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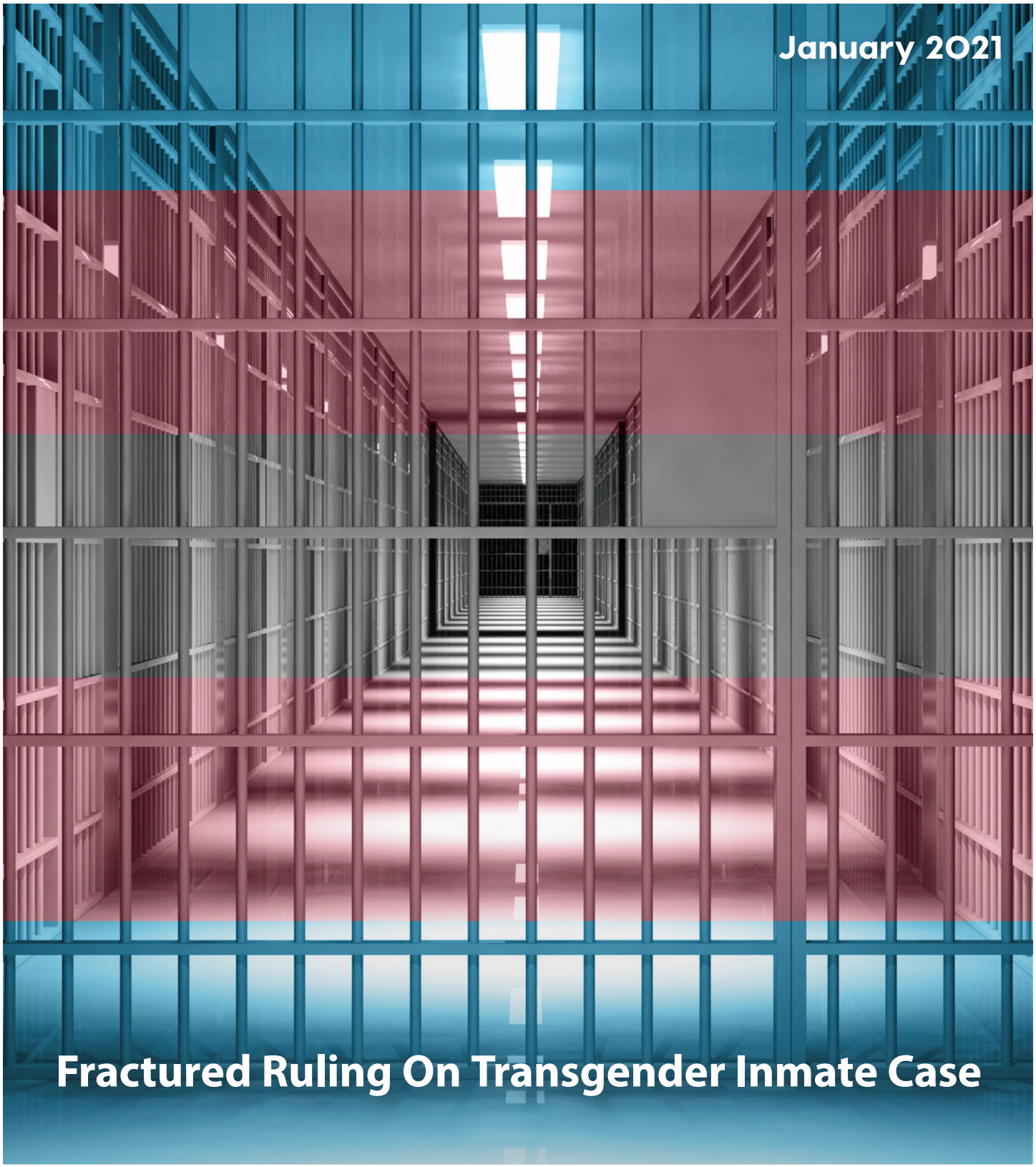

January 2021

Fractured Ruling On Transgender Inmate Case

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LAW NOTES

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EXECUTIVE SUMMARY

27 Notes **50** Citations

Eleventh Circuit Fractures Over Eighth Amendment Standards for Treatment of Transgender Prisoner

By William J. Rold

There are twelve active judges on the Eleventh Circuit, six appointed by President Trump. In *Keohane v. Florida DOC*, 2020 WL 7062613, 2020 U.S. App. LEXIS 38909 (11th Cir., Dec. 3, 2020), the court denied rehearing *en banc* of the reversal of the Eighth Amendment injunction granted by the U.S. District Court for the Northern District of Florida in the case of transgender inmate Reiyn Keohane – panel decision reported at 952 F.3d 1257 (11th Cir. 2020). Although three separate opinions expressed the views of eight of the judges, a majority did not favor rehearing.

The panel decision was a 2/1 split, with Chief Judge L. Scott Coogler of the N. D. Alabama (G.W. Bush), sitting by designation and providing the type-breaking vote. Circuit Judge Kevin C. Newsom (Trump) wrote the panel decision, and Circuit Judge Charles R. Wilson (Clinton) dissented. Keohane moved for rehearing *en banc,* and a "judge" (not identified) asked for a vote on the motion. This stayed the mandate, but the court did not ask for adverse briefing. Instead, it fought with itself for over seven months. District Judge Coogler did not participate.

The rehearing is denied by brief order, but the accompanying opinions consume thousands of words. This reporting can only give a flavor – and hopefully raise some questions.

Chief Judge William H. Pryor, Jr. (G.W. Bush), joined by Circuit Judge Elizabeth l. Branch (Trump) wrote a "Statement Respecting the Denial" that stressed the discretionary nature of *en banc* review and protested the tenor of the dissent from *en banc*. Judge Newsom repeated (often verbatim) his opinion for the panel, partially re-addressing the merits. He calls this opinion a "pre-buttal." He was joined by Circuit Judge Robert J. Luck (Trump). Circuit Judge Robin S. Rosenbaum (Obama), dissented from denial of rehearing, joined by Circuit Judge Wilson (who wrote the panel dissent) and by Circuit Judges Beverly B. Martin and Jill A. Pryor (both Obama). (Judge Newsom insists on calling Judge Rosenbaum's dissent a "dissental.") Four judges did not write: Obama appointee Adalberto Jordan and Trump appointees Britt C. Grant, Barbara Lagoa, and Andrew l. Brasher.

All of this is *dicta,* since rehearing was not granted, and the panel decision stands. But in this writer's opinion it is worse than that. Collectively, the writing is intemperate, condescending, and disrespectful – all the while, the judges deny they are doing that: only those who disagree are resorting to low blows. The judges who remained silent seem like the self-disciplined ones.

The focus of the "merits" opinions is the standard of review of Eighth Amendment deliberate indifference claims by inmates under *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010). In *Thomas,* the Eleventh Circuit affirmed an injunction against the Florida DOC's using chemical agents for behavioral control of mentally ill inmates in non-emergency situations. The competing opinions slice and dice *Thomas* to support their conviction that the panel decision here did (or did not) follow the standards of *Thomas* – at times belittling the comprehensive *Thomas* decision by saying, for example, that its precedent left only "breadcrumbs" to follow. This lack of comity is heightened by the presence of all three *Thomas* panel judges still on the Court as senior judges but silenced from voting on rehearing, despite the onslaught of such criticism.

Keohane herself receives little individual attention in this jurisprudential rabbit hole, which is why this report puts "merits" in quotation marks. Early in the litigation, she began receiving hormones and Florida DOC abandoned its transgender "freeze frame" policy (under which trans inmates are kept in the status of transition extant upon arrival). The District Court nevertheless entered an injunction, but the panel reversed on mootness, based on voluntary cessation. The petition for rehearing *en banc* sought review of this issue, but the opinions on rehearing do not substantively address it.

The rehearing opinions agree that Keohane's gender dysphoria presents a serious medical issue under the "objective" arm of the two-part deliberate indifference test. This leaves the subjective element, which contains three parts: (1) knowledge of the risk of serious harm; (2) disregard of that risk; and (3) conduct that is more than negligent. *See Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1270 (11th Cir. 2020).

The opinions clash on applying this subjective element to what they characterize as "social transitioning" – denial of Keohane's access to feminine underwear, grooming, cosmetics, hair length, and presentation as a woman. [Note: Judge Newsom says Keohane was given a bra, a separate shower, and use of preferred pronouns.] The opinions dispute whether the panel properly distinguished between facts and law and whether it applied clearly erroneous and *de novo* review, respectively, to each. Both cite *Thomas* to support their positions.

The problem is that the debate, for the most part, occurs at a high level of abstraction: did the panel re-evaluate credibility of witnesses or substitute its judgment for findings of fact that were not clearly erroneous, or was it reserving for itself the ultimate question of law on whether subjective deliberate indifference occurred? The same debate, in essence, occurred in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), when the *en banc* First Circuit reversed (by a vote of 3/2) the

panel decision which affirmed (2/1) the injunction issued by the district judge for gender confirmation surgery. The *en banc* dissent observed that the full court's decision would in the future be regarded as a "one-off reserved only for transgender prisoners." *Id*. at 115.

Here, the District Court found that Keohane was at risk from the lack of supportive therapies for her transition and that the experts who testified for the state were less credible either because they lacked experience treating transgender patients or because they did not know Keohane personally. *Koehane v. Jones,* 318 F.Supp.3d 1288, 1297-98, 1314-15 (N.D. Fla. 2018). The panel and Judge Newsom's "pre-buttal" do not explain why these findings are clearly erroneous, according to Judges Wilson and Rosenbaum. Rather, the panel and Judge Newsom say that the findings are subject to review as mixed questions of law and fact that are ultimately determined *de novo* as part of the legal question of deliberate indifference under the Eighth Amendment.

The panel decision establishes a rule for three states: Florida, Alabama and Georgia. Transgender inmates who are receiving hormones and "some" help with transition consistent with their feminine gender identity need not under the Eighth Amendment be given feminizing assistance besides a bra for clothing, a single shower for safety, and their choice of pronouns. The various opinions on rehearing do not help to clarify, but they are more difficult to dismiss as a "one-off" than the *en banc* in *Kosilek*.

Keohane had the support of most of the nation's transgender advocates, and their briefing is outstanding. But the panel decision took control of the terms of the question for debate. Once the Eighth Amendment issue was defined as "social transitioning," transgender plaintiffs were on the defensive. The courts have been stacked by Trump; and, to revert to the oldest prison dichotomy, there are at least as many "lock-'em-ups" as there are "rehabilitators."

A reason *Thomas* is different from *Keohane* is that "spraying mace on mental patients" tugs at the conscience in a way that deprivation of "feminizing cosmetics" does not. "Don't ask; don't tell" collapsed on itself at least in part because it seemed silly – juvenile and parental at the same time. A prisoner who has had her infected teeth pulled needs dentures because she has too few teeth to chew food; this is not "cosmetic dentistry." An inmate needs physical therapy after orthopedic surgery to restore use of a limb, not for "rehabilitation."

This wholistic approach to treatment plans goes all the way back to *Estelle v. Gamble,* 429 U.S. 97, 104 n.10 (1976), which cited as an example of deliberate indifference requiring an inmate to stand contrary to a surgeon's post-operative orders, which "rendered leg surgery unsuccessful" in *Martinez v. Mancusi,* 443 F.2d 921, 924 (2d Cir. 1970), *cert. denied,* 401 U.S. 903 (1971). The panel decision here cited *Roger v. Evans,* 792 F.2d 1052, 1058 (11th Cir. 1986), for the boilerplate proposition that conduct that "shocks the conscience" violates the Eighth Amendment. If one reads farther, however, the Eleventh Circuit also found a deliberate indifference claim very much like the one made here: it is for the "trier of fact" to determine if a psychiatrist's mental health services fell grossly below standards of care or if she was "prevented" from prescribing adequate care. *Id*. at 1059-62.

Controlling the vocabulary makes a difference. "Social transition" is a critical part of treatment of gender dysphoria, but it is not a phrase of choice in Eighth Amendment litigation. "Social transitioning" is a court-sanctioned shorthand for minimizing this key part of the treatment of gender dysphoria. Its possible implications need to be confronted squarely – or it will be used by transphobes as a dismissive.

How about enjoining "forced closeting of inmates on hormones"? Once a patient starts the endocrinological changes brought by hormones, the feminizing is as much part of the treatment plan as dentures and physical therapy. Forcing patients to behave and present in direct conflict with the relief they are receiving from hormones violates the Eighth Amendment. It is like making a starving person hungrier while keeping the food out of reach. Florida DOC, for administrative reasons, is imposing cruel and unusual punishment on transgender inmates by forcing those on hormones to remain closeted, thereby rendering their treatment less successful within the meaning of *Estelle*. ■

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.

Supreme Court Refuses to Review 7th Circuit Decision on Lesbian Spouses and Birth Certificates

By Arthur S. Leonard

The U.S. Supreme Court has refused to review a ruling by the 7th Circuit Court of Appeals in *Henderson v. Box*, 947 F.3d 482 (2020), that the state of Indiana must extend to married lesbian couples the same parentage presumption it applies to married different sex couples: that a birth mother's spouse is presumed to be a parent of her child, that the child be deemed born "in wedlock," and that both mothers be named as parents on the birth certificate. On December 14, the Supreme Court denied the State of Indiana's petition to review that ruling without explanation or any dissent. *Box v. Henderson*, 2020 WL 7327836 (Dec. 14, 2020).

On one hand, this action might be seen as routinely expected, because the Supreme Court decided a similar case from Arkansas exactly this way in 2017. In *Pavan v. Smith*, 137 S. Ct. 2075, the Court voted 6-3 to reverse a decision by the Arkansas Supreme Court. That opinion was issued *per curiam*, although a close reading would identify the hand of Justice Anthony M. Kennedy, Jr., author of the Court's 2015 marriage equality ruling, *Obergefell v. Hodges*, 135 S. Ct. 2584, in which the Court not only said that same-sex couples have a constitutional right under the 14th Amendment to marry, but also that such marriages must be treated by the states as equal in every respect to the marriages of different sex couples. In *Obergefell*, Justice Kennedy specifically mentioned listing on birth certificates as one of the incidents of legal marriage from which same-sex couples had previously been excluded.

Justice Neil Gorsuch wrote a dissenting opinion in *Pavan*, joined by Justices Samuel Alito and Clarence Thomas, arguing that the *Obergefell* ruling did not necessarily compel the conclusion stated by the Court and that the Court should have scheduled briefing and a full hearing on the question rather than issue a summary *per curiam* ruling.

Since *Pavan* was decided, Justice Kennedy has retired and Justice Ruth Bader Ginsburg has died, being replaced respectively by Justices Brett Kavanaugh and Amy Coney Barrett, both religious conservatives. When Indiana filed its petition for review in the *Henderson* case last spring, Justice Ginsburg was still on the Court and the *Pavan v. Smith* majority was intact. The same-sex couples who had filed the lawsuit, represented by the National Center for Lesbian Rights, did not even file an opposition, assuming the Court would dismiss the petition. But with Justice Ginsburg's death and replacement, the calculus had changed, as the *Pavan* 6-member majority had been reduced to a 4-member minority of the Court. The Supreme Court then requested the plaintiffs to file a reply to Indiana's petition for review, and the possibility appeared that the Supreme Court might take up the issue anew.

At the heart of Indiana's case was the contention that the presumption that a husband is the father is reality-based in biology, and there is no such basis for a reality-based presumption for the wife of a woman who gives birth, although the 7th Circuit had observed that one of the lesbian couples in the case comprised two biological mothers, as the second mother had donated the egg that was gestated by the birth mother.

Be that as it may, Indiana, in common with other states, has never treated the father's parental status as conclusive, since it could be rebutted by evidence that a different man was the biological father, and ultimately a birth certificate records legal parentage, not biological parentage, as in the new birth certificates that are issued upon a child's adoption. The trial court, and ultimately the 7th Circuit, related that Indiana relied on self-reporting by the mother in determining a man's name to record on a birth certificate, and the form the birth mother is given asks for the name of the father, not explicitly the name of the biological father, making it likely that many men are named as fathers on birth certificates despite the lack of a biological tie to the child.

Ultimately, wrote the 7th Circuit, "The district court's order requiring Indiana to recognize the children of these plaintiffs as legitimate children, born in wedlock, and to identify both wives in each union as parents, is affirmed."

By refusing to review this ruling, without any explanation or dissent by the conservative justices, the Supreme Court seems to have put the seal on this issue. This is particularly reassuring in light of gratuitous comments by Justice Alito (joined by Justice Thomas) in a statement he issued when the Court refused to review former Kentucky county clerk Kim Davis's petition to review an award of damages against her for refusing to issue marriage licenses to same-sex couples after the *Obergefell* decision was announced. *Davis v. Ermold*, 2020 U.S. LEXIS 3709, 2020 WL 588157 (October 5). In Alito's statement, and remarks he later delivered to a conservative public forum, Alito sharply criticized the *Obergefell* decision and suggested that the Court needed to "fix" the problems that ruling created for those with religious objections to same-sex marriage. This focused renewed attention on the *Henderson* case and the possibility that the Court would take it and rule in a way that would detract from the equal legal status of same-sex marriages. The decision not to take this case may represent an important bullet dodged for now. ■

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

10th Circuit Court of Appeals Denies Torture Relief to Already-Removed Gay Nigerian

By Bryan Johnson-Xenitelis

A panel of the U.S. Court of Appeals for the 10th Circuit denied a Petition for Review by a Gay Nigerian claiming he had been tortured in Nigeria for being gay and that he feared torture if returned, in *Igiebor v. Barr*, 2020 WL 7134460 2020 U.S. App. LEXIS 38078 (10th Cir., December 7, 2020).

Petitioner first arrived in the United States in 1999. He eventually adjusted status to permanent resident in 2004. In 2006 he returned to Nigeria to attend his father's burial, where he claims he was severely beaten and tortured. Petitioner returned to the United States and in 2014, pleaded guilty to several serious financial crimes, and was sentenced to ninety-six months in prison and nearly $10,000 in restitution. Petitioner was placed in removal proceedings, where he sought Convention Against Torture (CAT) deferral of removal.

In Petitioner's initial paper filing for CAT relief, he claimed that during his 2006 trip to Nigeria, he took the comfort of another man, and that the two were arrested after being seen holding hands because homosexuality is considered "an abomination" in that country. Petitioner claimed they were severely beaten, that he was bonded out by his mother, and that a few days later the other man died.

At his removal hearing, Petitioner testified to the contents of the application but added "significant additional information" including specific acts of torture to him and the other man, and that his mother suffered "significant mistreatment" for having aided him. Petitioner claimed he did not add these facts to his application because he was illiterate and someone helped him fill out the application. Petitioner also submitted documentary evidence including a medical record, a police report, and an affidavit from a Village Chief.

The Immigration Judge (IJ) denied CAT protection, finding that Petitioner had not met his burden of proving he was more likely than not to be tortured if returned to Nigeria. The IJ also found Petitioner to be not credible because of the inconsistencies between his application and his testimony. The IJ also excluded the medical record and police report on authenticity grounds, but held that even if they were admissible, they would not change the outcome of the case. The IJ noted that the documents were unreliable because the police report was filed by a brother when Petitioner's application listed no such brother and listed the other man's cause of death as beating from the community and not the police. The IJ found the medical report "has little evidentiary value" because the author had no personal knowledge of what happened to Petitioner; it is only a summary and not the actual report, wrote the IJ, and the source of the information was unknown.

The Board of Immigration Appeals upheld the IJ's decision, finding the adverse credibility determination to be well-supported by the record and "when combined with the absence of meaningful evidence in corroboration, Petitioner had not met his burden of proof." Petitioner filed a petition for review and also requested a stay of removal. The stay of removal was denied, and Petitioner was removed to Nigeria.

Writing for the 10th Circuit panel, Senior Judge Michael R. Murphy first addressed whether the case was moot as Petitioner was already removed. Based upon an Immigration and Customs Enforcement memo on "facilitation of return policy," Judge Murphy ruled that because it was very likely that if the petition for review were granted the Petitioner would be brought back to the United States, there remained a "live controversy," and that the fact that Petitioner previously held lawful resident status distinguished him in an even more favorable position than relevant prior cases, where petitioners had no legal status in the United States prior to their removal.

Next, Judge Murphy discussed a federal statute precluding judicial review of factual challenges to final orders of removal. Judge Murphy noted that CAT deferral relief involves ordering a person removed, but that "notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country," and that granting the petition would not "disturb" the existing order of removal and therefore the statute could not preclude review of the claim.

Having jurisdiction to review the merits, Judge Murphy found that "although the IJ took an inflexible stance as to authentication of foreign official records," the IJ "attempted to explain and resolve the evidentiary issues with [Petitioner] during the hearing." Moreover, Judge Murphy found that if the IJ had been in error in excluding the documents, "such error was remedied when the IJ considered the excluded evidence and found it to be unpersuasive."

To Petitioner's claims that the IJ violated Petitioner's due process rights by not allowing him to explain perceived inconsistencies between his application and testimony, Judge Murphy said the claim failed because Petitioner did not raise it on appeal. Moreover, Judge Murphy found that even if the claim was properly exhausted, the claim failed because there is no obligation of an IJ "to help petitioners seeking CAT relief to develop their cases," and that the administrative record showed the IJ pointed out the inconsistencies and gave Petitioner "multiple opportunities to explain those inconsistencies." Finally, Judge Murphy ruled that the "ultimate adverse credibility determination is supported by substantial evidence"

because the inconsistencies "go to the very heart of whether his recounting of the events was credible" and that "no reasonable adjudicator would be compelled to conclude Petitioner's testimony was credible. Accordingly, Judge Murphy denied the petition for review.

Counsel for Petitioner on the brief is Michael E. Ward of Alston & Bird LLP, Washington, D.C. ■

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

9th Circuit Panel Remands HIV/AIDS Plan Enrollees' Discriminatory Affordable Care Act Claim Where CVS Plan Manager Required Obtaining HIV/AIDS Drugs Only Through a CVS-Designated Pharmacy

By Wendy C. Bicovny

In *Doe v. CVS Pharmacy, Inc.*, 2020 U.S. App. LEXIS 38333, 2020 WL 7234964 (Dec. 9, 2020), a 9th Circuit panel vacated in part and remanded for further proceedings a district court order dismissing an action brought under the Affordable Care Act (ACA) by persons living with HIV/AIDS. The pharmacy benefits manager for the plaintiffs' employer-sponsored health plans, CVS Caremark (CVS), changed its program to require plan enrollees to obtain specialty medications (including all HIV/AIDS medications, through its designated specialty pharmacy for those benefits to be considered in-network.

The ACA incorporates the anti-discrimination provisions of various civil rights statutes and prohibits discrimination on the basis of disability – in this instance HIV/AIDS – pursuant to §504 of the federal Vocational Rehabilitation Act. Applying the §504 framework, the panel concluded that the plaintiffs were denied meaningful access to their prescription drug benefit under their employer-sponsored health plans because the new CVS program prevented them from receiving effective treatment for HIV/AIDS through the pharmacy of their choice.

The plaintiffs are individuals living with HIV/AIDS who have employer-sponsored health plans, and who rely on those plans to obtain prescription drugs. Until CVS changed the rules, they could fill their prescriptions at community pharmacies, where they were able to consult knowledgeable pharmacists who were familiar with their personal medical histories and could make adjustments to their drug regimens to avoid dangerous drug interactions or remedy potential side effects. The plaintiffs alleged that these services were critical to HIV/AIDS patients, who must maintain a consistent medication regimen to manage their chronic disease.

CVS changed its policy to require that all health plan enrollees obtain specialty medications, including HIV/AIDS drugs, through its designated specialty pharmacy for those benefits to be considered "in-network." The in-network specialty pharmacy dispensed specialty drugs *only* by mail or drop shipments to CVS pharmacy stores for pickup.

According to the plaintiffs, filling their prescriptions through the CVS program caused them substantial difficulties and put their privacy at risk. They alleged that they must be present at the time of delivery to avoid missing postal deliveries, having medications stolen, or having medications damaged by being left out in the elements. They also reported making multiple trips to CVS pharmacies — sometimes at great distances from their homes —to correct prescriptions that were filled incorrectly and risking their privacy when CVS pharmacy staff shout their names and medications in front of other customers. Deliveries to the home or the workplace risked notifying neighbors or coworkers that the plaintiffs had HIV/AIDS. Their specific claim was that the CVS program constituted a material and discriminatory change in plan coverage, a significant reduction in or elimination of prescription drug benefits, and a violation of the standards of good health care and clinically appropriate care for HIV/AIDS patients.

First, the panel considered the nature of the benefit that the plaintiffs were allegedly denied. The crux of their complaint was that the CVS program discriminated against them by eliminating various aspects of pharmaceutical care that they deemed critical to their health by refusing to cover prescription fulfillment through their local community pharmacies. Moreover, looking to the benefit's statutory source, ACA requires that health plans cover prescription drugs as an "essential health benefit." The district court's definition unduly narrowed the benefit to obtaining specialty drugs at favorable prices from certain pharmacies, when plaintiffs' characterization of the benefit tracked the ACA, which asserted more than just cost-related differences, the panel determined.

Second, the panel analyzed whether the plan as changed by CVS provided meaningful access to the benefit. The district court erroneously evaluated the benefits under the ACA at issue here against the guarantees, or lack thereof, of the Medicaid Act, the panel stated. The district court should have looked to the ACA to determine whether the plaintiffs adequately alleged that they were denied meaningful access to an ACA-provided benefit.

Plaintiffs adequately alleged that they were denied meaningful access to their prescription drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling. Due to the structure of the CVS Program as it related to HIV/AIDS drugs, plaintiffs claimed, they could not receive effective treatment under the CVS program *because of their disability*. ACA requires that "any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals," and must "not be directed at individual participants or beneficiaries based on [disability]." Moreover, ACA regulations state, "[A]n issuer does not provide [essential health benefits] if its benefit design, or *the implementation of its benefits design*, discriminates based on an individual's . . . disability[.]" (Emphasis added by the panel). Here, the plaintiffs alleged that the structure and implementation of the CVS program discriminated against them on the basis of their disability by preventing HIV/AIDS patients from obtaining the same quality of pharmaceutical care that non-HIV/AIDS patients may obtain in filling non-specialty prescriptions, thereby denying them meaningful access to their prescription drug benefit. These allegations were sufficient to state an ACA disability discrimination claim, the panel concluded.

Further, the fact that the benefit is facially neutral does not dispose of a disparate impact claim based on lack of meaningful access, the panel added. Here, plaintiffs have alleged that even though the CVS Program applied to specialty medications that may not be used to treat conditions associated with disabilities, HIV/AIDS patients were burdened differently *because* of their unique pharmaceutical needs. Changes in medication to treat the continual mutation of the virus required pharmacists to review all of an HIV/AIDS patient's medications for side effects and adverse drug interactions, a benefit they no longer received under the CVS program. Thus, the fact that the CVS Program may apply to plan enrollees in a facially neutral way did not necessarily defeat an ACA *§ 504* claim.

Finally, the district court erred by requiring that plaintiffs plead allegations showing the CVS program impacted people with HIV/AIDS in a unique or severe manner. The meaningful access standard requirement was that plaintiffs need only show that they were not provided meaningful access to the benefit. Under the ACA *§ 504* framework, the plaintiffs had adequately alleged that they were denied meaningful access to their prescription drug benefit under their employer-sponsored health plans because the CVS program prevented them from receiving effective treatment for HIV/AIDS. Accordingly, the panel vacated the district court's dismissal of Does' ACA claim and remanded proceedings for further proceedings.

Class action plaintiffs are represented by a substantial litigation team: Jerry Flanagan, Benjamin Powell, and Daniel L. Sternberg, of Consumer Watchdog, Los Angeles, California; Alan M. Mansfield of Whatley Kallas LLP, San Diego, California; Henry C. Quillen of Whatley Kallas LLP, Portsmouth, New Hampshire; and Edith M. Kallas, of Whatley Kallas LLP, New York, New York. Amicus support for plaintiffs came from Jeffrey Blend, Tom Myers, and Arti Bhimani of the AIDS Healthcare Foundation, Los Angeles, California; Carly A. Myers, Silvia Yee, and Arlene B. Mayerson, of the Disability Rights Education & Defense Fund, Berkeley, California, for Disability Rights Education and Defense Fund, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, National Health Law Program, and the American Civil Liberties Union. ■

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

California Federal Court Issues Preliminary Injunction against Trump's Anti-Diversity Training Executive Order

By Arthur S Leonard

A federal court in San Jose, California, issued a preliminary injunction on December 22 against enforcement of two key provisions of President Donald Trump's Executive Order 13950, which prohibits the Defense Department, civilian federal agencies, federal contractors and grant recipients from carrying out diversity and inclusion training programs that include concepts offensive to President Trump. *Santa Cruz Lesbian and Gay Community Center v. Trump*, 2020 U.S. Dist. LEXIS 242006, 2020 WL 7640460 (N.D. Cal.).

U.S. District Judge Beth Labson Freeman found that the plaintiffs, a group of LGBT and AIDS organizations that provide diversity training to their staffs and to other organizations, as well as some individual counselors, had standing to challenge the portions of the Order that are applicable to their activities on 1st and 5th Amendment grounds and were sufficiently likely to be successful that they were entitled to a preliminary injunction while the case is pending.

Trump signed his Executive Order on September 22, a few weeks after the federal Office of Management & Budget (OMB) had issued a similar memorandum to federal agencies on "Training in the Government," warning against agencies conducting diversity training that includes concepts that Trump had disapproved in a prior internal executive branch directive. The memo described as "divisive, un-American propaganda training sessions" any activities that would relate to such subjects as "critical race theory," "white privilege," or any suggestion that the U.S. is "an inherently racist or evil country." In short, the memo, and the subsequent Executive Order, paints a cartoonish and exaggerated picture of the kind of diversity training sessions that have become widespread through both the private and public sectors in recent years, responding to an expanding professional literature about unconscious bias and implicit racism and sexism.

The Executive Order targets diversity training in the armed forces (section 3), in civilian federal agencies (section 6), in organizations that have contracts with the federal government (section 4), and in organizations that receive grants from the federal government to carry out programs (section 5). The Order seeks to censor the content of such training programs, even if they are not specifically funded by the federal government or are not the subject matter of a federal contract or grant, as long as they are conducted by organizations that have federal contracts or receive federal grants. OMB issued a memorandum on September 28 detailing how the Order would be enforced.

Within weeks of Trump signing the Order, some organizations theoretically affected by the ban started to cancel diversity programs, some of which were provided by plaintiffs in this lawsuit filed by Lambda Legal and cooperating attorneys from the law firm Ropes & Gray. Some individual consultants who provide diversity training services also reported cancellation of programs for which they were contracted.

The lead plaintiff is the Santa Cruz Lesbian and Gay Community Center, which also operates under the name "Diversity Center of Santa Cruz." Other organizational plaintiffs include the Los Angeles LGBT Center, The AIDS Foundation of Chicago, the Bradbury-Sullivan LGBT Community Center in Lehigh Valley, Pennsylvania, the NO/AIDS Task Force in New Orleans, and SAGE (headquartered in New York). The government's initial response to the lawsuit was to deny that the plaintiffs had "standing" to sue, or that any of their constitutional rights were threatened or violated. Among other things, the government argued that the 1st Amendment does not restrict it from deciding how federal money will be spent or the content of training offered to federal employees.

Turning to standing, it quickly became clear to the court and the parties that the plaintiffs could easily satisfy standing requirements to challenge sections 4 and 5, dealing with contractors and grant recipients, because all the organizational plaintiffs either have federal contracts or receive federal grants and the individual plaintiffs provided the kind of training targeted by the EO. Indeed, for some of the organizations a majority of their funding comes from the federal government, and the court found that the possibility that the restrictions in the EO will be enforced against them are not merely hypothetical, given the enforcement directives of the OMB memo and the cancellation of programs that have already occurred because presenting organizations feared losing federal contracts or funding.

The court also found that despite some lack of clarity in the Order about what could or could not be included in training programs, because of the vague and convoluted language (which is typical of Trump Administration executive orders), it was very likely that the plaintiffs would be targeted for enforcement because of the content of their training programs.

"The September 28 Memorandum issued by the OMB Director specifically directs agencies to identify entities that promote the prohibited "divisive concepts" by doing keyword searches for the terms "critical race theory," "white privilege," "intersectionality," "systemic racism," "positionality," "racial humility," and "unconscious bias," wrote Judge Freeman. "As Plaintiffs' counsel commented at the hearing, these keyword searches may as well have been designed to target Plaintiffs."

Having established standing concerning sections 4 and 5, the court turned to the four-part test for preliminary relief: likelihood of success on the merits, irreparable harm to plaintiffs if the injunction is not issued, balance of the equities as between the plaintiffs and the government, and the public interest. The court found that all four tests are satisfied.

The Supreme Court's decisions on similar claims have engaged in difficult line-drawing between the degree to which the government can control the speech of contractors and grantees and the degree to which they retain freedom of speech with respect to issues of public concern. Opposing the motion, the government claimed that it was within its rights to impose these restrictions, but Judge Freeman found that the plaintiffs' training programs were entitled to 1st Amendment protection, especially when it came to training they did for their own employees as part of their goal to provide appropriate non-discriminatory service to their clients. The Order seeks to control that, even when the federal contracts to which the organizations are parties may have nothing to do directly with diversity training, likewise with grantees. Furthermore, the training directly involves matters of public interest and concern. Rejecting the government's contrary argument, Judge Freeman conclude that the *Pickering* balancing test applied to cases involving public employee speech could be applied, and that the balance likely favored the plaintiffs.

"Although the Government has a legitimate interest in controlling the scope of diversity training in the federal workforce and can limit the expenditure of federal funds," wrote Judge Freeman, "that interest can be protected by narrowing the scope of this preliminary injunction. Thus, the Government's interest is outweighed by the effect of the impermissible reach of the Executive Order on Plaintiff's freedom to deliver the diversity training and advocacy they deem necessary to train their own employees and the service providers in the communities in which they work, using funds unrelated to the federal contract."

Several major research universities submitted an amicus brief in support of plaintiffs, pointing out how the section 5 restrictions "appear to require universities that accept federal grants to curtail promotion of these concepts through teaching, training and discussion," wrote Judge Freeman. "The 8 Institutions of Higher Education argue persuasively that 'scholars need to be able to give voice to, and indeed "endorse," opposing views in order for intellectual progress to occur. The Order inhibits this advancement – which is a core component of amici's missions." The court saw in the OMB memorandum that the implementation directive was aimed at "actually imposing the condition on as many grant programs as possible," presenting a clear threat to freedom of speech in the academic setting.

As to the Due Process claim, the language of the EO and the OMB memorandum, while specific in some respects, was vague in others, so that a contractor or grantee might have difficulty determining whether particular subjects in their diversity training programs were covered by the Order. The court found that an FAQ section in the OMB Memo made the ambiguity even worse. "In conclusion," wrote Freeman, "the Court finds wholly unpersuasive the Government's assertions that Sections 4 and 5 of the Executive Order are clear or that any ambiguities may be easily resolved," so plaintiffs were likely to succeed in showing that those sections are void for vagueness in violation of the Due Process Clause of the 5th Amendment.

Furthermore, the chilling of 1st Amendment rights is generally deemed to be an "irreparable injury" by the federal courts, and the protection of 1st Amendment rights is generally deemed to be within the public interest, so the court concluded that the tests for preliminary injunctive relief had been satisfied, and that narrowing the scope of the injunction to Sections 4 and 5 was sufficient to meeting the Government's objection.

The court accepted the plaintiffs' argument that only a nationwide injunction would suffice, given the geographical diversity of the co-plaintiffs and the scope of their training activities, which were certainly not confined to the northern California counties within the Northern District of California. Similarly, Judge Freeman rejected the argument that injunctive relief should be limited to the plaintiff organizations and individuals, and noted that the plaintiffs had not asked for the injunction to run personally against the lead defendant, one Donald J. Trump, but rather against the government agencies that would enforce the Order.

If the Trump Administration follows its usual course, it will seek a stay of the injunction from the court while it appeals to the 9th Circuit. But perhaps, since the Trump Administration has only weeks to go, it may not bother to seek immediate review. And perhaps the Biden Administration will quickly move to revoke this inappropriate Executive Order, which can join the lengthy list of objectionable Executive Orders signed by President Trump.

Judge Freem was appointed by President Barack Obama. ■

Wisconsin Federal Judge Orders Confirmation Surgery for Transgender Inmate

By William J. Rold

Mark A. (Nicole Rose) Campbell, a transgender woman incarcerated in Wisconsin, has sued Department of Corrections officials for gender confirmation surgery since 2013, requesting damages and injunctive relief. Her case went to the Seventh Circuit in *Campbell v. Kallas,* 936 F.3d 536, 549 (7th Cir. 2019), which ruled (over a dissent) that defendants had qualified immunity from damages because a constitutional right to gender confirmation surgery was not clearly established – reversing Chief U.S. District Judge James D. Peterson on the point. Now, in *Campbell v. Kallas,* 2020 U.S. Dist. LEXIS 230117, 2020 WL 7230235 (W.D. Wisc., Dec. 8, 2020), Judge Peterson grants Campbell an injunction for the surgery.

Campbell suffers from severe, unremitting gender dysphoria that causes her severe anguish and puts her at risk of self-harm. She responded "well" to hormones, but she remains in anguish. Her release date is in 2041. Her serious condition and the possibility of relief from surgery were not contested. According to Judge Peterson, the parties also agreed to the following: "Sex reassignment surgery is not experimental or cosmetic. In the appropriate case, it is an effective treatment for gender dysphoria. Sex reassignment surgery is not a necessary treatment for all cases of gender dysphoria; some persons with gender dysphoria can be adequately treated without surgery."

Judge Peterson had a three-day trial on whether gender confirmation surgery was necessary for Campbell. Campbell called two experts, Drs. Kathy Oriel and Felicia Levine; and the defendants, four "non-retained experts": Cynthia Osborne (their gender dysphoria consultant), Dr. Betsy Luxford (the physician who managed Campbell's hormone therapy), Dr. Kevin Kallas (their mental health director), and Larry Fuchs (their security chief). [Note: calling Osborne "non-retained" seems wrong; she is based at Johns Hopkins and regularly "consults" with state correctional defendants in transgender cases.]

Unusually in a bench trial, Judge Peterson begins by ruling on multiple motions *in limine*. Judge Peterson granted Campbell's motion to limit defendant mental health director Kallas' testimony about proper treatment of gender dysphoria, because he was not an expert on the subject, allowing him to testify about the impact of various treatment on correctional administration. The motion to exclude details about Peterson's criminal conviction for sexual abuse of a child was denied, but Judge Peterson found it irrelevant to deliberate indifference and its admission non-prejudicial in the absence of a jury.

Judge Peterson limited both sides' experts to what they disclosed pre-trial in their F.R.C.P. 26(a) reports. This limited Osborne's testimony, but it also limited Campbell's experts, precluding them from saying that Campbell needed breast augmentation, electrolysis, and voice therapy. Campbell also moved to exclude as "unreliable" the opinions of defense expert, Dr. Chester Schmidt (also Johns Hopkins). [Note: Schmidt figures prominently as a defense witness in the majority and dissenting opinions in *Kosilek v. Spencer,* 774 F.3d 63, 87-90, 102-4 (1st Cir. 2014) (*en banc*).] Here, defendants decided not to call him, and Judge Peterson granted the motion as to his report opinions.

On the merits, perhaps most interesting to this writer is Judge Peterson's almost routine assessment of defendants' denial of confirmation surgery as a necessary treatment of a medical condition – compared to the histrionic "the sky is falling" approach to "gender transition" in prison taken by the *en banc* judges of the Eleventh Circuit – also in this issue of *Law Notes*. Maybe we are finally beginning to turn a corner.

Judge Peterson found the published Standards of the World Professional Association for Transgender Health [WPATH] to be the "generally accepted" standards of care and that Campbell fell within diagnostic criteria. Osborne endorsed the criteria, but she said the WPATH had evolved to an advocacy group and that not all standards could be "fully" applied in an institutional setting.

Osborne found that Campbell was "a good candidate for sex reassignment surgery" in her 2014 report, with "potential contradictions": she had not yet received "maximum benefit" from hormones; and she could not achieve a "real life experience" as a woman in a men's prison. By the time of trial, however, the parties conceded that hormone therapy had been "optimized" for years, but severe dysphoria continued. As to the second "contradiction," Osborne conceded that her views had evolved. Osborne testified that, for patients whose dysphoria is severely triggered by the presence of male anatomy (as Campbell's is), surgery may be the only solution to prevent self-mutilation. Osborne also made a significant admission: "[R]eal-life experience was a common-sense practice based more on tradition than any science. She was aware of no systematic evidence that completion of a real-life experience led to better outcomes . . . . [D]epartures from the requirement of the real-life experience might be appropriate in an individual case, particularly among incarcerated persons." Judge Peterson cites: Osborne & Lawrence, "Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?" 45 Archives of Sexual Behavior 1649, 1656 (2016). In the article, Osborne questioned whether real-life experience "has much practical or prognostic relevance for inmates," particularly for inmates who, like Campbell, have many years of incarceration left

to serve. Judge Peterson found that Campbell's transition began well before incarceration and that she has "lived, to the fullest extent possible, as a woman in male prisons for years."

Based on the evidence, Judge Peterson found that Campbell's gender dysphoria "would not remit without surgery." The defendants could not, as a matter of policy, apply the same kind of blanket rule prohibiting necessary treatment for gender dysphoria found unconstitutional when it was enacted as a statute. *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

As a last gasp, defendants asked Judge Peterson to order Campbell to spend a year in the women's prison prior to surgery. He declined to do so. Defendants "did not dispute that without surgery, Campbell was left in continuing anguish that surgery could alleviate." Campbell has waited "long enough." Judge Peterson also rejected as speculative proffers about possible difficulty Campbell might face in a women's prison, noting proof of her ability to adapt in a men's prison.

Judge Peterson concludes: "I find that defendants consciously disregarded Campbell's need for treatment for her severe anatomic gender dysphoria by denying her the one effective treatment. They did so as a matter of DOC policy without an individualized assessment of her suitability for sex reassignment surgery. I find further that no reasonable professional with expertise in the treatment of gender dysphoria would conclude that Campbell was not an appropriate candidate for sex reassignment surgery."

The parties are directed to try to agree on the terms of an injunction. In balancing the need for equitable relief (and in what could be taken as a bit of a dig at the Seventh Circuit), Judge Peterson finds that damages were not sufficient for the irreparable injury proven – and that in any event, they have been removed from the case by the Court of Appeals.

Campbell is represented by Husch Blackwell, LLP (Madison). Judge Peterson, who was appointed by President Barack Obama, notes his appreciation to counsel for their work. ■

Federal Court Says Ohio Must Let Transgender People Correct Their Birth Certificates

By Arthur S. Leonard

U.S. District Judge Michael H. Watson ruled on December 16 that Ohio's refusal to issue corrected birth certificates for transgender people violates the United States Constitution. Lambda Legal and the American Civil Liberties Union sued state officials on behalf of four transgender plaintiffs whose attempts to get their birth certificates changed to correctly identify their gender had been thwarted. *Ray v. McCloud*, Case No. 2:18-cv-272 (S.D. Ohio).

At the time Lambda sued two years ago, there were only three states that categorically prohibited such changes: Kansas, Ohio and Tennessee. Since then, Kansas has settled a lawsuit by agreeing to change its policy. That leaves Tennessee as the last holdout.

However, Judge Watson's opinion did not address what requirements Ohio may impose to determine whether a particular transgender individual may obtain a new birth certificate correctly reflecting their gender identity. Some jurisdictions require proof of surgical alteration or at least some clinical treatment, some others are satisfied with a doctor's attestation as to gender identity, and some will accept a sworn declaration by the individual as to their correct gender identity. All that the judge held in this case was that the state cannot categorically refuse to make such changes under any circumstances.

This issue has had an inconsistent history in Ohio. State courts had turned down attempts by transgender individuals to get court orders to change their birth certificates for many years, but then the state did a turnabout and started allowing them until 2016, when it reverted to its former prohibition. Judge Watson noted that at least ten transgender people had actually obtained new birth certificates before the policy was changed. Since the statute governing birth certificates in Ohio does not even mention the issue but generally provides that a birth certificate can be corrected if information "has not been properly or accurately recorded," the state claimed that it was now acting according to its interpretation of the statute as requiring a record that was correct at the time of birth.

Lambda's complaint on behalf of Stacie Ray, Basil Argento, Ashley Breda and "Jane Doe" asserted that the state's policy violated their Due Process privacy rights and their Equal Protection rights under the 14th Amendment, as well as their Free Speech rights under the 1st Amendment. Having ruled in favor of the plaintiffs on their 14th Amendment claims, Judge Watson commented in a footnote that he would decline to analyze their 1st Amendment claim.

At an earlier stage in the litigation, the court had refused to dismiss the case outright. The December 16 ruling granted summary judgment to the plaintiffs based on the evidentiary record. Each of the plaintiffs had explained how having a birth certificate that did not correctly reflect their gender identity caused practical problems for them, essentially misgendering them and "outing" them as transgender when they were required to provide their birth certificate. The court also noted the significant risk of harassment and physical violence that transgender people face as an important reason to allow them to obtain birth certificates that identify them correctly, citing a 2015 U.S. Transgender Survey showing that almost one-third of transgender individuals who had to use an identity document that misgendered them consequently suffered harassment, denial of benefits or services, discrimination, or physical assault.

The court found that because the fundamental right of privacy was

involved, the standard of review for their Due Process claim is "strict scrutiny," under which the state's policy would be presumed to be unconstitutional unless it met the burden of showing a compelling justification. On the equal protection claim, Judge Watson found that many federal courts now agree that heightened scrutiny applies, under which the state must show an exceedingly persuasive reason for its policy. Courts use heightened scrutiny for sex discrimination claims, arguably making relevant the Supreme Court's *Bostock* decision earlier this year, which held that discrimination because of transgender status is sex discrimination within the meaning of the federal anti-discrimination law, Title VII.

Either way, however, the court concluded that the policy must fall, because the state's arguments didn't even support a "rational basis" for what it was doing. Having allowed transgender people to get new birth certificates in the past, the state should have articulated a reason why it had changed that policy, but it could not credibly do so. What the court left unstated was the likelihood that the change in policy was entirely political.

The state's attempt to argue that its interest in having accurate birth records required this categorical policy was fatally undermined by the fact that changes to birth certificates are made in many other circumstances. A person who gets a legal name change can get a new birth certificate showing their new legal name. After an adoption, a new birth certificate can be issued listing the adoptive parents instead of the birth parents. The court found that no persuasive justification had been offered for freely changing the information on birth certificates in these other circumstances but not for transgender people, especially in light of the difficulty and harm they suffered.

As noted, however, the court's ruling was limited to the categorical ban, leaving yet to be determined the criteria Ohio was adopt for determining whether the change can be made in a particular case. Furthermore, the state could attempt to appeal this ruling to the 6th Circuit Court of Appeals, but that court has already gone on record regarding gender identity discrimination as a form of sex discrimination in the case of the late Michigan transgender funeral director Aimee Stephens, who employment discrimination case was part of the Bostock decision by the Supreme Court.

Lambda Legal attorneys who worked on this case include Kara Ingelhart and Peter Renn. Malita Picasso and John Knight of the ACLU's LGBT Rights Project and Freda Levenson, Susan Becker, Elizabeth Bonham and David Carey of the ACLU of Ohio were co-counsel, as well as pro bono counsel Jennifer Roach from Thompson Hine LLP. Judge Watson was appointed to the district court by President George W. Bush. ■

Federal Court Enjoins Pennsylvania Ethics Rule against Discrimination by Lawyers

*By Ezra Cukor**

Zachary Greenberg, a Pennsylvania attorney represented by the Hamilton Lincoln Law Institute, won a preliminary injunction enjoining the enforcement of an amended attorney ethical rule prohibiting discrimination and bias from U.S. District Judge Chad F. Kenney, who found that the rule violates the 1st Amendment. *Greenberg v. Haggerty,* 2020 WL 7227251 (E.D. Pa. Dec. 8, 2020).

Pennsylvania's amended Rule 8.4(g) would have taken effect December 8, 2020. It defines as professional misconduct to "in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status." The Rule explicitly neither limits "the ability of a lawyer to accept, decline or withdraw" representation in accordance with the rules for so doing, nor precludes "advice or advocacy." Comments to the amended Rule 8.4(g) state that for purposes of the rule the practice law includes "participation in activities that are required for a lawyer to practice law," such as continuing legal education (CLE), and clarify that "substantive law of antidiscrimination and anti-harassment statutes and case law guide" its application.

Pennsylvania's amended Rule 8.4(g) is based on the American Bar

Association Model Rule 8.4(g). Seven states, including New York, have adopted versions of the model rule. New York's rule is not identical to Pennsylvania's version. NY Rules of Professional Conduct, 22 NYCRR 1200.0 rule 8.4(g).

Greenberg argued, among other things, that Rule 8.4(g) is viewpoint discrimination forbidden by the First Amendment. He is an attorney admitted to practice in Pennsylvania and program officer for the Foundation for Individual Rights in Education (FIRE), whose professional activities involve CLE and other speaking engagements in which he takes self-described controversial positions on topics such as universities' handling of hate speech and sexual assault allegations. He asserted that Rule 8.4(g) creates a specter of investigation or discipline for those activities that would chill his speech. Defendants moved to dismiss, arguing that the plaintiff lacked standing to challenge the Rule and failed to state a claim. The court rejected both arguments and enjoined enforcement of the Rule in its entirety.

The court concluded that the threat of enforcement of Rule 8.4(g) was an injury sufficiently concrete, particularized, and imminent to establish standing. The Plaintiff asserted that some consider his speech biased, prejudiced, or offensive and that during speaking engagements he utters "epithets, slurs, and demeaning nicknames," including when discussing the constitutional rights of those who do and say offensive things. Thus, he would have to censor himself to avoid investigation or discipline under Rule 8.4(g).

Defendants argued that Plaintiff lacked standing because several layers of speculation stood between him and any injury: He could only speculate that someone would conclude his speech manifested bias and, on top of that, speculate that the chain of events necessary for any investigation or discipline would ensue.

Nevertheless, the court found injury cognizable for standing purposes in Plaintiff's allegation that Rule 8.4(g) would chill his speech. The court also took into account that Plaintiff alleged that others had faced complaints for presenting on similar topics, although the Plaintiff pointed to no specific examples of anyone actually facing discipline under a similar attorney ethical rule, let alone any legal sanction. He instead referenced two complaints resolved in favor of the accused without disciplinary action. The first was an ethics complaint filed against a judge based on her speech to the Federalist Society. The second was a Title IX complaint filed against a law professor based on an article she published in the Chronicle of Higher Education. Plaintiff also referenced a litany of examples of people facing criticism that their views are racist, transphobic, or otherwise harmful, and in some cases losing private sector jobs as a result. The Plaintiff simultaneously positioned himself as opposing prohibitions on discrimination and harassment because he is an advocate for the right to speak freely and invokes the critical speech of others, which he labels harassment, to claim injury.

Defendants' additional arguments against Plaintiff's standing also failed. The court read Rule 8.4(g)'s plain language as a ban on repeating epithets and so rejected Defendant's argument that Plaintiff could not face discipline for quoting from court opinions. It construed Rule 8.4(g)'s express allowance for "advice or advocacy," as limited to advocacy in the course of representing a client, which provided no safe harbor for Plaintiff's speaking engagements. In sum, Defendants' arguments were, to the court, a plea to "trust them not to regulate and discipline [Plaintiff's] offensive speech even though they have given themselves the authority to do so."

The court next embraced Plaintiff's First Amendment arguments and denied Defendant's motion to dismiss. It first found that the Rule restricts speech that merits "the full protection of the First Amendment," rather than that which warrants more deferential review. Notably, the court reasoned that the plain language of the Rule proscribed speech itself. Moreover, Official Comments published together with the proposed rule make plain its intent do so because they list as examples of manifestations of bias and prejudice "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." The court therefore distinguished Rule 8.4(g) from regulations governing conduct, as in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47 (2006), and from allowances for regulation of speech in the professional context noted in *NIFLA v. Becerra,* 138 S.C. 2374 (2018).

Moreover, because Rule 8.4(g) extends to speech by attorneys at CLEs, which are outside of the courtroom and do not involve solicitation of clients, the Rule could not be saved by precedent permitting regulations in those contexts. Significantly, because Rule 8.4(g) "prohibit[s] using 'words' . . . to 'manifest bias or prejudice'" the court concluded it regulated "a much broader category of speech" than "'harassment and discrimination . . . carried out by words.'" And the court warns against the risk of government regulating the content of professionals' speech to "suppress unpopular ideas or information."

Next the court concluded that Rule 8.4(g) is viewpoint discrimination. Drawing on *Matal v. Tam,* 528 U.S.__ (2017), the court reasoned that by prohibiting attorneys from evincing bias or prejudice on several grounds but allowing them to express tolerance or respect on the same grounds, Rule 8.4(g) censored attorneys based on their views. As such, the Rule presumptively violates the First Amendment. Though the Plaintiff needed only to plead a plausible claim to survive a motion to dismiss, the court couched its conclusion in the unequivocal terms: Rule 8.4(g) "constitute[s] unconstitutional viewpoint discrimination."

The motion to dismiss analysis relegates the issue of preventing discrimination by attorneys to a footnote. Defendants asserted a compelling interest in "ensuring that those who engage in the practice of law do not knowingly discriminate or harass

someone so that the legal profession 'functions for all participants,' ensures justice and fairness, and maintains the public's confidence in the judicial system." The court summarily concluded that because the rule reached "words [that] manifest bias or prejudice" it was not narrowly tailored or the least restrictive means to advance that interest and so could survive neither strict nor intermediate scrutiny.

After dispatching with Defendants' arguments for dismissal the court easily concluded Plaintiff was entitled to a preliminary injunction. The First Amendment analysis that undergirded the denial of Defendants' motion to dismiss also supported the conclusion that Plaintiff was likely to succeed on the merits of his claim and that the remaining preliminary injunction factors---irreparable injury, the possibility of harm to others, and the public interest---tipped in his favor. The analysis does not grapple with, or even mention, the harm caused by discrimination or the public interest in preventing it. The court's order enjoined enforcement of Rule 8.4(g) in its entirety. Defendants appealed the order granting the preliminary injunction, and the court granted the parties' joint motion to stay proceedings pending resolution of the appeal to the 3rd Circuit.

Judge Kenney was appointed by President Donald J. Trump. ■

**The views contained in this article are my own and do not represent the opinions of my employer*

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

Indiana U.S. District Court Finds No First Amendment Violation in Agency's Termination of a Counselor Who Objects to Transgenderism on Religious Basis

By Filip Cukovic

On December 12, Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana held that a counselor's First Amendment rights were not violated after the counselor was terminated for expressing hesitance about counseling a transgender youth due to the counselor's religious objections to transgenderism. The counselor was employed by an organization that provides services by contract to the state. *Wade v. Stigdon*, 2020 U.S. Dist. LEXIS 232297; 2020 WL 819681.

Sometime in late 2017 or early 2018, the Indiana Department of Child Service (DCS) opened a case into the potential abuse or neglect of K.L, a transgender child. The case was assigned to Kelly McSween, who is a Family Case Manager at DCS. After investigating the case, McSween concluded that Family Center Therapy would be the most appropriate service both for K.L and his family. DCS does not provide such services itself, and instead, it contracts with appropriate non-governmental entities that provide needed therapies. One such entity is Lifeline Youth and Family Services, Inc. Specifically, Lifeline provides Family Center Therapy, and McSween asked Lifeline to provide such service to K.L.

The contract between DCS and Lifeline permits Lifeline to either accept or decline a referral based on whether it has adequate or appropriate staff to handle the referral. Moreover, Lifeline is contractually obligated to provide "a culturally competent, safe, and supportive environment for lesbian, gay, bisexual, transgender or questioning youth" and maintain sensitivity "to the sexual and/or gender orientation of" all family members, including "children/youth." The contract also specifies that it is "the expectation that providers and staff treat all individuals and families respectfully and non-judgmentally, irrespective of one's personal views of sexual orientation and/or gender identity." Finally, the contract allows DCS to request the replacement of any therapists who fails to abide by the above-stated principles.

Following this agreement, Lifeline's Kelly McSween accepted the referral and assigned K.L's case to Harry Kevin Wade, who, in addition to serving as a counselor, is also a Christian minister. Wade immediately expressed concern about his ability to counsel the family because of his religious beliefs. Although Wade never directly refused to provide counseling services to K.L. and his family, he informed McSween that he did not "understand" transgender individuals, and that he did not agree with the transgender "lifestyle."

McSween felt compelled to act, and she informed her supervisor Sarah Sutton about the conversation she had with Wade. Sutton further informed the Local Office Manager, Heidi Decker, about Wade's comments. Collectively, McSween, Sutton, and Decker concluded that it would be inappropriate for Wade to provide services to K.L. Soon, McSween informed the DCS Regional Manager – Kristina Killen – about her conversation with Wade.

Although Wade expressed that he was willing to "give it chance" and work with K.L and his family, Killen agreed that he should not be involved in K. L's case. Thus, she consulted with direct supervisors David Reed and Sarah Sparks, who are Deputy Directors of Child Welfare Services. Soon, Killen, Reed, and Sparks met with DCS's legal counsel, Jacob May, and concluded that Wade should no longer provide services

to DCS clients because he could not counsel transgender clients without allowing personal views to interfere with his therapy. Killen called Lifeline with this news on January 24, 2018, and that same day, Lifeline informed her over email that it no longer employed Wade.

Following his termination, Wade sued under 42 U.S.C. § 1983, arguing that the defendants retaliated against him for exercising his protected First Amendment rights. Wade sued defendants McSween, Decker, Stigdon, and May both in their personal and professional capacities. Wade alleged that he engaged in speech protected by the First Amendment by informing defendants that he was a Christian and that his exposure to transgender individuals was nonexistent. In turn, he argued, defendants violated his First Amendment rights by prohibiting him from having any contact with any DCS clients and ultimately terminating him. After Wade amended his Complaint for the third time, both parties filed cross motions for summary judgment. Eventually, the court issued a ruling in favor of Defendants, dismissing all of Wade's claims.

The court first addressed Wade's argument that defendants McSween, Decker, Stigdon, and May are individually liable for Wade's alleged unconstitutional termination. Individual liability under 42 USC § 1983 requires personal involvement in the alleged constitutional deprivation. Although direct participation is not necessary, to demonstrate personal involvement there must at least be a showing that a defendant acquiesced in some demonstrable way in the alleged constitutional violation. Wade wasn't able to demonstrate such involvement on the part of McSween, Decker, or Stigdon. Specifically, these defendants were not involved in deciding to bar Wade from counseling DCS clients. Instead, the decision to terminate Wade was made by Killen, Sparks, and Reed. McSween, Decker, and Stigdon simply relayed factual information about an event relating to Wade's comments to other DCS employees, who then decided to terminate Wade themselves.

As for attorney May, also sued in his individual capacity, the court held that he is shielded from any potential individual liability by attorney-client privilege. May advised employees of DCS on legal matters relevant to the Department, and throughout the process of advising, he may have advised DCS that Wade should be terminated. However, because legal advice was sought from May in his capacity as staff attorney, all evidence concerning May's involvement in this matter is protected by the attorney-client privilege.

The court then addressed the substantive part of Wade's motion. In his summary judgment brief, Wade argued that he is entitled to judgment as a matter of law because the defendants retaliated against him for exercising his First Amendment rights. Wade alleged that his religion informed his understanding of transgenderism, and that his willingness to express his opinion regarding that topic cost him his job. Relying on the court's prior conclusion that he was not an employee of DCS, Wade argued that the *Pickering* balancing test is inapplicable, and the court should instead apply the so-called *Bridges* test. Such test requires that a non-governmental employee show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take the retaliatory action. Moreover, Wade argued that he could satisfy that test by showing that (1) he expressed his religious beliefs as a Christian; (2) he was terminated shortly after expressing his religious views to McSween; (3) and after learning about his views, McSween contacted other defendants in an effort to oust Wade from his position with Lifeline.

The court rejected Wade's arguments, holding that his claim fails for several reasons. First, Wade was mistaken in arguing that the *Bridges* test should guide the analysis. Instead, the *Pickering* balancing test is an appropriate method of analysis. The cases in the Seventh Circuit are clear: when an independent contractor of a government agency has been fired because of his exercise of free speech, courts must balance interests pursuant to *Pickering*. *See Khuans v. Sch. Dist.*, 123 F.3d 1010 (7th Cir. 1997). Such holdings definitively foreclose Wade's contention that his claim is subject to the lower, non-government-employee standard outlined in *Bridges*.

But before even reaching any *Pickering* interest balancing, a plaintiff must first show that when his First Amendment rights were allegedly violated, he spoke as a citizen rather than as an employee, *see Garcetti v. Ceballos*, 547 U.S. 410 (2006), and that he spoke on a matter of public concern rather than on a matter only of personal interest. *See Connick v. Myers*, 461 U.S. 138, 147 (1983).

Wade failed to satisfy the *Garcetti* requirement. When expressing his concerns about his ability to fairly counsel K.L. and his family, Wade spoke only to his ability to provide services in his *professional*, not personal capacity. Because the critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, Wade's stated apprehension about his ability to perform the core job functions of his profession is not protected by the First Amendment.

Wade also failed to satisfy the *Connick* test, as his speech was not on a matter of public concern. In the Seventh Circuit, speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest. However, this inquiry requires considering the content, form, and context of the speech. For example, mere workplace concerns, like those expressed about job assignments, are matters of personal interest that are not protected by the First Amendment. In *Connick*, the Supreme Court refused to extend protection to statements that "if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. at 148. The same is true for Wade's comments: the only thing their revelation would disclose is Wade's view that he would likely be impaired by

his religious views in providing services to K.L. and his family.

However, even if Wade successfully satisfied the *Garcetti* and *Connick* requirements, his claim would still fail under the *Pickering* balancing test. Under *Pickering*, the court must balance the employee's interest—as a citizen speaking on matters of public concern—with the government employer's legitimate interests in effectively performing its mission. Here, even if Wade's speech related to matters of public concern, the speech would reveal that Wade would not be able to effectively counsel a child who is transgender, which by extension directly affects DCS's ability to deliver its services. This would also affect DCS's ability to uphold the public trust in advancing its policy of helping all children, regardless of their particular backgrounds. In contrast, Wade's interest was minimal—his statements were made solely to express his view that his religious beliefs would impede his ability to provide services. Thus, the court held that Wade's claim is doomed not only by *Garcetti* and *Connick*, but also by *Pickering*. For all those reasons, the court granted the defendants' motion for summary judgment.

Plaintiff was represented by Mark R. Waterfill, Esq. Defendants were represented by Benjamin C. Ellis, Joshua Robert Lowry, and Kelly Cochran from Indiana Attorney General's Office. Judge Pratt was appointed by President Barack Obama. ■

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Lenient New York City Law Saves *Pro Se* Plaintiff's Sexual Orientation Harassment Claim from Dismissal

By Corey L. Gibbs

Before Leg Apparel terminated Aftern Sanderson's job, his coworkers made insensitive remarks to him. Due to the statements made at work, Sanderson filed a complaint against his former employer, alleging that he was discriminated against based on his race and his sexual orientation in violation of Title VII and the New York City Human Rights Law (NYCHRL). The court declined to dismiss Sanderson's race discrimination claims but found his allegations insufficient to sustain the gender-based discrimination claim. However, the court granted him leave to amend his complaint. Following the submission of Sanderson's amended complaint, U.S. District Judge Gregory H. Woods dismissed his sexual orientation discrimination claim under Title VII, but allowed Sanderson's hostile work environment claim under the NYCHRL to proceed and granted him leave to further amend his complaint to include Daytona Apparel Group (the new name under which his former employer was doing business) as a defendant. *Sanderson v. Leg Apparel LLC,* 2020 U.S. Dist. LEXIS 102875; 2020 WL 7342742 (S.D.N.Y. Dec. 14, 2020).

Sanderson alleged that Melissa Romanino, a co-worker at Leg Apparel LLC, joked about him being at Martha's Vineyard with his boyfriend. She also twice joked about a client being his boyfriend. Sanderson claimed that these jokes created a hostile work environment. Earlier in the year, the court allowed Sanderson to amend his complaint.

Sanderson repleaded the gender-based hostile work environment and negligent infliction of emotional distress claims. The court liberally construed his amended complaint to raise the strongest arguments suggested because he was *pro se*. *See Nielsen v. Rabin*, 746 F.3d 58, 63 (2d Cir. 2014); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, Judge Woods wrote, "The Second Amended Complaint does not cure the deficiencies identified by the Court." While the court finally granted the Defendants' motions to dismiss the negligent infliction of emotional distress and gender-based hostile work environment Title VII claims, Sanderson's hostile work environment claim under the New York City Human Rights Law (NYCHRL) survived due to New York City's more lenient law.

Unlike Title VII, which requires the alleged discrimination to be severe and pervasive, the NYCHRL just requires Sanderson to show that he was treated "less well" than other employees on the basis of his gender. *See Stinson v. City Univ. of New York*, 2018 WL 2727886 (S.D.N.Y. 2018). The comments referring to Sanderson's client could plausibly be construed as attempts to diminish Sanderson's success. The court was able to salvage his claim under the NYCHRL because the comments made by his coworker as described in his complaint could be seen as treating him "less well." Furthermore, the Defendants did not argue that he failed to allege a claim. However, they relied on an affirmative defense, which was unavailable on a motion to dismiss.

Sanderson also sought leave to add a claim of defamation to his complaint. The court refused to grant leave, finding that the proposed amendment would be futile. Not only was the defamation claim time-barred, but the alleged defamatory statements were protected by absolute privilege because they were made during EEOC and NYSDHR proceedings. Finally, Sanderson sought leave to add a new Defendant. He received information that Leg Apparel

was claiming bankruptcy and began doing business as Daytona Apparel Group. Although the deadline to add parties in the case had passed, the court found that he had established good cause to allow the addition of Daytona.

Judge Gregory H. Woods was appointed by President Barack Obama. ■

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

Florida Federal Court Dismisses Title IX Claims Regarding a Verbally Abusive Women's Basketball Coach Over Homophobic Dismissals of Players

By David Escoto

On December 4, 2020, Chief Judge Mark E. Walker of the U.S. District Court for the Northern District of Florida granted summary judgment in favor of Florida Agricultural and Mechanical University (FAMU) regarding alleged Title IX violations by five former players of the FAMU women's basketball team. They alleged that they were wrongfully terminated from the team by Head Coach LeDawn Gibson because of their sexual orientation, association with homosexual players, and participation in a Title IX investigation. Judge Walker granted summary judgment, finding that no reasonable jury could find that a genuine dispute exists because the evidence is insufficient. *Burks v. Board of Trustees of Florida Agricultural and Mechanical University*, 2020 WL 7137108 (Dec. 4, 2020).

Two of the plaintiffs, Ms. Holland and Ms. Reynolds, are both openly gay. They were in a relationship together while Holland was a team member of the basketball team. However, they did not date while they were both teammates. Reynolds was dismissed from the team during the summer of 2016 and subsequently graduated from FAMU. Holland alleges she was dismissed in February 2017. Following both dismissals, Ms. Holland reached out to FAMU's Title IX coordinator, Carrie Gavin, about an investigation into FAMU's women's basketball coaching staff. Holland's parents also reached out to the Deputy Athletic Director to list several complaints about the coaching staff.

Another plaintiff, Ms. Njoku, was friendly with Holland and Reynolds. Njoku was dismissed from the team in March 2016. Following her dismissal, Njoku informed one of the FAMU Athletic Directors that she had been dismissed. However, the record does not state whether she told the Athletic Director she was dismissed from the team because of her association with Holland and Reynolds. Njoku later graduated from FAMU in 2017 before the Title IX investigation was completed.

The final two plaintiffs, Ms. Whitlow and Ms. Burks, were also friends with Holland and Reynolds. Concerned with the way her daughter was being treated, Whitlow's mother reached out to the Athletic Directors. Whitlow's mother explained that her daughter was being retaliated against because of who she hung out with, as Coach Gibson thought her friends were bad influences because of their homosexuality. Burks also experienced bullying from Coach Gibson. Both Burks and Whitlow were dismissed from the team one day apart in April 2017 while the Title IX investigation was ongoing.

When reviewing the record before the court, Judge Walker confirms that Coach Gibson was a rather abusive coach. Walker highlights that Gibson often humiliated and insulted players "beyond the normal limits of 'tough love.'" Neither party disputes that Coach Gibson used profanity around the players and often commented on personal relationships and openly discussed disapproval of same-sex relationships. On some occasions, Coach Gibson would call Burks a "dummy" and refer to other players as "whores" and "nasty girls." Understandably, this led many of the parents to raise concerns with the FAMU Athletic Department.

In February 2017, the Deputy Athletic Director received an email from an anonymous source listing Title IX complaints about the FAMU women's basketball coaching staff. The Deputy Athletic Director forwarded the email to Title IX Coordinator Gavin for further review. Upon receiving the email,

Gavin initiated an investigation into the allegations in the email and requested to meet with current and former players. During her investigation, she also spoke with the coaching staff and parents. Njoku, Holland, Burks, and Whitlow all participated in the investigation.

After an investigation that lasted several months, Gavin concluded that there was conflicting evidence about the discrimination based on sexual orientation and that those complaints were unfounded. Still, Gavin recommended that the coaches within the Athletic Department should attend trainings to learn appropriate motivational techniques. In 2019, another complaint about Coach Gibson emerged, and FAMU subsequently terminated her employment.

To succeed on their Title IX discrimination claims, the plaintiffs are required to show that an official with authority to take corrective measures had actual notice of the alleged discrimination, and the official with such knowledge was deliberately indifferent to the misconduct.

Judge Walker points out that there was actual notice to the proper official here. There is some dispute about whether any correspondence with the coaching staff other than Coach Gibson satisfies the notice requirement, because of their lack of authority. However, the complaints to the Athletic Director, Deputy Athletic Director, and Title XI Coordinator Gavin around the time of the anonymous email and throughout the investigation constitute proper notice to officials who can take corrective measures.

Despite having proper notice of the discrimination, Judge Walker concludes that there was no deliberate indifference to the misconduct. To constitute "deliberate indifference, the conduct of the official must be unreasonable in light of the known circumstances. Judge Walker focuses on the commencement of Gavin's months-long Title IX investigation. The plaintiffs alleged that the investigation was mediocre, and that Gavin's recommendations are unsupported by the facts that exist. The plaintiffs also argued that FAMU took no "actual action" that addressed the issue.

Unfortunately for the plaintiffs, Judge Walker did not find their argument persuasive, noting that the question here is not whether FAMU could have done better but whether FAMU acted with deliberate indifference. According to Judge Walker, the undisputed facts are that FAMU promptly investigated the complaints, made recommendations for the future, and subsequently fired Coach Gibson when other complaints emerged. Judge Walker concludes that the university's actions were not unreasonable in light of the known circumstances.

Judge Walker also dismissed all of the Title IX retaliation claims. There must be a causal link between a statutorily protected expression and the adverse action taken to succeed on a retaliation claim. Judge Walker finds that the causal link is lacking. Regarding Njoku and Reynolds, both of them were dismissed before FAMU received notice of the discrimination. Thus, Judge Walker finds there is no way that Coach Gibson based their dismissal on the complaints.

Similarly, Holland, Whitlow, and Burks failed to identify evidence clearly linking their dismissals from the team to their complaints about the coach. Given the timing of the dismissals, Coach Gibson could have known of anonymous complaints over the course of the Title IX investigation. However, Judge Walker finds that there is no evidence that Gavin communicated anything about the complaints before the players were dismissed. Further, these three plaintiffs presented no facts to suggest that Coach Gibson thought they were responsible for the anonymous complaints. Judge Walker holds that absent evidence to the contrary, the jury would have to impermissibly speculate that Coach Gibson was informed of the complaints and based the plaintiffs' dismissal on that knowledge.

The plaintiffs have remaining state law claims that were brought into federal court based on supplemental jurisdiction. Judge Walker declined to hear those claims since the causes of action under Title IX are dismissed. The state law claims are remanded for a determination by the state courts.

Plaintiffs are represented by Marie A. Mattox and Farnita Saunders Hill of Mattox Law Firm in Tallahassee, Florida. Defendant is represented by Diana K. Shumans, Mitchell Johann Herring, Robert Jacob Sniffen, and Terry Joseph Harmon of Sniffen & Spellman PA in Tallahassee, Florida. Judge Walker was appointed by President Barack Obama. ■

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Nevada Supreme Court Holds *Obergefell* Requires Retroactive Recognition of Out-of-State Same-Sex Marriages (but Not Civil Unions) for Community Property Purposes

By Arthur S. Leonard

The Supreme Court of Nevada unanimously ruled on December 23 that the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), must be applied retroactively in determining the commencement date of the marital "community" for purposes of dividing assets in a divorce, but such constitutionally-demanded retroactivity extends only to marriages, not to civil unions. *LaFrance v. Cline*, 2020 WL 7663476, 2020 Nev. Unpub. LEXIS 1209.

Mary Elizabeth LaFrance and Gail Cline, Nevada residents, went to Vermont to have a civil union ceremony in 2000, returning home to Nevada. In 2003, when same-sex marriage became available in Canada, they went there and got married, then returned to their home in Nevada. In 2014, they decided to break up their marriage and filed for judicial dissolution. That was the year that a lawsuit brought marriage equality to Nevada, in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). Nevada is a community property state, and it became necessary for the trial court to decide what property and assets were part of the "community" for purposes of division of assets. Responding to LaFrance's argument as of 2018 when the Clark County 8th Judicial District Court had to decide, Judge Mathew Harter concluded that pursuant to *Obergefell* he should find that the community came into effect when the parties entered into their civil union in 2000, and divided property accordingly. LaFrance appealed, contending that for purposes of Nevada law, their marital community didn't come into effect until the *Latta* decision in 2014.

The Nevada Supreme Court decided that both parties were incorrect. Under Nevada law as of the time the petition for dissolution was filed, a civil union from Vermont *could* be recognized for these purposes but only if the parties had registered their civil union as a domestic partnership with the Nevada Secretary of State, and these women had not done so. Thus, the court held in an opinion by Chief Justice Kristina Pickering, Judge Harter erred in dating the community from 2000.

On the other hand, the court ruled, the 2003 Canadian marriage should be deemed the date when the community was formed. Even though it was not recognized in Nevada *at that time*, the court found that it must be retroactively recognized pursuant to *Obergefell*.

"In 2015, before the parties' divorce was finalized, the United States Supreme Court decided *Obergefell*," wrote Chief Justice Pickering. "The Court in *Obergefell* held that 'the right to marry is a fundamental right,' and that each state must 'recognize a lawful same-sex marriage performed in another State.' Although the Supreme Court has not opined on the retroactive effects of its *Obergefell* holding, the Supreme Court has 'recognized a general rule of retrospective effect for [its] constitutional decisions,'" citing *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 94 (1993). Since the parties' divorce was not finalized until after *Obergefell* was decided, the court concluded that "the Supreme Court's constitutional decision in *Obergefell*, requiring states to recognize same-sex marriages, applies retroactively to the parties' 2003 Canadian marriage." Thus, 2003 is the commencement date for the marital community.

LaFrance protested that this was unfair, arguing that she and Cline had been operating all those years under the assumption that they did not have any legal rights as a couple in Nevada throughout the period of their Canadian marriage. (Recall that *Latta* was not decided until the year they initiated their divorce proceedings, the year prior to *Obergefell*.) No matter, said the court. "Nevada must credit the parties' marriage as having taken place in 2003 and apply the same terms and conditions as accorded to opposite-sex spouses. These conditions include a presumption that any property acquired during the marriage is community property, NRS 123.220, and an opportunity for spouses to rebut this presumption by showing by clear and certain proof that specific property is separate."

Thus, the property division issue was remanded to Judge Harter "to apply community property principles, including tracing, to the parties' property acquired after their 2003 Canadian marriage."

Justice Abbi Silver recused herself from the case voluntarily. The version of the opinion issued on Westlaw and Lexis as of the end of December did not list counsel for the parties. ■

Colorado High Court Allows Monetary Claims in LGBTQ Workplace Discrimination Suits Against State Subdivisions

By Matthew Goodwin

In a pair of decisions issued on December 21, Colorado's Supreme Court rejected the argument that the Colorado Governmental Immunity Act (CGIA) shields the state's political subdivisions from monetary compensation claims brought under the state's anti-discrimination act, or CADA. *Denver Health & Hosp. Auth. v. Houchin*, 2020 Colo. LEXIS 1097, 2020 WL 7485017; *Elder v. Williams*, 2020 Colo. LEXIS 1098, 2020 WL 7485019. In both cases, a 4-3 majority held that CGIA does not provide such immunity and remanded the case of gay plaintiff Brent Houchin so that he could pursue those claims in addition to equitable relief under CADA. Justice Richard Gabriel wrote for the majority in both cases.

Denver Health and Hospital Authority (Denver Health), the defendant in Houchin's case, was founded as "City Hospital" in 1860. Denver Health was part of the City of Denver from 1860 until 1997, when it became a public entity, or political subdivision, through state statute. This classification meant that Denver Health is not considered a state entity. The State of Colorado waived any CGIA immunity for itself or state entities from monetary claims in the same 2013 round of revisions to CADA that provided for monetary compensation for discrimination victims. However, it was an open question whether the 2013 CADA revisions applied to political subdivisions of the state such as Denver Health.

Houchin was hired by Denver Health as an Employee Relations Specialist in 2012 and he held the title of Employee Relations Manager at the time of his termination in 2016.

The local and broader LGBTQ community watching the case had observed that an adverse ruling on the question might substantially impair the rights of LGBTQ employees of Colorado's political subdivisions. Such subdivisions employ thousands of workers in the state, although clearly not all of them are LGBTQ.

While there was never any question whether Houchin's equitable claims against Denver Health under CADA could proceed, a number of commentators expressed doubt that anything short of monetary consequences provided for in 2013 revisions to the law would curb discriminatory practices of such employers. In point of fact, Houchin interposed an equal protection argument claiming that exempting political subdivisions from CADA's monetary remedies would deprive him and perhaps thousands of LGBTQ employees of such subdivisions of a remedy afforded generally to employees in the state.

For the purposes of their decision and opinion, the court accepted Houchin's allegations as true because the case was before them on a motion to dismiss.

According to Houchin, he consistently received positive reviews and feedback from Denver Health supervisors and did not have a history of discipline, complaints, or other negative marks against him. At some point towards the end of Houchin's employment, a man named Tim Hansen was hired by Denver Health to be Interim Chief Human Resources Officer and also Houchin's supervisor.

During an initial "get to know you" meeting, Houchin shared personal stories or anecdotes with Hansen involving his spouse, which revealed to Hansen that Houchin is gay. Houchin alleges that Hansen became visibly uncomfortable at the disclosure, even disgusted, and quickly changed the subject of their conversation. Further, "Houchin perceived that in subsequent interactions, Hansen began treating him with noticeable disrespect, declining to greet or make eye contact with him, excluding him from discussions pertinent to his position, and publicly criticizing him as overpaid."

Shortly after this meeting, Houchin recommended to Hansen that an employee suspected of methadone diversion at Denver Health's opioid addiction treatment center be placed on administrative leave in accordance with Denver Health policy. According to Houchin, at the time Hansen agreed with this assessment.

About a week later, however, Houchin attended a meeting with Hansen and other HR employees at which there was a discussion about whether Houchin had violated HIPPA in connection with the above-referenced investigation. Apparently, Houchin had learned of the suspected methadone diversion when the employee tested positive for the substance during unrelated medical care at Denver Health and the information was "passed up the chain" to Houchin.

Houchin believed that Hansen's claims that he violated HIPPA were a set-up for his termination and a week late he was indeed fired. Hansen filed an internal grievance with Denver Health " . . . to address what he believed to be the discriminatory circumstances of his termination. He also applied for unemployment benefits, but those benefits were ultimately denied due, in his view, to false information submitted by Denver Health regarding reasons for his termination."

Houchin was issued a Notice of Right to Sue by the Colorado Civil Rights Division and soon thereafter brought his claims under CADA alleging discrimination on the basis of sexual orientation and retaliation. In addition to equitable relief, Houchin sought "judgment in amounts to be determined at trial, including back pay, front pay, and compensatory damages."

Denver Health moved to dismiss. Their argument was that " . . . discrimination and retaliation claims under CADA . . . " as well as monetary relief for such claims " . . . lie in tort and are therefore barred by the CGIA." An earlier case, *City of Colorado Springs v. Conners,* 993 P.2d 1167 (Colo. 2000), appeared to dictate otherwise. Denver Health sought to distinguish *Conners*, taking the position that, " . . . the 2013

amendments to CADA, which for the first time authorized, among other things, front pay and compensatory and punitive damages, added tort remedies to CADA such that CADA claims like those that Houchin was asserting . . . were now tortious in nature and thus barred by the CGIA."

The trial court rejected this reasoning, holding relief available under CADA is primarily equitable in nature and remaining relief, such as monetary damages, were " . . . merely incidental to CADA's greater purpose of eliminating workplace discrimination."

The intermediate appellate court reached the opposite conclusion. Its analysis also seemed to focus on the question of what primary relief was being sought. In its view, Houchin was predominately seeking compensatory damages " . . . for personal injuries suffered as a consequence of prohibited conduct and were therefore barred by the CGIA." In this regard the appellate court acknowledged the odd result of allowing Houchin equitable remedies under CADA but not the monetary remedies for with it now provides.

The appellate court also reached the conclusion that "the state,"—which, as written above, is subject to the monetary relief afforded CADA claimants—does not include political subdivisions. "Notably, the division majority saw this conclusion, too, as anomalous, illogical, and inequitable, because such an interpretation effectively exempted thousands of state employees from CGIA's limitations while subjecting thousands of employees of political subdivisions to such limitations . . . The majority, however, felt constrained by its interpretation of the statutory text."

There was a dissent from Judge Berger at the intermediate appellate level which the Colorado Supreme Court appears to have adopted in large part in its opinion. Judge Berger, like the trial court and the appellate court, focused on the question of what, exactly, CADA is designed to do. "In Judge Berger's view, CADA claims are not designed primarily to compensate individual claimants but rather seek to fulfill the government's basic responsibility to redress discriminatory employment practices. Accordingly, irrespective of the equitable or legal nature of the remedies authorized by CADA, CADA claims are not claims that lie or could lie in tort."

As to the argument that political subdivisions were exempted under CADA from CGIA liability, Judge Berger " . . . stated that it is 'nearly inconceivable' that the legislature would have intended to expand broadly CADA's available remedies while at the same time denying those remedies to a multitude of public employees."

The Supreme Court in *Denver Health* pointed to their analysis in *Elder* to hold Houchin's monetary claims under CADA could proceed.

The court noted that when a statute derogates common law, a court is to strictly construe immunity provisions but broadly construe waiver provisions. They went on to observe that neither the complaint nor the nature of the relief requested are dispositive as to whether a claim is a tort or not. All of this resulted in them holding "[t]he focus of the Colorado Anti-Discrimination Act . . . is on discriminatory or unfair employment practices, and not on ensuring full compensation for claimants . . . Claims under [CADA] derive from statutory duties designed to implement the broad policy of eliminating intentional discriminatory or unfair employment practices, rather than to compensate an individual for personal injuries . . . Under the plain language of [CADA] . . . front pay is equitable in nature, and for that reason as well, claims for such relief are not compensatory."

The Supreme Court's analysis rejected the claimed distinction between liability for the state on one hand and political subdivisions on the other. "The [*Elder* defendant] has cited no authority or legislative history supporting such a premise, and we have seen no such authority or history. Accordingly, we are unwilling to infer such a legislative intent."

The three dissenting justices were the same in each case and the dissent in both was written by Justice Monica Marquez. The crux of the dissent was that CGIA includes language that provides immunity for claims that "could lie in tort" and the dissenters reasoned that the CADA claims could in certain instances—such as Houchin's case—lie in tort.

Furthermore, the dissent argued that selective immunity for political subdivisions but not the state is envisioned by CGIA.

Justice Marquez wrote: "One of the primary purposes of the CGIA is to create 'limitations on the liability of public entities . . . necessary in order to protect taxpayers against excessive fiscal burdens . . . This understanding of the selective waiver of immunity . . . is bolstered by the fact that the 2013 amendments to CADA added a provision to the state risk management fund to account for damages claims that may be filed against the state, but not against political subdivisions."

In other words, the dissent took the position that it was the legislature's intent to open up the state to CADA monetary claims as evidenced by the creation of a special fund to offset these outlays, but no such fund was created for claims against political subdivisions.

Addressing the equal protection argument that the majority declined to reach (having resolved the case on narrower grounds), the dissent concluded by stating "[g]iven the legitimate governmental objective that may be served by limiting political subdivisions' liability, I cannot say that [doing so] is wholly irrational. It thus satisfies rational basis review." Of course, since the majority did not take the question up, it's not clear that rational basis review is the standard to be applied on the equal protection question. The majority may have discerned the controlling classifications differently than did the minority.

Houchin was represented by Merrily Archer of the Denver firm EEO Legal Solutions, LLC. Amici Curie briefs were filed on Houchin's behalf by the Employment Lawyers Association and Colorado Lesbian Gay Bisexual Transgender Bar Association. ■

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Michigan Claims Court Issues Split Ruling on State's Public Accommodations Law

By Arthur S. Leonard

Michigan Court of Claims Judge Christopher M. Murray issued an opinion on December 7 in *Rouch World v. Michigan Department of Civil Rights*, Court of Claims Case No. 20-000145-MZ, holding that the state's Elliot-Larsen Civil Rights Act (ELCRA), which, among other things, prohibits businesses from discriminating against customers because of their sex, cannot be interpreted by his court as banning sexual orientation discrimination, because the state's Court of Appeals rejected the argument that sexual orientation discrimination is covered by the Act in a 1993 ruling.

On the other hand, finding that there is no Michigan court ruling on whether the ELCRA's sex discrimination ban can be applied to discrimination against transgender people, Judge Murray followed the Supreme Court's June 2020 ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731, which interpreted the federal ban on sex discrimination in employment to apply to claims of discrimination based on transgender status.

Michigan Attorney General Dana Nessel announced that she would appeal Murray's ruling as to sexual orientation discrimination, while the business that faces a gender identity discrimination claim announced that it would appeal that ruling.

Murray's opinion concerned discrimination claims against two businesses. *Rouch World*, an events venue that rents space for weddings and other celebrations, refused to book an event for a same-sex couple, citing the owners' religious objections to same-sex marriages. Uprooted Electrolysis, which provides permanent hair-removal treatment, turned down a transgender person seeking their service as part of her transition, also citing religious objections.

In both cases, the rejected customers filed complaints with MDCR, which began investigations pursuant to its Interpretative Statement 2018-1, which states that the ELCRA can be interpreted to cover such claims. In both cases, the businesses subsequently filed suit in the Court of Claims, arguing that the Department does not have jurisdiction over sexual orientation and gender identity claims, and even if it did, that their religious objections privileged them to deny the services. The plaintiffs asked the court to put an end to the investigations.

Judge Murray explained that the ELCRA does not define the word "sex" as used in the provision applicable to claims of discrimination by "a place of public accommodation," which includes businesses selling goods or services to the public. In 1993, the Michigan Court of Appeals ruled in *Barbour v. Department of Social Services*, 497 N.W. 2d 216, that "harassment or discrimination based on a person's sexual orientation is not an activity proscribed by the Act." That decision is binding on trial courts in Michigan. Judge Murray explained that "whether Barbour's reasoning is no longer valid in light of *Bostock v. Clayton County*, and cases containing similar reasoning, is a matter for the Court of Appeals, not this court." Consequently, Attorney General Nessel, herself an out lesbian who helped persuade the Department to issue Interpretative Statement 2018-1, will appeal this part of the ruling to the Court of Appeals.

On the other hand, Murray found no prior opinion by a Michigan court addressing the question of whether gender identity discrimination claims are covered by the ELCRA. Lacking such authority, Michigan courts will look to decisions concerning other statutes with similar language as well as federal rulings for interpretative guidance. This brings the *Bostock* decision into play.

Significantly, the Michigan Supreme Court recently vacated a Michigan Court of Appeals ruling in a case under the ethnic intimidation statute for reconsideration in light of *Bostock*. In that case, *People v. Rogers*, 331 Mich. App. 12, vacated, 950 N.W. 2d 48 (2020), the Court of Appeals ruled that the ethnic intimidation statute's listing of sex does not cover hate crimes against transgender people. The Michigan Supreme Court told the Court of Appeals to reconsider that ruling in light of *Bostock*, a clear signal that the Michigan court is prepared to treat the *Bostock* decision as a persuasive precedent for interpreting the state's sex discrimination laws.

"Following the *Bostock* Court's rationale," wrote Murray, "if defendants determine that a person treated someone who 'identifies' with a gender different than the gender that he or she was born as, then that is dissimilar treatment on the basis of sex, and they are entitled to redress that violation through the existing MDCR procedures. Nothing in the ELCRA would preclude that action."

The bottom line of Judge Murray's decision is that the Department does not have jurisdiction of the sexual orientation discrimination claim against Rouch World unless the Michigan Court of Appeals decides to overrule its old *Barbour* decision, but that the Department does have jurisdiction to investigate Uprooted Electrolysis's denial of service to a transgender client, at least so far as interpretation of the ELCRA goes. Of course, the Supreme Court's remand in the ethnic intimidation case is likely to persuade the Court of Appeals that it should also reconsider *Barbour* in light of *Bostock*.

The court refrained from ruling on the religious exemption claims, stating that issue "has not been sufficiently briefed to resolve at this juncture." The question of federal constitutional religious exemptions from compliance with state or local anti-discrimination laws is now before the U.S. Supreme

Court in *Fulton v. City of Philadelphia*, which was argued on November 4 and will be decided sometime in 2021. It is likely that many state agencies and courts dealing with religious exemption claims by civil rights defendants may delay ruling on such claims until the Supreme Court rules in *Fulton*.

Judge Murray ended his opinion by stating, "This is not a final order as it does not resolve all of the pending issues in this case." This cryptic remark implies that Uprooted Electrolysis may not immediately appeal the court's determination that the ELCRA applies to the transgender discrimination claim, since its religious exemption claim has not yet been ruled upon. However, the declaration that the MDCR does not have jurisdiction over the sexual orientation claim against Rouch World seems final as to that complaint, so Attorney General Nessel may be able to appeal that ruling. ■

N.Y. Appellate Division 2nd Department Overrules Precedent, Holding False Imputation of Homosexuality is not Defamatory *Per Se*

By Arthur S. Leonard

In *Laguerre v. Maurice*, 2020 WL 7636435, 2020 N.Y. App. LEXIS 8011, 2020 NY Slip Op 07887 (2nd Dept., Dec. 23, 2020), a panel of the N.Y. Appellate Division, 2nd Department, abandoned a departmental precedent dating from 1984, *Matherson v. Marchello*, 100 App. Div. 2d 233, finding that today a false statement that the plaintiff was a homosexual who watched gay porn on his employer's computer is not defamatory *per se* and thus a complaint to that effect must be dismissed for failure to allege special damages. The court noted with approval the 3rd Department's 2012 decision in *Yonaty v. Mincolla*, 97 App. Div. 3d 144, which was the first intermediate appellate ruling in New York to abandon prior case law on this point. Justice Sheri Roman wrote the opinion for the panel.

Pierre Delor Laguerre was an elder in the Gethsemane Seventh Day Adventist Church in Brooklyn. He claims that he had a falling out with Pastor Jean Renald Maurice, the defendant, which, according to Justice Roman's summary, "initially centered around church-related issues, and that Pastor Maurice stated that, if the plaintiff 'did not submit to him,' Pastor Maurice would 'crumble' the plaintiff." According to the complaint, Maurice stated that he would "make false statements against the plaintiff and have the church membership vote to relieve the plaintiff of his responsibilities at the church." Laguerre claims that before a congregational meeting with about 300 members in attendance, Maurice made the false statement concerning Laguerre, thus prompting the congregation to vote as Maurice requested. Laguerre sued for *per se* defamation.

Pastor Maurice moved to dismiss the complaint on three grounds.

First, he argued, the court lacked jurisdiction because this was essentially an ecclesiastical matter. Laguerre countered that the question of defamation could be decided as a matter of civil law without reference to any religious doctrine, and the trial judge, Justice Devin P. Cohen of Kings County Supreme Court, agreed with Laguerre's argument on this point and denied the motion to dismiss on jurisdictional grounds, and the Appellate Division panel found this ruling to be correct.

Second, Maurice argued that his statement was privileged under the "common interest" rule, contending that a communication from a pastor to a congregation on a church-related matter could not be made the basis of a defamation claim. While acknowledging the existence of the privilege, Justice Cohen found that Laguerre's allegations support the argument that the privilege was lost in this case because the statement was made with "malice," noting Laguerre's allegation that Pastor Maurice had threatened to make a false statement about Laguerre to persuade the congregation to terminate his status. Knowingly making a false statement of fact with malice is not privileged. The appellate panel also found this ruling to be correct.

However, Pastor Maurice was more successful with his third argument on appeal, that the alleged statement was not defamatory *per se*. Laguerre's complaint relies on *Matherson v. Marchello*, cited above, to contend that in the 2nd Department a false imputation of homosexuality is automatically actionable as *per se* defamation. That is, in ruling on a motion to dismiss, a trial court in the 2nd Department should presume that such a statement would harm the reputation and livelihood of the plaintiff, so the plaintiff would not

have to allege special damages such as economic injury in order to maintain his action. At the time *Matherson* was decided, there were rulings by all four Appellate Departments to similar effect. However, the 3rd Department broke ranks in 2012 with *Yonaty*. The Court of Appeals has not ruled on the question, so the matter is left to be decided by each Appellate Division department. Given the state of precedent in the 2nd Department, Justice Cohen had denied the motion to dismiss on this ground as well. Laguerre appealed Cohen's decision on all three grounds.

Finding the reasoning of *Yonaty* to be persuasive, the 2nd Department now holds that *Matherson* and the earlier cases that it had cited "are inconsistent with current public policy," wrote Justice Roman. "This profound and notable transformation of cultural attitudes and governmental protective laws impacts our own consideration of stare decisis," she wrote. The court recited a litany of legal developments since 1984, particularly noting the Supreme Court's 2003 decision in *Lawrence v. Texas* striking down as unconstitutional a Texas statute outlawing homosexual sex and that court's 2015 decision in *Obergefell v. Hodges* finding a constitutional right for same-sex couples to marry. The court also noted that New York has banned sexual orientation discrimination in employment, housing and public accommodations since 2002 and enacted its own marriage equality law in 2011.

Thus, there is today no necessary presumption that falsely calling somebody homosexual will harm their reputation, and such a statement no longer falls within the sphere of cases in which reputational harm can be assumed on ground of criminality, professional disqualification or the imputation of a "loathsome illness." A false statement that does demonstrably cause economic harm to the plaintiff could still be the basis of a defamation claim, but such harm would have to be alleged and factually supported in the complaint. Although the court does not discuss the point, it seems likely that being an elder in the church did not make Laguerre an employee and so the loss of his position did not inflict an economic injury on him; otherwise, he might have alleged that as special damages.

"Based on the foregoing," wrote Justice Roman, "we conclude that the false imputation of homosexuality does not constitute defamation *per se*. *Matherson*'s holding to the contrary should no longer be followed. Therefore, the plaintiff was required to allege special damages. He failed to do so, and, consequently, his cause of action alleging defamation *per se* must be dismissed."

The unanimous panel of the 2nd Department in this case included, in addition to Justice Roman, Justices Cheryl E. Chambers, Sylvia O. Hinds-Radix, and Colleen D. Duffy. Laguerre is represented by Maurice Dean Williams of The Bronx, and Pastor Maurice by the firm of Lester Schwab Katz & Dwyer of Manhattan. ■

Re-Thinking Correctional Liability for Threatened Violence Against LGBT Prisoners

By William J. Rold

A Missouri prison gang, calling itself "Family Values," extorts payment from gay prisoners who want to use the yard. Gang members told *pro se* plaintiff Daniel Van Allen that "all gay prisoners had to pay the gang 'sooner or later.'" Van Allen paid the gang with monthly canteen purchases. He was never actually beaten, although he was repeatedly threatened. In *Van Allen v. Lawson*, 2020 U.S. Dist. LEXIS 235349 (E.D. Mo., Dec. 15, 2020), U.S. District Judge Sarah E. Pitlyk dismissed Van Allen's equal protection and protection from harm claims as "frivolous." She allowed Van Allen to proceed against the warden and a unit manager on a First Amendment retaliation claim – more about that later – but first, a discussion about the dismissed claims and a suggestion of possible new arrows for the victimized LGBT inmate's quiver.

Judge Pitlyk dismissed the equal protection claim because of lack of "state action," since the extortion was from other inmates, in the form of forced commissary "buys." It was not carried out by prison employees, although Van Allen alleged that the warden and her deputy knew about and tolerated the extortion. In fact, Van Allen alleged that the Family Values extortion was so widely known that even the commissioner of DOC was a proper defendant. Nevertheless, Judge Pitlyk ruled: "The gang members who discriminatorily target inmates based on their sexual preference . . . are not acting under state law and are not state actors. They are private parties. There are no facts alleged suggesting joint activity between Defendants and

the gang members." *Compare Recton v. Stamps*, 2:18-cv-0001 (E.D. Mo., Mar. 23, 2018) (prisoner's claim that corrections officials knew Family Values gang extorted money allowed to proceed).

Judge Pitlyk also dismissed the protection from harm claim. She recognized that *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), protects against deliberate indifference of correctional officials to the safety of inmates at the hands of other inmates – and that it has objective and subjective components. She found that the commissary "buys" never amounted to more than $20/month and were therefore not serious under the Eighth Amendment. She then said that the plaintiff, having paid the extortion, had not been harmed because he was only threatened with beatings that were not carried out. Finally, she said that, even if the "objective" element was met by these facts, the "subjective" element was not, because the prison offered Van Allen protective custody and did cell searches for contraband. *Compare Anderson v. Godent*, 4:17-cv-2659 (E.D. Mo., Apr. 19, 2018) (prisoner released from protective custody entitled to protection from Family Values gang in population, where plaintiff alleged warden knew and "tacitly allowed" the gang to operate).

Here, Van Allen alleged that staff told him that: "Family Values has more control at [this prison] than any correctional officer does" and "DOC has no control over Family Values and the gang dominates every yard in DOC." This writer found that other judges in the Eastern District of Missouri (above) have recognized the problem. The Family Values gang has operated in Missouri for some time. *See Petty v. Lagore*, 2:13-cv-0093 (E.D. Mo., Nov. 25, 2013) (discussing clashes between white supremacist "Family Values" gang members and black gangs "Crips" and "Disciples"). In fact, "Family Values – gang – prison – Missouri" has a Wikipedia entry.

Judge Pitlyk wrote: "Prison gangs are nothing new to the Missouri Department of Corrections," citing *Turner v. Safley*, 482 U.S. 78, 91-2 (1987). That is true, as far as it goes, but she continues by saying that *Turner* "upheld" Missouri's efforts to mitigate gang violence. This is a stretch. In *Turner*, the Eighth Circuit had disapproved Missouri's prohibition on inmate-to-inmate correspondence between prisons, applying First Amendment "strict scrutiny." The Supreme Court held that, in Corrections, the test was a "balancing" one, giving due weight to correctional concerns. Missouri defended its correspondence rule as part of an effort to control gang activity after members were put in separate prisons, and the Court accepted this justification. *Turner* was decided seven years before *Farmer*, and it did not address protection from harm or whether Missouri's efforts to mitigate gang violence were adequate.

Putting aside Judge Pitlyk's rulings on equal protection and protection from harm, there may be other legal theories to protect LGBT inmates subject to gang or group violence. Applications of 42 U.S.C. § 1985(3) and § 1986 should also be considered.

Section 1985(3) prohibits conspiracies to interfere with civil rights, including equal protection, as part of the Reconstruction Era civil rights statutes. Unlike, § 1983, it reaches private conspirators and does not require "state action." It also protects victims of the conspiracy from damages to their "person or property." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Griffin marked a resuscitation of this section of the Civil Rights Act of 1871, as applied to the rights of black people to peacefully go about their business on the public streets and byways. It contains the following limiting language: "[T] here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. It was not long before the Court became skittish about what the "perhaps" language of the case may portend.

In *United Brotherhood of Carpenters & Joiners*, 463 U.S. 825, 830-12 (1983), the Court declined to extend Griffin's logic to union organizing activity, for two reasons: union membership (or its refusal) did not involve a protected class; and (2) rights protected against conspiracy under § 1985(3) must find their root under another part of the Constitution that protects against private as well as government encroachment. Since the First Amendment was the alleged basis here, and since the Constitution only prevents the government from infringing it, private conspiracies against First Amendment rights are not covered by § 1985(3).

Later, in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993), the Court applied the same reasoning to an alleged § 1985(3) conspiracy claim against Operation Rescue's interference with abortion clinics. [Interestingly, the Court was sharply divided, with multiple opinions. The case was first argued after Justice Marshall resigned and before Justice Thomas's investiture. From the published decision, it appears the Court was evenly divided (which would have affirmed the Fourth Circuit decision against Operation Rescue). The Court granted re-argument, and Justice Thomas provided the fifth vote.] Writing for the majority, Justice Scalia found no animus against women as a class because not all women want abortions (contrasting old restrictions against women practicing law, which were "because of their sex"). [Yes, that old chestnut that pregnancy discrimination is not sex discrimination in *Geduldgig v. Aiello*, 417 U.S. 484 (1974), refuses to die.] He also found that the privacy rights that underlie the right to abortion are not protected against private infringement.

Section 1985(3) claims have not fared much better in the Eighth Circuit. In *Federer v. Gephardt*, 363 F.3d 754, 759-60 (8th Cir. 2004), the Court declined to recognize a conspiracy of one Congressional campaign breaking into the offices of an adversary, since all action was done in a private capacity. More recently, whistleblowers could not state a § 1985(3) claim, because they were not a "discrete and insular minority" like "race, national origin or gender." *McDonald v. City of St. Paul*, 679 F.3d 698, 707 (8th Cir. 2012).

What does this leave? Is there a residual role for § 1985(3) in confronting gay bashing by private actors? Could a judge be persuaded that a gang whose

common purpose was homophobia violated § 1985(3) when it went about bashing people on the public byways outside gay bars? Prohibition of such seems very much like the purpose of the original Ku Klux Klan Acts in Reconstruction, of which § 1985(3) is a key survivor. And the prison yard is as close to a public byway as a prisoner can legally get.

Now, if the reader has suspended judgment this far, let us introduce § 1986. That clause creates a cause of action for damages against any person who: (1) has knowledge of a § 1985(3) conspiracy; (2) has "the power to prevent or aid prevention" of the conspiracy; and (3) "neglects or refuses to do so." There is no requirement of state action here, either; but surely the prison managers are "persons."

Section 1986 (unlike other Civil Rights era statutes) has a one-year statute of limitations, but gang conduct, like that alleged here, is ongoing. More importantly, the standard of proof under the statue is negligence. If this theory holds, one need not meet all of the pretzel elements inherent in a deliberate indifference claim under Farmer. For example, a § 1986 claim would dispense with subjective intent because "should have known" is enough for negligence. In this writer's view, advocates should look for a good test case, and go for it.

As mentioned, Judge Pitlyk allowed Van Allen to proceed on First Amendment retaliation claims against two defendants: a unit manager, for threatening him for complaining about the Family Values gang; and the warden for removing him from his sex-offender program needed for parole, after he filed this lawsuit. This all seems correct, but also naïve and dangerous. These defendants are hauled into litigation by the judge, while their underlying behavior with respect to the Family Values gang is put beyond the Court's reach. The gang is given the green light, and the defendants are told that they are doing enough and that the underlying claims against them are "frivolous." The two defendants who remain have, as a practical matter, the power to retaliate in ways that can never be proven.

Appointed by President Donald J. Trump, Judge Pitlyk took office in December of 2019. She clerked for Justice Kavanaugh when he was on the D.C. Circuit. The American Bar Association rated her as "not qualified" because she lacked any trial practice experience, and she was narrowly confirmed on a party-line vote. Her main "qualifications" from Trump's point of view would likely be that she clerked for Kavanaugh, was a member of the Federalist Society, and was born in 1977 so will likely serve for several decades. ■

Switzerland Must Consider Risks of Ill-Treatment Faced by Asylum-Seeking Gay Man from the Gambia

By Eric Wursthorn

On November 17, 2020, the European Court of Human Rights (ECHR) halted Switzerland's efforts to deport a gay male to the Gambia, finding that Swiss authorities needed to "sufficiently assess the risks of ill-treatment" the asylum-seeker faced in the Gambia as well as "the availability of State protection against ill-treatment emanating from non-State actors." *Case of B and C v. Switzerland*, Applications nos. 889/19 and 43987/16. In so doing, the ECHR found that Switzerland had violated Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court's holding was limited, however, as it reiterated that the "mere existence" of laws in the Gambia criminalizing same-sex sexual acts did not necessarily render deportation to the Gambia contrary to the Convention. Nor did the court set any guidelines for what Swiss authorities should consider, nor did it define the minimum threshold showing that Applicant B would need to establish in order to obtain asylum in Switzerland.

The man seeking asylum is identified in the court's decision as "B." B, a foreign national of both the Gambia and Mali, was in a same-sex domestic partnership with "C," a Swiss national. They registered their partnership in Switzerland in 2014. Meanwhile, in 2008, B filed his first asylum application. He would go on to file at least two more applications which would contradict one another regarding his national status, family, background, and criminal history. For example, B filed the first application under a different identity, claiming to be only from Mali. In his second asylum application, B claimed

that he feared criminal prosecution stemming from an alleged arrest for performing sexual acts in a hotel and that he escaped from the Gambia during his transfer to prison. Swiss authorities rejected B's asylum applications and he was ordered to leave Switzerland.

On appeal, the domestic court found B not credible, noting that he had obtained a Gambian passport in 2012 and that "[i]t was not plausible that the authorities would have issued him with a passport while criminal proceedings had been pending against him." B's third asylum application contained further inconsistencies about his account of his family members and his situation at home in the Gambia.

The Swiss courts did acknowledge that "the situation for homosexuals was difficult in the Gambia" but found that B had failed "to evince a concrete risk of ill-treatment." Further, the Swiss courts declined to consider the circumstances that LGBT people in the Gambia face because, as one Swiss appellate court noted, they were "not convinced that Gambian authorities would deduce . . . that [B and C] were in a same-sex relationship," B did not talk about his relationship with C to relatives in the Gambia, "[n]or had he been in close contact with same-sex groups or organizations."

Matters were further complicated when B was convicted of attempted extortion with violence, property damage and unlawful entry into and presence in Switzerland. B was sentenced to 18 months in prison while immigration proceedings were pending. Further, C, who was approximately 24 years older than B, was suffering from a severe illness during that time and ultimately died in December 2019, mooting his individual claims before the ECHR.

The situation in the Gambia for homosexuals, which underpins the court's decision, is deplorable. The Gambian Criminal Code under articles 144, 145 and 147 penalize same-sex relations, which are punishable by 5 and 14 years in prison, depending upon the circumstances. In 2014, the Gambian Parliament added the crime of "aggravated homosexuality" to the Code, which is punishable by life imprisonment. The ECHR noted that the situation in the Gambia appeared to improve when Adama Barrow was elected president in 2016, defeating anti-LGBT and authoritarian then-President Yahya Jammeh. According to a 2018 US State Department report, President Barrow "dismissed" homosexuality as a "nonissue" and the Gambia's delegation to the UN Human Rights Council represented that while the government had no immediate plans to reverse or change current laws, the government was not enforcing laws criminalizing homosexual conduct and "there are no recent reports of arrests and prosecutions" in the Gambia. Nonetheless, the ECHR noted widespread reports of continuing discrimination against gays in the Gambia and the lack of advocacy for LGBT rights there as compared to other countries such as Uganda and Nigeria where widespread persecution of the LGBT community takes place.

Article 3 of the Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." B argued that on his return to the Gambia, he will run a real risk of ill-treatment due to his sexual orientation. He asserted that even if the Gambian government was no longer actively persecuting homosexuals, "they were still far from willing and able to protect them against attacks from private individuals." B further argued that he should not be required to conceal his sexual orientation in order to avoid persecution, because it is "a fundamental part of his identity."

Meanwhile, the Swiss government painted B as incredible and a liar. They asserted that the situation in the Gambia was improving, such that B could expect to obtain protection from local authorities. Further, the Swiss government admitted that B "could not be obliged to conceal his sexual orientation in order to avoid persecution," but that the Swiss courts "had taken that case-law into account even if it had not expressly reproduced it." Finally, Switzerland argued that past persecution was necessary for a person to be deemed at risk of ill-treatment contrary to Article 3 of the convention.

The court found in favor of B to the extent that it determined that Switzerland failed to sufficiently assess the risks of ill-treatment faced by B as well as the availability of State protection against ill-treatment emanating from non-State actors. Therefore, Switzerland will be required to make "a fresh assessment" before it can deport B to the Gambia. The court rejected the Swiss government's claim that B's sexual orientation could remain a secret from the Gambian authorities as well as the argument that B needed to show past persecution to obtain asylum. However, as previously noted, the court did not define the parameters of any further proceedings. Further, the ECHR fell short of finding that the criminalization of same-sex conduct was a violation of Article 3 of the Convention, opining that "the general human rights situation [in the Gambia] is not such as to prevent the deportation of any Gambian national *per se*," likening such laws to a minor inconvenience. ■

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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 – On December 7, the Supreme Court announced denial of a petition for certiorari in *Parents for Privacy v. Barr*, No. 20-62, a case presenting the constitutional and statutory claims by a group of parents who objected to an Oregon school district's adoption of a policy allowing transgender students to use restrooms and locker rooms consistent with their gender identity. The 9th Circuit had rejected their challenge, 949 F.3d 1210 (February 12, 2020). The Court's denial of cert was consistent with its prior action refusing to review a similar ruling by the 3rd Circuit. One of the statutory issues indirectly implicit in the case was whether Title IX could be construed to protect the rights of transgender students to equal access to such facilities, and the likely answer after *Bostock v. Clayton County*'s holding that discrimination because of a person's transgender status is sex discrimination is that Title IX would provide such protection. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied review of a gay Chinese man's motion to reopen the Board of Immigration Appeals (BIA) denial of her petition for asylum. *Xiao Biao Li v. Barr*, 2020 WL 7329807 (December 14, 2020). Petitioner, a native and citizen of the People's Republic of China, asserted that China's treatment of gay men had worsened, the Chinese government would target him because it had learned that he is gay, and changes in attitudes towards gay people in the United States made it more likely that he would now be granted asylum. Petitioner's motion was untimely because he filed 14 years after the BIA's 2004 decision affirming his removal order. However, the time limitation for filing a motion to reopen does not apply if reopening is sought to apply for asylum and the motion "is based on changed country conditions arising in the country of nationality . . . , if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding," the panel first noted. However, despite the existence of changed country conditions, BIA may deny the motion if the new evidence fails to demonstrate the applicant's prima facie eligibility for asylum. The panel found five facets of substantial evidence that supported BIA's determination that Petitioner neither established a material change in country conditions nor demonstrated his prima facie eligibility for asylum. First, BIA reasonably concluded that the three exhibits Petitioner submitted to establish changed conditions in China evidenced improved conditions since Petitioner's initial removal hearing, not a material worsening of conditions as required to excuse the untimely filing. Second, Petitioner's argument that changed attitudes towards homosexuality in the United States warrant reopening was unavailing because he was required to show a change in conditions in China. Third, Petitioner also argued that reopening is warranted based on changed personal circumstances, i.e., his "permanent limbo" and deprivation of liberty as a result of being under an order of supervision for 15 years because China refused to issue him a passport to effectuate his removal. But Petitioner did not submit any evidence that China refused to issue him a passport, and his order of supervision stated only that the Government is unable to remove him "at this time." In any event, a change in "personal circumstances in the United States" generally does not excuse the filing deadline for motions to reopen, the panel explained. While Petitioner contended that a motion to reopen was the only available mechanism to challenge his order of supervision, he might be able to challenge that order by filing a habeas corpus petition, the panel added. Fourth, BIA also reasonably concluded that Petitioner failed to show his prima facie eligibility for asylum. The basis for his claim was that China would target him because it now knows that he is gay. But Petitioner proffered no evidence to support that assertion. And, contrary to Petitioner's contention that China's knowledge of his homosexuality was irrelevant because his sexuality is an immutable characteristic, such knowledge is central to his claim that China will target him for persecution as a gay man. Fifth and finally, to the extent that Petitioner contended BIA erred in finding that sexual orientation is not a particular social group, BIA never made this finding. To the contrary, BIA specifically assumed Petitioner's "membership in a [particular social group] consisting of homosexuals." For the foregoing reasons, the panel denied the petition for review, all pending motions and applications, and vacated stays. Petitioner was represented by Anthony Guidice, Fairport, N.Y. The panel issuing this Memorandum decision consisted of Chief Circuit Judge Livingston (George W. Bush), and Circuit Judges Leval (Clinton) and Lohier (Obama). – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 2ND CIRCUIT – Steven Palencar, a gay man, was unsuccessful in appealing from the summary judgment of his sexual orientation discrimination and retaliation case against his former employer, the New York Power Authority, in *Palencar v. New York Power Authority*, 2020 U.S. App. LEXIS 38156, 2020 WL 7227200.

CIVIL LITIGATION *notes*

District Judge David Hurd (N.D.N.Y.) had concluded that the Power Authority had legitimate, non-discriminatory reasons for its challenged actions against Palencar, who had failed to provide sufficient evidence of pretext to get his case to a jury. Palencar sued under both Title VII and the New York State Human Rights Law. The Summary Order by the 2nd Circuit panel does not go into detail about the factual issues, merely stating its conclusion in summary form. "Even if we assume that Palencar established a *prima facie* case of discrimination," it wrote, "the record is clear that NYPA proffered legitimate reasons for the various employment actions Palencar challenges as discriminatory, and that Palencar failed to adduce sufficient evidence from which a jury could find pretext." The court observed that ultimately the burden is on the plaintiff to prove, in this case, that his sexual orientation was "the real reason" for the actions he challenged as discriminatory. "The overall record, the entirety of which we do not detail here, shows that Palencar's subordinates lodged repeated complaints against him over the course of several years, that he was consistently combative and defiant toward his superiors, and that he was unwilling to incorporate constructive feedback in response to his performance reviews over that time," wrote the court. "Even if it could be argued that Palencar presented some evidence of pretext, the record, taken as a whole, does not permit a reasonable trier of fact to find that 'the most likely alternative explanation' for his termination was sexual orientation discrimination." The court applied a similar analysis to Palencar's claim that some of the actions he challenged were retaliatory for "bringing his previously settled lawsuit and for making subsequent internal and external complaints alleging unlawful activities." Something does not sound entirely right to this writer. If he "adduced some evidence of pretext," should he have been able to get his day in court? Also, the panel relied on pre-Bostock language from an old 2nd Circuit decision in describing the plaintiff's burden. Bostock suggests that multiple reasons may contribute to an unlawful discharge under Title VII, and as long as sexual orientation was a factor, the statute would be violated even if other reasons contributed. When a judge decides that "no reasonable jury" could rule in the plaintiff's favor, the judge is substituting his own view of the evidence for that of the fact-finder to whose judgment the plaintiff is statutorily entitled, a jury of his peers. But this does not sound like the kind of case that would entice a majority of the 2nd Circuit, especially as tilted by the addition of President Donald J. Trump's appointees, to go *en banc* and award Palencar a trial on remand. Trump's five appointees, added to incumbent Republican appointees, gave the 2nd Circuit a Republican-appointed majority for the first time in many years. The three Circuit Judges on this panel, Richard J. Sullivan, Michael H. Park, and William J. Nardini, where all appointed by Trump. Palencar is represented by Allen A. Shoikhetbrod of Tully Rinckey PLLC, Albany. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 6TH CIRCUIT – A 6th Circuit panel, taking note of the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), vacated and remanded a decision by the U.S. District Court for the Middle District of Tennessee, which had granted summary judgment to the employer on a Title VII claim of discrimination and hostile workplace environment by a gay plaintiff. *Kilpatrick v. HCA Human Resources, LLC*, 2020 U.S. App. LEXIS 39635, 2020 WL 7396046 (Dec. 17, 2020). The district court had faithfully applied 6th Circuit precedent that claims based on sexual orientation were not actionable under Title VII, but now the district court must reevaluate the factual allegations in light of *Bostock*'s holding that sexual orientation claims are covered under Title VII as "discrimination because of sex." However, the court affirmed summary judgment for the employer on a retaliation claim and on a claim of intentional infliction of emotional distress. On the retaliation claim, the court pointed out that the complaint failed to allege specific facts from which one could infer that an "anonymous" phone call that prompted the plaintiff's subsequent employer to fire him had emanated from the former employer as retaliation for the plaintiff's filing of his Title VII claim with the EEOC, and that the facts alleged by the plaintiff about his treatment by the employer and co-workers after the employer learned that he was gay and shared that information with other employees did not rise to the level of "outrageousness" required under Tennessee law to sustain a claim of intentional infliction of emotional distress. From Circuit Judge John K. Bush's summary of the plaintiff's factual allegations, we would conclude that he was treated in an outrageous manner, but evidently the 6th Circuit panel would not agree with that conclusion in light of Tennessee law. Judge Bush was appointed by President Donald J. Trump, as was Judge Eric Murphy, another member of the panel. The third member of the panel is Judge Jeffrey Sutton, who was appointed by President George W. Bush and who wrote the 6th Circuit's opinion that was reversed in the *Obergefell* case in 2015. In short, this three-judge panel is about what one may expect in light of the large number of appointments that Trump and Bush made to the 6th Circuit, where Republican appointees now outnumber Democratic appointees 11-5. Plaintiff Montrell Kilpatrick is represented by Constance Mann, of Franklin, TN. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 7TH CIRCUIT – The 7th Circuit has granted *en banc* review in *Demkovich v. St.*

CIVIL LITIGATION *notes*

Andrew the Apostle Parish, Calument City and The Archdiocese of Chicago, 973 F.3d 718 (7th Cir. 2020), *vacated for en banc review*, Dec. 9, 2020. The vacated panel decision was significant in holding that gay discharged church choir director could maintain an action against his former employer for hostile environment sexual harassment. The panel concluded that the "ministerial exception" recognized by the Supreme Court applied only to issues of hiring and firing, and did not affect the legal obligation of religious employer to refrain from creating or tolerating a hostile environment on the basis of race or color, religion, national origin, sex (including, after Bostock, sexual orientation or gender identity), and disability. Sandor Demkovich alleges that while employed by St. Andrew, he suffered a hostile environment because of his sexual orientation and disability (weight issues). At present the 7th Circuit has nine active judges, two appointed by Democratic presidents and seven appointed by Republican presidents, with two vacancies (one created by the appointment of Justice Amy Coney Barrett to the Supreme Court). The majority Republican composition of this circuit did not prevent it from becoming the first circuit court of appeals to rule en banc that a sexual orientation claim is actionable under Title VII, or to rule that a school district violates Title IX by excluding transgender public high school students from equal restroom access. However, this case involves not statutory interpretation but rather application of a constitutional doctrine identified by the Supreme Court and still in development. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – The petitioner in *Aileman v. Rosen*, 2020 U.S. App. LEXIS 40743, 2020 WL 7774955 (9th Cir., Dec. 30, 3030), is a gay man from Nigeria, who sought to reopen proceedings after having been relief by the Board of Immigration Appeals (BIA). He seeks reopening to petition for protection under the Convention against Torture (CAT). Writes the court: "He first argues that he needs protection from the Nigerian government as they have criminalized his status as a gay man and would seek to arrest, prosecute, and impose a 14-year prison sentence on that basis. Second, [he] argues that he is likely to be tortured in Nigeria because of his involvement in drug trafficking and connections with prominent Nigerian political figures." The standard for review here is abuse of discretion, and the court found that the BIA had not abused its discretion in denying reopening of this case. "The evidence [petitioner] submitted is contradictory and does not support the conclusion that he had an objective fear of torture in Nigeria on the basis of his sexual orientation or his involvement with former Nigerian politicians and their criminal enterprises," wrote the court. "The Board considered all evidence and reasonably found that it did not support the proposition that he would more likely than not be tortured on these bases." The opinion does not indicate whether petitioner had counsel for this appeal. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 11TH CIRCUIT – The City of Boca Raton and the County of Palm Beach filed a petition with the 11th Circuit on December 11 seeking either rehearing or *en banc* review in *Otto v. City of Boca Raton*, 2020 U.S. App. LEXIS 36589, 2020 WL 6813994 (Nov. 20, 2020), in which a panel voted 2-1 to reverse the decisions by two district courts to denying preliminary injunctions sought by SOCE practitioners to prevent enforcement of local laws banning the performance of such "therapy" on minors. The petition points out that the panel opinion violates circuit precedent for the standard of reviewing a district court's denial of injunctive relief, and mistakenly speaks as if it is a final ruling on the merits rather than just the granting of an interlocutory appeal concerning preliminary relief. The petition also claims that the majority misconstrued circuit precedent in holding that strict scrutiny must be applied to evaluating the constitutionality of the challenged ordinances. The panel majority consists of two judges appointed by Trump. * * * The panel assigned to hear the City of Tampa's appeal of a district court decision in *Vazzo v. City of Tampa*, striking down the City's law against performance of conversion therapy for minors, cancelled an oral argument scheduled for December 15 with a terse paragraph noting that under circuit rules the panel would be bound by the recent decision of a different three-judge panel in *Otto v. City of Boca Raton* which held that such a ban violates the 1st Amendment rights of practitioners of conversion therapy whose methods involve only talking. However, since time for seeking *en banc* review or filing a cert petition in *Otto* had not expired, and a mandate had not been issued in that case, the panel was merely holding the appeal in abeyance pending finality in *Otto*. In thinking about the potential fate of this issue in the 11th Circuit if en banc review was granted, it is noteworthy that 6 of the 12 active judges in the circuit are Trump appointees, one is a George W. Bush appointee, and the remaining judges are appointees of Bill Clinton and Barack Obama. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 11TH CIRCUIT – The court denied a petition for review of the Board of Immigration Appeals decision denying the Petitioner, a transgender woman from Nicaragua, either asylum, withholding of removal, or protection under the Convention against Torture (CAT). *Tijerino-Sevilla v. U.S. Attorney General*, 2020 WL 7419676, 2020 U.S. App. LEXIS 39808 (Dec. 18, 2020). An immigration judge had concluded that the Petitioner suffered no

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past persecution, lacked a well-founded fear of future persecution, and that "she could not satisfy the higher standard required for withholding of removal, and it was unlikely she would be tortured if she returned to Nicaragua." The Petitioner had testified to having been persecuted once as a child but omitted this incident from her appeal to the BIA, so the court deemed it waived. She also alleged having been sexually assaulted by gang members "at the direction of the owner of a bar who sought to hire her to work as a prostitute," but the evidence showed that the bar owner ordered the attack because she declined his offer to employment as a prostitute, not because of her gender identity, and she never reported the assault to law enforcement. Finally, her reliance on State Department country reports did not advance her case, because the report (the court does not mention a date for the report), while acknowledging that there is some evidence of violence against sexual minorities in Nicaragua, says that "Nicaraguan law afforded citizens equal protection and did not regulate sexual activities of consenting adults." In sum, the court found that human rights reporting on Nicaragua did not "compel" a conclusion that "any discrimination and mistreatment was so extreme and pervasive as to establish a pattern or practice of persecution of members of sexual minorities in Nicaragua," and that evidence of sexual minorities being targeted for torture was lacking as well, much less evidence of a particularized risk of harm to Petitioner if she is deported. The court pointed out that the government was "neither aware of nor did it acquiesce in either instance when [Petitioner] was sexually abused." Interestingly, the court's discussion throughout lumps together all "sexual minorities," when the more pertinent issue would be whether transgender women from Nicaragua should be protected under refugee law. Petitioner is represented by Martin S. High of Clemson, S.C. – *Arthur S. Leonard*

CALIFORNIA – *Barnett v. Kapla*, 2020 U.S. Dist. LEXIS 238859, 2020 WL 7428321 (N.D. Cal., Dec. 18, 2020), involves a claim by a gay medical student that he was subjected to sexual harassment by a gay doctor who was in charge of a clinic to which the student had been assigned. The student asserted a Title IX claim against the University of California, San Francisco School of Medicine, and half a dozen state law tort claims against the doctor. The December 18 decision by Chief U.S. Magistrate Judge Joseph C. Spero deals with motions to dismiss by the defendants, both on substantive grounds of failure to state claims and procedure grounds of time-bar. The lengthy opinion summarizes the plaintiff's factual allegations in great detail, from which one can conclude, if the allegations are accurate, that the student was put into a very awkward situation by the doctor which ultimately proved so stressful that he confided in a university-provided therapist who reported the allegations of sexual harassment to University officials. The student was quickly removed from the doctor's clinic, and ultimately the doctor (who was a volunteer as a clinical supervisor, not a University employee) was removed from supervising UC medical students. But the bureaucratic wheels moved slowly, the student perceived that his complaints were not addressed in a timely manner, and one could conclude, upon reading the opinion, that there was a certain amount of negligence in handling his case. He claimed to have suffered significant emotional distress that affected his academic performance and the situation delayed completion of his studies. He claims that he asked several times whether he should retain legal counsel but he was assured the University's internal process could handle the issues and delayed in retaining counsel. Ultimately, when he concluded that his needs had not been met and filed suit, his timing made it possible for both the University and the doctor to raise time-bar arguments, so a significant portion of the court's analysis focused on equitable tolling principles under Title IX and California tort law. Magistrate Judge Spero concluded that one of the tort claims against the doctor was definitely time-barred, but unresolved issues concerning possible equitable tolling claims persuaded him to give leave to the plaintiff to file an amended complaint addressing those issues. As to the Title IX claim, where the standard for University liability would be "deliberate indifference," the judge explained that despite the many ways the University might be faulted on the handling of the student's claim, the high bar of "deliberate indifference" may not have been reached, by comparison to prior 9th Circuit precedent. Lengthy delays in processing internal sexual harassment claims are not uncommon, and there was even a report published criticizing the University's handling of such cases, but ultimately various actions were taken in response to his complaints and ordinary negligence or typical bureaucratic slowness do not necessarily constitute "deliberate indifference." The court observed that even failure to comply with both internal guidelines and the guidelines issued by the Obama Administration under Title IX (these events took place during the Obama Administration) does not necessarily amount to "deliberate indifference." The judge gave the plaintiff until January 18, 2021 to file a third amended complaint, as the motions to dismiss were granted with leave to amend for all but one tort claim against the doctor, as to which the dismissal was with prejudice. The plaintiff is represented by Joel H. Siegal of Oakland, CA. – *Arthur S. Leonard*

CALIFORNIA – In *Malek Media Group LLC v. AXQG Corporation*, 2020 Cal. App. LEXIS 1192, 2020 WL 7382190 (Cal. 2nd Dist. Ct. App., Dec. 16, 2020), the plaintiff, losing party in a commercial arbitration, sought to get the arbitration

award set aside by the court based on the argument that the arbitrator must have been biased because many years ago he was one of the founders of GLAAD, the Gay & Lesbian Alliance Against Defamation, and had served for a time as legal counsel and board member to that organization, and that his award should be set aside because he did not "disclose" his past association with GLAAD. The arbitrator in question is retired U.S. Ambassador David Huebner, an experienced commercial arbitrator who had "a decorated career as a diplomat." The subject matter of the arbitration was the requested dissolution of a film production company sought by one of the two organizations that had formed the company, on the ground that the other organization's principal, Matthew Malek, had engaged in improper conduct, in particular in the handling of organizational funds. Arbitrator Huebner, selected by the parties to conduct the arbitration, ruled in favor of AXQG Corp., the company seeking dissolution, concluding that there was a breach of the agreement establishing the film production company and a breach of fiduciary duty by Mr. Malek, and gave AXQG "sole authority to wind down . . . the business in light of Malek's gross negligence, willful misconduct, and 'propensity for destructive delay.'" The winning party was awarded attorneys fees and costs, the losing party prevailed on none of its counterclaims, "and the arbitrator noted that several of MMG's contentions appeared to be frivolous based on its failure to assemble a record of supporting evidence." In its eagerness to get the arbitrator's award set aside, Malek "commenced a deep-dive, internet search" into the arbitrator's background, discovered his past roles with GLAAD, and sought to use that to attack his fairness. Malek, who was also being accused of sexual harassment and who self-identifies as a Catholic, dredged up information about GLAAD, mainly from press releases, arguing that anybody who was associated with GLAAD could not be fair to a Catholic who was being charged with sexual harassment. (Malek relied in part on statements in press releases purporting to show GLAAD's support for the #metoo movement to hold men accountable for sexual harassment.) The trial court rejected Malek's arguments, and so did the court of appeal, in an opinion by Justice Halim Dhanidina, who wrote, "MMG's arguments that the arbitrator was required to disclose his prior relationship with GLAAD are strained and convoluted to say the least . . . MMG mischaracterizes the arbitration as one that primarily involved issues of sexual harassment or social justice. The arbitration involved the dissolution of Foxtail based on the irreconcilable conflict between Malek and Gou [the principal of AXQG] and the numerous breaches by Malek of the Foxtail agreement, primarily, Malek's misuse of Foxtail's funds . . . MMG's absurd argument based on a mischaracterization of the underlying dispute expose MMG as a partisan litigant emotionally involved in the controversy and confirm that it is not a disinterested objective observer" as required by California caselaw as grounds for disqualifying an arbitrator and, quoting a precedent California case, wrote that "MMG's position would encourage parties to include unrelated testimony on controversial or partisan topics for the sole purpose of manufacturing a claim that the arbitrator was biased against those beliefs and thus could not act impartially." Furthermore, the court concluded, "MMG's appeal is objectively and subjectively frivolous," as it is "devoid of factual or legal support. Its primary argument is that the arbitrator was required to disclose his prior relationship with an LGBTQ rights organization because that relationship would cause a reasonable person to question his impartiality in a commercial arbitration where one of the parties' principals was a white male Catholic." The court found that MMG presented no evidence supporting this chain of reasoning, and its conduct of this appeal merited sanctions of both MMG and its counsel, Jeffrey S. Konvitz, who was ordered by the court to report the sanctions to the State Bar, in addition to requiring MMG and Konvitz to pay AXQG $46,000 for its costs of defending against the frivolous appeal and to pay a fine of $10,000 to the court. "This court has wasted its time and resources considering MMG's appeal, which has only served as a drain on the judicial system and the taxpayers of this state," concluded Justice Dhanidina. – *Arthur S. Leonard*

CALIFORNIA – Despite some rudimentary mistakes that *pro se* plaintiffs tend to make in framing their employment discrimination complaints, Natalia Howell's Title VII/ADA suit against her former employer, STRM LLC-Garden of Eden, apparently a retail establishment, largely survived a motion to dismiss her second amended complaint in *Howell v. STRM LLC-Garden of Eden*, 2020 WL 7319359 (N.D. Cal., Dec. 11, 2020). U.S. Magistrate Judge Jacqueline Scott Corley found that factual allegations of her complaint were insufficient to ground her race discrimination claim, but that her allegations were sufficient to support her Americans with Disabilities Act claim and her allegation of discrimination because of gender and sexual orientation under Title VII. Howell had mistakenly asserted a disability claim under Title VII, which does not list disability as a prohibited ground of discrimination, and she had identified the owners of the company and her former manager as individual defendants without pleading any cause of action that would extend to individuals. (Title VII and the ADA are concerned with the liability of the business, not of individual actors.) Howell, "who identifies as a 'woman of color, and androgynous lesbian,"

evidently did a capable job of describing the harassment and discriminatory treatment she received but did not clearly attribute these problems to race, more clearly tying them to her sexuality and androgynous appearance. Judge Corley dismissed the race discrimination claim with leave to amend, commenting, "Ms. Howell may also elect to just proceed with the claims the Court held are adequately pled: (1) discrimination based on gender and sexual orientation under Title VII, (2) disability discrimination under the ADA, and (3) retaliation under the ADA. The Court encourages Ms. Howell to contact the Northern District's Legal Help Center," she concluded, adding the Help Center's telephone number. Clearly, Judge Corley believes that through competent representation Ms. Howell would be able to plead a proper race discrimination claim. – *Arthur S. Leonard*

FLORIDA – U.S. District Judge Mark E. Walker dismissed several counts of employee benefit discrimination claims by three transgender Florida state employees in *Claire v. Florida Department of Management Services*, 2020 WL 7081640, 2020 U.S. Dist. LEXIS 229601 (N.D. Fla. Dec. 3, 2020). The complaint challenges the exclusion of gender-affirmative care under the employee benefit plans. At issue in the case are Title VII and Equal Protection Clause claims. Common to all of Plaintiffs' claims was the threshold constitutional requirement of standing, which requires Plaintiffs to plead sufficient facts to demonstrate that i) they suffered an injury in fact that was ii) traceable to Defendants and iii) was likely to be redressed by a favorable ruling. Judge Walker's analysis explained why the Plaintiffs' injuries were not fairly traceable to their employers under recent 11th Circuit precedent. Florida law makes the state's Department of Management Services (DMS) solely responsible for selecting and defining the contours of state health plan benefits. Plaintiffs alleged that DMS issued an Invitation to Negotiate that solicited private health maintenance organizations to offer contracts to administer state health plans, and that the Invitation specifically and categorically excluded "gender reassignment or modification services and supplies." This "State Plan Exclusion" was why "[t]ransgender individuals covered by State plans did not receive health insurance coverage for gender-affirming care, although medically necessary," alleges the plaintiffs. This context was critical in determining whether their injuries were fairly traceable to their employers, who were named as defendants in this lawsuit in addition to DMS. Citing 11th Circuit precedent, Judge Walker found that when a state law made one state official responsible for the challenged action, plaintiffs lacked standing to sue another, independent state official for that action. Florida law expressly gives DMS official control over state health plans, which originated the challenged coverage exclusion. Judge Walker also determined that the Eleventh Amendment bars Plaintiffs from bringing gender identity discrimination 14th Amendment equal protection claims against the state, but did not bar Title VII claims against their employers. State waiver of sovereign immunity or congressional abrogation of immunity were not present. Nor was a third exception, a "legal fiction" created by the Supreme Court that was limited only to certain potential defendants. Judge Walker explained that recent 11th Circuit precedent made clear that "[W]here the named defendant lacked any responsibility to enforce the statute at issue, 'the state was in fact, the real party in interest,' and the suit remained prohibited by the Eleventh Amendment." And despite being involved with this complained-of discriminatory health plan, the Defendant-employers did not enforce or administer it. That role was specifically and solely reserved for DMS by statute. DMS did not move to dismiss the claims against it. After dismissing claims as to which plaintiffs lacked standing or defendants enjoyed immunity, the case remains active against DMS and its Secretary, Jonathan Satter, in his official capacity. Counsel for Plaintiffs include Jodi Lynn Siegel, Kirsten Noelle Anderson, and Simone Michelle Chriss, Southern Legal Counsel, Inc., of Gainesville; Pamela Estafania Flores and Jeffrey Martin Hearne, and Jocelyn J. Armand, Legal Services of Greater Miami; Daniel Boaz Tilley and Anton Marino, ACLUY Foundation of Florida; and Eric Jacob Lindstrom, of Egan Lev Lindstrom & Siwica, Gainesville. Judge Walker was appointed by President Barack Obama. – *Wendy B. Bicovny*

HAWAII – In *Scutt v. Dorris,* 2020 WL 7344595 (Dec. 14, 2020), Chief Judge J. Michael Seabright of the U. S. District Court for Hawaii dismissed with leave to amend *pro se* transgender plaintiff Jason Scutt's complaint against Defendants Kelli Dorris, Xiayin (Gaoquiang) Lin, and Charlene Chen (collectively "Defendants"), alleging discrimination in violation of the Fair Housing Act (FHA). Scutt alleged that Defendants' "harassment and eviction" of her "were a direct result of [Defendants'] beliefs or opinions of both non-Christian and/or trans/LGBT" people. And, Scutt alleged, Defendants took "unreasonable actions . . . to remove a tenant based on objections to her LGBT status and . . . religious beliefs." Scutt sought damages of $300,000 "to relocate and for emotional pain and physical stress caused as a direct result of the discrimination." Lin and Chen were Scutt's landlords. Dorris was another tenant in the building where Scutt lived. On or around July 1, 2020, Scutt applied in state court for a temporary restraining order against Dorris, claiming in part that Dorris would not "allow [Scutt] to leave the common area exit," and had

"behaved violently," causing Scutt to be afraid. By note also dated July 23, 2020, at "landlord's request," Dorris granted Scutt permission to "exit the unit, includ[ing] the common area, Garage and driveway . . . from 07/24/2020-09/06/2020," and that if Scutt used the exit for others, Dorris' permission would end and she will "exercise [her] legal rights." Scutt's complaint further alleged that "acting as agent and on behalf of the building's owner," Dorris enforced "cleanliness in the common area," "noise complaints," and "served and signed for mail belonging to the owner and tenant." Scutt alleged that her trans/LGBT status would have been known to the defendants "by her dress, appearance and shared laundry facilities where clothing belonging to the building's tenants is commonly in view of the other tenants." Scutt further alleges that "Landlords employed [Dorris] to" post a Notice to Vacate on Scutt's front door, dated July 24, 2020, gave Scutt "45 days," or until "September 6th, 2020," to move out, and stated that failure to do so would "force [Lin and Chen] to exercise [their] legal rights," and waived fines or penalties if Scutt chose to move out sooner. That same day, Chen sent a copy of the Notice and Dorris' note (regarding permission to exit the unit) to Scutt via email. In her email message, Chen stated that she would also send copies of these documents to Scutt via text and by delivery. After receiving the Notice to Vacate, Scutt allegedly experienced unspecified "intensified Civil harassment," resulting in "an actual deadline to leave of more like three days." Judge Seabright said at the outset that Scutt failed to allege sufficient *facts* to state a claim for violation of the FHA. The judge found that Scutt alleged only conclusory allegations — without facts — regarding her subjective belief that Lin and Chen evicted her *because of* her religion and/or status as a "transgender/LGBT" person. In addition, the judge noted Scutt's failure to allege facts showing that Lin and Chen are vicariously liable for Dorris' conduct and/or that Dorris is herself subject to liability under the FHA, since she is not the landlord, only a tenant. As to Scutt's allegation of discriminatory intent by Lin and Chen, Scutt's complaint alleged no facts suggesting that Lin and Chen issued the Notice to Vacate or engaged in any other action *because of* the Plaintiff's religion or transgender/LGBT status. There were no allegations that Lin or Chen even knew that Scutt is transgender/LGBT. But even if Lin and Chen knew these details, the complaint failed to allege any facts showing that such facts were related in any way to their decision to issue the Notice to Vacate. Judge Seabright was appointed by President George W. Bush. – *Wendy B. Bicovny*

INDIANA – A lesbian mother lost a change of custody contest in *Walter v. Walter*, 2020 WL 7636681 (Nev. Ct. App., Dec. 23, 2020), and the Court of Appeals of Nevada affirmed the trial court's custody ruling, applying the "clearly erroneous" standard of review. The factual findings of Franklin Circuit Court Judge Clay M. Kellerman are quoted at length in the opinion by Court of Appeals Judge Edward Najam. They paint a picture of ex-spouses who have difficult communicating and cooperating with each other. The mother, now living with a same-sex partner, prioritizes the two boys' involvement with hockey, while the father emphasizes a more varied repertory of activities and complains that the focus on hockey distracts from other things. Mother and her partner join in coaching the hockey activity. Judge Kellerman concluded that joint custody was not working for this couple because of the difficulties in communication and coordination, and that it was in the boys' best interest for the father to have custody with visitation rights for the mother. On appeal, the mother argued that the trial judge's questioning about her same-sex partner "had nothing to do with the best interest of the boys" and she accused the father of "belaboring the same-sex relationship" at trial. But the court of appeals found no evidence of judicial bias and observed that because the mother's partner was present in the home, the court had to consider "the interaction and interrelationship of the child with 'any other person who may significantly affect the child's best interests,'" so such question was proper. It is difficult to tell from reading the appellate opinion whether the mother's loss of custody here had to do with her sexual orientation or same-sex partner, as the court rather blandly denies the possibility and emphasizes that the trial judge made numerous findings on a wide variety of relevant issues without any emphasis on the mother's sexuality and same-sex relationship. Mother argued that many of the trial court's findings were wrong from her perspective, but the court of appeals pointed out that under the "clearly erroneous" standard of judicial review, it was not going to let mother relitigate factual issues on appeal. It will be curious to see whether this one is headed to the state supreme court. Mother is represented by Stacy R. Uliana and Jack Kenney of Bargersville, Indiana. Father is represented by George A. Lohmeier of Allen Wellman McNew Harvey LLP, Greenfield, Indiana. – *Arthur S. Leonard*

KENTUCKY – If the non-marital male partner of a birth mother seeks to adopt her child, must the court terminate her parental rights? Yes, said the Court of Appeals of Kentucky in *S.R.V. v. J.S.B.*, 2020 WL 7083301 (Dec. 4, 2020), applying the state's adoption statute, and reversing an adoption order granted by Livingston Circuit Court Judge C.A. Woodall, III, who had relied on a historic LGBT rights precedent, *Mullins v. Picklesimer*, 317 S.W. 3d 569 (Ky. 2010), in which the court had creatively construed the statute to allow second-

parent adoptions for same-sex couples. Judge Glenn E. Acree explained: "When Mullins was rendered, same-sex couples were excluded from 'the recognition, stability, and predictability marriage offers, [such that] their children suffer[ed] the stigma of knowing their families [we]re somehow lesser,'" quoting from the U.S. Supreme Court's 2015 decision, *Obergefell v. Hodges*, 576 U.S. 644, 668. "The nature of family relationships had been changing for a long time," Judge Acree continued. "The law had not kept pace with change. Same-sex partners could not marry, and that legality impeded much, including the ability of a same-sex couple to co-parent a child as their own. Mullins addressed the problem with new law. Wee need not address Mullins at length except to say that, in the pre-*Obergefell* era, it established a new legal ground to challenge the fundamental right of a parent to raise her child as she deems to be in the child's best interest. The new legal ground was a kind of subcategory of an old one – waiver. In addition to what we must now call a 'complete waiver' of the fundamental right, *Mullins* allowed that, under some select circumstances such as the Court found to exist in that case, there need be only 'a waiver of some part of the superior parental right, which would essentially give the child another parent in addition to the natural parent.' The 4-3 majority Opinion in *Mullins* does not define what 'some part' of the superior parental right entailed. The case merely lists factors to consider when determining whether a partial waiver occurred. The Supreme Court gleaned these factors exclusively from cases of other jurisdictions that addressed the same pre-*Obergefell* legal impediments preventing same-sex couples from raising a child together." Acree asserted that under *Mullins* the listed factors "leaves the strong impression" that the holding was restricted to situations where a same-sex couple had jointly consented to create a child through donor insemination with the intent that the child would be co-parented. Thus, it was appropriate in such a setting where marriage was not available to allow the non-biological mother to adopt the biological mother's child without terminating the biological mother's parental rights. "If not impossible," wrote Acree, "it is surely difficult to believe *Mullins* would have been decided identically in a post-*Obergefell* America. That is part of the reason for limiting its application to a fact pattern that cannot be repeated today." Consequently, turning to the current case, the court should not approve an adoption by the non-marital former male partner of the birth mother over her objections, where she had not been found unfit to be the child's custodial and legal parent and there was no evidence that she had waived her "superior fundamental right to parent her children." A dissenting opinion objected to the intermediate appellate court limiting the application of a Kentucky Supreme Court opinion by determining "that it was somehow overruled *sub silentio* even though it continues to be widely cited by our Courts and relied upon post-*Obergefell*," and insisted that until the state's Supreme Court "speaks and directs otherwise, we need to follow *Mullins*." Thus, dissenting Judge Larry Thompson insisted it would be "appropriate to allow the circuit court to consider whether joint custody may still be appropriate on the alternative grounds of waiver" in this case. – *Arthur S. Leonard*

LOUISIANA – Donald "China" Nelson is a transgender woman who, as of the events in question in this case, still had the male genitalia nature had endowed upon her at birth. She traveled to Louisiana State Penitentiary (LSP) with her mother and brother to visit her other brother, an inmate. All three were on the "approved list" for visitation and had been visiting regularly over the prior fourteen years. However, when she walked through the SecurePass body scanner that is part of the security system, she "was stopped from proceeding into the Penitentiary because the SecurePass machine allegedly detected an 'unknown object' in her pants." She told the security personnel that "she was born a male as indicated on her driver's license," but two guards took her to a men's restroom and told her to remove her pants and underwear so they could confirm she wasn't bringing contraband into the prison. She refused to disrobe despite repeated requests, headed back to her car. She claims that "the supervisor and approximately nine other unknown guards" followed her and demanded that she reveal her genitalia "before being permitted to leave the premises." While she let them search her car, she refused again to remove her pants and underwear, and her visitation party was then told that their permission to visit that day was cancelled. She later received a letter from the Deputy Warden of Security at LSP, stating that her visiting privileges were suspended for six months. In *Nelson v. LeBlanc and Officers John and Jane Does 1-10*, 2020 WL 7365313, 2020 U.S. Dist. LEXIS 235770 (M.D. La., Dec. 15, 2020), she sues for violation of her 4th Amendment rights under 42 USC Section 1983. The only named defendant, James M. LeBlanc, the Secretary of the Department of Public Safety & Corrections, then moved to have the claim against him dismissed as moot, since Nelson's visiting rights were restored when she complained about her treatment, and failure to state a claim against him. The court found the claim was not moot, since Nelson was seeking damages for the violation of her 4th Amendment rights during the incident. The complaint had not specified whether LeBlanc was sued personally or in his official capacity. He argued that either way the complaint did not state a valid claim against him, since

he had nothing personally to do with the conduct of the LSP guards on that date. Opposing the motion, Nelson stated "Secretary LeBlanc has been adequately reference in the Petition," referring to her contention that he was mentioned in the letter informing Nelson of the visiting restriction. Not enough, said U.S. District Chief Judge Shelly Deckert Dick, since "personal involvement is an essential element of a civil rights cause of action." Nelson contended that LeBlanc should be held liable for failing to adopt a policy that would avoid violating the privacy of transgender individuals as part of the security screening at LSP, but the court pointed out that she had not alleged facts supporting an inference that LeBlanc "act with deliberate indifference" in failing to adopt such a policy. "Moreover," wrote Judge Dick, "the plaintiff must allege 'a pattern of similar constitutional violations . . . to demonstrate deliberate indifference,' since without notice of the effects of failing to promulgate a policy, policymakers cannot be said to have deliberately chosen a policy scheme that will cause violations of constitutional rights." In this case, concluded Dick, "Nelson does not plead any facts regarding Secretary LeBlanc's knowledge of the consequences of failing to adopt a policy, or any facts suggesting that the violation of her rights was an obvious consequence of that failure." Instead, she is trying to pin vicarious liability on him for the conduct of the guards at the security post, which the court won't allow. In fact, since she had been visiting LSP without incident for 14 years, "it would require a stretch to assume that Secretary LeBlanc was aware that the alleged lack of a policy for transgender visitors would obviously lead to constitutional deprivations." So, he was dismissed as a defendant. Presumably, the guards, whose identity can be determined from the duty roster for that date, are still in the case. Nelson is represented by Galen M Hair and John Eric Bicknell, Jr., of Scott, Vicknair, Hair & Checki, LLC, New Orleans, LA; and Joshua Holmes, of AIDSLaw of Louisiana, New Orleans, LA. As a result of this incident, the Department amended its policy, so the continuing suit concentrates on damages for the alleged violation of Nelson's constitutional rights. Judge Dick was appointed by President Barack Obama. – *Arthur S. Leonard*

MARYLAND – Jennifer Eller, a former English teacher at several schools in the Prince George's County Public School system, has a Title VII lawsuit against her former employer in the U.S. District Court, filed after the Equal Employment Opportunity Commission found reasonable cause to believe that she "was subjected to harassment, based upon her sex and gender identity, and unequal terms and conditions of employment, in retaliation for engaging in protected activity." Eller, presenting as a man when hired, transitioned on the job, encountering harassment and discrimination from students and school administrators alike, to such an extent that she never returned from an extended leave, so constructive discharge is part of her case. In *Eller v. Prince George's County Public Schools*, 2020 U.S. Dist. LEXIS 234367, 2020 WL 7336730 (D. Md. Dec. 14, 2020), U.S. Magistrate Judge Timothy J. Sullivan ruled on her motion for sanctions based on the school district's conduct during discovery. She alleges, and the court finds, that some of her allegations of spoliation of evidence by the Defendants are borne out, and her motion is granted in part and denied in part. Judge Sullivan concluded that the defendants "committed spoliation of the PS-74 forms," forms used by the school district to record student disciplinary incidents and sanctions imposed, which are relevant to Eller's harassment claims. Sullivan recommended that the district court issue a specially crafted jury charge concerning these missing forms, which Sullivan found were lost through gross negligence by district administrative employees but not out of any intent to destroy documentary evidence relevant to the case, and he recommended against awarding attorney's fees and costs to Eller in connection with her discovery efforts, finding that the district's culpability was "somewhat limited" for the lost evidence through their "failure to institute a litigation hold" after they were notified of her EEOC charge or to carry out an internal policy regarding preservation of such forms, and that a fee award was not necessary to deter the defendants from making similar errors in the future. (Why not is not explained by Judge Sullivan.) "Had Defendants acted willfully or in bad faith, monetary sanctions would be warranted," wrote Sullivan. The lengthy opinion also goes into great detail about other items of evidence as to which Eller argued spoliation, explaining, for example, that the videocam system used by the school district automatically records over existing tapes when they are filled up so that recordings from dates on which Eller alleges incidents occurred that might be documented on the tapes were not lost through any fault of the district as such. Those who may seek to make spoliation arguments may find reviewing Sullivan's decision in detail to be edifying. Eller has a substantial litigation team working on her behalf: Carl S Charles, Lambda Legal, New York, NY; Douglas Curtis, Arnold & Porter Kaye Scholer LLP, Chicago, IL ; Elliott Cruchley Mogul and Paul E Pompeo, Arnold and Porter Kaye Scholer LLP, Washington, DC; Jocelyn Wiesner, Arnold and Porter LLP, Washington, DC; Lori B Leskin, Arnold & Porter Kaye Scholer LLP, New York, NY; Michael Rodriguez, Arnold & Porter Kaye Scholer LLP, Washington, DC; Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund Inc., New York, NY; Rebecca Neubauer and Thomas Dallas McSorley, Arnold & Porter Kaye Scholer LLP, Washington, DC. – *Arthur S. Leonard*

CIVIL LITIGATION *notes*

MISSOURI – The National Center for Lesbian Rights (NCLR) announced a settlement in *Walsh v. Friendship Village*, a Fair Housing Act (FHA) case filed on behalf of Mary Walsh and Bev Nance, a married lesbian couple who were denied a housing unit in a senior housing community in 2016 specifically because they are a same-sex couple. They alleged sex discrimination, but the District Court dismissed their claim in 2019, accepting the defendant's argument that the prohibition of sex discrimination in the FHA did not extend to sexual orientation claims. Plaintiffs had argued that discriminating against them because they are a same-sex couple was sex discrimination, *simpliciter*, but the District Court insisted that the case was really about sexual orientation, and that the court was bound by 8th Circuit precedent. Shortly after the Supreme Court ruled in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that discrimination because of sexual orientation is sex discrimination, the 8th Circuit, before which an appeal was pending, vacated and remanded the case to the District Court, accepting the argument that the Supreme Court's interpretation of "discrimination because of sex" would also apply to the FHA. Seeing the handwriting on the wall, the defendant agreed to settle the case. The NCLR press release of December 8 referred to "a confidential settlement to resolve the case." *Walsh v. Friendship Village*, 352 F. Supp. 3d 920 (E.D. Mo. 2019), vacated and remanded, 2020 WL 5361010 (July 2, 2020). Joining NCLR in the representation were the ACLU of Missouri, Michael Allen of Relman Colfax PLLC, and Arlene Zarembka of St. Louis. – *Arthur S. Leonard*

NEBRASKA – In *Windham v. Kroll*, 307 Neb. 947, 2020 WL 7266371, 2020 Neb. LEXIS 194 (Dec. 11, 2020), the Supreme Court of Nebraska affirmed a decision by Douglas County District Court Judge J. Michael Coffey to modify certain child support provisions governing the obligation of the former same-sex partner of a birth mother upon a showing of changed financial circumstances of the *in loco parentis* parent and the parties' agreement to modify custody arrangements. The parties were in a relationship for about 17 years, during which Kroll gave birth to the two children, and the women shared parenting duties, but never married. (Through the entire duration of their relationship, which ended in 2011, Nebraska did not allow or recognize same-sex marriages.) The children have primarily lived with Kroll ever since Windham moved out, but shared joint legal and physical custody with a stipulated parenting time plan for Windham and an equitable apportionment of financial responsibility for child support, which was subsequently modified a few times. Kroll sought to modify to obtain sole custody in 2017, and as part of this modification Windham eventually sought to be relieved of some of her financial obligation, citing a downward change in her earning due to a job change. The court's opinion by Justice Stephanie Stacy provides a detailed discussion of Nebraska case law on child support modification issues, noting in particular that the rules courts follow in cases involving divorce are governed by statute while those involving an unmarried parent whose status is derived from the court-created *in loco parentis* doctrine are different, and the modification standard differs depending whether the children are adults or minors. Birth mother Rebecca Diane Kroll contended that Judge Coffey erred in modifying Alyssa Lee Windham's financial obligations for the minor children's private school educational expenses and college savings funds because the arrangement Windham sought to modify was embodied in a prior agreement of the parties that had been approved by the court, and Windham had failed to meet the high standard of "fraud or gross inequity." The Supreme Court rejected her argument, finding that the "fraud or gross inequity" standard had been applied in distinguishable cases not comparable to the one before the court. The Supreme Court held that "the district court correctly determined the support provisions were modifiable upon a showing of a material change in circumstances affecting the best interests of the children." Judge Coffey had accepted Windham's argument that her loss of her prior employment and her need to accept a lower-paying job justified reducing her financial obligation, taking into account as well that the parties had agreed to change their prior custody arrangement to confer sole custody on Kroll with parenting time for Windham. Windham is represented by Michael S. Kennedy, Omaha. Kroll is represented by Jamie C. Cooper, of Johnson & Pekny, LLC., Platsmouth. – *Arthur S. Leonard*

NEVADA – The Nevada Supreme Court, interpreting Title IX of the federal Education Amendments, found that in light of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), Title IX should be construed to ban homophobic harassment of students. *Clark County School District v. Bryan*, 2020 Nev. LEXIS 79, 2020 WL 7686545 (Dec. 24, 2020). The evidence showed that the school district failed to conduct an "official investigation" after parents reported that "sexual slurs, other insults, and physical assaults" had been directed against their sons, who were then sixth graders. A Nevada statute mandates that such an investigation be carried out in response to such reports of harassment. Clark County Judge Nancy Allf had found that the school's failure to conduct an investigation amounted to "deliberate indifference," sufficient to meet Title IX's requirement in order to hold a school district liable. Wrote Justice Abbi

Silver on this point, "The school district also challenges the district court's sole reliance on the violation of state law to satisfy 'deliberate indifference,' an essential element of both the Title IX and Sec. 1983 claims. Although the state law violation is a factor in determining deliberate indifference, it does not constitute *per se* deliberate indifference under federal law. We therefore reverse the judgment in Bryan's favor on both claims and remand for further finding on the Title IX claim." The parents are represented by Allen Lichtenstein (Las Vegas) and John Houston Scott (San Francisco). – *Arthur S. Leonard*

NEW YORK – Erie County Supreme Court Justice Dennis E. Ward granted a transgender Petitioner's name change, as well as the Petitioner's request for an anonymous caption for the case, a waiver of the requirement of publication of the order granting the requested name, and the sealing of the court's order. *In the Matter of M.M.H., Petitioner for Leave to Change Petitioner's Name to S.J.H.*, 2020 N.Y. Misc. LEXIS 10788; 2020 NY Slip Op 51544(U) (Sup. Ct., Erie Co., Dec. 17, 2020). The court pointed out that amendments to New York statutory law have empowered the courts to waive the normal requirement of publication, even in the absence of evidence of a specific risk or threat to the Petitioner. After referring to statistics concerning the frequency with which transgender people are assaulted and noting New York policy as encapsulated in the Gender Identity & Expression Non-Discrimination Act (GENDA, 2019), Justice Ward wrote, "Given the body of literature and statistics as to the high potential for violence against such individuals, the expression of a general concern for one's jeopardy is sufficient without citing any specific actual or threatened instances of violence or harassment. The explicit and implicit protections as most recently provided for in GENDA unequivocally represent the stated public policy of the State of New York." The petitioner was represented by Larry E. Waters of Neighborhood Legal Services, Inc. – *Arthur S. Leonard*

NORTH CAROLINA – Daniel Bittle-Lindsey, an HIV-positive but otherwise healthy man, seems to have an excellent Americans with Disabilities Act (ADA) discrimination claim against his former employer, but for one problem: his employer, the Newport branch of Seegars Fence Company, Inc., convinced Chief U.S. District Judge Terence W. Boyle to grant summary judgment to the employer on the ground that it employed fewer than the 15 people necessary to come under ADA jurisdiction, and Boyle determined that the plaintiff's factual allegations about the relationship between the Newport Branch and the Seegars corporation were insufficient to justify piercing the corporate veil and taking Seegars' employees into account to meet the jurisdictional number. *Bittle-Lindsey v. Seegars Fence Company, Inc.*, 2020 U.S. Dist. LEXIS 232903, 2020 WL 7265367 (E.D.N.C., Dec. 10, 2020). Shortly after starting work for the employer, Bittle-Lindsey made the mistake of telling a new co-worker that he was HIV-positive, sparking conversation that got back to the boss, who demanded that he get a physician's note attesting to his fitness to work. Although he provided the requested documentation, the company immediately demoted him and imposed various restrictions on his activities. When he protested this demotion, he was fired. He alleged in his original complaint that the Newark branch had enough employees to bring the company under the ADA, but in the face of the company's evidence to the contrary, resorted unsuccessfully to the "piercing the corporate veil" argument. Evidently, he would have been no better off in state court, since the North Carolina state laws on disability discrimination also limit jurisdiction to employers with at least 15 employees. Bittle-Lindsey is represented by Craig Hensel of Greensboro, NC. Judge Boyle was appointed by President Ronald W. Reagan. – *Arthur S. Leonard*

TENNESSEE – In *Walsh and Dailey v. Dendar, LLC*, 2020 WL 7090684 (W.D. Tenn., Dec. 3, 2020), Dendar, LLC, a McDonald's franchisee, moved to former employee Andrew Walsh's claim that he suffered discrimination in violation of the Americans with Disabilities Act (ADA) because of his HIV-positive status. Dendar argued that Walsh had failed to exhaust his EEOC administrative remedies, a prerequisite to sue an employer for ADA violations. U.S. District Judge Thomas L. Parker granted the motion. The Defendant employed Walsh and his same-sex partner Dontarian Dailey (Dailey), at its McDonald's franchise location in Tennessee. Before hiring Walsh and Dailey, Dendar allegedly knew about both partners' sexual orientation and that Walsh had HIV. During both partners' two months of employment, McDonald's employees allegedly spread "malicious" rumors about both men. Walsh and Dailey also jointly alleged Dendar discriminated and retaliated against them because of their sexual orientation in violation of Title VII, which claim Dendar did not move to dismiss. Dendar's sole focus was on Walsh's stand-alone discrimination claims based on violations of the ADA. Following his termination, Walsh completed an EEOC Intake Questionnaire (Questionnaire). The Questionnaire asks the claimant to check the boxes that denote the reason for their employment discrimination claims. Walsh apparently initially checked the box for disability but then crossed it out. The Questionnaire further instructs the claimant to complete a certain portion of the form "only if" the employee is claiming discrimination based on disability, which Walsh left blank. In the

Questionnaire's narrative description of the discrimination, Walsh mentioned his sexual orientation but not his HIV status. Later, Walsh completed an EEOC Charge of Discrimination form. Like the Questionnaire, the Charge Form lists categories of employment discrimination and prompts the employee to check all the boxes that apply to their claim. Walsh checked the boxes for "sex" and "retaliation" only, not "disability." The Charge also allows the employee to write a narrative about the "particulars" of the discrimination. Again, Walsh mentioned only his sexual orientation. EEOC issued a right to sue letter. Judge Parker first turned to the ADA's exhaustion requirements, specific to claims where a discharged employee omitted claims from the EEOC Charge Form. In order for administrative exhaustion to occur, the omitted claims must relate to or arise from those claims that Walsh did include in his Charge to put EEOC on notice of the claim. Judge Parker's analysis focused on whether the factual allegations in the charge would have put the EEOC on notice of Walsh's disability claim. Walsh claimed that "[a] n investigation of the rumor spreading by the EEOC would have allowed him to easily explain what the rumors and belittling were, including the discriminating actions and comments regarding his disability." Judge Parker found this argument unpersuasive, asserting that an investigation of Walsh's Charge of sexual orientation discrimination would not necessarily lead the EEOC to investigate disability discrimination. Nowhere in either the Charge Form or Questionnaire did Walsh mention that he was HIV-positive or that Dendar discriminated against him because of his disability. Likewise, Walsh's initial Charge Form lacked any factual allegations about his diagnosis with HIV or about discrimination in violation of the ADA. As a result, the court concluded, the EEOC would not have had one iota of notice regarding Walsh's disability discrimination claim, and it had to be dismissed. The case continues on the sexual orientation discrimination claims by both men. Walsh and Dailey are represented by William A. Wooten, of Covington, TN. Judge Parker was appointed by President Donald J. Trump. – *Wendy B. Bicovny*

TEXAS – In a complicated and lengthy multi-part decision, Senior U.S. District Judge Sidney A. Fitzwater granted in part and denied in part motions to dismiss by several plasma collection centers, which are being sued by individuals who donated blood for plasma extraction purposes, tested positive for HIV or Hepatitis C on the initial screen, later determined that those were false positive results, and later learned that the plasma centers had (pursuant to a federal regulation) reported the fact that they had tested positive to the National Donor Deferral Registry and took no steps to correct those reports upon being shown that the individuals were not infected. *Anderson v. Octapharma Plasma, Inc. et al.*, 2020 WL 7245075, 2020 U.S. Dist. LEXIS 230931 (N.D. Tex., Dallas Div., Dec. 9, 2020). The lawsuit asserts violations of the Texas Deceptive Trade Practices-Consumer Protection Act and common law claims of defamation, tortious interference, conspiracy to commit tortious interference, breach of contract, fraud, violation of privacy rights, and seeks a declaratory judgement from the court that the plaintiffs are not infected. Judge Fitzwater painstakingly works his way through the various causes of action, explaining why most of them are to be dismissed as a result of a careful analysis of the cause of action in question and the plaintiffs' factual allegations. A form of the defamation claim survived, but most of the remaining claims did not. Interestingly, Fitzwater raised several issues sua sponte, and gave leave to plaintiffs to file responses on those points. Despite inventive pleading, ultimately the plaintiffs lose most of their causes of action by this ruling, the details of which are far beyond the scope of reporting in *Law Notes*. Plaintiffs' counsel include D. Bradley Kizzia, J Nicole Ward, and Brandie Carver, of Kizzia Johnson PLLC, Dallas, TX. Judge Fitzwater was appointed by President Ronald W. Reagan. – *Arthur S. Leonard*

WEST VIRGINIA – Lisa Marie Kerr, an attorney employed as a Social Service Worker by Lincoln County, West Virginia, sued over a two-week suspension without pay, claiming "the defendants' conduct was motivated by their 'distaste for non-gender-conforming lesbians' like her," wrote Senior U.S. District Judge John T. Copenhaver, Jr., in *Kerr v. McKay*, 2020 U.S. Dist. LEXIS 243766, 2020 WL 7706514 (S.D. W. Va., Dec. 29, 2020). Kerr is representing herself in the litigation. Her employing agency, a supervisor and a manager are the named defendants. In this December 29 decision, rendered after Kerr had cured some faults in her original complaint with a timely amended complaint, the court adopted the recommendation by a magistrate judge to dismiss substantive and procedural due process claims against the individual defendants, noting that the amount of due process owed a public employee in connection with a brief suspension was significantly less than what is required to sustain a termination. However, the court allowed Title VII discrimination and retaliation claims to continue. The opinion does not specify Kerr's factual allegations, apart from those mentioned above. At the time Kerr filed suit, the Supreme Court had not yet decided the *Bostock* case, and West Virginia does not outlaw sexual orientation discrimination. However, the magistrate judge did not recommend dismissing the Title VII claims, perhaps reacting to without mentioning *Bostock*'s holding, when rejecting the employing agency's motion to dismiss

the Title VII claims. There is also a defamation claim against the employer that continues under this decision, with Kerr having reduced her damage claim to the face amount of the employer's liability insurance policy in order to avoid having this claim tossed out on sovereign immunity grounds. Judge Copenhaver was appointed by President Gerald R. Ford. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

ALABAMA – A man who was convicted on a 2006 guilty plea for on-line sexual solicitation of an adult police officer posing as a minor won a belated exoneration on December 16, 2020, when the Court of Criminal Appeals of Alabama ruled in *Shrove v. State*, 2020 Ala. Crim. App. LEXIS 99, 2020 WL 7382256, that a later decision interpreting the statute under which Christopher Shrove was convicted as applying *only* to cases where the defendant had actually solicited an underage person should be applied retroactively to vacate Shrove's conviction, as the conduct with which he was charge was, viewed retrospectively, not a violation of the statute. The Alabama legislature had reacted to the earlier ruling by amending the statute to provide that it applied to any solicitation where the defendant *believed* he was dealing with an underage person, presumably because that is what the legislature had intended to criminalize all along, but its hapless phrasing of the prior law had been found by the court to have the narrower application embraced by its interpretive ruling. (There's textualism for you!) So, Christopher Shrove goes free, since the police officer posing as a 14-year-old girl on-line was definitely an adult. The Westlaw and LEXIS reports of the court's opinion, as of the end of December, did not indicate counsel for Shrove or whether he undertook his appeal *pro se*. One judge dissented without writing an opinion.

ARIZONA – In *State of Arizona v. Axton*, 2020 Ariz. App. Unpub. LEXIS 1385, 2020 WL 7585927 (App. Ct. App., Div. 1, Dec. 22, 2020), the appellate court had to deal with the contention that the trial judge should have removed a juror on potential bias grounds. Anthony Axton was convicted by the jury on numerous criminal charges arising from theft at gunpoint from a retail store and subsequent events. During jury deliberations, the judge received a note from one of the jurors, G.M., informed the judge that one of the other jurors, K.A., had stated that he had previously seen Axton "in town as a crossdresser." The judge individually interviewed all the jurors and ultimately decided to replace K.A. on the jury with one of the alternates who had been excused before deliberations began. During the course of these interviews, one of the other jurors mentioned that there had been an argument within the jury about whether to inform the judge about K.A.'s statement, and G.M. was the strong proponent who took action and sent the note. "One juror believed that G.M. could not remain impartial and told the court that G.M. had stated: 'crossdressers or transgenders should not be allowed in society.'" No other juror confirmed hearing this remark, and the judge did not re-interview G.M. to follow up. Axton's counsel twice asked that G.M. be removed from the jury, but the trial judge evidently rested on G.M.'s statement during his interview with her that she could be impartial. On appeal, Axton claimed the verdict should be set aside because of G.M.'s continued presence on the jury. The Court of Appeals rejected this claim. "The only evidence that G.M. held a prejudice against Axton comes from one juror's statement, which the superior court weighed against G.M.'s statements," wrote the court. "The court's conclusion that G.M. could remain fair and unbiased was supported by sufficient evidence to fall within the court's discretion." The other jurors had not expressed any concern about whether G.M. could be fair, and the court noted that Axton's counsel had been more concerned about removing K.A. than removing G.M. "Although Axton's counsel still requested G.M. be struck after hearing the alleged comment," wrote the court, "he was not wholly convinced she held actual bias or prejudice against Axton. Trial counsel believed that the real issue regarding G.M. was that she 'wanted to make sure that this was brought to the court's attention [rather] than necessarily something against my client.' Thus, while counsel ultimately did move to remove G.M., his argument was equivocal and overshadowed by concerns about K.A." And, said the court, "Although the court did not recall G.M. for questioning after learning about her alleged statement, the court continued to interview the remaining jurors, none of whom reported hearing the comment. The court conducted a reasonably thorough investigation that was commensurate with the threat of possible juror bias." Concluded the court on this point: "There is no evidence here that G.M. relied on prejudice in voting to convict Axton, and she clearly stated that she could decide the case impartially. Accordingly, the superior court did not abuse its discretion by allowing G.M. to remain on the jury."

CALIFORNIA – In *People v. Barillas*, 2020 Cal. App. Unpub. LEXIS 8373; 2020 WL 7395996 (Cal. 6th Dist. Ct. App., Dec. 17, 2020), the defendant was convicted by a jury of having sexually abused the young daughter of his girlfriend over a period of several years. Upon conviction, the court imposed a lengthy prison term and ordered that the defendant submit to HIV testing. On appeal, the defendant objected to the expert testimony presented by

the prosecution, including testimony purporting to show that the proportion of sexual abuse claims made by youngsters that turn out to be false is very low. Defense counsel had not objected to this testimony at trial, but vigorously cross-examined the expert witness to cast doubt on the relevance of this statistical testimony to the facts of this case. On appeal, the defendant reiterated objection to the admission of the expert testimony, alleged ineffective assistance of his attorney for not objecting to it, and also contested the appropriateness of HIV testing. Most of the court's opinion concerns rejecting the appeal regarding the expert testimony, although the court noted its agreement with some other recent California decisions holding it is improper to admit testimony about the low rate of false sexual abuse accusations by children. In this case, however, the court found that the lack of objection by defendant's counsel, followed up by vigorous and well-informed cross-examination, effectively rebutted the ineffective assistance of counsel argument. On appeal, the state conceded that imposing an HIV test upon conviction of a sex crime when the trial court made no factual finding on the record that defendant's conduct could have transmitted HIV to the victim was in error, and the court remanded the case to the trial court, to give the prosecution a chance to present relevant evidence or to have the testing requirement dismissed.

KANSAS – The Court of Appeals of Kansas, affirming the conviction of Francis Joseph Smith on four felony sex crimes and two related misdemeanors, rejected, among other things, Smith's argument that he received ineffective assistance of counsel at trial because his defense attorney did not present evidence that Smith is gay and, "therefore, would not have had the requisite sexual interest in touching the girls or watching them touch each other to be guilty of the felony charges." The *per curiam* decision by the court of appeals in *Smith v. State of Kansas*, 2020 WL 7409939, 2020 Kan. App. Unpub. LEXIS 825 (Dec. 18, 2020), then asserts that "the jury was aware of Smith's statement to law enforcement officers that he was a homosexual and had sexual interests that did not involve underage girls," so presumably the point of Smith's claim on appeal is that his counsel should have presented evidence to corroborate his statement about his sexual orientation to the officers. In rejecting the ineffective assistance claim, the court noted testimony by the defense lawyer that this was a litigation strategy, since at the time of trial Smith had a prior conviction on his record, a guilty plea to a charge of having sex with a female minor 15 years earlier, and the lawyer "explained that Smith's earlier conviction substantially undermined such a defense and emphasizing Smith's homosexuality would only invite the prosecutor to highlight that conviction as a counterpoint." The court deemed this "the type of studied litigation strategy" that is protected in a habeas corpus challenge, as this proceeding was, so "the district court correctly declined to grant relief on this issue."

MASSACHUSETTS – The Appeals Court of Massachusetts rejected the argument by a criminal defendant that a motion judge during earlier stages of his case should have recused herself because a victim of the defendant's criminality (who could also be a witness in his case) is transgender, and the judge is one of the directors of an LGBTQ judges' association. *Commonwealth v. Dew*, 2020 Mass. App. Unpub. LEXIS 1067, 2020 WL 7585700, 99 Mass. App. Ct. 1104 (Dec. 22, 2020). "He asserts that because the judge was one of fourteen directors of the International Association of LGBTQ+ Judges, and because at least one of the victims of the underlying crimes was transgender, the judge was unable to maintain her objectivity in this case," wrote the court. "We reject the notion that a judge's membership in a minority group, or her involvement in a professional organization for members of such a group, gives rise to any inference of bias merely because a potential witness in a case may also be a member of the group." The court also noted that the defendant never filed a recusal motion "at any time during the life of this case," and the court pointed out that it had no jurisdiction to review any of the judge's earlier orders. The court also pointed out that its decision to affirm the ruling that defendant was appealing was made de novo, so "any hypothetical error in the judge's decision not to recuse herself *sua sponte* did not create any substantial risk off a miscarriage of justice," since the motion would have been denied in any event.

PRISONER LITIGATION NOTES

By William J. Rold

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

U.S. COURT OF APPEALS, 10TH CIRUIT – Transgender inmate (and frequent litigator) Jeremy Vaughn Pinson is denied compassionate release in an unreported Order and Judgment in *United States v. Pinson*, 2020 WL 7053771 (10th Cir., Dec. 2, 2020). Pinson appeared *pro se* before Senior Circuit Judge Michael R. Murphy (Clinton) and Circuit Judges Gregory A. Phillips and Carolyn B. McHugh (both Obama). Judge Phillips wrote for the Court. Pinson sought compassionate release "due to mental health diagnoses and conditions." There is no elaboration or mention of COVID-19. Pinson, still in her thirties, has been the plaintiff in many cases reported in *Law Notes*, most

of them concerning her claims based on transgender status. Judge Phillips' opinion refers to her criminal history, involving a conviction for embezzlement at age 18, and three more convictions while incarcerated. The latter involved threats against then-President George W. Bush and threats against federal judges and a juror in one of her criminal cases. The threats cases were consolidated for sentencing, and Pinson received twenty years. This was an upward departure of 135 months over Sentencing Guidelines. The Tenth Circuit affirmed the sentence, albeit with some "qualms" in *United States v. Pinson*, 542 F.3d 822, 827 (10th Cir. 2008). Now, Pinson makes no showing justifying extraordinary relief from sentence. In affirming the W.D. Oklahoma, the Tenth Circuit bypasses the issue of whether Pinson had exhausted prior to filing, to reach the merits. Referring to 18 U.S.C. § 3582, it notes that "some courts have concluded that passage of the First Step Act has reduced—or even eliminated—the relevance of the Sentencing Commission's policy statement" on criteria for sentencing under 18 U.S.C. § 3553(a). But it continues to follow such guidance, particularly community "dangerousness" – citing *United States v. Saldana*, 807 F. App'x 816, 818-9 (10th Cir. 2020). Reviewing the district judge on abuse of discretion and clearly erroneous standards, the court affirms that Pinson remains dangerous. Pinson argued that the district judge never considered her "particular vulnerability" as a transgender person in prison in denying her application. The court rules that the finding that Pinson remains a danger to the community "with a propensity for violence" is not clearly erroneous, and it is enough. "We won't disturb the district court's ruling." There are now two "unpublished" decisions from the Tenth Circuit saying that compassionate release decisions can rely on the unamended Sentencing Guidelines, despite the First Step and the CARES Acts.

CALIFORNIA – The saga of transgender plaintiff Ashley R. Vuz – who alleges she was falsely accused of robbing a women's bar she was patronizing, then arrested without probable cause, then transported and confined in violation of her rights – is detailed in "Transgender Club Patron Sues Bar Owner and San Diego City and County Defendants After Arrest and Ordeal in Jail," *Law Notes* (September 2020 at pages 21-22, reporting *Vuz v. DCSSIII, d/b/a Gossip Grill,* 2020 U.S. Dist. LEXIS 135312 (S.D. Calif., July 30, 2020) ["*Vuz I*"]. In *Vuz I,* U.S. District Judge Gonzalo P. Curiel ruled on a motion to dismiss and allowed Vuz to proceed on claims against the bar and its employees, against the City and County of San Diego on *Monell* claims, on Fourth Amendment claims concerning her arrest, and on conditions of confinement at the jail. He granted Vuz leave to replead First Amendment and other claims. Now, in *Vuz II,* 2020 U.S. Dist. LEXIS 231521, 2020 WL 7240369 (S.D. Calif., Dec. 8, 2020), Judge Curiel addresses mostly the First Amendment claims as replead and qualified immunity of individual defendants. At this point the claims are so complicated that Judge Curiel had to resort to a three-column table and different fonts to sort out his ruling. [Note: the formatting collapsed in both WestLaw and LEXIS, but it is clear in PACER, No. 3:20-cv-00246, Docket No. 90, for those who wish to follow every turn.] Suffice it for here to say that very little changes in *Vuz II*. There is still no progress against the private bar and its employees who allegedly set these events in motion; nothing on the arrest itself; and nothing on the cell conditions. The amended complaint did give the defendants a second pass at moving to dismiss. Judge Curiel again rejects Vuz's First Amendment claims, which are based on a theory that her feminine presentation was "protected" First Amendment activity and that it was chilled by the City Defendants, who also retaliated against her for exercising it. There is useful *dicta* on transgender expression and the First Amendment, but Vuz failed to convince the judge that she was actually chilled or retaliated against for exercising her First Amendment rights. Claims about transporting her to the men's jail also fail. The lead officer (who still faces false arrest claims) has immunity for following San Diego city policy on sending trans inmates to jail based on their genitalia, and Vuz concedes she told him she had not had lower surgery. Conditions in the jail were not known to the officer to be so bad as to impute fault to him for taking Vuz there. Judge Curiel finds the question closer as to the City, but he says this is for summary judgment. The nurse who screened Vuz at the jail may also have to answer at least at summary judgment for interfering with Vuz's transgender medication. This writer accepts Vuz's allegations (as did Judge Curiel), but she was only in the jail for about one day. She claims she was held "incommunicado," yet she admits she was permitted to use the telephone, through which she arranged $50,000 bail on the day after her arrest. She also claims violation of her rights by jail officials delaying her release for two hours after she posted bail. There are meritorious claims here, arising in tort and under *Monell*, but it is difficult to separate them from the distractions. Vuz may well be entitled to substantial damages, but the brevity of her incarceration seems to limit the test case viability of this action. Vuz is represented by Peterson Bradford Burkwitz, LLP (Burbank).

CALIFORNIA – This case is not what it appears to be upon reading the screening decision of U.S. District Judge Beth Larson Freeman in *Bohren v. San Jose Police Department,* 2020 WL 7696057, 2020 U.S. Dist. LEXIS 242886 (N.D. Calif., Dec. 28, 2020). Transgender plaintiff and attorney Roxanne Bohren, through separate counsel, claims that she was falsely arrested outside her

home in a sweep by San Jose Police on the false premise that transgender women on the street at night must be prostitutes. The officers laughed at her request that she be permitted to lock the doors to her home before she was taken away. Almost none of this (which is reminiscent of an incident involving Henry Lewis Gates) appears in Judge Freeman's short opinion. Bohren sued one named officer, several "John Does," the City of San Jose, and the County of Santa Clara (where she was briefly jailed). Her case is pleaded as a class action on behalf of transgender women in San Jose who are unlawfully arrested in such sweeps. When she got to the jail, Bohren claims she was housed with male inmates in a cell "covered" with feces and vomit. Bohren raised six claims: (1) false arrest; (2) discriminatory arrest; (3) *Monell* claim against City of San Jose; (4) *Monell* claim against Santa Clara County; (5) intentional infliction of emotional distress against the officers; and (6) negligence against all defendants. Bohren conceded that her complaint needed to be amended as to some of these claims, to provide additional detail and clarification – and Judge Freeman grants leave to do so. She declines to strike the "John Doe" defendants at this stage, citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Judge Freeman questions whether housing Bohren with men, by itself, is a constitutional violation, saying no such authority has been presented. [Note: a triage procedure is mandated by the Prison Rape Elimination Act, under which transgender inmates are "screened" for potential for victimization and such information is used for "housing" decisions. 28 C.F.R. §§ 115.41 and 115.42. This is not mentioned by the judge.] Judge Freeman writes that the jail's policy had to be shown to be deliberately indifferent to Bohren's rights and the "moving force" behind their deprivation, citing *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). Leave to amend is granted here, too. Judge Freeman dismisses with prejudice state law claims against the City of San Jose and the County of Santa Clara (but not against individual defendants), citing Calif. Gov't Code § 844.6, which grants localities immunity in cases involving prisoners. Bohren is represented by Bruce W. Nickerson, San Carlos, CA.

ILLINOIS – Dameko (Koko) Brickhouse, a black transgender inmate, filed a complaint of violation of her civil rights while in protective custody at Menard Correctional Facility in 2018, in *Brickhouse v. Lashbrook*, 2020 WL 7059256 (S.D. Ill., Dec. 2, 2020). The case was assigned to Chief U.S. District Judge Nancy J. Rosenstengel and remained on her docket unscreened officially for nine months before it was reassigned to newly-appointed U.S. District Judge Stephen P. McGlynn. Brickhouse had already been transferred to Pontiac Correctional Facility when she filed her complaint, so, on screening, Judge McGlynn dismissed claims for injunctive relief. He divided her damages claims into five counts: (1) an Eighth Amendment claim against Correction Officer Johnson for deliberately leaving her cell unlocked so that another inmate could sexually assault her; (2) Eighth Amendment claims against the warden and a John Doe supervising major for failing to protect her from Officer Johnson and from the inmate who assaulted her, saying they deliberately "turned a blind eye" to the known abuse of protective custody inmates; (3) a First Amendment claim against Johnson for retaliation after she filed a PREA compliant; (4) a Fourteenth Amendment substantive due process claim against Johnson for writing a false disciplinary ticket against her; and (5) a Fourteenth Amendment Equal Protection claim against all defendants for discriminating against her on the basis of race and gender identity. Judge McGlynn allowed Brickhouse to proceed on the first four counts. The protection from harm claims are classic applications of *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). The warden and the major stay in the case for now because the allegations are that they knew that Johnson was abusing protective custody inmates and using the inmate who assaulted Brickhouse (who had a known sexual assault victim history) as an "agent" to keep "order" and to terrorize protective custody inmates. While there is no constitutional claim for violation of PREA itself or for writing a false ticket, where actions are taken in retaliation for a PREA complaint, claims arise under both the First Amendment and substantive due process. *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012); *Black v. Lane*, 22 F.3d 1395, 1402–03 (7th Cir. 1994). On Equal Protection, Judge McGlynn recognizes that Brickhouse may have a claim on the basis of transgender status and race, but the complaint is too general. On race, there appears to be not much more than the claim of an "all-white" staff and a "mostly black" population in protection – but this would be true of most prisons in rural areas. Judge McGlynn found this claim "conclusory." On gender identity, the case seems closer. Brickhouse said that trans inmates were "singled-out" for discrimination in protective custody and that her rape is an example of it. Moreover, she attached affidavits from other victims in support of transgender discrimination claims. Judge McGlynn finds that Brickhouse's description of defendant Johnson as having "a history of harassing prisoners . . . in the proactive custody unit," may show a general animus against inmates in protection but not necessarily one against trans inmates in particular. The Equal Protection dismissal is without prejudice to replead.

ILLINOIS – Former prisoner Dion Thompson, proceeding *pro se*, sues for violation of his civil rights in connection

with his declaring himself to be gay and asking if a proposed cellmate had a problem with that. The proposed cellmate refused an order to take the cell, and Thompson was ticketed. In *Thompson v. Hagene,* 2020 U.S. Dist. LEXIS 239189, 2020 WL 7491292 (S.D. Ill., Dec. 21, 2020), Chief U.S. District Judge Nancy J. Rosenstengel allows Thompson to proceed on a First Amendment claim. She dismisses due process claims in connection with the issuance of the ticket and his punishment (30 days segregation, loss of commissary, etc.). The writing of a false ticket is not enough to invoke due process protections if procedures are followed. The "impartial Adjustment Committee terminates an officer's possible liability for the filing of an allegedly false disciplinary report." *Hadley v. Peters*, 841 F. Supp. 850, 856 (C.D. Ill. 1994), *aff'd*, 70 F.3d 117 (7th Cir. 1995); *Hanrahan v. Lane*, 747 F.2d 1137, 1140 (7th Cir.1984). In addition, the punishment here was insufficient to invoke a liberty interest. One month of segregation with commissary restrictions is "not enough to state a deprivation of a liberty interest," citing *Thomas v. Ramos*, 130 F.3d 754, 761, 762 n. 8 (7th Cir. 1997) (70 days not enough; collecting cases). Thompson does, however, state a viable First Amendment retaliation claim against the officer who ticketed him after the "I am gay" speech. *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012); *McElroy v. Lopac*, 403 F.3d 855, 858 (7th Cir. 2005); *Antoinev. Ramos*, 497 F. App'x 631, 633-34 (7th Cir. 2012).

ILLINOIS – U.S. District Judge Staci M. Yandle grants the petition for a writ of *habeas corpus* and injunctive relief to ICE detainee Ana Gabriela (Anton) Garcia Diaz in *Diaz v. Acuff,* 2020 WL 7342696, 2020 U.S. Dist. LEXIS 233870 (S.D. Ill., Dec. 14, 2020). Diaz is a transgender man who had twice previously been deported, who returned to the United States a third time, after which he was arrested for minor charges that were resolved by a civil fine. ICE continued to hold him for deportation, relying on the earlier adjudications. Diaz claims reasonable fear of serious harm or death if he returns to Honduras. An immigration judge found the fear to be credible and corroborated, but denied relief. Diaz has appealed to the Board of Immigration Appeals [BIA], where his case has languished for months, while ICE continues to detain him. Diaz filed a similar petition in May of 2020, which Judge Yandle denied without prejudice, if the length or circumstances of his detention were to change substantially. ICE conducted administrative detention "reviews" in July and October, but it continues to hold Diaz. Meanwhile, Diaz has been permitted access to hormone therapy while his case remains before the BIA. ICE maintains that Diaz' detention is "mandatory" under 8 U.S.C. § 1231 because it is based on a prior final adjudication of deportation, which he violated. Diaz maintains his detention is "discretionary" under 8 U.S.C. § 1226 because he is seeking relief from deportation. [Note: There is a circuit split on this, on which the Seventh Circuit has not ruled. The point is before the Supreme Court this term in *Albence v. Guzman Chavez*, *cert. granted,* 207 L. Ed. 2d 1050 (U.S. June 15, 2020). Judge Yandle finds that she need not resolve the "split" to decide whether Diaz' detention has been "unconstitutionally prolonged."] Diaz has been detained at the Pulaski ICE facility (extreme southern Illinois, near Kentucky border) since March 2020. He is in female housing – a unit of twelve double-occupancy cells. At first, he had no cellmate because there were only a few women being held, and there were no COVID-19 cases. As time passed, he had cellmates, and COVID-19 became a growing problem at Pulaski. Diaz argues that his continued detention violates his Fifth Amendment due process rights because he is neither a flight risk nor a danger to the community. Judge Yandle finds that this argument can be raised in a *habeas* action under *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830, 851-52 (2019); and *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001). While "brief" detention pending removal is "reasonable," detention longer than 6 months during attempts to execute a final order of removal is "presumptively unreasonable." *Zadvydas*, 533 U.S. at 682. "Diaz, who is actively pursuing a cognizable defense to his removal, falls into the latter category." Diaz "has been detained for over a year at this point" – and, this writer might add, for six months since Judge Yandle fired a shot across the bow without prejudice last May. Judge Yandle finds that Diaz is neither a flight risk nor a risk to the community. She also found that "there is no significant likelihood that he will be removed in the reasonably foreseeable future." She notes the backlog at BIA and at the Seventh Circuit, to which Diaz could appeal any final BIA decision. The "reality of the current pandemic" makes it unlikely that Diaz will be removed to Honduras. He has concrete plans to live with family in Chicago, which is safer than Pulaski. Judge Yandle orders his immediate release and directs ICE to transport him from Pulaski to his family's home in Chicago. In its discretion ICE may order GPS or electronic monitoring. Diaz is represented by National Immigrant Justice Center (Chicago) and by Sidley Austin, LLP (Chicago and Washington, DC).

ILLINOIS – The ruling in *Monroe v. Jeffreys,* 2020 WL 7405399 (S.D. Ill., Dec. 17, 2020), by Chief U.S. District Judge Nancy J. Rosenstengel, concerns a discovery dispute in the long-standing class action litigation about conditions for transgender inmates in Illinois. Plaintiffs seek to compel production of "all documents and communications"

concerning transgender inmates on topics including the following: (1) suicides of transgender inmates, mortality reviews of same, and operations of the Illinois "Suicide Task Force"; (2) the "new" directive on "Evaluations of Transgender Offenders"; and (3) efforts to comply with the Court's preliminary injunction. Defendants argued that suicide information and investigations are not catalogued by gender identity, so the request would be burdensome. Judge Rosenstengel rules that there are not that many suicides and that, in any event, the burden is outweighed by the importance of the information in dealing with defendants' knowledge of suicide and of self-harm prior to suicide. Defendants also cited the privacy rights of suicides who were not members of the transgender class. Judge Rosenstengel ruled that these disclosures could be handled the same way records were produced for unnamed class members. Defendants invoked deliberative privilege concerning their new transgender directive and their efforts to comply with the preliminary injunction. They also argued that DOC "continues to revamp its policies" and its efforts to comply with the injunction are "ongoing." The privilege protects documents that are both pre-decisional and deliberative, and the Government has the burden of proof. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 2 (2001); *Becker v. I.R.S.*, 34 F.3d 398, 403 (7th Cir. 1994); *King v. I.R.S.*, 684 F.2d 517, 519 (7th Cir. 1982). Judge Rosenstengel agrees that the documents meet the threshold requirements for deliberative privilege, although she questions whether a party can claim continuous privilege simply because efforts are ongoing. Deliberative privilege can be over-ridden by a showing of particularized need for the documents, which is more than simple relevance. *U.S. v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). Judge Rosenstengel rules for plaintiffs on this point. "These requests relate directly to the administrative processes regarding treatment of gender dysphoria and IDOC's efforts to comply with the Preliminary Injunction Order also regarding the treatment of gender dysphoria. Given the nature of the claims in this case, the Court finds that Plaintiffs' particularized need for these documents outweighs Defendants' need for confidentiality."

INDIANA – This writer has almost never seen a U.S. District Judge move this fast. Transgender prisoner Antonio Crawford filed a civil rights case on October 19, 2020, claiming that her safety and mental health were at risk from her cellmate in the U.S. Penitentiary, Terre Haute, in *Crawford v. Watson,* 2020 WL 7074630 (S.D. Ind., Dec. 3, 2020). The next day, U.S. District Judge James Patrick Hanlon appointed counsel for Crawford because of the life-threatening seriousness of the allegations. Counsel filed an amended complaint, which Judge Hanlon allowed to proceed on Eighth Amendment claims of deliberate indifference to the inmate's safety and health. He ordered defendants to be served and to respond to the request for a preliminary injunction within fourteen days after service. "Given the nature of the claims and the immediacy of the harm alleged," Judge Hanlon directed the Clerk of Court to provide copies of the papers to the United States Attorney and to counsel for the Penitentiary, in the interim. Crawford is represented by the ACLU of Indiana. Judge Hanlon was appointed by President Trump in 2018.

KANSAS – U.S. District Judge Daniel D. Crabtree granted the motion of federal defendant Luis Villa-Valencia for compassionate release due to COVID-19 in *United States v. Villa-Valencia,* 2020 U.S. Dist. LEXIS 232073, 2020 WL 7263894 (D. Kan., Dec. 10, 2020). Villa-Valencia is 36 years old, HIV-positive, with hypertension. He has served 68 months of a 78-month sentence on a guilty plea of conspiracy to distribute drugs. The Government did not file opposition papers or contest his factual assertions, which include: a low CD4 count, an "outbreak" of COVID-19 at Great Plains CI (Oklahoma) – a private prison run by GEO Group for the Bureau of Prisons – and an undercounting of the COVID-19 risk at Great Plains. Villa-Valencia has a clean prison record, and the Government, having presented no papers, effectively conceded that he posed no danger to society if released. Here's the kicker: Villa-Valencia is subject to deportation if released and is under an ICE detainer. Judge Crabtree cites *United States v. Pompey*, 2020 WL 3972735, at *5 (D.N.M. July 14, 2020) (finding the court may grant a motion for "compassionate release and order immediate release from BOP custody to ICE"). Judge Crabtree's order specifically states that it "does not nullify or supersede any detainer." Villa-Valencia will move from BOP incarceration to ICE detention. Given how many ICE facilities GEO Group operates for Homeland Security, he could well find himself in another GEO Group bunk. Villa-Valencia was represented by the Federal Defender, Kansas City, KS.

MICHIGAN – This writer has reported on dozens of cases of federal prisoners seeking compassionate release due to COVID-19, and (at least so far) there is no unifying standard that can be drawn from the widely disparate decisions on similar facts. Here, U.S. District Judge David M. Lawson grants HIV-positive prisoner Byron Simon Rucker's application in *United States v. Rucker,* 2020 U.S. Dist. LEXIS 231120, 2020 WL 7240900 (E.D. Mich., Dec. 9, 2020). Rucker had seven months left to serve on a 48 months' sentence for distributing heroin. The heroin he sold was laced with fentanyl, causing the death of a purchaser – although Rucker plead to

a single count of distribution. Rucker is 55 years old, with prior convictions. His HIV is described as "controlled" (with "normal" t-cell count), and he also has asthma, "gastro-intestinal issues," "history of stroke," "anxiety," and "chronic immune compromising disease." The medical details are sealed, but the opinion suggests Rucker may be immune compromised from medical history in addition to HIV. Judge Lawson finds that Rucker's health has deteriorated. There is a good discussion of the applicability of Sentencing "Guidelines" after passage of the First Step Act and the Sixth Circuit's granting judges more discretion in *United States v. Jones*, 2020 WL 6817488, at *7 (6th Cir. Nov. 20, 2020); also citing *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (same). Judge Lawson emphasizes the outbreak of COVID-19 at FCI-Cumberland (Maryland), in granting relief reducing Rucker's incarceration to time served. He says the Bureau of Prisons numbers show about a 20% positive COVID-19 rate among prisoners tested at Cumberland, but he questions these numbers as artificially low because of BOP's lack of a "prophylactic testing program." *See Wilson v. Williams,* 961 F.3d 829, 849 (6th Cir. 2020) (Cole, J., concurring) (infection rates in BOP are "questionable at best"); *United States v. Campbell*, 2020 WL 3491569, at *9 (N.D. Iowa, June 26, 2020) (same). Rucker is being confined in "a facility where the coronavirus is uncontrolled." Although Rucker's crime had "horrible consequences," it was not shown that Rucker knew that the heroin was laced. Rucker has a "clear" prison record, and his recidivism risk is lowered by his ill health. The release order is stayed for 14 days while quarantine and home arrangements are finalized. Rucker must wear electronic monitoring, which his probation officer may discontinue in her discretion after 90 days of full home compliance. Rucker is represented by the Federal Defender, Detroit.

NEW YORK – HIV-positive federal inmate Jeffrey Correa plead guilty to a charge of producing child pornography in connection with e-mails of his sexual conduct with his ten-year-old nephew. He was sentenced to 180 months. He was also prosecuted under New York State Law in Bronx County, and he was sentenced to twenty years for drugging and sexually assaulting a minor. There is no explanation in the decision as to why there were dual prosecutions, but it was a factor in U.S. District Judge Valerie Caproni's granting him compassionate release from federal custody in *United States v. Correa,* 2020 WL 7490098, 2020 U.S. Dist. LEXIS 239795 (S.D.N.Y., Dec. 21, 2020). In addition to HIV (which is controlled), Correa has asthma, which is not well-controlled and for which he has recently been prescribed steroids. He is also over-weight, bordering on obese. The decision marshals several cases of diseases acting in combination to create grounds for compassionate release, even where HIV is controlled. Correa has seven months left in his federal sentence, plus the balance of his state sentence, which is running concurrently. Federal release does not diminish the seriousness of his offenses, given the time served and his remaining state sentence. Judge Caproni finds that the First Step Act gives her discretion to resentence on compassionate release and that she is not bound by the strictures of the Sentencing Guidelines, citing *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020). [This burgeoning circuit split will hopefully be cured in the Biden Administration with new regulations.] Judge Caproni explicitly relies here on the fact that compassionate release from federal custody will not release Correa but transfer him to New York State custody, where he can make whatever applications for parole he may be qualified to raise. In noting COVID-19 risks in Bureau of Prisons custody, Judge Caproni observes that federal officials do not routinely test officers and staff for COVID, yet they enter and leave the institutions daily and can spread the virus to the inmates and each other. Correa is represented by Sabrina P. Schroff, New York City.

OHIO – U.S. District Judge Dan Aaron Polster denied the application of Joshua T. Massey for compassionate release due to COVID-19 in *United States v. Massey*, 2020 WL 7136877 (N.D. Ohio, Dec. 7, 2020). The motion and the Government's response are under seal in PACER. [Although the Bureau of Prisons often asks that its COVID-19 submissions be sealed, here the request to seal began with a motion by Massey.] Judge Polster found that Massey met exceptional standards for compassionate release under 18 U.S.C. § 3582(c)(1)(A), due to his unmonitored HIV-positive status, obesity, untreated hepatitis-C, postherpetic neuralgia, and mental illnesses. Massey (who is 38 years old) has served 59% of his sentence for possession of drugs with intent to distribute, with an expected release date of November 2021. Although a prison doctor said Massey's HIV was "well-controlled," Judge Polster noted that there was no lab work presented. He wrote that the HIV labs and commencement of treatment for hepatitis-C were both suspended due to COVID-19, about which he said he was "very concerned" (although he granted no relief about these facts). Judge Polster found that he had "full discretion" to grant release notwithstanding the failure to amend the Sentencing Guidelines, citing *United States v. Jones*, 2020 U.S. App. LEXIS 36620, at *19 (6th Cir. Nov. 20, 2020). [There appears to be a circuit split on this point, but it will probably be resolved by new Sentencing Guidelines under the Biden Administration.] Further, Judge Polster finds that USP-Canaan (in northeast Pennsylvania) is "in the midst of a COVID-19 outbreak." All of this makes the reader think Judge Polster is about to order a release, but he finds that, upon applying the Guidelines

as a matter of discretion, Massey remains a danger to society, under 18 U.S.C. §§ 3142(g) and 3553(a), because of his twenty-year recidivism. Massey was represented by Joan E. Pettinelli, North Royalton, Ohio. Judge Polster was appointed by President Bill Clinton.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

TRUMP ADMINISTRATION – A parting shot from the Trump Administration was the publication of a new rule essentially giving permission to nine federal agencies to enter into contracts (and subcontracts) with religious entities (i.e., "faith-based" institutions) whose employment and service policies, dictated by their religious beliefs, are out of compliance with anti-discrimination policies established through prior Executive Orders and regulations. Lambda Legal reported that the new rule allows the following agencies to direct federal taxpayer dollars to religious entities: U.S. Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, and Veterans Affairs, and the U.S. Agency for International Development. Under the Trump Administration, the Free Exercise Clause is exalted and the Establishment Clause is demeaned. The new rule, which was purportedly simultaneously promulgated by the nine agencies, was scheduled for publication in the Federal Register on December 17, and according to the summary released on December 14 was intended to implement Trump's May 2018 Executive Order 13831 directing all federal agencies to adopt policies maximizing the free exercise of religion. * * * Previously, on December 10, the Justice Department finalized new rules on asylum that will drastically diminish eligibility for LGBTQ asylum applicants. According to some reports, the new rule, scheduled to go into effect on January 11, would make it virtually impossible for an asylum applicant who did not enter the U.S. pursuant to a visa to win a grant of asylum, regardless of whether their home country viciously persecutes people like them, unless they can show that they had personally been persecuted to the extent of being subjected to prosecution by law enforcement. We have not seen the text of the rules, but it appears likely that LGBTQ people routinely fleeing persecution from countries with well-established records of fierce anti-LGBTQ conditions would encounter significant barriers under the new rules. * * * It is customary during the last weeks of a presidential administration preceding a change in power for the incumbent administration to rush out last-minute regulatory changes. This creates a daunting agenda for the incoming administration, which will face immediate demands by their political supporters for swift action to roll back such administrative moves. In the absence of working majorities in both houses of Congress, however, such rollbacks may take significant time due to the requirements of the Administrative Procedure Act.

U.S. DEPARTMENT OF LABOR – OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS – The OFCCP published a final rule allowing federal contractors with religious objections to complying with non-discrimination requirements generally imposed on contractors to discriminate without losing their federal contracts. See 85 Fed. Reg. 79324-01. The measure applies not only to contractors that identify as religious organizations but also to closely held for-profit business corporations whose owners have religious objections to complying with non-discrimination requirements. LGBTQ rights and civil rights groups were among the thousands who filed critical comments opposing the regulation, which formally takes effect during the first week of January 2021. Because it is published as a final regulation, it cannot be rescinded by the Biden Administration without going through the process for rescinding or amending a final regulation required under the Administrative Procedure Act. This is one of many regulations that the Trump Administration was rushing to promulgate in final form in the final months of the administration – a tacit admission without openly contradicting President Trump's refusal to conceded that he lost re-election that the window is closing for the Trump Administration to promulgate regulations. *Bloomberg Daily Labor Report*, December 7.

U.S. AGENCY FOR GLOBAL MEDIA – Michael Pack, a political appointee who is the CEO of the U.S. Agency for Global Media, has ousted the career journalist who was acting director of the Voice of America, Elez Biberaj, and replaced him with Robert Reilly, an outspokenly anti-LGBT conservative filmmaker and former associate of Steve Bannon, according to a report by *NBC News* (December 9). Biberaj had earned the wrath of Trump Administration officials by complaining about political interference with the news-reporting activities of VOA, which is supposed to be run according to non-partisan journalistic standards. Just one more last-minute action that the Biden Administration will need to countermand after January 20.

DISTRICT OF COLUMBIA – The City Council unanimously approved a measure to outlaw the so-called "gay panic defense," by which criminal defendants try to avoid or lessen their liability for physical attacks on LGBT people through psychiatric testimony that they were unable to control their

actions due to intense sexual panic cause by a sexual proposition by a person of the same sex as them.

MINNESOTA – The Duluth City Council voted unanimously on December 21 to establish a Nonbinary Queer, Trans, Two-Spirit, Lesbian, Gay, Bisexual, Intersex, Asexual, Commission. In reporting on the City Council vote, OutFrontMinnesota did not specify what the powers and duties of the Commission would be, other than to "create a sustainable voice for the LGBTQIA2S+ community."

NEW JERSEY – The Transgender Legal Defense & Education Fund reported on December 15 a successful effort to get the New Jersey Supreme Court to revise the state's name-change rules, which required publication of name-change decisions stating the former and new names of individuals. Such publication rules inevitably reveal the gender identity and transitioning process for transgender individuals, especially in a time when such publications are accessible on-line so that anybody doing an on-line search for information about somebody could quickly learn that the individual previously had a name associated with a different gender, which – in light of the plague of violence against transgender individuals – would pose a serious risk of harm to the individual. Reported TLDEF: "Together with partners at Garden State Equality and the law firm Lowenstein Sandler, TLDEF worked with the New Jersey Supreme Court to successfully remove the publication requirement for legal name changes among transgender youth and adults."

NORTH CAROLINA – On December 1, a statutory bar on local governments passing laws protecting people from discrimination because of sexual orientation or gender identity expired. Huffington Post reported that several municipalities are looking at the possibility of passing such measures. A handful of local governments did forbid such discrimination years ago, but an uproar over transgender restroom access led to a crisis as the Republican legislature passed the infamous "bathroom bill" to override a measure in Charlotte. Ultimately, after Roy Cooper, a Democrat opposed to the restroom bill was elected governor, a compromise was struck under which the most obnoxious provisions were repealed but a "moratorium" was placed on local laws addressing LGBTQ discrimination until December 1, 2020. Although Republicans still control the legislature, they don't have a veto-proof majority and Cooper was re-elected governor in November, so some municipalities may go forward over the coming months.

LAW & SOCIETY NOTES

By Arthur S. Leonard

After all the ballot counting was finally finished, NBC reported the Victory Fund's scorecard for out LGBTQ candidates in the November 2020 general elections. "This election cycle, more than 1,000 LGBTQ Americans ran for office, and as of this week, 334 of the 782 known general election candidates won their November races, according to data compiled by the **LGBTQ VICTORY FUND**, a group that trains, supports and advocates for queer candidates. Overall, 43 percent of LGBTQ candidates who made it to the general election won their races." *NBCnews.com*, Dec. 10. The report indicated that out lesbians had a high success rate than out gay men, and out judicial candidates did particularly well. * * * President-Elect Joseph R. Biden, Jr., announced the historic decision to nominate Pete Buttigieg, out gay Democratic politico who launched a campaign for the presidential nomination during his final year as Mayor of South Bend, Indiana, to be the Secretary of Transportation. One of Mayor Buttigieg's major initiatives in South Bend was to re-engineer the traffic patterns downtown in order to revive commercial and residential activity in a moribund part of the City. There is general agreement that his effort succeeded.

INTERNATIONAL NOTES

By Arthur S. Leonard

BHUTAN – A joint session of the Parliament repealed the nation's laws criminalizing consensual gay sex on December 9. Final enactment of the repeal requires assent of the Crown. *Reuters*, Dec. 10.

BOLIVIA – *Huffington Post* (Dec. 11) reported that Bolivia's civil registry broke new ground by allowing a same-sex couple, David Aruquipa and Guido Montano, to register their civil union. The men, who have been a couple for eleven years, were initially denied the right to register in 2018, but they went to court and won their argument that the failure to allow same-sex couples to register violated international human rights standards and thus constituted unconstitutional discrimination by the government.

CAYMAN ISLANDS – Paul Pearson, a resident of the Cayman Islands, married Randall Pinder in Ireland, then applied to have Pinder recognized as a "spouse of a permanent residency holder" for immigration purposes. The Caymanian Status and Permanent Residency Board denied the application, finding that the nation's Constitution defines marriage as a union between and man and a woman. But on appeal this was reversed by the Immigration Appeals Tribunal in a decision published in December. The

INTERNATIONAL *notes*

Tribunal found that denying recognition violated the couple's human rights, as guaranteed by the Constitution, because it was discriminatory. *Cayman Compass*, Dec. 23.

HUNGARY – The government proposed and the Parliament enacted constitutional amendments and enabling statutes that will effectively forbid legal recognition of same-sex couples and forbid them from adopting children. This has generated calls for action by the European Union and the signatories of the European Convention on Human Rights. The proposed amendments would be totally out of step with European human rights law.

JAMAICA – The website AidsFreeWorld.org reported on December 1: "The Inter-American Commission on Human Rights (IACHR) has issued a scathing report declaring that Jamaica's Offences Against the Person Act violates several of the individual rights protected by the American Convention on Human Rights, which Jamaica signed in 1977." Among the prohibitions in Jamaica's penal code are gay sex, including things as innocuous as same-sex kissing. So why are U.S. Immigration Judges finding that gay asylum applicants from Jamaica can't show a reasonable fear of persecution if they are removed to their home country?

MEXICO – Rex Wockner reports: "The congress of the Mexican state of Tlaxcala passed marriage equality in a 16-3 vote Dec. 8. Tlaxcala becomes the 19th state of 31 (+ Mexico City) with marriage equality and the 12th state to achieve it via legislative passage."

NETHERLANDS – At the end of November, the Dutch government formally apologized for the policy of requiring that transgender people be sterilized as part of gender transition procedures and set in motion a process for compensating people financially for the loss of their reproductive capacity, according to a December 1 report by Human Rights Watch.

ROMANIA – On December 16, the Constitutional Court ruled that a law that prohibited education about sex, gender, and gender identity was unconstitutional, according to a report by the International Lesbian & Gay Association's European branch.

SWITZERLAND – The Swiss Parliament gave final approval to a marriage equality bill on December 18, but the Federal Democratic Union, a right-wing Christian party, will call for a referendum before it can go into effect. In addition to allowing same-sex couples to marry, the legislation opens up availability of anonymous sperm donations to lesbians. Public opinion polls in Switzerland show overwhelming support (over 80%) for marriage equality, so proponents of the bill expressed confidence that it would be approved in a referendum. *Thelocal.ch*, Dec. 18. Rex Wockner, who has been keeping score, reports that when this measure goes into effect, Switzerland will become the 30th nation to allow marriage equality. * * * On the same date, the Parliament legislated to allow transgender people to obtain recognition of their gender identity by making a declaration rather than having to obtain a court order. At the same time, however, the Parliament reinstated a requirement that minors (under 16) have parental permission for a legal change of gender designation.

UNITED KINGDOM – The National Health Service announce a further modification for the blood donor screening rules intended to take account of the latest science regarding HIV testing and transmission and to avoid singling out gay or bisexual men for differential treatment. Under current rules, men who have sex with men have to be abstinent for at least three months to donate blood. Under the new rules going into effect next summer, the abstinence requirement will be abandoned for those who are in a relationship with a partner, and individualized screening will take place to determine whether a potential donor has engaged in conduct that could have exposed them to viral transmission recently enough to undermine the accuracy of a current HIV antibody test. The new rules are at least moderately complex, and don't end every vestige of differential treatment for gay men but mark an advance on prior policy. *The Guardian*, Dec. 13.

UNITED KINGDOM – The England and Wales High Court issued a ruling on December 1 in *R (on the application of Quincy Bell and A v. Tavistock and Portman NHS Trust and others*, [2020] EWHC 3274 (Admin) concerning the lawfulness of defendants' practice of "prescribing puberty-suppressing drugs to children who experience gender dysphoria," quoting the summary of the opinion issued by the court. The court noted that defendants had administered such drugs to children as young as 10 to prevent them from developing secondary sex characteristics of their sex as identified at birth. The court held that the sole question before it was whether children are capable of consenting to such treatment. The court held that in light of the information that a person would have to understand and evaluate maturely, it was "highly unlikely that a child aged 13 or under would be competent to give consent to the administration of puberty blockers," and that "It was also doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty-blocking drugs." However, the court found a statutory presumption that persons age 16 or older have the ability to consent to medical treatment.

PROFESSIONAL *notes*

"Given the long-term consequences of the clinical interventions at issue in this case," states the summary, "the court recognized that clinicians may well regard these as cases where the authorization of the court should be sought before starting treatment with puberty blocking drugs." The court issue a declaration "to reflect the points on which the application succeeded." One of the applicants, Quincy Bell, identified as female at birth, had been prescribed puberty blocking drugs at 15 and eventually underwent a complete transition culminating in surgery. The other applicant is the mother of a 15-year-old girl who was "concerned that her daughter may be referred to the Gender Identity Development Service and may be proscribed puberty blockers. The contention at issue was that persons under the age of 18 lack competence to consent to such treatment. Critics of the ruling contended that the court did not fully comprehend the scientific and medical issues involved, and had overstated the long-term consequences of the use of puberty blocking drugs, which delay the puberty process but do not produce irrevocable results, so that those who decide they don't want to transition can go through a delayed puberty by ceasing the drugs. – *Arthur S. Leonard*

PROFESSIONAL NOTES

By Arthur S. Leonard

SEAN PATRICK MALONEY, an out gay lawyer who was re-elected to the House of Representatives in November, was selected by majority vote of the Democratic members of the House early in December to chair the Democratic Congressional Campaign Committee (DCCC), which will lead and coordinate efforts to widen the Democrats' margin in the House in the 2020 elections. Maloney is the first out member of the House to chair the DCCC and was the first out gay person to be elected to Congress from New York, having served since 2013. (The contingent of out LGB members of the House will expand by two in January when newly elected Ritchie Torres and Mondaire Jones from New York take their seats.) Maloney served in the Clinton White House, then practiced law as a partner in several major law firms, before his first run for Congress.

The **AMERICAN CIVIL LIBERTIES UNION** is in hiring mode for new staff attorneys. Among the Projects that are receiving applications are the LGBT & HIV Project (considering both senior and more junior lawyers, and particularly interested in hearing from lawyers of color and trans and non-binary folks); Women's Rights Project; and the Voting Rights Project. Details about job openings at the ACLU and how to apply can be found on the website ACLU.org.

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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