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LAW NOTES

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Big SCOTUS Win for LGBTQ Workers

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U.S. Supreme Court Holds that Title VII of the Civil Rights Act of 1964 Bans Anti-LGBT Employment Discrimination in Landmark 6-3 Ruling

By Arthur S. Leonard

The U.S. Supreme Court's ruling on June 15, 2020, in *Bostock v. Clayton County, Georgia*, 590 U.S. ___ , 2020 WL 3146686, 2020 U.S. LEXIS 3252, that Title VII of the 1964 Civil Rights Act bans employment discrimination against people because of their sexual orientation or gender identity, was the fifth landmark in a chain of important LGBT rights victories dating from 1996, continuing the Court's crucial role in expanding the rights of LGBT people. The ruling culminated seventy years of struggle and activism seeking statutory protection for sexual minorities against employment discrimination, dating from the 1950s, when early LGBT rights organizations always listed such protection as one of their goals, even before the federal government began to address the issue of employment discrimination statutorily in 1964.

Justice Neil Gorsuch, appointed to the Court by President Donald J. Trump, wrote the Court's opinion, joined by Chief Justice John Roberts (a George W. Bush appointee), and the four Justices appointed by Democratic presidents: Ruth Bader Ginsburg and Stephen Breyer (Bill Clinton) and Sonia Sotomayor and Elena Kagan (Barack Obama).

Justice Samuel Alito, appointed to the Court by George W. Bush, wrote an outrage d dissenting opinion, joined by Clarence Thomas, who was appointed by George H.W. Bush. Trump-appointee Brett Kavanaugh penned a more temperate dissent, concluding with a surprising salute to the gay rights movement's achievement of this milestone. (In a rather tone-deaf note, his dissent – and particularly the final congratulatory paragraph – focused on the sexual orientation aspect of the opinion.)

Justice Gorsuch's emergence as the writer of this opinion caught many by surprise, because he is known as an acolyte of Justice Antonin Scalia, whose seat, vacated by death, he fill after the Republican-controlled Senate refused to consider President Obama's nomination of D.C. Circuit Court of Appeals Chief Judge Merrick B. Garland. Despite Scalia's avowed commitment to many of the interpretive principles that Gorsuch also embraces, one could not imagine Scalia writing such an opinion, especially in light of the vitriolic dissenting opinions that he wrote to all four prior landmark opinions. The dissenting opinions both argue that the brand of "textualism" embraced by the Court in this decision was not consistent with Justice Scalia's approach.

Because Chief Justice John Roberts voted with the majority of the Court, assignment of the majority opinion was up to him. Had this been a 5-4 ruling without Chief Justice Roberts, Justice Ruth Bader Ginsburg, the senior justice in the majority, would have decided which justice would write for the Court. In the two marriage equality rulings, Justice Anthony Kennedy, whose approach to gay issues had been established in earlier cases, assigned the opinions to himself as senior justice in the majority. Ginsburg might well have assigned the opinion to Gorsuch in any event, to help secure his vote, especially as it was possible that if Ginsburg or one of the other Democratic appointees wrote an opinion embracing arguments Gorsuch could not accept, he might either drift away or write a concurrence judgment, resulting in a plurality opinion whose precedential effect would conceptually be limited to the narrower grounds embraced by Gorsuch. It is possible that Roberts' vote came from his institutional concern that such a significant ruling have the weight of a 6-3 vote, or at least a unified majority opinion. Since there were already five votes in favor of the employee parties, his vote would not affect the outcome, but would give him some control over the opinion through his assignment to Gorsuch. In that sense, Roberts' assignment decision may have related more to his institutional concerns than substantive commitments on the issues before the Court. (Similar institutional concerns clearly underlay Roberts' action later in June, concurring in the Court's judgment in *June Medical Services v. Russo* (June 29, 2020), in which he cast the swing vote to declare unconstitutional a Louisiana anti-abortion statute that was virtually identical to a Texas law struck down by a 5-4 vote a few years earlier, with Roberts than dissenting. Roberts' concurrence solely on stare decisis grounds rendered Justice Breyer's opinion for the four more liberal justices as merely a plurality opinion, of less weighty precedential value.)

The first landmark gay rights ruling was *Romer v. Evans*, a 1996 decision that established for the first time that a state's discrimination against "homosexuals" violated the 14th Amendment's Equal Protection Clause, striking down a homophobic amendment that Colorado voters had added to their state constitution, which had forbidden the state from providing anti-discrimination protection to gay people. Justice Kennedy's opinion for a 6-3 Court found that the only explanation for the Colorado amendment's adoption was animus against lesbians and gay men, never a constitutionally valid reason, so the Court did not expressly consider whether heightened scrutiny would apply to a sexual orientation discrimination claim.

The second landmark decision was *Lawrence v. Texas* (2003), declaring that a state law making gay sex a crime violated the guarantee of liberty in the 14th Amendment's Due Process clause, and overruling a 1986 decision, *Bowers*

v. Hardwick, which had rejected such a challenge to Georgia's penal law. While noting that the Texas law, which applied only to same-sex sodomy, could be vulnerable to an equal protection challenge, Justice Kennedy's opinion for the Court premised the result solely on "liberty" protected by the Due Process Clause, leaving the precedent as to equal protection uncertain.

The third landmark, *United States v. Windsor*, held in 2013 that the federal government must recognize same-sex marriages that states had authorized, striking down Section 3 of the Defense of Marriage Act, which had put into the United States Code a definition of marriage limited to different-sex couples. The Court held that this violated both the Due Process and Equal Protection rights of same-sex couples under the 5th Amendment, again without explicitly engaging in discussion of whether a law discriminating based on sexual orientation is subject to heightened scrutiny.

The fourth landmark, *Obergefell v. Hodges*, held in 2015 that gay people enjoyed the same fundamental right to marry that had previously been guaranteed to straight people under the Due Process and Equal Protection Clauses of the 14th Amendment. Since the Court dealt with this as a fundamental rights case, both from the perspectives of due process and equal protection, it again avoided discussing whether the discriminatory aspect of the case implicated a suspect or quasi-suspect classification of sexual orientation.

In each of these cases, Justice Anthony M. Kennedy, Jr., wrote for the Court. The decisions were noteworthy as being the product of an otherwise conservative Court whose Republican appointees outnumbered the Democratic appointees. In *Windsor* and *Obergefell*, Kennedy was the only Republican appointee to side with the Democratic appointees to make up the 5-4 majority of the Court. Justice Sandra Day O'Connor, who was appointed by Ronald Reagan, cast a sixth vote for the prevailing parties in *Romer* and *Lawrence*. Her replacement, Justice Alito, dissented in *Windsor* and *Obergefell*, as well as *Bostock*. Justice David Souter, an appointee of President George H.W. Bush, was also part of the *Lawrence* majority.

The way in which the Court decided the Bostock case has far-reaching potential applications beyond the interpretation of Title VII. Among other things, as Justice Alito pointed out in his dissent, it was likely to influence the federal courts' approach to LGBT equal protection claims in future cases, which will be discussed at great length below.

The Bostock Decision

The *Bostock* decision, incorporating two other cases, *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, was the first major LGBT rights decision by the Court after Justice Kennedy retired and President Trump made his second appointment to the Court, Justice Brett Kavanaugh, seemingly locking in a solid conservative majority that was expected not to be receptive to LGBT rights claims. With the retirement of Kennedy, it was widely believed that it would be unlikely for a gay rights claim to carry a majority of the Court.

Consequently, when the Court announced more than a year ago that it would review these three cases, tremors ran through the LGBT rights legal community. Although progress had been made in persuading the Obama Administration – including the EEOC – and the lower federal courts that Title VII's ban on "discrimination because of an individual's sex" could be interpreted to forbid discrimination because of sexual orientation or gender identity, it was difficult for people to count a fifth vote to add to the presumed votes of the Democratic appointees on the Supreme Court. Chief Justice Roberts had emphatically dissented from the *Windsor* and *Obergefell* rulings, and LGBT rights groups had strongly opposed the nominations of both Gorsuch and Kavanaugh, based on their extremely conservative records as court of appeals judges, which was seemingly borne out in Gorsuch's case by his dissent in *Pavan v. Smith* (2017), taking the transparently incorrect position that the Court had not clearly held in *Obergefell* that same-sex marriages must be treated the same as different-sex marriages for all legal purposes, including birth certificates, something specifically mentioned in Justice Kennedy's *Obergefell* opinion. No observer of the Court thought it possible that Alito or Thomas would ever cast a vote in favor of an LGBT employee's claim, but Justices Kavanaugh and Gorsuch were question marks, as was the unpredictable chief justice, despite his anti-LGBT voting record up to that time.

The only facts about these cases that were relevant to the Supreme Court's decision were that the three employees whose discrimination claims ended up before the Court each claimed that they were discharged because of their sexual orientation (Gerald Bostock and Donald Zarda) or their gender identity (Aimee Stephens) in violation of Title VII's ban on sex discrimination. The merits of their Title VII claims had not been decided in *Bostock* or *Zarda*, because the district courts in both cases found the claims not to be covered under Title VII and dismissed them. (The district court in Zarda allowed a supplementary state law claim to go to trial, and a jury decided against Zarda, based on a jury charge that would have been incorrect under Title VII.) Aimee Stephens' Title VII claim survived a motion to dismiss, however; the district court found that although Title VII, standing alone, was violated in her case (solely using a sex stereotype theory rather than holding that gender identity claims are covered as such by Title VII), but that the employer's proprietor, a deeply religious funeral home owner, had a valid defense under the Religious Freedom Restoration Act (RFRA), and so granted judgement to the employer.

The 11th Circuit affirmed the dismissal in *Bostock*, as did a three-judge panel of the 2nd Circuit in *Zarda*, but the 2nd Circuit ultimately reversed the dismissal *en banc*. The Equal Employment Opportunity Commission (EEOC), which had sued on Stephens'

behalf, appealed to the 6th Circuit, which reversed the district court, finding the RFRA defense invalid, and ruling that Stephens' gender identity discrimination claim had been proven. The 6th Circuit also rejected the district court's conclusion that the EEOC, representing Stephens, was limited to a gender stereotyping claim, expanding on its prior precedents to hold that gender identity claims are necessarily covered by Title VII as a form of sex discrimination. Thus, the only final merits ruling in the cases before the Court was the EEOC's (and Stephens') victory in the 6th Circuit. Stephens had intervened at the 6th Circuit, represented by the ACLU, making her a respondent alongside the EEOC in the Supreme Court.

After the Trump Administration took office, the Solicitor General, who represents the government in the Supreme Court, took over the case from the EEOC and, consistent with the Administration's view that Title VII did not forbid gender identity discrimination, effectively "changed sides," arguing that the employer should have prevailed. But surprisingly, inasmuch as the employer was being represented by Alliance Defending Freedom, a conservative religious freedom litigation group, the employer had not sought review of the 6th Circuit's rejection of its RFRA defense, so the *only* question before the Court was the Title VII interpretation issue. Stephens, as Intervenor, was left to defend the 6th Circuit's ruling, with the EEOC, represented by the Solicitor General, on the other side. The Solicitor General also participated as an amicus on behalf of the government in the *Bostock* and *Zarda* cases.

There was a big difference between the earlier landmark cases and this case. The four landmarks all involved interpretations of Constitutional Due Process and Equal Protection, and were decided, in sometimes quite emotional opinions by Justice Kennedy, based on concepts of human dignity and equality, resting also on the Court conclusion that animus by voters or legislators lay beyond the challenged provisions. The *Bostock* case, by contrast, was a matter solely of statutory interpretation, and solely of Title VII, at least as the case was presented to the Court. Perhaps surprisingly, two of the most ardent "textualists" on the Court, President Trump's appointees, parted company about how to apply textualism in determining the meaning of a 55-year-old statute.

Textualists contend that statutory interpretation is a matter of figuring out what the meaning of statutory language was at the time it was adopted. Extraneous information, such as congressional committee reports, hearing transcripts, speeches on the floor of Congress or statements inserted into the Congressional Record, are generally rejected by many textualists, who argue, as Scalia memorably wrote in a 1998 opinion also involving Title VII and sex discrimination, that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore* (1998).

Gorsuch and Kavanaugh (as well as Alito) swear allegiance to the textualism principle, but it took them in different directions in this case. Gorsuch, who had signaled this result as a possibility during the oral argument on October 8 last year, inclined towards a literalistic approach to the words of Title VII. While claiming that he was trying to determine "the ordinary public meaning" of the words at the time they were enacted, he rejected the argument that this meant that sexual orientation and gender identity could not possibly be covered, because he was persuaded by various arguments and examples that the statute as properly understood has always prohibited discrimination against people because of their "homosexuality" or "transgender status." He wrote, "an employer who intentionally treats a person worse because of sex – such as firing the person for actions or attributes it would tolerate in an individual of another sex – discriminates against that person in violation of Title VII."

Having accepted that point, he found persuasive several examples offered by counsel for *Bostock* and *Zarda*. Most prominent was the example of two employees, a man and a woman, with equally good qualifications, work records, and so forth, both of whom are attracted to men. The employer will hire the woman but reject the man. Because the employer will tolerate attraction to men by women but not by men, the employer's refusal to hire the man is necessarily discrimination because of the man's sex, according to Gorsuch. Similar comparisons supported the gender identity claim: if a person identified as male at birth now presents as a woman, and the employer fires that person but not a person presenting as a woman who was identified as female at birth and is similarly qualified, the discrimination is based on the fired person's sex as identified at birth.

Stating his holding more generally, he wrote: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other facts besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group." The idea is that sex is supposed to be irrelevant to a personnel decision unless, as the statute provides, the employer can prove that sex is a bona fide occupational qualification for the job in question, an affirmative defense provision that Gorsuch neglects to mention but Alito, in dissent, notes in passing. But Gorsuch agreed that making a personnel decision because the person is gay or transgender makes sex relevant to the decision, and thus is generally prohibited by Title VII. Or, as he put it quite strongly, "Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

The issue, wrote Gorsuch, is whether the plaintiff's sex is a "but-for" cause of the challenged personnel action, but it doesn't have to be the sole cause, because the statute does not expressly require that. "When an employer fires an employee because she is homosexual or transgender," he explained, "two causal factors may be in play, *both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies).

But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach." Because all three cases being argued involved discharges, it is not surprising that Gorsuch mentions only discharges, but the clear important of the decision is that all the personnel actions coming within the scope of Title VII come within this ruling.

Responding to the argument that this could not possibly be the meaning of a statute passed in 1964, Gorsuch insisted that it has always been the meaning, it just was not recognized as such by the courts until more recently. He characterized this as the "elephant in the room" that everybody pretended was not really there. It was now time to recognize the presence of the elephant.

Aside from some passing references, Gorsuch's interpretive discussion, and the examples he presented, focused mainly on the sexual orientation issue, but he was careful to mention gender identity or transgender status as well as sexual orientation whenever he stated his conclusions.

Justice Alito unkindly stated in his dissent that Gorsuch's conclusion that sexual orientation and gender identity are covered by Title VII is "preposterous." Alito's focus on the "original meaning" of statutory language, which he documents at length, shows as a matter of the historical record that in 1964 gay people were widely reviled as sick criminals, so it is impossible in his view to read the statutory language of 1964 as forbidding discrimination on this ground. Furthermore, he pointed out, as of 1964 the public's awareness of transgender individuals was slight at best. Indeed, the very terms "transgender" and "gender identity" were not even used until much later. That a statute enacted in 1964 could be interpreted as prohibiting discrimination on this ground could not possibly accord with its "ordinary public meaning" at that time, he argued. But Gorsuch countered that Alito was talking about legislative intent, not contemporary meaning of the statutory language. As Scalia wrote so often in cases where he rejected evidence of legislative history, when the law is reduced to a written text, it is the text that is the law. Gorsuch even cited a few sources to suggest that some people at or near the time of enactment actually believed that gay or transgender people might have discrimination claims under Title VII. Justice Kavanaugh's separate dissent emphasized the difference between "literalistic textualism" and textualism informed by the context in which a statute is adopted, contending that the "ordinary meaning" of Title VII embraced by the Court in this case would not have occurred to any "reasonable person" reading the language of the statute in 1964.

"Ours is a society of written laws," Gorsuch wrote. "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Reading Alito's dissenting opinion may induce nausea in the reader, so graphic is his recounting of the horrendously homophobic views of the government and the public towards LGBT people in 1964, but he recites them to make his argument that prohibition of discrimination on these grounds could not possibly be a correct textualist interpretation of this language. He started his dissent pointedly by saying that the Court was engaged in "legislation," not interpretation. And he concentrated on shooting holes in Gorsuch's examples of the hypothetical situations that led Gorsuch to conclude that discrimination because of homosexuality or transgender identity is, at least in part, sex discrimination.

Alito also wandered far from the central question in the cases, interjecting discussion of various issues likely to arise as a result of the decision, such as hardship for employers with religious objections to homosexuality or transgender identity (such as the employer in the *Harris Funeral Homes* case), and objections by co-workers to transgender employees using bathrooms and locker rooms. He noted various controversial issues under Title IX of the Education Amendments of 1972, such as transgender students' access to restrooms and locker rooms and participation in sports. Gorsuch rejoined that these were questions for another day, not relevant to decide the appeals before the Court, noting particularly that Harris Funeral Homes had not asked the Court to review the 6th Circuit's decision rejecting its RFRA defense. Alito was definitely putting down markers for the future cases that the Court may confront.

Justice Kavanaugh makes some of the same points as Alito in his dissenting opinion, but it is notable that he, unlike Justice Thomas, did not join Alito's dissent. This may be at least in part a generational thing. Gorsuch and Kavanaugh are considerably younger than Alito and Thomas. By the time they were in college and law school, there were out gay people around and, on a personal level, they undoubtedly both agreed that as a matter of politics it would be appropriate for Congress to ban such discrimination. Kavanaugh said as much in his dissent. They just differed from each other on whether the Court could reach the same result through interpretation of the 55-year old law. Kavanaugh noted that three-judge panels of ten circuit courts of appeals had rejected this interpretation. 30 judges out of 30, he wrote, more than once in his opinion, as if the unanimity of an interpretation turned it into a correct interpretation. Obviously, Gorsuch might say, these judges did not recognize the "elephant in the room."

For Kavanaugh, this was really a "separation of powers" issue. The question for the Court, he wrote, was "Who decides?" The legislature has the power to make law, while the courts are limited to interpreting the statutes passed by the legislature. Here, agreeing with Alito, he asserted that the Court's decision was violating the separation of powers. And he disagreed with Gorsuch's approach to textualism in

this case, find it too narrowly focused on individual words, thus losing the context necessary in his view to determine the contemporary "public meaning" of the overall provision in 1964. Both Alito and Kavanaugh noted the progress LGBT rights advocates had made in Congress, without yet achieving ultimate success. Kavanaugh suggested the likelihood that the political process might result in passage of the Equality Act, a bill that would amend Title VII to add the terms "sexual orientation" and "gender identity," not too long in the future. Both Alito and Kavanaugh suggested that such legislative action would be justified on policy grounds, but that it was not up to the Court to achieve this result as a matter of "updating" an old statute through an interpretive method that they believed had been improperly applied by their colleagues in the majority.

Kavanaugh concluded his dissent revealing his political, as opposed to interpretive, preferences. "Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans," he wrote. "Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit – battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's results. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII." But Kavanaugh's dissent largely ignored transgender people. His omission of them from this paragraph is inexplicable in light of the scope of the Court's opinion and the activist role of transgender people seeking legislative protection over the past several decades.

Interestingly, Gorsuch premised the case entirely on a strict textualist reading of the statute, avoiding reliance on the alternative theories that the EEOC and some lower courts embraced. One such theory was sex stereotyping, grounded in the Court's 1989 decision in *Price Waterhouse v. Hopkins*, in which the Court held that an employer who takes an adverse action because an employee fails to comport with stereotypes about women or men has exhibited an impermissible motivation for its actions under Title VII. Another theory, first developed in race discrimination cases, was that discharging a worker because he or she was engaged in an interracial relationship was a form of discrimination because of race. Neither this "associational theory" nor the sex stereotyping theory entered into Gorsuch's rationale for binding Title VII applicable in *Bostock*. Alito, noting their omission from the majority opinion, devoted a section of his dissent to analyzing and rejecting both theories, as they had been raised in briefs filed with the Court and relied upon in several court of appeals decisions.

Impact of the Ruling

The Court's opinion has the immediate effect of extending protection to LGBT workers in the majority of states that do not ban sexual orientation or gender identity discrimination expressly in their state civil rights laws, but there remain significant gaps in protection. Title VII applies to employers with at least 15 employees, state and local government employees, and federal employees. It does not apply to the uniformed military (so this decision does not directly affect Trump's transgender service ban, the subject of five pending federal lawsuits), or to religious organizations in their policies on "ministerial employees." Thus, a substantial portion of the nation's workforce does not directly gain any protection from discrimination by this interpretation of Title VII, because a substantial portion of the workforce is employed by smaller businesses or is classified as non-employee contractors. Furthermore, as Justice Gorsuch noted briefly but Justice Alito expounded at length, the Religious Freedom Restoration Act (RFRA) might be interpreted to "supplant" the Title VII protections in particular cases, and Title VII explicitly exempts employers from its restrictions with respect to "ministerial" positions.

The potential application of RFRA is especially worth noting. Reading Gorsuch's opinion, one might immediately identify this as a potential "poison pill." A few years ago, in its *Hobby Lobby* decision, the Supreme Court suddenly discovered that business corporations could argue that a particular policy mandated by another federal law unduly burdened the employer's free exercise of religion, and they might thereby escape compliance with the law if the government fell short in showing that its policy was the least restrictive alternative to achieve a compelling government interest. (In *Harris Funeral Homes*, the 6th Circuit interpreted RFRA in this context and found that the government's compelling interest in preventing sex discrimination could be achieved only by an outright prohibition, without an exception for business owners who had religious objections.) Although Justice Alito's opinion for the Court in *Hobby Lobby* rejected the idea that an employer could make such an argument in defense of a race discrimination claim, Justice Ginsburg pointed out in dissent that Alito's opinion failed to address the issue of sexual orientation, mentioning cases where businesses claimed a religiously-based right to discriminate against gay people. This is an issue that is hardly settled, and Gorsuch's reference to the possibility of RFRA as a "super statute" to "supplant" Title VII protections in "appropriate cases" is ominous. Where a case does not involve "ministerial employees," the full weight of Title VII normally applies to the issue of employment discrimination by religious institutions whether because of race or color, sex or national origin. The Court would be issuing decisions in two ministerial exception cases from religious schools just weeks later, potentially casting more light on the scope of that exception. There are several cases pending in lower courts in which gay employees of Catholic educational institutions have been terminated for entering same-sex marriages which could be affected by these rulings.

In addition, Title VII only applies to employment decisions. It doesn't affect decisions by companies about hiring people as non-employee independent contractors, and it doesn't apply to the myriad other ways that LGBT people encounter discrimination through denial of services, housing, and other privileges of living in our society. This decision does not eliminate the need for enactment of the Equality Act, a bill that would amend numerous provisions of federal law to extend anti-discrimination protection to LGBT people, while amending Title VII to make explicit the coverage of sexual orientation and gender identity. Perhaps most importantly in terms of gap-filling, the Equality Act would add "sex" to the prohibited grounds of discrimination in federal public accommodations law while at the same time expanding the concept of a public accommodation, and would also require federal contractors and funding recipients not to discriminate on these grounds.

Alito's dissent suggested that the reasoning of the Court's opinion could protect LGBT people from discrimination under all those other federal statutes that address discrimination because of sex. That would fill a significant part of the gap left by this decision, but not all of it, because, as explained in the previous paragraph, the Civil Rights Act provisions on public accommodations do not forbid sex discrimination and small employers are not covered. Alito appended to his dissent a list of more than 100 federal statutory provisions that he claimed would be affected by this decision, among them Title IX of the Education Amendments Act, under which courts have addressed disputes involving transgender students. This provides a useful "to do" list for the LGBT rights litigation groups, finding cases to firmly establish that the Court's conclusion in *Bostock* applies to all those other protections. Closing the gaps through passage of the Equality Act and through passage of state and local laws to cover employers not subject to Title VII must be an ongoing project. There also may be an opening to persuade state courts that they should adopt similar interpretations of the prohibition of sex discrimination under their state laws.

An early test of Bostock's applicability to other federal sex discrimination laws will come as courts confront challenges to a new regulation announced by the Department of Health and Human Services, just days before this decision was announced, reversing an Obama Administration rule under the Affordable Care Act's antidiscrimination provision and "withdrawing" protection against discrimination under that Act for transgender people. Lawsuits were quickly threatened challenging this regulation. The ACA incorporates by reference the sex discrimination ban in Title IX, so federal courts should read this consistently with *Bostock* and hold that the regulatory action violates the statute.

Another question left open by the decision is whether state courts may follow Bostock in interpreting their state sex discrimination provisions in those jurisdictions that don't expressly address sexual orientation and gender identity. Although state civil rights agencies in Michigan and Pennsylvania have embraced definitions of sex discrimination in accord with the *Bostock* holding, the question of what courts will do is only beginning to receive an answer. Significantly, in many state courts have routinely applied Title VII precedents when interpreting their state sex discrimination laws. An early sign that *Bostock* will be followed in this regard came in Ohio on June 22 in *Angelina Nance v. Lima Auto Mall, Inc*., 2020-Ohio-3419, 2020 WL 3412268, 2020 Ohio App. LEXIS 2352 (Ohio Ct. App.), where the court stated: "Since the Ohio Supreme Court has held that federal case law is 'generally applicable to cases involving alleged violations of R.C. Chapter 4112,' the type of claim that Angelina raises herein could potentially have a basis in law under *Bostock*." The *Nance* decision is discussed in more detail in a separate article, below.

Justice Alito's dissent also alludes to the potential impact of *Bostock* on constitutional interpretation. Some federal appeals courts have already ruled that sexual orientation or gender identity discrimination claims involve quasi-suspect classifications that would receive "heightened scrutiny" in equal protection cases. As noted at the outset of this article, the Supreme Court itself has never undertaken an explicit analysis of the equal protection status of LGBT people in terms of quasi-suspect classes or heightened scrutiny. By equating such claims with sex discrimination claims, the Court's opinion in *Bostock* implicitly affirms those lower court holdings. This would mark a paradigm shift in equal protection rights of LGBT people, since laws subject to heightened scrutiny are presumed unconstitutional and the burden is placed on the government to show that they significantly advance an important governmental interest. In terms of pending litigation, Bostock puts Supreme Court muscle behind rulings from the 9th Circuit in pending challenges to the Trump Administration's transgender military service ban, and provides doctrinal support that that circuit's post-*Windsor* ruling that the *Batson* doctrine on peremptory jury challenges would apply to peremptory challenges used to keep LGBT people off juries. It could also provide additional protection to public employees of state and local government institutions in jurisdictions that provide no statutory protection against discrimination.

Another important point to bear in mind, however, is that coverage of a form of discrimination by Title VII does not inevitably lead to a ruling on the merits in favor of the employee. Title VII litigation can be very difficult, and many employees lose their cases early in the process due to procedural roadblocks or, in the case of sex discrimination claims, to the courts' view that sex may be a "bona fide occupational qualification" in a particular case. When plaintiffs attempt to represent themselves, as many employment discrimination plaintiffs do, they may be felled by statutes of limitations, shortcomings in their factual pleadings, or limited resources to investigate the facts and articulate a convincing claim as required by federal civil pleading standards. Furthermore, many employers require employees to execute arbitration agreements when

they are hired, so plaintiffs seeking to get their proverbial "day in court" may be disappointed to discover that they are relegated to arguing in private before an arbitrator, who in many cases was carefully selected by the employer based on the arbitrator's "track record" in ruling on employee claims. The road to vindication is not always a smooth one.

Public Reception of the Opinion

The Court's decision was immediately controversial with certain conservative and religious groups, some of which quickly made claims about how this ruling could interfere with their free exercise and free speech rights, but public opinion polls have consistently shown overwhelming support for outlawing employment discrimination against LGBT people for many years now, so there was no startled outcry by the public at large in the days following the ruling. President Trump's initial response was muted – along the lines that this is the Court's decision and we will live with it – but then evolved in response to the outcry from religious conservatives to provoke a more negative response from the president. (But, as a practical matter, he couldn't blame Democratic leftists on the Court when the opinion was written by his first appointee.) Those who are cynical about the idea of judging by "neutral principals of law" have often exclaimed that the Supreme Court follows the election returns, so they may characterize this opinion as more political than legal, but the "bipartisan" nature of the line-up of justices would rebut that contention. And, notably, many of the court of appeals decisions that have ruled this way in recent years have also been bipartisan in terms of the politics of the presidents who appointed the judges. The opinion, in the matter of fact way that Gorsuch writes about "homosexual" and "transgender" people in the opinion, comes across as impassive by comparison to the florid prose of Kennedy, but it gets the job done.

Kavanaugh's closing paragraph says that "gays and lesbians" should take pride in this victory, which was hard-earned through decades of political, legal and personal struggle. A brief pause to take pride in this ruling is appropriate but pushing ahead to fill the remaining gaps in full legal equality is essential. A battle has been won, but not yet the war.

The Cast of Characters

Unfortunately, neither Donald Zarda nor Aimee Stephens lived to learn of their victories. Zarda, who had been fired from a job as a sky-diving instructor, died in a sky-diving accident while his case was pending, and his Estate carried on the litigation in his name. Aimee Stephens was gravely ill by the time of the oral argument (which she attended, although wheelchair-bound), and she passed away just weeks before the Court's decision. Gerald Bostock, however, gave delighted interviews to the press, and was looking forward to the remand back to the district court so that he would get his opportunity to prove that he was the victim of unlawful discrimination (unless, of course, Clayton County pragmatically decides to avoid a trial by offering an acceptable settlement).

The Supreme Court was flooded with amicus briefs in these cases, too numerous to mention individually here. On October 8, 2019, the Court first heard arguments on the sexual orientation issue, with Pamela S. Karlan representing Bostock and the Estate of Zarda, Jeffrey M. Harris representing Clayton County and Altitude Express, and Solicitor General Noel J. Francisco presenting the Trump Administration's position in support of the employers. Next the Court heard arguments on the gender identity issue, with David Cole (ACLU) representing Aimee Stephens, John J. Bursch representing Harris Funeral Homes, and again Solicitor General Francisco officially representing EEOC but presenting the Trump Administration's position that gender identity discrimination is not covered by Title VII. The EEOC, the respondent in the case, was not separately represented and did not support the government's position, evidenced by the government's briefs, which unusually did not list attorneys from the agency. Although Trump's appointments to the agency have replaced the majority of Democratic appointees who initiated this litigation during the Obama Administration, the agency never backed away from its position on these cases that sexual orientation and gender identity claims are covered by Title VII.

There are cases pending in the lower federal courts that will be immediately affected by this case. The 8th Circuit, for example, heard argument in *Horton v. Midwest Geriatric Management, LLC*, Docket No. 18-1104, last year, an appeal from the district court's dismissal of a sexual orientation discrimination claim under Title VII based on 8th Circuit precedent. Shortly after that case was argued, the 8th Circuit took note of the cert grants in *Bostock*, *Zarda* and *Harris Funeral Homes*, and put the case "on hold" pending a Supreme Court decision. On June 18, counsel for plaintiff Mark Horton sent a letter to the court, advising it that its precedent had been effectively overruled and urging a quick remand to the district court so that the case can proceed to discovery.

An interesting side-note: In the April issue of *Law Notes*, we listed the following article: Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 Cal. L. Rev. Online 9 (March 2020). Ezra Young critiqued the oral argument presented for Aimee Stephens as excessively focused on gender stereotyping, and suggested that it should have emphasized textualism, proceeding from the premise that Aimee Stephens was discriminated against as a woman. Young also noted that only one member of the Supreme Court had sat on a Title VII transgender discrimination case while on a lower court: Justice Neil Gorsuch! Sitting by designation on a 9th Circuit panel, he had voted with the *per curiam* panel to find that the transgender plaintiff's claim was covered by Title VII, which was not

necessarily compelled by then-existing 9th Circuit precedents but was generally consistent with the tenor of 9th Circuit rulings in cases brought by LGBT plaintiffs. However, the brief opinion in that case premised coverage on sex stereotyping and concluded that the employer had shown a legitimate non-discriminatory reason for the restroom policy it was defending in the case. The case was *Kastl v. Maricopa Community College*, 325 Fed. App'x. 492 (9th Cir. 2009). Ezra Young was certainly prophetic in suggesting that the way to a majority for transgender coverage under Title VII was through Justice Gorsuch's textualist interpretation. But the 9th Circuit opinion may forecast how Justice Gorsuch might deal with a subsequent case involving a transgender employee's claim that her Title VII rights were violated by excluding her from using the restroom consistent with her gender identity, an issue that Judge Gorsuch disclaimed address in *Bostock*. ■

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U.S. Supreme Court Rules Against Trump Administration on DACA Termination

By Arthur S. Leonard

On June 18, an estimated 39,000 LGBTQ people enrolled in the Deferred Action for Childhood Arrivals (DACA) Program won a reprieve from possible deportation when the Supreme Court ruled in *Department of Homeland Security v. Regents of the University of California*, 2020 U.S. LEXIS 3254, 2020 WL 3271746, that the Trump Administration's attempt to terminate the program was fatally flawed, thus affirming several lower federal court rulings requiring that the program continue for now.

The estimated number of LGBTQ people in the program was provided by the Williams Institute at UCLA Law School, a think-tank that specializes in quantitative analysis of the LGBT community (and whose numerical estimates have been accepted by federal courts in decisions to certify class actions where the numerosity of the proposed class is an issue). The Institute also estimated that more than 80,000 "Dreamers" identify as LGBTQ, so any development concerning the availability and administration of this program is affecting a significant number of members of the LGBTQ community.

The Obama Administration adopted the program unilaterally after Congress deadlocked on providing protection to the so-called "Dreamers," people who were brought to the United States as children without documentation who would otherwise be subject to removal. The program was not adopted through a formal rule-making procedure, but rather through informal action by the Department of Homeland Security.

Donald Trump's presidential campaign in 2016 promised to "repeal" the program. After taking office, Trump at first indicated reluctance to expel the "Dreamers" from the county, but sharp criticism from the anti-immigration advocates in his administration and the right-wing media persuaded him to a sudden change of position, and the Acting Secretary of Homeland Security issued a memorandum terminating the program, in reliance on a memorandum from the Attorney General asserting that the program was unconstitutional.

Numerous lawsuits ensued, and several (but not all) district courts issued preliminary injunctive relief to protect those who were enrolled in the program pending final decisions on the lawsuits, although new people aging into the eligible class (age 15) were not allowed to enroll.

Acknowledging the multiplicity of lawsuits and divergent results, the Supreme Court granted some petitions for *certiorari* "before decision" and consolidated the cases for argument, which was held on November 12, 2019.

In the 5-4 ruling, a majority of the Court found that the lack of sufficient articulated justifications for terminating the program in the Acting Secretary's Memorandum rendered the decision "arbitrary or capricious" in violation of the Administrative Procedure Act. Chief Justice Roberts wrote for the Court, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. The opinion specifically noted the failure of the Acting Secretary's Memorandum to consider the reliance interests of those who were participating in the program. Justices Thomas – joined by Alito – and Kavanaugh wrote dissents.

The dissenters argued that the Attorney General's opinion was correct: The President and Executive Branch did not have the authority to adopt the program unilaterally, certainly not by a Memorandum without any compliance with APA procedures for rulemaking. Thomas's dissent accused the majority of making a political rather than a legal decision to save a popular program.

The Acting Secretary's Memorandum effectively amended various provisions of the Immigration and Nationality Act, the Social Security Act, and the Medicare Act, which cannot be done, the dissenters argued, without the consent of Congress. Furthermore, they argued, since the program was not adopted in a

procedure consistent with the APA, the APA was not relevant to the issue of its termination.

The dissenters did agree with a portion of Roberts' opinion rejecting the plaintiffs' equal protection arguments. Only Justice Sotomayor departed from the Court's equal protection ruling, asserting that at this stage of the litigation, the plaintiffs' allegations were sufficient to keep an equal protection argument in the case.

One point on which all of the justices agreed was that a program adopted unilaterally by the Executive Branch could be terminated unilaterally by the Executive Branch. The dispute concerned how that could be done. The majority opinion carefully refrained from pronouncing on the question whether the program was unconstitutional ab initio, but did observe that DACA could be subdivided into two distinct aspects for purposes of analysis: the provision providing protection against removal, and the provisions extending eligibility to program participants to participate in Social Security and Medicare, and to enjoy, albeit temporarily, the privileges of being considered lawful residents of the U.S. The first aspect might be justified under the Executive Branch's discretionary power to determine how to enforce the immigration laws (a point hotly contested by the dissent) while the second aspect seemed more questionable by opening statutory benefit programs to people whose participation was not authorized by statute.

The bottom line is that DACA continues in effect, at least to the extent that "Dreamers" continue to avoid removal from the U.S., although President Trump quickly announced that his Administration would restart the process of terminating the program in compliance with the requirements of the APA. Some doubts were express whether this process could be accomplished during the president's current term of office, in which case the continuation of DACA appeared to hinge heavily on the outcome of the presidential election in November. The presumptive Democratic nominee, former Vice President Joe Biden, announced that if elected he would seek to extend DACA and find a legislative solution. ■

Supreme Court Refuses to Extend Open Society Ruling to Foreign NGOs, Undercutting Overseas Efforts Against HIV

By Arthur S. Leonard

On June 29, the U.S. Supreme Court rejected by a 5-3 vote an attempt by the Alliance for Open Society International, a United States non-governmental organization, to free its overseas affiliates from a statutory requirement that they officially state a policy against prostitution in order to access federal funds targeted at combatting the spread of HIV. *Agency for International Development v. Alliance for Open Society International, Inc*., 2020 WL 3492638 (June 29, 2020).

Congress passed the Unites States Leadership Against HIV/AID, Tuberculosis, and Malaria Act in 2003. The Leadership Act authorizes grants to organizations working to halt the spread of HIV overseas. Congress placed two restrictions on organizations receiving money under this law: that they not promote prostitution or sex trafficking, and that that they have a "policy explicitly opposing prostitution and sex trafficking." This provision was attributed to congressional findings that prostitution and sex trafficking contribute to the spread of HIV.

Organizations seeking to curb the spread of HIV overseas argue that a key element of their strategy is to win the confidence of sex workers in order to provide them with health care and to supply training in the use of condoms. Having a policy explicitly opposing prostitution was inconsistent with this mission, they have pointed out.

The Alliance for Open Society found that in many countries the local governments insisted that the money flow through locally chartered organizations, so the Alliance created affiliated organizations in many of the countries where it was doing HIV prevention work. Although the organizations are incorporated in the countries where they operate, they are named as part of Open Society, use its logo, and are closely associated with the U.S. organization.

As soon as the law was passed, the Alliance went to federal court seeking a ruling that it had a right under the First Amendment to refuse to adopt an explicit anti-prostitution policy as a condition for receiving funding, and it succeeded at the Supreme Court. In 2013, the court ruled that any attempt to enforce this requirement against the Alliance was a violation of its free speech rights.

After that ruling came out, however, the government insisted that the Alliance's overseas affiliate organizations could not receive United States funds unless they adopted policy statements in compliance with the 2003 Act, and the Alliance headed back to court seeking a ruling that the Supreme Court's 2013 decision applied to its foreign affiliates.

The lower federal courts agreed with the Alliance that requiring the affiliates to adopt such a policy as a funding condition was imposing an "unconstitutional condition" in violation of the First Amendment, but a majority of the Supreme Court disagreed.

Writing for the court, Justice Brett Kavanaugh stated that it was a well-established precedent that the First Amendment protects the free speech rights of Americans and American organizations but has no application to the speech of foreign nationals and organizations operating outside the US. He concluded there was no First Amendment violation. All five conservative justices voted for this result, with Justice Clarence Thomas concurring on the ground that he thought the restriction was perfectly valid as applied to any recipient of federal funding, not just the overseas affiliates.

Justice Stephen Breyer dissented for himself and Justices Ruth Bader Ginsburg and Sonia Sotomayor. Justice Elena Kagan, who had been involved

in this litigation as US solicitor general during the Obama administration, recused herself from the case.

Justice Breyer argued that the court's opinion mischaracterized what the case was about. The dissenters agreed with the Alliance that applying the restriction to its foreign affiliates abridged the Alliance's own First Amendment rights, since creating those affiliates was the only way it could carry out its HIV prevention work in many countries. Requiring the affiliates to affirmatively oppose prostitution, likely driving sex workers away from participating in the program, was undermining that mission.

Barring an amendment to the Leadership Act, Alliance will have to require its affiliates to adopt affirmative policies against prostitution if it wants to distribute U.S. government funds to them under the Leadership Act. ■

Supreme Court Rules States Can Provide Scholarships to Religious School Students

By Arthur S. Leonard

In a further broadening of the Free Exercise Clause, the Supreme Court voted 5-4 on June 30 to hold that a Montana Constitutional Amendment dating from the 19th century could not be used to exclude students who were seeking scholarship assistance to attend religious schools under a state program intended to help parents who prefer to send their children private schools to meet the tuition expense. The case is *Espinoza v. Montana Department of Revenue*, 2020 WL 3518364 (June 30, 2020), continuing the Court's trend of broadening the potential scope of government financial assistance to religious organizations. Chief Justice John Roberts wrote for the five-member majority, with the liberal justices all dissenting. Of course, unmentioned in the opinion is that some of the taxpayer money that would go to private religious schools could be funding discrimination against LGBT people as students and employees.

Montana enacted a law to increase parents' ability to send their children to private schools. Taxpayers could make tax-deductible donations to a scholarship organization, which would then award scholarships to students who were attending any private school that met state educational criteria. The "school choice" statute made no distinction between religious and non-religious private schools. Not surprisingly, about 94 percent of the applications were for scholarships to attend religious schools, so this was essentially a way for the state to channel money into religious schools. The State Legislature appropriated millions of dollars to fund the tax credit program for the only scholarship organization that went into operation under the law.

The Legislature specified that the program had to comply with the Montana Constitution's provision that prohibits the state government from providing "any direct or indirect appropriation or payment from any public fund or monies to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Presumably, the Legislature concluded that providing scholarship assistance to students instead of directly funding the religious schools would not violate this provision, since they would be aiding the students and their parents in the first instance.

However, the Montana Department of Revenue subsequently adopted a regulation that the scholarships could not be used to attend religious schools. The state's attorney general opposed that regulation's adoption and refused to defend it in court when some parents who were told their children could not use the scholarship money to go to a religious school sued the Department of Revenue, claiming this violated their free exercise of religion.

The Montana Supreme Court found that the scholarship program violated the State Constitution because it authorized spending state funds for "any" qualified school, without excluding the religious schools. That court put an end to the entire program.

The parents appealed to the U.S. Supreme Court, claiming that the constitutional provision's application in this situation was violating their right to free exercise of religion.

The US Supreme Court had two prior precedents that could have applied here. In one, the court held that a state did not violate the free exercise clause when it set up a scholarship program that explicitly excluded any assistance to students studying to be clergy. In the other, it ruled that a state program to assist organizations in repaving projects could not deny participation to religious organizations. The money would be spent to repave parking lots and playgrounds, not for religious instruction, the court noted.

Ruling for the parents *Espinoza*, Roberts said that the decision was controlled by the paving case. As in that case, he wrote, the state may not discriminate against religious organizations under a general benefit program. While the state is under no compulsion to fund religious education, if it sets up a general scholarship program to provide financial assistance to parents who want to send their children to private schools, it can't single out private religious schools for exclusion solely because they are religious schools.

Roberts was joined by the other conservative justices, some of whom wrote concurring opinions. Justice Samuel Alito emphasized that the Montana constitutional amendment relied on by the State Supreme Court was one of a wave of such amendments passed by Protestant majorities in many states during the late 19th century in response to the massive immigration from Europe of Catholics, in order to prevent any governmental subsidy to Catholic schools. He saw these amendments as being conceived in anti-Catholic bigotry, and thus clearly violating the First Amendment by discriminating against a particular religion.

Justices Ginsburg, Breyer, and Sotomayor each filed dissenting opinions, and Kagan joined in some of the dissents.

The dissenters saw the clergy scholarship precedent as controlling here. Students attending a religious school are going to be getting religious instruction, so it is clear that any state financial assistance flowing to the school through the scholarship program is financing religious education. The data showing that scholarships under the program were almost all going to religious schools made clear that it was intended primarily to subsidize religious education.

Some of the dissenters also pointed out that since the Montana Supreme Court ended the entire program, there was no longer any discrimination being practiced against religion.

Roberts, in his majority opinion, pointed out that since no Establishment Clause claim was made in defending against the parents' lawsuit, the Supreme Court had not been asked to address the question whether a state program channeling significant money to scholarships for students attending religious schools violates the Establishment Clause.

The First Amendment religion clauses present a constant tension between free exercise rights and the ban on the establishment of religion. Many scholars have long embraced the notion of the "wall of separation" between church and state described by the republic's founders, who had rebelled against an empire with an established church funded by the government. But the Supreme Court, with its conservative majority since the Reagan administration, has adopted a very limited view of the Establishment Clause and an expansive view of the Free Exercise Clause.

There is one notable exception, however, a 1990 ruling, *Employment Division v. Smith*, in which Justice Antonin Scalia wrote for the Court, holding that the Free Exercise Clause does not excuse people from complying with general state laws that are religiously neutral just because the laws incidentally may place a burden on an individual's free exercise of their religion.

This principal was invoked by Justice Anthony Kennedy in one of his last opinions for the court, the June 2018 *Masterpiece Cakeshop* decision, when he wrote that individuals don't have a general right to refuse to comply with anti-discrimination laws based on their religious beliefs. (The baker refusing to make a wedding cake for a gay couple, however, prevailed, on narrow grounds, because the court found that the Colorado commission reviewing the case evidenced hostility to his religious views.)

This principal will be tested next term when the court hears the case of *Fulton v. City of Philadelphia*, a challenge by Catholic Social Services to the City's action cutting it off from participation in Philadelphia's foster care program because it won't provide its services to same-sex couples. Several of the conservative justices have already called for reconsideration of *Employment Division v. Smith* as part of their general agenda to broaden protection for free exercise of religion. If Scalia's opinion in that case is overruled, employers with religious objections to hiring LGBTQ people may find an enormous loophole in the Title VII protection that was so hard-won on June 15.

Meanwhile, under the Court's ruling in Espinoza, state taxpayers may see their taxes being used to subsidize religious schools, some of which maintain express policies against hiring LGBT staff or admitting LGBT students. ■

West Virginia's Highest Court Rules Out Gender Changes on Birth Certificates

By Arthur S. Leonard

The Supreme Court of Appeals of West Virginia, the state's highest court, ruled *per curium* on June 18 that trial courts in West Virginia do not have authority to change a gender designation on a birth certificate. *In re G.M.*, 2020 WL 3408589, 2020 W. Va. LEXIS 402 (June 18, 2020). S.M., the mother of minor G.M., filed a petition in Wood County Circuit Court on September 19, 2019, seeking a change of gender designation on G.M.'s birth certificate from female to male. Petitioner presented medical documentation of gender transition, including surgery which took place in June 2019. The Petition asked the court "to declare [G.M.'s] gender as male and to order that a new birth certificate be issued to reflect that gender change."

The circuit court denied the petition, having concluded that such a change was not specifically authorized by the statute governing corrections of birth certificates, which provides that "[i] n order to protect the integrity and accuracy of vital records, a certificate or report registered under this article may be amended only in accordance with the provisions of this article or legislative rule." The circuit court claimed it was without authority to provide the requested relief as a result.

On appeal, the Supreme Court did not even give the Petitioner the courtesy of scheduling an argument, instead issuing a brief Memorandum, reciting its rule that in cases requiring the construction of a statute, where the statutory language is plain, there is no need for interpretation. The court wrote: "In cases, such as the instant case, where the legislative intent is plain, it is the duty of the circuit court not to construe, but to apply the statute. The circuit court herein reviewed and referenced the express language of West Virginia Code § 16-5-25, including its limiting language, and rightfully determined that it did not have the authority to grant petitioner's requested relief. There is no indication in the record that petitioner provided any authority, either under West Virginia Code § 16-5-25, Chapter 16 Article 5 of the West Virginia Code, or any legislative rule, to support her contention that the circuit court had authority to order the 'change of gender' on a birth certificate. Without such authority, the court was unable to grant the requested relief."

This drew a dissenting opinion from Justice Margaret L. Workman, who argued that the court had overlooked another provision that would support the circuit court's authority to grant the requested petition. She noted that the statutory provision says that changes can be made pursuant to "any legislative rule," and notes that such a rule exists: "Any other amendment to vital records not specifically provided for in this rule or in the W. Va. Code or one which was previously rejected by the State Registrar shall be made in accordance with an Order from a court of competent jurisdiction." W.Va. C.S.R. § 64-32-12.2.d.

"The majority fails to examine or discuss the administrative rule, and therefore, mistakenly concludes that the statute expressly limits a circuit court's authority," wrote Workman. "In fact, however, the legislative rule recognizes that courts have broad discretion to rule on specific matters not addressed in West Virginia Code § 16-5-25."

She observed that so many states now provide for gender changes on birth certificates that the petition in this case is hardly novel. Only a handful of states are outliers as to this (including a recently enacted Idaho statute that was adopted in defiance of a federal court ruling striking down its predecessor; *see F.V. v. Barron*, 286 F. Supp. 3rd 1131, discussed in *Civil Litigation Notes*, below.). She invokes *In re Heilig*, 816 A.2d 68 (Md. 2003), a leading case in which Maryland's highest court said that a trial court in that state could exercise its general equitable powers to declare a change of gender for a resident of the state who was born in a different state. While the Maryland court did not adopt explicit factors to determine when such a declaration could be issued, it seems clear that medical evidence of a successful gender transition including surgery would clearly meet any reasonable standard for a court to recognize a gender change.

Workman also suggested that in light of the U.S. Supreme Court's decision in *Obergefell*, failing to afford a transgender person a means of obtaining legal recognition of gender transition would violate due process rights. "Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015) (citations omitted). Our courts are vested with the constitutional authority and duty to protect these liberties. Thus, even if our Legislature expressly stated that a gender change to a birth certificate is a forbidden practice in this State, an individual could seek redress in the courts. *See e.g.*, *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (finding birth certificate policy that permitted name change on birth certificate, while prohibiting gender change violated plaintiffs' constitutional rights). History teaches us 'to jealously guard the judicial power against encroachment from the other two branches of government and to conscientiously perform our constitutional duties and continue our most precious legacy.'"

The Petitioner is represented by Walt Auvil and Kirk Auvil. ■

Sixth Circuit Vacates Preliminary Injunction for Federal Prisoners at Risk for COVID-19

By William J. Rold

U.S. Court of Appeals for the 6th Circuit vacated two injunctions issued by U.S. District Judge James S. Gwin (N.D. Ohio) to protect inmates at the Federal Correctional Institution in Elkton, Ohio, who are "vulnerable" to COVID-19. Circuit Judge Julia Smith Gibbons wrote for herself and for Senior Circuit Judge Deborah Cook (both G.W. Bush). Chief Circuit Judge R. Guy Cole, Jr., (Clinton) concurred on jurisdiction and dissented on vacating the injunctions, in *Wilson v. Williams,* 2020 U.S. App. LEXIS 18087, 2020 WL 3056217, No. 20-3447 (6th Cir. June 9, 2020).

The defendants are the Director of the Federal Bureau of Prisons [BOP] and the warden of Elkton, which is a low security institution, composed of six 150-bed dormitories and a "satellite" with two housing units, each with 250 inmates in bunkbeds. As of the writing, It was one of the two largest COVD-19 "hotspots" in BOP.

Judge Gwin provisionally certified a "sub-class" of inmates vulnerable to COVID-19, using CDC factors (including age and HIV/AIDS status). He found that social distancing was not possible at Elkton and that vulnerable inmates were at unconstitutional risk. He ordered BOP to evaluate each subclass member for transfer out of Elkton "by any means," including parole, community supervision, compassionate release, or furlough. He ordered BOP to transfer subclass members not so released to another BOP facility where physical distancing was possible and testing was available.

All judges agreed that Judge Gwin had jurisdiction under 28 U.S.C. § 2241 to hear the release petition by the subclass – under *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011) – although the majority held that relief could not extend under *habeas corpus* to transfer between BOP prisons. [Note: Elkton inmates not in the subclass because they were not "vulnerable" under CDC standards, but nevertheless claimed to be at risk, could not petition for *habeas* but had to file a conditions of confinement case.] Most of the discussion (and the disagreement) focused on whether Judge Gwin should have entered a preliminary injunction under the Eighth Amendment because the subclass had or had not shown a likelihood of prevailing on the merits of deliberate indifferent to their health and safety.

As discussed by the majority, BOP adopted a "six-phase" approach to COVID-19. Phase One (started in January 2020) was a plan to make a plan. It lasted until mid-March. Phase Two (adopted March 13th) involved suspension of visiting, and Elkton began to screen new arrivals for risk factors (without testing) on March 22. BOP also conducted an "inventory" of its medical and cleaning supplies. (It is not explained why this was not done earlier.) BOP went from Phase Two to Phase Five by March 31st. Steps included staggering meals to increase social distancing and establishing quarantine procedures. Phase Five was facility "lockdown," where inmates are "secured to their quarters." Phase Six is to continue Phase Five.

Of course, no prison can operate on total lockdown. Inmates considered "essential" to food services and cleaning had "enhanced screening" and were "encouraged to self-monitor and report symptoms." Elkton "began, but quickly ended, daily temperature screening." Elkton said that inmates "may receive new soap weekly" or "upon request," and they were given two surgical masks.

Subclass inmates maintained that they were particularly at risk at Elkton because they could not distance in the dormitory and bunk housing, had inadequate PPE, and rationed soap. They claimed that "there is no set of internal protocols or practices that, in light of the current conditions and population levels, Elkton can use that will prevent further disease and death." Judge Gwin agreed, given the "exceptional circumstances" at Elkton: "[Because of] the prison's 'dorm-style' design . . . , inmates remain in close proximity" and "COVID-19 is going to continue to spread."

As of April 18, Elkton had eighteen swabs left for COVID-19 testing and "hoped" to receive more each week. By April 22, when Judge Gwin entered a preliminary injunction, "fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died."

Judge Gwin denied a stay, and BOP filed an interlocutory appeal, requesting a stay from the circuit, which was also denied. BOP then sought a stay in the Supreme Court.

Meanwhile, petitioners filed papers charging BOP with violation of the preliminary injunction and seeking its enforcement. On May 19, 2020, Judge Gwen found non-compliance and issued additional orders. He found that BOP's efforts at Elkton had been "limited," that the facility had tested fewer than one-fourth of its inmates – and had results for less than half of those.

Of 837 subclass members, BOP made "minimal effort to get at-risk inmates out of harm's way": five were "pending home confinement"; six were "maybe qualified"; none were furloughed; and none were transferred. Judge Gwin found that BOP was not using its available legal tools to comply with the injunction and to mitigate the risk to the subclass. For example, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act [CARES Act], Pub.L. 116-136 (Mar. 27, 2020), which lifted restrictions on BOP's home confinement upon an emergency finding by the Attorney General. Attorney General Barr made such a finding on April 4, 2020, directing BOP to give priority to low security and high infection facilities, listing Elkton as an example. Judge Gwin's May 19th Order

directed BOP to show cause by name why individual class members could not be transferred to another BOP facility.

Justice Sotomayor, as Circuit Justice, referred the stay application on the April 22 Order to the full court. The Court denied a stay because the application did not include the May 19th Order, which BOP had not yet appealed. (Justices Thomas, Alito, and Gorsuch indicated they would have granted the stay.) No. 19A1041 (May 26, 2020).

BOP appealed the May 19th Order, and the Sixth Circuit again denied a stay. This time, Justice Sotomayor granted a stay (without referring the application to the full Court), until the Circuit acted. No. 19A1047 (June 5, 2020). The Supreme Court had earlier declined to vacate a Fifth Circuit stay of a preliminary injunction on COVID-19 prison litigation in *Valentine v. Collier,* 956 F.3d 797 (5th Cir. 2020 (*per curiam*), No. – Justices Ginsburg and Sotomayor dissenting – so the Court's division was clear.

While the likelihood of prevailing on the merits necessary for a preliminary injunction is a question of law, the other factors involving issuing such an order are reviewed under abuse of discretion standards, per *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). The majority found that Judge Gwin erred on the law and abused his discretion.

The panel agreed that COVID-19 meets the "serious" (objective) component of Eighth Amendment deliberate indifference jurisprudence. They divided on whether BOP had demonstrated subjective deliberate indifference, which it called a "mixed question of law and fact that we review *de novo*" under *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) (*en banc*).

The majority concluded that, "as of April 22, the BOP responded reasonably to the known, serious risks posed by COVID-19 to petitioners at Elkton." BOP's actions included: limiting inmate movement and gatherings; establishing isolation and quarantine; enhancing screening; providing soap and other cleaning materials; educating inmates and staff; and providing masks. BOP "struggled" with testing but was "on the cusp of expanding" it. The majority likened the subclass claims to individual inmate "disagreement with testing and treatment," citing *Rhinehart v. Scutt*, 894 F.3d 721, 740 (6th Cir. 2018), and noting that not all risks can be avoided, citing *Helling v. McKinney*, 509 U.S. 25, 32-34 (1993).

Both citations are odd. *Rinehart* involved a prisoner with end stage renal disease who received ultrasounds and MRI's, following by hospitalization and surgery. In *Helling,* the Supreme Court found that inmates involuntarily exposed to second-hand tobacco smoke stated an Eighth Amendment claim. Neither foreshadows the holding here. The majority also relies on "similar" conclusions by sister circuits, citing *el*UIn *Helling*

Swain v. Junior, 958 F.3d 1081 (11th Cir. 2020) (*per curiam*); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (*per curiam*); and *Marlowe v. LeBlanc*, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (*per curiam*). *Valentine* is particularly inapt, since the Fifth Circuit stay was entered upon a post-ruling showing by Texas that it had *complied* with the preliminary injunction.

The majority also found that Judge Gwin abused his discretion by not considering the public interest before issuing the injunction. BOP argued that release of subclass members "would cause substantial damage to others because there is no assurance that the inmates can care for themselves upon release." They offered no evidence for this cant, as noted by Judge Cole in dissent.

Finding that a judge abused his discretion by declining to defer to a position for which there was no evidence is a new one in this writer's experience. Congress's decision in the CARES Act to update the requirements for home confinement suggests that, if anything, the public interest is served by more eligible prisoners being released to home confinement during the pandemic.

Judge Cole disagrees with the majority's finding that it is unlikely the subclass would prevail on the merits, and he specifically counters each case the majority cites. Four factors stand out: Elkton is a COVID-19 "hotspot"; it cannot provide social distancing; it is not following CDC guidelines on testing; and it has not implemented the directives of the Attorney General to apply relaxed release standards under the CARES Act.

The BOP's plan only "sounds good on paper," and its "six phases" are illusory while case numbers continue to rise. According to the Cleveland *Plain Dealer,* another three inmates had died and 400 were ill from COVID-19 at Elkton by June 9, the day of this decision. (Yet, the majority would "freeze" the record as of April 22, unlike what was done in *Valentine*.) Judge Cole writes: "The government's assurances that the BOP's 'extraordinary actions' can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease," citing *United States v. Rodriguez*, 2020 WL 1627331 at *8 (E.D. Pa. 2020).

"The flaws inherent in the half-measures employed by the BOP are amplified by the BOP's inability to test inmates for COVID-19. At the time of the preliminary injunction, the BOP had only obtained 75 tests for roughly 2,500 inmates at Elkton . . . . The fact that more than two-thirds of those tests came back positive suggests an extremely high infection rate, but the BOP's testing shortage ensured that the record would not reflect the precise figure."

It should be no surprise that BOP's efforts reflect the general inadequacy of response of the federal government to the pandemic. It is distressing that a majority of a federal appeals court sustained it for a subclass that has nowhere else to turn.

Petitioners are represented by the ACLU of Ohio Foundation (Columbus and Cleveland); Ohio Justice and Policy Center (Cincinnati); and Hogan Lovells, (Washington). Amicus submissions for petitioners were filed by Disability Rights Ohio and by a consortium of current and former prosecutors and police chiefs from 30 states. ■

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.

Idaho DOC and Physician-Defendant Petition for *Certiorari* in Landmark Prisoner Gender Confirmation Surgery Case

By William J. Rold

Law Notes continues to follow the saga of Idaho transgender inmate Adree Edmo's medical care. Last month, we reported that the Supreme Court denied a stay of the proceedings pending a petition for *certiorari*. *Idaho DOC v. Edmo,* No. 19-1280. (Order in Application No. 19A1038, entered May 21, 2020, over objections of Justices Thomas and Alito.) This left intact the partial stay by the District Court, pending *certiorari*, reported in *Law Notes* (May 2020 at page 15). Pre-surgical procedures continue for Edmo.

The State of Idaho, and its medical contractor's (Corizon's) Chief Psychiatrist (Scott Eliason), having lost on Edmo's injunctive claim for confirmation surgery in the District Court, 358 F. Supp. 3d 1103 (D. Idaho 2018), and in the Ninth Circuit, 935 F.3d 757 (9th Cir. 2019), now petition for *certiorari*. [Note: Corizon was dismissed as a defendant by the Ninth Circuit, and it is not participating in the petition.]

The petition frames two questions: (1) whether the Ninth Circuit applied WPATH [World Professional Association of Transgender Health] standards as constitutional minima, in conflict with the First, Fifth, Tenth, and Eleventh Circuits; and (2) whether the Ninth Circuit's holding that the decision to deny confirmation surgery was unreasonable violates the subjective arm of the deliberate indifference test in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994). The circuit split is misrepresented and a bit contrived. The second point (that the Ninth Circuit erred in affirming an order for surgery for one inmate in one case) seems to lack the compelling "considerations" supporting grant of *certiorari* on federal questions (Supreme Court Rule 10) where there is no genuine circuit split.

The premise of question one (that the Ninth Circuit applied WPATH "standards" as constitutional minima) is belied by that court's language itself, which used WPATH guidelines as a "starting point," noting that the defense experts also did so. 935 F.3d at 778, 788 and n. 16. The Ninth Circuit found that the district court did not err in evaluating the evidence and that it was not the job of the appellate court to substitute its judgment. *Id*. at 787. The expert testimony (not deference to WPATH) formed the basis for the injunction for the surgery, one of several "evidence-based options" for treatment under the WPATH guidelines – which are the consensus of multiple health groups, including the American Medical Association, the American Psychiatric Association, the American Psychological Association, the Endocrine Society, the American College of Surgeons, and the National Commission on Correctional Health Care. *Id*. at 769-70.

In short, confirmation surgery was medically necessary, for this patient on this record, and consistent with consensus guidelines. As the Fourth Circuit wrote, citing to WPATH guidelines: "[S]ex reassignment surgery may be necessary for some individuals for whom serious symptoms persist. In these cases, the surgery is not considered experimental or cosmetic; it is accepted, effective, medically indicated treatment . . . ." *De'lonta v. Johnson,* 708 F.3d 520, 523 (4th Cir. 2013). Thus, the premise for the claimed circuit split is false. Petitioners do not cite *De'lonta*.

Putting the false premise about "standards" aside, the Ninth Circuit's decision in *Edmo* does not split from other circuits, except possibly the Fifth. As the Ninth Circuit wrote, the First Circuit's decision in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015), was based on a different record and expert testimony, including security concerns that are not interposed in the instant defense. 935 F.3d at 794.

The Ninth Circuit conceded a "tension" between *Edmo* and the Fifth Circuit's decision in *Gibson v. Collier*, 920 F.3d 212 (5th Cir.), *cert. denied*, 140 S. Ct. 653 (2019). It declined to adopt *Gibson*'s "dismaying" holding that denying confirmation surgery could never, as a matter of law, violation the Eighth Amendment. It also noted that there was no record in *Gibson,* which simply incorporated the earlier trial record in *Kosilek*. 935 F.3d at 794-95. Finally, the Ninth Circuit rejected the Fifth Circuit's "outdated" finding that there was "no medical consensus" in the medical community about treatment of gender dysphoria.

The decisions of the Tenth and Eleventh Circuits do not constitute "splits," either. Petitioners try to support their "no medical consensus" argument with *Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018), *cert. denied*, 140 S. Ct. 252 (2019), by stating that the court "implicitly" adopted the no consensus finding in the District Court's refusal to defer to WPATH in 262 F. Supp. 3d 1151,1156-57 (D. Kan. 2017). This is not quite what happened. The original panel decision of the Tenth Circuit had the "no consensus" language, but there was a *pro se* petition to rehear *en banc,* which attracted national amici. The Tenth Circuit withdrew the panel decision, and it struck the "no consensus" language. It is misleading to say that the Tenth Circuit "implicitly" approved of petitioners' argument.

In *Keohane v. Florida Department of Corrections Secretary*, 952 F.3d 1257 (11th Cir. 2020), a transgender inmate's gender dysphoria claims were "mooted" when Florida abandoned its "freeze frame" policy, under which there was no treatment for patients who were not already under treatment before incarceration. What was left was a claim

for feminizing items, which Florida had granted in part. The Eleventh Circuit wrote that the Eighth Amendment did not require more. *Id*. at 1275-77.

Regardless of whether there is a circuit "split," petitioners argue that use of WPATH guidelines is prohibited by *Bell v. Wolfish,* 441 U.S., 520, 543 n. 27 (1979), which declined to "constitutionalize" cell space standards for conditions of confinement challenges. The Supreme Court, however, said in that case that such standards could be "instructive." That is essentially what the Ninth Circuit found in *Edmo*.

Petitioners' next argument is that the affirmance of the injunction departs from the Supreme Court's jurisprudence regarding the subjective arm of the deliberate indifference test in *Estelle* and *Farmer*. It relies on the dissents from the denial of the petition for rehearing *en banc*, which say that these cases have been reduced to a negligence standard. If this is true, the Ninth Circuit wasted a lot of paper to get there.

Petitioners say that Dr. Eliason at most made an error of medical judgment, which is not actionable. They argue that the Ninth Circuit's use of "reasonable" and "unreasonable" confirm the negligence standard that has been substituted for deliberate indifference. The record showed that, regardless of WPATH guidelines, Eliason conceded that gender surgery would be medically necessary if a patient had "severe and devastating gender dysphoria that is primarily due to genitals." Yet, he could not explain why he refused to reconsider denial of surgery after Edmo tried twice to castrate herself. *Estelle* includes a refusal to exercise professional judgment as an example of deliberate indifference, which is "manifested by prison doctors in their response to prisoners' needs." *Estelle,* 429 U.S. at 104. The Ninth Circuit recognized that *Farmer* (511 U.S. at 837, 842) does not require a specific intent to inflict harm. 935 F.3d at 792-93. The Ninth Circuit did not find that Eliason "should" have known about the risk to Edmo; it found that he did know, but he disregarded it.

Even if the Ninth Circuit misapplied *Estelle* and *Farmer,* petitioners do not explain why *certiorari* is imperative. They concede that only one inmate had gender confirmation surgery while in prison, according to the record in this case. Yet, they argue that"[i] f left unchecked, the Ninth Circuit's decision threatens to have an immediate detrimental and destabilizing effect on prisons nationwide." If the careful record in *Edmo* has to be replicated before a transgender prisoner can obtain relief, the sky is a long way from falling, in this writer's view.

The petition was filed on May 6, 2020, by the Idaho Attorney General and Moore Elia Kraft & Hall, LLP (Boise) for Idaho DOC; and by Parsons Behle & Latimore (Boise) for Eliason. Respondent's briefing is not due until late August. ■

U.S. Supreme Court Rules Prisoner Dismissals Without Prejudice Count as "Strikes"

By William J. Rold

Resolving a circuit split, the Supreme Court ruled that prisoner *pro se* cases that are dismissed for failure to state a claim – even if "without prejudice" – still count as "strikes" under the Prisoner Litigation Reform Act [PLRA] "three strikes" rule. In *Lomax v. Ortiz-Marquez,* No. 18-8369 (June 8, 2020), the Court affirmed a decision by the Tenth Circuit, 754 Fed. App'x 756 (10th Cir. 2018), leaving intact the majority rule that dismissals either with or without prejudice are treated the same for *in forma pauperis* purposes under 28 U.S.C. §§ 1915(e) and 1915A. In both situations, a *pro se* prisoner receives a strike – and three strikes preclude future *in forma pauperis* filings absent a showing of "imminent" danger under § 1915(g) of the PLRA.

Such dismissals (and strike accumulation) are frequent obstacles in LGBTQ prisoner litigation, as shown by the pages of *Law Notes*. This is true in no small part because queer plaintiffs often must be creative in asserting claims under existing law and frequently do not prevail in federal district court.

The Supreme Court observed that district judges could still dismiss without prejudice, and the plaintiff could re-file if she had any strikes left. Alternatively, the court held in footnote four that a district court could save the plaintiff from a strike in "potentially meritorious prisoner suits" by affirmatively granting leave to amend, keeping jurisdiction, and not dismissing.

Although the Court does not say so, this appears to be an attempt to reconcile the slightly different language in § 1915(e) ("shall dismiss the case . . . if . . . the action . . . fails to state a claim") and § 1915A ("shall identify cognizable claims or dismiss the complaint or any

portion of the complaint . . . if [it] . . . fails to state a claim"). Amendments allowed under F.R.C.P. 15(a) are not within the scope of § 1915(g) ("three strikes"), and "no strike accrues."

Oddly, the Court cited no other authority for this point, except the *amicus* brief of the Trump Administration and the colloquy with Colorado's counsel, who stated: "[A] clear rule on this [treating with and without prejudice the same] will help courts adjust their behavior . . . fixing complaints rather than just dismissing them . . . to find out if there is a way to state a claim before a dismissal . . . ." (Oral Argument, Febr. 26, 2020, at 34). Justice Thomas did not write separately, but he declined to joint in footnote four.

This case involved a prisoner in a sex offender program in Colorado. He had already accumulated three strikes, if all prior dismissals counted. Thus, he is effectively out of court. Many LGBTQ prisoners – who have no ability to pay a filing fee and who seek legal recognition of their equality, gender identity, safety, and health care needs – may initially "fail to state a claim." The Court's decision leaves no safe harbor for good faith but unsuccessful efforts to extend, modify or reverse existing law. ■

State of Indiana Continues to Play Word Games in Petition for *Certiorari* Regarding the Failure to Recognize a Lesbian Mother on Her Biological Child's Birth Certificate

By David Escoto

The February issue of *Law Notes* reported on a case from the 7th Circuit that unanimously held that Indiana had to list both lesbian mothers as parents on their child's birth certificate. *Henderson v. Box*, 2020 U.S. App. LEXIS 1559, 2020 WL 255305 (January 17, 2020). On June 15, 2020, the Office of the Indiana Attorney General filed a petition for a writ of *certiorari* to the U.S. Supreme Court. Indiana asks the Supreme Court to answer whether a state can adopt a biology-based birth certificate system with a rebuttable presumption that a birth mother's husband is the biological parent. Indiana seems to be trying to wiggle its way out of applying precedent. *Obergefell v. Hodges* holds that governmental bodies must treat same-sex marriage identical in all respects to heterosexual marriages. *Pavan v. Smith* holds that *Obergefell* extended to the right to be identified as parents on a child's birth certificate. However, the State of Indiana would still rather play with semantics all the way to the Supreme Court.

In *Henderson v. Box*, the 7th Circuit affirmed a district court's injunction requiring the State to recognize two female parents on a birth certificate because the state inherently treats same-sex marriages differently on birth certificates by requiring only a biological mother and father to be listed. The Indiana statute at issue presumes that the husband of a married woman who gives birth is the father of her child but does not afford the presumption of parental status to a wife of a woman who gives birth. The 7th Circuit limited the injunction only to the extent that the presumption Indiana relies upon violates the Constitution.

The plaintiffs here are a group of eight married lesbian couples, seven of whom conceived via donor insemination. However, one couple's doctor created an embryo using an egg from one wife to be carried by the other. Thus, in that couple one wife is the actual biological mother, and the other wife is the birth mother and presumed biological mother under Indiana law. It is this situation that illuminates the reasoning of why Indiana's statutory presumption runs afoul of what *Obergefell* and *Pavan* hold. Under Indiana law, the actual biological parent is not afforded the presumption of parentage, based solely on the fact that she is the same sex as the birth mother, to whom she is married.

Now in petitioning for *certiorari*, Indiana argues that they are allowed to constitutionally continue to define a parent only as "a biological or an adoptive parent." Indiana reasons that the Supreme Court should grant the petition to hear this case to confirm that states should be able to adopt a birth certificate system that includes a rebuttable presumption that a birth mother's husband, but not her wife, is the child's parent. Indiana suggests that confirming a state's ability to adopt such a birth certificate system is of national importance and a step towards recognizing biological parents' rights.

Indiana argues that states are constitutionally allowed to design their birth certificate systems for recording biological parents at birth. In a very narrow reading of *Pavan*, Indiana distinguishes it by noting that there the Arkansas statutory structure "was so steadfast in requiring a birth mother's husband's name on the birth certificate even where all concerned know full well the husband has no biological connection to the child," but in Indiana, the presumption is rebuttable.

Indiana stresses the fact that because Indiana's statutory structure imposes a rebuttable presumption and not a

steadfast rule, the 7th Circuit erred in *Pavan*'s application to this case. However, the 7th Circuit correctly notes that under *Pavan*, the Constitution still does not permit Indiana to adopt a birth certificate system based on same-sex marital status under the guise of biology. Even if Indiana does record the biological parents, it does not base the presumption afforded to husbands of birth mothers, that is unavailable to wives, on biology. Instead, it is based on marital status, which violates the Constitution under *Obergefell*. A state cannot exclude married lesbians from the rights, benefits, and responsibilities a married couple must have access to, including being identified on birth and death certificates. The 7th Circuit finds that there is no way to reconcile *Obergefell* with the way Indiana uses their presumption, even if it is rebuttable.

The petition for *certiorari* spends quite a bit of time discussing the history of recognizing biological parents on a birth certificate. Indiana notes that states have used biological parentage for birth certificates for hundreds of years. The 7th Circuit handled this argument by noting that history and tradition still are not enough to overcome the Constitutional requirements under *Obergefell*. The history of using biological parentage on a birth certificate is undermined when a biological mother who does not happen to be the birth mother is not afforded a presumption of parentage just because she is married to the birth mother. Indiana's argument is nonsensical.

There are mixed emotions that stem from seeing a case like this filed to *certiorari*. On one hand, denying the petition maintains the 7th Circuit's decision recognizing that Indiana's presumption of biological parentage violates the Constitution. On the other hand, there is cautious optimism stemming from the Supreme Court's recent decisions that if this petition were granted, the Court would further cement the protections under *Obergefell* and *Pavan*, limiting states from using semantics to deprive married same-sex couples of their Constitutional protections.

Attorneys for the Respondents (Plaintiffs below) include Karen Celestino-Horseman, Raymond L. Faust of Norris Choplin & Schroeder LLP, Megan L. Gehring, Richard Andrew Mann and William R. Groth of Fillenwarth, Dennerline, Groth & Towe, LLP. At the 7th Circuit several amicus briefs were filed, from the National Center for Lesbian Rights, The Family Equality Council, and 49 Family Law Professors. ■

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

U.S. District Court Rules for Gay Dads in Citizenship Dispute with U.S. State Department

By Matthew Goodwin

On June 17, District Judge Theodore Chuang (D. Md.) ordered the U.S. Department of State to recognize the U.S. citizenship of and issue a U.S. passport to a same-sex married couple's one-year old baby whom the Trump Administration previously refused to recognize as a U.S. citizen because she was born abroad and is not related biologically to both of her parents.

The couple's attorneys—Immigration Equality, Lambda Legal, and pro bono counsel Morgan Lewis—successfully argued in the case that the State Department under Secretary Mike Pompeo was inserting a "biology" requirement into the Immigration and Naturalization Act's (INA) determination of nationality of a person born outside of the U.S. which advantaged different-sex couples over same-sex couples.

The case, *Kiviti v. Pompeo*, 2020 U.S. Dist. LEXIS 105985, 2020 WL 3268221, was brought by spouses Roee Kiviti and Adiel Kiviti, Israeli-born naturalized U.S. citizens, on behalf of their daughter identified in the opinion as K.R.K. K.R.K was born using assisted reproductive technology (ART), with the participation of a gestational surrogate in Canada, whereby such surrogate carried to term a baby which was the product of a donated egg and Adiel's sperm. A Canadian court issued a finding that a genetic relationship between K.R.K. and the biological father had been established and ordered that the Kivitis and not the surrogate were the only parents of both children. K.R.K.'s birth certificate listed both Adiel and Roee as the parents.

Upon returning to the U.S. with K.R.K., the parents applied for a passport for her at the Los Angeles Passport Agency.

A child born inside the U.S., Washington D.C., or another U.S. territory or possession is automatically granted citizenship. Citizenship is also available to persons born outside of the U.S. in a number of situations. 8 U.S.C. § 1401 "'establish[es] a range of residency and physical-presence requirements calibrated primarily to the parents' nationality and the child's place of birth."

§1401(c) provides that U.S. citizenship is granted at birth to "a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person."

At first blush, it seems this provision required K.R.K. be granted citizenship: she was born in Canada to, according to her birth certificate, parents both of whom are U.S. citizens, and both of whom had a residence in the U.S. prior to K.R.K.'s birth.

Nevertheless, K.R.K. was denied a passport because her application was categorized as that of a child born out of wedlock who was seeking citizenship. "According to the deposition testimony of Paul Peek, an official of the State Department's Bureau of Consular Affairs, two married men can never have a child that the State Department considers to have been born in wedlock. Instead, the children of such marriages are always deemed to have been born out of wedlock and must have their claims to citizenship at birth adjudicated . . . " through the provisions of the INA respecting children born out of wedlock.

The discrimination in the State Department's determination could not have been more obvious to the Kivitis who had already been through this process before with their older son L.R.K. L.R.K. had been born to the Kiviti's in 2016 through a Canadian surrogate but in that instance the couple had used Roee's rather Adeil's sperm. L.R.K. was issued a passport in early 2017 through the Washington D.C. Passport Agency, no questions asked.

Suit was filed in September 2019, amended in December 2019, and alleged that "State Department policy requiring that both parents be biologically related to a child in order to consider that child born in wedlock, and the application of that policy to deny K.R.K.'s passport application, (1) was contrary to the text of the INA; (2) infringed on substantive due process rights under the Fifth Amendment to the Constitution of the Kivitis to marry, procreate, and raise their children, and of K.R.K. to obtain United States citizenship at birth; (3) discriminated against the Kivitis as a same-sex couple and against K.R.K. based on the circumstances of her birth and parentage, in violation of the equal protection component of the Fifth Amendment's Due Process Clause; and (4) constituted arbitrary and capricious agency action that is contrary to law, in violation of the APA.

"As relief, Plaintiffs [sought] (1) a declaratory judgment pursuant to 8 U.S.C. § 1503 that K.R.K. acquired U.S. citizenship at birth; (2) an order requiring the State Department to issue her a passport; (3) a judgment declaring the State Department's policy unconstitutional and in violation of the INA; (4) a permanent injunction against the State Department treating the children of same-sex couples as born out of wedlock and thereby denying them U.S. citizenship at birth; and (5) attorney's fees and costs."

The decision rested on the question of statutory interpretation, not constitutional grounds, although Judge Chuang wrote "[t]he fact that, under the State Department's interpretation, a male same-sex married couple can never have a child deemed to be born in wedlock and receive the citizenship-related benefit associated with having such a marital child alone raises 'serious . . . doubts' whether it infringes on that fundamental right."

While plaintiffs argued K.R.K. was a citizen under §1401(c) because she was born to married parents both of whom are U.S. citizens, the State Department argued a child can never be "born of" two men and said the question of K.R.K's citizenship was controlled instead by § 1409(g). To be granted citizenship under §1409, the child seeking it must be biologically related to a U.S. citizen who had lived in the U.S. for a period or periods "totaling not less than five years." Adiel, apparently, could not meet the residency requirement of §1409(g) and therefore the State Department denied K.R.K.'s application.

The State Department's written guidance on interpreting the INA and determining citizenship questions is found in the Foreign Affairs Manual (FAM). The FAM stipulates that anonymous egg and sperm donors are not to be considered in the analysis of citizenship, nor is the surrogate relevant to the analysis. The FAM further provides that a child born to a married "mother" and "father" using their genetic material and a gestational surrogate is a child born in wedlock and is conferred citizenship under §1401(c).

The State Department—as evidenced by Mr. Peek's deposition testimony quoted above—did not read its own guidance in a gender neutral manner and instead took the position in K.R.K's case that, since it was impossible for her to be biologically connected to both fathers, it could not apply §1401(c) and she did not meet all of the requirements for citizenship of a child born out of wedlock under §1409(g).

Indeed, Judge Chuang distilled the conflict between the parties to a "disagreement . . . of whether the language 'born . . . of parents' in 8 U.S.C. § 1401(c) signifies that this provision applies only where both married parents are biologically related to a child."

In the absence of controlling precedent from either the 4th Circuit or the Supreme Court, Judge Chuang, looked to opinions from the Ninth and Second Circuits, both of which have held that the "born . . . .of parents" language in §1401 does not require such a blood relationship for a child to be considered to have been born in wedlock and thus afforded the more "relaxed" requirements of §1401 to obtain citizenship.

The Ninth Circuit case, *Scales v. INS*, 232 F.3d 1159 (2000), involved the citizenship status of a child's who was born in the Philippines. His mother was a Philippine citizen and was married to a U.S. citizen who, although not biologically related to the child, held

himself out to be the child's father. The child in Scales was adjudicated a U.S. citizen. Judge Chuang, quoting the Scales court, observed: "[a] straightforward reading of § 1401 indicates . . . that there is no requirement of a blood relationship and [the Scales court] rejected the argument that the lack of a biological relationship between the plaintiff and one of his parents meant that he should be considered to have been born out of wedlock and have had his claim adjudicated under § 1409 'because [the plaintiff] was born to parents who were married at the time of his birth.'"

A subsequent Ninth Circuit case held " . . . where [a child's] parents were married at the time of his birth, the [child] was not born 'out of wedlock," and thus subject to §1409(a), even though his U.S. citizen mother was not his biological mother.

The Second Circuit considered the issue in *Jaen v. Sessions*, 899 F.3d 182 (2018). The fact pattern was nearly identical to that in Scales, with the plaintiff-child having been born to a Panamanian mother married at the time to a male U.S. citizen, and such citizen was not the biological father. Ruling in Jaen, the court held " . . . where Congress used the term 'parent' without providing a definition, it had 'incorporated the common law meaning of 'parent' into the INA [and] therefore incorporated the longstanding presumption of parentage based on marriage."

It was also important to both the Jaen and Scales courts, and thus to Judge Chuang, that Congress "included the term 'blood relationship' in §1409(a) as part of a requirement of a biological relationship, yet did not use that term in §1401. 'As the court found in Jaen, 'Congress clearly specified enhanced requirements for proof of parentage in the case of children born out of wedlock. 'Congress' omission of the similar language' regarding married parents suggests that if Congress wanted to require proof of biological relationship 'it knew how to do so.'"

The State Department in the Kivitis' case had argued that what mattered in the phrase "born . . . of parents" was not the word "parents" but only the "born of." A child, under the State Department's reading, is only "born of" two individuals when the child "originates or derives from those parents" which, claimed the State Department, is not possible with two males creating a family.

Judge Chuang borrowed the Scales reasoning to reject this argument insofar as he held "born . . . of parents" could not be divorced from the "backdrop of the common law presumption of parentage, which effectively considered a child to be born of parents consisting of a biological parent and that parent's spouse at the time of the birth, without requiring proof that the spouse had a genetic relationship with the child."

Judge Chuang also pointed out that "born . . . of" is not so binary and black and white as the State Department had argued. If a child must "originate from parents" as the State Department would have it, K.R.K. must come within that definition because K.R.K. was the result of the Kivitis' "planning and supporting the use of surrogacy and ART to bring about the birth of a child."

As has already been mentioned, the decision in the Kivitis' case rested on statutory interpretation issues, not the Constitutional arguments raised by the plaintiffs. The court, having found that a plain reading of §1401(c) did not require a biological relationship between a child and both parents to be applicable, necessarily found it did not need to resort to the canon of constitutional avoidance. But, the judge did state that if the statutory language were deemed ambiguous, "the canon would apply and would lead to the same result because the State Department's interpretation "would raise a multitude of constitutional problems."

The principle of constitutional avoidance, to paraphrase the court's definition, suggests that, when faced with competing statutory interpretations, a court should choose that reading which will not raise serious constitutional doubts and should instead "adopt an alternative that avoids those problems." In this respect the court found that plaintiffs' and its reading of §1401 more easily conferred citizenship on children such as K.R.K. Such questions fall "within the 'constellation of benefits that the State has linked to marriage," which must be accorded equally to same-sex and opposite-sex married couples according to the Supreme Court's decision in *Obergefell*.

The opinion decided both the State Department's motion to dismiss and plaintiff's cross motion for summary judgment. The court did grant dismissal of the APA claim but otherwise denied the relief sought by the State Department and granted judgment to plaintiffs. As a result, K.R.K. was declared a U.S. citizen by birth.

Judge Chuang was appointed by President Obama. ■

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

Federal Judge Declines to Certify Class of Transgender ICE Detainees; Denies Preliminary Injunction Ordering Release on COVID-19 Claims

By William J. Rold

Thirteen transgender ICE detainees brought a civil rights case seeking certification of a class of all present and future transgender ICE detainees, their immediate release from detention, and an injunction against ICE's holding any transgender detainees in the future – all due to the risk of transmission of COVID-19. They sued the Acting Secretary of the Department of Homeland Security and the U.S. Attorney General as the only defendants. By the time U.S. District Judge Christopher R. Cooper considered the application, there were ten plaintiffs left, confined at five privately-operated ICE facilities. Judge Cooper denied relief in *C.G.B. v. Wolf*, 2020 U.S. Dist. LEXIS 96482, 2020 WL 2935111 (D.D.C., June 2, 2020).

Judge Cooper's decision exceeds 25,000 words (with 45 footnotes) and is beyond the scope of this article. Reporting is difficult because large swaths of the motion papers are sealed. It does not seem that plaintiffs (or Judge Cooper) called any experts – and it is unclear whether defendants did. Judge Cooper does not say which private contractors are operating the detention centers at Florence and LaPalma, Arizona; Pahrump, Nevada; Aurora, Colorado; and El Paso, Texas – and ICE's official websites do not disclose this. From secondary sources (news articles), it appears it is a combination of GEO Group (formerly Wackenhut) and CoreCivic (formerly Corrections Corporation of America). Judge Cooper denied joinder of additional transgender plaintiffs from ICE facilities in San Diego and Calexico, California [discussion of F.R.C.P. 20 omitted].

With great respect for the effort that was expended here, it appears to this writer that there were conceptual problems with this case from the beginning. First, being trans is not a CDC-recognized risk factor for contracting COVID-19. Judge Cooper rejected the argument that trans people on hormones may be at risk for COVID-19 complications due to "hypercoagulability," an increased tendency for potentially fatal blood clots to form and a possible side effect of hormone replacement therapy. The CDC does not identify hypercoagulability as a risk factor for complications from COVID-19, and the proposition is disputed. [Judge Cooper notes that "[p] laintiffs do not challenge ICE's policies concerning the treatment and protection of transgender detainees in general."]

The plaintiffs also seek the most sweeping preliminary injunctive possible: national class-wide release and a restraining order against any future trans admissions. No other court has been asked for such relief, to this writer's knowledge; and none has granted it.

After a detailed discussion of each plaintiff and each detention center (twice), Judge Cooper denied class certification for a combination of two factors under F.R.C.P. 23: commonality and adequate representation. The plaintiffs were relatively young (ages 19-37). Some were in discretionary detention; others, held under "mandatory" provisions of the Immigration and Naturalization Act. Their medical conditions ranged from "good health" to "serious" problems – but only three of them were considered "vulnerable" to COVID-19 by CDC standards. Thus, most were not members of the nation-wide class already certified in *Fraihat v. ICE,* 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020). Judge Cooper found that only these three had an argument for likely success on the merits. [Note: The testing results in *Fraihat* are not yet public, but Judge Cooper says that ICE has identified 4,400 "vulnerable" detainees nationwide.]

To sustain a class action, Judge Cooper holds that each plaintiff must be capable of sustaining an "individual action" if standing alone, citing *Tyson Foods, Inc. v. Bouaphaken,* 136 S.Ct. 1036, 1047-7 (2016). "Here a plaintiff like C.G.B., who attests to having no underlying high-risk health condition, could not rely on evidence that only applies to those plaintiffs who do have high-risk health conditions."

The disparity of the plaintiffs' medical conditions and the differences in the management, epidemiology, and COVID-19 mitigation efforts at the five detention centers defeat commonality under *Wal-Mart Stores, Inc., v. Dukes,* 564 U.S. 338, 350 (2011). Adding a "future" class is separately inadvisable because COVID-19 is a fast-moving target and the circumstances of future class members may be different, yet they could not "opt-out" of a (b)(2) class. Judge Cooper declines to "bind all transgender detainees to the Court's resolution of issues arising from a rapidly evolving health crisis."

Class-wide relief may also be precluded by 8 U.S.C. § 1251(f)(1), which restricts federal courts from enjoining or restraining the operation of 8 U.S.C. §§ 1221–32, other than with respect to "individual aliens." Judge Cooper engages in pages of jurisdictional discussion before determining that he need not reach the issue because he is not going to grant injunctive relief (which is not the same as holding that he could not do so).

In this regard, he notes that several circuits have stayed district court injunctions relating to COVID-19 and ICE detainees. Injunctive relief for ICE detainees at risk was stayed by the Eleventh Circuit in *Swain v. Junior,* 958 F.3d 1081, 1085 (11th Cir. 2020); and the Fifth Circuit stayed relief in *Valentine v. Collier,* 956 F.3d 797 (5th Cir. 2020 (*per curiam*). The Supreme Court denied a motion to vacate that stay (over a statement respecting the denial of an application to vacate the stay from

Justices Ginsburg and Sotomayor), No. 19A1034, 2020 WL 2497541 (U.S., May 14, 2020). An order that included release provisions was stayed by the Ninth Circuit in *Roman v. Wolf,* 2020 WL 2188048, at *1 (9th Cir., May 5, 2020) (*per curiam*).

The three plaintiffs who have potential for prevailing on the merits also meet irreparable injury standards, since "a remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney,* 509 U.S. 25, 33 (1993). They fail, however, to show that balance of equities and public interest warrant a release order.

Here, Judge Cooper defers to ICE and to the cabinet-level defendants, citing *Turner v. Safley,* 482 U.S. 78, 84-5 (1987). Judge Cooper notes that ICE had reduced its census, increased PPE and social distancing, and banned cohorting COVID-19-positive detainees with general population. Outlining what has been done at each facility (presumably detailed in sealed submissions), he finds that plaintiffs have not shown that a remedy short of a release order will suffice. This is the historical stuff of equitable discretion – *see* "the uncertain measure of the chancellor's foot" in *Table Talk* (J. Selden 1689) – rendered more indeterminate in the institutional setting. Yet, "the primary remedy that Plaintiffs seek – their immediate release from ICE custody – is the most intrusive measure possible" and one not "tailored to fit the violation" under *Women Prisoners of DOC v. District of Columbia,* 93 F.3d 910, 928 (D.C. Cir., 1996).

Without "overlapping" with the *Fraihat* litigation, Judge Cooper does order the defendants to file reports about the five facilities (including ones without viable representative plaintiffs). The reports must show: each facility's capacity and current population, numbers of detainees and staff tested, number tested positive, eating and sleeping arrangements, PPE and cleaning materials, access to medical care, and the extent to which release has been considered under the *Fraihat* injunction.

The reports were filed on June 4 and 10, according to PACER – all under seal – as are the compliance reports in *Fraihat*. It is thus not possible to read the reports in either case or to compare them to obtain an ICE profile. That these federal judges would consider sealing reports about the COVID-19 pandemic in ICE detention facilities to be in the public interest is beyond this writer's ken.

Plaintiffs also raised a claim that ICE did not follow its own regulations, citing *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 267 (1954). After lengthy analysis, Judge Cooper finds that plaintiffs have not shown a likelihood of prevailing on a substantive (as opposed to a procedural) application of *Accardi*. He likewise rejects mandamus because at least in part release of the plaintiffs turns on the discretion of the Secretary and the Attorney General. [These analyses are omitted.]

The putative class is represented by Rapid Defense Network (New York), Transgender Law Center (Brooklyn), and Ballard Spoke, LLP (Washington and Philadelphia). ■

Federal Court Rejects Civil Rights Claim by Contract Employee Who Was Offended by Gay Pride Flag

By Wendy Bicovny

On June 18, 2020, U.S. District Judge Leonie M. Brinkema dismissed contract employee James Tolle's *pro se* complaint against his former employer Rockwell Collins, Inc., (Rockwell) alleging a hostile work environment, failure to accommodate in violation of Title VII of the Civil Rights Act of 1964, and religious discrimination *James A. Tolle v. Rockwell Collins Control Technologies, Inc.,* 2020 WL 3316984, 2020 U.S. Dist. LEXIS 107449 (E.D. VA.) Tolle's claims center around Rockwell's decision to display a rainbow Gay Pride flag on its flagpoles at each of its locations for the month of June in honor of Pride month.

On June 15, 2019, Tolle met with his supervisor to complain that he found the display of the Gay Pride flag unwelcome and offensive because of his religious belief and practices, which did not allow him to participate in any activity which publicly associated him with the Gay Pride movement. He further said that flying the flag created an unwelcome, hostile environment which interfered with his work at that location, and he would prefer to work at another location where this offensive object was not being displayed as an accommodation to his religious beliefs.

Throughout July 2019, after Pride month had concluded and the Gay Pride flag had been taken down, numerous correspondences ensued between Tolle and management. First, Tolle stated to his manager that if Rockwell had a policy of flying the flag every year, this would create an offensive or hostile work environment under which he could not continue to work. Second, Tolle informed Human Resources (HR) that

he viewed this flag as something which is not neutral, but something which promotes one minority's viewpoint about pride in homosexual lifestyles and treats other minority viewpoints who don't agree with them as bigots and that he was left with the feeling that Rockwell is not a place where a Christian who does not support Gay Pride should work.

Rockwell HR responded that all the locations that have flagpoles flew the flag and provided Tolle a document which confirmed that company leadership is fully supportive of the effort to recognize Pride month "as we believe it reflects many of our company's values." Additionally, Rockwell's attorney informed Tolle that the company expected employees to take care to communicate with co-workers in a respectful, professional, and non-discriminatory or harassing manner. An employee who treats another in a way that contradicts this expectation will subject them to discipline, including termination.

In August, Tolle was told that Rockwell wanted to hire him as a regular employee. Tolle informed Rockwell that he could not accept the position due to the continuing discriminatory policies of Rockwell and because he would have to abandon his religious practice in order to continue working at Rockwell. Tolle argued that flying an object he found offensive due to religious reasons over all locations of the company for 30 days every year in the future was sufficiently severe or pervasive to alter the condition of his employment.

Tolle voluntarily left his work at Rockwell, which he characterizes as a constructive discharge.

Tolle filed an EEOC complaint alleging that Rockwell discriminated against him and other Christians, perpetuated a hostile work environment, threatened to retaliate against him, and constructively discharged him. The EEOC denied Tolle's complaint for inability to conclude that the information obtained establishes violations of the statute.

Tolle then filed this lawsuit. Judge Brinkema first explained that Tolle's factual allegations, even if accepted as true, do not come close to stating a claim for a hostile work environment. The sole basis for Tolle's claim is that defendants flew a Gay Pride flag on their flagpole for 30 days and warned Tolle that he could not harass others or use derogatory language to refer to someone due to their sexual orientation. This conduct was not frequent, severe, or physically threatening or humiliating, nor did it unreasonably interfere with Tolle's work. Even if Tolle had adequately alleged that his treatment at Rockwell were based on religion, which he has not, his experiences are much more akin to the sorts of isolated incidents and routine differences of opinion with one's supervisor and are inadequate to constitute a hostile work environment.

Next, Judge Brinkema explained why Tolle's failure to accommodate claim was invalid. First, Tolle has not adequately alleged that he was subjected to any kind of employment requirement which conflicted with his religious beliefs. Expecting him to attend work in the same location that a Gay Pride flag is generally displayed for one month does not amount to asking him to adhere to a conflicting employment requirement. Second, even if requiring plaintiff to attend work while the flag was flying constituted a conflicting employment requirement, Tolle's complaint is devoid of allegations that he was disciplined for failing to comply with that requirement. Far from disciplining him, Rockwell rewarded Tolle by offering him a permanent position days after he complained about the flag. That Tolle voluntarily declined to accept that position does not support a claim that Rockwell's actions were in any way disciplinary.

Finally, Judge Brinkema focused on the Title VII disparate treatment cause of action, to explain why Tolle's claims of religious discrimination failed. Here, Tolle attempted to portray his resignation and declination of Rockwell's offer as a constructive discharge. Constructive discharge occurs where an employer deliberately makes an employee's working conditions intolerable and forces him to quit his job. Even if Tolle plausibly alleged that Rockwell's actions were deliberate, which he had not, his factual allegations do not meet the intolerability requirement. Tolle's working conditions during the month of June did not meaningfully depart from the conditions under which he had previously been working; the sole difference that arose during that 30-day period was that Tolle walked by the Gay Pride flag on his way to work, communicated with his management about his discomfort with what the flag represents, and was advised of the company's policy prohibiting discrimination based on sexual orientation. Judge Brinkema said the conditions Tolle describes do not constitute discrimination at all.

Judge Brinkema further said Rockwell's decision to fly the Gay Pride flag during the month of June is consistent with the goals and objectives of our civil rights statutes. When Tolle challenged that decision, Rockwell did not ask Tolle to endorse homosexuality or to abandon his religious beliefs, and explicitly confirmed that it did not support one viewpoint over another and that all employees were entitled to their own beliefs. Moreover, Rockwell was generous to Tolle and offered him a better job. For all these reasons, Tolle has not stated a claim for religious discrimination. ■

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

Applying New Statute, New Jersey Appellate Court Vacates Punishment Segregating Transgender Inmate for Fighting

By William J. Rold

Sometimes, prisoners are better off litigating under state law. In *Doe v. New Jersey DOC,* 2020 N.J. Super. LEXIS 1052, 2020 WL 2892395 (N.J. App. Div., June 3, 2020), the Appellate Division of the Superior Court vacated a 270-day punishment imposed on a transgender prisoner after an altercation with officers. It is virtually certain that Sonia Doe (proceeding by pseudonym) could not have achieved this outcome in federal court. The *per curiam* opinion was issued by a panel consisting of Justices Mary Gibbons Whipple, Greta Gooden Brown, and Hany Mawla. Unfortunately, they determined not to officially publish what should be a precedential decision.

In 2019, the New Jersey legislature passed the nation's most progressive limitation on disciplinary segregation for prison inmates (the "Isolated Confinement Restriction Act"), effective this summer. The statute limits disciplinary confinement to twenty consecutive days (or thirty days of sixty days in multiple offense cases) and explicitly protects "vulnerable" Inmates, including those under 21, over 65, pregnant, mentally disabled, having a history of self-harm, sensorially deprived, or perceived to be LGBTQ. Doe falls within the last group as a transgender woman.

Doe filed for an expedited appeal of her 270 days' confinement and for a stay, pending appeal. The court granted both requests.

New Jersey prisoners can appeal their prison disciplinary cases from the Department of Correction directly to the Appellate Division, as a challenge to a final agency determination. [In most states, judicial review begins at the trial level, as it does in New York under Article 78 of the Civil Practice Law and Rules.] There are other advantages: The inmate can bypass detours into questions of personal involvement and qualified immunity, since the agency is always a proper defendant. The standard of proof and the relief that is available are more favorable. Federal prisoner-plaintiffs must show that their punishment was an "atypical and significant" intrusion on their liberty before they can state a federal claim. *Sandin v. Connor,* 515 U.S. 472, 486 (1995). The Third Circuit has held that fifteen months in segregation fails to meet that test. *Griffin v. Vaughn,* 112 F.3d 703, 708 (3d Cir. 1997).

In federal court, the sufficiency of evidence standard to satisfy due process is "some evidence" – overturning only those cases with "no evidence whatsoever." *Superintendent v. Hill,* 472 U.S. 445, 454-5 (1985). In New Jersey, the familiar "substantial evidence" test is applied to the administrative record made at the hearing to determine if it is arbitrary and capricious. *Henry v. Rahway State Prison,* 81 N.J. 571, 579-80, 410 A.2d 686 (N.J. 1980).

Here, Doe was taken to an administrative office for an interview about a grievance. She objected to being addressed as "him," to which a supervisor said: "search HIM again," emphasizing the pronoun. A fight ensued. Doe sustained multiple fractures and nerve damage; one of the officers had abrasions on his face, which were attributed to Doe. The officers also used oleoresin capsicum (commonly known as "OC" or "pepper spray") on Doe while she was on the floor. The accounts of the officers and Doe varied, although the hearing officer found that Doe threw at least one punch. The court found that the search violated standards of the Prison Rape Elimination Act [PREA] because female officers should have searched Doe, absent exigent circumstances (28 C.F.R. § 115.15) – which were not shown. Nevertheless, PREA violations do not justify striking an officer, for which there was substantial evidence. The court does not reach the issue of whether excessive force was employed, but the circumstances (and transphobia) affected review of the punishment.

Turning to the punishment of 270 days, the court vacates and remands. This is where the new statute really has teeth. After staying her solitary, the court sends the punishment back to the DOC to re-evaluate the length under the Isolated Confinement Restriction Act, codified as N.J.S.A. 30:4-82.10. While the statute's requirement of implementing regulations is not effective until August of 2020, its "spirit" requires a remand, since part of Doe's stayed punishment will otherwise occur after the Act's implementation. The court notes the legislature's findings about the "devastating and lasting effects of solitary confinement." N.J.S.A. 30:4.82.6. The court retains jurisdiction while Corrections redetermines Doe's punishment.

Doe is now in a women's prison, and she is challenging some of these events in civil rights litigation. She is represented by the ACLU of New Jersey Foundation and by Pashman Stein Walder Hayden, PC (Hackensack). ■

Federal Judge Allows Privacy Act Claim by "Outed" Transgender Prisoner Who Was Sexually Assaulted

By William J. Rold

In an unusual ruling, U. S. District Judge Vanessa L. Bryant allows federal transgender prisoner Jason (Anna) South, *pro se,* to proceed on a claim under the Privacy Act, 5 U.S.C. § 552a, after federal officials disclosed her transition to other inmates. South alleged that she asked for her safety that her purchase of feminizing items from the commissary be kept confidential during the early phases of her transition and while she was still at a men's prison. Officials blabbed anyway, and South was subjected to ridicule and then sexually assaulted in *South v. Licon-Vitale,* 2020 WL 3064320 (D. Conn., June 9, 2020).

Judge Bryant first determines whether South has exhausted her administrative remedies under the Prison Litigation Reform Act [PLRA]. After extended discussion of the four-step process for exhausting grievances in the Federal Bureau of Prisons [BOP], Judge Brant finds that South failed to exhaust most of her claims, including protection from harm. As to privacy, however, South said that the warden (step 2) never replied to her grievance and that when she appealed to the next level (regional BOP, step 3), she was told she failed to appeal to the warden. Judge Bryant found that this allegation that BOP did not properly handle the privacy grievance made the remedy "unavailable" within the exceptions outlined in *Ross v. Blake*, 136 S. Ct. 1850, 1854-55 (2016).

South originally tried to raise privacy claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 288 (1971), claiming the "outing" either violated her First Amendment rights (as retaliation for a grievance) or violated her privacy under the liberty interests protected by the Fifth Amendment. Judge Bryant found that the Supreme Court has never recognized a First Amendment retaliation claim under *Bivens,* citing *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012); and *Widi v. Hudson*, 2019 WL 3491250, at *3 (N.D.N.Y. Aug.1, 2019) (collecting cases).

Judge Bryant also found that South's privacy claim was "not cognizable under *Bivens*." While South may have a constitutional privacy right that has been implicated, a viable *Bivens* claim requires the additional finding that Congress did not provide other "adequate remedial mechanisms." *Schwerker v. Chilicky,* 487 U.S. 412, 423 (1988). Here, it did so, with the Privacy Act. Courts considering privacy claims under *Bivens* have held that the Privacy Act, 5 U.S.C. § 552a, precludes a Bivens action for damages, citing *Young v. Tryon*, 2015 WL 309431, at *18 (W.D.N.Y. Jan. 23, 2013).

The Privacy Act gives federal agencies (including BOP) detailed instructions for handling individuals' records, as well as penalties for violations of the Act. *Doe v. Chao*, 540 U.S. 614, 618 (2004). Aggrieved persons may bring a civil action against the agency in federal district court. 5 U.S.C. § 552a(g)(1)(D). Judge Bryant dismisses claims against the individual defendants, but she allows South to substitute the BOP as the sole defendant on the Privacy Act claim.

Judge Bryant rules that the claim is "plausible" at this juncture and that South plead "actual damages," as required by 5 U.S.C. § 552a(g)(4)(A), because she claims she was sexually assaulted after she was "outed." In *F.A.A. v. Cooper*, 566 U.S. 284 (2012), the Supreme Court held that pecuniary or economic loss was required for "actual damages"; but Judge Bryant rules, in the absence of contrary guidance from the Supreme Court or Second Circuit, that physical injury would also suffice. [This would also remove any problem with the PLRA's requirement of physical injury as a predicate for emotional distress claims.]

South also sought a preliminary injunction moving her to a women's prison. Judge Bryant finds that South has not made her case for such a transfer, noting that she is no longer at the prison where she was "outed" and assaulted. Moreover, her conditions of confinement claims have been dismissed under *Bivens* theory or for failure to exhaust. Her remaining Privacy Act claim is "unrelated" to the transfer claim.

This case ends a bit legalistically. South sought to begin transition without calling attention to herself as a target. Having involuntarily become one, she remains in a men's institution. Her Privacy Act victory may ring hollow – but it could help other trans inmates. ■

Florida District Court of Appeal Reverses Denial of Lesbian Mother's Ability to Contest Parental Status Issues Regarding Children Birthed Before Marriage by Her Now-Ex-Wife

By Bryan Xenitelis

The Florida 5th District Court of Appeal has reversed and remanded a lower court decision finding that the court lacked jurisdiction during divorce proceedings over any matters regarding two children born prior to the marriage of the Appellant and Appellee (the biological mother), in *Shealyn McGovern v. Jacqulyn Clark*, 2020 WL 3112760, 2020 Fla. App. LEXIS 8300 (June 12, 2020).

The couple were in a committed relationship and mutually decided to have children and start a family together. In 2012 and then 2013, the Appellee gave birth to two children. Shortly thereafter, the couple married in New Hampshire. They subsequently had two more children, both birthed by the Appellee. All four birth certificates list the Appellee as the mother and do not list a father, but the two children born before the marriage were given the Appellant's last name, even though she was not the birth mother. During divorce proceedings, the trial court ruled that it had no jurisdiction of issues relating the two premarital children, because Appellant never adopted them. She argued that under Florida laws regarding legitimation of children, if a couple has children before getting married, when they get married the husband is automatically considered the father, and she should be treated the same as a legal spouse. She also challenged Florida Statute 742.091, claiming it unfairly and unconstitutionally limited parental rights. The court seemingly had no issue with the LGBTQ issue that this relationship was two women and not a husband/wife traditional situation, and made no ruling finding Appellant ineligible because she is not the "father" per the statute, but the court did rule that since Appellant had no biological relationship to the children and never adopted them, it lacked jurisdiction over any matters regarding those two children. The lower court made no ruling on the constitutional issue, ruling solely on statutory interpretation, even though the constitutional issue was argued.

Writing for the Appeals Court, Judge Richard B. Orfinger noted that the facts of the case were not disputed, and that the only issues on appeal were the jurisdiction over the two children and the constitutionality of the Florida statute. He noted that the court would review the case *de novo*. Citing numerous cases and statutes, Judge Orfinger stated "legitimacy is the legal kinship between a child and its parent or parents" and that "Paternity and legitimacy are related, but nevertheless separate and distinct concepts." Therefore, he rejected the lower court's ruling that "it is a 'natural conclusion' that Section 724.091 requires that the 'reputed father' must be the child's biological father."

With respect to the constitutional issue, Judge Orfinger ruled that since the lower court never issued an opinion on the issue, the Appeals Court had no jurisdiction to make a decision on the issue.

Judge Orfinger ordered that the decision of the lower court be reversed and that the case be remanded, and ordered that the court have jurisdiction over and take consideration of all issues regarding the two children that should be addressed.

Appellant was represented by David Scott Glicken, Orlando. No counsel appeared for appellee. ■

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

Federal Magistrate Continues Pattern of Pinched Screening of *Pro Se* Complaints for LGBT Inmates in Eastern District of California

By William J. Rold

Law Notes has covered examples of Magistrate Judge screening decisions in the Eastern District of California that direct *pro se* plaintiffs to refile repeatedly (on pain of dismissal) without making dispositive recommendations to the District Judge or otherwise submitting to supervision. *See* "Triaging Justice for Prisoners in the Eastern District of California" (March 2020 at pages 13-14); and "Federal Courts Slam the Door on Gay Prisoner Victim of Serial Rape Who Contracted AIDS" (March 2020 at pages 9-10). In *Solorio v. Larranaga*, 2020 U.S. Dist. LEXIS 105118 (E.D. Calif., June 16, 2020), U. S. Magistrate Judge Stanley A. Boone continues this trend.

Transgender *pro se* plaintiff Jacob Ray (Brianna Nycole) Solorio claimed that she was denied appropriate treatment for her gender dysphoria by the Stanislaus County Jail. She alleges that, while they continued her hormones at the jail, she was told by the sheriff's staff, the chief of mental health, and the manager of the health care vendor (Wellpath) that they did not have resources for fully evaluating transgender inmates or any policies about surgery – and that she should wait until she is in state custody. Although she was "seen" by mental health, she was told that their information about trans people came from Google and that they did not know how to treat her. She pleaded that she was denied access to appropriately trained professionals and she attached documentation from Wellpath confirming that she had been waiting for seventeen months for referral

and evaluation at the time she filed her suit. She said she complained repeatedly to named defendants, giving dates. She became so desperate that she tried self-castration twice. It made no difference.

Judge Boone took six months to "screen" her initial complaint, which he told Solorio to refile within thirty days – or face an order to show cause why her case should not be dismissed for failure to prosecute. He said that it lacked sufficient individualized detail to state a claim. This process was repeated twice, after Solorio filed a First and a Second Amended Complaint – both of which were bounced by Judge Boone —with an order to "refile" and without District Court supervision.

When Solorio did not file a Third Amended Complaint, Judge Boone recommended dismissal for failure to prosecute. He also repeated his "findings" in his earlier screenings. He found that Solorio was still not particular enough. Judge Boone even went so far as to hypothecate that the delays in providing care were "reasonable," given the jail's lack of experience in a "new" area. He also compared her various complaints, relying repeatedly on "admissions" in the original complaint in his final dismissal recommendation – although it should have been deemed superseded under *Brown v. Sored Value Cards, Inc*., 953 F.3d 567, 572 (9th Cir. 2020); *accord Lacey v. Maricopa County*, 693 F.3d 896, 925 (9th Cir. 2012) (*en banc*).

These recommendations are made without the benefit of adversary papers, and they go far beyond the usual screening decision in an opinion of almost 8,000 words. *Compare* the judge's screening approval of an HIV medication and diet challenge in *Ragan v. Wellman,* 2020 U.S. Dist. LEXIS 106829 (W.D. Mich., June 18, 2020), this issue of *Law Notes*. On screening, as under F.R.C.P. 12(b)(6), the plaintiff, not the defendants, should be given the favorable inferences.

Solorio alleged that the mental health director and the sheriff did not have policies about range of treatment of gender dysphoria for transgender inmates and did not provide trained staff. Yet, Judge Boone finds that Solorio failed to allege enough particulars about supervisory liability – even as he recognizes that a failure or absence of policy or resources when the same is necessary can constitute deliberate indifference under *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Judge Boone also judicially noticed that the sheriff took office shortly before the suit was filed and that many allegations preceded his tenure – without regard to Solorio's allegation that the constitutional violations were ongoing and that the incumbent was a proper party to cure them – which he is under F.R.C.P 25(d).

In assessing the "adequacy" of Solorio's medical care, Judge Boone focuses on supervisors' direct involvement, citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978), and quoting: "A person subjects another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." He excludes the next three sentences: "[P]ersonal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which . . . cause . . . the constitutional injury."

Turning to equal protection, Judge Boone writes that whether transgender people are a "protected class" is an "unsettled question of law." Not so in the 9th Circuit, which applied intermediate scrutiny to transgender military discrimination in *Karnoski v. Trump,* 926 F.3d 1180, 1202 (9th Cir. 2019); *see also, Norsworthy v. Beard,* 87 F.Supp. 3d 11-4, 1120-21 (N.D. Calif., 2015) (intermediate scrutiny of claim by transgender prisoner comparing her care to that for cisgender women).

Judge Boone wrote that, even if Solorio were a member of a protected class, she has not shown that defendants intended to deprive transgender people of adequate medical care provided to heterosexual people. This misses the point: a jail regulation that lets transgender inmates go to sick call once a week but permits daily sick call for heterosexual inmates can violate equal protection without a showing of an underlying Eighth Amendment violation. The County must come forward with a substantial justification for such a disparity. By screening this claim out, Judge Boone did not require the County to have any basis, much less a rational one, for refusing to complete its own referral to a specialist. It is the reason for the discrimination, not whether there is also an Eighth Amendment violation, that informs the equal protection analysis.

In recommending dismissal, Judge Boone finds that Solorio's failure to file a Third Amended Complaint shows that she "does not intend to diligently litigate this action." He then finds a presumption of prejudice to the defendants, citing *In re Eisen*, 31 F.3d 1447, 1452-53 (9th Cir. 1994). *Eisen* was a bankruptcy case that mentioned a "presumption" in dicta but found that the debtor's discharge plan in fact was prejudiced when a named creditor tried to assert a claim four years late. It has no application here, where Solorio was not permitted to serve the defendants.

What happened here – requiring multiple filings without making recommendations to the District Judge, making inferences and taking judicial notice in defendants' favor, hypothecating prejudice, and misapplying the law – illustrate an aggressive screening process of *pro se* LGBT prisoner complaints that appears to be out of control. ■

Maryland District Court Rules Against Baltimore Police Officer who Claimed a Hostile Environment Stemming from Co-Workers' Knowledge of his Father's Bisexuality

By Corey L. Gibbs

Baltimore Police Officer Steven Angelini, a heterosexual man, brought an employment discrimination case against the Baltimore Police Department (BPD). He believed that there was a continued campaign of harassment against him, all of which he claimed stemmed from a homophobic incident in 2012. Defendants moved for summary judgment following discovery. On June 2, 2020, District Judge Ellen L. Hollander ruled in favor of the BPD and granted its motion for Summary Judgment. *Angelini v. Balt. Police Dep't*, 2020 U.S. Dist. LEXIS 96636; 2020 WL 2848123 (D. Md. 2020).

After several transfers within the BPD, Officer Angelini moved to the Southeastern District in February 2010. Angelini could visit his parents while on patrol because they lived within the Southeastern District. He took advantage of this and visited them often. One January day in 2012, he arrived at his parents' house for a visit and peered through a window. His father was engaging in oral sex with another man. Not only did Angelini realize that his father had an ongoing, extramarital affair, he also realized that his father was bisexual.

Soon thereafter, the father's ex-boyfriend began stalking and harassing the father. Officers responded to calls from the Angelini house on multiple occasions. Officer Angelini believed that his father's promiscuity became the topic of office gossip following the calls. Everyone seemed to know that his father enjoyed the company of other men. However, Angelini could only recall one instance when another officer mentioned his father.

To Angelini, everything seemed to go downhill at this point. At an unspecified date, sometime between 2011 and 2012, someone took advantage of the dust that had accumulated on Angelini's police vehicle to draw a penis and scrotum in the dust along with the words "Baby Dick." Then, on October 2, 2012, the incident happened. Angelini discovered graffiti in a bathroom stall that said "Angelini + Quaranto R HOMO's!!" Officer Angelini immediately reported the graffiti and told a sergeant that he was disturbed. However, he did not want to write an administrative report regarding this *childish* action. The sergeant brushed the incident off and said it was "just guys doing what they do."

After that, Officer Angelini felt unwelcome at the Southeastern District station, and he inevitably filed a report regarding the incident and requested a transfer. Then, he arranged for a meeting with a BPD internal investigator. Angelini had light desk duty at the time of the meeting, which required court attire. However, he wore a *very small T-shirt*. The sergeant in charge at the time joked that Angelini was, "Showing off [his] pecs." The sergeant's comment made Angelini feel like a "snitch." Even after his meeting with the internal investigator, Angelini had to remain at the Southeastern District.

When the sergeant asked Angelini why he felt the graffiti was offensive, he informed her that her previous comments were offensive and that he felt mocked. Angelini soon began feeling singled out by that sergeant. When he showed up to work with wrinkled pants, she asked him if he had "ever heard of an iron?" On January 17, 2013, he parked in someone else's parking spot, and she instructed him to move his vehicle. By this point, he had enough. Angelini told his sergeant to charge him, hoping that a charge would get the attention of "downtown." While Angelini was not charged for parking in the wrong spot, his police powers were suspended and he was placed on administrative duty.

Officer Angelini claimed that he experienced even more retaliation when his sergeant did not publicly recognize him after he seized several firearms from a suspect, whom he killed. His name was placed on the "gun board." However, he did not receive any other award following the seizure of those drugs and guns. Officer Angelini further asserted that his sergeant commented that his shooting was bad.

The BPD eventually moved Angelini to a different shift, and a new sergeant supervised him. Officer Angelini hoped this would be the fresh start he had been longing for since his father's promiscuity became a topic of conversation. After he faint from heat exhaustion, a major gave Angelini permission to wear a short sleeve shirt while on duty. While on patrol that same day, another sergeant told him to change into a long sleeve shirt. Officer Angelini overheated and ended up in the hospital. He claimed that the sergeant telling him to change was an act of retaliation.

Officer Angelini asserted that his mistreatment continued. He failed to turn in a police report in a timely manner, and he was subjected to a scolding by his supervisors. He claimed that his supervisors concealed that he had been selected for SWAT tryouts. After being charged multiple times for wrongful behavior, he claimed that his former counsel harassed him during litigation. Time and time again, Angelini cried harassment and retaliation. On May 18, 2017, the Equal Employment Opportunity Commission (EEOC) sent him a right-to-sue letter after investigating his discrimination claims.

District Judge Hollander began her discussion by stating that the Baltimore Police Department offered "a host of threshold defenses". Because Angelini did not respond to the challenges to his sex discrimination claims, he abandoned them. Angelini expressly

let go of his invasion of privacy claim. However, he continued to argue that his hostile work environment and retaliation claims were viable.

The Baltimore Police Department argued that the court should strike some of the affidavits used to support Angelini's claims. District Judge Hollander explained that the sham affidavit rule could be used to strike affidavits when there are irreconcilable conflicts between the affidavits and other testimonies. Here, the BPD could not identify any irreconcilable conflicts. However, the court struck portions of one affidavit due to hearsay and another, in its entirety, due to lack of personal knowledge.

Then, the BPD argued that Angelini should be estopped from making his claims because he did not disclose any potential claims during a bankruptcy proceeding. When he filed for bankruptcy, he had an obligation to reveal all ongoing and potential claims. District Judge Hollander estopped Angelini from claiming certain damages, which would not have been exempted from the bankruptcy proceeding.

The Department argued that Angelini's Title VII discrimination claims were barred by the statute of limitations. While the initial violation may have occurred years ago, Angelini argued that the continuing violation doctrine should be applied. The judge explained that hostile work environment claims can occur over long periods of time. Angelini's case survived the statute of limitations challenge, due to the alleged violations that occurred after the initial violation.

Finally, Judge Hollander turned to the substance of Angelini's case. According to the judge, there was no actionable hostile work environment. Angelini failed to provide evidence showing a link between his protected action and the adverse actions of his supervisors. The timeline Angelini provided was sparse, which made it even harder to show any connections. He even asked his supervisors to retaliate, when he told them to charge him. Judge Hollander noted that nothing in the record showed that two of his supervisors even knew about his discrimination claim. The judge summed up the case by stating, "The record reveals much smoke, but no fire." Judge Hollander granted the BPD's motion for summary judgment as to the hostile work environment claim. Officer Angelini's retaliation claim failed for the same reasons, and the police department was granted summary judgment.

While this case jumped from one event to the next, it was important to note that this case originated with a man discovering that his father was having an affair with a man. The judge wrote this opinion in a way that exuded exhaustion. This heterosexual man seemed to claim retaliation and a hostile work environment anytime something did not go his way, and it all stemmed from his father's promiscuity. Perhaps the issue was not a hostile work environment, but rather a man's inability to accept that his father was not who he had always believed his father to be.

Officer Steven Angelini was represented by Jeremy M. Eldridge, Kurt E. Nachtman, and Michael E. Glass. The Baltimore Police Department was represented by Justin Sperance Conroy, Kay Natalie Harding, and Michael G. Comeau. ■

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

Florida Supreme Court Denies Post-Conviction Relief from Murder Conviction Despite Seating of Homophobic Juror

By Filip Cukovic

Eric Kurt Patrick, a homeless drug addict who would occasionally sleep with gay men in exchange for money and shelter, was convicted of the kidnapping, robbery, and first-degree murder of Steven Schumacher and was consequentially sentenced to death for the murder in question. *Patrick v. State*, 2020 Fla. LEXIS 930 (June 4, 2020). A couple of weeks preceding this tragic incident, Schumacher allowed Patrick to stay at his home in exchange for occasional sexual acts that Schumacher would perform on Patrick.

After Patrick's convictions were affirmed, Patrick filed his initial motion for post-conviction relief. Among other things, Patrick argued he received ineffective assistance of counsel for counsel's failure to challenge a biased juror. Namely, during the trial, one of the jurors had expressed multiple anti-gay opinions, including the juror's statement that he personally believes that any gay person "is morally depraved enough that he might lie, might steal, might kill." Patrick reasoned that the juror could not have been impartial with regards to Patrick's trial, given that Patrick himself engaged in multiple sexual activities with other men. The lower court rejected Patrick's post-conviction motion, and the Supreme Court of Florida affirmed.

The facts surrounding this case are upsetting on multiple levels, as they raise issues concerning homelessness, sexual exploitation, drug addiction and violence. Briefly stated, Patrick beat Schumacher to death after staying with Schumacher in Schumacher's home for about two weeks. In an interview with police, Patrick explained that he was

homeless when he met Schumacher and that Schumacher had offered to help him. In exchange, Patrick had shown Schumacher affection and allowed Schumacher to perform certain sex acts on him. However, Patrick refused to label himself as a gay man.

On the night Patrick killed Schumacher, Schumacher attempted to engage in a sex act that Patrick had not previously allowed and did not agree to. Allegedly, as a result of Schumacher's persistence, Patrick lost control of himself and began beating Schumacher. Ultimately, Patrick had taken Schumacher's truck, ATM card, watch, and some money from his wallet after severely beating Schumacher, tying him up, placing him in a bathtub, and leaving the apartment. Shortly after, Schumacher was discovered and pronounced dead.

With regard to the murder charge, Patrick's was convicted of the first-degree murder and was sentenced to death. He appealed his conviction, but the conviction was affirmed. As a result, Patrick filed a post-conviction relief motion, which included seven different claims. The lower court denied all seven claims, but the Supreme Court reversed the summary denial regarding Patrick's ineffective counsel claim and remanded for an evidentiary hearing. After the evidentiary hearing was held, the lower court ruled that Patrick's ineffective counsel claim does not hold, as the defense counsel's choice not to challenge the juror who has expressed homophobic views could be seen as a reasonable and strategic choice.

Patrick decided to appeal once again, this time challenging the decision that came as a result of remanded evidentiary hearing. However, in a decision written by Justice Charles T. Canady, the court affirmed the lower court's decision. Effectively, this means that Patrick will remain on death row. No judge dissented, but Justice John Couriel did not participate in this case.

To prove a claim of ineffective assistance of counsel, a defendant must establish two prongs, both of which are mixed questions of law and fact. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The Supreme Court of Florida agreed that Patrick had established the prejudice prong of his claim and that conclusion was not contradicted by the post-conviction court's findings. Specifically, the court made that determination based on the *Carratelli* standard established in Florida case law, which provides that a defendant establishes the prejudice prong of an ineffective assistance of counsel claim concerning failure to challenge a juror by showing from the face of the record that a person who was actually biased against the defendant sat on the defendant's jury. Considering the juror's statements regarding his views on homosexuality, including his statement that any gay person "is morally depraved enough that he might lie, might steal, might kill", and considering the fact that Patrick himself engaged in sexual activities with multiple men, it stands to reason that the juror in question was prejudiced against Patrick.

However, an ineffective assistance of counsel claim has two prongs, even when it concerns juror bias. As noted above, in addition to showing prejudice, the defendant must also show that his counsel's performance was deficient, meaning that counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. The defendant's task in proving deficiency is difficult by design, as the courts give great deference to the attorney who observed the relevant proceedings, knew of materials outside the record, and has interacted with his client, the opposing counsel, and with the judge.

In upholding the lower court's decision that Patrick's counsel was not deficient to the point of failing to function as the counsel guaranteed by the Sixth Amendment, the court relied on defense counsel's testimony given at the evidentiary hearing. Namely, Patrick's lead counsel, George Reres testified that his decision not to challenge the juror's competency to sit on Patrick's trial was strategic. Furthermore, Patrick himself previously said under oath at jury selection that his attorneys consulted with him about the jury and that he was 'fine" with their selection.

During the evidentiary hearing, Reres explained that he had reason to believe that the juror's bias would operate *in favor* of Patrick during the guilt phase. Reres embraced two reasons that this juror was desirable from a defense perspective under the particular facts of this case, which he opined made a strong case for guilt.

First, Reres testified that the juror in question was "probably a good juror for the defense" in the guilt phase. Reres explained that one of the defense theories was that Schumacher, a gay man, preyed on Patrick. He opined that this juror's anti-gay bias would have made him predisposed to accept that claim and to "listen carefully" to the defense that Patrick beat Schumacher in reaction to Schumacher's unwanted sexual advance and therefore committed something less than first-degree murder.

Second, when Reres was reminded of statements this juror made concerning the death penalty, he said that he had become "enamored" of this juror from a penalty-phase perspective. Specifically, although this juror had said early in the process that he was "open minded" and "in the middle" concerning the death penalty, when later asked if the death penalty was worse than a life sentence, he answered as follows: "Honestly I don't think any of us in here want to bear that burden when we leave here whether he's found innocent or guilty of thinking wow, I just sent somebody off to be executed, oh my God, I hope we all make the right decision."

Thus, based on this testimony offered by Reres, the court concluded that the defense's decision to seat the juror at issue was a strategic choice and that Reres' testimony provides competent, substantial evidence to support that finding. The court also concluded that Reres's strategy was not objectively unreasonable from the perspective of

a defense attorney. Specifically, it was logical for Reres to believe that the juror's bias created a higher probability that he, as compared to other potential jurors, would return a verdict of a lesser degree of murder and that, if the jury convicted Patrick of first-degree murder, this juror was more likely than other potential jurors to recommend a life sentence. Thus, considering that the defense had good reasons not to strike the juror in question, Patrick failed to show that his counsel was deficient to the point of failing to function as the counsel guaranteed by the Sixth Amendment. It follows that Patrick's post-conviction claim rooted in his ineffective assistance of counsel theory failed and that he will remain on a death row.

Eric Kurt Patrick was represented by Neal A. Dupree from Capital Collateral Regional Counsel, and Suzanne Myers Keffer from Capital Collateral Regional Counsel, Fort Lauderdale, Florida. ■

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

New York Court Holds That Pervasive Misgendering of Transitioning Employee Can Ground Discrimination and Hostile Environment Claims under NYS and NYC Human Rights Laws

By Arthur S. Leonard

New York Supreme Court Justice Paul A. Goetz denied a motion to dismiss gender and gender identity employment discrimination claims under the New York State and City Human Rights Laws brought by a transitioning individual against the New York City contractor that runs the access-a-ride call center program in *Smith v. Global Contact Holding Co.*, 2020 N.Y. Misc. LEXIS 2969, 2020 NY Slip Op 32015(U) (June 26, 2020) (opinion designated as unpublished). Justice Goetz ruled that persistent and pervasive misgendering of the plaintiff by supervisors and managers could subject them to individual liability to the plaintiff, as well as establishing the employer's liability for a hostile environment.

In April 2018, Global Contact hired the plaintiff to be a customer service agent and sent him to a training program. At that time, plaintiff alleges he told the training staff that he was transitioning to his male gender identity and requested to be identified as Devon Smith. He was issued a temporary ID with that name and training staff honored his request. However, his government-issued ID identified him as Devonia Smith, and when he completed training and reported to the call center, he began to encounter pushback from supervisors and managers, who insisted on misgendering him as female. Although he was identified as "Devon Smith" for certain purposes, at some point management switched things back to Devonia over his protests. The lengthy summary of factual allegations sets forth a steady stream of incidents over many months during which plaintiff encountered pushback against his gender transition and was apparently even shunned by a supervisor who stopped talking to him. He needed knee surgery and requested medical leave but was not granted as much leave as his doctor thought he needed for recuperation and there were subsequent disputes about his attendance, leading to his termination.

In moving to dismiss the complaint, the employer submitted documentation concerning attendance and attempting to show that Smith was inconsistent about which name to use, that he had not formally requested in writing to have "Devon" used, and that his own lawyers had used "Devonia" and "her" to refer to plaintiff at various times. In addition to moving to dismiss the suit, the employer moved to disqualify Smith's counsel, contending that they would be called as witnesses by the defendant if the case was tried. Smith countered with a motion to sanction defendants for their frivolous motion to disqualify his counsel.

The court found that under the liberal pleading standards for employment discrimination cases in New York, the complaint was sufficient to survive the motion to dismiss the discrimination and hostile environment claims and denied the motion to disqualify counsel. However, the court determined that the disqualification motion was not frivolous and refused to sanction defendants for making it.

Perhaps the most significant and useful part of the opinion by Justice Goetz is the holding concerning plaintiff's allegations of "misgendering" as supporting his discrimination and hostile environment claims. "In this regard," wrote the judge, "the complaint alleges that despite having been informed that plaintiff identifies

as a male and would like to be referred to using the name 'Devon' and male pronouns, defendants persisted in repeatedly using a female name and pronouns when referring to him, which did not correspond to his gender identity. Additionally, plaintiff was subject to remarks such as 'I'm not going to call you Devon or he, everyone can see you are a woman'" and 'you've got some big things up there, you're no guy.' He was also referred to as 'my girl' and 'fat bitch.' These allegations, viewed in the light most favorable to plaintiff, are indicative of discriminatory animus."

"Considering (1) that the remarks regarding plaintiff's gender identity were made by decisionmakers and supervisors after plaintiff made it clear that he is a transgender man and uses a male name and pronouns, (2) the close temporal proximity of the remarks to the employment decisions at issue, and (3) that a reasonable juror could view the remarks as discriminatory, plaintiff's allegations demonstrate a connection between defendants' comments and the employment decisions at issue sufficient to give rise to an inference of discrimination," concluded the judge.

The employer claimed that documents it submitted with its motion conclusively established that it had cause to discharge Smith, but Justice Goetz did not find them determinative, finding contested fact issues relevant for trial. Certain obvious errors on the documents cast doubt on their validity, such as purporting to show that Smith had failed to report to work on a specific date when in fact he was not scheduled to work on that date.

Defendants also argued that Smith should be equitably estopped from relying on a misgendering claim, based on their contention that Smith was inconsistent in terms of which name was preferred and that official documents (government-issued ID, W-4 tax withholding form, etc.) all showed the female name. Since Smith was transitioning but not yet transitioned and obviously had not obtained a legal name-change, it is not surprising that his formal documents used the female name.

"Defendants' reliance on the doctrine of equitable estoppel is misplaced," wrote Justice Goetz, "'[I]n the absence of evidence that a party was misled by another's conduct of that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel [i]s lacking' (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 106-107, 850 N.E.2d 653, 817 N.Y.S.2d 606 [2006] [internal quotation marks and citations omitted]). In this case, defendants take the position that they were misled by documents and e-mails on which plaintiff identified himself as 'Devonia' or as a female. However, plaintiff specifically alleges in his complaint that he informed all of the individual defendants, including Darson (GC's director of HR), that he is a transgender male and requested that he be referred to as 'Devon' and by the use of male pronouns. None of the documents submitted by defendants in support of their motion utterly refutes these allegations. Therefore, accepting these allegations as true and according plaintiff the benefit of every possible favorable inference, the doctrine of equitable estoppel is inapplicable."

The court also rejected the motion to dismiss the hostile environment claim. "Plaintiff alleges that he was subject to a hostile work environment, by, among other things, the persistent and repeated use of a female name and pronouns when referring to him, and being subject to remarks such as 'I'm not going to call you Devon or he, everyone can see you are a woman' and 'you've got some big things up there, you're no guy.' He was also referred to as 'my girl' and 'fat bitch.' The complaint indicates that such incidents were pervasive and occurred repeatedly throughout plaintiff's employment. Viewed in the light most favorable to plaintiff, the circumstances set forth in the complaint sufficiently allege that plaintiff was subject to a hostile work environment based on his gender identity under the State HRL."

Devon Smith is represented by Laine A. Armstrong, Richard Soto, and their firm Advocates for Justice, of New York. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

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

U.S. SUPREME COURT – On January 17, 2020, the 7th Circuit ruled in *Henderson v. Box*, 947 F.3d 482, that both members of a married lesbian couple who had a child were entitled to be listed on the birth certificate, rejecting the state's argument that the Supreme Court's ruling in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), did not require this result. In *Pavan*, a *per curiam* ruling, the Supreme Court made clear that under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), a married same-sex couple is entitled to be treated exactly the same as a married different-sex couple, so the female spouse of a woman who gives birth should be listed on the birth certificate as the child's other parent. Now the state of Indiana has filed a petition for *certiorari*, asking the Supreme Court to endorse the state's position that because Indiana wants to treat a birth certificate as an accurate record of the biological parents of a child, it is entitled to refuse to list the non-birth mother on the certificate. *Box v. Henderson*, No. 19-1385. Because Pavan so clearly supports the 7th Circuit's decision, it seems unlike that the Supreme Court would grant review in this case. However, three justices dissented from the *per curiam* in *Pavan* – Gorsuch, Alito and Thomas – and it is always possible that Kavanaugh, who took Kennedy's seat on the Court subsequently, might provide a fourth vote to grant cert. On the other hand, he would be unlikely to do that unless there was some indication that Roberts, who was part of the per curium majority, had become shaky on the issue. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 2ND CIRCUIT – In *Moore v. Barr*, 2020 WL 3526369 (2nd Cir. June 30, 2020), an HIV-positive native and citizen of Barbados contested that he was removable on grounds of a crime of moral turpitude, and also contended his due process rights were violated by the denial of his claim for asylum and withholding of removal. In a memorandum opinion, a 2nd Circuit panel affirmed the Board of Immigration Appeals and rejected petitioner's due process claim, finding no evidence of alleged bias by the Immigration Judge based on petitioner's HIV status, writing: "Moore also claims that the IJ was biased against him because of his HIV-positive status and his sexual relationships. But the IJ did not condemn Moore for being HIV positive and sexually active generally; instead, he was concerned that Moore's current partner who was already health-compromised had been unknowingly exposed to the virus. More critically, the IJ was not verbally abusive or hostile such that meaningful review was impossible, and there is no indication in the record that the IJ declined to exercise discretion in Moore's favor because Moore was HIV positive." The court also affirmed the BIA's finding that charges on which Petitioner was convicted fell within the range of crimes involving moral turpitude making him removable. "Moore's indictment and plea transcript support the conclusion that the object crime of Moore's inchoate offense of conviction was second-degree murder," the court commented, "There can be no question that second-degree murder is a CIMT because it involves "'reprehensible conduct and a culpable mental state'". Petitioner is represented by Richard W. Mark and Julianne L. Duran, of Gibson, Dunn & Crutcher LLP. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 8TH CIRCUIT – In what may turn into the first case to apply the reasoning of *Bostock v. Clayton County* in the context of the Fair House Act, on July 2 an 8th Circuit panel granted a motion by Friendship Village, a retirement home being sued by a lesbian couple who were denied housing, to return the case to the U.S. District Court for the Eastern District of Missouri, which had dismissed the plaintiffs' sex discrimination claim, for reconsideration in light of the Supreme Court's ruling. The case is *Walsh v. Friendship Village*, 352 F.Supp.3d 920 (E.D. Mo. 2019). The district court, applying 8th Circuit precedent that laws banning sex discrimination do not apply to claims of sexual orientation discrimination, had dismissed the complaint in January 2019, and an appeal was pending in the 8th Circuit. The case had been argued, but the court of appeals panel granted a motion to suspend action until after the Supreme Court ruled in *Bostock*. As soon as the *Bostock* decision was issued, plaintiffs advised the court of the result, and the court asked the parties to brief the effect of *Bostock*, a Title VII case, on the pending FHA case. The plaintiffs-appellants asked the court to *reverse* the district court's decision and remand the case for trial. The defendant-appellee urged the court to send the case back to the district court for reconsideration in light of *Bostock*, pointing out in its motion that the operative language in Title VII and the FHA was identical. Either way, the plaintiffs will now get to pursue their claim in the U.S. District Court in Missouri, assuming the trial judge agrees that FHA must now be interpreted to ban sexual orientation discrimination in the provision of housing, as seems likely. Counsel for Mary Walsh and Beverly Nance in the district court included Amy E. Whelan, Julie H. Wilensky, National Center for Lesbian Rights, San Francisco, CA, Anthony E. Rothert, Jessie M. Steffan, American Civil Liberties Union of

Missouri Foundation, Arlene Zarembka, Law Office of Arlene Zarembka, St. Louis, MO, Joseph John Wardenski, Michael Gerhart Allen, Relman and Dane PLLC, Washington, DC, Gillian R. Wilcox, American Civil Liberties Union of Missouri, Kansas City, MO. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 8TH CIRCUIT – In *Omar v. Barr*, 2020 WL 3477003, 2020 U.S. App. LEXIS 19920 (8th Cir., June 26, 2020), the HIV-positive Petitioner appealed the Board of Immigration Appeal's reversal of an Immigration Judge's decision to grant relief under the Convention against Torture. The Petitioner, a native of Somalia, entered the U.S. as a refugee at age 16 and became a lawful permanent resident. Then he got in trouble with the law, being convicted in Minnesota of three offenses: (1) a controlled substance crime in the third degree (sale of a narcotic drug), (2) theft, and (3) first-degree drug possession. This was enough to trigger action by the Department of Homeland Security to deport him. The Immigration Judge found that he was removeable on this basis, but ruled in favor of his claim to relief from removal under the Convention against Torture, finding based on testimony by Petitioner and his mother, as well as State Department country reports, that the minority tribe of which he was a member in Somalia was disfavored and occasionally subjected to violence, and also that HIV-positive people suffer violence in Somalia as well. Petitioner's mother testified that she had heard about HIV-positive people being stoned to death. Finding the evidence credible, the IJ found that Petitioner had established that it was more likely than not that if removed to Somalia the Petitioner would be subject to serious physical harm or death. Petitioner conceded to the IJ's decision that he was removable due to his criminal record. The government appealed the decision on relief under the CAT to the BIA, which reversed, stating "although we are sympathetic to the respondent's situation, we conclude that he has not satisfied the high burden of establishing that it is more likely than not that he will be tortured in Somalia." The BIA found the evidence presented to the IJ was too generalized and did not establish that Petitioner himself would be targeted upon removal, making the IJ's conclusion "clearly erroneous." The Court of Appeals upheld the BIA's action, finding that it had articulated the correct legal standard for reviewing the evidence and rejecting the Petitioner's claim that the BIA had failed to view the evidence in the aggregate as required by caselaw. The court concluded that the BIA *had* adequately stated its justification for finding the IJ's ruling "clearly erroneous" and had specifically acknowledged the requirement to view the evidence in the aggregate. The 8th Circuit has embraced a very narrow conception of the scope of the CAT. Tough luck seemed to be the attitude of both the BIA and the IJ. We found this opinion very disturbing. Petitioner is represented by John Robert Bruning, The Advocates for Human Rights, Minneapolis, MN, and Kimberly Kay Hunter, Kim Hunter & Associates, Saint Paul, MN. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Toledo v. Barr,* 2020 WL 3119030 (9th Cir, June 11, 2020), the 9th Circuit rejected an appeal by a homosexual man from Mexico from the Board of Immigration Appeals' (BIA) denial of his petition for withholding of removal and asylum. The court first noted that an asylum applicant must file within a year of arrival in the United States unless the applicant can demonstrate changed circumstances affecting their asylum eligibility. Petitioner concedes his asylum application was untimely but claims that changed circumstances excuse his delay The BIA determined petitioner did not show a material change in circumstances that excused his untimely application. Petitioner points to three potential changed circumstances, however, only one relates to his homosexuality. Petitioner claims that coming out to his family in Hawaii was a changed circumstance excusing his untimely application. The court explained that the record shows petitioner revealed his sexual orientation to his family in January 2016 and applied for asylum in January 2017. Accepting arguendo that this event was a changed circumstance, petitioner was obligated to file within a reasonable amount of time after the changed circumstance. Here, the delay was a full year, with no explanation supplied to overcome the presumption of unreasonableness. Therefore, the court concluded that this circumstance couldn't excuse his late filing. Furthermore, the court's Memorandum opinion affirmed the BIA's conclusion that there was insufficient evidence to show that petitioner suffered past persecution based on his status as an out gay man. Because petitioner has not demonstrated past persecution, he is not entitled to a presumption of future persecution. The court explained that to establish eligibility for withholding of removal in the absence of past persecution, an applicant must demonstrate an objectively reasonable fear of future persecution by showing either that he will be 1) singled out individually for persecution, or 2) there is a pattern or practice of persecution against the group to which he belongs. The BIA determined petitioner did not adduce any credible, direct, and specific evidence that would support either showing. Thus, the court concluded that substantial evidence supports the BIA's finding that petitioner failed to show an objectively reasonable fear of future persecution. – *Wendy Bicovny*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In a rare victory on appeal from a decision by the Board of

Immigration Appeals (BIA), which had denied relief under the Convention against Torture, Lucero Xochihua-Jaimes, a lesbian native of Mexico, won an order from a 9th Circuit panel to allow her to remain in the United States because of the likelihood she would suffer torture or serious physical harm if removed to Mexico. *Xochihua-Maimes v. Barr*, 2020 WL 3479669, 2020 U.S. App. LEXIS 20308 (June 26, 2020). The Petitioner, who lived in the U.S. for more than twenty years without lawful entry or documentation, suffered an attempt to remove her when she pled guilty in connection with a drug offense. (By her account, she acceded to a friend's request to drive her somewhere, and the friend, unbeknownst to her, was transporting marijuana for drug dealers. Police stopped the car for driving too slowly, searched, and arrested her, leading to a plea deal.) Petitioner fled Mexico as a teenager after suffering physical and sexual abuse from family members and rejection due to her sexual orientation. After crossing the border, she was determined to appear to be leading a heterosexual life and became attached to a Mexican man who had permanent residence status but who, it turned out, was affiliated with a fearsome Mexican drug cartel. She had five children with him and he kept her on a tight rein, physically and sexually abusing her and the children. Ultimately, she was involved in getting him prosecuted and he is serving a long prison sentence. Members of his family (including one who had sexually assaulted her during a visit to Mexico when she attempted to return to her family but was rebuffed) threatened her that if she ever returned to Mexico she would be killed. This is an abbreviated version of a very troubling story. Even though the Immigration Judge found her story credible, he totally misapplied 9th Circuit precedents on a variety of key points, denying her claim to protection under the CAT, and the BIA affirmed in its all-too-often rubber-stamp manner. The 9th Circuit panel unanimously overturned the BIA, finding that 9th Circuit precedent backs up the Petitioner's case. In a prior case, the circuit had recognized the fierce reputation of the drug cartel with whom her husband had been connected, and its ability to function with virtual impunity in Mexico, undercutting the IJ's conclusion that the Petitioner could safely live in Mexico by moving to an area where she was not likely to be found and keeping her sexual orientation a secret. The court also noted prior decisions in which it found that LGBTQ refugees from Mexico were eligible to stay in the U.S. due to reasonable fear of persecution or significant risk of physical harm to them. The Petitioner is represented by Max Carter-Oberstone and Brian Goldman, of Orrick Herrington & Sutcliffe LLP, San Francisco. Judges on the panel include Senior Judge Eugene E. Siler and Judges Kim McLane Wardlaw and Milan D. Smith, Jr., who wrote the opinion. *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Valdizan v. Barr*, 2020 WL 3168522, 2020 U.S. App. LEXIS 18836 (9th Cir., June 15, 2020), a 9th Circuit panel affirmed the Board of Immigration Appeals' decision affirming an Immigration Judge's adverse credibility determination against petitioner, a gay man from Peru, who conceded having lied to U.S. border officials about his reasons for coming to the United States, undermining his claims for asylum or withholding of removal. As to relief under the Convention against Torture, the court noted that the petitioner's allegations that he had been subjected to sexual abuse because of his sexual orientation related to actions by private persons, not the government, and that petitioner had conceded that a police officer had been willing to accept his complaint about domestic violence between petitioner's friend and his same-sex partner, suggesting that he had not proved that the government would "acquiesce in future torture." The court acknowledged that "the documentary evidence that Petitioner submitted could support a conclusion that some members of the gay community in Peru are tortured with the government's acquiescence," but, it said, "the record does not compel the conclusion that Petitioner would more likely than not face a 'particularized threat' of torture if he returned to Peru." The court also found no sign in the record that the IJ was biased against the petitioner, or that he had been prevented from presenting his case to the IJ in full. The petitioner is represented by Hillary Gaston Walsh, New Frontier Immigration Law, Gaston Walsh Law Group, LLC, Phoenix, AZ. – *Arthur S. Leonard*

ARIZONA – In *Bollfrass v. City of Phoenix*, 2020 U.S. Dist. LEXIS 110051 (D. Ariz., June 23, 2020), U.S. District Judge Michael T. Liburdi dismissed a claim by a gay married couple living in public housing in Phoenix that they were subjected to discrimination due to their sexual orientation in violation of their 14th Amendment Equal Protection rights. This is a complicated and lengthy story about a struggle by the couple, who were leaders among the tenants, to deal with the Phoenix Housing Department and various of its officials. It includes arrests, involvement of the federal Housing Department, and numerous complaints about discourteous and outright hostile treatment. Although Judge Liburdi found that the factual allegations did not support a claim that these men suffered discrimination because they are gay, he did find potentially valid many of their claims, including a claim that they suffered retaliation (including eviction proceedings) because of their activism as tenant leaders, which would enjoy First Amendment protection. They originally filed suit in state court, but the municipal and individual defendants

(who are numerous) removed the action to federal court. Plaintiffs are represented by David William Degnan and Mark Walter Horne, Degnan Law PLLC, Phoenix. – *Arthur S. Leonard*

CALIFORNIA – The California 4th District Court of Appeal affirmed a ruling by Riverside Superior Court Judge Cheryl C. Murphy to terminate the parental status of C.D., the mother of three young daughters who had lost possession of them due to her recurring problem with powdered meth. *In re A.L. et al., Persons Coming Under the Juvenile Court Law, Riverside County Department of Public Social Services, v. C.D.*, 2020 Cal. App. Unpub. LEXIS 3951 (June 24, 2020). Both the mother and two of the girls are hearing impaired. The children were placed with a gay couple, with whom they bonded nicely, and the girls had expressed a preference to live with their new parents. Attempts at reunification of the mother with the daughters had not been successful, as she cancelled or missed most of her scheduled visitations and attempts at kicking her meth addiction showed periodic relapses. The mother sought an order extending the reunification period for another six months, but the court concluded that the need for permanency supported the social workers' recommendation to go ahead with an adoption by the gay couple and to terminate C.D.'s parental status. There is no indication whatsoever in the opinion for the Court of Appeal by Judge Martha Slough that the sexual orientation of the proposed adoptive parents played any role in the decision. According to the court's summary of the record, "The caregivers are a gay couple who have been together for nearly 15 years and co-own an interior plant business. One of the caregivers has two children from a prior marriage with whom he still maintains close relationships. Both adult children support the adoption. The social worker described the caregivers as loving and responsible parents who are able to meet the girls' needs and provide a safe and permanent home. The social worker noted the couple had taken ASL classes in order to communicate with AM and A, had hired an ASL nanny, and were exploring services available to the hearing impaired. The social worker reported the girls had made an 'excellent adjustment' to the caregivers' home and are 'clearly well bonded' to them. In her opinion, the girls were 'thriving' in their care. They tell the caregivers they love them and call one 'Daddy' and the other 'Dad.'" – *Arthur S. Leonard*

CONNECTICUT – In *John Doe 1 v. Westport Board of Education*, 2020 WL 3487679, 2020 Conn. Super. LEXIS 622 (Conn. Super. Ct., May 27, 2020), a Westport public school student and his parents sued the town, the school board, and various school officials on various claims arising from alleged incidents of bullying involving the student and aspects of the subsequent investigations and actions taken by the school. Superior Court Judge Barbara Bellis summarized the allegations: "When Jack Doe 1 was a student in the Westport Public School system, he was the victim of multiple bullying incidents, including physical assaults, name calling, threats, ridicule, and mental abuse, from January 2013, until at least June 22, 2017. More specifically, Jack Doe 1 was ridiculed about his athletic ability and subjected to numerous and repeated comments regarding his sexual orientation and race. Although the bullying took place throughout this time period, the main incident occurred in gym class at Coleytown Middle School (school) on March 18, 2016, when Jack Doe 1 was attacked and assaulted by four students." The suit under Title IX revolved around the question whether the school failed to follow the plan it had adopted pursuant to a state law requiring schools to have policies and plans concerning bullying of students, whether the school could be charged with knowledge about any danger to Jack Doe 1, the student, whether school personnel acted with reckless indifference to danger to Jack Doe, and whether the town and the individual defendants enjoyed immunity from personal liability under the circumstances of the case. In granting summary judgement to the town, the school and named defendants on all but one count of the complaint, Judge Bellis found a lack of evidence supporting the plaintiffs' claims and that allegations concerning the conduct of individual defendants generally supported their immunity claims, except as to one claim of assault and battery against the middle school principal, who was charged with grabbing Jack Doe's wrist and holding it tightly during a meeting in her office when she was frustrated by Doe's resistance to providing a written account about what had happened to him before he would be allowed to phone his father. As to that, conflicting accounts of what happened led the judge to conclude that resolution of material facts would be necessary to rule on the tort claim. The opinion does not identify Jack's sexual orientation, merely stating, as noted above, it was the subject of bullying by other students. Counsel are not identified in the opinion. – *Arthur S. Leonard*

IDAHO – On March 5, 2018, the U.S. District Court in Idaho ruled in *F.V. v. Barron*, 286 F. Supp. 3rd 1131, that the state of Idaho's refusal to issue new birth certificates to transgender individuals violated their equal protection rights under the 14th Amendment. The court issued an order requiring the state to adopt a procedure to handle requests for new birth certificates in a procedure compliant with the constitution and enjoined it from continuing to enforce its existing

policy. The state had conceded that it lacked a policy justification that would meet the heightened scrutiny test that the court determined was appropriate for a policy that discriminates against transgender people. Indeed, the state conceded that there was no rational policy basis for its willingness to issue new birth certificates in adoption cases or in cases where paternal status was newly determined after an initial birth certificate was issued but at the same time categorically refusing to issue new birth certificates for transgender people. But the state legislature, all fired up on the issue, passed a new law earlier this year specifying circumstances where a new birth certificate can be issued which, on its face, appears to perpetuate the old policy. Plaintiffs in the lawsuit filed a motion with the court, seeking a declaration that the new law violates the court's order. What they got from the court, in an unpublished order that was posted on the case docket on June 1, 2020, was a reaffirmation that the existing court order requires the state to continue issuing new birth certificates to transgender people consistent with the requirements set out in the court's original order. (as of the end of June, the court's order was not published on Westlaw or Lexis.) Magistrate Judge Candy W. Dale opined that it was premature to determine whether the new law, which was to take effect on July 1, 2020, would be implemented in a way that violates the court's order. But the message to the state was unmistakable: the legislature can't evade the court's permanent injunction by passing a new law with slightly different wording from the old law if it has the same effect. The new law was passed simultaneously with another barring transgender women from competing as women in school athletics. Both new laws face legal attacks and were passed despite arguments about their constitutionality. Although the Supreme Court's *Bostock* decision, announced June 15, does not directly affect these cases, the Court's approach to the question whether discrimination because of gender identity is "discrimination because of sex" analytically reinforces Judge Dale's opinion from two years ago that "heightened scrutiny" is the standard for evaluating the state's policy, since that is the level of review mandated for governmental discrimination because of sex under Supreme Court precedents. With a personnel change in the state government, a new defendant is substituted, so the case is now named *F.V. v. Jeppesen*. – *Arthur S. Leonard*

ILLINOIS – In *Jaros v. Village of Downers Grove*, 2020 IL App (2d) 180654, 2020 Ill. App. LEXIS 412 (App. Ct. Il., 2nd Dist., June 25, 2020), the court affirmed dismissal of defamation, free speech, and due process claims against city officials and the local chapter of the League of Women Voters, as well as several individuals, stemming from the League's publication of an account of a regular meeting of the Library Board, of which Arthur G. Jaros, Jr., was a member, describing remarks he made at the meeting. After one of the individual defendants posted the remarks on his Facebook page with a call that Jaros be removed from the Board, the Board voted to remove Jaros. Jaros claimed he was defamed by the LWV publication and by the Facebook posting, and that his rights of free speech and due process were violated by his removal from the Board. According to the League publication, Jaros objected at the meeting to a proposed policy statement about providing training on "Equity, Diversity and Inclusion" to library staff. As reported, Jaros delivered a statement evincing racist and homophobic sentiments, in particular suggesting that library staff had to protect children from exposure to a homosexual lifestyle. Although this meeting occurred in August 2017, more than two years after *Obergefell* and even more years after Illinois adopted a marriage equality law, Jaros noted that the published state standards for sex education (obviously outdated) stated that marriage is only between a man and a woman, and he argued against any instruction that would have staff telling children that gay marriage is acceptable. The report continued: "He proceeded to continue to express his personal views on how we should view straight people vs. gays and reject any inclusion and people different from white straight people." An email Jaros subsequently sent to the Mayor explaining his remarks actually dug a deeper hole, although he vehemently denied using the word "white" in that quotation. Jaros, by the way, is a lawyer. He claimed *per se* defamation, but the court noted that nothing published about him fell into the specific categories of *per se* defamation under Illinois law, and as to his free speech claim, the court noted that he was speaking as a member of the library board, not as a private citizen, so the Board could remove him for his statements without incurring 1st Amendment liability. – *Arthur S. Leonard*

INDIANA – U.S. Magistrate Judge Tim A. Baker denied Roncalli High School's (Roncalli) motion to bifurcate discovery seeking to limit initial discovery to the applicability of the ministerial exception, which provides First Amendment safeguards to religious groups. *Fitzgerald v. Roncalli High School, Inc., Roman Catholic Archdiocese of Indianapolis, Inc.*, 2020 U.S. Dist. LEXIS 106574, 2020 WL 3270314 (S.D. Ind,, June 17, 2020) Roncalli's motion to bifurcate discovery, requests the court limit discovery to determine whether Michelle Fitzgerald, a high school guidance counselor, was performing ministerial duties within the scope of the ministerial exception. Roncalli contends that application of the ministerial exception would be dispositive of all claims and that bifurcation is the standard practice

in these types of cases. In opposition, Fitzgerald contends she was not a minister, Roncalli's reason for and the applicability of the ministerial exception in this matter are hotly contested, and unlikely to be resolved upon summary judgment, and even if Roncalli were entitled to it, some of her claims would remain to proceed on the merits. Furthermore, she claims that Roncalli's "entanglement with religion" concern is not relevant because she has not brought a religious discrimination claim, but rather alleges that comparable male and/or heterosexual employees were treated differently than her following substantially similar conduct. Thus, Fitzgerald contends that her claims do not require the court to resolve any religious questions. Finally, Fitzgerald argues that bifurcation would require unnecessary time and expense and hinder resolution of this matter. Judge Baker noted that Roncalli's bifurcation motion is strikingly similar to a motion to bifurcate filed in *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc*., 2019 WL 7019362 (see, *Law Notes*, Jan. 2020, for discussion.) In *Starkey*, this court concluded that the applicability of the ministerial exception was very much up in the air. Here, as similarly noted in *Starkey*, whether Fitzgerald's role can be considered ministerial is a fact-intensive question usually left for a jury to resolve. Roncalli and Fitzgerald paint Fitzgerald's job duties in two different lights, making it difficult to conclude at this stage whether the ministerial exception may apply. The court once again concludes, as it did in Starkey, that the litigation will proceed most expeditiously by moving forward with full discovery. (However, local news sources indicate that a trial would be unlikely before 2021.) Fitzgerald is represented by David Thomas Page, Henn Haworth Cummings & Page, Greenwood, IN, and Mark W. Sniderman, Park Conyers Woody & Sniderman, PC, Indianapolis, IN. – *Wendy Bicovny*

KENTUCKY – Applying established state supreme court precedent, the Kentucky Court of Appeals affirmed Jefferson Family Court Judge Tara Hagerty's determination that a lesbian co-parent who had no legal relationship to the child adopted by her former same-sex partner should be awarded joint custody and equal parenting time in *Tornatore v. Karibo*, 2020 WL 3401153 (Ky. Ct. App., June 19, 2020). The women began their relationship in Kentucky in 2001. Tornatore tried to conceive through in vitro fertilization several times unsuccessfully, and then they decided to adopt. Since Kentucky did not then allow joint adoptions by same-sex couples, Tornatore was the sole adoptive parent named on the birth certificate of the newborn boy that was adopted. Both women participated in all the preparations for adoption and went through the process together. Karibo was the stay-at-home mother while Tornatore was the main wage-earner in their family. The women held themselves out to family, friends, school, etc., as co-parents, and Karibo's siblings were godparents to the child. Even after the child started in school, Karibo worked only part-time in order to be home for the child after school. The court heard undisputed evidence that Karibo played a full parental role and was bonded with the child, who referred to both women as his mothers. After the women's relationship ended and Karibo moved out, she petitioned to be recognized as a parent and to have equal parenting time with the child. Judge Hagerty, applying the Kentucky Supreme Court's ruling in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), found that Karibo had standing to seek custody and that based on all the facts, mostly undisputed, it was in the best interest of the child to award joint custody with equal parenting time to Karibo, rejecting Tornatore's argument that Karibo lacked standing to seek custody. Affirming this result, the Court of Appeals pointed out that the facts supporting Karibo's claim were much stronger than the facts in *Mullins*, and that the trial court's decision was supported by substantial evidence. Furthermore, under the system of precedent, the *Mullins* decision was binding on the court if not distinguishable, and it was clearly not distinguishable. Tornatore was represented on appeal by Jason Anthony Bowman, Louisville, Kentucky. Karibo was represented on appeal by Scott E. Karem, Louisville, Kentucky. Judge Kelly Thompson wrote for the unanimous panel. – *Arthur S. Leonard*

LOUISIANA – In *Hills v. Tangipahoa Parish School System*, 2020 U.S. Dist. LEXIS 97581, 2020 WL 2951027 (E.D. La., June 3, 2020), U.S. District Judge Sarah S. Vance, having previously dismissed Kaarla Hills' claims of disability discrimination under the Americans with Disabilities Act (ADA) and state law defamation (*see* 2020 U.S. Dist. LEXIS 44775, March 16, 2020), now dismissed her remaining claims of invasion of privacy, negligent infliction of emotional distress, and disability discrimination under Louisiana law. Hills, who was employed by the school system as a pre-kindergarten professional teacher's aide, took Family & Medical Leave Act (FMLA) leave and didn't return to her job, after claiming to be stressed due to rumors circulating at the school that she had HIV. She traced the rumors to a website that inaccurately listed her as having HIV, and she attributed the posting on the website to the father of her children (to whom she was not married) and his girlfriend, with whom she was engaged in a custody dispute. She was called into a meeting with administrators who asked whether she knew about the website, and she explained her belief about how that listing came about. Later, one of the teachers with whom she worked told her that an administrator had spoken to the teacher, asking whether Hills had HIV and generally about Hills' work. Hills

claims that the rumor about her HIV status spread at the school, she perceived some teachers with whom she had good working relationships becoming distant, and even her children asked her about the rumor. She assumed they heard about it from other children at the school, and that she had become the subject of gossip. Ultimately the stress led her to take FMLA leave and to quit, and she sued the school. Judge Vance concluded that her failure to specifically identify an incident of an administrator stating or telling somebody that Hills had HIV defeated her privacy claim, noting that the website available to the public, whether accurate or note, made an invasion of privacy claim against the school not viable. Furthermore, no conduct attributed to the administrators at her school would meet the test of negligent infliction of emotional distress, which requires extreme or outrageous conduct. Having dismissed the ADA claim in the earlier ruling, the court concluded that dismissal of the state disability law claim naturally followed. Hills is represented by Galen M. Hair and Madison C. Pitre, of Scott, Vicknair, Hair & Checki, LLC, New Orleans, LA. Judge Vance was appointed by President Bill Clinton. – *Arthur S. Leonard*

MARYLAND – In an attorney disciplinary proceeding, the Maryland Court of Appeals indefinitely suspended from practice of law in Maryland James Andrew Markey and Charles Leonard Hancock, who worked as a Veterans Law Judge and an Attorney-Advisor, respectively, at the Board of Veterans' Appeals (Board), which is part of the United States Department of Veterans Affairs (VA). Judge Shirley M. Watts wrote for the unanimous court. The attorneys were suspended for violating the Maryland Lawyers' Rules of Professional Conduct (MLRPC) for "Conduct That Is Prejudicial to Administration of Justice and Bias or Prejudice." *Attorney Grievance Commission of Maryland v. James Andrew Markey and Charles Leonard Hancock*, 2020 Md. LEXIS 290 (June 26, 2020). Judge Watts explained at the outset that in an attorney discipline proceeding, a court reviews the hearing judge's conclusions to determine whether clear and convincing evidence establishes that a lawyer violated the MLRPC, and said this court gives full support of the hearing judge's conclusions. For approximately seven years, Markey, Hancock, and three other employees of the Board used their official Department e-mail addresses to participate in an e-mail chain that they called "the Forum of Hate" (FOH). They referred to themselves as FOH members. As members of the FOH, Markey and Hancock sent numerous e-mails that included statements about their Board colleagues that were highly offensive, and that frequently evinced bias or prejudice based upon race, sex, national origin, sexual orientation or socioeconomic status. During an unrelated investigation, the Veterans Affairs Office of Inspector General discovered the e-mails and began investigating Markey, Hancock, and the three other employees. The Department terminated Markey. Hancock, an at-will employee, voluntarily retired. Subsequently, Bar Counsel on behalf of the Attorney Grievance Commission filed in this court a Petition for Disciplinary or Remedial Action against Markey and Hancock. The hearing judge cited numerous emails. The emails related to the LGBTQ community include selected examples demonstrating bias or prejudice based on sexual orientation. In one email, Hancock stated that, "two male colleagues gobbled another male individual's j[***]", and further stated, "Two male individuals belonged to a male colleague's Forum of Gayness." In another e-mail, Markey stated, "nothing's too gay for one of the e-mail participants." In yet another e-mail, Hancock stated that, "a clandestine bj meeting had been arranged by a male colleague," referring to fellatio, and when Markey complimented him on the remark, Hancock responded: "I clearly am filled with hate. Need to stop." In response to a question about "whether an employee leaked the Board e-mail archive to Julian Assange," Hancock responded: "No, but he like to leak some semen his way." In the same e-mail exchange, Hancock asked: "Can we talk about gay stuff on the VA e-mail system?" In another email exchange, in which one participant used the word randy, Hancock retorted that "randy is too gay a word to use here." Judge Watts said that without question, the remarks summarized above demonstrate that Markey and Hancock engaged in conduct that knowingly manifested bias or prejudice based upon sexual orientation. Judge Watts supported the hearing judge's conclusions that 1) Markey and Hancock were acting in their professional capacity when they made the comments at issue because they made the comments using Department e-mail addresses and sent thee-mails during work hours; 2) e-mails were aimed at their Board colleagues, and were generally about the work performed by the Board; 3) the statements were prejudicial to the administration of justice and not in support of legitimate advocacy. With respect to the appropriate sanction, Judge Watts noted that there is no case in Maryland that is directly on point. She explained that what the court decides in this attorney discipline proceeding will become precedent for the sanctions imposed for similar misconduct by lawyers in the future. An indefinite suspension makes clear to every Maryland lawyer and the public that such conduct is unacceptable, Judge Watts concluded. – *Wendy Bicovny*

MICHIGAN – The saga of litigation involving allegations that countertenor

David Daniels, who was a professor at the University, and his husband Scott Walters engaged in sexual misconduct with a student, Andrew Lipian, continues with a June 19 ruling by Senior U.S. District Judge Arthur J. Tarnow. *Lipian v. University of Michigan*, 2020 U.S. Dist. LEXIS 108124 (E.D. Mich., June 19). Daniels and Walters are no longer defendants in this case, in which Lipian is seeking damages from the University of Michigan under Title IX of the Education Amendments of 1972, which forbids sex discrimination by educational institutions that get federal funds. The University was seeking permission for an interlocutory appeal to the 6th Circuit from some of the district court's rulings, and to have the trial in the case stayed pending the appeal. Judge Tarnow refused to certify the appeal, concluding that at this stage there are no purely legal questions that could be resolved by the court of appeals in the absence of determination of relevant disputed facts at the trial level. As to delaying the trial, Judge Tarnow observed that it has been stayed by events (court closure due to the pandemic), so there was no need for a stay in any event. The opinion also goes into considerable detail about squabbling between the parties over various issues as discovery has proceeded. Those who are interested in developments should check out the court's opinion, which is lengthy and detailed. A key issue that will require more factual development at this point is what University administrators knew and when they knew it considering Daniel's sexual activities with students. The University is arguing that it cannot be held responsible to act on mere rumors or innuendo, while Lipian contends that the University had more knowledge than it is admitting. There is also contentiousness about Daniels and Walters having pled the 5th Amendment extensively during their depositions, in light of criminal prosecution pending against them in Texas. It is a complicated tale. Part of Lipian's allegations were that the University did not take his charges against Daniels seriously because Lipian is gay. The judge actually expressed some shock and outrage at the report that University officials issued from their investigation, in the way it treated Lipian. Not a good sign for the University down the road. At the same time, however, the court upheld an award of fees to the University for legal expenses in responding to Lipian's faulty 2nd Amended Complaint. The case is now on a 3rd Amended Complaint. – *Arthur S. Leonard*

MISSISSIPPI – In *Kelly v. AES Enterprises, Inc.*, 2020 WL 3104945, 2020 U.S. Dist. LEXIS 102780 (N.D. Miss., June 11, 2020), decided a week before the Supreme Court's decision in *Bostock v. Clayton County*, U.S. District Judge Sharion Aycock used the sex stereotype theory from the Supreme Court's *Price Waterhouse* decision to find that a transgender plaintiff could sue for discrimination because of sex under Title VII, even though prior 5th Circuit precedent would likely preclude a straightforward claim of discrimination because of transgender status. (As seems to be the case frequently in opinions emanating from courts within the 5th Circuit, the opinion in this case confusingly conflates sexual orientation and gender identity.) Joselyn Kelly "came out" as transgender during the hiring process and was told that the company did not discriminate on that basis. AES Enterprises runs several McDonald's franchise restaurants and was seeking somebody with a Masters in Business Administration (MBA) and management experience to fill a store management opening. Kelly had some management experience, having worked as a manager for a Wendy's restaurant providing similar kinds of restaurant service. She did not have an MBA but had attended business school for several years and listed that on her resume, leaving unstated that she had not completed the program but in a way that AES contends would mislead the reader. At her interview, she claims that the focus was on her experience, not her educational credentials, and she was offered the position. AES's procedure is to require new managers to spend some time learning all the jobs in the restaurant. While Kelly understood this as practice in the industry, she chafed at being given work that an entry level employee would be assigned. For their part, AES contends that she was deficient, especially in relating to customers. For her part, Kelly contends that co-workers were nasty to her, that some misgendered her and called her names, but AES claimed she never complained to them about this co-worker misconduct. Soon after she began, she was offered the option of either resigning (with some severance if she signed a waiver of right to sue) or to go into a performance improvement program. She ended up resigning, but refused to sign the waiver, filed a discrimination charge with the EEOC under Title VII, and then this lawsuit, claiming sex discrimination. AES provided an affidavit in support of its motion for summary judgment, stating that if it had known she didn't have an MBA, they would not have hired her, and had this been discovered while she was employed, she would have been fired for lying in the hiring process. Although Judge Aycock found that Kelly's claim could be covered by the sex discrimination provision of Title VII, the employer's affidavit sealed Kelly's fate, as she did not contend that she had an MBA and she put in no evidence that an MBA was not advertised as a requirement for the job. Kelly is represented by Charles Hays Burchfield and Alexis D. Banks, Burchfield Law Firm, PLLC, Eupora, MS. Judge Aycock was appointed by President George W. Bush. – *Arthur S. Leonard*

CIVIL LITIGATION *notes*

NEW JERSEY – U.S. District Judge Freda L. Wolfson dismissed 1st and 14th Amendment claims against New Jersey's Division of Child Protection and Permanency (DCPP) and various employees of the Division by Michael and Jennifer Lasche, a married couple whose license as foster parents was suspended and whose hopes to adopt two young sisters were stymied. *Lasche v. State of New Jersey*, 2020 U.S. Dist. LEXIS 97988, 2020 WL 2989145 (D.N.J., June 4, 2020) (not officially published). The Lasches claim that they suffered discrimination and violation of their right of free exercise of religion because of their beliefs about homosexuality as a sin. They had asserted more wide-ranging claims in their original complaint, which was filed in state court but removed to federal court by the defendants because of its assertion of federal constitutional claims. In an earlier opinion, Judge Wolfson had dismissed all of the plaintiffs' claims except the Equal Protection and Free Exercise claims, as to which they were permitted to file an amended complaint. But the judge concluded that the amended complaint lacked the factual allegations necessary to state either constitutional claim. They did not allege with specificity that they were treated worse than others with different beliefs, and they had not established that the suspension of their license was due to hostility against religion by the DCPP. It was not enough for them to argue in a brief opposing Defendants' motion that plaintiffs knew many foster parents who had been treated differently from them, and the court found that a seven-month lag between the time DCPP officials were aware of plaintiffs' religious views was too long to support an inference that their license was suspended to retaliate against them for their religious beliefs. The court found that questions a DCPP case worker asked the children whose placement was at issue about religion were consistent with DCCP's statutory obligations. As much as the complaint revealed, the court found, it appeared to be based on the Lasche's supposition as to why the DCPP took the actions it did, rather than based on facts from which discriminatory or anti-religious motivation could be inferred. "if Plaintiffs believe they can allege additional facts to remedy the identified pleading deficiencies in their First Amendment claim regarding any actions taken by Defendants in connection with the non-renewal of Plaintiffs' foster parent license, they may file a motion for leave to amend before the Magistrate Judge within thirty (30) days," wrote Judge Wolfson in conclusion. "If Plaintiffs do not file such a motion, the Clerk of the Court will be directed to close this case." The plaintiffs are represented by Michael P. Laffey, Messina Law Firm, Holmdel, N.J. Judge Wolfson was appointed by President George W. Bush. – *Arthur S. Leonard*

NEW YORK – U.S. District Judge Gregory H. Woods denied Leg Apparel's (Leg) motion to dismiss former senior planner Aftern Sanderson's perceived sexual orientation discrimination claims, but the court granted Leg's motion to dismiss Sanderson's gender-based hostile work environment claim. Both claims were brought *pro se* under Title VII, the NYSHRL, and the NYCHRL. Sanderson, who is black, also asserted race discrimination claims under the aforesaid statutes and 42 USC Section 1981, which survived the motion to dismiss. *Sanderson v. Leg Apparel, LLC,* 2020 WL 3100256, 2020 U.S. Dist. LEXIS 102875 (S.D.N.Y., June 11, 2020). Sanderson's perceived sexual orientation claim arises from several incidents during his nearly three years of employment at Leg. First, Sanderson's trainee, Victor Doggett, told Sanderson of a conversation he witnessed between Sanderson's supervisor, Melissa Romanino and two other colleagues during Doggett's job interview claiming that Sanderson was not present because he was with his boyfriend in Martha's Vineyard. What followed was humorous banter among the three interviewers, of which Sanderson was the target. Sanderson disputes that he was with his boyfriend on Martha's Vineyard. Second, in July 2017, Sanderson alleges that Romanino again derisively referred to his sexual orientation. Sanderson alleges he reported to Romanino that a conference call with a contact at Walmart went well. Romanino asked in response whether the client contact at Walmart was Sanderson's boyfriend, then laughed with a different Leg employee. Sanderson alleges that Romanino made this remark in front of their colleagues and that Sanderson was thus humiliated by the remark. However, Sanderson did not report the incident to HR because he worried that Leg management would retaliate against him. Sanderson alleges that management has fired other employees who have filed complaints. Third, Sanderson alleges that a similar incident occurred on September 7, 2017. When he reported to Romanino that a conference call with a different client contact at Walmart had gone well, Romanino again asked, in front of other Leg employees, whether Sanderson's client contact at Walmart was his boyfriend. Again, Sanderson was humiliated. Four days later, Sanderson emailed Romanino and HR to complain, describing the July and September incidents. Sanderson told HR that he just wanted the sexist jokes to stop. Two days later, Sanderson called in sick, and discovered that he could not connect to the company server. Ten minutes later, Sanderson received a call from HR that allegedly told Sanderson that he was terminated because it was in the best interest of the company. Two days after he was terminated, Sanderson filed a complaint with the EEOC alleging that the CFO admitted that Leg retaliated against him for complaining about discrimination. Sanderson filed this lawsuit in September 2019 with fourteen

claims, two of which relate to perceived sexual orientation. Judge Woods first noted that Sanderson had plausibly alleged a claim for sex discrimination. The standard for a prima facie case of gender discrimination is that the plaintiff is (1) a member of a protected class, (2) was qualified for the position (3) suffered an adverse employment action, and (4) can sustain a minimal burden of showing facts suggesting an inference of discriminatory motivation. Sanderson alleges that Leg discriminated against him based on his perceived sexual orientation. Sexual orientation discrimination is a form of sex discrimination under Title VII, and under state and city law it is explicitly unlawful for employers to discriminate based on sexual orientation. Judge Woods also disposed of Leg's argument that because Sanderson has not alleged that he is not heterosexual, he cannot bring a sex discrimination claim as unpersuasive. Courts in this district have recognized employment discrimination claims based on perceived sexual orientation as a subset of sex discrimination barred by Title VII. More importantly, Leg has not offered a reason to distinguish between actual and perceived sexual orientation. The court sees no reason for this distinction. So the mere fact that Sanderson has not alleged that he is not heterosexual does not compel dismissal. Sanderson has also alleged the other three elements necessary to satisfy his pleading burden. He has alleged that he: 1) was otherwise qualified for his job as a planner; 2) suffered an adverse employment action because he was terminated; and 3) was terminated just days after Romanino made a derisive remark about his sexual orientation. That suffices to suggest that he was terminated because of Romanino's perception of his sexual orientation. But Sanderson's hostile work environment gender discrimination claim is inadequately pleaded, the judge concluded. Sanderson alleges that Romanino joked to coworkers about Sanderson's Martha's Vineyard and Walmart Client Contact "boyfriends," that Romanino intended to embarrass him, and that she laughed with a coworker after making these remarks. As alleged, Romanino was not earnestly asking whether Sanderson's client contacts at Walmart were his "boyfriends." But even so, incidents of discrimination must be more than episodic to support a hostile work environment claim. Rather, they must be sufficiently continuous and concerted in order to be deemed pervasive. The court concluded that no reasonable fact finder could find that the three comments of which Sanderson complains were pervasive enough to create an objectively hostile work environment, so the hostile environment claim was dismissed. But he has adequately pleaded adverse employment action theory and sexual orientation discrimination. * * * The day after issuing this opinion, Judge Wood granted motion by Sanderson for appointment of pro bono counsel to represent him in discovery. – *Wendy Bicovny*

NEW YORK – In *Torres v. City of New York*, 2020 U.S. Dist. LEXIS 98435 (S.D.N.Y., June 3, 2020), U.S. Magistrate Judge Katharine H. Parker issued a Report and Recommendation concerning an award of fees and costs to The Kurland Group, which represented plaintiff Lisette Torres in litigating her sexual orientation discrimination claim against the New York Police Department to a successful settlement. The case was originally filed as a proposed class action. The opinion does not disclose the terms of the settlement, but mentions that the parties were unable to reach agreement on a fee for The Kurland Group, so they submitted their claim to the court. Judge Parker recommended writing down the substantial amount claimed by counsel, from $759,760.50 and costs in the amount of $18,014.02.2 to 294,229.65 and costs in the amount of $17,193.32. The opinion discusses in detail Judge Parker's reasons for rejecting the amounts claimed, which will be of interest to those who may be in the position to submit fee award claims in sexual orientation discrimination cases litigated to settlement in federal court. In brief, the judge was not persuaded that the hourly rates quoted by counsel were typical of what they would be paid by clients for work of this type, and she complained that although biographical information had been submitted about the partners of the Kurland group for whom time was billed, information was less complete on the associates. "This case at its core was a straightforward employment discrimination case," wrote Judge Parker. "Plaintiff's counsel was a zealous advocate for their client and demonstrated a satisfactory level of competence and knowledge of the facts. While the Kurland Group specializes in civil rights litigation, it does not have the reputation or experience of other Plaintiffs'-side employment firms that have commanded and been awarded higher hourly rates." The judge then cited cases where prevailing parties were represented by Vladeck, Waldman, Elias & Engelhard, P.C., and Outten & Golden, where senior partners were awarded fees based on hourly rates several hundred dollars higher than those being claimed for Yetta Kurland, name partner of Torres' counsel. "Notably, Ms. Kurland does not provide an affidavit stating that the rates she proposes are her customary billing rates. While Plaintiff apparently signed an engagement letter stating that she would pay the proposed rates, the engagement letter has not been provided. Nor is there any evidence that any client of the Kurland Group has ever paid the proposed rates. Nor is there any evidence that a Court has ever approved or awarded the Kurland Group the rates proposed in a similar case." The court then listed several reported fee awards in other employment discrimination

cases in which firm partners were compensated at several hundred dollars an hour less than what counsel was seeking in this case. The Report and Recommendation will be submitted to District Judge Lorna G. Schofield, so The Kurland Group has a further opportunity to contest the Magistrate Judge's recommendation. Counsel for plaintiff listed in the opinion include Erica Tracy Kagan and Yetta G; Kurland, The Kurland Group, New York, NY; and Kathleen Belle Cullum, Indiana Legal Services, Indianapolis, IN. – *Arthur S. Leonard*

OHIO – The Court of Appeals of Ohio, 3rd District, issued a decision on June 22 in *Nance v. Lima Auto Mall, Inc*, 2020 WL 3412268 (Allen County), recognizing that in light of *Bostock v. Clayton County*, the U.S. Supreme Court's June 15 decision construing Title VII's ban on sex discrimination to cover sexual orientation discrimination claims, Ohio's statutory ban on sex discrimination in employment should be interpreted the same way. The plaintiff, Angelina Nance, was laid off from her position as a "detailer" at the auto shop when she came back from a medical leave she had taken due to a shoulder injury. The employer's position was that business had slowed down and they had to reduce the number of detailers, and the company's general manager told her that there was not work for her and he didn't want her to risk re-injuring herself. Nance, a lesbian who had been very outspoken at work about being married to a woman and raising a child with her, included in her lawsuit a claim for sexual orientation discrimination, although at the time of briefing on the summary judgment motion she conceded that Ohio's civil rights law did not cover sexual orientation claims, and the trial court granted summary judgment on the sexual orientation claim (and generally ruled against her on her other claims). On appeal, Judge John R. Willamowski, writing for the panel, noted the effect of *Bostock*: "The Supreme Court of Ohio has held that 'federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112.'" *Russel v. United Parcel Service*, 110 Ohio App.3d 95, 100, 673 N.E.2d 659 (10th Dist.), quoting *Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128, 131 (1981) . . . . During the pendency of this case, the Supreme Court of the United States decided *Bostock v. Clayton County, Georgia* (Slip Opinion). In that decision, the Supreme Court held that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Id. at 9. Thus, the Court concluded that "[a]n employer who fires an individual merely for being gay or transgender defies the law." Id. at 33. Since the Ohio Supreme Court has held that federal case law is "generally applicable to cases involving alleged violations of R.C. Chapter 4112," the type of claim that Angelina raises herein could potentially have a basis in law under *Bostock*. *Russel*, *supra*, at 100, quoting *Plumbers & Steamfitters Commt.* at 196. See *Bostock* at 33." However, the court found that Angelina's factual allegations were insufficient to state a sexual orientation discrimination claim. "In her deposition, Angelina agreed that Henry was aware of her sexual orientation at the time that she was hired; was accepting of her lifestyle; and had never expressed displeasure that she was married to a woman." Henry is her father, Henry Nance, who was also her supervisor at work. "McClain [the general manager] and Henry testified that they were each aware that Angelina was gay at the time that she was hired. She also testified that McClain did not directly speak to her about her marriage or make any discriminatory slurs regarding her sexual orientation. However, Angelina did state that McClain had mentioned to her father that he (McClain) was uncomfortable with Angelina referring to Vanessa as her wife. She agreed that this was "one isolated incident in 2017." She admitted that there were no other "expression[s] of dislike or displeasure" with her lifestyle or her marriage. Angelina also affirmed that no "adverse disciplinary actions were taken against" her after this incident. In her deposition, her response to the motion for summary judgment, and her appellate brief, Angelina has not drawn a connection between her sexual orientation and any adverse employment action taken by Lima Auto Mall. She only argues that there is a right to raise a claim for discrimination on the basis of sexual orientation under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, et seq. However, she does not identify facts in the record that would substantiate such a claim. Thus, her third assignment of error is overruled." Angelina Nance is represented by Matthew G. Bruce. – *Arthur S. Leonard*

OHIO – In *Shields v. Sinclair Media III, Inc.*, 2020 WL 3432754, 2020 U.S. Dist. LEXIS 110099 (D. Ohio, June 23, 2020), U.S. Magistrate Judge Karen L. Litkovitz, taking note of the Supreme Court's ruling in *Bostock v. Clayton County, Georgia*, a week earlier, concluded that *pro se* plaintiff Erica Shields' sexual orientation discrimination and retaliation claims were actionable under Title VII, but nonetheless found that Shields' evidence in support of those claims was inadequate to support a *prima facie* case, and that the employer's evidence of the reason for her discharge had not been shown to be pretextual. Shields had also alleged discrimination because of race and gender under Ohio's Civil Rights law. Judge Litkovitz observed that the Ohio courts had consistently refused to find sexual orientation discrimination

actionable under the state law. She did not take the next step, as the Ohio Court of Appeals did in the *Nance* case (see directly above) of noting that under Ohio Supreme Court precedents, the state civil rights law should be construed to extend to sexual orientation discrimination claims in accordance with the U.S. Supreme Court's ruling in *Bostock*. Shields sought to bolster her case by presenting a "Declaration" which purported to be under oath, but she failed to get it notarized or to provide her actual signature, resting on typing her name on the document, so the court excluded it from evidence as not admissible under the Rules of Evidence as an affidavit. The perils of proceeding *pro se* . . . – *Arthur S. Leonard*

PENNSYLVANIA – In *Doe v. Triangle Doughnuts, LLC*, 2020 WL 3425150 (E.D. Pa., June 23, 2020), U.S. District Judge Joseph F. Leeson, Jr., granted *sua sponte* a transgender plaintiff's motion to proceed anonymously on her Title VII employment discrimination claim. Upon receiving the complaint, the employer – which did not oppose the anonymity motion – moved to have the case stayed until the Supreme Court decided whether gender identity claims could be litigated under Title VII. This opinion was issued the week after the Supreme Court's ruling in *Bostock v. Clayton County*, which answered that question affirmatively. The court mentions that development tersely in a footnote without further comment, focusing entirely on analyzing the unopposed anonymity motion, which it does at length. The court recites factors that federal courts have used to decide whether an exception can be made to the requirement in the Federal Rules of Civil Procedure that cases are to be prosecuted in the name of the plaintiff(s), and concludes that the balance of the factors overwhelmingly supports plaintiff's motion. There is no great public interest to be served by identifying her by name in court papers, and the court is well aware of the dangers of violence faced by transgender people. It is rare for a court to require a transgender plaintiff who is not a public figure to proceed under their legal name, so there was no great mystery in this case about the outcome. The treatment of plaintiff described in the complaint suggests that she has an excellent Title VII discrimination claim. 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. – *Arthur S. Leonard*

SOUTH CAROLINA – *Riley v. Hardee's*, 2020 U.S. Dist. LEXIS 105451 (D.S.C., June 16, 2020), is a sexual orientation employment discrimination case filed *pro se* under Title VII and referred to Magistrate Judge Paige J. Gossett, who delayed ruling on the defendant's motion to dismiss pending a ruling by the Supreme Court in *Bostock v. Clayton County*. The employer had moved to dismiss on the ground that 4th Circuit precedent precluded sexual orientation discrimination claims under Title VII. Judge Gossett issued this brief Report and Recommendation to the district court the day after the *Bostock* ruling was announced. "On June 15, 2020, the Supreme Court issued its decision in that case, holding that Title VII's proscription of discrimination because of sex encompasses discrimination based on sexual orientation. *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 U.S. LEXIS 3252, 2020 WL 3146686 (U.S. June 15, 2020). In light of that decision, the court recommends that the defendant's motion to dismiss, which was largely based on Fourth Circuit precedent holding that Title VII did not include a proscription against discrimination based on sexual orientation, be denied. The plaintiff is hereby granted twenty-one days to amend her complaint in light of the Supreme Court's decision in *Bostock* so that she may have the opportunity to formulate her pleading in a manner consistent with the Supreme Court's decision." – *Arthur S. Leonard*

VIRGINIA – The day before Virginia's new Virginia Values Act was to go into effect at the beginning of July, Alliance Defending Freedom filed a pre-enforcement challenge in the U.S. District Court for the Eastern District of Virginia, claiming that the statute's ban on sexual orientation discrimination in public accommodations – and particularly a provision forbidding a business from advertising that it discriminates in violation of the statute – violates the 1st Amendment rights of photographer Chris Herring, who takes on wedding photography business but will not provide his services for same-sex weddings and wants to be able to communicate that on his business's website. The irony is that the named defendant in the lawsuit is Mark Herring, the state's Attorney General, who is not related to the plaintiff. *Chris Herring Photography v. Herring* is the name of the case! Although Herring cites his religious beliefs as the reason why he won't photograph same-sex weddings, his raises freedom of speech as well as free exercise arguments. Freedom of speech arguments have proven successful in some lawsuits where the nature of the service is arguably inherently expressive, such as wedding invitations, wedding videos, and photographic albums. – *Arthur Leonard*

WASHINGTON – Discovery continues in *Karnoski v. Trump*, 2020 U.S. Dist. LEXIS 110922 (W.D. Wash., June 24), a challenge to the Trump Administration's transgender service policy. The June 24 opinion focuses on claims of deliberative privilege

by defendants attempting to justify withholding numerous documents that the court had found fell within the substantive scope of inquiry in light of the underlying factual issue in the case, which is, boiled down to its essence, whether the policy eventually put into place after the Supreme Court stayed various preliminary injunctions was the product of considered military judgment with some objective basis in fact. To get at this, plaintiffs are trying to discover documents that will shed light on the deliberative process leading to the Mattis Report submitted to the president in February 2018 which was purportedly the basis for the policy suggestions that President Trump authorized then-Secretary of Defense Mattis to implement. Pursuant to instruction from the 9th Circuit, the parties and the court are having to engage in document by document consideration whether a particular requested document is shielded by deliberative privilege for purposes of discovery in this case. After *in camera* examination of documents, Judge Marsha Pechmann concluded that many of the requested documents were not covered by deliberative privilege, and she ordered defendants to produce 500 more documents for *in camera* inspection. Ultimately, the defendants appear to be "playing out the string" to delay a trial or ultimate summary judgment against them. (The impact of the pandemic on federal court activities may also help them delay having to defend the policy at trial.) If they can delay a trial long enough and Trump is not re-elected, a new administration would likely restore something like the *status quo ante* as it was before the President announced (via Twitter) in July 2017 his determination to exclude transgender people without exception from any form of military service. This would moot the plaintiffs' demand for equitable relief. Armies of lawyers are amassed on both sides of the case. – *Arthur S. Leonard*

WEST VIRGINIA – In *Wilson v. Twitter*, 2020 U.S. Dist. LEXIS 104910 (S.D. W.Va., June 16, 2020), U.S. District Judge Robert Chambers approved a magistrate judge's recommendation to dismiss Robert Wilson's *pro se* lawsuit against Twitter, in which he claimed that his constitutional and statutory rights were violated when Twitter booted him from the service because his homophobic tweeting violated the terms of service. The relevant parts of the decision can be quoted: "Wilson used Twitter to insult gay, lesbian, bisexual, and transgender people, so Twitter suspended at least three of his accounts for violating the company's terms of service, specifically its rules against hateful conduct. Wilson then sued Twitter, alleging that the company suspended his accounts based on his heterosexual and Christian expression in violation of the First Amendment, 42 U.S.C. § 1981, and Title II of the Civil Rights Act of 1964. He also alleged 'legal abuse' by Twitter. In her very thorough Proposed Findings and Recommendations, Magistrate Judge Cheryl A. Eifert explains why Wilson's claims are baseless. Wilson has no First Amendment claim against Twitter because Twitter is a private actor. He has no claim under § 1981 because he does not allege racial discrimination. His Civil Rights Act claim fails for at least three reasons. First, only injunctive relief is available under Title II, not damages as Wilson seeks. Second, Section 230 of the Communications Decency Act bars his claim. 47 U.S.C. § 207. And third, Title II does not prohibit discrimination on the basis of sex or sexual orientation, and Wilson asserted no facts showing Twitter acted in a discriminatory manner in enforcing its generally applicable rules. Finally, Wilson also failed to allege any conduct by Twitter that could plausibly amount to 'legal abuse.'" In contesting the Magistrate's Recommendation, Wilson argued that because Twitter is a "publicly traded company," the First Amendment applies to its actions. After patiently explaining the difference between a publicly traded company and the government, Judge Chambers dismissed the case. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

FLORIDA – In *Santiago-Gonzalez v. State*, 2020 WL 3456751, 2020 Fla. LEXIS 1051 (Fla. Sup. Ct., June 25, 2020), the court affirmed a death sentence for an inmate who pled guilty to a first-degree murder charge. Inmate Angel Santiago-Gonzalez asked to be placed in a cell with Donald Burns to receive assistance from Burns on some legal matters. Both men had served time together in another prison. Burns was known to Santiago-Gonzalez to have been sentenced for sexual assault of minors. Santiago-Gonzalez ripped up a bedsheet and tied restraints on Burns' arms and legs, then stabbed him repeatedly all over his body. Inmates in adjoining cells banged on their bars to get the attention of Corrections Officers who came, disarmed Santiago-Gonzalez of the homemade knife he had smuggled into the cell, and untied Burns, who was conscious. While awaiting medical assistance, an officer tried to question Burns about what happened, getting less than coherent responses as Burns repeatedly stated: "I'm dying." Burns was rendered quadriplegic from his injuries, was in intense pain and unable to digest food due to injuries to his digestive tract, and died after 6 months, at that point weighing only 86 pounds. Under questioning after receiving Miranda warnings, Santiago-Gonzalez claimed that Burns had grabbed his ass, which set Santiago-Gonzalez off. Santiago-Gonzalez was serving multiple 100-years sentences for a variety of offenses, some violent. Represented by appointed public defenders, he pled guilty against advice of counsel and said he wanted to be sentenced to death.

During the penalty phase, the court found lots of alleged mitigating factors had not been proved, although it was undisputed that Santiago-Gonzalez had a tragic childhood (which included being sexually abused both at home and in youth detention). He made it clear to the judge that if he was not executed, he was likely to kill other inmates, because he could not control himself. As required by law, the death sentence was appealed to the Florida Supreme Court and Santiago-Gonzalez's counsel argued again the mitigating factors, but the court upheld the death penalty, finding the record supported the trial court's determination that Santiago-Gonzalez was competent to plead guilty and that in light of the nature of the crime, the death penalty was not a disproportionate sentence. Counsel for Santiago-Gonzalez made no attempt, as far as one can tell from reading the Supreme Court's opinion, to plead a "gay panic" defense, although the court did note that Santiago-Gonzalez said to the CO under question that he was "not interested in homosexual activity."

NORTH CAROLINA – In *State v. Jackson*, 2020 N.C. App. LEXIS 459, 2020 WL 2847885 (June 2, 2020) (unpublished disposition), a jury convicted John Lewis Jackson, Jr., of kidnapping and raping a 16-year-old girl. The girl told police officers that she had been raped, that she had been a virgin and she identified as a lesbian. Jackson, of course, claimed their sex was consensual and that the girl was not a virgin prior to the encounter. A big issue at trial was whether the girl's sexual orientation was admissible, the potential applicability of the Rape Shield Law, and the defendant's desire to introduce evidence to contradict the contention that she had not had sex with any man by offering as a witness a man who claimed to have had sex previously with the girl. On appeal, Jackson contended that "the trial court committed plain error by allowing the State to question T.H. about her sexual orientation and virginity in violation of Rule 412 of the North Carolina Rules of Evidence." The court of appeals rejected this claim. "Defendant did not object to T.H.'s testimony about her sexual orientation and virginity and, therefore, we are limited to plain error review," wrote Judge Linda M. McGee. Usually the issue under the state's Rape Shield Law is whether defendant can introduce evidence about the victim's sexual behavior to attempt to prove his innocence. The court noted that it was unusual for the prosecution to introduce such evidence in support of its case that the sex was not consensual, but that it was not improper for the trial court to allow the evidence. The court noted that the trial court had appropriately given the defendant an opportunity to attempt to impeach the victim's testimony, so it was appropriate to allow the defendant's cousin to testify that years earlier he had sex with victim but to exclude part of his testimony and some vague testimony by another defense witness that the court found insufficiently specific to be admitted. Thus, the trial court admitted defendant's impeachment evidence to the extent that the court found it was specific enough to be potentially probative. The court found that other evidence corroborating the charges was so substantial that the trial court did not commit clear error in allowing the prosecution to present the evidence concerning the victim's sexual orientation, or to limit admissibility of some of the impeachment evidence.

UTAH – A Utah Court of Appeals panel unanimously affirmed a five-year prison sentence for a gay man convicted of initiating non-consensual anal sex with another man, in *State v. Nunez-Vasquez*, 2020 WL 3456748, 2020 Utah App. LEXIS 100 (Utah Ct. App., June 25, 2020). The Defendant, the Victim (who was a casual acquaintance of the Defendant) and another Friend were out drinking and eventually ended up at the Friend's apartment. At some point during the night Defendant had heard that Victim identified as straight. The Victim, who had been drinking to excess, took off his shirt and passed out on the couch. The next thing he remembered was being on the floor with his pants down and somebody (the Defendant) on top of him and fondling him. He broke free and felt pain and lubricant in his rectum, ran outside and called the police. Defendant also came out and began to walk away when the police arrived. Eventually the police had defendant in cuffs and were questioning him after he received a paraphrase of Miranda warnings. Ultimately a medical exam confirmed that anal sex had taken place, and Defendant had stated to a police officer that he had "a thing" for sex with straight men. Defendant was prosecuted for forcible sodomy, his only defense being consent. Victim was injured in a motorcycle accident subsequently and claimed to have impaired memory of the incident. Defendant's counsel sought to introduce evidence that in the past Victim had flirted with other gay men, but the court refused to allow such testimony unless the Victim testified that he was straight and would never have consented to anal sex. Victim's testimony at trial was carefully stated to avoid making any such declaration, although he testified, despite fuzzy memory, that he had not consented. Defendant was never able to get the testimony of past sexual conduct by the Victim introduced. The jury got to hear a recording of Defendant's interview with a police officer, in which he talked about the "challenge" of having sex with straight men. The trial judge, District Judge Mark Kouris, declined to give the jury a "mistake of fact" instruction suggested by the Defendant, instead giving his own charge on the state's burden to prove the sex was not consensual. Not surprisingly, the Defendant was convicted. The court

of appeals analyzed in great detail the Defendant's various contentions on appeal of ineffective assistance of counsel and of violation of his 6th Amendment rights to confront his accuser, both as to admission of evidence and as to the jury charge. He contended that based on body language from the Victim he concluded that he could go ahead with the sex, and the Victim professed no memory of what had happened. The Court of Appeals agreed with the trial judge that the evidence Defendant sought to introduce was properly excluded, and that counsel had not rendered ineffective assistance. The court rejected the contention that admission of the evidence that Victim had flirted with other gay men in the past would tend to show that the sex was consensual on this occasion, or that the testimony the Victim gave had "opened the door" to introduction of evidence about Victim's past sexual behavior, which would ordinarily be barred under the rape shield evidentiary rules. Defendant's counsel on appeal is Nathalie S. Skibine. The court's opinion is by Judge Michele M. Christiansen Forster.

WASHINGTON – This is a little funny. . . . The case is *State v. Vazquez*, 2020 WL 3097454 (Wash. Ct. App., Div. 3, June 11, 2020). A police raid on a reputed "drug house" found methamphetamine in the apartment occupied by Jessica Vazquez and she was prosecuted and convicted on various drug-related charges involving meth. The trial court imposed various sanctions and ordered that she submit to HIV testing. On appeal, her claim of ineffective assistance of counsel was, in a word, "ineffective." But she got the court of appeals to quash some of the financial aspects of the sanctions on the ground that she was indigent. More significantly, she got the HIV test quashed. "The trial court may order HIV testing if it 'determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles,'" wrote Judge Kevin Kosmo, citing RCW 70.24.340(1)(c). "The court must enter an appropriate finding to establish whether the defendant used or intended to use needles as part of the offense," he continued. "The record does not establish that Ms. Vazquez used needles as part of this offense. Her testimony only described smoking methamphetamine. Without an appropriate basis for the finding, we reverse the HIV testing order." A wake-up notice to the trial judge?

WASHINGTON – Stacey Allen was tried on counts of child rape and child molestation, the state charging that when she was a teenager she sexually imposed on the much younger daughter of her half-sister. She was acquitted of rape, but convicted on the child molestation charges, and appealed her conviction. *State v. Allen*, 2020 WL 2857609, 2020 Wash. App. LEXIS 1535 (Wash. Ct. App., Div. 2, June 2, 2020). Prior to the trial, the court granted her motion *in limine* that her sexual orientation (lesbian) would not be mentioned during the trial. When the victim was on the stand, however, and was asked why the assaults to which the witness was testifying had stopped, the witness said, "Because she got a girlfriend." Counsel objected. The judge granted the objection and instructed the jurors to disregard that statement. Counsel then moved for a mistrial, arguing that the jurors would not forget what they had heard and that now Allen could not get a fair trial, but the judge denied the motion. Allen renewed this point on appeal, but the court of appeals was not persuaded. "We hold that the trial court did not abuse its discretion in finding that TW's statement was not a serious irregularity requiring a new trial," wrote Judge Bradley Maxa for the unanimous panel. "Allen states that TW's testimony identified Allen as a person who had a sexual interest in females and argues that a significant number of people continue to be biased against such people. As a result, Allen claims that TW's reference to her sexual orientation prejudiced her and denied her a fair trial," Maxa continued. "The trial court concluded that TW's statement was not a serious irregularity that warranted a mistrial, which is the first factor of a mistrial analysis. We agree. TW's statement was brief and only vaguely referenced Allen's sexual orientation. And the issue of Allen's sexual orientation was never mentioned again. Further, the fact that the jury acquitted Allen of the two most serious charges indicates that this statement did not taint the fairness of the trial." The court also said it could presume that the jurors would follow the trial judge's instruction, since, of course, when sitting as jurors, people abandon any stereotypes they hold about people who are different from them. (We're being sarcastic here, folks! Who thinks all the jurors would flush this information out of their minds and not be influenced by it in deciding that Allen did what T.W. claimed that she did?) The court remanded for resentencing, however, finding that the trial judge did not take adequate account of the defendant's age and immaturity at the time of the offenses in calculating the sentence. Stacey Allen is represented by Jason Brett Saunders and Kimberly Noel Gordon of Gordon & Saunders PLLC, Seattle, WA; Kimberly Noel Gordon, Law Offices of Gordon & Saunders PLLC, Seattle.

PRISONER LITIGATION NOTES

By William J. Rold

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

U.S. COURT OF APPEALS, 7TH CIRCUIT – Wisconsin transgender inmate John H. (Melissa) Balsewicz

is well known to *Law Notes*. She has sued about her medical care and about her protection from harm. Last year, we reported that U.S. District Judge J.P. Stadtmueller (E.D. Wisc.) granted summary judgment against her concerning an assault (dining room assault) that following earlier threats (shower threats), after which she sought protection from her assailant, whom she had accused of using the transgender shower even though he was not trans. After the threats, Balsewicz sought protection from the defendant sergeant. The dining room assault followed the threats by two days. Judge Stadtmueller concluded that there was not evidence on which a jury could find the defendant sergeant liable for not preventing the assault – and even if they could, the sergeant should have qualified immunity At the time, this writer commented that Judge Stadtmueller's ruling that no reasonable trier of fact could find subjective advance knowledge of risk seemed to be a "stretch" of the holding of *Farmer v. Brennan,* 511 U.S. 825, 837 (1994). In *Balsewicz v. Pawlyk,* 2020 U.S.App. LEXIS 20010, 2020 WL 3481688 (7th Cir., June 26, 2020), the Court of Appeals reversed, based on *Farmer*. Senior Circuit Judge Michael Stephen Kanne wrote for himself and Senior Circuit Judge Daniel Anthony Manion (both appointed by President Ronald Reagan) and Chief Circuit Judge Diane P. Wood (appointed by President Bill Clinton). The decision reaffirmed: "When a prison official knows that an inmate faces a substantial risk of serious harm, the Eighth Amendment requires that official to take reasonable measures to abate the risk." The sergeant took no action in response to Balsewicz's report "and two days later, the inmate who had threatened Balsewicz punched her in the head repeatedly, causing her to fall unconscious." The Court of Appeals found a jury would not necessarily find under the circumstances that the risk had abated when Balsewicz left the shower. While a jury did not have to find that the risk was ongoing, there was enough based on Balsewicz's complaints (corroborated by other inmates) for a jury to conclude that it was, that the sergeant knew of it, and that he disregarded it. *Farmer,* 511 U.S. at 837. Similarly, Baldewicz's right to be free of deliberate indifference to her safety was clearly established – so qualified immunity did not apply. While this decision makes no new law, it is gratifying to see seasoned appellate judges enforce the existing law that they have forged.

ALABAMA – HIV-positive inmate Travis Goins, age 38, applied for compassionate release from federal custody, alleging he is at enhanced risk of COVID-19 due to his medical condition. Chief U.S. District Judge Kristi K. DuBose denied his application in *United States v. Goins,* 2020 U.S. Dist. LEXIS 106539 (S.D. Ala., June 18, 2020). Under the First Step Act, 18 U.S.C. § 3582, a federal prisoner may apply to the Court for compassionate release upon a showing of "extraordinary and compelling reasons" (and other factors), if the defendant has either exhausted remedies within the Federal Bureau of Prisons or has presented his application to the warden more than 30 days previously, whichever is shorter. Judge DuBose finds that Goins met neither criterion, and she denies the motion without prejudice. The rest of the opinion is *dicta*. Judge DuBose notes that the U.S. Sentencing Commission was charged with modifying its guidelines for compassionate release under the First Step Act, but it has not done so. [She does not refer to the Attorney General's ability (which has been exercised) to exempt certain at-risk inmates from compassionate release restrictions under the CARES Act, which is COVID-19 specific.] Although Goins said in his motion that he is "dying from AIDS," he presented no medical evidence of his HIV control or of his life expectancy. The CDC lists HIV as a risk factor when the patient is over 65 or the HIV is not under control. Goins also presented no evidence of the spread of COVID-19 at his current institution. His situation "may be comparable or analogous" to other factors appropriate for consideration of compassionate release, but "the Court does not have sufficient evidence as to the status of Goins' AIDS upon which to base a finding that his condition in combination with the risk of contracting COVID-19 are compelling and extraordinary," wrote the judge, citing *United States v. Bueno-Serra,* 2020 WL 2526501 (S.D. Fla., May 17, 2020). Goins has had two prior releases on this firearms sentence, both of which were revoked due to failure to comply with conditions. Judge DuBose notes that safety considerations itemized in 18 U.S.C. § 3553 (which are to be considered along with compassionate release standards) raise issues after two prior revocations of early release. Goins is to be released in regular course in August of 2020.

ARIZONA – Immigration detainee Omar Dimas Bernal is a transgender man with multiple medical conditions, including heart problems, hypertension, obesity, borderline diabetes, and Bell's palsy, thus at risk of severe complications if he contracts the coronavirus. Although Bernal was brought to this country many years ago at age four, he was charged as a removable alien under 8 U.S.C. § 1182 after his arrest for a drug offense. In *Bernal v. Barr,* 2020 WL 3403087 (D. Ariz., June 19, 2020), U.S. District Judge Michael T. Liburdi denied a preliminary injunction, but directed the Attorney General to respond to the portion of the papers requesting a writ of *habeas corpus*. Bernal is confined at an ICE facility operated by CoreCivic in Eloy, Arizona. [ICE's Eloy facility was the subject of part of an article last month, "ICE Detainee Wins Injunction/Habeas

PRISONER LITIGATION *notes*

Relief for COVID-19 Risk" (June 2020 *LawNotes* at pages 12-13). At that time, ICE mooted out many of the claims by releasing plaintiffs, leaving no one from Eloy. Now, Judge Liburdi's decision says there were 78 cases of COVID-19 among Eloy's detainees.] Bernal is seeking asylum as a transgender gay male with fear of bodily harm if returned to Mexico, and he has a "reasonable fear" hearing scheduled by the end of Summer. He seeks "humanitarian parole" in the meantime, arguing that his risk of complications from COVID-19 is ten times higher than other detainees and that at Eloy he lives in a pod, where he is forced to share common space with hundreds of other inmates using the same sinks, showers, telephones, and so on – and that rotating staff, absence of PPE, and inability to perform social distancing creates a risk to his life in violation of the Fifth Amendment. He also maintains that ICE's failure to rule on his application for humanitarian parole violates his constitutional right to procedural due process. He seeks a preliminary injunction, as well as *habeas,* and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Judge Liburdi denies a preliminary injunction, finding that an expedited submission of the *habeas* petition will suffice to avoid irreparable injury. (The denial is without prejudice.) He orders the Attorney General to Answer (not to file a "dispositive motion") within two weeks. [Note: There is an unresolved circuit split as to whether the Attorney General is a proper defendant on the *habeas* claims – as opposed to the custodial warden. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 n.8 (2004). The Ninth Circuit held that he is proper in *Armentero v. INS*, 340 F.3d 1058, 1071-73 (9th Cir. 2003), but the opinion was withdrawn, 382 F.3d 1153 (9th Cir. 2004) (order). Judge Liburdi applies *Armentero* here, saying the question need not be decided at this time.] Bernal is represented by Pope and Associates, Phoenix.

CALIFORNIA – This compassionate release motion for a federal prisoner was "too-o-o-o late." Andrew William Zahn, age 63 and HIV-positive, has chronic obstructive pulmonary disease – together with his age, these factors place him "in the ballpark" of CDC risk factors for COVID-19. U.S. District Judge James Donato denied his application for compassionate release under 18 U.S.C. § 3582 in *United States v. Zahn*, 2020 WL 3035795 (N.D. Calif., June 6, 2020). Judge Donato found that "the Court does not need to delve into the details of Zahn's medical profile because he has already been exposed to and tested positive for COVID-19. The government reports that Zahn has fully recovered from the disease, and his infection status is listed as 'resolved.'" Zahn does not dispute these facts, but he argues that he is still at risk of re-infection and it is unknown if he now has immunity. Judge Donato said that there is no "consensus" on these issues, but the "immediate threat to Zahn has passed." There is no longer an "extraordinary and compelling reason for release."

CONNECTICUT – Yusuf Lang, *pro se*, alleged that he suffered emotional distress after watching a DVD as part of a domestic violence class because an actor in the DVD used a derogatory term. U.S. District Judge Kari A. Dooley dismissed his case in *Lang v. Doe*, 2020 U.S. Dist. LEXIS 95307, 2020 WL 2840255 (D. Conn., June 1, 2020), without leave to amend. As an example of improper verbal abuse, the DVD depicted a father calling his son a "fag." Lang was offended and complained up the chain of command without success. Then, he sued for damages in federal court. Judge Dooley found the video to be instructing against homophobia and not fostering it in intent or application. It also did not place Lang in danger within the meaning of *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Additionally, Lang is precluded from recovering damages for mental distress without physical injury under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). Leave to amend would be futile under *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

DELAWARE – U.S. District Judge Leonard P. Stark dismissed *pro se* plaintiff Hermione Kelly Ivy Winter's complaint as frivolous and denied leave to amend in *Winter v. Metzger,* 2020 U.S. Dist. LEXIS 104391 (D. Del., June 15, 2020). She filed a motion for reconsideration and a notice of appeal. The Third Circuit stayed the appeal pending a decision on the motion for reconsideration, under F.R.A.P. 4(a)(4). In her motion for reconsideration Winter admits that she did not state a claim for keeping her prison job but argued that she wished to assert additional justifications for her suit, including sexual orientation discrimination. Judge Stark ruled that these new justifications were not alleged, even implicitly, in the pleadings and that the motion for reconsideration was not well-taken under F.R.C.P. 59, since it did not present new evidence or an error of fact or law in the order. Judge Stark declines to construe the complaint as including these theories, in part because Winter is an experienced litigant (there are 14 "related" cases in the District of Delaware); and it was not proper to "recast her complaint on a motion for reconsideration" under *Comm. of Pa. ex rel Zimmerman v. PepsiCo, Inc.*, 836 F.3d 173, 181 (3d Cir. 1988). Nevertheless, Judge Stark grants her leave to file an amended complaint.

IDAHO – *Pro se* transgender prisoner Daisy Meadows was permitted to proceed on injunctive and damages claims arising from deliberate indifference to her safety and to her serious health needs by U.S. District

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Judge David Nye in 2018. She has since been transferred to Nevada, and her injunctive claims in Idaho are moot under *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995). In *Meadows v. Atencio*, 2020 WL 2797787 (D. Idaho, May 20, 2020), Senior U.S. District Judge B. Lynn Winmill denies her motion to amend her complaint to add new defendants and causes of action. Interestingly, the state did not oppose an amended complaint. Instead, they sought a new screening of Meadows' entire case and a full dismissal for failure to state a claim. Judge Winmill, to whom the case was reassigned, rejected this tactic. He found the claims to be duplicative of what had already passed screening by Judge Nye, and he denied the motion to amend. The case is limited by Meadows' failure to effect service on some defendants, but her constitutional claims will proceed for damages, along with state tort claims of negligence (for the beatings) and malpractice (for the denial of medical care). Meadows tried in her amendment to assert a claim under the Americans with Disabilities Act based on a failure to accommodate her gender dysphoria with feminizing items, but Judge Winmill found that it was misplead. Meadows failed properly to allege that her dysphoria was a disability resulting from an impairment that limits a major life function. As such, Judge Winmill found that he need not address whether the ADA excludes gender dysphoria under its "gender identity" exclusory language in 42 U.S.C. § 12211(b)(1). *Compare Parker v. Strawser Constr., Inc*., 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018) (declining to find that gender dysphoria is an impairment) with *Blatt v. Cabela's Retail, Inc*., 2017 WL 2178123, at *3-4 (E.D. Pa., May 18, 2017) ("it is fairly possible" to interpret gender identity disorders "narrowly" not to exclude disabling conditions such as gender dysphoria). Judge Winmill did not, however, grant leave for Meadows to try again.

LOUISIANA – Last Summer, *pro se* transgender prisoner Robert Clark won a TRO from U.S. District Judge Brian A. Jackson prohibiting the State of Louisiana from cutting her hair. Now, Judge Jackson denies her application for a preliminary injunction about her hair in *Clark v. LeBlanc,* 2020 WL 3065301 (M.D. La., June 9, 2020), because prison officials in Angola say they have no intention of interfering with the *status quo* as it concerns her hair. Clark also raised an issue about medical care for gender dysphoria. Judge Jackson has been receiving regular endocrinology reports. Despite a delay in provision of medications due to a claimed "paperwork oversight," the doctor's recommendations have been "implemented." Thus, there is no basis for a preliminary injunction on medical care either. Good to have an ear in Baton Rouge when you are a transgender inmate at The Farm.

LOUISIANA – Transgender inmate Dwight Joseph is serving ten years in federal prison for her second conviction of possession of large amounts of child pornography and failure to register as a sex offender after her first conviction. In *United States v. Joseph*, 2020 WL 3128845 (E.D. La., June 12, 2020), U.S. District Judge Sarah S. Vance denied her motion for compassionate release under 18 U.S.C. § 3582. Judge Vance also denied counsel. There is no right to counsel in a § 3582 proceeding, and the issues here are simple. Joseph's transgender status seems incidental. Although she alleges discrimination on this basis, the point is not developed, and she asserts high-risk of contracting COVID-19 as the basis for release, stating she has lung disease and borderline diabetes. Judge Vance does not find these reasons "compelling," and they were known at the time of sentencing. Moreover, the Bureau of Prisons "has taken measures" to address the spread of COVID-19. Judge Vance notes that the Attorney General's Memorandum under the CARES Act excludes home confinement consideration for a category of sex offenders into which Joseph falls. Judge Vance applies the Sentencing Guidelines that have not been updated pursuant to the First Step Act. In closing, Judge Vance notes that "fear" of contracting an illness is not grounds for § 3582 relief and that Joseph remains a danger to the community as a sex offender recidivist.

MICHIGAN – Inmate James Wyatt Booth, *pro se,* claims that he was denied promotion as a kitchen worker because of his sexual orientation and mental illness and that he suffered retaliation when he complained about it. U.S. District Judge Arthur J. Tarnow dismissed most of his case in *Booth v. Geary,* 2020 WL 2836334 (E.D. Mich., June 1, 2020). Judge Tarnow finds the allegations of retaliation are insufficient to show that the named defendants knew about the grievance when the alleged "retaliatory" act (a transfer) occurred. [Note: the transfer was from one minimum security facility to another.] As to an allegedly discriminatory denial of a promotion in food services, Judge Tarnow allows Booth to proceed against the food services supervisor in her individual capacity. He cites no authority, but it can be found in *Davis v. Prison Health Services,* 679 F.3d 433, 438 (6th Cir. 2012) (upholding gay prisoner's claim of loss of prison job because of sexual orientation).

MICHIGAN – *Pro se* transgender inmate Michael Salami got into a fight with her cellmate. From the description, each gave as good as was given, and they were both called "combatants." There is no failure to protect claim. In *Salami v. Sperling,* 2020 WL 3467567 (W.D. Mich., June 25, 2020), U.S. District Judge Paul L. Maloney permitted Salami to proceed on a deliberate indifference

to her serious medical needs claim for failure to treat her injuries after the fight. She said that her injuries required cleansing, bandages, disinfectant, and pain medication and that she was coughing up blood. She claims residual pain, nausea, black-outs, and mini-seizures. She sued a physician's assistant and an unnamed nurse. Judge Maloney allows her to proceed against the physician's assistant on a claim that she provided no care. The claim against the nurse also survives, but the defendant has yet to be identified. Salami's claims were serious and obvious under *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 466, 451 (6th Cir. 2014); and the delays/failures allegedly harmful under *Napier v. Madison Cty.*, 238 F.3d 739, 742 (6th Cir. 2001). An allegation of "no treatment at all" satisfies the Eighth Amendment standard. *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011). Salami also sued Corizon, the contractual provider, but she made no specific allegations against it that would constitute an actionable pattern, practice, or policy, as required by *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 817-18 (6th Cir. 1996).

MICHIGAN – The allegations of *pro se* prisoner Jack C. Bieri, III, insofar as they are relevant to *Law Notes* readers, may be briefly stated. Bieri was involved in a fight with members of a prison gang and placed in segregation. Thereafter, despite pleas that he remained in danger from the gang, Bieri was returned to general population with gang members by coercion from a sergeant and issuance of a ticket by an officer. Bieri was placed in a cell with a transgender prisoner, and Bieri was assaulted by gang members again. There is no allegation that his cellmate was involved in the second assault or that Bieri's double-celling with her precipitated it. U.S. District Judge Paul L. Maloney rules that Bieri stated a claim for screening purposes against the sergeant and the officer for deliberate indifference to his safety in *Bieri v. Rewerts,* 2020 WL 3055912 (W.D. Mich., June 9, 2020). Judge Maloney dismissed Beiri's separate claim that double-celling him with a transgender inmate violated the Eighth Amendment. In annoying *dicta*, Judge Maloney rules that, in any event, emotional damages for such double-celling would be barred by the Prison Litigation Reform Act's requirement that physical injury is a prerequisite to emotional damages under 42 U.S.C. § 1997e(e). [Query: would this have been added if the cellmate were not trans?]

MICHIGAN – *Pro se* prisoner Benjamin Ragan is HIV-positive. His medications cause serious side effects if not accompanied by a special diet, which was ordered for him. His complaint alleges that the dietician stopped his special diet on repeated occasions, sometimes with the concurrence of a nurse, but without permission of the prescribing doctor. After it happened the first time – and Ragan became seriously ill – he refused his HIV medications when the diet was suspended. A nurse practitioner informed the doctor that Ragan was not taking his HIV meds, to which he allegedly replied: "We should not reinforce this type of behavior." Ragan sued all of them and the contractual medical provider, Corizon, in *Ragan v. Wellman,* 2020 U.S. Dist. LEXIS 106829 (W.D. Mich., June 18, 2020). U.S. District Judge Janet T. Neff allowed the claims against the four individuals to go forward after screening, but she dismissed the case against Corizon. The dietician and the nurse were deliberately indifferent in failing to obtain medical approval for discontinuing a physician-ordered diet. The nurse practitioner delayed responding to the diet-medicine issue and then e-mailed the doctor, who treating the matter as misbehavior. Judge Neff found the allegations against the individual defendants sufficient: they knew the "seriousness of Plaintiff's need for HIV medications and the side effects of taking those medications with a high-protein snack," but they nevertheless presented Ragan "with the impossible choice of refusing his medication or becoming ill from taking it." Judge Neff applies one of the standards for deliberate indifference to serious medical needs under the Eighth Amendment – that the need is "obvious even to a lay person"; but she continues: "Obviousness . . . is not strictly limited to what is detectable to the eye. Even if the layman cannot see the medical need, a condition may be obviously medically serious where a layman, if informed of the true medical situation, would deem the need for medical attention clear." *See, e.g., Rouster v. Cty. of Saginaw*, 749 F.3d 437, 466, 451 (6th Cir. 2014) (perforated duodenum); *Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005) (severed tendon). As to Corizon, Ragan argued without specifics that it did not train its staff or adequately fund treatment. This is insufficient for § 1983 liability for a private vendor in Corrections absent proof of a custom or policy, which Ragan failed to allege. Moreover, such a claim for liability for failure to train under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978), must usually include allegations of a pattern, which Ragan did not plead. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

MICHIGAN – *Pro se* inmate Jamie Reilly is a transgender woman confined to a wheelchair. She sued 21 defendants after she was transferred from a setting where she had her own bathroom and female staff to a cell without handicapped accessories and where privacy was invaded by absence of shower curtains and presence of male staff. Her grievances were not taken seriously. She also claims that forcing her to dress, shower, and perform bodily functions observed by men violates her

religious beliefs, which stress privacy. In *Reilly v. Michigan DOC,* 2020 U.S. Dist. LEXIS 103806, 2020 WL 3172610 E.D. Mich., June 15, 2020), U.S. District Judge Arthur J. Tarnow dismissed claims arising from handling her grievances. He also dismissed claims against the Michigan DOC, its health division, and its transgender committee, saying none could be sued under the Eleventh Amendment. This extension of Eleventh Amendment sovereign immunity to low level subdivisions of state agencies (e.g., the transgender committee) seems to have reached its zenith in the Sixth Circuit district courts of Michigan. *See Salami v. Rewerts,* 2020 WL 1316510 at *3 (W.D. Mich., Mar. 20, 2020), citing *Harrison v. Michigan,* 722 F.3d 768, 771 (6th Cir. 2013). There is no discussion of suing the members or chairs of the subagencies to conform their conduct to the constitution under *Ex Parte Young,* 209 U.S. 123, 153 (1908). Judge Tarnow allowed Reilly to proceed against five individual defendants on her First Amendment religious claim, on her privacy claims (citing the Fourth, Eighth and Fourteenth Amendments without elaboration or reference to the regulations under the Prison Rape Elimination Act on this point – *see* 28 C.F.R. § 115.15), and on her cell accommodations, citing only the Eighth Amendment. There is also no discussion of the accommodation of Reilly under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq. See Pennsylvania DOC v. Yeskey,* 524 U.S. 206 (1998) (Congress included state agencies as "public entities" in disability protection statute). An ADA claim is proper against a state agency under the ADA.

MISSISSIPPI – U.S. District Judge Carlton W. Reeves granted a motion for compassionate release from federal prison to Willie Joe Mason, Jr., who had one year left on a 360-month sentence on a drug plea, in *United States v. Mason,* 2020 WL 3065303 (S.D. Miss., June 9, 2020). Mason has HIV and asthma, and he was held at the FCI low security camp in Forest City, Arkansas. This camp has one of the highest COVID-19 outbreaks in the federal prison system, with positive inmates increasing ten-fold over the last six weeks. Judge Reeves granted relief under 18 U.S.C. § 3582, finding that Mason was not a danger to the community. While the sentencing judge had already taken lack of dangerousness and Mason's acceptance of responsibility into account in a downward departure from sentencing guidelines, Judge Reeves found that Mason's risk of catching COVID-19 due to his vulnerabilities warranted release now. This comports with 18 U.S.C. § 3553, since "just punishment" should not include a COVID-19 risk of death – a factor not "knowable" in 2018. Judge Reeves relies on *Benavides v. Gartland,* 2020 WL 1914916 (S.D. Ga., Apr. 18, 2020) (prisoner with HIV/AIDS); and *United States v. Bass*, 2020 WL 2831851, at *7 (N.D.N.Y. May 27, 2020) (collecting cases). While opposing the motion in general, the Bureau of Prisons asked that, if released, Mason spend a fourteen-day quarantine at the camp. Judge Reeves said no: "If forced to choose between Mason spending 14 more days in the federal prisons' number two outbreak facility, and self-isolation in a residence, the Court believes the safer course of action is the residence."

NEW YORK – U.S. District Judge Paul A. Engelmayer wrote one of the few cases granting compassionate release this month to a federal prisoner at risk for COVID-19, in *United States v. Brown,* 2020 U.S. Dist. LEXIS 105825 (S.D.N.Y., June 17, 2020). Judge Engelmayer asked the trial attorney for Louis Brown to submit a motion under 18 U.S.C. § 3582, so the court had the benefit of adversary counsel's briefing. The case is also unusual in that the U.S. Attorney conceded that Brown's medical condition put him at high risk of contracting COVID-19, since he is 65 years old, with HIV, liver disease, and partial paralysis from a stroke. Brown was convicted of one count of conspiracy in a large heroin/fentanyl trafficking case, but his involvement was at the street level, mostly to support his own addiction. The government opposed release, arguing that Brown remained a threat to the community, had not served enough of his sentence, and did not have a safe release plan. Judge Engelmayer did not agree, noting that the failure of the U.S. Sentencing Commission to update its "Guidelines" to comply with the First Step Act should not be an obstacle to compassionate release on these facts. He found that Brown presents a "relatively minimal danger . . . and no more so than he would upon his scheduled release." He found that Brown had no history of violence and that he is now too frail to make it likely that he would embark again on street sales. The decision includes a good annotated string citation of cases where compassionate release has been granted, including instances where less than half of the prisoner's sentence has been served. Judge Engelmayer shared the Government's expressed concern about a release plan, and he ordered the U.S. Probation Department to work with defense counsel to achieve safe and stable housing and support Brown after his release.

OHIO – Earlier this year, U.S. District Judge Sarah D. Morrison denied *pro se* HIV-positive inmate Demarco Armstead a preliminary injunction about his HIV medication, but she directed Corrections defendants to submit bi-weekly treatment reports in *Armstead v. Baldwin,* 2020 U.S. Dist. LEXIS 22476; 2020 WL 613934 (S.D. Ohio, Feb. 10, 2020). Now, U.S. Magistrate Judge Kimberly A. Jolson recommends denial of preliminary relief in *Armstead v. Baldwin,* 2020 WL 2832184 (S.D. Ohio, June 1, 2020). She determines that the medical

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dispute arises from an objection to skin medication that allegedly reduces the efficacy of Armstead's HIV "cocktail" and that this controversy does not state a constitutional claim. She also notes that Armstead has filed frivolous motions on trivial matters, including "dozens" of motions to amend his pleadings. Thirty motions were filed after warning him of his abuse of the system. Finding that Armstead has been "vexatious" and that the court has "inherent" authority to stop it, under *Chambers v. NASCO, Inc*., 501 U.S. 32, 45 (1991), she orders that no further filings will be accepted by the clerk without a court order, which could only be sought in a one-page application without attachments.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

FLORIDA – The Jacksonville City Council voted 15-4 on June 9 to re-enact a ban on sexual orientation and gender identity discrimination, after the Florida Court of Appeal ruled that the anti-discrimination measure enacted in 2017 was invalid because the bill presented to the Council did not expressly spell out in detail all essential aspects of the law, leaving it to the city attorney's office to draft appropriate language to place in the city's anti-discrimination ordinance. This time, the measure was redrafted to reflect the requirements spelled out by the court, which had cast no doubt on the council's jurisdiction to enact such measure. Mayor Lenny Curry had previously announced that he would sign the measure if it passed the Council. *Jacksonville.com* (June 9).

GEORGIA – On June 26, *Reuters* reported that Georgia Governor Brian Kemp signed into law a measure that authorized enhanced penalties for crimes that were motivated by the victim's "actual or perceived race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability." It is not clear from that list whether the measure protects people targeted because of their gender identity, but perhaps the reference to both sex and gender as distinct grounds will be construed to afford such protection.

KENTUCKY – On June 30, Governor Andy Beshear issued a non-discrimination executive order for state anti-discrimination policies that adds gender identity or expression and some other categories to the existing state anti-discrimination policies (which already included sexual orientation). The relevant text states: "It shall be the policy of the Commonwealth of Kentucky to prohibit discrimination in employer-employee relations or in the provision of public services because of race, color, religion, sex, national origin, sexual orientation, gender identity or expression, ancestry, age, pregnancy or related medical condition, marital or familial status, disability or veteran status. Employer-employee relations shall include but not be limited to hiring, promotion, termination, tenure, recruitment and compensation."

MASSACHUSETTS – During the last week of June, the City Council of Somerville, Massachusetts, approved a domestic partnership ordinance that would extend the partnership status to households including more than two adults – i.e., "polyamorous" partnerships. This may be a first for any jurisdiction in the United States. Any reader who knows of other is encouraged to contact *Law Notes* so we can report about it! *New York Times*, July 1.

MINNESOTA – The St. Paul City Council voted on June 16 to protect LGBTQ youth from the practice of conversion therapy. Efforts are under way to try to get the state to adopt a similar ban, but the legislature has been resistant. A few days later, the city of Red Wing passed a similar ban.

INTERNATIONAL NOTES

By Arthur S. Leonard

UNITED NATIONS –The United Nations released a report dated May 1 that was prepared for the Human Rights Council by the U.N.'s Independent Expert on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz, who proposed to the Council that it should condemn the practice of "conversion therapy" and call on all member nations to take steps to forbid its practice, due to the harm it poses to LGBT people. The report was made public in June and was the subject of a June 13 report by *NBC News*. The news report described the report as "controversial" within the U.N.

CUBA – Rex Wockner reported on June 21 that the Cuban government has accepted the registration of a boy with two mothers for the first time. He reports that a married Cuban/U.S. same sex couple who live in Cuba had a child born in Tallahassee, Florida, using donor insemination for one the women to bear the child. Both women are listed as parents on the child's birth certificate. After a year's effort, a birth certificate has also been issued in Cuba for Paulo Cesar Valdes, listing his two mothers, Hope Bastian and Dachely Valdes.

GABON – *Reuters* reported on June 23 that the lower house of the parliament in the central-African country of Gabon voted to end the penal law again consensual sodomy. The measure dates from colonial times. The vote was unusual for an African country. It was next passed in the Senate with

a substantial minority a few days later, and was expected to be signed into law by the president shortly.

JAPAN – Kyodo News reported that Nagoya District Court ruled on June 4 that the surviving same-sex partner of a gay man who was murdered is ineligible for victim's compensation as a surviving family member. "I cannot recognize same-sex relationships as de facto marriages," Presiding Judge Masatake Kakutani said in a hearing of an appeal from a December 2017 decision rejecting the claim by the Aichi Prefectural Public Safety Commission. The men had lived together for twenty years. However, this decision conflicts with a previous one issued by a different court, according to the news report: "In another trial involving the recognition of same-sex partnerships, a district court branch in Utsunomiya, Tochigi Prefecture, ruled last September in favor of a woman who sought compensation for infidelity by her same-sex partner. The Tokyo High Court upheld the ruling in March."

KAZAKHSTAN – The Parliament of Kazakhstan adopted a new Code on Health of the Nation and Healthcare System on June 17, which raises the age at which people can access transgender specific health care to 21. This is generally out of sync with the approach in most countries, which allow adults to access gender confirmation surgery at 18 and less permanent transitional care at much earlier ages.

ROMANIA – Civil Society groups launched a petition campaign during June to persuade the president to block an amendment to the Education Law that prohibits the discussion of gender identity and transgender issues in the schools, according to a press release conveyed on-line by the International Lesbian & Gay Association (ILGA).

SWITZERLAND – On June 11 the lower house of the legislature gave overwhelming approval to a marriage equality bill. It goes next to the upper house and, if approved, gets put on the ballot. Polling shows overwhelming public support for following the Western European trend towards marriage equality. The lower house also approved a measure that would open up assisted reproductive technology for LGBT people as well. These developments follow on the successful achievement of protection against discrimination in February. *Reuters*, June 11.

TRINIDAD & TOBAGO – *Trinidad & Tobago Guardian* reported on June 23 that the Senate, considering a proposal to expand the Domestic Violence law, rejected a proposal to make orders of protection available to those in same-sex relationships. T&T does not have marriage equality or even recognition for same-sex civil unions or partnerships, but proponents argued that there was no reason to deny protection to people just because the abuse came from a same-sex partners. But only Independent members of the Senate, a minority, supported the proposal.

TUNISIA – Human Rights Watch reported that a Tunisian court sentenced two men to two years in prison for consensual sodomy, a violation of Section 230 of the Penal Code. Police sought to conduct anal examinations of the men to collect evidence, but the men refused to submit to the examinations, which may be why the sentence was longer than typical (although the law authorizes a punishment up to three years). An appeal was scheduled immediately while the men are detained in prison. The convictions violate Tunisia's obligations under international human rights treaties to which it is a party.

UNITED KINGDOM – The government leaked a document intended for publication during July containing the government's proposals from a consultation that was launched by the former Prime Minister, Theresa May, concerning demands by the transgender community to modify certain provisions of the Gender Recognition Act. The central demand was to drop the requirement of medical certification that a person has surgically transitioned in order to get a new birth certificate consistent with their gender identity, but Prime Minister Boris Johnson's government is opposed to that. The proposal policy will also specifically provide that persons who continue to have a male anatomy, regardless of their gender identity, will not be allowed to use facilities that designated for use only by women. However, the document proposed a ban on conversion therapy, thus responding affirmatively to at least one of the demands made by transgender groups. *ITV*, June 13.

PROFESSIONAL NOTES

By Arthur S. Leonard

WILLIAMS INSTITUTE, UCLA LAW SCHOOL – The Williams Institute seeks an experienced attorney or legal scholar to serve as a Counsel. Qualified applicants will be well-versed in litigation, legislative lawyering, and/or public policy. The Counsel will provide legal research and analysis related to litigation, legislation, and regulatory and policy developments concerning issues of sexual orientation and gender identity, particularly at the federal level. The Counsel will also work on independent research projects to inform current issues of law and public policy. For more information and to apply, go to the Williams Instute's website, scroll to the bottom of the entry page, and click on "Careers."

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EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers. All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. 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.