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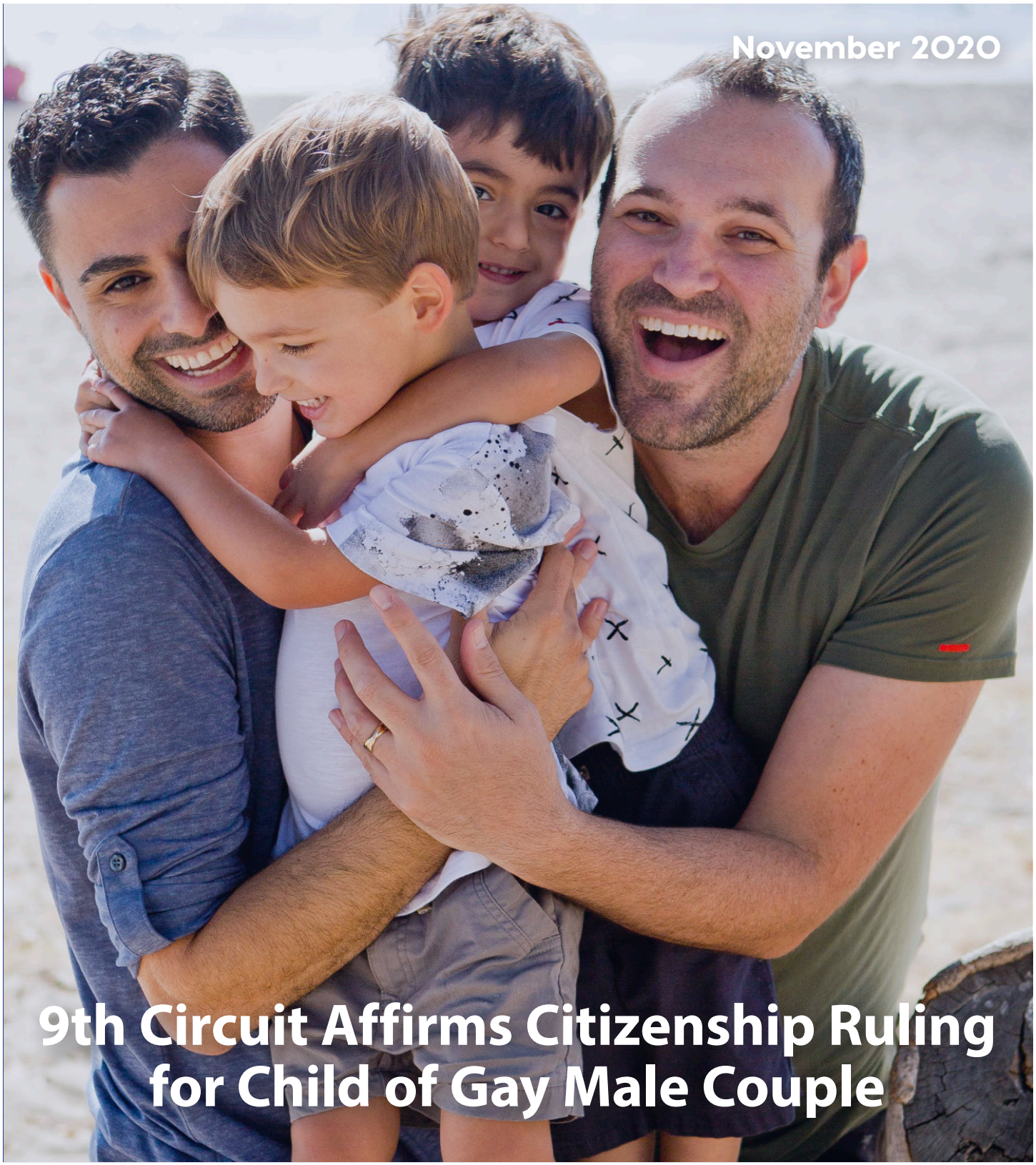

November 2020

9th Circuit Affirms Citizenship Ruling for Child of Gay Male Couple

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

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ISSN 8755-9021
Cover photo: Immigration Equality

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9th Circuit Panel Unanimously Affirms Citizenship Ruling for Child of Gay Male Couple

By Arthur S. Leonard

In *E.J.D.-B., a Minor*, 2020 U.S. App. LEXIS 32064 (9th Cir., Oct. 9, 2020) (not officially published), a 9th Circuit panel affirmed *per curiam* a ruling by U.S. District Judge John F. Walter in *Dvash-Banks v. Pompeo*, 2019 U.S. Dist. LEXIS 30525, 2020 WL 5991163 (C.D. Cal., Feb. 21, 2019), holding that a child born overseas to a married gay male couple, one of whom is a U.S. citizen, is entitled to be recognized as a natural-born U.S. citizen, eligible to be issued a U.S. passport. Judge Walter's ruling is one of three that have been issued on similar facts in U.S. District Courts, rejecting the State Department's interpretation of 8 U.S.C. Sec. 1401, which concerns citizenship status of children born overseas.

The statute provides that a citizen from birth includes "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years."

E.J. is one of the two sons of U.S. citizen Andrew Dvash-Banks and Israeli citizen Elad Dvash-Banks, who are married to each other. The two sons were conceived through donor insemination in Canada, where they were born. E.J. was conceived using Elad's sperm, while the other son was conceived using Andrew's sperm. When the fathers went to a U.S. consulate seeking passports for their sons, they were granted a passport for Andrew's biological son but not for Elad's biological son, even though both men are listed as parents on each boy's birth certificate. The State Department interpreted the statute as incorporating a biological relationship component and has insisted that it is not required to recognize parental status of a parent who is not biologically related to their child, in effect refusing to recognize Andrew as a parent of E.J. for purposes of the statute, despite his being married to E.J.'s other parent at the time of E.J.'s birth and both of their names on the birth certificate.

Judge Walter, applying 9th Circuit precedents that arose from other factual settings, found that the statute does not require a biological tie between the U.S. citizen parent and the child, and that E.J. is entitled to be recognized as a natural born citizen the same as his brother. (The family is living together in California, as E.J. gained admission through a visitor visa.) Because three-judge panels of the 9th Circuit are bound to apply circuit precedents, wrote the Court of Appeals panel, it was bound to apply *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) and *Solis-Espinoza v. Gonzales*, 401 F.3 1090 (9th Cir. 2005), and affirmed Judge Walter. "The government concedes that *Scales* and *Solis-Espinoza* control this case and has appealed to preserve the argument that those cases were incorrectly decided," explained the court.

Presumably the next step would be for the government to seek *en banc* review to reverse the earlier rulings, or to seek review in the Supreme Court. As of the end of October, the government had not signaled its intention. But two late-breaking developments suggested that perhaps the State Department is ready to change course.

Lambda Legal, representing gay couples in the two other district court cases, issued a press release on Oct. 27 announcing that the previous day the State Department had withdrawn its pending appeal in the 4th Circuit in *Kiviti v. Pompeo*, 2020 WL 3268221, 2020 U.S. Dist. LEXIS 105985 (D. Md., June 17, 2020) (Theodore Chuang, J.), and announced that it had decided not to appeal the district court's opinion in *Mize & Gregg v. Pompeo*, 2020 WL 5059253, 2020 U.S. Dist. LEXIS 156121 (N.D. Ga., Aug. 27, 2020) (Michael Brown, J.). In both cases, as noted above, the district court had found that the child of a married same-sex couple would not need a biological connection to their U.S. citizen parent in order to be recognized as a natural-born U.S. citizen. The State Department's action in *Kiviti* and *Mize* spurred speculation that depending on the outcome of the election in November, the Department may hold off on seeking an appellate ruling upholding its interpretation and instead rethink the policy, perhaps with a change of administration.

E.J. and his parents are represented by Aaron Morris of Immigration Equality and cooperating attorneys from Sullivan & Cromwell LLP: Alexa M. Lawson-Remer (Los Angeles office) and Theodore Edelman and Lauren Maisel Goldsmith (New York office). ■

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

Is *Obergefell v. Hodges* Safe?

By Arthur S. Leonard

With the confirmation of Amy Coney Barrett to fill the Supreme Court vacancy left by the death of Justice Ruth Bader Ginsberg, there was speculation that *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court's 5-4 marriage equality ruling, might be in danger of overruling. Indeed, there were reports that some panicked same-sex couples rushed to marry before a Senate confirmation vote for Barrett, under the delusional belief that her confirmation would automatically overrule *Obergefell*. But that's not how the Court works, of course.

This panic was fed, however, by a "Statement" issued by Justice Clarence Thomas, joined by Justice Samuel Alito, when the Court announced on October 5 that it had denied a petition for *certiorari* in *Davis v. Ermold*, 2020 U.S. LEXIS 3709, 2020 WL 588157. Kim Davis, then the Rowan County, Kentucky, clerk, had refused to issue marriage licenses to same-sex couples based on her religious beliefs, despite the Supreme Court's ruling. A couple sued to obtain a marriage license, and Davis's stout resistance (and refusal to allow any of her employees to issue licenses in her place) led to some time in jail for contempt, until a compromise was reached under which she authorized one of her employees to sign the license with her name omitted from the certificate. The sticking point for Davis was the requirement that the county clerk's signature appear on the license, which she saw as violating her right to free exercise of religion by constituting an endorsement of the marriage. When the district court rejected her qualified immunity claim and issued a damage award against her, she appealed without success to the 6th Circuit.

The Supreme Court's refusal to take up the qualified immunity question in her case was predictable. No matter what the currently serving Justices think about *Obergefell*, it was controlling Supreme Court precedent, as was *Employment Division v. Smith*, 494 U.S. 872 (1990), under which Davis had to know she could not claim a free exercise exemption from complying with the state's marriage license law and her oath of office. However, Justices Thomas and Alito thought the occasion suitable to express their continued disapproval of *Obergefell* and suggest that the Court needed to do something to protect the free exercise rights of those whose faith disapproves of same-sex marriages (and, indeed, of homosexuality).

Thomas's "statement" made no secret of the low esteem in which he holds *Obergefell*, to which he had filed a dissenting opinion. He wrote that in *Obergefell* "the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text." A bit ironic, coming from Thomas, an African-American man whose marriage to a Caucasian woman would have been illegal in several states were it not for the Court's decision in *Loving v. Virginia*, based on the Court's identification of a fundamental right to marriage in that same Fourteenth Amendment, whose text does not mention marriage at all. The *Obergefell* decision, as conceptualized in the Court's opinion by Justice Anthony Kennedy, sprang from the *Loving* precedent. "As a result of this Court's alteration of the Constitution, Davis found herself faced with a choice between her religious beliefs and her job," wrote Thomas, expressing empathy for the woman who suddenly faced a conflict between her faith and her job that she could not have anticipated when she first ascended to the position of county clerk.

But Thomas did not call for an overruling of *Obergefell* explicitly. Instead, after recounting how *Obergefell* had led to the oppression of religious dissenters, he suggested that "the Court has created a problem that only it can fix." "This petition implicates important questions about the scope of our decision in *Obergefell*, but it does not clearly present them," so he did not dissent from the denial of *certiorari*. Sigh of partial relief. Thomas is suggesting that the Court should recognize the right of religious objectors to refuse to deal with same-sex couples. (Any guessing where he will stand when the Court decides *Fulton v. City of Philadelphia* later this Term?)

So, we know that Thomas and Alito think that *Obergefell* created a problem that needs to be "fixed." We know from his dissent in *Pavan v. Smith,* 137 S. Ct. 2075 (2017), that Justice Gorsuch is also concerned with the scope of *Obergefell*. Thomas and Alito joined that dissent, arguing that the Court should have given plenary consideration to the question whether a child's second mother had a right to be recorded as a parent on the birth certificate, rather than issuing a *Per Curiam* citing *Obergefell*. Chief Justice Roberts did not join that dissent, holding out hope for some that although he dissented in *Obergefell*, he would respect it as a precedent and not join a call to narrow it. But with the ascension of Barrett to the High Court bench, there might be five votes to carve exceptions out of *Obergefell*, if not overrule it outright. Although Barrett refused to answer questions about *Obergefell* in her confirmation hearing, prior to her judicial service on the 7th Circuit, while working as a full-time faculty member at Notre Dame Law School, she had signed a newspaper advertisement opposing same-sex marriage.

Obergefell is a decision that has engendered substantial reliance, as thousands of same-sex couples have married and enjoyed the benefits and entitlements that married couples enjoy under the law. In addition, it is a popular precedent, with an overwhelming majority of the public stating approval of the right of same-sex couples to marry, at least when responding to pollsters. This may persuade Roberts, perhaps also Brett Kavanaugh (successor to Justice Kennedy), that it is a precedent entitled to respect. One can hope. The first signs may come when the Court decides *Fulton*, as *Obergefell* was prominently mentioned during the oral argument on November 4. ■

3rd Circuit Remands Gay Honduran Asylum and Torture Claim

By Bryan Xenitelis

The U.S. Court of Appeals for the 3rd Circuit has remanded for further consideration the asylum, withholding of removal, and Convention Against Torture claims of a bisexual and gay Honduran man who suffered rape at knife-point and who suffered gang threats for having voted for the political party they opposed, in *Castro v. Attorney General,* 2020 WL 6042122 (3rd Cir., October 13, 2020).

Petitioner was age 20 when raped by a "man with tattoos" who told him "he would like it because he is a faggot." He did not report the assault to the police because "he was afraid of being ridiculed by being raped by a man, or worse, that his assailant would find and kill him." He also encountered issues with the Mara 18 gang members, who "called him a traitor," asked him to "unite with them" by voting for their preferred political party, and who added that they "did not like him because he was gay." Petitioner initially came to the United States but was promptly removed. After further encounters with the gang, he fled Honduras a second time and sought protection in the United States.

An Immigration Judge (IJ) found that the petitioner failed to satisfy his claims of membership in a particular social group or political opinion despite his credible testimony. The Board of Immigration Appeals affirmed the decision without an opinion. Petitioner appealed to the 3rd Circuit. As the Board wrote no opinion, the IJ decision was reviewed for legal issues de novo and other issues under the "substantial evidence" standard.

Writing for a 3rd Circuit panel, Judge Luis Felipe Restrepo issued an opinion remanding the case to the Board for further consideration. Judge Restrepo found the IJ erred as a matter of law when she stated that persecution "cannot be established when persecutors are motivated by criminal intent," finding that persecutors may "have mixed motives for their actions." He further found that the persecutors' "chosen method of harm, the locus of the harm, social stereotypes or stigmas associated with the harm – often provide a window into the persecutor's motives," finding that "homophobia is a widespread problem in Honduras" and that the "harassment and intimidation" Petitioner experienced "may be indicative of a graver problem than ordinary criminal conduct."

Judge Restrepo further ruled that clearly the harm suffered by the Petitioner rose to the level of "persecution."

Finally, with respect to the asylum claim, Judge Restrepo ruled that while the IJ found the Government of Honduras had the ability and willingness to control violence and abuse generally, the Petitioner's claim of "particularized harm based on sexual orientation and political opinion" did not "relate exclusively or primarily to generalized crime" and was a cognizable claim.

With respect to Petitioner's torture claim (a separate standard requiring proof of "government acquiescence" to prior or anticipated future torture), Judge Restrepo found that the IJ erred in ignoring the government of Honduras's failure to control "lower-level officials who may be perpetrating that violence or turning a blind eye to it." He found the IJ's ruling that since Petitioner had participated in a "gay march" that he was able to live as an openly gay man to not be true, ruling that the fact that he had once in his entire life attended such a march "puts him in greater (not lesser) danger," particularly when there was record evidence "indicating that visible gay rights activists and other human right defenders are being killed."

Finding the IJ to have been in error, Judge Restrepo remanded the case to the Board for further consideration. ■

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

Federal Court Refuses to Dismiss Privacy and Defamation Claims by Man Falsely Identified as HIV-Positive by Police Chief in Social Media Posting

By Wendy C. Bicovny

Kevin Logan sued the City of Evanston and Evanston Police Chief Demitrous Cook asserting privacy and defamation claims – under 42 U.S.C.§ 1983 against the City based on the *Monell* theory of municipal liability, and against Cook in his individual capacity. The claims stemmed from a social media posting by Cook including a photo of Logan with "HIV" written next to the photo. Among other things, Logan asserted claims against the City and Cook for violation of the Fourth and Fourteenth Amendments of the U.S. Constitution (counts 1 and 2 against both defendants, and count 10 against the City only), and defamation against both the City and Cook (counts 3 & 4). Defendants moved to dismiss all claims. U.S. District Judge Matthew F. Kennelly dismissed Logan's defamation claims against the City but denied the defendants' motions with respect to Logan's other claims. *Logan v. City of Evanston and Evanston Police Chief Demitrous Cook*, 2020 WL 6020487 (N.D. Ill., Oct.12, 2020). Only Logan's HIV-related claims are discussed in this article.

On February 17, 2020, Evanston police chief Demetrious Cook published onto his personal public Snapchat several photographs of Logan, who was an individual of interest in Evanston police investigations. Cook also published Logan's date of birth and last known addresses onto his public Snapchat story. In Cook's publication of Logan's

image, the words "pending" and "HIV" appeared handwritten next to Logan's image. With a single click, users who saw Cook's publication of Logan then shared the publication on Facebook and via personal text messages, which included Logan's image, personal information, and supposed HIV status. Logan contended this was a false statement in that he had never been diagnosed with HIV and was not pending a test result. After the incident, Logan underwent an HIV test on February 22, 2020, which was negative. On February 21, 2020, after Cook was informed that members of the public had shared the pictures, he removed them from his Snapchat story and issued a public statement regarding the incident, stating that the individual whose information he shared were subjects previously identified in Evanston Police Department investigations and that the photos were taken to assist him with the investigation. He further stated that he did not realize that photos taken with the Snapchat application could be made public with a single click.

Judge Kennelly addressed each count by integrating respective facets of Logan's allegations into his analysis.

Count 1: In violation of Logan's Fourth Amendment rights, Cook knowingly obtained and disclosed to the public purported medical information regarding Logan, indicated by the handwritten notation HIV. Defendants failed to challenge the sufficiency of this claim in their opening briefs, and thus forfeited any challenge to the legal sufficiency. Motion to dismiss denied.

Count 2: Violation of Logan's right to privacy under the Fourteenth Amendment by disclosing alleged medical information about him to the public. Seventh Circuit precedent dictated that the Fourteenth Amendment confers a fundamental right to the privacy of medical and other categories of highly personal information. Logan sufficiently alleged a Fourteenth Amendment substantive due process claim based on Cook's public disclosure of his purported HIV status on Snapchat without his permission. His allegations also contained enough factual content to make out a claim for governmental violation of his medical privacy. Based on his Count I and 2 analysis, Judge Kennelly next determined Logan had viable claims under § 1983 against Cook in his individual capacity.

In Counts 1, 2, and 10, Logan also sought to impose liability on the City under Monell, which states a municipality may be found liable under § 1983 when it violates constitutional rights via an official policy. Logan contended that Monell liability existed because Cook, as the Evanston police chief, had final policymaking authority that he exercised, causing Logan's constitutional injuries. Judge Kennelly concluded that there was no question that a chief of police was a final policymaker. Logan plausibly alleged that no ordinance constrained Cook as it pertained to his alleged role as a policymaker in Evanston police investigations. For these reasons, the City was not entitled to dismissal of Logan's Monell claims.

Next, Judge Kennelly noted although Logan's defamation per se and defamation claims against the City were barred by specific provisions of the Illinois Tort Immunity Act, the Act was devoid of any provision expressly immunizing governmental employees from liability for knowing defamatory statements. Judge Kennelly then began his analysis of Logan's defamation per se and defamation claims against Cook (counts 3 & 4) stating that, "[S]tatements that impute infection with a loathsome communicable disease, are considered defamatory per se." Logan alleged that Cook's statement imputes that he was infected with a "loathsome communicable disease." Judge Kennelly rejected defendants' argument that "[C]ook's statement was reasonably construed to indicate that the results of an HIV test were pending, not that Logan was, in fact, HIV positive, and thus was protected under the innocent construction rule." Specifically, the configuration of the handwritten notations next to Logan's photograph did not indicate that HIV test results were pending. Rather, the notation "pending" was written horizontally next to Logan's contact and arrest information, the notation "HIV" was written vertically, in much large letters, lower on the page, next to Logan's photograph. Any connection between the words "pending" and "HIV" was not evident. With this in mind, there was a solid basis for a contention that Cook's use of the term "HIV," given its configuration on the page, clearly indicated or would have led a reasonable person to believe Logan was HIV positive, or was, at least, suspected of being HIV positive by the Evanston police, Judge Kennelly pointed out. Moreover, Cook's statement never made any reference to HIV testing. Context of a statement was critical in determining meaning, and here the context failed to suggest that Cook was merely saying Logan had HIV test results pending. Accordingly, defendants' motion to dismiss Logan's defamation claims against Cook, were denied. ■

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

State Trial Judge's "Fag" Comment During Sentencing Sets Up Possible Appeal of District Court's Denial of Habeas Corpus

By Wendy C. Bicovny

U.S. District Judge Rodney W. Sippel in *Carroll v. Payne*, 2020 WL 5848073, 2020 U.S. Dist. LEXIS 181564 (E.D. Mo., Oct. 1, 2020), denied Petitioner Anthony Carroll's *pro se* application for a writ of *habeas corpus*, but certified the case for possible appeal to the Circuit Court of Appeals. The facts are numerous. For this reason, only the relevant facts impacting *Law Notes* readers are discussed.

To summarize: In 2005, a jury convicted Carroll of one count of first-degree robbery, counts of forcible sodomy, three counts of armed criminal action, one count of first-degree burglary, and one count of misdemeanor stealing. Immediately prior to sentencing, the trial judge made the following remarks on the record: "Mr. Carroll, during the trial, I was baffled during cross-examination. The prosecutor asked you whether you were a homosexual and you were upset. You told him no. I believe your words were you were not a fag. I've consulted some of my friends that are homosexuals and they want me to let you know, whether or not you're the giver or the givee, if you have forced a heterosexual man to suck your penis and you're so gratified that you take him and put him in the bed and have anal sex with him, you are a fag." No objections were raised in response to these comments. The trial court then sentenced Carroll to 160 years in prison.

On November 16, 2018, Carroll filed for habeas corpus relief raising the same argument as in his thirteen-year span of prior failed direct appeals to the Missouri Court of Appeals: that his sentence of 160 years' imprisonment violates the Eighth Amendment because it was disproportionate to his offenses and was the result of the trial judge's personal animus. Because defense failed to object on the record, Judge Sippel said, Carroll's claims were procedurally defaulted. To satisfy the miscarriage of justice exceptions to the procedural bar of review, Carroll had to make a credible claim of actual innocence. Here, the trial judge's use of a homophobic slur and his admission of *ex parte* discussions about the facts of the case did not occur until after the jury convicted Carroll. Thus, Carroll's claim did not have any relation to his claim of actual innocence, failing the exception.

Carroll's claim also failed on the merits because the Missouri Court of Appeals' determination that the 160-year imprisonment sentence did not violate the Eighth Amendment was not an unreasonable application of clearly established federal law, at least in Judge Sippel's view.

Carroll's habeas petition could only be granted if it was unreasonable for the Missouri Court of Appeals to determine that the trial judge's inflammatory remarks, as well as his open admission of *ex parte* discussions about the facts of the case before sentencing, had no bearing on the sentences imposed. Judge Sippel expressed unequivocal agreement with Carroll that the trial judge's statements should not have been made.

"This language—especially use of the word 'fag,' which, despite the trial judge's contention to the contrary, was unnecessary and shockingly inappropriate. When a judge uses slurs or epithets to disparage someone's race, religion, or sexual orientation on the record, that language certainly harms the individual insulted. It also does lasting damage to the reputation of the judiciary by eroding public confidence in the fairness and impartiality of our system of justice. It is no wonder that Carroll questioned whether the trial judge held some personal prejudice against him and, acting on that prejudice, imposed the lengthy sentence that he did," Judge Sippel emphatically wrote.

Yet, a state court's factual determination is not unreasonable simply because the federal habeas court would have reached a different conclusion in the first instance, Judge Sippel qualified. Federal law that made disqualification mandatory where the judge had either a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding, did not apply to the trial court here, and Missouri had no analogous state law. The Missouri Court of Appeals found that "a thorough review of the trial transcript and sentencing transcript lead to the conclusion that the remarks had no bearing on the sentences imposed." This was not an objectively unreasonable determination of the facts, ruled the court, since the sentence imposed was within the statutory limits for the crimes of which Carroll was convicted. However, upon a final review of Carroll's claims, the Missouri Court of Appeals might have unreasonably determined that the trial judge's disparaging remarks had no bearing on the 160-year prison sentence that Carroll received.

Whether a trial judge's pre-sentencing comments that indicated bias towards a criminal defendant could impermissibly affect the sentence imposed was debatable and the issue deserved further review, Judge Sippel concluded, and thus ordered that a certificate of appealability be issued. Thus, it is open to Carroll to seek review in the U.S. Court of Appeals on the question whether bias by the trial judge requires reconsideration of his lengthy prison sentence. ■

Federal Court Temporarily Blocks New York State from Requiring a Religious Adoption Agency to Provide Services to Married Same-Sex Couples

By Arthur S. Leonard

New Hope Family Services, which describes itself as a Christian adoption agency licensed by New York State to provide adoption services, has won a preliminary injunction to block New York's Office of Children and Family Services (OCFS) from closing the agency because of its refusal to provide services to married same-sex couples. *New Hope Family Services, Inc. v. Poole*, 2020 WL 5887296, 2020 U.S. Dist. LEXIS 183926 (N.D.N.Y., October 5, 2020).

New Hope sued Sheila J. Poole, OCFS's Commissioner, after OCFS instructed New Hope to prepare to close down its adoption services if was unwilling to change its policy and work with married same-sex couples as required by a state regulation. U.S. District Judge Mae A. D'Agostino issued the injunction after being directed by the U.S. 2nd Circuit Court of Appeals to reconsider her prior denial of a preliminary injunction at the same time that she dismissed New Hope's lawsuit. The 2nd Circuit panel reversed the dismissal decision. See 966 F. 3d 145 (2nd Cir. 2020), *reversing and remanding* 387 F.Supp.3d 194 (N.D.N.Y. 2019).

Under New York law, only an "authorized agency" can evaluate potential adoptive parents, match them with children needing adoption, and make recommendations to a court that will ultimately grant the adoption. Evangelical Family Service was formed in 1965 by a Christian minister to undertake this work in Syracuse and was granted a two-year certificate of incorporation by the state. When the certificate came up for renewal, the state extended permanent certification. Eventually the agency was renamed New Hope Family Services. At that time, New York's adoption statute limited the right to adopt children to "an adult unmarried person or an adult husband and his adult wife."

In 2010, the legislature amended the law to allow authorized agencies to place children for adoption with "an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together." This amendment updated the statute to comply with what the courts had been doing, as the New York Court of Appeals had recognized second-parent adoptions for same-sex couples during the 1990s. The adoption statute empowers OCFS to adopt regulations for enforcing statutory rights, which led it to adopt a non-discrimination regulation and to inform all authorized agencies that they could not discriminate against same-sex couples or unmarried couples.

After New York's Marriage Equality Law went into effect in July 2011, of course, married same-sex couples would be covered by the amended adoption statute, since the Marriage Equality Law adopted a policy of equal rights for same-sex marriage couples, and authorized agencies were so advised. In 2015, the Supreme Court found that same-sex couples have a federal constitutional right to marry, and their marriages are entitled to the same treatment under state law as all other marriages.

Regardless of these developments, New Hope retained its existing policy, which was to limit its services to unmarried adults who were not living together with other adults in an intimate relationship, and to heterosexually married adults. If New Hope was approached for services by individuals or couples who did not come within this policy, it would offer to refer them to other agencies for adoption services. It refers to this policy as "recusal and referral."

In 2018, OCFS decided to audit the policies of all authorized agencies. It had never received a complaint about denial of services by New Hope, so this was the first time OFCS was confronted by New Hope's non-compliant policy. After some conversations between the office and New Hope, in the course of which OCFS staff made some statements that New Hope (and the 2nd Circuit panel) seized upon as showing "hostility" to New Hope's religious beliefs, the written ultimatum was delivered late in the fall of 2018, setting a deadline for New Hope to adjust its policy by the end of November. Instead, New Hope filed this lawsuit, represented by Alliance Defending Freedom, a religious-freedom litigation organization that frequently challenges gay rights policies in the courts.

New Hope argued that the regulation went beyond the statute by compelling authorized agencies to provide services to same-sex couples, whereas the statute was worded in permissive language – that agencies were *allowed* to provide service to such couples. At the time the statute was adopted, Governor David Paterson issued a statement that it would not require any agencies to change their polices. Thus, New Hope argued, OCFS was going beyond its authority in trying to force New Hope to change its policy. Furthermore, New Hope argued, requiring it to serve same-sex couples against its religious beliefs would violate its First Amendment rights of free speech and free exercise of religion, and, citing the Supreme Court's Masterpiece Cakeshop decision, it claimed that OCFS had expressed hostility to New Hope's religious beliefs. New Hope sought a preliminary injunction to block OCFS from taking action against it while the lawsuit was pending.

The state moved to dismiss the lawsuit. Judge D'Agostino granted the state's motion in May 2019, finding that the regulation was within the scope of the statute and did not violate New Hope's constitutional rights. At the

same time, she denied the motion for injunctive relief. New Hope appealed to the 2nd Circuit, which reversed the dismissal in July 2020 and sent the case back to Judge D'Agostino. The three-judge Circuit panel concluded that New Hope's allegations were sufficient to put into play its constitutional claims as well as its claims about the limited scope of the adoption statute as permissive rather than mandatory, and directed Judge D'Agostino to reconsider the issue of the preliminary injunction in that light. The three-judge panel, which also mentioned the "hostility" issue, retained jurisdiction of the case, advising that if D'Agostino issued a new decision that was appealed, the appeal would go to the same three-judge panel.

Given the realities of the situation, it was foreordained that D'Agostino would issue the injunction, although there were signs in her opinion that she had not changed her mind about her original analysis but was basically following the directions of the court of appeals, her explanations flowing from their decision. In one footnote, responding to the issue of "hostility," she wrote: "In conducting its analysis, the Court cannot ignore the drastic difference in the circumstances which have historically led to findings of religious hostility and the circumstances of the present case. . . Here, the only statements upon which the Second Circuit relies indicate, at worst, that OCFS intends to ensure compliance with anti-discrimination law in the adoption process, regardless of an organization's religious beliefs. The Court finds the argument that these statements indicate hostility tenuous." But she acknowledged that she was bound by the 2nd Circuit's opinion to credit this argument for purposes of deciding whether to issue the preliminary injunction.

At the heart of the constitutional free exercise issue is the U.S. Supreme Court's 1990 decision *Employment Division v. Smith*, 494 U.S. 873, which ruled that there is no constitutional right under the Free Exercise Clause for individuals and organizations to refuse to comply with religiously-neutral laws of general application that incidentally burden their free exercise rights. In that case, however, the Supreme Court recognized that a government policy that burdens other rights as well as religious free exercise rights (a so-called "hybrid rights case") presents a different issue and may carry a higher burden of justification by the government. Judge D'Agostino had originally responded to this point by rejecting New Hope's compelled speech argument, labeling as "government speech" any recommendation that they would make to a court to approve an adoption by a same-sex couple, on the premise that as an "authorized agency" they were performing an inherently governmental function on behalf of the state, applying state-specified criteria, and they were not speaking for themself. The 2nd Circuit panel disagreed, finding that the state gave authorized agencies substantial discretion, so their speech was entitled to First Amendment protection. Furthermore, New Hope's argument that the regulation went beyond the scope of the statute was also arguable, given the statute's permissive rather than mandatory wording. In that case, New Hope should be entitled to litigate the case.

Concerning the public interest, which is considered on a motion for injunctive relief, closing down New Hope would reduce the number of agencies in its geographical area providing adoption services, it claims to never have been approach by same-sex couples seeking its services, and in the past New Hope had been repeatedly praised for the high quality of its services, so on balance it was arguable that the public interest supports keeping it open while the case continues.

The New Hope case is very similar to a case that will be argued in the Supreme Court on November 4, the day after election day, *Fulton v. City of Philadelphia*, in which Catholic Social Services is suing the City of Philadelphia over the city's refusal to renew its contract with CSS to participate in the city's foster care system. CSS refuses to provide its services to same-sex couples seeking to be foster parents.

In granting CSS's petition to review a decision in favor of the city by the U.S. Court of Appeals for the 3rd Circuit, see 922 F.3d 140 (3rd Cir. 2019), CSS specifically asked the Supreme Court both to reconsider its ruling in *Employment Division v. Smith* and to consider whether requiring a religious agency to violate is principles in order to participate in the child welfare system violates its 1st Amendment rights. There are already at least four members of the Court who have signaled their desire to reconsider Employment Division. The probable addition of Judge Amy Coney Barrett to the Court may well tip the Court over to a majority to overrule or narrow the Employment Division precedent, which could affect litigation in other cases challenging Trump Administration policies to carve broad religious and moral objection protection out of non-discrimination rules.

It is unlikely that Judge D'Agostino would issue a final ruling in the New Hope case until after the Supreme Court rules in the CSS case. Such a ruling is unlikely to come before the beginning of 2021 and theoretically could come as late as June. In the meanwhile, the preliminary injunction blocks OCFS from taking any action to shut down New Hope's adoption activities.

Judge D'Agostino was appointed by President Obama. ■

Federal Court Issues Disconcerting Ruling Contemplating Religious Exemption from Non-Discrimination Policy for Prospective Foster Parents

By David Escoto

On October 8, 2020, Judge Salvador Mendoza, Jr. of the U.S. District Court for the Eastern District of Washington granted a preliminary injunction in favor of some Seventh-day Adventists wishing to adopt their great-granddaughter. The Washington Department of Children, Youth, and Families was concerned with the great-grandparents' responses to hypothetical questions about their ability to provide a supportive and affirming home to LGBTQ+ youth, and denied their foster license application. Judge Mendoza found that the Department's policy violated the First and Fourteenth Amendments by disqualifying the great-grandparents based on their religious beliefs in violation of the 1st and 14th Amendments. *Blais v. Hunter*, 2020 WL 59600687 (Oct. 8, 2020). This decision raises some serious concerns about a state's ability to ensure that some of the most vulnerable LGBTQ+ youth are protected.

In September 2019, Gail Blais's granddaughter gave birth to Gail's great-granddaughter, H.V. Soon after the birth, concerns about the infant's well-being arose, and the hospital contacted the Idaho Department of Health and Welfare (IDHW). IDHW removed H.V. from her birth parents and placed her in foster care. In December, IDHW contacted the Blaises, who had expressed an interest in fostering and possibly adopting their great-granddaughter. The following month, the Blaises applied for a foster care license. The IDHW asked the Department to evaluate whether the Blaises were fit to be foster parents. The Department assigned the Blaises' case to Partick Sager, a foster care licensor. A week later, Sager went to the Blaises' residence to conduct an interview and home study.

Sager asked the Blaises an array of questions about their family and employment history, past spouses, experience with children, communication styles, mental health issues, and attitude towards corporal punishment. Sager also asked several hypothetical questions as to the infant's sexual orientation and gender identity. The questions ranged from asking how the Balises' would feel if H.V. were a lesbian or transgender to asking if they would support H.V.'s decision to receive hormone therapy.

The Blaises informed Sager that, as Seventh-day Adventists, their faith obliges them to love and support all people, especially children who feel "isolated or uncomfortable." Regarding the specific question about hormone therapy, the Blaises' said they could not support those treatments but that they would be loving and supportive of H.V. They went on to elaborate that "in the unlikely event H.V. may develop gender dysphoria as a teenager, [they] would provide her with loving, medically and therapeutically appropriate care that is consistent with both then-accepted medical principles and [their] beliefs as Seventh-day Adventists and Christians."

The answers were concerning to Sager. Sager informed the Blaises that their application would likely be denied because their responses violated the Department's policy to protect LGBTQ+ children. After he informed his supervisor, the Department decided to send the Blaises educational materials about LGBTQ+ children, so they could make a more informed decision about supporting LGBTQ+ foster children.

The Department also mailed the Blaises' adult children questionnaires inquiring about the Blaises' parenting. In response to a question about whether they would feel comfortable leaving their own child with their parents long or short term, James Blais's son responded just for short term care. James's son elaborated that the Blaises' stance on same-sex and interracial marriages because of their religious views were concerning to him. Sager determined that this was independent proof that the Blaises could not adequately support foster children.

After reading the educational materials, the Blaises reiterated that they would provide a loving and supportive home for H.V., but their sincerely held religious beliefs did not support hormone treatment for a child wishing to transition. After asking similar questions but receiving the same answer, Sager suggested that the Blasises abandon their application to become H.V.'s foster parents because their answers still conflict with the Department policy. The Blaises persisted.

Several days later, Sager, the Blaises, and the Department's LGBTQ+ lead person met via video conference to discuss in detail Policy 6900, which is the policy that dictates how Department staff will make sure children who identify as LGBTQ+ have safe and affirming care. The Blaises reiterated their commitment to their beliefs. Sager told them they had reached an impasse.

The Blaises sued for declaratory judgment and injunctive relief, alleging the Department violated the First and Fourteenth Amendments and then moved for a preliminary and permanent injunction. The Department moved to dismiss the action because the Blaises had not exhausted their administrative remedies. The Department then denied the application for a foster care license, noting that "they have been unwilling to agree to provide a safe and affirming support to a child who is or may identify as LGBTQ+." The decision also notified the Blaises on how to file an administrative appeal.

The Blaises did not file an administrative appeal and instead opted

to amend their complaint in federal court. They sought declaratory and injunctive relief, asking the court to declare the Department's policies unconstitutional. The Blaises also requested the court to force the Department to issue a foster license and to enjoin the Department from enforcing or threatening to enforce policies that conflict with an applicant's sincerely held religious beliefs about sexual orientation or gender identity. However, the only issue argued before Judge Mendoza was the preliminary injunction that would force the Department to grant the Blaises' foster parent license.

Judge Mendoza first assessed the likelihood of success on the merits of the Blaises' free exercise challenge to address the "sliding scale approach" to preliminary injunctions in the Ninth Circuit. This is where the opinion gets quite concerning. Even though Judge Mendoza finds that the Department's policies are facially neutral, he finds the Blaises' argument that the policies operate in a non-neutral manner suppressing religious beliefs convincing.

First, Judge Mendoza looked at the text of Policy 6900 itself and determines that it only applies to Department staff and not to prospective foster parents. Under this policy, which Judge Mendoza said the Department has been applying to prospective foster parents, there is no separate foster parent licensing requirement under which the applicant must comply. Second, Judge Mendoza saw the Department's actions as favoring secular beliefs over certain religious ones. Despite the purpose of the policy being to protect the well-being of LGBTQ+ children, Judge Mendoza reasoned that this policy works to preclude people with certain religious beliefs from participating in foster care.

In assessing the Department's argument that the policies are ones of general applicability, Judge Mendoza articulated that the individualized assessment impermissibly imposed substantial burdens on the Blaises' free exercise protections. In essence, Jude Mendoza said that the Blaises had the choice of adhering to their religion and losing the opportunity to foster or denounce their religion for a foster license. Further, Judge Mendoza saw these policies as targeting religious individuals as having "special disabilities" based on their religious status, and thus, the policy withholds a government benefit because of religious views.

Since Judge Mendoza saw these policies as imposing a penalty on the free exercise of religion, he examined the policy under strict scrutiny. Judge Mendoza did not see these policies as the least restrictive means of achieving a compelling state interest. The Blaises argued that the Department could address the LGBTQ+ concerns at a different stage, rather than at licensing. For example, they suggest the Department could address these issues at a more appropriate age with case planning or make a placement change if it were to happen that the Blaises were unable to support the Department's decisions because of their beliefs. Judge Mendoza sees these alternatives as less restrictive.

In balancing the public interest implications in about two paragraphs, Judge Mendoza says that the free exercise rights at stake outweigh the important interest of protecting LGBTQ+ youth. He fails to address what many members of the LGBTQ+ community have experienced. In his blanket statement that protecting LGBTQ+ youth is important, he overlooks the psychological harm that these "less restrictive options" will have on LGBTQ+ youth. For example, what is an appropriate age? LGBTQ+ youth do not magically reach an age where it may be appropriate to reassess their needs for a supportive home. They need a supportive home from day one. Instead, they will have been living in an unsupportive home for years until they decide to self-identify, which is harmful to LGBTQ+ youth.

Judge Mendoza concluded that the Blaises are entitled to a preliminary injunction and enjoins the Department from using Policy 6900 against prospective foster license applicants. The Department is not enjoined from taking LGBTQ+ considerations into account; however, it cannot be the sole determining factor when an applicant expresses their religious beliefs. The decision does not force the Department to grant the licenses, but remands the decision back to the Department to allow the Blaises to complete their application.

The Blaises are represented by Andrew G. Schultz of Rodey Dickason Sloan Akin & Robb, PA, Jerome R. Aiken of Meyer Fluegge & Tenney, and Todd R McFarland of the General Conference of Seventh-Day Adventists. Ross Hunter, in his official capacity of Secretary of Washington State Department of Children, Youth and Families is represented by Andrew D. Pugsley and Carrie Hoon Wayno of Office of the Attorney General, Olympia, Washington, and Jeffrey C. Grant of the Office of the Attorney General, Seattle, Washington. ■

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

Federal Court Dismisses Gay Student's Title IX and FHA Discrimination Claims Against University of Scranton

By Matthew Goodwin

U.S. District Judge Matthew W. Brann, sitting in the Middle District of Pennsylvania, dismissed claims brought by an undergraduate student alleging that the University of Scranton failed to protect him from anti-gay bullying that he suffered at the hands of his straight roommate. *Doe v. University of Scranton*, 2020 U.S. Dist. Lexis 187526, 2020 WL 5993766 (Oct. 9, 2020). However, the court gave leave to the plaintiff, who is represented by counsel, to replead.

The plaintiff—who proceeded as John Doe to protect his privacy—sued under Title IX of the Education Amendments of 1972 and two sections of the Fair Housing Act, and also asserted various state law claims.

The Plaintiff was a student at the University of Scranton in the fall of 2018 living off-campus with four roommates. Students must receive permission from the school before they can live off campus; once approved, they remain subject to a plethora of rules and regulations promulgated by the University including, but not limited to, the University's non-discrimination and anti-harassment policy.

One of plaintiff's roommates was the alleged harasser, but he was not a named defendant in the suit. Rather, plaintiff's claims were brought against the University and alleged liability on the basis that the University was responsible for and failed to protect him against the harassment.

The harassment started out as verbal but escalated and culminated in one instance of physical violence by the roommate against the plaintiff. The plaintiff's roommate "commented that other male students either were gay or looked gay, and generally made statements like 'that's gay.'" Once plaintiff came out to the roommate, the roommate doubled down on these comments and "ostracized" and "embarrassed" the plaintiff on this basis.

The plaintiff first complained to the University about the roommate's behavior after the roommate sent an "offensive group text message that referenced a sexual encounter between [p]laintiff and his ex-boyfriend." The complaint was lodged with an administrative assistant at the University's Academic Advising Center. When this administrative assistant apparently dismissed plaintiff and took no action, plaintiff complained to an academic advisor, who also failed to take any action.

Then in December of 2018, the roommate apparently physically attacked the plaintiff, referring to him as a "faggot" and threatening his life.

Plaintiff complained again, this time to the University's dean of students. After "processing" the complaint, however, the University "declined to find that the aggrieved of conduct violated the University's sexual harassment policy or Title IX policy." The University did implement a no-contact order between plaintiff and the roommate after the plaintiff moved back onto campus.

Following the University's exoneration of the harasser, the plaintiff filed an 11-count complaint sometime in early 2019. In December of that year, the University made a rule 12(b)(6) motion to dismiss all claims. The court granted dismissal of all claims, but granted plaintiff leave to file an amended complaint as to his Title IX claims and to refile therewith the pendant state law claims.

Plaintiff's Title IX claim rested on a theory that the University had been deliberately indifferent to his complaints of harassment. The court observed that the Supreme Court in *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999), had interpreted Title IX to hold an educational institution liable for deliberate indifference to student-on-student harassment, but went on to hold that such liability attached only in certain, very limited circumstances.

For "deliberate indifference" to be actionable in the context of Title IX, the defendant must have had "substantial control" over the alleged wrongdoer. The inadequate pleading of this element proved fatal to the plaintiff's Title IX claim. Wrote Judge Brann, "[t]he Amended Complaint does not allege . . . that . . . the harassment took place on-campus, during school hours, or in connection with a University event or setting. […] Plaintiff does not plausibly aver that imposing certain conditions on a student's ability to live off-campus necessarily transformed private, off-campus residences into settings under Defendant's substantial control."

The court—perhaps providing somewhat of a roadmap for the plaintiff for a further amended complaint—explained that what was lacking was an explanation of the relationship between the University and the off-campus housing in question, the control the University exerts over the housing, or whether the University approves housing choices for students before they occupy a certain off-campus housing unit.

The University had also sought dismissal of the Title IX claim on the basis of another element of the "deliberate indifference" claim, i.e. that plaintiff failed to make his complaints about the pre-attack harassment to "appropriate persons." The court sided with the plaintiff in this regard but, in the words of the Judge Brann, "just barely." Brann wrote that an administrative assistant and then an academic advisor were not "appropriate persons" to report the harassment to because these individuals lacked remedial power. What saved the plaintiff on this element was the plaintiff's allegation that these individuals were mandatory reporters of harassment to those who did have remedial power, and that these allegations had to be assumed true on a 12(b)(6) motion.

The court was harsher as to the plaintiff's claims under the Fair Housing Act (FHA) and plaintiff was not permitted leave to replead these claims.

Plaintiff's theory of liability under the FHA was twofold: first, that the University's indifference to the harassment was tantamount to subjecting him to a hostile environment based on sexual orientation which would be a violation of the FHA; and, second, that the University was engaged in interference, coercion, and intimidation also in violation of the FHA.

As to a hostile environment, the court laid out the legal standard as follows: "The FHA provides in relevant part that it is unlawful 'to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . sex . . . .'" Notably, this provision "refers not just to the sale or rental itself, but to certain benefits or protections flowing from and following the sale or rental." Accordingly, several courts from sister circuits have held that Section 3604(b) extends to post-acquisition conduct and imposes a duty "not to permit *known* harassment on *protected* grounds."

The court seemed to couch the issue, again, as one of control. " . . . [T]he Court is not convinced that Plaintiff has plausibly alleged that Defendant, as either an off-campus housing provider or third-party provider of related services, permitted known discriminatory harassment to occur in an off-campus setting over which it had control." Strangely, however, the court allowed plaintiff to replead as to the "substantial control" element described above, but not to replead this FHA claim. It seems clear from the opinion that perhaps plaintiff's pleading of control on this claim was less of an issue and the real issue lies in the court's skepticism that the FHA can be called upon in the fashion envisioned by the plaintiff.

As to the FHA interference, coercion, and intimidation claim, the plaintiff seemed to allege a theory similar to constructive discharge under employment law. " . . . Plaintiff alleges that, but for the harassment and intimidation he experienced, he would not have moved out of the off-campus residence. Plaintiff further argues that his choice to move back on-campus was not 'completely voluntary,' as Defendant purportedly put him in the position that compelled his move."

The Court dismissed this FHA claim for two stated reasons: First, and perhaps somewhat missing the mark of plaintiff's argument, the court suggested that plaintiff could have continued to reside off-campus but elsewhere and that moving back on campus was a choice and not a result of any interference by the University. Second, and confusingly, the court dismissed this claim reasoning " . . . if Defendant was unaware of the purported acts of tenant-on-tenant harassment leading up to the Attack, as discussed *supra*, it then did not intentionally subject Plaintiff 'to conduct that the FHA forbids' based on his sex or sexual orientation." This would seem to contradict the earlier portion of the decision, in which the court wrote that plaintiff had reported the pre-attack harassment to the "appropriate persons;" if this were the case, how could the University have been unaware of the complained-of harassment?

As stated above, the court did permit plaintiff leave to replead his Title IX claims. However, in the last section of the opinion the court stated, rather conclusorily, that no repleading of the FHA claims could save them in any event and so those were denied without prejudice. With no surviving claims arising under federal law, the court, of course, declined to exercise supplemental jurisdiction over the pendant state law claims.

The judge in the case, Matthew W. Brann, was appointed by President Obama. It is unknown whether plaintiff will appeal or refile his Title IX claims with the court. The plaintiff is represented by Justin Frederick Robinette, The Law Offices of Eric A. Shore, P.C., Philadelphia, PA. ■

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

Federal Court Allows Pro-Se Plaintiff to Extend *Bostock* to Equal Pay Act Claims

*By Ezra Cukor**

U.S. District Chief Judge Michael Seabright greenlighted the Equal Pay Act claim and some Title VII claims of a transgender Certified Public Accountant proceeding *pro se* against her erstwhile employer. *Scutt v. Carbonaro CPAS NM Mgmt Group*, 2020 WL 5880715 (D. Hawaii, Oct. 2, 2020). Ms. Scutt alleged that Carbonaro mistreated and ultimately terminated her in violation of sundry laws because she is transgender/ LGBTQIA+, disabled, and not Christian. Because her claims proceed *in forma pauperis*, pursuant to 28 U.S.C. § 1915(e)(2)(B), the court evaluated whether the complaint states a claim.

The court concluded that Jason Scutt's Title VII claims alleging disparate treatment based on sex and religion could proceed. Scutt alleged that despite being qualified she was paid less than straight Christian employees, passed over for a promotion, and terminated because she is transgender, not Christian, and possibly also because of her sexual orientation. Scutt's religious discrimination claim additionally rested on allegations that her employer made her bonus contingent on attending a Christmas celebration and then terminated her when the employer's bid to convert her to their faith failed. Relying on *Bostock v. Clayton County,* 140 S. Ct. 1731, 1741 (2020), the court concluded that her allegations stated a claim for sex discrimination in violation of Title VII.

The decision may be the first to conclude that the Equal Pay Act encompasses discrimination based on sexual orientation or transgender status. The Act, 29 U.S.C. § 206(d)(1), embedded in the Fair Labor Standards Act, forbids sex-based disparities in pay

for substantially equal work performed under similar conditions.

The court again looked to *Bostock's* resounding affirmation that it is impossible to discriminate against someone for being gay or transgender "'without discriminating against that individual based on sex.'" Judge Seabright concluded that Scutt stated a claim by asserting that she was paid less than colleagues with the same qualifications who did not share her sexual orientation and gender identity. EPA claims do not require a showing of intentional discrimination. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007). However, to prevail on the merits, Scutt must prove that her work involved skill, effort, and responsibility equal to that of her higher paid different sex colleagues. 29 C.F.R. § 1620.14(a). Moreover, her former employer can defend by proving the affirmative defense that the disparity was based on a factor other than sex. *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir. 2020), cert. denied, 2020 WL 3578691 (U.S. July 2, 2020)

Scutt also brought Americans with Disabilities Act claims. Her complaint did not specify the nature of her disability, but indicated that she had undergone surgery and a period of hospitalization necessitating her absence from work. The court dismissed the claim without prejudice, concluding that she had failed to allege facts sufficient to support her claim. Even so, the court noted that despite the ADA's bigoted exclusion of "transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders," an ADA claim based on gender dysphoria may be cognizable. A handful of courts have approved such claims in both the employment and prison context. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822-JFL, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (employment); *Tay v. Dennison,* No. 19-CV-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (claim brought under Title II of the ADA by transgender woman who is incarcerated); *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018); *Edmo v. Idaho Dep't of Correction*, No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018).

Scutt had also requested that the court appoint counsel. In civil cases, the court appoints counsel in exceptional circumstances. It declined to do so here. Because Scutt's ADA claim if based on gender dysphoria raises complex issues, however, the court referred her case to its pro bono coordinator to investigate the availability of *pro bono* counsel. ■

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

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

Illinois District Court Applies *Bostock* in Employee Benefits Case

By Corey L. Gibbs

Zuyin Jimenez sued Local 225 of the Laborer's International Union and the Laborers' Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity for sex discrimination under Title VII and the Illinois Human Rights Act, based on denial of health benefits to her same-sex spouse. Both defendants in the case moved to dismiss the complaint. On October 8, the Judge John J. Tharp, Jr., of the U.S. District Court for the North District of Illinois (Eastern Division) denied both defendants' motions to dismiss. *Jimenez v. Local 225 of the Laborers' International Union of North America*, 2020 WL 5979653; 2020 U.S. Dist. LEXIS 187023 (2020).

Following the 2013 *Windsor* decision, Zuyin Jimenez married Laura Luna on October 14, 2014. Jimenez, a member of Local 225, applied for health insurance for both herself and her new wife. On November 17, 2014, the Fund sent a letter that informed Jimenez that same-sex partners were not eligible for benefits under the health insurance plan. After receiving the letter, Jimenez called the Fund. An employee of the Fund told her that the company was private and did not recognize same-sex marriages. Local 225 did not offer any other options for health care.

In the month leading up to the 2015 *Obergefell* decision, the Fund extended coverage to same-sex spouses. Luna was then able to obtain health insurance. When Luna used the new benefits, she discovered that she had cancer. She had an advanced form of cancer and had to undergo a hysterectomy. Jimenez alleged that had Luna received the benefits earlier, there would have been an earlier diagnosis and the hysterectomy could have been avoided. After an investigation,

the Equal Employment Opportunity Commission determined that Jimenez may have suffered discrimination in violation of Title VII. Jimenez sought damages.

Before Judge John J. Tharp, Jr. began his discussion of the defendants' motions to dismiss, he acknowledged the Supreme Court's recent decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). The judge wrote, "There can no longer be any dispute that the conduct alleged constitutes sex discrimination, so long as the other requirements of a Title VII claim are met." Had Jimenez been a man, then her wife would have had the benefits. The Fund's alleged denial of spousal coverage was due to Jimenez's sex.

Judge Tharp turned to each defendants' motion to dismiss. Local 225 claimed that Jimenez's complaint was against the Fund, not Local 225. The judge began his analysis by stating that Unions could be held liable for discriminatory conduct. According to *Maalik v. Int'l Union of Elevator Constructors, Local 2*, unions failed their duty to their members and were only liable if they knew or should have known of the discriminatory conduct and chose to not act. 437 F.3d 650, 653 (7th Cir. 2006). Judge Tharp explained, "This failure could take one of two forms: either the Union bargained for a discriminatory health insurance plan to be provided through the Fund, or it later found out that the health plan was discriminatory and made no attempt to change it." The judge also expressed that Jimenez's pleading was sufficient to bring a Title VII claim because it had alleged the defendant's intent generally. *See E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 781 (7th Cir. 2007).

Next, Judge Tharp began assessing the Fund's motion to dismiss. The Fund claimed that it did not have an employment relationship with Jimenez and could not be held liable under Title VII. However, the Supreme Court has recognized that third parties can be held liable under certain circumstances. *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 718 (1978). Third parties can be held liable as agents of employers where they exercise significant control over a part of the plaintiff's employment, where employers delegate control, or where the agent impacts the employee's access to employment opportunities. *See Alam v. Miller Brewing Co.*, 709 F.3d 662, 668-69 (7th Cir. 2013). Jimenez's complaint alleged that the Fund exercised significant control over a part of her employment by denying her spousal coverage altogether.

Additionally, the Fund argued that Jimenez did not exhaust her administrative remedies. Judge Tharp noted that "there [was] no requirement at the pleading stage for a plaintiff to establish that she has timely exhausted her administrative remedies." The judge wrapped up the opinion by stating that all of the defendants' motions to dismiss were denied.

This case highlighted how employment discrimination could exist on a deeper level. There was no employer terminating an employee for being LGBTQ+. There was no derogatory language. There was, however, an exclusionary policy that impacted an employee's life. An employer or agent may not act in a discriminatory fashion, but they may create policies that further discriminatory initiatives. *Bostock* did not magically eradicate discrimination in its entirety. It provides the legal tools necessary to weed out discriminatory policies like the one in this case.

Zuyin Jimenez is represented by Johanna J. Raimond. The Laborers' Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity is represented by Carol A. Poplawski. ■

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

Straight Male Police Officer Can Proceed With Discrimination Claims on Assertion of Bias by Lesbian Supervisor

By Wendy C. Bicovny

On Oct. 13, 2020, U.S. District Judge Sarah E. Pitlyk issued two separate but related rulings in suits by former Police Officer Louis Naes. In *Naes v. The City of St. Louis*, 2020 WL 6044355 (E.D. Mo.), which names the City of St. Louis, Major Angela Coonce, and Chief John Hayden as defendants, the court denied motions to strike portions of Naes' complaint. In *Naes v. The City of St. Louis*, 2020 WL 6044356 (E.D. Mo.), the Defendants' motion to dismiss Naes' five-count complaint (detailed below), was denied in part and granted in part.

Naes was employed as a police officer with the St. Louis Metropolitan Police Department (SLMPD) since 2003. In October 2012, he was assigned as a detective to the problem properties unit working with Randy Grim. When they learned of illegal activities including sexual comments, Naes and his partner tried to investigate Grim. When Grim learned of this, he told Naes that when Coonce was put in charge, he (Grim) would have the last laugh. On April 12, 2018, Coonce was promoted to the rank of major and placed in charge. On April 27, 2018, Coonce removed Naes as a detective in problem properties and replaced him with a member of "the Lesbian Mafia," a group of women within the SLMPD whom, Naes alleged, Coonce advanced based upon gender and sexual orientation rather than knowledge, skills, or abilities. On May 2, 2018, Naes complained about this to Hayden. On May 4, 2018, an Employee Misconduct Report was filed against Naes. On April 24, 2019, the detective

position Naes had held in problem properties was posted. Naes applied for the position, but he learned on May 24, 2019, that the same alleged "Lesbian Mafia" member who had replaced him the year before had been selected. Naes claimed to have lost over $10,000 in overtime compensation and suffered emotional damages as a direct and proximate result of Defendants' actions.

In the first case, Naes claimed that Randy Grim, not a party to either case, made an anti-heterosexual comment that contained references to Grim's own sexual orientation that suggested a kinship with Coonce. Judge Pitlyk determined that Defendants failed to meet the high bar required to strike portions of Naes' complaint. According to Naes, Grim's alleged conduct and comments supported Naes' claim that Coonce was biased against men who conform to traditional male stereotypes, such as Naes. This was important context and background to Naes' discrimination suit. Given Grim's alleged statements about having the last laugh when Coonce was in charge, and the speed with which Coonce had Naes removed from his detective assignment after Coonce's promotion, Judge Pitlyk found the disputed paragraph context bore on the subject matter of his discrimination suit, and thus declined to strike them.

In the second case, Count I alleged against the City gender discrimination for the 2018 Removal, in violation of Title VII and the Missouri Human Rights Act. Naes alleged that he lost over $10,000 in overtime compensation because of not working as a detective. A loss of $10,000 in compensation represented a diminution in his title, salary or benefits. Therefore, Judge Pitlyk determined that Naes adequately pleaded an adverse employment action to establish a prima facie case of sex discrimination under Title VII.

In Count II, Naes alleged against the City gender discrimination for his non-selection for the 2019 Posting, in violation of Title VII and the MHRA. Denial of a sought-after transfer constituted an adverse employment action if the transfer resulted in a change in pay, rank, or material working conditions, Judge Pitlyk initially pointed out. Naes' alleged loss of $10,000 in overtime compensation was a change in pay, and claims that he suffered that loss from not working as a detective, implied that being hired back into his old position would also have brought a change in rank. As such, Naes had adequately alleged an adverse employment action, and defendants' motion to dismiss Count II failed.

In Count III, Retaliation, the question was whether Naes' complaint sufficiently alleged a causal connection between his 2018 complaints and his not being hired in 2019. If Defendants would not have selected a candidate other than Naes but for his filing of the Charge of Discrimination in May 2018 and/or complaining about illegal discrimination to Hayden during this same timeframe, this would indicate that the stated reasons for the decision to select the woman who initially replaced Naes was nothing but pretext to hide illegal retaliation, wrote Judge Pitlyk. Accordingly, Naes' allegations of a causal connection are more than mere labels and conclusions and, if true, they state a claim for relief that is plausible on its face.

Count IV alleged an Equal Protection Violation. Unlike Counts I-III, here Naes brought a trifecta of claims against the City, as well as Coonce and Hayden in both their individual and official capacities. First, he alleged that defendants, acting under color of state law, deprived him of his Fourteenth Amendment right to equal protection by removing him from "problem properties" and not selecting him for the open detective position because of his gender, in violation of § 1983. Judge Pitlyk dismissed Naes' claims against the City because, in the five examples Naes cited, he failed to allege sufficient facts to support an inference of past retaliation and discrimination that were factually similar to his claims to be manifestations of the same continuing, widespread, persistent pattern of unconstitutional misconduct required to support a finding of a municipal custom for his § 1983 claim against the City for violation of his right to equal protection. Judge Pitlyk also dismissed Naes' § 1983 claims against the individual employees of the City in their official capacities as redundant of his claim against the City. However, Naes' complaint adequately described Coonce's and Hayden's personal involvement in the alleged violations of Naes' constitutional rights to sustain claims against them in their individual capacities and thus survived dismissal.

In Count V, Naes brought another trifecta of claims against the City and against Hayden in his official and individual capacities. Naes alleged that if defendants had trained, supervised, controlled, or disciplined law enforcement personnel properly, gender-based discrimination and retaliation would not have occurred. Judge Pitlyk said that for similar reasons discussed in Count IV, Naes failed to establish a pattern of constitutional violations on the basis of which the City could be found to have failed to train or supervise its employees. Likewise, Naes' claim against Hayden in his official capacity was redundant of his claim against the City. Thus, Naes' § 1983 claims against the City for failure to train or supervise and against Hayden in his official capacity were dismissed. Last, Judge Pitlyk pointed out that notice was the touchstone of deliberate indifference in the context of § 1983 liability. Because Hayden clearly did not have notice of a pattern of unconstitutional conduct, Naes' § 1983 claim against Hayden individually for failure to train or supervise had to be dismissed.

Plaintiff Naes is represented by Lynette M. Petruska, Pleban and Petruska Law LLC, St. Louis, MO. ■

Federal Court Denies Summary Judgement in Bizarre Workplace Harassment Case

By Wendy C. Bicovny

In *Blades v. J&S Pharmacy, Inc.*, 2020 WL 6020487 (S.D. Ill., 0ct. 22, 2020), U.S. District Judge J. Phil Gilbert denied summary judgment to defendants J & S Professional Pharmacy, Inc. and Joyce Fogleman and allowed former employee Wendy Blades to proceed to trial with her sexual harassment case.

The record indicated that the work environment at J & S was hardly ordinary. To summarize: In 2004, Fogleman, the day-to-day manger, hired Blades as a pharmacy technician. Fogleman, a lesbian, had no children, and lived in a committed relationship. Blades alleged that each payday Fogleman hand-delivered checks to each employee, pursed her lips and leaned in so the recipient had to come forward to meet her. Blades claimed Fogleman insisted on kissing her on the lips, even when she turned her cheek. Blades also testified about Fogleman streaking and running a lap around the (closed) pharmacy. Fogleman admitted to this and to mooning a customer who was taunting [her], but denied Blades' additional allegations of flashing her privates during both J & S holiday parties, and at customers parked at the drive-thru window. Fogleman claimed she did not believe that exposing herself in the workplace was objectionable because J&S was like her family and her employees like her children.

During her 13-year employment, Blades said that Fogleman and Blades developed an unconventional relationship. According to Blades, Fogleman asked her to hold hands, kissed Blades randomly throughout the workday, and at least twice a week wrapped an arm around Blades' right side and grabbed the fat below her breast. Yet, Blades never objected, she just assumed Fogleman knew that she was uncomfortable.

It was not until Fogleman asked Blades not to participate in J & S's next inventory check that Blades, who considered the inventory check one of her job duties, became very upset and her face started turning red. She went over to the doctor's office, across the hall, to have them take her blood pressure, which was dangerously high enough to force Blade to leave work early. A few days after Blades returned, Judi Markwell, Fogleman's administrative assistant, told Blades that if she ever walked out again, she would be fired.

Blades decided to gather her belongings and told Maxwell that she was leaving. On her way out, she told a coworker that she had quit.

Blades maintained contact with Fogleman even after her departure. In a series of text messages, she told Fogleman, "You didn[']t treat me bad ever. You just really hurt my feelings . . . . Who knows we m[a]y turn out to be [best friends] now that we don't work together."

When Fogleman told Blades that she "never realized that they had a poor relationship," Blades clarified that "[i]t never was [bad], just the last few days." By the end, Blades said, "I wish I could just give you a hug! I know it sounds cheesy! . . . . I just needed us to makeup!" Days later, Blades sent Fogleman a spontaneous message in German: "Ich vermisse dich!!!"—I miss you.

Even so, Blades sued J &S and Fogleman for sexual harassment under Title VII and the Illinois Human Rights Act (IHRA), and for IHRA violations for battery and intentional infliction of emotional distress (IIED). Because the factual disputes under Title VII and the IHRA were the same, Judge Gilbert applied the Supreme Court's Title VII jurisprudence objective–subjective test to preclude summary judgment. According to the judge, a reasonable person in Blades' position would have found the work environment to be objectively abusive. It was never appropriate for an employer to expose herself in front of her employees, even in jest. Butt smacking, kissing on the lips, mooning — that behavior was unacceptable in the workplace, no matter if there are sexual undertones attached. That said, a genuine dispute of material fact existed as to whether Blades found the environment subjectively abusive, Judge Gilbert added. The record suggested that Blades and Fogleman had a close friendship. In the days following her departure, Blades sent Fogleman a series of text messages that indicated she [Blades] loved everything about the job, and how much she missed her [Fogleman]. Although the fact that sex-related conduct was voluntary, in the sense that [Blades] was not forced to participate against her will, was not a defense, it could still help clarify whether [Blade's] conduct indicated that the alleged sexual advances were unwelcome. Relatedly, Blades suggested that even though she did not voice her discomfort, Fogleman should have inferred as much based on her body language. These factual disputes were best left for a jury to resolve, Judge Gilbert concluded.

As for Blades' IHRA battery claim, a factual dispute existed about the existence and validity of Blades' consent. According to Blades, she turned her cheek to kisses and shuddered whenever Fogleman grabbed her waist or behind. To her, that was enough to put Fogleman on notice that she did not want to be touched. But to Fogleman, there was no unauthorized touching. Again, a jury was needed to weigh the disputed evidence and decide which facet was more probative.

As to Blades' IIED claim, the parties disputed whether Fogleman knew that it was highly probable that her conduct would lead to severe emotional distress. To be sure, Fogleman's conduct, if true, was intolerable in any workplace in this civilized society. But in 13 years, Blades never openly complained about Fogleman's behavior. A factual question for a jury thus arose involving the extent of what Fogleman's intended or knew might happen, Judge Gilbert determined. ■

From Darkness to Early Light: Discrimination Law Reforms in Guernsey

By Michael Whitbread

It might be hard to believe, but in 2020 there is a jurisdiction in the British Isles with no law prohibiting discrimination by private sector organizations against lesbian, gay and bisexual people, and only partial protection for trans people. This is the position in the British bailiwick of Guernsey.

The United Kingdom has an Equality Act prohibiting LGBT discrimination, but not every component of the British Isles falls within the UK's domestic jurisdiction. Guernsey is a 'Crown Dependency', meaning its constitutional status lies directly with the Monarch rather than as a constituent element of the UK – the latter composed of England, Wales, Scotland and Northern Ireland. Guernsey's status came about as a consequence of a 13th century treaty settling the borders between the Kingdoms of England and France after a hundred years of conflict. The UK is responsible for defense and most international relations in respect of Guernsey and other Crown Dependencies. Despite a population of only around 63,000, Guernsey is self-governing on domestic matters, including discrimination law (or lack thereof).

Guernsey, like other Crown Dependencies and overseas territories, is generally free to adopt aspects of UK law on domestic matters or make its own. Guernsey has, for example, applied aspects of UK immigration law. It has not adopted the UK Equality Act nor anything approaching it.

The existing framework

Guernsey is a signatory to a range of international instruments, including the *European Convention on Human Rights* (ECHR) and the *Convention on the Elimination of all Forms of Racial Discrimination* (CEFRD). These laudable instruments do not provide adequate protection from discrimination based on LGBT status.

The ECHR applies as against State actors. Article 8 requires respect for private and family life, and the European Court of Human Rights in Strasbourg has interpreted this to include prohibiting the criminalizing of private, consensual homosexual acts. *See, for example*, *Dudgeon v. the United Kingdom*, Application no. 7525/76, ECHR, October 22, 1981; *Norris v. Ireland*, Application no. 10581/83, ECHR, October 26, 1988; *Modinos v. Cyprus*, Application no. 15070/89, ECHR, April 22, 1993; and *A.D.T. v. the United Kingdom* ECHR 2000-IX. The ECHR generally does not apply to discrimination by private actors, such as for-profit service providers and employers. The CEFRD is focused on a different but equally important ground of protection, being protection from racial discrimination.

The Human Rights (Bailiwick of Guernsey) Law, 2000 incorporates the ECHR into domestic law, requiring non-discrimination by public bodies. The *Sex Discrimination (Employment) (Guernsey) Ordinance, 2005*, prohibits discrimination on the ground of sex in the course of employment. It includes persons undergoing gender re-assignment as a protected class. It does not prohibit discrimination against LGB people, or (arguably) trans people not undergoing gender reassignment.

The result is a ragged patchwork quilt which either doesn't protect LGBT people at all (in the case of discrimination in the provision of goods or services) or only protects an ostensibly random group in our community (being people undergoing gender reassignment in the course of employment). It goes without saying that this patchy protection is unsatisfactory.

Changes coming

The Guernsey government had been considering introducing comprehensive discrimination legislation for some years and conducted public consultation through 2018. As a result, in early 2020 it proposed to bring in protection on the ground of race, disability, and carer status. It did not propose to bring in LGBT protection until 2026.

Following sustained community pressure, in July 2020 the government announced that it would bring forward sexual orientation as a protected ground in the first round of reforms, with additional grounds to follow. (As at the date of writing, this change in approach was not reflected on the official government website but did appear in media reports. Compare https://www.gov.gg/discrimination and, for example, https://www.bbc.co.uk/news/world-europe-guernsey-53429975.)

It does appear that at long last this little jurisdiction is going to have a discrimination law that reflects the civilized values it espouses. The reform will literally protect thousands of people and will change lives. It would have made a world of difference to the author when he resided there. Of course, and as recently noted on an LGBT Bar Association podcast, bringing in the law is only the first part. Then the real work of changing behavior begins. ■

Michael Whitbread is an attorney admitted to practice law in the State of New York and the Australian State of New South Wales. He currently practices in the British Channel Islands.

Supreme Court Denies *Certiorari* in Case of Idaho Transgender Prisoner Who Had Court-Ordered Transition Surgery; Rejects Mootness Claim

By William J. Rold

Idaho transgender prisoner Adree Edmo had transition surgery over the summer, after the U.S. Supreme Court declined to grant Idaho officials a stay of the Ninth Circuit's decision affirming the injunction for such surgery. The vote to deny a stay in 19A-1038 (May 21, 2020), was 7-2. The Supreme Court denied *certiorari* on the merits in *Idaho Department of Correction v. Edmo*, 2020 U.S. LEXIS 4867 (No. 19-1280) on October 13.

Justice Samuel Alito (joined by Justice Clarence Thomas) filed a statement dissenting from denial of *certiorari*: "I would hold that the case is moot and direct that the decision below be vacated," wrote Alito, citing *United States v. Munsingwear, Inc*., 340 U.S. 36 (1950). Determining why the Supreme Court denies *certiorari* is the stuff of fancy. Since it takes four affirmative votes to grant *certiorari*, all that can be said here is that at least two other justices did not find this case "cert-worthy" on mootness or on any other basis.

Thus ends the saga of Edmo's surgery in her four-year litigation. Her case for post-operative care and for damages remains in the U.S. District Court in Idaho. "So much pressure and inner turmoil is gone," said Edmo in a press release. Now confined in a women's prison, Edmo added: "I feel whole and connected in myself. The surgery itself was literally life-changing. I'm extremely grateful that I finally received the treatment."

Edmo's distress was so severe that she twice attempted self-castration. U.S. District Judge B. Lynn Winmill found that Idaho correctional officials and their for-profit provider, Corizon, denied Edmo surgery despite their own diagnosis of her gender dysphoria and her clear and urgent need for surgery. "In refusing to provide surgery, IDOC and Corizon have ignored generally accepted medical standards for the treatment of gender dysphoria," the District Court ruled in December 2018. The Ninth Circuit unanimously affirmed in an 85-page opinion, but it dropped Corizon, a corporation that contracts to provide medical services to inmates of correctional institutions, as a defendant for purposes of injunctive relief regarding surgery. The court sustained the injunction against Corizon's chief psychiatrist Scott Eliason. In its ruling, the 9th Circuit reserved the issue of whether Corizon might be liable in damages under the Monell theory for "pattern and practice" behavior that violated the Eighth Amendment. *Edmo v. Corizon, Inc*., 935 F.3d 757, 799-800 (9th Cir. 2019).

The "decision reinforces that state officials cannot pick and choose which serious medical conditions they will treat. Intentionally depriving someone of medically necessary care amounts to cruel and unusual punishment, regardless of gender identity," said Lori Rifkin, lead attorney for Edmo. The National Center for Lesbian Rights represents plaintiff Edmo, together with Rifkin Law Office, Hadsell Stormer Renick & Dai LLP, and Ferguson Durham, PLLC. Appellate lawyers from Cooley LLP, Jenner & Block LLP, and the MacArthur Justice Center also represented Edmo before the Supreme Court.

The denial of *certiorari* leaves intact differing approaches of Courts of Appeals on addressing prisoner transgender surgery, depending on the factual presentation, in other words, a circuit split of the type that deserves Supreme Court review. In this writer's opinion, a case involving the Eighth Amendment and health care for transgender inmates will eventually be reviewed by the high court.■

William Rold is a civil rights attorney in NYC and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

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

U.S. COURT OF APPEALS, 1ST CIRCUIT – A three-judge panel of the U.S. Court of Appeals for the 1st Circuit has rejected a constitutional challenge to a Maine statute that excludes sectarian schools from receiving funding from the state under a program intended to assist parents in providing secondary education to their children if they live in the approximately 130 school administrative units (SAU) in the state that lack their own public secondary schools. *Carson v. Markin*, 2020 WL 6335999 (Oct. 29, 2020). Because there are significant areas in Maine without public high schools, the legislature enacted a program under which parents can receive tuition assistance through their local SAU to pay for attending a qualified private high school, but provided that such funds could not be used to pay for attendance at a private school unless the school is "nonsectarian in accordance with the First Amendment." The district court rejected the challenge based on prior 1st Circuit rulings that had rejected such constitutional challenges, but the 1st Circuit determined that it would have to reexamine the issue in light of the Supreme Court's recent decision in *Espinoza v. Montana Department of Education*, 140 S. Ct. 2246 (2020), in which the Court reversed a Montana Supreme Court ruling that had invalidated a state program because it had provided tax credits to parents for tuition payments they made to schools controlled by a "church, sect, or denomination" in violation of the state constitution. The Supreme Court held that this was impermissible discrimination because of the religious status of the schools. The unanimous 1st Circuit panel in *Carson* managed to distinguish Espinoza by tightly focusing on how the Maine program works. The issue in Maine is not whether the school is "controlled by a church sect, or denomination," but rather whether its educational mission is to teach religion through its curriculum. Indeed, the schools in question to which the plaintiffs would send their children if they received tuition assistance are not church-controlled, but they have set themselves up as schools that infuse Biblical teaching through their curriculum. Both of the schools in question have up to now avoided receiving any state money so that they could escape the requirements of Maine's Human Rights Law banning employment discrimination based on sexual orientation or gender identity, as both schools maintain a policy against employing gay or transgender staff. The court found that the way Maine has set up its standard for determining how its scholarship funds can be used – a focus on whether the money will be used for religious instruction rather than on whether the institution is church-affiliated – provides a basis for distinguishing *Espinoza*. Interestingly, the three-judge panel included retired Supreme Court Justice David Souter, who regularly participates as a 'visiting' judge in the understaffed 1st Circuit. Given the direction in which the Supreme Court has been going in its Free Exercise jurisprudence, and especially with the addition of Justice Amy Coney Barrett to fill the seat vacated by the death of Justice Ginsburg in September, this case would be a prime candidate for Supreme Court review if the parents who brought this case – represented by lawyers from the Institute for Justice and the First Liberty Institute – seek a further appeal. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 3RD CIRCUIT – A 3rd Circuit panel denied a bisexual Jamaican man's petition for review of a ruling by the Board of Immigration Appeals (BIA) denying his request for protection under the Convention Against Torture. *Wright v. Attorney General of the United States*, 2020 WL 6112281 (3rd Cir., Oct. 16, 2020). The petitioner arrived in the U.S. as a visitor in 2007 and overstayed his visa. In 2014, Department of Homeland Security initiated removal proceedings and he conceded removability. Then he made his fatal misstep of getting involved with heroin distribution, for which he accumulated three convictions in New Jersey state courts. As a result of his criminal record, any hope for asylum and withholding of removal was gone. His sole means of staying in the U.S. legally would be protection under the CAT, which would require showing that he was more likely than not to suffer torture or serious physical harm at the hands of the government or that the government would acquiesce in such treatment by private parties. The Immigration Judge and the BIA found that he failed to prove this. His petition tried to poke holes in the administrative decisions, but the opinion for the panel by Circuit Judge Peter J. Phipps, a recent Trump appointee, found no basis to grant review. Countering Wright's arguments that various parts of the evidence had been overlooked, the opinion cites instances where the evidence in question was mentioned by either the IJ or the BIA, any dispute being over how the evidence was weighed, a matter of judgment, rather than whether it was considered. Wright had recounted being the victim of bullying and assaults as a child, but the court found no fault with the IJ/BIA treatment of that evidence as it weighed on the necessary proof for Wright's CAT claim – likelihood of future harm as an adult. The opinion says that Wright pulled quotes from the IJ or BIA opinions out of context in a way that misrepresented what the IJ or

CIVIL LITIGATION *notes*

the BIA had done. "In rejecting Wright's petition for CAT deferral," wrote Judge Phipps, "the BIA did not – independently or through adoption of the IJ's decision – commit an error of law in evaluating whether Wright would experience a likelihood of future torture." The court found it unnecessary to weigh Wright's evidence on acquiescence in the absence of evidence that Wright was likely to experience torture. Wright is represented by Ingrid D. Johnson of Faegre Drinker Biddle & Reath, Princeton. The other judges on the panel – Theodore McKee and Thomas Ambro – were appointed by President Clinton. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 6TH CIRCUIT – In *Breiner v. Bd. of Education*, 2020 U.S. App. LEXIS 33103 (Oct. 20, 2020), Nicholas Breiner appealed an order by the district court dismissing his employment discrimination claim that his employer, a public school district. Breiner alleged that the district subjected him to adverse disparate treatment because he is bisexual. The district court granted the employer's motion to dismiss based on 6th Circuit precedent holding that discrimination because of sexual orientation does not violate Title VII. Acknowledging the Supreme Court's *Bostock* decision, the 6th Circuit panel granted a motion to remand the case back to the district court for reconsideration, inasmuch as sexual orientation discrimination claims are now treated as actionable under Title VII. Since the trial court dismissed the case on motion without any fact-finding and before there was any discovery, the district court will first have to determine whether the plaintiff's factual allegations are sufficient to state a Title VII claim. If the answer is yes, the case will proceed to discovery. – *Arthur S. Leonard*

ARIZONA – In *Hennessy-Walker v. Snyder*, CV-20-0335, TUC-SHR, the U.S. District Court in Arizona faces a claim that a transgender person's rights under the Equal Protection Clause, the Affordable Care Act, and the Medicaid Act, are violated by the denial of coverage for "gender reassignment surgery." Further along in litigation before a different judge in the Arizona district court is *Toomey v. State of Arizona*, in which a public university professor in need of gender reassignment surgery is suing under Title VII of the Civil Rights Act of 1964 as well as the equal protection clause. In *Toomey*, the district court has denied a motion to dismiss and certified a class action. The Hennessy-Waller plaintiff filed a motion to have to the two cases consolidated before the judge hearing the *Toomey* case. On October 20, the court denied the consolidation motion. *Toomey v. State of Arizona,* 2020 WL 6149843 (D. Ariz., Oct. 20, 2020). The court pointed out that although both cases seek a ruling that denying the surgery violates their Equal Protection Rights, otherwise they are proceeding under different statutes, and the exact surgical procedure sought differs as between the two cases. "The questions of law presented in the two actions may be similar," wrote the court, "but it does not appear that they will be so similar that there will be any meaningful advantage from having both cases heard by the same judge. It seems unlikely that there will be substantial duplication of effort should the two cases remain with their respective judges." The court also raised the specter of forum shopping on the part of the plaintiff in *Hennessy-Waller.* While the court said there was no evidence of forum shopping here, "the circumstances are such that the pending motion to transfer gives that appearance," and although this is not dispositive, "the Court finds that even the appearance of forum shopping militates against transfer." – *Arthur S. Leonard*

CALIFORNIA – In *Jones v. Lewis*, 2020 WL 6149693 (N.D. Cal., Oct. 20, 2020), District Judge Susan Illston granted defendants' motions to dismiss discrimination complaints by former employee Dolene Jones and granted Jones leave to amend. Jones appeared *pro se*. Her complaint alleged race, color and sex/gender claims in violation of Title VII of the Civil Rights Act of 1964. Jones retired as an employee of AC Transit District in 2010. The complaint names four individual defendants (Jeffrey Lewis, Davis Riemer, Hugo Wildmann, and Curtis Lim), all of whom are alleged to be members of the AC Transit Retirement Board. Jones who is black, female and a lesbian, alleged that defendants discriminated against her by temporarily holding back a portion of her retirement benefits because she had previously registered two different same-sex domestic partnerships with the AC Transit Employees' Retirement System. The hold back occurred *despite* the fact that she provided government-documented proof that showed she was not declared domestic-partnered with anyone. Jones further alleged that she was the sole lesbian pensioner to have *two* pension holdbacks. Jones' complaint sought damages against the *individual* defendants. However, the Ninth Circuit has held that individual supervisors cannot be held liable under Title VII, Judge Illston first noted. As to the merits of the Title VII claim, defendants contended that Jones' complaint failed to allege that defendants intentionally discriminated against her on account of a protected characteristic to support a violation of Title VII. Judge Illston concurred. Disparate treatment occurs when an employer treated a particular person less favorably than others because of a protected trait, wrote the judge. Jones' complaint did not contain *any* allegations that she was treated differently *because* she is black or female. Jones' complaint did, however, allege that defendants temporarily held back a portion of her retirement benefits because Jones had previously registered two same-sex domestic partners, which suggested that Jones believed that she

was discriminated against on account of sexual orientation. But Jones failed to allege that defendants withheld her retirement benefits *because* she is a lesbian. Instead, the complaint and the materials attached thereto indicated that the amounts were initially withheld because Jones had registered two domestic partners. However, a policy regarding treatment of domestic partners with regard to retirement benefits is a *facially neutral policy*, Judge Illston pointed out. Where, as here, Jones challenged a facially neutral policy, a specific allegation of discriminatory intent is mandatory, Judge Illston explained. Accordingly, defendants' motion to dismiss Jones' Title VII claim is granted. If Jones amends this claim, she must *specifically* allege how defendants intentionally discriminated against her on the basis of a protected characteristic. The Court encourages Jones to contact the Pro Se Help Desk at (415) 782-8982 to seek assistance with amending the complaint, Judge Illston added. – *Wendy C. Bicovny*

GEORGIA – Ruling on defendants' motions seeking to dispose of a lawsuit by a transgender public employee who was denied health insurance coverage for gender confirmation surgery, Chief Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia ruled on October 30 that the plaintiff can proceed under Title I of the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the 14th Amendment against the County and the Sheriff in his official capacity. *Lange v. Houston County*, 2020 WL 6372702, 2020 U.S. Dist. LEXIS 202246. Anna Lange, presenting as male when she was originally hired, has been employed as a deputy sheriff since 2006. Her healthcare provider diagnosed gender dysphoria. Lange then adopted a female name and pronouns, began hormone therapy and started identifying as female to family, friends, employers and co-workers. In April 2018 she had feminizing chest surgery and is seeking feminizing genital surgery, on the advice of her endocrinologist, two psychologists and a surgeon. Her health insurance is an employee benefit from the Sheriff's Office. She alleges that the Sheriff's Office has arranged for Houston County to provide its employees with fringe benefits, so she is a participant in the County's employee health plan. (The County is self-insured but retains Anthem Blue Cross/Blue Shield as plan administrator.) She was told that pursuant to an express exclusion in the health plan, she is not covered for the genital surgery. She claims this exclusion violates her rights under the ADA, the federal Rehabilitation Act, Title VII, and the federal and state constitutional equal protection provisions. She also alleges that Anthem informed her employers that the exclusion in question may be illegal, but Anthem is just the administrator and it is up to the employer and plan provider whether to cover it, which explains which Anthem is not a defendant here. The exclusion was not contained in a form insurance policy provided by Anthem, but rather is a provision of an insurance plan adopted by the County, and reaffirmed by the County after this dispute arose. Lange originally sued only the County and County legislators and officials who affirmatively elected to exclude coverage, but when they pointed out that they were not her employer, she amended the complaint to add the Sheriff and Sheriff's Office as well in order to ensure that the dispute would be covered by ADA Title I and CRA Title VII. While the court whittled down the defendant list on immunity and pleading grounds, the net of the ruling, as above, allows Lange to proceed with her discrimination claims against her employer and the county. She is represented by Kenneth E. Barton, III and Michael Devlin Cooper, of Cooper, Barton & Cooper, LLP, Macon, GA; Alejandra Caraballo, David Brown, Jill K. Grant, Mary Eaton, Noah E. Lewis, and Wesley Powell, of New York, NY, Kevin Barry, of Hamden, CT, and Sarah Matlack Wastler, of Washington, DC. Judge Treadwell was appointed by President Obama in 2010. – *Arthur S. Leonard*

GEORGIA – In *Collett v. Olympus Medical Systems Corporation*, 2020 U.S. Dist. LEXIS 191859 (M.D. Ga., Oct. 16, 2020), U.S. District Judge Clay D. Land denied both parties' motions to compel third-party entities to disclose information that could lead to HIV-related information that is privileged under Georgia law. Dr. Stephen Collett and Felicity Collett allege that Stephen contracted HIV from a defective colonoscope at Athens Gastroenterology Endoscopy Center. The plaintiffs wanted to know the HIV status from a list of approximately forty-five other patients of the Center who underwent colonoscopies around the same time with the colonoscope that was used on Stephen. The argument was that this information was relevant as to whether the colonoscope in question was contaminated with HIV virus *prior* to Stephen's procedure. Olympus moved to compel the Center to state whether any of the patients on the Center's list reported HIV-positive status. The Colletts moved for an order permitting them to present the Center's list of patients to the Georgia Department of Public Health and ask it to determine whether anyone on the list has ever tested positive for HIV. Judge Land referred to these requests as "step one." The central issue to decide was whether Georgia law permitted disclosure of the information the parties now seek and will seek under the circumstances presented here. The more complicated issue was what would happen if one or more patients on the list *were* reported to be infected with HIV. Though the requests would not require the Center or the health department to

say *who,* five patients were reported HIV positive. Ergo, the parties would know at least one person on a small list of patients was reported as HIV positive. Then, logically the parties would want additional discovery to learn when the person was infected and tested positive. Without those crucial additional facts, "step one" information would either not be relevant to any issue in the case because 1) the simple fact that someone on the list may be HIV positive is not enough standing alone to be probative of whether that person contaminated the colonoscope with the virus, and 2) allowing the circumstantial evidence discovered in "step one," while denying the discovery of evidence that could refute it, would be unjust. Thus, what Judge Land deemed as "step two" would need to be taken. However, the parties failed to provide a complete, clear path for "step two." And Judge Land conceived of no path that did not include identification of the HIV-positive patient. Based on the record, Judge Land was not persuaded that the parties had a compelling need for obtaining what Georgia's statute deemed as a "court ordered disclosure exception" to protection of confidential AIDS information about the Center's patients. This was not a case where a person whose confidential AIDS information was sought was already known to the parties and was accused of committing a crime or a tort related to that person's HIV status, Judge Land stated. In this case, the parties' private need for disclosure of AIDS confidential information in this product liability action was *far outweighed by the privacy interest of any person whose private information is sought and by the public interest that would be disserved by disclosures which may deter voluntary HIV tests* (emphasis added), Judge Land explained. Accordingly, the information sought was not discoverable via court order. Given this finding, the information the parties presently seek in order to lay the foundation for obtaining this privileged information – "step one" – was either irrelevant or its probative value was substantially outweighed by the risk of unfair prejudice. Thus, the court would not order its production, Judge Land concluded. Plaintiffs Colletts are represented by James W. Hurt, Jr., Watkinsville, GA; Richard A Wingate and Francis E. Hallman Jr., Marietta, GA.—*Wendy C. Bicovny*

MAINE – In *Flanders v. Athenahealth, Inc*. 2020 U.S. Dist. LEXIS 192136, (Me., Oct. 16, 2020), U.S. Magistrate Judge John C. Nivison granted defendant Athenahealth's summary judgment motion against former employee John Flanders, who appeared *pro se*. Only Flanders' claim that during his employment with Athenahealth he was subjected to discrimination/harassment due to his sexual orientation and facts related to this claim are discussed herein. Flanders began working on the company's Technical Innovation and Support (TIES) team in 2015, where his supervisor was Justin Richards and team lead was Joseph Dunphy. During certain meetings with Flanders in 2016, Dunphy allegedly made two statements to Flanders related to Flanders' sexual orientation. When Flanders and Dunphy discussed Flanders' interest in a position in Chennai, India, Dunphy allegedly suggested that Flanders wanted to go to India because of the sexual acts Indian men could perform with their mustaches. Dunphy also purportedly referenced this joke in his notes regarding the position in India, writing, "Potential interest in [Athenahealth India] (minus the mustaches)?" On another occasion, Dunphy allegedly commented, "His interest in a transfer to the Manila location was because he wanted to have sex with Filipino men." Flanders neither told Dunphy that he was offended by his comments nor reported the comments to either his supervisor, Richards, or to Human Resources. Two of Flanders' TIES coworkers also allegedly made jokes about his sexual orientation. One of the jokes was to the effect that "there was only one kind of meat," and the other two jokes were related to people being gay, but Flanders did not recall the details of those jokes. During Flanders' employment, Athenahealth had a written Anti-Discrimination Policy which prohibited discrimination and harassment against employees based on any legally protected status, including sexual orientation. The policy directed employees to report suspected violations of the policy to certain named members of senior management, any of Athenahealth's Human Resources business partners, or any member of Atheahealth's compliance team. Flanders received and read a copy of the policy when he was hired, and understood that he could report violations. Flanders claims that during his employment with Anthem, he was subjected to discrimination/harassment due to his sexual orientation. Taking note of the Supreme Court's ruling in *Bostock v. Clayton County, Georgia*, that held sexual orientation discrimination constituted discrimination on the basis of sex and is actionable under Title VII, Flanders appeared to have based his discrimination claim on a hostile work environment, Judge Nivison observed. Flanders pointed to the two comments made by Dunphy regarding jokes made by two other co-workers and three jokes made by two other co-workers as the bases of his claim. The severity of the allegedly hostile conduct, its frequency, and whether it unreasonably interfered with the victim's work performance are all relevant factors in distinguishing between ordinary, if occasionally unpleasant, vicissitudes of the workplace and actual hostile environment, wrote the judge. However, courts agree that isolated incidents (unless extremely serious) fail to amount to discriminatory changes in the terms and conditions of employment to establish an objectively hostile or abusive work environment. Athenahealth contended that while

the statements might be offensive, they failed to support a hostile work environment claim. This court, however, did not have to make that assessment, Judge Nivison stated. To establish employer liability for a non-supervisory co-employee, Flanders must demonstrate that his employer, Athenahealth, knew or should have known of the alleged sexual harassment and failed to implement prompt and appropriate action. Flanders evidently contended that because of Dunphy's management status, Athenahealth was liable for Dunphy's conduct. Contrary to Flanders' contention, the record established that Dunphy 1) was neither a manager nor a supervisor, 2) did not have the authority to hire, fire, demote, promote, transfer, or discipline employees, and 3) had no role in evaluating an employee's performance. The fact that Dunphy was the team leader did not alter the analysis. Because Flanders could not rely on Dunphy's alleged involvement in or knowledge of the statements to establish Athenahealth's liability, and because Flanders never reported the alleged harassment to anyone in Anthem's management, Flanders' sexual orientation discrimination claim failed, Judge Nivison concluded. – *Wendy C. Bicovny*

MARYLAND – In *Pense v. Maryland Department of Public Safety and Correctional Services,* 2020 WL 5946574 (D.Md., Oct 7, 2020), U.S. District Judge Paul W. Grimm denied a motion to dismiss an action brought against the Maryland Department of Public Safety and Correctional Services by fired employee Michael Pense. Pense claimed disability discrimination in violation of the Rehabilitation Act of 1973 ("Act"), with a specific claim of wrongful termination. Pense, a 17-year employee, alleged that in April 2015, a new female employee, Ms. Matta Zeinali, falsely accused him of sexual harassment. This incident led to an investigatory interview in June 2015, during which Pense disclosed he was both gay and HIV-positive. Two hours after the interview, Pense was placed on administrative leave and two weeks later terminated. Although the Department determined that Zeinali's allegations could not be sustained, it denied Pense's internal appeal of his termination. At the time of termination, the Department provided no reason, and later sent Pense a letter stating that his employment was terminated because "new leadership was needed to promote effective and efficient operations." Pense claimed the real reason he was fired was because he "is a homosexual and HIV positive." Pense added that of the four individuals that Zeinali alleged had perpetuated the harassment, *only* he was placed on administrative leave and terminated. The Act prohibits recipients of federal funding from discriminating against an "otherwise qualified individual with a disability . . . solely by reason of her or his disability." Pense's specific claim, wrongful termination, is a four-factor test. But, only one factor was at issue before Judge Grimm—whether Pense failed to satisfy the fourth factor—that the circumstances of his "discharge raise a reasonable inference of unlawful discrimination." The Department asserted that because Pense alleged no facts to suggest direct evidence of discrimination, and his disparate treatment theory—that other similarly-situated employees outside of his protected class were treated differently— was lacking because his selected comparators were not similarly situated. Only Pense was accused of sexual harassment against a co-worker, whereas the selected comparators were accused of permitting the harassment to continue unabated after it was reported, which suggests that the comparators were in supervisory positions over Pense. Judge Grimm first noted that a comparator must be similarly situated in all relevant respects. To be be similarly situated the employees must have been disciplined by the same supervisor. Here, Pense alleged that Zeinali complained to executive management about him and three other directors, plausibly, at least for pleading purposes, making them peers, since they all reported to the same executive management, Judge Grimm said. According to the allegations in the complaint, there is a difference in the complained-of behavior—Zeinali complained that Pense sexually harassed her, but she complained only that the other three did nothing about the harassment. Thus, even though it is plausible that they all had the same supervisor, they were *not* investigated for engaging in the *same* conduct, Judge Grimm pointed out. But the time to sort out the conflicting evidentiary facts that the Department raises is not on a motion to dismiss, but after discovery has taken place and the competing facts can be evaluated to determine if there is a genuine issue of material fact. The similarly situated analysis typically occurs in the context of establishing a prima facie case of discrimination, not at the motion to dismiss for failure to state a claim stage, Judge Grimm explained. At this stage, all that is required was that Pense plead sufficient facts, taken as true, for this court to draw a reasonable inference that the Department may be liable for discriminatory termination. Pense alleged that it was not until he later disclosed that he was a homosexual and HIV positive that he was placed on leave within two hours and terminated two weeks later with no reason provided. He also added that the three individuals who were accused of misconduct by allowing the complained-of harassment to continue were not homosexual males, had no disability, and were not placed on leave or terminated. Pense further alleged that a heterosexual non-disabled male replaced him. And, that within six months of his termination, the Department also terminated two other homosexual men. Further, Pense

alleged he was given no reason for his termination. For over 17 years, he had always received positive feedback, which led him to the conclusion that the reason provided in the letter he later received was pretextual. Taken together, all of Pense's allegations *were more than sufficient* to state a plausible claim that he was terminated because executive management learned he was an HIV-positive homosexual male, Judge Grimm concluded. Whether the Department can provide a nondiscriminatory explanation was for later analysis. In short, the Department is attempting to put the cart before the horse, Judge Grimm quipped. Finally, the Department also argued that Pense failed to allege that it received federal financial assistance. To pursue a claim under the Act, the program or activity in question must receive federal financial assistance. Since the Department had not disputed that it received federal funds, Judge Grimm deemed the allegation sufficient to withstand dismissal, and further allowed Pense's claim to proceed. – *Wendy C. Bicovny*

MARYLAND – In *Know Your IX v. Devos*, 2020 U.S. Dist. LEXIS 194288, 2020 WL 6150935 (D. Md., Oct. 20, 2020), U.S. District Judge Robert D. Bennett (appointed by George W. Bush) ruled that four organizational plaintiffs lack standing to litigate an Administrative Process Act challenge in district court to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Regulation," 85 Fed. Reg. 30,026 (May 19, 2020), a new set of rules published by the U.S. Department of Education last spring. The court found that the new rules, which embrace new concepts favored by the Trump Administration in cutting down the rules governing sexual harassment in schools, to not cause any direct harm to the four organizations, which advocate on policy issues and, in some cases, provide representation for individuals claiming to have been sexually harassed or discrimination against because of sex by educational institutions subject to Title IX. The court rejected plaintiffs' argument that changes in the rules impose additional burdens on the plaintiffs to learn about the new rules and to advocate for changes in them. The new rules adopt a narrower definition of actional sexual harassment under Title IX than he been embrace in prior rules. The court was unwilling to accept allegations of associational standing. – *Arthur S. Leonard*

MICHIGAN – In 2016, the U.S. Department of Education issued guidelines to public schools interpreting Title IX's requirement of equal educational opportunity without regard to sex in the context of LGBT students, specifying policies that would afford such students equal treatment and a safe learning environment. Although the Trump Administration "withdrew" this guidance in the spring of 2017, many school districts formally adopted policies in accord with the guidelines, even after they had been withdrawn. The Williamstown Public School District in Michigan adopted policies consistent with the guidelines in the fall of 2017, drawing a lawsuit by several parents on behalf of their children who were students in the district, claiming that the policies violated their children's federal and state constitutional and statutory rights. The parents claimed that these policies interfered with the students' ability to exercise religious freedom, chilled their speech, and subjected them to potential penalties for enacting those beliefs, but did not articulate in their complaint any concrete instance in which any student suffered an injury. In its motion to dismiss, the school district contended, among other things, that the complaint had misrepresented the policies and their potential application. The defendants moved to dismiss, and the Williamston High School Gay-Straight Alliance moved to intervene to defend the School District's policies. In *Reynolds v. Talberg*, 2020 WL 6375396, 2020 U.S. Dist. LEXIS 2024118 (W.D. Mich., Oct. 30, 3030), District Judge Hala Y. Jarbou, a Trump appointee who had taken the bench late in September, granted the motion to dismiss in full and denied the motion for intervention as moot. She found that plaintiffs lacked standing to bring some of their federal claims, and the court lacked jurisdiction over the remainder for failure to state a viable claim. The complaint anticipated possible situations that might arise, she found, but the claims were mainly hypothetical. There was no indication that there were actually transgender students at the high school who were insisting on using restrooms or locker rooms or competing on single-sex sports teams, etc. The judge rejected the claim that parents who had withdrawn their children from the public schools and sent them to private schools in reaction to the adoption of the new policies had stated an injury in fact sufficient to confer standing. The judge basically evaded taking a position on the constitutionality or statutory permissibility of the policies under federal law, and abstained from asserting jurisdiction on the state law claims once all the federal claims were dismissed. Had she got to the merits, she would have found ample support in decisions by other federal courts rejecting similar challenges on the merits. – *Arthur S. Leonard*

NEW YORK – On August 17, Senior U.S. District Judge Frederic Block issued a decision finding that a new definition of discrimination on the basis of sex published by the Department of Health and Human Services a few days after the Supreme Court's *Bostock* decision was announced in June 2020 violated the Administrative Procedure Act, as being "contrary to law and arbitrary and capricious." *See Walker*

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v. Azar, 2020 WL 4749849 (E.D.N.Y., Aug. 17, 2020). A few weeks later, counsel for the plaintiffs asked the court to clarify whether it meant to enjoin the entire 2020 Rule, which the Trump Administration intended to substitute for a 2016 Rule adopted during the Obama Administration which recognized that the anti-discrimination provision of the Affordable Care Act (ACA) extended to discrimination because of gender identity and sex stereotyping. The 2020 Rule removed this expanded definition and referred back to the text of Title IX (which is incorporated by reference in the ACA), stating in its explanation the Administration's position that bans on sex discrimination do not reach sexual orientation, gender identity and sex stereotyping claims, a position no longer tenable after *Bostock*. The court asked the plaintiffs to submit a list of regulatory sections that they contend should also be enjoined. On October 29, Judge Block issued a new decision, *Walker v. Azar II*, 2020 WL 6363970, expanding the injunction to cover the new Rule's withdrawal of one more regulatory section dealing with how health care providers are supposed to deal with transgender people. Otherwise, Judge Block went through the list submitted by plaintiffs and found that these provisions of the 2020 Rule were not affected by *Bostock* or, in some instances, that the plaintiffs in this case lacked standing to raise the particular issues. He stated agreement with Judge Boasberg, who ruled in a similar case in the D.C. district court on September 2, that a blanket invalidation of the entire rule, which covers a range of policy issues, was inappropriate in light of standing issues and relevance issues. However, the judge informed the plaintiffs that they could come back to him seeking expansion of the order to cover more of the proposed Rule if they could show how it was affected by *Bostock* and that they had standing to challenge it. Plaintiffs are represented by attorneys from the New York, Cleveland and Atlanta offices of Baker & Hostetler LLP. – *Arthur S. Leonard*

NEW YORK – A unanimous 5-judge panel of the N.Y. Appellate Division, 3rd Department, ruled on October 22 that the Family Court does not at present have jurisdiction to issue a declaration of parentage to a married female same-sex couple who had a child through donor insemination with sperm from a donor who gave up his parental rights. In the Matter of Alison R.R., 2020 WL 6168369. The court noted that both parents are named on the child's birth certificate. A Support Magistrate found that Family Law lacked jurisdiction to issue such a declaration, dismissing the petition without prejudice. The Appellate Division panel rejected any argument that the archaic gendered language in the Family Court Act got in the way of what plaintiffs were requesting but concluded that the limited jurisdiction of the Family Court did not extend to what plaintiffs were requesting. The Family Court is expressly authorized by statute to issue such declarations when a child is born out of wedlock, but these women were married when their child was born. The Family Court is also authorized to make paternity declarations. However, the court wrote, "This determination will not, as petitioners contend, leave them with the sole remedy of a time-consuming and costly stepparent adoption proceeding. We note the recent enactment of Family Court Act Article 5-C, which will soon allow a petition for a judgment of parentage. Moreover, if petitioners articulate how 'an adjudication of the merits will result in immediate and practical consequences to' them, they are presently free 'to bring a declaratory judgment action in Supreme Court to determine the status of the child and the rights of all interested parties." Plaintiffs are represented by Joseph R. Williams of Copps Di Paola Silverman, PLLC, Albany. – *Arthur S. Leonard*

NEW YORK – In *Rosalie v. Supreme Glass Co., Inc.*, 2020 WL 6263311 (E.D.N.Y., Oct. 23, 2020), U.S. District Judge I. Leo Glasser ruled on the employer's summary judgment motion in a sexual orientation discrimination case brought under Title VII and the New York City Human Rights Law. Christopher Rosalie, an out gay man, claimed to have been subject to a hostile environment at work, and to have been wrongfully discharged due to his sexual orientation. He also made a retaliation claim, which Judge Glasser found was not supported by his complaint. Denying summary judgment on the harassment and discharge claims, the judge found that a jury could conclude based on the evidence in the summary judgment record that Rosalie was subjected to the kind of ongoing verbal harassment that could meet the high bar set by the courts for showing an adverse effect on his terms and conditions of employment, and that this could be attributed to the employer, since one of the sources was the company's president, and another was the Customer Service and Office Manager. Although this Manager does not have all the statutory attributes of a supervisor, the court found that there was enough evidence of her ability to influence employment decisions that a jury could conclude that she was a supervisor for purposes of attributing her offensive comments to the company. As to discharge, the court found that Rosalie had alleged the necessary facts to support a prima facie case and that the company's position that Rosalie was discharged for unsatisfactory work could not be resolved on summary judgment, because he had proffered sufficient grounds that a jury could conclude that the reasons given for his discharge were pretextual. Having survived the summary judgment motions under Title VII, the court noted, the claims under the New York City law naturally survived as well, since it expressly provides broader protection than the federal statute. Rosalie is represented by Edgar Mikel Rivera, The

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Liddle Law Firm PLLC, New York, and Walter G. Harman, Jr., the Harman Firm LLP, New York. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

MISSOURI – U.S. District Judge Rodney W. Sippel in *Carroll v. Payne*, 2020 WL 5848073, 2020 U.S. Dist. LEXIS 181564 (E.D. Mo., Oct. 1, 2020), denied Petitioner Anthony Carroll's *pro se* application for a writ of *habeas corpus*, but certified the case for possible appeal to the Circuit Court of Appeals. The facts are numerous. For this reason, only the relevant facts impacting *Law Notes* readers are discussed. To summarize: In 2005, a jury convicted Carroll of one count of first-degree robbery, counts of forcible sodomy, three counts of armed criminal action, one count of first-degree burglary, and one count of misdemeanor stealing. Immediately prior to sentencing, the trial judge made the following remarks on the record: "Mr. Carroll, during the trial, I was baffled during cross-examination. The prosecutor asked you whether you were a homosexual and you were upset. You told him no. I believe your words were you were not a fag. I've consulted some of my friends that are homosexuals and they want me to let you know, whether or not you're the giver or the givee, if you have forced a heterosexual man to suck your penis and you're so gratified that you take him and put him in the bed and have anal sex with him, you are a fag." No objections were raised in response to these comments. The trial court then sentenced Carroll to 160 years in prison. On November 16, 2018, Carroll filed for habeas corpus relief raising the same argument as in his thirteen-year span of prior failed direct appeals to the Missouri Court of Appeals: that his sentence of 160 years' imprisonment violates the Eighth Amendment because it was disproportionate to his offenses and was the result of the trial judge's personal animus. Because defense failed to object on the record, Judge Sippel said, Carroll's claims were procedurally defaulted. To satisfy the miscarriage of justice exceptions to the procedural bar of review, Carroll had to make a credible claim of actual innocence. Here, the trial judge's use of a homophobic slur and his admission of ex parte discussions about the facts of the case did not occur until after the jury convicted Carroll. Thus, Carroll's claim did not have any relation to his claim of actual innocence, failing the exception. Carroll's claim also failed on the merits because the Missouri Court of Appeals' determination that the 160-year imprisonment sentence did not violate the Eighth Amendment was not an unreasonable application of clearly established federal law. Carroll's habeas petition could only be granted if it was unreasonable for the Missouri Court of Appeals to determine that the trial judge's inflammatory remarks, as well as his open admission of ex parte discussions about the facts of the case before sentencing, had no bearing on the sentences imposed. Judge Sippel expressed unequivocal agreement with Carroll that the trial judge's statements should not have been made. "This language—especially use of the word 'fag,' which, despite the trial judge's contention to the contrary, was unnecessary and shockingly inappropriate. When a judge uses slurs or epithets to disparage someone's race, religion, or sexual orientation on the record, that language certainly harms the individual insulted. It also does lasting damage to the reputation of the judiciary by eroding public confidence in the fairness and impartiality of our system of justice. It is no wonder that Carroll questioned whether the trial judge held some personal prejudice against him and, acting on that prejudice, imposed the lengthy sentence that he did," Judge Sippel emphatically wrote. Yet, a state court's factual determination is not unreasonable simply because the federal habeas court would have reached a different conclusion in the first instance, Judge Sippel qualified. Federal law that made disqualification mandatory where the judge had either a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding, did not apply to the trial court here, and Missouri had no analogous state law. The Missouri Court of Appeals found that "a thorough review of the trial transcript and sentencing transcript lead to the conclusion that the remarks had no bearing on the sentences imposed." This was not an objectively unreasonable determination of the facts, ruled the court, since the sentence imposed was within the statutory limits for the crimes of which Carroll was convicted However, upon a final review of Carroll's claims, the Missouri Court of Appeals might have unreasonably determined that the trial judge's disparaging remarks had no bearing on the 160-year prison sentence that Carroll received. Whether a trial judge's pre-sentencing comments that indicated bias towards a criminal defendant could impermissibly affect the sentence imposed was debatable and the issue deserved further review, Judge Sippel concluded, and thus ordered that a certificate of appealability be issued. Thus, it is open to Carroll to seek review in the U.S. Court of Appeals on the question whether bias by the trial judge requires reconsideration of his lengthy prison sentence. – *Wendy C. Bicovny*

PRISONER LITIGATION NOTES

By William J. Rold

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

ARIZONA – Transgender federal prisoner Jeremy Pinson, *pro se,* is a frequent

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litigator and one subject to a litigation bar under the "three-strikes" rule of the Prison Litigation Reform Act [PLRA] unless she is allegedly in "imminent danger" *See* 28 U.S.C. § 1915(g). In *Pinson v. Othon,* 2020 WL 6273410 (D. Ariz., Oct. 26, 2020), U.S. District Judge Rosemary Marquez screens an amended complaint of three causes of action. The court had previously allowed Pinson to proceed on a claim of deliberate indifference to her health care needs relating to gender dysphoria, so this screening involved two additional claims. Judge Marquez dismisses a new claim about general conditions in the special housing unit as an abuse of the "imminent danger" exception to the "three strikes" rule. The remaining new claim involves hygiene and other protective items and procedures necessary to mitigate the risk of exposure to COVID-19 – for example, "insufficient soap to comply with Center for Disease Control guidelines on handwashing"; lack of "social distancing." Judge Marquez held, for screening purposes, that these claims are for injunctive, not monetary, relief and therefore are not barred by "*Bivens*" considerations. They are "non-*Bivens* claims," as Judge Marquez puts it. There is no federal sovereign immunity for suing the correctional defendants in their "official" capacity, since the Administrative Procedure Act, 5 U.S.C. § 702, waives it, under *Presbyterian Church v. United States*, 870 F.2d 518, 523–25 (9th Cir. 1989) – where the court found § 702 allows injunctive suit against federal immigration officers who were "bugging" services at allegedly "sanctuary" churches. *See also, Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1170–72 (9th Cir. 2017) (reaffirming that the waiver of sovereign immunity in § 702 is not limited to claims brought under the APA and instead constitutes "a broad, unqualified waiver for all non-monetary claims for relief against federal agencies"). [Note: *Navajo Nation* recognizes a potential split between Ninth Circuit panels and attempts to resolve it. *Id.* at 1172. Although much of the case is about water rights and federal trust responsibility to Native Americans, *Navajo Nation* is useful reading for advocates suing federal defendants in their official capacities for injunctive relief on constitutional claims.]

DISTRICT OF COLUMBIA – Former federal prisoner Jeanette Driever, *pro se,* a presumably cisgender woman, sues for violation of her rights when she was confined by the Bureau of Prisons together with transgender women. U. S. District Judge Timothy J. Kelly dismisses all of her claims in *Driever v. United States,* 2020 U.S. Dist. LEXIS 192695, 2020 WL 6135036 (D.D.C., Oct. 19, 2020). He finds that Driever cannot represent a class of other women. He rules that Driever's declaratory and injunctive claims are moot because she has been released for over two years and that she may not move to intervene other current prisoners when they did not file papers themselves. This case is useful as a primer on how BOP houses trans women, but it does not offer much on the law. Driever's claims at this point are limited to damages and Judge Kelly dismisses them. On the authority of *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017), he declines to "extend" a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to reach these claims. In any event, as a constitutional matter, housing Drievers with trans women does not violate her First, Fifth, or Eighth Amendment rights. Generally, a prisoner has no constitutionally protected interest in her place of confinement, *Olim v. Wakinekona*, 461 U.S. 238, 248 (1983). *See also, Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) (rejecting *Bivens* suit for invasion of privacy). The defendants would also be entitled to qualified immunity on this novel theory of damages. Judge Kelly finds that Driever's religious beliefs are not "substantially burdened" by the BOP policy and that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, does not waive the federal government's sovereign immunity from damages. Any claim under the Federal Tort Claims Act is "premature" because Driever did not exhaust administrative remedies.

HAWAII – HIV-positive federal prisoner Sean Akina seeks compassionate release because of alleged risks to his health due to COVID-19. Chief U. S. District Judge J. Michael Seabright denies relief under 18 U.S.C. § 3582(c)(1)(A)(i) in *United States v. Akina,* 2020 U.S. Dist. LEXIS 190012, 2020 WL 6065300 (D. Haw., Oct. 14, 2020). Akina is 31 years old, and he is serving five years for bank fraud and aggravated identity theft at FCI Sheridan in Oregon. Judge Seabright finds that "extraordinary and compelling reasons" for release do not exist. While HIV can pose a risk for complications from COVID-19, this is primarily for patients with a low t-cell count who are not on effective treatment, per the Centers for Disease Control: "we believe people with HIV who are on effective HIV treatment have the same risk for COVID-19 as people who do not have HIV." Although Akina has HIV, he receives HIV treatment and his CD4 counts are within the normal range. His claim "of an inability to self-care due to his HIV status is not supported by the medical records." In addition, data from the federal Bureau of Prisons show no inmates or staff with COVID-19 at FCI Sheridan as of October 14, 2020. Even if there were "compelling" reasons for release, Judge Seabright rules that Akina's motion would be denied under 18 U.S.C. § 3553(a) factors, since there has already been an upward departure from sentencing guidelines because he was the leader of a conspiracy that had 64 victims of check fraud in Honolulu.

PRISONER LITIGATION *notes*

INDIANA – Chief U.S. District Judge Jon E. DeGuilio allows transgender inmate Michael Brandon Thompson, *pro se*, to proceed on a claim of damages against jail officials for denying treatment for gender dysphoria in *Thompson v. Lawson*, 2020 WL 6119527 (N.D. Ind., Oct. 15, 2020). Prior to his incarceration in the jail, Thompson had been receiving treatment in a Michigan prison and had taken hormones obtained through the internet before his arrest in Indiana. Jail officials refused to provide any treatment. A doctor allegedly said that "it is his job to treat people with mental disorders, not people who are confused in life." The warden allegedly agreed, since Thompson would be sent back to Michigan "soon." This happened, so injunctive relief is moot. Damages are available, however, for the time his serious needs went totally untreated at the jail. The court applied *Mitchell v. Kallas*, 895 F.3d 492, 496 (7th Cir. 2018), saying that jail officials "cannot bide their time and wait for an inmate's sentence to expire before providing necessary treatments." Mitchell is usually cited as allowing qualified immunity from damages based on delays in transgender treatment that occur for various reasons, but here there was no treatment at all.

INDIANA – U.S. District Judge Robert L. Miller, Jr., allows *pro se* transgender inmate Elmer D. Charles, Jr. (a/k/a Anastaisa Renee), to pursue civil rights claims in *Charles v. Neal,* 2020 WL 6387415 (N.D. Ind., Oct. 30, 2020). Although Renee obtained a gender change identification order in state court, she claims here that the warden "refuses to recognize her gender change or permit staff to address her as a female, refuses to permit her to wear women's clothing and makeup, and has denied her request to be transferred to a women's prison." Judge Miller allows Renee to proceed on claims for injunctive relief and damages on the authority of *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019) and other 7th Circuit cases, because "[g]iving her the inferences to which she is entitled at this stage, she has alleged a plausible Eighth Amendment claim . . . . " Renee also made a First Amendment claim alleging violation of her free expression on basically the same facts. Judge Miller denies this claim because Renee is pursuing it in *Renee v. Neal*, 3:18-cv-592-RLM (N.D. Ind. filed Aug. 6, 2018), which is also before Judge Miller, with the same defendant. Oddly, Judge Miller says nothing about consolidating the cases.

KANSAS – *Pro se* prisoner Criss McEldridge Clay alleged that Corrections Officer Gael Esparza forcibly exposed Clay's penis and fondled it while Clay was handcuffed in *Clay v. Esparza,* 2020 U.S. Dist. LEXIS 191847, 2020 WL 6117556 (D. Kan., Oct.16, 2020). Clay also alleged that: (1) medical staff refused to perform a "rape kit"; and (2) supervisors allowed Esparza to have contact with Clay during an investigation under the Prison Rape Elimination Act [PREA]. Senior U.S. District Judge Sam A. Crow ordered Clay to show cause why his case should not be dismissed for failure to exhaust administrative remedies under the Prisoner Litigation Reform Act [PLRA] before bringing suit; and he denied a preliminary injunction to keep Esparza separate from Clay. On exhaustion, Clay filed for an "informal resolution," but he claims he never received a reply to it. He says that the failure to reply is exhaustion "by default" and that filing a PREA complaint is also exhaustion (or so he was told by prison officials). Judge Crow indicates a likelihood that he will reject both arguments. First, there is no exhaustion "by default" under Kansas inmate grievances rules. *See* K.A.R. § 44-15-101(b), which allows an inmate to appeal a non-response. Secondly, a PREA complaint does not trigger exhaustion. *See Howard v. Rodgers*, *reconsideration denied*, 2019 WL 480556 (D. Kan. Feb. 7, 2019), *aff'd*, 780 F. App'x 670 (10th Cir. 2019) (finding that the filing of a PREA complaint did not supersede the PLRA's exhaustion requirement) (other citations omitted). Because the PREA investigation is over and it ended with a finding of "unsubstantiated," there is no basis for a preliminary injunction separating Clay and Esparza.

MAINE – State Inmate Nicholas A. Gladu wanted to receive publications with nude pictures of men. According to U.S. Magistrate Judge John C. Nivison, Gladu's mother accommodated him by ordering several titles to be sent to him in prison, including "Peak of Perfection – Nude Portraits of Dancers, Athletes, and Gymnasts"; "Beefcake: 100% Perfection"; and "White Trash Uncut." Maine corrections officials censored the publications, arguing that they depicted bondage and sadomasochism and interfered with Gladu's rehabilitation as a convicted sex offender. In *Gladu v. Waltz,* 2020 WL 6385618 (D. Maine., Oct. 30, 2020), Judge Nivison recommended that defendants be granted summary judgment. Much of the docket for this case in PACER concerns Gladu's efforts to persuade the court to review the materials. Apparently, defendants eventually produced some pages *in camera* [what fun is that?]. Among Gladu's arguments is that the censorship was anti-gay homophobia, because nude female images are allowed but not nude male images. Judge Nivison does not address this claim of equal protection access to alleged porn. He also defers to defendants' conclusion that the images were porn, citing *Turner v. Safley*, 482 U.S. 78, 89 (1987). This appears wrong on two counts: ignoring the disparate censorship based on the sexual orientation of the viewer; and misapplying the *Turner* analysis. Under *Thornburgh v. Abbott,* 490 U.S. 401,

404 (1989), *Turner* deference applies to facial censorship challenges in prison, but publications are required to be reviewed for content on a case-by-case basis.

MISSOURI – *Pro se* federal prisoner Timothy L. Matthews, having served over seven years of a ten-year sentence for conspiracy to distribute drugs, seeks compassionate release because of his HIV status and risks from COVID-19. Senior U.S. District Judge Howard F. Sachs denied his application in *United States v. Matthews,* 2020 WL 5983908 (W.D. Mo., Oct. 8, 2020). Matthews is 47 years old and has had HIV for over 20 years. He also has asthma. He is housed at FCC Forest City (Arkansas), with a scheduled release date of May 2021. Judge Sachs finds that Matthews does not meet the criteria for compassionate release under the First Step Act, 18 U.S.C. § 3582(c), because his HIV is controlled by medication and he is "asymptomatic"; his asthma is also controlled, with normal pulmonary function tests. Judge Sachs applies U.S.S.G § 181.13, without mentioning the Sentencing Commission's failure to update the Guidelines following passage of the First Step Act. He notes, without explanation of the reasons for remarking on it, that Matthews' HIV was "possible sexually transmitted." He rejects Matthews' argument that FCC Forest City is a COVID "hot spot," because Bureau of Prisons statistics show only three "active cases," while 641 inmates and four staff "have recovered." [Note: Based on inmate population and numbers tested, this is a 40% positivity rate.] Judge Sachs writes: "FCI Forrest City Low has made strides in trying to control the pandemic at the facility . . . . Social distancing can be difficult for individuals living or working in a prison." Even if compassionate release were appropriate, discretionary factors weigh against it, particularly Matthews' long criminal record since age 17. Judge Sachs also notes: "[T]he compassionate release triage committee reviewed the pending motion on August 11, 2020, and the Federal Public Defender declined to enter in the case. (Doc. 417)." This is misleading. Document 417 is the Bureau of Prison's brief. It is referring to its own "committee." There is no statement from the Public Defender in the record. Even the BOP's brief says that the Public Defender "does not plan to enter in the case" – not that it has "declined to enter" – which implies that the PD was on the committee and had negatively evaluated the case as part of triage. Judge Sachs was appointed by President Carter.

NEW YORK – New York Supreme Court, Appellate Division, Second Department, ruled in *Budha v. State,* 2020 WL 6153280 (2d Dept., Oct. 21, 2020), that there is no common law tort for damages caused by sexual harassment in New York. The case was appealed on this sole point by the Office of New York Attorney General Letitia James. Budha is a transgender prisoner who was allegedly harassed by corrections officers in connection with a strip and body cavity search. The State did not seek dismissal for alleged constitutional violations. The unsigned "Decision & Order" was issued by Justices Mark C. Dillon, Jeffrey A. Cohen, Robert J. Miller, and Betsy Marros. The court finds that such claims are not cognizable at common law because they are subsumed in statutory protection (Title VII and New York Human Rights Law § 296), and there are other common law torts available, such as assault and battery, negligent training and supervision, and intentional infliction of emotional distress. This holding takes no account of the fact that the plaintiff is a prisoner not covered by Title VII and § 296 because inmates are neither employees nor consumers of public accommodations. (Title VI, which covers recipients of federal funds, reaches prisoners, but it does not include "sex" as a protected category.) The elements of claims for assault and battery and inadequate training may not be met on these facts. IIED is notoriously difficult to sustain in New York. The cases cited by the Second Department do not involve prisoners. It was not so long ago that the New York Attorney General argued that claims under the New York Constitution were not cognizable in the Court of Claims. Thankfully, that argument failed. *Brown v. State,* 89 N.Y.2d 172, 176 (Ct. App. 1996). With no common law protection against sexual harassment, the constitution may be all that Budha has left.

WISCONSIN – In *Bradley v. Kessnich,* 2020 U.S. Dist. LEXIS 193975, 2020 WL 6130948 (W.D. Wisc., Oct. 19, 2020), *pro se* transgender inmate Brandon D. Bradley, Sr., alleges violation of her rights arising from "an altercation with prison officials that she says resulted in her being restrained, strip searched, and confined to a chair," but she also "alleges that her rights have been violated in other ways at other times." U.S. District Judge James D. Peterson finds: "The main problem with Bradley's complaint is that she is trying to bring different sets of claims against different prison officials, which violates Federal Rules of Civil Procedure 18 and 20 by joining claims together that don't belong in a single lawsuit." This violates the rule of *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). Besides the altercation, Bradley alleges unspecified "other" harassment and a conspiracy to violate her civil rights. There is "only partial overlap" of defendants, and these are separate events and causes of action. Bradley may proceed on the first claim on these papers, and the other two claims will be stricken. If Bradley wishes to proceed on either of the other theories, she must file amended complaints as to each, providing more detail, to satisfy screening. Bradley's

LEGISLATIVE/LAW & SOCIETY *notes*

transgender status is the subject of a separate lawsuit, *Bradley v. Novak*, No. 20-cv-48 (W.D. Wis.).

WISCONSIN – U.S. District Judge Pamela Pepper allows *pro se* inmate Brandon A. Thomas to proceed on claims of verbal harassment in *Thomas v. Lehman,* 2020 WL 6382927 (E.D.Wisc., Oct. 30, 2020). According to the Complaint, defendant officers engaged in a "campaign of harassment" of homophobic remarks about Thomas and his mother over a period of four months. They also tried to incite other inmates to attack Thomas physically. This is enough under *Beal v. Foster,* 803 F.3d 356 (7th Cir. 2015), to survive screening. "The proposition that verbal harassment cannot amount to cruel and unusual punishment is incorrect." *Id*. at 357. This is not "simple verbal harassment" – *see Dewalt v. Carter,* 244 F.3d 607, 612 (7th Cir. 2000) – because of the danger of peer assault presented by the defendants. Judge Pepper dismisses a claim for retaliation, because the harassment began before the First Amendment activity (filing grievances) continued during and after the harassment – thus negating an inference that Thomas was "chilled." There is lengthy discussion about supplementing a complaint to add defendants and events occurring after the original complaint was filed, which Judge Pepper finds must be accomplished through a new amended complaint containing all cumulative claims.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

MICHIGAN – In an attempt to force the legislature to amend the state's anti-discrimination law so that it would expressly forbid discrimination because of sexual orientation or gender identity, Fair and Equal Michigan has collected over 483,000 signatures on a petition calling for a ballot initiative. If the Board of State Canvassers finds that at least 340,047 signatures are valid, the legislature will have 40 days to pass the requested legislation or the matter will be placed on the ballot in 2022. Several prior attempts to amend the state legislatively have failed. The Michigan Civil Rights Commission anticipated the U.S. Supreme Court's *Bostock* decision a few years ago, opining that the existing ban on sex discrimination covers these grounds, but that opinion could be withdrawn if the political balance on the Commission changes, and the lack of judicial appellate endorsement for the Commission's interpretation provides a reason for the initiative effort. Public polling shows a majority of Michiganders support banning such discrimination, but the Republican-controlled legislature has been opposed.

TEXAS – Although state statutes in Texas provide no express protection for LGBTQ people in any respect, the State Board of Social Work Examiners had years ago adopted rules requiring that social workers not discriminate against LGBTQ people or people with disabilities – another category not covered by the applicable state statute. This has become a hot button issue in some places when self-described Christians have said that they can't provide services due to their religious beliefs, especially to LGBTQ people. The professional association ethical codes have all included sexual orientation and gender identity for some time now, which led the State Board to adopt these rules. However, during October, at the request of Governor Abbott, the Board voted to delete those categories not required by state statute. Abbott claimed it was for the purpose of making the rules consistent, but – wink, wink, nod, nod – this is part of the Texas Republican Party agenda to let people with religious objections freely exercise their religious beliefs without endangering their professional standing. Announcement of the policy change brought condemnation from the professional associations involved and several Texas state legislators, who demanded that the Board restore the categories of protection. Two weeks after the initial announcement, Board reversed course and unanimously voted to restore protection for LGBTQ people and people with disabilities But this may not be the last word, because the Board also voted to ask for a legal opinion from Attorney General Ken Paxton, an outspoken homophobe, about whether they have the authority to cover those categories. (In light of the Supreme Court's decision in *Bostock v. Clayton County* from June 15, holding that it is impossible to discriminate because of sexual orientation or transgender status without discrimination because of sex, the answer should be obvious, since the relevant state prohibits discrimination because of sex. But one can predict that Paxton is likely to tell the Board that they have gone beyond their statutory power.)

LAW & SOCIETY NOTES

By Arthur S. Leonard

The Senate's confirmation of 7th Circuit Judge **AMY CONEY BARRETT** to fill the Supreme Court seat vacated by the death of Justice Ruth Bader Ginsburg by a 52-48 vote on October 26 is expected to shift the Court sharply to the right and make it difficult to advance LGBT rights issues at the Court. Indeed, some speculate that her addition to the conservative wing will endanger existing precedents, such as *Obergefell v. Hodges*, the marriage equality ruling where the majority consisted of the four Democratic appointees plus Justice

INTERNATIONAL *notes*

Kennedy. While it seems unlikely that the Court would soon see a case where overruling *Obergefell* is on the table, oral argument was to be held on November 4 in *Fulton v. City of Philadelphia*, where the Court confronts the clash between the civil rights claims of same-sex married couples and the free exercise rights of a Catholic social services organization that doesn't want to provide its foster care evaluation and placement services to them. The Court granted cert on three questions, among them whether *Employment Division v. Smith* should be reconsidered. Since the four most conservative members of the Court have already signaled their interest in possibly overruling that decision, the addition of Barrett may tip the balance and reopen the possibility of broad constitutional exemptions from complying with general laws on religious grounds.

The *Washington Blade* reported on October 10 that a **PRIDE IN FEDERAL SERVICE SUMMIT**, a virtual event for over 500 federal LGBT employees, which was scheduled to take place later in October, was cancelled, apparently in response to an Executive Order signed earlier in the month by President Trump directing that teaching about "critical race theory" should be abolished from all federal personnel programs. The *Blade*'s article speculated that the Summit fell victim to an implementing action by the federal Office of Personnel Management, requiring that any such employee training programs be submitted for approval to OPM, which would review the planned programs to make sure that "critical race theory" is not included. As revealed in comments he made during the first presidential debate, Trump is offended by the concept of implicit bias, probably because he rejects the idea that he is a racist despite the racist comments he makes both publicly and in private.

INTERNATIONAL NOTES

By Arthur S. Leonard

CANADA – The federal House of Commons voted 308-7 to give preliminary support to a bill that would ban the practice of conversion therapy on minors late in October.

ESTONIA – A petition by the Green Party (which is not represented in the parliament) seeking same-sex marriage has attained sufficient signatures to be presented for parliamentary consideration. If all goes well, it will be considered before a scheduled national referendum next spring asking whether the Constitution should be amended to define marriage only as the union of a man and a woman. At present, while same-sex marriage is not legal in Estonia, there is no constitutional bar, as the marriage law is only statutory and can be changed by the Parliament. Proponents of marriage equality hope that favorable parliamentary action may help to defeat the referendum which, if passed, would bar the parliament from adopting a marriage equality law. *ERR.ee*, 10/24.

INDIA – Several new marriage equality lawsuits have been initiated in India. One of the cases involves a couple who legally married in the United States and have been denied recognition of their marriage in India. The judicial system in that country is famous for the glacial movement of cases, so now merits rulings are anticipated anytime soon. If India were to embrace marriage equality, it would substantially increase the percentage of the world's population living in marriage equality jurisdictions, because India has 18% of the world's population, according to a report on the pending litigation by Rex Wockner posted on October 9.

MEXICO – Despite numerous rulings by the nation's Supreme Court that same-sex couples have a right to marry, the issue is still being addressed in the individual states. Rex Wockner reported on October 28 that the "Congress of Mexico's Guerrero state voted down marriage equality 23-15 with 2 abstentions." Same-sex couples can marry in one of the other states that performs such ceremonies, and Supreme Court jurisprudence would require the local government in Guerrero to recognize the marriage, or they can go to court to get an order (called an "amparo") for local officials to allow them to marry.

NEW ZEALAND – Prime Minister Jacinda Ardern announced that Grant Robertson, an out gay man who has been serving as finance minister, will also take on the role of deputy Prime Minister, the highest governmental rank yet attained by an out LGBT person in that country. *Associated Press*.

PHILIPPINES – The city of Manila has legislated a local law ban on discrimination against LGBTQ people. The measure was signed into law late in October by Mayor Isko Moreno. *Rappler.com*, Oct. 29.

NEW ZEALAND – The Labor Party's commanding lead in national elections produced what may end of being the "gayest" national Parliament in the world, as it appeared that a dozen out LGBT people will be members of the body, depending on final results. While New Zealand may end up with the highest percentage of out LGBT members, the prize for the absolute largest number would go to the U.K. Parliament, a huge body with more than two score out LGBT members.

NIGERIA -Justice Rilwan Aikawa "struck out" a prosecution against 47

men who were arrested and charged with violating the law against homosexual relationships a few years ago. This is essentially a dismissal for failure to prosecute, since the prosecutors did not show up for the scheduled hearing. The men who were arrested contend that they were merely attending a birthday dinner at a hotel, which the police characterized as a gay club "initiation" ceremony. (One of the arrested men was a taxi driver who said his only connection with the event was driving some people there.) Because the arrest was followed by publicity on local television, several of the men have suffered severe social consequences, including ostracism by family members. A case that is "struck out" can be refiled by the prosecution, so this is not necessarily the end of prosecution for these men. Because nobody had previously been convicted under the current iteration of the law, which was enacted in 2014, this was widely seen as a potential test case, but the court expressed no view about whether the law had been violated or was constitutionally defective. *Reuters*, Oct. 27.

NORTHERN IRELAND – The government announced that full marriage equality will finally be attained on December 7 when everybody in a civil union can convert their relationship to a marriage, and everybody in a marriage can convert their relationship to a civil union. There will be a three-year window to allow these conversions to take place, with all fees being waived during the first year. The new relationship will be recognized as retroactive to when the former relationship was formalized. *BBC News, October 22*.

PROFESSIONAL NOTES

By Arthur S. Leonard

California Governor Gavin Newsom announced on October 5 his appointment of **MARTIN JENKINS**, an out gay African-American man, to the California Supreme Court. Jenkins has extensive judicial experience as a trial and appellate judge, having served on the U.S District Court for the Northern District of California as well as the California Court of Appeal. A moderate Democrat, his past judicial appointments have been by both Democratic and Republican executives. At the time of his appointment, Jenkins has been serving as Judicial Appointments Secretary to the Governor, helping to select appointees to the state's courts as part of Newsom's goal of diversifying the bench. Jenkins is only the third African-American man to serve on the California Supreme Court, and the first out gay justice. His appointment is subject to a confirmation process that is normally *pro forma*.

The Associated Press reported that **AUSTIN QUINN-DAVIDSON** would serve as acting mayor of Anchorage, Alaska, starting October 23, after Mayor Ethan Berkowitz's resignation. Quinn-Davidson, 40, an attorney, is the first woman and the first openly gay person to serve as mayor or acting mayor of Anchorage. Eventually a new election will determine who will continue as mayor. One of the other council members, an out gay man, is also a potential mayor.

BRAD SEARS will be the interim Executive Director at the UCLA Law School's Williams Institute, a leading think-tank on LGBT issues, as the previous director, **JOCELYN SAMUELS**, resigned to accept an appointment as a Commissioner at the Equal Employment Opportunity Commission. Now that the Supreme Court has ruled in *Bostock v. Clayton County, Georgia,* that EEOC has jurisdiction over sexual orientation and gender identity claims, having an "out" commissioner is particularly important as the Commission will need to devise further guidance on the enforcement of Title VII in such cases. Sears was the founding director of the Williams Institute, and has been teaching and filling administrative positions at UCLA since leaving that position. UCLA is conducting a national search for a permanent Executive Director, details to be announced.

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1. Armijo, Enrique, Faint-Hearted First Amendment Lochnerism, 100 B.U. L. Rev. 1377 (Sept. 2020).
2. Boscolo, Stephen, Using Judicial Motives to Persuade Judges: A Dramtistic Analysis of the Petitioner's Brief in *Lawrence v. Texas*, 17 Legal Comm. & Rhetoric: JALWD 103 (Fall 2020).
3. Brown, Heidi K., Get With the Pronoun, 17 Legal Comm. & Rhetoric: JALWD 61 (Fall 2020).
4. Cohen, Sara R., and Mathilde Foucault, Who Goes on the Child's Birth Certificate for International Two-Dad Families When a Child is Born Through Surrogacy in the United States?, 43-FALL Fam. Advoc. 44 (Fall 2020).
5. Redding, Jeffrey A., Review of Damian A. Gonzalez Salzberg, Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law, Oxford: Hart Publishing, 2019, xviii + 248 pp, hb £58.32, 83 Modern Law Review (UK) 702-07 (2020).
6. Sweeny, Dr. JoAnne, and Dan Canon, The Language of *Love v. Beshear*: Telling a Client's Story While Creating a Civil Rights Case Narrative, 17 Legal Comm. & Rhetoric: JALWD 129 (Fall 2020).

EDITOR'S NOTES

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