retaliation claims based on employees suffering adverse treatment after complaining to management about harassment. From the introductory paragraph of the opinion, it sounds like the judge was excited to get this case: "This case presents issues on the cutting edge of employment discrimination law relating to the extent to which federal law protects workers from acts of workplace discrimination based upon gender identification, perceived gender identification or hostility to an employee's failure to abide the employer's stereotypical views of gender roles. While the legal benchmarks which govern such claims are in flux, as discussed below we find that under current prevailing legal standards in this circuit disputed issues of fact regarding the conduct and motivation of the parties preclude summary judgment in this case." Bonson is represented by Christopher J. DelGaizo, Derek Smith Law Group, PLLC, Philadelphia, PA.

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**TENNESSEE** – In *Hubbard v. Evolution Wireless, Inc.*, 2020 WL 1644512 (E.D. Tenn., April 2, 2020), Michael Hubbard, a bisexual African-American man, is suing his former employer and former supervisor under Title VII and Tennessee law for discrimination based on sex and sexual orientation as well as supplementary state law claims. In this ruling on the defendants' motion to dismiss, U.S. District Judge Travis R. McDonough acceded to the plaintiff's request to abstain from ruling on whether to dismiss the sexual orientation claim, while awaiting a ruling from the Supreme Court resolving a circuit split on the question whether sexual orientation claims are actionable under Title VII, in *Altitude Express v. Zarda*, which was argued on October 8, 2019. As of the end of April, the Supreme Court had yet to issue a ruling in the case. The defendants did not seek to dismiss in this motion Hubbard's Title VII sex discrimination claim. Hubbard alleges that he, as the only male among several supervisors, was treated differently from the female supervisors by James Watts, the management official who terminated him and who allegedly showed partiality to female supervisors with whom he was having sexual relationships. "After calling Hubbard a 'faggot,' Watts also allegedly said, 'I don't tell you not to do what you guys do,' and 'I am not telling you where to stick your thing so don't tell me where to stick mine.'" The judge found several of the state law claims to be barred by the statute of limitations, but he concluded that Hubbard also stated a viable claim for tortious interference with contractual relations. Hubbard is represented by Kimberley Rhoton, Kingsport, TN. Judge McDonough was appointed by President Barack Obama in 2015.

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**WASHINGTON** – The State of Washington is a co-plaintiff in *Karnoski v. Trump*, 2020 WL 1916931 (W.D. Wash., April 20, 2020), one of the five pending district court proceedings challenging the Trump Administration's policy on military service by transgender individuals. This April 20 ruling by District Judge Marsha J. Pechman is one of numerous rulings address discovery disputes. The State of Washington sought an order from the court that the government comply with discovery requests, in particular focusing on the requests for information about transgender service members from Washington State who are affected by the policy. The government continues to stonewall against requests, in this instance arguing that the requested information goes beyond the mandate of the 9th Circuit when it remanded this case to the district court, instructing that the challenge now goes to the policy as adopted by Defense Department pursuant to the President's letter authorizing then-Defense Secretary James Mattis to adopt the policy he described in a February 2018 report to the president, not the prior

version as described in a White House memorandum of August 2017. Now the government argues that because judicial review is limited to information upon which Mattis based his decision to implement the policy, the discovery request is irrelevant, as discovery should be limited to information before Mattis back then. In addition, the government contends that it does not have such information. Judge Pechman rejected these arguments. "Defendants confuse the evidentiary standard at trial with the broader discovery standard, which allows parties to obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," she wrote. "Under Rule 26, the concept of relevance has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case," quoting from *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978). "Here, Plaintiffs seek information that would establish the number of transgender Washingtonians who have been affected by the military's policies with respect to open service by transgender members, both leading up to and following Defendants' current ban on open service. As Washington argues, this information is relevant to the Court's review of Defendants' ban on transgender military service under the heightened scrutiny standard identified by the Ninth Circuit. This standard requires the Court to review Defendants' process and intent, and whether the ban significantly furthers important government interests. The Court finds that Washington's requests seek information that is relevant to that inquiry." She also found the government's contention that it did not have the relevant information to be contradictory to its responses to discovery requests in one of the other pending cases, and she ordered the government to comply with the discovery request by May 8.

## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard*

**CALIFORNIA** – A gay 16-year-old boy who used Grindr to lure a gay man into a sexual assignation for the purpose of extorting money from him was convicted of extortion in Contra Costa County Juvenile Court, and sentenced to a term in juvenile hall, a detention facility for youthful offenders. The defendant, identified as G.H. in the unpublished Court of Appeal opinion, appealed on various grounds, but succeeded only in winning a remand from the 1st District Court of Appeal to cure a statutory flaw in the proceedings: "Appellant contends the case must be remanded because neither the court nor the prosecution complied with their statutory obligation to notify him that he was eligible for a DEJ [Deferred Entry of Judgment]. The People agree the case must be remanded for this purpose." Under California law, the prosecutor in a juvenile case is supposed to determine whether the defendant satisfies a statutory test for eligibility to withhold judgment and be placed on probation, with the judgment vacated if the individual successfully completes probation. The prosecutor in this case determined that the defendant was eligible for this treatment, and he attached the appropriate form to papers submitted to the court, but neither the prosecutor nor the court advised the defendant that he could apply for this procedure. It would still be up to the discretion of the court whether to grant DEJ, and from the trial judge's comments quoted in the opinion, that seems unlikely. The court noted that the defendant, misrepresenting himself on Grindr as being three years older than he was, had carefully set up the assignation to make a video recording of the man performing oral sex on him, and then using the recording to blackmail the man, showing a fair degree of sophistication in concocting and carrying out the scheme. Indeed, it was based on this finding that the trial judge had rejected the prosecutor's suggestion to send the defendant to a residential institution for youthful offenders rather than the more punitive juvenile hall setting as recommended by the Probation Department. "The court concluded that the probation officer's recommendation was appropriate and that placement should be at juvenile hall. It noted that at the contested jurisdictional hearing, appellant had given M.G. [the victim] a 'menacing stare.' 'He didn't blink[ ]. he never looked away . . . . It was shocking to me. It was cold, it was calculated, it was the same as how he treated the victim of this offense.' The court cited appellant's 'significant sophistication' in victimizing a highly vulnerable person and indicated it would be inappropriate to put him in a residential treatment facility like Oakendell, where he would pose a significant risk to the other residents who were trying to work through their issues. The court found appellant had not yet taken responsibility for his conduct and had manipulated past dependency proceedings." If this case goes back to the same trial judge in Contra Costa County, one predicts the same result. The opinion by Judge Henry E. Needham, Jr., contains a detailed description of the defendant's execution of his plan. *In re G.H., a Person Coming Under the Juvenile Court Law*, 2020 WL 1898854 (Calif. 1st Dist. Ct. App., April 17, 2020).

**GEORGIA** – A jury convicted Richard Williams II of murdering Cory Robinson by choking him to death. In appeal his murder conviction, he claimed he was convicted due to ineffective assistance of counsel. He claims that he tried to get his attorney to present an accidental death defense, based on the argument that the two men were engaged in an erotic asphyxiation session that went wrong. But, Williams claims, his defense counsel refused

to consider it and was uncomfortable with discussing sexual matters, even though Williams and Robinson were living together in a sexual relationship. Williams' trial counsel denies that he was uncomfortable in discussing sexual issues, and says that he and Williams had a thorough discussion during which Williams never raised the issue of erotic asphyxiation, and they had devised a trial strategy of trying to shift blame for the death to an acquaintance of the two men, Kelvin Spencer, who was supposedly jealous about the relationship between Williams and Robinsin. At the time Williams was apprehended by the police, some weeks after the crime, Williams said nothing about erotic asphyxiation as the cause of Robinson's death, and the Georgia Supreme Court was unwilling to credit the story. *Williams v. State*, 2020 WL 1907773 (Ga. Supreme Ct., April 20, 2020).

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**TENNESSEE** – In *Haynes v. Boyd*, 2020 WL 1977122, 2020 U.S. Dist. LEXIS 72612 (W.D. Tenn., April 24, 2020), Chief U.S. District Judge S. Thomas Anderson denied a petition for habeas corpus filed *pro se* by Jay Earl Haynes, who was convicted of rape in a Tennessee trial court for performing anal sex on the 19-year-old twin grandsons of his girlfriend. Expert testimony at trial showed that the 19-year-old twins were mentally disabled to the extent that they were incapable of consenting to sexual activity. Haynes also suffers a mental disability, but according to the expert testimony at trial, he was capable of realizing that the twins were not able to consent. He was sentenced to twenty years in prison per twin raped. His attempts to obtain post-conviction relief were unsuccessful in the Tennessee courts, which specifically rejected his argument that he was provided an ineffective defense because, he claimed, his attorney did not attack his conviction under *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court decision striking down Texas's ban on "homosexual conduct" in the form of oral or anal sex between consenting adults. It turns out that his attorney did attempt to use *Lawrence* (although referred to it incorrectly as *Garner*, which was the name of John Lawrence's co-defendant), but only in the as-applied sense, in arguing that the sex was consensual. The statute under which Haynes was prosecuted deals with sex involving persons who can't consent due to mental disability. Now Haynes argues in his petition for habeas corpus that his attorney should have challenged the statute on its face as not containing a consent factor, broadly arguing that the statute violates his constitutional rights because in effect it forbids people with mental disabilities from having sex. Judge Anderson was not persuaded that trial counsel's performance was ineffective in the sense necessary to support a grant of habeas corpus, not least because all the expert medical testimony offered at trial would support the conclusion that *Lawrence*, even if correctly cited by counsel, would not have affected the outcome, as the Supreme Court made clear in that case that the liberty interest it identified did not extend to sex involving people who would not be able to consent.

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**WASHINGTON** – In *United States v. Fanyo-Patchou*, 2020 U.S. Dist. LEXIS 60342 (W.D. Wash., April 6, 2020), U.S. District Judge John C. Coughenour upheld a magistrate judge's action in restricting one of the defendants' access to the internet pending trial. Under the restriction imposed by the magistrate, the individual would have to get permission from Pretrial Services in order to access the internet. Wrote Judge Coughenour, "Mr. Kamdem is charged with conducting an online campaign to 'out' a man's sexual orientation in a way that put that individual in real danger. As the Court noted in a prior order, the evidence of that campaign is strong. Given the evidence against Mr. Kamdem, it is reasonable to fear that he might further harass John Doe or others if he had access to a computer and the internet. Restricting Mr. Kamdem's internet and computer access is therefore warranted." Kamdem had argued that the restriction was unfair because he had lost his job and had to look for a new one. He needed access to the internet for the purpose of job-hunting. The judge pointed out that the magistrate's order did not impose a total restriction, and that Kamdem could apply to Pretrial Services to get limited internet access for a particular purpose.

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## PRISONER LITIGATION NOTES

*By William J. Rold*

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

**IDAHO** – Chief U.S. District Judge David C. Nye grants *pro se* transgender inmate Joseph A. Peterson 28 days to amend her complaint in *Peterson v. IMSI Medical*, 2020 WL 1535566 (D. Idaho, Mar. 31, 2020). Peterson claims deliberate indifference to her serious medical needs (mostly, a hormones claim, as described in the decision), as well as denial of equal protection on the basis of race and transgender status. Judge Nye finds that her complaint is too generalized and that she failed to name a proper defendant, suing only an apparently non-existent state agency. While Judge Nye spends most of the opinion providing "guidance" to Peterson for refiling, the scholarship is both confusing and off the mark. First, although Peterson seems to focus on injunctive relief (medical care and non-discrimination), Judge Nye addresses mostly damages. He includes a long section on municipal liability under

*Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978), when there is no municipal defendant. There is a likely private vendor defendant (Corizon), but Judge Nye does not make the connection clear to a layperson. He cites only *Tsao v. Desert Palace, Inc*., 698 F.3d 1128, 1139 (9th Cir. 2012), with a legalistic parenthetical "(applying *Monell* to private entities performing a government function)." *Tsao* was not a prison case; it involved a casino's rough handling of a card "counter." Judge Nye presents only the most generalized discussion of medical deliberate indifference, starting with *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). He says Peterson must show her medical claims are "serious," without discussing that nearly all federal courts already routinely find that transgender treatment presents a serious medical issue. He cites only one transgender case, *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1117 (N.D. Cal. 2015), without mentioning it as such. Most strikingly, he omits any reference to the controlling Ninth Circuit case (from Idaho) on transgender care. *Edmo v. Corizon, Inc.,* 935 F.3d 757 (9th Cir. 2019) (*passim*). The failure to cite *Edmo* makes Judge Nye's discussion of differences of opinion about medical treatment particularly troubling in the transgender setting. With all due respect, the equal protection section is even worse. Judge Nye begins his discussion with "class of one" theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); and *Tigner v. Texas*, 310 U.S. 141, 147 (1940), noting that inmates are "not a protected class" under *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998). He writes: "State action is presumed constitutional and will not be set aside if any set of facts reasonably may be conceived to justify it, " citing *More v. Farrier*, 984 F.2d 269, 271 (9th Cir. 1993). Actually, *More v. Farrier,* is an Eighth Circuit case. The Court of Appeals found no equal protection violation where Iowa inmates in wheelchairs were forced to watch cable television in the day room and not in their individual cells. Quoting *Pratt v. Rowland,* 65 F.3d 802, 806 (9th Cir. 1995), Judge Nye then writes: "A prisoner asserting an equal protection claim 'bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct of which he complains.'" The internal quotation is accurate, but the introductory phrase is not. *Pratt* did not address Equal Protection. It was a First Amendment retaliation case, and the quotation appears in that context, applying *Sandin v. Connor,* 515 U.S. 472, 484 (1995). Judge Nye concedes that "strict scrutiny" applies to racial classifications under *Johnson v. California,* 543 U.S. 499, 507 (2005); but he does not address transgender equal protection scrutiny. Judge Nye concludes: "Plaintiff should keep the above standards in mind if he files an amended complaint." Judge Nye was first nominated to the District Court by President Obama, but the Senate did not act. He was re-nominated by President Trump and confirmed unanimously.

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**ILLINOIS –**Transgender inmate Robert (Nickie/Alexis/Honebee) Quillman sued for damages for denial of hormone treatment during a period of some sixty days in 2014. U.S. District Judge Mary M. Rowland granted summary judgment for defendants in *Quillman v. Estate of Obaisi,* 2020 WL 2084989 (N.D. Ill., Apr. 30, 2020). In *Mitchell v. Kallas*, 895 F.3d 492, 499-500 (7th Cir. 2018), the Seventh Circuit ruled that refusing hormones needed by a transgender inmate raised factual issues of deliberate indifference that survived a defense motion for summary judgment. Earlier (at the time relevant here) the court had found that a statutory blanket denial of hormones was unconstitutional, because it precluded individualized treatment. *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011). Here, however, Quillman received hormones within sixty days of her request. There is no evidence that the named defendants delayed the hormone decision. Judge Rowland accepted the defendants' statement of facts because the plaintiff failed to file objections to them as required by N.D. Ill. Local Rules implementing F.R.C.P. 56. Quillman also failed to file her own Statement of Facts, with record citations – also required by local rule. The procedural faults were damning, but this writer is not aware of a federal court's allowing a hormone delay of two months to go to a jury.

## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**THE U.S. FOOD AND DRUG ADMINISTRATION –** In 1985, the FDA adopted a policy that any man who had sex with another man from 1977 onwards was disqualified from donating blood, for fear of contaminating the blood supply with HIV. This policy was adopted in the wake of the identification of HIV as a blood-borne pathogen that was associated with AIDS, and with concern that the antibody test developed to determine if somebody was infected could falsely show negative results between the time somebody was exposed to the virus and the time when their body generated detectable levels of antibodies. At that time, it was uncertain how accurate the new screening tests were, and it was at least understandable that the FDA would be super-cautious as of 1985, especially considering that blood banks and hospitals stood to be sued for transmission based on the argument that epidemiological studies by 1983 had found with a high degree of certainty that AIDS was being transmitted by some blood-borne agent, and that lifestyle screening for "high risk group" membership in the absence of a blood-screening test might have prevented transmission. Although improvements in testing and increasing knowledge about

antibody development eventually made this policy obsolete in terms of science, it proved politically impossible to get the FDA to revise the policy until 2015, when many other countries had reduced the period of required sexual abstinence for sexually active gay male donors to one year. Thus, in 2015, the FDA finally substituted the one year rule for the previous lifetime disqualification. In the wake of the new coronavirus pandemic, and alarming shortages of new blood donations, the FDA has finally bowed to the general wisdom of the world medical community and agreed to do what many other countries have now done and reduce the abstinence period to three months. Studies show that it would be very unusual for somebody who was infected with HIV not to have generated antibodies within that period of time. But announcing the policy on April 3 did not, it turned out, lead to immediate change by the blood banking community, since various steps needed to be taken to translate the FDA's policy announcement into practice in the field, and there were reports of outraged gay men who were turned away when they rushed to donate blood after the FDA announcement, only to be told that the 12-month requirement remained until new screening questionnaires could be devised and approved by FDA and the blood banking industry, circulated to blood banks, and then training of the personnel who actually run the system. Thus, it turns out, it could be months before the policy change is effectuated, and the critical need to expand the pool of eligible donors will be delayed. There is special need for blood donations from people who have recovered from COVID-19, since researchers hope to use their plasma as a source for potential treatment of those newly infected with the coronavirus.

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**U.S. DEPARTMENT OF HOMELAND SECURITY** – Lambda Legal reported that it was able to secure the release from immigration detention of two HIV-positive Cuban men, arguing that holding them was dangerous because of their vulnerability to the novel coronavirus. Lambda sent a letter noting the U.S. District Court's injunction in the *Fraihat* case (see article above), which requires DHS to release those whose medical conditions or disabilities make them particularly susceptible to serious illness if they are exposed to the virus.

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**FLORIDA** – The Tallahassee City Council unanimously approved an ordinance outlawing the practice of conversion therapy by licensed health care professionals and counselors on April 8. Unlike some such bans, this one is an absolute prohibition, regardless of the age of the "patient" or "client." It also prohibits city expenditures to pay for such "therapy." Such enactments readily draw lawsuits on behalf of practitioners, and there are several such against other Florida municipalities which have reached a variety of results.

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**NEW YORK** – Under the new surrogacy law enacted on April2 as part of the state budget, paid surrogacy agreements will be legal and enforceable beginning in February 2021, provided they comply with the provisions of the new Surrogacy Bill of Rights. New Yorkers will now legally be able to arrange and carry out paid surrogacy contracts beginning on Feb. 15, 2021. The requirements are strict. The surrogate must be at least 21 years old. The intended parents must pay for the surrogate's legal counsel. Intended parents are required to pay for health and life insurance for one year after the surrogate gives birth. The minimum compensation for the surrogate is $35,000. The measure creates legal protections for parents of children conceived by reproductive technologies such as artificial insemination and egg donation and establishes criteria for surrogacy contracts to protect all parties in the process. The law eliminates burdensome and often expensive barriers for "second parent adoption," instead requiring a single visit to court to recognize legal parenthood while the child is in utero. Until the new law goes into effect, New York remains one of only three states that outlaw surrogacy contracts, but many states still have no legislation on the subject one way or the other, leaving enforceability of such contracts up to court decisions about whether they violate public policy.

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**VIRGINIA** – Virginia became the first southern state to enact protection against discrimination for LGBTQ people on April 11, when Governor Ralph Northam signed into law S.B. 868, which prohibits discrimination in housing, public and private employment, public accommodations, and access to credit, because of a person's race, color, religion, national origin, sex, sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, age, marital status, disability, and veteran status. The measure was sponsored in the legislature by out gay Senator Adam Ebbin. "This legislation sends a strong, clear message—Virginia is a place where all people are welcome to live, work, visit, and raise a family," said Governor Northam, a Democrat, in a press release reporting on the signing ceremony. "We are building an inclusive Commonwealth where there is opportunity for everyone, and everyone is treated fairly. No longer will LGBTQ Virginians have to fear being fired, evicted, or denied service in public places because of who they are." Similar legislative proposals have been pending in Virginia for many years, but enactment only because a reality when the legislative election in 2019 delivered control of both houses of the legislature to the Democrats for the first time in two decades. In addition to adding prohibited grounds of discrimination, the statute

expands the scope of coverage to public accommodations for the first time in Virginia. The measure goes into effect July 1, 2020.

## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

**OHIO** – Charmaine McGuffey, a former Hamilton County deputy sheriff, defeated Sheriff Jim Neil by winning nearly 70 percent of the vote in the April 28 primary for the Democratic nomination for county sheriff. This was sweet revenge, since McGuffey, an out lesbian, was fired from her position by Neil. The Advocate reported her victory on April 29.

## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**CHILE** – The Constitutional Court ruled 5-4 on April 17 against a claim by a same-sex couple married elsewhere that Chile had violated their constitutional rights by recognizing their relationship as a civil union rather than a marriage. While acknowledging that under international legal principles same-sex couples are entitled to a legal status for their relationship, the majority of the court insisted that it was not required to be a marriage. The dissent noted that under a prior decision by the Inter-American Court of Human Rights, it is required to be marriage, and Chile is a signatory to the Human Rights Charter that imposes this obligation. There is already an appeal pending before the Inter-American court in another case involving Chile. Unfortunately, there is no real enforcement mechanism for the Inter-American Court's judgments, which are essentially declaratory judgments not backed up by any compulsory process other than moral suasion.

**COLOMBIA** – Not to be a stickler for consistency, Colombia's highest court voted 6-3 to reject on non-substantive grounds a lawsuit challenging a constitutional provision stating that the ultimate end of marriage is procreation, even though Colombia already has same-sex marriage as a result of a prior ruling of the court.

**COSTA RICA** – Journalist Rex Wockner reports that marriage equality goes into effect on May 26, eighteen months after a ruling by the Constitutional Chamber of the Supreme Court of Justice was published in the *Judicial Bulletin*. By his count, Costa Rica will be the 29th nation to have marriage equality. Mr. Wockner provides detailed coverage of the spread of marriage equality on his blog.

**ISRAEL** – On April 21, Judge Orit Lipshitz of Beersheba Magistrate's Court ruled that Rainbow Color, a local printshop, violated a non-discrimination statute when it refused to print posters for the Ben Gurion University LGBT Chapter of the Aguda Association for LGBT Equality in Israel. When the student group asked for a quote from the printshop on a potential order, the reply they got was "We do not deal with abomination materials. We are Jews!" The court accepted the plaintiffs' argument that this rejection of business violated the clumsily named Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, passed by the Knesset (Parliament) in 2000. According to an English-language report by The Times of Israel, Judge Lipshitz wrote, "The court does not seek to enter into the consciousness of service providers . . . when it comes to their subjective opinions with regard to others. The legislature also does not seek to interfere with the freedom of religion and worship reserved for them as human beings. When their beliefs conflict with a necessity of providing service to all in a public space, the last value holds superior." She ordered the printshop to pay the equivalent of about $14,000 in damages as well as the plaintiffs' legal expenses.

**JAMAICA** – The Inter-American Court of Human Rights has ruled that Jamaica should repeal its law against consensual sex between men in order to address the underlying problem in the country of a fiercely hostile environment for gay people. Jamaica is one of many former British colonies that have perpetuated the colonial-era sex crimes laws in their criminal codes. The Inter-American Court finds that such laws violate basic human rights, but their opinion is only recommendatory.

**JAPAN** – Kyodo News reported that twenty Japanese companies will begin honoring "partnership certificates" issued by Famiee Project, a private, non-governmental organization, as a basis for providing spousal benefits to the same-sex partners of their employees. "We want to start changing where we can through the private sector so that families of same-sex couples can be recognized as normal," said Famiee founder Koki Uchiyama. Several local governments in Japan have moved to issue partnership certificates that can be used to gain equal access to public housing or in making medical decisions. Famiee Project hopes to build on the local government efforts to encourage businesses to provide the same benefits to same-sex partners that they provide for their married employees. Meanwhile, legislative and litigation efforts continue to attempt to achieve legal marriage equality in Japan.

**PERU** – The Inter-American Court of Human Rights issued a decision holding

# PROFESSIONAL *notes*

the government of Peru responsible for the arbitrary detention and rape of Azul Rojas Marin, a transgender woman, by police officers. Marin filed a criminal complaint against police officers, but state prosecutors dismissed the case. Human Rights groups championed the case at the Inter-American Court. The ruling is dated March 12, but was publicly released on April 6. The court ordered the government of Peru to provide psychological treatment to Rojas, adopt new protocols for investigating attacks against LGBT people, and track statistics of violence against the LGBT community. Thomson Reuters Foundation, April 6.

**TURKEY** – Human Rights Watch reported that the prosecutor's office in Ankara has launched a criminal investigation into the Ankara Bar Association, in response to the Association filing a human rights complaint against an Imam who preached an anti-gay sermon.

**UGANDA** – At the end of April police arrested gay men who were gathered in a safe-house shelter in Kampala, asserting that they were violating a COVID-related government order against gatherings of more than five people. A court denied bail to 19 men, so now, ironically enough, the men are probably at greater risk in jail. A lawyer was denied access, even by telephone, to the jailed men. Law enforcement authorities claim that they were just enforcing the governmental order, and that neighbors of the house had reported a gathering in excess of five. But their lawyer insisted they were targeted because they are gay, and a U.N. Human Rights officer backed up that claim. Voice of America, April 30.

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*By Arthur S. Leonard*

On April 14, Washington State Governor **JAY INSLEE** appointed Pierce County Superior Court **JUDGE HELEN WHITENER** to an open position on the Washington Supreme Court. When she is sworn in, Justice Whitener, who is an African-American lesbian, will be the second "out" justice in the court's history, and its first African-American woman. *The News Tribune*, April 14.

## PUBLICATIONS NOTED

1. Hall, David A., Ten Years of Fighting Hate, 10 U. Miami Race & Soc. Just. L. Rev. 79 (Spring 2020) (evaluating the first decade of the federal Hate Crimes Law).
2. Jacobs, Charles, and Christopher E. Smith, Justice Anthony Kennedy as Senior Associate Justice: Influence and Impact, 52 UIC J. Marshall L. Rev. 907 (Summer 2019) (Includes discussion of Kennedy's major LGBT rights opinions).
3. Le, Dantam, Leveraging the ILO for Human Rights and Workers' Rights in International Sporting Events, 42 Hastings Comm. & Ent L.J. 171 (Summer 2020).
4. Maltz, Earl M., The Ripples of Backlash: Same-Sex Marriage, The Election of 2004, and the Evolution of Constitutional Law, 42 U. Ark. Little Rock L. Rev. 485 (Spring 2020) (The author seeks to put the blame on LGBT rights advocates for litigating marriage equality as a reason Bush was re-elected in 2004 and got to put conservatives on the court to replace O'Connor and Rehnquist, thus sealing the conservative majority that still prevails on the Court).
5. Marcosson, Samuel A., *Masterpiece Cakeshop* and Tolerance as a Constitutional Mandate: Strategic Compromise in the Enactment of Civil Rights Laws, 15 Duke J. Const. L. & Pub. Pol'y 139 (2020).
6. Rowe, Peggy, States' Rights or States' Wrongs? The Constitutional Argument for Medically Accurate and Comprehensive Sex Eduation, 62 Ariz. L. Rev. 539 (2020).
7. Strasser, Mark, Marriage, Domicile, and the Constitution, 15 Duke J. Const. L. & Pub. Pol'y 103 (2020).
8. Turner, Ronald, W(h)ither Glucksberg?, 15 Duke J. Const. L. & Pub. Pol'y 183 (2020) (Refuting Chief Justice Roberts' contention, in his *Obergefell* dissent, that the Court's approach to fundamental rights in that case had overruled *Glucksberg*, in which the Court rejected a constitutional challenge to a state ban on assisted suicide).
9. Williams, Jessica, Beyond the Binary: Protecting Sexual Minorities from Workplace Discrimination, 71 Fla. L. Rev. F. 22 (2020).

## EDITOR'S NOTES

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