

L G B T
LAW NOTES

August 2019



**Adoption Agency Asks SCOTUS
for License to Discriminate**

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Notes Podcast are Publications of the
LGBT Bar Association Foundation
of New York (www.lgbtbarny.org)

ISSN 8755-9021

Cover photo by J. Fusco
for Visit Philadelphia

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Catholic Agency Seeks Supreme Court Review of Exclusion from Philadelphia Foster Care Program

By Arthur S. Leonard

Catholic Social Services (CSS), a religious foster care agency operated by the Archdiocese of Philadelphia, has asked the U.S. Supreme Court to overrule a decision by the U.S. Court of Appeals for the 3rd Circuit, which on April 22 rejected CSS's claim that it enjoys a constitutional religious freedom right to continue functioning as a foster care agency by contract with the City of Philadelphia while maintaining a policy that it will not provide its services to married same-sex couples seeking to be foster parents. The decision below is *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd Cir. 2019).

CSS and several of its clients sued the City when the agency was told that if it would not drop its policy, it would be disqualified from certifying potential foster parents whom it deemed qualified to the Family Court for foster care placements and its contract with the City would not be renewed. CSS insists that the City's Fair Practices Ordinance, which prohibits discrimination because of sexual orientation by public accommodations, does not apply to it, and that it is entitled under the 1st Amendment's Free Exercise Clause to maintain its religiously-based policy without forfeiting its longstanding role within the City's foster care system.

The Petition filed with the Clerk of the Court on July 22 is one of a small stream of petitions the Court has received in the aftermath of its June 26, 2015, marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584, in which the Court held that same-sex couples have a right to marry and have their marriages recognized by the states under the 14th Amendment's Due Process and Equal Protection Clauses. Dissenters in that 5-4 case predicted that the ruling would lead to clashes based on religious objections to same-sex marriage. Most of those cases have

involved small businesses that refuse to provide their goods or services for same-sex weddings, such as the *Masterpiece Cakeshop* decision from last spring, 138 S. Ct. 1719 (2018).

This new petition is one of many that may end up at the Court as a result of clashes between local governments that ban sexual orientation discrimination and government contractors who insist that they must discriminate against same-sex couples for religious reasons. Catholic foster care and adoption services have actually closed down in several cities rather than agree to drop their policies against providing services to same-sex couples. CSS argues that it will suffer the same fate, since the services it provides – screening applicants through home studies, assisting in matching children with foster parents, and providing support financially and logistically to its foster families through funding provided by the City – can only legally be provided by an agency that has a contract with the City, and that even as its current contract plays out, the refusal of the City to accept any more of its referrals has resulted in its active roster of foster placements dropping by half in a short period of time, requiring laying off part of its staff.

Desperate to keep the program running, CSS went to federal district court seeking preliminary injunctive relief while the case is litigated, but it was turned down at every stage. Last summer, when the 3rd Circuit denied a motion to overturn the district court's denial of preliminary relief, CSS applied to the Supreme Court for "injunctive relief pending appeal," which was denied on August 30, with the Court noting that Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch would have granted the Application. See 139 S. Ct. 49 (2018). That at least three justices would

have provided interim relief suggests that CSS's Petition for review may be granted, since the Court grants review on the vote of four justices, and Brett Kavanaugh, who was not on the Court last August, might provide the fourth vote.

According to its Petition, CSS dates from 1917, when the City of Philadelphia was not even involved in screening and licensing foster parents. CSS claims that from 1917 until the start of this lawsuit, it had never been approached by a same-sex couple seeking to be certified as prospective foster parents. CSS argues that as there are thirty different agencies in Philadelphia with City contract to provide this service, same-sex couples seeking to be foster parents have numerous alternatives and if any were to approach CSS, they would be promptly referred to another agency. CSS argues that referrals of applicants among agencies are a common and frequent practice, not a sign of discrimination.

CSS has three different arguments seeking to attract the Court's attention. One is that it was singled out due to official hostility to its religiously-motivated policy and that the City's introduction of a requirement that foster agencies affirmatively agree to provide services to same-sex couples was inappropriately adopted specifically to target CSS. Another is that the 3rd Circuit misapplied Supreme Court precedents to find that the City's policy was a "neutral law of general application" under the 1990 Supreme Court precedent of *Employment Division v. Smith*, 494 U.S. 872 (1990), and thus not subject to serious constitutional challenge. Finally, CSS argues, the *Smith* precedent has given rise to confusion and disagreement among the lower federal courts and should be reconsidered by the Supreme Court.

Opponents of same-sex marriage have been urging the Court to reconsider *Smith*, which was a controversial decision from the outset. In *Smith*, the Supreme Court rejected a challenge to the Oregon Unemployment System's refusal to provide benefits to an employee who was discharged for flunking a drug test. The employee, a native American, had used peyote in a religious ceremony, and claimed the denial violated his 1st Amendment rights. The Court disagreed, in an opinion by Justice Antonin Scalia, holding that state laws that are neutral regarding religion and of general application could be enforced even though they incidentally burdened somebody's religious practices. Last year, Justice Neil Gorsuch's opinion, concurring in part and dissenting in part in *Masterpiece Cakeshop*, suggested reconsideration of *Smith*, and since the *Masterpiece* ruling, other Petitions have asked the Court to reconsider *Smith*, including the "Sweetcakes by Melissa" wedding cake case from Oregon. So far, the Court has not committed itself to such reconsideration. In the *Sweetcakes* case, it vacated an Oregon appellate ruling against the recalcitrant baker and sent the case back to the state court for "further consideration" in light of the *Masterpiece Cakeshop* ruling, but said nothing about reconsidering *Smith*.

The CSS lawsuit arose when a local newspaper, the *Philadelphia Inquirer*, published an article reporting that CSS would not provide foster care services for same-sex couples. The article sparked a City Council resolution calling for an investigation into CSS. Then the Mayor asked the Commission on Human Relations (CHR), which enforces the City's Fair Practices Ordinance (FPO), and the Department of Human Services (DHS), which contracts with foster care agencies, to investigate. The head of DHS, reacting to the article's report about religious objections to serving same-sex couples, did not investigate the policies of the many secular foster care agencies. She contacted religious agencies, and in the end, only CSS insisted that it could not

provide services to same-sex couples, but would refer them to other agencies.

After correspondence back and forth and some face to face meetings between Department and CSS officials, DHS "cut off CSS's foster care referrals," which meant that "no new foster children could be placed with any foster parents certified by CSS." DHS wrote CSS that its practice violated the FPO, and that unless it changed its practice, its annual contract with the City would not be renewed. This meant that not only would it receive no referrals, but payments would be suspended upon expiration of the current contract, and CSS could no longer continue its foster care operation. CSS and several women who had been certified by CSS as foster parents then filed suit seeking a preliminary injunction to keep the program going, which they were denied.

CSS's Petition is artfully fashioned to persuade the Court that the 3rd Circuit's approach in this case, while consistent with cases from the 9th Circuit, is out of sync with the approach of several other circuit courts in deciding whether a government policy is shielded from 1st Amendment attack under *Smith*. Furthermore, it emphasizes the differing approaches of lower federal courts in determining how *Smith* applies to the cases before them. The Supreme Court's interest in taking a case crucially depends on persuading the Court that there is an urgent need to resolve lower court conflicts so that there is a unified approach throughout the country to the interpretation and application of constitutional rights.

The Petition names as Respondents the City of Philadelphia, DHS, CHR, and Support Center for Child Advocates and Philadelphia Family Pride, who were defendant-intervenors in the lower courts. Once the Clerk has placed the Petition on the Court's docket, the respondents have thirty days to file responding briefs, although respondents frequently request and receive extensions of time, especially over the summer when the Court is not in session. Once all responses are in, the case will be distributed to the Justices' chambers and placed on the

agenda for a conference. The Court's first conference for the new Term will be on October 1.

Last summer, when the Court was considering Petitions on cases involving whether Title VII of the Civil Rights Act forbids sexual orientation or gender identity discrimination, the U.S. Solicitor General received numerous extensions of time to respond to the Petitions, so those cases were not actually conferenced until the middle of the Term and review was not granted until April 22. Those cases will be argued on October 8, the second hearing date of the Court's new Term.

The Petitioners are represented by attorneys from The Becket Fund for Religious Liberty, a conservative religiously-oriented litigation group that advocates for broad rights of free exercise of religion, and local Philadelphia attorneys Nicholas M. Centrella and Conrad O'Brien. Their framing of this case is reflected in the headline of their press release announcing the Petition: "Philly foster mothers ask Supreme Court to protect foster kids."

The Municipal respondents are represented by Philadelphia's City Law Department. Attorneys from the ACLU represented the Intervenors, who were backing up the City's position, in the lower courts.

The 3rd Circuit was flooded with amicus briefs from religious freedom groups (on both sides of the issues), separation of church and state groups, LGBT rights and civil liberties groups, and government officials. One brief in support of CSS's position was filed by numerous Republican members of Congress; another by attorney generals of several conservative states. The wide range and number of amicus briefs filed in the 3rd Circuit suggests that the Supreme Court will be hearing from many of these groups as well, which may influence the Court to conclude that the matter is sufficiently important to justify Supreme Court consideration. ■

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Transgender Teen's Mother Asks Supreme Court to Recognize a Parent's Due Process Rights to Control Her Child's Life

By Arthur S. Leonard

Anmarie Calgaro is one angry mama! Despite being defeated at every turn in the lower courts, and despite her child having reached age 18 and thus no longer being subject to her parental control as a matter of law, she is asking the U.S. Supreme Court to reverse decisions by the U.S. 8th Circuit Court of Appeals and the U.S. District Court for Minnesota, and to establish that governmental and private entities should not be allowed to shut out a parent from continuing to control her transgender teen, even after the teen has left home and is living on her own. The decisions in the lower courts are *Calgaro v. St. Louis County*, 2017 WL 2269500 (D. Minn. 2017), affirmed, 919 F.3d 1054 (8th Cir. 2019), *petition for certiorari filed*, July 26, 2019, No. 19-127. The Respondents have a filing deadline of August 26.

Calgaro is suing St. Louis County, Minnesota; St. Louis County Public Health and Human Service's former director, Linnea Mirsch; Fairview Health Services and Park Nicollet Health Services, non-governmental health care providers; St. Louis County School District; Principal Michael Johnson of the Cherry School in that district; and, not least, her child, identified in court papers as E.J.K.

The Petition filed with the Supreme Court in *Calgaro v. St. Louis County*, No. 19-127 (docketed July 26, 2019), presents a factual narrative that differs a bit from that provided by the lower court opinions. The Petition refers to E.J.K. by male pronouns, despite E.J.K.'s female gender identity, and tells the story from the perspective of a mother confronting misbehaving adults who were wrongfully treating her child, male from her perspective, as if he was emancipated and could make decisions on his own without notice to or approval by his mother. She was particularly concerned that these adults (governmental and non-

governmental) were assisting her child in gender transition without giving her an opportunity to object.

The gist of the story is that the teen, identified as male at birth but who came to identify as female, was living with her mother and younger siblings, but decided at age 15 to move out to live with her biological father for reasons not articulated by the courts or the Petition, but one can imagine them. (From the court's reference to "biological father," one hypothesizes that E.J.K.'s biological parents were not married to each other.) She stayed with her father only briefly, then staying with various family and friends, refusing to move back in with Calgaro, who claims that she has always been willing to provide a home for E.J.K.

After leaving her mother's home, E.J.K. consulted a lawyer at Mid-Minnesota Legal Aid. The lawyer "provided her with a letter that concluded she was legally emancipated under Minnesota law," wrote District Judge Paul A. Magnuson. E.J.K. never sought or obtained a court order declaring her to be emancipated. But this letter, which by itself has no legal effect, was used effectively by E.J.K. to get government financial assistance payments that ordinarily would not be available to a minor who is not emancipated, to persuade two health care institutions to provide her with treatment in support of her gender transition, and to persuade her high school principal to recognize her gender identity and to treat her as emancipated and to refuse to deal with her mother's requests for information and input about E.J.K.'s educational decisions. All of these steps were achieved by E.J.K. without notice to Anmarie Calgaro, who claims to have been rebuffed at every turn in her attempt to find out what was going on with the child to whom she referred as her "son."

The essence of Calgaro's claim is that in the absence of a court order declaring that E.J.K. was emancipated from her parents, none of these things should have happened. Relying on cases finding that parents have Due Process rights under the 14th Amendment concerning the custody, control and raising of their minor children, she claims that each of the defendants violated her constitutional rights by failing to give notice to her of what was happening, failing to afford her some kind of hearing in which she could state her position, and shutting her out from information about her child.

She had specifically requested from Cherry School Principal Johnson to have access to E.J.K.'s educational records, but was turned down. She asked the government agency and the health care institutions for access to E.J.K.'s records concerning her health care and her government assistance, but was turned down again. Who knew a Legal Aid lawyer's opinion letter could be so powerful!

District Judge Magnuson dismissed Calgaro's lawsuit on May 23, 2017. As a practical matter, E.J.K. was then less than two months from turning 18, at which point she would become a legal adult and emancipated as a matter of law, so Calgaro's request for injunctive relief would quickly become moot.

The trial court rejected Calgaro's argument that the county, the school district, the health care institutions, or the individual named plaintiffs had violated Calgaro's constitutional rights by declaring her child to be emancipated, for, the judge concluded, the defendants "did not emancipate E.J.K. and Calgaro continues to have sole physical and joint legal custody of E.J.K." The question remaining is what flows from the fact that until turning 18, E.J.K. continued to be a minor in the custody of Calgaro, even though she was no longer living at home and was effectively managing her own life without parental guidance.

Turning first to the health care institutions, the court pointed out that they are not “state actors” but rather private, non-profit entities, so the Due Process Clause does not impose any legal obligations on them, and they could rely on the Legal Aid lawyer’s letter and act accordingly without accruing any liability under the federal constitution.

As to the school district, the court found that the district could not be held liable for actions of its employees, only for its own policies or customs, and there was no evidence that the school district had any particular policy or custom regarding how to deal with transgender students or their parents. “Calgaro fails to provide any facts that the School District executed a policy or custom that deprived Calgaro of her parental rights without due process,” wrote Magnuson.

As to Principal Johnson, the court found that he enjoyed “qualified immunity” from any personal liability for the actions he took as principal of Cherry School, so long as he was not violating any clearly-established constitutional right of Calgaro, and the court found no support in published court opinions for a constitutional right of parents to have access to their child’s school records.

The judge also rejected Calgaro’s argument that the County violated her rights by providing financial assistance to E.J.K. without Calgaro’s consent or participation. The County was providing assistance based on its interpretation of a Minnesota statute that allows payment of welfare benefits to some who does not have “adequate income” and is “a child under the age of 18 who is not living with a parent, stepparent, or legal custodian” but “only if: the child is legally emancipated or living with an adult with the consent of an agency acting as a legal custodian,” with “legally emancipated” meaning “a person under the age of 18 years who: (i) has been married; (ii) is on active duty in the uniformed services of the United States; (iii) has been emancipated by a court of competent jurisdiction; or (iv) is otherwise considered emancipated under Minnesota law, and for whom

county social services has not determined that a social services case plan is necessary, for reasons other than the child has failed or refuses to cooperate with the county agency in developing the plan.”

Judge Magnuson pointed out that under this statute, the county was not necessarily required to give E.J.K. financial assistance – it was a discretionary decision by the local officials – but that as with her suit against the school district, Calgaro failed to identify a policy or custom that would subject the county to liability. The court found the county could not be held liable for violating Calgaro’s Due Process rights based on the decision by county officials to provide benefits to E.J.K., and that the head of the county welfare agency, also named a defendant, could not be sued because there was no evidence she had anything to do with the decision to provide the benefits.

Furthermore, Calgaro could not sue E.J.K. “Calgaro stops short of making the absurd argument that E.J.K. deprived Calgaro of her parental rights without due process while acting under color of state law,” wrote Magnuson, who found that as all of Calgaro’s other claims had to be dismissed, any claim against E.J.K. had to fall as well.

Calgaro appealed to the 8th Circuit, which issued a brief decision on March 25, 2019, affirming the district court in all particulars. Furthermore, noting the passage of time, Circuit Judge Steven Colloton wrote, “Calgaro’s remaining claims for declaratory and injunctive relief against the several defendants are moot. E.J.K. has turned eighteen years old, ceased to be a minor under Minnesota law, and completed her education in the St. Louis County School District. There is no ongoing case or controversy over Calgaro’s parental rights to make decisions for E.J.K. as a minor or to access her medical or educational records.”

Calgaro tried to argue that because she has three minor children other than E.J.K., she has a continuing interest in establishing as a matter of law that the various defendants should not be able to override her parental rights with respect

to her remaining minor children, but the court found that “Calgaro has not established a reasonable expectation that any of her three minor children will be deemed emancipated by the defendants.”

Calgaro is represented by the Thomas More Society, a religious freedom litigation group, which is trying to use this case to establish the rights of parents, presenting two questions to the Supreme Court: first, whether parents’ Due Process rights to custody and control of their minor children “apply to local governments and medical providers” such that these entities cannot invade “parental rights, responsibilities or duties over their minor children’s welfare, education and medical care decisions without a court order;” and, second, in a rather long and convoluted question, whether the Minnesota statute defining emancipation is unconstitutional to the extent that it might be construed to authorize entities in the position of the defendants to do the things they did in this case.

Although the Petition does not stage this case as a religious free exercise case, the advocacy of Thomas More Society suggests that religious objections to transgender identity and transitional care underlie its interest in the case, and that if the Court were to grant the Petition, many religious organizations would be among those arguing that a parent should be able to prevent schools, government agencies, and health-care providers from assisting minors who identify as transgender from effectively freeing themselves from parental control as they seek to live in the gender with which they identify.

The National Center for Lesbian Rights provided legal representation to E.J.K. in the lower courts, and continues to represent E.J.K. as one of the named respondents in this Petition.

The odds against this Petition being granted are long, but the Court’s recent trend of taking an expansive view of religious free exercise rights suggests that it would not be totally surprising were the Court to take this case for review. ■

Supreme Court Receives a Flood of Amicus Briefs Supporting Broad Interpretation of Sex Discrimination under Title VII in Cases to be Argued on October 8

By Arthur S. Leonard

July 3, 2019 was the deadline for amicus briefs filed in support of the gay employees in the cases of *Altitude Express v. Estate of Donald Zarda*, No. 17-163, and *Bostock v. Clayton County, Georgia*, No. 17-1618, pending before the Supreme Court on the question whether Title VII forbids sexual orientation discrimination in employment. These two cases have been consolidated for argument before the Court, with 30 minutes allocated for counsel for the gay employees (plaintiffs below) and 30 minutes allocated for the employers (defendants below). Oral argument will take place on October 8, the second argument date of the Court's October 2019 Term.

The docket notes the filing on July 26 of a joint motion by Bostock and Zarda asking that the 30 minutes allocated for argument on behalf of the Employees be divided for ten minutes to counsel for Bostock (Brian J. Sutherland, the Atlanta attorney who has represented Gerald Lynn Bostock throughout his lawsuit), and twenty minutes to counsel for the Estate of Zarda (Professor Pamela J. Karlen of Stanford Law School's Supreme Court Litigation Clinic, who was asked to present Zarda's case by Gregory Antollino, who represented Donald Zarda and then his Estate at the district and court of appeals levels). The Motion asks that rebuttal time be allocated to Professor Karlen.

The Joint Motion explains that the two cases came up to the Court with different postures, and there are some differences in the arguments they intend to present to the Court, justifying dividing up the time rather than requiring that one advocate speak for both parties. In *Bostock*, the 11th Circuit ruled in favor of the employer and dismissed the case. In *Zarda*, the *en banc* 2nd Circuit rejected the employer's defense that Title VII

does not apply to sexual orientation claims, and remanded for trial. The motion explains that Bostock intends to argue that several amendments to Title VII support the argument that Congressional intent as of 1964 is not the fixed time for interpreting the statute, as the subsequent amendments reflect congressional intent to embrace a broad reading of "discrimination because of sex" reflected in intervening Supreme Court decisions. Zarda intends to focus on the various interpretive theories that the 2nd Circuit below and the EEOC (in 2015) advanced to support coverage of sexual orientation.

The Clerk of the Court posted a notice on the docket that as the cases had been consolidated for argument, all of the amicus briefs filed in one or both of them would be listed under the *Bostock* docket entry, 17-1618. The Supreme Court's docket reflects the filing of 42 amicus briefs in support of the employees in these two cases as of July 26, most addressing both cases and some also addressing the gender identity case that will also be argued that day, *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission* (Aimee Stephens, Intervenor-Plaintiff), No. 18-107. Those seeking to file amicus briefs in support of the employers, Clayton County (Georgia) and Altitude Express, have a deadline in August.

The *Harris Funeral Homes* case, concerning whether Title VII applies to gender identity discrimination claims, presents an unusual tripartite situation. Because of the change from the Obama Administration to the Trump Administration, the government has changed sides in the case. In the 6th Circuit, the EEOC won a ruling on behalf of employee Aimee Stephens that transgender individuals are protected from discrimination because

of their gender identity under Title VII as a form of sex discrimination. The employer petitioned the Supreme Court for review, and after the change of administration, the Solicitor General informed the Court that the government would support the Funeral Home's position that Title VII does not apply to this case, thus leaving Intervenor Stephens, represented by the American Civil Liberties Union's LGBT Rights Project, as the *de facto* sole real Respondent. The Court, flipping the usual order of things, directed that Stephens file her principal brief by June 26, and gave the Funeral Home and the Solicitor General until August 16 to file their principal briefs in response, even though usually it would be the Petitioner who files the first principal brief. Even though the EEOC won below, the Court is, in effect, treating the Funeral Home and the Solicitor General as if they are respondents to a petition filed by Stephens!

The signatories on Stephens' principal brief are all ACLU staff attorneys, with John A. Knight designated as counsel of record. Amicus briefs supporting Stephens (and the EEOC's original position in the case) were filed early in July, with the docket reflecting the filing of 48 briefs, but many of them were cross-filed in the sexual orientation cases. Counting the two lists of amicus briefs together, more than 50 amicus briefs were filed altogether in support of finding Title VII coverage for sexual orientation and/or gender identity discrimination claims, with over 2,000 signers. Amicus briefs from those supporting the employer and the Trump Administration's position are due later in August.

The organization and filing of amicus briefs in support of the LGBTQ parties were coordinated jointly by the ACLU, Freedom for All Americans,

and other LGBTQ-rights legal organizations. On July 3, Freedom for All Americans released a summary on the signers of the briefs. They include more than 200 businesses, more than 90 mayors, more than 35 Republican current and former elected officials and party advocates, more than 40 major civil rights organizations, thirty prominent women CEOs of businesses, more than 750 clergy, religious leaders and religious organizations, more than 150 current members of Congress, a group of Chambers of Commerce and small business associations, and major professional associations, including the American Bar Association, the American Medical Association and more than a dozen other professional health care associations, and both the National Education Association (representing teachers) and the National School Boards Association (representing those who employ the teachers). There were also several different scholar briefs, organized by fields of expertise. And, of course, there was a brief on behalf of the National LGBT Bar Association and several state and LGBTQ legal professional associations, including the LGBT Bar Association of Greater New York.

Those who are curious and have lots of time to spend can find all of the briefs filed in the three cases so far on the Supreme Court's very user-friendly website. Go to the Docket Search tab and put the name of one of the parties of the case into the search box, which will bring up links to cases having that name in their heading. Click on the docket page for the case and scroll down to find links to all the documents filed in each case, all of which can be downloaded as pdf files. Anybody who wants a thorough grounding in the issues raised by these cases should find all the information they need in this flood of amicus briefs. And anybody who wants to be well briefed on what the "other side" is arguing can go back to supremecourt.gov at the end of August and take a look at the commensurate flood of amicus briefs that are sure to be filed. Happy Reading for the Summer! ■

First Circuit Refuses to Order Reopening of Asylum Proceedings for Lesbian from Uganda

By Arthur S. Leonard

The U.S. Court of Appeals for the 1st Circuit denied a petition by a lesbian from Uganda to order the Board of Immigration Appeals (BIA) to reopen her immigration case, finding that nothing she had introduced in support of her second petition for reopening showed that conditions for LGBT people in Uganda had gotten worse since the original proceeding in which she was ordered to be removed back to her home country. *Nantume v. Barr*, 2019 WL 3296962, 2019 U.S. App. LEXIS 21952 (July 23, 2019). Senior Circuit Judge Bruce Selya conceded the "disturbing" evidence concerning the situation of LGBT people in Uganda, but the panel found that this was beside the point on an untimely second motion to reopen, in which the primary issue is whether the petitioner had new evidence to present that conditions were worse than when the BIA originally ruled in her case.

The Petitioner entered the U.S. on a six month visitor's visa in October 2001, overstayed the visa, and married a male U.S. citizen, attaining the status of lawful permanent resident in March 2004. But immigration authorities challenged the marriage's validity, and ultimately proved that it was a sham marriage entered solely for immigration purposes. The Petitioner was convicted of conspiring to defraud the U.S. and was sentenced to a year in prison, after which removal proceedings were begun. While in prison, she "met a female prisoner with whom she developed a romantic relationship," wrote Judge Selya. "This relationship outlasted the petitioner's incarceration and led to the petitioner 'coming out' as a lesbian." During the removal proceedings, she admitted the allegations of the Notice to Appear and conceded removability, as well as conceding that she was not entitled to any relief from removal, and the Immigration Judge (IJ) ordered her removed to Uganda on May 12, 2014. In other words, her counsel at that time appears not to have tried to overcome

the taint of the felony conviction for a sham marriage by asserting a refugee claim based on her new-found sexual orientation. She did not appeal the IJ's removal order, it a final agency order. But, she did not leave.

Apparently, this fiasco led her to find new counsel. Two months later, as fervent anti-gay propaganda in Uganda inspired the legislature to consider a draconian new anti-gay criminal law, and represented by her new counsel, who were evidently more tuned-in to the LGBT issue than her prior counsel, she filed a timely motion to reopen her removal proceedings, seeking to apply for asylum, withholding of removal, and protection under the Convention against Torture (CAT). She sought a stay of the outstanding removal order, predicated these filings on her recent identification as a lesbian and thus a member of a social class recognized under U.S. immigration law for purposes of refugee status, depending of course on a finding that members of the LGBT community are subject to persecution in their home country.

Since the Petitioner had never been "out" as a lesbian in Uganda, she had no incident of actual persecution of herself to present, so her case for reopening relied on two "new" facts: that she now identified as an "out" lesbian, and that Uganda had passed a new anti-gay law, in support of her contention that conditions for LGBT people in Uganda were worsening. The problem she had was that these were not really "new" facts with respect to her original removal hearing. She had *already* identified as a lesbian at that time, and the new law was actually signed by the President of Uganda *while* her original removal hearing was in progress. Her original counsel, perhaps oblivious to this issue, had made nothing of them. The court's opinion says nothing about this, but it strikes us as possible that she had not told her original counsel that she was a lesbian, but apparently her new

representatives made a valiant attempt to repair that problem.

On August 11, 2014, the IJ denied her petition to reopen the case, and the BIA rejected her appeal of this ruling on February 6, 2015. She did not seek judicial review at that time. Although she was thus still subject to the original removal order, she remained in the U.S. In the meantime, the 2014 anti-gay law in Uganda was declared to have been invalidly enacted in a ruling by that nation's highest court. A new law was passed in 2016, denying recognized non-governmental organization status to any groups formed to work for LGBT rights. On June 25, 2018, the Petitioner filed a second motion to reopen her removal case, which was untimely under the rules governing these proceedings, but she attached "a trove of documents (including country conditions reports, family correspondence, photographs, and a psychiatric assessment) aimed in part at showing changed circumstances." The BIA rejected this motion as well, finding that it was procedurally barred, and, besides, that her new evidence had "failed to establish a material change in Ugandan country conditions." This time, she petitioned for judicial review. While her petition was pending at the 1st Circuit, she was finally removed from the U.S. back to Uganda, but the court stated in a footnote, "Her removal does not affect the justiciability of her petition for review."

The issue for the court was two-fold. First, because this petition was untimely under the rules governing this process, did she qualify for an exception? "To fit within the narrow confines of the exception applicable to untimely motions to reopen, an alien must breach two barriers," wrote Judge Selya. "First, the alien must show that the change in country conditions is material and must support that showing by evidence that was either unavailable or undiscoverable at the time of her merits hearing." (Note that the merits hearing took place beginning on February 20, 2014, and consumed several hearing days extending over a period of weeks into May 2014.) "Second, the alien must show prima facie eligibility for the substantive relief that she seeks (here, asylum, withholding of removal, and CAT protection"), and she bears the burden of proof as to both.

The court decided that since the Petitioner had not met the burden of showing materially changed circumstances, her petition must be denied, regardless whether she could have shown prima facie eligibility for substantive relief. Indeed, the problem she faced was apparently insurmountable, because the situation for "out" LGBT people is, all concede, dire, but it has been so throughout the period covered by the Petitioner's removal proceedings, and she missed the boat on this issue by not presenting the necessary evidence in her original proceeding. Her attempt to show that things had gotten worse "is belied by the record," wrote Judge Selya, "which makes manifest that Uganda has historically and persistently discriminated against individuals who engage in same-sex sexual activity . . . To be sure, the submitted materials reflect an ongoing animus toward LGBT individuals in Uganda (manifested through harassment, violence, and the like). The record contains nothing, however, that fairly suggests a deepening of this animus over the relevant period. Instead, it discloses that the criminalization of same-sex sexual activity has 'remained' official policy [since colonial times] . . . Put bluntly, the situation is dreadful – but it has been dreadful throughout the relevant period. The petitioner's submissions fail to show that the level of hostility, persecution, or other mistreatment intensified between May of 2014 (when the merits hearing concluded) and June of 2018 (when the petitioner's second motion to reopen was filed)."

The court found that legislative activity in Uganda in 2014 and 2016 cited by the Petitioner did not change this conclusion. She could have brought up the 2014 sodomy law amendments during her initial hearing, but evidently did not, and the BIA had found that the more recent enactment did not materially change the treatment of LGBT individuals in Uganda. In light of these findings, the court concluded that the BIA had acted within its discretion in finding that Petitioner's evidence did not show a material adverse change of conditions in Uganda during the relevant time, thus an essential ground for reopening the case was not met.

"Let us be perfectly clear," wrote Selya. "We have no illusions about what is happening in Uganda with respect to LGBT individuals," citing to *Sexual Minorities Uganda v. Lively*, 899 F.3d 24 (1st Cir. 2018), reviewing an appeal in a case arising out of a 'vicious and frightening campaign of repression against LGBTI persons in Uganda' as found by the district court in that case. "We regard the views of the Ugandan government toward members of the LGBT community as benighted, and we know that the petitioner's life in her homeland may prove trying. But the conditions that confront LGBT individuals in Uganda, though disturbing, are not new. Those conditions have persisted for decades, and they have not materially changed in the relatively brief interval between the conclusion of the petitioner's 2014 merits hearing and the filing of her 2018 motion to reopen."

The court pointed out that the Petitioner has one more possible route: to petition the Attorney General to parole her into the United States for "urgent humanitarian reasons." Selya pointed out that the courts "are bound by a more rigid framework of legal rules and cannot reconstruct those rules to achieve particular results. It follows that our antipathy for certain of the norms that prevail in Uganda, without more, does not authorize us to bar the removal of a Ugandan national to that country." Dickensian, no?

The three-judge panel of the 1st Circuit that decided this case is composed entirely of Republican appointees. Senior Circuit Judge Selya and Circuit Judge Torruella were appointed by Ronald Reagan, and Chief Circuit Judge Howard was appointed by George W. Bush.

The Petitioner is represented by Melanie Shapiro, with Harvey Kaplan and the Harvard Law School Immigration and Refugee Clinic at Greater Boston Legal Services on the brief. Perhaps they can quickly get up an application to Attorney General Barr for discretionary relief, but the Petitioner's past conviction of a serious felony (fraud on the U.S. regarding her sham marriage) makes her case more difficult, due to the moral turpitude standards applied in withholding cases. ■

Federal Court Issues Odd Ruling Denying Gay Citizen's Spousal Petition

By Filip Cukovic

On July 2, 2019, U.S. District Judge Roy Bale Dalton (M.D. Fla.) held that the court lacked subject matter jurisdiction over Plaintiff's claim that the United States Citizenship and Immigration Services (USCIS) misapplied the Adam Walsh Child Protection and Safety Act when reviewing Plaintiff's family-based visa petition for his Mexican same-sex spouse. Judge Dalton also dismissed the Plaintiff's Fifth Amendment equal protection challenge, holding that there is a legitimate government interest in protecting the public from sex offenders and discouraging the commission of future sex crimes. *Carkeet v. Director, National Benefits Center*, 2019 U.S. Dist. LEXIS 110379, 2019 WL 2774264. Neither of those goals, however, is advanced by the court's action.

Plaintiff Kenneth Dale Carkeet, a U.S. citizen, married his husband Alejandro Sanguines, who is a citizen of Mexico, in 2013. The couple intended to live together in the United States. Carkeet submitted a family-based visa petition (Form I-130) to USCIS. However, the process became complicated when USCIS notified Carkeet that his petition will be subject to review under the Adam Walsh Child Protection and Safety Act. The agency made this decision after obtaining records indicating that Plaintiff was arrested and prosecuted in the Netherlands for trafficking in child pornography. Among other things, the Adam Walsh Act prohibits U.S. citizens who have been convicted of any "specified offense against a minor" from filing a family-based visa petition unless the Secretary of USCIS determines that the petitioner poses no risk to the visa beneficiary. "Specified offense against a minor" includes possession, production, or distribution of child pornography.

USCIS requested Carkeet to produce evidence that would clearly establish either that Carkeet was

not convicted of violating the Dutch Criminal Code or that the offense for which Carkeet was convicted is not a "specified offense against a minor." To prove either, Carkeet had to submit copies of relevant police reports or trial transcripts. Carkeet responded that he couldn't obtain the requested records because Dutch law forbids sending such written personal information to anyone. Instead, Carkeet submitted letters from family members, friends, counsel, and evaluations from a psychologist and a mental health counselor.

USCIS concluded that the submitted documents are not sufficient to show that Carkeet was not convicted of violating the Dutch Criminal Code or that the offense for which he was convicted is not a "specified offense against a minor." However, to avoid an automatic denial of Carkeet's visa petition, USCIS turned its inquiry to whether Carkeet submitted evidence demonstrating, beyond any reasonable doubt, that he poses no risk to the beneficiary of the visa petition. After considering factors such as the nature and severity of the offense allegedly committed by the Plaintiff; Plaintiff's criminal history; Plaintiff's relationship to the beneficiary; and the beneficiary's age and gender, USCIS denied Carkeet's petition and held that due to the absence of police and court records as well as to the nature and severity of an Adam Walsh Act qualifying offense, Carkeet failed to demonstrate that he posed no risk to the safety of the visa beneficiary (his husband, who is an adult), a conclusion that makes no apparent sense.

Although Carkeet had a right to appeal the decision, he instead decided to file a new visa petition for his spouse on May 9, 2018. After USCIS issued a new request for police records from the Netherlands, Carkeet initiated this action in the U.S. District Court, alleging claims against USCIS and

DHS' directors. Carkeet argued that USCIS wrongfully applied the Adam Walsh Act to his petition, because the intended visa-beneficiary in this case was his spouse, not a child. Carkeet also argued that defendants infringed on his right to equal protection under the Fifth Amendment, because it is irrational to apply the Adam Walsh Act to a spousal petition. On the other hand, defendants argued in their motion to dismiss that the District Court lacks subject matter jurisdiction to review USCIS' decision and that Carkeet failed to state a constitutional claim.

Judge Dalton's July 2 decision ruled for the defendants, dismissing Carkeet's case. First, the court held that it lacked subject matter jurisdiction to review denials of immigration benefits by USCIS. Carkeet claimed that USCIS's decision is reviewable because Carkeet's claims against the agency do not challenge its ultimate disposition, but rather the procedure in applying the Adam Walsh Act to his petition. The court rejected this argument, holding that "a plaintiff cannot evade the jurisdiction-restricting provisions by attacking an agency's deliberation of evidence . . . rather than the ultimate outcome of that deliberation." Judge Dalton found that under 8 U.S.C. § 1154(a)(1)(A)(viii), USCIS has "sole" authority to determine in its "unreviewable discretion" whether a petitioner with an Adam Walsh Act conviction has established that he poses "no risk" to the beneficiary, and that courts have no power to review USCIS decisions in this particular context.

The court also dismissed Carkeet's constitutional claim. Carkeet argued that under the Fifth Amendment, it is irrational to apply the Adam Walsh Act to a spousal petition. Carkeet maintained that the Adam Walsh Act should not apply to him because he is in a same-sex relationship; that he is petitioning for immigration benefits

on behalf of his spouse, not on behalf of a child, which means that there is no legitimate government interest in invoking the Adam Walsh Act, which was intended to protect children, to begin with. However, the court relied on a surprisingly broad reading of the Act, holding that the goal of the Act is to protect the *public* from sex offenders generally and to discourage the commission of future sex crimes *against minors*. Therefore, the court held that the Adam Walsh Act is “conceivably related to the achievement of a federal interest” and was rationally applied to Plaintiff’s Form I-130 Petition.

The court’s holding regarding Carkeet’s constitutional claim is not necessarily reasonable and there may be grounds for appeal in this case. The purpose behind passing the Adam Walsh Act, among other things, was to protect children by prohibiting sex offenders from importing children to the U.S under the guise of an “adoptive parent.” It is unclear why it would be rational to scrutinize a spousal visa application under the Adam Walsh Act when the beneficiary of the visa himself is neither a child nor a sexual offender.

Kenneth Dale Carkeet is represented by Henye S. Perez, Lim Law, PA, Orlando, FL. ■

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



Sharply Divided Connecticut Supreme Court Expands Scope of Physician Liability for Giving Patient Mistaken Negative Result on STD Test

By Daniel Chavez and Christian Kummer

In the case of *Doe v. Cochran*, 2019 Conn. LEXIS 203, 2019 WL 3070154 (July 16, 2019), the Supreme Court of Connecticut, by a 4-3 vote, held that a physician, Charles Cochran, owed a duty of care to the plaintiff even though she was not his patient. In this case of first impression for Connecticut, the court considered the issue of whether a physician who mistakenly informs a patient that the patient does not have a sexually transmitted disease (STD) may be held liable in ordinary negligence to the patient’s exclusive sexual partner for her resulting injuries when the physician knows that the patient sought testing and treatment for the express benefit of that partner.

In early 2013, the plaintiff (identified by the pseudonym, “Jane Doe”) began dating her boyfriend (identified by the pseudonym of “John Smith”). Before their relationship became sexually intimate, both the plaintiff and her boyfriend agreed to undergo testing for STDs. As of July 2013, the plaintiff had tested negative for all STDs. When Smith visited his physician, he was asked why he was testing for STDs considering he had undergone testing just five months earlier. Smith explicitly stated to the physician that he was being tested for the benefit and protection of Doe. After Smith’s lab report was finalized, the physician delegated to a staff member the task of informing Smith of his test results. While Smith clearly tested positive for herpes, he was mistakenly told that his test results had come back negative. Under the belief that both parties had tested negative for all STDs, Doe and Smith began a sexual relationship. Sometime thereafter, Doe developed symptoms of herpes. After contacting his doctor to inquire once more about his STD status, Smith was informed that he had

in fact tested positive for herpes. The defendant apologized to Smith for his staff member having provided incorrect information.

After Smith relayed his conversation with his doctor to Doe, she filed a tort action against Dr. Cochran, although it was unclear at trial in Stamford-Norwalk Superior Court, whether claims of negligence or medical malpractice were being made. The defendant moved to dismiss Doe’s claim, arguing that no official physician-patient relationship existed between Doe and the defendant, relying on the required privity element of a medical malpractice suit. Superior Court Judge Kenneth B. Povodator sided with the defendant, granting his motion to strike Doe’s claim. The judge appeared to have viewed Doe’s claims as sounding in ordinary negligence, but concluded that the defendant did not owe a duty of care to Doe.

The Supreme Court, reversing in an opinion by Justice Richard Palmer, reasoned that Doe’s claims clearly sound in ordinary negligence rather than medical malpractice, as the specific error that caused harm was not a matter of faulty administration or interpretation of the test, but rather careless office administration. Medical malpractice involves the failure to exercise requisite *medical* skills. The defendant did not deviate from a requisite standard of care but, rather, failed successfully to deliver the test results to Smith due to a communications error in his office.

Because the court found that the pleadings contained enough allegations to bring a claim for ordinary negligence, the court next reviewed whether the defendant physician owed a common-law duty of care not only to his patient, Smith, but also to the plaintiff, a non-patient yet identifiable third party. The court ruled that, under the

circumstances presented, a physician does in fact owe a duty of care to an identifiable third party who is not a patient. The court considered a host of factors in its determination, including relevant public policy arguments, and the case law of other jurisdictions.

Justice Palmer's opinion expressly limited the holding as a narrow interpretation of the duty requirement by stating that "it extends only to identifiable third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any STD that a physician fails to diagnose or properly report." The opinion states that "the physician fully satisfies that third-party duty simply by treating the patient according to the prevailing standard of care and accurately informing the patient of the relevant test results." The court's analysis focused on whether a duty existed at all to the third-party plaintiff and relied on the familiar concept in the law of the reasonable foreseeability of a resulting harm.

The court thus clarified the scope of the duty by carving out a narrow exception to the general duty rule. The court relied on the Restatement (Second) of Torts, and was persuaded by the characterization of the claim as one resembling negligent misrepresentation, "where a tortfeasor negligently supplies misinformation knowing that the recipient of that information intends to supply it in turn for the benefit and guidance of a third party." Because the Restatement deals specifically with "limitless third-party liability, first, by conferring standing only on those third parties to whom *the defendant knew that the recipient intended to supply the information . . .* and second, by restricting liability to losses arising from transactions for the purpose of which the information was supplied," the court was clear in its delineation of its exception to the general duty rule.

Moreover, the court considered other professional contexts in which the issues of privity and special relationships may arise, such as the attorney-client relationship. The court acknowledged that a number of jurisdictions have

done away with a traditional privity requirement and have imposed liability on attorneys when the attorney's advice is sought for the benefit of an identifiable third party, and the attorney is aware that his or her advice is sought for that specific purpose. The court was explicit that "they would not employ or endorse a *per se* rule that third party claims against health care providers are categorically barred because of the absence of a physician-patient relationship," and "left open the possibility that, under the appropriate circumstances, and in particular with respect to the diagnosis of communicable diseases, a physician's common-law duty of care may extend to non-patients." The court was clear that, "under these circumstances, imposing third-party liability would play an important role in spurring physicians such as the defendant to take greater care in reporting STD lab results."

Two important public policy concerns stood out in Justice Palmer's reasoning. First, the principle that "a physician's duty to protect the broader public health and to help to deter the spread of contagious diseases at times transcends the physician's duty to his or her individual patient," which the court noted had been codified in both state and federal law. Specifically, Connecticut had passed laws requiring physicians to test pregnant patients for syphilis and HIV and to report certain infectious diseases to state and federal authorities. Second, the court looked to the "purposes of the tort compensation system, which seek to compensate innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities and deterrence of wrongful conduct."

Finally, the court was not persuaded by "slippery-slope" and administrability concerns, given the rare nature of this sort of mistake, and the absence of logistical hurdles related to disclosing medical records. In addition to the court's more traditional negligence analysis, the court also employed a decidedly pragmatic "law and economics" approach when it reasoned that a jury might reasonably conclude that "the defendant, and not the plaintiff or Smith, was most effectively and

economically situated to avoid the harm that befell the plaintiff."

Chief Justice Richard Robinson filed a lengthy dissenting opinion. He was particularly concerned about how this ruling would affect the confidentiality of the doctor-patient relationship and its potential effect on already high malpractice insurance rates for physicians, which might lead some physicians to abandon practice or to curtail the services they offer in order to avoid potential liability due to inadvertent mishaps in their offices. He suggested that the potential social ramifications of the ruling supported leaving this issue to the legislative branch, rather than common law development. He also noted the sharp split of authority on this question from other jurisdictions.

Whether this decision has a chilling effect on medical providers – especially those who care for HIV-affected individuals and communities, remains to be seen. In the meantime, however, the state's medical/hospital interests might follow up on Chief Justice Robinson's argument and approach the legislature for an overruling of this common law decision.

Thomas B. Noonan represented appellant Jane Doe. James S. Newfield and Diana M. Carlino represented Dr. Cochran. The court received amicus briefs from the American Medical Association, the Connecticut Hospital Association, and the Connecticut Trial Lawyers Association. ■

Daniel Chavez (Cardozo, 2021) and Christian Kummer (Middlebury College, 2022) are Summer 2019 Interns at The LGBT Bar Association of Greater New York (LeGaL)



Federal Court Dismisses Establishment Clause Challenge to Tennessee Law Protecting Counselors Who Refuse to Serve Gay Clients

By Arthur S. Leonard

U.S. District Judge Aleta A. Trauger has ruled that a gay military veteran who mounted an Establishment Clause challenge to a new Tennessee law that immunizes counselors and therapists from any liability for refusing to provide counseling or treatment based on their “sincerely held principles” lacked standing to maintain the lawsuit. *Copas v. Lee*, 2019 WL 3252933, 2019 U.S. Dist. LEXIS 120674 (M.D. Tenn., July 19, 2019).

The measure at issue was provoked by the American Counseling Association’s action in 2014 amending its Code of Ethics to provide that counselors should not refuse to provide services to patients based on the counselors’ “personally held values, attitudes, beliefs, and behaviors.” The Code of Ethics went on to state: “Counselors respect the diversity of clients and seek training in areas in which they are at risk of imposing their values onto clients, especially when the counselor’s values are inconsistent with the client’s goals or are discriminatory in nature.” The ACA’s action was reacting to occasional cases in which conflict arose in training programs when students averred that due to their religious beliefs about homosexuality they would not be able to counsel gay people, and a few instances of mental health organizations dismissing counselors who refused to counsel gay clients for similar reasons. “Tennessee regularly adopts” the ACA Code of Ethics, Judge Trauger noted. A faith-based counselor in Tennessee brought the ACA Code amendment to the attention of State Senator Jack Johnson, who introduced the bill, S.B. 1556. It was adopted in 2016 and codified at Tenn. Code. Ann. Sec. 63-22-302. It was originally proposed to protect counselors’ “sincerely-held religious beliefs” but was amended during the legislative process to specify

“sincerely held principles” instead, presumably to avoid Establishment Clause problems.

Bleu Copas, the plaintiff, was discharged from the military under the “Don’t Ask, Don’t Tell” policy in 2006, obtained a Master’s degree in Counseling, and is a “certified peer recovery specialist.” He is seeking a license as a professional counselor. He was in therapy as a patient periodically throughout his life, and has been diagnosed with post-traumatic stress disorder and chronic adjustment disorder, for which he received therapy from 2014 to 2016, but he “has not sought therapy since 2016” when the new law was passed. Copas has also worked as a gay activist, and was at one time a Vice President of the Tennessee Equality Project, an LGBT- rights political group, but that group’s failure to support him in this lawsuit has caused him to “distance” himself from TEP.

Copas alleges that the measure was “conceived to protect religious counselors and therapists,” and that it has deterred him from seeking counseling for fear that he will encounter a therapist who refuses to counsel him based on the therapist’s religious beliefs. His complaint, originally filed against Governor Bill Haslam, who signed the measure into law, is now focused on Governor Bill Lee, in his official capacity, and the state Attorney General’s Office is defending the action, having moved first to dismiss the complaint, and then after part of the case survived the motion to dismiss, for summary judgment. Copas also moved for summary judgment after discovery was complete.

The complaint originally alleged both Equal Protection and Establishment Clause causes of action, but the court dismissed the Equal Protection claim, leaving standing issues concerning

the Establishment Clause claim to be resolved after discovery, since they would depend heavily on factual issues.

In discovery, the state showed that both TEP and the website psychologytoday.com have published directories of psychologists and therapists in Tennessee who identify as LGBT-friendly or as specializing in providing service to LGBT people. This ultimately knocked the props out of Copas’ individual injury claim.

He premised his Article III standing on the idea that because there was no requirement for counselors and therapists to advertise or disclose in advance that they would not provide services to LGBT people based on their “sincerely held principles,” Copas had been paralyzed from seeking a new therapist for fear of rejection or being referred somewhere else by a therapist who refuses to treat gay people for religious reasons. Copas claimed to be unaware of these directory resources until the state introduced them in evidence during his deposition, but the court noted that Copas, a former officer of TEP, had acknowledge receiving its publications.

Judge Trauger explained the difficulty that courts have had in dealing with Establishment Clause standing issues, as the Supreme Court has failed to adopt an analytical test and the circuit courts are split about how to analyze the issue. She noted, however, that in *New Doe Child #1 v. Congress of the United States*, 891 F.3d 578 (6th Cir. 2018), the 6th Circuit “found standing for plaintiffs who suffered stigmatic injury and changed their conduct in response to governmental action.” Copas was trying to fit himself into this formulation, alleging that he had suffered stigmatic injury from his state government having specifically acted to shelter professional counselors who

might refuse to serve him due to their religious objections, and that this action by the government had deterred him from seeking out a new therapist.

Judge Trauger found that Copas could not establish standing under either the 6th Circuit's approach or the more demanding approach adopted by some other circuits. "In sum," she wrote, "Copas's testimony paints a picture of someone who has for many years struggled with the debilitating effects of mental illness and discrimination. But the stigmas and fears he describes all long predate the Bill's passage. His allegation that the Bill's passage increased his fear of referral due to his sexuality 'from zero,' is belied by his acknowledgement that he has always been reticent to engaged in therapy and has always been afraid of discrimination in every aspect of his life. And his claim that he wants to re-engage in therapy is at odds with his admission that he has only started an internal deliberative process to determine whether he is ready to start a new therapy relationship and with the lack of even prefatory steps taken to initiate that process." She asserted that "assuming that Copas has previously not re-engaged in therapy due to the Bill's passage, he must also show the Bill's passage currently keeps him from re-engaging in therapy or will do so in the future," and, as to this, "Copas cannot make such a showing based on he record," because the publication of directories of LGBT-friendly counselors and therapists makes it possible for him to find a therapist without fear of being rejected because of his sexuality.

"He cannot plausibly suggest that the Bill's passage now limits him from re-engaging in therapy, should he wish to do so," wrote Trauger. "Copas bears the burden of establishing standing and, in light of the TEP initiative and the psychologytoday.com directories, he cannot show that the Bill's passage will prevent him from receiving treatment, should he wish to seek it."

Judge Trauger found, contrary to Copas's assertions of an individual injury sufficient to confer standing, that "his injury amounts only to a

generalized grievance shared, at the very least, by all LGBT individuals in Tennessee . . . This is not to suggest that a future litigant might lack standing if he suffered a more particularized harm, such as by being referred by a therapist due to the litigant's sexual orientation or showing that the Bill prevented the litigant from re-engaging in desired therapy. Copas has shown neither and thus lacks standing."

The court denied Copas's motion for summary judgment, granted defendant's motion for summary judgment, and dismissed the Establishment Clause claim "due to lack of standing."

Copas is represented by Christopher W. Cardwell and Mary Taylor Gallagher, of Gullett, Sanford, Robinson & Martin, Nashville, TN. ■



U.S. Magistrate Recommends Dismissing Gay Tech's Discrimination Claim Against FBI Web-Systems Contractor

By Arthur S. Leonard

A general suspicion of discrimination in the air will not do to meet federal factual pleading standards in civil litigation. That seems to be one message of an opinion by U.S. Magistrate Judge Joel C. Hoppe, who issued a report and recommendation to the district court in *Kinnett v. Key W + Sotera Defense Solutions*, 2019 U.S. Dist. LEXIS 10482 (W.D. Va., July 19, 2019), recommending dismissal of a discrimination complaint by Robert E. Kinnett, a gay man who was discharged from his position as a "Web Application Developer" by Sotera, which was providing web-based business applications to the Federal Bureau of Investigation's Business Operations Support Unit (BOSU).

Kinnett claims that the problems leading to his discharge stemmed from religiously-based hostility toward him because of his sexual orientation by Tim Willems, an FBI employee who was a supervisor in the BOSU. Kinnett related that Willems had asked to meet him to "get to know" him, as Kinnett was newly assigned to work on web applications for the BOSU. Wrote Judge Hoppe, summarizing the allegations of the complaint, "The two sat at a table in a common area discussing both their personal and professional backgrounds. Willems was 'very religious.' He 'discussed his family and that he had attended a bluegrass concert at a Church in Stanley, [Virginia] where [Kinnett] resides.' When Willems 'asked what [his] wife did' for a living, Kinnett 'responded that his husband was currently developing a kiln to heat treat firewood.' 'Willems was unable to

continue the conversation,’ and Kinnett ‘continued talking about his husband’s work until Mr. Willems was able to regain his composure.’ Thereafter, Willems ‘would periodically ask Plaintiff, “So you don’t know the church in Stanley with the bluegrass concert?” always with a creepy smile and a little chuckle.’ Willems’s ‘repeated’ ‘out-of-the-blue’ questions made Kinnett ‘very uncomfortable with his work environment.’”

The story unfolds with various twists and turns, all of which led Kinnett to conclude that Willems disapproved of him based on religious hostility to homosexuality or same-sex marriage, but without any sort of “smoking gun” direct evidence. Kinnett alleges that his work was wrongly restricted and disparaged, and ultimately his employer fired him at Willems’s request. He alleges that Willems then recommended a member of his church to Sotera to be hired as Kinnett’s replacement.

Kinnett filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP), which administers an executive order banning sexual orientation discrimination by federal contractors, and ultimately obtained a right-to-sue letter. Part of the procedural underbrush dealt with by Judge Hoppe was the issue whether filing a complaint with OFCCP suffices to exhaust administrative remedies under Title VII, in the absence of filing a charge with the EEOC. Here, a recent Supreme Court ruling that the statutory requirement to file a charge with EEOC is not jurisdictional, provided a basis for Hoppe to recommend against dismissing the claim on failure of exhaustion grounds. However, he recommended it anyway, an insufficient factual pleading grounds.

Kinnett went to federal district court suing his employer, claiming discrimination on grounds of religion and sex (sexual orientation) under Title VII. (Individuals may not sue their employers under the Executive Order, being limited to administrative relief.) One problem Kinnett ran into, of course, was that Willems was an FBI employee, not an employee of Sotera, and there was no evidence that Sotera was itself prejudiced against Kinnett because of his religion (or lack of religion) or sexual orientation.

There was the additional problem, since this case arises in the 4th Circuit, that the 4th Circuit Court of Appeals has not endorsed the view that sexual orientation discrimination claims are actionable under Title VII. District Courts within the 4th Circuit continue to cite and be bound by the circuit’s old decision in *Wrightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996), which is superannuated but binding on the district courts unless overruled or disavowed at the appellate level. Of course, the Supreme Court’s action in three pending Title VII cases is likely to resolve the question whether Title VII can apply to a sexual orientation claim. Given the 4th Circuit precedent, however, Judge Hoppe effectively limited the case to a religious discrimination claim.

Kinnett tried to establish that the FBI and Sotera are “joint employers” in his case, such that his belief that Willems was biased against him because of Willems’s religious objections to homosexuality or same-sex marriage could be imputed to Sotera as a cause of his discharge, especially since he was told by his supervisor that he was being discharged at Willems’s request, but Judge Hoppe concluded that even if one classified Sotera and the FBI as joint employers, under the civil pleading standards established by the Supreme Court, Kinnett’s factual allegations lacked the specificity required to show illegal religious motivation by the employer.

Hoppe wrote, “[A]ssuming that Willems’s actions may be attributed to Sotera, Kinnett’s allegations do not rise above mere speculation that Willems’s allegedly discriminatory behavior was motivated by his religious beliefs. Kinnett ask the Court to infer that Willems’s actions were based on an anti-gay bias because Willems was ‘very religious,’ was a member of a church, and periodically asked Kinnett about a bluegrass concert hosted by a church in Kinnett’s hometown. This inference is unwarranted. The Fourth Circuit has long held that Title VII ‘does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion.’ The same principle applies to workplace conflicts between

individuals of different faiths, sexes, or sexual orientations.” Hoppe asserted that even if Kinnett’s factual allegations were “consistent with discrimination,” that did not “alone support a reasonable inference that the decision-makers were motivated by [religious] bias.” And, under the *Iqbal* civil pleading standards, the absence of facts supporting such an inference were fatal to his claim.

The judge also rejected a retaliation claim, finding another missing factual link from the necessary elements in that Kinnett had never formally complained to Sotera about alleged discrimination; consequently, how could he claim that his discharge was retaliation for complaining about discrimination. Kinnett did mention speaking to various Sotera employees about his strained relationship with Willems, but the court did not credit that as “protected activity” in the same category as a discrimination complaint to the employer.

Judge Hoppe’s recommendation to dismiss the action with prejudice goes to District Judge Michael F. Urbanski. Kinnett, who was given two weeks from the date of Hoppe’s decision to file written objections, is representing himself *pro se*. We get a sinking feeling whenever we see that a discrimination plaintiff is representing himself *pro se*. While federal employment discrimination law is not necessarily “rocket science,” it is complicated enough, especially in combination with the challenges of civil procedure and civil pleading standards, that *pro se* litigants are at a huge disadvantage, frequently suffering dismissals based on inadequate factual pleadings in their complaints, which is the case here. This case was complicated by the need to navigate the procedural interplay between federal contractor regulation and Title VII, the difficulties of proving joint employer relationships, and the stringent pleading standards established by *Iqbal*, which frequently trip up experienced litigators, not just *pro se* plaintiffs. Based on the court’s summary of Kinnett’s allegations, however, it seems possible that an experienced litigator could have put together a complaint that would have survived a dismissal motion and gotten the case to discovery and the possibility of achieving a settlement. But perhaps we are being too optimistic. ■

Transgender Corrections Officer's Hostile Work Environment Claim Survives Summary Judgment, But Not His Constructive Discharge Claim

By Corey L. Gibbs

John Doe, a transgender male, brought a hostile work environment claim and a constructive discharge claim against his former employer, the State of Arizona. Doe worked as a corrections officer at the Arizona Department of Corrections for approximately ten years, but transferred work locations numerous times in order to evade the harassment to which his job subjected him. The State moved for summary judgment on both claims. Chief U.S. District Judge G. Murray Snow granted in part and denied in part the State's motion. *Doe v. State of Arizona*, 2019 U.S. Dist. LEXIS 112396; 2019 WL 2929953 (D. Ariz., July 8, 2019). The court noted that "John Doe" is a pseudonym.

Doe began working at the Arizona Department of Corrections facilities in 2006. When he began working for the facilities, he was transitioning from female to male. He originally worked in the South Unit in Florence, Arizona. After his training, Doe informed his supervisors about his transition. He asked that his colleagues respect his status, and he acknowledged that this time period was awkward.

Doe worked at the South Unit for approximately four years. During the time that he worked at that particular facility, other correctional officers and his supervisors would refer to Doe as "she," a "he/she," an "it," a "d—," and a "b—." The other officers also complained about Doe using the men's restroom. While Doe claims that he asked his supervisors to instruct the others to refrain from calling him a "she" and other derogatory terms, he acknowledges that he did not report every occurrences to his supervisors. Some of the officers who previously made comments were reprimanded.

Doe continued to inform his supervisors of the comments, however his supervisors did not take corrective action. A supervisor once told Doe that

he should "stay to himself" because the female correctional officers "feel uncomfortable with you." There was an "initial climax" in 2010, when someone slashed Doe's tires in the parking lot of the prison. Doe informed the deputy warden about the incident, but the deputy warden did nothing. He then informed the warden, who agreed that Doe had reasons to fear for his safety. Doe was then transferred to the "Complex," which is the prison's administrative unit. The Arizona Department of Corrections did not perform an official investigation to discover who had slashed Doe's tires.

At the Complex, the offensive comments persisted. Doe's supervisor even referred to him as "she," and told other officers that Doe used to be a female. The supervisor even stated, "Did you know that [Doe] used to be a female . . . [c]an you believe that s—?" Following the supervisor's behavior, many of the coworkers asked "unwelcome questions about his gender status." Doe complained to that supervisor about the statements and comments, but the supervisor did not take any corrective action. Doe requested another transfer following the continued harassment at the Complex.

By October of 2011, Doe moved to the North Unit. The supervisors and coworkers at this location also engaged in discussions revolving around Doe's transgender status. One supervisor at the North Unit mentioned hesitating before investigating the sexual assault of a transgender female in the prison. Doe was told that other officers were discussing his transgender status with inmates at the facility. One of the officers speaking to the inmates was none other than one of Doe's supervisors. This same supervisor allegedly referred to Doe as a "he/she."

Another officer filed an information report with the Arizona Department of Corrections to document her fears

for Doe's safety. However, the Arizona Department of Corrections did not investigate the information report. Doe filed a charge of discrimination with the Equal Employment Opportunity Commission. He alleged that his job had breached his confidentiality, which jeopardized his safety. Following the discrimination charge and the continued lack of corrective action by the Arizona Department of Corrections, Doe requested an additional transfer.

By July of 2015, Doe was working in the Papago Unit. His direct supervisor made a series of offensive comments. The supervisor called a prominent transgender celebrity a "nut job," and he discussed that he wanted her in his prison. He stated that she would be "one sorry b—." The supervisor discussed Doritos Rainbow Chips. "What the hell this is about paying 15, 20 bucks for a stupid bag of Doritos," and, "who in their right mind would pay for Doritos like that to support the queers." Another supervisor "allegedly criticized Doe's performance on the job, and scrutinized his extended sick leave when he returned to the job." Doe did not file a complaint with the Arizona Department of Corrections regarding the incidents at the Papago Unit. On April of 2016, Doe resigned and cited interference with his sick leave.

Doe filed a hostile work environment claim and a constructive discharge claim. The State of Arizona, the Defendant, moved for summary judgment on both claims. Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

Title VII provides that employees have "the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Judge Snow cited Ninth Circuit precedent and explained that "[t]he required level of severity or seriousness varies inversely with

the pervasiveness or frequency of the conduct.” *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1105 (9th Cir. 1998). Judge Snow also acknowledged that the comments did not have to be made directly to Doe to establish a hostile work environment. In order to “survive at summary judgment stage,” Doe has to show that there is a genuine factual dispute regarding whether a reasonable person in his position would find the work environment hostile towards a transgender man and whether the Arizona Department of Corrections “failed to take adequate remedial and disciplinary action.”

Judge Snow stated that there were sufficient facts for Doe to survive summary judgment for the hostile work environment claim. His supervisors regularly disregarded his requests for confidentiality and engaged in harassing Doe. The judge also stated that a jury could find that the Arizona Department of Corrections’ remedial actions were insufficient. The judge then continued, citing the Ninth Circuit, “Nor . . . can the purported offer of transfer be counted as sufficient: harassment is to be remedied through actions targeted at the harasser, not the victim.”

As for the constructive discharge claims, Judge Snow sided with the State of Arizona. The Ninth Circuit recognizes that constructive discharge occurs when “[t]he working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn livelihood and to serve his or her employer.” *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000). The judge acknowledges that this is a more difficult claim to succeed with, as opposed to a hostile work environment claim.

Here, the State of Arizona prevailed. Doe pointed to the conduct of his last two supervisors as demonstrative of constructive discharge, but failed to allege specific facts showing that their conduct was discriminatory. He also pointed to the offensive comments made by one supervisor in September of 2015 or earlier, which was more than six

months before he resigned, detracting from their probative value to support a constructive discharge claim.

Doe v. Arizona shows how Title VII claims can be an effective outlet when it comes to protecting the LGBTQ+ community in the workplace. The addition of the constructive discharge claim made this case particularly interesting. Judge Snow mentioned that constructive discharge was a hard claim with which to prevail. However, the issue for Doe appears to be in Chief Judge Snow’s interpretation of the claim itself.

“The working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn livelihood and to serve his or her employer.” This description seems perfectly tailored to Doe’s case. In approximately ten years, Doe had to transfer numerous times in order to escape discrimination. Many may be familiar with the phrase the straw that broke the camel’s back. It is one that refers to the continuation of something until someone or something is unable to tolerate it. For Doe, his issue did not appear to be just the last two supervisors, but rather a culmination of all the harassment he had suffered over the course of years at the Arizona Department of Corrections. Perhaps the “final straw” was not egregious alone, but when added to the pile of other occurrences, it was impossible to go back to the workplace. But Judge Snow interprets the Ninth Circuit’s precedent as requiring an immediate deterioration, as opposed to a deterioration over time.

While the constructive discharge claim was unsuccessful, the Title VII hostile work environment claim survived the motion for summary judgment. Doe is represented by Stephen G. Montoya from Montoya, Lucero & Pastor, P.A.. The State of Arizona is represented by Mark Ogden, Peter Christopher Pryniewicz, and Littler Mendelson P.C.. ■

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Court of Appeal in England Confronts the Latest Round of “Homosexuality v. Christianity”

By Vito John Marzano

The matter *R (Ngole) v. University of Sheffield* [2019] EWCA Civ 1127, presents another iteration of homosexuality and Christianity squaring off in the courts. The issue is a university expelling a social work student who publicly posted on Facebook disparaging remarks about homosexuals and same-sex marriage in response to an MSNBC news article in violation of the regulatory framework governing his profession.

By way of background, in 2014, Felix Ngole, then in his late 30s, enrolled in the two-year Master’s program for social work at the University of Sheffield. Mr. Ngole identifies as a “devout Christian” and believes that the Bible is “literal truth.” Upon enrollment, Mr. Ngole had to sign an agreement he had access to and understood the professional code and guidelines set forth by the Health and Care Professions Council (HCPC). The HCPC is the body in England that is statutorily charged with establishing a professional code and guidelines for those who practice or wish to practice, among other things, in the social work profession. Those regulations mandate, as relevant here, that a professional (1) keep high standards of professional conduct; and (2) ensure that their behavior does not damage public confidence in the social work profession. Importantly, in England, a social worker is assigned to those in need. Hence, a social worker must be mindful that their public conduct does not hurt the public’s confidence in the services they will receive.

Turning back to the matter, during his second year of studies in 2015, Mr. Ngole made several comments through Facebook about an MSNBC news story

about Kim Davis, the Rowan County (Kentucky) Clerk who refused to issue same-sex couples marriage licenses. His comments described homosexuality as a sin, same-sex marriage as a sin, that homosexuality is “wicked,” and that “God hates the act.” He included several Biblical quotes, namely from the books of Leviticus, Jude, and Romans, describing homosexuality as an abomination, immoral, and dishonorable.

After receiving an anonymous tip from another student, the University commenced an investigation as to whether Mr. Ngole’s comments breached the HCPC’s guidelines. At the initial interview in November 2015, Mr. Ngole sought to justify his comments as an expression of his religious beliefs, that he would never discriminate against anyone because of their sexuality, and that he would rather face expulsion than change his beliefs. However, Mr. Ngole explained that he would not outright share his position on homosexuality with a client, but if he was called to do so, he would. The University stressed that he did not have to change his beliefs, but that the manner in which he expressed them on Facebook could erode confidence in the social work profession. Viewers of those comments would not seek the help of social workers because of perceived biases. Although the investigators did not think that Mr. Ngole would discriminate or had discriminated, they referred the matter to the Fitness to Practice Committee (FTP).

The FTP informed Mr. Ngole of its intention to hold a hearing and invited him to attend. Mr. Ngole declined by email, and claimed that, among other things, his rights as a Christian were being ignored, he has never discriminated, and he only shared what the Bible thought of homosexuality. After the hearing, the FTP concluded that, based on reaction to the hearing and the statements made at the initial interview and in his email, Mr. Ngole: (1) lacked sufficient “insight” into the effect on the social work profession that publicly posting his views on Facebook would have; (2) exercised “extremely poor judgment” in posting

the comments that “may cause offense” to some individuals; (3) admitted his familiarity with social media and the regulations in question; and (4) provided no evidence that he would refrain from presenting these views in the same fashion in the future.

Given the foregoing, the FTP concluded that Mr. Ngole would not respond to guidance and reflection, and that the only recourse lay with his removal from the social work program. Mr. Ngole brought the issue to the Appeals Committee of the University Senate. He claimed that he “ha[d] been discriminated against because [he is] a Christian.” Among his several points of contention, he described his use of Biblical terms (e.g. wicked and abomination) as “moderate.” The Appeals Committee affirmed on the basis that Mr. Ngole lacked insight into the problems caused by his postings, and that his conduct in reacting to the investigation indicates that he was not open to guidance on the issue.

Mr. Ngole then sought judicial review in the English High Court of Justice alleging violations of his rights under articles 9 and 10 of the European Convention on Human Rights (“ECHR”). Article 9 protects the freedom of thought, conscience, and religion. Article 10 protects the right to freedom of expression. Further, he argued that the HCPC’s regulations and guidelines lacked the clarity necessary to interfere with his rights under the ECHR, that the regulations were in want of a legitimate aim, and that the interference was not proportionally weighed against his religious beliefs.

The High Court concluded that Mr. Ngole’s article 9 rights were not engaged because his postings were not a manifestation of religion, but they happened to be motivated by religion as part of a political debate. Accordingly, only the freedom of expression under article 10 was relevant. The High Court affirmed on similar grounds as the Appeals Committee.

Mr. Ngole then presented the same arguments to the Court of Appeal (England and Wales). At the outset, the court was unpersuaded that the

HCPC’s regulation and guidance lacked sufficient clarity and precision. In cases such as these, the court explained, where absolutely certainty is unachievable, the guidelines simply call for flexibility and proportionality in enforcement. Notwithstanding, the guidelines patently made clear that offensive language and discriminatory expression were unacceptable.

The Court of Appeal further agreed with the lower court that Mr. Ngole’s complaint arises under article 10 and not article 9 of the ECHR. Accordingly, the State may interfere with a person’s article 10 rights, the court explained, if it has a legitimate aim. Setting standards appropriate for a profession qualifies as a legitimate aim for regulation. Further, different requirements will apply to different professions. The court provided an example: “public expression of firm, political views will be perfectly proper for a lawyer in private practice, but are quite improper for a judge.” Meaning, a private lawyer can express controversial views because it would not harm the public perception of the profession in that an individual can simply go to another lawyer, but that a judge must always appear impartial and unbiased.

Social workers in England are closer to judges because, generally, a person seeking the aid of a social worker cannot choose the provider. Absolute proscription, however, is inappropriate. A social worker can publicly state that social work is underfunded. Likewise, a complete bar on religious expression, even if condemning homosexuality, goes too far. Such a blanket ban would apply to Muslims, Hindus, and other religious groups that held similar beliefs from working in the profession unless they agreed to, essentially, never speak about those beliefs.

However, those individuals must find a way to express those beliefs in a manner that conveys to the public that it will not cause them to discriminate. Such limitations have a legitimate aim to preserve public confidence in the profession.

The court noted that Mr. Ngole qualified those Biblical terms as moderate. To wit, he viewed describing

homosexuality as wicked and an abomination, both Biblical terms, as moderate. Taken out of context, use of those terms would be viewed as discriminatory. Further, lacking explanation as to why those terms were referenced could lead one to think that the person would discriminate. The individual must figure out a way to accurately convey the meaning and intended use of the reference. Mr. Ngole did not comprehend that Biblical nomenclature would be viewed as extreme and not moderate, and the University did not attempt to explain this to Mr. Ngole. This detail illustrates, as explained more below, why the Court of Appeal ruled in favor of Mr. Ngole—the University did not attempt to explain the actual problem to Mr. Ngole.

Having concluded that there is a legitimate aim to the regulation, the analysis turns to proportionality—the degree to which the University could intrude on Mr. Ngole’s article 10 right to expression.

The guidelines properly require that Mr. Ngole use his professional judgment to ensure that his views do not give the impression that a person will face discrimination if requiring the services of a social worker. The University fell short because it did not adequately convey that Mr. Ngole could maintain his views, but the manner in which he expressed them could be viewed as offensive and lead one to think he would discriminate.

The next issue arose from the University’s conduct in deciding the appropriate discipline. It confused expression of religious views with discrimination. The record established that Mr. Ngole had never discriminated against homosexuals or those in same-sex relationships on religious grounds, and it was reasonable to think that he was unlikely to do so in the future.

The University persistently argued that Mr. Ngole lacked insight and reflection into how his use of social media, and his public statements, could negatively impact the profession, and to be more mindful of such potential impact in the future. However, the court reasoned that the University,

instead, lacked insight into how its actions were perceived by Mr. Ngole, and it failed to reflect that this failure explains Mr. Ngole’s reaction. The University never considered that Mr. Ngole’s reaction, for which he faced expulsion, was understandable given the circumstances, and the University should have sought to address this. The two sides became so entrenched in their positions that neither saw the actual problem. The University, however, has the greater onus properly to carry out a disciplinary procedure that has the insight and reflection to consider why a student may react the way that they do.

The Court of Appeal concluded that the University acted too quickly, and it disproportionately concluded that removal was the only available avenue of recourse. Rather, it should have engaged in a calm process of guidance, carefully explaining to Mr. Ngole what he could and could not say and an appropriate manner to say it. The University should have picked up on the dissonance when Mr. Ngole used extreme Biblical terms to describe homosexuality, and did so thinking those views were moderate. The University should have listened more closely when Mr. Ngole stated that he would not discriminate, and that he only used those terms to describe how the Bible views homosexuality.

Such considerations would have informed whether Mr. Ngole could be reasoned with and whether he was receptive to reflection on how his comments could be viewed as leading to discrimination, and thus erode confidence in the profession. Thus, the University’s decision to remove Mr. Ngole lacked the requisite proportionality to interfere with his article 10 right to freedom of expression. By failing to provide Mr. Ngole with the benefit of the doubt, as it were, the University could not adequately conclude that removal was the only proper remedy. Mr. Ngole must be offered a reasonable opportunity of reflection.

Notwithstanding, the court left unanswered whether Mr. Ngole would have resisted such an approach, and whether he would have accepted

guidance. Accordingly, the matter was remitted to a new FTP committee to make these findings of fact.

Supporters of Mr. Ngole have misrepresented this matter as one concerning “free speech” and “freedom of religion.” However, the Court of Appeal was, from the decision, fully prepared to accept such limitations, but decided against the University because it became entrenched in its position and failed to consider that its conduct fueled the fire, instead of de-escalating the situation. It needed to better explain the issue to the student before expulsion. Essentially, it is a cautionary tale of a University reacting too quickly and engaging in the same conduct it accused the student of engaging in. Both sides engaged in problematic conduct, but the University, being in a position of power, must have the clean hands. ■

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Gay Mississippi Inmate Loses Protection from Harm Case; State Prohibits Inmate Claims for Negligence

By William J. Rold

In *Brown v. Bufkin*, 2019 U.S. Dist. LEXIS 118673, 2019 WL 3220002 (S.D. Miss., July 17, 2019), after granting summary judgment to state defendants on gay *pro se* inmate Antonio S. Brown's federal civil rights claims of failure to protect him from assault from other inmates, U. S. Magistrate Judge Robert H. Walker ruled that there is no state negligence claim against Mississippi officials for misperformance of their duties, when the claim occurred while the plaintiff was a prisoner.

Antonio S. Brown signed himself out of protective custody, but rumors began to swirl that he was a "snitch." He sought to return to protective custody, but officials moved him instead to another unit in the same prison and told him to let them know if he remained threatened. He said he was afraid of "gangs" and his reputation as a "snitch." Brown quotes the supervisors as stating: "You should have stayed on PC when you was on PC." The opinion notes that Brown had reported that "gang" members in the unit from which he was moved had attempted to extort him to hide contraband. Three months passed after the move, whereupon Brown was assaulted by a gang member whom he did not know, resulting in serious injury and criminal charges against the assailant.

As framed by Judge Walker, resolution of the federal issue under *Farmer v. Brennan*, 511 U.S. 825, 832-4 (1994), turned on whether the defendants subjectively "knew" that Brown remained in danger, having taken some steps for his protection by moving him and asking him to report continuing threats. It is unclear how much Brown's sexual orientation had to do with events. It is mentioned only in a footnote, as the reason Brown was previously in protective custody before he signed himself back into general population.

Judge Walker did not find a jury question on subjective intent under the Farmer standard. "[N]othing before the Court indicates that [Brown] reported a problem with his new housing assignment for the three months he lived there before [the assailant] attacked him. Brown has presented no evidence that he ever expressed anything more than a generalized fear of gang-affiliated inmates." Defendants are thus entitled to qualified immunity because they violated no constitutional right to protection. *Longoria v. Texas*, 473 F.3d 586, 592-93 (5th Cir. 2006).

Judge Walker continued: "Even if Defendants were mistaken in choosing to move Brown in response to his situation, 'decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity.'" *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Negligent failure to protect an inmate does not rise to the level of a constitutional violation and is not actionable under 42 USC § 1983. *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990) (other Fifth Circuit citations omitted).

Here lies the rub. There is no negligence claim, either, under Mississippi law. All claims against individual government officials devolve into claims against the State under the Mississippi Tort Claims Act so long as the defendants acted within their scope of employment. In 1993, the Mississippi Legislature amended the Claims Act to exclude any claims that occurred while a claimant was a prisoner. Miss. Code Ann. § 11-46-9(1)(m).

Not only does this preclusion apply to claims of negligent failure to protect, it also applies to medical malpractice. *Mallery v. Taylor*, 805 So.2d 613, 623 (Miss. Ct. App. 2002). See also, *Clay v. Epps*, 19 So.3d 743, 746 (Miss. Ct. App. 2008) (rejecting both negligent failure to

protect and medical malpractice claims under state tort law).

The obdurate hostility to inmate claims is seen in the majority opinion of the Mississippi Supreme Court on the inmate exclusion, albeit in a 5/4 decision with fiery dissents, in *Sparks v. Kim*, 701 So.2d 1113 (Miss. 1997), where an inmate died following a "tragic misdiagnosis" of fatal meningitis that was treated with cold tablets and Tylenol. There is this: "Doctors . . . are not able to view their inmate patients as mere medical patients, but they must also view them as security risks whose treatment also involves considerations unrelated to medical necessities." And this: " . . . permitting lawsuits against prison doctors and other prison medical personnel would adversely affect the ability of prisons to hire competent personnel." And: " . . . there are serious public policy arguments against granting inmates access to yet another outlet for the exercise of creative litigation." Id. at 1115-16.

The dissents were "startled" by the majority decision and said it granted "a license of indifference to maim or kill." *Law Notes* is likewise "startled" by this line of authority. Please tell us we have missed something. ■

William 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.



European Court of Human Rights Holds Russia Violated the Rights of LGBT Persons-AGAIN! But Does the Decision Also Limit Which LGBT People Are Entitled to Protections?

By Vito John Marzano

The European Court of Human Rights (Court) again confronts Russia's abysmal record as it relates to LGBT civil rights in *Zhdanov and Others v. Russia*, nos. 12200/08, 35949/11, and 58282/12 (16 July 2019). The issues before the Court arose from the Russian government refusing to register three separate organizations that sought to advocate for LGBT rights. To wit, (1) Rainbow House, (2) Movement for Marriage Equality, and (3) Sochi Pride House.

As discussed below, a unanimous seven-member chamber found that Russia breached articles 11 (freedom of assembly and association) and 14 (prohibition on discrimination) of the European Convention on Human Rights (ECHR) by denying legal status to those organizations. However, in a 4-3 decision, the Court concluded that individual Nikolay Alekseyev engaged in conduct that resulted in an abuse of the right of application and, as such, his individual application was deemed inadmissible. Because the Court consolidated separate, but related, applications, the facts of each are discussed separately.

Aleksandr Zhdanov opened a gay nightclub in April 2005. Thereafter, masked and armed police stormed the club and closed it down. As a result, in August 2005, Mr. Zhdanov and other activists notified the Tyumen Administration (Tyumen is both a city and oblast—i.e. province—in Russia) of their intention to hold a gay march on September 5, 2005. The head of the Interior Department for the Tyumen Region then held a press conference on the planned march and stated, alongside representatives of the Orthodox Church, that no march could occur. On August 20, 2005, the activists publicly announced that they would create a regional public association named *Rainbow House*.

In June 2006, Mr. Zhdanov applied to register *Rainbow House* with the local department of the Federal Registration Service of the Ministry of Justice. The Tyumen registration authority commissioned an "expert" opinion from the Tyumen Institute of Legal Studies of the Interior Ministry of Russia, which concluded that permitting such an organization may, in sum, endanger the security of Russian society and the State because advocacy of "non-traditional sexual orientation" would destroy the moral values of society and undermine the sovereignty and territorial integrity of Russia through decreasing the population.

Based on the above report, on December 29, 2006, the Tyumen registration authority refused registration, concluding that it represented a danger to Russia's national security. Further, permitting such an organization might interfere with the rights and freedoms of others by encouraging social and religious hatred and enmity. Thus, the Tyumen registration authority deemed *Rainbow House* an extremist organization.

Mr. Zhdanov challenged the foregoing with an expert opinion from the Independent Legal Expert Council. The opinion, dated February 7, 2007, concluded that the articles of association did not suggest that *Rainbow House* would send out propaganda of homosexuality, or would encourage social and religious hatred or enmity or endanger national security.

On March 10, 2007, Mr. Zhdanov challenged the first decision directly to the Federal Registration Service. He argued, particularly, that under Russian law, only a judicial decision can declare an association as extremist. The Federal Registration Service upheld the decision. On August 15, 2007, Mr. Zhdanov sought judicial review in district court. On October 26, 2007, the district court

dismissed the complaint, referring to the expert opinion commissioned by the Tyumen registration authority and repeating, verbatim, its determination. It declined to consider the expert opinion offered by Mr. Zhdanov. On Appeal, the Moscow City Court upheld the judgment on December 11, 2007.

During that time, Mr. Zhdanov submitted a second application to the Tyumen registration authority, which was rejected on the same basis but also for minor irregularities in the application for registration and accompanying documents (e.g. failure to staple the application form or a typo in the name of the department that issued Mr. Zhdanov's passport). Mr. Zhdanov challenged dismissal in district court, with the same arguments made before, and that the minor irregularities could have been fixed through a special procedure provided by law. On a date uncertain, the Tyumen registration authority commissioned another expert opinion, which, on October 17, 2007, again found that *Rainbow House* might be extremist. The rights of heterosexual citizens, and society as a whole, and of the State, might be breached if an information center were created.

On November 7, 2007, the district court affirmed the administrative determination. On appeal, the regional court affirmed the lower court's decision. Further applications were refused in May and November 2010. Mr. Zhdanov filed an application to the Court on behalf of himself and *Rainbow House*.

Turning to the next matter, Nikolay Alekseyev sought to establish a non-profit called *Movement for Marriage Equality*. He submitted an application on December 14, 2009 to the local department in Moscow of the Federal Registration Service. On January 12, 2010, the Moscow registration authority refused to register the organization

on the basis that the name was not in line with section 2(2) of the Non-profit Organisations Act and article 12 of the Family Code. It further found fault in certain paragraphs of the proposed articles of association.

On April 5, 2010, Mr. Alekseyev challenged the determination in district court, arguing that it violated the freedom of association guaranteed under article 30 of the Russian Constitution, and article 11 of the ECHR. He further contended that the organization's aims were compatible with section 2(2) of the Non-profit Organisations Act because it sought to promote equality, combat discrimination, and defend human rights, specifically, the right to marry.

On July 20, 2010, the district court dismissed the complaint, holding, among other things, that the aims of the organization were incompatible with basic morality because it sought to promote legislation to legalize same-sex marriage. The Moscow City Court affirmed on appeal on December 20, 2010. Mr. Alekseyev filed an application on behalf as himself and *Movement for Marriage Equality*.

The remaining individual applicants, including Mr. Alekseyev as well as Kirill Nepomnyashchii and Aleksandr Naumchik, sought to create *Sochi Pride House* in October 2011. The organization aimed to develop sports activities for LGBT people, combat homophobia in professional sports, create positive attitudes, and provide a forum at the Sochi Olympic Games. The application was submitted to the local department in the city of Krasnodar of the Federal Registration Service. On November 16, 2011, the Krasnodar department denied registration on the basis that the articles of association were incompatible with Russian law, specifically the name contained words that did not exist in the Russian language, that the application did not denote the type of organization *Sochi House* was, and that there were several minor mistakes.

On December 6, 2011, the applicants challenged the refusal in district court. On February 20, 2012, the district court dismissed the complaint, concluding, among other things, that "the aims of combating homophobia and creating a positive attitude towards LGBT

sportspeople are incompatible with basic morality as they may lead to increasing the number of citizens belong to sexual minorities, thereby undermining the conceptions of good and evil, of sin and virtue established in society[.]"

The applicants did not attend the announcement. A written text of the judgment was sent by mail on March 27, 2012 and did not include a date on which the full decision was finalized. The applicants, however, sought to appeal from a short form order on March 19, 2012, which was received on March 26, 2012. On the same day, a complete version of the judgment was submitted, and it was received by the district court on April 3, 2012. However, on March 28, 2012, the district court rejected the appeal, finding that the one-month time to appeal expired based on the February 2012 date, and that the applicants had not sought an extension. For similar reasons, the complete version of the appeal was rejected thereafter.

The Krasnodar Regional Court, on appeal, upheld the decision on July 24, 2014, for the same reasons as the district court. It did not address the decision to reject the appeal from the full order. Mr. Alekseyev and the two others filed an application on behalf of themselves and *Sochi House*.

Having set forth the foregoing facts, the Court then turns to the applicable domestic law. The Constitution of Russia provides for freedom of association (article 30 § 1), that all public associations are equal before the law (article 13 § 4), and that associations that seek to make a forcible change to the constitutional system of Russia or to incite social, racial, ethnic, or religious discord are prohibited (article 13 § 5).

The Non-profit Organisations Act permits the creation of groups for, among other things, pursuit of social aims, protecting public health, develop sports activates, and defending rights and legitimate interests of citizens. Registration is subject to refusal if: (a) the articles of association do not comply with Russian law; (b) the registration documents are defective or incomplete; or (c) the association's name is insulting to the moral, national, or religious feelings of citizens. The registration authority may suspend registration for

incomplete or defective documents, and set a time limit to cure defects.

The Public Associations Act allows a non-registered group to carry on its activities without the benefits of a legally recognized entity. The Suppression of Extremism Act defines *extremist activities* as, among others, (1) forcible change to the foundations of the constitutional system of Russia; and (2) incitement of social, racial, ethnic, or religious discord.

Turning first to *Sochi House*, the Court, without much analysis, declared the application as admissible and not manifestly ill-founded. For readers unfamiliar with the European Court of Human Rights, admissibility is, roughly, analogous to the U.S. doctrine of standing.

In any event, the Court was unpersuaded by the Government's argument that the applicants failed to exhaust their domestic remedies by filing an appeal within one month of the February 20, 2012 decision. Such a defect would be fatal to the Court hearing the matter pursuant to article 6 of the ECHR. However, the Court reasoned that the one-month window starts when the party receives the full judgment. The February 20, 2012, decision only read the holding, and it is unclear when the full decision was received by the applicants. Even going by the date, the applicants filed their appeal, with proof of mailing, on March 19, 2012, thus rendering inexplicable why the Russian courts considered March 26, 2012, the date it received the mail, as untimely.

As it relates to all three organizations, the Government argued, in sum, that it had a legitimate aim to refuse registration to protect the morals, national security, public safety, and rights and freedoms of others. The Court found this unavailing, noting that the only legitimate purpose relevant here was to prevent hatred and enmity. The Government believes that because the majority of Russians disapproved of homosexuality, the applicants would become the victims of aggression.

The Court concluded that the role of the authorities was not to remove the cause of tension, but to ensure tolerance between competing groups.

The Government has the duty to take reasonable steps for an organization to carry out their activities without fear of violence, and no evidence was put forth that the Government attempted to do this. The refusal was not, as argued by the Government, necessary. A democratic society, the Court noted, requires pluralism. Accordingly, by refusing to permit the three organizations to register, the Government violated the applicants' right to freedom of association under article 11.

Turning to article 14's prohibition on discrimination, article 14 generally compliments another article, such as here, article 11. The Court noted its well-established precept that disparate treatment based solely on sexual orientation is unacceptable under the ECHR. The record unequivocally established that the refusal to register the organizations was because they sought to promote LGBT rights. The supposed irregularities and defects in the applications were inconsequential because it was patent that the Government would not have permitted those organizations to register if the defects were cured. The aim to promote LGBT rights was the decisive factor. Other reasons advanced by the Government were merely pretextual in nature. Given the foregoing, the Government breached article 14, taken in conjunction with article 11, because its refusal to register the organizations constituted discrimination on the basis of sexual orientation.

Article 41 of the ECHR permits the award of just satisfaction when there is a breach. The Court unanimously held that that *Rainbow House* was entitled to non-pecuniary damages. In a 4-3 decision, the Court awarded €10,000 to Mr. Zhadnov, €13,000 each to Mr. Nepomyashchiiy and Mr. Naumchik, €6,000 to *Rainbow House* for costs and expenses.

Of particular note, however, the Court concluded that certain conduct of Mr. Alekseyev amounted to abuse of the right to petition and, therefore, his application, only in his individual capacity, was declared inadmissible.

Article 35 § 3 (a) of the ECHR requires the Court to declare inadmissible

any applicant who abuses their right to petition. Abuse can arise from knowingly stating untrue facts, or use of vexatious, contemptuous, threatening, or provocative language in communication with the Court.

The conduct here, however, stems from comments Mr. Alekseyev made in connection with the Court's recent decision in *Alekseyev and Others v. Russia*, nos. 14988/09 and 50 others (November, 27, 2018) (covered in the December 2018 edition of *LGBT Law Notes*). There, the Court concluded that Russia violated the ECHR by refusing to allow pro-LGBT rallies over the course of six years. However, the Court stopped short of awarding pecuniary damages.

Afterwards, Mr. Alekseyev posted disparaging comments about the judges and the Court to his social networking account. He posted photographs of the judges with captions "alcoholic," "drug addict," and "corrupt." Against one judge, he posted "this crone owes me 100,000 euros . . . God will punish her." He referred to judges as "European bastards and generals," "freaks," "venal scum," and "idiotic." He threatened to "torture [them] . . . with litres of vodka" and proclaimed that "it [was] time to set fire to the European Court of Human Rights." Regarding women, Mr. Alekseyev stated that "We should not have given wenches the right to vote . . . They should be cooking soup."

The majority noted that the comments were made outside of the present matter, but considered that, by publishing these statements, Mr. Alekseyev sought the widest possible circulation. The Court sent a letter to Mr. Alekseyev warning him that these statements might amount to an abuse of right of petition, but Mr. Alekseyev did not withdraw his comments. Although he claimed that there is no proof these were his accounts, the majority concluded that a simple search easily connects the accounts to him.

The majority reasoned that Mr. Alekseyev disparaged and threatened the very institution he now seeks to vindicate his rights. The continued existence of these posts reflects his disrespect for the institution. As the majority put it, "It is unacceptable to

seek protection of a court in which the applicant has lost all trust. [Mr. Alekseyev's] conduct constitutes a vexing manifestation of irresponsibility and frivolous attitude towards the Court, amounting to contempt" (internal quotations omitted). As such, pursuant to article 35 § 3 (a), the majority found that Mr. Alekseyev abused his right to petition and held that his individual application was inadmissible.

Three judges dissented and would have award Mr. Alekseyev compensation. The dissent did not object to the majority's characterization of the language, but emphasized that the comments were not made in connection to the instant matter and should not have resulted in inadmissibility. The Court's prior findings of abuse of petition stemmed from conduct within a current case before it, not from extraneous matters. The dissent further contends that the *prima facie* interpretation of the applicable provision leads them to conclude that it is the application itself that must contain the egregious language, not conduct or behavior unconnected to the application.

The dissent warns that the majority's holding in this instance will have an effect on free speech and be viewed as retaliatory. They also consider that the majority did not identify the specific statement, if any, that lead to its conclusion.

Of the most concern, in this writer's opinion, is, as the dissent points out, the invitation the majority has made to Governments to increase surveillance on citizens that have cases before it, as such would then be a weapon to get a matter dismissed. Certainly, Mr. Alekseyev's comments breach certain concepts of propriety and civil engagement. However, considering Russia's endless violations of the rights of LGBT people living in its borders, one cannot avoid questioning whether only recognizing the rights of those who meet the majority's concept of appropriate civil discourse as opposed to the more rambunctious, and perhaps juvenile, among us is wise. That is to ask—are the rights and protections afforded to Europeans under the ECHR limited only to those who behave and act a certain way? ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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U.S. COURT OF APPEALS, 2ND CIRCUIT

– Last summer, we reported on a decision by U.S. District Judge Paul Engelmayer rejecting Title VII and NYS Human Rights claims by Otis Daniel, a closeted gay lobby attendant working for the security contractor at a Manhattan office building. *Daniel v. T&M Prot. Res. LLC*, 2018 U.S. Dist. LEXIS 116303, 2018 WL 3388295 (S.D.N.Y. July 12, 2018). Daniel, going *pro se*, appealed the ruling to the 2nd Circuit, which issued a summary order on July 2, rejecting the appeal. *Daniel v. T&M Protection Resources LLC*, 2019 WL 2754961, 2019 U.S. App. LEXIS 19747. The court held that Judge Engelmayer’s factual findings were not “clearly erroneous,” revolving around Daniel’s credibility, which was compromised because many of the facts he was alleging before the district court at trial were not supported by the complaint forms he had filled out at the EEOC and the NYS Division of Human Rights, especially concerning his hostile environment sexual harassment claim. By the time Judge Engelmayer came to write his decision last summer, the 2nd Circuit had issued its ruling in *Zarda* that Title VII covers sexual orientation discrimination claims, but that didn’t help Daniel very much. If one goes back and reads the entire chain of decisions (this case has been to the 2nd Circuit before, when the court vacated Engelmayer’s first summary judgment ruling and remanded for discovery and trial). Judge Engelmayer appointed *pro bono* counsel for Daniel, but shortly Daniel rejected their assistance and insisted on representing himself, which is frequently a fatal mistake in employment discrimination cases. Daniel’s factual allegations that had

the strongest bearing on his case were the least well supported by evidence, because of their omission from contemporary documentation. (For example, making complaints about his supervisor to management without citing the specifics that would have given the complaints some bite.) Trying to piece together what happened here from less than overwhelmingly informative judicial opinions, it sounds very much like a situation where a closeted African-American man set off the “gaydar” of his straight white supervisor (who was the father of a gay son), and the supervisor then engaged in a course of conduct playing off Daniel’s perceived sexual orientation; that Daniel, quite embarrassed by the situation, preferred to resort to euphemisms and generalizations rather than specific facts, when filling out the intake forms at the EEOC and the SDHR. Adverse credibility determinations by the trial judge were a natural consequence of this, which was compounded by Daniel’s reticent complaints to the company. The 2nd Circuit panel was not willing to help him out, however, on this subsequent appeal, finding that even if his factual allegations concerning his supervisor’s conduct were true, they “established only mild or isolated instances of harassment, which are insufficient to create a hostile work environment.” We sense a lack of imaginative empathy by the district judge and the court of appeals panel, confronted with an intensely private man who was possibly too embarrassed to present his case adequately, especially in the absence of counsel who could have said things in court that the plaintiff would be too embarrassed to say. In any event, we see this case as an example of how the employment discrimination litigation process can fail to protect the rights of LGBT people. Elsewhere in this issue of *Law Notes*, we say much the same thing about how the refugee process can be inadequate to protect the rights

of LGBT people. A recurring theme, unfortunately.

ARIZONA – Does Title VII’s ban on sex discrimination in employment protect a probationary heterosexual employee who was fired after complaining about the broadcast of music in his workplace that could be construed as offense to women and gays? Granting partial summary judgment to the employer in *Sorge v. Yelp Incorporated*, 2019 WL 3072286, 2019 U.S. Dist. LEXIS (D. Ariz., June 25, 2019), Senior U.S. District Judge Stephen M. McNamee held that Joseph Sorge’s factual allegations were not sufficient to make out a hostile environment claim under Title VII. “Sorge identifies as a heterosexual man, but he complains of a work environment hostile to women and homosexuals,” wrote Judge McNamee. “Because Sorge is neither a woman nor homosexual, his complaints about the Song [which he alleged was played repeatedly in the workplace, using the terms “bitch” to refer to women and “faggot” to refer to gays] cannot support a claim for hostile work environment as he has not experienced harassment because of *his own sex* At no point does Sorge allege that the Song was demeaning to heterosexual men. Sorge will not be permitted to amend the theory of liability stated in his Complaint in opposition to summary judgment.” The court found “irrelevant” to Sorge’s claim the employer’s “No Tolerance” policy, stating that the policy “does not alter the statutory requirements of Title VII, which requires that the discrimination occur because of the plaintiff’s sex. Sorge does not identify any case law stating otherwise.” However, the court refused to grant summary judgment to the employer on the retaliation claim, stating that its “argument misconstrues what constitutes a protected activity for purposes of a retaliation claim. An employee need not prove an ‘unlawful

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employment practice’ to prevail on a claim of unlawful retaliation; rather, ‘the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation. Furthermore, an employee’s complaints about the treatment of others is considered a protected activity, even if the employee is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable. Thus, Sorge’s alleged complaint about the Song is not excluded from protection under Title VII’s retaliation provision merely because Sorge is not a woman or a homosexual. Because Yelp makes no further arguments against Sorge’s prima facie case, the Court assumes, without finding, that Sorge has established his prima facie case.” Although Yelp presented evidence of non-retaliatory reasons for decision to dismiss Sorge, the court held that temporal proximity of the discharge to the employee’s complaint to management in this case precluded granting Yelp summary judgment, writing that “the Court is compelled to conclude that the temporal proximity of 24 hours between Sorge’s alleged complaint and his termination is sufficient to raise a triable issue as to pretext.” The judge explained that “a reasonable jury could potentially find evidence of retaliatory intent in Susa’s response to Sorge’s complaint and Yelp’s formally stated reason for Sorge’s termination. Sorge alleges that when he complained to Susa about the offensive lyrics, Susa responded by saying ‘it was company culture’ and that Sorge should ‘get over it.’ Then on the formal paperwork documenting Sorge’s termination, Yelp noted that the primary reason for Sorge’s termination was ‘Not a good Cultural Fit.’” Rather clear evidence of retaliatory intent, we would think. Joseph Sorge is represented by Joshua William Carden of Scottsdale, AZ.

CALIFORNIA – In *McGee v. Poverello House*, 2019 U.S. Dist. LEXIS 109892, 2019 WL 2725342 (E.D. Cal., July 1, 2019), U.S. Magistrate Judge Stanley A. Boone had to rule on a discovery dispute between plaintiffs – a group of cisgender women who are clients of two Fresno women’s shelters – and the owners of the shelters, who are defending their decision to allow a transgender woman to use the shelters. The plaintiffs, represented by Peter N. Kapetan of Fresno, filed suit in Fresno Superior Court, claiming that their rights were being violated by the shelters allowing D.N., the transgender person, to use the facilities and, in particular, subjecting them to objectionable circumstances. Their invocation of federal as well as state law gave defendants a right to remove the case to federal court. A main point of contention in the case is that the shelters require the homeless women who use the facilities to shower every night if they want to sleep over in the facilities. This sounds like a reasonable common-sense rule. The rule applies, of course, to D.N., who dresses and grooms as a woman but has male genitalia. The plaintiffs object to having to disrobe in D.N.’s presence, and claims that she “repeatedly” makes “lewd and sexually inappropriate comments” to the women. The defendants proffered a series of “requests for admissions” that the plaintiffs were refusing to answer, claiming that there were various ambiguities in their wording that turned them, in effect, into “trick questions,” and in some cases called for opinions by the plaintiffs rather than factual responses. Much argument was expended over how the term “female” should be construed in the context of this litigation. In any event, the opinion by Judge Boone on the disputed questions is fascinating and frustrating to read, as the judge tries to parse terminological disputes by parties who may be speaking at cross-purposes to each other with widely different frames of reference for discussing issues of sex,

gender and gender identity or expression. We don’t have the space in this format to set it all out in detail, but those who are interested are encouraged to read the opinion for themselves and try to figure out (1) what the defendants were trying to achieve by asking the plaintiffs to make the specific admissions at issue and (2) how the questions could have been worded to avoid the ambiguities identified by the plaintiffs, as to some of which Judge Boone agreed and some of which he disputed. One of the defendants’ apparent goals was to achieve through admissions a basis to obtain a summary judgment dismissing the case, of course. The shelters are represented by Cynthia Gill Lawrence and Tahmina Yassine, of Roseville, CA, and William E. McComas of Thornton Law Group PC, Fresno. The recent decision by the Trump Administration to abandon the Obama Administration’s interpretation of federal fair housing law regarding transgender protection might eventually moot some of the issues in this case, since they would release these all-women shelters from the obligation to provide shelter to transgender women, but – of course – are part of the Trump Administration general disregard for the civil rights of transgender people and would deprive many needy people of an important benefit subsidized by the federal government.

CALIFORNIA – The California 4th District Court of Appeal affirmed San Diego Superior Court Judge Eddie C. Sturgeon’s denial of a gay anesthesiologist’s attempt to escape an adverse ruling by a labor arbitrator on his claims against his former employer in *Bogue v. Anesthesia Service Medical Group, Inc.*, 2019 Cal. App. Unpub. LEXIS 4750, 2019 WL 3214245 (July 17, 2019). Michael Bogue claimed that the employer decided not to renew his annual contract because of Bogue’s sexual orientation, that he was subjected to a hostile environment, and that

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he was being punished for being a “whistleblower” in violation of several California statutes. The employer moved to send the case to arbitration under an agreement that Bogue had signed. The arbitrator ruled against Bogue on all of his claims, and the employer sought court confirmation of the arbitration award, which Bogue opposed. Part of the opinion for the court of appeal by Judge Judith McConnell disposes of Bogue’s claim that the arbitration agreement was unenforceable under California unconscionability principles, which the court handily rejected. The part that is interesting from the perspective of *Law Notes* was his claim that he was denied an unbiased, neutral forum because the arbitrator who decided his case was Jewish. Bogue asserted that the award should not be enforced because the arbitrator “failed to disclose members of his faith, including him, are biased against homosexuals.” Bogue offered no specific evidence that this particular arbitrator was biased against him because of his sexual orientation, other than to claim that the arbitrator had ruled against him, had been rude to him during the hearing, (recommending at one point that Bogue get anti-anxiety medication), that the arbitrator had admitted hearsay evidence, and that he had found Bogue’s testimony to be less credible than that offered by the employer’s witnesses. Judge McConnell pointed out that as part of the arbitrator selection process, Bogue and his counsel were provided a 10-page curriculum vitae that disclosed, among other things, the arbitrator’s affiliation with the Union for Reform Judaism, the Commission on Social Action of Reform Judaism, the Stephen S. Wise Temple, and the Jewish Social Service Agency of Washington, D.C. “Once Bogue received this information,” wrote the judge, “he had sufficient notice of the arbitrator’s religious affiliation to determine whether to seek the arbitrator’s disqualification. Indeed, the record includes Internet

research from both parties about how people who practice the Jewish faith may regard homosexuals. The research conflicts and we express no view on its accuracy or relevancy. However, its existence demonstrates Bogue had readily available means to determine whether the arbitrator’s religious affiliation warranted service of a notice of disqualification,” and that Bogue had “forfeited his right to disqualify the arbitrator on this basis” by failing to seek disqualification before the arbitrator’s selection for the case. Furthermore, she wrote, “An arbitrator’s membership in the Jewish faith would not cause a person to *reasonably* entertain a doubt concerning the arbitrator’s ability to act impartially. As the information supplied by the parties indicates, there is more than one Jewish sect and at least one does not view homosexuality or homosexuals adversely. Thus, a person cannot *reasonably* presume because an arbitrator is Jewish, the arbitrator has any faith-based animosity toward homosexuality or homosexuals. Moreover, many people of faith, including arbitrators and judges, engage in professions requiring them to make decisions based on standards separate from and not necessarily aligned with the tenets of their faith. As long as an arbitrator is able to base his or her decision on the evidence and the applicable law, regardless of the tenets of his or her faith, the arbitrator is not required to disclose his or her faith-based memberships.” We found Bogue’s argument ironic, because the religious affiliations disclosed by the arbitrator in this case are from the “sect” of Judaism that is strongly pro-LGBT, with its movement organizations signing pro-LGBT amicus briefs in prominent Supreme Court cases, such as *Lawrence v. Texas* and *Obergefell v. Hodges*. Nobody could *reasonably* presume that somebody affiliated with the Union for Reform Judaism or the Commission on Social Action of Reform Judaism (or the Reconstructionist movement)

is anti-LGBT, although the opposite presumption might arise from somebody noting affiliation with traditionalist Orthodox organizations. As to the Conservative movement, we will refrain from commenting . . . Michael Bogue is represented by Michael A. Conger.

CALIFORNIA – Sue Herold, a now-retired Los Angeles police officer who is an out lesbian and, as described by the court, “a recognized leader and advocate for the rights of gay and lesbian officers in the LAPD,” suffered summary judgment of a discrimination suit she brought against the City under the California Fair Employment & Housing Act (FEHA), as Los Angeles Superior Court Judge Deidre Hill found that the subject matter of her complaint was time-barred. On July 1, 2019, the 2nd District Court of Appeal affirmed this ruling, in *Herold v. City of Los Angeles*, 2019 WL 2723176, 2019 Cal. App. Unpub. LEXIS 4464. The opinion for the court of appeal by Judge Elizabeth Grimes sets out the entire disciplinary history of Officer Herold over the course of her employment by the Department from 1984 until her retirement in 2015. She was a co-plaintiff in the historic case of *Grobson v. City of Los Angeles*, attacking sexual orientation discrimination in the LAPD, which was filed in 1987 and settled in 1992, with an agreement that the City would change its practices and avoid sexual orientation discrimination in the police department. Her participation established Herold as a leader within the Department on these issues. She had received several promotions in rank until a series of incidents beginning in 2006 ultimately led to a demotion, pursuant to LAPD Special Order No. 47, which gave commanding officers discretion to demote officers without having to show “good cause.” Herold was the subject of several complaints about her conduct by former girlfriends, suggesting that she had a temper and could act out a bit at

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times in response to domestic tension. She suffered several suspensions, and ultimately a demotion. She contested these actions, but never suggested in the appeals process that they were due to her sexual orientation. In October 2011, she filed a petition for a writ of mandate alleging that her demotion violated the Public Safety Officers' Procedural Bill of Rights Act (POBRA), as well as due process and contract rights, focusing particularly on Special Order 47, which was also the subject of a separate legal challenge by the Los Angeles Police Protective League. While Herold's writ action was pending, the court in the other case issued a preliminary injunction against the use of Special Order 47 as a violation of the POBRA, which statutorily recognized due process rights of police officers in connection with disciplinary actions. Then, on November 1, 2013, Herold filed a claim with the Fair Employment and Housing Department, claiming that her demotion had violated the ban on sexual orientation discrimination in the FEHA, and was retaliatory for her conduct in speaking out about discrimination in the Department. She also had some complaints about subsequent incidents during her assignments in 2014, but they were specifically resolved. Her writ petition was granted in May 2014, with an order that her demotion be rescinded retroactively with back pay, because Special Order 47 had been held invalid and she had not received appropriate due process prior to her demotions. She was thus reinstated to her former rank. She filed this discrimination case in October 2014, and retired in 2015 while this action was pending. The City asserted several affirmative defenses, but the one that stuck was statute of limitations. It seems that after reviewing the entire history of her disciplinary record in the Department, the trial judge concluded that any potentially actionable things had all occurred so many years ago that they were effectively time-barred by the time she filed her complaint with the

FEH Department. The court rejected her attempt to invoke a "continuing violation" theory to avoid the statute of limitations, and the court of appeal concurred, concluding that "there are no material triable issues supporting application of the continuing violation doctrine. Virtually all of the acts plaintiff identified as unlawful conduct in violation of FEHA occurred before 2010, culminating in her demotion in early 2011 to the rank of Police Officer II. It is undisputed that in August 2011, after the conclusion of plaintiff's administrative appeal, Chief Beck adopted the recommendation of the administrative hearing officer to sustain plaintiff's demotion. There can be no question but that plaintiff's demotion had achieved permanence within the LAPD by August 2011. Thus, by that time, plaintiff was on notice that any further effort to challenge her demotion would require litigation. Nonetheless, plaintiff *waited over two years before filing her FEHA complaint* with the Department of Fair Employment and Housing, in which she raised, for the first time, her contention that her demotion was based on discriminatory animus and in retaliation for her years of speaking out about discrimination in the LAPD." Problems occurring after that date, when she had been transferred to a different command, away from the officer, Captain Kane, who was the main focus of her discrimination charge, had been resolved or were on their face not discriminatory, found the court. Herold is represented by Matthew S. McNicholas, Douglas Winter, and Courtney C. McNicholas of McNicholas & McNicholas; and Stuart B. Esner, Andrew N. Chang and Steffi Jose, of Enser, Chang & Boyer.

COLORADO – Mhariel Summers, an African-American lesbian woman, "considers herself to have an unconventionally masculine, 'less feminine' appearance," wrote U.S.

District Judge Daniel D. Domenico in *Summers v. Green River Corporation*, 2019 U.S. Dist. LEXIS 110897, 2019 WL 2775523 (D. Colo., July 2, 2019). "At times, customers would mistake her for a man, and she would generally not correct them." Several weeks after being hired as a management trainee at one of the defendant's stores, she applied for a received a promotion go become a general manager, with a significant salary increased. She was given some management training and put in charge of a store which was performing adequately, but by the time the company decided to demote her back to trainee status, the store had one of the worst profit records and there were difficulties in collecting balances due from customers. After removing Summers as manager, the company installed a white male with consideration retail management experience. Summers resigned and filed suit under Title VII, relying heavily on a statement by the general manager of the store to which she was reassigned upon her demotion, to the effect that the company "would usually permit a GM's numbers to decline for a substantially longer period before taking such action," and that it "crossed his mind" that Summers was treated differently because she is a black woman and "pretty much all of our stores [were run by] white males." Summers' Title VII claim was based on race and sex, but did not make anything of her sexual orientation, instead emphasizing her masculine appearance. The court granted summary judgment to the employer. Judge Domenico accepted Summers' pleading of a sex discrimination case in terms of the requirement that alleged discrimination have been "because of sex," providing an explanation in a footnote: "Ms. Summers claims two forms of sex discrimination. As stated in the Amended Complaint, 'Defendant treated male employees more favorably than M.s Summers. Defendant treated female employees who confirmed more

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closely to sexual stereotypes about how women are expected to present more favorably than Ms. Summers.’ In addition to more traditional claims of sex discrimination, the Tenth Circuit ‘has implicitly recognized that claims based on the failure to conform to stereotypical gender norms may be viable.’” However, Summers fell short, in the court’s estimation, due to the employer’s credible and un rebutted evidence that under her management the store fell from acceptable to significantly unacceptable performance. “Here,” he wrote, “Green River points to Ms. Summers’s poor store performance and leadership deficiencies as its reasons for her demotion, and Ms. Summer provides no rational reason to find these explanations unbelievable. She argues that Green River’s reliance on pre-tax profits is pretextual because it had not previously emphasized that metric. Ms. Summers, however, has not disputed the commonsense notion that profits were of primary concern to the leadership of a for-profit entity like Green River, nor has she generally undermined a business’s prerogative to maximize profits. The rises and falls in her position and pay grade corollate [sic] closely with the profitability of her store.” The court also noted that she was demoted by the same person who had promoted her, as cutting against the idea that her race or sex had anything to do with it. The company also pointed to high staff turnover “and the stated frustrations of her immediate subordinates” as supporting the company’s argument that the demotion was based on performance, not prohibited grounds under Title VII. Summers is represented by Rachel E. Ellis, Lifelihood Law LLC, Denver.

FLORIDA – This is a “bad old days” decision, showing how Florida is behind more progressive jurisdictions in dealing with “non-traditional families.” In *Springer v. Springer*, 2019 WL 3242195, 2019 Fla. App. LEXIS 11402

(Fla. 2nd Dist. Ct. App., July 19, 2019), a former same-sex couple who had a child together is battling over the biological mother’s refusal to allow her former partner, the co-parent, to maintain a relationship with the child after the mothers’ relationship ended. “The parties met and began their relationship in Ohio,” wrote Judge Morris Silberman for the Court of Appeal. They began discussing having a family in the spring of 2013. Nicole became pregnant through donor insemination, her own egg being fertilized by donor sperm, which was paid for by Christy. During the pregnancy, Christy did on-line research and found a form for a co-parenting agreement, which the women signed on June 24, 2014, shortly before the birth of their child on July 14. The document refers to the child as “our child” and expresses the parties’ intention to “jointly and equally” share parental responsibility, but acknowledges that such co-parenting agreements are not automatically legally enforceable, since courts are supposed to decide custody and visitation disputes in the “best interest of the child,” rather than by agreement of the parents. Furthermore, some jurisdictions, including Florida, do not recognize same-sex partners as parents in the absence of a biological relationship or adoption, although many have come around – with some hesitations – to accepting co-parent status, and the Supreme Court of the United States has affirmed that the wife of a woman who gives birth is entitled to the same recognition as presumptive parent of the child as is the husband of a woman who gives birth; see *Pavan v. Smith*, 137 S. Ct. 2075 (2017). The child was born in Ohio. The couple moved to Florida in May 2015, and later separated. They had never married (same-sex marriage became available in Florida early in 2015 as a result of ongoing marriage equality litigation in the federal courts), and they had never arranged for Christy to adopt the child. Christy petitioned for declaratory

relief in Pinellas County Circuit Court, seeking recognition of parentage and time-sharing, but was turned down by Judge Jack Helinger, and the Court of Appeal affirmed. In a lengthy paragraph riddled with citations to earlier Florida decisions, Judge Silberman pointed out that Florida courts do not recognize unmarried same-sex partners as parents in the absence of adoption, and have found similar co-parenting agreements unenforceable. “We commend the trial court for its thorough analysis and acknowledge its concerns that ‘the law is slow to address’ changes in this area ‘as society and medicine create new factual situations,’ echoing Judge Van Nortwick’s special concurrence in *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. 1st Dist. Ct. App. 2006).” Despite his observations, Judge Van Nortwick recognized that Florida law does not provide a remedy to a partner who has no biological connection to a child. Based on the applicable law, we affirm the trial court’s order.” The court noted that Christy sought relief solely under Florida law. “Despite inquiry by the trial court, she did not present any substantive argument regarding Ohio law, the location where the parties entered into the agreement.” The parties are represented by counsel: Carrington Madison Mead, of Jacksonville, represents Christy, and Stephanie M. Willis of Willis Law and Mediation, PLLC, Palm Harbor, represents Nicole. There is no mention of a *guardian ad litem* being appointed to represent the child, whose best interests are entirely left out of the proceeding based on Florida’s outmoded standing rules.

FLORIDA – A gay man in Florida claims that he was retaliated against and fired because of his sexual orientation. *Concannon v. International Cruise & Excursions, Inc.*, 2019 WL 3369707, 2019 U.S. Dist. LEXIS 124666 (M.D. Fla., July 26, 2019). Florida law does not ban sexual orientation discrimination,

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so his lawsuit was filed in federal court under Title VII, alleging discrimination because of sexual orientation as a form of sex discrimination. As it was *pro se*, the complaint was referred to U.S. Magistrate Judge Leslie Hoffman for screening, and Judge Hoffman, after giving the plaintiff several opportunities to amend the complaint, recommended dismissing the case for failure to allege “membership in a protected class” under Title VII. This, of course, reflects the typical semantic confusion exhibited by lower federal courts (and even, occasionally, some U.S. Supreme Court justices), who fail to notice that Title VII does not establish “protected classes” as such. Gay people, like everybody else, can file sex discrimination complaints. Be that as it may, U.S. District Judge Roy B. Dalton, Jr., accepted the Magistrate Judge’s recommendation, because “an allegation of discrimination based on sexual orientation does not state a cause of action under Title VII in this court,” citing, of course, *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017), and *Bostock v. Clayton County Board of Commissioners*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted, sub nom Bostock v. Clayton County*, 139 S. Ct. 1599 (2019). Evidently, plaintiff Michael J. Concannon had suggested that in light of the *cert* grant in *Bostock*, which was announced about two weeks before he filed his complaint, the 11th Circuit’s precedent is under active review by the Supreme Court, which would justify staying his action pending a Supreme Court ruling rather than dismissing it outright. But Judge Dalton evidently doesn’t want to stockpile his docket, writing, “While the Court appreciates Plaintiff’s argument regarding *certiorari* in *Bostock*, the law of the U.S. Court of Appeals for the Eleventh Circuit remains intact until the U.S. Supreme Court determines otherwise, and the Court will not stay this action indefinitely. Thus, Plaintiff’s Objection is overruled. As Plaintiff already had

three attempts at pleading his claims, the case is dismissed with prejudice and the R&R adopted.” Perhaps Mr. Concannon, lacking counsel, was not aware of the possibility that he could re-plead a sex discrimination case based on gender stereotyping? Or perhaps, as in some sexual orientation cases, the argument for gender stereotyping would rely *solely* on the contention that being gay is by definition of violation of male gender stereotypes, which has had only mixed success in the courts. If Concannon was a flamboyant queen, however, he might have been able to re-plead his complaint and survive screening.

INDIANA – A gay teacher who was discharged by Cathedral High School, a Catholic school, after the school learned he was in a same-sex marriage, reached a settlement with the school to resolve his legal rights. However, on July 12, it was reported that the teacher, Joshua Payne-Elliott, filed a lawsuit against the Archdiocese a day after reaching the settlement with the school, charging unlawful interference by the Archdiocese in his contractual relationship with the school. It seems that the Archdiocese had threatened that it would withdraw recognition of Cathedral High as a Catholic school if it did not discharge the teacher. Religious Clause (Blog), July 12.*** Meanwhile, the Archdiocese of Indiana faces litigation before the Equal Employment Opportunity Commission (EEOC) brought by lesbian guidance counselors discharged from Roncalli High School, with the focus of dispute being whether guidance counselors come with the “ministerial exception” under the 1st Amendment recognized by the Supreme Court. The women claim they are not ministers, have no religious function or calling, and thus should be deemed protected against discrimination by Title VII, which is construed in the 7th Circuit (including Indiana) to cover sexual

orientation discrimination claims, at least as of now. *Indianapolis Star*, July 10. Lynn Starkey filed her lawsuit against the Archdiocese and Roncalli High School in the U.S. District Court for the Southern District of Indiana on July 29, having received a right-to-sue letter from the EEOC dated July 3. She characterizes the high school and the Archdiocese as her “co-employers” and asserts claims under both Title VII and Title IX. *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc. and Roncalli High School, Inc.*, Cause No.: 1:19-cv-3153. The case has been assigned to the junior judge in the district, James R. Sweeney II, appointed by President Trump, who has been sitting for just under a year. Good luck!

IOWA – A jury in Jasper County District Court awarded \$1.5 million in damages on July 15 to former Iowa Workers’ Compensation Commissioner Chris Godfrey, an out gay man who had been appointed in a prior Democratic Administration and then suffered discrimination and retaliation by Republican Governor Terry Branstad when he declined to step down in the middle of his term so that Branstad could replace him with a Republican. Branstad tried urged him to quit, and when he didn’t, Branstad drastically cut his pay in retaliation. The litigation lasted for eight years, including interlocutory appeals twice to the Iowa Supreme Court. In 2014, Godfrey was appointed by U.S. Secretary of Labor Tom Perez to be Chief Judge and Chairman of the U.S. Department of Labor’s Employees’ Compensation Review Board, where he currently serves. Branstad, now serving as U.S. Ambassador to China, claims he never had any animosity toward Godfrey because of his sexual orientation, but wanted to remove him to put in somebody who was more pro-business in his orientation. Godfrey’s attorney, Roxanne Conlin, expects that their fee

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award request will come to about \$2 million, and estimates that the state spent at least \$1.5 million defending the case, in light of the extensive discovery, intermediate appeals, and jury trial, and the state's decision to hire outside counsel to defend the case rather than having it done by the Attorney General's Office. The jury was given questions to answer, and answered yes to the questions whether Godfrey had proved sexual orientation discrimination and violation of his constitutionally protected property rights. A spokesperson for Governor Kim Reynolds announced disappointment with the verdict. *Godfrey v. State of Iowa*, No. LACV121599 (Iowa Dist. Ct., Jasper Co.), reported by Bloomberg Law, July 17.

MARYLAND – How does an employee discharged by a franchise restaurant know whom to sue for employment discrimination? “This employment discrimination action concerns the difficulties that transgender employees encounter all too routinely,” wrote U.S. District Judge Paula Xinis in her July 23 ruling on pretrial motions in *Membreno v. Atlanta Restaurant Partners, LLC*, 2019 U.S. Dist. LEXIS 122191, 2019 WL 3306020 (D. Md.). Membreno was hired in 2007 to work at a TGI Fridays restaurant in Silver Spring, Maryland. During the hiring process Membreno presented as a man, but showed up for the first day of work dressed as a woman, used the women's restroom facilities, and asked colleagues to call her Diana. “Membrano asserts that despite this request, Patricia [the manager] referred to her as a ‘man,’ told Membreno that she was no longer allowed to use the women's restroom and was often hostile toward Membreno.” The opinion recites Membreno's allegation that she found her hours cut back for “no apparent reason,” and that the man promoted to Kitchen Manager in 2015 was hostile to her, using offensive language to refer

to her and announcing that she “makes too much money for ‘what she is,’ and physically pushing her on one occasion. By late December 2016, Membreno found herself without scheduled work, contacted the contractor that provided management services to the owner of the TGI-Fridays to ask about her schedule change, but got no response. She was terminated on January 4, 2017, purportedly because she failed to find coverage for her shift scheduled on December 24, Christmas Eve, even though, she alleges, she had “followed proper protocol regarding the shift change.” She filed a charge of discrimination based on sex and gender identity with the Maryland Civil Rights Commission, cross-filing a Title VII claim with the EEOC. In the charge, she listed her employer as “TGI Fridays.” When she got her right-to-sue letter, however, she sued in state court, invoking only state and county law, asserting no federal claims. Defendant immediately removed to federal court, citing diversity as the ownership of the restaurant was a Georgia corporation. Membreno moved to remand back to state court. The corporate owner of the TGI-Fridays restaurant in Silver Spring is a Georgia corporation, and the management company they hired to run the restaurant, is also a Georgia Corporation (with principal owners in common). They moved to dismiss for failure to state a claim, since the management company wasn't named in the administrative complaint, arguing failure to exhaust administrative remedies. Membreno then amended her complaint to take account of the new factual allegations asserted by defendants. It was left to Judge Xinis to sort all of this out. She decided that there was diversity here, since all the corporate defendants are based in Georgia, and denied the motion to remand, condition on giving defendants 14 days to file a corrected notice of removal, since their original removal notice had failed to include sufficient factual information

explaining the basis of their diversity jurisdiction claim. As to the “failure to state a claim” allegation, the judge trudged through the information about the relationships between the various corporations and the question of joint employer status between the owner corporation and the management corporation to excuse the failure to name the management corporation in the original administrative complaint. Ultimately, the court concluded that facts on the record did not support a joint employer determination, but dismissed against the management company without prejudice since discovery might disclose more facts that would support bringing them back in as a defendant. Meanwhile, the court found sufficient identity of interests between the management company and the ownership company to reject, at least at this stage, the claim of failure to exhaust administrative remedies just because both were not mentioned in the original administrative charge. She noted defendants' admission that both companies are “TGI Friday's franchisees . . . and operate out of the same home office within the same family of companies” with several individual owners in common. “The court is hard pressed to see how notice of the administrative charge to ARP (the owner company) would not also reach Jackmont Hospitality (the management company).” She continued, “Defendants further concede that Membreno ‘may have been confused about the relationship between the parties’ precisely because of their interrelated relationship. Membreno understandably listed TGI Fridays in the charge because ‘she worked at a restaurant with that name.’ Accordingly, Membreno's failure to include Jackmont Hospitality by name in the administrative charge was a reasonable mistake and will not bar suit as to Jackmont Hospitality.” Membreno is represented by Andrew Adelman and Jonathan C. Puth of Correai & Puth, PLLC, Washington, D.C.

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NEW YORK – Randolph Wright, a/k/a Ashley Wright, sued the City of New York, Acacia Network Housing, Inc., Sera Security Services, Inc., and employees of the corporate defendants and NYC police officers, about an incident that occurred on December 1, 2017. *Wright v. City of New York*, 2019 U.S. Dist. LEXIS 110799, 2019 WL 2869066 (S.D.N.Y., July 2, 2019). Wright, a transgender woman, was residing in the Pam's Place Women's Shelter, operated by Acacia under contract with the City, with Sera as the security contractor. Wright had filed numerous complaints about her treatment at Pam's Place, including that staff members had made "rude and disparaging comments" about her due to her transgender status. District Judge Denise Cote's factual narrative is not entirely clear (which may parallel deficiencies in the complaint), but it appears that Wright and Diamond Pitman, a staff member of Pam's, got into an argument during which Pitman waved her finger in Wright's face and got a facial slap in return. Two city police officers appeared on the scene later that night in response to a radio call alerting them that Wright had struck or assaulted Pitman, and ended up arresting Wright, who was awakened at 2:00 am, she claims, and forcibly removed from her room by Sera and Pam's employees. Although the incident occurred on December 1, Wright did not file a notice of claim with the City until May 17, 2018, more than five months later. Because the Municipal Law requires filing tort claims against the City within 90 days after the claim arises, the court granted the City's motion to bar Wright's claims against the City of unlawful entry, false arrest, and excessive force. Judge Cote also found that the claims against City employees had to be dismissed on other grounds, as the facts suggested that the police officers had probable cause to arrest Wright, even though the charges against her were subsequently dismissed. Further, the court found that municipal liability for negligence in failure to train

the police officers should be dismissed as well, as Wright "has made no attempt to plead any factual support for her bare legal conclusions." It is not enough to allege that because police officers had not, in the opinion of the plaintiff, acted appropriately in the circumstances, to support a negligent training claim. The court said that the second amended complaint "contains little more than 'labels and conclusions or a formulaic recitation of the elements of a cause of action' without asserting facts necessary to sustain the claim. Normally, courts require factual allegations of a pattern of misconduct before entertaining a negligence training claim. Here, wrote Cote, "Wright has failed to allege a pattern of similar violations as ordinarily required to support a failure to train claim. Indeed, she has not pointed to a single example beyond her own experience with the City Defendants on December 1, 2017," as described in the complaint. Thus, the court dismissed 42 USC Sec. 1983 claims against the City defendants, as well as tort claims. The court found it inappropriate at this time to dismiss cross-claims asserted against the Defendants by other defendants. This motion did not address claims against the corporate defendants or their employees. Wright is represented by James Meyerson of New York.

NORTH CAROLINA – Over the objections of state legislators who claimed that the measure might tie the hands of law enforcement in the future, U.S. District Judge Thomas D. Schroeder approved a consent decree negotiated by attorneys for the plaintiffs and the Executive Branch defendants in *Carcano v. Cooper and Berger*, 2019 WL 3302208 (M.D. N. Car., July 23, 2019). This was litigation brought to challenge H.B. 2 in 2016, a state legislative measure intended to make it a crime for transgender people to use restrooms consistent with their gender identity but inconsistent with the sex

recorded on their birth certificates. H.B. 2 was sex panic legislation pushed by the Republican state legislative majorities, spurred on by Senate President Pro Tempore Phil Berger and House Speaker Tim Moore. In addition to restriction restroom use, it preempted localities from passing laws protecting LGBTQ people from discrimination, and was promptly signed into law by then-Governor McCrory. Public consternation and backlash from major corporations and sports leagues inspired McCrory to issue an LGBTQ rights executive order, but that did not do the trick, and McCrory was defeated for reelection by Democratic candidate Roy Cooper, the state's attorney general who had refused to defend H.B. 2. The legislature remained in Republican hands however, but Cooper and legislative leaders sought to end the financial boycott of the state by adopting a new law, H.B. 142, which repealed the usage ban contained in H.B. 2, and adopted a sunset provision for the preemption of local laws. Plaintiffs, who had challenged the constitutionality of H.B. 2 in court, amended their complaint to focus on H.B. 142, and pretrial skirmishing led Judge Schroeder to dismiss some of their claims. Meanwhile, Cooper's administration engaged in negotiations with the defendants and came up with a proposed consent decree under which the state agreed that transgender people could use public restrooms consistent with their gender identity and H.B. 142 could not be construed to exclude them from such usage. The proposed consent decree was pending for many months before Judge Schroeder as counsel for the legislative leaders, also named defendants in the case, argued against its adoption. On July 23, Judge Schroeder signed the consent decree, releasing an opinion addressing in detail and rejecting the legislative intervenor's argument that the consent decree was beyond the court's jurisdiction and would improperly tie the hands of law enforcement to deal with improper

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public restroom conduct in the future. Schroeder found that all the consent decree did in that respect was to seal into a legally binding document the interpretation of H.B. 142 that had been agreed upon by the executive branch and the legislative leaders, who had advanced such an interpretation in their arguments that had caused the court to dismiss some of the grounds for the complaint. What is left on hold, however, is the question whether H.B.2 or H.B. 142 violate Title IX (in the context of public schools and universities) or Title VII. The court was persuaded that the Supreme Court's cert grant in three pending Title VII cases justified deferring any ruling on the question whether excluding transgender people from public restrooms might violate the state's obligations as an employer or an operator of educational institutions. Those issues now will be put off until after the Supreme Court decides *Zarda*, *Bostock*, and *Harris Funeral Home* (all to be argued on October 8). And, in the meantime, the plaintiffs are celebrating the achievement of a court order stating that public facilities under Executive Branch control may not construe H.G. 142 "to prevent transgender people from lawfully using public facilities in accordance with their gender identity," and permanently enjoining them, "in their official capacities, and all successors, officers, and employees" being permanently enjoined "from applying Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities . . . in accordance with the transgender individual's gender identity." The parties agreed that each would bear their own litigation costs arising from the claims asserted against the Executive Branch defendants, and all remaining claims against the Executive Branch Defendants were dismissed with prejudice. The ACLU, as counsel as well as co-plaintiff in a representative capacity for its North Carolina transgender members,

negotiated the settlement with the state attorney general's office.

OKLAHOMA – *Childers v. Board of Commissioners*, 2019 U.S. Dist. LEXIS 116673, 2019 WL3069446 (W.D. Okla., July 12, 2019), is a same-sex harassment case involving a male plaintiff complaining about his male supervisor's conduct and the plaintiff's subsequent discharge. Plaintiff had complained about the supervisor, who was discharged, but then a few months later so was plaintiff. Unfortunately for the plaintiff, the U.S. District Judge Stephen P. Friot agreed with the public employer that the complaint fails to meet civil pleading standards by being too general and conclusory and failing to allege specific facts necessary to determine whether the conduct of the supervisors met the basic elements of a hostile environment case. Without factual detail, the court can't determine whether plaintiff has plausibly alleged conduct sufficiently "severe and pervasive" to meet the pleading standard of plausible claim under Title VII. "Upon review," wrote Judge Friot, "the court agrees with defendant that the petition's allegations, taken as true, fail to state a plausible sexually hostile work environment claim. With regard to this claim, the petition merely alleges that plaintiff 'was subjected to a series of frequent, unwelcome sexual innuendo, accusations and harassment by his manager/supervisor. This sexual harassment created a hostile environment.' The court notes that the EEOC charge Childers had filed alleges that "sexual harassment was sexual natured comments that occurred on several occasions." The court pointed out that neither allegation specifically showed that plaintiff was targeted because of his sex, as required by the Supreme Court's *Oncale* same-sex harassment decision, and were not sufficient "to establish that the alleged harassment was so severe or pervasive

as to alter a term, condition, or privilege of plaintiff's employment and create an abusive working environment." Not enough to say "frequent." How often? Not enough to say "unwelcome sexual innuendo, accusations and harassment." What did the supervisor say? What accusations did he make? What other alleged acts constituted "harassment"? "The petition gives the court no allegations which would enable the court to plausibly infer that the work environment was objectively hostile." "Objective" is the key. To be actionable, it is not enough that the plaintiff found the supervisor's conduct to be offensive, unwelcome or objectionable. Plaintiff must also satisfy an objective test, and that can't be done without more specific allegations. For what it's worth, the court rejected the defendant's argument that plaintiff's retaliation charge should be dismissed for failure to exhaust administrative remedies or for failure to allege facts that could support an inference that the plaintiff's complaints about the supervisor are plausibly connected to the plaintiff's subsequent discharge, despite a three-month time gap. The court granted the motion to dismiss the hostile environment claim without prejudice, giving the plaintiff a chance to attempt to replead his claim with more specificity, but the new complaint must be filed by August 2. Plaintiff is represented by counsel – Tom M. Cummings of Oklahoma City.

TEXAS – U.S. Magistrate Judge Andrew W. Austin recommended that District Judge Lee Yeakel deny a motion for fees by an employer who prevailed in winning a summary judgment dismissal of a Title VII employment claim brought by a transgender former employee in *Rudkin v. Roger Beasley Imports, Inc.*, 2019 U.S. Dist. LEXIS 110304, 2019 WL 2754947 (W.D. Tex., July 2, 2019). Bradley Rudkin, a transgender man, sued his former employer in Travis County District Court for sex

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discrimination in violation of Title VII and state common law claims: breach of contract and intentional torts. The employer removed the case to federal court and ultimately won a motion for summary judgment, then filing a motion to recover fees as the prevailing party. Judge Austin observed that in order to award fees to an employer who prevails in a Title VII case, the court must find that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in bad faith." Under 5th Circuit precedents, "To determine whether a suit is frivolous, the court must ask whether 'the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful.'" By contrast, a plaintiff who obtains some relief in a Title VII lawsuit is entitled to attorney's fees and costs, at least as to the portion of his claims upon which relief was granted. In this case, the employer argued that "Rudkin offered no evidence in support of his claims and could not establish a prima facie case of discrimination," but Judge Austin rejected this characterization of the case. "Although Rudkin ultimately lost this case," wrote the judge, "his claims were not frivolous or wholly without foundation. Rudkin asserted claims for sex discrimination pursuant to Title VII based upon comments about his transgender status he alleged were made in the workplace, and based on the fact he was terminated from his job. While he lost on those claims, these are statutory claims, and he pled some factual bases in their support. The Court never addressed Rudkin's state law claims, but rather deferred to the state courts on those claims, and thus it made no merits determination on them. The Court believes the proper exercise of its discretion here is to deny Roger Beasley's Motion for Fees." The recommendation goes to Judge Yeakel, and the employer has two weeks to file objections. Rudkin is represented by Justin P. Nichols of San Antonio.

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By Arthur S. Leonard

CALIFORNIA – In *People v. Reagor*, 2019 Cal. App. Unpub. LEXIS 4709, 2019 WL3140027 (5th Dist. Ct. App., July 16, 2019), the court affirmed the jury conviction of Bryant Andrué Reagor, Jr., who had been charged with connecting with a transgender woman on a dating site, coming to her hotel room, beating and tying her up, forcing her to perform oral sex on him, and making off with valuables and her car, as well as subsequently resisting arrest. This incident occurred on September 2, 2016. At trial, in addition to offering testimony about the incident that resulted in Reagor's arrest, the prosecution presented evidence about a similar incident that occurred two years earlier, in 2014, also involving a transgender woman with whom Reagor had connected on the same dating site, meeting at a hotel room, physically assaulting, threatening, forcing himself on her sexually, and making off with valuables. Reagor, testifying in his own defense, did not deny the oral sex but claimed it was consensual. The jury, sorting through a seven-count charge, acquitted on the sex-related charges but convicted on robbery and false imprisonment, while failing to reach a verdict on burglary. Reagor was sentenced to a total of 11 years. On appeal, he objected to the court allowing introduction of evidence about the earlier incident, and the opinion affirming the verdict focuses on the circumstances in which evidence of earlier uncharged crimes may be introduced. The jury had been instructed that it could consider the evidence of the earlier incident "for the purpose of deciding whether or not he: was the person who committed the offenses alleged in this case (identity); acted with the intent to commit forcible oral copulation and/ or robbery in this case; had a motive to

commit the offenses alleged in this case; or had a plan or scheme to commit the offenses alleged in this case. The court pointed out that this did not involve "propensity" evidence, i.e., trying to persuade the jury that Reagor was a person who had a propensity to engage in such behaviors. Rather, because of the close similarity in the two incidents, it went to proving he was the person who did these things (identity). "Here," wrote Judge Mark Wood Snauffer for the court of appeal panel, "the unique combination of the similarities between these crimes set Reagor's crimes apart from 'other crimes of the same general variety.' The victim in both incidents was a transgender woman Reagor met using the dating application Badoo to meet for dating or a sexual encounter. Reagor assaulted both victims in a motel room in Bakersfield to effectuate takings of their valuables. He tied Eva up and threatened to tie Samantha up. He used motel room furniture to trap Eva under the bed and attempted to use a drawer from the motel room dresser to assault Samantha. There was a sexual component to each of the incidents, and with regard to forcible sexual conduct, he used similar phrasing with each woman; he told Eva he would make her 'his,' and he told Samantha he would make her '[his] bitch.' He threatened to kill both women if they did not allow him to take their belongings, telling Samantha 'you won't be the first transsexual I kill.' This comment supports an inference that Reagor has a specific vendetta against transgender women. Though perhaps many robbers, for example, may meet their victims on dating applications or target transgender victims, the combination of the similarities in this case tend to prove that the person who committed the 2014 crimes also committed the 2016 crimes." The court found there was "sufficient similarity between the conduct to be probative as to identity," and found no abuse of discretion by the trial judge in admitting the evidence. The court also noted, of

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course, that the jury had acquitted on the sexual counts, so evidently admission of the evidence about the earlier incident did not prejudice Reagor as to the sex-related charges. The acquittals on the sex-related charges persuaded the court that “the jury clearly did not harbor any blanket prejudice toward Reagor,” as it had “carefully weighed the evidence as to each element of each count” and held the prosecution to its burden of proof, evidently concluding there was reasonable doubt on the issue of consent to the oral sex. “Reagor’s only pointed argument with regard to prejudice, that the evidence on intent was ‘cumulative,’ does not alter our conclusion for the foregoing reasons.” Defendant Reagor was represented by Robert Navarro by appointment of the Court of Appeal. * * * Berkeley drew international press comment in response to a City Council measure mandating gender neutrality in language for official purposes. For example, “manholes” will become “maintenance holes.” Press commentators scored the city for “political correctness.” *New Zealand Herald*, July 20.

MICHIGAN – A man on trial in the U.S. District Court for the Eastern District of Michigan under a four-count indictment alleging that he has, through his business, received illegal kickbacks and bribes in exchange for referring Medicare beneficiaries to a particular home health care agency, filed a motion *in limine*, asking the court to prelude the prosecution from making “any reference to Defendant being bisexual/homosexual or having boyfriends because it is allegedly prejudicial under Federal Rules of Evidence 401.” Chief U.S. District Judge Denise Page Hood explained why she granted this motion: “. . . the Court agrees that references to Defendant being bisexual/homosexual or having boyfriends is not relevant to Defendant’s guilt and could be prejudicial. The

Government argues that Defendant’s sexual orientation is relevant to prove Defendant’s character for truthfulness in the event that Defendant elects to testify at trial under Federal Rule of Evidence 608(b).” That rule provides for admissibility of “specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness . . .” “Neither party has indicated that Defendant will testify at trial,” wrote Judge Hood, “and Federal Rule of Evidence 608(b) only applies to witnesses. At this time, the Court precludes the Government from introducing any evidence of Defendant’s sexual history. If however, Defendant testifies, and Defendant’s sexual history becomes an issue, the Government may seek to introduce any sexual history evidence by first requesting such outside the presence of the jury.” Hold on, we thought when reading this. Why did the Government think that the fact that somebody is bisexual or homosexual has any necessary bearing on whether they are a truthful witness at trial? Did they intend to characterize the Defendant as being an untrustworthy witness because he is bi or gay or has boyfriends? This sounds like stereotyping from the bad old days of McCarthyism and the treatment of gay people as “sexual deviants and perverts” by the federal government, when security clearances were routinely denied to gay people who were barred by Executive Order from working in the federal government. What’s going on in the U.S. Attorney’s Office for the Eastern District of Michigan, we ask, that they are making such assertions? See *United States v. Trumbo*, 2019 U.S. Dist. LEXIS 121388, 2019 WL 3289848 (E.D. Mich., July 22, 2019).

MISSOURI – In 2015, a St. Charles County Court convicted Michael Johnson on one felony count of “knowingly” transmitting HIV to one man and four charges of exposing other men to the virus. He was sentenced to

30 years in prison. His lawyers filed an appeal, arguing that prosecutors failed to turn over exculpatory evidence. The appeals court overturned the conviction and ordered a new trial. Then the plea bargaining began. Johnson was allowed to enter an “Alford Plea,” under which the defendant does not admit guilt, but does admit that there is enough evidence that they might be found guilty if tried. The guilty plea was entered under a health statute rather than a criminal statute, so Johnson, who has been released from the Boonville Correctional Center after serving since his conviction, will not have to register as a sex offender. Press reports of the trial at which he was convicted indicate that there were several grounds to question the verdict, including scientific misstatements by the prosecutors about what constitutes exposure that could actually result in HIV transmission, and misstatements of the law by counsel. *Buzzfeed*, July 9.

NEW YORK – Bronx Supreme Court Justice Michael Gross convicted Abel Cedenio, age 19, on July 15 of first-degree manslaughter, assault and criminal weapons possession. Cedenio stabbed to death Matthew McCree and seriously injured Ariane LeBoy during a confrontation in his history class at the Urban Assembly School for Wildlife Conservation in the Bronx on September 27, 2017. Cedenio had been the target of homophobic harassment and claimed that he felt endangered by his two classmates, who were coming towards him when he scolded them for throwing things at him in class. The judge did not buy the self-defense claim, and Cedenio’s possession of a knife in school didn’t help his self-defense claim. Sentencing was scheduled to take place on September 10. Cedenio is asking the judge to treat him as a juvenile, given his age when the incident occurred. If the judge decides to treat him as an adult, he could face a sentence as long as 25 years. The judge granted a defense request that

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Cedeno be placed in protective custody and receive psychiatric attention while he is held at the city jail on Rikers Island pending sentencing, and the judge agreed to recommend that Cedeno be placed in an LGBT dorm until then. *New York Daily News*, July 16.

OHIO – Soap opera time in *State of Ohio v. David Carl Kinney*, 2019 WL 2774306 (Ohio 7th Dist. Ct. App., June 28, 2019), in which the court of appeal upheld the aggravated murder conviction by a jury of David Carl Kinney, who shot to death Brad McGarry, with whom he was carrying on a sexual affair behind the back of Kinney's wife and children, who knew McGarry as a close friend of Kinney with whom the family spent holidays and who the children referred to as "Uncle Brad." The opinion by Judge Carol Ann Robb lays out the facts quite neatly, including, of course, the dispute between the men about Kinney's unwillingness to leave his "straight" life behind and commit himself to McGarry, McGarry's threats to tell Mrs. Kinney about what was going on, and Kinney's plan to eliminate McGarry and to make it look like a robbery gone bad. Ultimately, it seems, Kinney's act was not polished enough to fool the police detectives trying to solve the murder. McGarry was shot in the head in the basement of his house, his body "discovered" by Kinney and family days later when they came to pay a social call. It didn't help Kinney's case that the local police chief lived on the same block as McGarry and his security surveillance system had video of Kinney coming to McGarry's house and leaving a short time later, within the time parameter of the murder. An investigative interrogation of Kinney evolved into a confession; in the course of things Kinney went from witness to suspect and it became a custodial interrogation with *Miranda* warnings given prior to Kinney's confession. The opinion does not relate whether Kinney rejected a plea bargain offer, but possibly

this was a case where the prosecutor felt no need to offer anything less than the crime charged. After the jury's verdict, the court imposed a sentence of life without parole for aggravated murder, seeing as how there was clear proof that Kinney had planned things out to dispose of the troublesome McGarry to attempt to preserve his straight façade with his family. Kinney's counsel made a barrage of arguments and objections on appeal, all rebuffed by the court of appeal. Somewhere there is a script in this. HBO special?

SOUTH DAKOTA – In a rare move, U.S. Chief District Judge Jeffrey L. Viken (D. S. Dak.) found that a man convicted by a jury on one count of attempted enticement of a minor under 18 USC Sec. 2422(b) is entitled to a new trial because the government failed to disclose exculpatory evidence in its possession. *United States v. Snyman*, 2019 WL 3325397, 2019 U.S. Dist. LEXIS 123324 (July 24, 2019). Andries Snyman was hanging out on Grindr and began a conversation with somebody using the screen name "Genissie" who – unbeknownst to Snyman – was a government agent out to catch gay men soliciting sex with minors. Snyman elicited the information that Genissie was under age and proceeded to make an appointment to meet him, being arrested when he showed up at the appointed place to meet the fictional teen. At trial, Snyman's defense was that he was not meeting the minor for sex, but rather, responding to the uncertainty projected by Genissie in their text conversation, just meeting for conversation as a gay adult to give a gay teen some guidance about coming out and the dangers of on-line hookups. Part of Snyman's defense was that he actually already had a date to meet somebody else for sex that evening, and the only reason he was on Grindr at that point was that his date had called to set back their appointment by several hours and he

had time to kill. As part of the arrest, of course, Snyman had to surrender his phone and law enforcement did a forensic probe on it, recovering his text messages. What they failed to disclose prior to trial was material from the phone texts that tended to corroborate Snyman's story about already having a date with somebody else for that evening, characterized by the court as "the planning messages." In addition, of course, the prosecutor argued to the jury that Grindr was solely about sexual hookups and gay men would not be on the app for purposes other than getting sex. Wrote the court, "The planning messages lend support to the defense case. They support defendant's factual contention he planned to meet Jonny on August 5 for sex. If the defense can establish that fact at a second trial, it is more likely the jury could take the inferential step to a conclusion defendant lacked the intent to entice the persona into sex because he had a sexual liaison planned for that evening. The defense in this case centered on the intent element and the planning messages are highly relevant to that element. The court finds the messages would have been material to the outcome of the trial because there is a 'reasonable probability that, had they been disclosed, the result of the trial would have been different,'" citing the 8th Circuit precedent of *U.S. v. Robinson*, 809 F.3d 991 (2016), and concluding that the court's "confidence in the outcome" was "undermined" by the prosecution's failure to disclose the planning messages that had been uncovered by its probe of Snyman's phone. Furthermore, and contrary to the government's argument, the government's case in the absence of this evidence was not "overwhelming," because "virtually every message defendant sent to Investigator Freeouf's persona is capable of being interpreted to support the defense theory that defendant did not intend to persuade the persona into sex, but instead wanted to explain to him the dangers of sexual activity," then quoting various portions

PRISONER LITIGATION *notes*

of the text exchange. “Defendant never directly stated he wanted to have sex with the persona or asked the persona to have sex with him. In many of the messages, defendant evinces concern for the persona and expresses a desire to inform him about sexual matters.” Further, the court discounted the prosecution’s argument that the sexually-charged planning messages between Snyman and “Jonny” tended to support its case that Grindr was just about sexual hook-ups. “It is highly doubtful the sexual messages with Jonny” (presumably an adult, certainly not a police decoy) “have any bearing at all on defendant’s intent in his conversation with the persona,” continued the judge. “Given their content, it is likely any probative value of the sexual messages is outweighed by the danger of unfair prejudice.” As far as the court was concerned, those messages “relate to consensual activity between adults entirely separate from defendant’s conversation with the persona.” Snyman is represented by Thomas M. Diggins, a Federal Public Defender staff attorney.

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.

COLORADO – Last year, *Law Notes* reported that Chief U.S. District Judge Marcia S. Krieger denied an application for a TRO by transgender inmate Lindsay Alexandria Saunders-Velez regarding her safety and conditions of confinement in *Saunders-Velez v. Colorado DOC*, 2018 WL 1887979 (D. Colo., April 20, 2018) (reported May 2018 at page 256). At that time Saunders-Velez complained that she was less safe in a “disciplinary” pod than she had been in general population. While

Judge Krieger denied the TRO, she expedited proceedings toward a hearing on a preliminary injunction. Saunders-Velez has now settled her case for \$170,000, according to the Associated Press. Her attorney, Paula Greisen, said the settlement was a “sign of shifting attitudes in state government” toward transgender prisoners. Corrections officials maintained they review each inmate on a “case-by-case” basis to determine housing and purchase of commissary items (including undergarments) consistent with their gender identity, with input from medical and mental health providers. Saunders-Velez is scheduled for release this fall. She is represented by King & Greisen, LLP, Denver.

COLORADO – This case involves claims of a *pro se* transgender parolee – Christopher (a/k/a Karen) Glenn – who objects to dangerous conditions at Denver shelters, where she says she is forced to reside by parole officials or to be homeless. U.S. Magistrate Judge Kristen L. Mix, who has the case for all purposes, dismissed it for failure to state any claim in *Glenn v. Brown*, 2019 U.S. Dist. LEXIS 116249, 2019 WL 3067286 (D. Colo. July 12, 2019). At the outset, we must mention that this opinion addresses Glenn’s transgender status only in a footnote, because Glenn did not rely on it in framing her complaint (except with a vague reference to her “lifestyle”), and it appeared only in her reply to defendants’ motion to dismiss, in which she said there was another case pending in the District of Colorado that also challenged the Colorado DOC policies for transgender inmates. Instead, Glenn relied on her mental health needs and the failure to address them in the shelter system, subjecting her to threats and to being “almost robbed.” Judge Mix found Glenn could not raise the point for the first time in reply papers and that, in any event, the Tenth Circuit does not treat transgender

people as a suspect class, citing *Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015) (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995)). Thus, the rest of the report about this rather lengthy opinion is limited to a summary for *Law Notes* readers who wish to explore these parole issues for a transgender client placed in a shelter. [Note: The court does not discuss the Trump Administration’s attempt to rescind the Obama Administration’s requirement that HUD-funded housing be available in the shelter system according to the resident’s gender identity.] Judge Mix first found that these parole claims were better analyzed under the Due Process Clause of the Fourteenth Amendment rather than under the Cruel and Unusual Punishment Clause of the Eighth Amendment. Judge Mix found that the Due Process Clause does not generally protect an individual “against private violence,” which is how Judge Mix sees the claims here. There are two exceptions: “special relationship” and “danger creation.” Judge Mix found that neither exception applied, because Glenn was not “sufficiently restrained” in her ability to protect herself while on parole and the private shelters did not meet the multiple requirements for a “state-created” danger. This writer thinks the analysis is a bit facile: Glenn could well find herself in violation of parole requirements that she have a regular abode if she tries to protect herself by becoming homeless. Judge Mix allows Glenn to file a second amended complaint, but a lawyer would help in framing these claims.

DISTRICT OF COLUMBIA – *Pro se* plaintiff Jeannette Driever, a former federal inmate still under Department of Justice supervision, purports to bring a lawsuit on behalf of all women in federal custody who have been housed in cells or dorms with transgender women – whom

PRISONER LITIGATION *notes*

she defines as “biologically born male inmates who allege they are women and/or female lesbians.” In *Driever v. United States*, 2019 U.S. Dist. LEXIS 111659 (D.D.C., July 3, 2019), U.S. District Judge Amy Berman Jackson grants Driever’s request to proceed *in forma pauperis*, without screening the case on the pleadings. She dismisses any attempt by Driever to represent parties other than herself, citing 28 U.S.C. § 1654; *Georgiades v. Martin-Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984). She also strikes the class action allegations under *DeBrew v. Atwood*, 792 F.3d 118, 132, 416 U.S. App. D.C. 457 (D.C. Cir. 2015), because *pro se* plaintiffs may not commence class actions. Judge Jackson returns the case to the Clerk of Court for random assignment to a judge for further proceedings.

ILLINOIS – *Sauk Valley Newspapers* and **CHICAGO PUBLIC RADIO** reported that transgender Illinois prisoner Strawberry Hampton has been released. 2019 WLNR 21113880 (July 10, 2019). The strength of this plaintiff and the persistent advocacy of the MacArthur Center at Northwestern University has resulted in restoration of Hampton’s “good time,” prior to which she endured sexual assault at multiple men’s prisons before she was finally transferred to a women’s facility. *Law Notes* has been following Hampton’s litigation since 2017. In June, we reported on the history and the movement of her case toward trial. *Law Notes* (June 2019 at pages 22-3). Her damages claims will remain, despite her release. Among her allegations is one that staff forced her to have sex with her cellmate for their entertainment. On her release, Hampton expressed fears for transgender people across the country who are held in prisons that do not correspond to their gender identity. U.S. Justice Department data estimate there were over 3,200 transgender inmates in state and federal prisons as of 2012.

Nearly 40% reported being victims of sexual misconduct by other inmates and guards. That compares to around 4% of the general prison population reporting such abuse.

PENNSYLVANIA – *Pro se* gay inmate Mark-Alonzo Williams was sexually assaulted by another inmate. He alleges that staff attempted to cover up the incident, denied him medical care, retaliated against him, and discriminated against him because of his sexual orientation. U.S. District Judge Sylvia H. Rambo dealt with discovery issues in *Williams v. Wetzel*, 2019 WL 2762974, 2019 U.S. Dist. LEXIS 110299 (M.D. Pa., July 2, 2019). Judge Rambo denied Williams’ request for records involving other inmates who had been sexually assaulted, citing privacy concerns. Compare *Sunderland v. Suffolk County*, 2018 U.S. Dist. LEXIS 159196 (E.D.N.Y., September 17, 2018), reported in *Law Notes* (October 2018 at page 556-7), where the court allowed discovery of records of other transgender inmates (with identifiers redacted) in a pattern and practice case where the plaintiff had counsel. Here, the defendant prison officials said that other documents (like block notes) that a magistrate judge had ordered produced were “lost” in a flood. Judge Rambo accepted an affidavit as proof of the flood, and there is no discussion of spoliation. Judge Rambo grants Williams’ request to compel answers to interrogatories from a named defendant, but she denies Williams’ request to compel interrogatory answers from non-parties. There is no discussion of deposition by written questions under F.R.C.P. 31 (which may be the only avenue for non-party “testimonial” discovery available to a *pro se* prisoner, who is unlikely to receive permission to take depositions on oral examination). Judge Rambo compels disclosure of Williams’ “parole packet” as relevant to the issues of damages. Finally, Judge

Rambo grants Williams’ request to compel production of the policies and procedures regarding inmate transfers and staff retaliation that were in effect in 2014-5 (when the events occurred), rejecting defendants’ argument that the prison law library had “current” policies and that that was enough.

SOUTH CAROLINA – *Pro se* HIV-positive inmate Charles E. Thomas suffered summary judgment in a case claiming that he was subjected to segregated confinement because of his HIV status for a period of nine years, in violation of his rights under: the Equal Protection Clause; the Americans with Disabilities Act; and a consent decree forbidding such segregation that covered South Carolina prisons. Thomas sought only damages and an order releasing him from prison. In *Thomas v. South Carolina DOC*, 2019 WL 3208849 (D.S.C., July 3, 2019), U.S. Magistrate Judge Bristow Marchant granted the state summary judgment because Thomas filed his action beyond the most generous statute of limitations available (four years). At first, Thomas sued only the Department of Correction, but he filed a motion to add the Director of the DOC as a party defendant, because the state enjoys Eleventh Amendment immunity. Judge Bristow cites *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), but the controlling case is *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (interpreting *Will* to focus on capacity in which defendants have acted to injure the plaintiff, not the capacity in which they are sued). Naming a “person,” however, does not solve the timeliness problem. Statute of Limitations disposes of the damages claims under the Constitution and the ADA. As to the consent decree, Judge Bristow found that the “segregation” ceased shortly after the decree became effective. Thomas could also not seek release from custody in a § 1983 case. *Preiser v. Rodriguez*, 411 U.S. 476, 477

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(1973). Judge Bristow mentions that Thomas filed three previous lawsuits, raising the same facts, all of which were dismissed prior to service. There is no discussion of whether any of them could be construed as tolling the running of the statute of limitations.

VIRGINIA – U.S. District Judge Leonie M. Brinkema dismissed all claims of pro se inmate Cecil Guy Truman, who alleged a failure to protect him and deliberate indifference to his serious medical needs in *Truman v. Frye*, 2019 U.S. Dist. LEXIS 121043, 2019 WL 3268877 (E.D. Va., July 18, 2019). Only two dismissed claims are part of this report. Truman alleged that officers failed to protect him from the threats of another inmate, whom Truman believed to be HIV-positive. The other inmate yelled at him and pounded and kicked on his cell door, while shouting racial comments. Ultimately, the other inmate spit on Truman's cell door and a bit of spittle came through a door crack and, according to Truman, contacted Truman's face. Judge Brinkema found that, while an inmate can raise a claim about failure to protect against a serious future harm that has not yet occurred – citing *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (a transgender prisoner case) – the future risk must itself be serious. Here, the shouts and banging were not sufficient to raise a serious future risk that the other inmate would spit. In addition, spitting itself is not a serious harm on these facts, even if the other inmate had been HIV-positive – a point on which Judge Brinkema finds Truman to be contradictory. Likewise, the defendant officers were not deliberately indifferent by failing to take Truman for immediate medical evaluation – and Truman did not sue any medical staff. Judge Brinkema finds that the risk of contracting HIV under these circumstances is not a serious medical complaint. She dismissed the Complaint with prejudice.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

TRUMP ADMINISTRATION LGBT RIGHTS INITIATIVE

– The Trump Administration is not particularly interested in promoting LGBT rights in the United States, to judge by its administrative actions rescinding and opposing protection against discrimination, but U.S. Ambassador to Germany Richard Grenell, an out gay conservative Republican, hosted (purportedly with the support of the Administration) a panel discussion at the U.S. Embassy in Berlin in which representatives of LGBT rights movements in several different countries spoke to a full auditorium about efforts to decriminalize gay sex in the many countries that still maintain such laws. Among the participants at the July 26 event, reported by the *Washington Blade*, were Harvey Milk Foundation President Stuart Milk; Caine Youngman of Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo); Hadi Damien of Beirut Pride in Lebanon and Hourvash Pourkian of International Women in Power in Germany. LeGaBiBo achieved a great victory in the High Court in Botswana in June, although the country's Attorney General has initiated an appeal to the Court of Appeals, which is comprised of jurists from other British Commonwealth appeals courts. Grenell's efforts were praised in a tweet by Donald Trump, Jr.

TRUMP ADMINISTRATION – BORDER POLICIES

– Amidst continued heated discussion about the Trump Administrations policies involving the separation of children from their parents upon apprehension cross the southwestern border from Mexico surfaced the fact that a parent's HIV status has been cited to justify

separating parents and children. In testimony before the House Judiciary Committee, Customs & Border Patrol Chief Brian Hastings stated that a parent's HIV status is alone enough to justify separation from their child. "It is because it's a communicable disease under guidance," said Hastings. When asked for further explanation, Hastings just responded "That's the guidance that we follow," and indicated uncertainty about whence the guidance came, stating he was "unsure" whether it came from "legal counsel." Under questioning, Hastings conceded that children were not always separated from parents just because the parent had a communicable disease, but insisted that HIV was on a list somewhere *Washington Blade*, July 25.

TRUMP ADMINISTRATION – TITLE IX ENFORCEMENT

– Title IX of the Education Amendment Act provides that nobody should be subjected to discrimination because of sex by educational institutions that receive federal financial assistance. The Obama Administration interpreted this to extend to sexual orientation and gender identity discrimination, and informed school districts of their particular responsibilities regarding transgender youth. The Trump Administration "rescinded" this guidance, and officially takes the position that sex discrimination laws do not include sexual orientation or gender identity discrimination. However, Secretary of Education Betsy DeVos, while indicating that her department would no longer investigate or prosecute cases involving transgender student restroom access, was otherwise going to continue to protect the rights of LGBT students under Title IX. Window-dressing, it seems. On July 29, the New York Times described a report prepared by the Center for American Progress which, based on the Department of Education's own database, concluded that students who identify as LGBT

LEGISLATIVE & ADMINISTRATIVE *notes*

are not faring particularly well when they bring discrimination complaints to DOE. “The report found that the Trump administration was less likely to investigate claims of discrimination filed by the student – and more likely to dismiss them” by comparison to the Obama Administration. No surprise? “The percentage of complaints that resulted in a school being required to take action to remedy the discrimination under the current administration was nine times lower than under the Obama administration, it concluded.” Thus, DeVos’s statement that DOE would continue to enforce protection for LGBTQ students who were bullied, penalized or harassed for failing to conform to sex-based stereotypes was pretty empty. “These data really show that Betsy DeVos is not doing her job,” said Frank J. Bewkes, a co-author of the report. “Her office just doesn’t seem to care about enforcing civil rights for these students.” DOE spokespersons charged that the report was “selectively compiled” by a left-wing group with an ideological story to tell, and insisted that DOE is vigorously protecting the civil rights of all students.” Who do you believe?

U.S. CONGRESS – HOUSE OF REPRESENTATIVES

– The House of Representatives voted to amend a \$1 trillion spending package include the Defense Department to provide that none of the appropriate funds could be used to implement Trump’s ban on transgender military service. At the same time, National Guard leaders in several states announced that they would refuse to dismiss transgender members, and although the Supreme Court had voted in the spring to grant the government’s motion to stay preliminary injunctions that district courts had issued against implementation of the policy, press reports were lacking about any significant moves by the military forces to dismiss transgender troops.

Indeed, the most significant immediate effect of the Supreme Court’s 5-4 action was to reinstate the ban on enlistment, and from all reports few transgender people who had applied to enlist were very far along in the process, since the Pentagon seemed to be “slow-walking” such applications. A determined effort by gay journalists to find out what was happening met a Pentagon stonewall, and a claim that the Pentagon did not have any data on transgender-related discharges. Thus, of course, reinforcing the view that the transgender ban was mainly a Trump P.R. move full of symbolism for his political base and lacking any real substance. It was sprung on the Pentagon without advance consultation and without any evidence that transgender troops, who had been allowed to serve openly since July 1, 2016, were causing any of the kinds of problems hypothesize by the president in his infamous July 2017 tweets announcing the policy. No word yet on whether the House’s amendment will survive a conference committee with the Senate on a final military spending bill. * * * On July 24 the House approved the PRIDE Act, a measure intended to allow same-sex couples to obtain tax refunds if they married before the Supreme Court struck down the Defense of Marriage Act, Sec. 3, in 2013. The measure was approved by voice vote with no audible opposition. The measure removes gendered language – like “husband” and “wife” – from the Tax Code, allows same-sex couples married before DOMA was struck down to claim tax refunds to which they would have been entitled based on their state law marriages if not for DOMA. The IRS has been allowing same-sex couples to file for refunds, but limited by an existing statute of limitations. The PRIDE Act lifts the statute of limitations, in recognition that same-sex couples had been contracting lawful marriages in Canada since 2003 and the U.S. (first in Massachusetts) beginning in the spring of 2004. The

Joint Committee on Taxation suggests that as much as \$67 million in refunds might be at stake. It is possible that the most significant refund claims will come from surviving spouses whose marriages were not recognized for purposes of the exemption from estate taxation for inheritances from spouses. The measure does not require retroactive filing for those who would have owed more taxes under the “marriage penalty” had the federal government recognized their marriages. There was optimism that the lack of Republican opposition in the House boded well for the measure surviving in the Senate. *Washington Blade*, July 24. * * * Rep. Dina Titus (D-Las Vegas) has reintroduced legislation to codify the position of Special Envoy for the Human Rights of LGBT Persons in the U.S. State Department. The position was created administratively during the Obama Administration, but has been vacant since President Trump took office. The bill would also require the State Department to document human rights abuses against LGBT people, institute sanctions against those responsible for “egregious abuses and murders” of LGBT people, and ensure fair access to asylum and refugee programs for LGBT people. The measure will go nowhere if Senator Majority Leader Mitch McConnell has anything to say about it, of course.

ALABAMA

– The Mobile City Council reached a verbal agreement on July 2 to “restore a dormant city Human Relations Commission to look into the possible creation of a non-discrimination ordinance providing a new legal shield for the LGBTQ community,” reported the *Press-Register* on July 3. If enacted, such a measure would make Mobile the third municipality in Alabama to take action to protect its LGBTQ residents from discrimination, following Birmingham (2017) and Montevallo (2018).

LEGISLATIVE & ADMINISTRATIVE *notes*

CALIFORNIA – Gov. Gavin Newsom signed a bill that lets different-sex couples register as domestic partners. With the advent of marriage equality in 2013 after the Supreme Court rejected the appeal from the district court decision in *Perry v. Schwarzenegger*, the state had a policy decision to make, since it had a well-developed legislative scheme for same-sex registered domestic partnerships: either phase them out or open them up. Out gay San Francisco State Senator Scott Wiener argued for maximum choice. Since same-sex partners now have the choice of either marrying or registered as domestic partners, why not preserve choice and extend it to different-sex couples? Wiener pointed out that some couples prefer domestic partnerships because they “are not associated with traditional gender-differentiated roles” and don’t have “the same historic and cultural connotations that some people may find undesirable,” and others may have financial incentives to refrain from marriage. One wrinkle for couples to consider is that federal law does not recognize any form of domestic partnerships. In some cases this can be advantageous for a couple that could suffer a substantial tax penalty if married. The form of domestic partnership that exists under California law includes a package of rights that is almost identical with marriage rights under state law, so the main difference for those choosing partnership over marriage is to avoid federal recognition of their relationships. *Associated Press*, July 30. * * * The San Diego City Council voted on July 9 to adopt a resolution opposing the federal policy excluding transgender persons from military service, calling the policy discriminatory and arbitrary. They justified addressing this issue by reference to the large presence of military personnel in San Diego. The measure was approved on a party-line vote. The council’s six Democrats and one Independent voted yes, one Republican member voted no, and the

other Republican member was absent for the vote. The Republican who voted no, Scott Sherman, stated that he opposed the ban but felt that city resolutions regarding state and federal legislation are “inappropriate and ineffective,” citing his consistent opposition to all such resolutions since he was elected in 2012. *San Diego Union-Tribune*, July 10.

CONNECTICUT – A ceremony in Governor Ned Lamont’s office on July 9 marked the enactment of three important measures championed by the LGBT community. One measure allows minors to obtain pre-exposure prophylaxis for HIV (PreP) without parental consent. The legislation was inspired by testimony from HIV-positive gay teens who said they knew about the medication before they were infected but did not want to have to come out to their parents and get their authorization in order to get it. Another measure established an LGBTQ Health and Human Services Network within the Department of Public Health to analyze the health care needs of LGBTQ citizens and award grants to organizations to fill those needs. The goal is to identify areas of the state that are underserved in this respect and to encourage the development of services in those areas. Finally, there is a measure, similar to one passed in New York recently, banning the gay panic defense. It provides that the victim’s sexual orientation or gender identity may not be used as a justification for a defendant’s violent reaction in criminal cases. *Hartford Courant*, July 10.

MAINE – On June 23, Governor Janet Mills signed into law L.D. 1701, adding “gender identity” to the Human Rights Law expressly, and providing that public accommodations that provide restroom facilities may not designate single-occupancy toilet facilities as for use only by members of one sex.

NEW HAMPSHIRE – Governor Chris Sununu has allowed House Bill 969 to become law without his signature, making New Hampshire the thirteenth state that will provide an X designation for gender non-binary people who do not want to identify as either male or female on drivers’ licenses and other state ID documents. The measure was controversial and there was some suspense about whether Sununu, a conservative Republican, would veto the measure. *New Hampshire Union Leader*, July 11. However, shortly thereafter, Sununu vetoed a bill that would have allowed birth-record changes for transgender people more easily than under current procedures. The bill approved by the legislature would have authorized such changes with notarized statements from health care providers attesting to the individual’s gender identity. Under existing law, a court order must be obtained in the county where the individual was born, which Sununu characterized as a “reasonable process.” *Portland Press*, July 22.

NEW YORK – Governor Andrew Cuomo signed into law a measure that expands the jurisdiction of the State Division of Human Rights to deal with discrimination complaints by public school students. Prior to the new law going into effect, the Division’s jurisdiction was restricted by court decisions holding that the public accommodations provisions did not apply to the state’s public schools. Also, the governor announced a proposal of new guidelines and regulations intended to expand the availability of pre-exposure prophylaxis for HIV by mandating that health insurance policies subject to state regulation cover this medication without co-pays or deductibles. They will also require that HIV-testing be similarly available without co-pays or deductibles. Unfortunately, due to ERISA preemption, the state may not regulate the substance of health insurance plans

LAW & SOCIETY/INTERNATIONAL *notes*

provided by employers through self-insured employee benefit plans, which cover a majority of the state's population, but that still leaves several million people who will benefit from being able to obtain HIV screening and PreP under their individual insurance policies, Medicaid programs, or employee-related coverage that is obtained by employer contracts with insurance companies.

PENNSYLVANIA – The Pittsburgh City Council unanimously approved a measure to amend the city's anti-discrimination code to cover claims based on gender identity or gender expression. The measure, which has long covered sexual orientation, applies to employment, housing, and public accommodations. The measure to add these provisions was introduced on June 25, the 50th anniversary of the Stonewall Riots. The city's Commission on Human Relations enforces the code. *Pittsburgh Post-Gazette*, July 10.

WISCONSIN – The Racine City Council voted to ban conversion therapy for minors, joining such other Wisconsin municipalities as Milwaukee, Madison, Cudahy, and Eau Claire. The measure passed on an 11-3 vote. Legislation is pending in the state legislature on the subject as well. *Wpr.org* (July 17).

LAW & SOCIETY NOTES

By Arthur S. Leonard

PUERTO RICO – Evidence of homophobia and transphobia by Governor Ricardo Rossello and members of his inner circle contributed to the public pressure that led Rossello to announce he would resign effective August 2. A private on-line chat between Rossello and some of his close political allies was leaked to the public, revealing discriminatory attitudes

including homophobia, transphobia, misogyny, xenophobia and fat-shaming, according to a July 26 report by *NBC News*, which described Puerto Rico's LGBTQ community as being on the "front lines" of the successful protest movement. The most prominent out gay Puerto Rican, pop star Ricky Martin, emerged as a leading voice in the movement to pressure Rossello to resign. Martin was described as "the subject of homophobic jokes in the leaked chats." Upon the announcement of Rossello's planned resignation, Martin wrote on Instagram: "Puerto Rico, we did it. . We just wrote an important page in history. We rescued our island . . . We did it peacefully, without weapons . . . Now let's lead by example."

INTERNATIONAL NOTES

By Arthur S. Leonard

UNITED NATIONS – The Human Rights Council of the United Nations has renewed the mandate of the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity, a position created in 2016. Seven Latin American countries took the lead in presenting the resolution – Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico and Uruguay – and they managed to prevail over strong opposition, by a vote of 27-12 with 7 abstentions. The current Independent Expert is Victor Madrigal Borloz.

BARBADOS – The Inter-American Commission on Human Rights has given the country of Barbados three months to respond to a petition challenging its anti-gay sex crimes laws.

BULGARIA – The *Associated Press* (July 25) reported that two women who married in France are entitled to have

their marriage recognized as creating a spousal relationship for purposes of Bulgarian law. An Australian Citizen, Kristina Palma, married Mariama Dialo, a French citizen, in 2016. As the spouse of a citizen of a European Union state, Palma claimed the right to live, work and travel in the European Union, including Bulgaria. The Bulgarian government initially allowed her to live, work and travel in Bulgaria on that basis, but changed its position, arguing that same-sex marriage was not legal in Bulgaria. Palma and Dialo then initiated legal proceedings, resulting in a Bulgarian court ruling that Palma does have the rights of a spouse in Bulgaria. Their lawyer, Denitsa Lyubenova, said that the decision could be an important first step towards achieving marriage equality in Bulgaria.

CANADA – St. Albert city council voted on July 8 to approve a motion to draft a bylaw to ban conversion therapy in the municipality. The proposal is to impose a \$10,000 (Canadian) fine for anyone advertising therapy to minors that would change their sexual orientation or sexual identity, and to refuse a business license or development permit to any organization that include conversion therapy in their business model. *Calgary Herald*, July 9. *The Canadian Press*, July 9. In the wake of this vote, Canada's Ministers of Justice and Health and a special advisor to Prime Minister Trudeau collaborated on a letter to all provincial governments urging them to take action to ban conversion therapy. Regulation of professional practice, such as counseling and psychiatry, is done at the provincial and territorial level in Canada, so it is up to local governments in the first instance to address the issue. But the letter said that the federal government was considering Criminal Code reform to address conversion therapy. Some provinces and municipalities have already taken such action. * * * Nova Scotia's Minister for Service Nova

INTERNATIONAL *notes*

Scotia and Internal Services, Patricia Arab, announced on July 9 that Nova Scotians can now opt for an “X” as a gender marker on provincial identity cards, driver’s licenses, health cards and other official documents. The use of “X” on birth certificates had been previously approved legislative last year, at which time the province had also removed the requirement for anyone 16 or older to get a statement from a health professional to change the sex indicator on their birth certificate. Other provinces that have allowed for the “X” now include Ontario, Newfoundland and Labrador, Alberta, Yukon and the Northwest Territories, and New Brunswick. Saskatchewan and Ontario have provided an option to omit a sex marker on birth certificates, and the federal government now allows for an “X” on national passports. *StarMetro Halifax*, July 10.

CUBA – Independent journalist Rex Wockner reported on July 19 on the marriage of a transgender couple in the San Francisco de Paul Marriages Palace in Havana Province on July 16. News and photos of the ceremony were posted to Facebook by the National Sexual Education Center, the base of the official wing of the nation’s LGBT Rights movement. The Center said that both parties are receiving care from the National Commission of Comprehensive Care to Transsexual Persons and are awaiting, “by their own decision,” surgical interventions. The Center said that the two individuals are legally male and female “thought that is not coherent with the gender identities” of the two.

DOMINICA – A lawsuit was filed on July 19 in Dominica, challenging the tiny Caribbean country’s sodomy law, which dates from 1873 during British colonial times. Under this archaic law, offenders are subject to up to 12 years in prison for consensual gay sex, and can be sent by

the court to psychiatric institutions. The anonymous gay man who filed the claim “has suffered extreme abuses, including being attacked in his own home, and the police did nothing about,” said activist Maurice Tomlinson, speaking to Thomson Reuters for a news report about the case.

ECUADOR – Marriage equality arrived July 18 as Ecuador finally put into effect a ruling by the InterAmerican Court of Human Rights that is technically binding on all countries signatory to the InterAmerican Human Rights Covenant, but requires member states to take appropriate steps to implement the court’s ruling.

FRANCE – Health Minister Agnes Buzyn is taking steps to phase out the categorical ban on blood donations by men who have sex with men. She announced her decision to reduce from 12 to 4 months the time to give blood after the last sex between men, effective February 1, 2020. The ultimate target is to abandon the categorical ban and to align the rules for all donors, focusing on individual behavior at risk in determining whether to defer donations from particular individuals. The rule at present requires sexually active men who have sex with men to refrain from donating blood for one year since their last sexual contact. The Health Ministry indicated that the new rule will be closely monitored to determine when or whether to advance to the next step. *Mena Report*, 2019 WLNR 22738258 (July 25, 2019). * * * France enacted legislation requiring digital platforms to delete within 24 hours messages that are “manifestly unlawful on grounds of race, religion, sex, sexual orientation or disability,” and authorizes regulators in the event of non-compliance to impose an administrative penalty of a maximum of 4% of the turnover of ‘content accelerators.’” A lawmaker from the

governing party, La Republique en march, said, “What is not tolerated on the street must no longer be tolerated on the Internet.” *EurActiv.com PLC*, July 10.

GERMANY/BRITAIN – A study by Dr. Mengia Tschalaer, a scholar at the University of Bristol (England), of gay applicants for asylum in Germany who were from Tunisia, Syria, Iran, Lebanon and Pakistan showed that those who conformed to “Western gay stereotypes” had a much higher likelihood of receiving asylum than those who were not “out” in their home country and did not fit into preconceived expectations that gay people would be “flamboyant” in their dress, would frequently visit gay bars and parties, engage in public displays of affection, and wear rainbow-colored clothing. Tschalaer Reporting on the study, *The Independent Online (UK)* said, “Gay migrants also stand a better chance if they can prove they attended Pride marches, visited gay bars, or were involved in activism in their country of origin.” The article cited a case of an Iraqi man whose asylum application was rejected in Austria because authorities said “they did not believe he was gay because he was ‘too girlish.’” This is an odd one; we thought the stereotype of gay men was effeminacy, but evidently the Castro clone generation destroyed that! Now to be persuasively gay a guy must be macho and on the front lines with pro-gay picket signs in public demonstrations (in a home country where gays are subject to social persecution, discrimination, and criminal prosecution for their sex lives). *The Independent* reported similar problems confronted by gay refugees dealing with British authorities. Last year in Britain, the Home Office denied 78 percent of applications that referenced sexual orientation, a 52 percent increase on figures from four years ago when 61 percent of LGBT asylum seekers were rejected. Considering the countries they are coming from, the rejection rates based on the failure to conform to “out

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gay” stereotypes is appalling. *The New Arab* also published a substantial report on the study on July 26.

INDIA – Once again the Indian government has proposed a transgender rights bill, titled “The Transgender Persons (Protection of Rights) Bill, 2019, in the legislature on July 19. The measure, while well-intentioned, has drawn substantial criticism from community groups as not going far enough in some respects and as erecting barriers to the welfare of transgender people by, among other things, stiffening criminal penalties for public begging, a profession some transgender people in India count upon to support themselves in the face of vicious employment discrimination. *Hindustan Times*, July 17. * * * *India Times* (July 24) reported that the body responsible for judicial appointments, the Supreme Court Collegium, has been stalling on a prominent attorney who has been recommended for appointment to the High Court in Delhi, because the man has lived with a same-sex partner, a foreign national, for several years. The Delhi High Court Collegium had unanimously recommended his appointment ten months ago, but an Intelligence Bureau Report, prepared after the government received the High Court recommendation, suggested that the appointment posed a “security risk.” The report described the lawyer’s professional credentials as “impeccable,” and said his integrity was beyond doubt. The Supreme Court Collegium has reportedly asked the government for additional information about the “security” issue before moving on the appointment. News reports noted that other nations that were former British colonies – Australia and South Africa – have both had judges of their highest courts who were “out” gay men with same-sex partners. * * * *Star India*, a major media company, extended insurance to cover the partners of its LGBT employees effective July 1,

making available all employee benefits around maternity and paternity, IVG, surrogacy and adoption, as well as basic health insurance coverage. * * * The Delhi High Court dismissed a plea that it order the government to recognize LGBT relations by modifying laws on marriage, adoption, divorce, etc. The petitioner, Tajinder Singh, also sought a direction to the government to constitute an LGBT Commission in Delhi to address issues of the LGBT community. In dismissing the petition, the court stated that it “will be slow in giving directions to formulate policy,” but clarified that the government could constitute such a commission if it wished to do so. The petition sought to build on the Supreme Court’s decision from last year striking down the law against consensual sodomy, drawing on some of the high-flown rhetoric of that decision to support claims of equality and full citizenship for LGBT people.

JAMAICA – Gay rights activist Maurice Thomlinson, a Jamaica native who had previously challenged the sodomy laws there, has initiated a challenge to the failure of Jamaica to allow or recognize same-sex marriages. He petitioned the Inter-American Commission of Human Rights requesting a ruling that Sec. 18(2) of the Jamaican Constitution, which defines marriage heterosexually, violates various provisions of the American Convention on Human Rights, which Jamaica ratified 41 years ago. Tomlinson and his same-sex partner married in Canada, and complain that Jamaica’s refusal to recognize same-sex marriages have prevented them from returning to his homeland, Jamaica, with his Canadian husband, in order to work and provide care and support for his ageing parents, who are in declining health. *Jamaica-Gleaner*, a local media source, reported on July 26 that the petition says that by virtue of the constitutional ban on same-sex marriages, “there is neither an adequate

nor effective domestic remedy available to him and/or his same-sex partners under Jamaican law.” The Jamaican government has been asked to respond to the petition in three months.

JAPAN – The Japan Federation of Bar Associations (JFBA) sent a statement to the Minister of Justice, the Prime Minister, the House of Representatives Speaker and the House of Councilors on Wednesday, July 24, stating that the government’s failure to recognize same-sex marriage was a “serious human rights violation,” according to a *Gay Star News* report. The JFBA, whose views on legal questions carry great weight, asserted that the current law violates equality and contravenes Articles 13 and 14 of the Japanese Constitution. “Therefore, the state should allow same-sex marriages and promptly revised the relevant laws and regulations,” stated the summary of the report. Litigation is already underway on behalf of 13 couples who are seeking the right to marry. Taiga Ishikawa, newly-elected as only the second out gay member of the Upper House of the legislature, promised that legal same-sex marriage would become available within his six-year term of office. (We are sorry to note that *Gay Star News*, which has become an important on-line news source, announced it would be suspending operations for financial reasons, although its announcement has brought inquiries that might lead to a financial solution to keep it afloat.)

KENYA – Individual dignity guaranteed by Kenya’s constitution was the basis for a Court of Appeal ruling upholding a decision by the High Court ordering the Kenya National Examinations Council to change academic certificates for Audrey Ithibu Mbugua, a transgender woman, whose certificates were issued in her former name, having been earned when she was identified as male. The

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government had argued that policy concerns justified leaving this issue to the legislative process, but the court was not persuaded. According to a report by *Nation* (Kenya), July 22, “The judges said there is, of course, need for the government, and Parliament in particular, to address in a holistic manner the interests of minorities such as transgender persons. However, such minorities cannot wait until there is a policy and legislative framework in place, to get recourse to secure their dignity guaranteed under the Constitution.” The Council’s refusal of her request left her to have to try to prove to potential employers that the documents, naming a man, actually referred to her educational credential. It was noted that there is no statutory requirement that educational credentials include a notation of gender in any event.

KUWAIT – *Al Bawaba News from the Middle East and Africa* reported on July 10 that there was a “surge of public outrage” in Kuwait at the news that about 30 people had submitted an official request to the Ministry of Social Affairs and Labor to establish an officially sanctioned LGBT society in the country, to be named “Horriyah” (Freedom), for the purpose of “raising awareness of the LGBT+ community in Kuwait.” A prior request along these lines was rejected in 2007. If such a request was granted, it would probably be the first time that a Muslim country in the Middle East has officially allowed for such an organization. Litigation in Botswana (Africa) resulted in a court order directing the government to allow for registration of an LGBT rights advocacy group, but that is a rather isolated case.

MEXICO – The Yucatan Congress rejected a measure to establish marriage equality, which would have brought the state into line with Supreme Court

rulings. In Mexico, the Supreme Court can’t establish a national rule for marriage equality, but it can dictate the course of individual marriage litigation, and has ruled in 2015 that same-sex couples anywhere in the country are entitled to seek and obtain an order (called an “amparo”) directing local officials to issue them a marriage license and record their marriage. The situation now varies from state to state. In some, couples can go directly to local officials and obtain licenses without need for litigation, while in others they must apply first to a court for an amparo. The resultant marriages have the same legal validity, but the action of the Yucatan Congress in repeatedly refusing to amend its local laws is more than merely symbolic, since requiring couples to go to court creates a stumbling block and generates unnecessary expenses for court proceedings. According to a news report in *NoticiasFinancieras* – English, an on-line news service, same-sex unions can be formed directly in 19 states, and in three other states in a handful of municipalities. Otherwise, couples must seek amparos from the courts. 2019 WLNLR 21745446, July 16, 2019.

NORTHERN IRELAND – Northern Ireland has been without a local government for so long that the U.K. Parliament passed a measure conditionally addressing two of the issues that have proven to be stumbling blocks preventing a new power-sharing arrangement between enough of the political parties represented in the local legislature to achieve a ruling majority: abortion and same-sex marriage. The U.K. Parliament’s measure provides solutions to these issues – including the establishment of marriage equality – if a power-sharing arrangement is not achieved by October 21. *BBC News*, July 17. However, Michelle O’Neill, Vice President of Sinn Fein, stated during a political debate held at the Belfast Pride Festival that her party,

Sinn Fein, will not agree to a power-sharing arrangement unless it includes the extension of same-sex marriage to Northern Ireland. *Belfast Telegraph*, July 30. This was seen as increasing the odds that marriage equality will finally arrive in Northern Ireland, where a majority of voters tell pollsters that they support it, by next year.

OGLALA SIOUX TRIBE – On July 8, the Oglala Sioux Tribe Council voted 12-3 to allow same-sex marriages under tribal law. When the U.S. Supreme Court ruled in *Obergefell v. Hodges* in 2015 that same-sex couples have a 14th Amendment right to marry, the ruling did not affect tribal law for the 573 federally recognized tribes, as matters of domestic law are still reserved to the tribes as sovereigns, as recognized by the Supreme Court in a 1978 ruling, *Santa Clara Pueblo v. Martinez*. Although some tribes had voted to embrace marriage equality before *Obergefell*, there are many hold-outs and the process of reform efforts on tribal marriage law are ongoing. *Rapid City Journal*, July 16.

PAKISTAN – On July 22, the district and session court in Peshawar announced a death sentence for Fazal Dayan alias Fazal Gujar, for the murder of a transgender woman, Alisha, based on her dying statement to police in the hospital. There was physical and circumstantial evidence linking Gujar to the crime, but the dying declaration was given the greatest weight. The press report stated that the woman was “brutally gunned down.” *Tribal News Network* (July 22).

POLAND – Responding to an anti-gay rhetorical campaign of the government, a weekly magazine, *Gazeta Polska*, supplemented an issue with sheets of stickers that readers could use to signal that their premises are “an LGBT-free zone.” The magazine’s sticker campaign

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came after the first gay pride parade in Bialystok was disrupted by violent protesters, egged on by the police. Several local governments had adopted resolutions declaring themselves “free of LGBT ideology” in response to homophobic statements by the leader of the powerful Law and Justice Party, Jaroslaw Kaczynski, dubbing gays a “threat” to the nation, and echoing anti-gay statements emanating from Poland’s influential Roman Catholic hierarchy. *Agence France Presse English Wire* reported on July 25 that a Polish court had ordered the magazine to temporarily halt the distribution of the anti-LGBT stickers while litigation proceeded challenging their legality.

RUSSIA – A gay male couple who have been raising children adopted by one of them are in trouble with the government after having sought medical care for one of the children, according to a *Human Rights Watch* report on July 24. They took their younger boy to a hospital with suspected appendicitis. When the doctor asked him about his “mom” he said he had two “dads,” and the same day the hospital sent a letter to Russia’s chief investigative agency and the Prosecutor General’s Office alleging child abuse, invoking the states “gay propaganda law” making it a crime for anybody to propagandize to minors about same-sex families. The hospital’s letter described the fathers’ “non-traditional sexual orientation.” An investigator from the Prosecutor’s office invited them to come in for a “conversation” about their family life. Alarmed, they left the country with their children. The case workers for the family who had approved the adopting of the children by one of the men were then charged with inadequate performance of their duties, on the ground that they failed to take action despite knowing that the adoptive father “promoted non-traditional relationships, thus shaping distorted ideas about family values in children’s minds and

harming their health, moral and spiritual development.” Subsequently Moscow policy searched the family’s apartment, and relatives in another city had their apartment searched as well. Such is the Orwellian state in which gay people live in Putin’s Russia.

ST. VINCENT AND THE GRENADINES

– These British Commonwealth Caribbean countries faced litigation filed litigation challenging the “buggery” and “gross indecency” laws that they inherited from their days as colonies. Challenges to the laws were filed on July 26 in the High Court in Kingstown, any decision ultimately subject to appeal to the Privy Council in London, which remains the court of last appellate resort for many Commonwealth countries. The challenges were filed by local lawyers, Zita Barnwell and Jomo Thomas, associating some English barristers – Jeremy Johnson and Peter Laverack – as intended trial counsel. This information is taken from a press release distributed by Laverack.

SOUTH AFRICA – INDEPENDENT ON SATURDAY

(July 25) reported that the Phillipstown Regional Court has sentenced Zabathini Jonas to life in prison for engaging in “corrective rape” of a lesbian. According to the press report, Jonas threatened the openly lesbian woman with a knife and raped her for two hours until she lost consciousness. He claimed the intercourse was consensual and that he acted to “correct her sexual orientation.” She reported the assault to a doctor, who testified that the woman was “the most traumatized patient he had ever examined, due to the extensive pain she endured,” and that it was “highly improbable” that the intercourse was consensual. At trial, Jonas claimed that he had turned a lesbian into a heterosexual in the past through such “corrective” sex, and the presiding

magistrate at trial expressed the view that Jonas had boasted regarding his “misplaced and offensive powers to correct the lesbian’s sexual orientation.” Jonas appealed his sentence to the Northern Cape High Court, where Judge Violet Phatshoane dismissed the appeal, calling Jonas’s acts “repulsive and unpardonable. Gender-based violence has no place in our Constitutional dispensation,” wrote the judge. “The so-called ‘corrective rape’ is evil and cannot be countenanced. Our courts will continue with their concerted effort to protect lesbian, gay, bisexual and transgender (LGBT) rights. What he did to the complainant was to pulverize her sense of belonging and self-expression. This is repulsive and unpardonable.”

SOUTH KOREA – The Seoul Eastern District court ruled on July 19 that Presbyterian University and Theological Seminary violated the rights of four students when it punished them – including suspension from classes – for wearing “rainbow clothing” to chapel on the International Day Against Homophobia and Biphobia in 2018 in order to show support for LGBTI people, reported *Gay Star News*. The court ordered the University to nullify the punishments and pay the students’ legal fees, finding that there was a procedural defect that mandated ruling for the students.

SWITZERLAND – The Swiss Supreme court reversed a prior ruling and barred Caster Semenya from competing as a woman in sanctioned track competition in races between 400 meters and one mile, pending a final determination of the merits of her case. Semenya, a South African, has always identified as female but has a condition that produces testosterone at levels well above the female norm, which some competitors and athletic administrators charge gives her an unfair advantage in

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competition with men. She is a two-time Olympic gold medalist in the 800 meter run. The International Association of Athletics Federations (IAAF), which establishes rules governing competitive sports, had ruled against Semenya being allowed to compete as a woman in distance races. She appealed to the Court of Arbitration for Sport, but in May that court backed up the IAAF decision and Semenya appealed to the Swiss Supreme court, also known as the Swiss Federal Tribunal. At first that court temporarily suspended the IAAF rules, allowing Semenya to compete while the case is pending, but now it has reversed itself and said she should not compete while it considers her challenge to the testosterone rules. If the rules are upheld, she could compete in national competition but not in sanctioned international competition for distance, unless she is willing to submit to hormone therapy to reduce her testosterone production, which she has objected to doing. *New York Times*, July 31.

UNITED KINGDOM – Requiring a gay employee to stay in the closet violates their rights under English law, according to an Employment Tribunal ruling against Redwood TTM Limited and Pilling. The employer was ordered to pay the employee 8,000 pounds plus interest in damages, finding direct discrimination because of sexual orientation. During the employee's first week of employment, her manager asked her not to disclose her sexual orientation to "the wider business" because the owner was "old school" and the company then employed no other gay people. She felt excluded from company social events and was laid off after 7-1/2 months as "redundant." She then filed a claim of discrimination. The manager denied having ever had the conversation with her, but the tribunal found her testimony more credible. While it ruled against her other claims

against the company, the tribunal sustained the claim based on this issue, finding that the manager would not have made a similar request of a heterosexual employee. *Mondaq*, July 16 ("Employer Discriminated Against Employee by Asking Her to Keep Her Sexuality a Secret"), 2019 WLNR 21730896.

PROFESSIONAL NOTES

By Arthur S. Leonard

GLBTQ LEGAL ADVOCATES AND DEFENDERS (GLAD) announced that **CHAI FELDBLUM** will be awarded the organization's 2019 Spirit of Justice Award at its 20th Annual Spirit of Justice Award dinner on October 25, 2019, in Boston. Feldblum, partner and director of Workplace Culture Consulting at Morgan Lewis, was the first out lesbian commissioner on the federal Equal Employment Opportunity commission from 2010 until earlier this year when her term expired. She played a crucial role in getting the EEOC to overrule old precedents and determine that sexual orientation and gender identity discrimination claims are covered by Title VII, resulting in important rulings in several federal sector employment discrimination cases. In her current role, Feldblum counsels companies and organizations about creating safe, respectful, and inclusive workplaces that prevent harassment of LGBTQ employees.

TRANSGENDER LEGAL DEFENSE & EDUCATION FUND (TLDEF) has appointed **DAVID BROWN** as its new Legal Director. Brown joins TLDEF from the Lawyering Project, an organization focused on reproductive health care access, and previously served as an attorney at the Center of Reproductive Rights and practiced law with Clearly, Gottlieb, Steen & Hamilton. He is a graduate of the

University of Michigan Law School. He originally joined TLDEF as a member of its first class of law clerks in 2007, and served on the board of directors from 2009 to 2017. He began working as Legal Director on July 22.

MENAKA GURUSWAMY and **ARUNDHATI KATJU**, lawyers who took a leading role in the case decriminalizing gay sex in India in 2018, have come out as a couple, reported *shethepeople.tv/news* on July 20. The article recalls a court hearing in the case in 2013 when the senior judge on the bench asked the law officer if he knew any homosexuals, and the law officer laughed and said, "no, my lord, I am not that modern," making it clear that they would lose before that judge who "had no imagination of who is a gay Indian," while gay Indian lawyers were standing in the court before him.

CORRECTION – FIRST MONDAY IN OCTOBER – *Law Notes* wrote in July that the "Constitution mandates" that the Supreme Court's term begin on the first Monday in October. The Constitution is silent on this point, and the date is set by statute, 28 U.S.C. § 2. Historically, the date has moved around. The Judiciary Act of 1789 called for two terms each year, beginning in February and August. An annual term was established by Congress in the 19th Century, commencing on the first Monday in January (1827), first Monday in December (1844), and second Monday in October (1873). The change to the first Monday in October was approved in 1916. Congress recodified it for the same day in 1948, 62 Stat. 869. Arguments that posited that the date was set to conform to the traditional convening of the British Inns of Court in the 18th Century or to the Michaelmas Term used for academic calendars at Cambridge and Oxford are fanciful and unsupported by history. – William J. Rold.

PUBLICATIONS NOTED

1. Abreu, Kylie, and Tanner J. Bean, An Unparalleled Gathering: A Review of the Idaho Interfaith & LGBT Summit on Religious Liberty and Nondiscrimination Solutions, 62-JUL Advocate (Idaho) 22 (June/July 2019) (unsurprising punchline – they failed to reach a consensus).
2. Acosta, S. Grace, Implicit Bias in Attorney Evaluation of Judges and Why It Applies to Everyone, Even You, 32-AUG Utah B.J. 18 (July/August 2019).
3. Adams, Megan E., Assuring Financial Stability for Survivors of Domestic Violence: A Judicial Remedy for Coerced Debt in New York's Family Court, 84 Brooklyn L. Rev. 1387 (Summer 2019).
4. Badida, Aaron, Positive Rights: The New York "Baby AIDS Bill" as State-Created Danger, 71 Fla. L. Rev. 569 (March 2019).
5. Barry, Kevin M., Challenging Inaccurate Sex Designations on Birth Certificates Through Disability Rights Law, 26 Geo. J. on Poverty L. & Pol'y 313 (Spring 2019).
6. Bauges, Brenda M., and Tenielle Fordyce-Ruff, Avoiding Gatekeeper Bias in Hiring Decisions, 62-JUL Advocate (Idaho) 39 (June/July 2019).
7. Belavusau, Uladzislau, and Kristin Henrarda, A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives, 20 German L.J. 614 (July 2019).
8. Butlin, Sarah Fraser, Cakes in the Supreme Court, The Cambridge Law Journal, 78 [2019], pp 280-283 (The U.K. has its counterpart to *Masterpiece Cakeshop*).
9. Calabresi, Steven G., The Jurisprudence of Justice Samuel Alito, 87 Geo. Wash. L. Rev. 507 (May 2019).
10. Chemerinsky, Erwin, and Barry P. McDonald, Eviscerating a Healthy Church-State Separation, 96 Wash. U. L. Rev. 1009 (2019) (sharp critique of Supreme Court's recent turn in Establishment Clause jurisprudence, even before the most recent 5-4 catastrophe . . .).
11. Connolly, Michael, *Lee v. Ashers Baking and Its Ramifications for Employment Law*, 48 Indus. L.J. 240 (U.K.) (June 2019).
12. Cucolo, Heather Ellis, and Michael L. Perlin, "The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases, 69 Case W. Res. L. Rev. 637 (Spring 2019).
13. Das, Atanu, Chilling Social Media: Warrantless Border Searches of Social Media Accounts Infringe upon the Freedom of Association and the Free to be Anonymous Under the First Amendment, 84 Brooklyn L. Rev. 1287 (Summer 2019).
14. DeGirolami, Marc O., The Sickness Unto Death of the First Amendment, 42 Harv. J.L. & Pub. Pol'y 751 (Summer 2019).
15. Dodge, Jeffrey A., Supporting Diversity: From Pre-Law to the Legal Profession, 62-JUL Advocate (Idaho) 26 (June/July 2019).
16. Esposito, Alexandria, The Trend Towards Equality: How Sexual Orientation Discrimination Continues to Evolve Under Title VII, 44 U. Dayton L. Rev. 295 (Spring 2019).
17. Feldblum, Chai, Symposium – Religious Liberty and LGBTQI Rights: Finding the Right Balance – Ruth Bader Ginsburg Lecture, 41 T. Jefferson L. Rev. 163 (Spring 2019).
18. Goldberg, Erica, "Good Orthodoxy" and the Legacy of *Barnette*, 13 FIU L. Rev. 639 (Spring 2019).
19. Greenberg, Julie A., Beyond the Binary: Constitutional Challenges to Male/Female Classification Systems, 41 T. Jefferson L. Rev. 195 (Spring 2019).
20. Greene, Abner S., *Barnette* and *Masterpiece Cakeshop*: Some Unanswered Questions, 13 FIU L. Rev. 667 (Spring 2019).
21. Haksgaard, Hannah, Blending Surnames at Marriage, 30 Stan. L. & Pol'y Rev. 307 (2019) (Did you know that state laws in many jurisdiction restrict what people can do in terms of last names when they marry? We didn't know it was a "thing" until we read this article.).
22. Halliwell, Pamuela A., The Psychological & Emotional Effects of Discrimination Within the LGBTQ, Transgender & Non-Binary Communities, 41 T. Jefferson L. Rev. 222 (Spring 2019).
23. Ham, Jared, Getting Away with Marginalization: Rejecting a Formalistic Standing Analysis and Remediating LGBTQ+ Discrimination through Congressional Legislation, 28 Cornell J.L. & Pub. Pol'y 569 (Spring 2019).
24. Higdon, Michael J., The Quasi-Parent Conundrum, 90 U. Colo. L. Rev. 941 (Fall 2019).
25. Horwitz, Paul, A Close Reading of *Barnette*, in Honor of Vincent Blasi, 13 FIU L. Rev. 689 (Spring 2019).
26. Kim, Jonathan J., and Eugene Temchenkor, Constitutional Intolerance to Religious Gerrymandering, 18 Conn. Pub. Int. L.J. 1 (Winter 2019).
27. King, Mary Stuart, Annual Survey of South Carolina Law: Labor & Employment Law: to Protect or Not to Protect: An Empirical Approach to Predicting Where the Fourth Circuit Would Stand on Coverage for Sexual Orientation Discrimination Under Title VII, 70 S.C. L. Rev. 1151 (Summer 2019).
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29. Lakier, Genevieve, Not Such a Fixed Star After All: *West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not to Speak, 13 FIU L. Rev. 741 (Spring 2019).
30. Lin, Silver, Problems of Proof for the Ban on Female Athletes with Endogenously High Testosterone Levels, 20 Chi. J. Int'l L. 217 (Summer 2019).
31. Lindevaldsen, Rena M., An Ethically Appropriate Response to Individuals with Gender Dysphoria, 13 Liberty U. L. Rev. 295 (Spring 2019) (Note the venue . . .).
32. Lindevaldsen, Rena M., Does Sex Discrimination Include Gender Identity: Courts in the Fourth Circuit Weigh In On the Question, 70 S.C. L. Rev. 1223 (Summer 2019) (Annual Survey of South Carolina Law).
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36. Oman, Nathan B., Contract Law and the Liberalism of Fear, 20 Theoretical Inquiries L. 381 (July 2019) (at several points uses the case of same-sex marriage as a talking point for questioning the relevance of autonomy as a justification for freedom of contract).
37. Perry, Olivia, Learning to Discrimination: Vouchers and Private School Policies' Impact on Homosexual Students, 17 First Amend. L. Rev. 477 (Spring 2019).
38. Potter, Andrew, Sexual Orientation and ECOA: A Case for Statutory Protections, 31 Loy. Consumer L. Rev. 371 (2019) (One of the federal anti-discrimination provisions that will likely be affected by the Supreme Court's consideration of the Title VII cases next Term in the Equal Credit Opportunity Act, which bans sex discrimination by commercial lenders).
39. Ranstrom, Will, Understanding and Compromise Can Bring Solutions, 62-JUL Advocate (Idaho) 29 (June/July 2019).
40. Roisman, Shalev, Presidential Factfinding, 72 Vand. L. Rev. 825 (April 2019) (What do you do when a president makes up "alternative facts" in order to justify executive action under statutes that authorize the president to take an action upon finding particular facts?).
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48. Valdes, Julian, From the "Jewish Clause" to the "Homosexual Clause": An Analysis of Beneficiary Restriction Clauses Which Restrict Same-Sex Marriage in Illinois, 43 S. Ill. U. L.J. 771 (Spring 2019).
49. Varsava, Nina, The Role of Dissents in the Formation of Precedent, 14 Duke J. Const. L. & Pub. Pol'y 285 (Spring 2019).
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52. Witte, John, Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?, 68 Emory L. J. 837 (2019).
53. Wolitz, Rebecca E., A Corporate Duty to Rescue: Biopharmaceutical Companies and Access to Medications, 94 Ind. L.J. 1163 (Summer 2019).
54. Yost, Emily, Queering the Landscape: Decriminalizing Consent and Remapping the Permissible Geographies of Intimacy, 19 U. Md. L.J. Race, Religion, Gender & Class 201 (Spring 2019).
55. Ziyadov, Nazim, From Justice to Injustice: Lowering the Threshold of European Consensus in *Oliari and Others versus Italy*, 26 Ind. J. Global Legal Stud. 631 (Spring 2019) (Questioning the threshold for finding European Consensus in marriage equality litigation under the European Convention on Human Rights).

SPECIALLY NOTED

One of the questions left unanswered by the Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* was whether a business whose products are the result of artistic creativity enjoys a First Amendment free speech right to deny services, on the argument that requiring the business to provide the service would be unconstitutional compelled speech. This theory was championed in one of the dissenting opinions. The Florida International University Law Review published a symposium issue partially dedicated to exploring the tension between cases such as *Masterpiece Cakeshop* and the Supreme Court's famous decision of *West Virginia State Board of Education v. Barnette*, in which the Court held that a state's mandatory flag salute law violated the First Amendment rights of school children as unconstitutional compelled speech. There are also articles on other LGBTQ issues. Individual articles from the symposium noted above. * * * The June/July issue of *Advocate*, the journal of the Idaho Bar, contains several articles related to LGBTQ issue, individually noted above, several by out LGBT lawyers or law students recounting their experiences and insights.

EDITOR'S NOTES

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