

L G B T
LAW NOTES

May 2019



**SCOTUS Takes Up
LGBT Workplace Rights Cases**

Editor-In-Chief

Arthur S. Leonard,
Robert F. Wagner Professor
of Labor and Employment Law
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
arthur.leonard@nyls.edu

Contributors

Matthew Goodwin, Esq.
Cyril Heron, Cornell '19
Eric Lesh, Esq.
Vito John Marzano, Esq.
Chan Tov McNamara, Cornell '19
Ryan H. Nelson, Esq.
Timothy Ramos, NYLS '19
William J. Rold, Esq.
Bryan Xenitelis, Esq.

Production Manager

Leah Harper

Circulation Rate Inquiries

LeGaL Foundation
601 West 26th Street, Suite 325-20
New York, NY 10001
(212) 353-9118 | info@le-gal.org

LGBT Law Notes Podcast

Listen on iTunes
(search "LGBT Legal")
or Podbean at legal.podbean.com.

Law Notes Archive

<http://bit.ly/LGBTLawNotes-archive>

© 2019 The LeGaL Foundation

LGBT Law Notes & the LGBT Law
Notes Podcast are Publications of the
LGBT Bar Association Foundation
of Greater New York
www.lgbtbarny.org

ISSN 8755-9021

*If you are interested in becoming a
contributing author to LGBT Law
Notes, please contact info@le-gal.org.*

EXECUTIVE SUMMARY

- 1 Supreme Court to Decide Whether Discrimination Because of Sexual Orientation or Gender Identity Violates Title VII's Ban on Discrimination Because of Sex
- 3 Supreme Court Rejects Appeals from Gay Death Row Inmate and Conversion Therapy Practitioners
- 4 Fifth Circuit Panel Forcefully Reasserts That Title VII Does Not Cover Sexual Orientation Discrimination
- 6 Federal Appeals Court Refuses to Block Enforcement of City Anti-Discrimination Policy Against Catholic Social Services Agency
- 8 District of Columbia Court of Appeals Rules on Same-Sex Common Law Marriage Claim
- 10 Another District Court Concludes That the Critical Inquiry in a Sexual Orientation Discrimination Claim Is the Same as One for Gender Stereotyping
- 12 Arizona Supreme Court Rules on Family Court's Directive Order in Dispute Between Parents of Transgender Youth
- 15 New York Second Department Applies Equitable Estoppel Supporting Rights of Lesbian Co-Parent
- 16 Lesbian Veteran's Claim Remanded for Reconsideration by Board for Correction of Naval Records
- 18 Wisconsin Federal Judge Grants Summary Judgment Against Transgender Inmate on Civil Rights Claims; Certifies Appeal "Frivolous" Despite 7th Circuit Precedent
- 19 Virginia Federal Judge Orders Damages Trial for Transgender Inmate on Claims of Denial of Health Care, Abuse, and Retaliation
- 21 Kansas Appeals Court Holds One-Half of Former Same-Sex Couple Failed to Establish Parentage to Twins Who Lived with the Couple Prior to Separation
- 22 Ohio Appeals Court Reaffirms Prohibition on Same-Sex Sexual Harassment
- 24 District Court Denies University Summary Judgment Against a Title IX Retaliation Claim
- 26 Congressional Felon Suspended from Law Practice for Two Months for Lying Under Oath About Despicable Mailing to Lesbian Attorney
- 27 Federal Judge Allows Civil Rights Case for HIV+ Inmate Who Dies from Sepsis from Untreated Dog Bites While in Jail Infirmary
- 28 Lesbian NYC Police Officer Suffers Dismissal of Sexual Orientation Discrimination Claims Despite Colleague's Disgustingly Offensive Harassment
- 29 Federal Magistrate Recommends Dismissal of Harassment Claims of Gender Non-Conforming Inmates in Women's Prison; Allows Claims of Excessive Force and Retaliation

Supreme Court to Decide Whether Discrimination Because of Sexual Orientation or Gender Identity Violates Title VII's Ban on Discrimination Because of Sex

By Arthur S. Leonard

The U.S. Supreme Court announced on April 22 that it will consider appeals next term in three cases presenting the question whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination because of an individual's sex, covers claims of discrimination because of sexual orientation or gender identity. Because federal courts tend to follow Title VII precedents when interpreting other federal sex discrimination statutes, such as the Fair Housing Act and Title IX of the Education Amendments of 1972, a ruling in these cases could have wider significance than just employment discrimination claims. Because the Court had granted only nine certiorari petitions for the Fall 2019 Term prior to April 22, it is possible that these cases will be argued early in term, which could result in opinions being issued as early as December, although when the Court is sharply divided over an issue, resulting in dissents and concurrences, it can take longer for an opinion to issue after argument.

The first Petition for certiorari was filed on behalf of Gerald Lynn Bostock, a gay man who claimed he was fired by the Clayton County, Georgia, Juvenile Court System, for which he worked as Child Welfare Services Coordinator, because of his sexual orientation. *Bostock v. Clayton County Board of Commissioners*, No. 17-1618 (filed May 25, 2018). The trial court dismissed his claim, and the Atlanta-based 11th Circuit Court of Appeals affirmed the dismissal, 723 Fed. Appx. 964 (11th Cir., May 10, 2018), *petition for en banc review denied*, 894 F.3d 1335 (11th Cir., July 18, 2018), reiterating an old circuit precedent from 1979 that Title VII does not forbid discrimination against homosexuals.

The second Petition was filed by Altitude Express, a now-defunct sky-

diving company that discharged Donald Zarda, a gay man, who claimed the discharge was at least in part due to his sexual orientation. *Altitude Express v. Zarda*, No. 17-1623 (filed May 29, 2018). The trial court, applying 2nd Circuit precedents, rejected his Title VII claim, and a jury ruled against him on his New York State Human Rights Law claim. He appealed to the New York-based 2nd Circuit Court of Appeals, which ultimately ruled *en banc* that the trial judge should not have dismissed the Title VII claim, because that law applies to sexual orientation discrimination. *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir., Feb. 26, 2018). This overruled numerous earlier 2nd Circuit decisions.

The third petition was filed by R.G. & G.R. Harris Funeral Homes, three establishments located in Detroit and its suburbs, which discharged a funeral director, William Anthony Beasley Stephens, when Stephens informed the proprietor, Thomas Rost, about her planned transition. *R.G. & G.R. Funeral Homes v. EEOC*, No. 18-107 (filed July 20, 2018). Rost stated religious objections to gender transition, claiming protection from liability under the Religious Freedom Restoration Act (RFRA) when the Equal Employment Opportunity Commission sued the funeral home under Title VII. Stephens, who changed her name to Aimee as part of her transition, intervened as a co-plaintiff in the case. The trial judge found that Title VII had been violated, but that RFRA protected Harris Funeral Homes from liability. The Cincinnati-based 6th Circuit Court of Appeals affirmed the trial court's holding that the funeral home violated Title VII, but reversed the RFRA ruling, finding that complying with Title VII would not substantially burden the funeral home's free exercise of religion. *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir.,

March 7, 2018). The 6th Circuit's ruling reaffirmed its 2004 precedent in *Smith v. City of Salem*, 378 F.3d 566, using a gender stereotyping theory, but also pushed forward to hold directly that gender identity discrimination is a form of sex discrimination under Title VII.

In all three cases, the Court has agreed to consider whether Title VII's ban on discrimination "because of sex" is limited to discrimination against a person because the person is a man or a woman, or whether, as the EEOC has ruled in several federal employment disputes, it extends to sexual orientation and gender identity discrimination claims.

The question whether the Court would consider these cases has been lingering on its docket almost a year, as the petitions in the *Bostock* and *Zarda* cases were filed within days of each other last May, and the funeral home's petition was filed in July. The Court originally listed the *Bostock* and *Zarda* petitions for consideration during its pre-Term "long conference" at the end of September, but then took them off the conference list at the urging of Alliance Defending Freedom, representing the funeral home, which suggested that the Court should wait until briefing on the funeral home was completed and then take up all three cases together.

The Court returned the petitions to its conference list in December, and the cases were listed continuously since the beginning of this year, sparking speculation about why the Court was delaying, including the possibility that it wanted to put off consideration of this package of controversial cases until its next term, beginning in October 2019. That makes it likely that the cases will not be argued until next winter, with decisions emerging during the heat of the presidential election campaign next spring, as late as the end of June.

Title VII was adopted as part of the Civil Rights Act of 1964 and went into effect in July 1965. “Sex” was added as a forbidden ground of discrimination in employment in a floor amendment shortly before House passage of the bill. The EEOC, originally charged with receiving and investigating employment discrimination charges and attempting to conciliate between the parties, quickly determined that it had no jurisdiction over complaints charging sexual orientation or gender identity discrimination, and federal courts uniformly agreed with the EEOC.

The courts’ attitude began to change after the Supreme Court ruled in 1989 that evidence of sex stereotyping by employers could support a sex discrimination charge under Title VII in the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (plurality opinion by Justice William J. Brennan), and in 1998 in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (opinion by Justice Antonin Scalia), the Court suggested that Title VII could apply to a “same-sex harassment” case. Justice Scalia stated that Title VII’s application was not limited to the concerns of the legislators who voted for it, but would extend to “comparable evils.”

These two rulings were part of a series of cases in which the Supreme Court took an increasingly flexible approach to interpreting discrimination “because of sex,” which in turn led lower federal courts earlier in this century to reconsider their earlier rulings in LGBT discrimination cases. Federal appeals court rulings finding protection for transgender plaintiffs relied on *Price Waterhouse*’s sex stereotyping analysis, eventually leading the EEOC to rule in 2012 that a transgender applicant for a federal job, Mia Macy, could bring a Title VII claim against the federal employer. *Macy v. Holder*, 2012 WL 1435995. In 2015, the EEOC extended that analysis to a claim brought by a gay air traffic controller, David Baldwin, against the U.S. Transportation Department, *Baldwin v. Foxx*, 2015 WL 4397641, and the EEOC has followed up these rulings by filing discrimination claims in federal court on behalf of LGBT plaintiffs and appearing as

amicus curiae in such cases as *Zarda v. Altitude Express*.

In *Harris Funeral Homes*, the 6th Circuit became the first federal appeals court to go beyond the sex stereotype theory for gender identity discrimination claims, agreeing with the EEOC that discrimination because of gender identity is always discrimination because of sex, as it involves the employer taking account of the sex of the individual in making a personnel decision. The EEOC’s argument along the same lines for sexual orientation discrimination was adopted by the Chicago-based 7th Circuit Court of Appeals in 2017 in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. *en banc*), a case that the losing employer did not appeal to the Supreme Court. In 2018, the 2nd Circuit endorsed the EEOC’s view in *Zarda*.

During the oral argument of *Zarda* in the 2nd Circuit, the judges expressed some amusement and confusion when an attorney for the EEOC argued in support of Don Zarda’s claim, and an attorney for the Justice Department argued in opposition. When the case was argued in September 2017, the EEOC still had a majority of commissioners appointed by President Obama who continued to support the Baldwin decision, but Attorney General Jeff Sessions took the position on behalf of the Justice Department that federal sex discrimination laws do not apply to sexual orientation or gender identity discrimination claims.

Due to the Trump Administration’s failure to fill vacancies on the EEOC, the Commission currently lacks a quorum and cannot decide new cases. Thus, the Solicitor General’s response for the government to Harris Funeral Home’s petition for review did not really present the position of the Commission, although the Solicitor General urged the Court to take up the sexual orientation cases and defer deciding the gender identity case. Perhaps this was a strategic recognition that unless the Court was going to back away from or narrow *Price Waterhouse*, it was more likely to uphold the 6th Circuit’s gender identity ruling than the 2nd Circuit’s

sexual orientation ruling in *Zarda*, since the role of sex stereotyping in a gender identity case seems more intuitively obvious to federal judges, at least as reflected in many district and appeals court decisions in recent years.

The Court sometimes tips its hand a bit when granting certiorari by reframing the questions posed by the Petitioner. It did not do this regarding sexual orientation, merely stating that it would consolidate the two cases and allot one hour for oral argument. Further instructions will undoubtedly come from the Court about how many attorneys will be allotted argument time, and whether the Solicitor General or the EEOC will argue on the sexual orientation issue as amicus curiae.

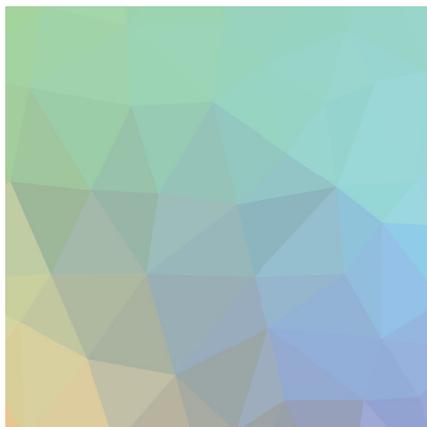
The Court was more informative as to *Harris Funeral Homes*, slightly rephrasing the question presented in the Petition. The Court said that the Petition “is granted limited to the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.” One wonders why the Supreme Court used the phrase “status as transgender” rather than “gender identity” in describing the first part of the question, since “gender identity” fits more neatly into the terminology of Title VII than a reference to “status.”

None of the members of the Court have addressed the questions presented in these three cases during their judicial careers up to this point, so venturing predictions about how these cases will be decided is difficult lacking pertinent information. The four most recent appointees to the Court with substantial federal judicial careers prior to their Supreme Court appointment – Samuel Alito, Sonia Sotomayor, Neil Gorsuch, and Brett Kavanaugh – have never written a published opinion on sexual orientation or gender identity discrimination, and neither did Chief Justice John Roberts during his brief service on the D.C. Circuit Court of Appeals. However, it seems predictable that the justices most committed to construing civil rights laws narrowly in the context of the time when they

were adopted will be skeptical about the argument that the 1964 statute can be interpreted to extend to sexual orientation or gender identity discrimination.

The counsel of record for Bostock is Brian J. Sutherland of Buckley Beal LLP, Atlanta. Clayton County, Georgia, retained Jack R. Hancock of Freeman Mathis & Gary LLP, of Forest Park, Georgia, to submit its response to the Bostock Petition. Counsel of record for Altitude Express is Saul D. Zabell of Bohemia, New York. The brief in opposition was filed on behalf of the Zarda Estate by Gregory Antollino of New York City. Zabell and Antollino were both trial counsel in the case and have pursued it through the appellate process. Several attorneys from Alliance Defending Freedom, the Scottsdale, Arizona, based conservative religious liberty litigation group, represent Harris Funeral Home, and Solicitor General Noel J. Francisco's office represents the EEOC. John A. Knight of the ACLU Foundation, Chicago, is counsel of record for Aimee Stephens. It is not unusual when the Supreme Court grants review for private parties to seek out experienced Supreme Court advocates to present their arguments to the Court, so some of these attorneys listed on the Petitions and other Briefs will likely not be appearing before the Court when the cases are argued next Term. ■

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



Supreme Court Rejects Appeals from Gay Death Row Inmate and Conversion Therapy Practitioners

By Arthur S. Leonard

The U.S. Supreme Court announced on April 15 that it will not hear an appeal by gay death row inmate Charles Rhines, who contends that the jury that chose death over life in prison without parole in his murder trial in 1993 was tainted by homophobic statements by some of the jurors during deliberations. *Rhines v. Young*, No. 18-8029 (filed Feb. 15, 2019). At the same time, the Court announced that it will not take up the question whether the U.S. 3rd Circuit Court of Appeals, based in Philadelphia, should reconsider its 2014 decision to reject a constitutional challenge to a New Jersey law prohibiting licensed health care providers from providing “conversion therapy” to minors. *King v. Murphy*, No. 18-1073 (filed Feb. 11, 2019). Both of these petitions for review were considered long shots at best. However, Liberty Counsel, representing the practitioner plaintiffs, announced it would start a new legal challenge in federal district court.

The South Dakota Attorney General's Office filed a short reply to Rhines' petition, insisting that its own investigation of the jury – sparked by his contentions – had failed to substantiate his claim that the jurors sentenced him to death because he is gay. There is no doubt that a juror joked that Rhines, as a gay man, would enjoy being locked up for life in an all-male environment where he would be able to mingle with other prisoners and enjoy sexual contacts, as even interviews conducted by the AG's office confirmed this. Interviews of jurors by Rhines' lawyers, conducted long after the trial, produced a range of recollections, ranging from a recollection that the juror in question was challenged for his remarks and apologized, to a recollection that there was considerable discussion of Rhines' sexuality, which had been a topic of testimony during the penalty phase

of the trial, when a family member testified that Rhines had struggled with his sexuality.

The jury sent a note to the trial judge during penalty deliberations, posing a series of questions about the conditions under which Rhines would be serving if he were sentenced to life without parole. Some of the questions inspired concerns by Rhines' defense attorney that the jurors were inappropriately taking his sexual orientation into account in making their decision. The trial judge refused to respond to the questions, instructing the jurors to rely on the instructions he had previously given them.

Rhines has spent a quarter-century on death row since his conviction and sentencing, seeking to get courts to set aside the death sentence based on a variety of theories, but his hopes were spurred by a Supreme Court decision last year, holding that a court could breach the usual confidentiality of jury deliberations when there was evidence of inappropriate race discrimination by a jury. Had the Court taken Rhines' case, it would have provided an opportunity to determine whether juror homophobia should receive the same constitutional evaluation as jury racism.

Unfortunately, the federal courts in South Dakota and the 8th Circuit Court of Appeals found that this issue was not raised early enough in the appellate process, and that Rhines' attempt to bring a fuller account of the juror interviews before the courts came too late. As a result, no court has ever considered Rhines' evidence of jury homophobia on the merits. The Supreme Court had turned down a prior attempt by Rhines last year, while a prior appeal was pending before the 8th Circuit. After the 8th Circuit rejected his latest attempt, Rhines filed a new petition, but in vain.

Publicity to his plight resulted in the submission of three briefs in support of his petition, by a Law Professors group, the NAACP Legal Defense & Education Fund, and the American Civil Liberties Union. Although the Court granted the motions to receive those briefs, it rejected Rhines' petition without comment.

The conversion therapy petition posed a novel question to the Court. Should it order a federal appeals court to reopen a decision that had received unfavorable mention in a recent Supreme Court opinion in an unrelated case, when the Supreme Court itself had years ago rejected a petition to review the appeals court decision?

Conversion therapy practitioners filed a constitutional challenge to the New Jersey law banning conversion therapy, claiming it violated their constitutional free speech rights. The federal district court and the 3rd Circuit Court of Appeals both rejected their argument. *King v. Governor of New Jersey*, 767 F. 3d 216 (3rd Cir. 2014), cert. denied, 135 S. Ct. 2048 (2015). The speech involved was "professional speech," said the court of appeals, and thus entitled to less protection than political or literary speech. The 3rd Circuit's ruling reached the same result as a ruling by the San Francisco-based 9th Circuit in rejecting an earlier challenge to California's conversion therapy ban, but the 9th Circuit had opined that the regulation of therapy was not subject to 1st Amendment challenge because it was a regulation of health care practice, not specifically aimed at speech as such. These distinctions did not affect the outcome of the two cases. Either way, the courts found that the state's legitimate concerns about protecting minors from a practiced that he been condemned by leading professional associations outweighed the practitioners' free speech claims.

However, in a new case arising from California last year, *Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (June 26, 2018), the Supreme Court found fault with a state law that required licensed clinics providing services to pregnant women to advise them of the availability of abortion services from

the state. The Supreme Court found this to be "compelled speech" subject to the most demanding level of judicial review, "strict scrutiny." The state's argument defending this requirement relied on the conversion therapy cases, arguing that the speech in question was "professional speech" subject to a less demanding level of judicial review. Writing for the Court, Justice Clarence Thomas rejected that argument, and he specifically mentioned the 3rd Circuit's ruling with disfavor.

Even though the Supreme Court had refused a petition to review the 3rd Circuit's ruling in 2015, the conversion therapy practitioners asked the 3rd Circuit to reconsider its ruling in light of the Supreme Court's negative comments about the earlier decision. The 3rd Circuit refused, and this petition for Supreme Court review was filed on February 11. Counsel for the respondents – New Jersey's Attorney General and Garden State Equality, which had intervened as a co-defendant in the original case – thought so little of the petitioners' chances that they did not file briefs in opposition. Their confidence was justified. It was never likely that the Supreme Court would order a circuit court to reopen a case from years ago that had already been denied direct review by the Supreme Court.

However, this does not preclude plaintiffs from bringing a new challenge to the statute, which their pro bono counsel, Liberty Counsel, quickly announced that they would do. So the question will be whether the statute can withstand challenge in light of the Supreme Court's ruling in *Family Life Advocates*. This will call upon the state to provide strong proof that it has a compelling interest supporting the conversion therapy ban, and that outlawing the procedure is the least restrictive alternative because of the documented harm that such therapy imposes. As recent litigation in Florida suggests, this burden will probably require the state to show that 'talk therapy' is itself sufficiently harmful to justify state intervention, even if plaintiffs allege that the conversion therapy they provide consists entirely of 'talk therapy.' ■

Fifth Circuit Panel Forcefully Reasserts That Title VII Does Not Cover Sexual Orientation Discrimination

By Arthur S. Leonard

A 5th Circuit panel forcefully reasserted the circuit's position that Title VII's ban on employment discrimination because of sex does not apply to a sexual orientation discrimination claim, in an opinion by Circuit Judge Edith H. Jones in *O'Daniel v. Industrial Service Solutions*, 2019 WL 1748679, 2019 U.S. App. LEXIS 11458 (5th Cir., April 19, 2019). Ironically, the losing plaintiff in this appeal is a self-described heterosexual who sought to benefit from the developing case law in other circuits recognizing such grounds for protection, but Judge Jones and another member of the panel, Andrew Oldham, were not moved. As to the third member of the panel, Catharina Haynes, concurring in the result, see below.

Bonnie O'Daniel worked for an employment agency in 2016 when a news story inspired her to make an "incendiary" post on Facebook, wrote Judge Jones. The news story reported about a transgender woman being allowed to use a women's restroom at a Target store. O'Daniel ungrammatically commented on Facebook: "So meet, ROBERTa! Shopping in the women's department for a swimsuit at the BR Target. For all of you people that say you don't care what bathroom it's using, you're full of shit!! Let this try to walk in the women's bathroom while my daughters are in there!! #hellwillfreezeoverfirst." "The post tagged O'Daniel's husband and included photos of the individual referred to in the post," wrote Judge Jones.

This post did not sit well with O'Daniel's employer evidently, particularly Cindy Huber, a part owner and president of the business who is a

lesbian and who saw the post, as did Vice President Tex Simoneaux, Jr. Simoneaux informed O'Daniel that Huber wanted her fired immediately and that she had "personally taken offense to the post because Huber was a member of the LGBT community. The next day," Jones continued, "Simoneaux informed O'Daniel that Huber wanted to know for whom her husband worked, as Huber felt a responsibility to report the Facebook post to his employer. Simoneaux also told O'Daniel that Huber had taken the Facebook post personally and felt the post wronged all members of the LGBT community, including herself." Huber subsequently texted O'Daniel to be available for a phone conference the next day, and O'Daniel sent a text to Simoneaux, "saying she felt she was being discriminated against because she was heterosexual." During the ensuing conference call, O'Daniel was instructed to take a sensitivity/diversity training course and to refrain from using social media for employment recruiting – a part of her job. She also received a letter of reprimand about her Facebook post and things went downhill for her at the company. She previously had a good relationship with Huber, but, "After the post, Huber refused to engaged with O'Daniel on a personal level."

Without going into all the bloody detail, which Judge Jones relates in her opinion, ultimately O'Daniel lost her job and filed a complaint with the EEOC on December 20, 2016, complaining she was the victim of sexual orientation discrimination. The EEOC, which had ruled in 2015 that discrimination because of sexual orientation violates Title VII, sent her a right-to-sue letter and she filed a complaint with the U.S. District Court, citing both Title VII and the Louisiana Constitution's protection for freedom of speech. U.S. Magistrate Judge Richard Lewis Bourgeois granted a motion to dismiss her complaint, which she appealed to the 5th Circuit.

She styled her claim as a retaliation claim. Her counsel evidently anticipated the argument that 5th Circuit precedent is solidly set against recognizing sexual orientation discrimination claims under Title VII, so they argued that in a sexual

orientation retaliation claim she could prevail by asserting that she reasonably believed that sexual orientation discrimination violates Title VII. No dice.

Wrote Jones: "O'Daniel claims in essence that she was retaliated against because she 'opposed' discrimination perpetrated against her on the basis of her heterosexual orientation. The proposition that she and the amici advocate would require us to press beyond limits firmly established in the statute and our case law. Therefore, regardless of the 'evolution' in other courts' decisions or the parties' preferred policy positions, we affirm the magistrate judge's straightforward approach . . . Other circuits have recognized the Fifth Circuit's unequivocal stance barring Title VII coverage of 'sexual orientation' as a protected class," she wrote. "Declining to consider the statute to cover a category of people not squarely identified by Congress in 1964 or even linguistically encompassed today by the applicable language, see Judge Ho's concurrence in *Wittmer*, 915 F.3d at 333-41, is thus a matter of precedent, otherwise known as our rule of orderliness. Because the law in this circuit is clear, we cannot accept O'Daniel's or the amici's suggestions that this panel either overrule the precedents or assume arguing that the 'trend' has upended them."

Furthermore, the panel was unwilling to indulge the argument that O'Daniel could have reasonably believed that sexual orientation discrimination violates Title VII, at least in the 5th Circuit, or that the hostile environment she claimed to have experienced in the company after – in the view of the president – having maligned the LGBT community on Facebook, was actionable under Title VII. "Here, however," wrote Jones, "the question is not the potential scope of 'sex harassment' prohibited by Title VII for over thirty years, it is the exclusion altogether of 'sexual orientation' from the term 'sex' in the statute. O'Daniel's and the amici's arguments claim it is 'reasonable' to assume that the law is not what it is. In fact, as PNP [the employer] acutely observes, they claim it is 'reasonable'

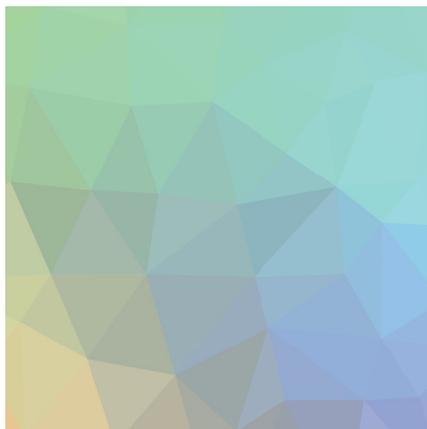
for O'Daniel to be knowledgeable about the 'uncertain' state of federal law throughout the circuit courts about the coverage of sexual orientation in Title VII, but ignorant about what this court has held. Those positions are untenable. A court could not award damages for Title VII 'retaliation' on a plaintiff's claim that he reasonably 'opposed' nepotism, unfair though nepotism might be, if the nepotism had nothing to do with the statutorily protected classes . . . The scope of this provision, in sum, is dictated by the scope of Title VII's prohibitions, not by freestanding conceptions of 'retaliation' and 'opposition.' Title VII protects an employee only from 'retaliation for complaining about the types of discrimination it prohibits.' O'Daniel's retaliation claim fails as a matter of law."

The court also affirmed dismissal of the free speech claim, finding that Louisiana's constitutional guarantee of free speech is a restriction on government, not private actors, and rejecting the argument that it is "unsettled law" whether the provision covers conduct by private individuals or companies. The court found that a Louisiana Supreme Court ruling, *Quebedeaux v. Dow Chemical Co.*, 820 So. 2d 542 (La. 2002), made it very clear that although the Louisiana constitution provides broad protection for free speech, "it does so only as to state actors."

Circuit Judge Haynes filed a concurring opinion, agreeing with the court on the free speech claim, but joining only in the result as to the Title VII claim, not the court's reasoning. She wrote that she would not reach the issues the majority opinion addressed, because "even if all the factual allegations in [Plaintiff's] complaint are accepted as true, there is no reasonable inference that she was fired for any reason other than her Facebook post . . . Other than her repeated statements that she was discriminated against because of her sexual orientation as a heterosexual, she points to zero facts supporting a conclusion that such was the case . . . The question is not whether people are entitled to disagree (rudely

or politely) about sensitive issues. The question is whether O’Daniel has stated a claim under Title VII. Simply put, Title VII does not grant employees the right to make online rants about gender identity with impunity. I would stop there.”

O’Daniel is represented by Joseph Arthur Smith, III, of Baton Rouge. The court received several amicus briefs arguing in support of the contention that sexual orientation discrimination violates Title VII from, among others the EEOC and Lambda Legal, Americans United for Separation of Church and State, the ACLU Foundation of Louisiana, and the National Center for Lesbian Rights. Of course, these amici undoubtedly disagree with the sentiments expressed in O’Daniel’s Facebook post, but saw this appeal as a vehicle for getting the 5th Circuit to reconsider its position regarding an issue as to which there is a significant circuit split. Of course, the three-judge panel was bound by circuit precedent, but the panel ruling is but a step on the way to *en banc* review, which O’Daniel requested early in May. However, a petition for *en banc* review seems pointless in light of the Supreme Court’s action, three days after this opinion was released, granting petitions for *certiorari* in *Altitude Express v. Zarda* and *Bostock v. Clayton County*, presenting the very question addressed here for consideration next Term. Even if the Circuit granted the motion, chances are good that even if it held an *en banc* rehearing, it would postpone issuing a decision while awaiting a Supreme Court ruling in *Altitude Express* and *Bostock*. ■



Federal Appeals Court Refuses to Block Enforcement of City Anti-Discrimination Policy Against Catholic Social Services Agency

By Arthur S. Leonard

The U.S. 3rd Circuit Court of Appeals refused a request by Catholic Social Services (CSS) to block enforcement of the City of Philadelphia’s requirement that the agency not discriminate against same-sex couples who seek certification to be foster parents. *Fulton v. City of Philadelphia*, 2019 U.S. App. LEXIS 11711, 2019 WL 1758355 (3rd Cir. 2019). The April 22 ruling by a unanimous three-judge panel, which affirmed the denial of a preliminary injunction by District Judge Petrese B. Tucker, rejected CSS’s claim that it has a First Amendment religious freedom right to discriminate against same-sex couples in performing a service for which it is paid by the City of Philadelphia. The court also rejected CSS’s claim under Pennsylvania’s religious freedom statute. Local news reports indicated that CSS will try to appeal this ruling, although they didn’t specify whether it would seek rehearing before a larger panel of the 3rd Circuit (*en banc* review) first or would directly petition the U.S. Supreme Court.

CSS had already tried to interest the U.S. Supreme Court in granting it temporary relief through an “emergency application,” but that Court decline to take action last August, with Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas indicating that they would have granted temporary relief to CSS. See 139 S. Ct. 49. These are the justices who may be most interested in having the Court reconsider its holding in *Employment Division v. Smith*, 494 U.S. 892 (1990), as Gorsuch intimated in his concurring opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

CSS’s policy came to light in March 2018 when a reporter from the Philadelphia inquirer informed the City’s Department of Human Services that two of its contracting agencies, CSS and Bethany Christian Services, were

refusing applications from same-sex couples. These are among thirty non-governmental agencies with which the Department contracted to do the job of evaluating applications and matching up prospective foster parents with children referred to the agencies by the Department.

The Department followed up by contacting the agencies to confirm this information. The Department then advised the agencies that they would stop referring foster children to them, noting the City’s ordinance banning sexual orientation discrimination by public accommodations. Bethany backed down and agreed to stop discriminating, but CSS insisted that as a Catholic agency it has a right, consistent with its religious mission, to reject applications from same-sex couples. At the same time, CSS pointed out that it had not received any applications from same-sex couples, and argued that it should not be deemed a “public accommodation” subject to the City’s anti-discrimination ordinance. The Department considered the lack of applications in the past to be irrelevant, disagreed with CSS’s claim that it was not subject to the anti-discrimination policy, and let CSS know that its year-to-year contract with the City to handle foster placements would lapse if it would not agree to new contract language obliging CSS not to discriminate.

CSS reacted to this by filing a federal lawsuit seeking an injunction against the City, requiring it to renew the contract while allowing CSS to turn away same-sex couples, and to resume referring children in need of foster care to CSS. CSS demanded a preliminary injunction to keep the child referrals going while the case is litigated, arguing that it was financially dependent on the City’s contractual payments to keep the agency going. Concerned that the agency might not be able to function without the City

money, several prospective Catholic foster parents joined CSS as co-plaintiffs in the case.

District Judge Tucker denied the preliminary injunction and CSS appealed, represented by the Becket Fund for Religious Liberty, a litigation group that provides representation to Catholics claiming religious free exercise rights.

Court of Appeals Judge Thomas Ambro's opinion for the court treats this as a relatively easy case on the constitutional claim. Despite its religious affiliation, CSS is not a church and, under the Supreme Court's long-standing precedent of *Employment Division v. Smith*, the religious views of CSS "do not entitle it to an exception" from the City's policy against sexual orientation discrimination in the provision of services, especially those financed by a City contract. The court found that CSS had "failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation." CSS had attempted to argue that its claim should receive the same treatment the Supreme Court had accorded to *Masterpiece Cakeshop*. Judge Ambro carefully evaluated that claim, and pointed out that the factors relied on by the Supreme Court to find that the Colorado Civil Rights Commission's proceeding had been tainted by anti-religious bias were not present in this case.

Although rejecting CSS's constitutional claim was an easy call for the court, it also had to deal with the Pennsylvania Religious Freedom Protection Act (RFPA), which was passed in response to federal rulings such as *Smith* rejecting these sorts of constitutional free exercise claims. The RFPA, which is binding on the City's Department of Human Services as well as its municipal civil rights agency, provides that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." In common with the federal Religious Freedom Restoration Act (RFRA), however, the law says that the government may enforce its law, despite the substantial burden on free exercise, if it has a compelling interest

for the law and its enforcement is the least restrictive means of satisfying that interest.

The court found that Pennsylvania courts have given this law a narrow interpretation. "Pennsylvania courts applying the RFPA scrutinize claims of religious burden to see whether the burdened activity is truly 'fundamental to the person's religion,'" wrote Judge Ambro. Although a particular function might flow in general from a religious mission, he continued, Pennsylvania courts would ask whether it is "an inherently religious activity as opposed to something that could be done either by a religious person or group or by a secular one."

Pointing to this case, Ambro wrote, "Caring for vulnerable children can flow from a religious mission, but is not an intrinsically religious activity under Pennsylvania law." A variety of agencies have contracts with the City to evaluate foster care applications and place children, some religiously-affiliated and some not. "It thus seems unlikely," Ambro continued, "that the Pennsylvania courts would recognize a substantial burden on CSS's exercise of religion in this case."

Furthermore, he wrote, even if the court were to assume that there is a substantial burden, CSS still would be unlikely to prevail on its RFPA claim "because the City's actions are the least restrictive means of furthering a compelling government interest. It is black-letter law that 'eradicating discrimination' is a compelling interest. And mandating compliance is the least restrictive means of pursuing that interest."

Judge Ambro cited in support of this analysis the decision last year by the U.S. Court of Appeals for the 6th Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 897 F.3d 518 (6th Cir. 2018), from Michigan, in which the 6th Circuit rejected the funeral home's religious freedom claim under RFRA. The funeral home argued that being required to employ a transgender funeral director violated its RFRA rights because of its owner's religious beliefs. The 6th Circuit held that the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 provides a compelling interest to protect the funeral director, and the least

restrictive way of doing that is to enforce the non-discrimination requirement. Ironically, the 3rd Circuit issued its CSS decision the same day the U.S. Supreme Court announced that it would review the 6th Circuit's decision, although that review will focus on the question whether Title VII applies to gender identity discrimination claims, not on the RFRA issue.

The 3rd Circuit panel commented that even if CSS could show a substantial burden on its religious freedom under the state law, the City's actions would even survive the "strict scrutiny" that could be applied under the state's religious freedom law, and thus the plaintiffs failed on a key test for getting a preliminary injunction: showing a reasonable likelihood of success on the merits of its claim.

"The City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services," the court commented. "Under *Smith*, the First Amendment does not prohibit government regulation of religiously-motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while CSS may assert that the City's actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias (and is of course able to introduce additional evidence as this case proceeds), the current record does not show religious persecution or bias. Instead it shows so far the City's good faith in its effort to enforce its laws against discrimination."

Judge Ambro was appointed to the 3rd Circuit by President Bill Clinton in 2000. The other members of the panel, Senior Circuit Judge Anthony Scirica and Senior Circuit Judge Marjorie Rendell, were appointed by Presidents Ronald Reagan and Bill Clinton, respectively. This litigation, among the first cases to go to a federal court of appeals testing whether a religious social services agency can be required to deal with same-sex couples under a state or local anti-discrimination law, attracted a long list of amicus briefs on both sides, including religious organizations, LGBT rights organizations, child welfare associations, and Attorneys General from other states (including New York). ■

District of Columbia Court of Appeals Rules on Same-Sex Common Law Marriage Claim

By Arthur S. Leonard

“Brian Gill and Rodney Van Nostrand were in a romantic relationship and cohabited for several years beginning in 2004,” begins Judge Phyllis Thompson’s opinion for the District of Columbia Court of Appeals in *Gill v. Van Nostrand*, 2019 WL 1827998, 2019 D.C. App. LEXIS 159 (April 25, 2019). “After their romantic relationship waned, and a few months after Mr. Van Nostrand had a ceremonial wedding in Brazil to another man he had met while on a lengthy work assignment in that country, Mr. Gill filed a complaint for legal separation from Mr. Van Nostrand, alleging that the two men are parties in a common law marriage that began in 2004.” Van Nostrand’s denial that the men were common-law married led to a trial in D.C. Superior Court, resulting in a decision by Judge Robert Okun rejecting Gill’s claim. Gill’s appeal of that ruling is the subject of the Court of Appeals’ April 25 ruling. The District of Columbia Court of Appeals is the equivalent of a state supreme court for the District of Columbia. Its rulings can be appealed to the U.S. Court of Appeals for the D.C. Circuit.

Judge Thompson’s opinion goes to considerable length to explain why the court affirmed Judge Okun’s ruling, and to set out in some detail how District of Columbia trial courts should evaluate claims that same-sex couples had formed common law marriages prior to the U.S. Supreme Court’s ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Although the District of Columbia legislated to allow same-sex marriage several years prior to *Obergefell*, the issue of whether same-sex couples could form such marriages in the District, one of a handful of U.S. jurisdictions that still recognize common law marriages, depends on retroactive application of *Obergefell*’s holding that same-sex couples enjoy a fundamental right to marry as an aspect of liberty guaranteed by the Due

Process Clause. In the case of D.C., of course, the relevant Due Process Clause would be that in the 5th Amendment of the Bill of Rights, whereas the Due Process Clause upon which the Court relied in *Obergefell* was that in the 14th Amendment, binding on the states.

The D.C. Court of Appeals agreed with Judge Okun that the fundamental right identified by the Supreme Court in *Obergefell* did apply to the marital aspirations of same-sex couples at the time in question (2004). The issue is how to decide whether a particular couple was in a common law marriage, when the District’s relevant case law was stated, in large part, in ways pertaining to different-sex couples whose right to marry at the time was legally recognized, as such a right was not then recognized for same-sex couples. At an early stage in this case, Judge Okun refused Van Nostrand’s motion to dismiss the case, stating “that a party in a same-sex relationship must be given the opportunity to prove a common law marriage, even at a time when same-sex marriage was not legal.” This led to the trial, in which Van Nostrand testified that he never considered himself to be married to Mr. Gill, and Mr. Gill testified about an exchange of rings, a pledge of monogamy, and his belief that they considered themselves effectively married, if not legally so.

Under District of Columbia precedents, “the elements of common law marriage in this jurisdiction are cohabitation as husband and wife, following an express mutual agreement, which must be in word of the present tense.” Quoting *Coleman v. United States*, 948 A.2d 534 (D.C. Ct. App. 2008). What that means is the people can’t just “drift” into a common law marriage in D.C. There must be a mutual express agreement, and it can’t just be an agreement that sometime in the future the couple will get married; it must be a present statement of agreeing

to live as a married couple, albeit without the formalities of a marriage license and ceremony by a governmentally authorized officiant. Normally a preponderance of the evidence standard would apply, but depending on the circumstances the court might apply a “clear and convincing evidence” standard, which the court found applicable in this case, where Gill is trying to prove a common law marriage with a man who is legally married to another man. (The court noted that the clear and convincing evidence standard has been used by D.C. courts in the past when somebody is trying to prove that they have a common law marriage with somebody who is legally married to somebody else.)

“We shall assume *arguendo* that serious constitutional issues would arise if the trial court’s analysis of common-law marriage operated to the peculiar disadvantage of Mr. Gill and Mr. Van Nostrand as a same-sex-couple, i.e., required them to meet expectations that they as a same-sex couple could meet only with more difficulty than opposite-sex couples would encounter,” wrote Judge Thompson. “Such an approach is arguably warranted in order to accord same-sex couples who have chosen to share their lives in a union comparable to traditional marriage ‘the same respect and dignity accorded a union traditionally designated as marriage,’” quoting *Strauss v. Horton*, 46 Cal. 4th 364 (Cal. 2009), a decision in which the California Supreme Court ruled that marriages of same-sex couples who were married in California prior to the passage of Proposition 8 would have exactly the same status as all legally-contracted marriages in that state.

The trial court focused on six factors in its analysis in concluding that Gill and Nostrand did not have a common law marriage.

First was the failure of either man, but particularly Mr. Gill, to remember

the date on which Gill claimed they exchanged rings that they agreed to wear for the duration of their relationship. Gill testified that he “decided to surprise Mr. Van Nostrand by purchasing two rings and presenting them to Mr. Van Nostrand along with M& M candies inscribed with “Will you marry me?” Gill testified that he got down on one knee and proposed to Mr. Van Nostrand, who said yes and allowed Gill to slip one of the rings on his finger. Van Nostrand denied various particulars of this testimony, and there was no testimonial agreement about the date on which this purportedly occurred. The court found Gill’s testimony, which goes to the crucial question of whether there was an express agreement to be married, as “exceptionally vague,” although, by contrast, Gill remembered precisely both their first date and the first time they had sex with each other. “The court reasoned that ‘the date on which parties agree to be married surely would be at least as memorable [as], if not more memorable . . . than the date on which’ the parties first had sexual relations ‘or first had a “real date” at a restaurant,’” wrote Thompson. Gill criticized the judge’s “overreliance” on this factor, but the appeals court did not consider this “unfairly prejudicial” or improperly expecting the parties “to meet expectations of traditional marriage that they, as a same-sex couple, could meet only with difficulty.” Since the date in question is the date when Gill claims to have proposed marriage, proffered a ring, and received an affirmative response from Von Nostrand, the court found failure to remember the date was not an “unreasonable factor to consider,” taking into account that it was not the only or dispositive factor, merely one of several.

Secondly, the trial court found that neither of the men “told their friends or family about the alleged marriage (or perhaps more correctly, the alleged ‘entry into a commitment comparable to marriage’) and the couple did not commemorate it with a ceremony or celebrate it by going on a honeymoon.” The court did find that at that time both parties’ families had “harsh

anti-gay views” which could explain why there was no contemporaneous communication to them about this topic, and the court acknowledged that “same-sex couples, prior to the legalization of same-sex marriage, might have been less likely to have a public ceremony or honeymoon,” but, pointed out Thompson, the question was “how *these parties* and their friends in the gay community marked or signified important events in their romantic lives,” and evidence was lacking as to that. Traditionally, “holding out” as married to one’s relevant community is an important signifier of common law marriage, and there was nothing stopping a same-sex couple from taking a honeymoon trip to celebrate their new relationship. Gill attempted to show that a European trip the men took in 2005 was their “honeymoon,” but Van Nostrand testified to the contrary.

Furthermore, there was evidence that Van Nostrand was partial to “celebrating events in a flamboyant manner,” as shown by his marriage to Weller da Silva, the Brazilian man whom he legally married in April 2014. Related Thompson, “Mr. Van Nostrand delivered the proposal while the pair were in a hot-air balloon over the Serengeti, created an album commemorating the proposal, told family members and friends, met Mr. da Silva’s family, and, after the two were married, went on a honeymoon trip to Ecuador and the Galapagos Islands.” (Sounds fab!!) The trial court credited Van Nostrand’s testimony that “he would not have entered into a marriage with [Gill] without commemorating such an event with . . . pomp and circumstance” and the evidence showed that Van Nostrand had the financial ability to sustain such activities, as shown by the “shared history of foreign travel” of the two men during their relationship.

The third factor was that the parties “never inscribed their rings,” a step that Van Nostrand credibly testified they would have done had they considered themselves married. The court also noted that when marriage became available in Massachusetts, Van Nostrand asked Gill whether he wanted to go there to get married and Gill said

no. He also testified that he asked Gill about having their rings inscribed, but Gill declined, and also declined to enter into a registered domestic partnership, which became available in D.C. Furthermore, D.C. enacted marriage equality in 2010, but the men did not take the step of formalizing their relationship as a marriage then. Gill criticized the trial court’s reliance on this factor, but the court found that Van Nostrand credibly testified that these were “the steps *he* would have taken to symbolize and validate that the parties’ relationship had advanced to a mutual commitment comparable to marriage.” Here, the court referred to a ruling last year by the Colorado Court of Appeals, *Hogsett v. Neale*, 2018 WL 6564880, which placed some weight on the failure of a lesbian couple to go out of state to get married as a factor in determining that they did not have a common law marriage under Colorado law.

The fourth factor was that “the parties maintained largely separate finances.” The house in which they lived together from 2005 was only in Van Nostrand’s name, they had no joint bank accounts or credit card accounts, and even though they discussed creating wills, powers of attorney, and so forth, only Van Nostrand made and executed such documents. The trial court observed that “although [Gill] was supposed to draft documents giving [Van Nostrand] these same benefits and responsibilities, he failed to do so.” By contrast, shortly after Van Nostrand married da Silva, they established joint bank accounts and executed wills, powers of attorney and the like. (A docket search shows that sometime after his marriage to da Silva, Van Nostrand sought to evict Gill from the D.C. home, resulting in litigation in which Gill sought, without success, injunctive relief against the eviction, before a different D.C. trial judge. There is no published opinion, and Judge Okun’s decision in this case is apparently not published, either.)

The fifth factor was Gill’s failure to object or to claim he was in a common law marriage with Van Nostrand when he was informed that Van Nostrand planned to marry da Silva in Brazil. Gill’s

response to this news was not to state that they needed to get divorced first in order for that marriage to take place. He raised the issue “only after realizing that this would affect” his beneficiary status in terms of Van Nostrand’s employee benefits. As the court pointedly notes, he seemed to have sprung into action when he was removed from coverage under Van Nostrand’s employment-related health insurance. He went to an attorney and apparently first learned about the possibility of claiming a common law marriage at that point. “Mr. Gill asserts that he reacted as he did because he was not aware that the parties’ relationship gave him legally enforceable rights vis-à-vis Mr. Van Nostrand,” observed the court. The court of appeals found this to be “understandable” as the parties are not lawyers, and the trial court did not deem this as a determinative factor in the analysis. However, wrote Thompson, “we think the trial court exercised reasonable skepticism in light of Mr. Gill’s financial incentive to claim that the parties had a common-law marriage. Courts have long ‘regarded common-law marriage as a fruitful source of fraud and perjury,’” quoting *In re Estate of Danza*, 188 App. Div. 2d 530, 591 N.Y.S. 2d 197 (1992).

Finally, the sixth factor concerns the growing body of court decisions about retroactive common law marriage claims, and particularly a case in which a Pennsylvania trial court did find a common law marriage, *In re Estate of Carter*, 159 A.3d 970 (Pa. Super. Ct. 2017). Carter presented ideal facts to find a same-sex common law marriage. There was a marriage proposal and a diamond ring that Mr. Hunter gave Mr. Carter on Christmas Day 1996, a day easy to remember and prove. Mr. Carter then gave Hunter an engraved diamond ring on February 18, 1997, with the date inscribed, and the men faithfully observed that date as their anniversary for 16 years until Carter’s death. They had joint banking and investment accounts, owned their home together with a joint mortgage, had mutual wills and powers of attorney, and referred to each other as spouses. While Judge Okun disclaimed requiring that *all*

these factors be satisfied in order to find a common law marriage for a same-sex couple formed prior to the legalization of same-sex marriages, he reasoned that Gill’s “failure to prove *any* of these factors substantially undercuts his effort to prove the existence of a common law marriage.” In this case, Judge Okun found that the men had at best “an agreement to get married at some point in the future.” Wrote Thompson, “We cannot say that the trial court’s reliance on *Carter* as persuasive authority and its resultant analysis were legally or factually erroneous.”

In conclusion, wrote Thompson, “For all the foregoing reasons, we are satisfied that the evidence did not compel the trial court to conclude that the parties had an express mutual agreement to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage. The evidence permitted the court to conclude, as it did, that the parties never expressly agreed to be married, in the present tense.” And that decides the case consistent with D.C. case law.

Gill is represented by Aaron Marr Page and Christopher J. Gowen. Jack Maginnis represents Van Nostrand. As noted, this ruling could be appealed to the U.S. Court of Appeals for the D.C. Circuit. Federal question jurisdiction is not required for an appeal from the D.C. local courts on questions of D.C. common law, but if it were, this case arguably presents an underlying constitutional question concerning the jurisdiction’s obligation to recognize the fundamental rights of same-sex couples to enter into common law marriages, and the question whether the trial court’s analysis did not adequately respect that right could still be argued on appeal. However, Judge Thompson took great lengths to reiterate the D.C. Court of Appeals’ view that the court had to take account of contemporary circumstances pre-*Obergefell* in avoiding unfairly prejudicing the question by imposing unreasonable expectations on how same-sex couples intended to form a common law marriage would have acted in 2004, and that the trial court had done that adequately in this case. ■

Another District Court Concludes That the Critical Inquiry in a Sexual Orientation Discrimination Claim Is the Same as One for Gender Stereotyping

By Vito John Marzano

U.S. District Judge Joel H. Slomsky (E.D. Pennsylvania) became the latest federal judge in the Third Circuit to address the arbitrary pleading distinction between a Title VII discrimination claim on the basis of sexual orientation compared to discrimination on the basis of gender stereotyping. In his order entered on April 12, 2019, in *Doe v. Parx Casino*, 2019 U.S. Dist. LEXIS, 2019 WL 1585201 (E.D. Pa.), Judge Slomsky dismissed plaintiff’s claims because she explicitly pleaded discrimination based on sexual orientation. However, the court did so without prejudice and explicitly directed plaintiff to file an amended complaint for the same claims but sounding in gender stereotyping.

The court summarizes the pleaded facts as follows: Plaintiff, identified anonymously as Michelle Doe, is a black lesbian who was employed as a table games dealer at Parx Casino in Bensalem, Pennsylvania beginning in December 2017. She claims that she was subjected to a hostile work environment and wrongful termination on the basis of her sexual orientation. Plaintiff references several incidents in support of her claims, which she alleges resulted in her termination.

For instance, colleagues, such as a male a security guard, a male cook, and a female table games dealer, would misgender her and refer to her as “Sir.” Another male table games dealer acted aggressively towards her, refused to

move out of her way, and even jumped in her face in one instance. Plaintiff's colleagues ostracized her by refusing to sit with her in break rooms or to acknowledge her on the casino floor, and they did not wish to associate with or be around her.

Although plaintiff discussed the harassment with her supervisors, including her manager and human resources staff, nothing was done. At a pre-shift meeting in May 2018, plaintiff sought to address these issues, but her boss stopped her and told her to cease interrupting the meeting. However, at a pre-shift meeting a few months earlier, a male employee was permitted to express his opinions and issues without rebuke from superiors. When plaintiff attempted to ignore harassment from her colleagues, she was called "dirty" and that she had a "bald head."

On August 11, 2018, a male patron threatened and intimidated the plaintiff by "getting in her face" and making a fist. Plaintiff reported this to her boss. The following day, her manager informed her that she was "under investigative supervision" and suspended her. She was informed of her termination the next day. Plaintiff claims that the foregoing was a pretext to end her employment because of her sexual orientation or because of negative reactions to her from her colleagues because she is an open lesbian.

In December 2019, plaintiff commenced this action claiming a hostile work environment and unlawful termination on the basis of sexual orientation in violation of Title VII. Defendant moved to dismiss the complaint for failure to state a claim, relying on binding Third Circuit precedent that a claim for discrimination on the basis of sex in violation of Title VII does not contemplate sexual orientation. *See Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001). Plaintiff responded that discrimination based on sexual orientation is necessarily one for gender stereotyping, and that, notwithstanding, plaintiff has pleaded a viable, stand-alone claim for gender stereotyping.

On a motion to dismiss, the court

accepts as true the plaintiff's factual allegations. It then determines whether she plausibly pleaded a claim for which relief can be granted. Generally, the court is limited to the four corners of the complaint, and a plaintiff cannot offer an alternative legal theory in a responsive filing to defeat dismissal.

As it relates to the hostile work environment claim, the complaint must allege that (1) plaintiff suffered intentional discrimination because of sex; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected plaintiff; (4) the discrimination would detrimentally affect a reasonable person in like circumstances; and (5) the employer would be liable for the actions of its employees (i.e., respondeat superior liability). To survive dismissal for wrongful termination absent direct evidence of discrimination, the complaint must allege that plaintiff (1) has a protected characteristic; (2) was discharged; (3) was qualified for the position; and (4) was replaced by someone without that characteristic or those without that characteristic received better as to give rise to an inference of discrimination.

As an aside, although many lawyers and courts will argue whether a "group" is protected by Title VII, this imprecise terminology misses the mark. Title VII proscribes discrimination against certain characteristics, not groups. It does so indiscriminately of several groups. For instance, adhering to gender binary, men and women are two different groups. Title VII's proscription on discrimination "because of sex" means that a woman cannot suffer discrimination because she is a woman; likewise, a man cannot suffer discrimination because he is a man. In both scenarios, it is the characteristic (i.e., gender) that is protected, not the group of individuals (i.e., men and women). To put this another way, everyone is protected from discrimination because of sex. The use of "group" is nothing short of semantic gobbledygook. Attorneys representing plaintiffs who have suffered discrimination because of sexual orientation should present

the argument that "sexual orientation" is a characteristic contemplated by the phrase "because of sex" — a heterosexual is protected just as much as a homosexual.

In any event, defendant sought dismissal based on the first elements of both claims—namely, that "because of sex" does not mean that sexual orientation is a protected characteristic and therefore plaintiff does not have a claim under Title VII. In its analysis, the court traces the development of "because of sex" from its enactment in 1964 to fairly recent and topical decisions by the Seventh and Second Circuits. In *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017), the Seventh Circuit en banc overruled its prior precedent to conclude that "because of sex" extends to sexual orientation. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), the Second Circuit en banc followed the Seventh Circuit's lead. (On April 22, 2019, the Supreme Court announced that it would review the *Zarda* case, which may result in some finality to the issue.)

The court also considers the recent decision by District Judge McHugh in *Guess v. Philadelphia Housing Authority*, 354 F.Supp.3d 596 (E.D. Pa., 2019). To wit, Judge McHugh stated, "I am at a loss to conceive of a sexual orientation discrimination claim that could occur in so much of a vacuum as to be free of any gender stereotyping." As an aside, *Guess* was appealed to the Third Circuit on March 16, 2019. It is likely, however, that the Third Circuit will stay a determination until the Supreme Court resolves *Zarda* and *Hively*. Also, the attorney who represented the plaintiff in *Guess* represents plaintiff in this matter.

In any event, the Third Circuit has acknowledged that the line between gender stereotyping and sexual orientation "is difficult to draw." Relying on this, District Judge Slomsky states that "in certain cases, the line between these two types of claims does not seem merely difficult to draw; it seems arbitrary." The court then compares two cases that had nearly identical facts. In one, the plaintiff pleaded discrimination

based on sexual orientation, and the complaint was dismissed accordingly. *Coleman v. Caritas*, 2017 U.S. Dist. LEXIS 85319, 2017 WL 2423794 (E.D. Pa., June 2, 2017). In the other, the plaintiff merely used gender stereotyping and survived dismissal. *Barrett v. Union Railroad Company*, U.S. Dist. LEXIS 97825, 2017 WL 2731284 (W.D. Pa., June 26, 2017). Judge Slomsky concludes, “The stark contrast between these outcomes leads a court to contemplate whether the difference between a gender stereotyping claim and a sexual orientation claim is nothing more than artifice.”

Judge Slomsky proceeds to question the wisdom of Bibby. He acknowledges that decades have passed since Bibby during which gays and lesbians have seen tremendous improvements in society and with courts vindicating their rights, including winning the right to have their marriages recognized.

In an ostensible nod to the higher courts, Judge Slomsky quotes the unanimous decision delivered by the late Justice Antonin Scalia when interpreting Title VII’s “because of sex” language. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), Justice Scalia wrote that “statutory prohibitions go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

This is to say that sexual orientation is not necessarily a comparable evil to gender stereotyping inasmuch as gender stereotyping consumes the entirety of a sexual orientation discrimination claim. Rather, if one were to contend that Congress did not consider sexual orientation when enacting Title VII, then the two are undeniable comparable evils.

The court generally considers Bibby to be bad law, given the improved understanding of sexual orientation in the years since it was decided. Similar to *Guess*, however, the court must respect the judicial hierarchy and apply Bibby to this case. Plaintiff’s claims must be dismissed because she based them explicitly on sexual orientation. The

attempt to reframe the claims for gender stereotyping is futile because she cannot adopt a new legal theory in a responsive filing to defeat dismissal. But the court did not foreclose justice. Plaintiff may file an amended complaint, merely changing “sexual orientation” to “gender stereotyping” and then the matter would proceed. Such a conclusion illustrates the arbitrary line imposed by Bibby, but it again potentially portends some light in the event that the Supreme Court does not affirm *Zarda*.

Attorneys representing plaintiffs for these claims should pay mind to the particularized pleading requirement for sexual orientation claims under Title VII outside of the 2nd and 7th Circuit: plead gender stereotyping, or use it together with sexual orientation. Of course one should avoid this understanding as conclusive, only that this is what the district courts are saying to do as of now. It should not come as a surprise if the conservative Supreme Court exercises mental gymnastics to distinguish a discrimination claim based on sexual orientation from one based on gender stereotyping when it decides *Zarda*. Thus, attorneys owe it to their clients to prepare for such an eventuality. Further, they must respect the “well-pleaded complaint” standard to, at the very least, survive a motion to dismiss, even if they wish to use the case to update the law.

Michelle “Doe” is represented by Justin F. Robinette of Philadelphia. ■

Vito John Marzano is a member of the New York Bar and an associate at Traub Lieberman Straus & Shrewsbury LLP in New York.



Arizona Supreme Court Rules on Family Court’s Directive Order in Dispute Between Parents of Transgender Youth

By Arthur S. Leonard

As a matter of statutory interpretation, the Arizona Supreme Court found that Maricopa County Superior Court Judge Joseph C. Kreamer exceeded his authority by directing the appointment of specific mental health professionals to deal with a young child’s gender identity issues in the context of a disagreement between the child’s divorced parents about how the issues should be handled. Writing for the unanimous court in *Paul E. v. Courtney F.*, 2019 WL 1811328, 2019 Ariz. LEXIS 120 (April 25, 2019), Arizona Supreme Court Justice Ann A. Scott Timmer found that Section 408 of the Uniform Marriage and Divorce Act, codified in Arizona at A.R.S. Sec. 25-410(A), limits the trial judge’s authority in such situations to impose a “specific limitation” on the authority of the parent designated as “sole legal decision-maker” to those instances where the lack of such court direction to situations where “the child’s physical health would be endangered or the child’s emotional development would be significantly impaired.” This definitely rejects the argument that such intervention could be justified based on the trial judge’s view of the best interest of the child.

The parents are identified in Justice Timmer’s opinion as Paul E. and Courtney F. and the child as L., one of three children of the parents, who divorced in 2010, when L. was three years old. Part of the divorce decree awarded the parents joint legal decision-making authority with equal parenting time, but gave Paul E. “final legal decision-making authority concerning L’s education and medical and dental

care.” The court notes that the parents “have clashed on several parenting issues since their divorce, making their relationship, according to the family court, ‘volatile and dysfunctional.’” The particular dispute of concern in this case concerns L, “biologically male,” who began to self-identify as female very early, displaying “an early interest in toys and clothes generally associated with girls.” Courtney apparently quickly fell into step with L’s expressed preferences, to the extent of sending then-five-year-old L to school wearing a skirt on a “free dress day” (a concept not explained in the court’s opinion, but we guess meant a day free of restraints from whatever dress code the school normally maintained). Courtney had contacted L’s teacher, asking the teacher to “encourage his classmates to accept him for who he is,” but word got back to Paul E., who was hearing about L’s preferences for the first time and “immediately sought professional assistance and, with Mother’s agreement, he retained Diana Vigil, a licensed professional counselor, to counsel L and advise the parties.”

Vigil was in favor of letting L “explore wearing clothing playing with toys typically associated with girls in Mother’s home but nowhere else.” The parents agreed to speak with L about gender issues only in a clinical environment, but it appears that Courtney did not abide by this agreement. “For example,” wrote Justice Timmer, “she referred to L with female pronouns and permitted L to appear in public wearing clothes generally worn by girls. Mother also spoke with L about matters beyond L’s ability to comprehend, such as sex reassignment surgery and hormone therapy. Mother summed up the parties’ situation in a September email to Father: ‘We definitely disagree about how to handle [L’s] gender variance.’” Paul E. petitioned the family court for a change, seeking sole legal decision-making authority concerning all three of the children. This motion remained pending for two years, while the trial judge took “intermediate” action: ordering Courtney to “temporarily remove girl-oriented toys from her

house and refrain from, among other things, dressing L in clothing generally worn by girls, referring to L with feminine pronouns, and discussing gender-related issues with L and the other children.” This order was referred to by all concerned as “The Rule,” and it appears that both parents followed it. The court also ordered “diagnostic and custody evaluations and appointed a parenting coordinator.”

The various evaluations produced professional consensus on a diagnosis of gender dysphoria for L, who “struggled under the Rule,” wrote Timmer. “L repeatedly asked for the return of ‘girl’s stuff,’ expressed anger over the Rule, and, under Mother’s influence, blamed Father for its existence.” L’s frustration manifested itself in, among other things, expressing a desire to die by hanging. This led Mother to take L to a hospital, where L articulated this desire again, but, writes Timmer, “there were no signs of self-harm, and L did not relate any incidences of self-harm.” The hospital discharged L to Paul’s custody. Courtney unsuccessfully urged the court to vacate the Rule.

As the trial date neared, a psychological appointed as the custody evaluator, Dr. Paulette Selmi, recommended against joint legal decision-making due to the parents’ “high level of conflict” and recommended Father as the preferable sole decision-maker, on the ground that he would “make the more rational and responsible decisions.” Selmi did find L to be a happy, well-adjusted child – a bit surprising in light of the ongoing struggles about gender identity. Selmi recommended that Vigil continue as L’s therapist and to provide L a “safe haven” within which to discuss L’s issues, barring the parents from discussing gender issues with L and requiring Vigil to maintain confidentiality and not share with either parents what was happening in therapy. Indeed, she recommended that the gag order the court had imposed on Courtney be extended to Paul!

After a four-day trial in December 2015, the court made Paul the sole legal decision-maker, upon his agreement to consult Courtney on all major

decisions. The court adopted many of Dr. Selmi’s recommendations as part of its order, including court appointment of a “gender expert” to provide input to the court and guidance to the parents “regarding gender identification issues,” directing that Vigil continue as L’s therapist according to the “safe haven” concept recommended by Selmi, and partially vacating the Rule, so as to allow “gender exploration by L” in Vigil’s office and the parents’ homes, but not in public, with a restriction that the parents not discuss this modification of “The Rule” with L, leaving that task to Vigil. The order also directed the parents not to discuss “gender identification issues” with L, leaving that to the professionals. If L raised questions, the parents were to suggest speaking to Vigil about them. But, wrote the trial judge, “The Court is open to allowing the parents to discuss gender identification issues in the future should such an approach be suggested by the gender expert.” Finally, the trial judge directed the neither parent “directly or indirectly, promote or discourage a specific view of gender identification for L.” After receiving input from the parties, the court appointed Dr. Diane Ehrensaft to be the gender expert. Following post-trial motions, the court clarified that Vigil’s status would be as court-appointed expert and sole clinician to evaluate or treat L, unless Vigil gave permission or the court ordered that some other professional be involved. Vigil was also to keep all records confidential (including from the parents) and authorized to consult with L’s teachers and other child-care providers, and that both Vigil and Dr. Ehrensaft would be “cloaked with applicable judicial immunity.”

Paul E. considered the court’s adoption of these “guidelines” as improperly interfering with his status as sole legal decision-maker and not authorized by statute, and he prevailed in persuading the Court of Appeals to vacate the family court’s orders “to the extent they infringed on Father’s exercise of his sole legal decision-making authority concerning L.” The Court of Appeals’ ruling is published

at 418 P.3d 413 (Ariz. App. 2018). The court said that the family court did not have authority to choose L's therapists, to order the parties to refrain from making certain parenting chides (including discussing sensitive topics with L), or to confer judicial immunity on the appointed therapists, and the case went up to the state supreme court.

The Supreme Court agreed with the court of appeals that Arizona law did not authorize the court to make these appointments of professionals, as these orders "infringed on Father's sole legal decision-making authority." On the other hand, the Supreme Court said, the relevant statutes would support specific orders concerning the child upon a finding that they were necessary to protect the child's physical health or emotional development. Justice Timmer suggested that the circumstances on which a court could limit the sole decision-maker's authority "presumably would occur infrequently with a fit parent making decisions. Also," she wrote, "any finding of endangerment or significant emotional impairment must spring from 'the absence of the specific limitation.' It follows that a permissible 'specific limitation' must have a nexus with the required finding. And the use of the term 'specific' suggests that any ordered limitation must avert endangerment or impairment without unnecessarily infringing on the sole legal decision-maker's authority, which is broad and unshared."

Noting the commentary from the drafters of the Uniform Act from which the relevant Arizona statute is derived, the court said that the sole decision-maker is generally "responsible for post-divorce decisions concerning the upbringing of the child" and "cautions against court intervention unless it is to enforce a written agreement between the parents or to prevent endangering the child." This was seen as necessary to accommodate "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" under the 14th Amendment Due Process Clause. The Supreme Court parted company from the court of appeals, however, when

it came to distinguishing between a "directive," which the court of appeals said the statute would not allow, and a "limitation," focusing in on the exact wording of the statutory provision. "Just as a prohibition restricts and restrains a sole legal decision-maker's authority, so does a directive," wrote Justice Timmer. "The key to complying with sec. 25-410(A) is that the limitation, in either form, must be necessary to prevent the child's physical endangerment or significant emotional impairment. The court of appeals apparently was persuaded that a 'directive' is impermissible because the family court 'has no say in the actual decisions of the chosen parent' and 'typically may do no more than reallocate the authority between the parents' when they disagree This is not so." The court recited several instances where the relevant statutes do empower the family court to make decisions or intervene when parents cannot agree. "When an impasse occurs," wrote Timmer, "the court is authorized to determine not only the parenting plan element in dispute, but also 'other factors that are necessary to promote and protection the emotional and physical health of the child.'"

"When, as here, the family court has awarded sole legal decision-making authority to a parent," continued Justice Timmer, "if the other parent disagrees with the sole legal decision-maker on a major issue, the court may only intervene as authorized in Sec. 25-410(A)." She also signaled disagreement with the court of appeals' view that "endangerment and significant emotional impairment" means, for these purposes, "abuse or neglect, which implies wrongdoing," finding no legislative intent to important that standard into this provision. Instead, she wrote, this provision is intended to deal with situations where the sole legal decision-maker "has either actually exercised authority or has indicated he or she would do so in a way that would harm the child," and "any limitation must be tailored to prevent or remedy the endangerment or impairment. The court must be mindful not to unnecessarily intrude on the sole legal

decision-maker's unshared authority to make major decisions concerning the child's upbringing, even if those decision conflict with expert opinion or the court's own view of childrearing."

In this case, noting the limits the trial court imposed in its order, Justice Timmer wrote, "This order does not satisfy sec. 25-410(A) because it fails to focus on how Father's exercise of unchecked legal decision-making authority would place L at risk for physical injury or significantly impair L's emotional development. The complexity of L's situation is not a basis alone for invoking Sec. 25-410(A). Fit parents, like Father, frequently guide their children through complex situations without court interference. The 'dynamics of the parties' relationship' does not suggest that Father will exercise his sole legal decision-making authority in a way that endangers or impairs L. And the potential for harm due to mismanaging the gender dysphoria diagnosis is not equivalent to finding that absent a specific limitation, L would be put at risk for harm or suffer harm."

In other words, the Supreme Court found that the record did not support a conclusion that without the "mandatory guidelines" imposed by the trial court, Paul's exercise of authority would physically endanger or significantly impair L's emotional development." This conclusion seems to have been heavily influenced by Paul's gradual acceptance of the diagnosis of gender dysphoria, leading the court to believe that his past reluctance did not show that his future conduct would present these problems, especially given his acceptance of letting L "explore" his gender issues while in his father's home, and even Dr. Selmi's recommendation that Paul 'see a therapist to acquire 'psycho-educational approaches to learning about gender issues.'"

"In short," concluded Timmer on this point, "although the court had concerns about Father's ability to successfully guide L through gender dysphoria, Mother failed to show that Father's exercise of his sole legal decision-making authority would place L at risk for physical injury or significantly impair

L's emotional development without the court's appointment of specific treating professionals and attendant restrictions on Father's authority," so the statute did not authorize these specifics in the court's order. However, the court saw that continuing L's therapy was necessary in these circumstances, and the trial court could be justified in acting if Paul failed to maintain therapy for L, failed to retain a gender expert or declined to "allow L to gender explore." In that case, the court could issue the kind of order that it actually did issue.

Thus, the bottom line was that the court of appeals' decision, which had vacated the trial court's order, was itself vacated in part and affirmed in part, in an opinion that will require close study for Arizona matrimonial lawyers.

We have quoted at great length from the court's opinion than we usually would do in order to try to accurately reflect the holding in a complicated case. Paul E. is represented by Paul F. Eckstein and Michael P. Berman of Perkins Coie LLP (Phoenix) and Todd Frnaks and Robert C. Houser of Franks Law Offices P.C. (also Phoenix). Courtney F. is represented by Taylor C. Young of Mandel Young PLC (Phoenix), Steven D. Wolfson and Michelle N. Khazai of Dickinson Wright PLLC (Phoenix), and Catherine Sakimura (Pro Hac Vice) of the National Center for Lesbian Rights (San Francisco). The court also received an amicus brief by Helen R. David, The Cavanagh Law Firm P.A. (Phoenix) and Annette T. Burns (Phoenix), on behalf of American Academy of Matrimonial Lawyers. ■



New York Second Department Applies Equitable Estoppel Supporting Rights of Lesbian Co-Parent

By Marina Theo and Brett Figlewski

In the April 17 decision of *Matter of Chimienti v. Perperis*, 2019 N.Y. App. Div. LEXIS 2849, 2019 WL 1646344, 2019 NY Slip Op 02866, the Appellate Division for New York's Second Judicial Department (Mastro, J.P., and Maltese, Duffy, and Connolly, J.J., concurring) once more ruled in favor of a non-biological LGBT parent's rights to seek visitation and custody of her children. By applying the holding of *Brooke S.B. v. Elizabeth A.C.C.* (28 NY3d 1, 39 N.Y.S.3d 89, 61, N.E.3d 488), the Appellate Division concluded that the doctrine of equitable estoppel was appropriately applied as a means of determining whether a non-biological parent has standing, and, furthermore, such application may be applied even when the marital presumption is invoked by the biological parent against the non-biological parent.

The facts of the case are similar to other parentage and custodial disputes between same-sex parents: Nicole Perperis is the biological mother of two children, born by means of alternative insemination in September of 2014 and May of 2016, respectively, while her former partner, Jennifer Chimienti, is not biologically- or adoptively-related to the children. The older child was conceived shortly after the biological mother had separated from – but was still married to – a previous partner. The stipulation of settlement (as well as the judgment of divorce) in Perperis' divorce action expressly provided that there were no children in the marriage and that the marital presumption (that children born during a marriage are the legal children of the spouses) was rebutted.

Perperis and Chimienti had begun a romantic relationship in 2014, shortly before the older child was conceived, and continued their relationship through the conception and birth of the younger child. The couple did not have a pre-

conception agreement regarding the children, but they raised the children together before they ended their relationship in early 2017. Both Perperis and Chimienti carried out significant parental responsibilities for the children. The court noted, specifically, that Chimienti had participated in the prenatal care and births of the children; had raised the children as hers; and was held out as a parent by Perperis, who fostered and facilitated Chimienti's parental role.

Even after their separation, for four months Chimienti spent significant time with the children until Perperis refused to allow her access to them. The decision by the Second Department was based on the Court of Appeals' 2016 determination in *Brooke S.B.*, which recognized the parental rights of LeGaL's client, Brooke. In Brooke's case, the Court of Appeals had held that, in cases in which there is clear and convincing evidence of a preconception agreement to raise a child together, the non-biological/non-adoptive parent will have standing to seek visitation or custody. The Court of Appeals expressly left open the issue of whether, in the *absence* of a preconception agreement, a non-biological/non-adoptive parent might have standing, particularly through application of the doctrine of equitable estoppel. Equitable estoppel is a longstanding common law doctrine which prevents an individual from asserting rights contrary to his or her words and actions and on which another party and – in the context of custodial determinations – a child have relied.

In its decision, the Second Department answered that question unequivocally in the affirmative, thereby confirming post-*Brooke* Family Court decisions which have already utilized and applied equitable estoppel in similar instances. Though not explicitly enumerated, the

court relied upon the factors which advocates have advanced in supporting equitable estoppel claims and which may in the future serve as the elements of a multi-part test to evaluate such claims: 1) the biological parent's fostering of a relationship between the non-biological parent and the child and holding out the non-biological parent as such; 2) the non-biological parent's carrying out of the responsibilities of parenthood; 3) the non-biological parent's residing with the children – at least for some period of time – as a family unit; and 4) the establishment of a parent-child bond, indicated by such things as a child's addressing a non-biological mother as “mommy”.

The court's analysis was a reaffirmation of the power of the doctrine of equitable estoppel in determinations of standing in custodial and parentage disputes. Moreover, the court emphasized that it is the consideration of the *best interests of the child* that precipitates and guides the application of the doctrine which may override other competing principles, such as the marital presumption. Thanks to this decision, advocates will now have even firmer footing when arguing for equitable principles to be applied in complicated and contested custodial and parentage disputes which advance recognition and protection for LGBT families.

Jennifer Chimienti is represented by Susan G. Mintz, Gervase & Mintz PC, Garden City. Nicole Perperis is represented by Sari M. Friedman, Friedman & Friedman, Garden City. Counsel for the children is Marjorie G. Adler, also of Garden City. ■

Marina Theo is a student intern at LeGal; Brett Figlewski is the Legal Director of LeGal.



Lesbian Veteran's Claim Remanded for Reconsideration by Board for Correction of Naval Records

By Cyril Heron

On April 11, 2019, Judge Robert N. Chatigny of the U.S. District Court in Connecticut remanded a Fifth Amendment Due Process and Administrative Procedure Act (hereinafter APA) challenge to an adverse decision by the Board for Correction of Naval Records on a claim brought by a lesbian veteran. Katrina Bradley sought to correct her discharge from “Other-than-Honorable.” The basis of her claim is that Don't Ask Don't Tell – in effect during her service – has been repealed, and she believes the designation was a discriminatory and retaliatory move against her. The court chose to remand the case on the defendant's motion admitting that the Board for Correction of Naval Records (hereinafter BCNR) failed to consider the Military Whistleblower Protection Act (hereinafter MWPA) and had voluntarily requested the remand. *Bradley v. Spencer*, 2019 U.S. Dist. LEXIS 62782, 2019 WL 1567838 (D. Conn., Apr. 11, 2019).

Katrina Bradley, an African American and a lesbian woman, enlisted in the Navy in 1994. According to Bradley, not long after she enlisted she experienced racial profiling at the hands of military police officers and sexual harassment from one of her male superiors. Bradley noted that she felt especially vulnerable to the sexual harassment because she was forced to keep mum about her sexuality under Don't Ask Don't Tell to avoid discharge. Bradley filed a formal sexual harassment complaint against the superior officer, but the Navy failed to adequately investigate him. The complaint only served to infuriate Bradley's superior, who told her that she “messed up” when she filed the complaint. The Navy supervisors immediately treated her poorly, targeted her for discipline, and made her rue her decision to report her harassment.

Bradley was punished for leaving her place of duty and watching a movie; being tardy to a “Captain's Call”; falling asleep on duty; and failing to pay her phone bill. The punishment was non-judicial, but soon after that, the command put her on administrative counseling and confined her to her barracks. The harassing officer paid her a visit during her confinement and taunted her. Finally, formal discharge proceedings were initiated, and the harassing officer was involved in the process leading to Bradley's eventual discharge. Katrina Bradley was discharged in 1996 under Other-than-Honorable conditions subsequent to a recommendation for “Administrative Separation by reason of Misconduct due to Commission of a Serious Offense.” In her 2016 application to the BCNR to correct her Naval record, Bradley did not dispute the misconduct, but instead attacked the discharge by alleging the reason for the discharge was seeped in discriminatory and retaliatory motives. Bradley included affidavits and a declaration from a woman who was her romantic partner in 1995 as support for her claim.

Notwithstanding Bradley's application coming ten years after her discharge, the BCNR waived the time limit. That was, however, the only concession they would grant her. The BCNR denied the application under the belief that her punishment was a direct result of her action and that there was no evidence provided by her or in the record to support her assertions of sexual harassment. The BCNR decision did not, however, discuss the retaliation claim, the MWPA, or several other arguments proffered by Bradley. That misstep by the BCNR instigated the instant quagmire where the questions left for the court were whether voluntary remand should be granted.

Judge Chatigny first begins his analysis by laying out the legal standard. Statutory law enables the courts to invalidate agency action, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Administrative law jurisprudence gets more specific on that note: a court that determines an error of law by the administration must remand it; voluntary remand is usually appropriate when new evidence becomes available, a new legal standard comes about, or new legislation is passed that could affect the validity of the original decision. Remands are also appropriate when the agency has a substantial and legitimate concern. Judge Chatigny takes care to note, however, that a court still has discretion to grant or deny a remand, and denial of remand is allowed when it is clear that remand would be futile.

Against that legal background, Judge Chatigny holds that remand is appropriate, over Bradley's objection, as she would prefer the court to decide this case on the merits. Notwithstanding Bradley's argument that remand would be futile – based on the BCNR's paltry record of finding MWPA violations and its infamous record of failure to adequately review those applications – the court still found remand appropriate. Judge Chatigny explained that remand is appropriate so long as there is some chance the agency could come to a different conclusion than its original one.

Another argument offered by Bradley was similarly unpersuasive. She argued that remand would delay the proceedings, but Judge Chatigny found this unconvincing in the absence of supporting case law. Additionally, he found the argument was akin to the futility argument in that the ultimate result is the case will be brought back to the district court after the Board rules, if it still rules against Bradley. To Judge Chatigny, this is only a benefit to Bradley's position because it allows for the development of a fuller record and the option of an administrative appeal of her MWPA claim. But seemingly most important to the court, is the fact

that remand is judicially economic where both the agency and the opponent acknowledge the incompleteness and incorrectness of the agency's action – which is interesting when one considers that the court is allowing the malfasant to correct itself when the agency would have been content to let its previous decision stand absent the judicial challenge. In that regard Bradley seemed to be of the same mind.

The remainder of Judge Chatigny's opinion concerns requests by Bradley to impose requirements on the BCNR to follow on remand. Bradley requested that the court (1) direct there is undisputed evidence in the record that she filed a sexual harassment complaint; (2) require the BCNR to determine whether the sworn statements to rebut the established presumption of regularity to support official actions and explain why; (3) order certain discovery procedures and an in-person evidentiary hearing; (4) impose mandatory deadlines on the BCNR; and, (5) ensure the BCNR addresses all of her arguments. Of those five, only requests two and five were granted. Established case law requires an agency to articulate a satisfactory explanation for its actions, and military boards of corrections shall have their decisions reversed and remanded if they fail to address arguments that are not facially frivolous.

What Judge Chatigny has done is neither benevolent nor malicious. He simply applied the law as he found it. That poses a problem on multiple fronts, but particularly with regard to legitimacy in the eyes of those who seek justice. Bradley allegedly faced heinous discrimination and harassment and was punished for it. Her hopes for redress were dashed initially by the BCNR but subsequently by the court because it deemed judicial efficiency more pressing than justice. Judge Chatigny found case law requiring explanations for decisions and responses to all arguments presented, cases from the first half of the current decade and as early as the nineties. The court even quotes operative regulations supporting the imposition of requirements two and five. Thus, the question becomes,

how could the court, in its discretion, retain confidence enough in the BCNR to remand the case when the BCNR blatantly ignored operative regulations and decades old legal standards in what seems to be an attempt to remove Bradley's case as quickly as possible? Moreover, judicial economy may be of consideration, but what about Bradley's economic position? It is unclear whether she may or may not have had the means to develop a fuller record and subsequently re-file the case with the district court. Those should certainly be considerations one takes into account when there is an institution that has shown its unwillingness to give a petitioner a fair opportunity to change her record.

Bradley is represented by Michael J. Wishnie of the Jerome N. Frank Legal Services of New Haven, Connecticut. Sean J. Stackley, Acting Secretary of the Navy, is represented by Natalie Nicole Elicker of the U.S. Attorney's Office in Connecticut. ■

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



Wisconsin Federal Judge Grants Summary Judgment Against Transgender Inmate on Civil Rights Claims; Certifies Appeal “Frivolous” Despite 7th Circuit Precedent

By William J. Rold

Transgender inmate John H. (“Melissa”) Balsewicz, *pro se*, loses her damages case for delayed hormonal treatment, protection from harm, and retaliation in *Balsewicz v. Blumer*, 2019 WL 1370105, 2019 U.S. Dist. LEXIS 50327 (E.D. Wisc., March 26, 2019). Balsewicz’s case, still before U.S. District Judge Joseph P. Stadtmueller, has been reported previously. In *Balsewicz v. Bartow*, 2017 U.S. Dist. LEXIS 89698 (E.D. Wisc., June 12, 2017), reported in *Law Notes* (Summer 2017 at page 279), Judge Stadtmueller screened her complaint and allowed her to proceed on two claims of deliberate indifference under the Eighth Amendment: failure to treat her gender dysphoria; and failure to treat her suicidal tendencies arising from her untreated condition. In *Balsewicz v. Blumer*, 2017 U.S. Dist. LEXIS 213176 (E.D. Wisc., December 29, 2017), reported in *Law Notes* (January 2018 at pages 94-5), Judge Stadtmueller allowed her to elaborate on these claims and to add a defendant and the retaliation claim.

Now, Judge Stadtmueller’s grant of summary judgment fails to accord all favorable inferences to Balsewicz, and it ignores relevant Seventh Circuit precedent. Moreover, his handling of the *pro se* appeal violates Federal Rule of Appellate Procedure 24(a), governing *in forma pauperis* appeals, prompting a suspension of the appeal.

While Balsewicz’s case has been pending in the Eastern District of Wisconsin, another case followed by *Law Notes* involving transgender inmate Lisa Mitchell has been working its way through the Western District of Wisconsin and the Seventh Circuit. Both cases involve Wisconsin’s use of a “Transgender Committee” [the “Committee”], chaired by Mental Health Director Kevin Kallas, and an outside “consultant” from Johns Hopkins, Cynthia Osborne. Mitchell’s transgender

evaluation was interrupted by her parole, which the Seventh Circuit ruled mooted her case. *Mitchell v. Wall*, 2015 WL 9309923 (7th Cir., December 23, 2015), reported in *Law Notes* (January 2016 at page 34). Mitchell lost her damages case for the delay in the district court. See “Wisconsin Transgender Inmate Who Waited Over a Year for Evaluation for Hormones Loses Summary Judgment on Failure to Treat Damages Claims” (October 2016, *Law Notes* at pages 424-5) (recounting history).

When Mitchell found herself in Wisconsin state custody again, the Seventh Circuit evaluated her claims for a second time. It reversed summary judgment against Mitchell on claims against Kallas. It affirmed summary judgment on qualified immunity for the “Committee,” in the absence of clear precedent, although it “criticized” the delays and found them “disturbing,” thereby providing the precedent for future cases. See “7th Circuit Panel Blasts Corrections for Delays in Responding to Inmate’s Gender Dysphoria,” reporting *Mitchell v. Kallas*, 2018 U.S. App. LEXIS 18722, 2018 WL 3359113 (7th Cir. July 10, 2018), *Law Notes* (September 2018 at pages 436-7).

This case is now published circuit precedent. *Mitchell v. Kallas*, 895 F.3d 492 (7th Cir. 2018). Judge Stadtmueller does not mention it. The Court of Appeals found that the overall delays and failures in evaluation of Mitchell presented a jury question of whether she had received a timely “individualized medical determination,” writing: “The Wisconsin DOC staff must approach Mitchell’s request for treating gender dysphoria with the same urgency and care as it would any other serious medication condition.” *Id.* at 501, 503.

The *Mitchell* decision was being picked up by electronic databases (since *Law Notes* had it) prior to the final briefing on summary judgment in *Balsewicz* on

August 10, 2018. Moreover, the motion remained *sub judice* for over seven months. Nevertheless, *Mitchell* was not found by Chambers (did they look?), nor does it appear to have been cited as possible adverse precedent by defense counsel—Michael Best & Friedrich, LLP, Milwaukee; and Wisconsin Department of Justice, Madison—although the Wisconsin Attorney General appeared in both cases.

On the merits, Judge Stadtmueller focuses on the approximately two years between April of 2016 and May of 2018. During this time, Balsewicz: (1) waited four months to be referred to Osborne (which Judge Stadtmueller accepted as an “oversight”); (2) waited an additional seven months for an initial evaluation by Osborne, who recommended that hormones be deferred for “at least a year” because of other co-morbidity; (3) waited that year for another evaluation; and (4) had not received ordered hormones by the time of briefing. Judge Stadtmueller does not address whether the “other” co-morbidity was caused by the gender dysphoria, but the defendants’ opposing papers in summary judgment concede that Balsewicz’s “decompensation” leading to self-harm was triggered by her dysphoria. *Compare Edmo v. Idaho Dep’t of Corr.*, 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018), reported in *Law Notes* (January 2019 at pages 7-8) (appeal pending in the 9th Circuit) (co-existing psychological conditions should not necessarily be considered a separate management issue from dysphoria, if caused by same, citing WPATH Standards).

Judge Stadtmueller noted that Balsewicz was evaluated again in May of 2018, over two years after her initial referral to the Committee. At this time Osborne recommended hormones but, as of the briefing on summary judgment three months later,

Balsewicz had not received them. Judge Stadtmueller deferred to defendants' last briefing representation that receipt of hormones was "imminent," but the summary judgment opinion more than seven months later does not update whether Balsewicz ever received them. Balsewicz wrote to the Clerk of Court in February of 2019, stating she remained "stressed" about her case. Overall, Balsewicz's delays exceed three years, if hormones have not commenced.

During this time, Balsewicz received "dialectical" therapy to try to help her cope with suicidal ideation. Judge Stadtmueller finds that it was not treatment for dysphoria. Defendants concluded that her "commitment" to such therapy was "low." Judge Stadtmueller accepts Kallas' testimony "by declaration" that delays prior to seeing Osborne were medically irrelevant because an earlier visit would have produced the same recommendation: to wait for psychological stabilization. Notably, when Osborne saw Balsewicz in May of 2018, she found that the patient "still" had the "personality disorders," but she recommended commencement of hormones anyway because Balsewicz had waited a year.

During her delays, Balsewicz attempted suicide multiple times. Defendants responded with varying degrees of intervention, depending on their current assessment of risk. Judge Stadtmueller separately discusses three attempts: hanging, cutting, and overdosing – without an attempt to link the behaviors – finding defendants' response to be reasonable in each individual instance. Judge Stadtmueller addresses the suicidal behavior as a separate issue from the failure to treat Balsewicz's dysphoria, although they were linked in the initial screening opinions. It is apparent to this writer that it would not be possible for Balsewicz to get past summary judgment over some dozen defense "declarations" without an expert who could refute the balkanization of her case. Judge Stadtmueller refused repeated motions for appointment of counsel, which proved so beneficial in *Mitchell*, when Skadden & Arps (Chicago) appeared on the appeal.

Finally, on the merits, Judge Stadtmueller found that Balsewicz failed to show retaliatory motive behind her removal from dialectical therapy, which was the primary retaliation claimed. There was temporal proximity between her removal and the filing of complaints, but Judge Stadtmueller accepted defendants' representation that it was Balsewicz's own behavior and lack of interest in dialectical therapy (Judge Stadtmueller faults Balsewicz for focusing too much on her "transgender issues" in therapy) that caused her removal.

When Balsewicz appealed the summary judgment (with the standard general statement of appeal of "all" issues), she also filed a motion to proceed *in forma pauperis*. She should probably have not done so, since she was entitled to file an appeal without an IFP motion because she had prior permission to proceed IFP in the district court. F.R.A.P. 24(a)(3). Judge Stadtmueller responded by certifying the appeal as "frivolous" because the motion did not describe the errors of law or fact that formed the basis of the appeal. *Balsewicz v. Blumer*, 2019 U.S. Dist. LEXIS (E.D. Wisc., April 9, 2019). Such specification is not required when there is prior approval, and Judge Stadtmueller does not otherwise explain the certification. In this writer's view, an appeal cannot be frivolous because of the reversal of summary judgment in *Mitchell*.

The Seventh Circuit immediately suspended the appeal, however, because there was neither a payment of the \$505 fee nor a grant of IFP status. No. 19-1619 (Order of 4/9/19). Balsewicz is now left with filing a motion in the Court of Appeals to proceed IFP, accompanied by a statement of points of appeal under F.R.A.P. 24(a)(5), and (hopefully) a request for counsel on appeal. The Seventh Circuit's opinion in *Mitchell* should obviously be front and center. Is Balsewicz, unlike Judge Stadtmueller, aware of it? ■

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.

Virginia Federal Judge Orders Damages Trial for Transgender Inmate on Claims of Denial of Health Care, Abuse, and Retaliation

By William J. Rold

It is hard to believe that this case came from the same judge who dismissively upheld summary judgment against transgender inmate Terah C. Moore (see report under "Prisoner Litigation Notes – Virginia" this issue of *Law Notes*), although Senior U.S. District Judge Norman K. Moon also signed this decision, sending transgender inmate Steven R. Delk's damages case to trial in *Delk v. Moran*, 2019 WL 1370880, 2019 U.S. Dist. 49950 (W.D. Va., March 26, 2019). Both inmates raised claims from incarceration at Virginia's Red Onion Prison, in the state's southwest toe. Initially, Judge Moon had allowed Delk to proceed against the prison psychiatrist (McDuffie), with leave to file an amended complaint against other defendants. *Delk v. Moran*, 2018 U.S. Dist. LEXIS 50534 (W.D. Va., March 27, 2018), reported in *Law Notes* (May 2018 at page 265).

In March of this year, Judge Moon issued two more decisions in Delk's litigation. The first, in *Delk v. Moran*, 2019 U.S. Dist. LEXIS 38165 (W.D. Va., March 11, 2019), granted McDuffie summary judgment. The second, about two weeks later, as cited above, sent other defendants to trial. *Law Notes* has been following the Delk case and developments for transgender inmates at the Red Onion Prison for over two years.

Originally, McDuffie took the unsuccessful position that he lacked personal involvement because he had not had much contact with Delk. By summary judgment McDuffie was arguing that he saw Delk promptly after

a delayed referral, and he convinced Judge Moon that his contact with Delk was sufficiently attentive to defeat deliberate indifference, even if he committed malpractice. This writer reviewed the summary judgment papers and other matters on the docket in PACER. McDuffie moved for summary judgment shortly after he lost his motion to dismiss. There appears to have been very little discovery. McDuffie and others diagnosed presumptive gender dysphoria, and McDuffie's "C.V." attached to his affidavit said he was qualified to treat it. Delk's request for an independent psychiatric examination was denied.

McDuffie's affidavit and its attachments say very little about treatment after 2016 on which to base summary judgment for McDuffie. In particular, there is slight support for Judge Moon's finding that McDuffie "continuously treated" Delk throughout her stay at Red Onion, where she was seen mostly by master's-level practitioners, according to the skeletal notes. Other defendants, however, did not fare as well in the second summary judgment decision. The trial is going to focus on the failure to refer Delk to McDuffie and Delk's allegations of abuse and retaliation.

Delk had sixteen claims at the time of summary judgment. Because of overlap or a finding that she had not exhausted administrative remedies under the Prison Litigation Reform Act, Judge Moon only fully considers five claims, but his analysis is substantively exhaustive. This article will not address claims of denial of procedural due process, religious liberty or special meals, on which Judge Moon granted defendants summary judgment. Judge Moon also analyzed parallel claims under the Virginia Constitution, but he declined to authorize trial on them either because the Virginia Constitutional provisions were not "self-executing" [i.e., did not provide a cause of action] or were co-extensive with federal analogous provisions. [Supreme Court of Virginia citations omitted.]

Turning to the medical claims, Judge Moon does not cite or apply the leading Fourth Circuit transgender prisoner case of *De'lonta v. Johnson*, 708 F.3d 520,

525 (4th Cir. 2013). He grants summary judgment to all medical defendants except Trent, an intermediate level provider, whom Delk claims refused to refer her to McDuffie for over a year and falsified her mental health records to show that Delk was "MH-0" – "no treatment no mental health needs" – although he knew her clinical presentation was otherwise the entire time. The provider's denials merely created a contested issue of material fact. Moreover, Trent could not rely on McDuffie's initial psychiatrist's findings as a defense, because they were based on a chart review of Trent's own allegedly false reporting. Because the dispute is about what actually happened, not deliberate indifference if it happened, Trent is also not entitled to qualified immunity under *Vathekan v. Prince George's County*, 154 F.3d 173, 180 (4th Cir. 1998).

Delk alleges that her sexual and racial harassment began by an officer Adams after Adams learned that Delk was receiving an LGBTQ magazine. It began with verbal harassment, which escalated until it occurred "every time" Delk tried to leave her cell. She filed a complaint against Adams. After that, Adams began fondling Delk during security searches. He threatened to rape her. According to Delk, Adams told her he was excited by her "resistance" and wrote false disciplinary charges. Subsequently, Delk alleges that Adams "viciously" raped her and forced her to engage in fellatio and anal intercourse, which caused "tearing" to her rectum. She complained about all of this.

After that, Adams charged Delk with refusing to exit her cell for a search. Delk denies she refused, and she claimed that Adams used OC (pepper spray) in two long bursts into her face, despite her asthma. Adams denied all of the pertinent allegations, except he said he used OC as a reasonable use of force.

Judge Moon again found a dispute as to material facts. In this writer's view, he was influenced in part by the absence of videotape of the cell extraction, when it is standard procedure to videotape such incidents. Defendants also overplayed their hand: they claimed that a nurse had authorized the use of OC despite the asthma. If this was so,

Delk argued, it supported her claim that the incident was a planned attack. Moreover, she said, if they had time to check with the nurse, they had time to get a video camera. Judge Moon found a jury question present under *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); and *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

Finally, Judge Moon found that Delk was entitled to a trial against Adams and another officer (Mullins) on claims that they retaliated against Delk through false disciplinary charges and denial of privileges: Adams, because Delk complained about his sexual advances and assaults; and Mullins, because Delk complained about Adams. Delk also complained that they adulterated her food and called her out as a "snitch." They said they had a basis for the charges and denied the rest. This is also heading to trial against Adams and Mullins. Delk's complaints were protected First Amendment activity, the retaliation would deter a reasonable person, and there was temporal connection – citing *Booker v. South Carolina DOC*, 855 F.3d 533, 546-7 (4th Cir. 2017) [other Fourth Circuit cases omitted].

It seems in this case that Judge Moon found Delk sufficiently credible on multiple points (or at least the remaining defendants not more credible) that a pro se transgender inmate got parts of her case to trial. One cannot expect a transgender breakthrough on the medical claim, since the deliberate failure of a mid-level provider to refer a patient to the doctor is not a test case. But the combination of claims and the setting are a unique opportunity for counsel.

The Virginia Attorney General continues to represent all remaining defendants, even Adams, at least for now. Trial is set for 9:30 a.m., before Senior Judge Moon on October 21, 2019 at Big Stone Gap (Really! – see 28 U.S.C. § 127(b)). Trial will be at the Campbell Bascom Slemph Federal Building – named for a six-term Virginia Congressman and secretary to President Coolidge, who graduated from VMI in 1891 with the highest grade-point average in the school's history – a records that stands today. Trial counsel is urgently needed in this case. ■

Kansas Appeals Court Holds One-Half of Former Same-Sex Couple Failed to Establish Parentage to Twins Who Lived with the Couple Prior to Separation

By Matthew Goodwin

The Kansas Court of Appeals rejected claims of parentage made by a lesbian woman to twins who lived with her and her former same-sex partner following the children's birth and prior to separation. *In Re W.L. and G.L.*, 2019 WL 1746838; 2019 Kan. App. Lexis 22 (April 19, 2019). Justice David Bruns wrote for the court.

Specifically, the court agreed with the trial judge, Crawford District Judge Richard Smith, that the petitioner, M.S., failed to adduce evidence that she was entitled to parental rights under the Kansas Parentage Act (KPA). In so holding, the court sided with the biological mother, E.L., and affirmed the lower court's ruling whereby M.S. was denied any role in the lives of the twins—W.L. and G.L.—who were the subject of the case. Much of the court's rationale for the holding focused on the absence of any written agreement between the two women or written acknowledgment of parentage executed in conformity with Kansas law.

Drawing from Justice Bruns's opinion, the salient facts were as follows. The two women began a romantic relationship in early 2012 which then ended in late 2015. They never married or entered into a civil union. Having discussed how each of them would like children, in the fall of 2012, M.S. purchased a three-month membership for E.L. to a sperm bank. Upon expiration of this first membership, E.L. purchased another membership to the same sperm bank. The women apparently logged onto a website together to view profiles of the potential donors, although their testimony at trial differed as to their respective involvement in this connection and as to M.S.'s participation in sperm-donor selection.

Eventually, in 2014, E.L. purchased semen from a donor whom she selected

at the sperm bank. M.S. may or may not have paid for some of this expense. E.L. became pregnant with the twins on the third insemination attempt, for which M.S. was present. Crucially, M.S. did not sign an insemination contract with the clinic where the inseminations took place and she was only present for some of E.L.'s subsequent pre-natal appointments. Nevertheless, E.L. sent out a pregnancy announcement with both women's names and pictures. At a baby shower the women opened gifts together.

When the children were born in late 2014, only their biological mother, E.L., was listed on the birth certificate, although E.L. specifically requested that the last name of the children on the certificate include M.S.'s surname as well as E.L.'s.

Following the birth, M.S. contributed significantly to the household finances and helped to pay for daycare, healthcare, and various other expenses. E.L.'s testimony was that she made all of the major parenting decisions despite this financial support.

The parties' relationship became strained during E.L.'s pregnancy and worsened after the twins' birth. M.S. drank heavily during the pregnancy as well as after. E.L. testified that the children were very ill in the spring of 2015 and M.S. went out to party rather than stay home to care for the children. Then in July of 2015 M.S. received a citation for DUI. Later that same year, while E.L.'s family was visiting, E.L. found M.S. having sex with E.L.'s sister's boyfriend in the parties' backyard after M.S. had again been drinking heavily.

E.L. ended the relationship in October of 2015 and thereafter moved with the children from Kansas to Pittsburg, Pennsylvania., apparently with M.S.'s knowledge. At that time,

E.L. had the children's birth certificates amended to remove M.S.'s surname. M.S. followed E.L. to Pittsburg and, for a time, E.L. and M.S. shared time with the children and they even spent some overnights with M.S. and M.S.'s parents, who also lived in Pittsburg.

E.L. testified that during M.S.'s time with the children in Pittsburg, M.S. began dating a new woman and behaved in a manner inconsistent with the best interests of the children, including but not limited to driving while intoxicated with the children. Sometime thereafter, M.S. returned to Kansas and filed a petition for parentage, alleging that the court should find her to have a parent-child relationship with W.L. and G.L. E.L. moved to dismiss the petition for lack of standing.

Under the KPA, M.S. had the initial burden of proof to show by a preponderance of evidence that she was entitled to a presumption of parentage. The court's analysis of proceedings below summarized the requirements of the KPA's presumption of parentage as (1) a biological parent "notoriously or in writing recogniz[ing] [parentage] of child, including but not limited to a voluntary acknowledgment . . . "; (2) adoption by a non-biological parent; (3) meeting fact-specific criteria of prior case law interpreting the KPA.

The court found it to have been harmless error that the trial judge failed to make a specific ruling on the question of whether M.S. met her initial burden to establish a presumption of parentage and further found M.S. received the benefit of the presumption when the district court "shifted the burden of proof to E.L. to overcome the presumption by clear and convincing evidence."

It was undisputed that there was no written agreement or acknowledgment of parentage in this case. Justice Bruns

agreed with District Judge Smith that the absence of a written agreement made it difficult to interpret the parties' intent and to thereby confer the status of parent on M.S. Wrote Bruns: "In other words, by showing that there was never a written agreement between the parties, we find that E.L. met her burden to overcome the presumption in favor of M.S. We also note that M.S. has not alleged the existence of an oral agreement in this case. Accordingly, we conclude that the district court's finding that 'there was never really a "meeting of the minds" . . . regarding parentage' is supported by clear and convincing evidence."

In addition to the absence of that written agreement, the court of appeals sided with the trial judge in determining that E.L. met her burden to overcome the presumption in favor of M.S., especially because the district court found E.L. to be more credible than M.S., and credibility determinations are not reviewable on appeal under Kansas law.

The trial court's decision also rested, in part, on a best interest analysis. M.S. contended this was error. M.S. argued, "courts strive to avoid harm to children; however, 'best interests' is not and cannot be the linchpin in making a determination of parentage." The court pointed to a line of cases holding the KPA confers upon children an interest in his or her parentage. "Consequently, although the extent to which a child's best interests should be considered in a particular case may be subject to debate, it is imperative that Kansas courts take into consideration the best interests of the child in cases such as this that affect the parent-child relationship."

Finally, M.S. advanced an argument that the trial court's application of the KPA to her case was not gender neutral and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. According to the court, to prevail on this argument M.S. would have had to show that similarly situated persons were being treated differently. It was on this threshold issue that the court found M.S. to have failed. The court ruled that

M.S. failed to " . . . show KPA treats 'arguably indistinguishable' classes of people differently.

The court went on, "[w]e do not find someone in a relationship with another person—whether the relationship is heterosexual or same-sex—to be similarly situated to a biological or adoptive parent for equal protection purposes." In other words, in Kansas, "Those who are not connected to a child by biology or adoption do not share [a fundamental constitutional right to make decisions about the upbringing of] . . ." children to whom they are not biologically connected or whom they have not adopted, even if they participated in planning for the birth of the child and served as a parent during the child's early years.

M.S. is represented by Valerie L. Moore, of Lenexa. E.L. is represented by Adam M. Hall and Sarah E. Warner, of Thompson Warner, P.A., of Lawrence. ■

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



Ohio Appeals Court Reaffirms Prohibition on Same-Sex Sexual Harassment

By Ryan H. Nelson

In *Fry v. Wheatland Tube, LLC*, 2019-Ohio-1453, 2019 Ohio App. LEXIS 1536 (Ohio Ct. App., Apr. 17, 2019), the Judge W. Scott Gwin (an elected official from the Democratic Party), writing for a divided panel of the Ohio Court of Appeals, considered the case of alleged rampant sexual harassment targeting a gay employee who had worked at a steel tube and pipe manufacturer in rural Ohio. Specifically, Howard Fry (represented by Lewis A. Zipkin, In Son J. Loving, and April M. Bensimone) alleged that Wheatland Tube, as well as the company's Shipping Leader, General Foreman, and General Manager of Operations (collectively represented by Bruce G. Hearey and Monica L. Lacks) violated Ohio state law by subjecting Fry to a sex-based hostile work environment and by firing Fry in retaliation for complaining about it; that Wheatland negligently retained and/or supervised its Shipping Leader; and that Wheatland intentionally inflicted emotional distress on Fry. Defendants moved for summary judgment, which the trial court granted. This appeal followed.

Fry's allegations of sexual harassment were startling. Among other things, Fry alleged that the Shipping Leader (another man who could direct Fry's work, but lacked the authority to discipline or terminate him) sexually harassed Fry for many years—allegedly grabbing Fry's face and pulling it toward his penis, telling coworkers that Fry was his "new bitch," massaging Fry's shoulders, patting Fry on the leg, placing his exposed penis on Fry's lower back while Fry was bent over, showing other employees his

exposed penis, asking an employee to show Fry her underwear, pulling down a female coworker's pants, asking Fry to purchase a dildo, grabbing Fry's breasts after he had put on some weight, putting a female employee's hand on his pants while he had an erection, "humping" Fry, referencing having sex with men, and rubbing Fry's knee after surgery and telling him that he knew how to "make it feel better."

Significantly, Fry alleged that he never told the Shipping Leader that he was gay, and Fry further alleged that the Shipping Leader himself was either gay or bisexual. Fry further alleged that he complained about the Shipping Leader's behavior many times to the General Foreman and requested that the General Manager of Operations move him to another shift, all to no avail. During the timeframe that Fry was complaining and requesting to be transferred, Fry allegedly violated the company's absences and tardiness policy enough times to warrant termination, so the company fired him. Yet, Fry claimed that his termination was retaliatory because the company had not fired another employee with similar attendance and tardiness problems. Finally, Fry alleged that the Shipping Leader's conduct had caused him emotional distress, forcing him to seek psychological help and resulting in him exhibiting symptoms of insomnia, anxiety, and depression.

After dismissing the sexual harassment claims against the Shipping Leader individually on the grounds that he was not Fry's supervisor and, thus, beyond the purview of Ohio's state employment antidiscrimination statute, the court went on to analyze the sexual harassment claim against Wheatland. Foremost, the court noted that Ohio law tracks federal law here, so a hostile work environment exists if plaintiff can show that the alleged harassment was unwelcome; based on sex; and sufficiently severe or pervasive to affect the terms, conditions, or privileges of his employment; and that Wheatland knew or should have known of the harassment and failed to take

immediate and appropriate corrective action. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). Applying that standard, the court concluded that the harassment, as alleged, was certainly unwelcome and Wheatland failed to take action despite knowing about the harassment from Fry's many complaints. Accordingly, the court's analysis focused largely on whether the harassment was because of sex and sufficiently severe or pervasive.

First, the court concluded that Fry had sufficiently alleged that the Shipping Leader's conduct was because of sex. The court reached this conclusion by determining that, in cases of same-sex harassment, the plaintiff could prove that the harassment was motivated by sexual desire (which was a material issue of fact here given the uncertainty surrounding the Shipping Leader's sexual orientation) or that the harassment targeted men and women differently in a mixed-gender workplace (which was also to be determined by a fact finder here). Second, the court noted that the "accumulated effect" of the allegations here could prove that the conduct was so severe and pervasive that it rendered Fry unable to effectively work and to request to be transferred. As such, the court reversed the trial court and denied Wheatland's motion for summary judgment on Fry's sexual harassment claim. Notably, the lone dissenting judge, the Patricia A. Delaney (another elected official from the Democratic Party) would have upheld the trial court, focusing her analysis on the fact that the Shipping Leader "engaged in offensive and vulgar behavior with both his male and female coworkers" and thereby concluding that the Shipping Leader's conduct was not because of Fry's sex.

With respect to Fry's retaliation claim, however, the court affirmed the trial court's grant of Wheatland's motion, because Fry had failed to present evidence sufficient for a fact finder to establish the necessary causal connection between Fry complaining about sexual harassment and his termination. To that end, the court recognized that Wheatland had

legitimately terminated Fry for violating the attendance and tardiness policy and that the other employee whom Fry alleged had not been terminated had dissimilar incidents of absenteeism and tardiness.

Next, the court resolved that Fry's negligent retention and/or supervision claim should also survive. Such a claim hinges, in part, on the "incompetence" of the harasser, whether the employer had knowledge of that incompetence and failed to try to stop it, and whether the manifestation of that incompetence proximately caused the plaintiff's injuries. Applying that standard, the court concluded that the Shipping Leader was allegedly incompetent given that his "behavior while on the job [was] inapposite to the tasks that [the] job involves and [] materially inhibit[ed] other employees from performing their assigned job tasks." Furthermore, Wheatland certainly was on notice of the Shipping Leader's actions, yet took no remedial action, and Fry alleges that the actions caused him emotional distress. Hence, the court held that the claim could proceed.

Finally, and for similar reasons, the court also resolved that Fry's intentional infliction of emotional distress claim should survive. Specifically, the court recognized that there was an open issue of material fact concerning whether the Shipping Leader's conduct was "so extreme and outrageous as to go beyond all possible bounds of human decency, and whether the conduct proximately caused Fry serious emotional distress."

In sum, this case serves as a reminder of the myriad ways in which same-sex workplace harassment can be actionable. In doing so, it underscores the U.S. Supreme Court's watershed holding in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), that Title VII hostile work environment claims can be viable even if the harasser and victim are of the same sex. ■

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

District Court Denies University Summary Judgment Against a Title IX Retaliation Claim

By Timothy Ramos

During April the U.S. Supreme Court announced that it will take on three major cases concerning discrimination against LGBT employees. (See lead story, above.) The court may finally rule on whether sexual orientation discrimination and gender identity discrimination are prohibited forms of sex discrimination under Title VII of the Civil Rights Act of 1964. Although Title VII focuses on workplace discrimination, the outcome of these cases will undoubtedly influence the interpretation of sex discrimination under other federal anti-discrimination laws, such as those regarding housing or education. Title IX of the Education Amendments of 1972 prohibits discrimination “on the basis of sex” by any federally funded education program or activity. Over the past few years, the Trump Administration has worked to undermine Obama-era guidelines protecting transgender students from discrimination; specifically, the Trump Administration argues that “sex” and “gender” should be narrowly construed to mean a person’s biological sex at birth. While the administration’s efforts are targeted towards transgender students, they would also leave more students without protection against sexual orientation discrimination.

On April 5, 2019, the U.S. District Court for the District of Maryland denied a motion for summary judgment by Bowie State University (BSU) against a Title IX retaliation claim brought by Kesslyn Brade Stennis. *Stennis v. Bowie State Univ.*, 2019 U.S. Dist. LEXIS 59085, 2019 WL 1507777 (D. Md. Apr. 5, 2019). Stennis formerly worked as an Assistant Professor in BSU’s Department of Social Work (DSW). She claimed that the Chief of the DSW, Dr. Andre Stevenson, retaliated against her after she voiced the concerns of several students who believed that they were being discriminated against on the basis of their gender and sexual orientation. Furthermore, Stennis claimed that Stevenson’s retaliatory

acts negatively affected her tenure application and professional standing. Ultimately, the court denied summary judgment for BSU because it found that: (i) liability for Stevenson’s retaliatory acts can be imputed to BSU; and (ii) in the alternative, there are genuine issues of material fact regarding Stennis’s retaliation claim.

In 2009, Stennis began working as a tenure-track faculty member at BSU, where she also served as the advisor for the student-run Social Work Club. Until 2013, she received positive performance reviews from Stevenson, who acted as her direct supervisor. The trouble began in the Fall of 2012, prior to a conference attended by Stennis, Stevenson, and a group of social work students. During a meeting, Stevenson required the students to sign documents stating that they were willing to share housing with two gay males. After the meeting, Stevenson admitted to Stennis that he was not comfortable with “the whole gay thing.”

Stennis witnessed more instances of Stevenson’s anti-gay bias over the next few months. In the Spring of 2013, Stevenson told Stennis that the DSW would not add a course about homosexuality on his watch because “he did not want his legacy to be that he introduced a class on some ‘gay***.’” After several members of the Social Work Club told Stennis their concerns about Stevenson’s hostility towards students based on their gender and sexual orientation, Stennis relayed those concerns to Stevenson in a September 2013 memorandum. Six days afterwards, Stevenson assigned a co-advisor to the Social Work Club because he considered Stennis’s action to be inappropriate.

Worried that Stevenson’s continued retaliation could affect her application for tenure, Stennis notified Elizabeth Stachura, the BSU Labor and Employee Relations Manager and the acting Title IX officer. Initially, Stachura’s only suggestion was that Stennis should speak with Stevenson directly and ask him for

“ways and areas” she could improve her performance. In response to Stennis’s subsequent complaints, Stachura merely suggested that Stennis speak to Dean Jerome Schiele and gave Stennis a copy of the Faculty Handbook which did not discuss how to pursue discrimination complaints.

By December 2013, Stevenson had removed Stennis from various departmental service activities, including her role as co-advisor of the Social Work Club. He also did not recommend her for tenure and formed a three-member committee that unanimously voted not to recommend her. Because Stevenson removed Stennis from various responsibilities, Schiele also did not recommend Stennis for tenure. Even so, BSU awarded Stennis tenure on July 1, 2014. However, due to ongoing retaliatory acts by Stevenson, Stennis resigned and took a tenured position at Coppin State University.

On May 5, 2016, Stennis filed suit against BSU alleging unlawful retaliation under Title VII, Title IX, and Maryland’s Fair Employment Practices Act. Though the district court dismissed all of Stennis’s claims, the U.S. Court of Appeals for the Fourth Circuit vacated that portion of the district court’s decision dismissing Stennis’s Title IX retaliation claim as it pertains to Stevenson’s attempts to deny her tenure. See *Stennis v. Bowie State Univ.*, 716 F. App’x 164 (4th Cir. Dec. 27, 2017); see also *Stennis v. Bowie State Univ.*, 236 F. Supp. 3d 903 (D. Md. Feb. 16, 2017). On remand, BSU alleged that it was entitled to summary judgment because: (i) there was insufficient evidence to impute liability to BSU for Stevenson’s retaliatory acts; and (ii) in the alternative, no evidence existed that Stevenson retaliated against Stennis because she reported alleged discrimination.

U.S. District Judge Paula Xinis first held that summary judgment was not appropriate because liability can be imputed to BSU. Title IX prohibits

recipients of federal education funding from retaliating against a person who speaks out against sex discrimination. A recipient institution is liable under Title IX when (i) an official with the authority to address the alleged retaliation and to institute corrective measures (ii) has actual knowledge of retaliation in the institution's programs and (iii) fails to adequately respond. The failure to adequately respond must amount to deliberate indifference, as such indifference would be clearly unreasonable. Judge Xinis found that Stachura and Schiele were both officials who had the authority to address instances of retaliation; notably, Stachura was the acting Title IX officer. Stachura and Schiele also had actual knowledge of Stevenson's retaliatory attempts to derail Stennis's tenure because Stennis had complained to both of them multiple times. Judge Xinis then concluded that a reasonable trier of fact could determine that Stachura and Schiele failed to adequately respond to Stennis's complaints. Their failure to initiate, contribute to, or participate in any formal or informal investigation of Stennis's complaints could amount to deliberate indifference. Additionally, Stachura's mere suggestions to Stennis—to speak to Stevenson and Schiele, as well as review the Faculty Handbook—may not convince a reasonable trier of fact that BSU was not deliberately indifferent. Thus, Judge Xinis held that summary judgment was not appropriate because liability for Stevenson's retaliatory acts could be imputed to BSU.

Next, Judge Xinis rejected BSU's contention that, alternatively, it was entitled to summary judgment because Stennis failed to provide sufficient evidence to support her retaliation claim. Under Fourth Circuit precedent, a plaintiff seeking to establish a Title IX retaliation claim must follow the same standard laid out under Title VII. *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994). Thus, the plaintiff must make a prima facie showing that: (i) she engaged in a protected activity; (ii) the employer took an adverse employment action against her; and (iii) a causal connection existed between the protected activity and the adverse employment action.

After the plaintiff establishes the elements of her prima facie case, the burden shifts to the employer to proffer evidence of a legitimate, non-retaliatory reason for its action. If the employer does so, the burden shifts back to the plaintiff to demonstrate that the employer's proffered reason is pretext for retaliation. This author notes that the Fourth Circuit's adoption of Title VII's standard to a Title IX retaliation claim exemplifies the connectedness between the federal antidiscrimination statutes; an interpretive ruling for one statute often influences subsequent interpretation of the other statute. Thus, the Supreme Court's upcoming rulings on the meaning of "sex" under Title VII will strongly influence interpretation of the word under Title IX.

Judge Xinis's opinion focuses specifically on whether Stennis sufficiently alleged that Stevenson took adverse employment actions against her, and whether she sufficiently alleged that Stevenson's reasons for those actions were pretext. First, Judge Xinis looked at Stevenson's decision to assign a co-advisor to the Social Work Club after Stennis delivered her memo to him. Although Stevenson claimed to have done so "in an attempt to become more transparent and collegial," he clearly admitted that Stennis's assessment influenced his decision to assign a co-advisor. Next, the judge looked at Stevenson's removal of Stennis as a co-advisor for the Social Work Club. BSU contended that Stennis's removal was due to an incident during which her husband called the University President's office on behalf of a social work student complaining about an advisement matter; Stevenson and Schiele deemed his action to be inappropriate. Even so, Judge Xinis found that a reasonable trier of fact could find that this incident bore no rational relationship to Stennis's role as a co-advisor of the Social Work Club. Furthermore, Stevenson's decision to reassign Stennis to another student organization during the Fall 2014 semester could support a finding that Stevenson removed Stennis as a retaliatory attempt to end her tenure chances. Lastly, Judge Xinis looked at Stevenson's recommendation not to award tenure to Stennis. The judge

found that the credibility of Stevenson's recommendation was called into question because it ran at odds with the University ART Committee, the Provost, and the President's recommendation and ultimate decision to award tenure to Stennis. Furthermore, Stevenson's views on Stennis's qualifications changed after she presented her memo to him. Thus, Judge Xinis held that summary judgment was inappropriate because there were genuine issues of material fact for a jury to decide.

Interestingly, BSU did not argue that it was entitled to summary judgment because Stennis failed to allege that she engaged in protected activity. Although Stennis alleged to complain of Stevenson's discrimination on the basis of gender and sexual orientation, Judge Xinis's factual background only recount instances of Stevenson's anti-gay bias. BSU could have argued that Stennis only complained of sexual orientation discrimination and, under a narrow interpretation of "sex," did not complain of an employment practice that violated federal antidiscrimination law. Yet, the Fourth Circuit also holds that a plaintiff does not need to establish that a complained-of employment practice actually violated the statute; it is enough that the plaintiff had a good faith belief that the practice violated the antidiscrimination statute. In this case, one could find that Stennis had a good faith belief that Stevenson's sexual orientation discrimination violated a federal statute prohibiting discrimination "on the basis of sex." So here we are again, at the question of whether sexual orientation discrimination is inherently a form of sex discrimination under federal law.

Stennis is represented by Nathaniel David Johnson of The Johnson Law Group LLC in White Plains, Maryland. BSU is represented by Christopher Bowie Lord of the Office of the Attorney General, Educational Affairs Division in Baltimore, Maryland. BSU is also represented by Matthew Paul Reinhart of Townson University, Office of the General Counsel in Baltimore, Maryland. ■

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

Congressional Felon Suspended from Law Practice for Two Months for Lying Under Oath About Despicable Mailing to Lesbian Attorney

By Arthur S. Leonard

Standards of “good moral character” are laughably low in Kentucky, apparently, in light of the repeated treatment by the Kentucky Supreme Court of Carroll Hubbard, Jr., a former member of the U.S. House of Representatives, who was suspended from law practice for 60 days for a more recent outrage in *Hubbard v. Kentucky Bar Association*, 2019 Ky. LEXIS 151, 2019 WL 1747096 (Ky. Sup. Ct., April 18, 2019). This relatively light penalty for several instances of perjury in connection with his repeated denial of having sent an offensively homophobic missive to a lesbian attorney represented opposing party in a case he was litigating, is a reflection of the Kentucky court’s repeated indulgence of a person whose history suggests that the court’s kind-heartedness may be a bit misplaced.

Hubbard, born in 1937, was admitted to practice in Kentucky in 1962 after graduating from the University of Louisville Law School. He went into politics a few years later, winning election to the Kentucky State Senate, where he served 1968-1975. Then he was elected to the U.S. House of Representatives, where he served from January 3, 1975, through January 3, 1993. He lost renomination in 1992 after becoming embroiled in the “Rubbergate” banking scandal, which led to his guilty plea to violations of federal campaign finance laws and two years in prison (with resultant disbarment). Amazingly, he was subsequently reinstated to law practice by the Kentucky Supreme Court, despite a unanimous contrary recommendation by the Kentucky Bar Association board of directors. The Supreme Court unanimously found that despite his admitted violations of federal felony statutes, he was of the necessary “good moral character” to practice law in Kentucky. One of the Kentucky justices, now retired, told a reporter, “He did a crime but he did his time,” and suggested that he had may have had a First Amendment right to send the letter to

Bobo. Hubbard subsequently tried twice more to run for the Kentucky Senate, coming incredibly close to election in 2006 (58 votes short). Kentuckians, like their supreme court justices, evidently are forgiving where campaign finance violations (among other things, spending donated campaign funds on various personal expenses) are concerned.

And now we have Hubbard’s conduct while representing some parties in a “heated” grandparent visitation case in McCracken County Family Court, facing Attorney Alisha Kay Bobo, an out lesbian. Bobo had moved to “disqualify Hubbard from the case in October 2017 on the basis that he had become a fact witness,” states the unsigned Kentucky Supreme Court opinion. “Hubbard disagreed. The next month, Hubbard clipped a picture of Bobo and her wife (Lisa Thompson Bobo) from a newspaper, drew an arrow to the couple, and wrote ‘2 pitifull [sic.], fat, ugly lesbians’ beneath the photograph, addressed an envelope to Bobo and her wife, and mailed it to them.” Attorney Bobo raised the issue of the missive she had received at a hearing in the case on January 31, 2018. Family Court Judge Deanna Wise Henschel asked Hubbard if he sent the letter, and he denied that he had done so. “Then,” wrote the court, “Hubbard turned to Bobo on two separate occasions and denied sending the photograph to her and her wife. When Judge Henschel asked Hubbard yet again, he maintained his denial of sending the clipping to the Bobos. Finally, Hubbard was sworn in after being called as a witness by Bobo. Under oath, Hubbard denied that it was his handwriting on the envelope containing the photograph and addressed to the Bobos.” In a news report about the incident, the *Louisville Courier-Journal* (February 8, 2018), reported that subsequently Hubbard refused to answer further, invoking his 5th Amendment right against self-incrimination. Bobo then

filed a disciplinary complaint against Hubbard, which prompted Hubbard to confess by self-reporting his misconduct to the Kentucky State Bar, admitting that he had violated several statutes and disciplinary rules. He also admitted that he subsequently filed a false disciplinary complaint against Judge Henschel with the Judicial Conduct Commission, which he admits was “retaliatory and vindictive,” and then he tried to smear the judge by asking another attorney who regularly appeared before Judge Henschel whether she knew that the judge had been subpoenaed to a “judicial ethics hearing.”

After all this, he managed to negotiate a settlement of the ethics charges against him with the Kentucky Bar Association by agreeing to take a 60-day suspension, which strikes us as a slap on the wrist for somebody whose attestation by the Kentucky Supreme Court as being “of good moral character” seems to be decisively disproven. The court stated, “After examining our case law, we agree with the parties that a sixty-day suspension from the practice of law is the appropriate sanction. For example, in *Kentucky Bar Association v. Jacob*, 950 S.W.2d 832 (Ky. 1997), we suspended the attorney for thirty days for (among other counts) knowingly making a false state of fact or law to a tribunal. Given the additional charges to which Hubbard admits in the case at bar and the fact that the parties agree on the sanction, we accept the negotiated sanction of a sixty-day suspension from the practice of law with conditions.” The conditions are that Hubbard write apologies to everybody concerned, provide copies of the apologies to the court clerk and the Office of Bar Counsel within thirty days, and pay all costs associated with the disciplinary proceedings (which seem to be done pretty cheaply in Kentucky, since the court mentions the sum of \$1,062.65). And maybe it is time for him to retire . . . ■

Federal Judge Allows Civil Rights Case for HIV+ Inmate Who Dies from Sepsis from Untreated Dog Bites While in Jail Infirmary

By William S. Rold

This is one of those prisoner cases that passes the “make the judge throw up” test for stating a claim. Max Gracia, Jr., suffered severe multiple dog bites to both hands and legs during his arrest. After emergency room treatment, he was confined in the infirmary of the Orange County (Florida) Jail. He died four days later. “An autopsy report concluded that the manner of his death was homicide, due to his incarceration, and that the cause of death was ‘septic shock complicating infected dog bite wounds’ with HIV as a contributory factor.” Gracia’s parents, Willine Bryant and Max Gracia, Sr., sued as representatives of his estate in *Bryant v. Orange County*, 2019 U.S. Dist. LEXIS 69121, 2019 WL 1787490 (M.D. Fla., April 24, 2019). U.S. District Judge Gregory A. Presnell denied summary judgment to the Jail’s physician/medical director (Robert J. Buck, III) and to an infirmary supervisory nurse (Karen Clairmont), finding contested issues of deliberate indifference for a jury trial. He granted summary judgment to Orange County on pattern and practice claims.

Buck saw Gracia on admission to the infirmary (which Judge Presnell says was unusual and due to nursing shortage that day). Buck renewed Gracia’s seizure medication and prescribed antibiotics and pain medication. Gracia had been taking Atripla for HIV. Buck noted that it “should” be ordered if Gracia “had been compliant in the community”; but he did not order it. In fact, he “never saw or inquired about [Gracia] again.” All of Gracia’s “care” was “managed” by nursing or non-physician staff until his death.

On the second day in the infirmary, Gracia’s dressings were changed, and it was noted that his wounds were “reddened” with serosanguineous (blood and pus) drainage. Clairmont did not take vital signs or perform any other physical assessment. The same

presentation and non-“evaluation” occurred the next day, although by then Gracia was vomiting coffee-ground-like emesis. His chart entry said: “No signs or symptoms of infection.” By the third day, the drainage was “large” and “bloody,” and Gracia was still vomiting and complained of dizziness and weakness. Vital signs were finally taken after 55 hours, and he had tachycardia (rapid heart-beat). Vital signs were never taken again.

That night, Gracia “moaned loudly” and fell to the ground. His chart read that he “refused to get up for his evening medications.” Officers tried to move Gracia to a cell with a camera, but he was unresponsive. Defendant Clairmont said he was “faking”; she wrote he “refus[ed] all treatment.” Gracia was given a ticket for refusing to follow orders in connection with the cell movement. Officers tried to interview him about the ticket, but he “was groaning lethargically” on the floor of the new cell to which he had been dragged. They noted Gracia was “unable to reply” to their questions. By morning, an officer informed Clairmont that Gracia was not breathing. She noted that he had no pulse or respirations. EMS took Gracia to a regional medical center, which pronounced him dead.

Defendant Buck tried to defend based on the “brevity” of his interaction with Gracia. This argument proved to be his undoing. Based on his intake, Buck knew that he had an HIV+ patient, with seizures and multiple severe dog bites, at risk for sepsis. “Buck examined an HIV positive patient with a severe dog-bite wound and deliberately declined to play any active role in his subsequent treatment. Viewing the facts in the light most favorable to the Plaintiffs, that behavior is the very essence of deliberate indifference,” wrote the court, citing *Taylor v. Hughes*, 2019 WL 1461316, at *3 (11th Cir. Apr. 3, 2019).

Buck’s failures in his role as medical director are also going to trial. He admitted that he set and reviewed policies. He knew that the infirmary had a “burdensome” nurse-to-patient ratio (sometimes as high as 1:40, when evidence showed that ratios of at least 1:6 or 1:8 were needed for close monitoring). Clairmont said that she had no standards for when to call a physician and had never contacted a physician “on call” while she worked in the infirmary.

Judge Presnell found a case against Buck as a physician and as medical director. “While understaffing alone may not be sufficient to show a custom or policy resulting in deliberate indifference, a jury could conclude that persistent, extreme understaffing, when coupled with the failure to involve doctors, would be. The Plaintiffs have met their burden of showing genuine issues of material fact as to deliberate indifference by Defendant Buck both as a medical provider and director.”

Clairmont tried to defend on the grounds that she subjectively believed that Gracia was faking and therefore lacked the subjective intent necessary for deliberate indifference. Stressing the inconsistency between Gracia’s presentation and Clairmont’s chart notes, Judge Presnell wrote: “Ignoring an apparently serious medical condition because of an unfounded belief that the patient is malingering can certainly constitute deliberate indifference.” See, e.g., *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002) (refusal to treat pain based on good faith belief that patient is malingering is a question for the jury).

Clairmont was an “experienced nurse” with specific knowledge of Gracia’s condition. Plaintiffs’ expert said that Gracia’s “condition worsened steadily” over days and that his kidney failure, adrenal hemorrhage and esophageal disintegration as shown by

the coffee ground remains of vomited blood were plainly evident. Clairmont also said that she “watched” Gracia on a video monitor once he was “transferred” to the new cell and that she never saw him move. Yet, she did not respond to this inactivity, although it was the apparent reason for placing a camera to observe him. Judge Presnell called the allegations against her “classic indifference.”

It would seem to this writer that Judge Presnell erred in dismissing the *Monell* claim against Orange County, since the pattern and practice of understaffing, physician non-involvement, and lack of infirmity patient monitoring are found sufficient as to the individual defendants; and they constitute evidence of a pattern and practice. A review of this decision on PACER reveals that Judge Presnell found only 3 other death cases attributable to such failures in the last thirty years and that was too few to satisfy *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658 (1978), and its progeny. This will likely be addressed in the event of an appeal.

Bryant and Gracia are represented by NeJame Law, PA, Orlando. ■

Lesbian NYC Police Officer Suffers Dismissal of Sexual Orientation Discrimination Claims Despite Colleague’s Disgustingly Offensive Harassment

By Arthur S. Leonard

Lisette Torres, a former New York City policy officer, sued the City of New York claiming that for several years towards the end of her 18-year tenure in the Department, she was the victim of sexual orientation discrimination, hostile work environment, and retaliation. In an April 22 ruling, U.S. District Judge Lorna G. Schofield granted the City’s motion to dismiss the discrimination and hostile work environment claims. *Torres v. City of New York*, 2019 U.S. Dist. LEXIS 68168, 2019 WL 1765223 (S.D.N.Y.) The City did not move to dismiss the retaliation claim, for the obvious reason that based on the pleadings, as summarized by the court, the City will probably lose that claim on the merits.

They really have to do a better job of educating police officers with supervisory and managerial responsibility about refraining from taking adverse actions against officers shortly after they file discrimination charges. It’s not rocket science! But in reading numerous opinions in employment discrimination cases, it seems that employees who refrain from complaining about discrimination for fear of suffering retaliation for complaining are not being paranoid – they are being pragmatic.

In this case, Officer Torres, who was not then generally “out” in the Department, began to suffer discrimination when she brought her domestic partner to an “off-duty police social event” in June 2013. While Torres, her partner Lisa Velez, and another officer, Migdalia Chu, were in the restroom, “Chu saw Velez leave the restroom and said, ‘You should have used the men’s bathroom, bitch.’” A supervising officer was present but did nothing.

“After the June 2013 incident, when Plaintiff was in common precinct areas with Chu, Chu would make grunting and animal noises direct at Plaintiff,” wrote

Judge Schofield. “When Plaintiff notified her supervisors, they offered to move Plaintiff’s locker into her office to avoid contract with Chu.” Instead, of course, of taking any sort of disciplinary action against the offending Chu because, naturally, the complaining officer is the problem in the eyes of improperly trained supervisors.

The next noted incident took place on August 10, 2015, when Torres and Chu were both on duty at the 48th Precinct. “When Chu saw Plaintiff, Chu began making grunting and animal noises and called Plaintiff a ‘filthy animal,’” according to Chu’s Complaint. “In front of several officers Chu repeatedly yelled ‘go eat pussy, you lesbian bitch,’ and another officer was forced to restrain Chu to prevent her from attacking Plaintiff. Chu’s public comments forced Plaintiff to come out as gay to her colleagues.”

A few days later, Torres discussed with two sergeants filing a complaint with the Department’s Office of Equal Employment Opportunity (OEEEO), but they discouraged her, undoubtedly aware that in the NYPD filing a discrimination complaint invites retaliation . . . Either heedless of this or assuming that her good record of long service would protect her, Torres filed the complaint anyway and – guess what? “After filing her complaint, Plaintiff started experiencing ‘antagonistic treatment by her peers and supervisors.’ Plaintiff was reassigned from her regular night-shift to a less lucrative day shift, her requests to be scheduled on different shifts from Chu were ignored and she was denied overtime after previously working approximately 25 hours of overtime per month. Plaintiff was also denied participation in community engagement events, including Harmony Day, in which she had been a leader for several years.”

The OEEEO offered mediation to try



to get Chu and Torres to settle their differences, but after two apparently fruitless sessions, Torres decided she wanted a more formal hearing. “Around December 2015, after OEE0 conducted an incomplete investigation, Plaintiff received OEE0’s determination that her complaint did not ‘rise to the level of employment discrimination in the workplace’ and further referred ‘the matter to the Commanding Officer [in their precinct] for appropriate attention and further corrective action to preclude a reoccurrence.’” Torres felt compelled to seek a transfer out of the precinct, resulting in going to the bottom of the seniority list in a new precinct and loss of her position as Auxiliary Police Coordinator. Also, the loss of her overtime opportunities caused her to postpone her planned retirement for financial reasons.

Sound like a good case of sexual orientation discrimination and hostile environment under Title VII, the NY Human Rights Law, and the NYC Human Rights Ordinance? Not to Judge Schofield, who granted the City’s motion to dismiss these claims.

The judge concluded that Torres’s Complaint “does not sufficiently allege that Plaintiff’s sexual orientation was a motivating factor in the alleged adverse employment actions.” Technically true, as far as that goes. “Adverse employment actions” of a tangible nature, i.e., emanating from the Department, such as denial of overtime and unwanted shift change, were apparently due to her complaining about the discrimination and harassment, not directly because of her sexual orientation. Thus, as we noted above, the City did not move to dismiss the retaliation count, since on that they don’t have any apparent defense.

As to the hostile environment harassment claim, it is inescapable that at least *Chu’s* harassment was motivated by Torres’ sexual orientation. However, Judge Schofield concluded that the handful of incidents described were inadequate to meet the “severe and pervasive” requirement under Title VII and the State law. She said that two incidents over the course of two years were insufficient to constitute harassment that was “severe and pervasive,” apparently overlooking the allegation that Chu taunted Torres with

her disgusting animal noises at other times as well, to the point where when it became clear that the Department was not going to do anything serious about it (which might include disciplining Chu for her unprofessional conduct and transferring *her* away from Torres), Torres sought a transfer that involved personal and financial sacrifice. Not enough for Judge Schofield, however.

Also, although the City law expressly extends broader protection, Schofield felt that even there, it was inappropriate to fix liability on the City (i.e., the NYPD) for Chu’s misconduct. “The hostile work environment claim under NYCHRL is dismissed because the Complaint does not allege that Chu’s conduct is attributable to Defendant,” wrote Schofield. “The Complaint contains no allegation that Defendant ‘acquiesced’ in Chu’s discriminatory comments, and as discussed above, the Complaint states that Defendant took corrective action by facilitating mediation. As the Complaint fails to allege facts sufficient to impute Chu’s conduct to Defendant under federal law, it also fails under the stricter NYCHRL standard.” This seems to fall rather short of the City Council’s articulated instruction to federal courts that Title VII and New York Human Rights Law precedents should not be used to analyze hostile environment claims under the City’s Human Rights Law, and conveniently overlooks the fact that lots of “acquiescence” to Chu’s misconduct is implied by the Complaint.

The judge did note, however, in summarizing her ruling: “For clarity, the retaliation claims, which were not the subject of this motion, remain.” Now the City will likely attempt to settle the case, having achieved dismissal of the discrimination and hostile environment claims and thus likely reduced its financial exposure.

Torres, “on behalf of herself and other similarly situated individuals,” is represented by Erica Tracy Kagan and Yetta G. Kurland of the Kurland Group, New York, N.Y., and Kathleen Belle Cullum, Indiana Legal Services, Indianapolis. (Yes, we wondered why an Indiana legal services attorney would be co-counsel in this case, but have no basis for speculation.) This frustrating decision seems ripe for appeal to the 2nd Circuit. ■

Federal Magistrate Recommends Dismissal of Harassment Claims of Gender Non-Conforming Inmates in Women’s Prison; Allows Claims of Excessive Force and Retaliation

By William J. Rold

Stacy Rojas, Ivett Ayestas, and Sarah Lara [plaintiffs] present as “gender non-conforming and/or queer individuals and . . . survivors of sexual trauma and violence.” They all shared a cell at the Central California Women’s Facility [CCFW], when events giving rise to their lawsuit began. U.S. Magistrate Judge Jennifer L. Thurston screens their complaint of harassment, brutality, and retaliation in *Rojas v. Brown*, 2019 U.S. Dist. LEXIS 71998, 2019 WL 1902591 (E.D. Calif., April 29, 2019), and she recommends that they be allowed to proceed on claims of excessive force and retaliation against a number of defendant officers. The lengthy opinion (over 10,000 words) is a good road map of claims against abusive officers. This article will focus on the claims that survived and lost, along with notable case law, and how Judge Thurston handled allegations of gender identity and sexual orientation harassment.

Beginning with the harassment, the plaintiffs endured almost daily verbal slurs and epithets, including statements that the plaintiffs needed to “learn” what men really do, which the plaintiffs took as sexual threats. Judge Thurston did not find the verbal harassment to be actionable under the Eighth Amendment, relying mostly on older case law denying a cause of action for “mere verbal harassment,” such as *Austin v. Terhune*, 367 F.3d

1167, 1171 (9th Cir. 2004). There is little recognition of a space between words and excessive force in this decision, although plaintiffs endured repeated touching and enforced nudity.

Judge Thurston applied a high standard for actionability: “severe.” Again, she cited mostly older decisions, except for *Watison v. Carter*, 668 F.3d 1108, 1112-3 (9th Cir. 2012), where a male officer’s rubbing a male inmate’s thigh, smiling in a sexual manner, and laughing was not “severe” and did not state a cause of action. *Watison* distinguished the *en banc* affirmation of an injunction against male officers’ conducting routine searches in the Washington State women’s prison for victims with post-sexual assault trauma – *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) – on the grounds that the injunction was justified in *Jordan* based on the women’s “shocking histories.” 668 F.3d at 1113. Judge Thurston does not cite *Jordan* (and it seems difficult to distinguish on the pleadings), and her opinion appears to be rooted in a binary theory of sexual harassment that recognizes neither the plaintiffs’ gender non-conformity nor their history of sexual assault.

Judge Thurston relies heavily on *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997), citing it five times. *Boddie*’s holding on this point was substantially over-ruled by *Crawford v. Cuomo*, 796 F.3d 252, 259 (2d Cir. 2015). Finding even a single sexual fondling to present constitutional questions, the Second Circuit noted the impact of the Prison Rape Elimination Act and observed that “the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment.” 796 F.3d at 260. Judge Thurston does not cite *Crawford* and its practical “over-ruling” of *Boddie*.

One plaintiff suffered a guard’s stomping on her breast. Because of the violence of the force and the bruising, Judge Thurston found this incident to collapse into the claims of excessive force that she allowed to proceed. The exhaustive opinion does not really address the issue of sexual touching that is objectionable within the meaning of

Crawford but is short of excessive force under *Hudson*, discussed below.

Plaintiffs also objected to their forced nude exposure to male officers. They were strip searched by men and forced for hours to wear muumuus that were oversized and fell off their shoulders while they were cuffed, exposing their naked bodies underneath. In this writer’s view, Judge Thurston’s opinion does not make room for the notion (implicit in a contemporary reading of *Jordan*) that biological women who present as transgender men with a history of sexual violence could have legitimate objections to searches by or nude exposure to male heterosexual officers.

Judge Thurston carefully parses the excessive force claims of each plaintiff against each defendant, allowing several to proceed under *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992). These involved slamming non-resisting plaintiffs to the floor, stomping on their breasts, grinding boots into their backs after cuffing (“boot burns” in prison slang), hitting faces on toilets, and cutting off clothing with a scissors for no penological reason.

Officers who did not themselves engage directly in the brutality remain as defendants if they were what Judge Thurston called “integral participants,” citing *Boyd v. Benton Cty.*, 374 F.3d 773, 780 (9th Cir. 2004). Such defendants are more than mere bystanders who fail to intervene. One example is the officer who handed the scissors to the officer who cut off the clothing.

This theory of liability seems unique to the Ninth Circuit. Elsewhere, bystander officers risk exposure for failing to intervene, even if they are not “integral participants.” *Randall v. Prince George’s County*, 302 F.3d 188, 203-4 (4th Cir. 2002); *Smith v. Messenger*, 293 F.3d 641, 650-1 (3d Cir. 2002); *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994); cf. *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (must have reasonable opportunity to intervene). Judge Thurston found cuffing alone by one named defendant to be inadequate for “integral participation,” although

this officer was a bystander under other circuit’s tests – and the events of excessive force that occurred thereafter were made easier by the cuffing, so (like the officer who handed off the scissors) it seems the cuffing officer should have stayed in the case even under Ninth Circuit rules. No further explanation is given.

Judge Thurston also recommended that retaliation claims proceed against the officers who used excessive force to punish the plaintiffs for complaining about their harassment. Judge Thurston noted that, although neither the Supreme Court nor the Ninth Circuit has ruled that verbal complaints constitute activity protected against retaliation by the First Amendment, she wrote that U.S. District Judge Dale A. Drozd had earlier ruled in this case that verbal complaints were protected. [Note: Judge Drozd over-ruled Judge Thurston on this point, so it is the law of the case. His decision in PACER, citing four district courts in the Ninth Circuit and district courts in Colorado and Michigan, is at Docket Entry 53 in 17-cv-1514 (E.D. Calif., 3/14/19).] Judge Thurston did not find the plaintiffs’ cell searches to be temporally related to their complaints and recommended dismissal of the search claims.

Finally, plaintiffs tried to proceed with a claim against the California Corrections Secretary and the CCFW Warden for inadequate hiring, training, and supervision of the defendant officers against whom claims remained. Judge Thurston noted that, despite a request in the ruling dismissing the First Amended Complaint that more specificity be plead on the supervisory claims, it was not forthcoming. She found claims against the Secretary for hiring, training, and supervision to be “dubious.” Moreover, there was not sufficient identification of policies, practices, and patterns of unconstitutional behavior attributable to the warden to keep her in the case.

Because Judge Thurston was screening a second amended complaint drafted by counsel, she recommended denial of further amendment as futile as to the dismissed claims. Plaintiffs are represented by attorneys from Siegel & Yee, Oakland. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. SUPREME COURT – LGBT-related cert petitions were still pending at the Supreme Court at the end of April in *Doe v. Boyertown Area School District*, No. 18-658 (Petition filed Nov. 2018) and *Klein v. Oregon Bureau of Labor and Industries*, No. 18-547 (Petition filed Oct. 2019). The Boyertown case is a lawsuit by some cisgender students backed by a religious litigation group challenging the constitutionality of the school district’s decision to follow Obama Administration guidance on treatment of transgender students. Plaintiffs claim a violation of their constitutional privacy rights and creation of a hostile environment in violation of Title IX by the presence of transgender students in restrooms and locker rooms consistent with their gender identity rather than their sex as identified at birth. Klein is a “gay wedding cake case” that is factually parallel to Masterpiece Cakeshop, giving the Court a second chance (if it wants one) to confront the question whether bakers with religious objections to same-sex weddings may be held to violate public accommodations laws banning sexual orientation discrimination, or whether their refusal of such business is protected by the 1st Amendment.

U.S. COURT OF APPEALS, 4TH CIRCUIT – On April 18 the government filed an appeal to the 4th Circuit in *Roe v. Department of Defense*, in which U.S. District Judge Leonie M. Brinkema issued a preliminary injunction on February 15 to put a hold on the Air Force’s policy of discharging HIV-positive airmen based on a spurious and

non-scientific evaluation of their fitness to serve. The district court opinion is published as *Roe v. Shanahan*, 359 F. Supp. 3d 382 (E.D. Va. 2019). Of course, as prerequisite to issuing the injunction, the judge found that the plaintiffs have a good case under the Administrative Procedure Act and the 5th Amendment. The biggest potential stumbling block would be traditional judicial deference to military expertise in personnel matters, but the Defense Department has never really manifested much expertise worth deferring to when it comes to HIV.

U.S. COURT OF APPEALS, 4TH CIRCUIT – In a *per curiam* opinion, a 4th Circuit panel affirmed a decision by U.S. District Judge Elizabeth Kay Dillon to grant summary judgment to employer Capstone Logistics on Thomas Dooley’s claim of sexual harassment by his supervisor, Curtis Howe, and judgment as a matter of law on his claim that the company retaliated against him for accusing Howe by firing him. *Dooley v. Capstone Logistics*, 2019 U.S. App. LEXIS 11091, 2019 WL 1716978 (4th Cir., April 16, 2019). The opinion does not go into detail about the facts, but concludes that summary judgement was due under the Supreme Court’s same-sex harassment precedent, *Oncale v. Sundowner Offshore*, 523 U.S. 75 (1998), because Dooley did not provide any evidence either that his harasser was gay, that the harasser treated Dooley harshly because Howe was hostile to men in the workplace, or that Howe treated Dooley worse than women. Thus, said the court, Dooley “failed to establish that Howe’s alleged harassment was on the basis of his sex.” This misstates the *Oncale* holding, in which the court suggested these three methods of proving same-sex harassment was due to the victim’s sex but did not say they were the only method of proof, but lower courts tend to apply the “three-methods” test with undue rigidity. As to the retaliation claim, noting the

Supreme Court’s standard in *University of Texas v. Nassar*, 570 U.S. 338 (2013), that retaliation plaintiffs under Title VII must show that their Title VII-protected activity was the but-for cause of the alleged retaliation, the court said it was not “persuaded” that the district court erred in granting judgment, because Dooley’s *only* trial testimony on the issue was that two reasons for firing him were proffered, and that “a coworker” testified “about an incident that Capstone proffers precipitated the firing for a non-retaliatory reason.” Under the Supreme Court’s unduly narrow interpretation of the anti-retaliation provisions (in a 5-4 decision over vigorous dissents), plaintiffs are not protected from retaliation unless there is no question of mixed motives or dual motives in connection with the adverse personnel action they suffered. Dooley is represented by Brittany M. Haddox and Terry N. Grimes, Grimes & Haddox, PC, Roanoke, VA.

U.S. COURT OF APPEALS, 6TH CIRCUIT – BANKRUPTCY APPELLATE PANEL – Bankruptcy fans may want to take a look at the decision in *Limor v. Anderson*, 2019 Bankr. LEXIS 933, 2019 WL 1418698 (6th Cir. Bankruptcy Appellate Panel, March 28, 2019). The debtor is Carla Renea Scarbrough, who filed a bankruptcy petition on June 8, 2015, a little more than a year after she and Michelle Lee Anderson formally dissolved their domestic partnership. They had lived together in Tennessee for about ten years, “acquiring property and incurring debts and otherwise running their lives as other couples in the same household customarily do.” During that time, and before ending their personal relationship in September, 2013, they acquired several pieces of artwork and two real estate parcels in Murfreesboro. In their 2015 “Dissolution of Domestic Partnership” agreement, which they apparently prepared and executed

CIVIL LITIGATION *notes*

without advice of counsel, they split up their assets unevenly, with Anderson receiving both real estate parcels, the artwork, and three of the six vehicles the women had acquired. Anderson came away with assets totaling almost \$175,000 in value, while Scarbrough received three vehicles worth \$7,800.28. The Bankruptcy trustee tried to reclaim some of this value for the benefit of Scarbrough's creditors, and the bankruptcy judge granted summary judgment in her favor. The key issue on appeal was whether Scarbrough was already insolvent at the time of this Dissolution Agreement, in which case the trustee could seek to have Anderson disgorge the disproportionate value of the assets she received. While the Appellate Panel agreed that it was likely that the trustee would be able to win a judgment in some amount against Anderson, it found that it was inappropriate for the bankruptcy judge to have granted summary judgment without putting the trustee to the burden of demonstrating that Scarbrough was insolvent at that time, since the information before the judge concerning her finances was rather incomplete. The bankruptcy judge had relied on the papers filed in court, but the Appellate Panel found those papers may have fallen short of providing a complete picture of Scarbrough's financial situation at the time. Among other things, they didn't include reference to a share in the value of one of the properties that had previously been transferred to Scarbrough by Anderson. Also, the judge may have placed too much weight on the fact that Scarbrough had filed bankruptcy petitions in 1997 and 2005, unrelated to the petition filed in 2015.

U.S. COURT OF APPEALS, 8TH CIRCUIT – On April 17, a three-judge panel of the 8th Circuit Court of Appeals heard oral argument in *Horton v. Midwest Geriatric Management, LLC*, No. 18-01104, in which Mark Horton, a

gay man, is appealing the district court's dismissal of his sexual orientation discrimination claim under Title VII of the Civil Rights Act of 1964. The district court's opinion, not officially published, can be found at 2017 WL 6536576, 101 Empl. Prac. Dec. (CCH) Para. 45949 (E.D. Mo., Dec. 21, 2017). Five days later, the Supreme Court announced that it would review circuit court decisions on this issue from the 2nd and 11th Circuits. (See lead story, above.) A few days later, the 8th Circuit announced that it would stay proceedings on Mr. Horton's appeal pending a ruling by the U.S. Supreme Court in these other cases.

U.S. COURT OF APPEALS, 9TH CIRCUIT – Those eagerly awaiting the

release of videotapes of the Proposition 8 trial must wait a bit longer, but will eventually get to listen. On April 22, the 9th Circuit dismissed an appeal from an order that the tapes be kept under seal until August 12, 2020. A three-judge panel comprised of Senior Judges Ferdinand F. Fernandez and N. Randy Smith and Judge Carlos Bea issued a brief memo: "In light of the district court's briefing and hearing schedule for a future motion to continue to seal the recording at issue, we presently lack jurisdiction over Proponents' appeal. The district court's order compelling 'the recordings be kept under seal until August 12, 2020' is not a 'final decision' of the district court . . . Nor is it a reviewable collateral order, for the order is not 'effectively unreviewable on appeal from a final judgment.' . . . Accordingly, this appeal is dismissed without prejudice for lack of jurisdiction." The controversial tapes were made by District Judge Vaughan Walker upon his representation to the parties that they would be only for his personal use in connection with reviewing the record to write his decision (which he issued in August 2010, striking down Proposition 8 under the 14th Amendment), after the Supreme Court had countermanded the

Judge Walker's order that the trial be broadcast at least to several courthouses where those who could not attend personally in the courtroom could hear. The Supreme Court remains allergic to broadcasting of court proceedings, and in this case Proponents of Proposition 8, who were defending their handiwork against a constitutional challenge, argued that some of their witnesses would be deterred by the making of an audio recording. After the case was over and Judge Walker had retired, the tapes came under the jurisdiction of Chief District Judge James Ware, who ordered them released to the public, but the 9th Circuit reversed on February 2, 2012, in an opinion by the late Judge Stephen Reinhardt, who focused on Judge Walker's promise to the parties that the tapes would never be released to the public. A local TV station in San Francisco has been litigating to get the tapes released, so they can be used in documentaries about the marriage equality fight. Judge William Orrick, ruling on KQED's petition to release the tapes, ordered that they can be released on August 12, 2020, unless some reason arises to delay further.

ARIZONA – Senior U.S. District Judge James A. Teilberg granted summary judgment to the employer on several counts in *Villa v. State of Arizona*, 2019 WL 1858138, 2019 U.S. Dist. LEXIS 69940 (D. Ariz., April 25, 2019), but found that disputes about material facts precluded granting summary judgment on Hector Villa's claim that he was subjected to hostile environment harassment due to his national origin (Mexican) and suffered retaliation when he complained about the harassment, and that the employer should be held liable for harassment and retaliation by a co-worker because of its failure adequately to investigate his complaints by failing to interview some of the people identified by Villa in his complaint as witnesses to the harassment he

CIVIL LITIGATION *notes*

experienced. However, certain of Villa's claims were dismissed for failure to exhaust administrative remedies, including his claim of constructive discharge, which was never mentioned in his EEOC charge and, the court found, could not be subsumed within his complaint about hostile environment harassment. Of particular concern to *Law Notes* readers is Judge Teilberg's grant of summary judgement to the employer on Villa's claim of hostile environment harassment because of sex. Villa alleged that David Deem, a co-worker, subjected him to constant slurs, including "Italian nigger," "wet back," "chomo" (prison slang for a child molester), and "faggot" on a daily basis and "all the time." Villa identifies as "straight" and is married to a woman. He alleged that it is discrimination because of sex to repeatedly call a heterosexual person a "faggot." (Villa alleged that Deem also called him "gay" and "homosexual" but the analysis of his claim focused on "faggot.") Judge Teilberg reviewed the Supreme Court's same-sex harassment decision, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), noting that it describes several types of proof that could establish that same-sex harassment is "because of" the plaintiff's "sex," but found that Villa's allegations did not support any of these. There is no indication that Deem was sexually interested in him, or was motivated by "general hostility to the presence of members of the same sex in the workplace." Further, Villa offered no comparative evidence to show that Deem treated men and women differently. Finally, beyond the suggestions of Justice Scalia in *Oncale*, Teilberg noted 9th Circuit precedent concerning same-sex harassment because of sexual stereotyping, per *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (2001), where the harassment was demonstrably due to a gay employee's failure to conform to masculine gender stereotypes in his speech and mannerisms. Villa made

no allegations supporting such a theory here. He basically argued that Deem's use of "faggot" was "anti-homosexual," and was so demeaning to Villa's dignity that he eventually felt compelled to resign after the company failed to take his complaints seriously enough. Teilberg quoted from *Oncale*: "We have never held that workplace harassment is automatically discrimination because of sex merely because the words used have sexual content or connotations." "Rather," wrote Judge Teilberg, "allegations that a plaintiff's co-workers routinely call an individual a 'faggot' or another derogatory term related to sexuality do not necessarily establish a claim for discrimination based on sex . . . Plaintiff does not present any evidence that Deem's verbal harassment resulted from Plaintiff's failure to conform to male gender stereotypes. In the absence of any proof that the comments made by Deem were due to Plaintiff's gender, a reasonable trier of fact could not conclude that Plaintiff experienced a hostile work environment based on his sex." Thus, summary judgment was granted on this claim. It is uncertain, reading Judge Teilberg's explanation on this ruling, whether a Supreme Court decision accepting that discrimination "because of sex" include discrimination "because of sexual orientation" would produce a different result in this kind of case. Villa is represented by Stephen G. Montoya, of Montoya, Lucero & Pastor, PA, Phoenix.

CALIFORNIA – Lambda Legal announced the settlement of a lawsuit by Julia Frost, a former English teacher, against Hesperia Unified School District. *Frost v. Hesperia Unified School District*. The lawsuit, filed in 2013, charged officials at Sultana High School of subjected Frost to harassment and targeting her because she is an out lesbian, in violation of state law. The action in San Bernardino Superior Court asserted rights under the state's

Fair Employment and Housing Act. Total damages as part of the settlement equal \$850,000.00. After losing her job, Frost was unable to secure full-time employment and supported herself through part-time positions and online teaching jobs, according to her Lambda attorney, Jenny Pizer. The damages represent lost and front wages and loss of expected retirement income. Two years after the lawsuit was filed, the school district revised its nondiscrimination policies. The District released a statement on April 18, denying that it had discriminated against Frost and contending the settlement was entirely to avoid the costs of continued litigation, pointing out that the settlement does not require it to make any further policy changes.. Yeah, tell us that you have a bridge to Brooklyn for sale while you are at it . . . Co-counsel with Lambda are attorneys from Hadsell Stormer Renick. *Bloomberg Law*, April 18.

INDIANA – In the electronic age, counsel have duties of digital diligence. That is the message of *Major v. State of Indiana*, 2019 WL 1894874, 2019 U.S. Dist. LEXIS 71956 (N.D. Ind., April 29, 2019), in which U.S. Magistrate Judge John E. Martin denied a motion for reconsideration of the court's prior grant of summary judgment to Defendants after Plaintiff's counsel failed to file a copy of his reply to the summary judgment motion on the district court's electronic docket. We know nothing about the merits of this case, other than what Magistrate Martin writes summarily in this opinion. The plaintiff, Barbara Major, a former employee of the Indiana Department of Corrections, filed a complaint on January 12, 2017, alleged discrimination on the basis of her sex, race, and sexual orientation, and retaliation based on her treatment during employment and termination from her job with the defendant. On October 23, 2017, the court granted Defendants' motion for partial judgment on the

CIVIL LITIGATION *notes*

pleadings as to the race discrimination claim and the demand for punitive damages. Defendants filed a motion for summary judgment on June 14, 2018; no timely response to the motion was filed with the court. Defendants then filed a “reply” on July 26, 2018, noting the lack of response to the motion, but mentioning that a “purported response” had been emailed to them by plaintiff’s counsel. This “reply” requested summary ruling on the motion. “The Court’s docket reflects that notice of the reply brief was electronically served on the email address provided by counsel for Plaintiff,” wrote Martin. On November 7, 2018, the court granted summary judgment to the Defendants. Plaintiff filed a motion for reconsideration on January 22, 2019. Plaintiff’s counsel noted Defendants’ admission in their “reply” that they had received Plaintiff’s response to the summary judgment motion by email. Plaintiff’s attorney argued that the summary judgment should be “set aside because counsel for Plaintiff did not realize that the response brief was never docketed with the Court,” wrote Martin. “Counsel for Plaintiff explains that he emailed a copy of the response to counsel for Defendant within the response deadline and thought that he had placed a copy on the docket, and that he did not realize that no response was filed until Plaintiff herself informed him that judgment had been entered against her, several months after the Court’s opinion issued. He represents that he did not receive email notification of the reply brief filed by Defendants or of the Court’s Opinion and Order.” Well, too bad, wrote Martin, placing complete trust in the proper operation of the court’s electronic filing system. Martin pointed out that attorneys are required to register with the court’s docket system and enter a correct email, and the system generates a response to the lawyer’s email address. If the lawyer didn’t get such an email acknowledgement, he had to know that something was wrong and take

appropriate steps. Martin quoted a 7th Circuit ruling, *Farzana K. v. Indiana Department of Education*, 473 F.3d 703, 705-706 (7th Cir. 2017): “If counsel blundered to his client’s prejudice, the remedy is malpractice litigation against the culprit, not the continuation of litigation against an adversary who played no role in the error.”

KENTUCKY – U.S. District Court Judge Claria Horn Boom granted an employer’s motion for summary judgment in *Tuttle v. Baptist Health Medical Group, Inc.*, 2019 WL 1447475, 2019 U.S. Dist. LEXIS 55000 (E.D. Ky., March 31, 2019), an Americans with Disabilities Act (ADA) case that turned largely on the plaintiff’s attempt to use the “cat’s paw” theory to hold the employer liable for her discharge. Shannon Tuttle was discharged after a human resources officer, in the course of investigating a complaint against another employee, was told by many employees whom she interviewed about inappropriate and abusive conduct towards them by Tuttle. Three months earlier, local news reports that Tuttle’s son, Dylan Cartwright, was HIV-positive and was “facing charges after intentionally biting a corrections officer knowing that he was HIV-positive,” had led many employees at Baptist Health to be aware that Tuttle had an HIV-positive son. Tuttle claims that after the news story appeared, she experienced shunning from co-workers with whom she claims to have previously had good relationships. She had previously only confided in one employee about her son’s HIV condition, and that employee had treated the information as confidential. However, about six months before the news story appeared, Tuttle had received an informal warning for violating employer rules by using the computer system at work to access her son’s medical records without authorization. This warning may have played into management’s determination

to terminate her after receiving the human resource officer’s report about the numerous complaints by co-workers concerning Tuttle’s behavior at work. In any event, the discharge decision was made by management officials who disclaimed any knowledge about Tuttle’s son’s HIV condition. Tuttle sought protection under an ADA provision forbidding discrimination against somebody because of their association with a person with a disability. Tuttle tried to construct a chain of causation by which the co-workers, biased against her because of her son, made false complaints to the HR officer in order to get management to dismiss her. Judge Boom concluded that the version of the “cat’s paw” theory endorsed by the Supreme Court and the 6th Circuit would not extend to this situation, since to attribute discriminatory animus to the employer, it was necessary that the individuals influencing management’s decision be themselves supervisors, and Tuttle’s theory placed the animus on co-workers who had no supervisory attributes. Furthermore, the court found that the discharge took place too long after the events concerning Tuttle’s son to support an inference that the one had anything to do with the other. The opinion includes an extended discussion of the cat’s paw theory and its potential application to this case, with a detailed summary of relevant deposition testimony and case law that would be worth reading for anybody trying to figure out how the theory does or does not work in practice to make an employer liable for a decision where the actual decision-maker was unaware of the information that is the crux of the bias complaint. An appeal to the 6th Circuit seeking to expand the cat’s paw case to encompass discriminatory statements to co-workers is, of course, a possibility. The court also rejected liability under the Kentucky Civil Rights Act, which does not expressly forbid associational discrimination regarding disabilities. The court found Tuttle’s

CIVIL LITIGATION *notes*

reliance on a 6th Circuit case purportedly recognizing a more expansive scope for cat's paw liability was misplaced; that case involved a challenged academic tenure decision, where the co-workers in question were tenured faculty whose input could affect a tenure decision, thus presenting a special circumstance where non-supervisory co-workers could logically exert cat's paw influence. Tuttle is represented by Rachel A. Shelton and William Nicholas Wallingford of Wallingford Law PSC, Lexington.

KENTUCKY – The Kentucky Court of Appeals ruled against Perry Puckett, an out gay man with more than ten years of workplace seniority who was dismissed from his position of Disability Adjudicator III – Trainer by the Kentucky Cabinet for Health and Family Services (CHFS). *Kentucky Cabinet v. Puckett*, 2019 Ky. App. Unpub. LEXIS 273, 2019 WL 1868918 (April 26, 2019). CHFS suddenly dismissed Puckett without any due process formalities after “discovering” that he “routinely spent his hours at work, over an extended period of time, e-mailing hundreds of inappropriate messages to twenty-five of his subordinates and colleagues. The e-mails included a variety of lascivious content, racist comments regarding superiors, offensive language, and solicitation of sexual photographs,” wrote Court of Appeals Judge Glenn E. Acree. CHFS gave Puckett a discharge letter signed by HR Division Director Jay Klein, purportedly on behalf of Executive Director J.P. Hamm. Puckett appealed his discharge to the Kentucky Personnel Board, whose hearing officer recommended reducing the penalty to a thirty-day suspension, crediting Puckett’s argument that discharge was disproportionate to discipline meted out to other employees for misusing email. But CHFS filed exceptions, and the Board affirmed Puckett’s dismissal, rejecting the hearing officer’s findings of fact and conclusions of

law. The Board found the comparison to discipline meted out to others “unpersuasive,” because nobody else had abused e-mail to the same extent as Puckett. The Board stated that his “e-mail usage is not the type of conduct that must be tolerated by an employer, especially not from an employee with many years of experience and who is in a position to train and mentor subordinate employees.” The Board insisted that dismissal was “taken with just cause and was neither excessive nor erroneous.” Puckett appealed to Franklin County Circuit Court, adding a claim that the Board’s action was motivated by his sexual orientation. At about the same time, Puckett read a newspaper article reporting that several disciplinary actions against CHFS employees had been vacated in other cases because Executive Director Hamm had not signed their dismissal letters, which Jay Klein was not formally authorized to sign. So Puckett add this argument to his appeal, and the circuit court remanded the case to the Board, which reiterated its rejection of Puckett’s appeal, but this time the circuit court reversed the Board’s decision, finding the decision was not based on substantial evidence and was arbitrary. Now the Board appealed, and the Court of Appeals ruled for the Board. It found that he raised the issue of Klein’s signature too late in the proceedings, so it was not preserved for judicial review. The court found that Puckett’s sexual orientation discrimination claim should not have been raised so late in the proceedings, either, and was untimely under the statute of limitations. The court found that the circuit court should not have substituted its judgment for that the Board on the merits of Puckett’s dismissal, finding “erroneous” the circuit court’s holding that the Board did not act on the basis of substantial evidence when it overruled the hearing officer’s recommendation of a 30-day suspension. “The court shall not substitute its judgment for that of the agency as to the weight of the

evidence on questions of fact,” wrote Judge Acree, finding that the circuit court “rendered its own judgment without finding a pertinent factor from the statute to justify remanding the case. There is nothing in the order giving deference to the Board’s findings. In fact, the order reflects the circuit court’s own judgment, stating ‘the Personnel Board argues that these [prior cases of e-mail abuse in the agency] are not persuasive because the cases involved employees and not a supervisor like Mr. Puckett. This Court is not so convinced.’ It is not the circuit court’s responsibility to be the fact-finder. The circuit court must give deference to the agency’s decision.” Acree’s opinion then goes into the details of the Board’s findings, rejecting Puckett’s argument that the differing findings by the hearing officer and the Board would justify overturning the Board’s ruling. “We find the Board complied with all statutory requirements and based its ruling on substantial evidence,” wrote Acree. “The Board’s decision, therefore, was not arbitrary.” Further, Puckett’s attempt to add a sexual orientation discrimination claim was barred by the doctrine of governmental immunity, as he had not named any individual government officials as defendants, just the agency, which cannot be sued directly. Furthermore, amendment of the complaint to name names would be futile because a one-year limitations statute applies to claims brought under 42 USC Sec.1983. Puckett tried to get around this, saying that his constitutional claim accrued when the board rejected the hearing officer’s recommendation. The court disagreed, but said that even if it accepted Puckett’s view as to when the limitations period began, his claim would still be late. But the court is wrong as to that. Acree wrote that the Board’s order was entered on June 17, 2010, and Puckett moved to amend his court complaint to add the new federal claim on February 16, 2011. By our count that is 8 months, not more than a

CIVIL LITIGATION *notes*

year, thus contrary to his assertion that granting the motion to amend would “inevitably” result in a dismissal as time-barred. Perhaps Puckett will try to appeal this obvious calculation error to the Kentucky Supreme Court. But it does not sound to us like he is going to get his job back through litigation. Too many offensive e-mails. David Leighty of Louisville represents Puckett.

MICHIGAN – After Attorney General Dana Nessel settled litigation against the state by ending a policy of contracting with adoption and foster care agencies that discriminate based on sexual orientation and gender identity, two lawsuits were filed challenging the policy on behalf of Catholic agencies: *St. Vincent Catholic Charities v. Michigan Department of Health and Human Services* and *Catholic Charities West Michigan v. Michigan Department of Health and Human Services*. The settlement of the lawsuits against the state required the Department to maintain non-discriminatory provisions in foster care and adopting agency contracts and to end contracts with agencies that have a policy of denying services to same-sex couples seeking to foster or adopt children. The lawsuits claim that Nessel’s settlements violate a Michigan law enacted in 2015 which prohibits adverse actions toward agencies that chose “to abstain from conduct that conflicts with an agency’s sincerely held religious beliefs.” Nessel’s office argues that the law only protects faith-based agencies when they decline services that are not provided by contract with the state. Although Michigan’s civil rights laws to no ban anti-LGBT discrimination, government actions are subject to challenge under the 14th Amendment. In *Obergefell v. Hodges*, the U.S. Supreme Court held that same-sex marriages are to be treated the same as all other marriages under state laws and policies, and the constitutional requirements would, of

course, supersede any state laws to the contrary under the Supremacy Clause of the Constitution – or so one would hope the U.S. Supreme Court would rule, although given recent changes in the membership of the Court, one cannot confidently predict. The agencies who are suing the state are heavily dependent on revenue from state contracts to maintain their operations, and some have stated that they would have to go out of business if their current contracts are not renewed. At least one agency that was being sued in the cases that were settled, Bethany Christian Services, has agreed to end its policy against serving same-sex couples in order to retain its contracts. But the Catholic agencies are hanging tough . . . *Detroit News*, April 27; *Religion Clause Blog*, April 28.

NEW YORK – U.S. District Judge Naomi Reice Buchwald denied a motion for summary judgment by the New York City Board of Education in a suit by Rosanne Kaplan-Dinola, a lesbian former teacher who sought to hold the Board to municipal policy liability in connection with plaintiff’s allegation of having been exposed to a hostile work environment, retaliation and constructive discharge by the two women (co-defendants) who successively served as principals of P.S. 207, where she was employed. *Kaplan-Dinola v. Board of Education*, 2019 WL 1779601, 2019 U.S. Dist. LEXIS 69107 (S.D.N.Y., April 23, 2019). Plaintiff’s complaint alleges that throughout her tenure as a teacher at P.S. 208, she was “discriminated against by [co-defendants] on the basis of her sexual orientation and related against for her lawful complaints of sexual orientation discrimination, harassment, and a hostile work environment.” She alleged that she resigned in May 2016, citing her need “to escape the discrimination and retaliation I continued to experience on a daily basis.” The Board’s motion for summary judgment was premised

“solely on the ground that a principal cannot be a ‘final policymaker’ for purposes of imposing municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). That is, arguing that principals are not in a position to “establish municipal policy” so their actions can’t be the basis of imposing liability on the municipality. While conceding that building principals in the New York City public schools do not have authority to discharge teachers – a function which ultimately is centralized – Judge Buchwald found that the record was insufficiently detailed at this early point in the litigation to determine whether principals’ authority was sufficient to make them “final policymakers” as to other issues, noting that the complaint in this case is not restricted to discharge but also raises claims of hostile environment, discrimination and harassments. After reviewing several federal district court decisions that have grappled with this issue, she wrote, “We join these courts in concluding that principals can be final policymakers in certain circumstances. Whether those circumstances exist in the present case, however, is unclear. Such an affirmative finding would require a more robust record than the one presently before the Court, which does not include evidence of the underlying discrimination or retaliation that plaintiff was allegedly subject to. What we can conclude is that here, where the challenged employment actions are not limited to wrongful termination of the plaintiff’s employment, the Board has failed to demonstrate that it is entitled to judgment as a matter of law.”

NEW YORK – The town of Root, New York, will pay \$25,000 in damages to Dylan Toften and Thomas Hurd, who were denied a marriage license by Town Clerk Lauren “Sherrie” Eriksen based on her religious objection to same-sex marriage. When the men approached

CIVIL LITIGATION *notes*

her to get a license last July, she told them to make an appointment for a time when she was not on duty. Lambda Legal represented the men in suing the town for violating the state's Marriage Equality Act and federal and state civil rights laws. A settlement was reached on April 10. The clerk is required to issue a statement agreeing to follow the law, and issued an apology in writing. . The town, in addition to paying damages to the couple, must adopt a policy that town clerks must provide licenses to all couples who are entitled under the state law to marry. The couple, now married, obtained a license in neighboring Cobleskill. *Gay City News*, April 22.

OHIO – On April 3, The Lyceum, a private Catholic school, brought a federal declaratory injunction action against the city of South Euclid, Ohio, seeking a determination that The Lyceum is not subject to an anti-discrimination ordinance recently enacted by the city. *The Lyceum v. City of South Euclid, Ohio*, Case 1:19-cv-00731 (N.D. Ohio). The plaintiff describes itself as a “small, Catholic college preparatory school dedicated to providing its students with a faith-integrated, classical Catholic education.” In order to fulfill its mission, it discriminated in admissions and employment on the basis of, inter alia, gender identity and sexual orientation, which are listed as forbidden grounds of discrimination in the South Euclid ordinance. Because the school is independent of the Catholic church (although it operates in space rented from the Sacred Heart of Jesus Parish Campus under a lease requiring the school to operate consistent with Catholic doctrine), it is concerned to know that the city will not enforce the ordinance against it, since the ordinance does not contain an express religious exemption. The complaint asserts various claims under the 1st and 14th Amendments, asks for declaratory and injunctive relief, and asserts a claim for

damages in an unspecified amount, as well as all costs of the litigation. Not surprising, Alliance Defending Freedom is listed as counsel on the complaint, as well as local Ohio counsel.

OHIO – The Lakota Board of Education has approved a settlement in a federal lawsuit by Emily Osterling, who claimed to be the victim of retaliation by district officials for her support of transgender students. The district will pay the former teacher \$175,000, according to a report by the *Dayton Daily News* on April 10. This includes back pay starting with Fall 2018, and allowing a retroactive resignation by Osterling. The Board had voted unanimously to discharge Osterling last September. \$100,000 of the settlement will be paid by the District's liability insurer. We predict their premiums will go up!

TEXAS – U.S. Magistrate Judge Elizabeth S. Chestney issued a Report & Recommendation to District Judge Orlando Garcia in *Garcia v. Randolph-Brooks Federal Credit Union*, 2019 WL 1643741, 2019 U.S. Dist. LEXIS 64747 (W.D. Tex., April 16, 2019), in which former employee Jennifer Garcia is suing for interference with her rights under the Family and Medical Leave Act (FMLA), retaliation for taking FMLA leave, hostile environment sex discrimination under Title VII of the Civil Rights Act of 1964, and the torts of intentional infliction of emotional distress and false imprisonment. Herein lies a tale. Garcia, a lesbian, claims that she suffered a hostile environment in reaction to her romantic relationship with a female co-worker. She claims that the company's written relationship policy forbids romantic relationships only between employees who report to the same supervisor, but the woman with whom she became friendly obtained a transfer to report to a different

supervisor before their relationship became romantic. Nonetheless, she claims, her male supervisors subjected her to repeated harassment about this relationship, which “exacerbated her anxiety and depression,” leading her to apply for FMLA leave due to her emotional distress and mental symptoms, documented by her primary care physician. Then, she claims, the employer gave her a hard time about granting the leave, requiring her to “recertify” her request twice through a third-party claims administrator (whom, she later learned, interviewed her doctor and his staff and then wrongly accused them of fraud in connection with the leave claim). Meantime, she alleges, she was subjected to “a multitude of trivial complaints” regarding her performance, resulting in what she characterized as “groundless” disciplinary reports. She says that she was told she was “unreliable” because she took FMLA leave, and she was dismissed in a humiliating procedure in front of 60 other employees. To top that off, three company security officers (two of whom were armed) then accompanied her to the parking lot, where they backed her into a corner, told her to “shut the fuck up,” and refused to let her get into her car. She claims she “escaped” on foot and walked home. In this opinion, Judge Chestney was responding to the employer's motion to dismiss Garcia's claims of FMLA interference, intentional infliction of emotional distress, and false imprisonment. (The employer did not move at this time to dismiss the sexual harassment claim under Title VII or the retaliation claim under FMLA.) Garcia exhausted administrative remedies and filed suit in Bexar County District Court. The employer removed to federal court based on the Title VII and FMLA claims, Garcia filed an amended complaint, and then the employer filed this dismissal motion. Judge Chestney granted the employer's motion as to FMLA interference and intentional infliction

CRIMINAL LITIGATION *notes*

of emotional distress. Chestney found that the employer eventually did grant the leave, and thus Garcia was not prevented from taking FMLA leave. As to the false imprisonment claim, based on the parking garage incident, the judge found that Garcia has alleged elements necessary for such a claim under Texas law, so denied the motion to dismiss that. As to the intentional infliction of emotional distress claim, again applying Texas law, Chestney found that this tort claim is reserved as a “gap-filler” for cases where a plaintiff does not otherwise have a vehicle to seek emotional distress damages. The FMLA retaliation claim and the Title VII and false imprisonment claims could provide the basis for awarding damages for emotional distress, wrote Chestney. Garcia had argued that emotional distress damages might not be available for her FMLA claim, but the court concluded she might seek such damages under Title VII and the false imprisonment claim. Chestney’s recommendation goes to Judge Garcia. One wonders whether the 5th Circuit’s decision in *O’Daniel* (see above) might quickly prompt a dismissal of the Title VII claim as well. Garcia is represented by S. Tyler Rutherford, San Antonio.

WISCONSIN – A *pro se* plaintiff managed to frame a defamation claim that partially survived a motion for summary judgement in *Harp v. Glock & Harp v. NBCUniversal*, 2019 WL 1859258 (E.D. Wis., April 25, 2019). Rebecca Harp, the mother of Malika Willoughby, who is serving a 13-year sentence for reckless homicide and use of a deadly weapon in the shooting of her same-sex partner, Rosalind (“Roz”) Ross, claims that she was defamed in an article about the Malika-Roz story by defendant Allison Glock that was published in *ESPN The Magazine* in 2012, and later made the subject of an episode of NBCUniversal’s true-crime documentary series *Unraveled*. Glock

appeared in the episode and spoke about various elements of the story. Plaintiff Harp claims that both the magazine story and the film dramatization make untrue claims about her daughter’s childhood and her actions concerning her daughter’s sexual orientation and relationship with Roz, and that these falsehoods that have harmed her own reputation and are actionable as “slander.” (Judge Lynn Adelman corrects this to “libel.”) Although Judge Adelman found that some of Harp’s allegations are not actionable, she said that others were, and a jury could find defamation based upon them if it was persuaded that they various statements in the story and episode depart from the truth. However, the judge ruled against Harp’s claims of intentional infliction of emotional distress, fraudulent misrepresentation and unjust enrichment (this last claim aimed solely at Ms. Glock, the author of the article). Judge Adelman noted that the *pro se* plaintiff apparently did not understand the doctrines of fraudulent misrepresentation and unjust enrichment, which do not apply to her situation. She is not defrauded by the defendants, and she conferred no benefit on Glock for which she was entitled to be paid. She apparently believes that a claim of “unjust enrichment” would apply anytime a defendant profits from something that harms the plaintiff. Most first-year law students could instruct her otherwise.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

NORTH CAROLINA – The Court of Appeals of North Carolina affirmed in part the conviction and sentencing of Melvin Lamar Fields, in connection with Fields’ attack on a transgender woman, identified by initials as A.R. in the opinion. *State of North Carolina v. Fields*, 2019 N.C. App. LEXIS 333 (April 16, 2019). Amazingly, A.R.

argued on appeal that the evidence did not support the trial court’s charge to the jury of a felony assault inflicting serious bodily injury. The indictments alleged that on November 2, 2015, Fields attacked and tore the scrotum of A.R. In advance of trial, Fields stipulated two prior misdemeanor assaults. “The evidence at trial tended to show after the assault, A.R. had a log rip in her genitals; A.R. required 15 stitches and pain medication; A.R. remained out of work for two weeks and upon return to work was placed on modified duties; A.R. continued to suffer pain for three months, and it was six months before the pain completely abated. A.R. has a large, jagged scar from the assault. Additionally, A.R.’s doctor testified an injury like A.R.’s ‘would be significantly painful.’” With no evidence presented to contradict this, the court decided that the “serious bodily injury” requirement under the statute was met, and rejected the appeal on this point. However, the appeals court concluded, over a dissent, that the trial judge over-sentenced Fields based on a technical reading of the statutes under which he was prosecuted, and remanded for resentencing.

TENNESSEE – U.S. District Judge Leon Jordan denied a petition for habeas corpus from Russell Patrick Brown, who was convicted by a state court jury of first-degree premeditated murder and aggravated arson in connection with the death and burning of a long-time friend in the aftermath of drug-fueled sex. *Brown v. Hampton*, 2019 WL 1795926, 2019 U.S. Dist. LEXIS 69160 (E.D. Tenn., April 25, 2019). Brown was sentenced to life on the homicide and concurrent twenty years on the arson count. Brown petitioned the federal court *pro se* after losing his direct appeal before the Tennessee Court of Criminal Appeals and the state Supreme Court denied his petition for further review. Judge Jordan relied on the Court of Criminal Appeals opinion

PRISONER LITIGATION *notes*

to summarize the facts, as to which there is little dispute. Brown and the victim had a long-time friendship “eventually turning into a sexual relationship, based on drugs.” Brown does not identify as gay, but claimed he engaged in sex with the victim because he was addicted to cocaine, which the victim provided for him. On New Year’s Eve, 2011, the men bought alcohol, cocaine, and prescription pills and ended the evening in a hotel room. Brown anally penetrated the victim, who then performed fellatio on him, after which Brown fell asleep. He awakened to find the victim on top of him, penetrating him anally, which Brown testified that “he never allowed because he was not a homosexual.” “He got the victim off of him, and the two men began a physical altercation. When he saw that a pocketknife that they had used earlier in the evening to cut their crack cocaine was open on the nightstand, he picked it up and stabbed the victim nineteen times. He then set fire to the bed, took the victim’s car, and fled the scene. On cross-examination, the petitioner claimed that the victim had informed him that he had AIDS after letting the petitioner perform on him, and attempting to have anal intercourse with the petitioner. The petitioner conceded that he was larger than the victim, that the victim was unarmed, that the fight was over when he picked up the knife with the intent to harm the victim, and that he had intentionally set the fire.” In his habeas petition, Brown claimed the evidence was insufficient to support the verdicts, that he should have gotten a self-defense charge to the jury, and that his suffered from ineffective representation by his trial counsel. Judge Jordan found that some of Brown’s claims had not been preserved for review, and others fell short of the standard for granting habeas corpus. Even though one of his trial counsel had a technical conflict of interest, having represented the victim years before on a drug charge, the court found no evidence this affected the representation. Perhaps

more importantly, in light of the uncontradicted factual record, much of it taken from Brown’s own testimony, any errors seemed unlikely to have affected the outcome.

TENNESSEE – Brandon Wiley, a Tennessee man who beat up a gay man in a bar and then bragged about it, posting blood-covered selfies to social media, pleaded guilty to aggravated assault, according to an April 8 posting by Andy Towle on his blog, towleroad.com.

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. SUPREME COURT – Like most *pro se* litigation, this case stays beneath the radar. It does not involve LGBT plaintiffs or rights, but it is of pressing concern regarding how *pro se* civil rights plaintiffs (who are the vast majority of prisoner plaintiffs) are treated in the federal courts. Indeed, *Law Notes* has observed that many (perhaps most, since so many cases are never reported) LGBT civil plaintiffs are unrepresented in civil rights, discrimination, employment, social security, immigration, and prisoner cases. Here, proceeding *pro se*, plaintiff, William C. Bond (sexual orientation unknown), sued various Maryland state and federal officials for retaliating against him for government protest, in violation of the First Amendment. Senior U.S. District Judge David A. Faber dismissed his complaint with leave to amend in *Bond v. United States*, 2017 WL 1347884 (D. Md., April 12, 2017). When Bond filed a more detailed complaint, trying to comply with the deficiencies, Judge Faber dismissed it

summarily, relying on his first opinion. He also denied reconsideration. 2017 WL 4507499 (D. Md., Aug. 1, 2017). Bond appealed, with counsel (including the Chicago firm formed by retired Seventh Circuit Court of Appeals Judge Richard A. Posner). Judge Posner has promised to do this kind of work with his retirement. *See* “Posner Says He Is Open to Litigating on Behalf of *Pro Se* Litigants,” *ABA Journal* (September 27, 2017). The Fourth Circuit affirmed in a *per curiam* opinion, 742 Fed. Appx. 735 (4th Cir., Aug. 2, 2018), the panel composed of Judge James A. Wyman, Jr., and Senior Judges William J. Traxler, Jr., and Allyson K. Duncan. The decision found that district judges need not articulate reasons for dismissing a curative complaint, so long as the reasons can be “gleaned” from the record (here the first opinion, without new findings on the amended complaint). The Circuit also affirmed the denial of deference ordinarily due *pro se* litigants, in part because Bond’s complaint failed to comply with the requirements of the Federal Rules of Civil Procedure. Bond filed a petition for a writ of *certiorari* to air these issues about handling of *pro se* litigation. He was represented by former Judge Posner and by David Boise of Boise Schiller Flexner, LLP (Washington, D.C.). The Supreme Court denied *certiorari* on April 29, 2019 (No. 18-792). Not even two of the biggest guns in litigation in this country could get a hearing for this *pro se* plaintiff. In this writer’s opinion, some of the sloppiest work of the federal courts occurs in the *pro se* handling of LGBT civil rights cases, particularly prisoners – *see, e.g.*, this issue of *Law Notes*. What happened here should be of concern to all who care about access to courts for vulnerable plaintiffs.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT – The case of transgender inmate Andree Edmo has been the subject of recent

PRISONER LITIGATION *notes*

Law Notes reports. We featured her case in “Federal Judge in Idaho Grants Preliminary Injunction for Confirmation Surgery for Transgender Inmate” (January 2019 at pages 7-8), reporting the exhaustive decision of U.S. District Judge Barry Lynn Winmill in *Edmo v. Idaho Dep’t of Corr.*, 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018). Last month, we reported that Judge Winmill declined to stay his preliminary injunction pending appeal of his order that Edmo have her surgery within six months. 2019 U.S. Dist. LEXIS 35314, 2019 WL 1027979 (D. Idaho, March 4, 2019). Now, in two unreported Ninth Circuit orders, the 9th Circuit Court of Appeals has stayed the preliminary injunction pending consolidated appeals: No. 19-35017 [state defendants’ appeal] and No. 19-35019 [private vendor’s (Corizon’s) appeal]. Unlike Judge Winmill’s stay decision, there is no analysis, just a citation to *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), which is an odd choice, since it is an appeal of a successful petition for a writ of *habeas corpus* and dealt with the release of a violent offender pending appeal, an issue not presented here. Nevertheless, Senior Circuit Judge Richard C. Tallman (Clinton) and Circuit Judge Mary H. Murguia (Obama) granted the stay on March 20, 2019; but they expedited the appeal, on a very short leash. Briefing is due in April, and the case will be argued on May 16, 2019. On March 29, 2019, the same judges – it is not clear if they will retain the case when it is assigned to a panel – modified the stay (over defendants’ objections) to allow Edmo to keep her scheduled appointment for a pre-surgical consultation. [How keeping this appointment could irreparably harm defendants is beyond this writer’s ken.] Defendants continued to push their luck: In April, they filed an “urgent” motion that the appeal (and case) be dismissed as “moot” under the Prison Litigation Reform Act [PLRA]. They argued that the preliminary injunction was

void as a matter of law because Judge Winmill allegedly failed to make the “narrowness” findings required by the PLRA for injunctive relief or to supply them within 90 days. [Note: The Ninth Circuit has never ruled that the PLRA’s “narrowness” provisions have this effect.] They further argued that they would be “irreparably injured” if they had to continue to brief and argue an appeal of a “moot” case. This argument strikes this writer as frivolous. Any reasonable reading of Judge Winmill’s decision on the preliminary injunction shows that he was painstaking in ruling that no relief short of surgery would meet Edmo’s serious medical need. This “urgent” motion was denied by the Clerk of Court for failure to meet Ninth Circuit standards for “urgent” motions, with the notation that defendants could argue the matter as a regular motion along with the merits on May 16th. In this writer’s experience, it is never a good plan to take a federal appellate court’s time to argue that participation in counsel’s own appeal is a waste of counsel’s time. Stay tuned.

CALIFORNIA – During a stop movement “lockdown” at a California prison, caused by a fight, all inmates were directed to lie prone on the ground. According to her complaint, transgender inmate Zaiid Walker was singled-out for cuffing as a “faggot,” although she was not involved in the fight and had complied with all orders. She presented her hands behind her back for cuffing without resistance, but an officer (Doe #1) nevertheless kned her in the back, causing “excruciating pain,” and cuffed her extremely tightly, saying: “I hate dealing with you faggots.” After the cuffing, another officer (Doe #2) kicked Walker in the face repeatedly. U.S. Magistrate Judge Barbara A. McAuliffe dismisses the pro se complaint upon screening for failure to state a constitutional claim in *Walker v. Ibarra*, 2019 U.S. Dist. LEXIS 59372 (E.D.

Calif., April 5, 2019). Judge McAuliffe’s stated reasons are as follows: Officers Doe did not use excessive force because their blows were *de minimis* and there is no allegation of injury. Because the Does did not commit a constitutional tort, the bystander officers also did not commit a constitutional tort by failing to intervene. Finally, the verbal slurs were not actionable under Ninth Circuit law. This is contrary to the pleadings in the record, and to the law. First, Judge McAuliffe does not mention that Walker was kicked in the face while cuffed prone on the ground and not resisting, according to the pleadings. It is not possible to justify such kicks as reasonable use of force as a matter of law. A superior officer later ordered the tight cuffs to be removed, also raising a question about their use. Walker attached her grievance records to the complaint. They establish that the first level of grievance review was “bypassed” by the institution, and the complaint was sent directly to the second level, where it was reviewed by a lieutenant. Records show an investigation ensued, involving interviews with approximately a dozen officers and inmates and review of a medical report and a videotape of the incident. It is also notable that Walker was not charged with any violation of rules in connection with the events. Walker’s grievance was “granted in part” but the decision does not say what was done other than the investigation. Walker was denied access to the video, the medical report, and the personnel actions taken, if any. Judge McAuliffe correctly cites the controlling Supreme Court decision on excessive force, *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). The test is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Although recognizing Hudson’s standard, Judge McAuliffe supports her action with an out-of-context quote from *Wilkins v. Gaddy*, 559 U.S. 34, 37-38, 130 S. Ct. 1175 (2010): “An inmate who complains

PRISONER LITIGATION *notes*

of a push or shove that causes no discernible injury almost certainly fails to state a valid excessive force claim” – and she continues by stating that Walker’s complaint does not allege that she “suffered any significant or serious injury from any use of force by the defendants.” This is probably as total an out-of-context misreading of *Wilkins* as is possible in a court decision. *Wilkins* is one of those very rare Supreme Court grants of *certiorari* where review is taken *not* because of a circuit split but because the Fourth Circuit’s “strained” reading of *Hudson* was “not defensible.” The docket in *Wilkins* shows that the Supreme Court granted *certiorari* on *pro se* papers, without briefing, and reversed in its supervisory capacity on facts not distinguishable from this case. The *per curiam* decision was unanimous. Inmate *Wilkins* had been kicked and struck, but he did not plead medical injuries. The Supreme Court ruled that there is no “*non-de minimis*” element in a *Hudson* claim. Immediately following the “push and shove” language quoted by Judge McAuliffe, which the Supreme Court used to show the opposite end of the spectrum of the rule it was applying, the following appears: “Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.” 130 S. Ct. at 1178-8. As to the homophobic slurs, Ninth Circuit decisions have held that language *by itself (or alone)* not to be actionable. Here, the words accompanied action and informed the intent of what followed. In *Hudson*, Justice O’Connor found relevance in a supervisor’s telling officers prior to a use of force “not to have too much fun.” 503 U.S. at 4. This is not the first time Judge McAuliffe has dismissed a *pro se* LGBT case without factual or legal justification. See discussion of twin dismissals of “freeze frame” challenges

by transgender inmate Jared Richardson in *Richardson v. Corizon Health Care*, 2017 U.S. Dist. LEXIS 205254, 2017 WL 6371330 (E.D. Calif., December 13, 2017), in Law Notes (January 2018 at pages 40-41; and 2018 U.S. Dist. LEXIS 28851 (E.D. Calif., February 22, 2018), in Law Notes (March 2018 at pages 145-6). Judge McAuliffe ruled, inter alia, that allegations that the plaintiff, who was in extreme mental distress and had used a dental loop and a razor to attempt self-castration, failed to raise an inference that she was at a high degree of risk of self-harm if her mental health were left untreated. Free “faggot” facial kicks are now available in Judge McAuliffe’s court for homophobic Corrections officers who wish to single out LGBT inmates for brutality and to brag about it. And she undoubtedly believes she can get away with this because nobody pays attention to magistrate screening decisions in *pro se* prisoner cases. But we do in *Law Notes*.

CALIFORNIA – This *pro se* case involving transgender inmate Lamar McQueen, a/k/a Nina Shanay McQueen, was originally filed in 2015; but, for reasons that are not explained on the PACER docket, defendants were not served until an “operative” first amended complaint was filed in 2018. Now, in *McQueen v. Brown*, 2019 WL 949442, 2019 U.S. Dist. LEXIS 31521 (E.D. Calif., February 27, 2019), U.S. Magistrate Judge Allison Claire recommends [R & R] that McQueen be permitted to proceed despite a motion to dismiss her claims for declaratory and injunctive relief against the Director of the California Department of Corrections and Rehabilitative Services [DCRS] (sued in official capacity only) and the executive physician in charge of the utilization review committee managing transgender inmate care (sued in official and individual capacities) for deliberate indifference to her serious health care needs. McQueen alleges that she has

been on hormone therapy for eight years, without success at controlling her severe gender dysphoria. She has been evaluated twice for sex confirmation surgery and denied twice by DCRS’s central office transgender committee under regulations and policies that Judge Claire judicially notices. The motion to dismiss is based primarily on the arguments that the dispute is merely a disagreement about treatment modalities that is not actionable under the Eighth Amendment and that the central committee has carefully considered McQueen’s individual circumstances in its decisions and was therefore not deliberately indifferent. Judge Claire’s R & R rejects these arguments, based on *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1187 (N.D. Cal.), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015). Judge Claire found that McQueen’s allegations were more than a mere treatment disagreement, but instead were claims of an outright denial of needed care, supported by a DCRS psychologist, who was McQueen’s treating mental health provider. Judge Claire finds that the “crux” of McQueen’s case is that her eight-year hormone treatment “has proven to be ineffective treatment for the severe mental and physical distress plaintiff experiences as a result of her gender dysphoria. It is plaintiff’s allegation that SRS [sex reassignment surgery] is the *only way* to treat her gender dysphoria and hence that it was medically unacceptable for defendants to refuse plaintiff’s requests for SRS, which she alleges was decided in conscious disregard of the excessive risks to plaintiff’s mental and physical health” (emphasis by the court), citing *Rosati v. Igbinosos*, 791 F.3d 1037, 1040 (9th Cir. 2015) (plaintiff “plausibly alleges her symptoms . . . are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS”); *Stevens v. Beard*, 2018 WL 2081850, at *6, 2018 U.S. Dist. LEXIS 74519, at *12 (E.D.

PRISONER LITIGATION *notes*

Cal. May 2, 2018) (denying motion to dismiss where “several medical experts have recommended SRS,” finding that “[p]laintiff has plausibly alleged more than a mere disagreement with the course of treatment.”) Judge Claire also recommended appointment of counsel. She recommended denial of a preliminary injunction for immediate surgery “on this record,” without prejudice to appointed counsel’s renewing a motion for same. The R & R rejected without prejudice an argument that McQueen was denied Equal Protection as a transgender woman because cisgender women were allowed vaginoplasty under DCRS regulations, but transgender women were not. See *Denegal v. Farrell*, 2016 WL 3648956, at *7, 2016 U.S. Dist. LEXIS 88937, at *19 (E.D. Cal. July 8, 2016) (allowing such claim), *report and recommendation adopted*, 2016 WL 8731336, 2016 U.S. Dist. LEXIS 122586 (E.D. Cal. Sept. 9, 2016). Judge Claire found this claim was “moot” at present, because in 2018 California had changed its regulations to omit the transgender/cisgender distinction. This would not preclude an “as applied” challenge, should counsel be able to argue that California still makes this distinction in practice.

CALIFORNIA – *Pro se* prisoner Michelle Concepcion is a transgender man who wants gender confirmation surgery to reflect his male identity in *Concepcion v. California DOC*, 2019 U.S. Dist. LEXIS 56776, 2019 WL 1469192 (E.D. Calif., April 2, 2019). U. S. Magistrate Judge Jennifer L. Thurston dismisses the complaint on initial screening, with leave to amend. Concepcion, who has been on hormone treatment for five years, seeks both declaratory relief that failure to provide surgery denies his rights under the Eighth Amendment and the Equal Protection Clause, and injunctive relief for surgery. The first problem is that he names

improper defendants. State agencies have Eleventh Amendment immunity. Moreover, he names the receiver appointed to oversee California’s prison medical system; but this person, as a judicial officer, has absolute immunity under *Pierson v. Ray*, 286 U.S. 547, 553-54 (1967); *see also, Coleman v. Schwarzenegger*, 2007 WL 4276554 (E.D. Cal. Nov.29, 2007) (California’s receiver is judicial officer and arm of the federal court). Concepcion’s use of some fifty “John Doe’s” does not save his case from dismissal because it is impossible from the pleading to determine the personnel involvement. Judge Thurston nevertheless discusses the Eighth Amendment and Equal Protection claims. Concepcion states that provision of testosterone alone without surgery does not address his strong psychological stress from having breasts, female genitalia, and internal organs that produce female hormones. He says it also places him at increased risk of certain cancers and exacerbates his hepatitis-C infection. He also says that testosterone combines with his body’s female hormone production to reduce the development of secondary male characteristics, such as body recontouring and facial hair. At this stage there is no defense reply, but on re-pleading Concepcion must show which defendants are responsible and how. He will also need an expert, such as an endocrinologist, to support the medical points. Judge Thurston provides some substantive direction, noting that an inmate in Concepcion’s situation must plead that her denial of surgery “was medically unacceptable under the circumstances” and made “in conscious disregard of an excessive risk to [the inmate]’s health,” *Rosati v. Igbino*, 791 F.3d 1037, 1039 (9th Cir. 2015). Further noting that California has conceded that gender dysphoria is a serious medical need, Judge Thurston writes: “The Ninth Circuit has held that a blanket denial of hormone replacement therapy and/or SRS equates to deliberate

indifference.” *Rosati v. Igbino*, 791 F.3d 1037, 1039-40 (9th Cir. 2015)(*per curiam*); *see also, Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014) (holding that the “categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference”). Judge Thurston is less helpful on the Equal Protection claims. Concepcion framed the claim as one between transgender women and cisgender women, but Judge Thurston found no suspect or quasi-suspect class, using instead “class of one” theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). She says the Equal Protection claims fail because both transgender and cisgender women must prove medical necessity for surgery – effectively collapsing the Equal Protection claim into the claim for deliberate indifference under the Eighth Amendment. This argument could apply to transgender men and cisgender women both seeking hysterectomies for ovarian cancer. Here, however, the transgender male is put through myriad additional layers of approval for surgery solely because of his transgender status – a classification not shared with cisgender women. Concepcion plead this explicitly: “Defendants regarded and applied CDCR and CCHCS policy to require more onerous standards, which consider factors other than whether the treatment is medically necessary, solely because Plaintiff was assigned female at birth, but is a transgender man.” In this writer’s view, the court does not address this point adequately.

GEORGIA – U.S. Magistrate Judge Charles H. Weigle recommended that *pro se* HIV+ inmate Cruz Lanier Gray’s complaint be screened to dismiss against the warden and “John Doe” defendants on claims of denial of a specific HIV drug (Atripla), but that Gray be permitted to proceed against

PRISONER LITIGATION *notes*

three defendants, including the prison medical director, in *Gray v. Doe*, 2019 WL 1550795 (M.D. Ga., February 22, 2019). At this stage, Gray can proceed under *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (complete withdrawal of HIV medication). Judge Weigle also cites *McMillan v. Hunter*, 2007 WL 570180, at *1, 2-3 (M.D. Fla. Feb. 20, 2007) (prisoner claimed defendants caused him to miss 39 doses of HIV medication). This is an unusual case, where an inmate is permitted to proceed on a specific medication, but Judge Weigle recommends that the claims “merit further factual development.”

ILLINOIS – In 1995, Appellant, transgender mental health patient Maikobi Burks (presently known as Mia Tatiana Martinez) was found not guilty by reason of insanity [“NGRI”] of the murder of her father, mother, and sister. Except for a brief period when she “eloped,” she has been in mental health custody ever since. This case, *People v. Burks*, 2019 Ill. App. Unpub. LEXIS 548, 2019 Il. App. (1st) 181628-U (Ill. App. 1st, March 29, 2019), is her second attempt to obtain judicial release. Under Illinois law, she must prove by clear and convincing evidence that she is entitled to release. Since the trial judge ruled against her, she must show he committed “manifest error”; and special deference is given to his findings, since this is a case of NGRI, under *People v. Bethke*, 2014 IL App (1st) 122502 (2017). During her more than 22 years in psychiatric custody, Burks has completed triadic treatment as a transgender woman through sex confirmation surgery. She was also granted unsupervised privileges in the 2000’s, allowing her time alone, first on the grounds and then in the community. Because she engaged in prohibited financial activities and “eloped” when unsupervised in the community, she was returned to secure custody. She petitioned for release in

2009, but its denial was affirmed on appeal in *People v. Burks*, 2016 IL App (1st) 152581-U (2016). Restrictions were again relaxed in the 2010’s. By 2017, her treatment team, headed by a Dr. Hussain, wrote that she should again be considered for staged unsupervised release because “[t]he treatment team does not currently consider [defendant] to be dangerous to herself or others.” Burks then filed her second petition for full judicial release, without completing the staged community re-entry planned by the committee. Burks called Hussain to testify on her behalf, but he said on cross-examination that he could not reasonably rule out future dangerousness because she did not complete re-entry, she had a history of community failure (albeit non-violent), and money issues or other undue stress could “trigger” violent episodes given her psychiatric history. He also said that her transgender orientation was a “complication,” without elaboration. The trial judge noted that the murder of her family was triggered by the upset caused by Burks’ wearing women’s clothing to her aunt’s funeral. There are ethical issues attaching to a treating provider’s forensic testimony against a patient – see Nat’l Commission on Correctional Health Care Standard P-I-03 (“outside health professionals . . . not involved in a therapeutic relationship” should be used for forensic purposes) – but they seem off the mark here. Burks herself called Hussain in the current case, knowing that he testified against her in the previous one and that she was defying his current treatment plan. She also called her own expert, who testified in favor of unsupervised release. The trial judge gave more weight to Hussain. On appeal, Justice John C. Griffin, for himself and Justices David J. Pierce and Carl Anthony Walker, could not find this decision to be against the manifest weight of the evidence. Upon reading the decision, it does not appear that Burks’ transgender history played a major part in the release decision. The trial

judge and court of appeals spent more time on her unauthorized possession of credit cards, her purchase of a car, and her elopement on her first community release. In fact, the decision is rather emotionless on both the particulars of her offense and on her sex reassignment surgery. The decision recognizes that the Due Process Clause prohibits indefinite detention of an inmate found NGRI who is later determined to be harmless – *Jones v. United States*, 463 U.S. 354, 366 (1983) – but the court did not upset the trial judge’s finding that Burks was still not clearly and convincingly harmless. It seems to this writer that Burks’ documented impulsivity is going to present an uphill battle obtaining release before the state says she is ready after a NGRI verdict for killing her family.

MICHIGAN – The protection from harm civil rights claim of Michael Salami, *pro se*, survived screening by U.S. District Judge Janet T. Neff in *Salami v. Chippewa Correctional Facility*, 2019 WL 1873170, 2019 U.S. Dist. LEXIS 70698 (W.D. Mich., April 26, 2019). Salami self-identifies as a gay, white, Romanian, Muslim, male. He was double-celled with a known sexual predator (Jensen), who outweighed him by 70 pounds. Jensen threatened Salami and told him he would rape him if he fell asleep. Salami made multiple requests for protection to prison personnel, which he claims were ignored. In one exchange with a “John Doe” defendant sergeant, the officer said: “You can’t rape someone who likes it, camel jockey.” Whereupon, Salami called him a “Nazi.” The sergeant then allegedly threatened to Taser Salami, to write up false tickets, and to knife his property. The sergeant left Salami and Jensen together, and, predictably, Jensen raped Salami two days later – confirmed by a rape kit. In conclusory terms, Judge Neff finds that Salami states a claim of denial of protection from harm. Judge Neff

PRISONER LITIGATION *notes*

refuses to accept Salami's argument that defendants' failure to screen him as a potential victim in violation of the Prison Rape Elimination Act (PREA) – see 28 C.F.R. § 115.41 – stated a cause of action, citing the usual boilerplate cases but noting that the issue of a private right of action under PREA is not “resolved” in the Sixth Circuit. The judge does not address PREA regulations as setting forth an Eighth Amendment marker for standard of care for protection from harm, even if they do not themselves state a separate cause of action.

NORTH CAROLINA – Pro se prisoner Daniel B. Parsons filed a civil rights case in 2013, claiming that he was sexually assaulted by an officer (Kelvin Andrews) and that other defendants failed to protect him from assault from other inmates. U.S. District Judge Louise W. Flanagan grants summary judgment to the “other” defendants; the claims against Andrews will go to trial – in *Parsons v. Andrews*, 2019 WL 1440268 (E.D.N.C., March 29, 2019). The case has a somewhat unique procedural aspect in that Judge Flanagan appointed North Carolina Prisoners Legal Services [“NCPLS”] to represent Parsons in the documentary discovery phase of the case pursuant to E.D.N.C. Standing Order 17-SO-03 (8/23/17). The Order provides for appointment of NCPLS in state prisoner cases for initial broadly-listed documentary discovery, with leave to ask for depositions and expert disclosure. NCPLS must file a report with the Court at the conclusion, stating whether: (1) they will continue to represent; (2) the plaintiff no longer needs appointed counsel; (3) the plaintiff has refused further representation by NCPLS; or (4) the case is meritorious, but NCPLS lacks the resources to continue with it. Chief U.S. District Judges and pro se clerks' offices throughout the country should look at this Standing Order. After completion of initial discovery, NCPLS filed a

motion to withdraw, under seal. Parsons initially agreed to the seal, but he later moved to unseal the papers. The North Carolina Attorney General moved for summary judgment for all defendants except Andrews. Judge Flanagan found that defendants conducted Prison Rape Elimination Act investigations of each alleged inmate sexual assault and that Parsons was placed in protection while investigations were underway. All were found “unsubstantiated.” Parsons apparently admitted that at least some of the sex with other inmates was consensual and that he fabricated assaults to get cell changes and then denied them to get out of protective custody. Defendants' actions and Parsons' shifting accounts defeated a jury question on the subjective element of deliberate indifference to his safety under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Apparently, there was a State Bureau of Investigation inquiry into the allegations against Andrews. A sexual act between a guard and an inmate is a felony in North Carolina – N.C. Code § 14-27.7 – and “consent is not a defense.” There were also videotapes of Parsons and Andrews going alone together into places outside camera range and emerging later with Parsons' clothing disheveled. The results of the investigation are not disclosed, but Judge Flanagan stayed Parsons' civil action while it continued. Ultimately, Judge Flanagan decides that there is enough for a trial against Andrews, giving Parsons all favorable material inferences. The North Carolina Attorney General's Office, which represented the other defendants, continues to represent defendant Andrews. Judge Flanagan leaves NCPLS' withdrawal papers sealed for now, directing Parsons to reconsider, since, if she unseals them, the Attorney General will get to see them, too. This blurb uses male pronouns, but there is a brief suggestion that Parsons might be transgender, having filed a motion alleging failure to treat gender identity disorder. Judge Flanagan determined

that this could not be raised for the first time on summary judgment, but Parsons is free to file a new suit about it.

OHIO – Pro se transgender inmate Joel (Victoria) Drain sought a preliminary injunction for counselling and hormone treatment in the Ohio prison system in *Drain v. Sawyers*, 2019 U.S. Dist. LEXIS 66329, 2019 WL 1723525 (S.D. Ohio, April 28, 2019). U.S. Magistrate Judge Stephanie K. Bowman recommended denial of same. Earlier in 2019, Judge Bowman had ordered the state corrections officials to respond to Drain's complaints. In papers in which the State of Ohio appeared as an “interested party,” defendants promised to transfer Drain to the prison's highest-level psychiatric treatment center and place her on hormones if diagnosed and indicated. On or about April 1, 2019, defendants informed Judge Bowman that Drain had been transferred and that Drain was being evaluated for hormones. Judge Bowman thus recommended denial of the preliminary injunction, finding that Drain had not shown a likelihood of prevailing on the merits at this time, nor irreparable injury if the preliminary injunction does not issue. In dicta, Judge Bowman writes that a preliminary injunction that provides “affirmative relief” is “generally” beyond the scope of a preliminary injunction under F.R.C.P. 65. This is not correct. See *United Food v. SW Ohio Transit Authority*, 163 F.3d 341, 348 (6th Cir. 1998) (applying standards of F.R.C.P. 65 to mandatory preliminary injunctions). This case illustrates what can be accomplished when a federal judge is proactive and does not at the initial stage become obsessed with procedural entanglements.

PENNSYLVANIA – Gay inmate Joshua Shirey, who suffers from severe nerve and joint pain from Lyme Disease, was incarcerated in state prison twice, with

PRISONER LITIGATION *notes*

an intervening parole. It is unclear from U.S. District Judge Wendy Beetlestone's lengthy opinion in *Shirey v. Ladonne*, 2019 U.S. Dist. LEXIS 57153, 2019 WL 1470863 (E.D. Pa., April 3, 2019), whether Shirey's sexual orientation played a part in the denial of medication for his Lyme Disease; but the holding on screening his complaint may be useful to those representing LGBT clients in prison who are on a special medication cocktail at intake for such ailments as HIV, hepatitis-C, or hormone therapy. Shirey was on Gabapentin for Lyme prior to incarceration and again during his intervening parole. "Outside" medical opinion confirmed that other medications were ineffective in alleviating his severe symptoms. It also appears that Shirey's Gabapentin was abruptly stopped by the prison system without tapering off the dosage, as provided in the manufacturer's insert. Shirey claimed that he experienced severe pain, hallucinations, and panic attacks, culminating in suicidal ideation. All of this convinced Judge Beetlestone that medical staff, including physicians, were liable for a failure to assess Shirey individually. According to medical records, medical staff told Shirey: "You'll never get what you want: deal with it." Shirey became paranoid and believed that officers were trying to kill him with guns, resulting in their use of force to restrain him. When Shirey was reincarcerated after parole violation, he told the intake officer he was gay and asked for protective custody. He responded: "I hate you faggots . . . You wanna act like women and wonder why you get raped." He also pocketed money Shirey had on his person (a few thousand dollars), saying "faggots don't get [their] money around here." He then falsified the inventory sheet to show the money was never there. Later, Shirey managed to hoard pills and obtain a razor blade. He overdosed, cut his wrists, and swallowed the razor blade. The emergency room recommended resumption of Gabapentin. Judge

Beetlestone found that the "outside" confirmation of the need for Gabapentin was sufficient to state a claim and removed this case from those dismissed as mere differences of opinion between patient and doctor, for purposes of pleading, citing *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346-7 (3d Cir. 1987); *see also*, *White v. Napoleon*, 897 F.3d 103, 109 (3d Cir. 1990) (intentionally interfering with prescribed treatment). Judge Beetlestone also found that Shirey stated a claim that medical defendants were deliberately indifferent to his serious risk of suicide because he pleaded that he was particularly vulnerable to it, defendants knew that, they responded indifferently, and suicide attempts occurred. Judge Beetlestone cites *Palakovic v. Wetzel*, 854 F.3d 209, 223-24 (3d Cir. 2017); and *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir. 1991). Interestingly, Judge Beetlestone found that Shirey also stated claims against the medical staff for violation of his First Amendment rights because the more he complained and grieved the medical staff, the more intransigent they became about denying him Gabapentin ("you'll never get what you want"). The pleadings met the deferential First Amendment standard of *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003); *see also*, *Watson v. Rozum*, 834 F.3d 417, 424 (3d Cir. 2016) ("a pattern of antagonism coupled with timing that suggests a causal link"). The only link to LGBT discrimination in the case appears to be the commentary of the intake office who uttered homophobic slurs while stealing Shirey's money and denying him protective custody. Such slurs, "although distasteful," are not actionable. As to consequences, since Shirey does not claim he was sexually assaulted, only the money theft seems relevant. Here, Judge Beetlestone dismisses the claims under *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (intentional taking of inmate's property not unconstitutional if state provides post-deprivation remedy). That Shirey

may never be able to prove he ever had the money, due to the intake officer's falsified records, does not change the holding.

SOUTH CAROLINA – Transgender prisoner Michael Anthony Sarratt, a/k/a Goddess Shuggar Sarratt, *pro se*, has been litigating since 2016 to try to obtain medical care and accommodation of her gender dysphoria in the South Carolina prison system. In *Sarratt v. Stirling*, 2019 WL 1574861 (D.S.C., March 21, 2019), U.S. Magistrate Judge Jacqueline D. Austin recommends that Sarratt be denied a preliminary injunction on such matters as personal security searches and showering. Sarratt had previously had summary judgment entered against her on medical care. She had been sent to an endocrinologist with gender dysphoria experience three or four times. She refused to answer questions on her last visit, however, because she considered them either irrelevant or too personal, according to documents in PACER. Judge Austin then recommended summary judgment against her, and those claims are no longer before the court. As to accommodation, her prison has arranged for female guards to search her except in "emergencies" and has allowed her to shower at times when male inmates are in lockdown. Sarratt says she still has claims for female grooming items and underwear and that the promised accommodations are only sporadically occurring. Nevertheless, Judge Austin finds the showing insufficient to recommend preliminary relief. The leading Fourth Circuit case on transgender care, *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013), is not cited. On April 11, 2019, U.S. District Judge Donald C. Coggins, Jr., adopted Judge Austin's recommendations.

VIRGINIA – The plight of transgender inmates at Virginia's Red Onion Prison in the far southwest toe of the state

LEGISLATIVE & ADMINISTRATIVE *notes*

has been discussed in Law Notes on numerous occasions, including that of pro se inmate Terah C. Morris. See, e.g., article on the intertwined decisions of U.S. Magistrate Judge Pamela Meade Sargent and Senior U.S. District Judge Norman C. Moon in “Federal Judges Issue Mixed Decisions on Transgender Inmate’s Physical and Mental Health Care Claims; Ignore Issue of Unreasonable Restraints,” reporting *Morris v. Mrs. Fletcher*, 2018 WL 1163465 (W.D. Va., February 13, 2013); and *Morris v. Cary*, 2018 U.S. Dist. LEXIS 23952 (W.D. Va., February 14, 2018), *Law Notes* (April 2018 at pages 182-3). This year, *Law Notes* reported the Report and Recommendation [R & R] of Judge Sargent that summary judgment be granted against Morris’ claims of deliberate indifference to her serious health care needs and abusive treatment in *Morris v. Cary*, 2019 U.S. Dist. LEXIS 28880 (W.D. Va., February 25, 2019), reported, *Law Notes* (March 2019 at pages 54-5). This writer criticized prior decisions as failing to distinguish between homosexuality and gender identity. One even suggested that Morris must be malingering because she had “female fantasies.” The decisions also tacitly approve Virginia’s “freeze frame” policy regarding transgender treatment, faulting Morris for lack of documented pre-incarceration medical history of gender dysphoria. Now, Judge Moon adopts in full Judge Sargent’s latest R & R in *Morris v. Cary*, 2019 U.S. Dist. LEXIS 54731, 2019 WL 1435839 (W.D. Va., March 29, 2019). He separately addresses each of 8 objections (which are not artfully drawn) and overrules each one. There is not much of a learning curve for readers here, except for one point. Morris argued that Judge Sargent should have watched videos of Morris being extracted from her cell, moved, and placed in restraints. Judge Moon over-ruled the objection because: (1) *pro se* Morris did not ask that Judge Sargent order the videos produced (although either judge could have “so

ordered” that); and (2) the error, if any, was harmless because the R & R considered the underlying documents with defendants’ descriptions of the videos and included notations that Morris was “crying” and “threatening” suicide. A picture here was not worth a thousand words – or even more than a handful.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

UNITED STATES CONGRESS –

Despairing of passage of the Equality Act in this session of Congress because of Republican control of the legislative agenda in the Senate, Senators Tim Kaine (D-VA), Susan Collins (R-ME) and Angus King (I-ME) have introduced the Fair and Equal Housing Act of 2019, which would add gender identity and sexual orientation to the forbidden grounds of discrimination under the Fair Housing Act. They noted that 21 states and the District of Columbia already forbid such discrimination by legislation, and during the Obama Administration the US Department of Housing and Urban Development (HUD) took the position that the Fair Housing Act of 1968’s ban on sex discrimination in housing applied to sexual orientation and gender identity cases. Some federal district courts have ruled that way in recent years. Information about this policy “disappeared” from HUD’s website with the advent of Trump. However, when asked about this coverage under the federal law, Secretary of Housing and Urban Development Dr. Ben Carson declined to respond to inquiries from LGBT organizations, stating that they would not like what he might say. Of course, what he might say is dictated by Trump Administration policy, which is firmly opposed to interpreting federal sex discrimination laws as covering sexual orientation

or gender identity discrimination, as manifested in a policy memorandum issued by former Attorney General Jeff Session in October 2017 and in briefs and oral arguments presented by the Justice Department to the federal courts. Passage of the Equality Act, which has been approved by the House Judiciary Committee on a strict party line vote and which may pass the House during May, would address the issue across all the anti-discrimination measures in the United States Code by adding these forbidden grounds to all existing laws. The likelihood that the measure would get out of committee, much less receive a floor vote, is nil as long as Mitch McConnell is majority leader. Thus the more modest FEHA of 2019 introduced by Senators Kaine, Collins and King.

ARIZONA – A lawsuit filed by Lambda Legal challenging statutory bans on HIV and AIDS instruction that “promotes a homosexual lifestyle” precipitated a legislative repeal during April. Action was initiated in the House after Attorney General Mark Brnovich, a Republican, said that his office would not defend the statutory prohibition. The challenged statute also prohibited any safe-sex education that “portrays homosexuality as a positive alternative lifestyle” or “suggests that some methods of sex are safe methods of homosexual sex.” Very unscientific! Republican members led the initiative to repeal the challenged provisions. The lawsuit was filed on behalf of Equality Arizona. *AP State News*, April 10.

ILLINOIS – The Illinois Medicaid program announced that it will start covering gender reassignment surgery this summer. Medicaid members age 21 or older who are diagnosed with gender dysphoria will be eligible for genital and breast-related surgery, under rules proposed by the Department of Healthcare and Family Services.

LEGISLATIVE & ADMINISTRATIVE *notes*

According to the Department, about 1400 Illinois residents who are Medicaid recipients have received such a diagnosis. Governor J.B. Pritzker issued a statement applauding the move, stating: “Healthcare is a right, not a privilege, and I’m committed to ensuring our LGBTQ community and all Illinoisans have access to that right. Expanding Medicaid to cover gender affirming surgeries is cost effective, helps avoid long term health consequences, and most importantly is the right thing to do.” According to the Department’s announcement, at present 17 states and the District of Columbia provide at least some coverage for gender reassignment procedures under their Medicaid programs. The Department is working on administrative rules and will publish them for public comment soon. Coverage begins once the rules are published in final form. *Chicago Tribune*, April 7.

IOWA – Governor Kim Reynolds has signed into law a Medicaid appropriations bill that forbids coverage of gender transition-related care, passed late in the legislative session in reaction to the Iowa Supreme Court’s March 8 decision in *Good v. Iowa Department of Human Services*, 2019 WL 1086614, 2019 Iowa Sup. LEXIS 19, which held that Iowa Medicaid is a public accommodation subject to the non-discrimination requirements of the Iowa Civil Rights Act, which bans gender identity discrimination. The Supreme Court had declined to rule on plaintiffs’ alternative argument that denying the coverage violated the equal protection clause of the state’s constitution, that the agency’s position had a disproportionate negative impact on private rights, or that the policy’s adoption was arbitrary and capricious. The lack of a constitutional ruling left it open to the legislature to overrule the decision by ordinary legislation, or so it was argued. The plaintiffs could go back and ask for a

constitutional ruling in response to the new legislation. (Of course, Republicans control both houses of the legislature, and Governor Reynolds is a Republican. The Republican Party is officially allergic to gender transition.)

KENTUCKY – Bowling Green’s City Commission voted 3-2 on April 16 to reject the first reading of a measure that would have added sexual orientation and gender identity to the city’s civil rights law, making Bowling Green the largest municipality in the state to lack such formal protection. Kentucky state law does not ban anti-LGBT discrimination, but most of the state’s largest municipalities do so. *Associated Press*, April 17.

MARYLAND – Baltimore city school commissioners voted on April 9 to enact a policy allowing transgender students to use the names, pronouns and bathrooms that align with their gender identity, reports the *Baltimore Sun* on April 10.

MASSACHUSETTS – On April 8, Governor Charlie Baker signed into law a measure that prohibits health professionals from performing conversion therapy on minors. The measure passed both houses of the state legislature during March by huge margins. This reportedly made Massachusetts the 16th state to enact such restrictions, in the face of some uncertainty about how the measures will fare under challenge in the courts by proponents of the therapy. At the time, a petition was pending in the Supreme Court seeking to revive a constitutional challenge to a similar New Jersey statute, which had been upheld by the 3rd Circuit in *King v. Governor of New Jersey*, 767 F.3d 216, (3rd Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015), a ruling that the Supreme Court subsequently criticized in an unrelated case last June,

prompting the challengers to request the 3rd Circuit to revoke its mandate from the district court and reconsider the case. When the 3rd Circuit denied the request, the cert petition was filed. The disputed point is how the court should conduct a 1st Amendment challenge to a statute enacted under the states’ traditional power to regulate health care practice – strict scrutiny vs. heightened scrutiny vs. rationality review – when the practice in question consists largely of “talk therapy.”

MINNESOTA – The House of Representatives included H.F. 12, a conversion therapy ban for minors, in its HHS Omnibus financial bill, and sent it to the Senate for consideration. *Hrc.org*, April 26.

TENNESSEE – The legislature decided to defer action on a trio of anti-LGBTQ bills that had been expected to be enacted in this session. Six such bills had been introduced at the beginning of the session, and one, described a “much compromised,” actually passed, as the Republican majorities in both houses strove to achieve the first rank among state legislatures in passing anti-LGBTQ legislation this year. Business leaders stated opposition to all the measures. The deferred bills were expected to be taken up during next year’s legislative session. FreedomForAllAmericans.org described the deferred bills as follows in a May 2 press release: “SB 1499/HB 1274 would encourage school districts to pass anti-transgender restroom policies that prohibit transgender students from using the facilities that correspond with their gender identity, and would require the Attorney General to provide legal defense for those discriminatory school districts at taxpayers’ expense. SB 1304/HB 836 would allow taxpayer-funded child welfare services to discriminate against LGBTQ people, single parents, and people of minority faiths, among

LAW & SOCIETY *notes*

others. Earlier this session, the Senate deferred HB 563/SB 364, which would prevent local governments from providing business incentives to companies on the basis of their internal policies, such as LGBTQ-inclusive nondiscrimination protections.” Some of these bills aim at preempting local legislation, which forbids anti-LGBTQ discrimination in several of the state’s cities. Some of the measures had passed one house and were pending in the other as the term was running out.

LAW & SOCIETY NOTES

By Arthur S. Leonard

2020 PRESIDENTIAL RACE – With all the publicity given to out gay South Bend, Indiana, Mayor Peter Buttigieg’s campaign for the Democratic presidential nomination, another noteworthy contender has been largely ignored, according to a May 1 article in the *Cincinnati Inquirer*: Pamela Rocker, who “hopes to be the first transgender black female president in history,” according to the article. As of April 9, Rocker was one of about 670 presidential hopefuls who had filed an official “statement of candidacy” with the Federal Election Commission. Rocker is currently unemployed, so hitting the campaign trail will give her something to do. Rocker told an *Inquirer* reporter that watching the election returns on November 8, 2016, was “living a nightmare,” and that six months later she decided to run while on a mountain-climbing vacation in Washington State with her husband. Rocker was raised by a series of foster parents in Cincinnati and graduated from Robert A. Taft High School. She says that she was “out” as a gay boy in high school, the victim of bullying, and would dress as a woman on weekends as she eventually transitioned. She has never served in any elective office, and thus is as qualified in that respect as

Donald Trump was on election day. She told the reporter that she would be going to Iowa soon to begin campaigning.

LESBIAN MAYORS – TAMPA, FL, elected a new mayor on April 23: former police chief **JANE CASTOR**, an out lesbian who now holds the distinction of being the first out LGBTQ candidate to be elected mayor of a major southeastern U.S. city (if one doesn’t count Texas as part of the southeast, since out lesbian **ANNISE PARKER** – now head of the LGBTQ Victory Fund – previously served as mayor of **HOUSTON, TX**, a distinctly larger city than Tampa). Tampa is the nation’s 53rd largest city. Castor’s substantial victory on April 23 followed in the wake of **LORI LIGHTFOOT**’s landslide election as the first out LGBTQ major of **CHICAGO, IL** (the nation’s 3rd largest city), and **SATAYA RHODES-CONWAY**’s election as the first out LGBTQ mayor of **MADISON, WI** (the 83rd largest city). Still to come: The June 18 runoff in **KANSAS CITY** (the 37th largest city), where out lesbian **JOLIE JUSTUS** will be contending with councilmember Quinton Lucas. The other out lesbian big city mayor is **JENNY DURKAN**, of Seattle, Washington (the 20th largest city). Incidentally, South Bend, Indiana, does not show up on an on-line list of the nation’s 150 largest cities that we consulted to prepare this item.

TRANSGENDER MILITARY AND NATIONAL GUARD MEMBERS

– After the D.C. Circuit’s March 8 ruling cleared the way for President Trump’s transgender military ban, as explicated by former Defense Secretary James Mattis, to go into effect, the Defense Department set April 12 as the implementation date. Anticipating the action, the House of Representatives voted 238-185 (basically a party-line vote) to approve a resolution seeking to block the implementation, but the

resolution of one house is non-binding on the military, and there was no sign that the Republican-controlled Senate would buck President Trump and join with the House on this issue. There were not, however, widespread media reports of transgender personnel being notified of their discharges after April 12, and it was unclear how quickly the policy would actually be implemented against serving personnel. One story that quickly drew media attention (see *The Daily Texan*, April 16) focused on Map Pesqueira, a transgender freshman at the University of Texas at Austin, who was informed that the Defense Department had “voided” his three-year Reserve Officers’ Training Corps scholarship, since he would not be allowed to serve in the military upon graduation. Pesqueira, a transgender man, quickly went public with the problem, and soon raised enough money with a GoFundMe page on Facebook.com to make up for the missing scholarship, at least through his sophomore year. * * * As of April 24, reported *The Hill*, governors of five western states had stated that they would defy President Trump’s ban on transgender military service and allow transgender individuals to enlist and serve in National Guard units, which are mainly under state control although, technically, the Defense Department may have objections, since National Guard units have been frequently pressed into service, both overseas and along the southwestern border, in recent years. Governors of Nevada, Oregon, Washington, California and New Mexico have all made their positions clear, some in anticipation of the ban going into effect, some in response to the implementation of the ban on April 12. As of April 24, the Defense Department had not issued any statement about how it would deal with State Guard Units that include transgender members.

UNITED METHODIST CHURCH – On April 26, the judicial arm of the

INTERNATIONAL *notes*

United Methodist Church upheld the Traditional Plan that was narrowly approved by a special session of the church's General Conference, strengthening the denominations ban on same-sex marriage and the ordination of out gay clergy, thus placing the church on the wrong side of history in the United States, where a substantial majority of the population now tells pollsters that it approves of same-sex marriages, and where employment discrimination against LGBTQ people is overwhelmingly condemned in population surveys. The Church has about 7 million members in the United States. The recent vote and subsequent action by the nine-member court seem calculated to drive away LGBT members who had seen their denomination as generally supportive on the local level in many areas, despite the offensively anti-gay language in the Church's Book of Discipline. In other action, the Judicial Council ruled out a requirement that would have required a board of ordained ministry candidates to certify to a bishop whether they would follow the Book of Discipline in its entirety, ruled out a "homosexuality test" of clergy candidates that would involve investigating their social media accounts, and upheld an "exit plan" passed by the General Conference in anticipation that some more socially progressive congregations may want to dis-affiliate from the Church. The exit plan says that churches that decide to leave must pay their share of pension liability for clergy, and that exiting clergy may retain their pensions, but they will be "converted" to limit further liability to the conference. The Traditional Plan takes effect in January, 2020, but many of these issues are expected to come up again when the General Conference convenes in May, 2020. *Atlanta Journal and Constitution*, April 28.

MORMON CHURCH – Reversing a controversial position, the Mormon

Church announced on April 4 that it has rescinded rules prohibiting the baptism of children of gay parents, although it still considers same-sex marriage to be a "serious transgression" of church doctrine. The new policy, which was announced as "effective immediately," repeals rules adopted in November 2015. Children denied baptism could be baptized under these rules after reaching age 18 if they "disavowed same-sex relationships." Under the new rules, children can be blessed as babies and baptized at age 8. The statement said, "We want to reduce the hate and contention so common today." However, it added, "These changes do not represent a shift in church doctrine related to marriage or the commandments of God in regard to chastity and morality." Although considering same-sex marriages a "serious transgression," the church will no longer consider such unions "apostasy." *New York Times*, April 4.

CONVERSION THERAPY – Failing legislative attempts to ban conversion therapy, the Virginia Board of Psychology issued a letter of guidance stating that conversion therapy should be considered a violation of practice standards. Although the executive branch has been in Democratic hands and would welcome a conversion therapy ban, the General Assembly is narrowly controlled by the Republicans, who oppose such proposals, which is leading state agencies, licensing boards, and professional associations to attempt to fill the vacuum. The Virginia Board of Psychology release a guidance document in January that warns that practicing conversion therapy can lead to professional sanctions, and opened an online forum for public comments which received over 500 responses, mostly favoring a ban. The Board of Counseling was also receiving public comments until April 17. *Roanoke Times*, April 8.

FRANK KAMENY AWARD – The **NATIONAL LGBT BAR ASSOCIATION** announced that it will bestow its **2019 FRANK KAMENY AWARD** on **JUDY SHEPARD**, the mother of Matthew Shepard and president of the Matthew Shepard Foundation, who has worked tirelessly as an advocate for LGBT equality and the prevention of hate crimes ever since the horrific murder of her gay son. The award is named for Franklin Kameny, the first person to bring a sexual orientation discrimination claim to the U.S. Supreme Court after his discharge by the federal government for being gay. The award will be presented at the 2019 Lavender Law Conference and Career Fair taking place in August 2019 in Philadelphia.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – Tasmania has become the first Australian jurisdiction to make gender optional on birth certificates. The legislation also allows teenagers when they reach the age of 16 to have their gender changed on their birth certificates without obtaining permission from their parents. Individuals can do this via a statutory declaration. The law also ends the requirement for transgender people to have "sexual reassignment surgery" as a condition of getting legal recognition for their gender. *Daily Mail Online*, April 10.

BRUNEI – Responding to a public relations firestorm, the government of Brunei has indicated that although it is not formally withdrawing recently-reiterated policy that homosexual acts are subject to the death penalty in that country, there is no intention by the government to seek to execute gay people. The whole world is watching . . .

INTERNATIONAL *notes*

CAYMAN ISLANDS – The Grand Court of the Cayman Islands ruled in favor of marriage equality, but the decision was quickly stayed as the government announced an appeal of chief Justice Anthony Smellie’s ruling. Premier Alden McLaughlin told the Legislative Assembly on April 3 that the attorney general would take the case to the Court of Appeal, which McLaughlin said was a necessary action to address “significant and potentially far reaching” implications on the nation’s constitution.

CHILE – On April 29, the Santiago Appeals Court ruled unanimously against a gay couple who were seeking the right to marry, reported journalist Rex Wockner the next day. The Appeals Court had previously refused to consider their appeal, but was ordered to do so by the Supreme Court. The government of President Sebastian Pinera, which took office in March 2018, is under an obligation to advance marriage equality, under a settlement agreement that the previous government entered into before the Inter-American Commission on Human Rights in 2016, but Pinera has stated publicly his belief that “marriage, as we conceive it and by its nature, is between a man and a woman,” and he has not pushed the legislature to act on a marriage equality bill that has been pending since 2017. Ruling on an appeal by Ramon Gomez and Gonzalo Velasquez from the refusal of the Santiago Appeals Court to examine their case, the Supreme Court had stated that the Civil Registry’s refusal to give them a date for their marriage could have violated Article 20 of the Constitution, following upon a December 2018 Supreme Court ruling overturning a Civil Registry’s refusal to authorize a marriage of a different-sex couple because the woman was a foreigner without a Chilean identity card. In that case, the Court had stated: “Constitutional norms and international

convention provide that every person who inhabits the State of Chile is the holder of the right to marry and to found a family.” Gomez and Velasquez will now likely take their marital quest back to the Supreme Court. This summary is based on Wockner’s April 30 report.

INDIA – A panel of the Supreme Court of India rejected the suggestion that it should go beyond its ruling striking down Section 377 of the India Penal Code and address other matters concerning the basic civil rights of the LGBT community. The court dismissed a review petition seeking same-sex marriage, adoption and surrogacy rights. Chief Justice Ranjan Gogoi, referring to the prior ruling, said: “We are not inclined to entertain this petition after the decision of this court in *Navtej Singh Johar v. Union of India* decided on September 6, 2018.” The petition outlined in detail the ways in which the failure of the court to take on these additional issues leaves the LGBT community in a second-class citizenship status. But the Court apparently is not ready yet to go further. *News18English*, April 15. * * * The Madras High Court ruled in a case involving the marriage of Arun Kumar and Sreeja, a transgender woman, that the term “bride” as used in the Hindu Marriage Act will be construed to include a transgender woman. The couple married on October 31, 2018, at a temple in Tuticorin and moved the court after the local registrar office refused to register the marriage on the ground that the couple did not meet the statutory requirement of Section 5 of the Hindu Marriage Act, as the term “bride” can only refer to a “woman on her wedding day.” Justice GR Swaminathan said that the marriage was valid and the Registrar was bound to register it. “By holding so,” wrote the judge, “this court is not breaking any new ground. It is merely stating the obvious. Sometimes, to see the obvious, one needs not only physical vision in the eye

but also love in the heart.” At the same time, the court directed the Madras state government to issue an order banning sex reassignment surgeries on intersex infants and children, referring to a Supreme Court decision which upheld transgender persons’ right to decide their self-identified gender. The court said that forced medical procedures on minors deprived them of this right. *Indian Express*, April 23.

KENYA – The Kenya Christian Professionals Forum filed a notice of appeal against a High Court decision from last month that allowed a gay community organization to register with the government as recognized NGO. The Christian Forum’s notice stated: “Being dissatisfied with the entire judgment and order of the appellate court, we intend to appeal against the whole decision.” *BBC International News Reports*, April 11.

LEBANON – The nation’s top military prosecutor has ruled that homosexuality among military members is not a crime. In reaction, Judge Peter Germanos chose not to prosecute four soldiers dismissed in a “sodomy” case, stating “Sodomy is not punishable by law.” He observed that a provision of the country’s penal code mentioning crimes “against nature” was too vague. This responded to an appeal court ruling in 2017 acquitting nine gay defendants. The government remains non-supportive, however, having blocked Grindr, the gay dating app, from operating in Lebanon, and attempting to shut down gay rights conferences and events. *The New Arab*, March 30.

MEXICO – The Supreme Court struck down all laws in Aguascalientes State that define marriage as between a man and a woman, in a ruling on April 2, reports journalist Rex Wockner, who is tracking Mexican marriage quality

INTERNATIONAL *notes*

developments on his blog. The decision will come into force when the court officially notifies the state of the ruling. The circumstances for the court's ruling was the enactment of a new state law that deals with the health-care and pension system for state government workers. The National Human Rights Commission challenged the law, giving the court an opening to expand its marriage equality jurisprudence. However, a few days later the congress of the state of Yucatan rejected a marriage equality measure in a 15-9 vote. The Supreme Court ruled many years ago that same-sex couples are entitled to marry, but under Mexico's legal system such rulings, in challenges to the law of particular states, are limited in their effect to the state whose law is challenged, and multiple rulings are required to produce "jurisprudence" binding beyond the parties to the dispute, so the process of achieving marriage equality in the courts has been slow and piecemeal. In the meantime, because of the Supreme Court ruling, same-sex couples who wish to marry outside the 15 states that now permit it must obtain a court order, called an amparo, directly local officials to issue them a license. Courts are constrained to grant the amparo pursuant to the Supreme Court's decisions, which also hold that same-sex marriages contracted lawfully anywhere in Mexico must be recognized by government throughout the country, even in states that do not yet formally authorize same-sex marriages. Confused yet?

NETHERLANDS – The Netherlands is changing its procedure for transgender people to change the gender designation on their birth certificates. The current requirement of an "expert's certificate" from a psychologist or doctor will be replaced by self-certification on a form to be completed by the applicant. People aged under 16 will be given the right to submit an application to a court to

have their gender registration changed, according to a letter from Minister of Legal Protection Dekker to the House of Representatives on April 10. The requirement of an "expert's certificate" under current regulations was deemed to violate the right to self-determination. *ForeignAffairs.co.nz*, April 16.

RUSSIA – A court in St. Petersburg ruled that a printing company violated the legal rights of a transgender woman, Anna Grigoryeva, ordering her reinstatement and a payment of approximately \$28,000 in backpay and a small damage award. Grigoryeva had her sex officially changed through a court decision on April 25, 2017. According to a Russian LGBT rights group, Vykhod, this was the first known case in which a Russian court found in favor of a transgender woman in a labor dispute. The company claimed reliance on a government decree from 2000 listing 450 occupations in which it was illegal to employ women. Grigoryeva's lawyers successfully argued that the decree should not apply to her, because it was intended to protect mothers. Her sex change does not make it possible for her to bear children *BBC International Reports*, April 10.

SAUDI ARABIA – There were press reports late in April that Saudi Arabia's mass execution of 37 alleged "terrorists" included five men who "confessed" to being gay under torture. Reported *Mail on Sunday (UK)* on April 28, "the confessions are strongly thought to have been forced from the men after many of the 37 testified that they had been tortured. The five executed men admitted being involved in sexual relationships with each other – which is illegal in Saudi Arabia – in written statements which have emerged following one of the largest mass executions in the Gulf State's recent history." The *Mail* article reported that

one of the executed men "allegedly admitted to having sex with four of his co-accused 'terrorists.' A document obtained from the religious court states that the man confessed to gay acts and hating Saudi's majority Sunni sect. The unnamed man had denied the charges against him and his lawyer claimed the confession was a fabrication."

SOUTH KOREA – The National Human Rights Commission of Korea will add a non-binary gender option in official petition documents according to an announcement at the beginning of April. An NHRCK official stated, "After recently receiving a petition urging us to allow a third-gender option in our petition documents, a relevant department reviewed it and reached the conclusion that this was permissible." New documents were expected to be available by May. Those filing discrimination charges with the Commission had been required to indicate their gender on applications, and the existing forms allow for the choices of male, female, transgender male, and transgender female. The new forms will provide an option for those who do not specify a particular gender. *Korea Times*, April 1.

TURKEY – The local government in Ankara, capital city of Turkey, pronounced a ban on LGBT Pride events, but on April 19 it was announced that a Turkish LGBT-rights group, Kaos GL, had managed to get a court to overturn the ban. The local government had first announced a ban in November 2017, citing "public morality" and "social sensitivity and sensibilities." The court, by contrast, said that the government's more recent citation of security concerns did not justify banning the event, but instead called for increased security efforts by the government to ensure that it was held safely. *Pink News*, April 20.

PROFESSIONAL *notes*

PROFESSIONAL NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF JUSTICE – DOJ Pride, an organization for LGBTQ employees of the U.S. Department of Justice, sent a letter to Attorney General William Barr concerning the hostile work environment experienced by out attorneys in the Department, asking him to issue an EEOC statement. DOJ Pride quoted from an internal survey of its members finding that only 10% agreed that DOJ “attracts and retains the best LGBTQ talent” and fewer than half agreed that DOJ “does not discriminate” against LGBTQ people. Barr responded with a letter on April 4, attaching a new EEO statement he signed on that date, including gender identity and sexual orientation and addressing discrimination, retaliation, and harassment. Barr wrote that he was “troubled by the concerns you raised about low morale and in particular about discrimination against LGBTQ employees. I have shred your letter with the FBI and [the Bureau of Prisons] and hve directed them to take appropriate action to investigate and address allegations of discrimination and to prevent it going forward.” Barr’s predecessor, Jeff Sessions, had not issued such an EEOC statement, unsurprisingly in light of his known opposition to LGBTQ equality. *LGBTQ Nation.com*, April 8.

TRANSGENDER LAW CENTER

– On April 9 the Transgender Law Center announced openings for three full-time attorney positions: Immigration Attorney for the Black LGBTQ Migrant Project, Bilingual Legal Services Project Staff Attorney, and Detention Staff Attorney focusing on prison and jail work. Details about

job openings posted from time to time can be found on the Center’s website at: <https://tlcenter/bamboohr.com/jobs>.

In April, **THE PENNSYLVANIA BAR ASSOCIATION’s** Gay, Lesbian, Bisexual and Transgender Rights Committee selected Lancaster attorney **SHARON R. LOPEZ** for its **2019 DAVID M. ROSENBLUM GLBT PUBLIC POLICY AWARD**, for her numerous efforts to make the association more inclusive and diverse. Lopez, a partner at Triquetra Law, is immediate past president of the Bar Association. *Lancaster Newspapers*, April 22.

EDITOR’S NOTES

LGBT Law Notes 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.

EDITOR’S NOTES

1. Alexander, Klint W., *The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 Okla. L. Rev. 1069 (Summer 2019).
2. Barker, Paul, *Religious Exemptions and the Vocational Dimension of Work*, 119 Colum. L. Rev. 169 (Jan. 2019).
3. Barry, Kevin M., and Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 Touro L. Rev. 25 (2019).
4. Brazil, Bridget, *You Better Work: Employment Discrimination, Title VII, and Sexual Orientation*, 67 U. Kan. L. Rev. 631 (March 2019).
5. Brescia, Raymond H., *Creative Lawyering for Social Change*, 35 Ga. St. U. L. Rev. 529 (Spring 2019).
6. Brown, Elizabeth, and Inara Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 Am. Bus. L.J. 55 (Spring 2019).
7. Clark, Kendra, *Specters of California’s Homophobic Past: A Look at California’s Sex Offender Registration Requirements for Perpetrators of Statutory Rape*, 52 U.C. Davis L. Rev. 1747 (Feb. 2019).
8. Davidson, Nestor M., *The Dilemma of Localism in an Era of Polarization*, 128 Yale L.J. 954 (Feb. 2019).
9. Fontana, David, and Naomi Schoenbaum, *Unsexng Pregnancy*, 119 Colum. L. Rev. 309 (March 2019).
10. Hudson, David L. Jr., *Justice Kennedy and the First Amendment*, 9 HLRe 49 (Spring 2019).
11. Kot, Yaniv, *The Fundamental Right to Sexual Autonomy in Prison*, 56 Am. Crim. L. Rev. 511 (Spring 2019).
12. Liu, Goodwin, *Book Review, Jeffrey Sutton’s “State Courts and Constitutional Structure”* (Oxford, 2018), 128 Yale L.J. 1304 (March 2019).

13. Milosevic, Ashley, *The Tides of Transgressions: An Analysis of Defamation and the Rights of the LGBT Community*, 82 *Alb. L. Rev.* 323 (2018-2019).
14. Note, *Equal Dignity – Heeding Its Call*, 132 *Harv. L. Rev.* 1323 (Feb. 2019) (On Justice Kennedy’s 14th Amendment Jurisprudence).
15. Palacios, Jesus, et al., *Adoption in the Service of Child Protection: An International Interdisciplinary Perspective*, 25 *Psychol. Pub. Pol’y & L.* 57 (May 2019).
16. Piazza, Alexis M., *The Right to Education after Obergefell*, 43 *Harbinger* 62 (April 2, 2019) (building on the substantive due process theory of *Obergefell* to find support for a fundamental right to education).
17. Sanders, Steve, *Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue*, 87 *Fordham L. Rev.* 2069 (April 2019).
18. Segall, Eric, Jonathan Adler, Pam Karlan, and Mark Tushnet, *Symposium on the Jurisprudence of Justice Kennedy: Panel 1: Abortion and Gay Rights*, 35 *Ga. St. U. L. Rev.* 871 (Spring 2019) (fascinating discussion among constitutional law scholars about Kennedy’s gay rights jurisprudence).
19. Silverman, Lewis A., *Redefining Family in New York*, 91-*APR N.Y. St. B.J.* 16 (April 2019).
20. Springett, Lauren, *Why the Intent Test Falls Short: Examining the Ways in Which the Legal System Devalues Gestation to Promote Nuclear Families*, 52 *Colum. J.L. & Soc. Probs.* 391 (Spring 2019).
21. Strader, J. Kelly, and Lindsey Hay, *Lewd String: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 *Am. Crim. L. Rev.* 465 (Spring 2019).
22. Velte, Kyle C., *Mitigating the “LGBT Disconnect”:¹ Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 *Am. U. J. Gender Soc. Pol’y & L.* 29 (2019) (Symposium Edition).

