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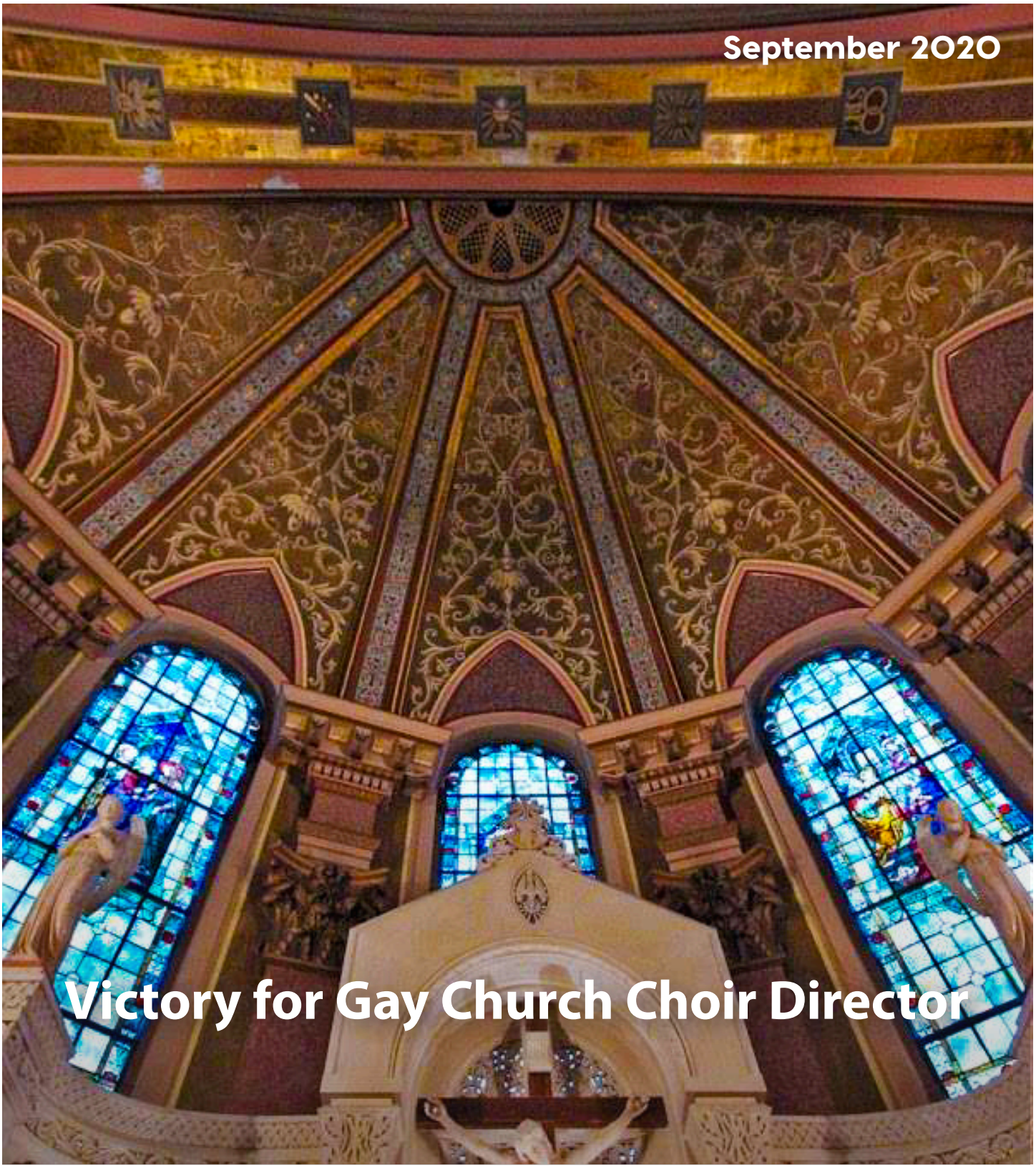
LAW NOTES

September 2020



Victory for Gay Church Choir Director

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

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ISSN 8755-9021

**Cover photo by Saul Loeb (AFP via Getty Images)*

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EXECUTIVE SUMMARY

37 Notes **60** Citations

7th Circuit Court of Appeals Holds That Fired Gay Church Music Director Can Pursue Damages for Hostile Work Environment Inflicted by Supervising Priest

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 7th Circuit ruled on August 31 in *Demkovich v. St. Andrew the Apostle Parish,* 2020 Westlaw 5105147, that a gay man fired as music director by a Catholic church after he married his boyfriend of many years can sue the church on a claim that he was subjected to a hostile work environment by his supervisor, a priest, because of his sexual orientation and physical disabilities. The panel voted 2-1 that the ministerial exception to anti-discrimination law identified by the Supreme Court under the Free Exercise Clause, which protects religious organizations from being sued about their decisions to hire or terminate employees who can be described as "ministers," does not apply to such an employee's claim that his employer has subjected him to a hostile work environment for reasons prohibited by anti-discrimination laws.

The St. Andrew the Apostle Roman Catholic church, in Calumet City, Illinois, hired Sandor Demkovich to be its music director in 2012. At the time he had been living with his same-sex partner for more than a decade. He suffered from diabetes and metabolic syndrome and was overweight, conditions that could be disabilities under the Americans with Disabilities Act (ADA). The church was aware of these physical conditions when he was hired.

There were no complaints about his performance as music director, but he was fired in 2014 after he refused a demand by his supervisor, Reverend Jacek Dada, that he not marry his partner once Illinois had passed a marriage equality law. In his lawsuit, Demkovich contends that Rev. Dada subjected him to a hostile work environment during his employment based on his sexual orientation and his disabilities. In his complaint, Demkovich claims that the nasty comments and epithets escalated as the date of his marriage ceremony approached. After the marriage ceremony, Dada demanded Demkovich's resignation. Demkovich was fired when he refused to resign.

Demkovich's lawsuit does not challenge his discharge. That would not subject the church to liability, because Demkovich was clearly a "ministerial employee" under the Supreme Court's key precedents: *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). But he claims that the church violated Title VII and the ADA under the hostile environment theory that the Supreme Court first recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Under this theory, if an employee is subjected to such severe or pervasive harassment that his ability to do his job is adversely affected, the employer may be liable to him for damages, particularly when a supervisor is the source of the harassment. The harassment does not have to be so bad that any reasonable person would quit, and courts struggle where to draw the line, but the situation must be more than merely uncomfortable for the employee. Demkovich's factual allegations are sufficient to state a plausible claim under the case law generated by *Meritor.*

The church moved to dismiss the case, invoking the ministerial exception. The church argued that under the 1st Amendment it is not subject to any restrictions on how it treats its employees under Title VII or the ADA. U.S. District Judge Edmond E. Chang dismissed the Title VII claim but allowed the ADA claim to proceed, evidently crediting the argument that the Title VII claim was invalid because Rev. Dada's religious beliefs regarding homosexuality and same-sex marriage were the motivation for his harassment of Demkovich, but that there was no religious basis to harass an employee because of his disabilities.

According to the panel opinion by Judge David Hamilton, the church "persuaded" Judge Chang to "certify" to the 7th Circuit a "broad legal question, not limited to the factual details of this particular case," of whether the ministerial exception does "ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?" Under Supreme Court precedents, hostile work environment claims are "intangible employment actions" while hiring, firing, promotion, and disciplinary actions by employers are considered to be "tangible."

The church was hoping to be relieved of potential liability under the ADA, but by posing the question they were putting their victory on the Title VII motion in danger. The 7th Circuit had already recognized that sexual orientation claims are covered by Title VII in *Hively v. Ivy Tech Community College*, 853 F. 3d 339 (7th Cir., *en banc*, 2017), but that position was bolstered on June 15, 2020, when the Supreme Court decided *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731.

The panel divided 2-1 over how to answer the question. For the majority, it was clear that the Supreme Court's ministerial exception decisions, which all involved wrongful termination lawsuits, did not extend to "intangible employment actions" such as hostile work environment harassment. Judge Hamilton's opinion bases this conclusion on the reason the Supreme Court articulated for its rulings: that a church's free exercise of religion must include its freedom to decide whom to employ as a minister of the faith, and that the government should not interfere with such decisions.

Hamilton asserted that holding a church liable for subjecting its workers

to severely hostile working conditions, especially conditions so severe that they adversely affect an individual's ability to perform his or her job, has nothing to do with the church's decision whom to employ. Thus, the Supreme Court's reasoning would not support allowing churches to mistreat employees in a way that would violate the statutes if perpetrated in a non-religious workplace. This struck the court as correct even if the mistreatment was motivated by the religious beliefs of the church.

The court confronted additional arguments by the church under the 1st Amendment's Establishment Clause, which forbids the government from excessive entanglement with religion. The court noted that the ministerial exception has not been used to shield churches from liability for breach of contract, or tort claims such as negligent or intentional infliction of harm. For example, churches have been sued for their priests' sexual exploitation of children by those injured, and they have also been prosecuted by the states for criminal action in that connection. Judge Hamilton asserted that subjecting churches to Title VII lawsuits on hostile work environment claims, at least at the stage of a motion to dismiss a case, was no more onerous in terms of church-state entanglement. He did note that discovery in such cases might be limited by 1st Amendment concerns, an issue that would be decided if it arose in the course of litigation.

Judge Joel Flaum, the senior member of the panel in terms of service on the court, dissented. He was appointed in 1983 by President Ronald Reagan and remains one of the most conservative judges on the 7th Circuit. Judge Flaum rejected the majority's assertion that the ministerial exception should be limited to tangible employment actions, even though Judge Hamilton quoted language from the Supreme Court's opinions tending to support that view. To Flaum, subjecting the church to any judicial intervention on a personnel matter was a serious invasion of its religious freedom, not to be allowed under the 1st Amendment.

The panel's ruling not only confirmed Judge Chang's decision to allow Sandor Demkovich to pursue his ADA claim but also revived the Title VII claim, so the church's gamble on escaping liability altogether has backfired, potentially subjecting it to liability under Title VII, which can include punitive damages in appropriate cases. On the other hand, the court was careful to state that it was not deciding the merits of Demkovich's claim, only whether the facts he alleged could, if proven true, provide a basis for imposing liability on the church for Rev. Dada's actions on a hostile environment theory.

The court pointed out that lower federal court decisions, some pre-dating *Hosanna-Tabor*, are divided about whether there is a distinction between tangible and intangible employment actions for this purpose. Thus, if the church wants to push the case, it is possible that it could interest the Supreme Court in resolving a circuit split on this issue, especially in light of the Court's recent interest in the intersection of religion and anti-discrimination law, signaled by its cert grant in *Fulton v. City of Philadelphia*, which will be argued this term. Judge Hamilton's decision did cite *Employment Division v. Smith*, 494 US 872 (1990), in support of the court's holding that the church did not enjoy a general Free Exercise right to violate neutral laws of general application. The cert petition in *Fulton* put the question whether the Court should reconsider that precedent, and at least four members of the Court have signaled their interest in doing so.

Judge Hamilton was President Barack Obama's first court of appeals nominee in 2009. The other judge in the majority, Circuit Judge Ilana Rovner, was appointed to the court by President George H.W. Bush in 1992. She had previously served on the district court, having been appointed to succeed then-District Judge Flaum when President Reagan promoted him to the court of appeals!

Demkovich is represented by Kristina B. Alkass, Thomas J. Fox, and Patti S. Levinson of Lavelle Law, Ltd., of Schaumburg, Illinois. ■

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

Eleventh Circuit Extends Bostock to Title IX, Allowing Transgender Students Access to Bathrooms Matching Gender Identity

By Matthew Goodwin

On August 7, two judges of a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit affirmed a lower court ruling requiring a school district in Jacksonville, Florida, to allow students equal access to the restroom matching their gender identity. *Adams v. School Board of St. Johns County*, 968 F.3d 1286.

Crucially, the court's decision in Adams rested on Title IX of the Education Amendments of 1972, in addition to the Equal Protection Clause — a result of the landmark ruling of the U.S. Supreme Court earlier this year in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (June 15, 2020).

Bostock held that Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of gender identity and sexual orientation; there, both sexual orientation and gender identity discrimination were found to be discrimination "on the basis of sex" and therefore impermissible under the statute.

Title IX is similar to Title VII insofar as its terms prohibit discrimination "on the basis of sex" in federally funded schools. Accordingly, the Eleventh Circuit in Adams extended the prohibition against gender identity discrimination outlined in Bostock to apply to the St. Johns County School District.

Circuit Judge Beverly B. Martin wrote for the court: "Bostock confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be

tolerated in schools. The School Board's bathroom policy, as applied to Mr. Adams, singled him out for different treatment because of his transgender status . . . "

"A public school may not punish its students for gender nonconformity. Neither may a public school harm transgender students by establishing arbitrary, separate rules for their restroom use. The evidence at trial confirms that Mr. Adams suffered both these indignities. The record developed in the District Court shows that the School Board failed to honor Mr. Adams's rights under the Fourteenth Amendment and Title IX."

Background

The plaintiff, Drew Adams, attended Nease High School in Jacksonville. Before entering high school Adams, identified as female at birth, had already begun living as a male, the gender with which he identifies. When Drew's mother enrolled her son in high school, she provided legal documents that had been updated with his true gender identity and informed the school that he was in the process of transitioning. She asked that Adams be considered and treated as a boy student, but which restroom Adams would use was not addressed at that time.

During his first six weeks at high school Adams used the boys' restroom. "One day, however, the school pulled Mr. Adams from class and told him he could no longer use the boys' restroom because students had complained. These complaints came from two unidentified girl students who saw [Adams] entering the boys' restroom. There were no complaints from boy students who shared bathroom facilities with Adams. Regardless, school officials gave Mr. Adams two choices: use a single-stall, gender neutral bathroom in the school office, or use the girls' facilities."

On the one hand, Adams found the suggestion that he use the multi-stall girls' restroom "profoundly 'insult[ing].'" The option to use the single-stall gender-neutral bathroom, on the other hand, was "'isolat[ing],' 'depress[ing]', 'humiliating', and burdensome."

In giving Adams this choice, the high school was following School District policy developed in 2012 (but not implemented until 2015 when Adams entered high school) to address " . . . how to best accommodate its lesbian, gay, bisexual, transgender, and queer . . . students." [the "Policy"].

The best practices in the Policy " . . . instructed educators to use LGBTQ students' preferred names and pronouns; prohibit discriminatory bullying or harassment; protect students' private information; allow students to be 'open about their sexual orientation or transgender identity'; and permit students to 'wear clothing in accordance with their consistently asserted gender identity.' For bathroom use, the [Policy] clarified: 'Transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex.' The [Policy] also stated the School District's belief that no law required schools to allow a transgender student to access the restroom corresponding to their consistently asserted transgender identity.'"

The School District's rationale for not allowing Adams and other transgender students to access the bathroom corresponding to their gender identity was based on a fear that " . . . any student might be able to gain access to any bathroom facility by identifying or pretending to identify as 'gender-fluid.'" The court's opinion noted that the School District had never experienced or even heard of "any gender-fluid students or pretenders seeking to access all bathroom facilities." Apparently, the School Board also believed their Policy "appropriately reconciled accommodations for transgender students with the privacy rights of non-transgender students."

When settlement discussions between Adams, Adams's mother, and the School District failed, Adams brought suit. He was denied a preliminary injunction but after a three-day bench trial the district court judge held that Adams " . . . was entitled to declaratory, injunctive, and monetary relief on his constitutional and Title IX claims."

Adams's Constitutional Claims

In considering Adams's constitutional gender discrimination claims, the parties agreed the appropriate standard of review was heightened—i.e. intermediate—scrutiny. In other words, to prevail the School District was required to demonstrate that the Policy was substantially related to an important government purpose.

The court recognized that the Policy was grounded in an important government purpose, namely "protecting the bodily privacy of young students[.]" The court further found that " . . . the government may promote its interest in protecting privacy by maintaining separate bathrooms for boys and girls or men and women." However, as the court pointed, Adams was not challenging " . . . the ubiquitous societal practice of separate bathrooms for men and women. Instead [Adams] argue[d] the School Board's bathroom policy single[d] him out for differential treatment on the basis of his gender nonconformity and without furthering student privacy whatsoever."

Thus, the court found the School District failed to carry its burden of demonstrating the Policy served or advanced the important interest of protecting bodily privacy of young students.

First, the court deemed the Policy arbitrary and not reasonable, citing the famous "three-two beer" Supreme Court case, *Craig v. Boren*, 429 U.S. 190 (1976). Craig struck down an Oklahoma law prohibiting sale of 3.2% beer to men under the age of 21 while allowing women age 18 and older to buy the alcohol, purportedly to promote traffic safety on the assumption "young men drink and drive more frequently than young women."

"[T]he [Supreme] Court observed that the statute as written did not even prevent young men from driving under the influence. This was because the law 'prohibits only the selling of 3.2% beer

to young males and not their drinking the beverage once acquired (even after purchased by their 18-20-year-old female companions).'"

Wrote Judge Martin in the case at bar: "Just as the statute in Craig did not prevent young men from driving after drinking 3.2% beer, the bathroom policy does not succeed in excluding every transgender student from the restroom matching his or her gender identity. This arbitrary result demonstrates the unconstitutionality of the [Policy]."

In this connection, the court pointed out that some transgender students would be beyond the Policy's reach. Specifically, the School District " . . . determines a student's sex assigned at birth for purposes of restroom use by looking to the forms the student presented at the time he enrolled in the District. Even if a student later provides the District with a birth certificate or driver's license indicating a different sex, the original enrollment documents control. The enrollment forms, however, say nothing about a student's assigned sex at birth or transgender status […] At trial, the School District admitted that if a transgender student enrolled with documents matching his gender identity, he would be permitted to use the restroom matching his gender identity."

Adams himself enrolled in the school district when he was female; had he enrolled after he began his transition and after he had changed his identification documents, he would have been able to use the boys' restroom. This, ruled the court, made no sense and violated the Equal Protection guaranteed under the Fourteenth Amendment.

Second, the Policy also failed heightened scrutiny review because the government only showed a hypothesized justification for the gender classification it imposed. "Here, the School Board's concerns about privacy in the boys' bathrooms are […] hypothetical […] After extensive evidence was presented at trial, the District Court found that Mr. Adams's presence in the boys' bathroom does not jeopardize the privacy of his peers in any concrete sense."

Third, the Policy was struck down because it " . . . treats transgender students like Mr. Adams differently because they fail to conform to gender stereotypes."

"To survive heightened scrutiny," wrote Judge Martin, "a sex classification 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" As to the particular gender stereotyping the School District undertook vis-à-vis Adams, the court stated, "[b]ecause Mr. Adams was assigned a female sex at birth but identifies consistently and persistently as a boy and presents as masculine, he defies the stereotype that one's gender identity and expression should align with one's birth sex . . . . The [Policy] advances gender stereotypes by deeming Mr. Adams 'truly' female, even though he produced legal and medical documentation showing he was male."

In defense, the School Board renewed its argument that a non-transgender student might "'pose as a gender-fluid student to access the bathroom.'" The court rejected this, again, because it was purely hypothetical.

The School Board had also argued that siding with Adams " . . . threatens the time-honored convention of separate bathrooms for men and women, because any person could 'claim discrimination' and use a different bathroom for 'no reason at all.'" The court also rejected this, pointing out that no party had put the issue of separate bathrooms before the court or argued that separate bathrooms for the genders treats men and women unequally.

Finally, the court addressed arguments that non-transgender students' fundamental right to privacy would be violated by the Policy allowing use of bathroom consistent with gender identity rather than biological sex. The privacy issue was not actually before the Court although they chose to address it anyway, and it sided with the Third and Ninth Circuits which rejected such arguments.

The court's use of gender stereotype analysis rather than relying on *Bostock* for the constitutional claim might be explained by existing 11th Circuit precedent that used stereotype theory to apply heightened scrutiny to a gender identity discrimination claim in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Adams's Title IX Claims

The court framed the Title IX issue succinctly: "whether excluding Mr. Adams from the boys' bathroom amounts to sex discrimination in violation of the statute."

As alluded to above, the jumping off point in this portion of the Court's analysis was Bostock. The court recognized Title VII and Title IX are "separate substantive provisions" but observed both statutes prohibit discrimination on the basis of sex and both titles rely upon a "but-for causation standard." Bostock held, inter alia, that "'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.'" The court further pointed out that the Supreme Court often looks to its Title VII interpretations and precedent when called upon to interpret Title IX.

The School Board argued Bostock to be inapplicable because "'schools are wildly different environment[s] than the workplace' and education 'is the province of local government officials.' The court was not persuaded principally because no support was offered for this proposition.

The School Board also pointed to the implementing regulations for Title IX that explicitly allow provision of " . . . separate toilet, locker room, and shower facilities on the basis of sex." And, without pointing to any authority, the School Board claimed that "sex" as set forth in the implementing regulations meant "biological sex." Thus, on the School Board's logic, because they denied Adams access to the boys' restroom on the basis of his biological sex, they were in compliance with Title IX.

Finally, the School Board relied on the Department of Education's withdrawal of Obama era guidance that, in a "Dear Colleague" letter, set forth the federal government's position—or at

least the executive branch's position—prior to 2016 that "sex" meant not just biological sex but also gender identity.

In summarizing its rejection of all of these arguments, Judge Martin wrote: "Even if we were to accept the School Board's argument that sex is 'founded on biology' or refers 'only to biological distinctions between male and female[…]' this interpretation does not establish that Mr. Adams is biologically female and belongs in the girls' restroom. As the District Court found, Mr. Adams—like some other transgender people—has confirmed his male sex not just legally and socially, but medically." Reducing Adams's sex to nothing more than " . . . the sum of [his] external genitalia at birth" is as narrow as it is unworkable."

The Dissent

One member of the three-judge panel, Circuit Judge William Pryor, dissented.

In his equal protection analysis, Judge Pryor complains that the majority's opinion "looks nothing like an intermediate-scrutiny inquiry into whether a sex-based classification satisfies the Equal Protection Clause." According to Judge Pryor, this "redefinition" of intermediate scrutiny will "invalidate all government policies that separate bathrooms—or locker rooms and showers, for that matter—by sex . . . "—despite the majority's explicit statement that the case does not work to advance elimination of sex-segregated bathrooms or locker rooms.

He argued the majority fundamentally misunderstood the classification at issue by framing the question as whether the Policy excludes transgender students from the bathroom of their choice, rather than whether it is permissible to provide bathrooms based on sex. However, both the majority and Judge Pryor agreed that separating bathrooms based on sex is acceptable. With some circularity and not much clarity, Judge Pryor stated that the Policy achieves its important purpose by separating bathrooms on the basis of sex.

Judge Pryor also took the position that the majority conceived of "bathroom privacy" too narrowly. Judge Pryor's dissent rails against the majority's "incorrect decision" that students do not have a privacy interest in using the bathroom away from "'students who do not share the same sex at birth.'"

In other words, Judge Pryor, however implicitly, agreed with the School Board in classifying Adams on the basis of his gender at birth, not his gender identity. The closest explicit statement Judge Pryor made of this position was in his argument that "[b]irth certificates are an almost perfect proxy for determining a student's sex." He continued, "[e]ven if all transgender students in the school district used bathrooms that did not align with their sex, the policy would still be 99.96 percent accurate in separating bathrooms by sex, which satisfies intermediate scrutiny."

As to Title IX and *Bostock*, Judge Pryor wrote "[c]ontrary to the majority's and Adams's arguments otherwise, the Supreme Court did not resolve [the question of what sex means in Title IX in *Bostock*]. Far from it."

From there, Judge Pryor launches into a lengthy dissertation as to why "sex" does not mean "gender identity," and without much support from case law, declares "[a]s used in Title IX and its implementing regulations, 'sex' unambiguously is a classification on the basis of reproductive function." As support he quotes portions of *Bostock* and writes "[n]ot only did the Court 'proceed on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female,' it disclaimed deciding whether Title VII allows for sex-separated bathrooms."

Somewhat ironically Pryor complains that the majority "[i]nstead of grappling with the meaning of 'sex,' . . . abdicates its duty to interpret the law." However, much of Pryor's definition of sex is informed by English dictionary definitions and outdated and roundly rejected provisions of old versions of the Diagnostic and Statistical Manual (DSM) published by the psychiatric profession which in the 1970's treated gender identity and homosexuality as mental disorders.

Adams is represented by Lambda Legal (Tara Borelli as the lead staff attorney on the case) and various cooperating law firms. Scores of *amici* were represented by briefs. The appellate argument aroused widespread interest on both sides of the issue, especially as the timing made it likely that this would be the first major appellate decision on the question after *Bostock*, as turned out to be the case. This opinion was cited and relied upon by the 4th Circuit when it ruled in Gavin Grimm's case just weeks later (see below).

Judge Martin was appointed by President Barack Obama, as was the other judge in the majority, Jill Pryor. Judge William Pryor was appointed by President George W. Bush. ■

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New York Federal District Court Blocks Trump Regulation Revoking Health Care Protections for Transgender People, While State of Washington Federal District Court Finds that State Lacked Standing to Challenge the Regulation

By Arthur S. Leonard

Senior U.S. District Judge Frederic Block ruled on August 17 that a new Trump Administration Regulation that rescinded the Obama Administration's Rule prohibiting gender identity discrimination in health care would not go into effect on August 18, its scheduled date, and he granted a preliminary injunction against the new rule's enforcement. Judge Block, appointed by President Bill Clinton in 1994, sits in the U.S. District Court for the Eastern District of New York, in Brooklyn. *Walker v. Azar*, 2020 U.S. Dist. LEXIS 148141. Subsequently, Judge James L. Robart of the U.S. District Court for the Western District of Washington, presiding over a similar lawsuit challenging the new Regulation brought by the State of Washington, noted the decision in *Walker* while finding in *State of Washington v. U.S. Department of Health and Human Services,* 2020 WL 5095467 (W.D. Wash., August 28, 2020), that the State of Washington lacked Title III standing to challenge the Regulation and denied the state's motion for a preliminary injunction on standing grounds.

After President Obama signed the Affordable Care Act (ACA) into law in 2010, the Department of Health and Human Services (HHS) decided to adopt a rule providing an official interpretation of the non-discrimination requirements contained in Section 1557 of that statute. The statute authorizes HHS to adopt regulations spelling out the meaning and applicability of the statute. Section 1557 incorporates by reference a provision of Title IX of the Education Amendments of 1972, which forbids discrimination because of sex in educational institutions that get federal funding. In the past, HHS and federal courts have looked to decisions interpreting the sex discrimination provision in Title VII of the Civil Rights Act of 1964, which bans sex discrimination in employment, in interpreting Title IX.

By the time HHS had finished writing its rule in 2016, both the Equal Employment Opportunity Commission and several federal appeals courts had interpreted Title VII to ban discrimination because of an individual's gender identity. The Obama Administration followed these precedents and included a prohibition on gender identity discrimination in its ACA rule. Several states and a religious health care institution then joined together to challenge the rule before U.S. District Judge Reed O'Connor, a 2007 appointee of President George W. Bush, the sole judge assigned to the Fort Worth branch courthouse of the Northern District of Texas, who was notoriously receptive to issuing nationwide injunctions against Obama Administration policies,. Judge O'Connor was true to that practice, holding in December 2016 that the inclusion of gender identity was contrary to the meaning of the term "because of sex" when it was adopted by Congress in Title IX in 1972. The case is *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

The new Trump Administration rule that was challenged in the *Walker v. Azar* was intended by HHS to codify the decision in *Franciscan Alliance*, which was decided just weeks before the Trump Administration took office. Had Hillary Clinton been elected president, the incoming administration would likely have appealed *Franciscan Alliance* to the 5th Circuit. But the Trump Administration informed the district court that it was not appealing and instead would not enforce the Obama Administration rule and would eventually replace it.

Judge Block emphasized this history as he set out his reasons for finding that Human Rights Campaign (HRC) and its volunteer attorneys from Baker & Hostetler LLP, representing two transgender women who had encountered discrimination from health care providers, were likely to succeed on the merits of their claim that the Trump Rule was both inconsistent with the ACA, and that HHS was "arbitrary and capricious" in adopting this new Rule and publishing it just days after the Supreme Court had ruled in *Bostock v. Clayton County,* 140 S. Ct. 1731 (June 15, 2020), that discrimination against a person because of their transgender status was "necessarily discrimination because of sex."

The Supreme Court had heard oral arguments in *Bostock*, which concerned the interpretation of Title VII, on October 8, 2019, while HHS was working on its proposed new rule. The HHS attorneys knew that the Supreme Court would be issuing a decision by the end of its term, most likely in June 2020. One of the three cases consolidated in *Bostock* involved a gender identity discrimination claim by Aimee Stephens against Harris Funeral Homes. The Equal Employment Opportunity Commission (EEOC) had sued the employer on Stephens' behalf. The 6th Circuit Court of Appeals ruled in *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (2018), that the employer violated Title VII by discharging Stephens for transitioning, and the Supreme Court granted review on the specific question whether discrimination because of transgender status violated Title VII. HHS conceded in the "preamble" of its new rule that interpretations of Title IX (and thus Section 1557) generally follow interpretations of Title VII.

In October 2017, then-Attorney General Jeff Sessions had issued a memorandum to the Executive Branch explaining the Trump Administration's position that bans on sex discrimination in federal law did not extend to claims of discrimination because of sexual orientation or gender identity. Thus, although the U.S. Solicitor General normally represents federal agencies such as the EEOC when their decisions are appealed to the Supreme Court, that office actually joined in arguing on behalf of the petitioner, Harris Funeral Homes, leaving it to the ACLU LGBT Rights Project to represent Aimee Stephens, who had intervened in the 6th Circuit and thus was a Respondent in the Supreme Court. Tellingly, none of the EEOC's staff attorneys were signers of the Solicitor General's brief, departing from the usual practice when the Solicitor General represents an administrative agency in the Supreme Court. But at the time the briefs were filed, a majority of the EEOC Commissioners were still Obama Administration appointees who supported the agency's decision to advocate on behalf of Stephens.

The Trump Administration was so confident that the Supreme Court would rule against Stephens that it decided to go ahead with its new Rule, effectively revoking the Obama Administration's Rule, although the "preamble" did acknowledge that a decision by the Supreme Court in the Title VII case could affect the interpretation of Section 1557. LGBTQ rights advocates waited impatiently for a ruling in the Title VII cases as the Court began to wind up its Term in June. (Until the Court released its decision, it was uncertain whether it would rule separately on the gender identity and sexual orientation cases, as separate arguments have been held on the same date in October.) The Trump Administration was no more patient, announcing its new Rule a few days *before* the Supreme Court announced its decision on June 15. apparently assuming that the Court would rule against Stephens. Without publicly reacting to the Supreme Court's *Bostock* opinion, or even revising its announced new Rule to acknowledge that the Trump Administration's interpretation of "discrimination because of sex" had been rejected by the Supreme Court (in an opinion by Trump's first appointee to the Court, Justice Neil Gorsuch), HHS went ahead and published the new Rule in the Federal Register five days later, with a specified effective date of August 18, 2020.

The new Rule omitted the language from the Obama Administration Rule that specified that discrimination because of sex under Section 1557 included discrimination because of sexual orientation and gender identity. Instead, it included in the "preamble," an introductory section of the Rule, that prior interpretations conflicted with the plain language of the statute, and specified that the statute would be interpreted to ban discrimination because of sex, which the new Rule specified to be the biological status of being male or female, as the Sessions memorandum of 2017 had explained.

Over the following weeks, challenges to the new Rule were filed in four different federal courts. HRC filed suit on behalf of Tanya Asapansa-Johnson Walker and Cecilia Gentili, two transgender women who had encountered discrimination from health care institutions covered by the ACA. Judge Block found that their experiences gave them formal standing to challenge the new Rule. He released his Order staying the effect of the Rule and enjoining its enforcement on August 17, the day before it was to go into effect. The immediate effect of his ruling was arguably to leave the Obama Administration Rule in effect, or perhaps to leave no rule, which would mean that at least for purposes of judicial enforcement, interpretation of the statute would be governed by *Bostock* and several lower federal court decisions that had in recent years accepted the argument the gender identity claims were cognizable under Section 1557.

Judge Block found that the well-established practice of following Title VII interpretations in sex discrimination cases was likely to be followed under the ACA, just as it was under Title IX, and thus the plaintiffs were likely to succeed in their claim that the new Rule was inconsistent with the statute. He noted that just two weeks earlier, the 11th Circuit Court of Appeals had followed the *Bostock* decision in *Adams v. School Board of St. Johns County, Florida*, 2020 U.S. App. LEXIS 24968, finding that the school district violated Title IX by denying appropriate restroom access to a transgender student. (See report of the *Adams* decision, above.)

Furthermore, the failure of the new Rule, officially published days *after* the *Bostock* decision, to mention that ruling or to offer any reasoned explanation why it should not be followed in interpreting Section 1557, was likely to be found to be "arbitrary and capricious," so the adoption of the new Rule probably violated the Administrative Procedure Act (APA), the federal law that details how federal agencies are to proceed in adopting new rules and regulations or rescinding old ones.

Because of the December 2016 ruling in *Franciscan Alliance* and the subsequent non-enforcement policy by the Trump Administration, the Obama Administration's Rule has not been enforced by HHS since December 2016. But the ACA allows individuals who suffer discrimination to sue on their own behalf to enforce the statutory anti-discrimination provision, and there have been numerous lawsuits under Section 1557 successfully challenging exclusion of transgender health care from coverage under health insurance policies that are subject to the ACA. Thus, there was plenty of case law for Judge Block to cite in support of his conclusion that the new Rule is inconsistent with the statute.

Judge Block's stay of the effective date and injunction against enforcing the new Rule gives the green light to HHS to resume enforcing Section 1557 in gender identity discrimination cases consistent with the *Bostock* ruling. While there are probably plenty of career agency officials in the HHS Office of Civil Rights who would like to do so, any significant effort in that direction seems unlikely so long as Trump remains in office. For now, the main impact of Judge Block's order will be to clear a potential obstacle for transgender litigants under Section 1557, as the opinion persuasively explains how Justice Gorsuch's reasoning in *Bostock*

compels protecting transgender health care patients under the ACA.

The practical effect of Judge Block's ruling in the course of this litigation is to allocate the burden to HHS to answer the Complaint and seek to justify its decision to publish the new rule without considering the impact of Bostock on its interpretation, which on its face is an impossible task. HHS must provide a reasoned explanation to the court about why the Bostock interpretation of "discrimination because of sex" should not be followed under Section 1557. The simplest way for HHS to proceed, consistent with the court's order, would be to withdraw the new Rule and, to strike those portions of the "preamble" discussing this subject, and to substitute a statement that Section 1557's ban on discrimination because of sex includes claims of discrimination because of sexual orientation or gender identity consistent with the U.S. Supreme Court's interpretation of similar statutory language in the *Bostock* case. But if the Trump Administration adheres to its normal operating procedure, HHS will could file an "emergency" motion with the 2nd Circuit Court of Appeals to stay Judge Block's ruling pending appeal, and if that fail, to follow the Administration's practice of seeking relief from the Supreme Court.

Meanwhile, on the West Coast, Judge Robart's decision in the *State of Washington* case pointed out that since the *Bostock* decision, several lower federal courts have used the reasoning of Justice Neil Gorsuch's opinion to find that Title IX, and by extension, of course, Section 1557, should be construed to cover sexual orientation and gender identity discrimination complaints, so the challenged Rule's *de facto* revocation of the Obama Administration's express interpretation of Section 1557 is a matter of no real moment. Indeed, the State of Washington's claim to standing was premised on its prediction that removal of protection on those grounds would generate various costs to the state and harms to its citizens. But as lower federal courts seem to agree with the conclusion suggested by Justice Alito's dissent in *Bostock* that the Court's decision would *de facto* extend coverage of all federal laws banning discrimination because of sex to sexual orientation and gender identity claims, it seems that the basis for the State's standing is seriously undermined. But since other federal courts are inclined to issue nationwide injunctions against the rule, there is no need for the district court in Seattle to do so.

Judge Robarts also discounted Washington's suggestion that the HHS Rule's extension of religious exemption language from Title IX to Section 1557 would generate sufficient costs to Washington to support Article III standing in attacking that provision, finding the assumption that many health care providers in the state would discriminate on those grounds were speculative at best. The judge made similar observations regarding the contention that the changed definition of "covered entities" under the new rule would generate costs sufficient to ground the State's standing to attack that provision. ■

Federal Court Blocks Idaho Law Barring Transgender Women from Athletic Competition

By Arthur S. Leonard

Chief U.S. District Judge David C. Nye (D. Idaho) issued an injunction on August 17 to block enforcement of Idaho's "Fairness in Women's Sports Act," which Governor Bradley Little had signed into law on March 30, 2020. *Hecox v. Little,* 2020 U.S. Dist. LEXIS 149442. Passage of this law made Idaho the first state to enact a statutory ban on transgender women and girls competing in women's interscholastic and team sports at all levels. The statute was not enacted in response to any particular incident or crisis involving transgender women in Idaho seeking to compete in women's sports. Rather, it appears to have been mainly inspired by news reports about incidents in other states, and in particular a lawsuit filed by some cisgender girls in Connecticut who were upset that the high school interscholastic sports association in that state had adopted a policy of allowing transgender girls to compete as girls.

Judge Nye pointed out that various professional associations governing women's interscholastic sports have adopted rules that transgender women would be eligible to compete in women's sports after having undergone at least one year of hormone therapy to suppress their testosterone levels, based on some evidence showing that this would not pose unfair competition to cisgender women.

Despite the lack of any sort of emergency, the Idaho legislature actually delayed by several days joining the nationwide trend of moving legislative activity on-line in the face of the coronavirus pandemic in order to enact two anti-transgender bills: this one, which the Republican State Attorney General warned them would present legal issues under the Constitution and Title IX of the Education Amendments

of 1972, and a bill effectively reviving a ban on issuing new birth certificates for transgender individuals, passed in defiance of an injunction issued by the federal court against a similar previous statute. It was clearly anti-trans month in the Idaho legislature.

In addition to excluding transgender women from competing in any organized or team sports activity that was designated for women only, the law empowered anybody to challenge the female sex of a participant, placing the burden on the challenged individual to provide evidence of their female sex according to a definition that in essence considers transgender women to be men, and requiring production of a doctor's statement under oath attesting to a determination of biological sex that would apparently require invasive examinations. The law also authorized anybody who claimed to have been harmed by a violation of the statute to sue for damages, and shielded from liability people whose challenge to an individual's biological sex was found to be wrong.

The ACLU filed suit on behalf of Lindsay Hecox, a transgender girl who wants to compete in women's sports at the university level (and would be allowed to do so under NCAA rules), and a cisgender girl who was allowed to proceed anonymously as Jane Doe, both challenging the law on constitutional and statutory grounds, and seeking a preliminary injunction to prevent the law from going into effect while the lawsuit plays out. The request for preliminary injunctive relief was premised on their Equal Protection claim. Jane Doe argued that the law subjected her to the possibility of being challenged as to her sex and subjected to invasive procedures, which was discriminatory because cisgender men but not cisgender women would be required to submit to invasive physical examinations in order to rebut an allegation regarding their sex. The state responded with a motion to dismiss the case, and two cisgender women filed a motion to intervene as co-defendants, claiming that they would be harmed by being subjected to unfair competition from transgender women if the law was blocked. Of course, the Trump Administrative, which is *not* a party to litigation involving a state law, filed a statement of interest, supporting Idaho's right to exclude transgender women from competition, consistent with its position, rejected by the Supreme Court in *Bostock*, that discrimination because of gender identity is not sex discrimination.

Much of Judge Nye's decision was taken up with the questions of whether the lawsuit was filed prematurely, whether the plaintiffs had standing to sue, and whether to grant the motion by the cisgender women to intervene. He dealt with those issues at length, ultimately concluding that the plaintiffs did have a personal stake in the outcome of the case and that the law, as written, was subject to a pre-enforcement legal challenge. The question of intervention was a closer call, but the judge resolved it in favor of allowing intervention, based on the Intervenors' allegation that they could be harmed by being required to compete against transgender women if the attack on the statute was successful.

However, the judge concluded that it was inappropriate to dismiss the case, because this was a clear case of discrimination due to transgender status, and the Supreme Court's June 15 decision in *Bostock v. Clayton County* clearly hold that such discrimination is discrimination "because of sex," and thus subject to "heightened scrutiny" in an Equal Protection challenge. When a law is subject to heightened scrutiny, it does not enjoy the normal presumption of constitutionality. Rather, the state has a burden of justification, to show that the law substantially advances an important state interest. Furthermore, as the Supreme Court held years ago in an opinion by Justice Ruth Bader Ginsburg finding the Virginia Military Institute's men-only admissions policy to be unconstitutional, a law that discriminates because of sex will survive judicial review only if the state has an "exceedingly persuasive" justification for it.

In this case, however, such a justification was lacking, as Judge Nye found when he turned to the issue of a preliminary injunction. Prior to the passage of the law there had been no official state policy restricting transgender women from competing as women, so this injunction was about maintaining the *status quo* while the lawsuit was under way. Judge Nye weighed the factors courts are supposed to consider when determining whether to interfere with the legislature's lawmaking power by blocking enforcement of a new statute and resolved the issue against the state.

The state's purported justification for the law was to "ensure equality and opportunities" for female athletes, but the court was not persuaded that law would substantially advance that goal. "Ultimately," Nye wrote, "the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho." An article published by the New York Times the day after this decision was issued quoted estimates that there are at most fifty transgender women engaged in women's collegiate level sports nationwide, and there was no evidence that transgender women were "dominating" any area of women's sports.

Taking note of existing NCAA rules in collegiate competition that transgender women could not compete in women's sports until they had undergone at least a year of testosterone suppression therapy, he could find little rationale for the law. "In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics," he concluded. "As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the 'likelihood' of success based on the information currently in the record. Actual success—or failure—

on the merits will be determined at a later stage."

However, Judge Nye continued, "Instead of ensuring 'long-term benefits that flow from success in athletic endeavors for women and girls,' it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations. In the absence of any evidence that transgender women threatened equality in sports, girls' athletic opportunities, or girls' access to scholarships in Idaho during the ten years such policies were in place, neither Defendants nor the Intervenors would be harmed by returning to this status quo."

Thus, the Idaho legislature is "0 for 2" on its decision to prolong the legislative session in the face of the pandemic, as a different federal judge has already reiterated that the injunction against the prior birth certificate law remains in effect as the lawsuit against the new birth certificate law – which was disingenuously worded to distinguish itself from the earlier one – continues.

The plaintiffs are represented by the ACLU. Judge Nye, who had served as a state court judge for several years, was nominated to the district court by President Barack Obama during his last year in office, when Senator Mitch McConnell and the Republican majority were refusing to confirm Obama's nominees in order to preserve vacancies for a potential Republican president to fill. But Nye, a graduate of Brigham Young University's Law School with a good reputation who earned the ABA's highest rating, was nominated on the recommendation of Idaho's two conservative Republican senators. After his nomination lapsed, the state's senators asked President Trump to re-nominate him in 2017, he was quickly confirmed, and he became Chief Judge when an elderly colleague retired shortly thereafter. So here is the irony: Just as Trump's first Supreme Court nominee wrote the opinion protecting transgender people under Title VII, one of his first district court nominees has rejected the Trump Administration's position filed in this case. ■

Grimm Victorious: U.S. Appeals Court Rejects School Board's Anti-Trans Restroom Policy

By Arthur S. Leonard

Capping litigation that began in 2015, a three-judge panel of the U.S. Court of Appeals for the 4th Circuit ruled by a vote of 2-1 on August 26 that the Gloucester County (Virginia) School Board violated the statutory and constitutional rights of Gavin Grimm, a transgender boy, when it denied him the use of boys' restrooms at Gloucester County High School. *Grimm v. Gloucester County School Board*, 2020 U.S. App. LEXIS 27234, 2020 Westlaw 5034430. This may sound like old news, especially since other federal appellate courts, most notably the 3rd, 7th, 9th and 11th Circuit, have either ruled in favor of the rights of transgender students or rejected arguments against such equal access policies by protesting parents and cisgender students. But Grimm's victory is particularly delicious because the Trump Administration intervened at a key point in the litigation to switch sides in the case after the Obama Administration had supported Grimm's original lawsuit.

Grimm, identified as female at birth, claimed his male gender identity by the end of his freshman year, taking on a male name and dressing and grooming as male. Before his sophomore year, he and his mother spoke to the high school principal and secured agreement that he could use boys' bathrooms, which he did for several weeks without incident. But as word spread that a transgender boy was using the facilities, parents became alarmed and deluged the school board with protests, leading to two stormy public meetings and a vote that transgender students in the district (of which Grimm was then the only known one) were restricted to using a single-occupant restroom in the nurse's office or restrooms consistent with their "biological sex," which the district defined as the sex identified at birth.

After Grimm filed his lawsuit represented by the American Civil Liberties Union (ACLU) seeking a court order to allow him to resume using the boys' restrooms in his school, the Obama Administration weighed in with a letter to the court siding with Grimm's argument that the school board's policy violated Title IX of the Education Amendments of 1972, which bans sex discrimination against students. Despite this positive letter, the district judge granted the school board's motion to dismiss the Title IX claim, reserving judgment on Grimm's alternative claim under the Equal Protection Clause of the 14th Amendment.

Grimm appealed the dismissal. A three-judge panel of the 4th Circuit then ruled that the district court should have deferred to the Obama Administration's interpretation of Title IX and not dismissed that claim. The school board sought review from the U.S. Supreme Court, which granted the petition and scheduled the case for argument in March 2017. The timing of this argument guaranteed that Grimm would never get to use the boys' restrooms at the high school before graduating that spring.

After the Trump Administration took office in January 2017, the Justice and Education Departments announced that they were "withdrawing" the Obama Administration's interpretation of Title IX. Without taking a formal position on the interpretive question, they criticized the Obama Administration as inadequately reasoned. But subsequently, Attorney General Jeff Sessions announced his disagreement with the Obama Administration's interpretation of Title IX and more generally the prior administration's position that transgender people are protected by all federal laws banning sex discrimination. In an October 2017 memorandum to all executive agencies, Sessions announced that laws banning sex discrimination apply only narrowly to a claim that an individual

suffered discrimination because he was a biological male or she was a biological female, defined by how they were identified at birth.

Since the 4th Circuit had premised its reversal of the dismissal of Grimm's Title IX claim on its conclusion that the district court should have deferred to the Obama Administration's interpretation, the basis for that ruling was effectively gone. The Solicitor General formally notified the Supreme Court, which cancelled the scheduled hearing, vacated the 4th Circuit's decision, and sent the case back to the District Court without any ruling by the Supreme Court. In the interim, the district court had responded to the 4th Circuit's decision by issuing an injunction requiring the school board to let Grimm use the boys' restrooms, but that was stayed while the appeal was pending in the Supreme Court and within months of the Supreme Court's action of March 2017, Grimm had graduated from high school.

The Gloucester County School Board than urged the district court to dismiss the case as moot, since Grimm was no longer a student. Grimm insisted that the case should continue, because he should be entitled to seek damages for the discrimination he suffered and he wanted to be able to use the male facilities if he returned to the school as an alumnus to attend events there. The mootness battle raged for some time, the complaint was amended to reflect the new reality that Grimm was no longer a student, and a new issue emerged when Grimm requested that the school issue him an appropriate transcript in his male name identifying him as male, since he was stuck in the odd situation of being a boy with a high school transcript identifying him as a girl. By this time, he had gotten a court order approving his name change and a new birth certificate, but the school persisted in denying him a new transcript, raising frivolous arguments about the validity of the new birth certificate.

Thus repurposed, the case went forward. Ultimately the district court ruled in Grimm's favor on both his statutory and constitutional claims, but the school board was not willing to settle the case, appealing again to the 4th Circuit. The August 26, 2020, ruling is the result.

The ACLU publicized this case heavily from the beginning, winning national media attention and an army of amicus parties filing briefs in support of Grimm's claim along the away. On May 26, 2020, the case was argued in the 4th Circuit before a panel of two Obama appointees, Judge Henry Floyd and Judge James A. Wynn, Jr., and an elderly George H.W. Bush appointee, Judge Paul Niemeyer (who had dissented from the original 4th Circuit ruling in this case). In light of the rulings by other courts of appeals on transgender student cases and the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, on June 25, 2020, holding that discrimination because of transgender status is discrimination "because of sex" under Title VII of the Civil Rights Act, the result in this new ruling was foreordained.

Judge Floyd's opinion for the panel, and Judge Wynn's concurring opinion, both go deeply into the factual and legal issues in the case, constituting a sweeping endorsement of the right of transgender students to equal treatment in schools that receive federal funding, a prerequisite for coverage under Title IX. Furthermore, public schools are bound by the Equal Protection Clause, and the court's ruling on the constitutional claim was just as sweeping.

The court first rejected the school board's argument that the case was moot, with Grimm having graduated and now being enrolled in college. Since damages are available for a violation of Title IX, it was irrelevant that Grimm was no longer a student. He had been barred from using the boys' restrooms for most of his sophomore and all of his junior and senior years. Even though the district court granted him only nominal damages, his claim for damages made this a live controversy, as did the school's continuing refusal to issue him a proper transcript, which the court held was also illegal.

Turning to the merits, Judge Floyd first tackled the Equal Protection claim. The court rejected the School Board's argument that there was no discrimination against Grimm because he was not "similarly situated" to cisgender boys. Judges Floyd and Wynn firmly asserted that Grimm is a boy entitled to be treated as a boy, regardless of his sex as identified at birth. This judicial endorsement of the reality of gender identity is strongly set forth in both opinions.

Judge Niemeyer's dissent rests on a Title IX regulation, which Grimm did not challenge, providing that schools could maintain separate single-sex facilities for male and female students, and the judge's rejection that Grimm is male for purposes of this regulation. Niemeyer insisted that Title IX only prohibits discrimination because of "biological sex" (a term with the statute does not use). As far as he was concerned, the school did all that the statute required it to do when it authorized Grimm to use the nurse's restroom or the girls' restrooms. But the majority of the panel accepted Grimm's argument that the school's policy subjected him to discriminatory stigma, as well as imposing physical disadvantages. As a boy, he would not be welcome in the girls' restroom, and the nurse's restroom was too far from the classrooms for a break between classes. As a result, he generally avoided using the restroom at school, leaving to awkward situations and urinary tract infections.

As the case unfolded, the school constructed additional single-user restrooms open to all students regardless of sex and made some modifications to the existing restrooms to increase the privacy of users, but the single-user restrooms were not conveniently located and cisgender students did not use them, reinforcing the stigma Grimm experienced. Stigma due to discrimination has long been recognized by the federal courts as the basis for a constitutional equal protection claim.

The school's actions undermined Judge Niemeyer's argument that the school board policy was justified by the need to protect the privacy of cisgender students, an argument that has been specifically rejected by the 3rd and 9th Circuit cases when they rejected cases brought by parents and cisgender students challenging school policies that allowed transgender students to use

appropriate restrooms. Judge Niemeyer colorfully wrote, "we want to be alone — to have our privacy — when we 'shit, shower, shave, shampoo, and shine.'" (Do high school boys shave in the boys' room as a general practice?) But the panel majority was not persuaded that it was necessary to exclude Grimm from the boys' restrooms to achieve this goal. After all, the only way Grimm as a transgender boy could relieve himself was by using an enclosed stall, lacking the physical equipment to use a urinal, so he would not be disrobing in front of the other students. (Let's be real here.)

Judge Floyd's opinion did not rely on the *Bostock* ruling for its constitutional analysis, instead noting that many circuit courts of appeals have accepted the argument that government policies discriminating because of gender identity are subject to heightened scrutiny, and are thus presumptively unconstitutional unless they substantially advance an important state interest. The majority, contrary to judge Floyd, did not think that excluding Grimm advanced an important state interest, especially after the School Board had altered the restrooms to afford more privacy, an obvious solution to any privacy issue.

Turning to the statutory claim, Judge Floyd pointed out that judicial interpretation of Title IX has always been informed by the Supreme Court's Title VII rulings on sex discrimination, so the *Bostock* decision carried heavy precedential weight and the school board's arguments on the constitutional claim were no more successful on this claim. The School Board lacked a sufficient justification under Title IX to impose unequal access to school facilities on Grimm.

At this point, the Gloucester County School Board can read the writing on the wall and concede defeat, or it can petition the 4th Circuit for *en banc* review (review by the full 15-judge bench of the circuit court), or it can seek Supreme Court review a second time. As to the *en banc* situation, the 4th Circuit is one of the few remaining federal circuit courts with a majority of Democratic appointees, as several of Bill Clinton's appointees are still serving as active judges and all six of Obama's appointees are still serving, leaving a majority of Democratic appointees on the full bench, so seeking *en banc* review, which requires that a majority of the active judges vote to review the case, would be a long shot.

On the other hand, Justice Neil Gorsuch's decision for the Supreme Court in *Bostock* refrained from deciding – since it wasn't an issue in that case – whether excluding transgender people from restroom facilities violates sex discrimination laws, and this case would provide a vehicle for addressing that issue. It takes only four votes on the Supreme Court to grant review of a lower court case, so there may be another chapter in the saga of Grimm's legal battle. It is also possible that the St. Johns County School District in Florida, which lost in the 11th Circuit in a virtually identical ruling, might also seek Supreme Court review, so one way or another, this issue may yet get on to the Court's Docket this term or next.

ACLU attorney Joshua Block has been representing Grimm throughout the struggle, but the case was argued in May by cooperating attorney David Patrick Corrigan, a litigation specialist at the Richmond firm of Harman Claytor Corrigan & Wellman. A local Richmond firm represented the School Board, confronting Virginia Attorney General Mark Herring supporting Grimm with an amicus brief. The overwhelming majority of amicus briefs filed, many by state attorneys general, sided with Grimm. ■

HHS Moots Suit by Turning Its Back on Protections for LGBTQ Youth

*By Ezra Cukor**

U.S. District Judge Jeffrey Vincent Brown dismissed as moot Texas & The Archdiocese of Houston's challenge to a Health and Human Services (HHS) rule prohibiting discrimination in foster care and adoption programs. *Texas v. Azar*, 2020 U.S. Dist. LEXIS 139371 (S.D. Tx. August 5, 2020).

The question of discrimination in foster-care and adoption programs is far from academic. Anti-LGBTQ discrimination in foster care is to the detriment of kids, who face harm for being, or being perceived to be, LGBTQ. LGBTQ youth are likely both overrepresented in the foster system and more likely than their cisgender peers to report certain categories of mistreatment. See e.g. Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles. The Williams Institute, UCLA School of Law (2014). Moreover, kids of all sexual orientations and gender identities may be deprived of prospective parents who are LGBTQ.

The challenged HHS rule, finalized at the end of the Obama Administration, barred discrimination in foster care and adoption programs by forbidding programs supported by HHS from excluding people from their programs or otherwise discriminating based on "non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation" and requiring them to recognize the marriages of same-sex couples. 45 C.F.R. § 75.300(c)-(d).

HHS never enforced the rule. Nevertheless, the Archdiocese alleged the rule chilled it from establishing a foster-care program because it would have to "compromise its sincerely held religious beliefs" by serving LGBTQ

people without discrimination, or else face a financial penalty. The Archdiocese and Texas brought suit alleging violations of the Administrative Procedure Act (APA), the Religious Freedom Restoration Act (RFRA), the First Amendment, the Spending Clause, and non-delegation doctrine. HHS asserted that because it will never enforce the rule the plaintiffs' claims are moot and moved to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1).

A case is moot when "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." The party claiming mootness must demonstrate absolute clarity that the challenged conduct won't recur. In general, a defendant's voluntary cessation of the challenged conduct during litigation cannot clear this very high hurdle, because its shenanigans could resume once the case is dismissed.

HHS had twice announced it would never enforce the rule against plaintiffs or otherwise. It wrote plaintiffs a letter agreeing that RFRA prohibits enforcement of the challenged rule against "Texas with respect to the Archdiocese and other similarly situated entities." HHS also issued a notice of proposed rulemaking indicating that it will replace, and in the meantime not to enforce, the rule. Plaintiffs argued that their case was not moot because HHS could revoke these assurances, and, in any case, the rule remained on the books.

The court credited HHS's assurances and agreed the case was moot. It reasoned that the government enjoys a presumption of good faith, rooted in the assumption that government actors are "public servants, not self-interested private parties." That assumption lightens its burden of proof significantly, allowing voluntary cessation of conduct to moot a case unless there is reason to doubt the government's assurances that the conduct won't recur. Here, there was no reason to believe the rule would be enforced. Moreover, the impending election and attendant possibility of a change in administration does not keep the controversy alive. Though HHS could again change position, that does not change the outcome against the present defendants. The question for mootness purposes is where the parties stand today.

The have power only by virtue of their ability to resolve conflicting interests. Absent conflict, they cannot afford relief to the prevailing party. Bec opinion also explained why the parties' fundamental agreement defeats the core Article III requirement of a live case and controversy. Courts depend on the self-interest of genuine adversaries to "stimulate . . . a full presentation of the facts and arguments." Moreover, courts ause the court concluded the case was moot, the court did not address HHS's alternative argument that the plaintiffs lack standing.

HHS's position that RFRA requires anti-discrimination provisions to yield to religious objections is a radical one. Not long ago, Justice Alito opined that RFRA would not insulate employers from liability for race discrimination because Title VII is "precisely tailored" to advance the compelling government interest "in providing an equal opportunity to participate in the workforce without regard to race." *Burwell v. Hobby Lobby Stores, Inc*. 573 U.S. 682, 733 (2014); see also, *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc*., 884 F.3d 560, 595 (6th Cir. 2018) ("enforcement actions brought under Title VII . . . will necessarily defeat RFRA defenses to discrimination made illegal by Title VII."), aff'd on other grounds sub nom. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020).

HHS's proposed replacement rule is also cause for alarm. It erases clear anti-discrimination protections and replaces them with the milquetoast statement that HHS has a policy against discrimination against qualified people "to the extent doing so is prohibited by federal statute" and a promise to "follow all applicable Supreme Court decisions." HHS justifies these changes based on RFRA and a concern that the existing rule "reduce[s] the effectiveness of foster-care placement programs." In other words, HHS is saying its programs will be more effective if they stop expressly prohibiting discrimination based on not only sexual orientation and gender identity but also all non-merit factors, at minimum race, color, national origin, age, disability, sex, and religion.

This change of course leaves everyone more exposed to discrimination. The proposed rule will likely leave program participants and covered entities unclear as to their rights and obligations. Providers will have to unpack a dense system of federal law and regulations, not to mention state and local requirements, to understand what they must do to avoid liability. Kids in the system as well as adults who wish to care for them will no longer be able to point to clear anti-discrimination protections to prevent or redress hostile treatment.

The issue of anti-LGBTQ discrimination in foster care and adoption remains live in the courts. In its coming term the Supreme Court will review *Fulton v. City of Philadelphia*, a Third Circuit ruling against a foster care organization seeking an exemption to discriminate against same-sex couples because of its religious beliefs. 922 F.3d 140 (3rd Cir. 2019), petition for certiorari granted, No. 19-123, 2020 WL 871694 (February 24, 2020). The Court will consider whether the First Amendment affords a religious exemption to neutral anti-discrimination laws of general applicability. A ruling that it does would upend decades of precedent with devastating ramifications for foster parents and children and beyond. ■

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

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

Kentucky District Court Enjoins the Louisville Metro Government from Invoking Anti-Discrimination Ordinance Against Wedding Photographer Who Declines to Photograph Same-Sex Weddings

By Filip Cukovic

In an important decision that highlights the growing tension between local anti-discrimination ordinances and First Amendment rights, Judge Justin R. Walker (W.D. Ky) held that the Louisville local ordinance that prohibits discrimination on the basis of sexual orientation by public accommodations is likely unconstitutional as applied to the case of Chelsey Nelson, a wedding photographer who would refuse to take photos of a gay marriage ceremony due to her religious belief that marriage should be a unity between one man and one woman. *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't*, 2020 U.S. Dist. LEXIS 1462468, 2020 WL 4745771 (August 14, 2020). The court refused to dismiss Nelson's declaratory judgment action on the basis that she would likely prevail on her First Amendment claim, making Louisville's motion to dismiss void.

Louisville enacted the Fairness Ordinance in 1999. It prohibits discrimination based on sexual orientation and gender identity in housing, public accommodations, and employment. Among other things, the Ordinance requires that companies both (1) serve gay and lesbian customers and (2) refrain from advertising that they won't serve them. These two prohibitions are codified as Metro Ordinance § 92.05(A) and Metro Ordinance § 92.05(B).

Although the Ordinance was not enforced against Chelsey Nelson - as no charge was ever filed against her on this basis - Nelson nonetheless decided to challenge the ordinance and seek a declaratory judgment. Nelson claimed the Ordinance infringes on her free speech and religious liberty rights because it requires her to photograph same-sex weddings just as she photographs opposite-sex weddings. Considering that she is a Christian and that her faith shapes everything she does, she has strong personal objection to gay marriage. Thus, if asked, she would refuse to take photographs of one such wedding, and she wants to be transparent about it. Specifically, she would want her website page to clearly specify that she would not participate in her capacity as a photographer in any gay wedding ceremony. However, due to Metro Ordinance § 92.05(B), which bars businesses from advertising that they would refuse to serve gay people, her website does not feature such disclaimers yet.

First, in order to address the substantive merits of Nelson's argument that the Ordinance in question violates her First Amendment rights, Nelson had to persuade the court that it has jurisdiction over her case, even though the Ordinance was never enforced against her. Thus, Nelson had to allege that (1) she intends to act in a way that implicates constitutional rights; (2) the provision prohibits what she intends to do; and (3) her intended actions raise "a credible threat of prosecution" under the Fairness Ordinance.

Judge Walker held that Nelson easily cleared the first two hurdles. First, considering that the First Amendment's scope includes blog posts and photographs, Nelson's constitutional free speech rights were clearly implicated. Next, since the Ordinance prohibits Nelson both from refusing to serve gay customers and from advertising that she would refuse to serve them, it is clear how the Ordinance prohibits what Nelson intends to do. Finally, since there is a history of past enforcement of the Ordinance, which includes at least 93 investigations for alleged violations of the Fairness Ordinance between 2010 and 2017, Judge Walker held that there was a credible threat of prosecution under the Ordinance. Thus, he concluded that the court had jurisdiction to hear Nelson's grievances.

On the substantive issue of whether the Ordinance violates Nelson's First Amendment rights, the Court held that Louisville cannot enforce the Fairness Ordinance against Nelson without unconstitutionally "abridging the freedom of speech."

To arrive to such conclusion, Judge Walker begun by outlining the most important principles of the First Amendment. Namely, a core First Amendment principle is that "the government may not discriminate against speech based on the ideas or opinions it conveys," and the Amendment generally prohibits the government from suppressing expression because of its message, its ideas, its subject matter, or its content, especially in domains such as politics and religion. However, in order to show that the viewpoint discrimination has occurred, the plaintiff alleging the First Amendment violation must first show that she indeed engaged in an action that the court would recognize as speech. Thus, one of the main issues in this case was whether the activity of taking wedding photos in exchange for money constitutes speech.

To understand why Judge Walker answered that question in the positive, the Judge reminded that the protection of the First Amendment is not limited to written or spoken words. Instead, it includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures. Furthermore, even activities that traditionally would not be recognized as pure speech but are sufficiently imbued with elements of communication

also fall within the scope of the First Amendment. The examples include conduct such as nude dancing, flag-burning, displaying swastikas, refusing to salute the flag, and so on.

Considering that photos send messages of humor, happiness, beauty, and protest, and because photography can say as much about the picture-taker as it does about the person whose picture is being taken, photography must be considered art. And because courts have always recognized that art is speech, Nelson's activity of taking wedding photos was seen as worthy of receiving the First Amendment protections. For example, Nelson believes that by capturing and conveying engagements, weddings, and marriages between one man and one woman, she can show the beauty and joy of marriage as God intends it and she can convince her clients, their friends, and the public that this type of marriage should be pursued and valued. Thus, she is using her photography to express both her religious and political ideas. To justify this conclusion, Judge Walker mostly relied on an Eighth Circuit decision where the Circuit reached the same conclusion as Walker in a case about wedding videography. See Telescope Media Group, 936 F.3d at 752-53.

Because the activity of taking wedding photographs is considered speech, and because the Ordinance compels Nelson to express herself in a manner contrary to her conscience, the court presumed that the provision — as applied to Nelson — is unconstitutional. Of course, because at this point the court only denied Louisville's motion to dismiss, this decision does not mean that Nelson won the case just yet. However, Louisville will now have to jump over a tall hurdle, because at the next stage of the litigation, Louisville will have to at least prove that the Accommodations Provision requiring Walker to serve gay customers is narrowly tailored to serve a compelling governmental interest. In the meanwhile, Louisville will be enjoined from enforcing the Ordinance Accommodation Provision against Nelson.

On the issue of the Publication Provision of the Fairness Ordinance - which generally bars businesses from advertising that they would refuse to serve gay customers - the court issued another favorable decision to Nelson as it allowed her to publicize on her website page that she would not photograph gay wedding ceremonies. As applied to Nelson's policy on same-sex weddings, the Publication Provision prohibits Nelson from truthfully advertising that she will not abide by an Accommodations Provision that itself cannot be validly applied to her wedding photography. To hold otherwise would allow Louisville to ban Nelson from saying she will refuse to photograph weddings that she has a constitutional right not to photograph. Bans on truthful commercial speech about lawful activity require the government to show more than that it assumes the public can't handle the truth. Here, at this early stage, the court did not think that Louisville made such showing.

Although this decision is rather favorable to Nelson, Nelson did not get all the remedies she had hoped for. First, the court held that it did not have jurisdiction to award Nelson any nominal or compensatory damages. Additionally, Nelson also sought an injunction barring Louisville from requiring her to "participate" in same-sex weddings. But the Court thought that issuing such injunction would be unnecessary because Nelson provides no wedding services other than photography. Finally, Nelson asked the court to block Louisville from enforcing the Publication Provision Clause against anyone, not just her. The court refused to do so, stating that when "commercial speech concerns unlawful activity," it "is not protected by the First Amendment." And because most commercial conduct covered by the Accommodations Provision is unprotected by the Free Speech Clause, most advertisements covered by the Publication Clause are likewise unprotected. What this means for now is that Louisville will not be allowed to enforce the Fairness Ordinance against Nelson. Furthermore, it is clear that Louisville will have a difficult time prevailing in this suit after the discovery process commences considering the legal standards that Judge Walker outlined here. On the other hand, Judge Walker issued this opinion on his way out the door to take a seat on the U.S. Court of Appeals for the D.C. Circuit, so the case will be reassigned to a different district judge.

Chelsey Nelson is represented by Bryan Neihart, Jonathan A. Scruggs, and Katherine L. Anderson, from Alliance Defending Freedom - Scottsdale, Scottsdale, AZ; David A. Cortman, from Alliance Defending Freedom - Lawrenceville, Lawrenceville, GA; and Joshua D. Hershberger, Hershberger Law Office, Hanover, IN. Louisville County Metro Government is represented by Casey L. Hinkle and David S. Kaplan, from Kaplan Johnson Abate & Bird LLP, Louisville, KY; Jason D. Fowler, John F. Carroll, Jr., and Peter Frank Ervin; Jefferson County Attorney, Louisville, KY.

[Editor's Note: Judge Walker, a youthful protégé of U.S. Senator Mitch McConnell, was appointed to the district court and subsequently to the court of appeals by President Donald J. Trump.]

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New York Cosmetic Surgeon Who Screened Out HIV-Positive Patients Ordered by SDNY to Pay Compensatory Damages and a Civil Penalty for Violations of the Americans with Disabilities Act

By David Escoto

On August 5, 2020, the U.S. District Court for the Southern District of New York ordered a New York cosmetic surgeon to pay compensatory damages and a civil penalty for a policy that effectively screened every possible HIV-positive patient. *United States v. Asare*, 2020 U.S. Dist. LEXIS 139864, 2020 WL 4496319 (August 5, 2020). Back in July of 2014, Mark Milano, a potential patient, filed a complaint with the Department of Justice against Dr. Emmanuel Asare and his former cosmetic surgery practice, Advanced Cosmetic Surgery of New York (Advanced Cosmetic), for violating his rights under the Americans with Disabilities Act (ADA). Despite attempts to convince the court otherwise, District Judge Analise Torres sees Asare's policy as a blatant violation of the ADA implemented for the sole purpose of denying procedures to HIV-positive individuals.

Milano's complaint resulted in the Government's investigation into Asare and his practice. On May 6, 2015, the Government commenced an enforcement action under Title III of the ADA. This provision permits the Attorney General to file a civil action when they have reasonable cause to believe there is a pattern or practice of discrimination and seek appropriate relief for the aggrieved individuals. During discovery, the Government decided to pursue damages not only for Milano but also for two unnamed individuals.

In 2018, in ruling on cross-motions for summary judgment, the court determined that Asare's flat-out refusal to perform surgery on Milano after disclosing his HIV status ran afoul of the ADA. However, the court could not grant summary judgment in favor of the Government relating to the unnamed individuals because the policy itself that screened them out was a disputed issue of material fact needing to be resolved at trial.

Dr. Asare specialized in gynecomastia surgery, which is the cosmetic surgery to remove fat deposits in a man's chest. Each of the men sought out Asare to perform this procedure. All three men had a different experience with Asare. However, all three men were refused cosmetic surgery services once Asare became aware that the men were living with HIV, potentially living with HIV, or taking antiretroviral drugs for HIV. Asare tested two of the men without their consent.

J.G., one of the unnamed men, is a classically-trained tenor. He has traveled the world performing in various opera houses. In 2009, J.G. was diagnosed with HIV. He began taking antiretroviral medication the same year. In 2014, J.G. had an undetectable viral load. J.G. had lifelong insecurities about "having a little extra tissue" in his chest and decided he would go to Asare for cosmetic surgery.

At his initial consultation on April 2, 2014, when asked on a form if he had medical problems including HIV, J.G. answered no. J.G felt that sharing his status was something that would cause him a lot of anxiety and stress. J.G had not yet disclosed his HIV status to his family, only sharing his status with a close circle, including his doctor, best friend, and boyfriend. After completing the form, J.G. met with Asare to discuss the procedure and make an initial deposit. The procedure was scheduled for June 6, 2014.

On May 15, 2014, J.G returned to Asare's office to have blood drawn for pre-surgical testing. A week later, the scheduling assistant called J.G. requesting he come back into the office to speak with Asare. At their next meeting, Asare told J.G. that the blood test revealed he was HIV-positive and that it was office policy not to perform surgery on people with HIV. J.G. responded that he was aware, had been on antiretroviral medication, and was undetectable. J.G claims that Asare said, "it is really [his] nurses that would be freaked out." J.G. was utterly unaware that his blood was being tested for HIV.

After that meeting, J.G. stood on the street outside Asare's office and called his boyfriend. J.G expressed that he was transported back to the moment he learned of his HIV status. J.G was overcome with feelings of guilt and shame. For several weeks he experienced feelings of distrust towards medical professionals because of the humiliation and degradation he experienced.

S.V., another unnamed man who sought Asare's services, is an underwriter of auto loans. He has two children. He was planning on getting married on a beach in September of 2014. In anticipation of his beach wedding, S.V. decided he wanted to undergo the gynecomastia procedure. After researching doctors, S.V. contacted Asare.

At his initial consultation, S.V. was asked to fill out several forms. S.V. suffers from a condition called neutrophilic leukocytosis, which causes an abnormally high white blood cell count. This condition does not affect S.V.'s day-to-day life, and he does not take any medication. S.V. did not disclose his condition on the forms because he did not feel the condition was responsive to the questions. His own hematologist even told him that he did not need to mention it before having surgery. At a preoperative visit on May 16, 2014, employees of Advance Cosmetic drew blood. The employees never asked if

S.V. consents to have an HIV test done.

On the day of the surgery, S.V. used a car service to go to the operating facility. S.V. put on a medical robe and was taken into the operating room where a nurse gave him two or three sedative pills. Asare marked S.V.'s body for surgery and injected S.V. with another sedative. About five minutes later, Asare reentered the room and declared that the surgery was canceled because of the blood test results. In a partially sedated state, Asare informed S.V., then in a partially sedated state, that he was HIV positive.

S.V. said there was no way this could be accurate because he regularly gets his blood drawn and has never received an HIV diagnosis. Nonetheless, Asare reiterated the procedure was canceled and sent him home. Usually, the procedure to discharge takes about four hours to give patients enough time for the sedative to wear off. S.V. was not afforded any time for the sedative to wear off and was sent home in a car service.

Once home, S.V. had to crawl on all fours to get upstairs to his bedroom. He slept until 11:00 p.m. that night. When he woke up, he was shocked and scared. S.V. stayed up the rest of the night, distraught and trying to figure out what had happened. S.V. was so distraught he contemplated suicide. No one from Advanced Cosmetic called to check in on S.V. after he left the facility. On May 22, 2014, S.V. contacted Advanced Cosmetic to get more information but was told Asare was not available.

The following day he met with Asare, who told him the blood test came back HIV-positive and that the office was not "outfitted to do the surgery on someone with HIV." S.V. insisted that he could not be HIV-positive, but Asare clapped his hands and claimed that there was no false positive. After this meeting, S.V. went to North Shore Hospital and received a more conclusive HIV test. The HIV test showed that he was not HIV-positive.

Mark Milano is an HIV educator, writer, and editor at an HIV research organization. He was diagnosed with HIV in 1982 and began taking antiretroviral drugs in 2007 following a cancer diagnosis. In 2008, Milano began developing extra fat deposits in his chest and could not get rid of them through diet and exercise. In July 2014, Milano scheduled an appointment with Asare to discuss the possibility of cosmetic surgery.

At the initial consultation, Milano was asked to fill out the medical history form. He skipped those questions preferring to discuss them in person with Asare. Following the physical examination, Milano asked if any of the HIV medications he had taken in the past contributed to the gynecomastia. At that moment, Asare's demeanor changed. In an accusatory manner, Asare exclaimed that Milano did not check off HIV on the form. Milano claims Asare informed him "that he does not perform the surgery on any patient with the 'human immunodeficiency virus.'" When confronted with the fact his policy is illegal, Asare asserted that he could turn away any patients he feels are medically inappropriate.

Milano testified that the hasty rejection by Asare because of his HIV status was traumatizing. He expressed that he has always seen the medical profession as a "salve against the stigma" he faces from other uninformed people. For years after the incident, Milano continually experienced anxiety to the point of needing Xanax. Further, as a result of their interaction, Milano also suffered from persistent sleeplessness. Milano's coworker testified that before seeing Asare, he was the "go-to-guy" at work; after he was lethargic and depressed. In an email dated July 15, 2014, Milano expressed how sad he felt that after 25 years as an AIDS activist, an uninformed person could psychologically and emotionally impact him so profoundly.

All three of these men were subjected to Asare and Advanced Cosmetic's policy of testing every patient for HIV, or screening out those who test positive. Asare claims that HIV testing is necessary to determine whether a patient is an appropriate candidate for surgery. However, expert witnesses testified to the contrary. The advent of "universal precautions" established almost thirty years ago makes Asare's testing medically unnecessary. Further, the court notes that an otherwise healthy individual with controlled HIV is as appropriate of a candidate for surgery as anyone else.

The court notes that several statements that Asare made are hard to believe. Asare generally denies that several meetings with Milano, J.G., and S.V. occurred, pointing to no record of the meetings. However, the court notes that Advanced Cosmetic has many shortcomings regarding record-keeping and that lack of meeting records is not indicative of its occurrence. Asare also claims that an interaction with Milano did not occur because he would not use the words "human immunodeficiency virus" because he struggles to say it. The court struggles to give this any credit, considering Asare had been practicing medicine in the United States for twenty-eight years and testified in clear and smooth English.

The court sees through Asare's claims that his testing policy was used to provide appropriate care. For example, no one from Advanced Cosmetic ever reached out after S.V. learned of his false HIV-positive status while sedated in the operating room. Further, in reviewing Advanced Cosmetic's records, when Milano filed his complaint, Asare had not performed surgery on any HIV-positive patient. The court sees these examples as evidence that testing was done solely to determine who is HIV-positive and deny them medical services.

The screen out policy implemented by Asare and Advanced Cosmetic is illegal under the ADA because it imposes an unjustified eligibility criterion for a medical service. The court finds that it was the HIV status of the three men and no other factor that led to their denial of a medical procedure, and that the weight of credible expert testimony was that the procedures in questions could be safely performed on an HIV-positive person, provided "universal precautions" against blood exposure, as mandated by OSHA regulations, are followed.

Under the ADA, the court ordered compensatory damages to all three individuals who suffered discrimination by Asare and Advanced Cosmetic. The emotional distress award imposed by

the court falls under the "garden variety kind," which generally merits an award between $35,000 to $125,000. The court held that Asare's egregious behavior warranted an emotional distress award of $125,000 to each of them. Further, pursuant to the ADA, a civil penalty was imposed of $15,000. Finally, the court ordered an injunction against Asare, requiring him to adhere to a new policy compliant with the ADA.

The United States is represented by Arastu Kabeer Chaudhury of the U.S. Attorney Office, SDNY. Defendants Dr. Asare and Advanced Cosmetic are represented by Steven Michael Warshawsky of the Law Firm of Steven M. Warshawsky in New York, NY. Milano, who intervened as a plaintiff, is represented by Alison Ellis Frick and Matthew D. Brinckerhoff of Emery Celli Brinckerhoff & Abady, LLP in New York, NY, and Armen Hagop Merjian of Housing Works, Inc. in New York, NY. ■

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

Transgender Inmate Edmo Has Confirmation Surgery; Idaho Prison Defendants "Suggest" to Supreme Court that Injunctive Case Is Moot

By William J. Rold

Idaho transgender prisoner Andree Edmo had gender confirmation surgery on July 10, 2020. This writer believes that this is the first court-ordered confirmation surgery performed on a transgender prisoner. *Law Notes* has followed this case for years. Defendants (Idaho DOC officials and a physician employee of their medical vendor, Corizon) fought to the end – and they are still doing so.

Last year, the Ninth Circuit affirmed an injunction directing defendants to provide gender confirmation surgery. *Edmo v. Corizon,* 935 F.3d 757 (9th Cir. 2019). After losing an application for *en banc* review, defendants sought delay, ultimately losing a stay in the Supreme Court (Justices Alito and Thomas, dissenting) on May 21, 2020, pending a petition for *certiorari*. 19A1038.

Defendants filed their petition for *certiorari* in June, and it was covered in *Law Notes* (July 2020 at pages 15-16). Edmo filed respondent's opposition to *certiorari* on August 10, 2020. The opposition makes two key points, both based on the 9th Circuit's "fact-specific" decision in Edmo's individual case: (1) there is not a genuine "circuit split" that needs to be resolved on transgender care under the Eighth Amendment; and (2) the record in this case is a "poor vehicle" for the Court's national review of this issue as a matter of discretion.

Edmo, represented by a large coalition, argues that the closest there is to a "split" is the First Circuit's decision overturning an injunction for surgery in *Kosilek v. Spencer,* 774 F.3d 63 (1st Cir. 2014) (*en banc*). The facts in *Kosilek* are quite different, including the security arguments made at trial in 2012. *Gibson v. Collier,* 920 F.3d 212 (5th Cir. 2019), has no record of its own, having adopted the record in *Kosilek*. Thus, it adds nothing to the heft of the "split" if the Court accepts Edmo's fact-intensive argument.

Other cases are even less in conflict. *Lamb v. Norwood,* 899 F.3d 1159, 1163 (10th Cir. 2018), was a *pro se* summary judgment case with a "sparse" record. *Lamb* was also amended on rehearing to delete suggestions that there is "no medical consensus" on treatment of gender dysphoria or that "scientific advances in understanding gender dysphoria need not be considered." *Compare* 895 F. 3d 756, 759-60, *with* 899 F.3d at 1162, *cert. denied,* 140 S. Ct. 252 (2019). *Koehane v. Florida DOC,* 952 F.3d 1257 (11th Cir. 2000), involved hormones, not surgery, which the inmate plaintiff was receiving by the time the case reached the Court of Appeals, so that court found the injunctive claim on this point to be moot.

Like the corrections defendants in *Keohane,* the defendants here filed a motion after Edmo's surgery "suggesting mootness" (August 24, 2020). They ask that Edmo's injunction be vacated, noting that the physician defendant has a right to a jury trial on damages claims, and his liability should not be prejudged.

The same tack was taken by the California correctional officials after a district judge ordered confirmation surgery in *Norsworthy v. Beard*. The defendants paroled Beard (who got surgery in a half-way house) and then argued the case was "moot" and sought a vacatur of the injunction. The Ninth Circuit declined this bait, agreeing the injunctive claims as stated were moot but sending the vacatur decision back to the district court. 802 F.2d 1090, 1093 (9th Cir. 2015).

This seems even more like the correct ruling here. Unlike Norsworthy, Edmo remains in prison and she will

likely have post-operative needs – very likely, serious ones. The district court is in the best position to determine whether she continues to experience deliberate indifference to her mental and physical health and to her safety.

The California DOC was represented by the Attorney General in *Norsworthy,* when Senator Kamala Harris held that office. She told the *Washington Blade* last year (1/21/19) that she worked "behind the scenes" to obtain transgender care (including surgery) for inmates and that she fought to change California policy about transgender care in prisons. She said the same thing in an interview with the National Center for Transgender Equality, posted 10/18/19. California did change (and liberalize) its policy, but it has hundreds of trans prisoners – and lawsuits continue. The issue did not reach the Ninth Circuit again until *Edmo,* four years later.

On the discretionary review point, Edmo argues that the Court should not dive into the myriad details of the testimony; the district court and the court of appeals have already done that. Edmo argues that this case "presents no opportunity for this Court to consider any overarching legal issue without re-weighing the facts, re-evaluating witness credibility determination, and reviewing the correctness of the inferences the lower courts drew from the record. That is not this Court's job." Edmo cites *Newell v. Norton,* 70 U.S. 257, 268 (1865).

Kudos to Edmo's counsel for finding *Newell*. It has not appeared in a Supreme Court decision for over 125 years. While *Newell* was a maritime case under different appellate jurisdiction, its warning is prescient here: "It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses . . . . [E]ven if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding . . . . [P]arties should not appeal to this court with any expectation that we will reverse the decision of the courts below, because counsel can find in the mass of conflicting testimony enough to support the allegations of the appellant, if the testimony of the appellee be entirely disregarded; or by attacking the character of his witnesses when the truth of their testimony has been sustained by the opinions of both the courts below." *Id*. at 267-8.

Edmo also asks the Court not to give credence to the cant that the Ninth Circuit "constitutionalized" the standards of the World Professional Association of Transgender Health. It specifically disavowed that WPATH established a constitutional test, using its standards as a "starting point," as have most other courts and as defendants did here.

In this writer's view, it is the defendants who seem to argue for a different test for transgender inmates. One can recall in the 1980s that Corrections was stumbling to address HIV, and it set up "Task Forces," "Interdisciplinary Groups," and "AIDS Committees." In many cases, these entities were promoted by ignorance and fear – by staff; by other inmates. They have mostly gone away, as HIV care is seen as like another chronic illness that does not need a special committee.

Neither should gender dysphoria. Near the end of their brief in opposition to *certiorari,* counsel observe that the Supreme Court in *Bostock v. Clayton County,* 140 S. Ct. 1731, 1751 (2020), included transgender people within the reach of Title VII protection because they, like prisoners – however "politically unpopular" – are included in the "promise that all persons are entitled to the benefit of the law's terms."

Edmo has not responded to the "suggestion of mootness"— and she may need leave for a supplemental submission. The Court has set the case for conference on September 29, 2020. Edmo 's lead counsel is Lori Rifkin, Rifkin Law Office (Berkeley). ■

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.

With Great Protections Comes Great Cautions: Ninth Circuit Remands Discrimination Case to Determine Frivolousness

By Corey L. Gibbs

Hung Nguyen was an engineering professor at the University of California, Irvine. He claimed that the University and some individual administrators discriminated and retaliated against him because of his sexual orientation. On July 20, 2020, the U.S. District Court for the Central District of California granted summary judgment in favor of the Defendants. On August 13, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's summary judgment; however, it vacated the award of attorney's fees and remanded that single issue. *Nguyen v. Regents of the Univ. Of Cal*., 2020 U.S. App. LEXIS 25714; 2020 WL 4717914 (9th Cir. 2020).

Hung Nguyen sought to become a tenured professor at the University of California, Irvine. Initially, he applied for tenure during the 2014-2015 academic year. Following a preliminary denial of his application, Nguyen drafted a rebuttal letter that stated, "Given the enormous disparity between how my work was characterized and my actual achievements, I have to wonder what motivates such statements, which seem to suggest something else other than an objective evaluation."

While he continued to pursue tenure, the University continued to reject him. On August 17, 2016, the University Chancellor both denied Nguyen's tenure and sent him a letter terminating his position for the next academic year. By August 2017, Hung Nguyen no longer taught at the University. Soon after, he claimed his tenure application was rejected because of his sexual orientation. *Nguyen v. Regents of the*

Univ. Of Cal., 2018 WL 5886018 (C.D. Cal. 2018).

Nguyen was sufficiently qualified and considered by the University for promotion. The University claimed that Nguyen was unsuccessful in obtaining external funding, did not have great reviews, and had limited publications. In addition to the legitimate, nondiscriminatory reasons the University provided for not promoting Nguyen, some of the individual administrators claimed that they were unaware of Nguyen's sexual orientation. When Nguyen was unable to show that the University hid discriminatory intentions behind its legitimate reasons for not promoting him, the District Court granted summary judgment in favor of the Defendants. The Ninth Circuit agreed.

Nguyen also claimed that the Defendants had retaliated against him. He identified three protected activities for which he alleged he suffered adverse actions: drafting a letter alleging discrimination, submitting the letter, and formally alleging the discrimination. However, Nguyen failed to show that any of the Defendants were aware of his allegations. While the Defendants were aware of the letter he submitted, his allegations were too vague. For those reasons, the District Court granted summary judgment in favor of the Defendants, and the Ninth Circuit affirmed.

Nguyen's final argument arose from the awarding of $144,670 in attorney's fees to the Defendants. While he did not challenge the separate award of $11,852.12 in costs, he claimed that the District Court erred when it awarded the attorney fees. That court called Nguyen's claims frivolous, which justified its determination of such a high price. Although the Ninth Circuit had sided with the lower court at each step of this appeal, it was the $144,670 in attorney's fees that pushed the court to disagree.

The Ninth Circuit acknowledged that Nguyen should have realized that he did not have an actionable claim against some of the Defendants following discovery, specifically two who did not even know of his sexual orientation. The Ninth Circuit stated, "We thus conclude that the district court did not abuse its discretion in finding that these claims were frivolous." However, Nguyen was able to establish a prima facie case against the other Defendants with regard to his claims of discrimination. Therefore, some of his claims were likely not frivolous. The Circuit Court remanded the issue and asked the District Court to determine whether Nguyen's discrimination claims against the Regents and two individuals were in fact frivolous. If the claims were found not to be frivolous, then the District Court should reassess the amount of fees to which the Defendants are entitled.

In *Bostock v. Clayton County*, the Supreme Court recently concluded that sexual orientation discrimination violates Title VII. 140 S. Ct. 1731 (2020). While Nguyen made claims under 42 U.S.C. § 1983 and Title XII, the courts slapped him with a hefty payment because his claims were considered frivolous. This same consequence applies to frivolous Title VII claims. In *CRST Van Expedited, Inc. v. E.E.O.C.*, Justice Kennedy wrote, "Title VII's fee-shifting statute allows prevailing defendants to recover whenever the plaintiff's 'claim was frivolous, unreasonable, or groundless.'" 136 S. Ct. 1642 (2016).

While the LGBTQ+ community has cause for celebration, we must also remember that the courts that protect us can also charge us. America could be described as a litigious society because of our citizens' proclivity for legal solutions to their problems. With courts reopening and our new protections recognized, we should remain cautious to litigate. An eagerness to litigate using our new protection could come with a hefty price tag—just ask Nguyen.

Juan Hong represented Hung Nguyen, and Sandra L. McDonough represented the Defendants. This case went before and was decided by Circuit Judge Carlos T. Bea, Circuit Judge Bridget S. Bade, and visiting Judge Gershwin A. Drain, who is a United States District Judge for the Eastern District of Michigan. ■

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

Settlement with Jail Provides for Damages to Transgender Plaintiff and Jail-Wide Policy Changes for Future Transgender Inmates

By William J. Rold

Plaintiff Jena Faith, a transgender woman, spent about a month in the Steuben County (New York) Jail under allegedly discriminatory and unsafe conditions. Her lawsuit in state court, which raised only state law claims, was settled after one year, giving her damages and providing policy changes for future transgender inmates. The settlement of the case, *Faith v. Steuben County,* was reported in the *New York Law Journal* on August 5, 2020: "Wester New York Settlement Could State New Standards for Treatment of Transgender Inmates, Advocates Say." The case was filed in New York Supreme Court, Steuben County, Index No. E2019-1208-CV.

There are no written opinions to report, but there is a teaching moment for advocates who represent LGBT prisoners and think nothing can be accomplished in state court. Here, the Complaint eschewed all federal claims, relying on the New York Constitution (Article I, §§ 1, 6, and 11), state civil rights statutes (Executive Law § 296; Civil Rights Law §§ 40-c and 79-n), and common law negligence. It did not seek class certification, but it asked for injunctive relief for Faith and for "any transgender person . . . at the Steuben County Jail."

The settlement amount, which is public, was $60,000 (or about $2,000/day) for Faith's time in the Jail. The parties bore their own attorneys' fees. The settlement included as an essential element the issuance of an attached "General Order," issued by Sheriff James L. Allard, that covers ""interactions with members of the

transgender, intersex, gender non-binary, and gender nonconforming communities."

The General Order prohibits "derogatory remarks relating to a person's actual or perceived sex, gender identity or gender expression." It requires use of preferred pronouns and names (even if not legally changed). When legal papers have a different name, it can remain, but staff must use the preferred name when interacting with the inmate. "Self-identification" is sufficient to trigger the protections of the General Order and booking officers must invite new arrestees to state their gender identity.

Inmates may grieve an alleged violation of the General Order. Complaints of harassment or risk to safety must be investigated immediately and there is protection against retaliation. An unusual provision states that safety complaints must be processed through the chain-of-command to the attention of the Sheriff.

Transgender inmates may request housing with cisgender inmates with similar gender identities where there are sex-segregated units. This may be over-ridden by the Jail in individual cases, but not for reasons of genitalia, sexual orientation, or complaints by cisgender inmates. Transgender inmates must be offered the same commissary, grooming, and programmatic services available to cisgender inmates with whom they identify. Items usually considered "contraband," such as wigs or chest binders, must be accommodated.

Transgender inmates must be permitted to shower separately, but they cannot be required to do so except for particularized reasons. "Wherever practical," bodily searches must be conducted by officers of the inmates' identified gender.

The Jail must train all staff in the new General Order and provide annual "refresher" training. This shall include notice that violators of the General Order are subject to discipline, up to and including termination. In a provision this writer has not seen, new inmates and visitors to the Jail must be given notice of the non-discrimination and non-harassment protections of the General Order in "plain language" – a facsimile of which is attached to the General Order.

The General Order has few provisions about medical or mental health care, but it notes that the Jail uses vendors for these services, who are bound by the provisions of the Order on non-discrimination. This includes requests for hormones and dilation after gender affirming surgery. Faith's complaint indicates her hormone medication was interrupted while she was in the Jail. The General Order does not otherwise address gender confirmation surgery for inmates in the Jail.

This settlement did not involve knotty satellite skirmishes on qualified immunity, personal involvement, or "pattern and practice" Monell liability of county government that would have burdened federal litigation. Can this be replicated? Steuben County is mostly rural, in New York's "Southern Tier," but it would be worth trying.

Can it be enforced by other trans inmates? It is not a court order or injunction, but future transgender inmates may be able to enforce this settlement as third-party beneficiaries. It seems clear they are intended beneficiaries and not incidental to the settlement. See *CB v. Howard Security*, 158 A.D.3d 157, 166-7 (1st Dept. 2018) (affirming that a triable issue existed as to whether minor child was third party beneficiary of agreement resulting in "Statement of Client Rights," even if not named therein). All of this, of course, will occur in New York state court.

Shortly after the settlement was negotiated, Sheriff Allard and Steuben County issues a press release calling the new policies "groundbreaking" changes that filled a "large gap" in housing the "transgender community" at the Jail. The statement said it was "collaborative work" with the New York State Sheriff's Association, the New York State Jail Association, and the New York Civil Liberties Union.

Faith is represented by Baker & Hostettler, LLP, the New York Civil Liberties Union Foundation, and the Transgender Legal Defense & Education Fund (all of New York City). ■

Transgender Club Patron Sues Bar Owner and San Diego City and County Defendants After Arrest and Ordeal in Jail

By William J. Rold

Ashley R. Vuz is a transgender woman in transition. She presents as a woman and takes hormones. Her legal status has been changed to "female" by a California Superior Court. According to Vuz, she and her party were in the Gossip Grill ["Gossip," identified on the web as a San Diego Hillcrest neighborhood women's bar], when an employee followed her into the gender-neutral restroom, accused her of intoxication, and asked her to leave. A verbal disagreement occurred. Vuz claims that Gossip employees assaulted her, following her outside the bar for a block, continuing their assaults, and yelling obscenities. A San Diego police officer (defendant Zajda) arrested Vuz and charged her with robbery, upon a complaint made by the bar. Vuz sued Gossip, four employees, and officer Zajda for these events. She also sued the City and County of San Diego and a jail nurse for what happened after her arrest. In *Vuz v. DCSS, III d/b/a Gossip Grill*, 2020 U.S. Dist. LEXIS 135312 (S.D. Calif., July 30, 2020), U.S. District Judge Gonzalo P. Curiel granted in part and denied in part the government defendants' motions. The claims against Gossip and its employees are not part of this decision.

This lengthy decision (over 12,000 words) cannot be reported in full here, so the main focus will be on her claims regarding the manner of arrest and subsequent detention.

There has been a series of district court judges assigned to the case: Judge Janis L. Sannartino was assigned on February 6 and recused on February 11, 2020. Judge Marilyn C. Huff sat until

June 4, when she recused. On June 8-9, the case was assigned to Judges Michael M. Anello, Thomas J. Whelan, John A. Houston – each recusing in rapid succession – and now, Judge Curiel, since June 9, 2020. The docket gives no explanation for this highly unusual sequence.

Judge Curiel's opinion starts with the arrest and transport by defendant Zajda, who had no warrant. Zajda originally noted in his paperwork that Vuz was female, but he changed this to male when he got to the jail per San Diego police manual and county policy saying that "lower anatomy" was determinative. (The opinion does not say how Zajda knew.) The jail nurse, also a defendant, did a medical intake and noted that Vuz was male. She was placed in administrative segregation in a cell with walls "covered in feces." She got bail the next day. She alleges she contracted influenza and hepatitis-A from exposure in the cell and has post-traumatic stress disorder from her ordeal.

Judge Curiel denies the motion to dismiss the *Monell* claims – *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978) – against both the City and County of San Diego because there was sufficient pleading of policy and practice regarding allegedly unconstitutional transportation and booking of transgender arrestees to survive a motion to dismiss. There is a good discussion of Ninth Circuit law on this point.

The individual defendants Zajda and the jail nurse argued that they were entitled to qualified immunity. Judge Curiel finds the complaint insufficient to show that either Zajda or the nurse had notice that transporting Vuz to a male facility (which Judge Curiel frames as an Equal Protection claim) or that clearing her for administrative segregation violated clearly established law. [Note: Municipalities are not entitled to the defense of qualified immunity. *Owen v. City of Independence,* 445 U.S. 622, 650 (1980).]

On individual constitutional rights, Judge Curiel addresses whether defendants violated Vuz's First Amendment protections by burdening her free expression as a transgender person or by retaliating against her for so expressing herself. Judge Curiel's extensive discussion of this point is the best this writer has seen, and it is recommended reading. He ultimately finds that Vuz failed to show that her conduct on the night in question was "expressive," which is her burden. *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018). He compares *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010), where the school unconstitutionally forbade a lesbian student to take a female date to prom or to wear a tuxedo. Having found that Vuz failed to plead "expressive" conduct, there was no predicate for a retaliation claim.

Judge Curiel declines to dismiss Vuz's claim that Zajda arrested her illegally under the Fourth Amendment. Having no warrant, he was obligated to conduct an "independent" investigation at the scene and not just rely on statements of Gossip's employees. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) (declining to adopt the view that "citizen witnesses are presumptively reliable"); *Arpin v. Santa Clara Valley Trans. Agency*, 261 F.3d 912, 924 (9th Cir. 2001) (reversing the dismissal of a Fourth Amendment false arrest claim against police officers based on arrest where the plaintiff raised an inference that the officers did not independently investigate asserted violation of law). Zajda may reassert Fourth Amendment satisfaction at summary judgment, but the complaint withstands a motion to dismiss. This holding allowing discovery is important because many transgender arrestees face similar situations of arbitrary arrest.

On Equal Protection claims against the City and County, Judge Curiel declines to dismiss, based on intermediate scrutiny of the pleadings under *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). The claim against the City is "plausible" insofar as it states that decisions to transport and book were based on Vuz's anatomy. As to the County, dismissal is also inappropriate, although it is a closer question, because the processing into administrative segregation may be related to safety issues, which can be revisited at summary judgment.

As to the allegations concerning disgusting conditions in the jail cell, Judge Curiel finds that the pleadings do not allege sufficiently that the City (or defendant Zajda) foresaw the conditions under which Vuz would be held at the jail. Dismissal is granted as to them, but this defect seems easy to cure. As to the County (which ran the jail), the complaint is sufficient to state a claim. As to the County's argument that Vuz was not in the cell long enough to raise a constitutional threshold of harm, Judge Curiel held that this was a summary judgment issue and that a few hours can constitute a violation of the Due Process Clause for pre-trial detainees if conditions were bad enough to cause serious harm. There is extensive discussion.

The opinion addresses many other issues, including denial of access to a telephone and claims under California state law – which are omitted here. Judge Curiel grants leave to amend. Vuz is represented by Peterson Bradford Burkwitz, LLP, Burbank, CA. ■

Federal Court Orders State Department to Recognize Birthright Citizenship of Child Born Overseas to Married Gay Male Couple Through Gestational Surrogacy

By Arthur S. Leonard

A U.S. District Judge in Georgia issued a ruling on August 27 that a married male couple's daughter, Simone, conceived through donor insemination from a donated egg with an English woman serving as gestational surrogate, should be deemed a natural-born U.S. citizen and entitled to a passport over the objections of the State Department. The complication in this case is that the spouse whose sperm was used was not a U.S. citizen at the time, although he since has become one through the marriage to his native-born U.S. citizen husband. If this sounds familiar, it is because the case of *Mize v. Pompeo*, 2020 WL 5059253, 2020 U.S. Dist. LEXIS 156121 (N.D. Ga., Aug. 27, 2020), presents issues similar to those in *Kiviti v. Pompeo*, 2020 WL 3268221 (D. Md. June 17, 2020), decided a few months earlier by a federal court in Maryland, which also ordered the State Department to recognize the birthright citizenship of the child of a married gay couple.

This is a recurring problem encountered by married gay male couples who use a foreign surrogate to have their child overseas.

Under the 14th Amendment of the Constitution, all persons born in the United States are citizens at birth, regardless of the nationality or citizenship status of their parents. By statute and court decision, the only people born in the U.S. who are not citizens at birth are children born to foreign diplomats stationed in the U.S. or temporary tourist or business visitors. The citizenship of children born overseas to U.S. citizens is determined by a statute, the Immigration and Nationality Act (INA).

Under the INA, there is a crucial distinction depending whether the child's U.S. citizen parents are married to each other when the child is born. One provision concerns the overseas children of married U.S. citizens, and a different provision applies if the children are born "out of wedlock." As interpreted by the State Department, if the parents are married, the child is a birthright citizen so long as it is biologically related to one of them. If the parents are not married, at least one them who is biologically related to the child must be a United States citizen who has resided in the U.S. for at least five years.

In this case, James Mize, a native-born U.S. citizen, and Jonathan Gregg, a British native, met when Gregg moved to the U.S. in 2014 and they subsequently married. They then decided to have a child together, and a British woman who was a friend of the couple agreed to be the gestational surrogate. They obtained an anonymously donated egg which was fertilized in vitro with Jonathan's sperm, implanted in their friend, who bore the child in England in 2018. The local authorities issued a birth certificate recognizing the two men as the parents of the child, identified in court papers as SM-G. The men had moved to England before the child was conceived. After she was born, they applied for a U.S. passport and citizenship declaration, but the State Department refused to provide it. The Department treated the child as if she was born out of wedlock, since her biological parents were not married to each other, and found that her biological father, Gregg, had not resided in the United States as a citizen long enough to confer birthright citizenship on her. Mize is not her biological parent, so the Department was unwilling to recognize birthright citizenship based on Mize's natural-born citizenship status.

These rules have proved to be a recurring issue for gay male couples who go out of the country to have children through surrogacy, as it has generated several lawsuits, and the State Department, while losing individual cases, has not modified its interpretation of the statute. Unsurprisingly, the Trump Administration has filed appeals of prior cases and there is no definite appellate interpretation yet.

Mize and Gregg sued the State Department, claiming that the denial of the passport and citizenship declaration for their daughter violated their 5th Amendment constitutional rights, violated the INA, and also violated the Administrative Procedure Act.

Meanwhile, however, because of the citizenship status eventually acquired by Gregg through his marriage to Mize, their daughter ultimately acquired naturalized citizenship as the minor child of a naturalized citizen while this case was pending, and is living with the couple in Georgia. In addition to refusing to change its interpretation of the INA and moving for summary judgment as to that, the State Department also suggested that the case should be dismissed as moot, since the child now has a U.S. passport as a "naturalized" citizen by derivation from her biological father.

U.S. District Judge Michael Brown rejected the mootness argument before turning to the merits of the case in his August 27 opinion. He said that the dignitary harm suffered by the men in their marriage being deemed irrelevant for the purpose of their daughter's citizenship status at birth kept this case from being moot, because constitutional law requires the State Department to recognize the marriage as equal to the marriage of a different-sex couple.

On the merits, Judge Brown pointed out that as a matter of constitutional law, under the Supreme Court's decisions in *Obergefell v. Hodges* in 2015 and *Pavan v. Smith* in 2017, same-sex marriages are supposed to be treated the same as opposite sex marriages for all purposes of law. They are entitled to the same rights and have the same

responsibilities. However, if the INA can be interpreted to treat their daughter as a child "of the marriage," then the provision concerning the children of married U.S. citizens would apply and there would be no requirement that the child be biologically related to both parents to be a birthright citizen, and the court would not have to address the constitutional issues.

Judge Brown found that the INA does not define what a child "of the marriage" is, leaving an ambiguity because the statutory language can be interpreted in more than one way. If the language is interpreted as the State Department insists, he found that would raise constitutional issues under the 5th Amendment. Federal courts apply a doctrine of "constitutional avoidance." They avoid having to decide questions about the constitutionality of a statute or its interpretation by the government if there is a reasonable way to interpret the statutory language to make the constitutional issues go away.

In this case, Judge Brown, in line with several prior district court decisions, concluded that such an interpretation is possible. The Mize-Gregg marriage is valid and must be recognized by the State Department, and the process by which Mize and Gregg decided to have a child through gestational surrogacy and carried out their plan supports the argument that SM-G is a child "of" their marriage in a practical sense. Thus, the court concluded, she was not born "out of wedlock," and the requirement that she be biologically related to as U.S. parent with sufficient duration of residency under the "out of wedlock" provision would not apply.

Judge Brown granted summary judgment to Mize and Gregg as a matter of statutory interpretation, rendering it unnecessary to decide the constitutional questions, and he ordered the State Department to issue the documents for which the men had applied. He dismissed the Administrative Procedure Act claim as moot.

The State Department could decide to appeal this ruling, which would be consistent with the Trump Administration's general tendency to fall in line with efforts by Christian conservatives to chip away at the legal status of same-sex marriages. Unsurprisingly, the Department filed an appeal of the *Kiviti* decision in the 4th Circuit Court of Appeals on August 14, but in the normal course of things that appeal will probably not be argued for several months and a decision would be unlikely until sometime next year at the earliest. Meanwhile, the Trump Administration could consistently file an appeal in this case to "protect" its position about how to interpret the statute.

If Joe Biden is elected president, it is possible that the State Department would decide to protect the rights of same-sex couples and their children by revising the Foreign Affairs Manual to adopt an interpretation consistent with the court's rulings for the guidance of U.S. consulates and embassies that receive these sorts of applications when children are born to U.S. citizens overseas.

Immigration Equality and Lambda Legal are representing Mize and Gregg, as they are also representing the plaintiffs in the *Kiviti* case.

Judge Brown was appointed by President Donald J. Trump and took the bench in January 2018. ■

New York Trial Court Makes Substantial Equitable Distribution Award and Spousal Maintenance in Same-Sex Divorce Case

By Hannah McMillan

On August 21, 2020, Justice Matthew F. Cooper (N.Y. Sup.Ct., N.Y. County) issued a decision after trial in favor of G.R., the plaintiff in a highly-contested, multi-year same-sex divorce action. G.R. was represented by the LGBT Bar Association of Greater New York (LeGaL), together with Sanctuary for Families, in his long effort to win freedom and justice from an abusive relationship. *G.R. v. K.R.*, 2020 NY Slip Op 50976 (U).

In 1989, G.R. moved to New York from Puerto Rico. He worked several jobs to support himself until he met K.R., a successful businessman who is fifteen years his senior. K.R. induced him to quit his jobs, and G.R. became entirely financially dependent on K.R.. K.R. financed a luxurious lifestyle for the couple, and, in 1990, they had a commitment ceremony. After Marriage Equality, the two were legally married in New York in 2011. The relationship was marked by a pattern of power and control of G.R. by K.R., including ongoing sexual exploitation of G.R. by his being coerced into high-risk sexual activity with multiple individuals and likely resulting in seroconversion and subsequent bouts of AIDS.

After the relationship ended in approximately 2015, G.R. – ill and supported in part by public assistance – sought spousal maintenance in order to survive. He also sought equitable distribution of the marital assets, including the properties owned during the relationship and the defendant's business.

At the time of trial, K.R. claimed to have suffered an unforeseen financial hardship which made him unable to pay maintenance and left no assets to be divided. However, K.R. brought forth no witnesses and failed to provide sufficient corroboration or documentation to support his claims of lost income, the bankruptcy of the business, or foreclosure and sale of the residential properties. Based on past tax returns, K.R. had run a lucrative business, and the court was left to conclude that K.R. either allowed this to occur or was concealing the true value of the assets. The lack of evidence offered by K.R., coupled with the many discrepancies in his testimony, called into question his credibility, while G.R. was found to be credible in all respects.

Significantly, the court recognized that the parties had a long-term relationship but only a brief marriage because they were unable to marry prior to New York's enactment Marriage Equality in June 2011. The court's determination of the value of the marital property did not ultimately turn on this fact, however, as the law favors the inclusion of property within the marital estate and the party who asserts that the assets are separate has the burden of proof. Here, K.R. failed to meet his burden.

The court assessed the reasonable value of the shared assets and used specific factors from the Domestic Relations Law (DRL Section 236B). The judge examined G.R.'s poor health, inability to work, the contributions made to the properties as a homemaker, and the wasteful dissipation of assets by K.R. and found that G.R. was entitled to an equal portion of the marital assets and 15% of the value of the business. Additionally, G.R. was entitled to spousal maintenance, and recognizing the full length of the relationship and other enumerated factors in the DRL, the court granted G.R. relief in a sum of approximately $1 million. Because of G.R.'s precarious health and health coverage, the court directed, upon suggestion of counsel, that the funds be deposited into a Special Needs Trust.

Thanks to this remarkable decision, G.R. now has the chance to live his life free from abuse as well as financial dependency. In addition, this decision sets a precedent for other LGBT New Yorkers seeking recognition of their rights and economic justice in divorce actions, especially those whose relationships may have predated Marriage Equality. ■

Hannah McMillan is a law student at Brooklyn Law School (class of 2022).

Lesbian Litigant Loses Oregon Appeal Over Juror Bias Issue

By Arthur S. Leonard

Dorn v. Three Rivers School District, 306 Or.App. 103 (August 19, 2020), is a breach of contract suit by a former special education teacher for Three Rivers, Devon Dorn, who is a married lesbian. She sought damages for the district's violation of a settlement agreement they made with her after her discharge. The opinion for the Court of Appeals is by Senior Judge Rives Kistler, who prior to taking the senior position served two terms on the Oregon Supreme Court, where he was the nation's first out gay justice of a state's highest court, after having previously served on the Court of Appeals.

Three Rivers School District dismissed Dorn for cause after eleven years of service. Among the reasons given was her erratic attendance in recent years attributable to her alcoholism. When she indicated she would institute an administrative appeal, the district negotiated a settlement with her. Under the terms of the settlement, she would get a positive letter of reference and a promise that if the district was called to check references, they would confine themselves to what was in the positive letter.

She then interviewed for a special ed job with the Medford school district. Impressed with her credentials and interview, they called Three Rivers to check her reference. As per the settlement agreement, they were told what was in the positive letter. Then they asked whether Three Rivers would hire her again, and the answer was "No, because of missing work and attendance issues." She didn't get the Medford job, but Medford had trouble filling the position and eventually came back to hire her later in the semester, although it did not renew her contract at the end of the year. She decided to sue Three Rivers for breach of the settlement agreement.

There was no question before the trial court that the agreement was breached, as Three Rivers confessed up front. The only issue for the jury was to determine damages, which incidentally required determining whether the breach of the settlement agreement caused her to lose the Medford job.

Because of her sexual orientation, her same-sex marriage, and her drinking problems, Dorn's attorney questioned potential jurors about their attitudes concerning homosexuality, same-sex marriage, and alcohol use. Attention came to focus on four potential jurors, and particularly as it ultimately affected the case, Juror R. Wrote Judge Kistler, "Plaintiff asked Juror R for his opinion on same-sex marriage. Juror R answered, 'I don't think it's a marriage. You know, I don't, whether they have some legal right to a union, I don't know, that's not my decision.' He added, 'But I don't feel like it's a marriage.' Plaintiff's lawyer then asked, 'You wouldn't hold my client's same sex marriage against her in this trial,' to which Juror R replied, 'No.' Having said that, Juror R volunteered that he had a problem with 'tenure' and 'drinking and driving,' which he explained caused him to lean towards the defense."

Plaintiff had indicated there were several potential jurors, among them Juror R, whom she would move to strike for cause. But the judge gave a little speech, attempting to "rehabilitate" some jurors. Wrote Judge Kistler: "The court noted the three issues that Juror R had mentioned—same-sex marriage, tenure, and drinking and driving. It explained that the 'great thing about American justice is that we try to treat everybody equally.' It told the prospective jurors that, whatever personal views they might have about same-sex marriage, people selected to serve as jurors would need to put their own views aside and decide plaintiff's claim fairly and impartially. It observed that 'tenure' did not appear to be much of an issue in the case, and neither did drinking and driving. The court told the jurors that they could not base their decision on any views they might have on tenure or drinking and driving; rather, the jurors could consider those issues only to the extent they were relevant to plaintiff's claim for breach of the settlement agreement. The court concluded by asking if any juror would be unable to put his or her views on those issues aside," asking for a show of hands. Juror R did not raise his hand and was not dismissed from the panel.

Counsel and judge repaired to chambers to discuss peremptory strikes. No record was kept of that discussion, but when it ended Juror R was still on the jury panel and, it appears, Plaintiff did not exhaust her peremptory strikes. But Plaintiff's counsel became uneasy about the jury as the trial continued and express his unease to the judge. Unfortunately, however, he had difficulty recalling what jurors had said during voir dire, and when the judge asked him (with the jury not present of course) about which jurors gave him concern, he didn't mention Juror R.

Ultimately the jury awarded $5,000 to the plaintiff. Dissatisfied, she appealed, arguing that the trial judge should have granted the motion to strike Juror R. for cause. She also argued that the trial court erred by failing to keep a record of the in-chambers discussion of peremptory challenges, since her attorney seemed to have an imperfect memory of what went down there. But the court of appeals did not find grounds to set aside the verdict. Plaintiff could have excluded Juror R with a peremptory, since the record showed that she had exercised only three of the four peremptory challenges open to her during that in-chambers conference. The Oregon rule, it seems, is that the failure of the trial judge to strike a juror for cause is grounds for reversal only if an unsatisfactory juror is "forced" on the objecting party. In this case, Juror R was not forced on Plaintiff, because she did not use all her peremptories and could have struck him without cause. The court also found that the trial judge's failure to keep a record of the in-chambers meeting was not a ground for reversal.

Dorn was represented by Steven Wilker, Robert Koch and Megan Reuther, of Tonkon Torp LLP. Kelly Simon and ACLU Foundation of Oregon, Inc., filed the briefs for appellant. ■

South Carolina Appeals Court Rejects Gay Man's Jury Challenges and Upholds Murder Conviction

By Bryan Xenitelis

The Court of Appeals of South Carolina found that a gay defendant's jury selection challenges did not meet a prima facie standard and that his jury charge request was not denied in clear error, in *State v. Weatherall*, 2020 S.C. App. LEXIS 92 (Ct. App. SC, August 29, 2020). Chief Judge James Lockemy wrote for the appeals court panel.

Defendant Mitch Weatherall was accused of murdering a man in a motel with a broken bottle causing the victim to die of a skull fracture and brain injury. There was blood in the room matching the victim's blood and the body was found on a dirt access trail. Surveillance footage showed Defendant and another man carrying a body to Defendant's car.

"During *voir dire*, the court asked, 'Is there any member of the jury panel who feels that a person's sexual orientation would affect your ability to be fair and impartial to that person? If so, please stand.' No one stood in response," reported Judge Lockemy.

During the jury selection process, the State excused at that time the only black woman on the jury, who was replaced by a black man. The Defendant objected to the elimination on the basis of race, but the court denied the request. The state explained that they thought she had a prior conviction, because she did not have a driver's license, which they inferred meant she probably had a serious traffic violation on her record. The court let it pass.

The State also excused another juror, whom Defendant challenged on the basis of the juror's sexual orientation. Perhaps the Defendant's gaydar was working, but when pressed for evidence

as to the juror's sexual orientation, he did not offer any. The judge observed that sexual orientation was not a "protected class" so the Prosecutor did not have to state a reason.

During the trial, a friend of Defendant testified, stating that Defendant brought her to the motel on the night of the murder but asked her to wait outside. She identified herself, Defendant, and the other man in a surveillance video. She testified she had gone around the corner to drink and didn't witness the body being carried into the car.

Defendant's roommate for a week period with the Department of Corrections had written a letter that he believed would get his own sentence reduced explaining that Defendant had admitted the crime to him; however, at trial, the roommate testified that he had subsequent to writing the letter learned that testifying would not improve his situation, but that testifying was "pretty much the right thing to do" even if it would not reduce his sentence.

At the end of the trial, Defendant asked that the jury be charged with a particular section of law (SC Code of Laws Section 17-26-65) that could potentially have benefited the roommate by reducing his sentence by testifying, and the trial court refused. Defendant was found guilty of murder and sentenced to life imprisonment. He appealed.

Chief Judge James E. Lockemy stated that the court had jurisdiction only over errors of law and therefore factual findings could only be overturned if "clearly erroneous," and the trial court's jury charges reversed only if the court "abused its discretion." To challenge jury selection, Defendant was required to make a prima facie showing that the challenge was based on a protected class, and if successful that the State must then provide a neutral explanation for the challenge, and, if the State cannot meet that burden, the court must determine whether Defendant has proved purposeful discrimination.

With respect to Defendant's race claim, Chief Judge Lockemy noted that the juror was not the only black juror on the jury as she was replaced with a black juror. The State argued that the juror was excused because there was a suspicion that she had been convicted of a crime, and not because of race. She denied having been convicted of a crime, however, and the Prosecution presented no proof that she had been. The court commented that the State's reasoning based on her lack of a driver's license was not "fundamentally implausible" and that therefore the trial court did not err in denying Petitioner's challenge.

With respect to Defendant's sexual orientation claim, Judge Lockemy noted that while the lower court had allowed Defendant's challenge to undergo the analysis of discrimination despite the fact that sexual orientation is not a protected class for which such a challenge can be made, he nonetheless found that Defendant had failed to submit any evidence that the juror excused was gay or that the State knew or believed that juror was gay and therefore could not establish a prima facie case even if sexual orientation were a protected class. The Prosecutor denied having any knowledge about that juror's sexual orientation, stating he was dismissed because he seemed indifferent to the proceedings. The court did not mention that some other jurisdictions now find the use of peremptory challenges to remove gay jurors to be covered by the *Batson* rules, since some courts have found sexual orientation to be at least a quasi-suspect classification.

Finally, on the issue of jury charges, Chief Judge Lockemy set forth the analysis that "to warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." The court of appeals found the trial court correct in denying Defendant's request that the jury be charged with the proffered law because both the roommate's testimony that "he did not expect anything from the State" in exchange for his testimony and the fact that Defendant never cross-examined the roommate regarding the law and the roommate's knowledge of that law supported the idea that the roommate's testimony was not influenced or motivated by the possibility of a reduced sentence for himself.

Therefore, Chief Judge Lockemy found the trial court did not err and affirmed the decision convicting Defendant of murder and sentencing him to life imprisonment.

Weatherall's counsel for the appeal is J. Falkner Wilkes, of Greenville. ■

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

Virginia School Teacher Discharged For Insisting on Misgendering Transgender Student Successfully Resists School Board's Attempt to Remove His Lawsuit to Federal Court

By Wendy Bicovny

The U.S. District Court for the Eastern District of Virginia granted discharged public school French language teacher Peter Vlaming's move to remand his asserted violation of Virginia State law claims against the West Point School Board back to state court because of lack of subject matter jurisdiction in the federal court. *Vlaming v. West Point Sch. Bd.*, 2020 U.S. Dist. LEXIS (Aug 19, 2020).

At the beginning of the 2018 school year, Vlaming met with John Doe (a student who had recently transitioned from female to male), Doe's parents, and the school guidance counselor regarding Doe's transition. In late October 2018, Doe, his parents, and school administrators ordered Vlaming to use pronouns that match Doe's gender identity. Vlaming refused, stating that his conscience and religious beliefs prohibited him from using pronouns that do not match a person's biological sex. The Board fired Vlaming for violating its policies against discrimination, harassment and for failing to comply with orders.

Vlaming filed suit in state court, asserting that the Board's decision violated numerous rights guaranteed to him by the Virginia Constitution and the Virginia Code: (1) freedom of speech (Counts I to III); (2) free exercise of religion (Counts IV to V); (3) due process (Count VI); and (4) freedom from governmental discrimination (Count VII). Vlaming also alleged that the Board violated the Dillon Rule (limitations on state localities to adopt policies that might run afoul of a state's preferences) and the Virginia Code when it enacted non-discrimination policies that were more stringent than Virginia laws (Count VIII). Vlaming further contended that the Board breached their employment contract with him (Count IX). The Board removed the case to federal district court, asserting that the case involves federal questions related to Title IX and the U.S. Constitution. The Board argued that its decision to fire Vlaming amounts to either an "act under color of authority derived from any [l]aw providing for equal rights" or a "refus[al] to do any act inconsistent with such law."

U.S. District Judge John A. Gibney, Jr. first rejected the Board's argument that Vlaming based all of his claims "on the legal submission that his treatment of a transgender student did not constitute discrimination under Title IX and that his purported rights under state law are superior to the student's rights under Title IX." Judge Gibney pointed out that Vlaming does not raise claims under Title IX in his complaint. Instead, Vlaming asserts that the Board's policies do not comport with Virginia law. The Board's generalized argument that Vlaming's complaint on the whole raises Title IX issues fails to establish that the court has jurisdiction over this case, determined the court.

Next, Judge Gibney rejected the Board's assertion that Counts VIII and IX turn on whether Title IX prohibits discrimination based on gender identity. As to Count VIII, Vlaming argued that relevant Virginia law does not list "gender identity" as a protected class. He asked the Court to determine the scope of a state statute, not to decide whether the statute adequately aligns with Title IX with regard to Count IX, Judge Gibney noted. The Board's contention that Title IX's ban on discrimination establishes that they had legal authority to fire Vlaming is a defense, and a defendant cannot remove a state law case based on a federal defense. Thus, Vlaming's complaint does not on its face raise a federal issue under Title IX.

The Board also argued that due to the coextensive nature of the Virginia Constitution and the U.S. Constitution concerning free speech and due process, the Court's analysis necessarily turns on federal precedents that Virginia courts would follow. The Board also argued that Vlaming relied on federal law in his complaint because he cites U.S. Supreme Court decisions under his free speech counts. Judge Gibney explained why Vlaming's complaint did not necessarily raise a federal issue under his constitutional claims. First, the Board failed to cite any authority establishing that Vlaming could not succeed on his due process or free speech claims on exclusively state law grounds. Second, the Board has not shown that a court cannot decide this case on state law grounds, and the court cannot speculate that a state court will rely on federal law to resolve this lawsuit. Third, Vlaming has not asserted a cause of action under the U.S. Constitution. Finally, the fact that a complaint refers to federal cases does not mean that it necessarily raises a federal question.

Here, Gibney asserted, the court must decide whether School Board-specific policies and actions violated Vlaming's state constitutional rights — a fact-bound determination, not a "pure issue of law" that a federal court must settle "once and for all." The Board's further claim that removal would not disrupt the federal-state balance also failed. Merely pointing out that Congress created a federal remedy for constitutional violations by enacting 42 U.S.C. § 1983 is not dispositive, because Vlaming did not seek relief under 42 U.S.C. § 1983. The relationship between the Virginia and U.S. Constitutions, therefore, does not support federal question jurisdiction in this case. Thus, the Court lacks subject matter jurisdiction over Vlaming's claims under 42 U.S.C. § 1983.

The Board removed this case pursuant to § 1443(2), relying on Title IX as a "law providing for equal rights." Vlaming, however, contends that § 1443(2) only applies to cases

about rights related to racial equality. Judge Gibney noted that the court had concluded that claims removed under § 1443(2) "require redress specifically toward racial equality." Thus, because Vlaming had not raised issues related to racial equality, the defendants cannot remove this case pursuant to § 1443(2).

In a well thought out conclusion, the judge observed that the court (1) does not by any means minimize the interests that the parties and John Doe have in the outcome of the litigation; 2) nor downplay the important protections that Title IX and the state and federal constitutions provide; but (3) cannot ignore the limits of its jurisdiction. Accordingly, the court finds that it lacks subject matter jurisdiction over Vlaming's claims and will remand this case to the state court. Also, because the court lacks jurisdiction, it cannot rule on Doe's motion to intervene as a co-defendant. Further, the judge granted Doe's motion to proceed pseudonymously to the extent he seeks to proceed as "John Doe" in any filings made in this court.

Peter Vlaming is represented by Shawn Ashley Voyles, McKenry Dancigers Dawson PC, Virginia Beach, VA. ■

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

Personal Comments By Fired Gay Employee's Husband Deemed Unprotected Speech Under First Amendment To Support Claim of Retaliation

By Wendy Bicovny

In *DeFrancesco v. Arizona Board of Regents*., 2020 WL 4673165 (D. Ariz., Aug. 12, 2020), U.S. District Judge Cindy K. Jorgenson dismissed with prejudice 1st Amendment Retaliation and Freedom of Association claims brought by Anthony T. DeFrancesco, a gay man, against the Arizona Board of Regents and Drs. Robert Robbins and Michael Dake. But the court dismissed *without* prejudice DeFrancesco's Equal Protection and Title VII claims, allowing 30 days for filing an amended complaint.

DeFrancesco was the Senior Director for the University of Arizona Health Sciences (UAHS) and also assumed the duties of the Associate Vice President of Finance and Administration. Robbins, president of the UAHS, put together a search committee to find a new Senior Vice President (SVP). DeFrancesco's husband, who was an SVP and CFO of the University, co-chaired the search committee. DeFrancesco alleges that Robbins rigged the SVP hiring process so that Robbins' best friend, Dake, could get the job. DeFrancesco's husband informed Robbins that if he were to hire Dake, it would be the worst mistake and likely cost him his presidency. Robbins hired Dake, allegedly informed him that the husband was strongly against his candidacy, and as SVP, Dake had the authority to fire DeFrancesco. The husband voluntarily left UA.

At a later date, Dake allegedly told DeFrancesco that now that his husband had left, Dake had "a decision to make." At or after this meeting, DeFrancesco insinuated when he refused to resign, Dake orchestrated a campaign of harassment and he was humiliated by this conduct.

On June 30, 2019, Dake fired DeFrancesco, making DeFrancesco the *only homosexual male* at his level of seniority at UAHS who was terminated at that time. De Francesco outlined three causes of action against Defendants in his complaint: (i) a First Amendment retaliation claim against Robbins and Dake in their individual capacities; (ii) an Equal Protection claim against Robbins and Dake in their individual capacities; and (iii) an employment discrimination claim under Title VII of the Civil Rights Act of 1964 against the Arizona Board of Regents. Judge Jorgenson addressed each claim in turn.

The gravamen of DeFrancesco's complaint is that his First Amendment claim constituted retaliation because of the First Amendment-protected speech of his spouse, Judge Jorgensen first noted. DeFrancesco claimed his termination was directly related to his husband's comments to Robbins regarding Dake. Jorgensen explained that the husband's speech failed to address matters of public concern (which are protected by the First Amendment), because it did not implicate matters of political, social, or other public concern to the community. Instead, the judge concluded, the speech focused on matters of personal interest and was not protected by the First Amendment, and she also noted that a plaintiff has a cause of action for a violation of his First Amendment right to freedom of association when they suffered an adverse employment action based on the protected speech of his spouse. This made DeFrancesco's claim of First Amendment retaliation intertwined with his right to freedom of association. Notwithstanding this fact, the claim also failed, since the Husband's speech was found to be unprotected. Accordingly, DeFrancesco's First Amendment claim failed. Because the

claim could not possibly be cured by the allegation of other facts, Judge Jorgensen dismissed with prejudice.

DeFrancesco also failed to state a claim for violation of the Equal Protection Clause. In the scenario at hand, DeFrancesco failed to allege sufficient facts to reasonably infer that he was terminated because he was gay. The allegation that he was "the only homosexual male at his level of seniority in UAHS who was terminated at the time," only implies that UAHS employed other homosexual males at DeFrancesco's seniority level who were not terminated at the same time, Judge Jorgensen observed. Neither can one reasonably infer that De Francesco was fired due to his sexual orientation, since the same allegation suggested Defendants had no issue with retaining other gay men in similar positions. Notwithstanding Judge Jorgensen's determination, DeFrancesco was granted leave to file an amended complaint to allege facts that would demonstrate that he was treated differently than others similarly-situated and that the disparate treatment was intentional. Accordingly, DeFrancesco's Equal Protection claim was dismissed without prejudice.

As to the claim of disparate treatment under Title VII, DeFrancesco failed to provide sufficient allegations to draw the reasonable inference that he was terminated because he is gay, Judge Jorgensen again stated. He provides only conclusory allegations that his sexuality was a motivating factor for his termination. Not only did DeFrancesco fail to sufficiently allege that his sexuality was used against him, he also failed to reference any similarly situated individual or group that was treated more favorably, Judge Jorgensen further pointed out. Notwithstanding, the judge again granted leave to amend the complaint to submit other facts upon which DeFrancesco may state a Title VII claim. Accordingly, this cause of action was dismissed without prejudice.

DeFrancesco is represented by David W. Schecter, and Louis R. Miller, both appearing Pro Hac Vice, Miller Barondess LLP, Los Angeles, CA., and Jonathan Adam Dessaules, Dessaules Law Group, Phoenix, AZ. ■

Federal Court Restores Gay Employee's Title VII Case to the Docket After Bostock, but Grants Summary Judgment on the Merits to Employer

By Wendy Bicovny

On August 13, 2020, U.S. District Judge Linda R. Reade granted Mediacom Communications Corp, and Deborah Hornbuckle ("Defendants") motions for summary judgment against a discrimination claim by a gay former employee, Jayson Gearhart. *Gearhart v. Mediacom Communications Corporation,* 2020 WL 4728817, 2020 U.S. Dist. LEXIS 146480 (N.D. Ia., Cedar Rapids Division).

On November 4, 2019, Gerhart filed a complaint against Defendants alleging discrimination on the basis of sexual orientation in violation of the Iowa Civil Rights Act (ICRA)(Count I), negligent misrepresentation (Count II), and discrimination on the basis of sexual orientation in violation of Title VII of the Civil Rights Act of 1964 (Count III). The court dismissed only Gearhart's Title VII claim with prejudice.

On June 15, 2020, Gearhart filed a Motion to Reconsider, as a result of the United States Supreme Court opinion in *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731, which held that Title VII applies to claims of discrimination based on sexual orientation. On June 22, 2020, the court held a status conference to discuss Gearhart's Motion in light of *Bostock*. Following the status conference, the court granted Gearhart's Motion to Reconsider and reinstated his Title VII claim. The parties agreed that because Iowa courts look to federal law in evaluating claims under the ICRA, resolution of the ICRA sexual orientation discrimination claim would also govern the resolution of the reinstated Title VII sexual orientation discrimination claim. The facts are best understood in Judge Reade's analysis of each count.

To establish his prima facie case under Title VII, Gearhart needed to demonstrate that: (1) he is a member of a protected class; (2) he was performing his work satisfactorily; and (3) he suffered an adverse employment action. Gearhart met the first element. Judge Reade found no disputed issues as to the first element in that Gearhart is gay. As to the second element, however, the court found that Gearhart was not performing his work as Direct Sales Representative for the Iowa home office satisfactorily. He violated Mediacom's Code of Ethics & Business Conduct, as well as Mediacom's Direct Sales Program, both of which were in writing and provided to Gearhart twice during his employment. Gearhart's malfeasance was discovered after a January 2018 audit disclosed that he shifted invoice credits to his family members and his friends who were clearly not Medicom customers. Managers, senior supervisors and HR Director, Deborah Hornbuckle determined Gearhart's actions violated company policy. Two managers recommended that Gearhart be terminated, but Hornbuckle, the HR director, decided on a disciplinary final warning. Mediacom company policy provided that an employee on disciplinary final warning was ineligible to transfer for twelve months. Importantly, Gearhart did not claim that this investigation and the findings of the investigation were motivated by discrimination on the basis of his sexual orientation, Judge Reade pointed out. In light of these facts, Judge Reade accepted Defendant's good faith investigation and determination that Gearhart had violated company policies, which resulted in a disciplinary final warning letter, and ineligibility to transfer for twelve months.

Turning to the third element, the issue was whether Gearhart suffered an adverse employment action. Gearhart claimed that the adverse employment

action was due to the denial of a transfer to Mediacom's Florida office. As a result, Gearhart claimed he suffered a constructive discharge. Gearhart's claim failed both factually and as a matter of law, for several reasons, Judge Reade explained. Hornbuckle told Gearhart that a final written warning would normally make an employee ineligible for transfer. But a transfer could be discussed after he returned to work from his pending approved medical leave. Yet, Gearhart had not even formally applied for an open position at the Florida office. In other words, Gearhart had no job to transfer to in Florida. Also, even if Mediacom denied his transfer, 8th Circuit precedent is clear that a denial of a transfer request to the same job in a different location is not an adverse employment action. Further, the court found that Mediacom did not terminate Gearhart's employment, rejecting his constructive discharge argument. Full well knowing that company policy prohibited his transfer for at least twelve months, Gearhart voluntarily resigned. He told his supervisor that he was resigning because he had moved to Florida. Thus, because Gearhart failed to establish the second and third elements of his prima facie case, Judge Reade concluded that Defendants were entitled to summary judgment on Gearhart's claims of discrimination based on sexual orientation under both the ICRA and Title VII.

As to Gearhart's claim of negligent misrepresentation, Judge Reade explained, the claim failed because there were no genuine issues of disputed fact that Hornbuckle (1) owed a duty to Gearhart, (2) supplied Gearhart with false information, or (3) that Gearhart detrimentally relied on such information. Hornbuckle was performing her role as a human resources manager for Mediacom when she provided information to Gearhart regarding Mediacom employment policies. The court found that he information supplied to Gearhart was between Gearhart and Mediacom. Under these circumstances, Judge Reade found that, because the limited dealings between Hornbuckle and Gearhart were at arm's length and Hornbuckle was not in the business of supplying information to Gearhart, Hornbuckle had not breached any duty of disclosure to Gearhart, which was necessary for a negligent misrepresentation claim. Nor did Hornbuckle supply Gearhart with false information. Hornbuckle told Gearhart that a final disciplinary warning would normally make an employee ineligible for transfer, Judge Reade noted. At no time did Mediacom or Hornbuckle confirm or approve a transfer to Florida. Thus, Gearhart was unable to establish that Hornbuckle supplied him with false information, which was also necessary for a negligent misrepresentation claim. Moreover, based on the timing of the alleged misrepresentation and Gearhart failing to procure a job at any time to transfer to in Florida, there are no facts to support a finding of detrimental reliance. Accordingly, Gearhart's negligent misrepresentation claim fails as a matter of law and Defendants are entitled to summary judgment on this claim.

Jayson Gearhart is represented by Bradley J. Kaspar, of Pickens Barnes & Abernathy, Cedar Rapids, IA. ■

More Government Stonewalling in the Ongoing Discovery Disputes Over The Transgender Military Ban Policy at Issue in *Karnoski v. Trump*

By Eric Lesh

On August 17, Senior U.S. District Judge Marsha J. Pechman issued yet another ruling on more discovery issues over "tens of thousands of documents" in *Karnoski v. Trump*, one of the five challenges to the Trump Administration's hateful transgender military ban which was announced by tweet way back in July 2017. The court's frustration with the dozens of motions on access to documents was apparent from the start as the ruling opens with "To date, the Government continues to withhold 25,000 documents solely on the basis of the Deliberative Process Privilege (DPP) and over 40,000 documents based on the DPP in combination with other privileges."

This ruling, at 2020 U.S. Dist. LEXIS 148189 (W.D. Wash., Aug 17, 2020), concerned the Government's July motion to stay compliance with the court's discovery order issued earlier that month, and the Plaintiffs' proposed modifications to the original order. The order at issue was "based on the Court's growing concerns that the Government has been haphazardly and mistakenly labeling documents as privileged without proper review, the age of this particular discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000 withheld documents over which the Government has claimed the DPP." Specifically, the order outlined a discovery management tool that would speed the Court's review of documents going forward given that, as the court puts it, "the Government has displayed largescale and pervasive failures in its discovery process."

By way of background on the merits of the case, the June 2020 edition of Law Notes summarizes things nicely. "Under the so-called Mattis policy, individuals who have transitioned are allowed to serve in the gender with which they identify, and those who had not initiated transition before the policy went into effect can serve only in the gender recorded on their formal military records when they joined the service. Despite the string of court victories for the Plaintiffs, the Government continues to stonewall and appeal every ruling, no matter how small." Also, of course, anybody who has been diagnosed with gender dysphoria is not allowed to enlist, and person who identify as transgender but have not been diagnosed with gender dysphoria may only enlist on the condition that they will not transition and will serve in their gender as identified at birth.

In determining whether to grant a stay, the court ruling concluded, first, that the Defendants have not made a strong showing that they are likely to succeed on the merits. The court found that the order would not require the production of a large trove of documents but rather a "granular" one, pursuant to the 9th Circuit's directive that individual documents as to which privilege is claimed receive individual scrutiny from the court. The court also rejected the Government's second and third objections relating to the time frame chosen as a discovery management tool to deal with the so-called "predecisional requirement," which means that the claimed privilege applies 'prior to the time the decision is made' and not to 'communications made after the decision and designed to explain it.'" In sum the court's timeframes "are a discovery management tool, meant to counteract the Government's troubling and apparently prevalent practice of mislabeling documents as privileged, while also aiding the court's review of the 25,000 to 40,000 documents the Government continues to withhold under the DPP." The court makes clear that the stay is not warranted, particularly since the Government can bring individual documents to the court's attention for an in-camera review. The court goes even farther to adopt a proposal by the Plaintiffs that "the Government can submit any documents it claims are privileged but outside the proposed timeframe for in camera review without separate motion practice," making success on the merits all the more unlikely.

The court quickly finds that the stay is denied because "the Government has also failed to demonstrate a likelihood of irreparable harm and that a stay would harm Plaintiffs and the public interest given that under the current policy, "hundreds if not thousands of lives are directly affected every single day," preventing countless potential servicemembers from "fulfilling a dream they have had their entire lives."

This decision squares with Judge Pechman's previous position that Plaintiffs are entitled to broad discovery in order to be able to make their case that the Government does not have sufficient justification for the current version of the transgender service ban under a "heightened scrutiny" standard. As noted in the June edition of Law Notes, "the government continues to assert that internal deliberations that led to the so-called Mattis policy, which was formulated during the fall of 2017 under a mandate from the president to recommend how to implement his total ban on transgender service, should be almost entirely shielded from discovery. They are fighting tooth and nail to be able to avoid having to expose the likely fraudulence of the formal report that was submitted to President Trump in February 2018." ■

Eric Lesh is the Executive Director of the LGBT Bar Association of New York (LeGaL).

Another Sloppy Screening of a Transgender Prisoner Case in the Eastern District of California

By William J. Rold

Pro se inmate Dominic Vargas is a transgender man housed in the women's prison at Chowchilla, California. He sues various California correctional defendants in the U.S. District Court for the Eastern District of California for denying him consideration for gender confirmation surgery after two years on hormones failed adequately to alleviate his gender dysphoria. He claims that testosterone is having extremely distressing side effects for him, including increased breast size and re-onset of menses. Naming internal departments and committees, as well as individual defendants, Vargas sought only injunctive relief under the Eighth Amendment and the Equal Protection Clause. His case went to the U.S. Magistrate Judge for screening in response to his petition to proceed *in forma pauperis*.

U.S. Magistrate Judge Jennifer L. Thurston issued an Order on August 4, stating that Vargas has three choices: file an amended complaint to "cure" the defects in his pleading; file a notice of voluntary dismissal; or stand on the complaint, as is. If Vargas chooses the first option, this opinion gives bad advice on the law. If he takes the second option, he is not told that he cannot obtain another voluntary dismissal on the same facts in the future under F.R.C.P. 41(a)(1)(B). If Vargas elects the last option, Judge Thurston will recommend to a District Judge that his case be dismissed with prejudice for disobeying a court order (even though standing on the complaint is given as a permissible option in the preceding clause) and for failing to state a claim. *Vargas v. Cal. Dep't of Corr. & Rehab.*, 2020 U.S. Dist. LEXIS 138911.

The case is not yet assigned to a district judge, because that is how civil cases are currently being handled in the Eastern District of California due to a shortage of Article III judges. (A Standing Order by the District Court informs the bar that civil trials are being adjourned and that no new civil trial dates will be given before 2022). This rationing of judicial resources does not justify the sloppy decision issued in this case.

Judge Thurston begins by denying *in forma pauperis*, because Vargas' inmate account "routinely" exceeded $250.00 – even though the filing fee is $350.00 – noting a need "to assure that federal funds are not squandered by underwriting frivolous cases." She issued an Order to Show Cause as to why Vargas should not pay the full fee in advance, because "he chose to spend his money elsewhere." Vargas replied that his only money was from his father in Puerto Rico and that his father could no longer help because his home was severely damaged in the January 2020 earthquake. Vargas did not hear from Judge Thurston for over four months, when she finally allowed IFP (with payments in installments), in the same opinion screening out the case.

Judge Thurston says the pleading must be dismissed because Vargas has failed to show how the named defendants violated his rights. Vargas sued the California Corrections Department, its medical director (by name), the medical director of Chowchilla (by name), two committees (sued as "Does") who denied him confirmation surgery, and two other named individuals (whose role is unclear from the complaint). Judge Thurston wrote: "[O]ther than naming the Defendants in the caption, it is not clear what roles or responsibilities these Defendants had with respect to Plaintiff's medical care and treatment or with respect to the December 2, 2019, denial of the SRS." This is only partly true, and it disregards Ninth Circuit law on prisoner civil rights cases and injunctive relief.

The cases cited by Judge Thurston for this point are damages cases. Injunctive cases are different in the requirement of specificity. In *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988), the court said: "[W]e believe it is important to distinguish the causal connection required when a plaintiff seeks injunctive or declaratory relief as opposed to damages. When a prisoner seeks injunctive or declaratory relief against a myriad of prison personnel responsible for operating a prison, we focus on whether the combined acts or omissions of the state officials responsible for operating the state's penal system created living conditions that violate the Eighth Amendment." This injunctive/damages distinction was reaffirmed in *Peralto v. Dillard*, 704 F.3d 1124, 1128 (9th Cir. 2013). Because Vargas challenged the transgender policy on Eighth Amendment and Equal Protection grounds, the executive defendants and the members of the relevant committees (the "Does") seem to be appropriate defendants. See "Federal Judge Preliminarily Enjoins 'Unqualified' Transgender 'Committee' in Illinois Prison System . . . " (*Law Notes*, January 2020, at pages 12-13), reporting *Monroe v. Baldwin*, 2019 WL 6918474, 2019 U.S. Dist. LEXIS 217925 (S.D. Ill., Dec. 19, 2019).

In fact, Judge Thurston concedes that Vargas has stated both Eighth Amendment and Equal Protection claims. (So much for the judge's remark in discussing reluctance to grant IFP petitions on the theory that the government should not be paying for frivolous litigation.) In so doing, however, she misstates the law on both points and rarely cites a case from this century.

On Eighth Amendment deliberate indifference, there is no mention of *Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019), which even a casual familiarity with transgender prisoner rights would call to mind. It is the controlling standard for gender confirmation surgery for prisoners in the Ninth Circuit.

On Equal Protection, Vargas said, in part: "Due to the difference in treatment, similarly situated cisgender women with serious medical needs are able to receive adequate medical care, including medically necessary mastectomies, hysterectomies . . . , but transgender prisoners assigned female at birth requiring such treatment are either barred from receiving it, or at a minimum held to a much more onerous standard." Yet Judge Thurston ignores developments in Ninth Circuit jurisprudence on gender identity, focusing instead on race, religion, class-of-one theory, and rational basis. The Ninth Circuit called for heightened scrutiny of sexual orientation discrimination claims in *Smith Kline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014); and it extended this heightened scrutiny to transgender claims in *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (military service). [Editor's Note: And anyone writing an opinion on this subject after the Supreme Court's ruling in *Bostock v. Clayton County*, decided with great media attention on June 15, 2020, should be aware that the Supreme Court, by a vote of 6-3, considers claims of discrimination because of gender identity as being, in reality, claims of discrimination because of sex, and of course sex discrimination claims under Equal Protection get heightened scrutiny.]

Judge Thurston directs Vargas "to carefully review this screening order" if he decides to amend. But the screening order is wrong on the law or misleading by omission, and it is not likely to push Vargas in the right direction. The presence of two responsible injunctive defendants should have been enough to direct service of the complaint and to require them to identify by name the "Does" on their own committees. Vargas's complaint was vague as to some defendants and he improperly included state non-person "entities" – but there are named defendants (and "Does") responsible for implementing state policy and who, through injunctive relief, can be required to conform their conduct to the Constitution. *See Ex parte Young*, 209 U.S. 123, 150-01 (1908) (Minnesota attorney general sued over interference with federal railroad regulation).

The screening requirement of the Prison Litigation Reform Act not only excludes cases without merit, it is also supposed to "identify cognizable claims." 28 U.S.C. § 1915A(b). It is not

so difficult: Judge Thurston easily added the California corrections secretary (or designee) as a party for purposes of attaching 20% of Vargas' inmate account each month to pay the filing fee.

Finally, Judge Thurston tells Vargas that a new complaint will "supersede" her initial one, which will "no longer serve a function in the case," citing *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). The sweep of this holding from more than half a century ago was overruled in *Lacey v. Maricopa County*, 693 F.3d 896, 925-28 (9th Cir. 2012) (*en banc*) (strict application of waiver rules to claims not repleaded in amended complaints is a "trap for unsuspecting plaintiffs"). One would expect a Magistrate Judge who routinely encounters this issue during the screening process to be reasonably familiar with current 9th Circuit doctrine on the issue.

This decision gives the *pro se* prisoner an option to stand on the complaint and have the recommendation reviewed by the District Court. It does so, however, under risk of dismissal with prejudice and affirmatively misleads the plaintiff on the law in making that choice. In other words, unfortunately, par for the course in the Eastern District of California, as we have reported in the past. ■

Federal Court Grants Summary Judgment Dismissing Plaintiff's Claims Alleging Discrimination Based On Sexual Orientation

By Vito John Marzano

On August 13, 2020, U.S. District Judge Linda R. Reade (N.D. Iowa) granted defendants summary judgment dismissing an employee's suit alleging, among others things, discrimination on the basis of sexual orientation under Iowa statute and discrimination on the basis of sex in violation of Title VII in *Gearhart v. Mediacom Communications Corporation*, 2020 U.S. Dist. LEXIS 148160, 2020 WL 4728817. The court had previously dismissed plaintiff's Title VII claim, but reinstated it following a motion to reconsider filed on the same day that the Supreme Court decided *Bostock v. Clayton County, Georgia*. Defendants thereafter moved for summary judgment on all of plaintiff's claims.

Defendant Mediacom Communications Corp., a cable and broadband provider, employed plaintiff Jayson Gearhart from April 2006 to April 2018 as a direct sales representative at multiple Iowa locations. Gearhart sold Mediacom services to multiple dwelling unit customers within his sales territory. This required that he develop productive working relationships with residential property managers and leasing agents to encourage them to recommend renters to subscribe to Mediacom's services.

To further encourage this, Mediacom set up a credit referral program in which a property manager or leasing agent could receive credits to their personal accounts for referring new subscribers. Property managers and agents had to fill out a Mediacom template and provide it to their direct sales representative. The representative would then provide it to Mediacom's office. Gearhart, however, did not use the template, but rather an Excel sheet that he created. The referral program was governed by Mediacom's Code of Ethics and Business Practices, which stated that a conflict of interest may exist where the representative engages in activities for personal gain, whether measured in tangible or intangible benefits that might interfere or appear to interfere with the objective performance of Mediacom duties and responsibilities.

In October 2017, Gearhart expressed interest in transferring to the Gulf Breeze office located in Florida. However, by December 2017, he had emailed the manager at that office that he had decided to put off relocating for the time. In January 2018, an audit from those outside of Gearhart's office revealed a higher amount of credits associated with someone with Gearhart's surname. On January 16, 2018, the auditors contacted defendant Deborah Hornbuckle, Mediacom's human resources director, about the internal review. She contacted Gearhart's local managers. The following day, Gearhart met with Hornbuckle and his local managers, at which time he acknowledged that he shifted invoice credits to one of his friends and to his son's girlfriend, and that neither of these individuals were property managers or leasing agents.

Those managers in Gearhart's office concluded that he violated the company's policy against conflicts of interest and should be terminated. Hornbuckle and other higher managers decided that a sanction should be a disciplinary warning. Prior to issuing the final written warning, Gearhart informed his managers that he anticipated undergoing surgery in February 2018.

At his request, Gearhart met with his managers and other human resources managers on February 1, 2018, to discuss his medical leave and the investigation. Gearhart stated that he believed that he did not commit any wrongdoing because the allocation of credits had been approved. He also raised concerns

about a question he received regarding his sexual orientation at a company picnic in September 2017 and that Hornbuckle expressed "surprise" when he mentioned his partner. Gearhart testified that he informed Hornbuckle in late January 2018 (after the initial meeting) that he intended to move to Florida to be with his partner Scott. Hornbuckle asked who Scott was, and upon being informed he was Gearhart's partner, stated, "Oh, I wasn't aware of that, but not that it matters. Have your surgery, and we'll get everything figured out after." However, as of this meeting, Gearhart had not applied for an open and posted position in Florida.

Thereafter, a final written notice was issued. Importantly, a final written notice would preclude Gearhart from transferring for a period of 12 months. Gearhart applied for two positions in the Gulf Breeze office, a commercial sales supervision position on February 12, 2018, and a commercial account representative position on February 23, 2018. Gearhart had never held either of these positions, and the record did not indicate that he was qualified for either position.

Notwithstanding, Gearhart asked those in the Iowa office a few times how the final notice would impact his plan to relocate. He was informed that Mediacom policy, as set forth in the employee handbook, precluded him from relocating for a period of 12 months. Gearhart acknowledged receiving this handbook, along with the code of ethics and referral program policies, in 2006 and 2014. Mediacom representatives further repeated that they would address the issue after he returned from medical leave.

In March 2018, Gearhart again notified Mediacom in Iowa that he would be moving to Florida. He also notified the Gulf Breeze office that he intended to move to Florida. Those in that Florida office referred the matter back to Iowa as they had not heard of any intent to relocate since December 2017. At several points in March 2018, Mediacom expressed to Gearhart that he could not transfer at this time, and that they would address the issue upon his return.

On April 9, 2018, Gearhart emailed Mediacom for direction. Mediacom followed up that he was expected to return to work in Iowa and asked whether he should be expected. Gearhart responded that he had no choice but to resign, since he had moved. Against that backdrop, in February 2018, Gearhart listed his home to be sold. He entered a purchase contract in March 2018 and closed in April 2018.

The amended complaint alleges that Gearhart was adversely terminated because of his sexual orientation. In sum, Gearhart alleged that he was denied a transfer from Iowa to Florida, and therefore constructively discharged, because of his sexual orientation.

Defendants moved for summary judgment to dismiss the complaint. For readers unfamiliar with summary judgment, this is a procedural part of litigation that usually comes at the conclusion of discovery. The party seeking summary judgment must establish that there is no material issue of fact for at jury to decide, and that the court can enter a judgment as a matter of law. Upon the moving party meeting that standard, the non-moving party must point to an issue of fact. All reasonable inferences are drawn in favor of the non-moving party. However, an issue of fact must be real and supported by some evidence, and not feigned or a mere contention.

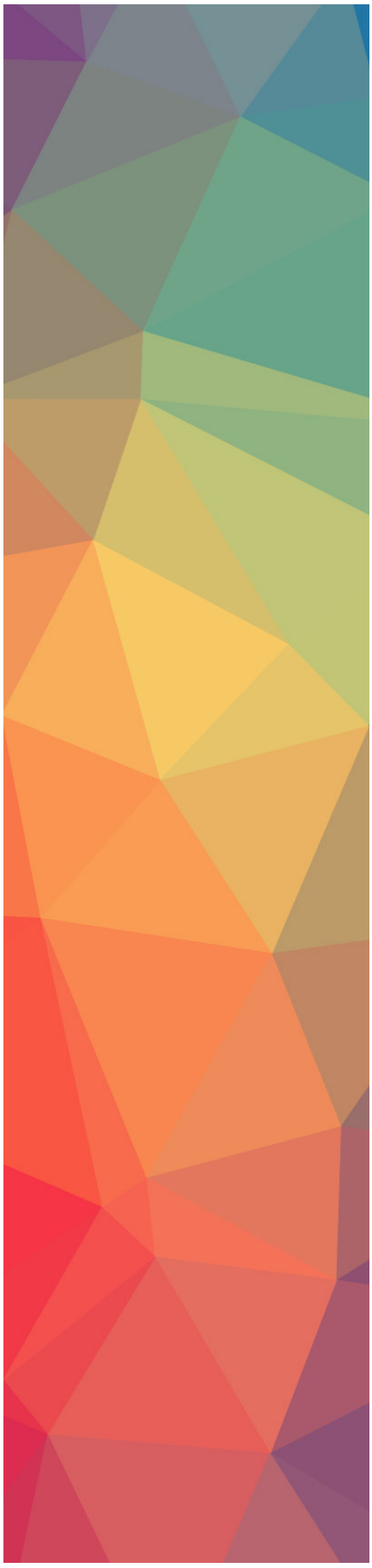
Iowa Code section 216.6(1)(a) protects individuals from employment discrimination because of sexual orientation. The Supreme Court of the United States recently expanded the reach of Title VII's employment protections in Bostock. Iowa courts have applied Title VII's framework to Iowa's state-level anti-discrimination laws because the statutes are similarly worded. Relevant here, the parties and the court agreed that Gearhart's discrimination claims under Iowa statute and Title VII rise and fall together.

To survive an employer's motion for summary judgment on a Title VII claim, an employee must either present direct evidence of discrimination or must employ the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green* to establish an inference of unlawful discrimination. Because Gearhart did not have direct evidence of discrimination, he had to rely on establishing an inference of discrimination through burden-shifting.

The McDonnell Douglas analysis requires that Gearhart establish a prima facie case of discrimination. Upon such a showing, the burden shifts to Mediacom to articulate a legitimate, nondiscriminatory reason for discharge. If Mediacom makes such a showing, the burden shifts back to Gearhart to establish that the proffered reason for the action is pretext for unlawful discrimination.

As it relates to a prima facie case, the court outlined the elements for a Title VII cause of action and one under Iowa law, which generally correspond with minor differences. However, because the parties relied on Iowa's framework for sexual orientation discrimination, the court applied that to the Title VII claim as well. The elements are: (1) the employee is a member of a protected class; (2) plaintiff was performing the work satisfactorily; and (3) plaintiff suffered an adverse employment action.

Applying the foregoing law and facts, the court decided as follows. The parties agree, and thus there is no material issue of fact, that Gearhart satisfied the first element in that he is a gay man and therefore a member of a protected class. However, the court agreed with Mediacom that plaintiff was not performing his work satisfactorily, considering the final written warning. Gearhart acknowledged receipt of all policies, including the referral program and code of ethics, in 2006 and 2014. He decided to give credits to individuals, such as his family, but they were ineligible for such credits. Gearhart claimed that he was unaware of such a prohibition, but Mediacom rejected this defense and issued the warning anyway. Gearhart never challenged the review process or argued that Mediacom had a discriminatory motive. Further, although two of his managers recommended termination, Hornbuckle and other higher managers decided a sanction was more appropriate. As such, the court accepted Mediacom's



investigation and determination as done in good faith.

Turning to the third element of an adverse employment action, Gearhart claimed that he was constructively discharged. But the court stressed that Gearhart had informed the Gulf Breeze office in December 2017 that he was not ready to transfer, and that he did not mention transferring again until after he had been questioned regarding the credit allocation. Even so, he did not re-establish contact with those in the Gulf Breeze office until around the time of his medical leave and after receiving his final written warning. He had not formally applied for any lateral position and had not been offered any position in the Gulf Breeze office. He had never held the positions to which he had applied, and there was no evidence that he was qualified for those positions. Gearhart did not present evidence that he had the background to be a successful candidate in either position. Notwithstanding, Gearhart testified that he assumed a job would be created for him by Mediacom upon his transfer to Florida. The court found that this was unsupported by the record.

More to the point, the court was bound to follow the precedent set by the Eighth Circuit Court of Appeals. The court explains that Eight Circuit law is clear that, in general, the denial of a transfer request to the same job in a different location does not constitute an adverse employment action for purposes of Title VII. However, denial of a sought-after transfer could be an adverse employment action if the transfer would result in a change in pay, rank, or material working conditions. Here, there was no evidence that a lateral position was available to Gearhart in the Gulf Breeze office. The combined testimonies of Gearhart and Hornbuckle established only that Gearhart knew that he could not transfer for 12 months after receiving the warning, that he was not terminated because of his sexuality or the final written notice, and that Mediacom would discuss the issue of transfer after he returned to work at the Iowa office following medical leave. With that information, Gearhart decided to relocate to Florida and resign once a new position was not created for him. As such, there was no material issue of fact that Gearhart suffered an adverse employment action.

While the court's inquiry should have stopped at this point as summary judgment dismissing the complaint was warranted, the court proceeded to determine that, even assuming Gearhart made out a prima facie case, Mediacom presented a legitimate, nondiscriminatory reason for not permitting the transfer in that it had denied the same based on the final written warning. As mentioned, Gearhart did not challenge the process or result, or argue that either was tainted by discrimination. That, coupled with any evidence in the recorded, established that the inquiry and result were done in good faith and supported the denial of transfer. As such, Gearhart would have needed to come forth with evidence that the proffered reason was pretext to discrimination, which Gearhart could not do.

While one can be tempted to seek out issues of fact based on the close temporal proximity of events between Hornbuckle learning of Gearhart's sexual orientation and the denial of a transfer, the record is clear that the decision to deny the transfer was made before this information was disclosed. Hence, the charge that Gearhart was denied a transfer because he is a gay man was not reasonable under the facts developed. The court emphasized that Gearhart never challenged the propriety of the investigation or its conclusion. As such, no inference could be drawn that Gearhart's sexual orientation played a factor in the denial of a transfer. Ultimately, this case presents a straightforward application of the developed facts to the law.

Jayson Gearhart is represented by Bradley J. Kaspar, of Pickens Barnes & Abernathy, Cedar Rapids, IA. ■

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

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

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

UNITED STATES SUPREME COURT – The Court has scheduled oral argument for November 4 in *Fulton v. City of Philadelphia*, which presents the question whether the City violated the First Amendment Free Exercise of Religion when it terminated a contract with Catholic Social Services (CSS) to evaluate potential foster parents, due to the agency's policy of denying such services to same-sex couples. The deeper question in the case: at least four members of the Court have called for reconsideration of its 30-year old precedent, *Employment Division v. Smith*, under which there is no Free Exercise exception from compliance with neutral state laws of general application. CSS argues that it was singled out for enforcement because of the substance of its religious views, in violation of the requirement under *Masterpiece Cakeshop v. Colorado Human Rights Commission* that the government not evince hostility against religion. The federal district court in Philadelphia and the 3rd Circuit (panel and *en banc*) denied preliminary injunctive relief to CSS, and the Supreme Court refused to grant a request for such preliminary relief by a vote of 5-4. Presumably the same four justices who would have granted relief voted to grant certiorari. The issue boils down to Chief Justice John Roberts, who was not among the dissenters. The Solicitor General has requested argument time to present the Trump Administration's position in the case. The Supreme Court argument will take place immediately after election day when, due to the expected high volume of mail-in balloting nationwide, it may not be known whether the Trump Administration was re-elected or is a lame duck. *Washington Blade*, August 19. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Kenny v. University of Delaware*, 2020 U.S. App. LEXIS 26296, 2020 WL 4814074 (3rd Cir., Aug. 19, 2020) (designated as not precedential), a 3rd Circuit panel issued a brief memorandum affirming the district court's grant of summary judgment to the University of Delaware, finding that it had non-discriminatory reasons for firing Bonnie Kenny and Cindy Gregory, a married lesbian couple who were in their fifties at the time they were terminated as head coach and associate head coach of the school's women's volleyball team. Thus, the court found that the employer was entitled to summary judgment on claims asserted under the Age Discrimination in Employment Act, the Delaware Discrimination in Employment Act (which forbids sexual orientation discrimination), and the Equal Protection Clause of the Fourteenth Amendment. The opinion does not discuss the facts. According to the district court's opinion (2019 WL 5865595), after a new athletic director for women's sports was appointed by the University, complaints arose about how Kenny and Gregory interacted with the volleyball players, and the director concluded after observing a few games that the women exhibited "unprofessional conduct." This was taking place in the midst of the team's losing record. The new coaches hired to replace the plaintiffs were women under age 40. The trial court decided that the University's evidence rebutted the inference of discriminatory motive under the statutes, and that the plaintiffs failed to establish pretext, thus justifying the grant of summary judgment against them. The plaintiffs are represented by Allyson B. DiRocco, James H. McMackin, III, and David H. Williams, Esq., of Morris James, Wilmington, DE. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Oladele v. Barr*, 2020 U.S. App. LEXIS 25992 (9th Cir. Aug. 17, 2020), the court of appeals denied a Nigerian man's petition for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The immigration judge (IJ) found the petitioner not credible. The Board of Immigration Appeals determined that the finding was not in error. The court agreed and stated three reasons how substantial evidence supported the adverse credibility determination. *First*, the IJ found petitioner materially altered his account of persecution. Upon his United States arrival, petitioner stated that he feared persecution from a cult, but testified a few weeks later that he also fled because of his sexual orientation. These new allegations tell a vastly different and more compelling tale of persecution than petitioner's initial application, and support the adverse credibility determination in this case, the court determined. *Second*, the IJ found that petitioner did not testify credibly based on his demeanor. Specifically, the IJ noted that petitioner was often "non-responsive" and seemed to "contemplate" how one of his answers would fit "in the context of his claimed sequence of events." The court added that IJs are in the best position to assess demeanor. *Third*, petitioner testified that after a 2013 visit to South Africa, he returned to Nigeria *despite fearing persecution there*. "An alien's history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution," the court explained. Because petitioner failed to prove that he either suffered past persecution, or that there is a clear

CIVIL LITIGATION *notes*

probability of future persecution, the court denied the petitioner's claims for asylum and withholding of removal. Additionally, because petitioner's CAT claim was premised "on the same statements . . . that the BIA determined to be not credible," the adverse credibility finding also supports denial of CAT relief, the court concluded. – *Wendy Bicovny*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In an unpublished *per curiam* decision, the 9th Circuit ruled on August 13 that Atain Specialty Insurance Company, which sold insurance policies to Armory Studios in San Francisco, which hosted filming of pornographic videos by various companies, including Kink.com, the producer of a several lines of BDSM material, both gay and straight, did not have to cover claims brought by actors who contracted HIV in the course of making these videos. The panel endorsed a ruling by District Judge James Donato (N.D. Cal.) that an exclusionary clause in the insurance policies clearly applied to this situation. Titled "Physical-Sexual Abuse Exclusion," the exclusion precludes coverage of any "occurrence, suit, . . . or causes of action arising out of or resulting from the physical abuse, sexual abuse or licentious, immoral or sexual behavior intended to lead to, or culminating in any sexual act, whether caused by, or at the instigation of, or at the direction of, or omission by: The insured or the insured's employees . . . ." Sounds clear to us. There is specific reference to a ruling by a California court holding Armory liable to a porn performer and Atain's refusal to pay Armory's claim for coverage appears to have led to the filing of this suit by Armory against its insurer. *Atain Specialty Ins. Co. v. Armory Studios, LLC*, 2020 U.S. App. LEXIS 25703 (9th Cir., August 13, 2020). – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 11TH CIRCUIT – Gerald Lynn Bostock was employed by Clayton County, Georgia. He was discharged and filed a charge of sexual orientation discrimination with the EEOC. His employer claimed that it had a legitimate non-discriminatory cause for the discharge. Obtaining his right-to-sue letter from the agency, Bostock filed a Title VII suit in the U.S. District Court, which was dismissed on motion for failing to state a claim under existing 11th Circuit precedent that sexual orientation discrimination claims were not cognizable under Title VII as a form of sex discrimination. The 11th Circuit reaffirmed its prior precedents, rejecting his appeal, but the Supreme Court granted cert, combined this case with *Altitude Express v. Zarda* from the 2nd Circuit and *E.R. and R.G. Harris Funeral Homes v. E.E.O.C.* from the 6th Circuit, and ruling on June 15, 2020, in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, that it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, reversing and remanding the 11th Circuit's decision. In this brief *per curiam* issued on August 27, the court acknowledges the Supreme Court's decision and sends the case back to the District Court. Now Gerald Bostock will get his chance to conduct discovery and attempt to prove that his sexual orientation was a factor in his discharge, although there is the possibility that Clayton County might negotiate a settlement, depending upon their evaluation of the merits of their case and costs of litigation. Bostock is represented by Thomas J. Mew, IV, and Timothy Brian Green, of Buckley Beal, LLP, Atlanta, GA, and Brian J. Sutherland, Attorney General's Office, Seattle, WA. The county hired outside counsel to provide their defense: Jack Reynolds Hancock, of Freeman Mathis & Gary, LLP, Forest Park, GA, and William Hollis Buechner, Jr. and Martin B. Heller, Freeman Mathis & Gary, LLP, Atlanta, GA. – *Arthur S. Leonard*

ARIZONA – The trial court has ordered the city of Phoenix to pay more than $136,000 in attorney fees to Alliance Defending Freedom, the anti-LGBTQ litigation group, for its "victory" in *Brush & Nib Studio v. City of Phoenix*, 418 P.3d 426 (2018), in which the Arizona Supreme Court, reversing lower courts, ruled 4-3 that the plaintiff has a 1st Amendment right to refuse to make wedding invitations for same-sex couples. The majority said that requiring the company to make such invitations would be compelled speech in violation of their constitutional rights, while the dissent, siding with the lower courts, said that this was about the sexual orientation of the customers and thus could be prohibited by the city's human rights ordinance. *Arizona Republic*, August 26. – *Arthur S. Leonard*

CALIFORNIA – Remember *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), the case in which the U.S. District Court declared in 2010 that California's Proposition 8 was unconstitutional? U.S. District Judge Vaughn Walker want to make a video recording of the trial, but when the Proponents of Proposition 8, who were defending it in court, objected, he stated that the recording would be made only for his own use and not released publicly. The Proponents' appeal of Judge Walker's merits ruling flared out when the Supreme Court decided that they did not have standing to defend Proposition 8, which the governor and attorney general had decided not to defend, and the ruling went into effect in June 2013, with same-sex marriages resuming in California. But the recording remained under seal. Judge Walker came out as gay after the case was decided and he retired from the bench. Successive district judges have extended the seal on the recording at the urging of the Proponents, until July 2020, when Judge William Orrick confirmed his prior

order that the recording be made public during August, rejecting an argument from the Proponents that the time under seal be extended further. However, the Proponents filed an appeal in the 9th Circuit and obtained a stay pending decision, so Judge Orrick's Order did not go into effect on August 12. The court of appeals panel ordered expedited briefing, and the case will be argued in December. - *Arthur S. Leonard*

CALIFORNIA –The California 2nd District Court of Appeal affirmed a ruling by the trial court declining to hold a domestic partner parent, J.C., jointly liable for appellant U.P.'s attorney fee award. *L.S., et al. v. U.P.*, 2020 WL 4499633 (Aug. 5, 2020). J.C. and L.S, same-sex domestic partners, entered into a sperm donor agreement with U.P. L.S. was artificially inseminated with U.P.'s sperm and gave birth to two children. One of the children has a developmental disorder, which L.S. believed was caused by a genetic condition that U.P. failed to disclose. L.S. filed a petition seeking child support and medical insurance from U.P. to help pay for the child's special needs. J.C. was not a party to the petition. U.P. sought and obtained an order joining J.C as a "claimant" pursuant to California Rules of Court, requiring a person be joined as a party if that person has custody of any minor child of the domestic partnership. J.C. did not file any prejudgment pleadings or documents in this case. Nor did she seek any relief on her own behalf. J.C. did appear at a deposition noticed by U.P. and also testified at trial in response to a notice to appear served by U.P. Prior to trial, U.P. filed a request for attorney fees as to L.S. based on the fees clause in the sperm donor agreement. Following trial, the court entered judgment in U.P.'s favor, and determined that U.P. was the "prevailing party" which entitled him to an award of attorney fees and costs under the terms of the sperm donor agreement. U.P. filed a post-trial motion seeking approximately $90,000 attorney fees against both L.S. and J.C. The trial court awarded U.P. $40,000 in attorney fees, to be paid solely by L.S. The trial court rejected U.P.'s argument that L.S. and J.C. should be jointly liable. Because the court found that all the issues in the case involved L.S. and U.P., J.C.'s presence in the action was affirmatively sought by U.P. and aided only him. U.P. appealed. In the opinion for the Court of Appeal, Judge Steven Z. Perren first noted that most of the "evidence" U.P. relied upon to establish J.C.'s co-liability for the attorney fees award was not provided. The principal issue here is whether the extent of J.C.'s prejudgment involvement in L.S.'s petition is sufficient to subject her to attorney fees, Judge Perren stated. U.P.'s counsel proffered that at the hearing on U.P.'s request for attorney fees, when J.C. was asked "under oath" if she "knew whose idea it was to bring this lawsuit," J.C. replied: "[L.S.'s] and mine." U.P. contended that this testimonial admission and counsel's joint representation of L.S. and J.C. at trial under a conflict waiver agreement supported his contention that "[b]y aligning with the losing opposing party, J.C. took on the same liability as L.S. for attorney fees under the [sperm donor] contract that all three parties signed and were bound by." Judge Perren refuted each of U.P.'s claims in turn. In doing so, Judge Perren also explained why U.P.'s failure to provide an adequate record was fatal to his appeal. First and foremost, U.P.'s contention as to the alleged testimonial admission failed, because unsworn statements of counsel are not evidence. Further, since no trial transcript was provided, it is unclear whether the statement, to the extent it occurred, came from J.C.'s trial testimony or deposition testimony, both of which would have been made "under oath," Judge Perren explained. Second, U.P.'s argument that J.C. is liable for his attorney fees because the same counsel at trial represented both her and L.S. is wrong. J.C. did not appear on her own accord. The record indicated she was directed to appear by U.P. Without a reporter's transcript of the trial proceedings, it was impossible to determine whether J.C.'s testimony or any other evidence adduced at trial contradicted the trial court's post-judgment findings that she "raised no new issues or defenses and took no independent position in the litigation" and that her "presence in the action was affirmatively sought by [U.P] and aided only him," Judge Perren noted. Finally, U.P. explained that the trial transcripts were not included as a cost-saving measure for himself, and the vast majority of trial testimony was irrelevant to the issue of attorney fees. However, if the Appellate court had any concerns, U.P. invited the court to augment the record *sua sponte* in order to clear up any doubts. Judge Perren concluded with sharp clarity when he said, "[N]either the respondent nor the appellate court has a duty to augment an inadequate record. In the absence of one, we must presume the trial court's determination that J.C. is not jointly liable for U.P.'s attorney fees is correct."—*Wendy Bicovny*

CALIFORNIA – California's Anti-SLAPP (Strategic Lawsuit Against Public Participation) Statute authorizes courts to dismiss cases that are brought to deter people from exercising their rights to speak up about matters of public concern. In *Fritz v. Jimenez*, 2020 WL 4782821 (Cal. 3rd Dist. Ct. App., August 18, 2020) (not officially published), the court of appeal dealt with an appeal by a fundamentalist minister and various co-defendants of a decision by the Superior Court to reject defendants' motion to dismiss various claims based on the Anti-SLAPP law in a lawsuit by people who were protesting statements made by Rev. Roger Otoniel Jimenez from the pulpit of Verity Baptist Church that plaintiffs assert stirred up congregants

to engage in violence and threats against the plaintiffs. The court also dealt with a cross-appeal by plaintiffs of the trial court's grant of the Anti-SLAPP motion as to their negligent supervision and control claim. After the Pulse Nightclub shooting in Orlando, Florida, Reverend Jimenez made despicable comments from the pulpit of his church. "He preached sermons praising the shooter and justifying the killing of the gay patrons of the club," wrote the court. "Videos of the sermons were posted on the Internet and included such comments by Jimenez as: "'I wish the government would round them all up, put them up against a firing wall, put a firing squad in front of them, and blow their brains out.'" Jimenez's sermons reiterated the theme that homosexuals should be killed, saying: "'They're wicked, they're vile, they're predators. And God says they deserve the death penalty for what they do. That's what God says . . . . God said when you find the sodomite, put them to death.'" Jimenez encouraged his congregants to "take up arms," and "'arm and train their children' in preparation for a 'war' against homosexuals and those who support equal rights for all sexual orientations." VBC's Web site stated that God commanded homosexuals should be put to death. During a videotaped interview with the Sacramento Bee on June 14, 2016, Jimenez stated: "'All I'm saying is that when people die who deserve to die, it's not a tragedy.'" The plaintiffs participated in demonstrations against Jimenez outside his church and were filmed by the church's video cameras. They claim that assaults on them by various congregants and agents of Jimenez and the church were sparked by Jimenez's sermons. Their lawsuit asserts claims for assault, battery, violation of civil rights under the Ralph Civil Rights Act of 1976 (Civ. Code, § 51.7; the "Ralph Act"), intentional and negligent infliction of emotional distress, and negligence, naming Jimenez, the church, and various other individuals as defendants. The Anti-SLAPP motion focused on the emotional distress claims and the negligence claim directed against Jimenez and the church. The trial court rejected the motion as to the emotional distress claim but granted as to the negligence claim. The Court of Appeal affirmed denial of the motion on the emotional distress claims but reversed the trial court's dismissal of the negligence claim. Summarizing the court's ruling, Justice Andrea Lynn Hoch explained: "We conclude the trial court erred in dismissing the negligence claim against VBC and Jimenez. Our conclusion rests on the distinction between the right of VBC and Jimenez to engage in free speech and their affirmative duty to adequately supervise their agents and employees. The record shows agents and employees of VBC and Jimenez engaged in physical violence and intimidation on multiple occasions against plaintiffs. The freedom of VBC and Jimenez to express their opinions on homosexuality does not relieve them of the duty to supervise their agents and employees to prevent reasonably foreseeable acts of physical violence and intimidation. For similar reasons, we conclude the trial court properly denied the anti-SLAPP motion as to the causes of action for intentional and negligent infliction of emotional distress. Plaintiffs' pleadings tie these causes of action to the physical violence and intimidation repeatedly engaged in by agents and employees of VBC and Jimenez. Because physical violence and intimidation are not protected activities, the claims are not subject to dismissal under the anti-SLAPP statute." The plaintiffs are represented by Lora Lee Grevious of Sacramento. – *Arthur S. Leonard*

CONNECTICUT – Arelis Margurito, *pro se*, sued her former employer, Bridgeport Hospital (Hospital), alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 on the basis of her perceived sexual orientation. *Margurito v. Bridgeport Hospital*, 2020 U.S. Dist. LEXIS (D. Conn., Aug. 20, 2020) The Hospital moved for summary judgment, which U.S. District Judge Victor A. Bolden granted. Numerous events occurred during Ms. Margurito's seven-year tenure with the Hospital. However, only those events directly related to the issue of sexual orientation will be discussed. Ms. Margurito claimed that her coworkers were circulating false rumors about her behavior and that she was a lesbian, conduct that amounted to discrimination on the basis of her perceived sexual orientation. Judge Bolden clarified that Ms. Margurito appears to allege that she was subjected to a hostile work environment based on her sexual orientation in violation of Title VII, given that she describes ongoing rumors and accusations that began in 2015, and continued for two years until her 2017 termination. The Hospital argued that Ms. Margurito failed to create a genuine issue of material fact as to her hostile work environment claim because (1) the evidence shows that the Hospital was not negligent as to the alleged harassment; and (2) there is no evidence suggesting that the alleged harassment was connected to a protected class under Title VII. Judge Bolden agreed with the Hospital for several reasons. First, Ms. Margurito failed to show that the Hospital acted negligently with respect to the alleged harassment. Judge Bolden explained that here a plaintiff alleges that the hostile work environment is created solely by co-workers, the plaintiff must show that the employer failed to provide a reasonable avenue for complaint if it either knew, or should have known, about the harassment yet failed to take appropriate remedial action. Every time Ms. Margurito made a complaint to the Hospital regarding alleged rumors and complaints, the Hospital investigated immediately, Judge Bolden clearly noted. Investigations involved extensive

interviews with coworkers, attempts to identify factual bases for the claims, and attempts to mediate a resolution between Ms. Margurito and one of the primary coworkers she alleged was spreading rumors. Given the Hospital's actions, there is not a genuine issue of material fact as to whether the Hospital acted in good faith in addressing Ms. Margurito's complaints, Judge Bolden determined. Nor is there record evidence suggesting that the Hospital acted negligently, failed to respond or responded inappropriately with respect to any harassment Ms. Margurito allegedly faced. Next, Judge Bolden explained why the evidence also failed to show that any of Ms. Margurito's claimed pattern of alleged harassing treatment was because of her sexual orientation. Ms. Margurito alleges that she believed colleagues were spreading rumors that she was a lesbian, but her deposition testimony makes clear that no admissible evidence supported her beliefs that the conduct she allegedly experienced was based on her sexual orientation. Instead, Ms. Margurito repeatedly testified that she had not heard anyone say anything implicating her sexual orientation. Further, as to evidence in the record regarding Ms. Margarito's sexual orientation, she refers to a coworker's alleged accusation that Ms. Margarito was "looking at female employees' backsides," and a student nurse's alleged accusation that Ms. Margarito had "groped her." But it is not clear that these alleged accusations were connected to her sexual orientation, as opposed to merely being comments on the appropriateness of Ms. Margurito's behavior in the workplace, Judge Bolden clarified. In fact, the evidence in the record suggests that coworkers and supervisors were concerned about Ms. Margurito's conduct in the workplace generally. Finally, although her hostile workplace discrimination claim is based entirely on her allegations that coworkers were circulating rumors about her, there is no evidence in the record that any rumors about her were ever circulated. Ms. Margurito's testimony about any rumors alone is insufficient to create a genuine issue of material fact. Indeed, the evidence in this record—Ms. Margurito's deposition testimony, coupled with the plethora of through investigations conducted by the Hospital into Ms. Margurito's allegations, and sworn statements that staff concerns were escalating regarding Ms. Margurito's unfounded accusations towards coworkers—suggests that no rumors ever existed, Judge Bolden emphatically and clearly determined. As a result, Ms. Margurito failed to raise a genuine issue of material fact that she suffered a hostile work environment based on sexual orientation in violation of Title VII. – *Wendy Bicovny*

DISTRICT OF COLUMBIA – In *A.B.-B. v. Morgan*, 2020 WL 5107548 (D.D.C., August 31, 2020), U.S. District Judge Richard J. Leon granted a motion for a preliminary injunction against the government's use of agents from U.S. Customs and Border Protection (CBP) to conduct "credible fear" interviews for asylum seekers who present themselves without entry visas at the border. In this case a group of four mothers and their seven children (including at least one lesbian mother) claimed that the use of these agents for this purpose violates several federal statutes and the constitution. In each of their cases, an Immigration Judge upheld the decision by the CBP agent to find a lack of "credible fear" of persecution on the part of these refugees, which under Trump Administration policy would make them immediately removeable from the United States. Under normal procedures, a trained employee of Citizenship and Immigration Services (CIS) would conduct these interviews. Plaintiffs allege that the CBP agents are law enforcement personnel who are not trained appropriately to conduct such interviews. In deciding on the motion for preliminary relief, Judge Leon narrowed his focus to one statutory claim, writing: "While plaintiffs raise many important claims, I need address only one of them here because plaintiffs have shown a likelihood of success on the merits of their claim that the use of CBP agents who receive substantially less training than CIS asylum officers to conduct asylum interviews violates the Immigration and Nationality Act. Weighing the preliminary injunction factors, I find that plaintiffs are entitled to preliminary injunctive relief." Plaintiffs are represented by Brian Rene Frazelle, Brianne Jenna Gorod, and Elizabeth Bonnie Wydra, Constitutional Accountability Center, Washington, DC, and Julie M. Carpenter, Tahirih Justice Center, Falls Church, VA. – *Arthur S. Leonard*

IDAHO – In *F.V. and Dani Martin v. Jeppesen*, 2020 U.S. Dist. LEXIS 152375, 2020 WL 4726274 (D. Idaho, Aug. 7, 2020), U.S. Magistrate Judge Candy W. Dale held that the injunction the court issued in 2018 requiring Idaho to have a procedure for transgender people to get a new birth certificate consistent with their gender identity is violated by the implementation of a new law passed in 2020 by the legislature with the specific intent to deny transgender people new birth certificates. The legislators made no secret during consideration of the new law that their intention was to avoid ongoing compliance with the injunction. Under the new law, a person seeking a change of gender on their birth certificate needs to get a court order, and the new law circumscribes the authority of courts to issue such orders in a way that makes it impossible for transgender people to get the new birth certificates. Judge Dale made clear that she was not ruling that the new law was unconstitutional, since the only thing the plaintiffs were seeking in this motion was a clarification that the new law violates the previously issued injunction.

Judge Dale rejected the state's arguments against the court ruling on grounds of standing or ripeness, in light of what was being requested by the plaintiffs. Any transgender person who is denied a court order would have standing to challenge the constitutionality of the law, of course, and since the premise of the injunction was that the old law was unconstitutional, the result would seem to be ordained. Plaintiffs are represented by a large team of lawyers: Colleen Rosannah Smith, Henry Liu, Pro Hac Vice, Isaac C. Belfer, Pro Hac Vice, William Isasi, Pro Hac Vice, D. Jean Veta, Pro Hac Vice, Covington & Burling LLP, Washington, DC, Kara N. Ingelhart, Pro Hac Vice, Lambda Legal Defense and Education Fund, Inc., Chicago, IL,Michael J. Lanosa, Pro Hac Vice, Covington & Burling, Nora Huppert, Pro Hac Vice, Peter C. Renn, Pro Hac Vice, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, Monica G. Cockerille, Cockerille Law Office, PLLC, Boise, ID. – *Arthur S. Leonard*

ILLINOIS – In *Ball v. Roselein & Assocs*., 2020 U.S. Dist. LEXIS 144212 (U.S. Dist. Ct.. Il., S.D., Aug. 12, 2020), the court granted in part and denied in part the employer's motion to dismiss the complaint of terminated lesbian employee, Jessica A. Ball. Ball alleged several counts against Roeslein & Associates. Only those related to sexual orientation and gender violations under Title VII of the Civil Rights Act will be addressed. Specifically, Ball alleged that she experienced a hostile work environment, harassment, and discrimination while working for Roselein because of her gender and sexual orientation. Ball also alleged that Roselein terminated her in retaliation for her reports regarding the hostile work environment, harassment, and discrimination. First, the court analyzed Ball's sex discrimination claims based on gender and sexual orientation in violation of Title VII. The court explained that under Title VII a claimant may allege gender and/or sexual orientation employment discrimination quite generally. Here, Ball pleaded she: (1) is a lesbian female, (2) was subject to discrimination, harassment, and a hostile work environment by Roselein because of her gender and sexual orientation, and (3) was terminated as a result of her gender and sexual orientation. The Title VII general standard is met, the court determined. Accordingly, Roselein's motion to dismiss is denied. The court next noted that Ball did not plead a separate hostile work environment claim in the complaint. But did plead in her Title VII discrimination claims that she was subjected to a hostile work environment. Thus, the court treated the hostile work environment as if it was a separate claim. Roselein moved to dismiss, contending that Ball has failed to allege any facts that would support a hostile work environment claim. Ball merely stated that she was harassed and subjected to a "hostile work environment," the court noted. Here, Ball's allegations are insufficient to put Roselein on notice regarding the conduct or actions she believes rise to the level of harassment or a "hostile work environment," the court said. Thus, the court concluded that Ball's hostile work environment claims must be dismissed. Next the court analyzed Ball's retaliation claims. Ball alleged that she engaged in statutorily protected activity by reporting the hostile work environment, harassment, and discrimination based on her sexual orientation to her supervisors at Roselein. Ball further alleged that Roselein fired her because she reported sexual orientation discrimination, harassment, and a hostile work environment. Roselein argues Ball failed to state a retaliation claim under Title VII because she does not allege that she engaged in any protected activity under Title VII, much less provide any specific factual details related to a protected activity. Nor did Ball provide any factual support that her termination was connected in any way to a protected activity. The court agreed. Ball's complaint fails to plead even "a few tidbits" that would allow Roselein to investigate her retaliation claims, the court pointed out. Ball's retaliation claim under Title VII for her sexual orientation only states that she reported the discrimination. This is tantamount to an inadequate, general allegation of retaliation reporting some unspecified conduct., the court said. Therefore, Ball's retaliation claims under Title VII must be dismissed. Jessica Ball was represented by Michael J. Brunton, of Brunton Law Offices, P.C. – *Wendy Bicovny*

IOWA – A three-judge panel of the Court of Appeals of Iowa affirmed the district court's order dismissing an action by Mika Covington, Aiden Vasquez, and One Iowa, Inc. (Petitioners) for declaratory judgment regarding an amendment to the Iowa Civil Rights Act (ICRA) that exempts transgender Iowans seeking gender-affirming surgical procedures from protection against discrimination by state and local government. The panel also affirmed the district court's denial of petitioners' motion for temporary injunctive relief, and determination of One Iowa's lack of standing. *Covington v, Reynolds*, 2020 WL 4514691 (Aug. 5, 2020). As amended, the ICRA states that it "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Petitioners alleged the amendment violates provisions of the Iowa Constitution and moved for temporary and permanent injunctions to prevent its enforcement. The district court granted the State's motion to dismiss the action and denied

the petitioners' request for temporary injunctive relief on the basis that Covington and Vasquez had adequate remedies at law and their claims were not ripe for adjudication, and One Iowa lacked standing to challenge the legislative amendment. Petitioners first challenge the dismissal of their petition for declaratory judgment on ripeness grounds. The panel explained that a declaratory judgment action is not ripe if it depends on a future, contingent, and speculative event. Here, neither Covington nor Vasquez have requested Medicaid preauthorization, their Medicaid providers have not evaluated the request, nor had any notice of decision been issued. The panel agreed with the district court determination that until their Medicaid providers deny them coverage, the controversy is purely abstract because they have not been adversely affected in a concrete way. Although the ICRA amendment is clearly calculated to allow Medicaid providers to deny gender-affirming surgical procedures to transgender Iowans, nothing prohibits Medicaid providers from allowing such a claim, the panel further pointed out. Thus, any dispute is speculative until a denial occurs and the matter is not ripe for adjudication. Next, the panel addressed the denial of petitioners' motion for injunctive relief. The panel explained that a court will deny temporary injunctive relief if there is an adequate remedy at law available. Here, the district court determined that the petitioners have an adequate remedy at law by means of administrative challenge. In that, the question of whether Medicaid must provide a recipient with a gender-affirming surgical procedure still resides, ultimately, with the Iowa Department of Human Services (DHS). On this basis, the petitioners have a legally adequate means of legal redress through the DHS's administrative process. Finally, the panel addressed One Iowa's challenge to the district court's determination that it lacks standing. First, the district court determined that One Iowa failed to show the required actual or imminent injury to maintain standing. The panel agreed, since any injury is hypothetical or speculative at this time. Second, the district court found that One Iowa failed to show representational standing. An organization can establish representative standing by showing that at least one of its members are suffering immediate or threatened injury as a result of the challenged action that would make out a justiciable case. Since, the matter is not ripe for adjudication and therefore is not justiciable, One Iowa is without standing to bring this action, the panel said, again affirming the district court. – *Wendy Bicovny*

MARYLAND – In *Amador v. Mnuchin*, 2020 U.S. Dist. LEXIS 140175 (D. Md., Aug. 5, 2020), U.S. District Judge Ellen L. Hollander denied a motion to dismiss an action brought by several U.S. citizen taxpayers who claim their 1st and 5th Amendment rights are violated by a provision of the CARES Act which excludes them from receiving federal relief payments in the context of the COVID-19 pandemic because of the immigration status of their spouses. Congress provided that every person applying for the benefit must have a social security number, and if married couples apply, they both must have social security numbers, unless one of them is a non-citizen serving in the U.S. military. Children of a married couple are entitled to assistance, but only if both of their parents have social security numbers (with the same military exception). Social security numbers are issued to persons authorized to work in the United States. Alternative ID numbers are issued to persons not authorized to work, and don't count for this purpose. All of the plaintiffs in this case are U.S. citizens who are excluded from receiving the benefits solely because their spouses do not have social security numbers due to their immigration status. They argue that this violates their due process, equal protection, and freedom of association rights, and rely heavily on the Supreme Court's marriage equality decisions. In her lengthy opinion, Judge Hollander found that the court has jurisdiction as the Administrative Procedure Act would waive sovereign immunity in this case, the individuals have Article III standing, and the Supreme Court's marriage equality decisions provide a strong basis for contending that the provision of the CARES Act being challenged heavily burdens the freedom to marry and also burdens expressive associational rights. Under either constitutional cause of action, the burden would be on the government to provide justification for treating these marriages differently within this context of financial emergency. Next up in this case would be a ruling on plaintiffs' motion to certify a nationwide class action. – *Arthur S. Leonard*

MARYLAND – In *Doe v. Catholic Relief Services*, 2020 U.S. Dist. LEXIS 142069 (D. Md., August 10, 2020), U.S. District Judge Catherine C. Blake ruled that a gay plaintiff could proceed as "John Doe" in his suit against Catholic Relief Services, his employer, for denying certain benefits to his same-sex spouse that the employer normally extends to the different-sex spouses of employees. Judge Blake's opinion does not go into the substance of the plaintiff's claim. As CRS did not oppose the motion for court filings, the court's task was to satisfy itself that circumstances justified allowing use of a pseudonym in light of federal rules and procedures generally requiring plaintiffs in civil litigation to proceed under their own names. "In weighing whether to permit a party to proceed pseudonymously," wrote Blake, "the court considers: (1) whether the request is 'to preserve privacy in a matter of sensitive and highly personal nature,' rather than 'merely to avoid the annoyance and criticism that may attend

any litigation'; (2) whether there is 'a risk of retaliatory physical or mental harm to the requesting party' or to 'innocent' nonparties; (3) the age of the requesting party; (4) whether the action is against a governmental or private party; and (5) the risk of unfairness to the opposing party," citing *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) (*citing James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)). "Doe contends that any public interest in his identity is greatly outweighed by his interest in privacy regarding his sexual orientation and same-sex relationship, and further argues that the balance of the applicable *James* factors weighs in favor of granting his request." Judge Blake agreed. "Although in recent years societal attitudes have become more accepting of the LGBTQ community, prejudice persists, and Doe's wish to keep his true name off public filings in a case of this subject matter is a reasonable one. Even assuming, as the court does, that Doe faces no risk of retaliation or harassment from CRS, the balance of the *James* factors weighs in favor of allowing Doe to proceed pseudonymously." However, the question remained whether Doe's real name would be used during depositions and proceedings in court, which CRS advocate. The court decided it would be premature to address that now, since the motion referred only the how the plaintiff would be identified in papers filed with the court. Judge Blake said the question of how he would be identified in court could be decided when the issue arises, and he could file a new motion if he sought to be identified as John Doe for those purposes as well. Doe is represented by Shannon Clare Leary, Gilbert Employment Law, P.C., Silver Spring, MD; and Anthony J May, Eve Lynne Hill, and Regina Kline, all of Brown, Goldstein & Levy, LLP, Baltimore, MD. – *Arthur S. Leonard*

MASSACHUSETTS – In *Dacunha v. Skipi Sagris Enterprises, Inc.*, 2020 WL 5217059 (D. Mass., August 31, 2020), U.S. District Judge Denise J. Casper dismissed a gay worker's discriminatory discharge and retaliation claims but allowed the worker to pursue a hostile work environment claim. Steven Dacunha started working as a crew member at defendant's Dunkin Donuts franchise store in June 2017. A female co-worker subjected him to a hostile work environment pervaded by name-calling and offensive comments, sometimes in the presence of customer, related to his sexual orientation. His frequent complaints to supervisors and managers went nowhere. Finally, he was so fed up that, according to co-worker witnesses, he threatened the abusive co-worker with physical violence. This was reported to a manager who investigated, satisfied himself that the threats had been made, and fired Dacunha under the company's written policy against violence in the workplace. Unbeknownst to this manager, Dacunha was actually on the phone to the EEOC when the manager phoned him to come to the office, at which time Dacunha was discharged. Judge Casper found that the reason cited for Dacunha's discharge, the substantiated threat of violence against a co-worker, was a non-discriminatory reason, thus rebutting the prima facie case of sexual orientation discrimination. In addition, the discharge did not violate Title VII's anti-retaliation provision, because the manager did not know at the time that Dacunha had called the EEOC to complain about the employer's failure to take action against his harasser, a protected activity under the statute. However, Judge Casper found that Dacunha's factual allegations were sufficient to sustain a hostile work environment claim, in light of the abject failure of the employer to take any action against the abusive co-worker. (Ironically, when the manager investigated the claim that Dacunha had threatened the co-worker, he decided to discipline the co-worker for her mistreatment of Dacunha.) The case continues, narrowed to the hostile work environment claim, which the court suggested might be successful if Dacunha proves the factual allegations in his complaint. Dacunha is represented by Michael O. Shea, Law Office of Michael O. Shea, P.C., Wilbraham, MA. – *Arthur S. Leonard*

MINNESOTA – Two African-American children were placed with an African-American heterosexual couple as foster parents while the social welfare agency was determining whether to terminate their mother's parental rights. During that placement, the foster parents said they were not interested in adopting the children, so when the mother had a third child who was removed from the home, the agency placed the third child with a different set of foster parents, a married Caucasian lesbian couple. Due to the African-American couple's hesitancy about adopting, as the determination about terminating the mother's parental rights approached, the agency decided to move the two older children to the lesbian couple. After the mother's rights were terminated, both the African-American couple and the lesbian couple sought to adopt. The trial court ultimately determined that the African-American couple should adopt, and the lesbian couple appealed. The Court of Appeals found no error on the part of the trial court. From the summary and quotes from the trial court's opinion that appear in the court of appeals opinion, it appears that race and culture were a significant factor, the court expressing the view that the African-American couple was better situated to be able to raise African-American children to be able to adjust to adulthood in America, despite the determined efforts by the lesbian couple to provide a culturally sensitive setting for the children. Nothing in the opinions suggests that the sexual orientation of the lesbian couple was a factor, at least overtly, in

the decision-making by the agency or the courts, although from the court's narrative it appears that the agency social workers favored the lesbian couple for reasons not fully explicated, especially as the court found that the children did better when they were living with the African-American couple. The lengthy opinion goes into great factual detail and implies that the agency was biased against the African-American couple, including attempting to get their foster care license cancelled for reasons that were not substantiated before the court. From the court's factual description, the agency - Hennepin County Human Services and Public Health Department – does not come out looking very good. *In the Matter of the Welfare of the Child of: C.F., Parent*, 2020 WL 4433117 (Court of Appeals of Minnesota, Aug. 3, 2020) (unpublished opinion). – *Arthur S. Leonard*

NEW JERSEY – In *Smith v. Smith*, 2020 U.S. Dist. LEXIS 140439 (D. N.J., Aug. 6, 2020) (not officially published), District Judge Robert B. Kugler dismissed an amended complaint by *pro se* plaintiff Denise R. Smith, who alleges that a large array of local government officials and her wife, Sherlette Nadine Smith, were engaged in a conspiracy to get her to drop criminal charges against Sherlette, who she claims had "violently strangled her" – but evidently not violently enough to kill her. In any event, attempting to frame pleadings to sue government officials on conspiracy theories is not a task for amateurs, and despite comments in a prior unpublished opinion by Judge Kugler about the specific shortcomings in Smith's original complaint, the amended complaint fared no better. Denise Smith claims that as a Black lesbian she is the victim of race and sexual orientation discrimination by the local government officials – including the police chief and various police officers – but her allegations are conclusory and lack specific facts necessary to meet the federal civil pleading standards. As to the police chief, she fails to allege facts that would show he had any personal knowledge or involvement, basing her claim on an assumption that complaints she directed to the police department would turn up on the chief's desk. Claims of negligent supervision or training were unavailing in the absence of specific allegations about how appropriate supervision or training would have changed the situation described in her complaint. Having dismissed the federal civil rights charges, the court declined to assert jurisdiction over supplementary state law claims. One suspects that experienced counsel could debrief her and put together a complaint that would survive a motion to dismiss. – *Arthur S. Leonard*

NEW JERSEY – Dale Farparan filed a complaint against his former employer, Autozone, under the New Jersey Law Against Discrimination (NJLAD), in which he alleges unlawful discrimination and harassment based on his sexual orientation, unlawful retaliatory conduct, unlawful termination, and that he was required to work in a hostile environment. He named as co-defendants individual managers and supervisors who allegedly aided and abetted the employer in discriminating against him. Farparan filed in state court. Discovery commenced. In the midst of discovery, which had already gone on for many months, Autozone concluded that Farparan would not be able to hold the individual defendants (all New Jersey residents) liable, and removed the case to federal court, asserting diversity jurisdiction as it is incorporated and headquartered in other states. Autozone contended that Farparan named the individual defendants to prevent removal (a so-called "fraudulent joinder" claim). Farparan moved the federal court to remand the case to state court, observing that under 3rd Circuit precedents, the federal district court is not supposed to inquire into the merits of the claims against individual non-diverse defendants, so long as the complaint on its face could extend to them under state law, which it does in this case as New Jersey's law, unlike Title VII and most other state anti-discrimination laws, provides that individual managers and supervisors may bear liability for discrimination. District Judge Michael Shipp agreed with Farparan's argument and sent the case back to state court in his decision of August 11, 2020. *Farparan v. Autozoners*, 2020 U.S. Dist. LEXIS 143882 (D. N.J.)(unpublished). Farparan is represented by Steven D. Cahn and Harold A. Parra, Cahn & PARRA, LLC, Edison, NJ. – *Arthur S. Leonard*

NEW JERSEY – A three-judge panel of the of the New Jersey Appellate Division reversed and remanded to the trial court Resorts Casino Hotel claims by former employee Ann Fox and her wife Theresa Campana (Campana) of violation of the Conscientious Employee Protection Act (CEPA), two counts under the New Jersey Law Against Discrimination (LAD), and intentional infliction of emotional distress (IIED) against Resorts Casino Hotel, Barbara Hulsizer, and Mark Sachais. Only the trial court's dismissal of Campana's loss of consortium claim was affirmed by the panel. *Fox v. DMBG Casino, LLC, d/b/a Resorts Casino Hotel*, 2020 WL 4745281, 2020 N.J. Super. Unpub. LEXIS 1604 (Aug. 17, 2020). Hulsizer is a Human Resource Executive. Sachais is Director of Hotel Operations. The panel first explained why the trial court erred when it determined Fox failed to establish that she suffered an adverse employment action as a result of her protected whistleblower activity under CEPA. Although Fox was not terminated, transferred or demoted from her Director of Security position, arguably there were a number of actions

by her employer from which a jury could infer she suffered retaliatory actions, the panel first noted. Her parking spot and others were changed to a lot three blocks away, but in her position as director of security the exposure may have entailed greater risk; she claimed no one explained the move to her even though she had parked in the garage for twenty years. Fox's ability to hire staffing was removed and given to subordinates. She may have delegated some of this in the past, but under Sachais the hiring function was removed. He also suggested her office might be relocated and her assistant reassigned. She was required to report more frequently and to advise when she was in the building, things that she had not been asked to do in the past. All of these changes or threatened changes came within a month of Sachais becoming her supervisor. On this record and at this stage of the proceeding, there was a genuine issue of fact that she was subjected to an adverse employment action, the panel concluded. The panel next illustrated how the trial court erred dismissing plaintiff's LAD discrimination and retaliation claims. First, Fox established she was subjected to a hostile work environment in violation of LAD based on her age, gender and sexual orientation in violation of LAD. There are allegations here that Sachais wanted to replace older and heavier women in the security department with younger people and also require women to meet certain physical performance standards. Further allegations are that age and gender were being targeted in the security department and Fox opposed that. When we consider that in a thirty-two day period of time, Fox's ability to hire staffing was removed from her directive, her long term parking spot was changed to an area that was less secure, she now was more regularly supervised—even though she had no disciplinary history during her 37 year tenure—and older and heavier women were to be "weeded-out," the panel said one could conclude that the conditions were severe or pervasive and that Fox's conditions of employment were altered. In regard to Fox's claim of unlawful retaliation, she alleged she objected to Sachais's statements about "weeding out" old and fat women in order to replace them with a "youth force." Fox further claimed that because she is the same age that the comments also were directed at her. She claims that because she objected, Sachais retaliated against her by moving her parking spot, increasing supervision, removing her ability to hire staff, and threatening to move her office and remove her assistant. The panel concluded Fox's allegations sufficiently established retaliation under LAD. As to Fox's IIED claim, the panel again disagreed with the trial court's dismissal. In the thirty-two days she worked under Sachais's supervision, Fox claimed he wanted her to "fudge" reports to the Dept. of Gaming Enforcement, made remarks about women's appearance and age, wanted to implement physical tests for women to "weed them out," when Fox herself would fit the age and gender categories, was threatened with retaliatory conduct such as moving her office and removing her assistant and had her parking assignment changed to a less secure location. Sachais spoke to her in a manner that was "gruff" like he "was barking" at her and she felt she "was being bullied." Fox submitted a report from an examining psychologist that linked her emotional distress to these conditions. Looking at the totality of the circumstances alleged, the court could not say there is an absence of material facts on the IIED claim. The panel next explained why Fox's requested punitive damages claims should not be dismissed at this time. Sachais was the director of operations and plaintiff's supervisor. Hulsizer could be determined by the fact-finder as willfully indifferent if she was aware of Sachais's conduct and did not intervene. She might also be an active participant if she was assisting in the development of a plan for Sachais. Last, the panel affirmed dismissal of the loss of consortium claim by Campana. Although she is included as an appellant in the notice of appeal, the appeals brief did not include any argument addressing her claim. Because this issue was not raised in the merits brief, it is deemed waived, the panel concluded. Fox and Campana are represented by Jenna Marie Cook. - *Wendy C. Bicovny*

NEW MEXICO – In *Lucero v. Board of Directors of Jemez Mountains Cooperative, Inc.*, 2020 WL 5110733 (D. New Mexico, Aug. 31, 2020), Jimmy Lucero, a former employee of Jemez Mountains Cooperative, claims sexual orientation discrimination in violation of New Mexico's Human Rights Act and asserts a variety of other claims, some grounded in tort, some in rights under his collective bargaining agreement (which he says the union refuses to pursue to arbitration), and various other claims. The long, tedious opinion issued on August 31 by U.S. District Judge Browning cannot possibly be explored or explained in detail in this short civil litigation note, as the judge goes into detail about the legal essentials of half a dozen causes of action and procedural and jurisdictional issues (such as preemption of claims under the National Labor Relations Act), and the court relates the plaintiff's faulty claims in great detail and at great length. Although the opinion lists counsel for Lucero, the opinion sounds like a judge patiently explaining to a *pro se* plaintiff where his factual pleading fell short. Many of the legal claims are asserted without corresponding factual claims from which the court could infer that there was a factual basis to support the claims. The short of it is that some claims are dismissed, some are allowed to continue, and amendments to the complaint are in order. If the factual assertions recounted in the opinion can be proved, it sounds like Lucero has

potentially valid claims, at least from his side of the story of how he was treated in the workplace, but it is hard to tell without more specific factual pleading keyed to his proposed causes of action. He originally filed in state court but the case was removed by some of the individual named defendants. Lucero is represented by Betsy R. Salcedo, Salcedo Law PC, Albuquerque, New Mexico. – *Arthur S. Leonard*

NEW YORK – The surviving family members of Layleen Polanco, a transgender woman who died in solitary confinement from an epileptic fit, due in part to the negligence of Corrections Officers who were supposed to be checking on her regularly and failed to do so, sued the City of New York. Late in August it was announced that a settlement had been reached for $5.9 million, reportedly the largest settlement ever agreed to by NYC in the death of a person being held in New York jail facilities. In a statement issued August 30, the city Law Department said: "The death of Ms. Polanco was an absolute tragedy and our thoughts remain with her family and loved ones. The city will continue to do everything it can to make reforms towards a correction system that is fundamentally safer, fairer and more humane." She was 27 years old, and had suffered prior epileptic fits at Rikers, so prison officials were obviously aware that placing her in solitary without enforcing frequent observation was a set-up for disaster. Her death prompted calls for an end to solitary confinement for jail detainees. *The City*, Aug. 30. – *Arthur S. Leonard*

NEW YORK – U.S. District Judge Thomas J. McAvoy granted the City of Albany's motion to dismiss, without prejudice, Mariah Lopez's pro se claims for discrimination, failure to accommodate, retaliation and gender identity discrimination, in *Lopez v. City of Albany*, 2020 U.S. Dist. LEXIS 144831 (N.D. N.Y., Aug. 11, 2020). Lopez, a transgender woman, alleged that she suffers from multiple disabilities and uses a service dog. She rides buses operated by Defendant Capital District Transportation Authority (CDTA). She further alleges that when she boarded a bus operated by the CDTA the bus driver made statements that questioned the validity of her service animal and her status as a person with a disability. As a result, Lopez claimed she felt harassed, fearful, anxious and eventually traumatized. Lopez contended her transgender identity caused the driver to challenge her disability and use of a service animal. The bus driver ordered her either to produce documentation to prove her dog was a service dog or get off the bus. The driver than became more dismissive, cruel and retaliatory when Lopez refused to leave. The driver would not move the bus unless Lopez got off. This caused other passengers to blame Lopez for the delay, and verbally abuse her. The bus driver then called the police, and falsely told officers that Lopez had threatened passengers with a weapon. Lopez recorded the incident on her phone, which she showed police and CDTA supervisors. She again felt that her disability and transgender status influenced how police treated her. The next day, the same bus driver would not even open the door, called the police and CDTA supervisors, and claimed Lopez had threatened him. Police again backed the driver, and barred Lopez from boarding the bus. A CDTA supervisor supported these untruths to the police, even though he should have investigated the incident from the previous day and known that the driver was lying. Lopez's recording of that incident and the one from the previous day supported her claims, Judge McAvoy said. After service of the complaint, the City of Albany filed the instant motion to dismiss, arguing that Lopez failed to state a claim upon which relief could be granted. The City argued that it played no role in the events that led to Lopez's complaint. Lopez's complaint asserted the conduct of the CDTA, police officers, agents of the City of Watervliet and the CDTA harmed her. Since the City has no control of either of those entities, the complaint failed to state a claim against the City. Further, the complaint contained no specific allegations against the City of Albany and does not even name the City of Albany in the caption. Instead, Lopez names the County of Albany. Lopez alleged that the County of Albany operates the CDTA. Her complaint names the City of Albany, but lists as address of the City of Albany that of Daniel McCoy, the Albany County Executive. The complaint did mention the Municipality of Albany, but only to describe why venue is proper in this District. Otherwise, no part of the complaint makes any mention of any conduct by any person connected with the City of Albany. Under those circumstances, Judge McAvoy found that Lopez had not alleged any facts which made it plausible that the City of Albany could be liable to her under any the causes of action stated in her complaint. Accordingly, Judge McAvoy granted the City of Albany's motion to dismiss. Because, however, Lopez proceeded pro se, Judge McAvoy did not dismiss her complaint against the City of Albany with prejudice. Lopez may file an amended complaint if she is aware of facts by which she could plausibly allege that the City of Albany injured her, Judge McAvoy concluded. – *Wendy Bicovny*

NEW YORK – Juan Anthony Bidot, a gay Latino, has been employed by the Suffolk County Department of Probation since 1999. He was not "out" until 2017 when he married his husband. In this lawsuit, *Bidot v. County of Suffolk*, 2020 U.S. Dist. LEXIS 152358 (E.D.N.Y., August 20, 2020), he claims that his rights were violated by the employer under Title VII and the

New York State Human Rights Law, and by individual supervisors under the Constitution, for which he brings claims under 42 USC Section 1983. He was repeatedly discouraged in his attempts to get a transfer out of the sex offenders unit, with supervisory comments that he would never be transferred because he spoke Spanish. He was brought up on disciplinary charges concerning allegations of faulty record-keeping regarding his expenses (traveling as part of his probation supervisory work), and he claims that this discrimination occurred when supervisors learned he was gay. On August 20, U.S. Magistrate Judge Arlene R. Lindsay issued a Report & Recommendation to District Judge Sandra Feuerstein, which recommended dismissing the sexual orientation discrimination claims under Title VII and the NYSHRL for inadequate factual pleading, but allowing the race and national origin claims to go forward based on "thin" factual pleading. The county's argument that his status as the only Spanish-speaking probation officer may it a legitimate business decision to keep him in the sex offenders unit when there were many Spanish-speaking probationers to supervise, the Magistrate pointed out that this argument on the merits was not relevant at the motion to dismiss stage. The Magistrate Judge agreed with the employer that Bidot failed to exhaust administrative remedies on an Americans with Disabilities Act count he included in his complaint (based on PTSD and alleged failure of the employer to accommodate), and that he failed to allege the existence of official county policies that could be the basis for his Monell claim against the county. She rejected the county's argument that it enjoys sovereign immunity, applying precedents treating counties as municipalities rather than states for purposes of sovereign immunity jurisprudence. Leave is given to replead, so Bidot may be able to revive his sexual orientation claim if he can meet the civil pleading requirements for more facts to sustain his claim. But a simple issue of timing defeated a retaliation claim: the employer actions on which he premised the claim assertedly occurred before they found out he was gay. Bidot is represented by Frederick K. Brewington, Hempstead, NY. – *Arthur S. Leonard*

OHIO – On Aug. 20, 2020, the Court of Appeals of Ohio, 8th District, affirmed the decision of the trial court, granting John T. Branden's motion to terminate the spousal support award due to ex-wife Cari C. Branden's cohabitation with a woman constituting changed circumstances. *Branden v. Branden*, 2020 WL 4876806 (Cuyahoga County). At the time of their 2008 divorce, Cari was earning $24,000 and John was earning $110,000. In light of their disparity in earnings, and given that Cari had been a stay-at-home mom for the parties' two children much of the marriage, the trial court ordered John to pay Cari $2,000 per month indefinitely as spousal support and $754.03 per month for the child who was not yet emancipated. In 2011, Cari filed a motion asserting that John was not in compliance with his payment obligations. John filed a motion to modify spousal support, alleging that his earnings had been reduced to $70,000 per year. On July 23, 2014, the trial court modified the spousal support award to $1,275 per month until Cari's "death, remarriage, or cohabitation." On July 10, 2015, John filed a motion to terminate spousal support, alleging that Cari was cohabitating with Nicole Barkley. The hearing on John's motion to terminate and/or modify spousal support was concluded on May 13, 2019. Cari moved to dismiss this motion. On June 27, 2019, the trial court issued a judgment denying Cari's motion to dismiss and granting John's motion to terminate spousal support. In relevant part, the trial court found "overwhelming evidence" that John established the essential elements of cohabitation, and that there was a substantial change in circumstances. The trial court noted Cari's increased earnings of $43,000, found that Cari and Barkley have been cohabitating in a romantic relationship since 2013, and that their "sharing of significant housing expenses has enhanced [Cari's] economic situation." The court ordered that John's spousal support order terminate. Cari appealed, arguing that there was insufficient evidence to support the termination of the support order. Writing for the Appeals court, Judge Patricia Ann Blackmon explained that under the applicable Ohio spousal support code, cohabitation with another in a relationship, will not automatically terminate spousal support, but may be grounds for showing a change of circumstances warranting modification or termination of spousal support. Additionally, the trial court must retain jurisdiction throughout to modify spousal support. Last, whether a payee spouse's circumstances have changed in a manner that warrants modification or termination of spousal support can only be determined after a full hearing on the matter. Here, the trial court retained jurisdiction and held a full hearing on John's motion to terminate, Judge Blackmon first noted. The trial court found, and the record clearly demonstrated that Cari and Barkley have been living together in a romantic relationship since 2013. They share significant financial expenses such as housing as well as day-to-day expenses. They both contribute $1,500 each month to a joint checking account from which they paid the mortgage, the homeowner's fees, utilities, and groceries. They have purchased real estate together and have moved together for Barkley's employment. Although Cari described financial struggles, the trial court found that she has purchased a condominium with Barkley for $310,000. During the pendency of the hearing, it was listed for

CIVIL LITIGATION *notes*

sale for $369,000 and sold for $345,000. Cari has moved with Barkley for Barkley's job, has $12,000 in savings, has travelled, and is able to support herself without spousal support from John. In light of these facts, the trial court determined the existing award of spousal support is no longer reasonable nor appropriate. Therefore, while cohabitation does not automatically terminate an award of spousal support, in this instance it clearly significantly enhanced Cari's economic situation and constitutes a change in circumstances that warrants termination of spousal support, Judge Blackmon reiterated. There is abundant competent, credible evidence to support the trial court's ruling, Judge Blackmon concluded. John T. Brendan is represented by Mark A. Ziccarelli of Ziccarelli & Martello. – *Wendy C. Bicovny*

OHIO – In *State ex rel. Nauth v. Dirham*, 2020-Ohio-4208, 2020 Ohio LEXIS 1908 (Ohio Supreme Court, August 26, 2020), proponents of a referendum seeking to rescind the Medina City Ordinance banning discrimination because of sexual orientation or gender identity failed in their quest to get a writ of mandamus from the Ohio Supreme Court to place their referendum on the ballot. They had collected petition signatures during the summer of 2019, and ultimately submitted petitions cumulating a few hundred more signatures than the minimum required under city rules. However, enough signatures were struck as invalid by the Board of Elections to bring the number down below the threshold to get the measure on the ballot. The "Concerned Citizens of Medina City" sought a hearing from the City Council, sought reconsideration of the decision to strike signatures, and provided affidavits from a few dozen people who had signed petitions, but to no avail. Ultimately, the Ohio Supreme Court found that they had not presented credible evidence that errors by Board of Elections in striking signatures were responsible for the shortfall, so it looks like the question won't be on the November 2020 ballot. – *Arthur S. Leonard*

SOUTH CAROLINA – Aimee Maddonna, a Catholic, wanted to volunteer to serve as a foster parent and approached the largest accredited agency in the state, Miracle Hill Ministries, only to learn that they would not provide their services unless she signed a form agreeing with their distinctly Protestant conservative articles of faith. She had thought that an agency funded by the government could not discriminate against her based on her religious beliefs and made a fuss about it. But it turns out that the governor had obtained a waiver of compliance with statutory and regulatory non-discrimination requirements from the U.S. Department of Health and Human Services, and had directed the state's Administration for Children and Families to allow child-placement agencies to discriminate based on religious beliefs. Maddonna is now challenging that situation in federal court, having alleged violations of the Equal Protection Clause, the Establishment Clause, and the Administrative Procedure Act (this last claim focused only on the federal defendants, of course). All defendants moved to dismiss. District Judge Timothy M. Cain, who was appointed by President Barack Obama, granted the defendants' motion as to the Equal Protection claim, but found that Maddonna had stated a viable claim under the Establishment Clause and rejected the federal government's argument that the Department's decision to grant compliance waivers for religious organizations was not subject to judicial review under the APA. The court did not express a position as to the merits of the APA claim, since the government's motion was confined to the question of reviewability. *Law Notes* normally confines its subject matter scope to cases involving LGBTQ rights or HIV/AIDS, but the development of the waiver policy seems to have been adopted specifically to preserve the ability of religious organizations to discriminate against LGBTQ people. That a Protestant agency would deny services to a Catholic struck us as relevant to *Law Notes* readers, since it could lead to the waiver process being invalidated. For some reason, the August 10 ruling had not shown up on the Westlaw or Lexis databases by the end of August. *Maddonna v. U.S. Department of Health and Human Services*, No. 6:19-cv-3551-TMC (D. S. C., August 10, 2020). – *Arthur S. Leonard*

SOUTH CAROLINA – In *Steinhilber v. Yanfeng Us Auto. Interiors Systems I, LLC*, 2020 U.S. Dist. LEXIS 151492 (D. S. C., Aug. 21, 2020), U.S. District Judge Timothy M. Cain accepted a recommendation by a magistrate judge to grant summary judgement to the employer on claims of discriminatory termination and retaliation brought by Dillon Steinhilber under Title VII, the Americans with Disabilities Act (ADA), and similar state laws. The judge emphasized that this was a *de novo* review, and the magistrate's decision was not given any special weight. It is unclear from the court's opinion whether this was a sexual orientation case or a gender identity case, or perhaps a bit of both. The court was clear in describing the plaintiff's disability as autism spectrum disorder. Since the plaintiff did not present direct evidence of discriminatory intent as to either claim, the court employed the *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973),* method of allocating burdens of production and proof developed by the Supreme Court as to all claims. The court found that Steinhilber had made out a prima facie case under both statutes, but that the employer had

rebutted the inference of discrimination by articulating non-discriminatory reasons for his discharge. This focuses the burden on the plaintiff to show that the employer's reasons were pretexts for discrimination on grounds prohibited by the relevant statutes. The court found that this was where plaintiff fell short. In objecting to the magistrate's recommendation, the plaintiff focused on the retaliation claim, urging that the temporal proximity of his complaint to Human Resources and the termination decision should decide that claim in his favor, since he had sworn that the reason for his discharge given by the employer was false. But the court noted that an investigation into allegations against Steinhilber had been initiated before the employer learned of his complaints to the Human Resources Department, thus undermining his argument that the subsequent dismissal showed a retaliatory motive for his protected activity. The court said the he had failed to present evidence that either his sexuality or his disability were the reasons for the employer's actions. Steinhilber is represented by James Lewis Cromer and Julius Wistar Babb, IV, of Cromer Babb Porter and Hicks, Columbia, SC. – *Arthur S. Leonard*

TEXAS – The Texas 4th District Court of Appeals ruled on August 19 that the City of San Antonio enjoys governmental immunity from a suit by a group of conservative taxpayers who sought a court order that the city reverse course and let a Chick-fil-A restaurant operate at the municipal airport. The decision in *City of San Antonio v. Von Dohlen*, 2020 Tex. App. LEXIS 6623 (4th Dist. Ct. App., Aug. 19, 2020), reverses a ruling by Bexar County District Court Judge David A. Canales. Judge Sandee Bryan Marion, writing for the unanimous panel, explains the background: "On March 21, 2019, the San Antonio City Council considered whether to approve a proposed concession agreement that would permit a subcontractor to operate a Chick-fil-A restaurant in the airport. After two council members objected to the inclusion of Chick-fil-A in the concession agreement based on Chick-fil-A's 'legacy of anti-LGBTQ behavior,' the council approved the agreement subject to an amendment requiring Chick-fil-A be replaced with a different vendor." The municipal government in San Antonio is Democratic. The resulting political uproar led the Republican-controlled Texas legislature to enact Tex. Gov't Code Ann. § 2400.002, popularly known as the "Save Chick-Fil-A Bill," which prohibits governmental entities from taking any "adverse action" against any person or business based on "membership in, affiliation with, or contribution, donation, other support provided to a religious organization." One could question whether Section 2400.002 on its face would require the city to rescind its decision and authorize the operation of a Chick-Fil-A restaurant at the airport. The language was probably inspired by the religiosity of Chick-fil-A's controlling family and their significant donations to socially conservative religious causes. But that is beside the point, because the Court of Appeals ruled that the city enjoys immunity from this lawsuit. While Section 2400.002 includes a governmental immunity waiver provision, it is not retroactive, and at the time the City Council entered into the contract governing restaurant concessions at the airport, its action was entirely legal. Wrote Judge Marion, "Here, although appellees purport to seek only prospective relief for which the City's immunity would be waived and abolished under Government Code chapter 2400, the 'only plausible remedy' for their claims is nullification of the amended concession agreement—a contract made for the City's benefit prior to enactment of chapter 2400. Appellees pleaded for a declaration that the City is violating Government Code chapter 2400 by implementing the amended concession agreement, as well as an injunction requiring the city 'to install a Chick-fil-A restaurant in [the airport], consistent with the proposal submitted . . . before the . . . amendment' to the concession agreement. In other words, appellees seek effectively to undo and invalidate a contract previously approved by the city council, compel the City to re-open the contract approval process, and require the City to re-award the contract to a subcontractor that will operate a Chick-fil-A restaurant in the airport. Appellees' claims, therefore, are barred by governmental immunity from both suit and liability. Further, because appellees' claims affirmatively negate the existence of jurisdiction, amendment would not cure the defect." Because it disposed of the appeal by granting the city's plea to the jurisdiction, the court did not have to address the city's alternative defense that the plaintiffs lacked standing to sue on their claim. And, there will not be a Chick-fil-A Restaurant in the San Antonio Municipal Airport, at least for now. – *Arthur S. Leonard*

TEXAS – U.S. Magistrate Judge David L. Horan issued a recommendation to the district court to grant summary judgement to Rodney Ford in his suit against Otis Norman Freemen, the father of Ford's late same-sex common law spouse, seeking to recover over $700,000 from an insurance policy death benefit from David Freemen's employment. One might call *Ford v. Freemen*, 2020 WL 4808935 (N.D. Tex., Dallas Div., July 28, 2020), in Perry Mason style "The Case of the Faithless Father-in-Law." When David Freemen died in October 2016, his surviving partner of 24 years, Rodney Ford, became his executor and principal heir. David had designated Ford as beneficiary of the death benefit from his employment, but when Ford contacted the employer, they claimed they had no

record of the designation, and lacking one the money would go to Freemen's closest legal heir, his father Otis, unless Ford could prove they were common law spouses. (This possibility has existed in Texas since the U.S. Supreme Court's decision in *Obergefell v. Hodges,* which Texas courts recognizes as retroactive for this purpose.) Proving that would be time-consuming. Ford struck a deal with Otis by which Otis would apply for the money and then turn it over to Ford. There was some talk about possible tax consequences, but Otis agreed to do it. He applied for the benefit, and then sent a check for the full amount to Ford. But he had second thoughts. (Ford alleges that Otis's brother is the nefarious influence here.) Otis quickly called Ford and told him to tear up the check because he had decided to keep the money. He put a stop payment on the check, and when Ford tried to cash it, the bank refused to pay out. Otis spent most of the money, paying off his mortgage and other debts, but still has about $200,000 of it. Ford sued and at first won a default judgment when Otis failed to respond to the complaint, but this was vacated when it turned out that an error concerning Otis's address led to the complaint not having been served, and the case was revived. In the course of the litigation, probably in preparation for discovery, the former employer "found" the beneficiary designation to Ford. But Otis claimed that the money was legally his, and that Ford's breach of contract and unjust enrichment theories were invalid. Magistrate Horan found that the check is a contract, and promissory estoppel provided a basis for its enforcement, as Ford had, in reliance on Otis's promise, forborne from seeking to establish the common law marriage status in order to claim the insurance proceeds directly as spousal heir. Horan found that the proofs proffered by Ford would support a common law marriage claim under Texas law in any event. He also endorsed Ford's alternative ground of money "had and received" under equity. And he recommended awarding Ford over $30,000 in attorney's fees for the cost of this litigation. Maybe Otis is going to have to sell the house in order to meet the bill. Ford's counsel is Tom C. Clark. – *Arthur S. Leonard*

TEXAS – Judge Brian Umphress, who presides in a state court in Jack County, is standing for re-election as a state judge. He does not perform same-sex weddings for religious reasons, but does perform different-sex weddings. Noting that in an unrelated proceeding the State Commission on Judicial Conduct has found that another judge who similarly refuses to perform same-sex weddings but performs different-sex weddings has violated judicial ethics (a ruling that is currently pending on appeal in a Texas court), Umphress wants a declaratory judgment from the U.S. District Court for the Northern District of Texas (a notoriously anti-gay district bench) that he has a constitutional right to refuse to conduct such weddings, and to run for election on a platform stating that the U.S. Supreme Court's ruling in *Obergefell v. Hodges* is unconstitutional and does not require Texas judges to perform same-sex weddings. In an August 14 ruling in *Umphress v. Hall,* 2020 U.S. Dist. LEXIS 146625 (N.D. Tex., Ft. Worth Div.), District Judge Mark T. Pittman denied a motion by the members of the Commission on Judicial Conduct to dismiss the case or order it transferred to another district on venue grounds, as the Commission does not sit within the boundaries of the Northern District, and that although Umphress's state courthouse is in the Northern District, he actually resides outside the District. Umphress countered that he performs lots of weddings in the District, putting this forth as a basis for the court having jurisdiction over the case, and ultimately Judge Pittman, after a lengthy, incredibly boring discussion, denies the defendants' motion to transfer, but does not rule on the substantive motion to dismiss. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – In *United States v. Lewis*, 2020 CCA LEXIS 269 (U.S. Navy-Marine Corps Court of Criminal Appeals, Aug. 17, 2020), the court affirmed a court martial conviction of the defendant on "three specifications of failure to obey a lawful order or regulation for fraternization and wrongfully providing alcohol to a person under the age of 21, one specification of sexual assault by causing bodily harm, one specification of indecent viewing, and one specification of assault consummated by a battery in violation of Articles 92, 120, 120c, and 128, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892, 920, 920c, 928 (2012)." All of the charges related to Private First-Class Harris, in whom defendant was sexually interested but who apparently was not sexually interested in him. Lewis bought liquor for the underage Harris, propositioned him but was rebuffed, and, in the final incident that led Harris to make a report, began performing fellatio on Harris when Harris was passed out after a night of partying. Harris woke up to the sensation of somebody sucking on his penis, was startled, and demanded that Lewis desist, which he did. The kicker is that Lewis had tested HIV-positive and was provided with orders concerning his conduct, including disclosing his HIV status to anybody before having sex with them. Harris first learned that Lewis was HIV-positive when he was told that in connection with these proceedings. Lewis denied that his contacts with Harris were not consensual, and argued that because he was on retroviral therapy that had made

his virus undetectable and virtually non-transmissible, but the court found that it was bound by appellate precedent to consider Lewis's actions violative of the HIV-related order that was given to him. The court referred to a decision by the Supreme Court of Canada holding that there is not true consent to sexual contact with an HIV-positive person who does not disclose his HIV-status to his sexual partner, regardless of treatment, viral load, etc. In other words, this is a risk that courts generally agree that a person should be able to evaluate before consenting to sex. And, the testimony provided by Harris supported the court martial verdict that he did not overtly consent to having sexual contact with Lewis. The "indecent viewing specification" related to an incident when Lewis entered Harris's barracks room uninvited while Lewis was showering, went into the bathroom and opened the shower curtain, exposing Lewis's naked body. Since Harris had previously communicated no interest in having sex with Lewis, this was obviously nonconsensual as well. The punishment imposed by the court martial and affirmed by the appeal court was dishonorable discharge, which involves forfeiture of all government benefits, include veteran's benefits, health care and other entitlements.

CALIFORNIA – The 5th District Court of Appeal found that although the prosecutor was guilty of misconduct in asking a police officer witness a question that was certain to elicit a response that would violate the court's prior grant of a motion *in limine* that nobody was to being up the defendant's HIV-positive status in the presence of the jury, this was harmless error and would not provide grounds for a mistrial or for setting aside the assault verdict. *People v. Rodriguez*, 2020 WL 4696585 (Cal. 5th Dist. Ct. App., Aug. 13, 2020) (unpublished disposition). Jeffrey Rodriguez phone the police department help-line to ask for assistance because he found himself locked out of his apartment. During the conversation he told the operator that somebody had better come quickly or he would blow up the building. The operator relayed this threat to blow up the building to the police officer assigned to respond to the call, who quickly put out a call for other officers to assist. They knew of Rodriguez due to past incidents, and it seemed clear that mental problems were an issue with him. When the police arrived they put in a call to have him taken for evaluation at a health care facility, and an EMT ambulance arrived, after being strapped in, Rodriguez "lost it" and began struggling to get loose, during which he assaulted and injured the two EMT staffers. In the course of struggle, he was spitting and the officers knew from his landlord that he was HIV-positive, so they put a spit mask on him. Ultimately, he was tried for making a false bomb threat and for assaulting the EMTs. During questioning of a police officer on the stand, the prosecutor asked why they had put a spit mask on Rodriguez, which drew the obvious reply that it was due to his HIV-positive status, which brought a prompt objection from the defense and motion for mistrial. But the trial judge just instructed the jury to ignore that statement and Rodriguez was convicted and sentenced to prison time by the trial judge, who openly bemoaned the fact that no diversionary program was available, since Rodriguez's conduct appeared to involve mental health issues. The Court of Appeal noted that that a statute has since made such a diversionary program available and remanded for a reconsideration of sentencing. It set aside the false bomb threat conviction, finding it unsupported by the evidence, but affirmed the assault conviction, finding that the prosecutor's misconduct in posing a question he knew would elicit an answer violating the *in limine* order was "harmless" in the circumstances. "We are troubled by the prosecutor's elicitation of potentially inflammatory testimony about Rodriguez's HIV-positive status in violation of the court's *in limine* ruling. However, we conclude that, in view of the entire record, the trial court's striking of the testimony at issue and admonition to the jury to not consider it for any purpose, sufficed to dispel the potential for prejudice in this instance. Accordingly, we do not find reversible error here," wrote Justice M. Bruce Smith for the panel.

WASHINGTON – The U.S. Attorney for the Western District of Washington obtained indictments of Marie Christine Fanyo-Patchou, Rodrigue Fodjo Kamdem, and Christian Frey Djoko under federal statutory provisions concerning cyberstalking: 18 U.S.C. § 2261A(2)(A)(B) and 18 U.S.C. § 371. The defendants sought dismissal of the indictment on grounds that either as applied to them or considered on their face, the provisions violate First Amendment Freedom of Speech. They argued that as content-based restrictions on speech, they are subject to strict scrutiny. District Judge John C. Coughenour summarized the indictment: "The indictment alleges that Defendants engaged in a campaign of electronic harassment against U.M., a gay man from Cameroon who lives in Seattle. As part of that alleged campaign, Defendants purportedly disseminated private information about U.M.'s sexual orientation—including nude images of U.M. and his husband—to the Cameroonian community. Defendants allegedly committed those acts with the intent to harass or intimidate U.M., and the indictment claims that Defendants succeeded in placing U.M. in reasonable fear of serious bodily injury to himself and his immediate family members." *United States v. Fanyo-Patchou*, 2020 U.S. Dist. LEXIS 150354 (W.D. Wash., Aug. 19, 2020). The defendants contended that their

campaign was intended to disseminate truthful information that U.M. was defrauding federal immigration authorities concerning his allegedly "happy marriage" to his same-sex partner, and thus their communications should be considered protected speech on a matter of public concern under the 1st Amendment, for which they could not be held criminally liable. Judge Coughenour found that a motion to dismiss based on an "as applied" analysis could not be granted on this ground, as the truth of defendant's allegation was a disputed matter of fact, and false statements of this nature would not be protected. (Certainly, such false statements would be defamatory.) As to the facial challenge, the court was bound by a 9th Circuit opinion, *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014), that had rejected a facial challenge to an earlier iteration of the provision in question. Among other things, the court found that as worded the statutory provisions were a regulation of conduct, not speech. Also, the court found that subsequent amendments to the statute had not altered it in any way relevant to the 9th Circuit's constitutional analysis, merely making more concrete that the earlier statute applied to email/internet communications and to "intimidation" as well as the other goals/effects of the communications in question. The court did not find the statute susceptible to an overbreadth challenge in light of the 9th Circuit precedent.

PRISONER LITIGATION NOTES

By William J. Rold

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

U.S. COURT OF APPEALS – NINTH CIRCUIT – The U. S. Court of Appeals unanimously reversed U.S. District Judge Robert Clive Jones (D. Nev.) in *Reberger v. Dzurenda*, 2020 U.S. App. LEXIS 25577 (9th Cir., Aug. 12, 2020). Judge Jones had dismissed HIV-positive inmate Lance Reberger's pro se complaint because he had three previous "strikes" under the Prison Litigation Reform Act [PLRA] and was not in "imminent danger" under 28 U.S.C. § 1915(g). The not-for-publication opinion of Senior Circuit Judges Mary M. Schroeder (Carter) and Michael Daly Hawkins (Clinton), and Circuit Judge Kenneth Kiyul Lee (Trump) found that he was. Reberger alleged "imminent danger" of serious physical harm under the PLRA from "prolonged isolation in administrative segregation," because he has incurred physical injuries, he lacked access to prescribed doses of his HIV medication, and his drinking water was contaminated. This combination is sufficient under *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007) (liberal construction of "imminent danger" in pro se pleading – extensive discussion of PLRA § 1915(g)). The court remanded the case.

ALABAMA – Senior U.S. District Judge William H. Steele denied compassionate release to *pro se* HIV-positive inmate John McDonald (who sought to avoid exposure to COVID-19) in *McDonald v. United States*, 2020 U.S. Dist. LEXIS 139618 (S.D. Ala., Aug. 5, 2020). McDonald did not meet threshold criteria: he did not show either: (1) that he had exhausted compassionate release applications within the Federal Bureau of Prisons; or (2) that he had presented his application to the warden more than thirty days ago without response. McDonald's submission, consisting substantively of one page, without medical evidence proffer, does not establish that his HIV is out-of-control. Judge Steele judicially notices that the Centers for Disease control identifies HIV as a risk factor only when it is not controlled by medication. Enough said – but Judge Steele does not stop there. He cites to his own earlier pre-COVID compassionate release decision in *United States v. Lynn*, 2019 WL 3805349 (S.D. Ala., Aug. 13, 2019), which denied release under § 603 of the First Step Act (see 18 U.S.C. § 3582(c)(1)(A)(i)). In Lynn, which was fully briefed with adversary counsel, Judge Steele found that the Sentencing Commission had not changed its criteria following the First Step Act; and it was not for the judiciary to do so. He reached the same result here, applying § 12003(b)(2) of the post-COVID CARES Act. He then judicially notices BOP "data," without saying when it was compiled: "[T]here is no indication and no reason to believe that an outbreak of coronavirus is happening, or is likely to happen, at FCI Williamsburg . . . . [O]nly one inmate (of the 180 who have been tested) at that facility has received a positive test result . . . " FCI's website (August 10, 2020) shows an inmate population of nearly 1300 with 8 COVID-positive staff. This case lasted only ten days in Judge Steele's Court. The U.S. Attorney entered an appearance but filed no papers.

CALIFORNIA – Transgender prisoner Terrence Jesse Moore, *pro se*, alleges that her sole defendant, officer S. Calderon, sexually harassed her, saying: "I know you're transgender! I don't think you get it, I'll screw you over if you don't do what I say and you won't be getting out of prison anytime soon. Now show me your tits since you think you're a woman." When Calderon filed a grievance, Calderon allegedly said: "You faggots think you have so many rights. Since you're writ[ing] a grievance on me you'll regret it because I'm writing a 115 on you . . . . Two can play that game. I'm about to make your time at Kern Valley hell now. You're going to wish you were dead!" Moore alleged that Calderon had "no penological justification" for

the demand or threats and that it caused severe psychological damage, including suicidal thoughts. In *Moore v. Calderon,* 2020 WL 5017289 (E.D. Calif., Aug. 25, 2020), U.S. Magistrate Judge Barbara A. McAuliffe rules that, because Calderon did not assault Moore, there is no Eighth Amendment violation, citing a series of cases culminating in *Bearchild v. Cobban,* 947 F.3d 1130, 1144 (9th Cir. 2020). [Note: these cases have "yellow" "caution flags" from Westlaw.] Judge McAuliffe seems not to see the trend in the cases and omits the lead language from *Bearchild* (although it is on the same page she quotes): "We now hold that a prisoner presents a viable Eighth Amendment claim where he or she proves that prison staff members . . . , without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading or demeaning the prisoner." [Emphasis supplied.] Judge McAuliffe notes that Moore had to remove her shirt anyway to shower, but this begs the question of whether she had to show her chest to Calderon. Judge McAuliffe also states that upholding a claim here would "trivialize" the Eighth Amendment, citing *Somers v. Thurman,* 109 F.3d 614, 624 (9th Cir. 1997); and *Osborn v. Wishchuen*, 2020 WL 4697990, at *2 (D. Ariz. Aug. 13, 2020). In *Somers,* the prisoner did not know if officers who were laughing while he showered were pointing at him or intending to humiliate him or even why they were laughing. *Osborn* is discussed in this issue of *Law Notes*, under "Arizona." It should have been accepted on screening the pleadings that no apparent penological interest existed for Calderon's comments and that, having shown an intent to make Moore's life "hell," there was an intent to humiliate or degrade. The same thing, it seems, should have applied to Moore's claim of retaliation for her grievance. Judge McAuliffe found inmate grievances to be protected First Amendment activity under *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). She finds, however that: (1) the allegation of retaliation was conclusory; and (2) no unconstitutional conduct occurred. The first point is contradicted by the explicit nature of the threat (to make Moore's life "hell"; "two can play that game"). The second point misapprehends retaliation law. The behavior that constitutes retaliation need not itself be unconstitutional or illegal; it is enough if it "threatens to inhibit the exercise of the protected right." *Crawford-El v. Britton,* 523 U.S. 574, 588 n.10 (1998); *see also Austin v. Terhune,* 367 F.3d 1167 (9th Cir. 2004), which Judge McAulliffe cites here for the proposition that Calderon's behavior was not actionable since the officer who exposed himself to the inmate in *Austin* did not violate the Eighth Amendment. *Id*. at 1172. Earlier, in *Austin,* however, the Ninth Circuit reversed the district judge's summary judgment for the officer on retaliation, since he filed misbehavior charges against the plaintiff after the plaintiff filed a grievance about the incident. *Id*. at 1170-71. This is essentially the retaliation claim here. Lawyers familiar with civil rights laws know that a retaliation claim can survive even if the underlying cause of action is dismissed. In the past, some Eastern District of California magistrate judges were themselves directing dismissal, which (in this writer's view) exceeded their authority under Article III. Here, having already granted leave to amend once, Judge McAuliffe issues recommendations that the case be assigned a district judge who should dismiss.

INDIANA – Plaintiff Christopher Leathers had a job shining shoes in an Indiana prison, when he says Sgt. Neil Johnson propositioned him for oral sex. This happened more than once, with Johnson gesturing toward his crotch and rubbing himself. When Leathers repeatedly refused, Johnson allegedly cause him to be falsely charged with misconduct and to lose his prison job. Leathers said he was "scarred" by the events, had to seek mental health services, and was ridiculed by other inmates. In *Leathers v. Johnson,* 2020 U.S. Dist. LEXIS 149470 (N.D. Ind., August 19, 2020), Chief U.S. District Judge Jon E. DeGuilio denied defendant Johnson's motions for summary judgment and for qualified immunity, filed by the Indiana Attorney General. Judge DeGuilio rejects the defendant's argument that verbal abuse alone cannot constitute an Eighth Amendment violation, citing *Lisle v. Welborn*, 933 F.3d 705 (7th Cir. 2019), and *Beal v. Foster*, 803 F.3d 356 (7th Cir. 2015). Taking the cases in reverse order, *Beal* involved an officer verbally coercing an inmate to have sex with another inmate. The Seventh Circuit ruled: "The proposition that verbal harassment cannot amount to cruel and unusual punishment is incorrect . . . . [A] categorical distinction between verbal and physical harassment is arbitrary. In short, the alleged pain sufficient to constitute cruel punishment may be physical or psychological." The *Beal* court also noted that the officer's behavior may have increased the likelihood of assault on the inmate victim. 803 F.3d at 357-58. *Lisle* involved an inmate in a mental health unit after a suicide attempt and a nurse egging him to "do a better job next time." The court found the comments actionable, because the nurse "taunted and encouraged an inmate known to be suicidal and in the midst of a mental health crisis to take his own life." 933 F.3d at 718. The comments here are within this line of cases, and the sergeant's act of touching himself went beyond mere comments, allegedly causing Leathers to be ridiculed by others. On qualified immunity, Judge DeGuilio found the right to be free of such harassment to be clearly established; and no reasonable corrections officer could believe the

conduct was justified. Judge DeGuilio does not discuss the sexual orientation of either party – and that should be irrelevant. Indiana criminal law makes sexual conduct between officers and inmates a felony, and consent is not a defense. Ind. Code § 35-44.1-3-10. Leathers is represented by Christopher C. Myers & Associates (Fort Wayne).

INDIANA – HIV-positive inmate John Doe, proceeding *pro se* and by pseudonym, sues a contractual medical provider (Wexford) and three nurses for violation of his privacy for disclosing his HIV status in *Doe v. Wexford of Ind. Llc*, 2020 U.S. Dist. LEXIS 139053 (S.D. Ind., Aug. 4, 2020). U.S. District Judge Tanya Walton Pratt allows his case to proceed on Eighth and Fourteen Amendment claims. The claim arose when Doe was in the medication line, and his name and diagnosis appeared on a checklist that was in full view of other inmates. He objected that this list revealed his HIV status to other inmates, and he filed a grievance. This sequence was repeated with two other nurses in the pill line. Judge Pratt found the repetition and responses saying the list was used to make the line "go faster" were sufficient to state a policy and pattern claim against Wexford. Doe said that revealing his HIV diagnosis resulted in "taunting and complete ostracism from other inmates, causing a substantial risk for his harm, severe embarrassment, humiliation, mental anguish and psychological and emotional distress." Other inmates "shunned" him and told him "not to launder his clothes with [theirs]." Judge Pratt found that the Seventh Circuit had no case directly on point but that in 1995, it said in *dicta* that disseminating "humiliating but penologically irrelevant details of a prisoner's medical history" might constitute cruel and unusual punishment. *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995). Since then, other court of appeals decisions have recognized this claim. *See Moore v. Prevo*, 379 Fed. App'x 425, 427, 2010 WL 1849208 (6th Cir. May 6, 2010); *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001); *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999); *see also*, *Simpson v. Joseph*, 2007 WL 433097, *13 (E.D. Wis. 2007) (*Anderson* did not foreclose a claim under the Fourteenth Amendment). On screening, Doe's claims may proceed under the cruel and unusual punishment clause of the Eighth Amendment and under the privacy protections under the substantive due process clause of the Fourteenth Amendment. Wexford is ordered to provide the home address of any defendant nurse who does not accept service by mail.

MASSACHUSETTS – Ronald Whitmore, a state prisoner with HIV, seeks release to home confinement in *Commonwealth v. Whitmore*, 2020 Mass. App. Unpub. LEXIS 745 (Mass. App., Aug.6, 2020). Appeals Justices James Lemire, Sabita Singh, and John Englander affirmed denial of relief in an unpublished opinion. This case is primarily of interest to Massachusetts practitioners. The court ruled that Whitmore's relief is more properly framed as a conditions of confinement case and that it had no authority to release him in a motion attacking his conviction. The court then discusses three cases from the Supreme Judicial Court of Massachusetts, the state's highest court. This report provides citation links to them and discusses them briefly. In *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1)*, 484 Mass. 431, 450, 142 N.E.3d 525 (2020), the court ruled that it had "limited" authority to release already convicted prisoners due to COVID-19. It does have "extraordinary superintendence" power over those awaiting trial, and it ordered a reduction in jail population, with a master appointed to oversee the adjustment and consideration for release (on a rebuttal presumption) of those being held in default of set bail. Id. at 435. Later, in *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 2)*, 484 Mass. 1029, 1032, 143 N.E.3d 408 (2020), the court directed the reporting to the master (with identifiers) of testing, positive results, and prisoners eligible for early parole consideration. Finally, in a separate civil rights injunctive case, *Foster v. Commissioner of Correction (No. 1)*, 484 Mass. 698, 716-724, 146 N.E.3d 372 (2020), a divided court affirmed the denial of a preliminary injunction on mitigation of COVID-19 without prejudice. It directed the superior court to make determinations on class certification (including a sub-class of medically vulnerable) and to expedite a hearing on mitigation measures to be taken for COVID-19 in Massachusetts institutions, including those holding civilly committed inmates. Id. at 733-4. These cases show the potential for state court litigation on COVID-19.

MICHIGAN – Federal prisoner Alxleotold Gordon received a 30-year sentence in 2018 for distribution of heroin and fentanyl with death resulting and firearms offenses. In *United States v. Gordon*, 2020 U.S. Dist. LEXIS 144850 (E.D. Mich., August 12, 2020), he sought compassionate release due to HIV and risk of COVID-19. Senior U.S. District Judge Robert H. Cleland denied the application without a hearing. He found that Gordon's HIV was controlled and did not present a compelling reason for release due to risk of COVID-19, since he is "asymptomatic (never had an HIV-related illness)." Judge Cleland's opinion continues with analysis of the discretionary factors under sentencing per 18 U.S.C. § 3553(a). Practitioners in the Sixth Circuit may wish to review this part of the opinion for discussion of the variations of district courts applying such factors after the First Step and CARES Acts and the absence of controlling circuit precedent. Judge Cleland seemed

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to have been most influenced by the seriousness of Gordon's offenses, his recidivism, and his continuing danger to the community after serving only two years of a 30-year sentence. There is some unfortunate judicial notice – *dicta*. Judge Cleland finds that the Bureau of Prisons has "taken actions to mitigate" COVID-19, citing to their policies. (He is not able on this record to compare the "policies" with the facts on the ground.) He says that only one inmate of over 1100 prisoners at FCI Pekin has tested positive (as of August 7, 2020). [Note: As of August 22, 2020, the BOP website listed 8 positive inmate cases, with 7 tests "pending." Perhaps more importantly, BOP has tested only 25% of the inmates at FCI Pekin. There are nearly 1000 cases in Tazewell County, Illinois, where FCI Pekin sits, according to the Illinois Health Department.] Judge Cleland continues: "Defendant is from Detroit. If he is released, he may leave an institution with virtually no cases of COVID-19, with extensive precautions to mitigate the spread of the disease, and with regular monitoring and checkups, only to enter a society with tens of thousands of confirmed cases, potentially without access to quality healthcare . . . . The court does not find a consideration of Defendant's health and wellness to weigh in favor of immediate release." It would have been enough to say that neither Gordon's health nor his record justifies compassionate release. The comments on what the BOP is (or is not) doing are not based on fact-finding, and the remarks about Detroit hints of urban stereotype. Judge Cleland, appointed by President George W. Bush, is from Port Huron, in the "Thumb" of Michigan. Port Huron is the site of the only documented lynching in Michigan (in 1889). On the other end of politics, it is also known for the Port Huron Statement, the manifesto of the Students for a Democratic Society.

NEVADA – U.S. Magistrate Judge William G. Cobb grants *pro se* transgender inmate Rachel Whitted leave to file a fourth amended complaint because her original pleading was followed by three "piecemeal" filings, in *Whitted v. Schendgosk*, 2020 U.S. Dist. LEXIS 142204 (D. Nev., Aug. 7, 2020). Judge Cobb reminded Whitted that she must file a new complaint that is whole in itself, since it will replace all other pleadings. According to PACER, she filed a fourth complaint on August 11th, which raises Eighth Amendment medical claims (hormones and surgery), as well as Equal Protection claims. Practitioners may wish to take note of Judge Cobb's dicta: plaintiffs filing amended complaints do not need to replead claims that are dismissed in previous complaints to preserve them for appeal. This exception to the general rule that amended complaints supersede earlier ones was adopted by the Ninth Circuit in *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*). It seems to be the general exception, as it has been applied in the Second, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

NEW JERSEY – HIV-positive federal defendant Eric Esmond loses his application for "compassionate release" under 18 U.S.C. § 3582(c)(1)(A) in *United States v. Esmond,* 2020 U.S. Dist. LEXIS 152114 (D.N.J., Aug. 21, 2020). U.S. District Judge Susan D. Wigenton, while "sympathetic," finds that Esmond fails to show "extraordinary and compelling" reasons under the First Step Act. Judge Wigenton relies primarily on the Third Circuit decision in *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020), which held that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." Esmond is due to be released in January of 2021, his HIV is stable (with t-cell improvement), and he has no opportunistic illness. Judge Wigenton notes that she already departed downward 40% from the minimum sentence guidelines when imposing sentence in 2018 – in large part because of Esmond's HIV. She quotes the Centers for Disease Control: "[P]eople with HIV who are on effective HIV treatment have the same risk for COVID-19 as people who do not have HIV." Judge Wigenton includes citations of similar cases from Georgia, New York, and West Virginia. The dismissal is without prejudice in the event Esmond's HIV worsens. Esmond was represented by the Office of the Federal Public Defender (Newark).

NEW YORK – U.S. District Judge Paul A. Engelmayer grants prisoner Christopher Simon's request for compassionate release under 18 U.S.C. § 3582(c) in *United States v. Simon,* 2020 WL 5077390 (S.D.N.Y., Aug. 27, 2020). Simon had served more than half of his 66-month sentence and is eligible for release in 2022. He is 72 years old and has HIV, chronic obstructive pulmonary disorder, Hepatitis C, prostate cancer, and hypertension. Judge Engelmayer finds that Simon's age and medical conditions "distinguish him from the vast majority of defendants who have sought compassionate release before this Court." Noting that the court had already given Simon almost a 50% downward departure from sentencing guidelines, the Government opposed his release, citing risk of recidivism and danger to the community – factors to be considered for compassionate release under 18 U.S.C. § 3553(a) – and noting Simon's long criminal conviction history. Judge Engelmayer finds that Simon's crimes were mostly those of a "street-level dealer" to feed his own addiction, with no recent history of violence, and that his "sharp physical decline reduced the risk" of continued drug trafficking. He writes: "[G]iven his unusual vulnerability to COVID-19 even within the universe of individuals

at heightened risk," factors favoring release "take on outsize importance." In ordering release, however, Judge Engelmayer is "underwhelmed by Simon's proposed release plan—to stay with a close friend for several months before, hopefully, enrolling in and receiving support from New York City's HIV/AIDS Services Administration." This is "considerably less rigorous early supervision than the halfway-house plan ordered by the Court at sentencing." He therefore orders a plan to be devised jointly with the defense and the Government's Probation Department by mid-September that affords a level of supervision consistent with a half-way house and "readily available" drug treatment. The opinion has several string citations that compare and contrast other cases from the Southern District of New York that is omitted here but may be useful to advocates in the S.D.N.Y.

NORTH CAROLINA – *Pro se* transgender inmate Jennifer Ann Jasmaine lost her case for private showering in *Jasmaine v. Engrime*, 2020 U.S. Dist. LEXIS 139230 (W.D. N.C., Aug. 5, 2020). When she was in general population, she had an administrative pass to shower alone in the reception area, but she was moved to restrictive housing, where she no longer had access to the reception area. She sued to restore her private shower pass. Chief U.S. District Judge Martin Reidinger ruled that Jasmaine failed to exhaust her administrative remedies by appealing her shower grievance through all three steps. Covering their bases, the NCDOC also moved for summary judgment, attaching an affidavit from a central office Prison Rape Elimination Act [PREA] officer stating that he inspected the shower area in Jasmaine's restrictive confinement. There were individual partitioned showers, with opaque doors covering the bather from knees to upper chest. He also said that inmates could not see into the stalls from their cells. For those who might be inclined to argue that this inspection by the PREA official from central office sufficed to exhaust, Judge Reidinger also held (alternatively) that the conditions, as described, did not violate any constitutional privacy rights. No jury question was presented on privacy. The shower was "sufficiently private" on these facts and presented no substantial risk to the inmate under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). While an exhaustion flaw would ordinarily lead to a dismissal without prejudice, here the dismissal is with prejudice, because defendants are also entitled to summary judgment on the merits.

PENNSYLVANIA –Transgender prisoner Alexis Welter sued *pro se* primarily to obtain body hair removal products for her transition. Her case was dismissed with prejudice by the Commonwealth Court of Pennsylvania in *Welter v. Correct Care Solutions,* 2020 WL 5016763 (Pa. Comm., Aug. 25, 2020). The unpublished *per curiam* Order does not indicate the judges on the panel or whether Welter was represented. The Commonwealth Court is an intermediate court in Pennsylvania that also has original jurisdiction over petitions against state government agencies. Its decisions are subject to discretionary review by the Pennsylvania Supreme Court. Respondents moved to dismiss or, in the alternative, to send the case back to the Court of Common Pleas, the trial court where Welter filed it. Welter receives hormones for gender dysphoria, but prison officials denied her request for facial hair removal. She alleges that facial hair growth causes her severe distress and aggravates her dysphoria. The defendants' "Committee" said her "medical needs are being met." The court found that her dysphoria was "serious" but that her need for facial hair removal was not. The court wrote: "It is extremely difficult for an inmate to make out an Eighth Amendment claim when the inmate is receiving some type of medically acceptable treatment for GD," citing *Campbell v. Kallas*, 936 F.3d 536, 547-49 (7th Cir. 2019); *Gibson v. Collier*, 920 F.3d 212, 216-28 (5th Cir. 2019); *Lamb v. Norwood*, 899 F.3d 1159, 161-63 (10th Cir. 2018); and *Kosilek v. Spencer*, 774 F.3d 63, 76-78, 87-89, 96 (1st Cir. 2014) (*en banc*). None of these cases say that, and none dismissed on the pleadings. For example, the prisoner patient was receiving hair removal treatment in *Campbell, Gibson, and Kosilek,* all of which dealt with gender confirmation surgery, not intermediate transition steps. These cases (and *Lamb*) are discussed in the article in this issue of *Law Notes* on the respondent's brief opposing *certiorari* in the prisoner's transgender surgery case, *Idaho DOC v. Edmo*. Facial hair removal has been found to be an integral part of transition in individual cases. *Hicklin v. Precynthe,* 2018 U.S. Dist. LEXIS 2151566, 2018 WL 806764 (E.D.Mo., Febr. 9, 2018); *Sonyea v. Spencer,* 851 F.Supp.2d 228, 237-39 (D. Mass. 2012); *Konitzer v. Frank,* 847 F.Supp.2d 847, 886 (E.D.Wisc. 2010), which observed: "hair-related items may appear to be superficial or not medical but in fact play a prominent role in the treatment of [GD]." The court writes here that "Welter has not alleged that Respondents had a blanket policy against utilizing permanent facial hair removal" or that they "did not consider the possibility of such treatment." Nevertheless, they found no point in remanding the case to the trial court, because the pleading defects are "incurable." This seems obviously wrong – and there also seems to be no appeal.

WEST VIRGINIA – U.S. District Judge Robert C. Chambers grants HIV-positive plaintiff Ronnie Lee Hammonds' motion to amend his complaint after the deadline in the Scheduling Order in *Hammonds v.*

Wolfe, 2020 U.S. Dist. LEXIS 144768 (S.D. W.Va., Aug. 12, 2020). Hammonds seeks to substitute two defendants previously named as "John Does" and to add a claim that denial of HIV treatment caused him "to be resistant to antiretroviral medications." The named defendants are employees of PrimeCare Medical of West Virginia, Inc., which Hammonds also seeks to name as a defendant on this claim. Although defendants' names appeared in the medical records during the amendment period, Hammond successfully argued that their role was not clear until analysis was conducted on some 1600 pages of documents. Discovery in general (and the Scheduling Order regulating it) had already been adjusted twice for delays due to COVID-19. Judge Chambers applied F.R.C.P. 15(a), saying that leave to amend should be "freely granted" when justice requires, and F.R.C.P. 16(b), requiring "good cause" to amend a Scheduling Order. Judge Chambers found that the primary consideration under Rule 16(b) is the diligence of the moving party, citing *Montgomery v. Anne Arundel County*, 182 Fed. Appx. 156, 162 (4th Cir. 2006). (Hammonds' motion was unopposed.) Ultimately the matter is within the court's discretion under *Foman v. Davis,* 371 U.S. 178, 182 (1962). Judge Chambers found that justice and lack of prejudice to the defendants tipped in favor of amending the Scheduling Order and allowing the amended complaint. Hammonds is represented by Mountain State Justice (Morgantown) and Stroebel & Johnson (Charleston).

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS – The Office for Civil Rights has enforcement responsibility for Title IX of the Education Amendments of 1972, 20 U.S.C. Sections 1681 *et seq*., which forbids schools that receive federal funds from discriminating in educational opportunities because of sex. Because the operative language of Title IX is in relevant respects the same as the operative language regarding discrimination "because of sex" under Title VII of the Civil Rights Act of 1964, OCR and the federal courts have typically followed Title VII precedents in interpreting the scope of Title IX. On August 31, OCR made public a letter it had sent to a lesbian student who was complaining about sexual orientation discrimination by her school. The letter was redacted to preserve the anonymity of the complainant but is identified as OCR Complaint NO. 04-20-1409. It informs the complainant that OCR will investigate her complaint. This marks a change in OCR policy under the Trump Administration. Shortly after Trump and Education Secretary Betsy DeVos took office in 2017, they reversed the Obama Administration's policy of enforcing Title IX in response the complaints of sexual orientation or gender identity discrimination. But now OCR concedes that although it is not technically bound in interpreting Title IX by the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*, and "the U.S. Supreme Court has recognized the significant differences between workplaces and schools," nonetheless, "the Bostock decision guides OCR's understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex." OCR uses the term "biological sex" noting that Justice Gorsuch's opinion in *Bostock* "is based on the express assumption that sex is defined by reference to biological sex." And, in a footnote, OCR signals that it is not backing away from its position that the existing regulations allowing schools to maintain separate facilities for males and females also allows them to afford access to such facilities based on the "biological sex" of the individual. It is not retreating from its position that transgender students can be required to use gender-neutral facilities rather than facilities consistent with their gender identity, or its position of support for cisgender girls in Connecticut who are challenging the policy of allowing transgender girls to compete in athletics with cisgender girls. OCR solidified this point by also releasing a revision of the letter it had submitted to the court in that litigation, which it has revised to take account of the *Bostock* decision. To the extent that OCR had been arguing that Title IX does not apply to gender identity discrimination, it has retreated, but it still argues that "biological sex" should be the determinant for eligibility in sports competition.

NATIONAL LABOR RELATIONS BOARD – The union representing professional employees of the NLRB has brought to the attention of the House Oversight Committee that the Board's Republican majority is seeking a change to the collective bargaining agreement to remove protection against discrimination for LGBTQ employees, and to foreclose use of the grievance procedure under the agreement for any discrimination claims, thus requiring employees with such claims to bring them to the Merit Systems Protection Board or the Equal Employment Opportunity Commission. Both of those agencies have severe case backlogs of federal employee discrimination claims. By contrast, of course, grievances filed with the union under the collective bargaining agreement can be dealt with expeditiously through grievance arbitration. The Oversight subcommittee with jurisdiction over NLRB has sent a letter of concern to the agency, questioning why, especially in light of the Bostock ruling, the agency is pursuing this course. (The agency's

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demand to change the agreement predates that opinion.) Unfortunately, the Republican majority on the Board will continue to hold sway for another year or two, even if Trump is defeated for re-election, since Board members have five-year terms and the President gets to make one appointment per year. At present, three of the five members are Trump appointees, there is one Democrat recently nominated to fill a vacancy, and another vacancy for which no nomination is pending. The Act specifies that no more than three of the five Board members may be from the same party.

ALASKA – The city of Anchorage has joined the growing list of jurisdictions to legislate against the performance of conversion therapy on minors. The City Council vote on Aug. 26 was 9-2 for a measure that applies to license health care professionals but not to clergy or parents. According to a report in *Advocate.com* on Aug. 27, Anchorage is the first jurisdiction in Alaska to take this step. Its action makes Alaska the 40th state in which either the state or some jurisdiction within the state has enacted a ban on conversion therapy.

CALIFORNIA – The legislature passed several bills late in the session that were awaiting the governor's signature as of the end of August. One mandates the state collection of certain LGBTQ health data. Another addresses appropriate housing in correctional institutions for transgender detainees and inmates. The third is intended to end discrimination against LGBTQ+ young people on the sex offender registry. Equality California continues the mission of getting the California legislature to extend the state's extraordinary record of enacting LGBTQ-affirmative legislation.

KANSAS – The Kansas Human Rights Commission announced on August 21 that in response to the Bostock decision by the Supreme Court it will now accept for investigation claims of sexual orientation and gender identity discrimination, in line with its authority under the state's anti-discrimination statute to deal with sex discrimination claims in employment, housing and public accommodations. *Associated Press*, Aug. 22

MICHIGAN – The City Council of Holland, Michigan, voted 8-1 to approve an amendment to the city's anti-discrimination ordinance adding "sexual orientation" and "gender identity or expression" as prohibited grounds for discrimination. The state of Michigan does not expressly include those grounds in its state anti-discrimination law, although it is possible that state courts will follow the lead of the U.S. Supreme Court's Bostock decision and find that these grounds are part of the prohibition on discrimination because of sex.

NEBRASKA – The *Omaha World-Herald* report on August 12 that the state's Equal Opportunity Commission announced that it would follow the Supreme Court's interpretation of the phrase "because of sex" from the Bostock decision to interpret Nebraska's anti-discrimination law. Nebraska is one of the majority of states whose laws do not expressly protect LGBTQ people from discrimination because of their sexual orientation or gender identity. The agency said it would start investigating housing discrimination cases as well as employment cases, because the state law covers both categories by reference to the same list of forbidden discriminatory grounds.

UTAH – After public protests about privately-funded LGBT Pride banners hung on city-owned light and street posts for Pride Month, the City Council adopted an ordinance limiting banners that can be so hung to those sponsored by the city or the Chamber of Commerce, and prohibiting any banners of a political nature. While it was clear that some people objected to what appeared to be official city-promotion of LGBT rights, others argued that allowing the Pride banners would impose an obligation to allow other banners that might be controversial promoting opposing views. *Advocate.com*, Aug. 21.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – Queensland became the first state in Australia to ban conversion therapy through legislation by a vote of the legislature on August 13, according to a report by Thompson Reuters Foundation, which said that "healthcare professionals could face up to 18 months in jail for attempting to change or suppress a person's sexual orientation or gender identity using practices such as aversion therapy, hypnotherapy and psychoanalysis." * * * Queensland's action was followed at the end of August by the Australian Capital Territory, which legislation to ban aversion therapy as well. What distinguishes these Australian measures from most conversion therapy measures in the U.S. is that they do not apply only to conversion therapy on minors. *Qnews.au.com*, reporting on this development on August 28, noted that testimony about the continuing suffering of adult conversion therapy survivors moved even religious legislators to support the measure.

CAYMAN ISLANDS – On August 28, Governor Martyn Roper assented to the Civil Partnership Law. Together with amendments to several other laws, the Civil Partnership Law makes it

possible for same-sex couples to enter into legally-sanctioned partnerships that will bring many of the legal rights and responsibilities of marriage. *CaymanNewsService.com*. LGBT rights advocates on the islands are not satisfied with this "separate and unequal" solution, and anticipate the appeal to London in their marriage case, which will be heard next year.

CHIPPEWA TRIBE – The Turtle Mountain Band of Chippewa tribal council voted on August to amend the tribe's code to effectively broaden the definition of marriage to encompass same-sex couples. According to journalist Rex Wockner, who is maintaining a count on his blog, this brings the number of Native American tribes in the U.S. that have affirmatively voted to recognize same-sex marriages to 29.

DENMARK – The International Lesbian and Gay Association reports: "On 22 August, the Danish government released a package of LGBTI legislative promises that, if adopted, will be a leap forward in the protection of the rights of LGBTI people in Denmark. These include removal of the waiting limit and age restrictions on legal gender recognition, hate crimes protections on the bases of gender identity, gender expression, and sex characteristics, recognition of trans parents, and access to an X marker on passports." *ILGA-Europe Rainbow Digest*, Aug. 2020.

PUBLICATIONS NOTED

1. Anderson, Adrienne, Michelle Foster, Helene Lambert and Jane McAdam, A Well-Founded Fear of Being Persecuted . . . but When?, 42 Sydney L. Rev. 155 (June 2020).
2. Andreano, Jacquie, The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims, 108 Calif. L. Rev. 1047 (June 2020).
3. Barry, Kevin M., Challenging Transition-Related Care Exclusions Through Disability Rights Law, 23 U. D.C. L. Rev. 97 (Spring 2020).
4. Cahill, Courtney Megan, The New Maternity, 133 Harv. L. Rev. 2221 (May 2020) (A portion of the analysis in this article may be outmoded by the Bostock ruling on the question whether discrimination because of gender identity is sex discrimination, but otherwise the author has much to say about how new concepts of maternity may affect transgender rights).
5. Carpenter, Dale, LGBT Equality, Religious Liberty, and Masterpiece Cakeshop: Issues to Consider, 83 Tex. B.J. 464 (July/August 2020).
6. Di Wang and Sida Liua, Performing Artivism: Feminists, Lawyers, and Online Legal Mobilization in China, 45 Law & Soc. Inquiry 678 (Aug. 2020).
7. Gallagher, Robina, Redefining "CEDAW" to Include LGBT Rights: Incorporation Prohibitions Against the Discrimination of Sexual Orientation and Gender Identity, 29 S. Cal. Interdisc. L.J. 637 (Summer 2020).
8. Hasen, Richard L., The Supreme Court's Pro-Partisan Turn, 109 Geo. L.J. Online 50 (Summer 2020) (note particularly the author's discussion of "animus laundering," i.e., the Court allowing Congress or the Executive Branch to "cure" an animus problem by reenacting unconstitutional measures slightly altered or with different justifying arguments, as the government appears to be doing in the transgender military ban cases).
9. Hornby, Gerard A., Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty, 58 Duq. L. Rev. 377 (Summer 2020).
10. Jones, Joshua Aaron, Title IX's Substantive Equity Mandate for Transgender Persons in American Law Schools: A Call for Disaggregated SOGI Datat, 44 N.Y.U. Rev. L. & Soc. Change 399 (2020).
11. Kellner, Matt, Queer and Unusual: Capital Punishment, LGBTQ+ Identity, and the Constitutional Path Forward, 29 Tul. J. L. & Sexuality 1 (2020).
12. Labrie, Maia, Two Legal Mothers: Cementing Parental Rights for Lesbian Parents in Colorado, 91 U. Colo. L. Rev. 1247 (Fall 2020).
13. LaPiana, William P., Married Is As Married Does(?), 45 ACTEC L.J. 271 (Spring/Summer, 2020) (Comment on Raymond C. O'Brien, Marital Versus Nonmarital Entitlements, 45 ACTEC L.J. 79, 100 n.114 (2020).).
14. Leckey, Robert, 'Repugnant': Homosexuality and Criminal Family Law, 70 U. Toronto L.J. 225 (Summer 2020).
15. Lund, Nelson, Unleashed and Unbound: Living Textualism in *Bostock v. Clayton County*, 21 Federalist Soc'y Rev. 158 (Aug. 6, 2020) (argues that the version of "living textualism" embraced by the Supreme Court in Bostock could be used to strike down all voluntary affirmative action programs).
16. Mize, Macy, Congratulations, You're Having Twins! But Only One is a U.S. Citizen: How Constitutional Avoidance Should be Used to Avoid Discrimination

Against Same-Sex Couples Through the Denial of Birthright Citizenship, 88 Geo. Wash. L. Rev. 1014 (July 2020).
17. Momjian, Mark A., and Catherine M. McFadden, The 40th Anniversary of the Pennsylvania Divorce Code of 1980, 91 Pa. B.A. Q. 55 (July 2020) (noting the history of marriage equality in Pennsylvania and its impact on application of the Divorce Code).
18. Rehaag, Sean, and Hilary Evans Cameron, Experimenting with Credibility in Refugee Adjudication: "Gaydar," 9:1 Canadian Journal of Human Rights 1 (2020).
19. Singer, Samuel, Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice, 35 Canadian J. L. & Soc. No. 2 (2020).
20. Steiger, Russell L., and P.J. Henry, LGBT Workplace Protections as an Extension of the Protected Class Framework, 44 Law & Hum. Behav. 251 (Aug. 2020).
21. Tritt, Lee-ford, Litigation Blues for Red-State Trusts: Judicial Construction Issues for Wills and Trusts, 72 Fla. L. Rev. 841(July 2020).
22. Vlahoplus, John, Bostock, Zarda, and R.G & G.R. Harris Funeral Homes: Affirming Equality and Challenging Textualism, Geo. Wash. L. Rev. On the Docket, June 18, 2020.
23. Walter, Nicholas J., You May Kiss the AI: An Analysis of Whether Rationales for Legalizing Some Nontraditional Marriages also Justify Legalizing Human-Robot Marriage, 60 Jurimetrics J. 353 (Spring 2020) (Maybe that guy who sued to marry his laptop was not so far-out, after all?).

LETTER TO LAW NOTES

To the Editor:

Last month, *Law Notes* reported that the "Mattis Policy" on transgender military service asserted that "a diagnosis of gender dysphoria is prerequisite to transitioning under professional medical care" (August 2020, page 20). The Catch-22 is that the same policy also provides that anyone with that diagnosis is "unfit" for service. My reading of the Standards of Care of the World Professional Association for Transgender Health leads me to believe that WPATH tried very hard not to say that – to make room for the relatively well-adjusted transgender person in transition and for the "genderqueer" individuals who eschew binary choices and see gender "euphoria," not "dysphoria," in the way their lives are unfolding. Many transgender people have gender dysphoria, but what they have in common when diagnosed with dysphoria is the element of severe depression/stress, which is an essential element of the diagnosis of the "disorder" under the DSM-V. (The Fifth Revision of the Diagnostic and Statistical Manual is considered enlightened by most psychologists in its focus on symptoms of transgender people and not on their status – but it is also regarded as a waystation in the evolution of thinking on the subject.) To be sure, in my writing about Corrections, I have not yet encountered a transgender prisoner who has sued who did not allege gender dysphoria. The disorder is certainly fostered by the rules that go with imprisonment. This is where the debate usually falls with lawsuits about military service, as well. In fact, insurance companies demand the diagnosis to pay for transition. I just want to ring a warning bell – that this, too, may become outdated. I remember *Hardwick v. Bowers*, 478 U.S. 186 (1986). I remember Stonewall. We have come a long way – so let's continue to shout out when Government argues that transition = disorder and reject the notion that a person cannot "transition" without being "disordered"– because it may be the most "un-disordered" thing someone has ever done. – *William J. Rold*

EDITOR'S NOTES

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