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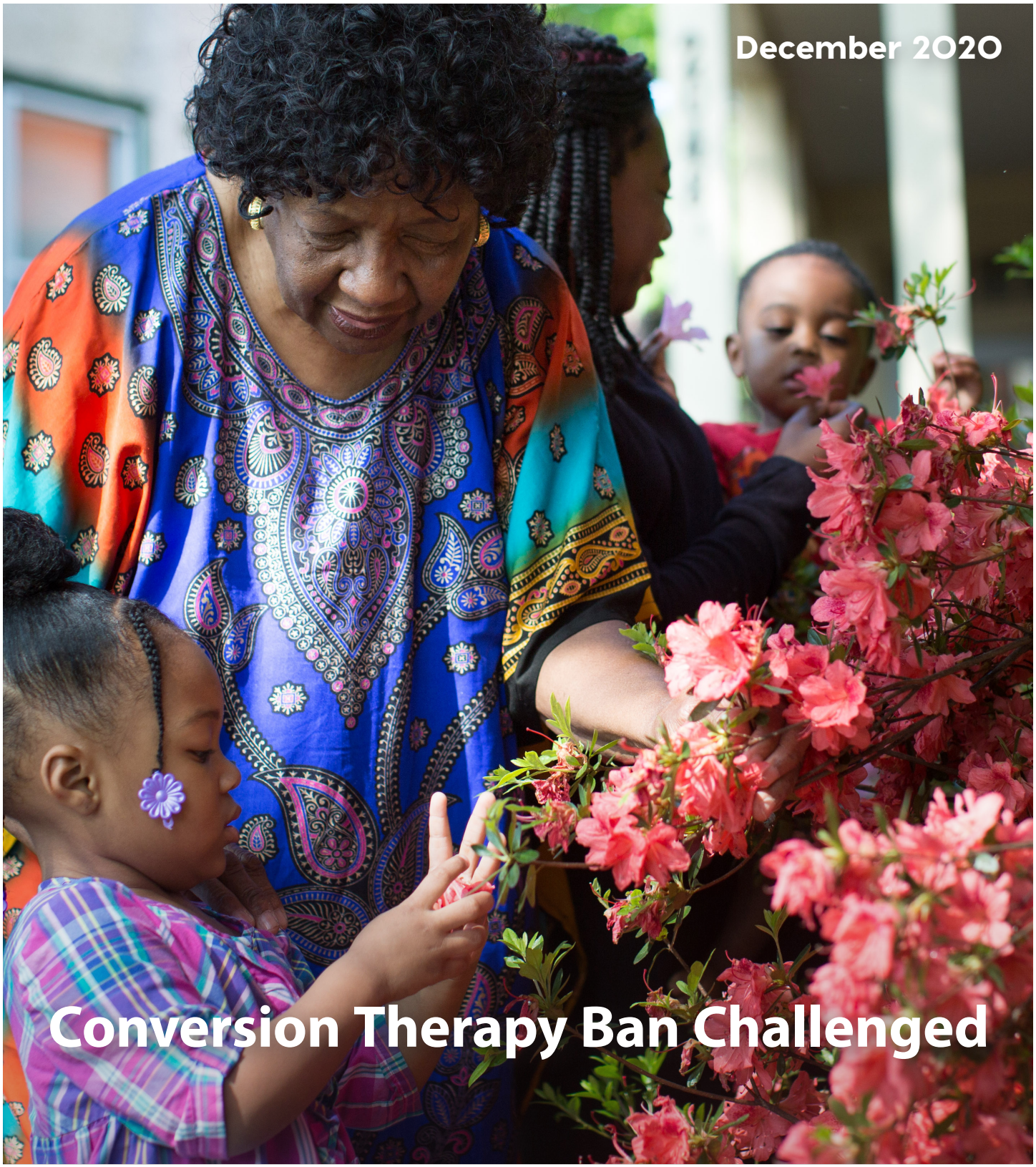

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Conversion Therapy Ban Challenged

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EXECUTIVE SUMMARY

Supreme Court Hears Argument on Catholic Social Services Claim for a Religious Freedom Exemption from Philadelphia Anti-Discrimination Policy

By Hannah McMillan

On November 4, the U.S. Supreme Court heard oral arguments from Lori Windham, of the Becket Fund for Religious Liberty, and Hashim Mooppan, Counselor to the U.S. Solicitor General, for the plaintiffs in *Fulton v. City of Philadelphia*, No. 19-123, in which Catholic Social Services (CSS) is challenging the City of Philadelphia's refusal to renew its contract with CSS to evaluate married same-sex couples as potential foster parents. The City of Philadelphia was represented by Neal Katyal, a former Solicitor General in the Obama administration, and the Support Center for Child Advocates and Family Pride was represented by Jeff Fisher.

The case comes before the Supreme Court after both the U.S. District Court for the Easter District of Pennsylvania (320 F.Supp.3d 661) and U.S. Court of Appeals for the 3rd Circuit (922 F.3d 140) denied CSS's motion for a preliminary injunction, both courts finding that the City was likely to sustain its position that it has a right to enforce its non-discrimination ordinances if the agency is carrying out a governmental function. *Fulton v. City of Philadelphia* presents the Supreme Court with competing interpretations of the First Amendment's protection of the free exercise of religion and the implication for anti-discrimination laws. Main arguments made by each side included defining the extent to which CSS operated on behalf of the City in carrying out a governmental function when executing its foster contract.

After an investigation prompted by advance notice that a local newspaper would be publishing a story about the refusal of some religious foster care agencies to provide services to same-sex couples, the City of Philadelphia declared that CSS must comply with the City's Fair Practice Ordinances or risk losing its contract. In the course of oral argument, the Court made efforts to clarify whether CSS should be seen as a contractor or a licensee. Windham pointed out that CSS is an independent contractor of the City, asserting, "The City is reaching out and telling a private religious ministry . . . how to run its internal affairs and trying to coerce it to make statements contrary to its religious beliefs as a condition of continuing to participate in the religious exercise." Tr. of Oral Arg. p. 10, 1-7.

CSS, which continues to perform other social service functions for the City, has received funding to screen prospective foster parents, and continues to receive millions of dollars for other social services programs. As Mr. Katyal pointed out, once the City became aware that CSS was not operating within requirements of the foster care contract, the City worried about becoming a party to discrimination.

Justice Sotomayor questioned why CSS sees itself as a "licensee as opposed to a government contractor." Meaning either the City contracted the agency to perform for them at a contracted price, or licensed CSS to perform the operations they had been performing. Ms. Windham argued that the City exercises licensing authority because it selects which private agencies are authorized to perform the service of evaluating prospective foster parents to receive placements of children referred by the City. Justice Sotomayor recalled that the Court has often permitted cases "with people who are not state actors or agents or actual employees but contractors or being retained by the government to do things for the government where they can set the criteria for what it wants." Tr. of Oral Arg. p. 19, 1-6.

Windham argued that the City had demanded that CSS take actions in opposition to the organization's faith allegiance, and in accordance with the City's Fair Practice Ordinances, or else it would be excluded, which the Free Exercise Clause prohibits. Justice Sotomayor pointed out the slippery slope for a contractor with religious belief to "exclude other religions from being families, someone with disabilities, or interracial couples." Tr. of Oral Arg. p. 20, 1-5.

CSS argued that home certification for a same-sex couple would violate its religious beliefs because it is "essentially a validation of their relationships in the home, and the relationship of the foster wants." Tr. of Oral Arg. p. 11, 14-19. Justice Barrett posed a hypothetical: what if the agency believed interracial marriage was an offense to God, and objected to an interracial couple as foster parents? Ms. Windham refuted the hypothetical based on *Loving v. Virginia*, which held that the government has a compelling interest in eradicating racial discrimination. Justice Sotomayor explained that a compelling state interest includes the avoidance of stigmatizing a class of people. Justice Kennedy had previously expressed this view in *Lawrence v. Texas*, under an Equal Protection claim that all persons are entitled to a basic level of dignity. Rules that are erected to strip individuals of dignity and to impose stigma violate this principle.

The Petitioners then discussed exemptions issued by the City from and argued that because the City itself issues exemptions; CSS should be allowed to reject same-sex couples as foster parents. Ms. Windham discussed the City's granting of exemptions from its Fair Practice Ordinances, particularly for those who have a disability and cannot appropriately care for foster children but are protected under the ordinances. The understanding of the exemptions provided is that there are categorical exemptions. Whenever an agency conducts a home study, it considers disability, marital status, and familial status. These actions are prohibited by

the City's Fair Practice Ordinances. Ms. Windham stated that the City itself deviates from these Ordinances when considering placing a child with foster parents, as it allows these judgments to be made. These exemptions happen, however, at the placement stage, not during home studies, and ensure the best fit for a child. With regard to the exemption for disabilities, Mr. Katyal explained that because state law requires foster care agencies to have a special license for disability needs, it is not discrimination but rather specialization to meet a child's needs. The City argued that *Employment Division v. Smith* should be applied and permits laws that infringe upon religious beliefs, as long as they are neutrally applied. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). Windham and Moopan argued that the instant policy is neither neutral nor generally applicable and that Employment Division should be overruled, a case that Justice Gorsuch had found controversial. Ms. Windham argued that, even under Smith, Fulton and CSS would still prevail because the ruling is confusing and unstable as it "does not control when the government uses a system of individualized exemptions or when it makes other exceptions that undermine its rules or when it changes the rules to prohibit a religious practice." Smith, in the eyes of the Petitioners, had a narrow view of the Free Exercise Clause and "stands in the way of sensible results." Tr. of Oral Arg. p. 118, 1-3.

The Court seemed to want to avoid answering such a heavy constitutional issue regarding the limits of the Free Exercise Clause and anti-discrimination laws. Justice Breyer was concerned with finding a balance to follow the City's requirements in such a way as not to offend anyone's beliefs, to evaluate the couple "irrespective of whether they are same-sex or different-sex", and to determine if they are suitable for a foster placement. Windham responded that this would still violate their religious beliefs, as it is a written endorsement of the relationship. Some of the Justices, particularly Breyer and Kavanaugh, seemed to want to avoid addressing a major constitutional issue when they saw no real dispute, as CSS had not actively denied many same-sex couples. This was clear in Justice Kavanaugh's line of questioning, that all levels of government "where possible and appropriate, should look for ways to accommodate both interests in reasonable ways . . . There are strong – very strong feelings on all sides that warrant respect . . . It seems like Philadelphia created a clash, it seems, and was looking for a fight and has brought that serious, controversial fight all the way to the Supreme Court." Tr. of Oral Arg. p.81, 12-21. Mr. Katyal argued that it was clear that the Respondents were not in search of bringing the case to the Supreme Court, as both courts below ruled in their favor and they resolved any allegations about religious hostility. Additionally, Justice Alito stated that, if everyone were being honest, it was not about ensuring the rights of same-sex couples, rather that "the city can't stand the message that Catholic Social Services and the Archdiocese are sending by continuing to adhere to the old-fashioned view about marriage." Tr. Oral Arg. p. 69, 8-11. The Respondents stated that, to the contrary, the City would like to widen the pool of applicants and avoid stigma towards same-sex couples.

With the current makeup of the Court, the outcome may favor CSS, though possibly avoiding the constitutional issues of religious freedom and civil liberties and potentially putting anti-discrimination laws in jeopardy. The implications of a ruling in favor of CSS might lead to wider exemptions to non-discrimination laws, including contractors' refusal to provide services to other religious groups, if they cite their own religious convictions. LGBT children in the foster care system may also be subjected to discrimination as well as stigma, preventing children from being placed in loving homes. Ideally, this case will be decided in such a way as to allow for a wider pool of applicants as well as permit CSS to continue its work without inflicting stigma upon vulnerable and historically marginalized LGBT youth. ■

Hannah McMillan is a law student at Brooklyn Law School (class of 2022) and 2020 intern with the LGBT Bar Association of New York (LeGaL).

Federal Appeals Court Rules Laws Against Conversion Therapy Using Solely Speech Violate the First Amendment

By Arthur S. Leonard

A three-judge panel of the Atlanta-based U.S. Court of Appeals for the 11th Circuit ruled on November 20 in *Otto v. City of Boca Raton*, 2020 U.S. App. LEXIS 36589, 2020 WL 6813994, that laws enacted by Boca Raton and Palm Beach County, Florida, prohibiting licensed therapists from performing conversion therapy on minors, violate the therapists' rights to freedom of speech under the First Amendment. The panel voted 2-1. Two judges appointed by Donald Trump – Britt Grant and Barbara Lagoa - made up the majority. Beverly Martin, appointed by Barack Obama, dissented.

Both of the local laws at issue were enacted in 2017. In both cases, the local legislatures reviewed the voluminous professional literature condemning "sexual orientation change efforts" (SOCE), commonly called "conversion therapy," as being fraudulent and causing potential harm to minors. The legislatures concluded that this evidence was sufficient to justify outlawing the procedure. Since local governments do not have authority to suspend or terminate a professional license granted by the state, instead they authorized fines to be imposed on licensed counselors who were found to have performed such "therapy." The local laws do not apply to unlicensed counselors, including religious counselors who are not required by the state to be licensed.

Nobody has actually been prosecuted under either law, but two licensed counselors, Robert W. Otto and Julie H. Hamilton, represented by lawyers from Liberty Counsel, an anti-LGBT legal

organization, filed lawsuits claiming that the therapy they provide consists entirely of speech which cannot be outlawed by the government. They asserted that they do not claim that they can change a person's sexual orientation, but that their therapy is intended to help their clients to "reduce same-sex behavior and attraction and eliminate what they term confusion over gender identity." They also asserted that their patients "typically" have religious beliefs that conflict with homosexuality and "seek SOCE counseling in order to live in congruence with their faith and to confirm their identity, concept of self, attractions, and behaviors to their sincerely held religious beliefs."

The plaintiffs also argued that their equal protection rights were violated because unlicensed counselors were not prohibited from performing SOCE, and that the localities were preempted from passing any law regulating the practice of therapists licensed by the state. They sought a preliminary injunction barring enforcement of the laws while the case was pending, which was denied to them by the district court. This appeal to the 11th Circuit sought to overturn the district court ruling and get the preliminary injunction pending a final ruling on the merits of their claims.

Similar laws passed by several states and other localities have been upheld against 1st Amendment claims. Both the 3rd Circuit Court of Appeals in *King v. Governor of New Jersey*, 767 F. 3d 216 (2014), ruling on a New Jersey statute, and the 9th Circuit in *Pickup v. Brown*, 740 F.3d 1208 (2014), ruling on a California statute, have rejected the argument that this "talk therapy" is shielded from state regulation by the First Amendment. They have held that the incidental burden on therapists' speech was justified within the government's legitimate role of regulating the practices of licensed practitioners, and the 3rd Circuit, in particular, held that when therapists are using speech in the context of providing "therapy," that is professional speech that comes within the sphere of regulatory authority. Furthermore, these other courts have recognized the compelling interest of states in protecting minors from harm.

In 2018, the Supreme Court ruled in a California case, *National Institute of Life Advocates v. Becerra*, 138 S. Ct. 2361, that a state law requiring reproductive health clinics that do not provide abortion services to provide their clients with information about the availability of such services from other providers, was an unconstitutional imposition of a speech requirement in violation of the 1st Amendment. California sought to defend its law by invoking the concept of "professional speech" as falling within the sphere of legitimate state regulation. Writing for the Court in that case, Justice Clarence Thomas rejected the idea that speech employed in the context of providing health care was a separate category of speech to be evaluated differently from other forms of speech that receive the full protection of the 1st Amendment. He specifically criticized the 3rd and 9th Circuit conversion therapy opinions in this connection, rejecting the idea that speech should enjoy less robust constitutional protection because it was used by licensed counselors as their method of providing therapy.

Following Justice Thomas's lead, the panel majority in this case held that the local laws should be reviewed under the "strict scrutiny" standard, as a content-based and viewpoint-based restriction on speech. This means that the laws would be treated as presumptively unconstitutional, placing the burden on the government to prove that they were necessary to achieving a compelling state interest and were narrowly tailored to avoid imposing unnecessary burdens on free speech.

Applying this strict scrutiny test, the majority of the panel concluded that the laws were unconstitutional. Although Judge Britt Grant, writing for the majority, acknowledged that protecting children from harm is a compelling state interest, she rejected the argument that harm to children had been sufficiently shown to justify this abridgement of speech.

Pointing to the reports and studies that were considered by the legislatures in passing these laws, Grant wrote, "But when examined closely, these documents offer assertions rather than evidence, at least regarding the effects of purely speech-based SOCE. Indeed, a report from the American Psychological Association [a Task Force Report from 2009], relied on by the defendants, concedes that 'nonaversive and recent approaches to SOCE have not been rigorously evaluated.' In fact, it found a 'complete lack' of 'rigorous recent prospective research' on SOCE." She also noted that the same report stated that "there are individuals who perceive they have been harmed and others who perceived they have benefited from nonaversive SOCE.' What's more, because of this 'complete lack' of rigorous recent research, the report concludes that it has 'no clear indication of the prevalence of harmful outcomes among people who have undergone' SOCE."

"We fail to see," Grant continued, "how, even completely crediting the report, such equivocal conclusions can satisfy strict scrutiny and overcome the strong presumption against content-based limitations on speech." Grant pointed out that people who claimed to have been harmed by SOCE practitioners can bring malpractice claims or file complaints with state regulators of professional practice, but he asserted that the state may not categorically outlaw the practice without stronger evidence that it actually causes harm.

When a plaintiff seeks a preliminary injunction barring enforcement of a challenged law before the trial court has ruled on the merits of the challenge, the plaintiff must show that it has stated a potentially valid claim and would suffer irreparable injury if the law can be enforced against them. In this case, Judge Grant wrote, since the majority of the panel found the law to be unconstitutional, it was reversing the district court decision and sending the case back to the district court "for entry of a preliminary injunction consistent with this opinion."

The dissenting judge, Beverly Martin, conceded that the challenged laws are subject to "strict scrutiny." In the face of Justice Thomas's statements in the 2018 NIFLA decision, it seems likely that basing her dissent on the idea that these laws regulate professional conduct and

not speech as such was not going to get anywhere. But, she argued, this is that rare case where a statute that prohibits a form of speech based on its content and viewpoint could be justified as serving the compelling interest of protecting minors from harm.

She rejected the majority's conclusion that the laws "restrict ideas to which children may be exposed" by pointing out that nothing in the laws prevents therapists from discussing with their minor patients "the perceived benefits of SOCE," and also that the therapists "may recommend that their minor patients receive SOCE treatment from a provider elsewhere in Florida." The only limitation imposed by the laws was the actual practice of this "talk therapy" on their patients within the jurisdictions of Boca Raton and Palm Beach County.

Most of her dissent was devoted to dissecting the majority's dismissive evaluation of the evidence on which the Boca Raton and Palm Beach County legislators had relied to find it necessary to ban conversion therapy in order to protect minors. She rejected Judge Grant's assertion that there is "insufficient evidence to conclude that SOCE is so harmful as to merit regulation." Pointing to the 2009 APA Task Force report, she quoted, "there was some evidence to indicate that individuals experienced harm from SOCE," including nonaversive methods. The Task Force Report went on to say that "attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." And the Report "catalogued recent studies reporting that patients who undergo SOCE experience negative consequences including 'anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction.'"

She was particularly critical of Grant's heavy reliance on the Report's comment about the lack of "rigorous recent prospective research" on SOCE. First, she wrote, "what studies have been done 'show that enduring change to an individual's sexual orientation is uncommon,' and that there is, in fact, already 'evidence to indicate that individuals experience harm from SOCE."

Perhaps more significantly, she pointed out that rigorous research would require an unethical methodology. She wrote, "the APA has cautioned that 'to conduct a random controlled trial of a treatment that has not been determined to be safe is not ethically permissible and to do such research with vulnerable minors who cannot themselves provide legal consent would be out of the question for institutional review boards to approve."

"To be clear," wrote Martin, "the very research the majority opinion seems to demand is 'not ethically permissible' to conduct. Thus, one implication of the majority holding is that because SOCE is too dangerous to study, children can continue to be subjected to it. The majority opinion has the result of inviting unethical research that is nowhere to be found in First Amendment jurisprudence."

Further, she noted, there is "the recognition that homosexuality is not a mental illness as well as the particular vulnerability of minors as a test-study population. All of this evidence leads to the inescapable conclusion that performing efficacy studies for SOCE on minors would be not only dangerous (by exposing children to a harmful practice known to increase the likelihood of suicide) but pointless (by studying a treatment for something that is not a mental-health issue)."

She also criticized the majority for focusing on comments selectively quoted from one APA Task Force report, and discounting that "SOCE is a practice that has already been deemed by institutions of science, research and practice" – listing nine of them – "to pose real risks of harm on children. It is reasonable for the Localities to enact the Ordinances based on the existing evidentiary record as to harm."

She rejected the plaintiffs' argument that the Ordinances were either too overinclusive or underinclusive to survive strict scrutiny review. "I believe the Localities' narrow regulation of a harmful medical practice affecting vulnerable minors falls within the narrow band of permissibility," she concluded," asserting that the plaintiffs are not entitled to a preliminary injunction.

At this point, the Boca Raton and Palm Beach County governments have strategic decisions to make. The "luck of the draw" exposed them to a three-judge panel whose majority were Trump appointees. Since this opinion is out of step with rulings by other federal courts of appeals, it is possible that the 11th Circuit would grant a motion for reconsideration *en banc*.

However, at present, six Trump appointees are balanced by four Obama appointees, one Clinton appointee, and an appointee of George W. Bush, so the "Trump judges" make up exactly half of the 11th Circuit bench, and the chances that the full circuit would overturn this ruling seem slim.

The defendants could also directly petition the Supreme Court for review. But in light of the current line-up of that Court, to take this issue to that Court directly would really be tempting fate and, in the past, the Supreme Court has declined to review the constitutionality of anti-SOCE laws from other jurisdictions.

This is the first federal court of appeals to part company from the many cases rejecting First Amendment challenges to these laws, increasing the likelihood that the Supreme Court would grant review, which could produce (in a worst case scenario) an opinion invalidating all the existing U.S. laws against conversion therapy. On the other hand, a Supreme Court opinion upholding the constitutionality of these laws could encourage the current campaign to get more state and local governments to adopt them. But given the odds, it may be particularly prudent for the defendants not to appeal, let the preliminary injunction go into effect, and concentrate on putting together a strengthened evidentiary record on the harms that SOCE does to minors to make it more likely they will prevail on the merits before the district court.

The court received five amicus briefs, all defending the challenged laws. Among the organizations signing the briefs were the National Center for Lesbian Rights, Southern Poverty Law Center, Equality Florida Institute, Inc., The Trevor Project, American Psychological Association, Florida Psychological Association, National Association of Social Workers, National Association of Social Workers Florida Chapter, and American Association For Marriage and Family Therapy. ■

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

Supreme Court May Address Parental Presumption for Children of Married Lesbians This Term

By Arthur S. Leonard

Now that there is a 6-3 conservative majority on the Supreme Court, it is possible that the Court will begin a process of cutting back on marriage equality. This is at least one interpretation of the Court's request for additional briefing on a cert petition filed by the state of Indiana in *Box v. Henderson,* No. 19-1385, seeking review of the 7th Circuit's January 17, 2020, decision in *Henderson v. Box*, 947 F.3d 482, in which the court of appeals applied the Supreme Court's rulings in *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), to rule that a state must apply the parental presumption regarding newborn children regardless of the sex of the birth mother's spouse, if it always applies the presumption when the birth mother's spouse is male.

When the petition was filed with the Court in June, the Respondents (same-sex mothers challenging the state's policy) waived their right to file a response, apparently assuming that the Court would not be interested in revisiting an issue that it had decided *per curiam* with only three dissenting votes as recently as June 2017. The petition was circulated to the justices for their conference of September 29, which would be held the week after the death on September 18 of Justice Ruth Bader Ginsburg, who was part of the *Pavan v. Smith* majority. Another member of that majority who is no longer on the Court is Anthony M. Kennedy, whose retirement led to Justice Brett Kavanaugh's appointment. By the time the Court was to hold its conference on the 29th, it was clear that Trump would nominate a conservative replacement for Ginsburg and that the Senate would rush to confirm the nominee to fulfil Trump's goal to ensure a 6-3 Republican conservative majority on the Court in case he sought to contest adverse election results.

Evidently the *Box v. Henderson* petition, lacking a responsive filing, caught the eyes of one or more of the conservative justices, who had the Clerk of the Court send a request to the plaintiffs to file a responding brief, which was filed on November 10. On November 23, the state of Indiana filed a Reply brief, which provided a news hook for media to report on November 24 that the new conservative majority might take up the case as a vehicle to cut back on marriage equality by holding that a state may decide that it is not required to presume that the wife of a birth mother is the other parent for purposes of officially recording the birth.

An argument that has been persuasive to lower courts, apart from the "equal treatment" for same-sex marriages statements in *Obergefell* and *Pavan*, is that states have applied the presumption in favor of the husbands of birth mothers even when it was clear that the husband was not the biological father, as for example when donor sperm was used to inseminate the wife with the husband's consent, or when the husband and wife were geographically separated when the wife became pregnant. Thus, under existing policies in many states, the parental presumption has not been limited to cases in which it was rational to assume that the birth mother's husband was the child's biological father. In this connection, even if Chief Justice Roberts, part of the *per curiam* majority in *Pavan* despite his dissent in *Obergefell*, sticks with his vote in *Pavan*, there are now five conservatives to vote the other way, two of whom joined Justice Neil Gorsuch's dissent in *Pavan* asserting that the issue was not decided simply on the basis of *Obergefell*.

With the filing of the state's reply brief, the Petition has been redistributed for the Court's conference of December 11. Sometimes the Court rolls over cert Petitions for many conferences before

reaching a decision whether to grant review. If the Court grants certiorari before the end of January, the case would likely be argued during the current term and decided by the end of June. A later grant would most likely be argued during the October 2021 Term.

Counsel listed on the Respondents' Brief in Opposition include Karen Celestino-Horseman (Counsel of Record) of Austin & Jones, P.C., Indianapolis; attorneys from the National Center for Lesbian Rights (Catherine Sakimura, Shannon Minter, and Christopher Stoll), San Francisco; Douglas Hallward-Driemeier of Ropes & Gray LLP, Washington (who was one of the oral advocates in the *Obergefell* case); Joshua E. Goldstein, also of Ropes & Gray LLP, Boston office; Raymond L. Faust, of Norris Choplin Schroeder LLP, Indianapolis, William R. Groth of Vlink Law Firm LLC, Indianapolis; and Richard Andrew Mann and Megal L. Gehring, of Mann Law, P.C., Indianapolis. Several same-sex couples joined in this case, resulting in several Indianapolis law firms being involved. ■

Kansas Supreme Court Creates Broad Path for Unmarried Lesbian Co-Parents to Seek Parental Rights

By Matthew Goodwin

A pair of cases handed down by the Kansas Supreme Court on November 6 adds that jurisdiction to the growing list of states providing a broad path to establishing parental rights for unmarried, former lesbian partners who are biologically unconnected to children conceived during a relationship. The two decisions, *In re M.F.* (2020 WL 6533288; [LEXIS]) and *In re W.L.* (2020 WL 6533290; [LEXIS]), appeared to create something akin to the marital presumption for children born to an unmarried woman who is in a same-sex relationship at the time of the child's birth.

The cases addressed familiar arguments by, on the one hand, former same-sex partners asserting parental rights to a child of the once intact family–despite a lack of adoptive or biological ties; and, on the other hand, their ex-partners who claim by contrast that any relationship between the child and former partner does not rise to the level of "parent-child." Both cases involved only lesbians and the rulings appear, facially, not to extend to gay men who may find themselves in a similar situation.

The factual background of and evidence relied upon by the respective parties in the two cases was similar. In both there was a discussion of the length of the parties' relationships; each party's involvement in the assisted reproduction process that conceived the child(ren); the parties' respective roles during the ensuing pregnancy (e.g. pre-natal visits, who was listed and how they were referenced on baby shower invitations etc.); the finances of the families while they were in-tact and after separation (maintenance of joint finances, contributions by the party without biological ties to IVF, pregnancy, and the child(ren)); the actions, behavior, roles, duties and involvement of each party vis-à-vis the child(ren) while the family was in-tact and thereafter.

The women asserting parental rights plead and testified to maximum involvement in the pregnancy and child(rem)'s life. By contrast, the women resisting establishment of parental rights averred minimum involvement and interest by the other woman in question in the child(ren)'s care and upbringing.

The child at issue in *In re M.F.* was approximately thirteen months old when the couple in that case separated and the biological mother ("bio-mother") began to limit contact with the non-biological ("non-bio") mother—who, not incidentally, appeared on the child's birth certificate. The children at issue in *In re W.L.* are twins and were approximately nine months old when that couple broke up and were approximately two years old when the women stopped living together; the non-bio mother of the twins did not appear on their birth certificate, but their last names were hyphenated to include the surnames of both bio and non-bio mothers.

Neither couple was married, nor did they enter into any written co-parenting agreements respecting the children, facts which were determinative and crucial to the analysis of the lower courts in both cases.

The two cases were heard by different trial court judges.

The non-biological mothers in both cases relied on the Kansas Parentage Act (KPA) in their efforts to establish maternity. Specifically, the non-biological mothers wanted the courts to apply the following presumption to their cases: "(a) man is presumed to be the father of a child if . . . [t]he man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A.

23-2223 or K.S.A. 65-2409a, and amendments thereto."

In both cases, heteronormative and gendered language of the statute was not raised or argued as a barrier to the non-biological mothers' claims because prior litigation in the state had conferred standing to those who had been in same-sex relationships and found themselves in this type of dispute. It did arise, however, in the dissents written in both cases, at it was apparent that the dissenting judge did not agree that gays or lesbians should be able to take advantage of these statutory provisions.

According to the Kansas Supreme Court, the trial courts and appellate courts in both cases focused erroneously on questions not incident to whether the biological mothers had held themselves out as parents and the burden shifting regime that follows therefrom. According to the Kansas Supreme Court, the starting point of the analysis in such a case is whether *the party alleging parentage* held herself out "notoriously" and "recognized" her maternity of the subject child.

The *In re M.F.* judge, for instance, focused too extensively on whether the bio-mother and non-bio mother had reached an agreement to co-parent when, in fact, "no meeting of the minds" analysis was required at all. He wrote: "The evidence in this case is overwhelming that they had an approximate seven year relationship, they bought a house together, shared expenses, lived together in an intimate and committed relationship for a period of years . . . Regarding the issue as to the joint decision to have children, the Court finds that the weight of evidence in this case suggests to this Court that [T.F.] wanted to have a child, and she wanted to have a child in the worst way, and that she was committed to doing so despite, the Court's belief, the position of her same sex partner . . . . [T.F] was going to go ahead with this regardless and that it was not a joint decision. It was a decision in which [K.L.] was consulted and provided some input and advice on, but the ultimate decision to have this child was [T.F]'s. And the involvement of [K.L.] in this process was either required, or it was a decision after [T.F.] had decided to go ahead and do this, that [K.L.] essentially got on board and then assisted to the extent that she could in this planning and insemination process and during the pregnancy." (In this particular case, T.F is bio-mother; K.L. is non-bio mother.)

In this connection, the bio-mother in *In re M.F.* urged the Kansas Supreme Court and the courts below to require a written co-parenting agreement or a biological or adoptive connection between a parent and a child for parental rights to subsequently attach to her former partner. In doing so, the *In re M.F.* bio-mother was reading an important Kansas Supreme Court case, *Frazier vs. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013)], to create a higher bar for lesbians seeking parental rights than men in a heterosexual couple who assert paternity.

The *Frazier* court conferred parental rights upon a non-bio lesbian mother based upon the existence of a written co-parenting agreement between her and the bio-mother which predated the conception of two children, who were conceived via artificial insemination. The bio-mother in *In re M.F.* wanted the courts to require the non-bio mother to produce evidence of this sort of pre-conception co-parenting agreement. The Kansas Supreme Court, however, declined to impose such a requirement.

More succinctly, the Kansas Supreme Court in *In re M.F.* wrote: "[n]either the KPA nor this court have required proof of the sorts of things the district judge and the Court of Appeals explicitly focused on here when analyzing whether the evidence was adequate. The question when conducting the statutory analysis was *not* whether [the non-bio mother] engaged in 'open and notorious demonstrations of parenting' or 'open and notorious assumption of parenting responsibilities' for [the child]. It simply was not necessary that she demonstrate she was an attentive, hands-on, involved mother. Rather, she had to show that she notoriously recognized her maternity, including the rights it would give her and the duties it would impose upon her. The two courts' focus, under the statutory language that our Legislature has not seen fit to change, needed to be on whether [the non-bio mother] had qualified as one of the child's two parents, not on whether she had later turned out to be a model of parenting success."

". . . If the [non-bio mother]'s maternity is established, there will no doubt be ample opportunity later in the progress of this case for the court to evaluate her behavior to determine how much she should be permitted to be involved in [the child's] life."

In guidance for the proceedings on remand, the Kansas Supreme Court stated that if the non-bio mother demonstrates she "notoriously . . . recognize[d]" her maternity, the bio-mother must rebut the resulting presumption of maternity by " . . . clear and convincing evidence that no such legal relationship ever existed or by showing the district judge a court decree establishing paternity or maternity of another individual or by invoking a competing presumption." If the bio-mother successfully rebuts a presumption of maternity, the burden shifts back to the non-bio mother to show "evidence" material and probative of notorious recognition of maternity.

The *In re M.F.* opinion also required an inquiry into whether, at the time of the child's birth, the bio-mother had consented to the non-bio mother's parentage. Language on this point seemed to signal not very subtly that the court's view was that the bio-mother here had, indeed, consented to the creation of a parent-child relationship between the child and the mother's former partner.

The *In re W.L.* trial judge's analysis, by contrast, disregarded the KPA altogether, finding that the "framework was not tailored to the situation before him and thus turned to caselaw, adopting as the governing legal rubric a de facto parenthood test from Wisconsin." As such, he wrote: "one way [a] presumption [of parentage] may be rebutted is if the biological or adoptive parent can demonstrate, by clear and convincing evidence, that the putative parent has never met the

criteria for a functional, psychologic, or de facto parent." He went on to lay out a four-pronged test, the elements of which a petitioner had to establish to justify parenthood. The *In re W.L.* appellate court criticized the trial court judge's approach in some respects, but held the error harmless because the bio-mother adduced evidence that there was no written agreement prior to conception to co-parent.

In reversing and remanding, the Kansas Supreme Court summarized the *In re M.F.* holding, emphasizing once again that no co-parenting agreement was required and that there must be proof that the bio-mother consented to the maternity of the other woman at the time of the child's birth.

Both opinions drew dissents written by the same judge (each appeal of each case was heard by the same three-judge panel). The dissenting judge argued that only the "plain-meaning" of the KPA could and should be considered in the court's decision. At its core, the dissent's argument was that the KPA's provisions should not be available to anyone other than parental claims by heterosexual males who conceive children with women in the confines of an unmarried heterosexual relationship.

He wrote: "the key to understanding the statutory scheme—and [the provision which the non-bio mothers sought to invoke in these cases] in particular—is to understand the plain meaning of the words paternity, maternity, and recognize or acknowledge: 'Paternity means something more specific than just generic fatherhood. As used in the KPA, it clearly means biological fatherhood. Paternity is the 'condition of being a father, esp. a biological one,' and maternity is the 'condition of being a mother, esp. a biological one.' *Black's Law Dictionary* 1125, 1306 (10th ed. 2014). An adoptive father does not take a paternity test to establish fatherhood—to do so would be both futile and nonsensical. Legal fatherhood is broader than mere paternity.'

'Furthermore, to acknowledge something means to recognize it 'as being factual.' Black's Law Dictionary 27 (10th ed. 2014). The act of acknowledgment [or recognition] does not make something true or real. To acknowledge something is merely to accept and recognize as true a preexisting reality. Thus, one cannot make oneself into a father by acknowledgment [or recognition]. A person who makes a voluntary acknowledgment of paternity is not akin to a person taking a citizenship oath—a noncitizen immediately beforehand and a citizen immediately afterward. Rather, a person acknowledging [or recognizing] paternity is a person who purportedly already is biologically related to a child and is merely availing himself of a presumption in favor of that preexisting condition . . . Recognition does not give birth to the fact."

From the dissenting judge's point of view, the most serious flaw with the majority opinion, beyond its non-comportment with "plain meaning", is that it seemed to allow establishment of parenthood by an individual just because the individual claims that they are a parent. In other words, he thinks the cases create a rule that allows anyone to become a parent when they say they are a parent.

It is true that the rule laid down in the opinion is very favorable to non-bio mothers who assert maternity; but the dissenting opinions do not really grapple with the fact that the bio-mother's consent must also be shown by the non-bio mother at the time maternity is asserted. In this way, the cases work to afford unmarried former lesbian partners something like a marital presumption. The majority is careful to point out that doing so is grounded in providing stability to the child in question in the litigation and removing uncertainty about who his or her or their parents are at the time of their birth.

The non-bio mothers in both cases were represented by Valerie L. Moore, Esq. The bio-mothers in each case were represented by different local attorneys.■

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Passport Denial Violates Transgender Man's Equal Protection Rights

By Arthur S. Leonard

U.S. District Judge Gloria M. Navarro ruled on November 23 that the State Department violated the 5th Amendment Equal Protection rights of Oliver Bruce Morris, a transgender man, by refusing to issue him a passport identifying him as male unless he could provide a doctor's certification of clinical treatment for gender transition. *Morris v. Pompeo*, 2020 U.S. Dist. LEXIS 219009, 2020 WL 6875208 (D. Nevada). Judge Navarro rejected Morris's claim that the denial violated his due process rights and abstained from deciding his Administrative Procedure Act claim on the ground that the relief ordered by the court – to process the passport application without requiring the physician's letter – had mooted that claim.

Morris, who was identified as female at birth but has identified as male for several years, has health insurance but it doesn't cover gender transition surgery. He has been receiving hormone treatment, which is covered by his insurance, under the care of a licensed practical nurse. He is identified as male on his driver's license, and obtained a legal name change from a Nevada court.

Morris applied for a 10-year passport in October 2018. "On the application's checkbox for 'Sex,'" wrote Judge Navarro, "Plaintiff checked the 'M' box, indicating male. Plaintiff included three identity documents in his application: a Nevada driver's license, which indicates his sex is male; an original copy of his birth certificate, which indicates his sex is female; and a court-ordered name change, indicating that he legally changed his name from "Chanesse Olivia Morris" to "Oliver Bruce Morris" on June 27, 2018."

Evidently the bureaucrats at the State Department were stymied by the inconsistency between the driver's license, the name-change court order, and the birth certificate, concerning Morris's gender. He received a letter asking him to "verify his sex," wrote Judge Navarro. "The letter explained, '[i]n order to issue you a passport card reflecting a sex different from the one on some or all of your citizenship and/or identity evidence, please send us a signed original statement on office letterhead from your attending medical physician.' The letter enumerated the information Plaintiff's physician would have to certify under penalty of perjury, including, '[l]anguage stating that you have had appropriate clinical treatment for transition to the new sex."

Now Morris was stymied, since he is not under a physician's care, which would not be covered by his health insurance for this purpose. As a person of limited means, he was being assisted on this application be a legal services attorney, who sent a letter on his behalf "explaining he would not provide the requested certification because he could not afford gender transition treatment, and the requirement violated his constitutional rights." The State Department sent several "final notices" repeating the request for a physician's letter before denying the application due to Morris's failure to "verify" his sex. Nevada Legal Services attorneys Christena Georgas-Burns and David A. Olshan then filed suit on his behalf.

The complaint claims that the denial of the passport violated Morris's 5th Amendment Due Process rights, alleging that he has a constitutional right to refuse medical treatment for gender transition, and his Equal Protection rights, arguing that because cisgender people are not required to provide a physician's verification of their sex in order to get a proper passport, such a requirement cannot be posed to transgender people. He also alleged that the barriers the State Department has erected in his case are outside the scope of its authority under the Administrative Procedure Act. The government moved for summary judgment on the APA claim and to dismiss the constitutional claims, and Morris countered with a motion for summary judgment on all his claims.

The court rejected Morris's Due Process claim, reasoning that the government is not requiring Morris to submit to surgical treatment in order to get a passport, as they would be happy to issue him a passport with a sex designation consistent with his birth certificate. That sounds a bit nonsensical, since a passport with his male name and picture and a female sex designation would undoubtedly lead to problems should he try to use it as identification, especially in international travel. Perhaps his Due Process claim would have gotten further by relying on the right to autonomy and self-identification mentioned by the Supreme Court in *Lawrence v. Texas*, but that theory was not argued on the summary judgment motion by Morris. Be that as it may, however, the court's acceptance of his Equal Protection claim renders the loss on the Due Process claim harmless in this context.

As to the Equal Protection claim, Judge Navarro's ruling on Morris's summary judgment motion treated his claim as an as-applied claim rather than a facial unconstitutionality claim, because of the particular proof issues in deciding the plaintiff's summary judgment motion on a claim of discrimination that merits heightened scrutiny. There is caselaw in the 9th Circuit – specifically, the circuit's ruling in *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) – holding that the federal government faces heightened scrutiny when it is challenged for applying a policy in a way that discriminates against a transgender person. (In *Karnoski*, the court was considering President Trump's transgender military service ban, as concretized by Defense Secretary Jim Mattis in a policy implemented in April 2019.) Morris's complaint alleges facts sufficient to sustain a claim of unequal treatment. Under heightened scrutiny, the government bears the burden on summary judgment of providing an "exceedingly persuasive justification" for imposing its requirement of a physician's statement to verify a person's sex and certifying clinical transitional treatment as a prerequisite to getting a passport consistent with the person's gender identity.

Judge Navarro found that the government's summary judgment motion was not accompanied by such proof, as it consisted of generalized statements about the importance of the passport as an identity document. "Here," she wrote, "the Government frames its purported interest too broadly and fails to provide evidence that the interest is exceedingly persuasive. Defendant asserts interests in verifying passport applicants' identities and '[i]ssuing passports that accurately state the bearer's identity[.]' There is little doubt that the State Department has an interest in accurately representing the identities of U.S. citizens to foreign nations. However, the only facet of identity at issue here is a passport applicant's sex or gender. Defendant has provided no explanation, let alone any evidence, of why the State Department has an important interest in verifying a transgender passport applicant's gender identity, nor a cogent explanation of why the Policy requiring a physician's certification increases the accuracy of issued passports. Assuming, arguendo, that Defendant has a substantial interest in verifying transgender applicants' gender identities, he has not shown why a doctor's certification substantially furthers the interest with respect to transgender applicants given that not all transgender persons receive or require physician treatment."

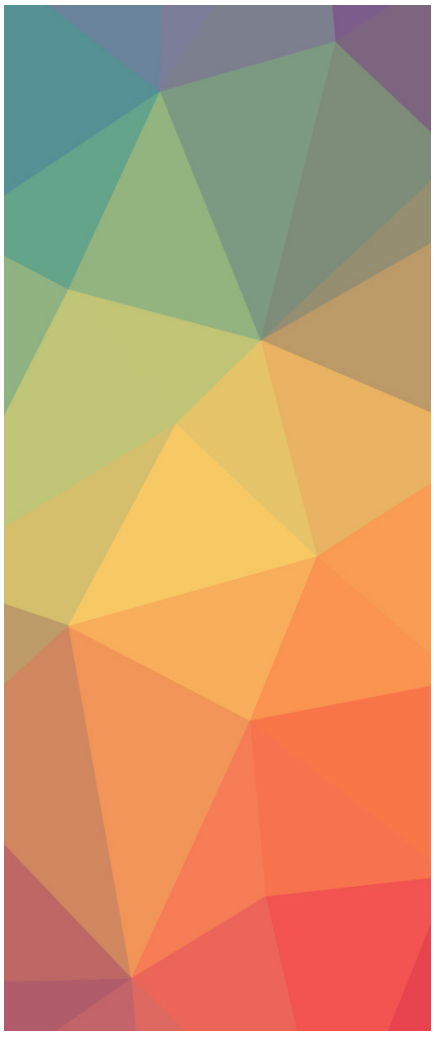
In other words, the court implicitly accepts the plaintiff's argument that one's gender identity and appropriate sex designation on a passport is not an artifact of genitalia. One can be a transgender person and entitled to recognition as such without undergoing gender confirmation surgery. The requirement for a physician to certify "clinical" treatment for transition is not supported by an "exceedingly persuasive" explanation here.

"Given that Plaintiff has prevailed on his equal protection claim," wrote Judge Navarro, "the Court orders Defendant to review Plaintiff's passport application without requiring a physician's certification of Plaintiff's gender. If

Plaintiff's application is otherwise sufficient under the relevant State Department regulations, Defendant shall issue Plaintiff a 10-year passport. As the Plaintiff has succeeded on his as-applied challenge, the Court declines to address whether the Policy is facially unconstitutional." And, as noted above, having provided Morris exactly what he is seeking under his constitutional claim, the court found it unnecessary to rule on the merits of his APA claim.

Thus, the government's motion to dismiss the constitutional claims was granted as to the Due Process claim and denied as to the Equal Protection claim, and the Plaintiff's motion for summary judgment was granted as to the Equal Protection claim and denied as to the Due Process claim, while the APA claim was dismissed as moot.

Judge Navarro was appointed to the district court by President Barack Obama in 2010. ■



Federal Judge Tightens Nationwide Injunction for ICE Detainees at Risk for COVID-19; Denies Stay of Discovery Pending Appeal

By William J. Rold

Last May, *Law Notes*' cover story about COVID-19 and prisoners at risk included reporting about the nationwide injunction against ICE in *Fraihat v. ICE*, 2020 WL 1032570 (C.D. Calif., Apr. 20, 2020). U.S. District Judge Jesus G. Bernal issued a 39-page "minute order" that certified a nationwide subclass of immigration detainees "at risk" for COVID-19, including HIV-positive inmates. While he did not order anyone to be released, he directed a survey to identify all class members and a "custodial determination" of their risk factors. He also directed training and revision of ICE standards in lieu of reliance on "non-binding guidance" from the CDC.

Judge Bernal found that the class was likely to prevail on claims under the Fifth Amendment and under § 504 of the Rehabilitation Act. Defendants took an interlocutory appeal from the preliminary injunction, but the relief was not stayed.

Alleging non-compliance with the April injunction and seeking to clarify certain provisions, plaintiffs moved to enforce the order. On October 7, 2020, in another lengthy "minute order" Judge Bernal granted additional relief to enforce the April order. *Fraihat v. ICE*, 5:19-cv-01546, Docket No. 240 (C.D. Calif., Oct. 7, 2020).

Plaintiffs filed dozens of declarations from inmates and experts, which Judge Bernal gave "considerable weight." He noted that defendants offered no expert testimony – just the "conclusory" views of the defendants themselves, some of which were demonstrably untrue – for example: Deputy ICE Director Tae Johnson "falsely claims that ICE has tested 'nearly 46% of the ICE detainee population' . . . [when] in fact less than 13% have been tested."

Judge Bernal first addresses whether the appeal divested him of jurisdiction to supervise the injunction. He finds that it does not, because of F.R.C.P. 62(d), which allows him to enforce or modify the injunction notwithstanding the appeal, to preserve the non-appellant's status quo. This permits the Court to consider new developments and to clarify the injunction but not to adjudicate anew the merits of the case. *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994); *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982).

Judge Bernal notes that many more ICE detainees have been infected with COVID-19 than predicted and that the numbers of detainees "cycled through" ICE detention facilities is "far greater than the number detained at any given moment." Despite the preliminary injunction's direction that release factors be considered for the vulnerable sub-class, at least 70% of the subclass (numbering nearly 6,000) remain in custody, although they have no criminal charges pending. Judge Bernal also notes that ICE overcounts the numbers released by including as "released" detainees those who won their immigration case, those who were actually deported, and those who died. Judge Bernal found no discernable change in the numbers of at-risk detainees released – before and after the April order – despite the preliminary injunction requiring individualized assessment.

The court also found that conditions got worse, with more cases, "lax social distancing," "unavailable" PPE, "inability" to isolate or quarantine, irrational transfer policy, and use of punitive detention for detainees testing

positive. Judge Bernal also found that standards were not promulgated "promptly" – ICE taking two months to issue the first set and relying on self-reporting questionnaires to assess compliance. Overall, he found a "disorganized patchwork of non-response or perfunctory denials" – quoting "standards" that resemble the loose federal monitoring of the meat-packing industry: should not cohort with quarantined individuals "unless unavoidable"; "ideally" should comply with CDC guidance; "should be mindful of increased risk."

Judge Bernal ordered new performance standards directed to mitigating risk to be promulgated within twenty days. Subclass members are to be tested twice daily for signs and symptoms, and quarantine protocols must be developed for detainees testing positive that do not involve punitive housing. Transfer protocols must protect the subclass, including suspension of transfers generally, except for "a narrow and well-defined list of exceptions."

ICE was ordered to "continuously" update its protocols, and defendants were ordered personally (or through trained designees) to monitor self-reports from detention facilities at least monthly. Corrective action plans must follow for non-compliance.

Judge Bernal creates a lengthy clarification of release assessments, with time limitations and what amounts to a presumption of release for detainees meeting certain criteria. He calls the assessments a "Fraihat custody review," which involves two steps: identification of risk factors; and a "timely" custody determination, which should "rarely" take more than a week. "Only in rare cases should a Subclass member not subject to mandatory detention remain detained . . . , and a justification is required."

Detainees subject to "mandatory" detention under 8 U.S.C. § 1226(c) are also entitled to "Fraihat custody review." Judge Bernal notes that they this might exceed the limitations of "clarifying" the April Order, but he finds that ICE agreed to include them in the subclass of vulnerable detainees in the notice to the class issued before the appeal. *Nat. Res. Def. Counsel, Inc. v. SW Marine, Inc.*, 242 F.3d 1163, 1166 (9TH Cir. 2001). Section 1226(c) does not support defendants' argument that mandatory detainees cannot be released under any circumstances.

All "Fraihat custody reviews" must be individualized and reported, along with individualized reasoning, to plaintiffs' counsel and to the court. The modified injunction applies defendants' "systemwide response to the pandemic" [emphasis by the court], regardless of detainees' "bond or parole requests or habeas petitions." It does not apply to conditions at individual ICE facilities or to applications by detainees for individual relief.

On October 30, 2020, Judge Bernal denied an application by ICE to freeze more discovery (probably because discovery was going dismally for them over the summer). Judge Bernal denied the stay in another "minute order." *Fraihat v. ICE*, 5:19-cv-01546, Docket No. 248 (C.D. Calif., Oct. 30, 2020). He found the balance of equities to tilt decidedly in plaintiff's favor. Moreover, two recent decisions on ICE detainees supported his granting of systemwide class relief. *Hernandez Roman v. Wolf*, 2020 WL 5683233 (9th Cir., Sept. 23, 2020); and *Gonzalez v. ICE*, 2020 WL 5494324 (9th Cir., Sept. 11, 2020).

The *Fraihat* plaintiffs are represented by Orrick, Herrington & Sutcliff, LLP (San Francisco and Los Angeles); Disability Rights Advocates (Berkeley and New York); Civil Rights Education and Enforcement Center (Denver and Los Angeles); and the Southern Poverty Law Center (New Orleans, Miami, Tallahassee, and Decatur, GA). Judge Bernal was appointed to the court by Barack Obama. ■

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.

Gay Mexican Asylum Applicant Found Not Credible for Denying Fear of Return to Border Agent

By Bryan Xenitelis

A panel of the U.S. Court of Appeals for the 9th Circuit, including the Chief Judge and a designated Tenth Circuit Judge, has upheld the Board of Immigration Appeals' denial to a gay Mexican man the relief of asylum, withholding of removal, or protection under the Convention against Torture. At his initial border entry interview, the man denied any fear of returning to Mexico but later claimed past persecution and a future fear of persecution on account of his sexual orientation. *Moreno v. Barr*, 2020 U.S. App. LEXIS 34906 (9th Cir., November 4, 2020).

The Petitioner had made three entries to the United States but only sought asylum on account fear of persecution because of his sexual orientation after his third entry. He had "expressly denied any fear of return" during his first border interview. Petitioner "had been informed of the possibility of seeking asylum during his second entry," and claimed that the reason he did not discuss his sexual orientation or fears during the first interview was because "he was very ashamed" of his orientation. An Immigration Judge did not find it credible that Petitioner "would wait to share his fear when he had the 'potential of asking to speak to a female or speaking to anyone, even an attorney, who would be able to assist him.'" The Board of Immigration Appeals found no clear error with the decision, finding it to be supported by "specific, cogent reasons."

By memorandum, a panel of the court reviewed both the Board and Immigration Judge's decisions.

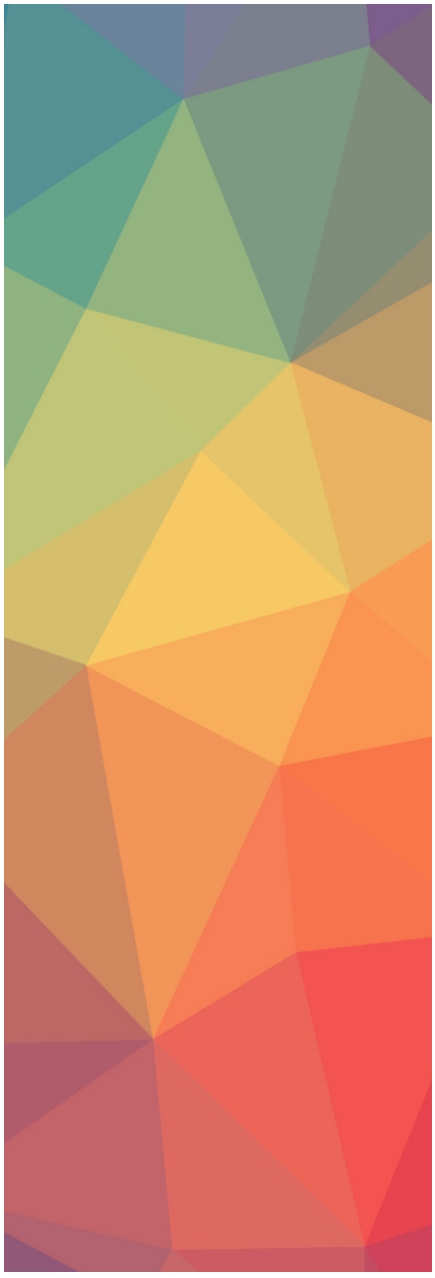
Their memorandum ruled that the inconsistency between Petitioner's initial border interview and his hearing testimony "goes to the heart of his asylum claim," and found that "while [Petitioner's] explanation that he was too ashamed to disclose his sexual orientation to government officials" was plausible, the Immigration Judge was "not required to accept it."

The panel noted that many of the judge's reasons were flawed. The panel found the Immigration Judge's assumptions that Petitioner had learned from his brother how to apply for asylum and had an opportunity to discuss asylum with an attorney were not supported by the record and that the Immigration Judge impermissibly speculated in assuming that Petitioner would be comfortable discussing sexual orientation with a border patrol officer because he believed "the United States to be less discriminatory than Mexico." The Immigration Judge also impermissibly relied on a case involving voluntary return to the country of feared persecution, strongly suggesting that Petitioner's procedural history included his involuntary removal to Mexico following one of his earlier entries to the United States.

However, the panel found that despite the flawed reasons, the Immigration Judge "also offered cogent reasons for rejecting [Petitioner's] explanation." The panel found that three weeks that Petitioner spent in Florence, Arizona – "a period of time during which he had spoken to others about the possibility of asylum" – had provided Petitioner " ample time to voice his fears about returning to Mexico." The panel also noted that Petitioner could have in his first interview discussed his past persecution, including being followed and threatened at a bus stop, or violence perpetrated against him by his uncles, without revealing his sexual orientation. Therefore, the panel found that "even if some of the Immigration Judge's reasoning was flawed, those flaws were not fatal to the credibility determination because the Immigration Judge also provided a reasonable basis for finding [Petitioner] not credible."

In a short dissent, Chief Judge Sidney R. Thomas concurred in finding Petitioner's argument that the agency lacked jurisdiction over his case foreclosed; however, he dissented regarding the credibility determination, stating "because I do not believe substantial evidence supports the agency's adverse credibility determination, I would grant the petition in part and remand the case to the agency for further proceedings." ■

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



Weaponizing Human Waste: Limits of the Eighth Amendment

By William J. Rold

Being hit with a projectile of human waste is an occupational hazard for employees working in prisons. Sometimes this is the only weapon a prisoner believes she has. Sometimes, prisoners are placed in waste to punish or terrorize. What happens before and after is usually not good either. Here, as can be reconstructed from the *pro se* complaint of Deondre Langston and the opinion of Chief U.S. District Judge Jon E. DeGuilio, is what occurred in *Langston v. McDonald,* 2020 WL 6874382, 2020 U.S. Dist. LEXIS 218566 (N.D. Ind., Nov. 23, 2020). Following that is an account of the U.S. Supreme Court's second decision this term, regarding a "shockingly unsanitary" pair of prison cells used in Texas.

Transgender inmate Langston was in her cell when Sergeant Darrell Martin called her a "fucking gay ass homosexual." Langston responded by "throwing fecal matter and urine at Sgt. Martin" from her cell. "Sgt. Martin then sprayed Langston with oleoresin capsicum" ["OC" or "pepper spray"]. Langston was allegedly then denied medical attention for the pepper spray.

Judge DeGuilio found the slur, while "unprofessional and deplorable," was not itself actionable, citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). He does not cite the leading Seventh Circuit case on verbal harassment, *Beal v. Foster,* 803 F.3d 356, 358 (7th Cir. 2015), which specifically limited *DeWalt* to instances of verbal harassment that are "fleeting" or "too limited to have an impact," leaving open claims that verbal language can itself create an Eighth Amendment-cognizable harm.

In fact, this writer believes the Seventh Circuit stands alone in going this far.

Regardless, Judge DeGuilio finds that there was no need to pepper spray an inmate inside a cell who obeyed an order to cuff-up. Langston has a claim that the use of force (pepper spray) was unnecessary, retaliatory, and excessive. *See Hendrickson v. Cooper*, 589 F.3d 887, 890 (7th Cir. 2009) (force used "maliciously and sadistically to cause harm").

Langston also has a claim that Sergeant Martin denied her medical care after the use of the pepper spray. This is based on the inference from the pleading that it is reasonable to assume that her need for medical evaluation would have been obvious. *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005); *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005).

It does not end there. The next day, a different Sergeant, Larry McDonald, who was a friend of Martin, got involved. Judge DeGuilio wrote: "Langston was in the shower and Sgt. Larry McDonald was cleaning the feces and urine from Langston's cell." [Note: this statement is close to verbatim what Langston said in her *pro se* complaint, but the scenario is unlikely. First, inmate cells do not have showers – their "*en suite* accommodations" are "half-bath" – so Langston probably could not see what occurred in her cell while she showered. Second, sergeants (who have been promoted from the ranks) do not do latrine duty – ever. This is a job for disfavored inmates.] Having said that, it is plausible that Sergeant McDonald took hold of the handle of a mop containing feces from Langston's cell and shoved it in her face in the shower, injuring her eye. This would also state a claim for an excessive and unconstitutional use of force.

McDonald allegedly also threatened to arrange for someone to rape Langston. Judge DiGuilio finds this threat to be not actionable, citing *Dobbey v. Illinois Department of Corrections*, 574 F.3d 443, 446 (7th Cir. 2009) – again, missing *Beal*. *Dobbey* involved a white officer swinging a rope looped into a noose in front of the cells of black inmates. The court found that this "symbolic" threat did not violate the Eighth Amendment because the white officer lacked the apparent ability to carry it out. Here, a rape of Langston was not an idle threat. Interestingly, both *Dobbey* and *Beal* were written by Judge Posner. He does not even cite *Dobbey* in *Beal* – perhaps saying all that is necessary about his evolution on the bench.

Sometimes feces is not removed from cells but allowed to accumulate, its presence becoming an agent of punishment or fear. The problem of feces in prison cells was addressed by the Supreme Court in *Taylor v. Riojas,* No. 19-1261 (Nov. 2, 2020). It followed the granting of a rare type of *certiorari* under Supreme Court Rule 10, not involving a circuit split or a conflict between states' highest courts or resolving an important unsettled question of federal law. Rather, the Fifth Circuit "so far departed" from usual jurisprudence as to call for an exercise of the Supreme Court's "supervisory power."

In September of 2013, Trent Michael Taylor, a Texas state prisoner, was for six days confined in a "pair of shockingly unsanitary cells" – although the *per curium* opinion does not say why he was placed there. The first cell, to quote the Supreme Court, "was covered, nearly floor to ceiling, in massive amounts of feces: all over the floor, the ceiling, the window, the walls, and even inside the water faucet." [Internal record quotations omitted]. Taylor did not eat or drink for four days. He was then placed for two more days in a cell with no toilet and "only a clogged drain in the floor to dispose of bodily wastes." When he involuntarily relieved himself, he caused "the drain to overflow and raw sewage to spill across the floor." Because the cell had no bunk, and Taylor had no clothing, he was "left to sleep naked in sewage."

This violation of civil rights has been in litigation for seven years. The Fifth Circuit "properly" found a constitutional violation, but it granted the officers qualified immunity – even though the record showed that at least some of them laughed at Taylor's situation and said "have a long weekend" when he was placed in the first cell and "hope you fucking freeze" when placed in the second one. The Fifth Circuit ruled that the law was not "clearly established" that "prisoners couldn't be housed in cells teeming with human waste . . . for only six days."

Taylor's sexual orientation is unknown and immaterial, but this writer has seen scores of LGBT prisoners' rights remain unredressed in damages because of the lack of a prior case that "clearly established" the protection recognized as the law expands. It is reassuring that the Supreme Court places some limits on the scope of qualified immunity, writing: "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."

Justice Thomas dissented, without opinion. He has gone on record many times with his belief that the Eighth Amendment is not offended by a condition of confinement unless said condition was an actual part of the sentence in a criminal case. Justice Barrett did not participate.

Justice Alito concurred in the judgment, spending most of his time criticizing the Court for granting *certiorari*, characterizing the case as "ill-suited" for the Court's attention, and belittling Taylor's time in the second cell as merely "a refusal to take him to the toilet." On the merits, since the Court was determined to reach them, he concurs that summary judgment should not have been granted on qualified immunity.

It is rare for a prisoner to win in the Supreme Court, let alone on a petition for *certiorari* without full briefing. When this writer began prison litigation forty years ago, the general rule of thumb was to ask the question: will it make the judge throw up? *Taylor* meets that test.

Feces has no sexual orientation or gender identity. But these cases set limits: *Langston*, on how much an inmate can be punished for throwing human waste; *Taylor*, on when violation of dignity becomes intolerable. ■

Federal Court Refuses to Dismiss Title VII Claim by Lesbian Guidance Counselor at Catholic High School Whose Contract Was Not Renewed Because of Her Domestic Partnership

By Arthur S. Leonard

U.S. District Judge Richard L. Young has denied defendants' motion to dismiss Title VII claims by a lesbian high school guidance counselor who was fired by a Catholic high school because of her same-sex domestic partnership. *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 2020 WL 6434979, 2020 U.S. Dist. LEXIS 206517 (S.D. Indiana, Oct. 21, 2020). Judge Young rejected the defendants' argument that Title VII's religious exemption provision, Section 702, barred this suit because the defendants' religious beliefs motivated the discharge. He also rejected the defendants' contentions that the potential application of the 1st Amendment ministerial exemption required dismissal as a matter of law without the development of a factual record to determine whether the exemption applies, or that the defendants' 1st Amendment freedom of association rights precluded requiring them to defend an employment discrimination case.

However, Judge Young found that the retaliation claim that the plaintiff asserted under Title IX of the Education Amendments Act was preempted by her assertion of a retaliation claim under Title VII, and so must be dismissed. Lynn Starkey's hostile environment claim under Title VII will also continue, and the court abstained from dealing with her supplemental state law claims in ruling on the motion.

Judge Young's decision begins with a concise summary of the overriding issue in the case. "This case places in stark relief the difficult questions that may arise when applying civil rights laws to religious institutions. At issue is a religious school's decision to not renew the contract of a guidance counselor because of her marriage to another woman."

Actually, more was involved than just that. Starkey had been an employee at Roncalli High School, an educational institution of the Roman Catholic Archdiocese of Indianapolis, for 39 years, and had a same-sex partner for much of that time. During her early years at Roncalli, she was a choir director and teacher of, among other subjects, religion. It seems likely that had the defendants discharged her when she held those positions, it would have enjoyed a constitutional defense under the "ministerial exemption" recognized by the Supreme Court as most recently elaborated this past summer, but that doctrine had not been developed during Starkey's early years at the school. She became a guidance counselor in 1998 and was promoted to co-director of Guidance in 2007. Whether her current role comes within the "ministerial exemption" is a central issue in this case.

In 2017, undoubtedly reacting to recent Supreme Court case law, the Archdiocese revised the written employment contracts it used, to include the word "ministry" and to concretize the requirement of employees to conform their conduct to Catholic doctrine, which disapproves of homosexuality and same-sex partnerships. But it wasn't until Starkey spoke up about the school's dismissal of one of her colleagues, also a lesbian who was fired when the school learned that she had married her partner, and asked to be able to address a meeting about the difficulties of being a gay employee at the school, that she was informed her contract would not be renewed at the end of the school year.

In May 2019, Roncalli High School officially notified Starkey by letter that her contract would not be renewed. The letter stated that Starkey's "civil union is a violation [of her] contract and contrary to the teaching of the Catholic Church." Starkey, who already had an EEOC charge on file against Roncalli and the Archdiocese, filed amended Charges of Discrimination with the EEOC against the Archdiocese and Roncalli on March 25, 2019 and May 9, 2019. Although the Supreme Court's *Bostock* decision would not come until more than a year later, the 7th Circuit had found sexual orientation discrimination actionable under Title VII in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (2017, *en banc*), so there was no question that Title VII could apply, unless the court found that defendants were shielded from liability under Title VII's express religious exemption or the 1st Amendment.

Judge Young rejected the defendant's argument that Section 702 of the statute precludes this suit. It provides: "This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Relying both on the language of the statute and its legislative history, Judge Young found that the purpose of the statute was to allow religious entities to favor members of their own religion in making hiring decisions, but not to exempt them from complying with the ban on discrimination on the other grounds enumerated in Title VII: race or color, national origin, or sex.

The defendants argued that the decision not to renew Starkey's contract was because of her failure to comport herself in compliance with Catholic doctrines and was therefore "because of religion" and protected by Section 702. The court looked to *Bostock*'s explanation of how Title VII works to reject that argument. "*Bostock* is helpful on this point," he wrote. "The majority explained that Title VII's 'because of' test incorporated the but-for standard

of causation. This form of causation is established whenever a particular outcome would not have happened but for a certain cause. But-for causation in the Title VII context means 'a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.' Starkey has alleged sufficient facts to allow the court to draw the reasonable inference that her sexual orientation was a but-for cause of Defendants' employment decision." He also noted legislative history supporting the proposition that Congress did not intended by enacting Section 702 to exempt religious institutions from the obligation not to discriminate based on the other categories specified in Title VII.

The defendants also argued that they had a non-discriminatory reason for dismissing Starkey – her breach of the morality standards spelled out in her employment contract by being a lesbian in a relationship – but the court pointed out that this was not relevant on the motion to dismiss, which is limited to the plaintiff's factual allegations. Whether this reason would defeat the Title VII claim was a question reserved for summary judgment or trial.

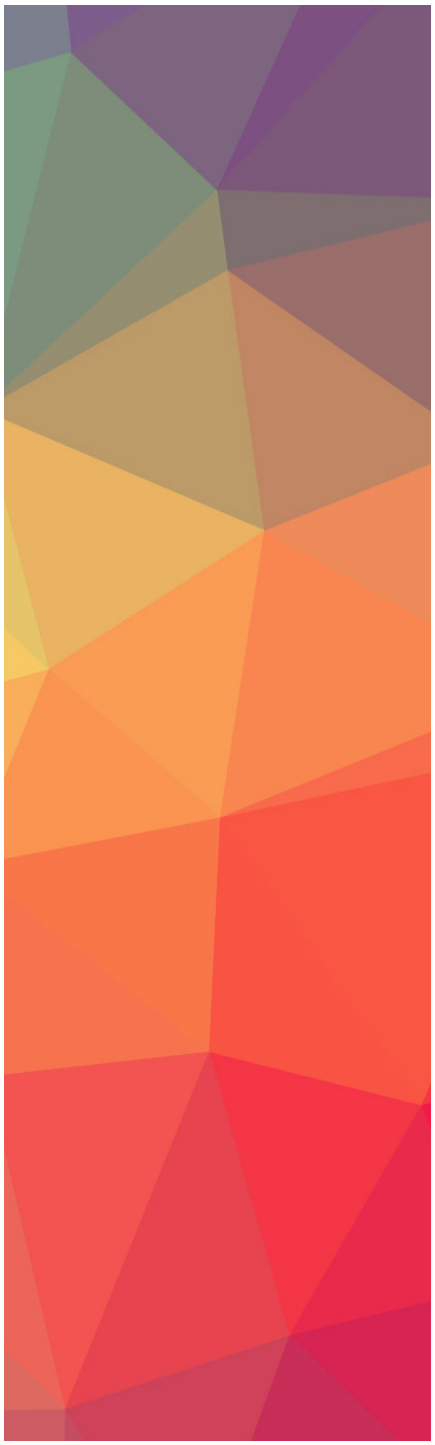
The defendants, pointing to Starkey's written employment contract, titled "School Guidance Counselor Ministry Contract," and the contract's description of the counselor ministry function as setting a role model for students consistent with the teachings of the church, claimed that its actions were protected under the ministerial exemption. Starkey sharply contested this in her opposition to the motion to dismiss, stating that her job duties did not involve any religious functions.

Judge Young turned next to the defendants' constitutional arguments. Although the Supreme Court's most recent pronouncement on the ministerial exception, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), is generally seen as having expanded upon the Court's prior recognition of the right of a religious entity to select its ministers without government interference under the Free Exercise Clause, nonetheless the plaintiffs in those cases were teachers with obligations to teach religion or to lead religious ceremonies. Young found that the question whether the co-director of Guidance at Roncalli High School could be considered a "minister" as the term was used by the Supreme Court involved disputed facts that, once again, could not be resolved on a motion to dismiss. And he found that the defendants' argument that their freedom of association would be abridged by application of Title VII to their decision not to renew an employment contract had a long history of rejection by the federal courts. Allowing such a claim would effectively repeal Title VII's ban on employment discrimination altogether!

The defendants tried to rely on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Supreme Court majority relied on freedom of expressive association to hold that the Boy Scouts could not be required by New Jersey's public accommodations law to continue Dale's status as a volunteer assistant scoutmaster when the Scouts became aware of his sexual orientation and gay rights advocacy. Young found that case totally distinguishable as not involving employment discrimination and pointed out that the Court in that case had found rather unusual the New Jersey Supreme Court's treatment of the BSA as a place of public accommodation in any event.

However, the court did find that within the 7th Circuit it is well established that claims of employment discrimination because of sex are to be brought under Title VII, not under Title IX, so he granted the high school's motion to dismiss the Title IX retaliation claim included in the complaint. At the same time, of course, the retaliation claim under Title VII continues in the case, so the issue will be addressed in any event, and the school's decision not to renew Starkey's contract after 39 years of employment in response to her filing her first charge with the EEOC could hardly be described as other than retaliatory (although the court refrained from saying so at this point). The court found it would be premature to analyze the state law claims on this motion.

Lynn Starkey is represented by Christopher S. Stake and Kathleen Ann DeLaney, of DeLaney & DeLaney LLC, Indianapolis. Judge Young was appointed to the court by President Bill Clinton and is perhaps best known for having ruled that Indiana's ban on same-sex marriage violated the 14th Amendment, in a decision affirmed by the 7th Circuit and denied certiorari by the U.S. Supreme Court in 2014. ■



Questionable Financial Reasons Provide Enough "Fodder" for Sole Fired Lesbian Employee to Proceed with Title VII Sex Discrimination Suit

By Wendy C. Bicovny

In *Lebel v. Insight Securities, Inc*., 2020 WL 9746993, 2020 U.S. Dist. LEXIS 214239 (N.D. Ill, Nov.17, 2020), U.S. District Judge Edmond F. Chang denied Insight Securities' summary judgment motion to dismiss against fired lesbian employee, Sandra Lebel. Only Lebel's allegations related to sex discrimination violations under Title VII of the Civil Rights Act will be addressed here.

Soon after she was hired in 2015, Lebel became a Branch Liaison. In 2016, Insight established a new Miami branch office designed specifically to handle business from Total and Pro - two advisory firms that contracted with Insight to service buy-sell orders. Lebel became a remote Branch Manager of this office.

As part of the contract agreement, Total and Pro reimbursed Insight around $7,500 a month to offset Lebel's salary. Insight also hired Larry Rozas, Diego De la Lama, and Nicolas Villarreal to work in the Miami branch as representatives under Lebel's supervision.

In December 2016, Lebel introduced her wife to Insight's CEO, Carlos Legaspy during the company Christmas party. After that, Lebel believed, Legaspy shunned her as if she were a "stepchild" or a "leper" by ignoring her but she did not, however, hear Legaspy make any negative comments against gay persons. Lebel testified that two colleagues would regularly look her way while laughing. But she did not, however, describe the substance of their statements, other than that they would comment on her clothes in a mocking tone.

In 2017 Insight informed Total and Pro in writing that Insight would cease business with Total and Pro entirely. On January 10, 2018, Legaspy informed Lebel that she was fired because her position was eliminated. Legaspy proffered that Insight could no longer afford her salary because of the loss of the Total and Pro business. Lebel did not believe this because she was the only Insight employee who was fired. The three male Miami employees, whom Lebel supervised, stayed with Insight.

Responding to Lebel's Title VII claim, Insight argued that it was entitled to summary judgment because Lebel offered no evidence of derogatory comments or mistreatment based on gender, other than what Insight deemed her unfounded perception of how her co-workers treated her.

Judge Chang determined that Lebel had established a prima facie case for sex discrimination in several respects. First, Lebel provided evidence that showed Insight treated similarly situated employees (Branch Liaisons) who were not members of the protected class (female, lesbians), more favorably. In this regard, Insight did not dispute that Lebel was the only employee to have been fired due to the loss of the Total and Pro revenue. But Insight characterized Lebel as "unique" among the Miami employees because her move to Branch Manager was allegedly a promotion that created new responsibilities specific to the Total and Pro business. Lebel pointed to evidence that she retained the same core responsibilities when moving from Branch Liaison to Branch Manager. Lebel also contended that all other Branch Liaisons, all of whom are male, retained their jobs. On review of the record, a reasonable jury could find that there was no substantial evolution in Lebel's duties when she transitioned to Branch Manager, wrote the judge. Insight showed no material change in responsibilities; only a change in the representatives for whom Lebel performed those responsibilities. Thus, Lebel had shown that similarly situated employees at Insight did not lose their jobs and thus she established a prima facie case of discriminatory termination based on sex.

Lebel also established a prima facie case under what is known as a mini-reduction-in-force. Here she needed only to establish that employees outside the protected class absorbed her duties. Again, Lebel presented enough evidence to show that employees who were all males had absorbed the duties of her position. Insight testimony indicated continued service to Total and Pro customers well after Lebel's firing. Lebel also presented evidence that she maintained her prior operations responsibilities, even after she became Branch Manager. The court found that a reasonable juror could infer that after Lebel's employment was terminated, her responsibilities, including those specific to Total and Pro customers, were absorbed by male employees in the operations department regardless of whether they were otherwise similarly situated.

Next, Judge Chang explained Insight's failure to present a legitimate, non-discriminatory reason for Lebel's firing. Insight proffered that it ceased doing business with Total and Pro customers, losing their revenue and the salary reimbursement they provided to defray Lebel's salary. On its face, this financial-based reason sufficed to satisfy Insight's burden to produce a non-discriminatory explanation. However, Lebel offered several categories of evidence to rebut the proffered explanation.

First, she pointed to the fact, which Insight conceded, that no other employee was fired. This included the three representatives she supervised, who remained and continued to work out of the supposedly eliminated Miami branch.

Second, Insight claimed that the loss of Total and Pro's business placed the company in financial straits so dire that Insight had to fire her. Lebel pointed to year-over-year revenue

increases. Insight argued that there was a "spike" in revenues generated by Total and Pro accounts due to "mass liquidations." But this failed to address Lebel's broader assertion that there was enough company-wide revenue to support her retention. According to Legaspy's testimony, revenue growth was attributed to additional registered representatives in another branch, not to any liquidation of Total or Pro accounts. Yet, further testimony of other Insight executives swore that the level of business at Insight stayed "similar or more" from the time issues with Total and Pro arose.

Third, Insight hired 12 new employees in 2018, 11 of whom received salaries ranging from $40,000 to $120,000.

Fourth, Insight did not lose business from Pro and Total in 2018 after placing that business on alleged liquidating-only status. Legaspy testified the revenue from Total and Pro was "basically zero." But evidence indicated Insight continued to serve Total and Pro customers. Although it was possible to service customers without generating any revenue, this planted some doubt as to the sincerity of Legaspy's proffered explanation that revenue from Total and Pro was basically zero. In fact, additional testimony indicated Total and Pro were placed on liquidation status "in limited circumstances."

Lastly, Lebel pointed to evidence that shortly after her firing, Insight discussed the retention of some end investor accounts with Total in a "full relationship" as opposed to a liquidation capacity. This purportedly created some accounts "orphaned" from Total that Insight spread across existing Insight representatives.

Based on all of this evidence, Judge Chang concluded that Lebel offered enough to demonstrate that the financial-based explanation for her firing was a mere pretext, as well as ample "fodder" for a reasonable jury to find that Insight could have afforded to keep Lebel.

Finally, Judge Chang explained how the cumulative evidence also raised a triable issue on the sex discrimination claim. This included the evidence Lebel put forth undermining the sincerity of Insight's financial reasons and Insight's contention of no evidence establishing that Lebel was the subject of any derogatory remarks based on her being a lesbian. Judge Change said Insight was simply pointing out the absence of direct evidence of sex discrimination. But, for purposes of summary judgment, the judge also had take into account that a jury must also consider circumstantial evidence as part of the "pile" of evidence and consider the total picture. By successful attacks on the sincerity of Insight's proffered financially-based alibi, Lebel established a triable issue of fact on her claims to survive Insight's summary judgment motion to dismiss.

Sandra Lebel is represented by Marko Andrew Duric, of Robertson Duric, Chicago, IL. ■

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

Police Raid of LGBT Organization in Georgia Violates the European Convention on Human Rights

By Eric J. Wursthorn

On October 8, 2020, the European Court of Human Rights held that homophobic and transphobic police misconduct in Georgia and the government's subsequent failure to investigate such violated Articles 3 and 14 of the European Convention on Human Rights. *Aghdgomelashvili and Japaridze v. Georgia*, Application no. 7224/11, October 8, 2020. As a result, the court awarded 2,000 euros to each of the applicants who were victims of the raid.

The case was brought by two Georgian nationals, Ms Ekaterine Aghdgomelashvili and Ms Tinatin Japaridz. It arises from a 2009 police raid on an LGBT advocacy organization called the Inclusive Foundation (IF), the first of its kind in Georgia. Aghdgomelashvili founded IF and was working as its program manager at the time of the raid while Japaridz was a program officer for IF.

The facts, which were not disputed by Georgia, are as follows. On December 15, 2009, approximately eight to ten women and the director of IF, a male identified as P.S., were at IF's office in Tbilisi making preparations for an upcoming art exhibition. At approximately 6-7pm that evening, P.S. and the women were in the kitchen when the doorbell rang. When the door was opened, seventeen men and women, who identified themselves as police officers, rushed into the office. The officers were dressed in civilian clothing. The police immediately isolated P.S. in a separate room for questioning, told the women to go to a meeting room, and left A.M., a transgender female, in the kitchen because the "police seemed to be

confused as to her gender." The officers claimed that they were there to conduct a search of the IF office. Throughout the ordeal, the police never showed a search warrant or other judicial order, despite repeated requests to do so.

The court states that at the beginning of the search, "the police did not know about the specific nature of [IF]." The officers apparently figured out that IF was an LGBT advocacy group by observing various posters "depicting homosexual couples." The police "suddenly became aggressive and started displaying homophobic behavior" by referring to the women as "not Georgians", "sick people" and "perverts who should receive medical treatment." The also referred to P.S. as a faggot and "wondered" what the women had in common with him.

The police threatened to reveal the women's sexual orientation to the public and their family. They also threatened to hurt the women's family members and "wished those in the office were men because in that case they would use physical force on them." The police trashed the office; while tearing a poster of two men embracing to pieces, one officer stated that "he would burn the place down if he had matches."

During the search, the police found marijuana in P.S.'s office desk. He was immediately arrested, taken to a police station, questioned, and ultimately charged with "a drug offence". P.S. pleaded guilty to the charge and was released on condition of paying a fine.

Meanwhile, back at the IF office, the police decided to start strip searching some of the women at around 10:30pm. The searches were conducted by a female officer in a toilet who made the women stand barefoot on the cold floor while the officers made denigrating comments such as "dykes". The court credited the women's conclusion that the searches were intended to humiliate them because "the police officers did not properly check the clothes which they took off."

Aghdgomelashvili and Japaridz each arrived at IF's office at approximately 8pm and 9pm respectively. Both were forced into the meeting room. The former's cell phone was confiscated by one of the officers after he twisted her arm. The latter noted that some of the women in the meeting room were "terrified and crying." Both of the applicants were strip searched by the officers. There was no record of the strip searches being performed, none of the women were ever charged with anything nor did they sign any other document. At about 11:30pm, the officers wrote down the women's names and dates of birth and then released them.

On January 9, 2010, the applicants filed a complaint with the Chief Public Prosecutor's Office, the Tbilisi city public prosecutor's office (Tbilisi Prosecutor) and the head of the General Inspectorate of the Ministry of Internal Affairs regarding the raid of the IF office. They requested that the authorities look into the matter and respond accordingly. The applicants were ignored for more than a year, while they made numerous inquiries about their complaint. On April 14, 2011, the applicants received a letter from the Tbilisi Prosecutor informing them that there was an ongoing investigation under Article 333 of the Criminal Code of Georgia for abuse of official powers. No other specific information was given to the applicants, including dates or what measures had been taken.

The applicants made another inquiry with the Tbilisi Prosecutor in May 2011. A month later, they received a letter reiterating that an investigation was ongoing and "a range of early investigative measures have already been implemented in relation to this criminal case. Other pertinent investigative measures are planned and will be implemented, for the purpose of a thorough investigation". No other information was provided.

As of the date of the Court of Human Rights' decision, the investigation was still not concluded. The court noted that the domestic investigation into the 2009 incident had been "ineffective," since Georgia had not shown that "a single investigative measure has ever been undertaken in practice."

Based on the officers' conduct, which demonstrated homophobic and transphobic intent, together with Georgia's failure to investigate the incident, the court found that there was a violation of Articles 3 and Article 14 of the Convention.

Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," while Article 14 charges that the "enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Georgia's sole argument in opposition to the application was that the police officers' conduct was not severe enough under Article 3 of the Convention. The court rejected this argument, finding that the physical and mental abuse that the applicants were subjected to, which was based upon discriminatory animus, in addition to the government's failure to comply with its positive obligation to investigate the incident, was sufficient to demonstrate a violation. The court poignantly wrote: "[t]he officers grossly mistreated the people gathered in the IF office, including the two applicants – who all belonged to the LGBT community which found itself in a precarious situation in the country at the material time [] – by promising to divulge their actual and/or perceived sexual orientation to the public and by saying that they were on the brink of resorting to physical violence against them. The threat to use physical force was followed by one of the police officers saying that he wished he could burn the place down, as well as by the forcible seizure of the first applicant's mobile telephone by another officer."

In regard to damages, the court rejected Georgia's claim that 2,000 euros each was excessive, instead awarding them that amount plus interest. The court, however, did not grant the applicants' request to tell Georgia to conduct an investigation into the underlying incident. The court reasoned that it was without authority to grant such relief. Instead, Georgia has the right to "choose, subject to supervision by the Committee of Ministers, the exact means to be used in

its domestic legal order to discharge its obligations under the Conventions . . . "

The applicants were represented by the London-based European Human Rights Advocacy Centre (EHRAC), which notes in a press release that the case was originally field by INTERIGHTS and Article 42. Japaridz is quoted in EHRAC's press release stating: "It has been a long struggle for resistance. I feel that this judgment is important for all persons who are or were subject to discrimination and ill-treatment on the grounds of homophobia. We were just two applicants. But it does not mean we were alone. Our friends, colleagues, LGBT members and allies, who could not speak up because of the issues faced by coming out, stand behind us. I am proud that our response to harassment, humiliation, and a long process of surveillance and threats, was to speak up for our rights and choose not to be silenced." ■

Eric J. Wursthorn is a Principal Court Attorney for the New York State Unified Court System, Chambers of the Hon. Lynn R. Kotler, J.S.C.

Louisiana Court of Appeal Refuses to Adopt the Concept of a "Psychological Parent" as it Denies Shared Custody Rights to a Lesbian Co-Parent

By Filip Cukovic

In a heartbreaking decision awarding sole custody of a child to its biological parent, the Court of Appeal of Louisiana appeared to have been more interested in formalities of the law than in the best interest of a child. *Cook v. Sullivan*, 2020 La. App. LEXIS 1671 (La.App. 2 Cir); 2020 WL 6750097. Namely, Judge James Stephens reversed the trial court's decision awarding shared custody and held that Billie Cook – a lesbian woman who was for many years co-parenting her child with Sharon Sullivan – failed to establish custody, notwithstanding the fact that she would likely qualify as a child's "psychological parent" in many other states.

Sharon Sullivan and Billie Cook – two lesbian women – began a romantic relationship in 2002. After failed attempts at donor insemination, Sharon gave birth on December 31, 2009, to a child whom she conceived with the assistance of her good friend. Importantly, no father was listed on the birth certificate; however, the child was given the hyphenated last name, "Cook-Sullivan." Clearly, Cook was Billie's last name. Although Sharon and Billie never married and Billie never formally adopted the child, Billie acted as a co-parent, as she lived with and took care of the child for many years.

In 2013, Sharon and Billie separated. Upon separation, the parties shared custody of the child and Billie continued seeing the child on a bi-weekly basis. That arrangement was subsequently terminated by Sharon in July 2016, leading Billie to file a petition to establish parentage, custody, and support.

In attempts to resolve the issue, the trial court in Louisiana held a four-day trial in mid-December of 2017. During the trial, both Sharon and Billie testified. Additionally, each party introduced her expert witness, testifying to the issue of child's current development and potential problems that may or may not arise, in the event the court awards Sharon with sole custody.

During the trial, Billie testified that she was a mother to the child from the time of the child's birth until Sharon abruptly refused to allow Billie any access to the child. She and Sharon exchanged wedding bands, held themselves out as a married couple, lived together in the manner of married persons, and decided together to start a family, choosing Sharon as the first to conceive because she was the older of the two women. Billie testified that she attended Sharon's doctor appointments throughout her pregnancy and was celebrated as a mother alongside Sharon at a baby shower. According to Billie, after the child was born, the three lived together as a family, with the child referring to each party as a mother. They shared a bank account, childcare expenses, and parental duties. Sharon countered Billie's testimony by claiming that Billie was simply an ex-girlfriend and described her decision to conceive as a personal one made independently of Billie.

Dr. Visconte also testified during the trial in her capacity as the court-appointed evaluator. Dr. Visconte testified to the effect that the child may suffer substantial harm if the child is entirely separated from Billie. Importantly, Billie never demanded sole custody, and instead she wanted to continue being a co-parent with Sharon. Dr. Visconte highlighted that that both Billie and Sharon maintain stable employment, have safe and comfortable homes, and are equipped to provide spiritual and moral guidance to the child. However, considering that the child has already developed

considerable attachment to Billie, a further separation of the child from Billie could seriously psychologically impair the child's welfare. Dr. Visconte also outlined numerous reasons as to why the child sees Billie as her "psychological parent", including the fact that the child and Billie have an established bond and that Billie publicly held herself out to be a parent of the child. Thus, she recommended Billie and Sharon share joint custody, with the child residing primarily with Sharon and having visitation with Billie every other weekend.

Dr. Visconte's recommendation was countered by the child counselor testimony of Ms. Davis. Ms. Davis testified that the child does not want to see Billie, does not consider Billie to be her family, and has no attachment to Billie. Ms. Davis further testified that the child has a healthy relationship with Sharon, who is very loving and doting. She opined that the child should not be forced to spend time with Billie.

Finally, the trial court decided in favor of Billie, awarding shared custody between her and Sharon. The trial court recognized that although Louisiana still has not formally adopted the concept of a "psychological parent", many other Southern states have done so, and Louisiana should follow their lead. Moreover, the court opined that since the child has already developed a significant attachment to Billie, Billie qualifies as the child's "psychological parent".

In recognizing that Billie is the child's "psychological parent", the trial court considered whether 1) Sharon and Billie voluntarily entered into jointly planned reproduction measures resulting in conception by one of the parties; 2) whether the parties resided in the same household before and for a substantial time after the birth of the child sufficient to form a parental bond; 3) whether the non-biological parent engaged in full and permanent responsibilities and caretaking of a parent without expectation of compensation; 4) whether the non-biological parent acknowledged publicly and held themselves out to be a parent of the child; 5) whether the non-biological parent established a bonded and dependent relationship with the child of a parental nature; and 6) whether the biological parent supported and fostered the bonded and dependent relationship between the child and non-biological parent. Because Billie spent many years living with and developing a parenting relationship with the child, and because the child saw Billie as one of her parents, Billie was the child's "psychological parent". Thus, the trial court reasoned, it was in the child's best interest to continue having parental relationships with both Sharon and Billie.

The Court of Appeal disagreed. The court stubbornly highlighted that Louisiana neither by statute or jurisprudence provides for the award of custody to a non-parent based on their status as a psychological parent. Therefore, custody disputes between former LGBTQ partners who co-parented the biological child of one of the partners cannot be decided by applying the "psychological parent" standard. Instead, such disputes must be decided under La. C.C. art. 133, which states that "if an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment."

By applying La. C.C. art. 133, the court effectively refused to recognize Billie as a co-parent, and instead treated her as a third party. Thus, under the Court of Appeal's standard, if Billie wished to establish custody, it would be insufficient to show that she is the child's "psychological parent" and instead she would have to satisfy a demanding "substantial harm" test imposed by La. C.C. art. 133. Considering that Shannon was undisputedly a good parent herself and given that the child has not seen Billie for over two years (due to lengthy litigation proceedings) was unable to establish that the child would suffer "substantial harm" by continuously being in Sharon's sole custody.

What is especially interesting about the *Cook v. Sullivan* decision is that the court kept recognizing that the "psychological parent" test could be a valid way of resolving the type of custody dispute that this case presented. In fact, the court stated that many Southern states successfully apply this test to resolve similar custody claims. However, since Louisiana does not have an explicit statute or case law that would allow for the application of the "psychological parent" test, the court's hands were apparently tied. It appears that in this case, the Court of Appeal forgot that – like all other appellate courts – the court itself has the power to establish a new and useful precedent. Thus, by decrying that it could not find any precedent that it could sensibly apply to Billie Cook's custody claim, the Court of Appeal ended up creating a precedent that will make it even more difficult for non-biological LGBTQ parents to establish custody over their own children in future litigation.

Billie Cook was represented by Hannah Marler from the Kelly L. Long and the Marler Law Firm.

Sharon Sullivan was represented by Emily S. Marckle from Gatti & Merckle. ■

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

Illinois U.S. District Court Spotted Equinox: Employee's Claim Did Not Work Out

By Corey L. Gibbs

Rick Onstott claimed that Equinox discriminated against him based on his HIV status and terminated his employment because he reported the discrimination. Equinox claimed that it terminated Onstott's employment due to his failure to demonstrate proficiency in the company's Manager-in-Training curriculum. Judge Mary M. Rowland of the U.S. District Court for the North District of Illinois (Eastern Division) sided with Equinox and granted its summary judgment motion. *Onstott v. Equinox Gold Coast, Inc*., 2020 WL 6681366; 2020 U.S. Dist. LEXIS 211084 (N.D. Ill 2020)

Onstott began working for Equinox on March 30, 2017. He was a Manager-in-Training at the Gold Coast club in Chicago. Prima Pongspikul oversaw Onstott's training, and the two had a friendly relationship. While Onstott had no symptoms of HIV while working at Equinox, he disclosed his status to Pongspikul in June because of their relationship. However, her reaction to this personal information made him feel uncomfortable. Then he informed her that he wanted to speak with Human Resources, but he claimed that his conversation with Human Resources was cut short.

In July, Pongspikul requested a meeting with Onstott and the General Manager to discuss Onstott's progress. Pongspikul and the General Manager shared concerns about Onstott's performance, so they issued him a written warning with an action plan. By September 7, Onstott had been unexpectedly absent due to his mother's health. This led Pongspikul and others at Equinox to extend the written warning and action plan until September 20. On September 23, Equinox terminated Onstott's employment. Onstott brought this action against Equinox following his termination.

Onstott alleged that Equinox discriminated against him based on his disability and terminated his employment in retaliation for reporting the discrimination. Equinox denied the allegations and moved for summary judgment. Judge Rowland wrote, "Summary judgment is proper where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" See Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In this instant, the court considered all the evidence in the light most favorable to Onstott. *See Skiba v. Ill. Cent. R.R. Co*., 884 F.3d 708, 717 (7th Cir. 2018).

Judge Rowland began her analysis by discussing discrimination based on disability under the Americans with Disabilities Act of 1990 (ADA). The ADA prohibits discrimination against qualified individuals due to a disability within the workplace. *Rowlands v. United Parcel Serv. - Fort Wayne*, 901 F.3d 792, 798 (7th Cir. 2018). In order to prove a violation, Onstott would need to show that he was disabled, he was otherwise qualified to perform the functions of the job, he suffered an adverse employment action, and the action was caused by his HIV status. *See Kurtzhals v. Cty. Of Dunn*, 969 F.3d 725, 728 (7th Cir. 2020). There was no dispute that Onstott had a disability or that the termination was an adverse action. However, Equinox argued that Onstott was not qualified to perform functions that were essential to his job and it terminated his employment because he failed to become proficient in the training curriculum.

In order to continue with his case, Onstott had to establish that he was meeting Equinox's legitimate expectations. *See Taylor-Novotny v. Health All. Med. Plans, Inc*., 772 F.3d 478, 491 (7th Cir. 2014). Equinox, however, provided evidence that he failed to meet its legitimate expectations. Onstott also failed to show that his disability led to the termination. He tried to argue suspicious timing, but the three and a half months between his disclosure to Pongspikul and the termination was more than the usual few days required for a suspicious timing allegation. *See Kidwell v. Eisenhauer*, 679 F.3d 957, 966 (7th Cir. 2012).

Onstott argued that Equinox gave a phony reason for the adverse action. S*ee Monroe v. Indiana Dep't of Transportation*, 871 F.3d 495, 505 (7th Cir. 2017) (Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] lie, specifically a phony reason for some action). However, it was undisputed that Pongspikul was the only person at Equinox who knew of his HIV status at the time. Onstott also argued that he did not receive the training manual, but he could not explain how that created a genuine issue of material fact that the termination was based on his HIV status. He even argued that he did not know that the written warning and action plan could lead to the termination of his employment, despite the warning and plan expressly including termination as a consequence of unsatisfactory performance.

Then, Judge Rowland turned to the hostile work environment claim. In order to bring this claim, Onstott would need to show that he was subject to unwelcome harassment, the harassment was based on his HIV status, the harassment was severe or pervasive enough to alter the conditions of his employment, and there was a basis for Equinox to be liable. *See Ford v. Marion Cty. Sheriff's Office,* 942 F.3d 839, 856 (7th Cir. 2019). For this claim, Onstott relied on four incidents. First, Pongspikul sent him home one day because he was coughing. Second, she did not let him work after he cut his finger. Third, she assigned him to underperforming trainers. Fourth, she made statements regarding his HIV status. However, none of these incidents

rose to the level of being severe or pervasive enough to alter the conditions of Onstott's employment, in the court's judgment.

Next, Judge Rowland reviewed Onstott's retaliation claim. Onstott would need to show that he was engaged in a protected activity for which he suffered an adverse action by Equinox. *See Pierri v. Medline Indus., Inc*., 970 F.3d 803, 808 (7th Cir. 2020). He claimed that he wanted to inform Human Resources about the harassment. Judge Rowland wrote, "However, the testimony he [relied] on does not show that he complained that [Pongspikul] was discriminating against him based on his HIV status." Furthermore, the judge noted that he did not show that the alleged complaint caused the termination.

The final issue Judge Rowland analyzed was that of Onstott's motion to reopen discovery. Onstott believed his former husband forged his signature on an affidavit. Equinox was in favor of reopening discovery. However, neither party convinced the court that discovery should be reopened. Finally, the court granted Equinox's motion for summary judgment.

Rick Onstott was represented by David Stuart Corwin. Equinox Gold Coast, Inc. was represented by Katrina Y. Morgan, Neil Hunter Dishman, and Sarah J. Gasperini. United States District Judge Mary M. Rowland was appointed to the court by Donald Trump. ■

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

Florida Magistrate Remands Disability Determination for Failing to Consider Plaintiff's Gender Dysphoria and "Gender Identity Disorder" in Determination of Benefits Eligibility

By David Escoto

On November 12, 2020, the U.S. Magistrate Judge Monte C. Richardson of the Middle District of Florida remanded the decision of an Administrative Law Judge (ALJ) for failing to consider a plaintiff's gender dysphoria and gender identity disorder when reviewing the denial of supplemental security income (SSI). *Brynildsen v. Commissioner of the Social Security Administration*, 2020 WL 6618764, 2020 U.S. Dist. LEXIS 211411 (Nov. 12, 2020). The administrative proceeding procedures are unambiguous and indicate that the ALJ had to weigh the totality of the Plaintiff's medical history, regardless of the severity of the impairment. Despite evidence presented by the Plaintiff, the ALJ appears to have edited out from the determination any mention of gender identity disorder and gender dysphoria.

The Plaintiff applied for SSI on July 1, 2017. In the application, Plaintiff alleged a disability onset date of January 10, 2016. The Plaintiff's claim was initially denied. A subsequent hearing was held before an ALJ on November 19, 2018, to reconsider the denial. The ALJ issued an unfavorable decision on November 29, 2018. The ALJ determined that Plaintiff was not disabled from the date the application was filed through the date of the ALJ's decision. Having exhausted his administrative remedies, Plaintiff appealed the ALJ's decision to the district court.

On appeal, the Plaintiff raised the issue that the ALJ erred by failing to address his gender dysphoria and gender identity disorder appropriately, which limited the ALJ's determination of his functional capacity in the workplace. Procedurally, there is a five-step sequential evaluation process for ALJs when evaluating an SSI application. At step two, the ALJ determines an applicant's severe limitations. Then, in subsequent steps, the ALJ determines the residual functioning capacity (RFC) relating to the applicant's workplace limitations.

The Plaintiff alleges that in failing to identify their gender dysphoria and gender identity disorder as a severe impairment, the ALJ subsequently made no findings that there were work-related limitations despite evidence to the contrary. The Plaintiff contended that "this created a ripple effect of errors" because the ALJ's failure affected the rest of the evaluation process, evidenced by the complete lack of mention of gender dysphoria or gender identity disorder.

Further, the Plaintiff argued that the error was not harmless because of the direct relationship between his gender dysphoria and gender identity disorder and his ability to handle workplace stress and interactions with others. The ALJ's omission of his prevalent impairment in the workplace precludes a determination that the ALJ's decision is supported by substantial evidence.

However, the Commissioner of the Social Security Administration responded that the ALJ's findings at step two of the evaluation process were supported by substantial evidence because Plaintiff failed to prove that the alleged impairment, severe or not, caused additional workplace limitations. Additionally, the Commissioner argued that despite being diagnosed with gender identity disorder, a diagnosis alone does not establish the existence of a severe impairment.

The Commissioner also points to the Plaintiff's other mental health complaints that were considered to support the

argument that the ALJ's decision was supported by substantial evidence. The ALJ found that the Plaintiff suffered from severe impairments, including a spinal disorder, a seizure disorder, an anxiety disorder, and post-traumatic stress disorder. The ALJ concluded that based on these impairments, with no mention of gender dysphoria and gender identity disorder, the Plaintiff had the RFC to perform light work with limitations such as avoiding the operation of heavy machinery.

Judge Richardson found that the Plaintiff's argument regarding the ALJ's failure to find the Plaintiff's gender dysphoria and gender identity disorder was a "severe impairment" was unsuccessful. The court notes that within the jurisdiction of the Eleventh Circuit, any finding of a "severe" impairment is enough to satisfy step two of the evaluation process, but beyond step two, the ALJ is required to consider the claimant's entire medical condition, including impairments that the ALJ deemed not to be "severe." Thus, the ALJ's error at step two was harmless because the ALJ found the Plaintiff suffered from severe impairments.

However, under the same standard, the court finds that the ALJ still erred and a remand is required. Even though the ALJ found the Plaintiff's gender identity disorder and gender dysphoria were not severe impairments at step two, the ALJ still needed to consider them in the remaining steps. By never explicitly analyzing the impact of the Plaintiff's gender identity disorder and gender dysphoria, the ALJ failed to correctly consider the Plaintiff's complete medical history when evaluating the complaint.

Even though the Commissioner argues the ALJ correctly considered the Plaintiff's mental health complaints and correctly concluded the Plaintiff failed to establish additional limitations due to gender identity disorder or gender dysphoria, Judge Richardson disagrees, noting that the Plaintiff's record reflects a history of mental health issues and medical treatment relating to gender dysphoria and gender identity disorder. The record indicated suicidal tendencies, substantial anxiety and fear for being transgender in Florida, and a desire to begin the transition process. The record established that the Plaintiff's gender dysphoria may impact his functional abilities, which the ALJ should have considered.

The court concludes that despite not needing to determine every alleged impairment as severe, the ALJ was required to consider all impairments, regardless of their severity, in totality with other impairments when performing the latter steps of the evaluation process. Thus, the court finds it questionable whether the ALJ gave the Plaintiff's gender dysphoria and gender identity due consideration when determining his ability to engage in substantial work activities. Since a court does not engage in fact-finding or re-weigh evidence in reviewing an administrative ruling, the court remanded the case back to the agency for further proceedings.

The Plaintiff is represented by Erik William Berger of Osterhout Berger Disability Law in Jacksonville, Florida. The Commissioner is represented by John F. Rudy, III, of the United States Attorney's Office, Jacksonville, Florida. ■

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

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.

UNITED STATES SUPREME COURT – The Supreme Court's December 4 conference agenda includes *Parents for Privacy v. Barr*, No. 20-62, in which a group of parents of Oregon public school students are challenging their school district's decision to let transgender students use facilities consistent with their gender identity. This is one of numerous suits, all unsuccessful so far, claiming that such policies violated the constitutional and statutory rights of the students and their parents under the 14th Amendment and Title IX of the Education Amendments Act. In this case, the 9th Circuit refused to reverse the district court in a February 2020 ruling, 949 F. 3d 1210. The 9th Circuit is one of five circuit courts of appeal to have reached the same conclusion, and there is no circuit split on the issue. If the Court grants cert in this case, that would provide a strong signal about how the Court has changed with the most recent appointment, since a similar 3rd Circuit ruling was denied review by the Court last Term. Attorney General William Barr is, ironically, the lead respondent, because when the school district adopted its policy, the position of the U.S. Departments of Justice and Education was that Title IX required public schools to allow transgender students access to facilities consistent with their gender identity. The Trump Administration disavowed that position soon after taking office in 2017, and Barr's predecessor, Jeff Sessions, issued a DOJ Memorandum in October 2017 taking the position that Title IX does not prohibit discrimination on the basis of transgender status or gender identity. The Solicitor General took the parallel position as to Title VII in arguing before the Supreme Court in *Bostock v. Clayton County* last term, but the Supreme Court rejected that position in *Bostock*, holding that discrimination because of a person's transgender identity was sex discrimination. In a Memorandum filed in response to the Petition, the Solicitor General pointed out that the federal government is no longer a defendant in the case, as the district court found that the plaintiff's lacked Article III standing to sue the federal defendantas, and the government took no position on whether cert should be granted or on the underlying merits. The remaining Respondents, which oppose the petition, are the Oregon School District in question and an Oregon LGBT rights group that intervened on behalf of defendants below. – *Arthur S. Leonard*

UNITED STATES SUPREME COURT – In one of its first opinions of the October 2020 Term, the Supreme Court issued a *per curiam* ruling in response to a petition from DeRay McKesson, reported in the press to be an out gay activist, who was seeking review of a ruling by the U.S. Court of Appeals for the 5th Circuit that he could be sued by a police officer for injuries the officer suffered when an unidentified person at a demonstration organized by McKesson threw a "piece of concrete or a similar rock-like object" at the police who were engaged in arresting demonstrators. *McKesson v. Doe*, 2020 WL 6385692 (Nov. 2, 2020). The police offer suffered serious injuries. His theory of the case was that by negligently organizing a protest demonstration that would block the street in front of police headquarters without a permit, McKesson bore responsibility for causing the assault on the police officer. McKesson moved to dismiss on 1st Amendment grounds, arguing that his action organizing the protest was protected expressive activity, and the district court dismissed, 272 F. Supp. 3d 818 (M.D. La. 2017). The officer appealed and a divided 5th Circuit panel reversed, finding that the John Doe police officer had stated a viable negligence claim under Louisiana law (in the absence of any Louisiana state appellate precedent upholding such a claim), and rejected the argument that the claim was precluded on 1st Amendment grounds because McKesson's only involvement was organizing the demonstration. 945 F. 3d 818 (2019). McKesson sought *en banc* review, but the 5th Circuit deadlocked 8-8 in response to his motion, with both sides generating opinions. McKesson pursued his 1st Amendment claim at the Supreme Court. The Court decided that rather than confront the constitutional issue presented to it, it would send the case back to the 5th Circuit with directions that the court certify the issue of the validity of Doe's tort claim under Louisiana law to that state's Supreme Court. The Court noted that 43 states authorize federal courts to certify questions of state law to their Supreme Courts, and that it would be preferable that the Louisiana Supreme Court weigh in on the plaintiff's novel theory before a ruling on McKesson's constitutional defense need be considered. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a bisexual Ghanaian man's petition for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The immigration judge (IJ) found the petitioner not credible. The panel agreed and referred to three specific reasons how substantial evidence supported the adverse credibility determination as to Petitioner's claim that his father and members of his community in Ghana beat him because he is bisexual. *Fuseini v. Barr*, 2020 WL 6734238,

2020 U.S. App. LEXIS 36344 (2nd Cir., Nov.17, 2020). First, held the court, the IJ reasonably relied on Petitioner's inconsistent testimony about how he came to possess the copy of his birth certificate that he submitted in support of his application, which bore a March 2016 certification that it was a true copy. Petitioner initially testified that he had this copy when he came to the United States in February 2015. When asked how he could have possessed a document dated March 2016 in February 2015, he changed his story and stated that a friend in Ghana mailed it to him. He claimed to still have the envelope in which it was mailed but did not have it with him. He had no other evidence from Ghana to corroborate his identity, claiming that he lost his passport in Colombia and that he never obtained a national identity card in Ghana, even though one was required. The court found that this internal inconsistency in Petitioner's testimony about the birth certificate constituted substantial support for the adverse credibility determination because whether Petitioner is a citizen of Ghana was material to his asylum claim, the panel emphasized. Second, the IJ also reasonably relied on Petitioner's demeanor, noting that he lacked forthrightness in responding to simple questions and that his testimony was vague and vacillating. The IJ specified that Petitioner vacillated about whether he had friends in the United States, he gave vague accounts of the difficulties of securing a new passport, and he failed to explain how he traveled through several countries without his passport after he had lost it in Colombia. The court found that the record supported these findings. Third, and finally, having questioned Petitioner's credibility, the IJ reasonably determined that Petitioner failed to rehabilitate his credibility with reliable corroborating evidence. Without citing to any legal support, Petitioner argued that he was not required to corroborate his sexual orientation because it "is a complicated personal feeling or characteristic that cannot be proved or disproved by physical evidence or other people's words." Although in certain circumstances the IJ may not deny relief based on an *otherwise credible* applicant's failure to provide corroborating evidence, said the court, here the IJ properly relied on the lack of corroboration. Because, as explained above, Petitioner was *not otherwise credible*. Petitioner had the burden to establish that his membership in a particular social group was or will be at least one central reason for his persecution. In sum, the inconsistencies, demeanor finding, and lack of corroboration described above provided substantial evidence for the IJ's adverse credibility determination. That determination is dispositive of asylum, withholding of removal, and CAT relief here because all three claims are based on the same factual predicate, the panel concluded. – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 2ND CIRCUIT – *Dollinger v. New York State Insurance Fund*, 2020 WL 6495083 (2nd Cir., Nov. 5, 2020), is yet another unfortunate case where a *pro se* litigant appears to have failed to take action quickly enough and lost out due to statute of limitations problems. Robert Dollinger brought sexual orientation discrimination, hostile environment, and retaliation claims against his employer, the New York State Insurance Fund, under Title VII, but the district court issued two orders, one dismissing two of his claims outright, the second granting summary judgment on the third. The 2nd Circuit affirms without much explanation, save for the appeal on the hostile environment claim. "Dollinger principally raises two arguments on appeal in connection with his hostile work environment claim. First, Dollinger argues that the District Court erred in relying on Dollinger's deposition testimony to establish that Dollinger's allegations that he received sexually graphic and offensive images in the workplace were untimely. Second, Dollinger characterizes the discriminatory conduct he suffered as 'ongoing,' which we construe as a challenge to the District Court's holding that the continuing-violation doctrine does not render timely Dollinger's otherwise time-barred allegations. For substantially the reasons stated by the District Court in its September 26, 2019 order, we conclude that Dollinger's allegations relating to the images he received in the workplace were untimely and that the continuing-violation doctrine does not apply to extend the limitations period here." For those unfamiliar with it, the continuing violation doctrine would make a hostile environment claim timely if the plaintiff can show that at least one of the specific incidents complained of fell within the statute of limitation period and was part of an ongoing pattern of related unlawful conduct, in which case the court can also look at prior incidents that would individually be barred as untimely under the statute of limitations. In this case, apparently, Dollinger failed to allege any specific incident recent enough not to be time-barred when he filed his discrimination charge, so evidence drawn from prior incidents are barred and cannot be made the basis of a Title VII claim. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – A 9th Circuit panel denied a lesbian Zimbabwe woman's motion to reopen the Bureau of Immigration Appeals' (BIA) denial of her petition for asylum, withholding of removal, and protection under the Convention Against Torture. *Makawa v. Barr*, 2020 WL 6867197, 2020 U.S. App. LEXIS 36820 (9th Cir., Nov. 18, 2020). Petitioner argued that new and material evidence of changed country conditions warrants reopening, and that equitable tolling applies. The court disagreed, providing several time-

related examples of why it concluded that the BIA did not abuse its discretion and therefore reasonably denied her motion to reopen. Petitioner primarily argued that a change in Zimbabwe's treatment of homosexuals since 1999 justifies reopening, but she failed to show how conditions in Zimbabwe have materially changed since the time of her Immigration Judge (IJ) hearing in 1999. Evidence submitted with Petitioner's motion showed that prior to her 1999 IJ hearing, homosexuals in Zimbabwe experienced similar treatment to what Petitioner claimed they now face. One 1998 news report documented how then-President Robert Mugabe referred to homosexuals as "lower than dogs and pigs." Petitioner also attached a statement to her motion made under penalty of perjury stating that she was afraid to return to Zimbabwe because in 1997 Mugabe's "Vice President . . . was outed as being gay and arrested for sodomy." Another article published in 1998 submitted with her initial asylum application stated that, unless extortion payments were made, neighbors and strangers would report homosexuals to the police since sodomy was illegal. Thus, Petitioner's evidence suggested such rhetoric and treatment has continued, at least through 2016. Although Zimbabwe further criminalized homosexual activity in 2006, according to a 2016 State Department country report, there were no known cases of prosecutions of consensual same-sex sexual activity. And while Petitioner presented evidence that the police have detained persons suspected of being homosexuals since 1999, there was similar evidence dating back to the period before her 1999 hearing. Evidence that simply recounts previous conditions presented at a previous hearing is not sufficient to show a change in country conditions, said the court. Accordingly, Petitioner failed to show that country conditions have materially changed since the original 1999 denial of her application. The court found that the BIA also reasonably determined that Petitioner did not demonstrate the requisite level of diligence to warrant equitable tolling. Equitable tolling attached where a petitioner was prevented from filing because of deception, fraud, or error, so long as the petitioner acted with due diligence in discovering the deception, fraud, or error. Petitioner provided no evidence that deception, fraud, or error prevented her from filing—in fact, she offered no explanation for the decades long delay in moving to reopen other than her repackaged changed country conditions argument. Petitioner was represented by Zulu Ali, Law Office of Zulu Ali, Riverside, CA. The panel issuing this Memorandum decision consisted of Circuit Judges Callahan (George W. Bush), Bumatay (Trump) and Van Dyke (Trump). – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 10TH CIRCUIT – Randy Gamel-Medler, a gay white man with an African-American son moved to Hitchcock, Oklahoma, in 2016, and immediately involved himself in local politics, quickly becoming so controversial that local law enforcement showed up at town council meetings in case there was disorder. Despite his controversies, Gamel-Medler evidently attracted a local following, as he was elected Town Clerk. Then he encountered pushback when he attempted to enforce local laws, the pushback being accompanied at times by homophobic epithets, but he claims his attempts to file charges with the Sheriff's Office or obtain the Sheriff's assistsance were rebuffed, and eventually somebody set fire to his house, which burned down. Fed up with the lack of assistance from local law enforcement, he sued Sheriff Tony Almgauer and other officials, claiming a violation of his Equal Protection rights as well a civil conspiracy against him because of his sexual orientation and the race of his son. *Gamel-Medler v. Almaguer*, 2020 WL 6537391 (10th Cir., Nov. 6, 2020). The defendants moved for summary judgment on qualified immunity grounds, but the district court denied their motion, and they appealed to the 10th Circuit. Senior Circuit Judge Michael Murphey, writing for himself and Judge Nancy Moritz, found that the court lacked jurisdiction over this interlocutory appeal denying summary judgment on qualified immunity grounds, because the appeal was focused on disputes about whether the facts alleged by the complaint stated a claim rather than the more usual focus of qualified immunity arguments about whether a reasonable public official in the position of the defendants had reason to know that discrimination against somebody because of their sexual orientation and the race of their son could state a constitutional equal protection claim. Thus, these judges voted to dismiss the appeal. One member of the panel, Judge Robert Bacharach, disagreed, finding that the court did have jurisdiction of the appeal as to at least some of the issues raised. Rather than dismissing the appeal, Judge Bacharach explained that he would decide the questions over which the court had jurisdiction and uphold the district court's denial of summary judgment to the defendants on qualified immunity grounds. In any event, the case continues before the district court. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 11TH CIRCUIT – An 11th Circuit panel denied a bisexual Macedonian man's petition for withholding of removal, finding that because substantial evidence supported the Bureau of Immigration Affairs (BIA) ruling affirming the immigration judge's (IJ) finding that Petitioner's fear of future persecution based on his bisexuality if he were to return to Macedonia, was not objectively reasonable. *Djadju v. Attorney General*, 2020 WL 6803161, 2020 U.S. App. LEXIS 36515 (11tn Cir., Nov.19, 2020). In

July 2018, the Department of Homeland Security filed removal proceedings against Petitioner on the ground that he had remained in the United States beyond the time permitted on his temporary visa. He filed an application for withholding of removal. Petitioner argued that 1) because he was a bisexual male, he would more likely than not face persecution if required to return to Macedonia; and 2) he was entitled to protection because the Macedonian government failed to protect the LGBTQ community and prosecute perpetrators of violent crimes committed against this community. Petitioner filed both his sworn statement and other documentary support. In the sworn statement, he indicated that although same-sex relationships in Macedonia are not illegal, they remain extremely taboo and that the LGBTQ community is regularly abused, humiliated, and physically attacked. Petitioner recounted a time when he visited an LGBTQ bar in Macedonia in 2012 where "hooligans" attacked patrons, many of whom were injured, which resulted in no police investigation. As further evidence of the high likelihood that he would face future persecution, he explained that he hid his sexual orientation, but, after travelling to the United States, one of his former male partners exposed him. Following this outing, he claimed that his friends told him that he "would be in trouble" if he returned to Macedonia and that he received messages from former coworkers, neighbors, and friends threatening him, He cited these threats as why he was afraid to return to Macedonia and for his decision to remain in the United States after his visa expired. Petitioner also filed a 2017 Department of State report, which found that one of the most significant human rights issues in Macedonia included violence against LGBTQ persons. According to the report and similar to Petitioner's statement, same-sex relationships were legal in Macedonia, and its "constitution and law prohibited discrimination based on sexual orientation and gender identity." But the LGBTQ community "remain[ed] marginalized, and activists supporting [LGBTQ] rights reported incidents of societal prejudice, including hate speech, physical assaults and other violence, failure of police to arrest perpetrators of attacks, and a failure of the government to condemn or combat discrimination against the [LGBTQ] community." The report further noted that there was a lack of will among the major political parties in Macedonia to address these issues. Two IJ denials and BIA remands ensued. Following the second hearing, the IJ stated that he found Petitioner's statement and testimony credible, but that the reported harassment and verbal threats did not rise to the level of persecution. The IJ further held that although Petitioner had a genuine, subjective fear of future persecution if he returned to Macedonia, he failed to meet his burden in demonstrating an objective, well-founded fear of future of persecution. As for the conditions in Macedonia, the IJ stated that although the people of Macedonia had historically been "intensely homophobic," activists and experts had indicated that "the mentality of people was slowly changing" and that the Macedonian government was more openly supportive of the LGBTQ community. The IJ stated that "the record [was] devoid of evidence that North Macedonian government officials would acquiescence to any future abuse" and thus concluded that Petitioner was not eligible for withholding of removal. The BIA echoed the IJ finding that Petitioner failed to establish that any harm he may have suffered, even in the aggregate, was of such severity as to rise to the level of persecution. Petitioner contended that the BIA and immigration judge erred in finding that he did not have an objectively reasonable fear of future persecution based on his bisexuality if required to return to Macedonia and the IJ failed to give reasoned consideration to all this evidence when he denied his application. The panel disagreed, stating that substantial evidence supported the IJ's determination that Petitioner failed to establish an objectively reasonable fear of future persecution. Petitioner argued that his fear was objectively reasonable because he had received actual threats on social media from his peers and that the Macedonian government was unlikely to protect his rights as a bisexual person. But persecution required more than mere harassment or intimidation, the panel stated. And, although the country of Macedonia had a history or marginalizing and discriminating against the LGBTQ community, the government there had recently taken large strides to combat such marginalization. The record showed that Macedonia prohibited, through both its constitution and laws, discrimination based on sexual orientation, provided verbal and financial support to the LGBTQ community, that included a grant for annual pride events, which have occurred in recent years without incident. The record reflected and the IJ concluded, that the LGBTQ community may still face harassment and discrimination in Macedonia, but such harassment was not condoned by the government and did not rise to the level of persecution. Accordingly, the IJ, and the BIA in affirming him, were devoid of error. As to Petitioner's claim that the IJ failed to give reasoned consideration because he did not consider the specific threats Petitioner received or the evidence related to the Macedonian government's inadequate protection of the LGBTQ community, the panel said the argument lacked merit. The immigration judge reviewed and considered all the evidence on record, specifically referencing the personal threats and the current conditions in Macedonia. The IJ decision sufficiently evidenced "that it [had] heard and thought and not merely reacted" to the issues presented. And the court insisted that the IJ reasonably concluded that the threats of harassment and discrimination

CIVIL LITIGATION *notes*

from Petitioner's peers did not amount to the level of persecution required to merit protection under U.S. refugee law, and that the steps taken by the Macedonian government to protect the LGBTQ community in its country strongly indicated that it would not sponsor or condone such persecution committed by private actors. – *Wendy C. Bicovny*

HAWAII – *Pro se* employment discrimination cases are heartbreaking to read, since usually the plaintiff runs afoul of the statute of limitations or the procedural prerequisites for suing, or just plain does not understand how to frame a cause of action. In any event, Jason Scutt, a transgender woman, suffered summary judgment in her Title VII and Americans with Disabilities Act claims in *Scutt Maui Land and Pineapple Company, Inc*., 2020 WL 6749935 (D. Hawaii) on November 12. Scutt, presenting as a man, applied for a posted position of Director of Accounting with Maui Land and had a good job interview, but was informed by the agency through which she applied that Maui decided to contract with an accounting firm instead of hiring somebody for in-house work. Scutt ended up working for the accounting firm that Maui contracted with and was assigned to audit Maui's books. She transitioned on the job and was subsequently discharged. Then she contacted the employment agency again to submit a new application to Maui, but they didn't hire her and she filed this lawsuit. Maui won summary judgment by showing that any cause of action based on their first decision not to hire her was time-barred, that they were not her employer when she was auditing their books as an employee of an accounting firm so had nothing to do with her discharge, and that on her second application they simply did not have a job opening, which is a complete defense to a discriminatory hiring case. Maui never challenged Scutt's claim under the ADA on the ground that being transgender is not considered a disability, because they had an irrefutable defense, as a refusal to hire can't be actionable under either Title VII or the ADA unless the potential employer actually has an opening for which they are hiring. – *Arthur S. Leonard*

MICHIGAN – The Equal Employment Opportunity Commission and R.G. & G.R. Harris Funeral Homes, a Detroit area establishment, reached a settlement agreement on December 1 in the case initiated by Aimee Stephens, who filed a discrimination charge with the EEOC when she was fired after telling her employer that she was transitioning. EEOC sued on her behalf, winning in the 6th Circuit and, ultimately, the Supreme Court, as one of the consolidated cases that made up *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731. The settlement agreement is worth over $250,000. Stephens attended the oral argument in the Supreme Court in October 2019 but died before the decision was announced in June 2020. Her estate will receive $130,000 under the settlement agreement for backpay and compensatory damages. The estate will also receive attorneys' fees in the amount of $120,000. (Although EEOC initiated the lawsuit, Stephens intervened and was a co-Respondent in the Supreme Court, represented by the ACLU.) $3705.00 will be distributed among female employees of the Funeral Homes as clothing allowance, because one of the goals of EEOC in this litigation was to compel the Funeral Home to cease discriminating against female employees with respect to clothing allowances. One of the holdings of *Bostock* was that discriminating against an employee because of their transgender status violates the ban on discrimination because of sex under Title VII of the Civil Rights Act. Because of the way the Court's opinion analyzes the interpretive issue, the precedent has potentially universal impact on all federal laws and policies banning discrimination because of sex. *BloombergLaw*, December 1. – *Arthur S. Leonard*

MINNESOTA – The Court of Appeals of Minnesota ruled in *Matter of E.D.M. v. S.J.M. & N.N.N.*, 2020 WL 6553653 (Nov. 9, 2020), that the wife of a woman who gave birth to a child is entitled to the spousal parental presumption, using a gender-neutral interpretation of Minnesota's parentage statute. The child was not, however, conceived during the marriage through donor insemination. Rather, plaintiff E.D.M., a man, claims that the child was conceived when he had sex with S.J.M., to whom he wasn't married. From the dates recited in the opinion, S.J.M. was pregnant when she married N.N.N., and they raised the child together until their marriage was dissolved some years later. In the stipulated dissolution judgment, the court awarded joint legal and physical custody to the two women and ordered N.N.N. to pay child support to S.J.M., based on the spousal presumption. However, E.D.M. is seeking as alleged biological father to be declared a parent of the child, and requests genetic testing to establish his biological parental status. The trial court dismissed E.D.M.'s petition, finding that the judgment dissolving the marriage of S.J.M. and N.N.N. required dismissal because the child has two legal parents as recognized in that judgment. But hold on, wrote Judge Louise Bjorkman for the Court of Appeals. If E.D.M. can prove the necessary elements under Minnesota law, he can seek to be declared the legal father of the child. While rejecting E.D.M.'s argument that the parentage statute may not be interpreted to apply the spousal presumption to N.N.N., "this presumption is not conclusive and, like the dissolution judgment, does not prevent E.D.M. from pursuing an action to establish his parentage. See Minn. Stat. § 257.55, subd. 2 (providing that parentage presumptions can be

rebutted); *In re Welfare of C.M.G.*, 516 N.W.2d 555, 558 (Minn. App. 1994) (stating that parentage presumptions are 'not conclusive'). To the extent the district court concluded otherwise, it erred. On remand, the district court should determine whether E.D.M. is also entitled to a parentage presumption, whether any presumption in favor of E.D.M. conflicts with N.N.N.'s parentage presumption, and, if so, which presumption prevails. See Minn. Stat. § 257.55, subd. 2 (requiring court to assess competing presumptions based on considerations of 'policy and logic'); *In re Welfare of C. F. N.*, 923 N.W.2d 325, 332 (Minn. App. 2018) (explaining that resolving conflicting presumptions requires examination of 'the particular facts of the case,' including the child's best interests), review denied (Minn. Mar. 19, 2019)." The court also criticized the trial judge for relying on the fact that E.D.M. was not married to S.J.M. when the child was conceived as a reason to dismiss his case. That was deemed irrelevant to the rights of a biological father to seek a declaration of his parentage. Birth mother S.J.M., Minneapolis, Minnesota, is listed by the court as *pro se* respondent. Amy J. Rotering and Susan J. Mundahl, of Mundahl Law, PLLC, Maple Grove, Minnesota, are representing N.N.N., whose parental rights are threatened by E.D.M.'s lawsuit. – *Arthur S. Leonard*

NEW JERSEY – On November 12, 2020, U.S. Magistrate Judge Edward S. Kiel denied U.S. Tech Solutions' motion to dismiss a gender identity discrimination claim on grounds of improper venue. Judge Kiel ordered in lieu of dismissal that the case be transferred to the U. S. District Court in South Carolina. *Binks v. US Tech Solutions, Inc.*, 2020 WL 6701470 (D. N.J.). On March 17, Hannah Binks, a transgender woman, filed a complaint against Tech Solutions asserting employment discrimination claims under Title VII and the New Jersey Law Against Discrimination (LAD). The complaint alleges that Tech Solutions discriminated against Binks by terminating her employment after Tech Solutions' customer, Boeing Aircraft, no longer wanted Binks on site because she is transgender. Tech Solutions is incorporated in New Jersey but provides its customers with temporary workers under contingent employment agreements in many other states. Tech Solutions hired Binks in August 2019 and assigned her to report to work at Boeing in Charleston, South Carolina on August 12. When Binks arrived, Boeing's manager told Binks that he was expecting a woman. On or after August 20, Binks was called into an office and told to leave. Binks' manager said he "did not want [your] kind in Charleston." Binks was then escorted out in front of co-workers and peers. When Binks contacted Tech Solutions, Binks' employment was immediately terminated. Binks filed a grievance with the EEOC, which issued a right-to-sue letter. She sued Tech Solution in New Jersey, where it is headquartered, but Tech Solutions sought dismissal on venue grounds or, alternatively, a transfer to the District of South Carolina. Tech Solutions contended venue in New Jersey was improper because South Carolina was where 1) the alleged unlawful employment practices occurred; 2) Binks' relevant employment records were maintained and administered; 3) Binks would have continued working but for the termination. Judge Kiel agreed that New Jersey was an improper venue. Judge Kiel first enumerated that Title VII actions should be venued: (1) "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed;" (2) "in the judicial district in which the employment records relevant to such practice are maintained and administered;" or (3) "in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice," discussing each in turn. He found that Binks failed to establish her alleged unlawful employment practice occurred in New Jersey. Judge Kiel pointed out that Tech Solutions presented two sworn declarations that clearly established both the decision to terminate Binks was made by Boeing and Tech Solutions in South Carolina, and Binks worked for Tech Solutions exclusively in South Carolina. Since Binks, in opposition, failed to refute the sworn statements set forth in those declarations, Judge Kiel said, "I cannot conclude that Binks sustained an unlawful employment practice in New Jersey, as her complaint alleged." In addition, Binks' own pleading identified instances wherein Binks was subjected to "embarrassing" and "humiliating" discriminatory remarks that occurred solely at Boeing Charleston. Accordingly, "[b]ecause there was no evidence that the wrongful employment practice was committed in New Jersey, [Binks] failed to establish venue in New Jersey under the first Title VII venue option," Judge Kiel concluded. As to the second venue option, further sworn declarations stated the employment records relevant to Binks' claims are administered and maintained in South Carolina. Once again, Judge Kiel stated, "Binks' suppositions as to the presumed whereabouts of the relevant records, without more, cannot overcome sworn testimony that the electronic systems for those records are located in South Carolina." As to the third venue option, Judge Kiel found that Binks "would have [principally] worked in [South Carolina] but for the unlawful employment practice alleged." Here, two sworn declarations pointed out that Binks' temporary assignment "would have continued at [Boeing Charleston] . . . if [Binks] was not terminated due to [Binks'] poor attendance." Accordingly, Binks would have continued working at Boeing Charleston in South Carolina but for Binks' termination. Last, Judge Kiel applied Third Circuit guidance on where

CIVIL LITIGATION *notes*

the original venue was improper and either transfer or dismissal of the case was deemed necessary. This authority dictated that a court transferring venue must simply determine a venue in which the action originally could have been brought that served the "interest of justice." Judge Kiel found "the interests of justice warranted transfer of this matter." In this regard, in lieu of dismissal, the District of South Carolina qualified as a venue in which the action originally could have been brought for the same reasons explained under the Title VII venue options analysis, Judge Kiel decided. – *Wendy C. Bicovny*

NEW YORK – Linda Dominguez, a transgender woman who was arrested while cutting through a NYC park after closing hours and charged both with trespassing and "false personation," has settled her lawsuit against the NY City Policy Department, the City, and officers who arrested her. The "false personation" charge refers to the fact that Dominguez gave the officers two names – her legal name, which had changed as part of her transition, and her birth name. An article reporting about the settlement in *Gay City News* (November 10), did not mention why she gave two names, but perhaps her identification still carried her birth name. In any event, she alleged that the police who arrested her subjected her to transphobic harassment. The City settled the case for $30,000 and an agreement to recirculate an earlier advisory on how to treat transgender people, as well as a commitment to train policy officers on the subject. *Dominguez v. City of New York* (Supreme Court, N.Y. County). – *Arthur S. Leonard*

NEW YORK – In *Saba v. Cuomo*, Case 1:20-cv-05859 (S.D.N.Y., filed 7/28/20), Lambda Legal filed suit on behalf of Sander Saba, who identifies as non-binary, contesting the refusal of the New York Division of Motor Vehicles to issue a driver's license with an X designation instead of M or F. In November, the Division announced that they will alter their software to be able to accommodate a non-binary designation on driver's licenses, but it will take some time to do so. In the meantime, they are going to try to accommodate Saba with a non-binary license on an individual basis, according to news reports. The complaint asserted claims under the 14th and 1st Amendments of the U.S. Constitution (equal protection, due process, freedom of speech) and the New York State Human Rights Law. – *Arthur S. Leonard*

NORTH CAROLINA – Under Title VII of the Civil Rights Act of 1964, an employee who suffers retaliation for engaging in activity protected under the state, such as opposing discrimination prohibited by the statute, has a cause of action for retaliation. In the past, employees who suffered retaliation for opposing sexual orientation discrimination in their workplace did not enjoy protection from retaliation for their opposition. After the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that is no longer the case, held U.S. District Judge Louise W. Flanagan in *McLucas v. Home Depot U.S.A., Inc.*, 2020 WL 6326097 (E.D. N.C., Oct. 28, 2020). After Juanita McLucas, an African-American woman, was discharged, she filed suit under Title VII, also asserting supplementary state law claims. Among her other allegations was the claim that she suffered retaliatory action after she complained that the store manager was harassing another employee because of their sexual orientation. As part of its motion to dismiss, the employer argued that this retaliation claim was not actionable, because Title VII did not forbid harassment of an employee because of their sexual orientation. Although some federal courts had gotten to the point of finding such harassment actionable when it was based on the failure of the victim to comport with sexual stereotypes, harassment purely based on sexual orientation was not recognized outside of the 2nd and 7th Circuits at the time Home Depot filed its motion to dismiss in this case. However, while the motion was pending, the Supreme Court announced its *Bostock* decision. Judge Flanagan wrote: "Turning to the first element, plaintiff engaged in protected activity when she reported discrimination and harassment on the basis of sexual orientation to the human resources department. Defendant argues that Title VII does not afford a cause of action for discrimination based upon sexual orientation, citing *Wrightson v. Pizza Hut of Am.*, Inc., 99 F.3d 138, 143 (4th Cir. 1996), in support. However, following briefing on the instant motion, the United States Supreme Court held that Title VII prohibits discrimination because of sexual orientation. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020). As such, plaintiff's report to the human resources department constitutes protected activity." McLucas is represented by Robert Lewis, Jr., The Lewis Law Firm, P.A., Raleigh, NC. Judge Flanagan was appointed by President George W. Bush. – *Arthur S. Leonard*

PENNSYLVANIA – In *Doe v. DeJoy*, 2020 U.S. Dist. LEXIS 206073 (E.D. Pa., Nov. 4, 2020), a discharged postal worker who was representing himself *pro se* until he finally obtained trial counsel, had difficulties complying with the various short time limits imposed by regulation and statutes for postal workers claiming to have been victims of unlawful discrimination. The "John Doe" plaintiff claims that his sexual orientation and HIV-status were reasons for his discharge. He filed a grievance with his union but did not

contact an EEO counselor at the agency until after the grievance was denied, believing that his time spent in the union grievance procedure would not be counted against him and he could only pursue a Title VII claim after the conclusion of the grievance process. His belief was incorrect wrote the court, finding that deadlines prerequisite to filing suit were not tolled during the grievance procedure. Doe claims to have been unaware that his time to contact a counselor, a prerequisite to later filing suit under Title VII, was not tolled during the union grievance proceeding, and actually started to run from the time of the notice of his discharge, not its effective date. He also claims that he was not aware that his sexual orientation or disability were factors in the discharge before he received a communication from a fellow worker with pertinent facts of which he had been unaware (but the court doubted the credibility of this contention). As a practical matter, Doe's lawsuit claiming discrimination on account of sexual orientation and disability, as well as a hostile environment claim, would be untimely and his suit would be dismissed unless the court was persuaded there was a basis for equitably tolling the time deadline for exhaustion of administrative remedies. In this case, where the plaintiff claimed ignorance of the deadline, and inadequate communication by the agency, the agency countered that the rules and time limits were posted in the workplace. Out of an excess of caution, District Judge Joseph F. Leeson, Jr., decided to hold off on dismissing the case, to allow for limited discovery on the issue whether Doe had reason to know the 45- day deadline at the relevant time. – *Arthur S. Leonard*

PENNSYLVANIA – The Commonwealth Court, an intermediate appellate court, reversed a ruling by the Court of Common Pleas, thus denying certain damages to a teacher retired from the Gateway School District who had contested the District's refusal to grant health care benefits offered to married couples as of his retirement due to the sex of his spouse. *Seech v. Gateway School District*, 2020 Pa. Commw. Unpub. LEXIS 568 (Pa. Commonwealth Ct., Nov. 24, 2020). Richard Seech sought to pursue his claim in two forums – a union grievance through arbitration and a discrimination claim in the Common Pleas court. When he filed suit after having initiated his union grievance, Gateway moved to dismiss the lawsuit on election of remedies grounds, but the trial judge refused to dismiss it. Seech won his arbitration, getting an order that his spouse be extended the benefits and made whole, but the arbitrator denied his request for other damages. Seech then pushed forward on his lawsuit, as Gateway appealed the arbitration award. Notably, Gateway did extend health coverage to Seech's spouse while its appeal of the arbitration award was pending. The trial judge awarded additional damages to Seech, as available under Title VII, rejecting Gateway's argument that Seech was limited to the remedy awarded by the arbitrator. The Commonwealth Court subsequently rejected Gateway's appeal of the trial court's affirmance of the arbitration award, without issuing a written opinion. *Gateway School District v. Gateway Education Association/PSEA/NEA*, 184 A.3d 209, 2018 Pa. Commw. Unpub. LEXIS 119 (Pa. Cmwlth., filed 2018) (Gateway I). In this new ruling on November 24, the Commonwealth Court finds that although Seech was not required to submit the dispute to arbitration, he had voluntarily done so, in a forum where the arbitrator had authority to consider claims under the law as well as the collective bargaining agreement, and the arbitrator had specifically done so. By its terms, the collective bargaining agreement set up an election of remedies, making clear that the issues decided in arbitration could not be relitigated in court. Thus, Seech loses the additional damages awarded by the Common Pleas court. – *Arthur S. Leonard*

TEXAS – In *Umphress v. Hall*, 2020 U.S. Dist. LEXIS 21164 (Nov. 12, 2020), Judge Mark T. Pittman of the U.S. District Court for the Northern District of Texas granted the Commission on Judicial Conduct's motion to dismiss for lack of standing a complaint by County Clerk Judge Brian Keith Umphress, but denied the Commission's motion to abstain from ruling on the motion as moot. Since the case is largely a history lesson in American Jurisprudence, only facts directly related to the court's decision are discussed. Judge Umphress contended that his plans to run for reelection in 2022 on the platform that the Supreme Court case of *Obergefell* (holding that marriage is a fundamental right that cannot be denied to same-sex couples under the Fourteenth Amendment) was wrongly decided and his intent to continue officiating traditional but not same-sex weddings exposed him to discipline from the Commission. He further asserted that he engaged in numerous extrajudicial activities, namely, being a member and supporter of a church that adhered to longstanding Christian teaching that marriage exists only between one man and one woman, and that homosexual conduct of any sort is immoral and contrary to Holy Scripture. Thus, Judge Umphress sought declaratory and equitable relief against the Commission's possible future enforcement of Judicial Canon 4A(1) of the Texas Code of Judicial Conduct, claiming that the Commission's actions that were still, at the time of the present litigation, pending for a different judge located in a different county chilled his First Amendment rights. Judge Pittman wrote at the outset that Judge Umphress lacked standing and that his claims were not ripe. Alternatively, even

if the court had jurisdiction over this action, it would further illustrate why it would abstain. Here, Judge Umphress's complaint mentions neither a currently nor imminently pending judicial disciplinary proceeding or investigation against him. Instead, his alleged injury was described as a chilling effect on his First Amendment rights stemming from the Commission's decision to issue a Public Warning to a different judge in a different county. Judge Umphress feared that he would risk disciplinary action if he continued to refuse to officiate at same-sex marriage ceremonies or when he announced his opposition to same-sex marriage as he seeks reelection in 2022. However, the Commission asserted not only that there were no plans to investigate or discipline Judge Umphress but that they would neither investigate nor discipline him if he acted in the very way that he claimed to be chilled against. A mere bare assertion of subjectively chilled activity to take place over a year and a half in the future fell outside the realm of imminent injury and remained well within that of the speculative, the court opined. Thus, given that Judge Umphress's alleged injury was far from imminent and that the Commission expressly disclaimed any intention of investigating or disciplining him for engaging in his desired activity, the court found that Judge Umphress lacked standing to assert his claims. On the same facts, consideration of this matter was also premature because the parties would not undergo any meaningful hardship if the court withheld consideration, and because the future events Judge Umphress feared may very well never occur. Accordingly, the court found that Judge Umphress's claims were also unripe. Alternatively, assuming arguendo that Judge Umphress had standing and that his claims were ripe, the court said it would be compelled to abstain. Judge Umphress was seeking reelection in 2022, and he candidly stated that he "intended to campaign for office as an opponent of same-sex marriage and the living constitution mindset that produced *Obergefell*." In the court's view, this reinforced that the focus of this lawsuit was an unsettled area of Texas law that may become a central issue in a Texas state election. Accordingly, Judge Umphress's claims against the Commission were dismissed with prejudice. Further, based on the court's ruling on the motion to dismiss, the Commission's motion to abstain was denied as moot. Judge Pittman was appointed to the court by President Obama in 2014. – *Wendy C. Bicovny*

TEXAS – U.S. Magistrate Judge Rebecca Rutherford has filed a Report and Recommendation to the U.S. District Court in *Henry v. Barr*, 2020 WL 6877703 (N.D. Tex., Oct. 30, 2020), in which an HIV-positive gay man from Jamaica was seeking either a writ of habeas corpus or a preliminary injunction to get released from ICE detention. Donovan Henry twice entered the United States without proper documentation and was eventually convicted, first of attempted drug trafficking and money laundering in a state court, then of illegal reentry of a removed alien in federal court. He was in ICE detention beginning in March 2019. Henry applied for withholding of removal and protection under the Convention Against Torture because he is HIV-positive gay and HIV-positive gays get nasty treatment in Jamaica, but an immigration judge ruled against him in August 2019, and he did not appeal. However, he remained in detention. Judge Rutherford explains why his removal to Jamaica was taking so long: "First, he suffers from serious medical conditions, including diabetes, high blood pressure, high cholesterol, and he is HIV-positive. These medical conditions require continuity of care and coordination with the Jamaican Ministry of Health. Additionally, due to the COVID-19 pandemic, Jamaica suspended removals in March 2020 and thereafter reduced the number of removals to only 40 per month." In April, Henry instituted this action with several other detainees, but only individuals can petition for a writ of habeas, so the court severed his case from the other plaintiffs. He claimed his continued detention was unconstitutional because it exceeded the presumed reasonable time under the statute (6 months) and it was unlikely Jamaica would issue entry papers to an HIV-positive homosexual. But, surprise, surprise, Jamaica issued papers for him to be removed there at the end of October. He was moved to a different detention center in anticipation of his removal, but there he contracted COVID-19 and he is receiving oxygen because of the breathing problems he is experiencing. Indeed, he was too sick to leave on the scheduled October 29 flight. (There is one fight per month for removals, as limited by the Jamaican government as a result of the pandemic.) So, he presses his case, but the court is unsympathetic. The six-month detention limit is not a firm thing, especially when somebody was convicted of serious felonies, and since the Jamaican government was willing to issue him entry documents, the court speculated he would make it onto a later flight. The Magistrate Judge recommended against granting his petition or his requested injunction. – *Arthur S. Leonard*

VIRGINIA – Saved by the *Bostock*! Dr. Thomas Guirkin, Jr., was employed as a doctor by CMH Physician Services, LLC, which sounds from the court's description like a physician temp firm that provides doctors on a contract basis to various medical facilities. He applied for and was given a signed contract, executed on November 26, 2018, to become Vice President of Medical Affairs and Chief Medical Officer, effective March 10, 2019. Guirkin was not "out" as a gay man during this process, but evidently getting

his contract emboldened him to start introducing his husband to co-workers. In his initial conversations with a new nurse practitioner, he came out to her and invited her to bring her spouse to a dinner with him and his husband. (Later, when he learned of his discharge, he was told that the NP had complained to management about his invitation.) His new contract went into effect on March 10, 2019, but by the end of April he had been fired "for cause," although the letters informing him of this decision were vague about the reason why. He filed Title VII charges and ultimately a lawsuit in the U.S. District Court for the Eastern District of Virginia, alleging a violation of Title VII and breach of his employment contract. *Guirkin v. CMH Physician Services, LLC*, 2020 U.S. Dist. LEXIS 217998, 2020 WL 6829769 (E.D. Va., Nov. 20, 2020). The case was assigned to District Judge M. Hannah Lauck (an Obama appointee) and was promptly met with CMH's motion to dismiss on the argument that Title VII did not apply to a sexual orientation discrimination claim and that, if the court dismissed the Title VII claim, there was no federal question left in the case so it should also dismiss the state law claim. While the motion was pending, the U.S. Supreme Court announced its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that sexual orientation claims are actionable under Title VII. The parties agreed to present this information to the court, and CMH's motion to dismiss was refocused on the question whether Guirkin's factual allegations were sufficient to state a wrongful discharge claim under Title VII. Judge Lauck found the factual allegations were sufficient to raise an inference of discriminatory intent and denied the motion to dismiss as to both claims. Dr. Guirkin is represented by Brittany Michelle Haddox, Linda Leigh Rhoads Strelka, Monica L Mroz, Norvell Winston West, IV, and Thomas Eugene Strelka, of Strelka Law Office PC, Roanoke, VA. – *Arthur S. Leonard*

WASHINGTON – During November, District Judge Marsha J. Pechman issued two orders in the pending case of *Karnoski v. Trump*, a challenge to the Trump Administration's transgender military policy. In the first, *Karnoski v. Trump*, 2020 WL 6561525 (W.D. Wash., Nov. 9, 2020), Judge Pechman was responding to the defendants' attempt to forestall depositions of four significant active or retired officials involved in the formulation of the policy, including retired Secretary of Defense James Mattis. She had previously refused to quash the plaintiffs' subpoenas seeking their testimony, and now the government was asking that the matter of the depositions be stayed (as well as all other discovery in the case) pending a ruling by the 9th Circuit on petitions for writs of mandamus that the government was filing in an attempt to get the Court of Appeals to cut off or restrict the ongoing discovery. The government is perturbed that Judge Pechman, in a series of rulings, has largely rejected its argument that many of the documents demanded by the plaintiffs are not protected by privilege in the context of this case. Judge Pechman granted the motion in part, commenting: "The Court finds that Defendants are unlikely to succeed on the merits of their Petition but concludes that the resolution of the Parties' current discovery disputes may render some of the contested depositions moot, or conversely, provide additional support for Plaintiffs' need to depose the witnesses. The Court therefore stays the deposition order but denies Defendant's motion to stay all remaining discovery." In the second order, *Karnoski v. Trump*, 2020 U.S. Dist. LEXIS 221500 (W.D. Wash., Nov. 24, 2020), Judge Pechman reported on her *in camera* review of various documents submitted pursuant to her prior discovery orders, indicating that she had sorted them into three groups: those that don't fall within the deliberative process privilege and must be turned over to plaintiffs' counsel, those that fall within the time period presumptively covered by the privilege and appear not to be discoverable when the court weighs the factors set out in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), and finally those falling within the privilege time period as to which the court can't make a determination under the *Warner* factors without more input from the government. She ordered the government to respond with its reasons why it contends the documents in this third group are not discoverable by December 9. By the time Judge Pechman issued the first of these orders, it had become clear that President Trump had not been re-elected, although he had refused to concede the victory to former Vice-President Joseph R. Biden, Jr. (That was still the case as of the end of November.) With the anticipated change in administration on January 20, it seems likely that some of the plaintiffs' claims in this and the other transgender cases may be mooted if, as anticipated, the Biden Administration rescinds the policy and restores something like the policy adopted by then-Secretary Ashton Carter in June 2016 generally allowing transgender people to enlist and serve in the military. However, there still may be questions to resolved, especially if plaintiffs seek relief other than a declaration that the policy is unconstitutional and an injunction against its operation. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard and William J. Rold

FLORIDA – The 11th Circuit ruled on November 13 that the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), is not a "new rule of constitutional law" that can be relied upon by a criminal convict to reopen the sentence in his conviction. *In re Handlon*, 3030 U.S. App. LEXIS 35846 (11th Cir., Nov. 13, 2020). Handlon

was convicted in 2014 on several federal criminal counts related to child pornography and the convictions were confirmed on direct appeal to the 11th Circuit. This is his second *pro se* habeas petition seeking that his sentence be vacated or set aside, but the first to raise this issue. He argues that as a result of *Bostock*, "no law/statute can be used to deny any person their protected civil rights based on their sexual orientation." He was asking the 11th Circuit panel to direct the district court in the Middle District of Florida to consider his petition on the merits. The panel pointed out that the grounds on which it could direct such an action were but two: newly discovered evidence that would establish his innocence, or a new rule of constitutional law that the Supreme Court had made retroactive. As *Bostock* was an interpretation of a civil statute anti-discrimination statute, not of a constitutional provision, the panel opined that Handlon could not rely on it for this purpose. The opinion seems technically correct, although it could be argued that the Supreme Court's mode of analysis in determining that discrimination because of sexual orientation is a form of discrimination because of sex would also be applicable in the context of sex discrimination violating the Equal Protection Clause, perhaps giving Handlon an equal protection challenge to his prosecution if he could show, for example, the prosecutors selected people for prosecution based on their sexual orientation. Be that as it may, Handlon had the luck of drawing a panel made up entirely of Trump appointees: Judges Branch, Grant and Lagoa. Many will encounter that fate, since Trump has appointed six of the 11th Circuit's twelve actively serving judges. – *Arthur S. Leonard*

FLORIDA – In *State v. Rush*, 2020 Fla. App. LEXIS 16607, 2020 WL 6815855 (Fla. 1st Dist. Ct. App., Nov. 20, 2020), the court of appeals corrected the egregious action of Barbara K. Hobbs, a Leon County Circuit Court judge, in sharply reducing the sentence of Ventrel Rush for his vicious assault of a gay man. Writing for the appeals panel, Judge Scott Makar succinctly described the facts: "Late one evening in September 2018, Rush and his roommate—after communicating with a person who they believed was a female interested in smoking marijuana and engaging in sex—traveled to and parked outside the victim's apartment. The victim saw both men and communicated to them electronically that he had misrepresented that he was a woman on Tinder®, but that he'd still be willing to engage in sexual activity. Rush and his roommate, now knowing that the victim was a homosexual male, rather than a woman, nonetheless went to the victim's door, knocked, and sought entry. The victim opened the door, attempted to stop Rush and his roommate from entering, but failed. Chaos ensued. Rush and his roommate immediately shot the victim repeatedly with BB guns (the victim initially believed they were real guns). The victim, who began to fight back, was then pistol-whipped, hit, and kicked, resulting in a gashed forehead and a swollen eye. The victim's roommates heard the commotion, came to the victim's assistance, and Rush and his roommate fled, bringing an end to the brutality." Rush was convicted of burglary, battery and assault and under the sentencing guidelines the "recommended sentence was a minimum of 48.15 months to a maximum of life in prison." But Judge Hobbs granted Rush's motion for a downward departure, ultimately coming to 11 months and 29 days in county jail (with 28 days' time served), followed by two years of community control and three years of probation, based on her view that the victim was the initiator of "the incident." "The State argues that the 'trial court's idea that the victim was the provoker of this homophobic attack is reprehensible and should not be tolerated.' We agree," wrote Judge Makar, quoting from Judge Hobbs' comments in court from the transcript of trial. Judge Makar succinctly explains the appeals court's reasoning: "The record reflects no basis for the victim to be considered the 'willing . . . aggressor or provoker' of his own brutal beating. The victim was entirely peaceful and engaged in no aggressive or willful acts whatsoever; the attack on him arose solely from Rush's unilateral decision to confront the victim, forcibly enter his home, and then shoot and beat him. Nor is there any evidence that the victim was the 'initiator' of the beating. While it is true that the victim was an amenable participant in the on-line discussions about a sexual hookup, and might be considered a co-initiator of the liaison, the chain of causation was broken when Rush—knowing that the victim was male, not female—nonetheless chose to exit his vehicle, walk to the victim's front door to confront him, and to thereafter forcibly enter the victim's home and engage in a vicious physical attack causing serious injuries. The motivating factor of the 'incident'—what caused the burglary and battery/assault to occur—was solely Rush's anger that he had been misled into believing the victim was a female and not a male. The victim was initially misleading as to his gender, but disclosed the truth, leaving Rush and his roommate with a decision to make: peaceably leave despite their anger or act upon their anger by confronting and committing violent acts upon the victim. The 'incident' that resulted was due solely to their wrong decision. To put this in perspective, if a potential buyer of a used car learned just before arrival at the seller's home that the seller misleadingly advertised the car on eBay® as a Maserati when it was a Mazda, the potential buyer—though justifiably angry—would not be justified in breaking into the seller's home to dispense a beating or receiving leniency in punishment." The

trial judge's decision was reversed and remanded "for sentencing within the guidelines." – *Arthur S. Leonard*

DELAWARE – Hermione Kelly Ivy Winter is a transgender prisoner in Delaware, and her cases in state and federal court about her civil rights have appeared several times in *Law Notes*. *Winter v. May,* 2020 WL 6743063, 2020 U.S. Dist. LEXIS 214202 (D. Del., Nov. 17, 2020), however, concerns her 2014 conviction for rape and multiple sexual assaults on a minor. Chief Judge Leonard P. Stark denied Winter's petition for *habeas corpus*. Winter's chief argument was that her Delaware trial counsel was ineffective in failing to recognize that Winter was mentally ill and not competent to enter a plea. In addition to her own affidavits, Winter submitted a report from a transgender support group that works with transgender prisoners in Delaware. There was also an affidavit from Winter's trial counsel – but it is unclear at whose behest. Winter had collaterally attacked her conviction in Delaware state court, and the Delaware Supreme Court affirmed denial of relief. Some, but not all, of the claims raised in federal *habeas* were "exhausted." There is extensive and thorough discussion about 28 U.S.C. § 2254(b)(1), and the preservation of federal *habeas* remedies, state exhaustion, deference, waiver, exceptional circumstances, claims of actual innocence, and standards for ineffective assistance. Winter argued that she was heavily medicated at the time of the plea and that her attorney should have known she was incompetent. Putting aside the legal point that the test for ineffective assistance is more demanding than "should have known," it appears from Judge Stark's decision that Winter participated in a tactical decision to forego trial so as to keep from the jury the lurid and shocking details of the crimes. For similar reasons, the defense did not seek a not guilty by reason of insanity verdict. Either approach would have given the details to the prosecution and to the jury – and to the court at sentencing, through a pre-sentence report. Keeping Winter's sentence to an actual term of ten years, to be followed by supervision, while keeping the full picture from being presented to the court was the best outcome for Winter, according to Winter's attorney, who said Winter fully concurred at the time. Winter interrupted the first plea colloquy to object, saying that she could not follow the proceedings. Her attorney attributed this to the effect of Winter's medications "wearing off" in the afternoon. During this time, Winter was on a cocktail of anti-psychotic, anti-schizophrenic, and anti-anxiety medications. At the adjourned plea colloquy, defense counsel stated: "As the court can see and we discussed yesterday, [Petitioner] is being medicated by the Department of Corrections for some mental health disorders, and [s]he is taking Risperdal, Haldol by injection, and Paxil, and [s]he gets doses by the prison at 3:00 a.m. and at 7:00 p.m." The opinion has no further inquiry on the medication, except to note that the collateral proceedings support Winter's desire to go forward with the plea that next morning, which the trial court found satisfactory. [Note: Defense counsel's description of medications is puzzling. This writer is no pharmacy expert, but this seems like a powerful combination. And the twice daily, with one dose at 3:00 a.m., makes no obvious sense. Was Winter in a mental health unit – an infirmary? Haldol is not usually given by injection unless the patient is non-compliant with oral meds – or there is a "prn" (as needed) order for interventional Haldol – which is often criticized in institutional practice. The opinion does not resolve whether Winter was competent only when medicated or if her outburst was lucid the previous day because she was "off" them.] Judge Stark finds it probative that the defense hired a forensic mental health consultant (whose report remained confidential), who interviewed Winter on several occasions, including the plea-taking days. It is unclear if Winter's transition played any role in her offense – or how she identified at that time. The transgender group's submission addressed behavior that began five years later – so Judge Stark found it irrelevant to the petition. He denied Winter a certificate of appealability. – *William J. Rold*

ILLINOIS – In *People v. Escobar*, 2020 IL App (2d) 180597-U; 2020 Ill. App. Unpub. LEXIS 1856 (App. Ct. Ill., 2nd Dist., Nov. 4, 2020), defendant Alfred Escobar was prosecuted for having sex with his teenage nephew (14 or 15 years old at the time) between ten and twenty times during the summer of 2017. He claims the sex was consensual, but the boy was under the age of consent. When Escobar was arrested and charged, his appointed counsel negotiated a plea bargain for him under which several of the counts of the indictment were dismissed, but there was no negotiation concerning the sentence. At the sentencing stage, Escobar's medical records revealed he was taking an HIV-medication, which put a new twist on the case, since he had not used a condom with his nephew and had been the active partner in oral and anal sex. (Evidently, he had not told his counsel that he was HIV positive.) Luckily, the boy has twice tested negative for HIV. At the sentencing hearing, the prosecutor emphasized that Escobar was putting the nephew at risk and requiring him to undergo HIV testing. Escobar stated in his allocution, "I don't ejaculate, all right? I have no testicle. Now, I don't have a — ADS syndrome [sic]. I don't have that. I couldn't." The trial judge, rejecting Escobar's plea for the minimum sentence, sentenced him to 18 years. On appeal, Escobar sought to put in evidence (for the first time) medical information supporting his contention that he was not subjecting his nephew to the risk of contracting

HIV and the judge should not have taken his HIV status into account in sentencing him. The Appellate Court, in an opinion by Justice Kathryn Zenoff, found that the trial judge, Liam C. Brennan, had not erred in sentencing Escobar. "We hold that there was a sufficient basis for the court to conclude that defendant put T.E. in danger by creating a risk of transmitting HIV," she wrote. "The evidence showed that defendant was HIV-positive and that he engaged in anal sex with T.E. without a condom. Unprotected sexual activity of this nature is widely understood as a common method of transmitting HIV. In fact, it is a class 2 felony for a person who knows that he is infected with HIV to intentionally engage in insertive anal intercourse without a condom, even if no transmission of the virus results, unless the person's partner 'knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.' 720 ILCS 5/12-5.01(a)(1), (b), (c), (d), (e) (West 2018). Neither party introduced evidence at defendant's sentencing hearing regarding either the general risks of an HIV-positive person transmitting the virus through unprotected anal sex or defendant's particularized risk of doing so. Based on the evidence that was presented, however, it was reasonable for the court to conclude that defendant's actions created at least some risk of transmitting the virus to T.E. that could have been mitigated by using condoms." The court also pointed out that the prosecutor's argument at the hearing emphasized the psychological harm to the boy of having to undergo HIV testing. Justice Zenoff observed that it was inappropriate for the appellant (or the state, for that matter) to submit new evidence in appealing the sentence, as the time for making a record was during the sentencing hearing. At the same time, the court rejected Escobar's argument that his sentence should be set aside because of "ineffective assistance of counsel," noting that he had not appealed his conviction, only the sentence. – *Arthur S. Leonard*

MICHIGAN – In January 2020, the Court of Appeals of Michigan ruled that a hate crime against a transgender victim was not within the scope of the state's Ethnic Intimidation Statute, which does apply to crimes targeting victims because of their "gender." *People v. Rogers*, 331 Mich. App. 12. On November 4, the Michigan Supreme Court vacated the Court of Appeals' decision and remanded for reconsideration in light of the U.S. Supreme Court's decision in *Bostock v. Clayton County. People v. Rogers*, 950 N.W. 2d 48. Without further explanation in its brief order, the Michigan Supreme Court was clearly responding to the methodology that Justice Neil Gorsuch used in construing Title VII's ban on "discrimination because of sex" as encompassing discrimination against an individual because of their transgender status. By the same reasoning, Michigan's hate crime law would logically extend to selecting a victim because of their transgender status. As we have been contending, *Bostock* creates a "universal precedent" for the argument that any law that uses the words "sex" or "gender" without a limiting statutory definition can be argued to encompass sexual orientation and transgender status. Which means that states that have resisted adding "sexual orientation" and "gender identity" to their hate crime statutes may discover that the addition has been made for them by the U.S. Supreme Court! – *Arthur S. Leonard*

TENNESSEE – In *State v. Gadsden*, 2020 WL 6791251 (Tennessee Ct. Crim. App., Nov. 19, 2020), the court affirmed a conviction of second-degree murder and theft of property valued between $1,000 and $10,000 of Christopher W. Gadsden in the stabbing death of a 24-year-old gay man who liked to dress in drag. The opinion for the Court of Criminal Appeals by Judge Thomas T. Woodall reads like a script for a police procedural in its description of how the crime was solved in the absence of any eyewitnesses. Ultimately the defendant admitted that he had stabbed the victim to death, arguing that he was acting in self-defense in the heat of passion. Cellphone records showed that the two men met at a designated parking lot in order to have sex in the back of a parked delivery truck to which Gadsden had access as a former employee of the company whose truck was parked there. Gadsden testified that after they had sex, he realized his wallet was missing and that the victim insisted he was supposed to be paid. When Gadsden pursued the victim, he claims the victim turned on him brandishing a knife, they struggled, Gadsden gained possession of the knife and stabbed the victim repeatedly, reclaiming his wallet and leaving the scene in the victim's car. The prosecution presented numerous friends and acquaintances of the victim who testified he was a gentle, non-aggressive person who was not known to carry a knife or any other weapon. The defense sought to introduce evidence about the defendant's past scrapes with the law to support the self-defense argument, but the trial judge excluded some of the evidence, ruling it was not probative of whether the victim was the first aggressor in this incident. The trial judge denied a motion to exclude bloody autopsy photos, accepting the prosecution's argument that they were helpful to the jury understanding the expert testimony concerning how the wounds were inflicted on the victim. The trial judge sentenced the defendant to 24 years. The appellate court found that the verdict was supported by the trial record and that the trial judge did not err regarding the contested evidentiary rulings and sentencing. – *Arthur S. Leonard*

PRISONER LITIGATION *notes*

TEXAS – In *Hopkins v. State*, 2020 Tex. App. LEXIS 9195, 2020 WL 6878412, Texas 1st District Court of Appeals (Houston), affirmed the conviction of Steven Hopkins for performing oral sex on J.S., a mentally impaired young man, and upheld an 18-year prison sentence. Hopkins, then 53, took a shine to J.S., then in his early 20s, who was staying with his cousin, a next-door neighbor of Hopkins. The cousin, who had been annoyed in the past by Hopkins coming on to him sexually, and who described Hopkins in testimony as "creepy," testified that he told Hopkins that J.S. was "kind of mentally slow so he's sexually just off limits." This evidently did not deter Hopkins, who invited J.S. into his house when the cousin was away and slowly after giving him an alcoholic drink, induced J.S. to allow him to perform oral sex on J.S. J.S., confused and uncertain, put up no firm objection but once home he was upset and complained to his cousin, who related the complaint to J.S.'s mother, who called the police. Hopkins readily admitted to having sex with J.S. but argued that it was consensual. The court of appeals provides a lengthy description of the trial record, which revolved around the question whether J.S., legally an adult, was capable of consenting to sex. The experts who testified agreed that J.S. had the mental state of a young teenager, and there was sufficient evidence that Hopkins was aware that J.S.'s mental ability was limited in some respects, although J.S. appeared as a physically healthy young adult, could hold a conversation, and clearly had a sense of right and wrong and a certain level of awareness to what was happening. His testimony suggested that he did not know how to resist getting into a sexual situation, was uncertain how to respond, and had limited understanding of what was happening. The court of appeals concluded that a reasonable jury could reach a guilty verdict based on its weighing of the evidence presented. – *Arthur S. Leonard*

WASHINGTON – In *Brealan v. State of Washington*, 2020 WL 6409146 (Wash. Ct. App., Nov. 2, 2020), the Court of Appeals affirmed the conviction of Raven Brealan for malicious harassment – a hate crime – under RCW 9A.36.080(1), and his five-year prison sentence. Brealan was sitting on a bench on the evening of September 17, 2011, obviously having been drinking, when two gay men, Alex McNeill and Michael, passed by, conversing with two "butch" women friends, heading for a dance party. The prosecution suggested that the men were dressed in a way that "could have been perceived to imply their sexual orientation." Evidently Brealan came to that conclusion, shouting at them to "[c]ut that faggot shit out." This was taking place at night in a neighborhood with gay clubs. "McNeill admonished Brealan, saying that he 'should think about where [he is] before [he] say[s] stuff like that,'" according to the opinion for the court by Chief Judge David Mann. This drew Brealan's ire, he rushed at McNeill, but stepped in front of his friend and Brealan punched him twice in the face. Brealan also struck in the head with a "sandwich board." The men called 911 and chased Brealan as he fled the scene, mouthing homophobic epithets. Police apprehended him. In a recorded interview with them he sounds drunk, and the victims also testified at trial that Brealan was obviously intoxicated. During the trial, "Brealan proposed a voluntary intoxication instruction, which read '[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with malice.' The trial court denied this instruction." If the jury concluded Brealan could not have acted from malice, the hate crime elements would not be met, and the penalty for simple assault would be much less. On appeal, the court found that the trial court's denial of the requested charge was not an abuse of discretion, although the Court of Appeals' reasoning differed slightly from that articulated by the trial judge when ruling on the charging request. Wrote Judge Mann: "The trial court's focus on whether Brealan's intoxication made him unable to form a feeling or attitude of hatred was incorrect. The question is not whether the intoxication impaired his ability to feel 'hatred' toward his victim, but whether the intoxication impaired his ability to select his victim because of the victim's apparent membership in the protected class. There is no evidence that it did. In fact, Brealan's own words demonstrate that he deliberately chose to confront and his friends because of their sexual orientation. He wasn't merely yelling out generalized comments about gays and lesbians. He explicitly ordered and his friends to '[c]ut that faggot shit out,' before punching in the face, and then repeatedly yelled homophobic slurs at before striking him in the head with the sandwich board. He directed his slurs at and his friends and did so in a way that indicates he selected the victim because of the victim's apparent membership in the protected class. Thus, while the trial court's analysis was incorrect, its conclusion was correct." – *Arthur S. Leonard*

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.

ARIZONA – This is one of ten *pro se* cases that transgender prisoner Melinda Gabriella Valenzuela has filed in federal court in Arizona, all but one before U.S. District Judge Michael T. Liburdi. In *Valenzuela v. Monson,* 2020 WL 6891414, 2020 U.S. Dist. LEXIS 219999 (D. Ariz., Nov. 24, 2020), Judge

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Liburdi combines three motions for a preliminary injunction into one opinion and denies relief. Judge Liburdi finds that Valenzuela has been transferred to a single cell in a segregated unit at the Florence prison, where she eats and showers alone, and there is twenty-four-hour surveillance. Prior to this move, Valenzuela complained of sexual and other violent assault, spitting, and "daily" harassment. She has numerous "keep separate" orders from other inmates. She objects to her current housing, because it is designed for suicide watch, and she says she has no need of it. Defendants counter that there is no other place to protect her. Judge Liburdi says that she has made no complaints of assault in this housing, so she has not shown she is likely to be irreparably injured – and so she is not entitled to preliminary relief. Housing trans inmates in what amounts to punitive segregation is a common response throughout Corrections in this writer's experience, when the inmates have a history of victimization. It is ripe for test case litigation, with expert testimony. Such claims are not likely to succeed in *pro se* requests for preliminary injunctions.

CALIFORNIA – U.S. District Judge John A. Houston granted HIV-positive federal prisoner Chad Edwin Brackett compassionate release due to COVID-19 in *United States v. Brackett*, 2020 WL 6799655, 2020 U.S. Dist. LEXIS 217093 (S.D. Calif., Nov. 19, 2020). Brackett also has hepatitis-C, which Judge Houston finds relevant in terms of possible liver damage but notes that the CDC equivocates on whether hepatitis-C in general poses a heightened risk for COVID-19. Brackett is called an "older offender," but little can be gleaned about his medical condition because this information is sealed and Judge Houston does not elaborate. This is a case where the Government did not oppose compassionate release, and Brackett had served 95% of his sentence. The balance (several months) will be served at home, with ankle bracelet monitoring, followed by probation. This case is precedent primarily for HIV-positive offenders almost at the end of their sentence where the government is persuaded not to oppose the application. Brackett is represented by Chandra Peterson, Federal Defenders, San Diego.

DELAWARE – Transgender prisoner Hermione Kelly Ivy Winter sues Delaware prison officials on multiple claims regarding her civil rights. This is one of twenty of her related cases listed on the docket. In *Winter v. Richman*, 2020 WL 6940760, 2020 U.S. Dist. LEXIS 222022 (D. Del. Nov. 25, 2020), U.S. District Judge Leonard P, Stark finds that the claims here (pending since 2017) are duplicative of several other cases. He notes that redundancies, as well as exhaustion of available administrative remedies under the Prison Litigation Reform Act [PLRA] and qualified immunity issues, need to be resolved prior to consideration of the "merits." The "merits" include claims of denial of hormone therapy, retaliation for complaints, violation of equal protection, and deliberate indifference to her safety. She sues under the United States and Delaware Constitutions. Judge Stark dismisses the Delaware constitutional claims, finding no implied cause of action to enforce them, citing *Schueller v. Cordrey*, 2017 WL 568344, at *2 (Del. Super. Ct., Feb. 13, 2017). This trial court decision seems a very thin basis for such a holding, and Judge Stark concedes it is only a "prediction." Judge Stark notes that Winter has lost PLRA exhaustion in some of her other cases (which the court "will not ignore") and directs discovery limited to exhaustion here and a motion and response directed to that point. Judge Stark also notes that defendants, who are not medical professionals, seek dismissal on qualified immunity, claiming that they reasonably relied on medical professionals who said hormones were "not indicated." Finding that this raises a preliminary issue as to whether liability under these circumstances is "clearly established" for qualified immunity purposes, Judge Stark orders limited discovery on qualified immunity – citing *Thomas v. Indep. Twp.*, 463 F.3d 285, 289 (3d Cir. 2006). This seems wrong, and the citations of *Thomas* are replete with "red flags" from *WestLaw*. Whether the law is clearly established is a question of law, not fact. It is the application of existing cases to allegations in the complaint to see if defendants' conduct was clearly wrong if the allegations are true. It is the second part of the two-part qualified immunity test: (1) whether constitutional rights were violated under the alleged conduct; and (2) whether the law was clear on giving defendants notice of that. Here, Judge Stark directs discovery on "clearly established." Briefing – sure; but factual discovery goes to the first part of the test: does a complaint that states a claim still present factual issues that remain to be developed to see if the constitutional was violated? In this writer's view, Judge Stark performs the "conflation" of qualified immunity's part one test with summary judgment merits that was generally disapproved in *Thomas*. The case does permit limited discovery on questions whose factual development would establish qualified immunity as a matter of law, however, so Judge Stark directs "the parties . . . to provide a proposal for how the Court should proceed with respect to qualified immunity." This is a small needle to thread, made more difficult by the last thing Judge Stark does. Winter had appointed counsel for two years – Paul J. Lockwood and Stefania A. Rosca, of Wilmington – but they moved to withdraw, citing "irreconcilable differences" with their client. PACER lists their affiliation as Skadden Arps, LLP (Wilmington), but it appears from their papers that they appeared individually, not on behalf of

the firm. In granting the motion, Judge Stark writes, in part, that there will be no prejudice because "no discovery requests or responses are pending, no depositions have been scheduled, no trial date has been set, and no motions remain pending." But he has plainly teed up collateral estoppel, PLRA exhaustion, and qualified immunity – and discovery and/or motions on all three. These can be knotty issues for experienced counsel, and Winter will be *pro se* again.

FLORIDA – In separate decisions, two HIV-positive federal inmates are denied compassionate release sought because of risks associated with COVID-19, in separate decisions. Both were made under 18 U.S.C. § 3582(c)(1)(A). They were filed in the Middle District of Florida before different judges. U.S. District Judge Brian J. Davis denied Brandon Pooler's application for compassionate release because of risks posed by COVID-19 due to his HIV status and asthma, in *United States v. Pooler,* 2020 U.S. Dist. LEXIS 206652 (M.D. Fla., Nov. 5, 2020). Pooler is 37 years old, serving ten years for drug distribution and firearms convictions. He is due to be released in 2023. Judge Davis finds that Davis' HIV is "managed" and "asymptomatic, as is his asthma, although he uses an albuterol inhaler at times." The opinion includes what has become a common citation to *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (HIV "by itself" is not enough for compassionate release). Pooler is also not at a "hot spot" Bureau of Prisons facility – per their tracking website. Judge Davis notes the split of authority on whether district courts are "bound" by Sentencing Commission "Guidelines" – citing *United States v. United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). *Brooker* found that the Court had additional authority from the passage of the First Step and CARES Acts, after which the Sentencing Commission did not update its "Guidelines." *Id*. at 237. Judge Davis finds that he would reach the same decision, even applying more relaxed scrutiny. Bandon Pooler was represented by CJA Counsel Andrew Bonderud (Jacksonville). In *United States v. Vugler,* 2020 U.S. Dist. LEXIS 205087; 2020 WL 6449322 (M.D. Fla., Nov. 3, 2020), U.S. District Judge Charlene Edwards Honeywell, denied Alexander Vugler's application for similar reasons. Vugler, 51, was convicted of transporting child pornography and sentenced to 168 months, with a projected release date in 2026. Before reaching the "merits," Judge Honeywell discusses exhaustion. Vulger filed a request with the warden, and thirty days later commenced his action in federal court. The warden filed a late response, and the Bureau of Prisons argued that Vulger therefore had to continue to appeal the warden through the BOP before filing in court. Judge Honeywell rejected this argument, ruling that an inmate is not bound to "exhaust" a warden's tardy response. There is a useful footnote survey of cases on this point, for advocates facing this BOP gambit. On the release issue, Judge Honeywell found that Vulger's HIV was controlled (citing *United States v. Raia*) and that his proof failed on "other" medical problems posing a risk. Judge Honeywell applies the Sentencing Commission "Guidelines" on "dangerousness," etc. She finds no "extraordinary and compelling" reason justifying release.

GEORGIA – In the Southern District of Georgia, rulings on prisoner applications for compassionate release due to COVID-19 have been reduced to "fill in the blanks" and "check the boxes" computerized forms. At least that is how U.S. District Judge Lisa G. Wood handled the motion of HIV-positive inmate Tracy Wayne Crosby in *United States v. Crosby,* 2020 U.S. Dist. LEXIS 216002 (S.D. Ga., Nov. 18, 2020). Crosby was convicted of sex trafficking of a minor and sentenced to 128 months, of which he has served less than one-third. A review of his petition in PACER says little about his actual medical condition, but he is over 60 years of age, HIV-positive, obese, and "prone to respiratory infections." The form order allows for boxes to be checked for "granted" (with boxes for various conditions) and "denied." It also has a box to be checked for "factors considered" followed by a balloon field, but it is marked "(optional)." Judge Wood wrote: "The Court will assume that Defendant has met his burden to show extraordinary and compelling reasons under [18 U.S.C.] § 3582(c)." The applications of Sentencing Guidelines under 18 U.S.C. § 3553(a), however, "weigh in favor of Defendant['s] serving the sentence imposed." Judge Wood cites Crosby's position as a high school teacher when he committed the offense and his knowing exposure of the victim to HIV. "The Court concludes that granting Defendant compassionate release at this juncture would not reflect the seriousness of his crime, promote respect for the law or the victim, provide just punishment for the offense, nor afford general or specific deterrence for similar offenses." She does not mention the lack of revision of Sentencing Guidelines under the First Step Act or the CARES Act. Crosby is eligible for release in 2026. This writer looked for a standing order adopting form disposition of COVID-19 compassionate release petitions in the South District of Georgia but found none.

ILLINOIS – In 2018, an officer at the Federal Correctional Institution at Beaumont, Texas, "attempted to issue" male boxer shorts to transgender inmate Marcus Choice Williams (a/k/a Ayana Satyagrahi). She refused to accept them. A heated disagreement followed, leading to disciplinary charges against Williams for "shouting derogatory expletives,"

PRISONER LITIGATION *notes*

for which she lost 27 days good time. Proceeding *pro se,* Williams brought a *habeas corpus* action for restoration of her good time, alleging the disciplinary proceedings violated her constitutional due process rights. In *Williams v. Spoul,* 2020 U.S. Dist. LEXIS 217635 (S.D. Ill., Nov. 20, 2020), U.S. District Judge J. Phil Gilbert allows her to proceed past preliminary *habeas* screening and directs that the government be served. Williams raised four claims: conviction not based on "some" evidence; (2) failure to find which evidence was of "greater weight"; (3) failure to accord her with "assistance" at the hearing; and (4) proceeding against her while she was "incompetent." Since Williams plead that she was found guilty of the infraction without "any" evidence, her claim that there was not "some" evidence will go forward. This seems imprecise. The infraction report, albeit hearsay, is admissible in a disciplinary proceeding, and presumably the officer testified or was interviewed – so there was "some" evidence for the prison. In *Superintendent v. Hill*, 472 U.S. 445, 454 (1985), on which Judge Gilbert relies, the Supreme Court sustained loss of good time based on "some" evidence where a guard found an injured inmate on the ground, evidence of a struggle, and three inmates walking away. All three lost good time, even though it was never made clear which (if any) of them had attacked the victim. As to her second point – that there was no finding as to which evidence should be given "greater weight" – Judge Gilbert ruled that Williams did not present evidence, so there was nothing to "weigh." This seems wrong, too. Williams denied using expletives – so she also presented evidence. Judge Gilbert cites 28 C.F.R. § 541(7)(e), but it specifically says that the first kind of evidence an inmate may present is "a statement." [In this writer's experience, it is a common error in administrative adjudication involving vulnerable people – inmates, immigrants, unemployment claimants – for the hearing officer to characterize such person's uncorroborated statement (like Judge Gilbert did here) as "no evidence." What is really meant is that the evidence is uncorroborated. A finding of "greater weight" should have been made.] 28 C.F.R. § 541(8) also calls for assistance for a charged inmate, including help at the hearing and with interviewing witnesses. Williams alleged that her "assistant" refused to help her and falsely told the hearing officer that Williams did not want any witnesses. Judge Gilbert ruled that this requires a response. Finally, 28 C.F.R. § 541.6 provides that disciplinary proceedings should not proceed against an inmate who cannot understand them. Judge Gilbert writes: "In this case, Williams suggests that she suffers from gender dysmorphia and general mental instability due to extended time spent in solitary confinement . . .. At this preliminary stage, it is unclear what evidence, if any, was presented . . . about Williams' competency . . . .; so this claim will proceed as well. [Note: "gender dysmorphia" is not commonly used in the DSM-V, which refers to "gender dysphoria" and "body dysmorphia."] Judge Gilbert emphasized that his rulings were for purposes of advancing the case at least through an answer.

ILLINOIS – U.S. District Judge Harold A. Baker allows *pro se* transgender prisoner Michael W. Harris a/k/a Ky'Anna Nicole Reignz, to proceed on protection from harm claims in *Harris v. Baldwin,* 2020 U.S. Dist. LEXIS 219676 (C.D. Ill., Nov. 24, 2020). Harris was assaulted by three inmates in the recreation yard. Harris alleged that defendants knew she was at risk because she had previously been in protective custody, yet they knowingly released her to a general population yard. Judge Baker also allows Harris to proceed on a pattern and practice claim against the warden under *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978), based on an alleged policy that revoked her protective custody status after thirty days in disciplinary segregation. He dismisses claims against the Illinois Corrections Commissioner. It seems a bit more complicated than that. Without fleshing out the "policy" about discontinuing PC, it is impossible to ascertain if it comes from DOC's central office, perhaps keeping the Commissioner in the case. Letting the case proceed, however, will permit a determination of whether the "policy" allowed for a hearing after ending PC (or if one did or did not occur), or whether the line defendants were just following orders (or disobeying them). The ruling shows that the better discretion may be to serve the defendants and let the case unfold in the ordinary course – something many judges refuse to permit.

MICHIGAN – At first blush, this case appears to present simply an example of a transgender inmate who did not exhaust her administrative remedies under the Prison Litigation Reform Act [PLRA] before filing a federal lawsuit. U.S. District Judge Hala Y. Jarbou, appointed slightly over two months ago, adopted Magistrate Judge Philip J. Green's recommendation that the case be dismissed without prejudice on this basis in *Russell v. Berkshire,* 2020 U.S. Dist. LEXIS 206982, 2020 WL 6498910 (W.D. Mich., Nov. 5, 2020). This writer looked at the grievance submitted by *pro se* plaintiff Kevin Russell. She begins by saying the problem is "ongoing," and she lists by last name and position the people with whom she spoke. She cites the policy directives on which she relies and her experiences in various general population placements, as well as the PREA. The disposition here justifies quoting the grievance at some length. "I have been diagnosed as G.I.D. (Gender Identity Disorder) inmate. I have attempted to live with the harsh conditions of this unit, the constant harassment, comments, and

blatant discrimination towards me solely due to my reference as being a male to female . . . . This discrimination comes from staff as well as inmates. I have directed staff to the continued issues. Each facility has an area within that facility to house G.I.D. prisoners. This is to prevent PREA incidents and discrimination that happens on a daily basis. The continual question is why am I being singled out and not placed with other prisoners diagnosed as G.I.D. to permit the discrimination and mental/physical abuse (pushing, touching, seek[ing] sexual favors) . . . . I should NOT have to be in a protection unit simply because I'm G.I.D . . . . [Emphasis in grievance.] If I am sexually assaulted or a hate crime committed against me, the department . . . has this grievance . . . . I meet all criteria to be housed in G Block unit where they house all G.I.D. inmates. There in the unit I would have the mental and emotional support from other G.I.D. prisoners, such as myself. I'd have the psych. dept. who work in the unit on a daily basis . . . . All I'm seeking is to be treated fairly and placed with my other G.I.D. prisoners so the harassment I'm having done to me can stop." The grievance officer (Step I) found the grievance "vague," saying Russell needs "to state who, what, when, where, why and how." The warden (Step II) summarily affirmed, as did the Michigan DOC (Step III). Still in population, Russell was raped a few months later, after which she commenced this federal lawsuit. Russell brought three claims: failure to protect her by placing her in safe housing, failure to protect her resulting in rape, and denial of equal protection. Judge Jarbou found the grievance "vague," writing that Russell "did not describe her underlying issues with sufficient clarity or indicate who committed the conduct that she complained about . . . . [S]he did not assert, as she contends in her objections, that her cellmate was seeking sexual favors from her. Thus, the Court agrees that the grievance was not adequate to exhaust her administrative remedies with respect to any of the claims in her complaint." This is the finding as to the first count regarding safe housing. Judge Jarbou rules that there has been no exhaustion as to count two because the grievance was filed before Russell was raped and she did not file a grievance afterwards. She rules that equal protection was not raised in the grievance that was exhausted. In this writer's view, none of these holdings fairly read the grievance, which plainly states what Russell is seeking, her fear of sexual assault, and her claims of transphobic discrimination. Both judges ignore (and do not even cite) controlling Sixth Circuit law. In *Does 8-10 v. Snyder,* 945 F.3d 951, 963 (6th Cir. 2019), the court exhaustively explored the tangled prisoner grievance procedures in Michigan and ruled that claims like this sound under PREA. It held "that MDOC's PREA grievance process is, in practice, unavailable, and consequently, [the prisoner plaintiffs] need not exhaust it." Once again, a federal judge has forgotten that the PLRA is designed to identify valid claims, not just to weed out frivolous ones.

NEW YORK – This is *pro se* bisexual prisoner Carlos Sanchez' second case in the Northern District of New York about alleged sexual orientation discrimination. He voluntarily dismissed his first case, which alleged he was fired from his kitchen job because of his sexual orientation, after he was rehired. He was suspended again and brought a claim of denial of Equal Protection against several defendants in *Sanchez v. Shanley,* 2020 U.S. Dist. LEXIS 204957; 2020 WL 6440272 (N.D.N.Y., Nov. 3, 2020). Chief U.S. District Judge Glenn T. Suddaby dismissed the case with leave to amend. Although Sanchez said he was subjected to homophobic slurs in connection with a cell change, he was not able to tie his job loss with sexual orientation animus. He also conceded that he received a misbehavior report prior to his removal from the kitchen. Judge Suddahy finds the Equal Protection claim to be "entirely conclusory." He writes that, even if there had been bisexual animus, "the amended complaint lacks any allegations which plausibly suggest either that (1) plaintiff was the only homosexual or bi-sexual inmate who sought admission to the Food Services Training Program, or (2) other homosexual or bi-sexual inmates were treated the same way as plaintiff." This is an odd way to limit the Equal Protection claim. It seems to this writer that the comparators could as easily be heterosexual inmates who got misbehavior reports like Sanchez did but were permitted to remain working in the kitchen. But Sanchez apparently did not try to make that case either.

WASHINGTON – Transgender inmate James Benton (Candy Rose) Barnes filed a federal civil rights action because of transgender hostility from her counselor (Mrs. Brown), whom Barnes says does not like transgender people or sex offenders and gives her "dirty looks." Barnes attached an infraction report issued against her by Brown for "no show" at an appointment. Barnes sued only "SBU staff," which is not defined in her papers or by the Court, but probably refers to a housing unit. U.S. Magistrate Judge J. Richard Creatura handles the Prison Litigation Reform Act [PLRA] screening with an Order to Show Cause, without ruling on the motion to proceed *in forma pauperis,* in *Barnes v. SBU,* 2020 WL 6799141, U.S. Dist. LEXIS 217124 (W.D. Wash., Nov. 18, 2020). Judge Creatura finds the "SBU" defendant not to be a suable entity and directs Barnes to file a new complaint with a person or persons named. He explains personal liability and says that Barnes must allege what Mrs. Brown did that violated his rights if she wants to sue her or anyone else. [Note: This writer's review of the

infraction paperwork attached to the *pro se* complaint reveals that rarest of prison events: a prisoner found "not guilty" of a staff-issued infraction.] This is a complaint that on its face seems a likely candidate for dismissal under the PLRA, but perhaps Judge Creatura sensed there might be something here, because he explained at length myriad issues, such as statute of limitations and how to file motions. He attached the full text of the W.D. Washington *pro se* prisoner complaint form, along with the full instructions. He explained the consequences of filing the wrong forms or being late. He explained how to contact the *Pro Se* Clerk's Office. Most significantly his Order to Show Cause deferred the IFP ruling, so that Barnes will not encounter a filing fee lien against her prison money account unless a subsequent complaint is filed and accepted. This is unusual. Most district judges rule on IFP before PLRA screening – so that the prisoner plaintiff is taxed with filing charges, even if deferred in tiny payments over months, and even if their case is screened out. This case is worth noting for inmates desiring to proceed IFP in federal court – both for the deferred IFP ruling and for all of the free advice.

WISCONSIN – Transgender inmate Brandon D. (Brittany) Bradley, *pro se,* was assaulted by two different successive cellmates in *Bradley v. Weber,* 2020 WL 6709848, 2020 U.S. Dist. LEXIS 214338 (W.D. Wisc., Nov. 16, 2020). U.S. District Judge James D. Peterson had screened her case and granted her permission to proceed on claims of failure to protect, lack of training, and negligence under Wisconsin law. Now served, the state defendants move to dismiss on Prison Litigation Reform Act [PLRA] exhaustion grounds and for failure to file a notice of claim on the state tort. Starting with the notice of claim issue, Judge Peterson dismisses the state tort claim on this basis. Under Wisconsin law, a claim against the state or its employees must be proceeded by a notice of claim filed with the state Attorney General within 120 days and before filing suit. Bradley failed to show she had done so, and an AG paralegal filed a declaration that none was received. This is a mandatory requirement to proceed on the state law tort claim. On PLRA exhaustion, Judge Peterson rejects both of defendants' arguments. They conceded that Bradley had fully exhausted for the first sexual assault. She was not required to exhaust again when she was raped the second time, even if some new individual defendants were involved. Wisconsin exhaustion is satisfied if the state was put on notice of an "ongoing" problem. *See Schillinger v. Kiley*, 954 F.3d 990, 995 (7th Cir. 2020) (inmate need only provide "notice to the prison of the nature of the wrong for which redress is sought") (internal citation omitted). "The PLRA's exhaustion requirement does not require an inmate complaint to name all defendants or identify all of the inmate's future legal claims. *Jones v. Bock*, 549 U.S. 199, 218–19 (2007)." In *Jones,* the Supreme Court reversed the Sixth Circuit for reading the PLRA to require this, which is what Western District of Michigan Judge Hala Y. Jarbou did in the *Russell* case, this issue of *Law Notes*.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF LABOR – OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS – *BloombergLaw* reported on Nov. 25 that the White House had cleared a proposed religious freedom regulation for the Office of Federal Contract Compliance Programs, under which religious organizations and closely-held for profit corporations that contract with the federal government will be shielded from discrimination charges when the challenged action was based on the religious beliefs of the organization or the owners of the closely-held corporations. Tracking the Supreme Court's ruling in the Hobby Lobby case allowing a closely-held corporation to violate a requirement under the Affordable Care Act to provide coverage for contraceptives to which the owners of the company stated religious objections, the proposed regulation aroused protests from LGBTQ rights organizations that it would permit federal dollars to go to contractors that discriminate against LGBTQ individuals and families in their employment policies. White House clearance is the last step before the regulation can be published in the Federal Register and take effect. Once published, it cannot be repealed by the incoming Biden Administration until it has gone through the time-consuming requirements under the Administrative Procedure Act for repealing, amending or replacing regulations.

NEVADA – Largely overlooked in the intense focus on the presidential and congressional elections, on November 3 voters overwhelmingly approved Ballot Question 2, which repeals Nevada's constitutional provision defining a marriage as the union of a man and a woman. Nevada is reportedly the first state to repeal such a constitutional provision (which was itself enacted through an amendment initiative by the voters). The remaining state constitutional provisions limiting the definition of marriage to the union of a man and a woman are, of course, superseded by the federal constitutional right to marry declared by the Supreme Court in 2015 in *Obergefell v. Hodges*, so this vote was just along the lines of removing an unconstitutional provision from the state constitution. But the symbolism is telling.

LAW & SOCIETY/INTERNATIONAL *notes*

NEW YORK – *The New York Law Journal* reported on December 3 that Governor Andrew Cuomo signed a bill on November 13 that authorizes the judiciary to collect demographic information on judges as part of a report on diversity in the judiciary. The bill specifies sexual orientation and gender identity as demographic categories of information to be collected and analyzed. The Richard C. Failla LGBTQ Commission of the New York Courts, which focuses on LGBTQ-related issues, sought that the Office of Court Administration collect such information from attorneys and judges. The biennial attorney registration form is amended to provide a space for attorneys to self-identify.

LAW & SOCIETY NOTES

By Arthur S. Leonard

The *National Law Journal* reported on November 18 that the Supreme Court case that drew the most amicus briefs during the October 2019 Term was **BOSTOCK V. CLAYTON COUNTY**, 140 S. Ct. 1731 (2020), the ruling that sexual orientation and gender identity discrimination claims are encompassed within Title VII's ban on discrimination because of sexual orientation. NLJ reported that 94 amicus briefs were filed. NLJ reported on a study that found that 65% of the Court's opinions last term include citations to amicus brief, and that all but a handful of cases argued last term drew amicus briefs.

The U.S. national elections produced a substantial popular vote majority for the Democratic Presidential/Vice-Presidential ticket of **JOSEPH R. BIDEN, JR., AND KAMALA HARRIS** and a likely electoral college count of 306 votes, sufficient to elect the ticket, but the competition for control of the legislative branch resulted in possible continuing control of the Senate by the Republicans, depending what happens in a run-off for two Senate seats in Georgia, balloting to take place on January 5. In the House, the Democrats suffered a net loss of seats resulting in a much narrower majority to preserve their control of the chamber. The number of "out" LGBT members of Congress will increase, however. Elected for the House were Sharice Davids (D-KS), Angie Craig (D-MN), Chris Pappas (D-NH), David Cicilline (D-RI), Mark Takano (D-CA), Mark Pocan (D-WI), Sean Patrick Maloney (D-NY), Ritchie Torres and Mondaire Jones (both D-NY). In the Senate, "out" LGBTQ members continuing in office are Tammy Baldwin (D-WI) and Kyrsten Sinema (D-AZ). As the transition got under way, there were indications from the Biden/Harris transition team that rescission of the Trump Administration's transgender military policy was high on the list of issues to address early in the new administration. It was also likely that various administrative agencies would be moving to modify or revoke various guidances, policy statements, and regulations promulgated during the Trump Administration that adversely affect LGBTQ rights, many of which are already under attack in the courts, frequently for being adopted or issued in violation of the Administrative Procedure Act as well as violating Equal Protection and/or contradicting or undermining the policy of the statutes whose enforcement they affect. Chief among those were likely to be policies cutting into the non-discrimination rights of LGBT people by granting religious exemptions from compliance. In the case of regulations, of course, the requirements of the Administrative Procedure Act (frequently slighted by the Trump Administration) mean that it will take some time to clean up the regulatory mess left by the Trump Administration. The transition team indicated that enactment of the Equality Act to adopt a broad policy against discrimination because of sexual orientation or gender identity was high on the incoming administration's legislative "to do" list, and it was anticipated that the Biden Administration will include plenty of "out" appointees in significant roles, including judicial positions, although the final determination of Senate control will affect the feasibility of such moves. * * * The Biden/Harris campaign did not appear to have coattails in down-ballot state legislative elections, as the Democrats failed to "flip" any state legislatures with incumbent Republican majorities, which means that when redistricting occurs after the 2020 Census is released, Republican who control a majority of state legislatures will be in the position to continue or strengthen political gerrymanders to increase their ability to retake control of the House in the 2022 midterm elections.

INTERNATIONAL NOTES

By Arthur S. Leonard

EUROPEAN UNION – *Associated Press* reported on November 12 that "the EU's executive arm, the European Commission, wants to extend the list of crimes in Europe to cover homophobic hate speech, propose new laws to guarantee that same-sex parenthood will be recognized across the 27 member nations, and to ensure that LGBTQI concerns are better reflected in the bloc's policies." The Commission is the executive body of the European Union, and its proposals will require approval by the Parliament of Europe.

GERMANY – The cabinet voted on November 26 to approve a proposal to provide compensation to people who had suffered discriminatory treatment due to their sexual orientation while in military service. This includes people who were prosecuted for same-sex

conduct, dismissed because of their homosexuality, or who suffered denial of promotion, etc., on that basis. The measure requires legislative approval before it can go into effect. *Associated Press*.

HUNGARY – The government is proposing language to ban same-sex couples from adopting children. * * * A regional court has requested the Constitutional Court to consider a challenge to a recently enacted law barring the government from recognizing gender transitions. The plaintiffs in this case claim that the new statute violates prior decisions by the Constitutional Court, as well as a constitutional provision guaranteeing respect for private life, and also notes that the European Court of Human Rights has also held that transgender people have a right to have their gender identity recognized by the government.

LATVIA – The Constitutional Court announced on November 1 that the government's interpretation of a statute authorizing paid leave for the spouses of women who give birth was in violation of the Constitution's command concerning support for the family because it did not provide leave to the female partner of a woman who gave birth. Effective June 1, 2022, the government's interpretation is "null and void" but it is void immediately with respect to the plaintiff in the case, who was not named for privacy reasons in the report by Public Broadcasting of Latvia on November 12.

MEXICO – Rex Wockner reports that the legislature of the Mexican state of Puebla has passed marriage equality by a vote of 31-5 with 3 abstentions. He also reports that the Supreme Court of the Nation has ruled that government agencies responsible for health care violated human rights by interrupting the provision of anti-retroviral medications to treat HIV/AIDS.

NORWAY – *Openlynews.com* reported that the Norwegian Parliament has extended the existing law banning anti-gay hate speech to apply as well to hate speech targeting transgender and bisexual people.

UNITED KINGDOM – The Supreme Court of the United Kingdom announced on November 16 that it will hear an appeal from the Court of Appeal Civil Division (England and Wales) in *R (on the application of Elan-Cane) v. Secretary of State for the Home Department*, IKSC 2020/0081, challenging the refusal of the Passport Office to provide for non-binary individuals to obtain passports that do not designate them as either male or female. The appellant is seeking the solution that is provided by several other countries, of providing a third box to check X for non-gendered status. The Court agreed to consider whether the Passport Office is violating the appellant's rights under Articles 8 and 14 of the European Convention on Human Rights. * * * On the same date, the Court announced that it will not hear an appeal concerning a claim by a transgender man to be listed as a father on the birth certificate of the child he bore. Actions were filed on behalf of both McConnell and his son, designated YY in court papers. Alfred McConnell has a gender recognition certificate and thus is recognized by the government as male, although he was identified as female at birth. McConnell bore a son as a gestational parent, and the Registrar General of England concluded that McConnell should be listed on the birth certificate as the boy's mother. Lower courts have rejected McConnell's argument that the Gender Recognition Act should be interpreted has having retroactive effect and that the refusal to record him as the boy's father violates his rights under Articles 8 and 14 of the European Convention on Human Rights. The Court announced that it refused permission to appeal "because the applications do not raise an arguable point of law which ought to be considered at this time bearing in mind that the cases were the subject of judicial decision and reviewed on appeal." The cases are *R (on the application of McConnell) v. Registrar General & R (on the application of YY, by his litigation friend Clare Brooks)*, UKSC 2020/0092.

PROFESSIONAL NOTES

By Arthur S. Leonard

The *New York Law Journal* reported on November 10 that the **NEW YORK STATE BAR ASSOCIATION'S HOUSE OF DELEGATES**, meeting remotely, had approved a proposal to establish an **LGBTQ PEOPLE AND THE LAW SECTION**, upgrading the status of the Association's existing LGBTQ People and the Law Committee, which was established in 2008. Section Committees are relatively small, task-oriented entities with rotating membership. Sections are membership organizations within the Association supported by section member dues, are staffed, and have a wide range of activities, including CLE programs and professional development activities. Sections range in membership from 300 to "upwards of 4500 members," according to the NYLJ report, **CHRISTOPHER RIANO**, who has been chairing the Committee will head the new Section. He told the Law Journal, "I think it is critical that we have a statewide home that can support LGBTQ lawyers and our friends and allies. We should always ensure that we champion inclusivity in our work whenever possible, which is why I am so excited for the support of NYSBA as we grow from a committee into a section."

The *Associated Press* reported on November 10 that **CALIFORNIA'S COMMISSION ON JUDICIAL APPOINTMENTS** had unanimously confirmed Governor Gavin Newsom's appointment of out gay **MARTIN JENKINS** to the California Supreme Court. Justice Jenkins will be the first out gay members of the court, after a distinguished career that has included service as a U.S. District Judge and a judge of the California Court of Appeal. Justice Jenkins is characterized as a moderate Democrat by the press. The Commission praised him for his "brilliant intellect, first-class temperament, and boundless humanity."

The *New York Law Journal* honored **ROBERTA KAPLAN** as its Lawyer of the Year for 2000 on November 17. Kaplan, founding partner of Kaplan Hecker & Fink, was saluted for the extraordinary breadth and importance of her litigation activity. She is probably best known among LGBT law aficionados as the lead counsel who argued in the Supreme Court for Edie Windsor in the case that struck down Section 3 of the Defense of Marriage Act and laid the foundation for the eventual marriage equality decision, *Obergefell v. Hodges*. She is among that nation's most prominent and respected out lesbian attorneys.

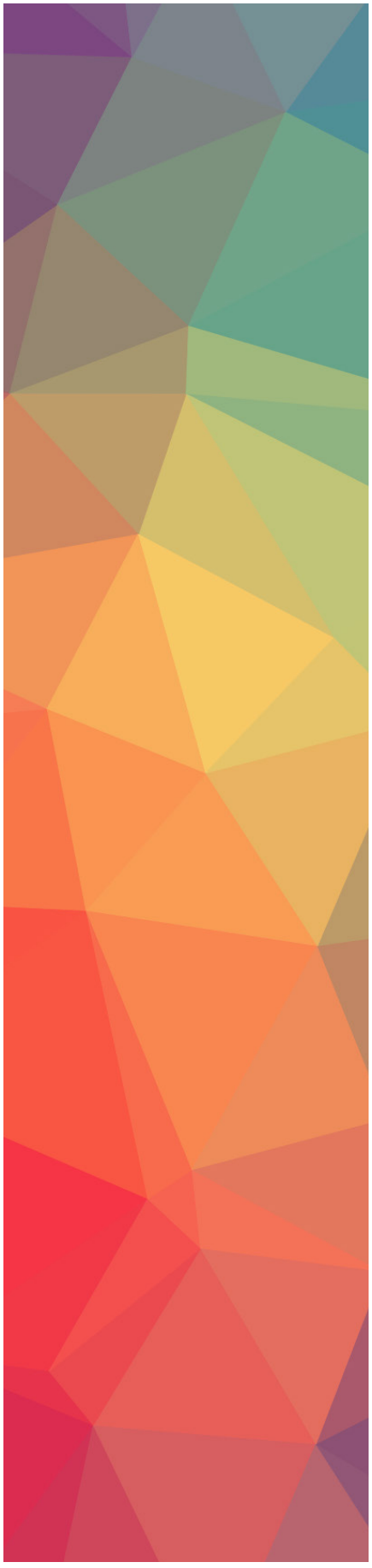
The **WILLIAMS INSTITUTE**, a national research organization at UCLA School of Law dedicated to advancing sexual orientation and gender identity law and public policy through research and scholarship, is accepting applications for the **RENBERG LAW FELLOW** program. The Renberg Law Fellow will engage in research and analysis related to a range of issues that impact the lives of LGBTQ people including discrimination, health disparities, family formation, the criminal justice system, immigration, and more. The Fellow will provide research and writing support to senior scholars at the Institute and will contribute to self-published reports, academic articles, public comments, amicus briefs, and other Institute work. The position will be for two years and will be based in Los Angeles, California (as COVID-19 regulations permit). Applications are due by January 11, 2021. To apply, candidates must submit their application through the UCLA career portal.

SPECIALLY NOTED

A new casebook, titled *DIGNITY LAW: Global Recognition, Cases and Perspectives*, by Erin Daly & James R. May, has been published by William S. Hein & Co. One chapter is devoted to cases on sexuality, sexual orientation, and gender identity. U.S. Supreme Court Justice Anthony M. Kennedy, Jr., notably relied on the concept of human dignity in his LGBTQ rights opinions, tying them in to an international human rights law trend that is explored in depth in this casebook.

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.



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