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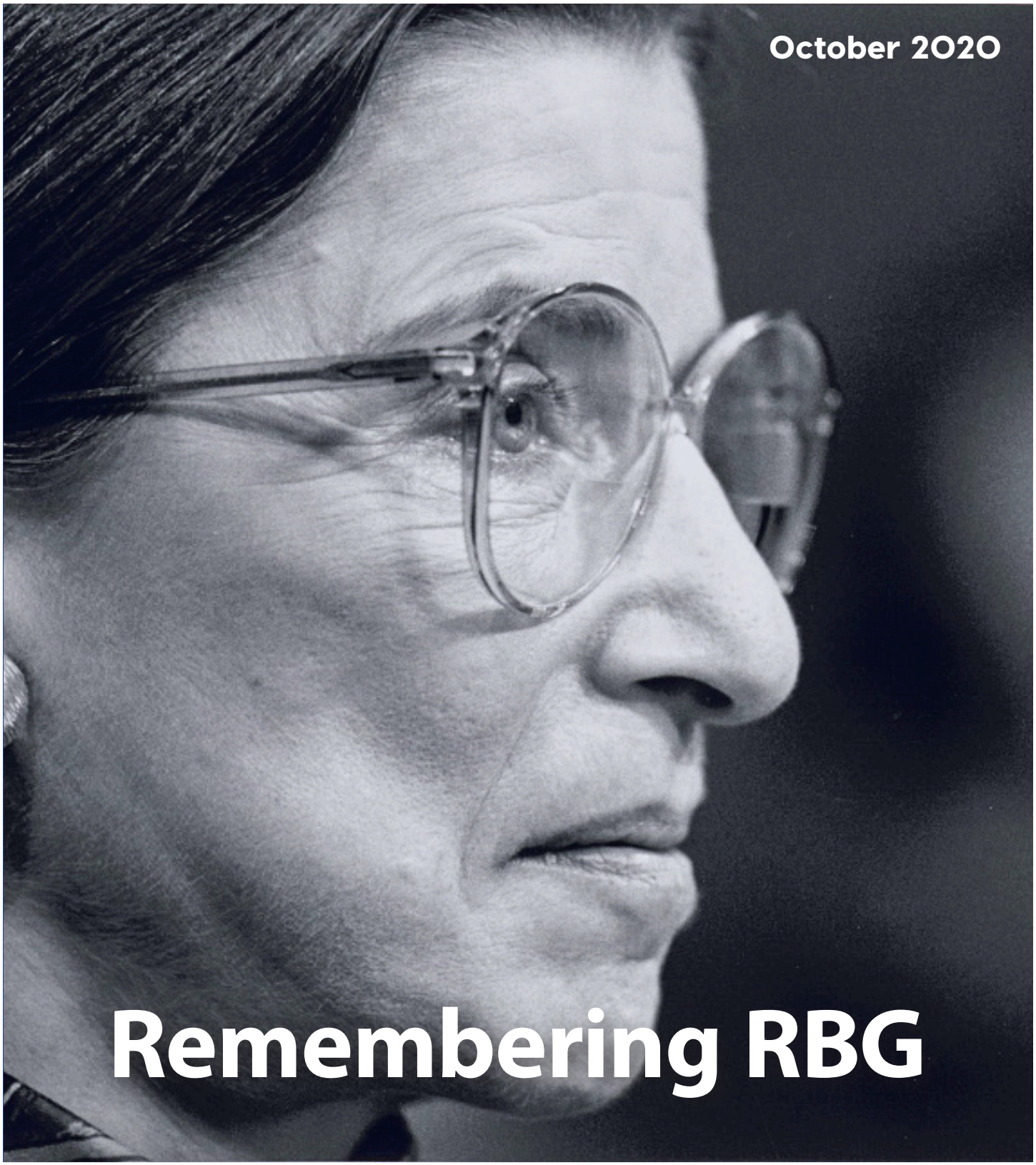

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EXECUTIVE SUMMARY

Death of Justice Ruth Bader Ginsburg Removes a Staunch Advocate of LGBTQ Rights from the Supreme Court

By Arthur S. Leonard

Justice Ruth Bader Ginsburg died on September 18, 2020, age 87, having served on the Supreme Court of the United States since August 10, 1993. Throughout her tenure on the Court she had been a staunch supporter of LGBTQ rights, joining all of the pro-LGBTQ rights majorities and dissenting from all of the adverse decisions except for two in which the Court was unanimous.

In 1993, she joined Justice David Souter's opinion for the Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), in which the Court ruled that a transgender inmate who was repeatedly subjected to sexual assault in prison could hold prison officials liable for damages under the 8th Amendment by showing that they knew the inmate faced "a substantial risk of serious harm" and that the officials "disregard[ed] that risk by failing to take reasonable measures to abate it." Although three members of the Court wrote concurring opinions, Justice Ginsburg did not write in this case.

In 1995, Justice Ginsburg joined Justice Souter's opinion for the unanimous Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), holding that the Boston St. Patrick's Day Parade was an expressive association whose organizers had a right to exclude from their parade an organization whose message they did not want to include. Thus, the Irish-American Gay, Lesbian and Bisexual Group was not entitled to an injunction requiring the parade organizers to allow them to participate under the banner bearing their name. While holding that Massachusetts could not enforce its public accommodations law banning sexual orientation discrimination against the parade organizers, the Court affirmed that it was within the legislative and constitutional authority of the state to generally ban public accommodations from discrimination based on sexual orientation.

In 1996, Justice Ginsburg joined the Court's opinion by Justice Anthony M. Kennedy, Jr., in *Romer v. Evans*, 517 U.S. 620 (1996), holding that Colorado violated the Equal Protection Clause of the 14th Amendment by enacting a state constitutional amendment that prohibited the state or any of its subdivisions from protecting "homosexuals" from discrimination. Justice Kennedy wrote that the state could not treat gay people as "strangers from the law" or categorically single gay people out for exclusion based on animus against homosexuality. The Court's vote was 6-3, with Chief Justice William Rehnquist and Justice Clarence Thomas joining Justice Antonin Scalia's dissenting opinion.

Justice Ginsburg joined Justice Scalia's opinion for the unanimous Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which embraced a textualist interpretation of Title VII of the Civil Rights Act of 1964, *reversing* a decision by the 5th Circuit Court of Appeals that a man who was subjected to severe and pervasive harassment of a sexual nature by male co-workers in an all-male workplace could not bring a hostile work environment sex discrimination claim under that statute. To the contrary, ruled the Court, nothing in the language of the statute suggested that so-called "same-sex harassment" was not actionable, so long as the plaintiff showed that he was harassed *because of his sex*. Justice Scalia memorably wrote that even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." This mode of interpretation provided a foundation for the Court's ruling during the October 2019 Term in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), the last LGBTQ rights victory in which Justice Ginsburg participated.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court ruled 5-4 that the Boy Scouts of America enjoyed a 1st Amendment right to exclude gay men from serving as adult leaders of their Boy Scout troops. Chief Justice Rehnquist wrote for the Court in an opinion that drew upon *Hurley* as precedent. Justice Ginsburg joined two dissenting opinions, one by Justice John Paul Stevens and the other by Justice David Souter.

Justice Ginsburg was part of the 6-3 majority that voted to hold that a Texas law penalizing "homosexual conduct" was unconstitutional as applied to private, consensual adult sexual activity. *Lawrence v. Texas*, 539 U.S. 558 (2003). Ginsburg joined the opinion for the Court by Justice Kennedy, which based its ruling on the Due Process Clause of the 14th Amendment, and overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had rejected a Due Process challenge to Georgia's sodomy law. Justice Sandra Day O'Connor concurred in the judgement but would not vote to overrule *Bowers* (a case in which she had joined the Court's opinion), rather premising her vote on Equal Protection. Scalia dissented, in any opinion joined by Rehnquist and Thomas.

In 2006, Justice Ginsburg joined the unanimous opinion by Chief Justice John Roberts in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), rejecting a 1st Amendment claim by a group of law schools and law faculty members that their institutions should have a right to exclude military recruiters because of the Defense Department's policy excluding gay people, among others, from the service. The "Solomon Amendment"

to the Defense Appropriations Act specified that educational institutions that did not accord "equal access" to military recruiters could be barred from receiving federal financial assistance. Justice Roberts premised the Court's ruling on Congress's power under Article I of the Constitution to "raise and support armies," holding that since Congress could constitutionally impose a direct mandate on educational institutions to allow access to military recruiters, it could surely support the recruiting function through the less direct means of denying federal financial assistance to such educational institutions. The continuing controversies over military recruitment at law schools ended when Congress voted in 2010 to repeal the "Don't Ask, Don't Tell" policy against military service by gay people and the Defense Department revised its regulations accordingly in 2011.

Justice Ginsburg wrote for the Court in 2010 in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), rejecting a claim by the Christian Legal Society (CLS) chapter at Hastings Law School that the school's denial of official status to CLS because of its exclusionary membership policy violated the 1st Amendment. The Court divided 5-4, with Justices Kennedy and Stevens issuing concurring opinions, from which it was reasonable to infer that Justice Ginsburg assembled her majority by seizing upon a factual stipulation entered at the district court that the school's policy required that student organizations allow *all* students to join, even though the wording of the policy prohibited discrimination based on enumerated characteristics, including sexual orientation, which was the "sticking point" with CLS. Writing in dissent, Justice Samuel Alito angrily charged the court with failing to address the explicit policy that the school had adopted and then relied upon to withdraw recognition from CLS. He claimed that the "all comers" policy was an artifact of the school's defense to the lawsuit rather than the policy in effect when CLS's recognized status was denied. He argued that the Court was unconstitutionally enabling viewpoint discrimination by the public law school. Justices Roberts, Scalia and Thomas joined the dissent.

In *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), writing in dissent, Justice Ginsburg rejected the Court's holding that commercial businesses could assert claims to being exempt from coverage requirements of contraceptives under the Affordable Care Act as an interpretation of the Religious Freedom Restoration Act. In his opinion for the 5-4 majority, Justice Alito observed (in dicta) that an employer could not rely on religious freedom claims to defend against a race discrimination claim under Title VII. In her dissent, Justice Ginsburg noted religious objections to homosexuality by some employers and questioned whether the Court would find that employers would have a right under RFRA statutes (both federal RFRA and state laws patterned on it) to discriminate on that basis. She specifically noted the case of *Elane Photography v. Willock*, in which the New Mexico Supreme Court had rejected a state RFRA defense by a wedding photographer being sued under the state's public accommodations law for refusing to photograph a lesbian commitment ceremony, and in which the Supreme Court had recently denied a petition for certiorari, as well as a state law case from Minnesota involving a health club owned by "born-again" Christians who denied membership to gay people in violation of a local anti-discrimination law.

Justice Ginsburg joined opinions for the Court by Justice Kennedy in *United States v. Windsor*, 570 U.S. 744 (2013) and *Obergefell v. Hodges*, 576 U.S. 644 (2015), both 5-4 rulings, in which the Court invoked concepts of Due Process and Equal Protection to invalidate Section 3 of the federal Defense of Marriage Act (which prohibited federal recognition of same-sex marriages recognized by some states at that time), and to strike down state constitutional and statutory provisions denying same-sex couples the right to marry or recognition of same-sex marriages performed in other states. As senior justice in the majority in both cases, Justice Kennedy assigned himself the opinions for the Court. As they were 5-4 decisions, Justice Ginsburg's vote was necessary to the outcome in both cases. During the two years between the decision in *Windsor* and the decision in *Obergefell*, Justice Ginsburg became the first sitting member of the Court to officiate at a same-sex wedding ceremony, an action that led some to call for her recusal in *Obergefell*.

In *Hollingsworth v. Perry*, 570 U.S. 693 (2013), Justice Ginsburg joined Chief Justice Roberts' opinion holding that the proponents of California Proposition 8, which had amended the state's constitution to define marriage solely as the union of a man and a woman, lacked Article III standing to appeal the district court's decision holding that measure unconstitutional, where the state had declined to appeal that ruling. The Court's opinion expressed no view as to the constitutionality of Proposition 8, focusing entirely on the question of standing, but its effect was to allow same-sex couples to resume marrying in California, which they had not been able to do from the effective date of Prop 8's passage in November 2008. Of course, California same-sex couples who subsequently married, as well as those who had married in the five-month period prior to the passage of Prop 8, benefited from federal recognition of their marriages under *U.S. v. Windsor*, which was issued by the Court on the same day as *Hollingsworth*. Justice Kennedy dissented, in an opinion joined by Thomas, Alito and Justice Sonia Sotomayor, claiming that the Court should have reached the merits.

In two subsequent *per curiam* rulings, Justice Ginsburg, who did not dissent, presumably joined in the Court's disposition of the cases. In 2016, the Court ruled *per curiam* in *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), that the courts of one state must accord full faith and credit to a second-parent adoption approved by a court in another state, where the court that approved the adoption had general jurisdiction over the subject of adoptions. The case involved a second-parent adoption in Georgia by the same-sex partner of the child's birth mother. The women were temporarily residing in Georgia, as courts in their home state of Alabama would not approve such an adoption. They moved back to Alabama

after the adoption in Georgia was final. In a subsequent split-up, the birth mother urged Alabama courts to refuse to recognize the adoption, arguing that had it been appealed, the appellate courts in Georgia would have found it invalid. There was no dissent from the U.S. Supreme Court *per curiam*, which asserted that the Full Faith and Credit Clause requires state courts to recognize decisions by courts of other states that had jurisdiction to render those decisions under the laws of their states, regardless of whether an unappealed decision might have been overturned by a higher court. And, in 2017 the Court ruled *per curiam* in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), that the state of Arkansas's refusal to apply the spousal presumption to name the wife of a woman who gave birth to a child as a parent of the child on the child's birth certificate violated the 14th Amendment as construed by the Supreme Court in *Obergefell v. Hodges*. In a dissenting opinion joined by Justices Alito and Thomas, Justice Neil Gorsuch argued that the decision in *Obergefell* did not necessarily decide this case, so the Court should have called for merits briefing and oral argument rather than deciding the case based on the cert documents.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), Justice Ginsburg wrote a dissent, joined by Justice Sotomayor, rejecting the Court's decision to reverse the Colorado Court of Appeals and the state's Civil Rights Commission in their ruling that a bakery violated the state's civil rights law by refusing to make a wedding cake for a same-sex couple. Justice Kennedy's opinion for the Court in the 7-2 ruling was premised on the majority's conclusion that the baker, who was relying on 1st Amendment free exercise and free speech arguments, had been denied a "neutral forum" for the decision of his case due to hostility to his religious views arguably expressed by two members of the Commission during the administrative hearing process. Justice Ginsburg observed in dissent that there was no evidence of a lack of neutrality on the part of the Colorado Court of Appeals, which had affirmed the Commission's ruling, and she agreed with that court's conclusion that application of the public accommodations law to the bakery did not violate the 1st Amendment. In his opinion for the Court, Justice Kennedy noted Supreme Court precedent that generally private actors, such as businesses, do not have a 1st Amendment Free Exercise right to fail to comply with the requirements of state laws of general application that do not specifically target religious practices or beliefs.

Finally, in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), Justice Ginsburg joined Justice Gorsuch's opinion for the Court holding that discrimination in employment because of sexual orientation or transgender status is, at least in part, discrimination because of sex and thus actionable under Title VII of the Civil Rights Act of 1964. The vote in this case was 6-3, with dissenting opinions by Justice Alito, joined by Thomas, and separately by Justice Brett Kavanaugh. In his dissent, Justice Alito asserted that the reasoning of the Court's opinion would affect the interpretation of more than 100 provisions of federal law, which he listed in an appendix to his opinion. The immediate effect of the opinion was to ratify the position of the Equal Employment Opportunity Commission, which had earlier recognized its jurisdiction over such claims, and to extend protection against discrimination on these grounds most importantly to employees in the majority of states where state or local laws did not provide such protection. However, because private sector protection under Title VII is limited to employers with at least 15 employees, the majority of private sector employers would not be covered by this ruling. This decision, which consolidated appeals from three circuits, presented the Court's first merits ruling on a transgender rights case since *Farmer v. Brennan* (1993), although of course the marriage equality rulings, *sub silentio*, effectively overruled decisions by several state courts refusing to recognize marriages involving a transgender spouse that were challenged is being invalid "same-sex" marriages.

During her career prior to her judicial service, Justice Ginsburg taught at Rutgers and Columbia Law Schools and was the founder and first director of the American Civil Liberties Union's Women's Rights Project. Litigation by that Project under her direction persuaded the Supreme Court in a series of important rulings beginning with *Reed v. Reed* in 1971 to recognize sex discrimination claims under the Equal Protection Clause, laying the doctrinal foundation for equal protection claims by LGBT litigants in later years. Although she was seen as a moderate on many issues at the time of her appointment to the Court by President Bill Clinton, she went on to become a leader of the Court's progressive wing and in the 21st century a frequent and pointed dissenter as the center of gravity of the Court moved in a more conservative direction with the appointment of justices by George W. Bush and Donald J. Trump.

Justice Ginsburg's death left a Supreme Court vacancy less than two months before national elections for President and Congress. Senate Republicans, who had blocked consideration of President Barack Obama's nomination of D.C. Circuit Chief Judge Merrick Garland after Justice Scalia died in February 2016, arguing that a Supreme Court appointment should not be made in a presidential election year, now claimed that this was no bar to approving a replacement when the President and the incumbent Senate majority were of the same party. President Trump announced his nomination of Judge Amy Coney Barrett of the 7th Circuit Court of Appeals on September 26. Based on her record, Judge Barrett would likely move the Court to the right, with a 6-3 Republican-appointed conservative majority for the first time in generations, leading to discussion among Democrats about the possibility of expanding the Court if former Vice-President Joseph R. Biden is elected president and Democrats win a majority in the Senate. Such a plan would require abolishing the filibuster rule by which a minority in the Senate can block a floor vote on legislation, unless the Republicans

retained fewer than 40 seats as a result of the election and thus would be unable to block legislation under the filibuster rule without successfully recruiting some Democrats to join them. Since the filibuster rule was repealed for Supreme Court nominations by a bare majority of the Senate in 2017 in order to confirm Justice Gorsuch in the face of a potential Democratic filibuster, it appeared likely at the time Trump announced his nomination that Judge Barrett would be confirmed, but the timing of a floor vote had not been announced by the end of September. ■

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District Court Allows HIV-Positive Services Members to Maintain Discrimination Lawsuit Against the Pentagon

By Vito John Marzano

U.S. District Court Judge Richard D. Bennett (Bush 2003) declined to dismiss a Lambda Legal lawsuit challenging certain regulations of the Departments of Defense, Navy, and Air Force that categorically preclude service academy graduates living with HIV from enlisting or being deployed or commissioned as an officer in the Armed Forces. The matter, *Deese v. Esper*, 2020 U.S. Dist. LEXIS 159847, 2020 WL 5230370 (D. Md. Sep. 2, 2020), stems from plaintiffs Kevin Deese and, proceeding under a pseudonym, John Doe, being discharged because of their HIV-positive status after they graduated from their respective military academies. The relevant regulations categorically bar service academy graduates diagnosed with HIV from being commissioned as officers, effectively ending their military careers. Contrastingly, an enlisted person who is diagnosed with HIV would not be effectively discharged from the military.

The crux of this matter stems from the disparate treatment of active personnel who test positive for HIV from those who are cadets in military academies and test positive for HIV prior to receiving a commission. Appointment of commissioned officers is statutorily restricted to those who are "physically qualified" for active service. 10 U.S.C. § 532(a)(3). The Department of Defense (DoD) policy lists several conditions, such as HIV-positive status, that would disqualify a person from military service, while authorizing the Secretaries of the Military Departments to issue waivers on a case-by-case basis. An active duty or reserve component service member who tests positive for HIV is not automatically separated from the military but is referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as service members with other chronic and/or progressive illnesses. On the other hand, those with HIV are barred from appointment, enlistment, or initial entry training for military service.

The Departments of the Navy and Air Force maintain similar requirements. Generally, individuals with HIV are not eligible for service. Individuals who are enrolled in their respective service academies and who test positive for HIV are to be processed for separation. However, this may be delayed to the end of the academic year, and if that is the individual's final year, they may graduate without commission and receive an honorable discharge. On the other hand, those in active service who test positive for HIV are not immediately discharged. Rather, the military evaluates each on a case-by-case basis for retention.

Regarding the plaintiffs, Deese matriculated in the Naval Academy in 2010, consistently performing well academically, receiving numerous accolades and medals, and serving as an Officer and Platoon Commander by his final year. He applied for an optional and selective dive program a few weeks prior to graduating in May 2014. This entailed additional medical screening, which subsequently revealed that Deese was HIV-positive and had thrombocytopenia (i.e. low platelet count). The Naval Academy subsequently informed him that this diagnosis precluded him from being commissioned as an officer upon graduation.

In October 2016, Deese formally requested a waiver, including several recommendations from Navy personnel with his request. Initially, the decision to honorably discharge Deese was reversed by the Superintendent of the Naval Academy, who noted that had Deese been diagnosed a few weeks later,

after commissioning, separation would not be required. On March 15, 2017, the Assistant Secretary of the Navy for Manpower and Reserve Affairs denied the waiver, noting that one of the conditions, either the asymptomatic HIV or thrombocytopenia, were non-waivable and the other could place him in extraordinary risk should he be injured. Deese received an honorable discharge in May 2017 because he did not "meet the established medical/physical standards during entry level status."

Similarly, Doe enlisted in the Air Force for a six-year term on January 31, 2009. A routine physical examination in February 2014 revealed that Doe had HIV. The Air Force convened a medical evaluation board for continued service, and subsequently determined that Doe should continue to serve. At the beginning of his third year at the Air Force Academy in August 2014, Doe took a commitment oath to serve an additional two years at the Academy and five thereafter as an officer. When his enlistment in the Air Force expired in January 2015, Doe did not seek to re-enlist because of the oath.

In September 2015, the Air Force Academy informed Doe that he was being recommended for potential disenrollment from the Academy and discharge from the Air Force because of the HIV diagnosis. Doe sought a waiver to complete his studies as well as an "exception-to-policy" (ETP), which would permit him to be commissioned as an officer. Doe received the support of every single officer in his chain of command, including all medical officers that were responsible for his evaluation and treatment. In November 2015, the medical waiver was granted.

Doe graduated in June 2016 and received a certificate of commission stating that he had been commissioned as a Second Lieutenant in the Regular component of the Air Force. However, the Air Force did not recognize this commission and maintained his "cadet status" pending a determination of the ETP. The Air Force disapproved of Doe's ETP in September 2016, notifying him of the decision thereafter. He was honorable discharged on November 1, 2016.

Plaintiffs commence this action challenging the military regulations regarding HIV and service members, claiming that, among other things, the regulations that categorically bar issuing a commission to an individual who becomes HIV-positive is arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act (APA), and that same violates their equal protection rights under the Fifth Amendment of the Constitution.

Defendants, comprised of various secretaries within the Departments of Defense, Navy, and Air Force, filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for several counts, and sought summary judgment on those related to the APA.

Defendants argued that the court lacked subject matter jurisdiction because, among other things, plaintiffs' claims involved a "quintessential military judgment" outside of judicial review. Generally, the courts afford great deference to the military for personnel matters. But these matters do not escape judicial review *per se*. In this matter, plaintiffs allege a violation of certain constitutional protections and statutory laws. Implicitly, plaintiffs have exhausted all administrative remedies. This being the circumstance, the court then balances four factors to determine justiciability.

That analysis, however, is entirely informed by the recent decision from the Fourth Circuit Court of Appeals in *Roe v. Dep't of Defense*, 947 F.3d 207 (4th Cir. 2020), which also concerned the military and HIV-positive service members. *Roe* involved a challenge by two members of the Air Force who were discharge based on their HIV status. Aligning the two matters, the district court reasoned that (1) plaintiffs in this case, as in *Roe*, allege that a motivating factor in the decision was to discriminate based on HIV status; (2) the alleged injuries between the two matters are nearly identical; (3) although *Roe* involved retention standards, this does not render this matter nonjusticiable because it would defy logic that courts treat regulations for *retention* different than *accession* for cadets; and (4) since the matters only involve whether the military acted in a constitutionally permissible manner and in accordance with its own policy, a decision does not require the court to exceed its expertise and interfere with military decision making. As such, the district court rejected defendants' justiciability argument.

Next, defendants argued that the challenged actions are not reviewable under the APA because they are solely within the purview of agency discretion. This argument requires overcoming a strong presumption in favor of judicial review of agency action. The district court explained that the APA prohibits judicial review only in certain, rare circumstances. This prohibition requires a defendant to establish that the agency has been granted authority so broad as to render nonexistent any meaningful standard against which to evaluate the agency's exercise of discretion. Even a broad grant of authority can contain enough content to guide judicial review.

The instant matter involved 10 U.S.C. § 532(a)(3), which authorizes the Secretary of Defense to set regulations regarding the appointment for a commissioned officer, and requires such only to those individuals who are "physically qualified for active service." The district court explains that the phrase "physically qualified for active service" provides the standard by which to adjudge the agencies' actions. For instance, a court may intervene if a regulation limited the attainment of officer roles for reasons unrelated to an officer's physical qualification, or for reasons outside of the statute's contemplation.

Defendants here categorically bar cadets from being commissioned as officers upon graduation simply because of their HIV status, even if the same diagnosis would not preclude them from "active service" in another capacity. Further, the record, as constituted before the court, relied on unfounded and contraindicatory policies that appear to deviate from the statutory prescription to ensure that officers are "physically qualified for active service."

Setting aside that aspect, an agency's own regulations may provide the avenue against which to adjudicate a claim. The district court proceeds to identify DoD policy aimed at ensuring that individuals under consideration for commissions meet certain criteria. Evaluating this regulation, however, required only the employment of familiar canons of statutory construction. That is, based on the wording of the regulation, does the agency's action fall within or without its regulatory framework. Nevertheless, it is also well-established that the federal courts accord quasi-dispositive deference to an agency's interpretation of its own regulation provided that the interpretation does not violate the Constitution or a federal statute. This presents a high bar to meet for a plaintiff challenging such a determination.

Having set the parameters for review, the opinion evaluates the parties' arguments as follows. In counts I and II, plaintiffs alleged that defendants breached the APA when they, among another thing, failed to recognize the proper officials responsible for issuing waivers and ETPs. The court rejected this argument, reasoning that defendants reasonably interpreted their own regulation as to who can grant the final waiver or ETP, and that defendants acted within their regulatory framework by failing to submit the requests to the appropriate Undersecretary of Defense for Personnel and Readiness. The court held that the military's interpretation of its own regulation, especially in light of the intricate and numerous rules regarding who is responsible for HIV policies, was permissible. Therefore, the military acted reasonably, warranting dismissal of these counts.

Turning to counts III, IV, and V, plaintiffs claimed that defendants violated the APA by applying certain policies to categorically bar cadets living with HIV from commissioning as officers. Two independent theories lend support to these claims. In sum, the categorical bar: (1) runs contrary to science as to render it arbitrary and capricious; and (2) is inconsistent and in conflict with those regulations governing active duty service members with HIV.

While the court must ensure that agencies engage in reasoned decision making, the scope of judicial review remains narrow. An agency's determination is arbitrary and capricious when, among other things, it "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency[.]" This requires an agency to scrutinize the relevant data and advance a satisfactory explanation for its action, which necessarily includes "a rational connection between the facts found and the choices made."

Defendants sought to justify their position by pointing to a 2018 Department of Defense Report to Congress as proof of the military's awareness of current medical science. The district court rejected this, again pointing to *Roe v. Dep't of Defense*. In *Roe*, the Fourth Circuit held that said report cannot substitute for judicial review. Next, the Fourth Circuit rejected the rationale in the report, discredited several of its assertions, and found that there was little risk of battlefield transmission of HIV, a ground defendants were asserting as a justification for their policy. Indeed, the appellate court held that "*any* understanding of HIV that could justify [a categorical bar on deploying HIV-positive service members] is outmoded and at odds with current science. Such obsolete understandings cannot justify a ban, even under a deferential standard of review" (emphasis and brackets in original).

Recognizing some differences with *Roe*, the district court could not reconcile a different holding based on the record before it. That is to say, the record before the court in *Roe* was incomplete, and if this report was insufficient in that context, it cannot logically be sufficient in this matter. Defendants chose to put forth a report that the Fourth Circuit rebuked and held insufficient to defeat an APA claim.

Next, the court addressed the second theory that defendants' categorical bar is inconsistent and in conflict with those regarding retention. Although mindful of the deference required to an agency to interpret its own regulations, relevant here, a DoD regulation specifically provides that active duty service members are not to be separated merely because of an HIV diagnosis. "Active Duty" includes those attending a military service academy. Accordingly, this places the Navy and the Air Force regulations at odds with the DoD regulation. Defendants did not advance an adequate basis for this discrepancy. As such, plaintiffs' second theory for counts III, IV, and V similarly defeats dismissal.

Plaintiffs also alleged that the policies violate the equal protection guaranty of the Fifth Amendment's due process clause facially and as applied. In sum, plaintiffs claimed that the policies stigmatized them as second-class citizens in violation of the equal protection guarantees.

The Fifth Amendment's due process clause restricts the government from intentionally treating one group different from another group that is similarly situated. The Fourth Circuit has held that claims for disparate treatment based on HIV status are subject to rational basis review. In other words, a defendant's actions will survive judicial scrutiny "if there is any reasonably conceivable state of facts that could provide rational basis for the classification."

Applying the foregoing, the district court found that plaintiffs plausibly alleged that defendants intentionally treated them differently based on their HIV status from those similarly situated graduates, and that such discriminatory practice has no rational basis. In sum, plaintiffs are exemplary military service academy graduates who would have received commissions with the rest of their graduating classes but for their HIV status. Relying on the same language quoted above from *Roe*, the district court found that such sweeping language applies equally to the rational basis inquiry.

In permitting the claims to proceed, District Judge Bennett concluded that "[t]here is simply no basis to hold that officers must be free from HIV even if they are physically capable of service and would otherwise be able to deploy.

The military's policy of withholding officer commissions from HIV-positive service members renders those service members second-class citizens. This is precisely what the equal protection clause forbids."

District Judge Bennett's rationale and reliance on science to render a determination illustrates an instance where justice does prevail, at least at the motion to dismiss stage.

The plaintiffs are represented by Anthony C. Pinggera and Scott A. Schoettes, Lambda Legal, Chicago, IL; Bryce Cooper, Geoffrey Eaton, Joseph Masullo, Lauren Gailey, and Zachary Benjamin Cohen, Winston and Strawn LLP, Washington, DC; and Peter E Perkowski, OutServe-SLDN, Inc., Washington, D.C. ■

Vito John Marzano is an attorney admitted to practice law in the States of New York and Connecticut.

Lambda Legal Wins Preliminary Injunction Against Key Provisions of Trump Administration's Gutting of Affordable Care Act Protections

By Arthur S. Leonard

On August 17, just a day before a new Trump Administration regulation interpreting the anti-discrimination requirements of the Affordable Care Act (ACA) was to go into effect, Judge Frederic Block of the U.S. District Court in Brooklyn issued an order blocking the new definition of discrimination because of sex, which would have rescinded the Obama Administration's determination that the ACA requires health care providers and insurers not to discriminate against transgender people. *See Walker v. Azar*, 2020 WL 4749859 (E.D.N.Y.). On September 2, U.S. District Judge James E. Boasberg of the U.S. District Court for the District of Columbia went a step further, preliminarily enjoining another part of the definition provision and a provision authorizing broad religious exemptions from complying with the ACA's non-discrimination requirements, taken from Title IX. Lambda Legal's Omar Gonzalez-Pagan is lead counsel in the case, representing D.C.'s Whitman-Walker Clinic and other associations and individuals concerned with the impact of the new regulation. *Whitman-Walker Clinic, Inc. v. U.S. Department of Health and Human Services*, 2020 WL 5232076, 2020 U.S. Dist. LEXIS 159951.

The Obama Administration promulgated the rule recognizing protection for LGBTQ individuals in 2016. The ACA's anti-discrimination provision does not list prohibited grounds of discrimination. Instead, it provides that those subject to regulation under the ACA based on the statute's insurance coverage requirements may not discriminate on grounds specified in a short list of other federal statutes, among them Title IX of the Education Amendments of 1972, which prohibits discrimination because of sex. In line with the interpretation of "discrimination because of sex" that the Obama Administration had adopted under Title VII and Title IX, its ACA regulation specified, among other things, that the anti-discrimination requirement encompassed discrimination because of gender identity or sex stereotypes.

A federal district court in Texas issued an injunction against HHS enforcing this antidiscrimination requirement at the instance of several states and a religious health care provider, *see Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex., 2016), based on that court's determination that bans on sex discrimination do not extend to gender identity discrimination, so the Obama regulation could only be enforced by individuals seeking to challenge discrimination against them, but not by the government. The Obama Administration sought to appeal that ruling, but time ran out on the administration and the incoming Trump Administration informed the 5th Circuit that it would not enforce the regulation, ultimately withdrawing it and eventually announcing its new proposed regulation in June 2020, just days before the Supreme Court was to rule in the *Bostock* case. In the meantime, Attorney General Jeff Sessions had issued a memorandum in October 2017, stating the Trump Administration's position that statutory prohibitions on sex discrimination do not apply to claims of sexual orientation or gender identity discrimination. As to gender identity, the Solicitor General, purportedly representing the EEOC as respondent in the *Harris Funeral Homes* case in the Supreme Court, argued in briefs and at oral argument that EEOC's position in the case was incorrect, supporting the employer's claim that a transgender funeral director

terminated after informing her employer of her transition, did not have a cause of action under Title VII.

In *Bostock*, the Court ruled 6-3 that under Title VII an employer discriminates because of sex when it discriminates because of an employee's "transgender status" or sexual orientation, affirming the 6th Circuit's ruling in the *Harris Funeral Homes* case and thus implicitly rejecting the *Franciscan Alliance* ruling, since federal courts generally follow Title VII precedents in interpreting Title IX. Although the Preamble prepared by H.H.S. to introduce its new regulation acknowledged that a ruling in *Bostock* could affect this issue under the ACA, the department went ahead in blithe disregard of the Supreme Court's decision and officially published the new rule in the *Federal Register* just days later, without offering any explanation of how its removal of protection for transgender people was consistent with the statutory anti-discrimination requirement. "Indeed," wrote Judge Boasberg, "the final Rule suggests that HHS simply thought *Bostock* would come out differently than it ultimately did." The regulation was set to become effective in mid-August. Several lawsuits were filed challenging it, with Judge Block issuing his 11th hour injunction the day before the measure was to go into effect, blocking the newly restrictive definition of sex discrimination.

Much of Judge Boasberg's opinion was devoted to standing. The lawsuit filed by Whitman-Walker and its allies broadly attacked an array of provisions in the new regulation, but the judge ultimately concluded that among them the various plaintiffs had standing only with respect to some of the targeted provisions, and that "they are likely to succeed (and will suffer irreparable harm) on two central claims: first, that the 2020 Rule arbitrarily and capriciously eliminated 'sex stereotyping' from the prior Rule's definition of 'discrimination because of sex'; and second, that it improperly incorporated Title IX's exemption of certain religious organizations from the statute's non-discrimination mandate." Thus, the court enjoined these two provisions from going into effect. The court did not have to enjoin the removal of the ban on gender identity discrimination, since that had already been enjoined by Judge Block in *Walker v. Azar*. And, given its ruling on standing, the court rejected the plaintiffs' request to broadly enjoin the entire Rule.

Pointing out that "The APA requires reasoning, deliberation and process," Judge Boasberg explained that "HHS should have at least *considered* the import of *Bostock* for the reasons underlying its regulatory action – namely, the agency's belief that Title IX does not prohibit discrimination based on transgender status – before it eliminated regulatory language providing for precisely what *Bostock* seemed to guarantee. The agency's failure to take that obvious deliberate step prevents the Court from finding that its policy change was supported by 'reasoned analysis' and compels the conclusion that its action was arbitrary and capricious. In so holding, the Court aligns itself with the Eastern District of New York's recent resolution of a similar challenge to the 2020 Rule." The court found none of the administration's arguments to the contrary to be persuasive, particularly noting the lack of any acknowledgement by the government that *Bostock* affects the *Franciscan Alliance* ruling, which HHS cited and relied on in its Preamble to the new rule. "HHS failed entirely to consider the implications of *Bostock* for the agency's reliance on *Franciscan Alliance* – to wit, the possibility that the Supreme Court thoroughly undermined that earlier decision's reasoning," wrote the judge.

Trump Administration agencies over the summer had either ignored the *Bostock* decision's affect on their administration of statutes other than Title VII that ban sex discrimination, or asserted that Bostock did not change their interpretations, but the lower federal courts have rejected such arguments so far in cases under Title IX and the ACA, which others expected to follow – for example, in attacks to the Department of Housing and Urban Development's proposal to give homeless shelters the green light to exclude transgender people from their services. A change of administration as a result of the November election could end up mooting many of the pending lawsuits if a Biden Administration acted quickly to quash proposed Trump Administration regulations or signal that recently adopted regulations will not be enforced while new ones are proposed to restore the protections extended under the Obama Administration.

This also raises the issue, however, of whether subsequent litigation over the meaning of sex discrimination may result in the Supreme Court backing away from the broader implications of Bostock. The decision itself appears safe, even if Amy Coney Barrett is confirmed to take the seat vacated by Justice Ginsburg's death, since the ruling was 6-3. However, Justice Gorsuch's opinion for the Court eschewed deciding any of the issues generally contested under Title IX or the ACA, leaving the bare holding that gender identity or sexual orientation discrimination claims may be asserted under laws banning discrimination because of sex, without resolving such issues as religious objections, moral objections, or asserted claims that transgender people need to be exclude from single-sex facilities to protect the privacy rights of others. On those issues, the impact of a Supreme Court rightward shift is uncertain. ■

Lambda Legal Wins Ruling in Favor of Social Security Spousal Benefits for Some Surviving Same-Sex Partners

By Arthur S. Leonard

Lambda Legal's challenge to the Social Security Administration's categorical denial of Social Security survivor benefits to surviving same-sex partners who were prevented from marrying by unconstitutional state laws has succeeded at the District Court level. Senior U.S. District Judge James L. Robart of the U.S. District Court for the Western District of Washington ruled that the SSA policy violates the equal protection and due process rights of the plaintiff in that case and of members of the national class certified by the court in this decision. Granting summary judgment to plaintiffs and denying it to defendants, the court accepted the report and recommendation previously issued by U.S. Magistrate Judge J. Richard Creatura in full. *Thornton v. Commissioner of Social Security,* 2020 WL 5494891, 2020 U.S. Dist. LEXIS 166805 (W.D. Wash., Sept. 11, 2020).

Lambda sued on behalf of Helen J. Thornton, whose same-sex partner of 27 years, Margery Brown, died in 2006. At that time, the State of Washington prohibited same-sex marriages by statute. Not too long afterwards, the state progressed to recognizing civil unions and, eventually marriage equality, a few years before the Supreme Court's 2015 ruling in *Obergefell v. Hodges* held that state bans on such marriages were unconstitutional.

In 2015, Thornton applied for the Social Security survivor benefits to which she would have been entitled had she and Brown been married when Brown died. She contended that the women had been married in every practical respect and would have been married had the state law allowed it. As of 2006, there were only a handful of states where same-sex couples could marry, and neither Washington State nor the federal government would have recognized such a marriage at that time.

Since the laws prohibiting the formation or recognition of such marriages are now known to have been unconstitutional, she argued, it was similarly unconstitutional to deny her the benefits. Under the Social Security Act, surviving spouses of people whose work record entitled them to Social Security retirement benefits are entitled to continue receiving the monthly benefits after their spouse dies, the main exception (being contested in another lawsuit, *Ely v. Saul)* being that those who married less than 9 months before the death are not entitled to the benefits.

In addition to representing Thornton, Lambda sought class certification, so that the determination of the legal issues would apply to anybody who is in the same situation as Thornton. Class certification is available if there are common legal and factual issues for all the class members, such that resolving the issues in a single proceeding is most efficient and economical, rather than relying upon each individual to litigate the same question before various federal courts.

Magistrate Judge Creatura responded affirmatively to Lambda's suit, recommending certification of a class that closely tracked the facts of Thornton's case. The recommended class consists of people who applied for surviving spouse benefits but were turned down by the Social Security Administration because they were not married to their deceased partners at the time of death because the law of the state where they resided prohibited such marriages.

The Administration opposed certifying the class, pointing out that each individual application presents different issues of proof as to whether the applicant and his or her deceased partner would have been married at the time of death had their state's law permitted it. Neither Magistrate Creatura nor Judge Robart saw that as a problem, pointing out that the main issue before the court in this proceeding is whether the categorical bar established by the Social Security Administration's interpretation of the statute is constitutional. Once that question is out of the way, it is just a matter of fact-finding in individual cases, some of which will be straightforward while others may entail extensive factual investigation.

On the main legal question, the Administration argued that because the Social Security Act does not discriminate on its face regarding sexual orientation, judicial review should use the deferential rational basis test, under which they claimed for various reasons of efficiency and ease of administration, as well as avoidance of fraudulent claims, the categorical bar was sufficiently rational to uphold the Administration's approach.

The judges rejected that argument. Under *Obergefell v. Hodges*, the right of same-sex couples to marry is deemed "fundamental" as a matter of both due process and equal protection, and the state laws that prevented these couples from marrying are clearly unconstitutional in retrospect. Furthermore, the statute, by relying on state law to determine the marital status of decedents and their survivors, is inextricably intertwined with the unconstitutional state laws. In light of that, and of 9th Circuit precedents holding that sexual orientation discrimination is subject to "heightened scrutiny," both judges applied heightened scrutiny here, which means the burden is on the government to show that its rule substantially advances an important state interest.

Judge Robart observed that the Administration never argued that its approach would survive heightened scrutiny, a concession that came back to haunt it now. But the judges went even further, finding that the policy even failed the rational basis test.

In light of these rulings, the only argument remaining was whether the class definition was too narrow or too broad, with the parties taking opposing positions on that. The court rejected the government's argument that it was too broad or that the court's order should be confined to Ms. Thornton's claim. At the same time, the court rejected Lambda's contention that relief should not be extended only to people who applied to the Social Security Administration and were rejected for benefits. Judge Robart pointed out that the statute only provides for judicial review of denial of benefits by the SSA, so the court was without jurisdiction to order relief for people who have not yet applied and been turned down.

The class certification also specifically excludes coverage of the claims of people who are part of the class in the *Ely v. Saul* lawsuit mentioned above, which deals with those who did marry as soon as same-sex marriage became available in their state, but less than nine months before the death of one of the spouses. Their issues are being address in the separate lawsuit.

The government can seek review of the court's order from the 9th Circuit Court of Appeals, but first the court directed the parties to submit their views on how the court should structure relief in this case.

Judge Robart was appointed to the district court by President George W. Bush and took senior (part-time) status in 2016.

Lambda Legal attorneys on the case include Tara Borelli from Lambda's Atlanta office, Karen Loewy from the New York office, and Peter Renn from the Los Angeles Office. Local cooperating attorneys are Linda Rae Larson and Robert D. Thornton from Nossaman LLP, a Seattle law firm. ■

Pair of Setbacks for the Trump Administration in the Ongoing Discovery Battle in Lambda Legal's Trans Military Ban Lawsuit

By Eric Lesh

In a pair of decisions on September 2 and 25, Senior U.S. District Judge Marsha J. Pechman, once again ruled against the Trump Administration in another round of motions pertaining to discovery issues in *Karnoski v. Trump*, 2020 U.S. Dist. LEXIS 160114, 2020 WL 5231313 & 2020 U.S. Dist. LEXIS 176962, 2020 WL 5747812 (W.D. Wash.)

Karnoski is one of the five challenges to the Trump Administration's hateful transgender military ban that was announced by tweet in July 2017. The government has been desperate to hide any evidence which would help the to determine whether the policy issued by then-Secretary of Defense James Mattis (Mattis Policy) was "dictated by the President and therefore 'preordained,' or whether it is the product of independent military judgment, separate and apart from the President's Tweet."

By way of background on the merits of the case, the June 2020 edition of Law Notes summarizes things nicely. "Under the so-called Mattis Policy, individuals who have transitioned are allowed to serve in the gender with which they identify, and those who had not initiated transition before the policy went into effect can serve only in the gender recorded on their formal military records when they joined the service. Despite the string of court victories for the Plaintiffs, the Government continues to stonewall and appeal every ruling, no matter how small."

The September 2nd opinion denied the administration's motions to quash third-party subpoenas issued to General Paul J. Selva, Secretary Robert Wilkie Jr., Secretary James N. Mattis, and Admiral William F. Moran, all of whom were witnesses with personal involvement in the actions taken surrounding the development of the Mattis Policy. The testimony of these individuals is central to the Plaintiffs' case that the development of the Mattis Policy was political, and therefore, not entitled to the deference usually afforded to military judgments.

The court rejected the government's assertion that the apex doctrine, which provides that "'[h]eads of government agencies are not normally subject to deposition,' especially where the information sought can be obtained through another witness or method," shielded these witnesses from the reach of a subpoena. The Defendants' arguments maintained that the depositions were inappropriate given the deference owed to military judgments and privileged nature of the communications. The court found those arguments only served to highlight "the very reason Plaintiffs are seeking to depose these four witnesses: to determine whether the policy has been decided by the appropriate military officials."

The court also found that that the Plaintiffs had demonstrated that extraordinary circumstances justify the depositions here, given that each subpoenaed official had important first-hand knowledge relating to issues central to the litigation. General Silvia was "personally involved in the decision to delay implementation of the Carter Policy and was responsible for overseeing the Panel of Experts." Secretary Wilkie chaired the final six meetings of the Panel, "signed the transmittal memorandum of the Panel's recommendations to the Secretary of Defense, and briefed then-Secretary Mattis on the Panel's findings." Secretary Mattis, naturally had knowledge as to "whether the Mattis Policy was the result of Secretary Mattis following the orders of his Commander-in-Chief or the military's exercise of 'independent

judgment.'" Admiral Moran was the only "voting member who also served on the prior Working Group appointed by Secretary Carter, which only a year before had recommended transgender persons be permitted to serve openly."

The September 25 ruling is more interesting. In it, Judge Pechman compelled the production of documents concerning the President's tweet because they did not fall within the proper scope of the Deliberative Process Privilege, which applies to protect the decision-making process. The Plaintiffs' theory of the case as stated above is of course that the transgender working group, which led to the Mattis Policy, believed the "President's Tweet was to be treated as an Order and required the working group to respond accordingly."

The court found that the documents at issue surrounding the President's Tweet "go directly to Plaintiffs' theory. They do not deal with a policy process. They are not deliberative; they are not pre-decisional. None refer to policymaking or processes. There are no documents reflecting discussions between the President and any of his 'Generals or military experts.'" In sum the court found that the documents were "material and reflect an absence of policy process."

With the election just a few short weeks away, the course of this litigation may ultimately rest on whether the President is reelected, as a Biden administration is expected to quickly reverse this tragic and harmful policy.

Attorneys from Lambda Legal are taking the lead for the plaintiffs in this case, together with cooperating attorneys from Kirkland & Ellis. ■

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

3rd Circuit Invalidates Statutory Information Recording Requirements for Those Pornography Performers Who Are At Least 30 Years of Age

By David Escoto

On September 12, 2020, Judge Jordan Chagares of the U.S. Court of Appeals for the 3rd Circuit delivered an opinion in favor of the adult film industry in its ongoing battle to limit application of stringent documentation requirements of the age of performers. This case stems from a decade worth of litigation claiming statutes enacted to combat child pornography violate the First Amendment rights of pornography producers by imposing requirements that go beyond the need to protect children. Twelve plaintiffs, including both individuals and commercial entities, filed suit in 2009. They also included the Free Speech Coalition, Inc. (FSC) and the American Society of Media Photographers (ASMP), two trade associations. Over course of the decade, the case has previously been appealed three times to the Third Circuit. This opinion is the fourth. *Free Speech Coalition, Inc. v. Attorney General of the United States*, 2020 U.S. App. LEXIS 27776, 2020 WL 5200685 (September 12, 2020).

Congress enacted 18 U.S.C. §§2257 and 2257(a) to address the issue of the sexual exploitation of children and child pornography. These statues require producers of pornography to verify the age and identity of each actor, to keep records of the age verification, and to label each depiction with the location where law enforcement may obtain them.

Congress's criminalization of child pornography dates back to government actions taken in 1978 and 1984. Congress noted that absent the ability for law enforcement to readily ascertain verification of a performer's age, the adult film industry's use of young-looking performers made it almost impossible to enforce these laws. In response to this difficulty in curtailing the interstate market for child pornography, Congress enacted § 2257 as part of the Child Protection and Obscenity Enforcement Act of 1988.

The statute imposes stringent recording requirements on those who produce visual depictions of "actual sexually explicit conduct" to prove that the performers are not children. In 2006, Congress enacted § 2257(a), as part of the Adam Walsh Child Protection and Safety Act of 2006, to extend similar requirements to individuals producing depictions of "simulated sexually explicit conduct." Three of these requirements are at issue here. First, every producer must ascertain identification displaying the birthday of every performer and verify information about any other name that the performer has worked under. Second, the producer is required to maintain records of that information. Lastly, the producer must label every copy of the depiction with a notice of where these records can be located.

The statues also differentiate between primary and secondary producers. The statute defines "primary producer" as "any person who actually films, videotapes, photographs, or creates a . . . visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct." A secondary producer is defined as anyone, concerning a visual depiction, who "produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" it for commercial distribution or contracts to do so. These statutes criminalize noncompliance with their requirements. A first-time offense warrants a maximum five-year sentence. Subsequent violations warrant a sentencing range between two and ten years.

Initially, the plaintiffs sought declaratory judgment and an injunction against the enforcement of these statutes on several constitutional grounds. Now, on its fourth appeal to the Third Circuit, only the First Amendment challenges remain. The court addresses whether the age verification, recordkeeping, and labeling requirements, and the criminal penalties for noncompliance violate the First Amendment as applied to them plaintiffs. Further, the Third Circuit examines whether the requirements should be invalidated facially under the First Amendment overbreadth doctrine.

Throughout each appeal, the way the Third Circuit categorized the content restrictions shifted as Supreme Court precedent changed. On the first appeal, the Third Circuit held that the statutes' requirements were content-neutral restrictions warranting intermediate scrutiny. The court reasoned that Congress singled out this type of speech, not because of the content or disagreement with the message, but because the statutory requirements are the most pragmatic way to combat child pornography.

On the second appeal, the Third Circuit affirmed the District Court's determination that FSC and ASMP lacked standing. The Third Circuit reasoned that under intermediate scrutiny, the as-applied claims brought by FSC and ASMP require an individualized inquiry into whether each member's First Amendment rights were burdened. Despite their members' collectively producing a substantial portion of pornographic material, FSC and ASMP failed to establish associational standing because general statements about the adult industry's free speech do not negate the need for individualized inquiries.

Between the second and third appeal, the Supreme Court decided *Reed v. Town of Gilbert*. In *Reed*, the Supreme Court held that a town sign code was "content based on its face" because its restrictions "depend[ed] entirely on the communicative content of the sign." The Court went further to hold that if the restriction were content based on its face, strict scrutiny would apply regardless of the government's motive. Based on this holding, the plaintiffs here petitioned for a rehearing. The Third Circuit applied *Reed* and held that the statutes were content based because they "depended on the communicative content of the speech." The Third Circuit remanded the case to resolve the First Amendment issues applying the appropriate level of scrutiny.

On remand, the District Court still held that FSC and ASMP lacked associational standing to bring an as-applied claim on behalf of their members. Further, the district court held that the age verification requirement survives the First Amendment as applied to primary producers but violates the First Amendment as applied to secondary producers. Also, the recordkeeping and labeling requirements violate the First Amendment as applied to both producers. Lastly, the statutes' criminal penalties violate the First Amendment to the extent they are used to enforce requirements that themselves are unconstitutional. In response to the overbreadth claim, the District Court stated that the plaintiffs failed to meet their burden of showing that the unconstitutional applications of the statute were overbroad. They concluded the plaintiffs are entitled to an injunction prohibiting nationwide enforcement of the requirements they found to be unconstitutional.

Here, on the fourth appeal, the Third Circuit reviewed the District Court's determinations *de novo*. Regarding associational standing, the Third Circuit affirms the District Court's holding. The court here notes that regardless of the level of scrutiny, an association must still show that "neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." FSC and ASMP have a wide variety of members in various capacities in the adult film industry. Each member of these associations could have a First Amendment infringement that needs to be determined based on their specific facts and circumstances. Therefore, the court held that the associations do not have standing to bring an as-applied claim.

The court goes on to examine the as-applied claims of the ten other plaintiffs with standing. With respect to the age verification, recordkeeping, and labeling requirements, the Third Circuit concludes that they all violate the First Amendment, regardless whether a plaintiff is a primary or a secondary producer. The plaintiffs argue that Congress could have used a less restrictive means to achieve its purpose by limiting the requirements to those performers who might reasonably appear to be children. These ten plaintiffs contend that when a depiction involves a "mature adult," there is no way that the performer might be a child. In these circumstances, the restriction of speech is unnecessary to protect children because there is no risk a child could be harmed.

The Third Circuit agreed with this argument. The government's interest in protecting children is undoubtedly a compelling interest. Still, the statutory requirements do not advance that interest when sexually explicit depictions show "performers whom no reasonable person could mistake" for a child. The court notes that the age of 30 years old, based on testimony from pubertal maturation experts, is the point where no reasonable person would think the depiction was of a child.

The government attempts to counter this argument by alleging there is no substantial burden to maintain the records since, generally, the plaintiffs still have to maintain records for those under 30. The Third Circuit does not buy this argument. The court notes that the number of performers employed by the plaintiffs who are over 30 is not insignificant. Under strict scrutiny, if a less restrictive alternative furthers the government's purpose, Congress must use that alternative. The availability of narrowly tailoring the age verification, recordkeeping, and labeling requirements for these plaintiffs in a less restrictive manner makes clear that the existing provision violates the First Amendment.

The Third Circuit upholds the District Court's conclusion that the criminal penalties cannot be applied

to requirements that themselves are unconstitutional. Plaintiffs argue that criminal punishment is too harsh and violates the First Amendment. Instead, the punishment should be an administrative sanction. The court does not agree with this argument, noting that Congress has the discretion to rely on criminal penalties. However, the government may not enforce any penalties for noncompliance with laws when the laws violate the Constitution. Therefore, since the requirements violate the First Amendment as applied to the plaintiffs, the criminal penalties for violating those provisions cannot be applied to those plaintiffs either.

The Third Circuit then goes on to affirm the District Court's denial of the overbreadth claim. The overbreadth claim would facially invalidate the la w in all applications. In examining the overbreadth claim, the court looks at the number of unconstitutional applications of the law "in relation to the statute's legitimate sweep." The legitimate sweep of the statute addresses the risk to children within the universe of pornography depicting young-looking performers. The impermissible applications are limited to depictions of "mature adults" and those not meant for commercial use. In weighing the two impermissible applications against the vast swath of permissible applications, the court refuses to facially invalidate the statutes.

Lastly, the Third Circuit reverses the nationwide injunction imposed by the District Court. The court notes that the ten remaining plaintiffs generally produce depictions with older performers. However, despite the plaintiffs having meritorious claims, there is no sound basis to enjoin enforcement of the statues on other producers of sexually explicit content in other circumstances.

Judge Chagares' opinion is generally favorable to the adult firm industry by easing the statutory requirements, especially since many adult film actors use pseudonyms and prefer to avoid having a public record of their real names on file and open to government inspection. As the adult film industry business model has evolved over time, the court's decision here seems to be a more open-minded and pragmatic approach to an industry that has over decades been vilified.

The government is represented by Scott R. McIntosh and Anne Murphy of the U.S. Department of Justice, Washington D.C. Plaintiff-Appellants are represented by Lorraine R. Baumgardner and J. Michael Murray of Berkman Gordon Murray & DeVan in Cleveland, Ohio. ■

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

The Crumbs That Remain: A California Court of Appeal Denies Discriminatory Bakery's Attorney Fee Demand

By Corey L. Gibbs

After a same-sex couple alleged they were denied bakery services due to their sexual orientation, California's Department of Fair Employment and Housing (DFEH) filed an action against Cathy's Creations, Inc., and Catharine Miller. The DFEH sought a temporary restraining order and a preliminary injunction. However, those requests were denied. Then, the defendants sought an award for attorneys' fees for having successfully defeated the preliminary injunction motion. The court denied that request, and the defendants appealed. On September 9, the California Fifth District Court of Appeal affirmed the lower court's decision to deny defendants' motion for attorneys' fees. *Dep't of Fair Employment and Housing v. Cathy's Creations, Inc.*, 2020 WL 5405797, 2020 Cal. App. LEXIS 856 (2020).

The DFEH initiated the case pursuant to Government Code section 12974. Justice Meehan began her discussion by acknowledging that section 12974 was a unique statute. She wrote, "Section 12974 [was] part of the [California Fair Employment and Housing Act], which [prohibited] discrimination and [incorporated] the Unruh Civil Rights Act's prohibitions on discrimination in public accommodations." The provisions of the FEHA were an exercise of California's police power, which was granted to states by the Tenth Amendment of the United States Constitution.

The DFEH's purpose was to protect and safeguard people from unlawful discrimination. *See Dep't of Fair Employment & Hous. v. Law Sch. Admission Council, Inc.*, 941 F.Supp.2d

1159 (2013). Under section 12974, the Legislature allowed DFEH to seek temporary restraining orders and preliminarily enjoin actions of other parties. Section 12974 also contained an attorneys' fee provision. The provision stated, "In civil actions brought under this section, the court, in its discretion, may award to the department reasonable attorney's fees and costs, including expert witness fees, when it is the prevailing party for the purposes of the order granting temporary or preliminary relief." In the case against Cathy's Creations, Inc. the DFEH seemed to act permissibly within the language of section 12974.

The defendants argued that they were entitled to attorneys' fees under the Code of Civil Procedure section 1021.5. Under this section, there were instances when a successful party could be awarded attorneys' fees in an action to enforce a right affecting public interest. This section of the statute acted as a codification of the private attorney general doctrine of attorney fees. The purpose of the doctrine was to encourage actions that execute public policies by providing substantial attorneys' fees. *See Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553 (2004); *See also Maria P. v. Riles*, 43 Cal.3d 1281 (1987).

The defendants argued that Code of Civil Procedure section 1021.5 should apply due to public policy reasons. The DFEH argued that section 12974's unilateral provision precluded the application of Code of Civil Procedure section 1021.5. The arguments rested on different statutory interpretations. The court turned to the rules of statutory construction and considered legislative intent. The court acknowledged that the Legislature was capable of creating reciprocal attorneys' fee provisions but could choose otherwise. *See D.C. v. Harvard-Westlake School*, 176 Cal. App 4th 836 (2009). In the case of section 12974, the Legislature chose to make a unilateral provision.

Justice Meehan wrote, "Whereas here two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.'" However, the two provisions before the court were irreconcilable and could not be molded into a single statute. In a situation like this, the court applied the following rules: the later provision superseded the earlier one; and the more specific provision superseded the more general one. *See State Dep't of Public Health v. Superior Court*, 60 Cal.4th 940 (2015).

The Legislature added the tailored attorneys' fee provision to Section 12974 in 2012. The codification of the more general Code of Civil Procedure section 1021.5 occurred in 1977. Justice Meehan explained, "The Legislature was no doubt aware of more general reciprocal attorneys' fee provisions like Code of Civil Procedure section 1021.5 when it expressly chose to codify a unilateral fee provision in the DFEH's favor for action under section 12974." This reasoning led the Court to conclude that section 12974 was a limited exception to an award of attorneys' fees to successful defendants, like Cathy's Creations, Inc.

This battle over attorneys' fees was what remained of a case from 2018. Similarly to the *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, in this case a baker refused to create a cake for an LGBTQ+ event. While the courts may not have provided the outcome some wanted, perhaps capitalism could. These cases are reminders to support businesses that support the LGBTQ community. Each of us gets to choose how we spend our money. Unless homophobia is your favorite flavor of cake, why support a business that does not support you?

The California Fifth District Court of Appeals did not consider the remaining arguments, which were dependent upon section 1021.5 prevailing over section 12974. Cathy's Creations, Inc., and Catharine Miller were represented by attorneys from the Freedom of Conscience Defense Fund. The Freedom of Conscience Defense Fund claimed to defend religious freedoms of Americans of all faiths and no faith. The Department of Fair Employment and Housing was represented by Xavier Becerra, Michael L. Newman, Satoshi Yanai, and Cherokee DM Melton. ■

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

Court of Appeals of Indiana Rules That Three Christian Advocacy Organizations Lack Standing to Challenge Local Anti-Discrimination Ordinances

By Filip Cukovic

The Indiana Family Institute (IFI), Indiana Family Action (IFA), and American Family Association (AFA) (collectively, "the Plaintiffs") brought suit against the cities of Carmel, Bloomington, Columbus, and Indianapolis (collectively, "the Cities") challenging the constitutionality of a provision of the Indiana Religious Freedom Restoration Act (RFRA) and the Cities' nondiscrimination ordinances. The Plaintiffs asserted that because they were not churches or other religious entities as defined in the legislation, RFRA afforded them no protection, and their exclusion of same-sex couples from their events would subject them to various penalties defined in the ordinances should the Cities choose to enforce them. The trial court granted summary judgment in favor of the Cities and the Plaintiffs appealed. On September 10, 2020, the Judge Michael A. Casati, writing for the Court of Appeals, affirmed the trial court's decision, holding that the Plaintiffs lacked standing to challenge RFRA and the ordinances. *Ind. Family Inst. V. City of Carmel*, 2020 Ind. App. LEXIS 386. Judges L. Mark Bailey and Terry Crone concurred.

IFI, IFA, and AFA are affiliated Christian advocacy organizations in Indiana that promote, among other things, what they believe to be "the Biblical teaching . . . that marriage must be between one man and one woman and sexual relations must be within

that marriage context." The Plaintiffs maintain that permitting same sex couples to attend their otherwise public programs would alter their "pro-traditional family message."

Although the organizations require their members and participants to meet certain ethical standards – including honesty, punctuality, and respect – none of the three organizations have so far excluded anyone from participating in their events on the basis of a participant's sexual orientation or religious belief. However, although these Plaintiffs have thus far welcomed and encouraged anyone to attend their meetings and hear their message – including numerous LGBT couples – they argue that they would want to reserve the right to exclude married same-sex couples from attending such events in the future, and that the municipal ordinances in question , which ban discrimination in public accommodations because of sexual orientation, have a chilling effect on their ability to do so.

The Plaintiffs recognize that RFRA and the Ordinances generally contain some exceptions to the broad rule that a religious provider shall not be authorized to refuse to provide services and facilities to any person on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service. However, those exceptions generally apply to entities or associations organized exclusively for fraternal or religious purposes. Because neither IFI, IFA, nor AFA would meet such exemption standards, the organizations' decision to exclude LGBT couples from their events would indeed constitute a violation of both RFRA and the local ordinances. Thus, the Plaintiffs argued that statutes and ordinances that penalize such exclusion run afoul of the First Amendment, both because they have a chilling effect on the Plaintiffs' right to free speech, and because they burden the Plaintiffs' right to freely exercise their religious beliefs.

However, neither the trial court nor Court of Appeals have addressed the Plaintiffs' substantive First Amendment claims, as both courts found that their claims are not ripe and that they lack standing to challenge the anti-discrimination ordinances.

The Court of Appeals decision begins by outlining the standard for establishing standing. To demonstrate standing, a party must show (1) an injury in fact, i.e., an invasion of a legally protected interest that is concrete, particularized, actual and imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that the injury will be redressed by a favorable decision. Closely related, to show that it has a ripe claim, the party must show that its problem is real and present or imminent, and not merely abstract or hypothetical.

In deciding the issue of standing, Judge Casati heavily relied on *Hulse v. Indiana State Fair Bd*., 94 N.E.3d 726, 730-31 (Ind. Ct. App. 2018). In *Hulse*, the plaintiff filed a complaint for declaratory and injunctive relief asserting that a condition of participating in the Indiana State Fair's china painting competition violated her First Amendment rights. Hulse alleged that she suffered injury because she "may be ban[ned]" from the china painting competition if she expresse[d] disagreement with the results" of the competition and that fear "chilled" her speech.

In awarding judgment for the State Fair Board, the Court of Appeals determined that "chilled" speech "may suffice" to establish standing only if the "threatened injury is certainly impending, or there is a substantial risk that the harm will occur." To make this showing, the plaintiff must show an "intention to engage in a course of conduct" with an arguable constitutional dimension, proscribed by a statute, and a "credible threat of prosecution." Among other things, the court in that case held that the evidence did not show that Hulse faced a credible threat of prosecution. To the contrary, it was established that even after Hulse submitted grievances in 2015, she participated in the fair in 2016. As a result, the court concluded that Hulse had not asserted an imminent injury in fact, which was necessary to acquire standing to challenge the Rule as it applied to her and, therefore, lacked standing.

As in *Hulse*, Court of Appeals held in this case that the Plaintiffs have not been the subject of a complaint or investigation; nor have they been threatened with sanctions or penalties. And there was no designated evidence establishing that the Plaintiffs have received, or are likely to receive, any notice of violations. In fact, they continued to hold their training events in the Cities since the passage of the ordinances, and they have not altered their presentations and programs in any fashion. In short, the they remained free, without interference, to express their religious views on marriage and human sexuality as they always have been. Thus, just like the plaintiff in *Hulse*, the Plaintiffs have failed to show how the ordinances subjected them to an imminent threat of harm or that they faced a credible threat of prosecution, and consequently, they lack standing to further pursue their claims.

Furthermore, the court also rejected the Plaintiffs' contention that their action should be permitted to proceed under the public standing doctrine because their claims against the Cities involved the enforcement of a "public" rather than a private right. Although Judge Casati recognized that in situations where public rights are at issue, the usual standards for establishing standing need not be met, RFRA operates to vindicate *only* a private right to religious exercise. Thus, the Plaintiffs had to meet the usual standard for demonstrating standing, and as summarized above, they were unable to do so.

Finally, notwithstanding their claimed policy of possible future exclusion of LGBT couples from their events, the Plaintiffs have made it clear that as of now everyone is welcome to attend their events and hear their message, regardless of an attendee's sexual orientation or religious beliefs. Thus, there is simply no reason to believe that RFRA and the Cities' ordinances had any effect--or will have any effect--on the Plaintiffs and their activities. Thus, for all those reasons, the Court of Appeals affirmed the trial court's

finding that the Plaintiffs lack standing to further pursue this claim and that the claims in question are not ripe.

The Cities in this case were represented by Libby Yin Goodknight; Jeffrey C. McDermott; and Matthew C. Branic from Krieg DeVault LLP; Douglas C. Haney from City of Carmel Corporation Counsel, Carmel, Indiana; Daniyal M. Habib from Office of Corporation Counsel, Indianapolis, Indiana; Curtis T. Hill, Jr., Attorney General, Indianapolis, Indiana; Aaron T. Craft, and Benjamin M.L. Jones, Deputy Attorneys General, Indianapolis, Indiana; Michael M. Rouker, City Attorney, Bloomington, Indiana; Larry D. Allen, Daniel A. Dixon, Assistant City Attorney, Bloomington, Indiana; Ann C. Coriden, Coriden Glover, LLC, Columbus, Indiana; Alan L. Whitted, Columbus City Attorney, Columbus, Indiana.■

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

California Court of Appeal Revives Bisexual Employee's Hostile Environment Sexual Harassment Claim

By Wendy C. Bicovny

The California 2nd District Court of Appeal reversed the trial court's separate order granting summary judgment and judgment against fired employee Gavin Sykes' causes of action for sexual harassment and failure to prevent harassment by his former employer. *Sykes v. Equinox Holdings, Inc.*, 2020 WL 5495269, 2020 Cal. App. Unpub. LEXIS 5885 (Sept. 11, 2020). This lengthy decision comprised 12 causes of action and cannot be reported fully here, so the main focus will be on Judge Timothy P. Dillon's reasons for his only reversal of the trial court's decision, focused on plaintiff's sexual orientation claims.

The trial court found that the incidents on which Sykes premised his sexual harassment claim were not sufficiently severe or pervasive to alter the conditions of Sykes's employment and create an abusive working environment. Judge Dillon disagreed, noting at the outset that Sykes had satisfied his burden to demonstrate triable issues of material fact exist regarding his cause of action for sexual harassment. Judge Dillon then set forth the evidence.

Sykes worked at Equinox for less than six months, a relatively short time. During this time frame, Thomas Hands, Sykes' direct supervisor and a gay male, occupied a position of authority over Sykes. Although Sykes chose to keep private that he was bisexual, Hands asked Sykes if he was gay. Sykes did not respond.

Knowing Sykes's sexual orientation was unwelcome subject matter, Hands persisted by asking on several occasions if Sykes had "fucked" certain male club members and, on other occasions, whether he wanted to "fuck" male club members. Hands also asked Sykes whether he frequented gay bars. Hands also told Sykes to stop flirting with male club members, even though there was no evidence that Sykes was doing so. Sykes did not respond to any of Hands' comments.

Sykes testified that he was "very uncomfortable" around Hands. Hands routinely addressed Sykes by using the terms "sir," "mister," "cutie," and "rock star." Through these greetings, according to Sykes, Hands conveyed sexual innuendos. Sykes believed Hands was flirting with him.

Hands also told Sykes that he had a "second job [that] was something related to the [pornographic] industry." Sykes believed Hands' comment about his second job was harassment because "it was sexual in nature."

Sykes also testified that an employee asked Sykes "which half is [your] black half." Sykes interpreted this question as referring to his penis. Hands then commented, "[W]e'll have to catch him in the locker room next time." Hands also made comments to Sykes about Hands' female supervisors' breast implants.

Sykes testified that Hands' harassment included unwanted physical contact. For example, on a number of occasions, after giving Sykes a "high five," Hands hugged him. On separate occasions, Hands also patted Sykes on the head and on the behind.

Sykes complained about Hands' conduct to Hands' supervisors, but the harassment continued.

Given the brief time frame of Sykes' employment at Equinox, the incidents of harassment were not, at least as a matter of law, occasional and isolated, Judge Dillon opined. The frequency and regularity of the alleged conduct supported an inference Hands engaged in a pervasive pattern of conduct, rather than a few isolated acts, Judge Dillon added. Whether Hands' alleged conduct interfered

with Sykes's work performance was a relevant factor in determining whether a hostile work environment existed, but no single factor was required. Based on the totality of the circumstances, a reasonable jury could conclude that Hands engaged in a pervasive pattern of harassing conduct, Judge Dillon determined.

Equinox argued that "there is no evidence that [Sykes' supervisor's] conduct or comments were directed at Sykes because of his sex or sexual orientation (the latter of which Sykes admitted no one at Equinox knew)." Judge Dillon refuted Equinox's argument, contending that a reasonable jury could infer that Hands directed his comments and physical touching at Sykes because of Sykes' sexual orientation. For example, Hands asked Sykes whether he "fucked" male club members and whether he frequented gay bars. Without any basis, Hands also asked Sykes to stop flirting with male club members. Although Sykes refused to reveal his sexual orientation, based on the nature of Hands' comments, it was reasonable to infer that Hands directed his attention to Sykes because Hands believed that Sykes was gay. Therefore, a reasonable jury could find Hands' conduct constituted harassment because of Sykes' sexual orientation, Judge Dillon observed.

Based on the foregoing, Sykes raised a triable issue as to whether Hands' conduct was sufficiently severe or pervasive to alter the conditions of Sykes' employment and create an abusive working environment based on sex. Sykes also contended that he complained about Hands' harassment, but Equinox failed to take steps to prevent Hands' harassing conduct. Because there are triable issues of fact as to Sykes' cause of action for sexual harassment, his claim for failure to prevent sexual harassment likewise survived summary adjudication, Judge Dillon concluded.

Gavin Sykes is represented by Berokim & Duel and Kousha Berokim. ■

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

Transgender Woman Assaulted by Police Allowed to Amend Complaint to Add Officers Who Abused Her While She Was Unconscious

By William J. Rold

This is this third article on the civil rights case of a transgender woman abused by San Diego Police. In *Lynch v. Burnett,* 2020 U.S. Dist. LEXIS 159938 (S.D. Calif., Sept. 2, 2020), U.S. Magistrate Judge Jill L. Burkhardt issues a Report and Recommendation [R & R] allowing *pro se* plaintiff Paul Anthony Lynch to file a third amended complaint adding police officers as defendants. Judge Burkhardt also recommended that Lynch be permitted to cure a procedural defect as to one key police defendant.

Lynch was forced from her house with transphobic invectives by a group of San Diego police and subjected to a carotid hold by Officer Boykin. This was originally reported in *Law Notes*, "Transgender Woman Assaulted by Police May Pursue Constitutional Claim." (July 2019 at pages 32-33). Lynch tried to sue bystander officers for not stopping Boykin, but the R & R said it all appeared to happen too fast for bystander liability – but Judge Burkhardt granted leave to amend.

In the second R & R, bystander liability was properly plead, but Lynch failed to rename Boykin as a defendant in the new complaint. Judge Burkhardt ruled that Lynch could proceed only against the bystander officers. This was reported (and severely criticized) in Law Notes (November 2019 at pages 34-5). See *Lynch v. Burnett,* 2019 U.S. Dist. LEXIS 187496 (S.D. Cal., Oct. 29, 2019).

Lynch learned through discovery, produced in 2020, that other officers were involved in the 2017 incident – and not just as bystanders. The third R & R, reported here, allows Lynch to add San Diego police officers Judge and Moss, who assaulted her by kneeing her back and legs while she was unconscious, according to police records.

The R & R first addresses discretion to allow a fourth pleading, applying the factors under *Foman v. Davis*, 371 U.S. 178, 182 (1962). Judge Burkhardt finds lack of prejudice to the defendants here to be paramount, citing *Eminence Capital, LLC v. Aspeon, Inc*., 316 F.3d 1048, 1051 (9th Cir. 2003). Here, it was all the same arrest and the additional information was in contemporaneous police records.

While California's two-year statute of limitations for § 1983 claims is a potential problem as to these "new" officers, the statute of limitations rule covers only the length of the limitations period, not its accrual. Federal law applies to accrual. *Olsen v. Idaho State Bd. of Med*., 363 F.3d 916, 926 (9th Cir. 2004). A constitutional tort "accrues" when the plaintiff knows of her injury and its cause. The claim accrues not from "suspicion" of a legal wrong but from knowledge of an "actual injury" and the "cause of that injury." *Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 581 (9th Cir. 2012); *Coppinger-Martin v. Solis*, 627 F.3d 745, 749 (9th Cir. 2010); *Lukovsky v. City of San Francisco*, 535 F.3d 1044, 1058-51 (9th Cir. 2008). Applying that rule here to injuries that occurred while Lynch was unconscious, her claim against officers Judge and Moss accrued in 2020 when the police reports showed their use of excessive force unknown to Lynch at the time it occurred. "Plaintiff had no reason to know or suspect that, while unconscious, Judge and Moss violated Plaintiff's right to be free from excessive force."

Judge Burkhardt also took this opportunity to correct the earlier procedural default concerning Officer Boykin, who applied the carotid choke hold. Construing Lynch's motion to reconsider this ruling as part of the

motion to file an amended pleading, Judge Burkhardt recommended that Lynch be permitted to re-include Boykin in the Third Amended Complaint.

U.S. District Judge Dana Sabraw adopted the latest R & R on September 28, 2020. It is surprising that Lynch is still *pro se*. ■

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.

Wisconsin Prisoner Granted Trial on Allegations of Sexual Assault by Counselor in Juvenile Institution; Supervisors Granted Summary Judgment

By William J. Rold

Gay prisoner Shayd Charles Mitchell represents himself in a civil rights case involving multiple instances of sexual assault by a counselor at the Lincoln Hills School, Wisconsin's principle institution for male juvenile sex offenders. U.S. District Judge James D. Peterson lets him have a trial on claims of sexual assault only by Counselor Bruce Meyer, but he grants summary judgment to all other defendants, in *Mitchell v. Meyer,* 2020 WL 5801499 (W.D. Wisc., Sept. 29, 2020).

Mitchell spent nearly eight years at Lincoln Hills, from his teens until his mid-twenties. He is now in an adult prison. As a teen, he was adjudicated delinquent as a sex offender, the particulars of which are not in the opinion. He was housed in a unit of other sex offenders, all of whom were governed by rules of behavior and penalties. This included such designations as "shower alone" and "staff escort only." There were also rules designed to foster behavior modification, such as forcing boys who had "homosexual contact" to wear red sweaters at all times.

Mitchell claims that Meyer subjected him to homophobic comments and slurs and to unequal application of rules, including the "red sweater" treatment: to call attention to Mitchell, to "shame" him, and to make it easier for Meyer to find him alone. Mitchell claims that Meyer victimized other juveniles and sexually assaulted them as well. Defendants claim that they found no evidence of a pattern and that one inmate who was mentioned by name denied that Meyer assaulted him. Mitchell says in his 344-paragraph affidavit opposing summary judgment (written as an adult) that he is unwilling to name other individuals in order to protect their privacy and to avoid re-traumatizing them by asking them to recount the same kind of events.

Mitchell says that the supervising defendants created an atmosphere that enabled Meyer, and they were lax in protecting Mitchell and others in his situation. Housing areas were understaffed (particularly on the night shift, when Mitchell says Meyer raped him), and video cameras left areas uncovered and frequently failed mechanically. Both inmates and staff knew where the gaps were, and there were no cameras in the cells where the rapes occurred.

Mitchell sued several managers, supervisors, and a deputy superintendent. All said they were unaware of misbehavior by Meyer. Mitchell says he told them about it. Mitchell claimed that Meyer had been subjected to discipline, but Judge Peterson found no evidence of it other than Mitchell's unsupported declaration. Apparently, Meyer's personnel file was not produced, and Mitchell was not allowed to take depositions.

Mitchell says the supervising defendants either discarded or did not process sexual misbehavior grievances against staff. Mitchell's own allegations were found "unsubstantiated" – meaning that there was not enough evidence to establish whether the events occurred. See 28 C.F.R. § 115.5 (definition of "unsubstantiated" in juvenile facilities under the Prison Rape Elimination Act). It does not appear that other PREA-required records of investigations, complaints, and the like, were produced in discovery.

A review of this case on PACER reveals at least two procedural things of interest. Early in the case Mitchell won a statute of limitations victory to continue his suit despite the age of some of the allegations. The litigation on this

point may be of interest to advocates with "stale" sexual assault claims involving juveniles.

The other ruling was less fortunate for the case. The magistrate judge separated fact discovery from expert discovery, allowing the latter on damages, if liability survived summary judgment. Judge Peterson accepted this dichotomy in his ruling on summary judgment. The problem is that the trier of fact needs to be educated about the nature of supervisory liability in an institutional sexual predator case. Judge Peterson's opinion suggests that he did not understand how Meyer could be responsible for both grooming and raping Mitchell. The supervisory defendants did not recognize this either, and they should have been sensitized to it from proper PREA training. An expert was needed at the liability phase to explain to Judge Peterson that the supervisory defendants were deliberately indifferent to Mitchell by their failure to recognize the obvious signs of a predator on their staff.

Judge Peterson finds that Mitchell states no sexual orientation equal protection claim, because regulating the sexuality of male juvenile sex offenders necessarily involved prohibiting sex between them. This pre-*Lawrence* view of gay sexuality led to Mitchell's being disciplined for "making eye contact in a sexual manner with another inmate." The opinion does not see a penological difference between prohibiting coercive sexual conduct and allowing behavior that would only be actionable if viewed through a homophobic lens.

Judge Peterson initially allowed Mitchell to proceed on a claim on the red sweater shaming on the theory that it was deliberately humiliating without penological justification, under *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009). He adopted an objective standard of review, since juveniles are not adults and are "adjudicated" but not actually convicted within the meaning of the Eighth Amendment. *See Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018) (correct standard to apply to juvenile cases remains unclear). After struggling with this point for several pages, Judge Peterson finds himself unable to determine whether the red sweater is an objectively reasonable penological response to a legitimate need, despite its ostracizing effect. He concludes that qualified immunity should apply, since there are no cases on point.

At the end, Mitchell will have his trial against Meyer. Mitchell's sworn submissions create genuine issues of material fact against Meyer's denials, regardless of whether Mitchell is corroborated. "[H]e provides a firsthand account of being repeatedly sexually assaulted by Meyer. That's enough…." The supervisors are granted summary judgment because "Mitchell fails to provide evidence from which a reasonable jury could conclude that Lincoln Hills officials were aware of a substantial risk to Mitchell of sexual assault."

Without a lawyer, an expert, and other victims unafraid to come forward, Mitchell will probably lose his case against Meyer. In this writer's opinion, granting a trial avoids a reversal that could have called all the rulings into question. A jury in a *pro se* trial against the State of Wisconsin is not likely to understand the predatory cookery of a juvenile institution any better than Judge Peterson did. ■

Transgender Plaintiff Suffers Dismissal of Her *Pro Se* Discrimination and Consumer Fraud Claims Against Bank

By Wendy C. Bicovny

Hannah Binks, a transgender female, filed a complaint *pro se* alleging violations of Maryland's Anti-Discrimination and Consumer Protection statutes against Ally Bank. U.S. District Judge Stephanie A. Gallagher granted Ally's motion to dismiss for failure to state a claim, in *Binks v. Ally Bank*, 2020 WL 5642257, (D. Md., Sept. 22, 2020).

At the time Binks opened an account with Ally in 2017, she had already successfully transitioned to her female gender identity, and all relevant legal documents were in the legal name of Hannah Binks. On February 20, 2020, Binks called Ally because she had received an email claiming that her online passcode had been changed, causing her account to be frozen. After a two-hour phone hold, she reached Ms. Kelly, a "fraud associate," who said that she didn't believe she was speaking to Hannah Binks. Binks explained that she was transgender and had a deep voice. After conferring with her manager, Kelly stated that Hannah's name did not match her social security number and that additional documents needed to be sent.

Dissatisfied, Binks placed another call to Ally, and this time spoke with Mark, another "fraud agent." Mark told Binks someone would listen to the previous call and would call Binks back within 48 hours. Binks was given a case number and instructed to email a copy of her driver's license and social security card to the bank. Mark refused to "verify" Binks over the phone or to work to correct the situation with the locked account.

Four days after her call to Ally, having not received a return call, Binks filed her two-count complaint in U.S. District Court. Judge Gallagher discussed and dismissed each count in turn.

Count One alleged a violation of Maryland's Anti-Discrimination Statute, which prohibits the "owner or operator of a place of public accommodation or an agent or employee of the place of public accommodation" from discriminating on the basis of, *inter alia*, sex or gender identity. The statute expressly provides a private right of action to individuals subjected to discrimination in employment or housing but includes no such language for persons alleging discrimination in public accommodations, Judge Gallagher pointed out. However, an aggrieved individual may file a complaint with the Maryland Commission on Civil Rights, and that entity is entitled to bring a complaint against the alleged discriminator. Thus, Judge Gallagher dismissed Count One with prejudice.

As to Count Two, Binks' Consumer Protection Act claim required: (1) an unfair or deceptive practice or misrepresentation, (2) that was relied upon, and (3) caused the complaining party actual injury. To prove reliance upon an unfair or deceptive practice or misrepresentation, a plaintiff *must* allege that the false or misleading statement substantially induced her choice.

Here, Brinks' complaint alleged, in part, "[U]nfair acts or practices in conduct of trade or commerce are unlawful violations of the Maryland Consumer Protection Act; violations of Maryland Law against discrimination are *per se* violations of the Consumer Protection Act…defendants [sic] actions injured Plaintiff, and are therefore liable under the Maryland Consumer Protection Act." These allegations failed to provide adequate notice to Ally of the exact nature of Binks' Consumer Protection Act claim, Judge Gallagher pointed out.

The Maryland Consumer Protection Act includes *fifteen specific examples* of an "unfair or deceptive trade practice." However, from Binks' generically worded pleading, the court could not ascertain *what* unfair or deceptive trade practice was alleged. No misleading statements or misrepresentations were articulated in Binks' complaint. The type of poor, and even potentially discriminatory, customer service that Binks alleged did not, as stated, amount to an unfair or deceptive trade practice within the meaning of the statute.

Furthermore, wrote the judge, the court found that it was difficult to conceive, under these alleged facts, how Binks would have been able to establish the required reliance. The facts she described suggested that she was *already* a customer of Ally at the time of the alleged conversations, and that she never took any action in reliance on any representations made by Ally, to conduct further business with the bank. Nevertheless, out of an abundance of caution, in case there were other facts not yet presented to the court, Judge Gallagher dismissed Binks' Count Two *without prejudice*, giving her the chance to file an amended complaint if she can make factual allegations that would support an actionable claim under the statute. ■

Transgender Man's Employment Discrimination Claims Against Access-a-Ride Call Center Survive Motion to Dismiss

By Bryan Xenitelis

Justice Paul Goetz, of New York Supreme Court, New York County, has denied the motion to dismiss by a NYC Access-a-Ride call center service in an employment discrimination lawsuit brought by a transgender man, in *Smith v. Global Contact Holding Co.*, 2020 NYLJ LEXIS 1435 (N.Y. Supreme Ct., Sept. 17, 2020). [Note – This case was reported in the July issue of Law Notes based on a Lexis report that dated the opinion June 26, 2020. See 2020 N.Y. Misc. LEXIS 2969. For some unaccountable reason, the opinion was published in the *NY Law Journal* bearing the date of September 17 and is being reported again here, as described by a different writer.]

Plaintiff, a transgender man who is in the process of a medical and social gender transition, was hired by Global Contact Holding Company, a call center service for NYC's Access-a-Ride Call Center. Plaintiff identifies as a man and uses the name Devon. Per Plaintiff's allegations, at the start of training, GC's training staff honored Plaintiff's request to be called Devon and to use male pronouns and had "Devon" as the name on his identification badge. However, after successfully completing training and beginning work on the floor of the call center, Plaintiff alleges that thereafter for the entire period of his employment with GC he was subjected to discrimination, harassment and retaliation in making complaints because of his gender identity.

Several of Plaintiff's supervisors and managers refused to call him Devon or to identify him by male pronouns, stating things such as: "I'm not going

to call you Devon or he, everyone can see you are a woman," "why would you want to do that?" (in reference to medical and social transition), "you've got some big things up there, you're no guy," "my girl," and "fat bitch." One allegedly informed Plaintiff she would not use "nicknames" and eventually refused even to talk to him.

Plaintiff sought leave for medically necessary knee surgery and was first threatened with termination but eventually was given leave (but less than his doctor's recommended recovery time). Plaintiff was repeatedly threatened with termination if he did not return to work early against his doctor's recommendation. Upon returning to work, Plaintiff was accused of several allegedly false disciplinary infractions and was eventually terminated. Plaintiff's union negotiated his return to work, where he was issued an ID badge in a feminine name even though the prior badge had been in the name "Devon." Eventually Plaintiff was again terminated and alleges that GC unlawfully denied him timely and lawful access to his final paycheck and lied about having sent it by mail when they had not yet sent it.

Plaintiff brought suit and sought various damages under both City and State Human Rights Laws for discrimination, harassment, hostile work environment and unlawful retaliation for reporting the discriminatory practices. He further sought injunctive relief declaring the acts and practices in violation of the laws. Defendants moved to dismiss on grounds of lack of evidence and failure to state a claim and further argued that Plaintiff's attorneys should be disqualified from representation because they would be called as witnesses. Plaintiff cross-moved for sanctions against Defendants.

Justice Goetz described the statutory definitions of "gender identity" and noted that both the State and City laws should be "construed liberally" to "accomplish the remedial purposes of prohibiting discrimination." He found that the Plaintiff had alleged he was in a protected class due to his gender identity, was qualified for the position having successfully completed training, was adversely treated by being denied medical leave, subjected to unwarranted discipline, and terminated twice, giving rise to an inference of discrimination. He found that Defendants' repeatedly refusing to use "Devon" or male pronouns and the many slurs and remarks were indicative of discriminatory animus beyond mere "stray remarks," in light of who made them and in what context.

Justice Goetz found Defendant's allegations in their motion to dismiss did not conclusively refute Plaintiff's allegations. Though Plaintiff had used the name "Devonia" and female pronouns in communications with his lawyers, Justice Goetz found equitable estoppel did not apply because no party was misled by another's conduct, nor was there significant or justifiable reliance on that conduct to a party's disadvantage.

Further, Justice Goetz ruled that Defendant's arguments that the individual superiors named were not subject to liability were without merit, finding that the complaint alleges that "at all relevant times, each of the individual defendants 'had management and supervisory authority over Plaintiff, including the power to cause Plaintiff's termination and to affect the terms and conditions of Plaintiff's employment.'" Unlike Title VII, the local laws do provide for individual supervisory liability in certain circumstances.

Justice Goetz found that the persistent and repeated use of a female name and pronouns when referring to Plaintiff ("misgendering") and the pervasive repeated offensive remarks constituted a hostile work environment under the State and local laws.

Justice Goetz found that Plaintiff adequately alleged retaliation because he made complaints to the Director of Travel Planning for GC, the Director of HR, and to his supervisor, who then allegedly retaliated by repeatedly addressing Smith as a woman, refusing to grant him a medical leave sufficient for his recovery from medically necessary surgery, subjected him to inaccurate disciplinary warnings, threatened to fire him if he took medical leave, and terminated his employment twice.

Finding none of Defendant's arguments required dismissal of the complaint, Justice Goetz dismissed the motion.

Additionally, Justice Goetz found that Defendants could not justify disqualifying Plaintiff's attorneys, Laine A. Armstrong, Esq., Richard Soto, Esq. and their firm Advocates for Justice, on speculation that they might be witnesses, and found that while the overall motion to dismiss lacked merit, it was not clearly frivolous, and denied monetary sanctions against Defendants. ■

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

Ohio Federal Judge Rejects Pleadings on Most Claims by Transgender Inmate but Allows Allegations on Cross-Gender Searches and Gender Confirmation Surgery

By William J. Rold

A plaintiff must state a claim of a civil rights violation that is plausible under existing law. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Sometimes, *pro se* litigants, like transgender inmate Tony Fisher here, file too much. U.S. District Judge Sara Loio dismissed most defendants and all but two claims from Fisher's 400-page complaint in *Fisher v. Fed. Bureau of Prisons*, 2020 U.S. Dist. LEXIS 161274 (N.D. Ohio, Sept. 3, 2020).

Unlike § 1983 civil rights cases, which require that a "person" be sued when a plaintiff's rights are violated by a state or locality, civil rights cases against federal defendants may proceed under Bivens theory against federal agencies themselves – at least where only injunctive relief is sought. Judge Loio thus dismissed all individual federal Bureau of Prisons individual defendants, allowing the action to continue only against the Bureau of Prisons and the institution (FCI-Elkton) where Fisher is confined.

Fisher attached to her pleadings: medical records and reports, doctors' statements, grievances, policies, publications, standards, etc. Judge Loio considered these matters in ruling on whether Fisher stated a claim – and they contributed to Fisher's undoing on many of her claims. Sixth Circuit law allows these "appended" documents to be assessed in ruling on a motion to dismiss under F.R.C.P. 12(b)(6), without converting it to a motion for summary judgment. *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

Judge Loio ruled that Fisher did not state a constitutional claim for what Judge Loio called a "second opinion" on treatment of her gender dysphoria. Fisher would have to show that professional judgment was absent from the opinions she was already receiving, under *Rhinehart v. Scutt*, 894 F.3d 721, 751 (6th Cir. 2018); s*ee also, Richmond v. Huq*, 885 F.3d 928, 941 (6th Cir. 2018) (affirming denial of referral to a burn specialist). In this writer's view, this claim was fatally weakened by Fisher's attaching multiple opinions from various doctors to her complaint. Presumably, what Fisher really wanted was not a "second" opinion but an "independent" opinion from an "outside" doctor, but this is unlikely to succeed as a stand-alone claim.

Judge Loio also dismissed Fisher's claim for feminizing items for grooming, personal hygiene and dressing. Again, she attached multiple documents showing why she was receiving some feminizing items and not others. Judge Loio adopted the Eleventh Circuit's holding that feminizing items are not constitutionally required in *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1277 (11th Cir. 2020). Fisher was allowed women's underwear, but the complaint could have probably gone to the summary judgment stage under Keohane had the complaint not been packed on this point. There is a national survey of cases on feminization.

Fisher also faced dismissal of her complaint of deliberate indifference to her safety. She had not been assaulted, and she did not allege credible threats. Judge Loio found that this claim amounted to a challenge to bathroom privacy, location of Fisher's bunk, and non-compliance with the Prison Rape Elimination Act [PREA]. While an inmate does not have to be a victim to state a protection from harm claim, under *Helling v. McKinney*, 509 U.S. 25, 33 (1993), she does have to show a credible threat. Here, from the details, Judge Loio found that the BOP had taken steps to assure bathroom privacy (a one-at-a-time rule) and that the location of Fisher's bunk did not pose an unreasonable risk. Judge Loio rejects any implied cause of action under PREA.

Judge Loio allows Fisher to proceed on her claim about cross-gender searches by male officers. She starts by noting that pat frisk searches are generally constitutional and raise questions only when conducted sadistically or maliciously under *Tuttle v. Carroll Cty. Det. Ctr.*, 500 F. App'x 480, 482 (6th Cir. 2012). Cross-gender searches are not per se unconstitutional. They can raise questions where the inmate had a history of sexual abuse and is re-traumatized by the search conducted by a male, citing *Jordan v. Gardner*, 986 F.2d 1521, 1525-30 (9th Cir. 1993). Judge Loio notes that BOP rules prohibit routine searches of transgender inmates by officers of the opposite gender if the warden grants an "exception." Program Statement 5521.06. The "record" here (as Judge Loio calls it) does not show that an "exception" was considered, so she allows this claim to proceed. She does not mention that PREA (28 C.F.R. § 115.15) prohibits cross-gender searches of trans inmates, absent "exigent" circumstances, in all adult facilities. Here, the details worked in Fisher's favor.

Judge Loio spends about 1/3 of her opinion discussing whether Fisher stated a claim for sex confirmation surgery. After extensive discussion of all the major cases, Judge Loio rules that Fisher can proceed on this claim past a motion to dismiss. She writes: "If Fisher's complaint only alleged disagreements between medical professionals as to the medical necessity of SRS to treat her GD, it would be difficult to find that FCI-Elkton was deliberately indifferent to Fisher's serious medical need. But Fisher's complaint—when interpreted liberally—claims more than a mere medical disagreement related to her treatment plan. Fisher claims that her

SRS requests were denied, not based on medical opinion, but on alleged unofficial BOP blanket policy against providing SRS to inmates with GD. The Sixth Circuit has not determined if a prison's blanket ban against treatments for GD constitutes a violation of the Eighth Amendment. And there is a split among the circuit courts that have considered the issue."

In this writer's view, Fisher needs counsel and an expert witness if she is to prevail. It would be a shame if this case ends up in the Sixth Circuit after summary judgment on this record. ■

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. SUPREME COURT – The Court set November 4 as the date for argument in *Fulton v. City of Philadelphia,* 922 F. 3d 140 (3rd Circuit), in which the 3rd Circuit ruled that Catholic Social Services of Philadelphia was not entitled to a religious exemption from complying with the city's sexual orientation non-discrimination policy. The city manifested its disapproval by refusing to renew CSS's contract under which it had rec Seived referrals of children in need of foster placement and was authorized to determine whether adult applicants to be foster parents were qualified and whether it was appropriate to make placements. CSS was also involved in matching children with potential foster parents and providing supportive services when the foster placement was made. Cancellation of the contract means CSS may no longer engage in these activities, even though the city continues to contract with CSS for other programs that don't raise these issues. CSS specifically asked the Court to "revisit" its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court ruled that individuals and organizations – even religious entities – do not enjoy a 1st Amendment exemption from complying with religiously-neutral state laws of general application that were not adopted specifically to target religion. The city of Philadelphia adopted a ban on sexual orientation discrimination by ordinance many years ago, and the agency that deals with child welfare organizations has its own non-discrimination criteria. Nobody had ever filed a complaint about CSS's policy of refusing services to same-sex couples (gay couples seeking to be foster parents evidently knew better than to apply to CSS, and there are about 30 such agencies in the Philadelphia metro area licensed to do provide these services), but a reporter doing a story for a Philadelphia newspaper alerted the agency that their article would mention CSS's policy, prompting the agency to contact all the social service agencies with which it contracted, determining that CSS and one other agency were the only ones maintaining such discriminatory policies based on religious objections. The other agency backed down when confronted by the city, but not CSS, which went to court seeking injunctive relief. At least four members of the Court have called for "revisiting" *Employment Division v. Smith*, which was so controversial when the opinion was issued – due to its sharp departure from prior free exercise precedent – that it led to bipartisan passage of the federal Religious Freedom Restoration Act, which provides a religious free exercise defense against federal enforcement actions. The likely addition of Judge Amy Coney Barrett to the Court may provide the necessary fifth vote to modify, limit, or overrule *Employment Division v. Smith*, a result that could rip a large constitutional hole in the protection provided by Title VII to LGBT people.

U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Nunez-Martinez v. Attorney General*, 2020 U.S. App. LEXIS 28630 (3rd Cir. Sept. 10, 2020), the court of appeals denied a Mexican man's petition for withholding of removal, and protection under the Convention Against Torture (CAT). Although the Immigration Judge (IJ) found the petitioner credible, and determined he was a member of a particular social group (homosexuals from Mexico), the IJ concluded the Petitioner had not suffered past persecution. The IJ

likewise concluded Petitioner failed to establish it was more likely than not he would suffer from future persecution and concluded that he was ineligible for protection under the CAT. The Board of Immigration Appeals (BIA) determined that the finding was not in error. The court agreed and stated specific reasons how substantial evidence supported the BIA's conclusion that Petitioner did not suffer past persecution and that he failed to establish that he is more likely than not to be persecuted in the future. The operative question here is whether past threats and their cumulative effects on an applicant present a real threat to a petitioner's life or freedom, the court began. In this regard, the court saw no error in the BIA's (and IJ's) conclusion that Petitioner did not suffer past persecution. Petitioner testified credibly that, in 2001, "after his former girlfriend's family began suspecting he was a homosexual," her brothers began "threaten[ing] to beat him" and "driving by his place of work." However, there was no allegation of intent to follow through on these threats, nor did any trouble follow Petitioner when he moved to Tijuana for four to six months around that time. Moreover, when Petitioner returned to Mexico in 2010, he was neither harmed nor mistreated the entire time he was there, although he lived a closeted life. Because Petitioner was unable to prove past persecution, the BIA agreed with the IJ that he failed to demonstrate a clear probability that his life or freedom would be threatened in Mexico on account of his membership in a particular social group. Additionally, beyond the threats from his ex-girlfriend's brothers years ago, Petitioner testified to no other harm or mistreatment, and he was never targeted by, nor afraid of, the police. The court's review of the record lead to the determination that more than a "mere scintilla" of evidence supported the entirety of the BIA's conclusions. Because the court agreed that Petitioner failed to establish that he was more likely than not to suffer from future persecution, the court did not address his remaining arguments challenging the BIA's denial of withholding of removal. Petitioner also argued that the BIA mischaracterized or improperly analyzed his claims for CAT relief. Not so, the court said. In seeking relief under the CAT, an applicant must establish that it is more likely than not that he would be tortured if removed to the proposed country of removal either by or with the government's acquiescence. The BIA accurately held that Petitioner was never physically harmed-and certainly not tortured-in the past, did not suffer any harm when he returned to Mexico in 2010, and never reported any problems to the police. Substantial evidence in the record supported these conclusions, the court noted. Accordingly, the court found no error in the BIA's and IJ's conclusion that Petitioner failed to establish that it is more likely than not he would be tortured if returned to Mexico. Thus, he was not entitled to protection under the CAT, the court concluded. For the reasons stated, the court reiterated the denial of Petitioner's petition for review. – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Castro v. Attorney General of the United States*, 2020 U.S. App. LEXIS 29051 (3rd Cir. Sept. 14, 2020), the court of appeals rejected a Belize man's petition for review of the Board of Immigration Appeals (BIA) denial of his motion to reopen removal proceedings. Petitioner entered the United States as a non-immigrant visitor in November 2000. Many years later, in September 2017, the Government charged Petitioner with removability as an alien convicted of crimes involving moral turpitude and child abuse. Petitioner filed for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). In December 2018, BIA dismissed Petitioner's appeal from the Immigration Judge's denial of his claim for relief. In March 2019, Petitioner filed a motion to reopen and to terminate the removal proceedings, arguing that he had a pending post-conviction petition in state court that could potentially vacate his conviction. BIA denied the motion. In December 2019, Petitioner filed a second motion to reopen. BIA denied the motion, holding it was untimely and number-barred. BIA also rejected Petitioner's argument that he qualified for an exception to those limitations based on his recognition in May 2019 that he gender-identified as queer, and would be hated and persecuted like the LBGTQ community in Belize. BIA also denied Petitioner's request for reopening. Petitioner filed a timely petition to review denial of a motion to reopen. Only one motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, the court first noted. Here, the final administrative order of removal was entered in December 2018. Therefore, Petitioner's second motion to reopen, filed on December 2019, was clearly time-and number-barred. However, a renewed asylum application based on changes in personal circumstances filed outside of the 90-day window must be accompanied by a motion to reopen that successfully shows changed country conditions. BIA held that Petitioner's evidence failed to speak to or establish changed country conditions in Belize that materially affected his eligibility. That evidence included statements from Petitioner, explaining that, in May 2019 he had come to realize and live his true gender identity, which he stated was queer or gender non-conformist. Although Petitioner alleged that he was persecuted in Belize more than 20 years ago because of his sexual orientation, he never explained how conditions in Belize have changed for the LGBTQ community since his last hearing. Petitioner's motion to reopen also included affidavits and letters, country reports, and news articles,

which BIA described as reports of discrimination and harassment against LGBTQ individuals in Belize. But BIA held that the evidence did not speak to or establish changed country conditions that materially affect his eligibility, and failed to support a finding that LGBTQ individuals suffer a significant form of mistreatment as compared to when Petitioner's removal hearing was first conducted. The court concluded that BIA's assessment of the evidence was accurate. For example, although Petitioner submitted affidavits and letters that generally spoke to his good character, they did not address a change in conditions in Belize for members of the LGBTQ community. News articles described the police's mistreatment of Petitioner in 1999, after he was accused of improperly obtaining Mayan artifacts, but do not demonstrate a relevant change in country conditions. Furthermore, the 2018 State Department Human Rights Reports for Belize, which Petitioner included with his motion to reopen, do not differ significantly from the 2017 Report in describing violence and discrimination against people based on their sexual orientation or gender identity. In both of those Reports, the State Department stated that the "extent of discrimination based on sexual orientation or gender identity was difficult to ascertain due to a lack of official reporting." Both Reports, as well as a March 2019 State Department travel advisory, described individual acts of discrimination and hostility toward the LGBTQ community. But those accounts did not suggest that conditions in Belize for LGBTQ individuals have worsened or would support asylum. In sum, the record failed to support Petitioner's claim that there had been a change in country conditions to warrant reopening, the court concluded. – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 4TH CIRCUIT – The 4th Circuit has denied a petition by the Gloucester County (Virginia) School Board for rehearing *en banc* of a three-judge panel's decision that the School Board violated Gavin Grimm's rights under Title IX and the Equal Protection Clause when it excluded the transgender youth from using the boys' restroom facilities at the county's high school and refused upon graduation to issue him a transcript consistent with his gender identity. The panel decision is *Grimm v. Gloucester County School Board*, 2020 U.S. App. LEXIS 27234, 2020 Westlaw 5034430 (4th Cir., Aug. 26, 2020). The ruling denying *en banc* review is reported at 2020 WL 5667294, 2020 U.S. App. LEXIS 30339 (4th Cir., September 22, 2020). None of the circuit's active justices voted to grant *en banc* review. Judge Niemeyer, who dissented in the panel, concurred in denying *en banc* review because he felt it would be futile, he explained in a brief opinion. Noting the history of the litigation, he thought it unlikely the 4th Circuit would change its position on the case, even though he continues to believe, even after the *Bostock* ruling, that Title IX allows schools to exclude transgender students from restroom access because, in his view, a transgender boy is not "similarly situated" to a cisgender boy and thus suffers no actionable discrimination from the exclusion, especially as regulations under Title IX authorize schools to maintain separate restrooms for boys and girls (and Niemeyer evidently does not consider Grimm to be a boy for this purpose). Judge Winn also issued an opinion, concurring in the denial of *en banc* review, but because he agrees with the panel decision, and he defended it at length. Judge Niemeyer suggested that the school board would be well advised to file a cert petition. Noting that the Supreme Court granted cert previously in this case, only to cancel the hearing when the Trump Administration rescinded the Obama Administration's position on transgender restroom access. In light of *Bostock*, Niemeyer suggested, it is possible the Supreme Court will be ready to address the issue on the merits now. After this *en banc* denial was announced, President Trump announced his nomination of Judge Amy Coney Barrett of the 7th Circuit to the Supreme Court, setting up the possibility of bringing the restroom access issue under Title IX before a newly bolstered 6-3 conservative majority on the Court. Presumably, Judge Barrett would be inclined to join the members of the Court who voted to grant cert on the earlier petition, although it is worth noting that the earlier petition was concerned with the 4th Circuit having directed the district court to defer to the Obama Administration's interpretation of Title IX rather than to the ultimate merits of the case. Conservative members of the Court were presumably eager to put an end to Auer deference as part of their project to neuter the regulatory state. Now that issue is not in play in this case. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 4TH CIRCUIT – In *Krell v. Braightmeyer*, 2020 WL 5640407 (September 20, 2020), the 4th Circuit affirmed the District Court's refusal to dismiss gross negligence claims by a gay man against a police officer who used violent force causing injury in the course of arresting the plaintiff in his home and then exhibited deliberate indifference to the man's need for medical attention. Finding that Maryland law provides immunity for police officers against charges of ordinary negligence for conduct in the course of duty, the court reversed the District Court's refusal to dismiss ordinary negligence claims against the defendants (Officer Braightmeyer and another officer who accompanied him). Although the plaintiff was unarmed and did not resist arrest, Office Braightmeyer allegedly pushed him to the ground, mashing his face into floor tiles, and cuffed

his hands behind his back, uttering an anti-gay slur, and refusing any relief to the plaintiff who was suffering shoulder pain thus restrained. The court rejected defendants' immunity claims against the plaintiff's constitutional equal protection claim, finding that Braightmeyer's conduct, considered in combination with his use of an anti-gay slur against the plaintiff, sufficed to ground an equal protection claim at this stage of the lawsuit. The *per curiam* opinion does not relate the reason why the police went to the plaintiff's home to arrest him. – *Arthur S. Leonard*

U.S. COURT OF APPEALS – 7TH CIRCUIT – This is an alleged sexual orientation employment discrimination and retaliation case involving Robbie Marshall, a gay internal affairs investigator at a county jail. U.S. District Judge Robert l. Miller, Jr. (S.D. Ind., sitting by designation from the N. D. Ind.), granted summary judgment against Marshall. The Seventh Circuit unanimously affirmed in *Marshall v. Ind. Dep't of Corr.*, 2020 U.S. App. LEXIS 28185 (7th Cir. Sept. 4, 2020), in an opinion by Senior Circuit Judge David Anthony Manion (Reagan), joined by Circuit Judge Diane P. Wood (Clinton) and Senior Circuit Judge Michael Stephen Kanne (Reagan). Marshall worked for the sheriff for over 20 years, identified as gay, and generally received good reviews and promotions. In 2015, however, he was arrested for drunk driving and received a written reprimand at work. There was also a complaint about his rowdy drunken behavior at a sheriffs' convention in 2016. Neither incident apparently had sexual overtones. In 2016, Marshall had cause to be involved in disciplining a subordinate (Storm), who was charged with submitting altered official reports and sharing confidential investigative information outside the office. Storm then accused Marshall of having sexually harassed him on two occasions in 2015. It is unclear if the harassment was ever substantiated, but Marshall was terminated – and Storm was demoted. Judge Miller was not persuaded that Marshall had a jury issue on either sexual orientation discrimination or retaliation. Marshall failed to present a prima facie case under the McDonnell Douglas burden-shifting framework. Judge Miller found (and the Seventh Circuit affirmed) that Marshall failed to show he met the expectations of his job but for his status in a protected class. The prior drunken incidents were fatal to this element of the framework, so the burden never shifted. Even if the burden shifted, Marshall failed to show that there was anyone with his employment record who was kept on staff because they were heterosexual even though they exhibited the same misconduct. The disparate treatment of Marshall and Storm (termination versus demotion) does not work, because Storm did not allegedly harass subordinates – and the courts found no other similarly situated comparators. The Seventh Circuit says twice that Judge Miller appropriately used the "Ortiz pile" in his determination of whether there was a material fact for a jury —without explanation or citation. This two-word phrase does not appear in any computerized legal research engine other than in this Seventh Circuit case, and Judge Miller did not use it or cite to "Ortiz" below. [It does not appear in any non-legal search engine either, except for a veterinary reference to hemorrhoids in farm animals, which seems astray.] But both words (although not together) appear in *Ortiz v. Werner Enterprises*, 834 F.3d 760, 765-6 (7th Cir. 2016), wherein the Seventh Circuit found that district courts' attempting to find a "mosaic" in considering disparate facts in employment discrimination cases were wrong. "All evidence belongs in a single pile" – thus, the "Ortiz pile." This concept may be unique to the Seventh Circuit, but this appears to be its etiology – and it was Marshall's undoing, even though the Ortiz case was remanded for trial. On retaliation, the court found that there was no evidence that Marshall's termination was based on his disciplining of Storm. This begs the question of whether Storm was making the harassment charges against Marshall in retaliation – but the court says that this is immaterial because the two personnel actions (Marshall and Storm) were directed by different executives and there were grounds to terminate Marshall separate from Storm's allegations. Moreover, "Marshall's exposure of Storm's breach of confidentiality is not protected by Title VII." Marshall's last gasp is that his termination was "anticipatory retaliation" for his future filing of an EEOC complaint on sexual orientation discrimination, which is recognized in *Beckel v. Wal-Mart Associates, Inc.*, 301 F.3d 621, 624 (7th Cir. 2002). It does not apply here, however, because the decision to terminate was made before the defendants knew that Marshall might file an EEOC complaint. – *William J. Rold*

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Zepeda v. Barr*, 2020 U.S. App. LEXIS 29552 (9th Cir. Sept. 16, 2020), the court of appeals denied an El Salvadoran woman's petition for review of asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The court recited only those facts corroborating the three reasons why it concluded that substantial evidence supported the Board of Immigration Appeals' affirmation of the Immigration Judge's denial of her application. First, substantial evidence supported the BIA's conclusion that Petitioner failed to demonstrate that the harm she suffered rose to the level of past persecution. Persecution is an extreme concept that was not inclusive of every sort of treatment our society regarded as offensive, the court explained. When determining whether threats rose to the level of persecution, the court looked

at all of the surrounding circumstances in order to determine whether the threats were actually credible and rose to the level of persecution. Contrary to Petitioner's proffered argument, the IJ and BIA did not apply an erroneous legal standard, but considered all the circumstances surrounding the mistreatment and threats Petitioner allegedly endured at the hands of her cousin, and correctly concluded that such behavior did not rise to the level of persecution. Petitioner's alternative interpretation of the evidence did not compel a finding of past persecution, the court reiterated. Second, substantial evidence also supported the finding that Petitioner failed to carry her burden to show that the El Salvadoran government is unable or unwilling to protect her. Her subjective belief that her cousin would harm her did not compel a finding that the authorities would be unable or unwilling to help her. Moreover, the record demonstrated to the court that the IJ thoroughly reviewed the 2017 U.S. Department of State Country Report and concluded that the El Salvadoran government had taken specific steps to combat discrimination against the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community. The court explained that it was not in a position to second-guess the IJ's construction of the 2017 country report. In short, the court concluded the evidence did not compel a finding that the El Salvadoran government was unable or unwilling to protect Petitioner. Third, substantial evidence supported the conclusion that Petitioner failed to demonstrate her eligibility for CAT relief. Although ineligibility for asylum and withholding of removal did not necessarily preclude eligibility for CAT relief, the court pointed out, Petitioner's claims under CAT were based on the same experiences with her cousin that the IJ determined did not rise to the level of persecution or demonstrate the government's unwillingness or inability to protect Petitioner from private actors. Thus, denial of CAT relief was supported by substantial evidence, the court concluded. The petitioner is represented by Walter Kronzer, III, Kronzer Law, Houston, TX. – *Wendy C. Bicovny*

DISTRICT OF COLUMBIA – The *Washington Blade* has filed suit in U.S. District Court against the U.S. Department of Labor for its failure to respond to a Freedom of Information Act request for copies of internal communications concerning the Trump Administration's new rule allowing federal contractors to discriminate against LGBTQ applicants and employees based on a broadly-worded religious/moral exemption from compliance with an Executive Order banning discrimination. The *Blade* reported on September 15 that lawyers for the Reporters Committee for Freedom of the Press had filed the lawsuit on its behalf. – *Arthur S. Leonard*

ILLINOIS – The Supreme Court of Illinois ruled on September 24 in *Sharpe v. Westmoreland*, 2020 IL 124863, that a civil union partner is a stepparent of their partner's children for purposes of child visitation rights. This case involves a child identified as A.S. A.S.'s parents, a heterosexual couple, were divorced. They had joint custody of A.S., but the father had residential custody. The father entered into a civil union with another person, who brought children of their own to the civil union. After the father died, his civil union partner wanted to maintain a relationship with A.S., but A.S.'s mother did not want to allow contact, claiming that her late husband's civil union partner had no legal relationship to the child. The Supreme Court of Illinois rejected that argument. "We find that, in enacting the Civil Union Act, the General Assembly intended to create an alternative to marriage that was equal in all respects. This intent was not limited to partners' rights as to each other. When a child's parent enters into a civil union with an individual who is not the child's other parent, that individual becomes the child's stepparent as defined by the Dissolution Act and thus meets that aspect of the standing requirement to petition the court for visitation, allocation of parental responsibilities, or both as allowed therein," wrote the court. The opinion does not specify the gender of the father's civil union partner, but from certain references in the opinion, it seems likely that the father's civil union partner is a woman. Although the Illinois legislature passed the statute mainly to provide a marriage substitute for same-sex partners (and it was eventually superseded in this respect by the passage of a marriage equality law), the civil union status was made available to any adult couple regardless of sex. Justice Garman delivered the court's opinion. – *Arthur S. Leonard*

INDIANA – In *Carter-Lawson v. Johnson*, 2020 WL 5750873 (N.D. Ind., Sept. 25, 2020), U.S. District Judge James T. Moody denied transgender woman Carmen Carter-Lawson's motion for summary judgment for violations of her equal protection rights against Antonio Johnson, a City of Gary employee. Security guard Johnson was working at the front desk of the police department when Carter-Lawson went into the women's restroom at the City of Gary Police Department. A female employee asked Johnson to get the man who went into the lady's restroom out of that bathroom. Johnson testified that he did not know to whom the employee was referring. Johnson also testified that he had seen Carter-Lawson before, and recognized her, and believed that Carter-Lawson was male. According to Carter-Lawson, before she could use the facilities she heard a knock on the door.

CIVIL LITIGATION *notes*

When she opened the door, she was met by Johnson. Johnson then asked, "What are you doing? You know you ain't supposed to be in here. You know you ain't got that fixed. You ain't got that changed down there. You know, you still got that thing down there. You can't be using this bathroom. Come on out of this bathroom." When Carter-Lawson opened the door, Johnson further testified that he believed Carter-Lawson was male because she was dressed like a male. Carter-Lawson left the bathroom to speak with Johnson's supervisor. As a result of this incident, Carter-Lawson filed suit against Johnson and the City of Gary for violations of her due process and equal protection rights. Judge Moody first dismissed Carter-Lawson's due process claims against Johnson because in her motion for summary judgment she did not make any argument regarding her due process claim. Further, since Carter-Lawson addressed her claims against the City for the first time in her reply brief, Judge Moody could not consider those claims. Thus, Judge Moody only addressed Carter-Lawson's equal protection claims against Johnson. Equal Protection protects against intentional and arbitrary discrimination, Judge Moody noted. Carter-Lawson's brief focused on the level of scrutiny that must be applied to her claims of sex discrimination and harassment. However, before reaching the question of the appropriate level of scrutiny, Carter-Lawson had to first prove that Johnson's actions had a discriminatory effect and were motivated by a discriminatory purpose, Judge Moody explained. Next, Moody set forth the requirements. To prove discriminatory effect, a plaintiff must show they are a member of a protected class, otherwise similarly situated to members of the unprotected class, and they were treated differently from members of the unprotected class. Discriminatory purpose required the defendant to have selected a particular course of action at least in part 'because of' the adverse effects upon an identifiable group. Carter-Lawson failed to establish that the evidence as to discriminatory effect and discriminatory purpose *was so one-sided* as to rule out the prospect of a finding in favor of Johnson on her claims, Judge Moody pointed out. After review of the parties' arguments and the record, Judge Moody concluded that the evidence, viewed in a light most favorable to Johnson, revealed genuine issues of material fact, including but not limited to the question of whether Johnson harassed and/or discriminated against Carter-Lawson because she is transgender. It was up to a fact-finder, and not the court on summary judgment, to assess the credibility of the evidence, Judge Moody said and therefore denied Carter-Lawson's motion for summary judgment. – *Wendy C. Bicovny*

KENTUCKY – U.S. Magistrate Judge Colin H. Lindsay has granted a stay of sexual orientation discrimination litigation against Lincoln Heritage Counsel of the Boy Scouts of America and two individual defendants who are employees of the Counsel because co-defendant Boy Scouts of America (BSA) has filed a bankruptcy petition, activating the automatic stay in bankruptcy. *Simpson v. Lincoln Heritage Council, Inc.*, 2020 U.S. Dist. LEXIS 174666, 2020 WL 5665077 (W.D. Ky., Sept. 23, 2020). Plaintiff argued that the action should be allowed to continue against the co-defendants, but Judge Lindsay agreed with their argument that because of the close entanglement between the BSA and its chartered local council and its employees, the BSA would inevitably be drawn into the litigation. Also, since BSA was funding the defense for the co-defendants, it would also incur litigation expenses even though the action against BSA as such was stayed. The opinion says nothing specifically about the factual allegations by Simpson, other than to identify this as a sexual orientation discrimination case. Plaintiff Joshua Simpson is represented by Georgia T. Connally, Louisville, KY. – *Arthur S. Leonard*

MINNESOTA – A three-judge panel of the Court of Appeals of Minnesota ruled 2-1 on September 28 that the Anoka County District Court appropriately refused to grant a motion to dismiss by the Anokin-Hennepin School District No. 11, responding to a complaint that the district violated the Minnesota Human Rights Act and the Equal Protection Clause of the state constitution when it directed a transgender boy attending Coon Rapids High School that he could not use the regular boys' locker room facilities, but instead had to use a special enhanced privacy boys' locker room that the school constructed to accommodate transgender students in response to N.H.'s attendance at the school. *N.H. v. Anoka-Hennepin School District No. 11*, 2020 WL 5755485, 2020 Minn. App. LEXIS 272. The School District argued that it had adequately accommodated the student by constructing the separate facility, and that a twenty-year old Minnesota Supreme Court ruling in an employment case brought by a transgender woman over the issue of restroom access required dismissal of the student's claim. Writing for the panel majority, Judge Reyes observed that the provisions of the MHRA pertaining to education and employment differed materially in their wording, and that students are guaranteed equal access to all facilities, so *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), which had denied the transgender employee's claim, was not binding in this case. (The court also noted that subsequent legislative and administrative developments may have superseded the ruling in *Goins*.) Furthermore, as Minnesota courts follow federal precedents in construing their anti-discrimination laws, the court found the district court's ruling was consistent with a growing body of federal appellate and district court precedents

which have almost unanimously ruled in favor of transgender students seeking equal access to sex-segregated facilities consistent with their gender identity. Furthermore, the district court was correct to deny the motion to dismiss the constitutional claim, although the court of appeals found that the district judge mistakenly applied strict scrutiny when heightened scrutiny should apply, equating gender identity discrimination claims with sex discrimination claims. The dissenter, Judge Johnson, argued that *Goins* was a binding precedent on this case and, furthermore, that a transgender boy is not "similarly situated" to a cisgender boy for purposes of an equal protection analysis. The dissenter noted that many of the decision relied on by the majority involved restroom access, not locker room access as in this case. The dissenter agreed with the school district's argument that it had adequately accommodated N.H. by constructing an enhanced privacy addition to the boys' locker room for his use, and not requiring him to use the girls' locker room, as some defendant school districts had done. Both the majority and the dissent both emphasized that the ultimately ruling on the merits would turn heavily on the facts, particularly with respect to the physical layout of the boys' locker room. Since this was a ruling on a motion to dismiss, N.H.'s factual allegations were relied upon to determine whether he had stated a statutory and/or constitutional claim. N.H. is represented by attorneys from Stinson LLP, the ACLU of Minnesota, and Gender Justice. The court received eight amicus briefs from a wide range of organizations. – *Arthur S. Leonard*

NEW YORK – In *Padilla v. Sacks and Sacks, LLP,* 2020 WL 5370799 (S.D.N.Y., Sept. 8, 2020), U.S. District Judge George B. Daniels granted defendants' motion to dismiss all claims against individual defendants by a fired paralegal, Lisa J. Padilla, a gay Latino-American woman. Padilla filed suit against (1) Kenneth Sacks, Evan Sacks, and Devon Reiff, as Individual Defendants, for sexual harassment and discrimination on the basis of gender and sexual orientation, wrongful discharge, in violation of Title VII of the Civil Rights Act of 1964, and (2) Sacks and Sacks, LLP, Kenneth Saks, Evan Saks, and Devon Reiff, for intentional infliction of emotional distress under New York tort law. She also asserted her discrimination claims under the New York State and City Human Rights Laws. Kenneth and Evan Sacks are senior name partners of the Sacks Law Firm and Reiff is an attorney at the firm. Padilla alleged that during her employment she was subject to persistent and unwanted sexual comments and questions by multiple attorneys, including Evan Sacks and Reiff. She further asserted that she clearly conveyed to her employers that the comments in question were unwelcome, but despite her protests, they continued. Further, Evan and Kenneth Sacks allegedly ignored the referenced conduct, which led to others at the Firm engaging in similar conduct. Padilla contended that after she complained about her treatment, Defendants retaliated against her, *inter alia*, by withdrawing legal representation of her in an ongoing tort case, segregating her from other employees, and ultimately terminating her employment. In granting the three Individual Defendants' motions to dismiss Padilla's claims under Title VII, Judge Daniels explained that the Second Circuit has unambiguously stated, "Individuals are not subject to liability under Title VII." As to Padilla's IIED claim, Judge Daniels noted that to form the basis of an IIED claim under New York tort law, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Here, Padilla alleged that she was routinely harassed on the basis of her gender and sexual orientation. On numerous occasions, Defendants Evan Sacks and Reiff allegedly asked, both in person and over text message, about Padilla's (1) sexual practices, (2) whether she engaged in "kinky behavior," and (3) whether she had sexually suggestive photographs. At other times, Padilla allegedly faced questions about lesbian bars, requests to be taken to such bars, and comments on her appearance. Simply put, Padilla's allegations against Defendants constitute improper behavior, but Judge Daniels concluded that they do not rise to the level of extreme and outrageous conduct. Though Padilla alleged that she was verbally harassed and subjected to ongoing humiliation, she was not physically threatened, assaulted, or otherwise subjected to such outrageous conduct to meet the extremely strict standard for IIED, Judge Daniel added to support his grant of dismissal of Padilla's IIED claim. Her discrimination claim against the law firm continues. Plaintiff is represented by John Walshe, John Walshe & Associates, New York City. – *Wendy C. Bicovny*

NORTH CAROLINA – In *Blount v. Ajinomoto Health & Nutrition*, 2020 U.S. Dist. LEXIS 159709 (W.D.N.C., Sept. 2, 2020), U.S. District Judge Louise W, Flanagan allowed *pro se* plaintiff David Lee Blount's hostile work environment claim to proceed, but dismissed *without prejudice* his claim for retaliation. Blount, a gay man, asserted claims for hostile work environment and retaliation on the basis of sexual orientation under Title VII of the Civil Rights Act of 1964 against his employer, Ajinomoto Health & Nutrition & Nutrition. Judge Flanagan incorporated the following facts contained in the Magistrate Judge's memorandum and recommendation. While an employee, Blount alleged he was the target of bullying and harassment because of his

sexual orientation. Colleagues called him "a gay faggot" and his foreman called him "a whiny bitch like his wife." Blount claimed reports of this behavior were constantly ignored. When Blount told the human resources director about what his foreman called him, the director "laughed in Blount's face." Another foreman reported Blount's foreman's behavior, yet Ajinomoto took no action. Blount said the foreman's boss knew about this mistreatment. But instead of addressing this behavior, the company retaliated against Blount by writing him up after he complained. Blount further said his complaints about workplace harassment have been "ignored for years." Blount feared for the safety of himself and his boyfriend because the employees who bullied him knew where he lived and one employee said he would "follow someone home from work to beat them into the ground." Blount's mental health has suffered because of this. He has been on medical leave since April 2020 and sees a therapist for panic attacks, fear, severe depression, and suicidal thoughts. Based upon the foregoing, Judge Flanagan adopted the M & R in its entirety, determined that Blount's claim of a hostile work environment was not frivolous, and ordered that his complaint be served. However, the judge ruled that Blount's retaliation claim be dismissed, *without prejudice*, for failure to state a claim, leaving open the possibility of Blount filing an amended complaint with more factual allegations to support the retaliation claim. – *Wendy C. Bicovny*

VIRGINIA – *Sarco v. 5 Star Financial, LLC*, 2020 U.S. Dist. LEXIS 166196 (W.D. Va., Sept. 11, 2020) is one of several cases in which motions to dismiss sexual orientation discrimination claims under Title VII were held in abeyance pending a Supreme Court decision in *Bostock v. Clayton County*. Based on *Bostock*, which the court discusses at unnecessary length, Judge Michael F. Urbanski found that Joshua Sarco's claim was actionable. Sarco, an out gay man who describes himself as a flamboyant dresser who was well known in the workforce as being gay, alleges that he attracted discriminatory remarks and treatment from supervisors and co-workers, and was then discharged, purportedly for poor work, despite having one of the best work records in the relatively small (but large enough to be covered by Title VII) workplace. Judge Urbanski determined that Sarco's factual allegations were sufficient to survive a dismissal motion as to his sexual orientation discrimination and sex stereotyping claims. "Sarco demonstrates a plausible nexus between his treatment at work and his gender nonconforming behavior and sexual orientation," wrote Judge Urbanski. The employer argued that this claim was not exhausted, because Sarco did not mention hostile environment specifically on his EEOC charge form. However, the court noted that Sarco did allege the facts on which he based his claim and it was part of the EEOC's investigation, so the court found that administrative exhaustion had taken place since the employer was clearly on notice of it during the administrative process. However, the judge found Sarco's factual assertions inadequate to ground the claim. "Sarco may have felt the environment was subjectively hostile, but the facts pled do not clear the 'high bar' of being objectively hostile," wrote the judge. "Sarco provides specific examples of comments that could be perceived as offensive as well as decisions made by superiors that could be perceived as adverse. However, he does not plead bigoted statements sufficiently severe or frequent to meet the objectively hostile standard required for a hostile work environment claim. Nor does he claim receiving physical threats, experiencing an impact to his ability to carry out his responsibilities, or suffering an injury to his psychological well-being, which could have demonstrated the severity of the discrimination as implied by the magnitude of its effect," wrote Urbanski, reflecting the general hostility that many federal trial judges have shown to hostile environment claims by gay men. (Note that the Supreme Court has specifically rejected the contention that a plaintiff in a hostile environment case has to show psychological injury in order to win their claim.) Thus, the court granted the motion to dismiss the hostile environment count of the complaint. Sarco is represented by Nicholas August Hurston, Hurston Law Offices, PLLC, Staunton, VA. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, 6TH CIRCUIT – In *United States v. Farrera-Brochez*, 2020 WL 5798068, 2020 U.S. App. LEXIS 31137 (September 29, 2020), the 6th Circuit affirmed the conviction of Mikhy Farrera-Brochez, a gay Singaporean, on counts of extortion and misuse of identification information of individuals, in a bizarre case whose details would take too long to tell here. In brief, the appellant is described as having been married to another man, a doctor employed by Singapore's Ministry of Health who had access to the national registry of HIV+ individuals maintained by the government. He believed that this registry was dangerous to the people listed on it and could be abused by the government, which is not a supporter of LGBT rights, and he managed to obtain access to it, copy it without authorization, and send a copy to his mother, who lived in Kentucky. He and his husband fell afoul of Singapore authorities, and both were sentenced to prison there. His husband remained in prison after he was released, and he left for Kentucky to live with his mother, accessed the copies of the Registry he had sent to her, and then attempted to use them to force the Singaporean government to

release his husband, release his cats (!), and eliminate use of the Registry. He did this by sending links to the Registry to various Singapore officials with threats to make them public if they did not accede to his demands. These actions came to the attention of U.S. federal authorities, and he was prosecuted on the charges mentioned above. He claimed that his acts fell outside the prohibitions of the federal extortion statute because he was acting for the public good, not for private gain, but the court of appeals, in an opinion by Judge Raymond Kethledge, rejected the argument, as well as the argument that as nobody was harmed by the release of Registry information, he had not violated the law against misusing identifying information about individuals. The court conclude that the trial record provide sufficient evidence for conviction on all counts. This brief summary leaves out many interesting details, for which interested readers are directed to the court's opinion. The appellant is represented by Timothy J. McKenna, Cincinnati, OH.

CALIFORNIA – U.S. Magistrate Judge Allison Claire recommended denying a petition for habeas corpus in *Chapa v. Lizarraga,* 2020 WL 5642358, 2020 U.S. Dist. LEXIS 174029 (September 22, 2020), a case in which a state trial judge sentenced the petitioner to a lengthy term in prison after he was convicted by a jury on charges of sexual improprieties with two teenage boys. The petitioner, a gay man who lived with his mother and his gay adult partner, became friendly with neighborhood boys, employing them on various tasks. According to their testimony, he eventually had them engaging in sex with them until, as they grew older, they declined to continue, ultimately telling parents who reported the petitioner to the police. The convictions were upheld through state court appeals. Now he challenges the constitutionality of his convictions based on the contention that the trial court's allowance of expert testimony on Child Sexual Abuse Accommodation Syndrome, and testimony by the expert that victims of childhood sexual abuse rarely make false accusations against adults, violated his due process right to a fair trial. While stating that she was troubled by some of the testimony that was allowed as dangerously close to improper profiling, Judge Claire noted that constraints imposed on the court by the Antiterrorism and Effective Death Penalty Act of 1996 sharply limited the grounds on which she could grant a writ to overturn a conviction that had been upheld on appeal through the state court system. The absence of U.S. Supreme Court precedent on the central issue in the case doomed the petition to failure in this instance. The expert, who was evidently well-versed in what one can or cannot say to avoid crossing a line, had made clear that it was "difficult" to study the issue of false accusations, and that he was not stating an opinion about the testimony of the victims in this case, since he denied any familiarity with the trial record. The petitioner represented himself on the petition.

IOWA – Douglas Lindaman, a gay man, was convicted of assault with intent to commit sexual abuse, and at sentencing was informed of the deadline to register as a sex offender. He filed an appeal of his conviction and neglected to register – he claims because he thought that filing the appeal of his conviction would automatically "vacate" the sentence pending a decision by the appeals court. He was mistaken, however. Despite visits from law enforcement officials after he missed the deadline, he continued to fail to register until finally, when he was arrested for failing to register, he registered in order to get out of jail pending trial. He was ultimately convicted of failing to register and sentenced on that charge. In this appeal, he unsuccessfully raised several points, including claiming the trial court erred by failing to require potential jurors to fill out an extensive questionnaire about their attitudes toward sexual issues, and by failing to give an instruction to the jury regarding anti-gay bias. In *State of Iowa v. Lindaman,* 2020 WL 5229188 (Iowa Court of Appeals, September 2, 2020), the court affirmed his conviction and sentence. After noting that the issues concerning sexual orientation were not appropriately considered in this appeal of his conviction for failing to register within the deadline set by the court, the court found that the trial court had not erred in these rulings, pointing out that the jury did receive a general instruction about avoiding bias or personal sympathy and basing their determinations on the facts and the law. Lindaman was represented on this appeal by Andrew C. Abbott of Abbott Law Office, P.C., Waterloo, but the court noted that Lindaman had submitted his own statement pro se in addition to the papers filed by his lawyer, one suspects on the sexual orientation issues.

MISSOURI – In *Beatty v. Norman*, 2020 WL 5642270, U.S Magistrate Judge Shirley Padmore Mensah rejected a petition for *habeas corpus* filed by Jerry Lewis Beatty, who had been convicted by a jury on several criminal counts in state court in connection with his violent acts against his girlfriend, who had taken out an order of protection against him which he violated. As relevant to *Law Notes*, Beatty argued that the trial court erred in not allowing him to introduce evidence about the HIV+ status of his girlfriend, as he sought to make a case that his acts were provoked by her first revealing that status to him *after* they had engaged in sex, so he was acting in the "heat of passion." He argued ineffective assistance of counsel, contending that his defense lawyer failed to provide the trial court with adequate arguments to oppose the prosecutor's motion *in limine* to exclude any evidence concerning the victim's HIV status. Judge Mensah,

concurring with the appellate courts of Missouri on this issue, found that Beatty's counsel had made a strenuous argument in support of allowing him to present the heat of passion defense, but that the evidence in the record made that defense irrelevant. Beatty's girlfriend disclosed her HIV status to him several days *before* his actions that gave rise to the prosecution, so the "heat of passion" defense would not be available to him, as he had several days to "cool down" before he acted. Furthermore, the court found that admitting evidence of the victim's HIV status would have been prejudicial to the prosecution. The parties had consented to the jurisdiction of the magistrate judge to rule on the merits. In light of the ruling, Judge Mensah denied a motion by Beatty to appoint counsel to represent him.

VERMONT – A fascinating incidence of textual literalism by the Vermont Supreme Court takes place in *State v. Billington*, 2020 VT 78, 2020 Vt. Lexis 93 (Sept. 18, 2020), where the Supreme Court affirms a ruling by the trial court that Robert J. Billington could not be tried on the charge of aggravated sexual assault, despite his failure to disclose his HIV-status to the female complainant in three sexual incidents, because the statute in question does not apply if the sexual acts were consensual. Justice Karen R. Carroll wrote for the court. The court was confronted with a case where the defendant lied about his HIV status to his sexual partner, even responding negatively to her direct question whether he had an STD. Her suspicions were aroused when, after she consented to have sex with him, Billington pulled out a condom. She testified that most men don't use condoms when their female sexual partner has been "fixed," so this alerted her to ask him the question, and he said no. They had sex two days in a row using a condom. When he asked to have sex a third time, she expressed reluctance, but consented to his request to be able to masturbate on her. "As defendant masturbated, he continued his effort to have sex with complainant, an effort which complainant continuously rejected," wrote the Court. "Defendant eventually forced his penis into and ejaculated inside of complainant's mouth against her will." Afterwards, she begged him again to tell her whether he had an STD, and he finally admitted he was HIV+. Vermont does not have a statute making it a crime for a person with a sexually transmitted disease, in general, or HIV in particular, to fail to disclose the fact to a sexual partner, so the state proceeded under the aggravated sexual assault statute, arguing that Billington's failure to disclose his HIV+ status vitiated her consent. Both the trial court and the Supreme Court seized upon the lack of the word "informed" before "consent" in the statute, finding that the legislature did not intend to require informed consent, merely consent. So long as the sex was voluntary (i.e., the complainant agreed to have sex with the defendant), a person could not be tried under the aggravated sexual assault statute for engaging in sex without disclosing his HIV+ status. Other charges against Billington remain, however, as the court was addressing only the state's appeal from the trial judge's dismissal of the aggravated sexual assault charge. Billington is represented by Matthew Valerio, Defender General, and Dawn Matthews, Appellate Defender, Montpelier.

PRISONER LITIGATION NOTES

By William J. Rold

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

U.S. COURT OF APPEALS – THIRD CIRCUIT – Federal transgender prisoner Jeremy Pinson succeeds *pro se* in securing a reversal of summary judgment in favor of a health services administrator and a physician on her Eighth Amendment gender confirmation surgery claims. She also obtained reversal of a negligence claim dismissed under the Federal Tort Claims Act. Circuit Court Judges Patty Schwartz and L. Philipe Restrepo (both Obama) and Senior Circuit Judge Morton I. Greenberg (Reagan) unanimously reversed and remanded in a *per curiam* not-for-publication decision in *Pinson v. United States,* 2020 U.S. App. LEXIS 28626 (3d Cir., Sept. 10, 2020). The events occurred over four months at FCI Allenwood, and the Senior U.S. District Judge Sylvia H. Rambo (M.D. Pa.) dismissed the case. Pinson was receiving weekly psychotherapy and hormones for transition. She spent much of her time at Allenwood in some type of segregation either for her safety or for incidents of self-harm, resulting in suicide monitoring. The defendants argued that the administrator was not responsible for medical decisions and that the physician engaged in professional judgment because Pinson did not meet criteria for gender confirmation surgery for three reasons: (1) she had only been on hormone therapy for five months, when a year was the standard; (2) her psychiatric illnesses were not stabilized; and (3) her confinement outside of general population deprived her of "real life" experience living as a woman, even in a prison. They also argued that injunctive claims were mooted by Pinson's transfer to Indiana. Pinson countered by affidavit that the two defendants had told her she would not receive care if she did not stop filing grievances and that she would never receive surgery because "FOX News and Republicans would go crazy." She also said that she should receive damages even if no longer at Allenwood. The Third Circuit ruled that Pinson's uncorroborated averments "were sufficient to withstand the defendants' summary judgment

motion." Her affidavit is "about the best that can be expected from [a pro se prisoner] at the summary judgment phase of the proceedings," citing *Brooks v. Kyler*, 204 F.3d 102, 108 n.7 (3d Cir. 2000). [Note: the footnote in *Brooks* is at best a "*cf.*" cite. It dealt with the legal issue of whether an inmate must have tangible serious visible injuries to state a claim of excessive force.] The sworn allegation of non-medical motivation for denial of surgery is enough to require trial against both defendants. The court also reverses dismissal of the FTCA claim, which involved giving Pinson a razor (despite knowing she was at risk of self-harm), which she then used to cut her arm, leg, head, scrotum, and tongue. Pinson had a medical permit to shave daily and the razor was usually returned. On the day she cut herself, although she was not then on razor restrictions or suicide monitoring, she had refused to return the razor, and staff did not forcibly retrieve it. She said she told an officer she was going to cut herself, and she said the officer told her he did not care "because he was going to go home at the end of his shift regardless." The officer denied this. The Third Circuit found that Judge Rambo improperly weighed the evidence on negligence in granting summary judgment on this claim, citing *Paladino v. Newsome*, 885 F.3d 203, 209-10 (3d Cir. 2018); and *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004). This authority is also thin. *Paladino* involved exhaustion under the Prison Litigation Reform Act, and the district judge erred by refusing to consider the plaintiff's deposition on the point. Since PLRA exhaustion is a bench issue, the "error" would not have occurred if the judge simply had weighed the testimony and found it less convincing. *Marino* involved a legal issue of whether a "special employee" was covered by workers' compensation, with no material contested facts. The reversal strikes this writer as a reach. There is another Pinson case in this issue under "Minnesota."

U.S. COURT OF APPEALS – THIRD CIRCUIT – In March, *Law Notes* reported the summary judgment granted defendants against transgender prisoner Mark-Alonzo Williams' protection from harm case by U.S. District Judge Sylvia H. Rambo (March 2020 at page 34), reported 2020 U.S. Dist. LEXIS 20105 (M.D. Pa., Feb. 6, 2020). Now, the Third Circuit has summarily affirmed in *Williams v. Wetzel*, 2020 U.S. App. LEXIS 28676 (3d Cir., Sept. 10, 2020), in a not-for-publication *per curiam* opinion, by Circuit Judges L. Felipe Restrepo (Obama) and David James Porter (Trump), and Senior Circuit Judge Anthony Joseph Scirica (Reagan). Williams, who is black and gay, had received death threats from another inmate, who was then moved off the cellblock. The other inmate found his way to Williams anyway after release from segregation and beat him and sexually assaulted him. Williams was then moved to another prison where he had known "incompatibles," but he was again placed on a different cellblock. Williams alleged this happened three more times, each ending in an assault. The Court of Appeals found no authority for the argument that it was deliberately indifferent to transfer an inmate to a prison where he had enemies if the "incompatibles" were put on different cellblocks. This is not true. *See Diamond v. Owens,* 2015 U.S.Dist. LEXIS 122189 (M.D. Ga., Sept. 14, 2015), wherein counsel (Southern Poverty Law Center) was permitted to go forward on a protection from harm case involving central office defendants and multiple wardens after several transfers of a transgender plaintiff, where the same "we didn't know" defense was rejected. The lack of more widespread authority is probably attributable to *pro se* inmates' inability to marshal a pattern and practice case involving multiple institutions and state-wide defendants. Here, the Third Circuit observed: "[I] n this case, the inmates who assaulted Williams were not individuals with whom he had separations." *Farmer v. Brennan,* 511 U.S. 825, 843 (1994), rejected this burden: "Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." Applying this test to summary judgment on subjective intent after multiple assaults, the court would have to conclude that there was no jury question on the obviousness of the danger, even after the third assault. This strikes this writer as wrong, as it did in the report of the decision below. The nub – why was Williams, a known victim, repeatedly transferred to institutions with known aggressors about whom he had separation orders? – is not addressed. The Third Circuit also summarily affirmed Judge Rambo's denial of Williams' Equal Protection claims based on race and sexual orientation, using "class of one" theory and an odd reference to Williams' having no equal protection interest in seeing that his assailants were prosecuted. Both framings beg the question of discrimination based on race or sexual orientation. As to this, the court wrote that Williams "failed to create a genuine issue of fact that he was treated differently from similarly situated inmates based on his race and sexual orientation."

U.S. ARMY COURT OF CRIMINAL APPEALS – Appellant Donald P. Laviolet was convicted of various charges after a general court-martial and sentenced to eleven months confinement and a bad conduct discharge from the Army. He was sent to a Navy brig, and this case deals with alleged sexual harassment and cruel and unusual punishment by a corporal, who was a guard at the brig. The U. S. Army Court of Criminal Appeals ruled that the corporal's conduct, while "inexcusable,"

did not violate Laviolet's rights under the Eighth Amendment or under Article 55, its counterpart under the Uniform Code of Military Justice ["UCMJ"], in *United States v. Laviolet,* 2020 WL 5372278 (Army Ct.Crim.App., 4 Sept. 2020). [Note: each branch of the armed forces has an officer-comprised appellate court that hears appeals from courts-martial. The United States Court of Appeals for the Armed Forces, comprised of civilians, has discretionary review (with some exceptions) over these courts. With very narrow exceptions, review of cases by the United States Supreme Court through *certiorari* is limited by 28 U.S.C. § 1259 to cases heard by the Court of Appeals for the Armed Forces.] The Uniform Code of Military Justice allows these service branch appeals courts to rule on conditions of confinement claims. The first issue here is whether the court should remand for a factual hearing. It finds that it is not necessary because, even taking all the allegations as true, there is no evidence that Laviolet presented his allegations to administrative officials, which is required "exhaustion." This alone would be dispositive, but the court continues by addressing the sufficiency of the legal claims. It finds that, even if Laviolet had exhausted, there would be no need for a hearing because, assuming the facts to be true, he has no legal claims under the Eighth Amendment or Article 55. Laviolet alleged that the corporal told Laviolet he was gay and shared stories about his sexuality and his boyfriend. The corporal would wink at him and flirt, and they agreed to meet up after Laviolet's incarceration. Laviolet's complaints were relatively mild at first, because (he said) he was trying to get along while a prisoner; but his complaints increased as the corporal's behavior became more aggressive, including watching Laviolet shower, selecting him for intrusive searches, "cupping" his genitalia during the searches, and the like. The corporal's behavior did not include physical brutality or demands for sexual favors. The court applies both Eighth Amendment and UCMJ precedent. Laviolet must show a "sufficiently serious act or omission," as well as a "culpable state of mind," under *United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006), citing *Farmer v. Brennan,* 511 U.S. 825, 832-4 (1994). The corporal's actions were not serious enough. The court compared other cases of sadistic striking and "karate chopping" of genitals in finding the "cupping" to be "inappropriate" but not malicious. Here, the court does not address the emerging case law that looks at correction officers' conduct in terms of self-gratification with no penological purpose. The corporal did not threaten Laviolet with sexual assault or try to lock him or trap him into coercive sex. While Laviolet says he had "anxiety," there is no clinically documented psychological trauma. The court also finds that the corporal did not have a "culpable" mental intent, stating that the corporal's actions are not the type "that, by their nature, reflect a culpable mental state of mind," quoting *United States v. Brennan,* 58 M.J. 351, 354 (C.A.A.F. 2003). The corporal's desire for a sexual and personal relationship with Laviolet upon his release, while unprofessional, did not evince deliberate indifference.

ARIZONA – Transgender inmate Jeremy Pinson, *pro se,* claims in this case that Arizona corrections officials illegally seized legal materials from her segregation cell in violation of the First Amendment, and she seeks sanctions in *Pinson v. Othon,* 2020 WL 5802108 (D. Ariz., Sept. 29, 2020). Two other cases from this prolific plaintiff appear in this issue of *Law Notes*. Here, U.S. District Judge Rosemary Marquez denies all relief. Defendants conceded that they confiscated some 200 pages of documents from Pinson's cell, but they insist that only eight pages were for Pinson's own legal work, which they returned to her. If the legal work belonged to someone whom Pinson was helping, her ability to help was limited in segregation; and she could only have possession of such documents in the segregation mini-law-library, not in her cell. Pinson did not present evidence that her own First Amendment right to access the court had been impaired. It may be useful to advocates who face deliberate spoliation of their inmate clients' legal papers to save reference to two cases where such conduct was found actionable. In *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2001), the court found that "the taking of an inmate's legal papers can be a constitutional violation when it infringes [her] right of access to the courts"; and withholding of legal papers must have a penological justification. In *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001), government counsel "received, read, and used bootlegged copies of legal correspondence between inmates and their lawyer" and used the information for tactical advantage. The conduct in Pinson's case did not rise to these tests. Moreover, as to sanctions, Pinson did not comply with F.R.C.P. 11's requirements of a safe harbor letter and separate motion, and she did not show a sanctionable breach of discovery rules in her case. Finally, Pinson already raised identical claims without success in another case in the District of Arizona.

CALIFORNIA – U. S. Magistrate Judge Karen L. Stevenson dismisses black transgender inmate James Leroye Jefferson's First Amended Complaint in *Jefferson v. Cabral,* 2020 U.S. Dist. LEXIS 160424 (C.D. Calif., Sept. 2, 2020). She grants the *pro se* plaintiff leave to amend. Judge Stevenson begins by quoting a snippet of 28 U.S.C. § 1915A, involving the screening review of prisoner complaints that directs district judges to "dismiss the complaint if the court determines that the complaint, or any portion thereof: (1) is frivolous or malicious; (2) fails to state a claim

upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief." Judge Stevenson omits the language that precedes the word "dismiss." Section 1915A(b) begins: "On review, the court shall identify cognizable claims or dismiss…" Far too many district court judges and magistrates ignore this requirement of the screening process, as Judge Stevenson did here. This is the first requirement of screening, and it is why the later language refers to dismissing the "portions" of the complaint that fail to state a claim, etc. The crux of Jefferson's complaint is that Officer C. CaBriel demanded she be his "girlfriend," or he would cause her to be harmed. When she refused, she claims he discriminated against her on the basis of race and gender identity through slurs (like "fag" "n-word", "ape"), which he stated to her and about her, and which he wrote near her name on inmate rosters. She further claims that Officer CaBriel incited other inmates to attack and burn her and harassed her at her kitchen job. Judge Stevenson ruled that the first complaint was too vague. Jefferson attached copies of her grievances to her amended complaint, and she dropped defendants other than CaBriel. Judge Stevenson wrote that she could not tell who was being sued because Jefferson calls the officer both "CaBriel" and "Cabral" in the amended complaint. This is not true. Jefferson consistently refers to the defendant as "CaBriel" in both pleadings in PACER. California DOC uses the name "Cabral" to refer to the officer about whom Jefferson is complaining in her grievances. Jefferson never does. It is unclear how Jefferson is expected to clarify a discrepancy she did not create. Confusion might justify dismissal if California DOC was genuinely unable to respond, but the grievances show that it had no problem identifying and interviewing CaBriel/Cabral about the complaints. The *pro se* pleadings contain several confusing claims, but it seems to this writer that Jefferson may have viable claims of denial of Equal Protection and of deliberate indifference to her safety that she will not be able to frame legally without counsel.

ILLINOIS – *Pro se* gay inmate Carlos H. Garcia will get a trial on his claim that Internal Affairs Investigator Jeffrey Molenhour was deliberately indifferent to his safety in events leading up to Garcia's rape in *Garcia v. Funk,* 2020 WL 5801908 (S.D. Ill., Sept. 29, 2020). U.S. Magistrate Judge Reona J. Daly (who apparently has the case for all purposes) grants summary judgment against Garcia as to other defendants and as to all defendants on First Amendment and Equal Protection claims. From the discovery she finds no triable issue that any defendant was motivated to retaliate against Garcia for being gay or expressing himself as gay or that any defendant denied him equal protection on that basis. On protection from harm, the facts leading to a trial against Molenhour cannot be resolved on summary judgment. Garcia says that he is not a gang member but became embroiled in a gang dispute between the Latin Folks and the Kings at his first prison, when the Latin Folks tried to coercive him into stabbing a King gang member. Garcia sought protection, and he was transferred to Lawrence Correctional Facility. Upon arrival at Lawrence, Garcia informed Molenhour, who was then a counselor, about his sexual orientation and his fears that the gang problems would follow him. Molenhour said: "Well, no one has ever jumped on you and if anybody does, let us know," a statement Molenhour denies. Later, Garcia saw a Latin Folks gang member from the previous prison at Lawrence and expressed his fears again to Molenhour, saying "he's going to see me and he is going to tell all of the Latin Folks, and it's going to be the same thing again." Molenhour either did or did not arrange for the arriving Latin Folks gang member to be moved to another part of the prison. In either event, Garcia, who had been celled alone, was given a cellmate, who was another member of the Latin Folks gang. Garcia also filed grievances, and members of his family called Lawrence with concerns. Garcia lied to his cellmate about his history, saying he had never been in a prison prior to Lawrence, but the cellmate found out about Garcia's history from other Latin Folks gang members. This led to the cellmate's rape of Garcia. Molenhour argued in support of summary judgment that he did what he could and that he did not have authority to grant protective custody to Garcia. Judge Daly found that, although there was insufficient evidence that other defendants had enough knowledge of the risks to Garcia to create a jury issue on deliberate indifference to his safety, despite the grievances, this was not true with Molenhour. A jury could find Molenhour liable for deliberate indifference to Garcia's safety even if he did not have authority to move Garcia. He certainly had authority to recommend it, to report the danger, and to take other protective steps. A jury could find on these facts that he did nothing. He knew of a specific threat to Garcia's safety from the Latin Folks at Lawrence and it does not matter that the rape was perpetrated by a member of the gang who was not at the prior prison. *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010), citing *Farmer v. Brennan,* 511 U.S. 825, 833-4 (1994). Molenhour did not have to know the "precise identity of the threat" if it was specific enough. *Dale v. Poston*, 548 F.3d 563, 570 (7th Cir. 2008). Molenhour is also not entitled to qualified immunity in light of *Farmer.* 511 U.S. at 847.

INDIANA – Transgender inmate Anastaisa Renee, *pro se,* sues the corrections commissioner and the warden on claims concerning strip searches, feminizing items, and gender

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confirmation surgery. In *Renee v. Neal,* 2020 WL 5230605 (N.D. Ind., Sept. 2, 2020), U.S. District Judge Robert L. Miller allowed claims to proceed on strip searches, including damages claims against the warden. Renee is receiving hormones and has been allowed a bra. Her requests for feminine grooming and hygiene items were denied, as was her request for gender confirmation surgery. Because her work assignment is in the kitchen, she is subjected to strip searches after every shift. She challenges this requirement as unjustified, but she concedes that her real beef is with the manner in which the officers conduct the search, laughing and unnecessarily touching her breasts. Judge Miller finds that the commissioner is not responsible in damages for the way the searches are conducted, under *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) – but the warden might be. He allows injunctive claims on the searches to proceed to trial against both defendants, but damages will be tried only against the warden. Renee plead her claim for feminizing accommodations as a First Amendment violation. Judge Miller finds no support in Seventh Circuit law for such a First Amendment right and cites *Jones v. Warden of Stateville,* 918 F. Supp. 1142, 1146 (N.D. Ill., 1995), which denied it. Alternatively, he analyzes feminine accommodation under the Eighth Amendment, finding no such right under *Campbell v. Kallas,* 936 F.3d 536, 549 (7th Cir. 2019). He also cites *Keohane v. Florida DOC,* 952 F.3d 1257, 1275 (11th Cir. 2020). He adds that "[t]he court doesn't intend to minimize the comfort such items might [bring]." On confirmation surgery, Renee was unable to produce a single professional recommendation for it, so she loses summary judgment on this point as well.

MICHIGAN – Transgender prisoner Joshua Snider sued *pro se* for violations of her rights, naming over a dozen defendants, in *Snider v. Corizon Med.,* 2020 U.S. Dist. LEXIS 166416, 2020 WL 5494497 (W.D. Mich., Sept. 11, 2020). Her complaint, with attachments, is over 70 pages. U.S. District Judge Paul L. Maloney screened it before service in a lengthy opinion. He dismisses without prejudice claims unrelated to health care and those involving only isolated incidents. The discussion is useful for Sixth Circuit practitioners facing misjoinder and severance issues. There is also a good circuit survey on preserving statutes of limitations for plaintiffs when dismissing mis-joined claims, applying the "on just terms" language of F.R.C.P. 21. On the deliberate indifference claims that survive, Snider alleges that: (1) she was denied hormone medication that was ordered; (2) serious side effects (including breast lumps) were not examined or treated; (3) referrals to specialists did not occur; (4) lab work was not done as ordered; and (5) practitioners who saw her did not know how to treat gender dysphoria. Snider claims that these failures (which were accompanied by alleged taunting by nurses) continued for more than a year, causing her severe distress. The submission includes responses to grievances Snider filed that tend to confirm that practitioners were not trained in treating gender dysphoria. The complaint is presented in almost diary form over the last year, and one can literally see Snider's mental deterioration in the ability to express herself, as the handwriting becomes less legible over the months and the composition dissolves from relative coherence to quotation of scripture – like the montage of breakfast table scenes depicting the disintegrating marriage in Orson Welles' *Citizen Kane* (RKO 1941). Judge Maloney finds these voluminous pleadings to state deliberate indifference claims, including a pattern and practice claim against the contractual vendor (Corizon), based on a failure to train its providers in transgender care. According to PACER, Judge Maloney referred this case to "early mediation" a few days after screening. A lawyer for Corizon entered a "limited" appearance for mediation only. Good luck with that. *See Rowland v. California Men's Colony*, 506 U.S. 194, 202 (1993) ("28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney"). This writer hopes that counsel can be found for Snider as well.

MINNESOTA – Kenneth S. Daywitt is a gay civilly committed sex offender. He alleges that he was forced to share a dayroom with another inmate who was a known homophobe, who then assaulted him. Daywitt sues for damages from various officials, including executive officials for inadequate protection of vulnerable LGBT inmates. He also sues for negligence under state law. In *Daywitt v. Harpstead,* 2020 WL 5709202 (D. Minn., Sept. 24, 2020), U.S. District Judge Paul A. Magnuson denies a motion to dismiss. The complaint is Daywitt's third pleading, with more information about the individual defendants' liability. Daywitt sought protection some 80 times before the assault, and he describes what each defendant knew – even quoting one defendant who said she understood that the assailant "hated homosexuals." Defendants also heard the assailant yelling "all homos have to die." Nevertheless, defendants placed Daywitt and the assailant in the same cell for a month before the assault. Judge Magnuson finds these allegations and the reasonable inferences from them to state a claim for deliberate indifference to Daywitt's safety. He also finds that the defendants are not entitled to qualified immunity. The law of protection from inmate-on-inmate assault was clearly established in *Young v. Selk,* 508 F.3d 868, 871, 875 (8th Cir. 2007). Defendants tried to distinguish

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Young on the ground that the facts were not identical, citing the Supreme Court's admonition that qualified immunity should not be assessed on a "high level of generality," under *Mullinix v. Luna,* 136 S.Ct. 305, 308 (2105). In overruling this argument, Judge Magnuson makes two findings: first, that the application here is not at too high a level of generality; and secondly (and more interesting for practitioners), that the "high generality" test should be applied to cases when corrections officials must act in "split second" judgment, as with quelling a disturbance. Here, they had plenty of advance warning and time to think about Daywitt's safety. Daywitt's situation did not present an unanticipated problem. Even if it did: "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002). Judge Magnuson also agrees to hear the state negligence claim, finding that it was plead on these facts and that Minnesota officials are not entitled to "official immunity" because there is a proffer that defendants' subjective intent could be shown to be willful under Minnesota law, citing *Vassallo ex rel. Brown v. Majeski,* 842 N.W.2d 456, 462 ((Minn. 2014); and *Semler v. Klang,* 743 N.W.2d 273, 279 (Minn. App. 2007). On a motion to dismiss, this is enough. Daywitt is represented by Zorislav R. Leyderman (Minneapolis).

MINNESOTA – Jeremy Pinson is a transgender prisoner who, since 2014, has brought over 150 lawsuits during her incarceration. In *Pinson v. Hadaway,* 2020 U.S. Dist. LEXIS 169664 (D. Minn., Sept. 16, 2020), U.S. District Judge Nancy E. Brasel overrules Pinson's objections to the magistrate judge's recommendations and dismisses this one with prejudice. Pinson alleged that, while she was incarcerated at the Federal Medical Center in Rochester, the defendants discontinued her hormone treatment, causing her to become suicidal, and denied her gender confirmation surgery. She sued under the Eighth Amendment for deliberate indifference to her health, under the First Amendment for retaliation, and under the Federal Tort Claims Act [FTCA]. Judge Brasel found that Pinson failed to raise any triable issue under the Eighth Amendment against the defendants being sued. On the First Amendment claim, Judge Brasel found that retaliation claims cannot be raised under *Bivens* theory in light of the restrictions in *Ziglar v. Abbassi*, 137 S. Ct. 1843 (2017), limiting "new" *Bivens* applications, which are not favored. Under the FTCA, the magistrate judge found that Pinson had not exhausted administrative remedies through the Bureau of Prisons. Pinson conceded that she did not do so with respect to surgery, but she maintains she did so against an officer who allegedly knew she was suicidal and nevertheless issued her a razor, which she then used to harm herself. Judge Brasel found that, even if exhaustion occurred, Pinson did not commence suit against the officer within the required six months of the end of exhaustion. Pinson won a partial victory in the Third Circuit in another case, reported above, in this issue of *Law Notes*.

PENNSYLVANIA – Federal prisoner Robert Thompson was ordered detained pending trial after his first appearance on an indictment for conspiracy to distribute controlled substances. He is being held at the Lackawanna County Prison, and he seeks "temporary release" under the Bail Reform Act, 18 U.S.C. § 3142(i). Usually such temporary release is related to trial preparation concerns, but here Thompson tries to use the clause to persuade the judge to release him due to COVID-19 risks. U.S. Magistrate Judge Karoline Mehalchick denies the application in *United States v. Thompson,* 2020 U.S. Dist. LEXIS 167327 (M.D. Pa., Sept. 14, 2020). Thompson had already been detained because of the evidence against him, the potential sentence, and the absence of any combination of factors that would "assure the safety" of the community under 18 U.S.C. § 3142(e). Thompson has heart failure, hypertension, and asthma. He also says he has had trouble obtaining his medication in the prison. His age is not stated. Judge Mehalchick begins by describing steps taken at the Lackawanna County Prison to mitigate COVID-19. Her information was "last updated" March 20, 2020. There is discussion of fever checking, but there is nothing about masks, distancing, COVID-testing, etc. There is no discussion of COVID cases among the prisoners or staff. Judge Mehalchick notes that this statutory theory of pre-trial release ("another compelling reason") is rarely successful. She cites a few cases of inmates near death where there were admissions they could not be medically managed in custody. The defendant bears the burden of proof. While short of useful pandemic information or details about Thompson's health, the opinion has a national survey of cases invoking this theory for federal pretrial release, from district courts in Arkansas, District of Columbia, Kansas, Louisiana, Minnesota, Nevada, Pennsylvania, and Puerto Rico. From this, Judge Mehalchick applies a four-factor analysis to § 3142(i) release applications relating to COVID-19: (1) the original grounds for pre-trial detention; (2) the specificity of the defendant's COVID-19 concerns; (3) the extent to which the proposed release would mitigate or exacerbate the COVID-19 risks; and (4) the likelihood that defendant's release would pose COVID-19 risks to others. Overlaying all of this are two decisions from the Third Circuit saying that COVID-19 is not by itself an independent reason for compassionate release for sentenced federal prisoners. *United States v. Raia*, 2020 WL 1647922, at *2 (3d Cir. 2020);

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United States v. Roeder, 2020 WL 1545872, at *3 (3d Cir. 2020). Thompson loses on all points. Judge Mehalchick reaffirms her original remand decision. On factor two, she writes that Thompson fails to show any increased risk from COVID-19 because "nothing in the record reflects how COVID-19 has prevented his medicines from reaching him." Further, Thompson does not show that his risks would be less (mitigated) if he were home with his mother or how he would avoid COVID risks if back in the community, in light of the "prison's steps to address and mitigate the risks of COVID-19." Finally – and here the decision goes completely into la-la-land – probation officers and the U.S. Marshals may be at greater risk if they had to stop enforcing shelter-in-place orders and look for Thompson if he violates his release conditions – and Thompson, if he violates such conditions, may be returned to prison with the virus he contracted while at large, thereby exacerbating the risks to prison inmates and staff on his return to custody "having had an abundant opportunity for contamination." The result may be right, but the reasoning should be an embarrassment. Prisons became petri dishes for COVID-19 last Spring.

TEXAS – This case is about how far correctional defendants in the Fifth Circuit will push *Gibson v. Collier,* 920 F.3d 212 (5th Cir. 2019), which held that there is no Eighth Amendment right to transgender confirmation surgery. Bobbie Lee Haverkamp is a transgender inmate seeking gender transition treatment, including surgery, and raising Eighth Amendment and Equal Protection claims. Defendants raised jurisdictional claims in light of *Gibson*. Because Haverkamp raised other claims, Senior U.S. District Judge Hilda Tagle denied their motion to dismiss, and the defendants took an interlocutory appeal on jurisdiction. The Fifth Circuit declined to grant a stay pending appeal. Defendants sought a stay of all proceedings in the district court. U.S. Magistrate Judge Julie K. Hampton issued a non-dispositive decision granting a stay of most discovery but criticizing defendants for failing to identify their various roles in provision of health care, despite their moving to dismiss. Defendants filed objection to Judge Hampton's decision with Judge Tagle. In *Haverkamp v. Penn,* 2020 WL 5652989 (S.D. Texas, Sept. 23, 2020), Judge Tagle overruled all of their objections. That Haverkamp had plead a cause of action under the Equal Protection Clause had already been decided, and it was the law of the case. *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006). The defendants' refusal to clarify their roles in providing Haverkamp health care left the court no choice but to deny without prejudice their motion to dismiss on the ground that some of them were improper parties. Defendants failed to show that injunctive relief against them would fail to redress any injury. Haverkamp also pled a viable state law claim of breach of contract for the benefit of inmates' health care. Judge Tagle declined to apply *Gibson* to prevent any movement on this transgender case.

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By Arthur S. Leonard

U.S. CONGRESS – The Science in Blood Donation Act, a bill introduced in the House of Representatives by Reps. Val Demmings (D-Fla.) and Mike Quigley (D-Ill.) on September 4, would outlaw discrimination against potential blood donors due to their sexual orientation or gender identity. This emerged as an issue in the mid-1980s in the wake of the HIV/AIDS epidemic and the fear that blood donations by LGBTQ people heightened the risk of HIV transmission through transfusions. At present, the screening rules set by the FDA require that to defer as a donor any man who has had sex with another man within the past twelve months, regardless whether they have recently had a negative HIV-antibody test. There is no such deferral requirement for men who have had sex with women during that time period, and given the present testing practices of blood donations and the impact of PREP in reducing contagiousness, opponents of the current rules argue that the deferral period is discriminatory. The bill is intended to end the discrimination.

EEOC – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION– On September 23 the Senate confirmed Jocelyn Samuels, the out Executive Director of UCLA's William Institute, the LGBTQ rights think-tank, to a five-year term as a Commission of the Equal Employment Opportunity Commission. There are five commissioners who serve staggered five-year terms, and by statute no more than three can be members of the same political party. Samuels is one of the two Democratic commissioners. The EEOC enforces federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The Commission authorizes lawsuits in the name of the agency as well as sitting as an appellate body for federal sector employment discrimination cases.

CALIFORNIA – Governor Newsom signed into law SB145, which amends the sex registration laws to remove unequal treatment of LGBTQ people. Under existing law, young adults who have penile-vaginal intercourse with slightly under-age teenagers do not necessarily have to register as sex offenders, depending on the discretion of the sentencing judge, even though

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the sex was not legally consensual. Sex registration is mandatory if the charge is anal or oral sex, regardless of consent, if the teen is under-age. Under the new law, judges will have discretion not to impose the registration requirement, depending on the circumstances, so young gay adults will theoretically have equal treatment. *San Francisco Chronicle*, Sept. 11. * * * On September 26, Governor Newsom signed into law SB 1255, which forbids life insurance companies from discriminating against HIV-positive people, SB 932, which requires that reporting of communicable diseases to public health authorities include information about the sexuality of the individuals so that there will be a statistical database evidence supporting public health strategies for the LGBTQ community, and SB 132, requiring that "incarcerated transgender, nonbinary, and intersex individuals in the custody of the California Department of Corrections and Rehabilitation (CDCR) be classified by their gender identity and housed based on their stated health and safety needs and searched according to the policy for their gender identity or the facility where they are housed, based on their search preference," according to a summary of the bill published online by Equality California.

KENTUCKY – On September 17, the Louisville City Council voted 24-1 to approve a measure banning licensed therapists from performing "conversion therapy" on minors. The controversial "therapy" purports to assist individuals who have same-sex attractions in achieving a heterosexual orientation. Studies showing the harmful effects of such therapy on the "patients" have led major professional associations such as the American Medical Association, American Psychiatric Association and American Psychological Association to condemn the practice, and the ethical codes governing licensed therapists prohibit its performance. *Fairness Campaign Press Release*, September 17. The mayor signed the measure into law early in October.

UTAH – Clarification to *Legislative Notes* – The September 2020 issue of *Law Notes* reported under "Utah" that gay pride signs could not be posted on city-owned light and street poles. We regret not specifying the locality, which is Heber City – a town of 12,000 (2010 census), east of Salt Lake City but outside of the metro Salt Lake SMSA per federal designation by the Office of Management and Budget. Both Greater Salt Lake and Southern Utah have vibrant annual gay pride events. There is also state-wide LGBT protection covering employment and housing discrimination. The legislation – widely seen as a compromise with the Mormon Church – does not cover public accommodations and has a broad religious organization exemption. Proselytizing at work is also protected, so long as it is "not disruptive or harassing." The Advocate, which reported the story on August 21, 2020, said that (whatever the intention behind it was) the Heber City Council was facing demand for placards from white supremacists and neo-Nazis when it banned all "political" signs from street poles. – *William J. Rold*

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BARBADOS – The government announced that it will hold a public referendum on a proposal to allow same-sex marriages, but in the meantime will legislate to allow civil unions. *BarbadosToday.com* on September 15.

GREECE – The Magistrate's Court of Kallithea blazed a new path by recognizing non-binary sexual identity for Jason Antigone, finding the right to self-identity to be rooted in personal freedom protected by the Greek Constitution, according to a September 20 report on the website *equal-eyes.org*.

HONG KONG – The *South China Morning Post* reported on September 18 that Mr. Justice Anderson Chow Ka-ming of the High Court of Hong Kong issues rulings in two separate cases involving claims for the rights of same-sex couples residing in Hong Kong who married in other countries where it is legal to do so. In the case of a man who sought a declaration that his overseas marriage must be recognized by the government for all purposes, the judge ruled that the plaintiff's claim went too far, since there is precedent in Hong Kong that marriage is limited to the union of one man with one woman However, in a case involving inheritance rights in real estate, the judge found that the government had provided no policy justification for refusing to recognize such a same-sex marriage for the limited purpose of inheritance rights. This is consistent with earlier cases that have focused on individual instances of discrimination against married same-sex couples rather than a claim for total, across-the-board recognition. Thus, for now same-sex couples in Hong Kong who have married elsewhere are relegated to litigating for rights piecemeal. The government did not immediately announce whether it would file an appeal of the latter decision.

POLAND – ILGA-Europe reports: "On Monday 14 September, ILGA-Europe together with Polish LGBT rights organizations KPH (Campaign Against Homophobia) and Fundacja Równości (The Equality Foundation) submitted a legal complaint to the European Commission about so-called Family Charters and LGBT Free Zones, which over 100 Polish local governments have

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adopted over the last two years." The complaint details various European treaties and charter provisions that have been violated by these measures. On September 17, the elected European Parliament voted overwhelmingly in favor of a measure requesting that the European Union take action against Poland for that nation's failure to comply with European human rights law with respect to LGBTQ rights. Among the measures that might be taken are suspending funding for Polish government activities by the EU.

UNITED KINGDOM – Although the majority of comments submitted in response to a public consultation on a proposal to drop the requirement under the Gender Identity Act that a person must receive a diagnosis of gender dysphoria as a prerequisite to an official recognition of gender transition were positive, the government announced that it is dropping the proposal, and will not ask Parliament to amend the Act accordingly. The government bowed to the wishes of some women's rights groups who were vociferously opposed, arguing that this would open the way to men declaring themselves to be women in order to gain access to women's spaces – a phenomenon that has not emerged in any of the several jurisdictions that currently recognize gender transition without medical diagnosis. * * * On September 14, Employment Tribunal Judge Hughes upheld a claim of discrimination and harassment under the Equality Bill on behalf of an individual identified in the summary published by the plaintiff's legal representative as Ms. Taylor, who alleged that she was victimized on account of her gender fluid/non-binary status. *Taylor v. Jaguar Land Rover*, Case No. 1304471/2018). The novel question before the court was whether legislation prohibiting discrimination because of gender identity was limited to those of transgender status, as argued by the employer, or whether the phrase "gender identity" should be construed to encompass the full "gender spectrum" of personal identity. Judge Hughes seized upon a statement made by the Solicitor-General during the Parliamentary consideration of the Act, to the effect that a "gender spectrum. . . concerns a personal journey and moving a gender identity away from birth sex." From this, the court concluded that it was "clear… that gender is a spectrum" and it was "beyond doubt" that the Claimant fell with the definition of Section 7 of the Equality Act. Judge Hughes ruled from the bench and set a hearing on remedy to take place on October 2.

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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.