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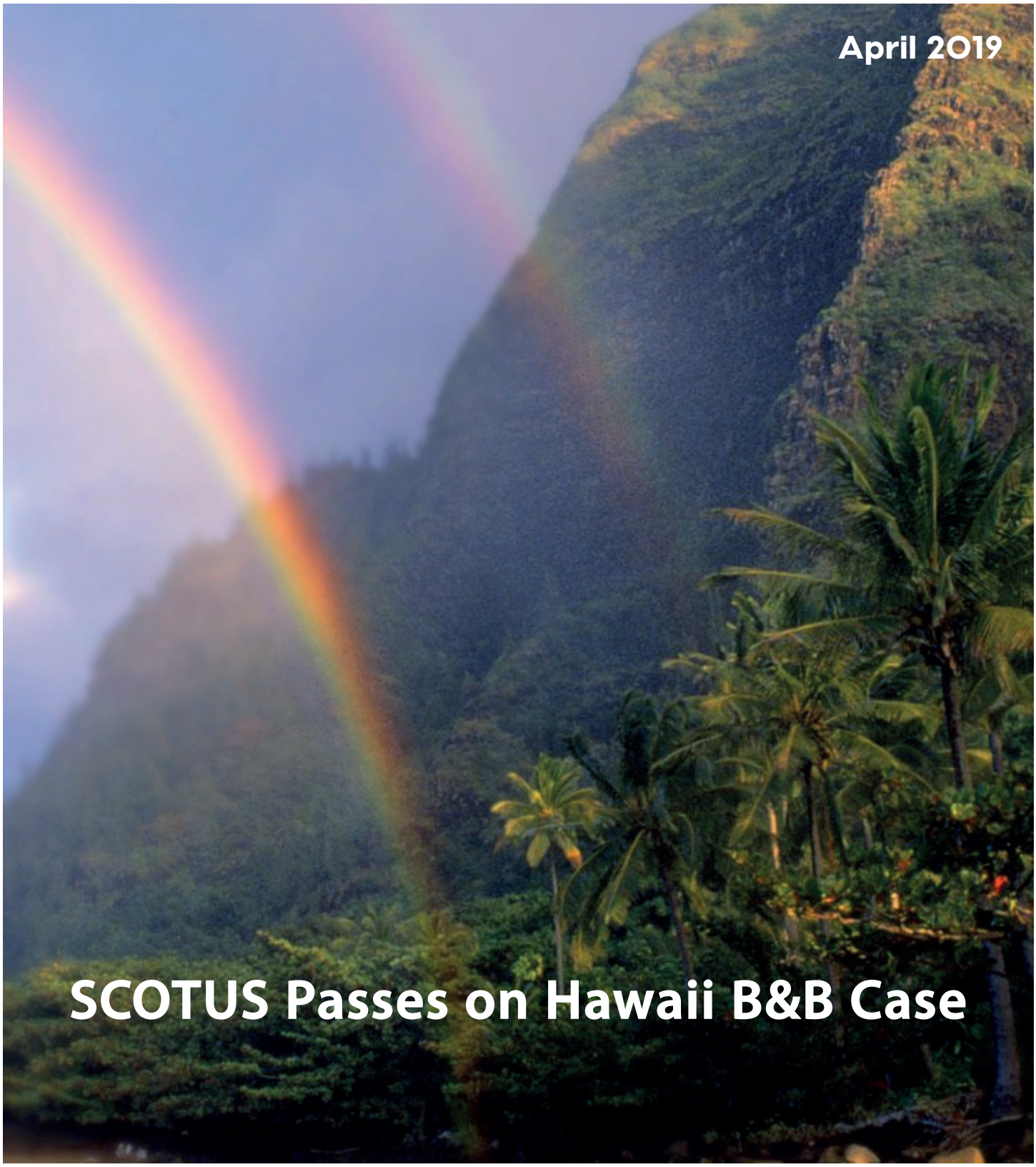

April 2019

SCOTUS Passes on Hawaii B&B Case

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LAW NOTES

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EXECUTIVE SUMMARY

30 Notes 52 Citations

Supreme Court Takes a Pass on Hawaii B&B Discrimination Case

By Arthur S. Leonard

The U.S. Supreme Court announced on March 18 that it will not review a decision by Hawaii's Intermediate Court of Appeals, which ruled in February 2018 that a small bed & breakfast operating in a private home in the Mariner's Ridge section of Hawai'i Kai, violated Hawaii's civil rights law by denying accommodations to an unmarried lesbian couple who were planning a trip to Hawaii to visit a friend. Hawaii's civil rights law forbids businesses that are "public accommodations" from discriminating in providing their services based on the sexual orientation of customers. *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Int. Ct. App. Haw. 2018), cert. denied by Hawaii S. Ct., 2018 WL 3358586 (July 10, 2018), cert. denied, No. 18-451, 2019 WL 1231949 (U.S. Sup. Ct., March 18, 2019).

The key issues raised in the case were whether such an operation is covered by the public accommodations law, and whether the owner, Phyllis Young, who lives there and operates it personally, could successfully raise constitutional claims against being required to accommodate a lesbian couple in her home.

Young operates "Aloha B&B" out of her four-bedroom house, and has averaged between one hundred and two hundred customers a year. She advertises on her own website and some third-party websites. Diane Cervelli and Taeko Bufford, a "committed" lesbian couple, emailed to inquire about renting a room for their vacation trip. Young immediately responded by email that a room was available and explained how to make a reservation. Cervelli phoned two weeks later to book the room. As Young was taking down her information, Cervelli mentioned that she would be accompanied by another woman, and Young asked whether they were lesbians. When Cervelli said "Yes," Young responded, "We're strong Christians. I'm very uncomfortable in accepting the reservation from you." Young refused the reservation and hung up on Cervelli.

Bufford then called and attempted to reserve the room, but again Young refused. Bufford asked her whether it was because she and Cervelli were lesbians, and Young said "Yes." Young referred to her religious beliefs as the reason she was refusing the reservation. "Apart from Plaintiff's sexual orientation," wrote Judge Craig Nakamura for the court of appeals, "there was no other reason for Young's refusal to accept Plaintiffs' request for a room."

The women filed a discrimination claim with the Hawaii Civil Rights Commission, which concluded that they had a legitimate case. Then Cervelli and Bufford filed a lawsuit against Aloha B&B in the state circuit court, represented by Lambda Legal with local attorneys from Honolulu, and the Civil Rights Commission intervened in the lawsuit as a co-plaintiff. Attorneys from Alliance Defending Freedom (ADF), the anti-LGBT religious litigation group, joined with local attorneys to defend the B&B.

Judge Edwin C. Nacino of the circuit court easily rejected the B&B's argument that it was not a public accommodation, but rather a landlord that would not be covered by this law. The law on discrimination in real estate transactions prohibits sexual orientation discrimination in residential rentals, but doesn't apply to facilities with four or fewer units. While the B&B has only four bedrooms, the evidence of 100-200 rentals per year made clear that Young's business came within the "public accommodations" definition. Young admitted that she only rented rooms for short stays, so this was a transient rather than a residential facility.

Young claimed that requiring her to accommodate the lesbian couple in her home violated her constitutional right to privacy, freedom of intimate association and free exercise of religion. The circuit court rejected these defenses, and awarded summary judgment to the plaintiffs on the issues of liability and injunctive relief. Since the defendant was planning to appeal, the issue of damages was put on hold pending a final decision on the case.

The appeals court affirmed the trial judge on all points. Judge Nakamura wrote that "to the extent that Young has chosen to operate her bed and breakfast business from her home, she has voluntarily given up the right to be left alone," thus rejecting her privacy claim. Opening up her residence to 100-200 paying guests a year is inconsistent with such a privacy claim. Furthermore, although Young lives there, the extent of commercial activity means that "it is no longer a purely private home." And, furthermore, "the State retains the right to regulate activities occurring in a home where others are harmed or likely to be harmed," and in this case "discriminatory conduct caused direct harm to Plaintiffs and threatens to harm other members of the general public."

The court similarly rejected the intimate association claim, which, said the court, applies to family relationships and other small-group settings. "The relationship between Aloha B&B and the customers to whom it provides transient lodging is not the type of intimate relationship that is entitled to constitutional protection against a law designed to prohibit discrimination in public accommodations," said the appeals court.

Finally, the court found Young's federal constitutional religious freedom claim would be foreclosed by *Employment Division v. Smith*,

494 U.S. 872 (1990), where the U.S. Supreme Court held that "neutral laws of generally applicability need not be justified by a compelling governmental interest even when they have the incidental effect of burdening a particular religious practice," wrote Nakamura, summarizing the holding. Fueled by ADF's representation, Young tried to argue that the appeals court should impose a stricter test using the Hawaii Constitution's protection of religious freedom, but the court refused to do so, stating that in its view Hawaii's civil rights law would survive the most demanding constitutional test in any event.

"Assuming, without deciding, that Aloha B&B established a prima facie case of substantial burden to Young's exercise of religion, we conclude that the application of [the Hawaii civil rights law] to Aloha B&B's conduct in this case satisfies the strict scrutiny standard," wrote Nakamura," since "Hawaii has a compelling state interest in prohibiting discrimination in public accommodations," as the legislature has declared "the practice of discrimination because of sexual orientation in public accommodations is against public policy." The court concluded that the civil rights law "is narrowly tailored to achieve Hawaii's compelling interest in prohibiting discrimination in public accommodations," as the law "responds precisely to the substantive problem which legitimately concerns the State."

The Hawaii Supreme Court refused to hear an appeal, so Young took the case to the Supreme Court, posing two questions: "Whether holding Mrs. Young liable without fair notice that her actions could be unlawful violates the Fourteenth Amendment's Due Process Clause, and whether the Commission's efforts to punish Mrs. Young for exercising her religious beliefs in her own home violate the First Amendment's Free Exercise Clause?"

The first question reflected Young's belief that she was covered by the exemption for rental operations with four or fewer bedrooms, so, as she claimed, when she turned down Cervelli and Bufford she sincerely believed her business was not covered by the civil rights law, and it would be fundamentally unfair to impose liability on her. The court of appeals had easily rejected this argument, and it is not the kind of argument that the Supreme Court was likely to address as a failure of procedural due process of law.

The second question was intended to tempt members of the Court who have been calling for a reconsideration of the *Employment Division v. Smith* precedent, which was controversial when decided and actually led to the enactment of the Religious Freedom Restoration Act (RFRA) by Congress and similar laws by many state legislatures. Prior to that ruling, the Supreme Court had required the government to show a "compelling interest" when laws that burden free exercise of religion were challenged in court.

Employment Division was seen by many as a sharp departure from prior precedents, liberal Supreme Court justices dissented from the Court's opinion by Justice Scalia, and a broad coalition spanning the political spectrum -among religious organizations successfully lobbied Congress to pass RFRA, ultimately reimposing the "strict scrutiny" standard when federal laws impose a substantial burden or religious free exercise.

Despite calls for reconsidering *Employment Division*, most prominently by Justice Neil Gorsuch in his concurring opinion in *Masterpiece Cakeshop* last June, this petition evidently did not tempt at least four members of the Court to use this case as a vehicle to expand the religious freedom of business owners to turn down customers whom they found objectionable based on the owners' religious beliefs. The Court avoided such reconsideration last Term in *Masterpiece Cakeshop* by deciding that case on a different ground. Of course, if the Court wants to address these issues directly, they still have pending a petition to review an Oregon state court ruling against a baker who refused to make a wedding cake for a same-sex couple, *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507, review denied by Oregon S. Ct., 363 Or. 224 (2018), so we continue to wait for another shoe to drop.

Meanwhile, unless a settlement is negotiated, Young faces a renewed proceeding in the Hawaii circuit court to determine what damages, if any, she will be ordered to pay to Cervelli and Bufford for unlawfully discriminating against them.

SUPREME COURT UPDATE: As March ended, the Supreme Court continued to delay ruling on several pending certiorari petitions raising LGBT-related legal issues. Two Title VII cases involving sexual orientation employment discrimination claims, both filed in May 2018, had still not drawn any public announcement from the court – *Bostock v. Clayton County Board of Commissioners*, No. 17-1618, and *Altitude Express v. Zarda*, No. 17-1623. One Title VII case involving a gender identity discrimination claim, filed in July, 2018, is still pending – *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107. The Court had also not yet ruled on a cert petition in a case challenging a school district's decision to let transgender students use the restroom and locker room facilities of their choice, *Doe v. Boyertown Area School District*, No. 18-658, or an appeal by a baker of a ruling by the Oregon Bureau of Labor and Industries that she had no valid Free Exercise defense to a discrimination charge for refusing to make a wedding cake for a same-sex couple, *Klein v. Oregon Bureau of Labor and Industries*, No. 18-547, both of these filed in the fall of 2018. All of these cases have been distributed for conference numerous times, and have been distributed again for the Court's April 12 conference. The only cert announcement from the Court during March was its decision not to hear the *Aloha Bed & Breakfast* case from Hawaii. * * * Finally, two newer cert petitions have been distributed for consideration during the Courts' April

12 conference. The Court will (at least theoretically) then consider the petitions in *King v. Governor of New Jersey*, No. 18-1073 (filed February 11, 2019), in which opponents of New Jersey's law banning conversion therapy for minors was upheld against constitutional challenge by the 3rd Circuit, and *Rhines v. Young*, No. 18-8029 (filed February 15, 2019), in which a gay death row inmate is trying to get the Court to consider his claim that the death sentence imposed by his trial jury in 1993 was tainted by homophobia, based on questions the jurors submitted to the trial judge (which he refused to answer) and comments made in the jury room as related by some of the surviving jurors when the petitioner's latest round of counsel belatedly decided to conduct juror interviews. Petitioners in both of these new cases are pinning their hopes on the Court's willingness to use some of its very recent decisions as a reason to overlook procedural barriers and reconsider what appeared to be final, settled rulings. In *King*, Petitioners rely on comments in an opinion by Justice Clarence Thomas, apparently rejecting the 3rd Circuit's free speech analysis pertinent to the conversion therapy law challenge. In *Rhines*, petitioner looks to a decision last term allowing a breach of the usual confidentiality of jury deliberations where there was evidence of racial bias within the jury, hoping that the Court will cut through procedural and jurisdictional rules to allow a court to consider the jury bias ruling on the merits, as no lower court has been yet willing to do regarding the results of the juror interviews. In opposing the petition, South Dakota's Attorney General argues that they have conducted their own investigation and find petitioner's claims unsupported, asserting that had they discovered evidence of anti-gay bias in the jury, they would have sought a remedy for Rhines. (Of course, responses to cert petitions are not submitted under oath . . . .) ■

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

Courts Dissolve Last Injunctive Barriers to Defense Department's Implementation of Former Secretary James Mattis's Plan Limiting Transgender Service

By Chan Tov McNamarah

July 26, 2017 is a date writ large on the calendar of LGBTQ+ history. On that day, President Donald J. Trump announced via Twitter that the United States government would no longer allow "Transgender individuals to serve in any capacity in the U.S. Military." The policy, formalized in an official memorandum a month later, was swiftly blocked by a series of four nationwide preliminary injunctions and had remained unimplemented since. But this will soon no longer be the case. In a January 22 decision, the Supreme Court voted to stay two of the four injunctions. The third injunction out of Maryland was stayed in a March 7 decision, *Stone v. Trump*, Civil Action No. GLR-17-2459 (D. Md. Mar. 7, 2019). And, only one day later on March 8, the D.C. Circuit Court of Appeals issued opinions supporting the dissolution of the last remaining injunction from the D.C. District Court in *Doe 2 v. Shanahan*, 2019 WL 1086495 (D.C. Cir. 2019); 2019 U.S. app. LEXIS 6915 (2019). Thus, almost two years after the original tweets, a version of President Trump's discriminatory ban was scheduled to go into effect on April 12.

Since the March 7 and 8 decisions out of Maryland and D.C., respectively, a number of related developments added further volatility to the status of the "Transgender Military Ban": (1) a March 12 memorandum from the Defense Department announced that the government would make the policy effective on April 12; (2) a March 19 Notice from Judge Kollar-Kotelly — the issuer of the original D.C. preliminary injunction — reminded the Department that her injunction remained in place until the D.C. Circuit's mandate vacating the last preliminary injunction is issued; (3) responding to an "emergency motion for clarification" that the government filed with the D.C. Circuit, the appeals panel issued an Order on March 26 directing the Clerk of the court "to issue the mandate forthwith."

This Note first briefly outlines the history of the Trump Administration's ban on transgender military service, and then offers individual analysis of recent legal developments.

(1) BACKGROUND & HISTORY

— Prior to 2015 the Department of Defense policy effectively banned all transgender persons from joining or remaining in the military. Under this policy all that mattered was the person's transgender status: that they did not identify with the gender assigned to them at birth.

Things began to change in July 2015. On July 28, then-Secretary of Defense Ash Carter issued memorandum mandating that service members could no longer be involuntarily separated or denied reenlistment on the basis of gender identity without special approval. The memorandum also ordered a working group and a study to formulate policy options regarding the military service of transgender service members. That study found no evidence allowing transgender individuals to serve would have any effect on unit cohesion and concluded any related costs would be "negligible."

Based on the findings, on June 30, 2016 Secretary Carter issued Directive Memorandum 16-005 (the Carter Policy) which permitted service by qualified transgender individuals. The policy went into effect immediately, prohibiting the discharge of qualified

service-members "solely on the basis of their gender identity." The policy also directed the Department of Defense to update its standards for military service by July 1, 2017.

On July 26, 2017 in a now infamous series of tweets President Donald J. Trump announced that the United States government would no longer accept or allow service by persons who are transgender. On August 25, 2017, the twitter declaration was formalized in a memorandum (2017 Presidential Memorandum). The 2017 Presidential Memorandum effectively reinstated the prior blanket ban on accession and retention in military service by all transgender persons. It also directed Secretary of Defense James Mattis to conduct a study to determine how to address transgender persons currently serving in the military.

A series of four judicial orders across the country preliminarily enjoined the government from enacting the discriminatory policy pending rulings on the merits of constitutional challenges by various groups of plaintiffs: (1) *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. Oct. 30, 2017), from D.C.; (2) *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. Nov. 21, 2017), from Maryland; (3) *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017), from Washington; and (4) *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017), from California.

In February 2018, as ordered by the 2017 Presidential Memorandum, Secretary Mattis presented his findings to the president and proposed a new policy regarding transgender military service (the Mattis Plan). On March 23, 2018 President Trump revoked the previous policy while simultaneously endorsing the Mattis Plan. The Mattis Plan, while not explicitly excluding all transgender persons, limited military eligibility to only transgender persons who were willing to serve in their biological gender, or who had not and would not undergo gender transition. The key test under the Mattis Plan would be whether an individual had been diagnosed with gender dysphoria, as described in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM).

Because President Trump revoked the 2017 Memorandum, the government moved to dissolve all the preliminary injunctions. They argued that since the policy was no longer a categorical ban, the legal issues presented in previous cases were now moot. They were utterly unsuccessful in the district courts: *Karnoski*, *Stockman*, and *Doe 2* district courts denied the motions to dissolve the preliminary injunctions. *Karnoski v. Trump*, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018); *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. Sept. 18, 2018); *Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. Aug. 6, 2018);

The government appealed in each of the cases and on January 4, 2019 the D.C. Circuit vacated the preliminary injunction that the D.C. District Court had entered in *Doe v. Trump*. Then, on January 22, the Supreme Court issued an order staying the preliminary injunctions in *Karnoski* and *Stockman*. *See Trump v. Karnoski*, No. 18A627 (U.S. Jan. 22, 2019) and *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019).

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(2) MARCH 2019 DEVELOPMENTS: *STONE v. TRUMP* — Two days after the Supreme Court issued an order staying two nation-wide injunctions against the Trump Administration's ban on January 22, 2019, the government filed an expedited motion to stay the preliminary injunction issued by the Maryland District Court on November 21, 2017. In reply, Plaintiffs did not oppose the stay of the preliminary injunction's nationwide effect. Instead, they opposed the stay only as applied to the five named plaintiffs in Stone.

Judge George L. Russell, III, however, sided with the government. He was persuaded by the reasoning that the Supreme Court decision had "necessarily rejected the option of leaving each injunction in place as to the individual plaintiffs."

Looking to the Supreme Court's Order, Judge Russell noted that the *Stockman* and *Karnoski* defendants had presented the option of narrowly tailoring the stays such that the injunctions would remain in effect only as to the plaintiffs in those cases. But in the Order the Court had stayed the nationwide effect of the preliminary injunctions in those cases without exception. To Russell, this was the implicit rejection of the option to narrow the injunctions.

Looking to the plaintiffs before him, Judge Russell maintained he could not distinguish them from the plaintiffs in the cases the Supreme Court had reviewed. Consequently, being bound by the Court's January Order, the judge granted the government's motion to stay and Maryland's preliminary injunction was dissolved.

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(3) *DOE 2 v. SHANAHAN* — As readers may recall from the February edition of *Law Notes*, on January 4, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that U.S. District Judge Colleen Kollar-Kotelly erred in denying the Justice Department's recent motion to dissolve a preliminary injunction she had issued in October 2017. While the order contained no formal opinion, it noted that the judges would issue separate opinions at a later date. On March 8, the opinions were released. Of the three judges on the panel, two filed opinions concurring in the judgment.

The first opinion, by Judge Robert L. Wilkins, primarily argued that the most recent iteration of the Trump Administration's prohibition on transgender military service, the Mattis Plan, was not a per se ban, and therefore the District Court's reasoning that the policy was a categorical ban was flawed.

Whereas the lower court decision rejecting the motion for stay of injunction had defined transgender persons as those who "do not identify or live in accord with their biological sex," in Wilkins' view, the correct definition was broader. His opinion argued that contrary to the lower court's reasoning,

transgender persons are those "who identify with a gender different from the sex they were assigned at birth."

While at first glance the difference in definition borders the semantic, to the judge this distinction was significant: a policy using the first definition would constitute a categorical ban of transfolk, but the latter allowed a subset of transgender individuals who do not wish to transition or live in accordance with their gender identity to serve in the military. Hence, because the Mattis Plan did not target all transgender persons, Wilkins concluded that it was substantively different from its predecessor, the 2017 Presidential Memorandum, and that the preliminary injunction should be vacated.

After a brief and surface-level acknowledgement of the hardship the Mattis Plan might impose on transgender servicemembers who wish to transition, the Wilkins opinion next turned to Plaintiff's facial challenge to the Plan. While the Judge emphasized that the court would normally defer to the Congress and Executive on matters strictly within the realm of military expertise, he conceded that there were limits to this principle. Relying on *Frontiero v. Richardson*, 411 U.S. 677 (1973), a case striking down a military policy discriminating against female service members, the judge remarked that some facially discriminatory military policies will be struck down.

Even so, Wilkins seemed skeptical that the Mattis Plan was facially discriminatory, since as previously demonstrated it was not a categorical ban on all transgender people serving. And, although Plaintiffs argued that transgender persons are a suspect class for Due Process and Equal Protection purposes, and that heightened scrutiny applied, looking to precedent the judge remarked that "the standard of review cannot be quantified using a specific degree of deference of level of scrutiny." All told, Wilkins stopped short of ruling on Plaintiffs' facial challenge. Instead, he opined only to outline factors the District Court should consider in its reassessment no remand.

The second opinion, by Senior Circuit Judge Williams, parted company with its precursor in several ways: Not only did it take a more intolerant tone, it also reached the merits of the constitutional issues in the case. As Judge Williams told it, he believed the record and law required complete dismissal of plaintiffs' claims.

Williams characterized the case before him not as a question of the constitutionality of a "transgender ban," but whether the Trump administration was required to reinstate the Obama Administration's policy allowing transgender persons to serve. Despite acknowledging that the Mattis Plan thwarted service by transgender persons who wanted to serve in accordance with their gender identity, Williams answered in the negative: "the Constitution does not compel the military to yield to [transgender persons'] preference." He went further, stating that the policy easily passes constitutional muster since "[t]o put it simply, there is no constitutional right for, say, biological males who identify as female to live, sleep, shower, and train with biological females."

Turning to the merits of the case, Williams began with a thorough detail of the separation of powers between Congress, the Executive and the Judiciary. He hammered that courts were required to defer to Congress and the president since they—not the courts—retained the responsibility for the "delicate task of balancing the rights of servicemen against the needs of the military." *Loving v. United States*, 517 U.S. 748, 767 (1996). And, with a view to such principles and the obligatory deference, Williams found that the Mattis Plan survived constitutional scrutiny.

To begin, the judge reasoned that the policy's reliance on gender dysphoria for limiting access to military service was far from suspect. First, he noted that gender dysphoria only affects a subset of transgender persons. Second, maintaining that gender dysphoria, as described in the DSM, is a "serious mental condition," he held that the Mattis Policy's limits on service were akin to the "many demanding selection practices that render the vast majority of military-age Americans presumptively ineligible." Thus, the Mattis policy served a legitimate interest: ensuring that the armed forces consists of "qualified, effective, and able-bodied persons."

Judge Williams went on to find that the Executive Branch relied on an abundance of legitimate military concerns in crafting the Mattis Plan. In support of its position, the government argued that the military appropriately maintained a clear line between the biological sexes to preserve unit cohesion, to protect reasonable expectations of privacy, and to minimize administrative challenges that would otherwise arise.

Specifically, the government argued that permitting transgender persons who had not begun transition to live, sleep, and shower with service members of the same biological sex would "create tension in the ranks." They went on to argue that since military preparation required combat training, "pitting biological females against biological males who identify as female and vice versa—would create serious safety risks."

In reply, Plaintiffs contended that these justifications lacked support and were contrary to "the consensus of the medical community." Judge Williams favored the government's justifications. He also accepted the Defendant's assertion that none of Plaintiffs' empirical studies "account for the added stress of military life, deployments, and combat."

Plaintiffs' next argument was that "unusual factors" surrounding the President's July 2017 tweets tainted the present policy. Judge Williams made quick work of this argument, stating the Mattis Plan was not "fruit of the poisonous tweet." Further, in his view, there was nothing "unusual" in the process since it was standard that a new administration coming to office might favor policy directions that opposed those of their priors. Thus, this argument failed as well.

Finally, Judge Williams turned to plaintiffs' claim that heightened scrutiny applied because the policy facially discriminates against transgender persons—a suspect class. Unsurprisingly, Williams took issue with this account. He concluded that the policy was facially neutral since "non-transgender people with gender dysphoria are no better off than their transgender compatriots in terms of rules for accession and retention." And, once again underlining the highly deferential approach he contended that courts must take with respect to military policy, he concluded by rejecting plaintiffs' final argument.

Typically, William's reasoning up to this point would be sufficient, and with the injunction dissolved the case would then proceed in the district court. But he then went further. Citing "sensitive separation of powers concerns," the judge definitively decided the merits of the case. He observed that any further proceedings, including a discovery process that would intrusively examine the President's mental processes, would be "idle or worse." And, finding that Plaintiffs' claims could not be saved through any further discovery, he contended that a futile fishing expedition by the district court would only undermine the judiciary's proper place in the American democratic system. In sum, since he believed Plaintiffs cannot demonstrate a likelihood of success on the merits, and ultimately could not prevail, Williams declared: "the wisest course is to terminate the litigation now."

Despite the publication of these opinions, the D.C. Circuit did not promptly issue a mandate to the district court, expressly leaving time for the plaintiffs to seek rehearing or rehearing *en banc* for a period of 21 days.

(4) DEFENSE DEPARTMENT MARCH 12, MEMORANDUM — In a memorandum issued four days after the filing of the D.C. Circuit opinions, the Defense Department ordered the military branches to adopt the trans-exclusionary policy to take effect April 12. Under the policy, transgender service-members who have not already transitioned since June 28, 2016, will be allowed to continue serving only if they serve, use the uniforms, sleeping, and bathroom facilities associated with their biological sex.

There are minor exceptions. Service members who had received a diagnosis of gender dysphoria and transitioned prior to the effective date of implementation will be allowed to continue serving in the military pursuant to the prior policies. However, other persons will be disqualified from service if they have a history or diagnosis of gender dysphoria.

(5) JUDGE COLLEEN KOLLAR-KOTELLY'S NOTICE — Replying to the Defense Department's memo outlined above, Judge Kollar-Kotelly issued a responsive Notice on March 19. In the Notice she took issue with the government's actions and characterization of the present state of affairs. She also warned the government that her initial preliminary injunction had not yet been vacated.

The Notice stated, "Defendants were incorrect in claiming that there was no longer an impediment to the military's implementation of the Mattis Policy in this case . . . . [T]he nationwide preliminary injunction issued by this Court remains in place." It then went on to detail that though the D.C. Circuit had issued a per curiam opinion vacating Kollar-Kotelly's injunction, the D.C. Circuit panel's judgement had not yet been made final through a mandate.

Here, the Notice walked through the procedural contours of the present case. Under Fed. R. App. P. 40 (a) a party has 45 days to file a petition for rehearing when an officer of the United States is sued in an official capacity. Moreover, in the present case the D.C. Circuit specifically ordered that the time for filing any petition for rehearing be extended to 21 days after the issuance of the forthcoming opinions. As the opinions were filed on March 8, by Judge Kollar-Kotelly's calculations, Plaintiffs had until March 29 to file for rehearing. Equally important, the mandate finalizing the stay of the injunction would not be issued until that time.

Accordingly, Judge Kollar-Kotelly ended the Notice by pronouncing that without a mandate the D.C. Circuit's judgment remained indeterminate, despite any developments related to the three other nationwide injunctions. She then reminded the Justice Department that any attempt to implement the Mattis Plan would be premature until the D.C. Circuit issued its mandate.

Thus chastised, the government filed an "emergency motion" with the D.C. Circuit, urging it, in light of the Supreme Court's action, to issue its mandate forthwith. On March 26, as noted above, the D.C. Circuit panel ordered the Clerk to issue the mandate, so the Defense Department's implementation plans can go forward. ■

[Editor's Note: This does not end the lawsuits challenging the ban, of course, as none of the four district courts has issued a decision on the merits of the constitutional challenges, and discovery disputes are ongoing. Still pending before the 9th Circuit is an appeal by the government from the Seattle district court's discovery orders, and similar appeals are likely in the three other pending cases before they can proceed to trials or summary judgment motions. Furthermore, upon implementation of the Mattis Plan, affected military personnel will acquire standing to initiate new litigation within the Defense Department and ultimately in the federal courts. All of the major LGBT rights litigation groups and Servicemembers Legal Defense are representing plaintiffs in the various cases, together with numerous local counsel and cooperating attorneys from several major national law firms.]

Chan Tov McNamarah is a law student at Cornell Law School (class of 2019).

5th Circuit Panel Rules Denial of Gender Confirmation Surgery for Transgender Inmate Does Not Violate 8th Amendment

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 5th Circuit ruled by a vote of 2-1 on March 29 that the state of Texas did not violate the 8th Amendment right against cruel or unusual punishment by denying gender confirmation surgery to transgender inmate Vanessa Lynn Gibson. *Gibson v. Collier*, 2019 WL 1417271, 2019 U.S. App. LEXIS 9397. The dissent argued that the substantive legal question was not properly before the court. The majority took the position that a state may categorically refuse to provide gender confirmation surgery (or, as they labelled it, "sex reassignment surgery") as a treatment for gender dysphoria, regardless of the needs of the individual inmate.

The opinion for the panel was written by James C. Ho, who was nominated by President Donald Trump to fill one of the long-standing vacancies on the 5th Circuit that was preserved by Senate Majority Leader Mitch McConnell's determined effort to block President Obama from filling circuit court vacancies that opened up during his second term. The retirement of an active judge created this vacancy in 2013. Upon confirmation by the Senate, James Ho joined the court on January 4, 2018. He was previously Solicitor General of Texas, and active in the Federalist Society. Joining Ho's opinion was Circuit Judge Jerry Edwin Smith, who was appointed to the court by President Ronald Reagan. The dissenter was Senior Circuit Judge Rhesa Hawkins Barksdale, who was appointed by President George H. W. Bush. (President Trump has appointed five out of the sixteen current active judges on the circuit court, among whom two were appointed by President Bill Clinton and three by President Barack Obama. There is on vacancy pending on the 5th Circuit.)

Judge Ho's opinion rests on two simple propositions. Under the 8th Amendment's text and case law concerning the rights of inmates to medical treatment, denying an inmate a treatment that is controversial within the medical profession and which has rarely if ever been provided to inmates cannot be held to violate the Amendment. For one thing, he argued, denying sex reassignment surgery is not rare. Indeed, it is a matter of course, since by his account only once in the nation's history has any state prison system provided sex reassignment surgery to an inmate, when California recently settled a lawsuit by agreeing to provide sex reassignment surgery to the plaintiff. Thus, denying such a procedure is not "rare," and the 8th Amendment only prohibits punishments that are cruel *and* unusual. On the other point, he wrote, the case law supports the proposition that the state only violates the 8th Amendment if it exhibits deliberate indifference to a serious medical condition, a demanding test that requires that the treatment requested by the inmate be one as to which there is widespread agreement among health care providers about its necessity. Thus, if there is significant disagreement among medical authorities about whether a particular treatment is necessary, it doesn't violate the Constitution for the state to refuse to provide it.

The opinion sets out only the bare bones of factual allegations by plaintiff Scott Lynn Gibson (a/k/a Vanessa Lynn Gibson). The court uses male pronouns to refer to Gibson, claiming that Gibson did not object, although the litigation papers Gibson prepared while pro se use feminine pronouns. Gibson is an inmate at the Gatesville facility of the Texas Department of Criminal Justice (TDCJ). Gibson was incarcerated on conviction of two counts of aggravated robbery, and committed additional crimes in prison of aggravated assault, possession of a deadly weapon, and murder. Upon further conviction, Gibson is sentenced to serve through May 2023, eligible for consideration for parole in April 2021. Identified male at birth, Gibson has identified and lived as female since age 15, but was not diagnosed as having gender dysphoria at the time of incarceration.

The court accepts that Gibson has gender dysphoria as described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) published by the American Psychiatric Association, is depressed, and has attempted self-castration and suicide, although according to the record is not presently considered suicidal (although learning of this decision may well affect that). It was not until after a suicide attempt that Gibson obtained a formal diagnosis. Gibson has been receiving counseling and hormone therapy, but insists that surgery is necessary to ameliorate her condition. Despite living as a woman, Gibson is incarcerated per the state's policy in a men's prison. The state's formal policy provides that transgender inmates be "evaluated by appropriate medical and mental health professionals and have their treatment determined on a case by case basis," reflecting the "current, accepted standards of care." The policy does not mention surgery, but doctors have repeatedly denied Gibson's request for surgery because the TDCJ formal policy does not "designate [sex reassignment surgery] as part of the treatment protocol for Gender Identity Disorder."

Gibson represented herself in this lawsuit until it reached the level of the Court of Appeals, at which point the court appointed counsel to represent Gibson on appeal: Stephen Louis Braga, I, of the University of Virginia Law School's Appellate Litigation

Clinic. This appointment is apparently only for the appeal; had the case been remanded, Gibson would presumably be *pro se* again. From the court's account of oral argument, referred to several times in the opinion, it appears that Braga made concessions at oral argument that supported the court's ultimate conclusion because of how Judge Ho dealt with the facts, but it is clear that the court was most heavily influenced by a decision of the U.S. Court of Appeals for the 1st Circuit, *Kosilek v. Spencer*, 774 F. 3d 63 (1st Circuit, en banc, 2014), in which the full 1st Circuit bench reversed a three-judge panel's 2-1 decision and held that a transgender inmate serving a sentence of life without parole was not entitled to receive sex reassignment surgery. Most importantly, Judge Ho referred repeatedly to the 1st Circuit's summary of expert medical testimony offered in that case, filling an important gap in this case's record, where there is no direct expert testimony because the district court rejected Gibson's claims outright. Judge Barksdale's dissent objects to heavy reliance on the *Kosilek* ruling in this way.

Prison inmates are entirely dependent on the corrections system for their health care, for obvious reasons. The Supreme Court and lower federal courts have found that prisoners are entitled to "necessary treatment for serious medical conditions." There is a consensus among federal courts that gender dysphoria is a "serious medical condition," but there is no judicial consensus about whether sex reassignment surgery is a necessary treatment for it, and to date there is no final ruling on the merits by any federal appeals court ordering a state to provide sex reassignment surgery to a transgender inmate. As the courts have interpreted the 8th Amendment's ban on cruel and unusual punishment, a "necessary" treatment is one that has achieved general acceptance in the relevant medical specialty, and some courts have relied on Standards of Care published by the World Professional Association for Transgender Health (WPATH) as potentially supporting general acceptance – however, Judge Ho asserts, only in denying motions to dismiss cases, not in ultimate rulings on the merits.

The WPATH Standards state that "for many, surgery is essential and medically necessary to alleviate their gender dysphoria." But, Judge Ho observes, in the *Kosilek* decision, the 1st Circuit reported expert testimony sharply divided over whether sex reassignment is necessary treatment, and some testimony suggesting that WPATH is not an objective source but rather an organization devoted to advocacy for transgender rights whose published standards do not necessarily reflect a consensus of the medical profession, or even of individuals specializing in providing treatment to transgender patients. Be that as it may, to the *Gibson* panel majority, this was sufficient to suggest that there is "serious dispute" within the medical profession about the necessity for sex reassignment surgery, and so long as that situation prevails, it is not "deliberate indifference" by the Texas corrections system to categorically refuse to provide such treatment.

While many federal courts have made clear that hormone therapy can be considered necessary for cases of severe gender dysphoria, and that counseling by itself is not always sufficient to meet the constitutional standard of care, even that point is not universally accepted, as Judge Ho demonstrated by citing cases on both sides of the question. Regardless of how the medical necessity point is resolved, however, the judge pointed out that under the 8th Amendment's language – cruel *and* unusual – it is not unusual to deny sex reassignment surgery to inmates diagnosed with gender dysphoria – indeed, it is the norm – and thus such denial cannot be found to violate the Constitution as an "unusual punishment."

Judge Barksdale's dissent argued that Gibson has never been afforded the opportunity in the lower courts to present any evidence beyond the factual assertions in her complaint. "Accordingly," she wrote, "as the majority notes correctly, this appeal springs from this very unusual and improper procedure and resulting sparse summary-judgment record, which is insufficient for summary judgment purposes," so she dissented from "the majority's reaching the merits of this action, which concerns the Eighth Amendment's well-established requirements for medical treatment to be provided prisoners."

Judge Ho specifically responds to Barksdale's various objections by asserting that it would be a waste of time and judicial resources to remand the case to build a factual record because, as he found, categorical denial of a right to sex reassignment surgery is so well-founded in the existing case law and facts readily available from published sources, including the *Kosilek* decision, that there is no need to compile a record of the individual facts of Gibson's case. The panel majority considers that Gibson's factual allegations fail to generate material fact issues that would need to be resolved before the court could render a decision on the merits as a matter of law. To the majority, there is no disputing that medical practitioners are divided as to whether sex reassignment surgery is a necessary treatment, so there is no need for inquiry into Gibson's individual case.

Judge Ho drew an analogy to an attempt by an inmate to obtain a drug that the Food and Drug Administration (FDA) has not approved, pointing out that no court would find that a prisoner's right to receive necessary treatment would be abridged by refusing to provide a treatment that has not been approved by the FDA. He also relies on some outdated information concerning practices under Medicaid and Medicare, as the Obama Administration withdrew the formal refusal to fund sex reassignment surgery under those programs, and there actually is a small but growing body of case law finding that these government programs must provide such treatment in appropriate cases, consistent with the Equal Protection Clause. There is also a U.S. Tax Court decision finding that the

costs of sex reassignment surgery are tax deductible, based on its conclusion that it is a medical necessary treatment within the meaning of the Internal Revenue Code's medical deduction provisions. (*Law Notes* reports below a new decision by the Iowa Supreme Court holding that refusing to provide such treatment under the state's Medicaid program violated the Iowa civil rights law's ban on gender identity discrimination. *EerieAnna Good and Carol Beal v. Iowa Department of Human Services*, 2019 WL 1086614, 2019 Iowa Sup. LEXIS 19 (March 8, 2019).) But what Ho is looking for is a professional medical consensus, not a legal consensus, and that has not yet been achieved, in the court's view.

Gibson can seek rehearing *en banc* or petition the Supreme Court for further review. Failing that, however, the precedent is now set for the states of the 5th Circuit – Texas, Louisiana and Mississippi – as they were previously set for the 1st Circuit – Maine, New Hampshire, Massachusetts, and Rhode Island, and Puerto Rico – that state corrections systems can categorically refuse to provide gender confirmation surgery to transgender inmates. ■

Iowa Supreme Court: Medicaid Must Cover Gender Re-Assignment Surgery

By Matthew Goodwin

On March 8, Iowa's highest court sided with transgender plaintiffs EerieAnna Good and Carol Beal and held that Iowa's Medicaid program must cover gender re-assignment surgical procedures related to gender identity disorders. *EerieAnna Good and Carol Beal v. Iowa Department of Human Services*, 2019 WL 1086614, 2019 Iowa Sup. LEXIS 19.

According to the opinion by Justice Susan Christensen, both Beal and Good, now female, were identified as male at birth and later diagnosed with gender dysphoria—Beal in 1989 and Good in 2013. Beal began presenting as female at the age of ten and began hormone therapy in 1989. Good began presenting as female in 2010 and began hormone therapy in 2014.

Both women sought and were denied Medicaid coverage in 2017 for gender-affirming surgery that their individual physicians concluded was medically necessary to treat their gender dysphoria. The managed care organizations (MCO) responsible for the women's Medicaid benefits cited Iowa Administrative Code Rule 441-78.1(4) (Rule 441) as the basis for the denials. Rule 441 excludes and limits Medicaid provision of "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions . . . specifically . . . procedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders[;] [c]osmetic, reconstructive, or plastic surgery procedures performed primarily for psychological reasons or as a result of the aging process[;] [b]reast augmentation mammoplasty, surgical insertion of prosthetic testicles, penile implant procedures, and surgeries for the purpose of sex reassignment[.]"

Both women sought review and reversal of the denials by and from Iowa's Department of Human Services (DHS), the state agency tasked with administration of Iowa's Medicaid program. DHS affirmed the MCOs determinations and Good and Beal filed a petition for judicial review in the Iowa district court in December of 2017.

Good and Beal's suit alleged that DHS is a public accommodation under Iowa law and, as such, is required to provide services to them without regard to their sex or gender identity. Here Good and Beal cited Iowa's Civil Rights Act, which was passed several years after Rule 441 was adopted, and provides "It shall be an unfair or discriminatory practice for . . . any . . . manager of any public accommodation or any agent or employee thereof . . . [t]o refuse or deny any person because of . . . sex . . . [or] gender identity . . . in the furnishing of such accommodations, advantages, facilities, services, or privileges." Good and Beal also alleged that Rule 441 violated the equal protection clause of the Iowa Constitution and that DHS's decision to enforce Rule 441 against them was arbitrary and capricious. Good and Beal prevailed at the trial court level and DHS appealed.

DHS argued that the trial court erred in: (1) deeming it a public accommodation under the ICRA; (2) holding that Rule 441 violated the ICRA; (3) finding Rule 441 violative of the equal protection clause of the Iowa Constitution; (4) that its ruling had a disproportionate negative impact on private rights; and (5) ruling that Rule 441 is arbitrary and capricious.

The Iowa Supreme Court considered only (1) and (2), agreeing with the trial court that the DHS is a public accommodation and that Rule 441 runs afoul of the ICRA. Unlike the trial court, the Supreme Court did not address the constitutional questions raised.

DHS had argued that it was not a

public accommodation because that term, in its view, was "limited to physical places, establishments, or facilities." The court found this unpersuasive, pointing in support of Good and Beal to an Iowa Code section which defines a public accommodation as including a "government unit," and looked to a limited number of cases which "support[ed] [their] interpretation that public accommodations are not limited to a physical place establishment or facility."

DHS also argued that even if it was a public accommodation, Rule 441 did not violate the ICRA because "transgender Medicaid beneficiaries and non-transgender Medicaid beneficiaries in Iowa alike are not entitled to gender-affirming surgical procedures. This position is based on the DHS's argument that the requested surgical procedures are performed primarily for psychological purposes."

Rejecting this argument, Justice Christensen wrote, "[t]he record does not support DHS's position . . . the DHS expressly denied Good and Beal coverage for their surgical procedures because they were 'related to transsexualism . . . [or] gender identity disorders' and 'for the purpose of sex reassignment[.]' . . . Moreover the rule authorizes payment for some cosmetic, reconstructive and plastic surgeries that serve psychological purposes—e.g., '[r]evision of disfiguring and extensive scars resulting from neoplastic surgery' and [c]orrection of a congenital anomaly.' . . . Yet it prohibits coverage for this same procedure if a transgender individual."

While the trial court initially held Rule 441 violated the equal protection clause of the Iowa Constitution, the Iowa Supreme Court declined to reach that question, having already decided the case based on Rule 441's violation of the IRCA.

In a story picked up by the Associated Press about the case, "Beal and Good also expressed elation over the ruling, with Beal saying she's 'extremely happy for those people who will come after me, that we've made a path for them so that they can get the medical care and surgery they need.'" "Good said the decision has been a long time coming. 'So many people still don't understand that this is not something we need for trivial or cosmetic reasons,' she said. 'It's medical care a doctor is recommending for someone who has a medical need for it. And it can save lives. Transgender people are at such risk for suicide, and I've lost transgender friends to suicide. I hope this decision helps change that."

Good and Beal were represented by, among others, Rita Bettis Austen of the ACLU of Iowa Foundation and John Knight of the ACLU Foundation LGBT & HIV Project. ■

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Matthew Herrick Loses 2nd Circuit Appeal in Grindr Cyberharassment Case

By Arthur S. Leonard

A unanimous three-judge panel of the U.S. Court of Appeals for the 2nd Circuit issued a ruling on March 27 in *Herrick v. Grindr LLC*, 2019 WL 1384092, stating total agreement with District Judge Valerie Caproni's earlier ruling in January 2018, 306 F.Supp.3d 579 (S.D.N.Y.), that Grindr, a hookup app aimed at gay men, enjoys totally immunity from any liability for the harms suffered by Matthew Herrick, a gay Manhattanite whose ex-boyfriend created fake Grindr profiles in Herrick's name that led more than a thousand people to contact Herrick at home and at work for "fetishistic sex, bondage, role playing, and rape fantasies."

Unlike Judge Caproni, the appellate panel, consisting of Circuit Judges Dennis Jacobs, Reena Raggi, and Raymond J. Lohier, Jr., omitted some of the gory details from their brief unofficially published "summary order" which does not have "precedential effect" but which nonetheless seems totally consistent with other court decisions interpreting Section 230 of the Communications Decency Act, a federal statute that Congress intended to crack down on internet pornography by requiring service providers, among other things, to enable parental controls over what minors can access on-line.

Herrick achieved some initial success when he first filed suit in a New York State court, getting a motion judge to grant a temporary restraining order requiring Grindr to disable the fake profiles. But Grindr immediately removed the action to federal court and moved to dismiss it, citing Section 230, which as relevant to this lawsuit says: "No provider or user of an interactive

computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

In other words, as found by Judge Caproni and the 2nd Circuit judges, Grindr is not responsible for the content of what users of its app post there. Of course, there is nothing in this statute to prevent Herrick from suing his ex-boyfriend using various state law theories, but Grindr is essentially immune from liability for harm caused by content posted on its app by users.

Herrick's attorneys ended up amending the original complaint that he had filed by himself in state court, in order to allege a wide array of possible legal theories seeking to escape Section 230 immunity, but to no avail. The court found that all of Herrick's claims arose out of "information provided by another information content provider" – that is, his ex-boyfriend – and thus all of them fell within the broad sphere of Section 230. The provision has been liberally interpreted by federal courts to avoid imposing an extremely burdensome censorship obligation on operators of what the statute calls "interactive computer services," which include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."

As Judge Caproni found in her earlier decision, courts have found that "social networking sites like Facebook.com, and online matching services like Roommates.com and Matchmaker.com," fall within this category, so its application to Grindr is not controversial.

Trying to get around this, the lawyers argued that Grindr is providing a defective product and is misrepresenting the safety of its site for users, but the court found that Grindr's Terms of Service published on its site provide adequate warnings. "The district court determined that there was no material misrepresentation by Grindr because the allegedly misleading statements identified in the Amended Complaint – Grindr's Terms of Service and its 'community values page' – do not represent that Grindr will remove illicit content or take action against users who provide such content," wrote the court of appeals, "and the Terms of Service specifically disclaim any obligation or responsibility to monitor user content."

The court said that even if it assumed that Herrick reasonably relied on assurances when he created his own Grindr account in 2011, "his claim would fail for lack of causation." That's because after he met his ex-boyfriend in 2015, he deactivated his Grindr account, long before the harassment following their breakup occurred. "Herrick therefore could have suffered the exact same harassment if he had never seen the Terms of Service or created a Grindr account," wrote the court, "so his injury is not a direct and proximate result of his reliance on (alleged) misrepresentations."

Furthermore, Grindr's Terms of Service were full of disclaimers for any responsibility for what users of the service posted there, which makes any reliance claim not credible.

Ultimately, said the court, quoting from a decision by the 9th Circuit Court of Appeals, *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F. 3d 1157 (9th Cir. en banc, 2008), under Section 230 an interactive computer service "will not be held responsible unless it assisted in the development of what made the content unlawful" and cannot be held liable for providing "neutral assistance" in the form of tools and functionality available equally to bad actors and the app's intended users." In *Roommates.com*, the court found that the provider had provided assistance by giving persons seeking to list apartments for rent a form seeking the kind of information that is not supposed to be included in residential housing advertising under anti-discrimination laws. News reports indicate that *Facebook.com* faces potential liability in a suit by the US Department of Housing and Urban Development, because it enables persons seeking to publicize availability of rental housing to target their advertisements to particular demographics based on prohibited grounds of discrimination under the federal Fair Housing Act.

Although federal courts are fairly united on this sort of broad interpretation of Section 230, there is an outlier opinion, by the Wisconsin Court of Appeals in *Daniel v. Armslist, LLC*, 913 N.W.2d 211 (2018), which specifically states disagreement with Judge Caproni's ruling in Herrick's case and several similar federal court rulings, finding that a state trial court should have allowed a lawsuit against the defendant ICS from which a person had purchased a firearm used in a crime against the plaintiff's decedent.

Grindr's parent-company was purchased by a Chinese corporation, which is reportedly being pressured by the US State Department to sell the app because of national security concerns raised by Chinese ownership. Intelligence agents so inclined might well find ways through Chinese ownership to exploit Grindr from "behind the scenes" to obtain blackmail information against gay men in sensitive positions. ■

Pennsylvania Superior Court Finds No Common Law Marriage Between a Lesbian Couple

By Timothy Ramos

Because a common law marriage is not accompanied by a marriage certificate or other public records, its existence is difficult to prove when marital validity is contested during a dissolution or probate proceeding. Evidence of cohabitation, joint financial planning, or co-parenting are no longer as conclusive as to whether a marriage exists between a couple because, in reality, many unmarried couples have chosen to do the same. Thus, the question of whether a common law marriage exists typically depends on whether a couple intended to enter into a marriage contract. Affirming the Adams County Court of Common Pleas, the Pennsylvania Superior Court found such intent had not been proven in a case involving a long-term lesbian couple. *Valentine v. Wetzel*, No. 790 MDA 2018, 2019 Pa. Super. Unpub. LEXIS 887, 2019 WL 1130441 (March 12, 2019).

Pennsylvania abolished common law marriage by statute in 2005. However, the state still permits a couple to establish—through a declaratory judgment action—the existence of a valid common law marriage entered into on or before January 1, 2005. *See 23 Pa. Cons. Stat. Ann. § 1103.* As we reported in the May 2017 issue of *Law Notes*, the Pennsylvania Superior Court extended the right to seek such a declaratory judgment to same-sex couples. *See In re Estate of Carter*, 2017 PA Super 104, 159 A.3d 970 (Pa. Super. Ct. Apr. 17, 2017) (holding that denying a same-sex couple the opportunity to establish a common law marriage violates the Equal Protection and Due Process Clauses of the 14th Amendment). Now, in *Valentine v. Wetzel*, the intermediate appellate court found that the Court of Common Pleas did not abuse its discretion in concluding that a lesbian couple did not enter into a common law marriage.

Kimberly Valentine and Melissa Wetzel began dating in August 2003. On December 25, 2003, Valentine gave Wetzel a sapphire and diamond ring and asked Wetzel to "be mine." In November 2004, the couple moved from their separate residences in Maryland to a shared home in Adams County, Pennsylvania, where they lived with Valentine's father and daughter (referred to as T.C.). Valentine alleged that the couple exchanged rings again on December 25, 2004. For the next thirteen years, Valentine and Wetzel continued living together, celebrated anniversaries together, started a business together, commingled their money and maintained joint bank accounts, and executed wills designating each other as beneficiaries with a power-of-attorney. T.C. also considered Wetzel to be her step-parent; Wetzel attended school functions as a parent and was listed on the school's emergency contact card.

Valentine filed for divorce on October 4, 2017. In her original complaint, Valentine alleged that she and Wetzel entered into a common law marriage in Frederick County, Maryland on December 25, 2003. However, in her amended complaint, Valentine stated that she and Wetzel entered into a common law marriage in Adams County, Pennsylvania on December 25, 2004. Ultimately, Judge Christina M. Simpson of the Court of Common Pleas of Adams County found that a common law marriage did not exist between the couple because Valentine did not prove by clear and convincing evidence that the couple intended to enter into a marriage contract on either date. Writing for the Pennsylvania Superior Court, Judge John L. Musmanno affirmed Judge Simpson's order.

In order to establish a common law marriage in Pennsylvania, the moving party must show by clear and convincing evidence that the parties had a present intent to enter into a marriage contract. *See Elk Mt. Ski Resort, Inc. v. Workers' Comp. Appeal Bd.*, 114 A.3d 27 (Pa. Commw. Ct. 2015). Typically, *verba in praesenti* (words in the present tense) spoken with the specific purpose of creating the legal relationship of marriage is required to find the existence of a common law marriage; however, there is no requirement regarding the form of the words used. *See David v. Bellevue Locust Garage*, 317 A.2d 341 (Pa. Commw. Ct. 1974). When faced with contradictory testimony regarding *verba in praesenti*, the moving party may introduce evidence of constant cohabitation and reputation of marriage in support of his or her claim. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998).

When asked to identify what was said on December 25, 2004, Valentine testified "just something about love and cherish and we pretty much just put the rings on each other's finger." Judge Simpson found that these words did not constitute verba in praesenti specifically spoken to create a marital relationship. Furthermore, no one—not even Valentine's daughter—was there to witness the exchange of rings or memorialize the event through photographs or recordings. Rather than symbols of marriage, Wetzel contended that the rings exchanged in 2003 and 2004 were simply Christmas gifts; T.C. even testified that Valentine gave Wetzel jewelry every Christmas. Wetzel's position was further bolstered by the fact that the couple celebrated their anniversary every August as opposed to December.

In order to counter Valentine's action for a declaratory judgment that a common law marriage existed, Wetzel also introduced a number of documents

showing that she intended to remain unmarried following her divorce from her husband. For instance, the deed to the couple's shared residence showed that Wetzel took title as a single woman. Additionally, Wetzel provided a 2010 article written by her aunt for a local newspaper; the article simply referred to Valentine as Wetzel's "friend." Wetzel even provided copies of Valentine's 2015 and 2016 tax returns in which Valentine did not claim to have a spouse. Thus, Judge Simpson concluded that Valentine failed to show by clear and convincing evidence that she and Wetzel entered into a common law marriage.

Once again, the case shows that a couple's intent to marry is the key question when determining whether a couple entered into a common law marriage. The fact that a couple lived together, slept together, or commingled assets and liabilities is no longer strong indicia of marriage. As stated by Judge Simpson, such behaviors no longer carry the same social taboo as when the common law marriage doctrine was developed. Even so, this writer notes that courts should consider that same-sex couples faced and continue to face stigmatization for those behaviors more than unmarried opposite-sex couples. Thus, such behaviors should be considered strong indicia of marriage at least for same-sex couples; however, it is unlikely that the case at hand would have turned out differently.

The court's opinion does not list counsel for the parties. ■

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

Ohio Appellate Court Rules in Favor of a Transgender Youth's Name Change

By Cyril Heron

On March 4, 2019, Judge Michael E. Powell, writing for the Twelfth Appellate District of the Ohio Court of Appeals, reversed and remanded a probate court's decision denying a transgender youth's change-of-name petition. *In re Change of Name of H.C.W.*, 2019 Ohio App. LEXIS 803, 2019 WL 1012537. The court found that the Warren County Court of Common Pleas, Probate Division abused its discretion "by failing to consider appropriate best interest factors before it denied the name change application." A concurring opinion suggested a different rationale from the majority to reach the same result.

E.J.W. (the new name of H.C.W.) recalled that as far back as he could remember he felt feelings of distress, the impetus of which because apparent at age fifteen when he realized his transgender identity. His parents were initially concerned that this was a fad or phase and in response sought a therapist for E.J.W. to counsel on these issues. E.J.W.'s first therapist referred him and his parents to Marcy Marklay, a therapist who specializes in transgender issues. Marklay diagnosed E.J.W. with gender dysphoria and, by the time of the hearing, had met with E.J.W. for about 20 hour-long sessions. E.J.W. was soon presenting himself as a male and was referred to as E.J.W. by his family and teachers. Eventually, Marklay granted E.J.W. a release for male hormone therapy which led them to a doctor. E.J.W. and his parents had four consultations where the doctor explained the proposed testosterone therapy. E.J.W.'s parents said they understand that the hormones will result in E.J.W. experiencing male puberty. E.J.W.'s mother additionally stated she understood the consequences and did not make the decision lightly. Ultimately, E.J.W. was scheduled to begin testosterone therapy a month after the probate court's hearing.

On April 24, 2018, Mother filed the application to change E.J.W.'s name, and a hearing with the probate court occurred on June 18, 2018. E.J.W.'s father stated that E.J.W. displayed anxiety and was on anti-depressants before his diagnosis. The probate court queried why E.J.W. sought a legal name change if he understood he had a common law legal right to go by any name he so chose. E.J.W. poignantly answered that his name on his school records continued to be the female name H.C.W., wherefore substitute teachers would refer to him thereby causing him distress. Father spoke on the topic as well stating, "E.J.W. is fifteen, soon will be fifteen and a half, and we'll be applying for driver's license, and, then eventually passports, and, college, and, um, for this I, I practically wanted the name changed to happen if that's what he wants." Moreover, Mother resolutely stated, "we have been going to therapy for about a year now, and we've been to Children's hospital and gone through all of the things that we feel like we should go through, and, we're convinced that it's in E.J.W.'s best interest to change his name."

Despite E.J.W.'s desires and his parents' passionate support, the probate court denied the name change on the basis that it was not "reasonable and proper and in the child's best interest at this time." The probate court continued by undermining E.J.W. and his parents' careful consideration with claims that he is too immature to know the ramifications of this life altering decision.

Judge Powell began with the common law and statutory standard for name changes: respectively, one may adopt any name so long as such change is not made for fraudulent purposes; and, a county resident of at least one year must submit an application with the reason for the name change and the requested new name, publish the name change in a newspaper of general circulation at least 30-days prior to the hearing,

and attend a hearing setting out proof of a reasonable and proper cause for the name change. R.C. 2717.01(B). If a minor is to have her name changed, her parents must file the application, and the court must consider the best interest of the child. Furthermore, Judge Powell held that an appellate court would only reverse a probate court's determination if it finds that the trial court abused its discretion; *i.e.*, the decision of the trial court was unreasonable, arbitrary, or unconscionable.

E.J.W.'s case involved a transgender name change, as opposed to a surname change; therefore, Judge Powell found that the *Bobo/Willhite* precedent, which set forth factors for determining the best interest of a child when conducting a surname change inquiry, was inapplicable. In fact, the court found no Ohio opinions on best-interest factors relating to transgender name changes for minors. Thus, the court innovatively looked to a decision of the New Jersey Superior Court, *Sacklow v. Betts*. *Sacklow v. Betts*, 163 A.3d 367 (2017). The *Sacklow* and *Bobo/Willhite* factors combined into seven factors for determining the best interest of a minor seeking a forename change: (1) the age of the child; (2) the child's motivations regarding the name change; (3) the length of time the child has used the preferred name; (4) any potential anxiety, embarrassment, or discomfort that may result from the child having a name he or she believes does not match his or her outward appearance or gender identity; (5) the history of any medical or mental health counseling the child and parents have received; (6) the name of the child is known by in [sic] his or her family, school, and community; and (7) the wishes and concerns of the child's parents.

At this point, the court profoundly missteps and creates potentially adverse precedent out of an otherwise empowering opinion. The remainder of the court's opinion centers on parental input as the dominant factor of the enumerated seven. Drawing from the Ohio Supreme Court's case *Harrold v. Collier*, Judge Powell affixes the special weight standard from nonparental-visitation cases to transgender name-change cases, *i.e.*, the wishes of parents of minor children are to have special weight. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334. As the LGBT community is acutely aware, many parents hold wishes and opinions born of animus and misunderstanding about gender identity and sexuality of their children. Therefore, the apportioning of special weight to the wishes of parents was a decision based on a utopian outlook at odds with the reality for some transgender youth. Notwithstanding the special weight, the court is quick to establish that this presumption in favor of the parent's wishes is not irrefutable nor the sole determinant.

Finally, the court ends its opinion by highlighting the trial court's errors leading to its improper decision. The trial court failed to take into account the parents' interests as evinced by its statement that E.J.W.'s parents held a preference motivated by a "desire to assuage their child." In addition, the trial court failed to consider E.J.W.'s mental health counseling, his upcoming testosterone therapy, or his identity as a male. Two judges concurred with Judge Powell's opinion, but Judge Robin Piper wrote separately, agreeing that the decision of the trial court was erroneous and an abuse of discretion, but his rationale is vastly different than Judge Powell's.

Judge Piper began his concurrence immediately attacking the special-weight standard mentioned previously. Rather than argue the appropriateness of special weight for parental wishes, Judge Piper instead focused on attacking it on technical grounds. He believed that the special weight utilized in *Collier* was born out of specific language in the statute regarding visitation. Therefore, *Collier* was not apropos, because no similar statutory language or provision was involved in this case. To his mind, the courts require a mandate from the legislature or the Ohio Supreme Court, not the edict from anything lower. Rather, Judge Piper believes that the probate court properly executed its duties and had the right tools, but ultimately arrived at the wrong decision.

Judge Piper proposed that the *Bobo/Willhite* factors were perfectly suitable for cases of both surname and forename changes, which he supported by pointing to the Ohio Supreme Court's use of comprehensive and inclusive factors. Many of the eight factors, however, are ostensibly non-comprehensive and difficult to adapt to the forename context: good examples include, the effect of the change on the preservation and development of the child's relationship with each parent; the identification of the child as part of a family unit; whether the child's surname is different from the surname of the child's residential parent; and parental failure to maintain contact with and support of the child. Therefore, the majority was seemingly right in their determination that a new test needed to be implemented. That notwithstanding, Judge Piper was comfortable to conclude that E.J.W. was entitled to have his legal name changed through judgment as a matter of law.

The concurrence concludes with sound advice that the court refrain from mandating the amount of weight any one factor must always receive in every case. Both the concurrence and the majority opinion reach the same conclusion allowing the name change, but both share the similarity of stopping short of fully inclusive and profound adjudication. The majority opinion fails to consider the entire ramifications of granting special weight to a parent's wishes in the context of a legal name change for a transgender individual. On the other hand, the concurrence recognizes the disjointedness of granting special weight but fails to mention the effect of that on transgender individuals, instead Judge Piper opted to argue solely based on technicalities. But, there still remains reason to rejoice: a man received his name change with the full backing of an appellate court, and that should be celebrated.

E.J.W. was represented by Joshua R. Langdon of Cincinnati, Ohio. ■

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

Maine Federal Court Partially Finds in Favor of Three Lesbian Plaintiffs in Gender/Sexual Orientation Discrimination Suits

By Vito John Marzano

On March 19, 2019, U.S. District Court Judge George Z. Singal concluded, in three separate orders, that certain claims for workplace discrimination brought by plaintiffs Deborah Huard and Diedre DiGiacomo can proceed to trial against their former employer, Kennebec County. *Huard v. Kennebec County*, 2019 WL 1264864, 2019 US Dist. LEXIS 44834; *DiGiacomo v. Kennebec County*, 2019 WL 1270927, 2019 US Dist. LEXIS 44500. However, in permitting those claims to proceed to trial, the court dismissed several other claims and defendants from the suit, as well as all claims alleged by plaintiff Cheri Caudill. *Caudill v. Kennebec County*, 2019 WL 1270921, 2019 US Dist. LEXIS 44502. All three plaintiffs are lesbians who struggled in a workplace where there was hostility due to their sexual orientation.

Plaintiffs initially commenced a joint action in the U.S. District Court for the District of Maine in September 2016. The complaint names several individual defendants, including colleagues, supervisors, and county executives, as well as Kennebec County and its departments. Because a county's subdivisions are considered a single entity for the purpose of being sued, the court viewed the claims made against the Kennebec County Corrections Facility (KCCF) as claims against Kennebec County. After discovery concluded, the court granted defendants' motion to severe the matters because the alleged events that resulted in workplace discrimination for each individual plaintiff arose out of separate occurrences. After severance, defendants filed three motions to dispose of the matters.

Regarding each plaintiff, Diedre DiGiacomo, a self-identified Jewish lesbian, was employed as a corrections officer at KCCF from November 2013 to May 2015. She alleged that she was constantly subjected to homophobic and anti-Semitic comments and jokes. DiGiacomo complained of her colleagues' conduct to supervisors but nothing substantively resulted from those complaints. Eventually, she submitted a five-page letter describing her allegations of discrimination, sexual harassment, and a hostile work environment, which did not result in any investigation. Her colleagues began to inform the inmates of her complaints, and those inmates began to make comments about her being a "rat" and alluding to what happens to "rats." In May 2015, she resigned her position on account of the hostile work environment and retaliation that she experienced. DiGiacomo did not grieve her issues to the County Commissions, as required under the union handbook. On October 5, 2015, she filed a complaint with the Maine Human Rights Commission (MHRC). A year later, the MHRC and the Equal Employment Opportunity Commission (EEOC) issued right-to-sue letters.

For the bulk of her 25 years at KCCF, Huard received strong performance reviews. In 2011, a new jail administrator effectively began to run the facility. The administrator was friends with three other women, and many employees perceived that relationship as furnishing certain privileges to those women. After the transition occurred, Huard began to receive poor reviews. Additionally, one of Huard's superiors was overheard saying that he was "going to get rid of all lesbians." Huard was temporarily terminated in October 2012, but reinstated two months thereafter on account of union negotiations.

After her return, Huard made several complaints about work conditions and employment discrimination for another colleague (Huard was union shop steward). Additionally, she informed her superiors that she could no longer work overtime on account of aggravated medical conditions to her feet and leg. She provided a note from her primary care physician in support of this, but KCCF deemed this insufficient (although it did not inform her of this). KCCF required Huard to undergo an examination by its doctor. Said doctor initially agreed with Huard's primary care physician but then amended his report to say that some overtime, with restrictions, was permissible. She was still required to work overtime and was not afforded a reasonable accommodation. For fear of being terminated, she announced her retirement. The following day, she met with a superior who agreed to limit her overtime if Huard provided a firm date. She retired on June 30, 2015. On November 12, 2015, Huard filed a complaint with the MHRC, and the following October, she received right-to-sue letters from the MHRC and EEOC.

On March 18, 2013, Caudill began her employment as a clerical specialist at KCCF. She did not have a written employment contract and was not a member of the union during her employment. On November 4, 2013, Caudill began training for the corrections officer certification. She was in a relationship with another corrections officer who is also a woman. They received direction to keep their personal and private lives separate, and that they could not work together. Both adhered to these directives. Nevertheless, once it became known that Caudill was in a relationship with another woman, she became a target of investigations. Further, she overheard numerous homophobic comments and gossip about her. Caudill never received unwanted sexual advances or touching.

After completing the corrections officer certification in 2014, Caudill began to receive write-ups, although she was considered to have a "good" or "excellent" probability of continued employment. Many of the concerns raised in the reprimands concerned reports from Caudill's peers. On September 17, 2014, she was informed that KCCF no longer employed her.

Caudill claims that all of the write-ups that led to her termination resulted from her colleagues learning that she was a lesbian. However, she never made any report of harassment to KCCF. Further, Caudill never filed a complaint with the MHRC or EEOC.

Common to all plaintiffs are claims for, among other things, workplace discrimination on the basis of gender, sexual harassment, and a hostile work environment in violation of Title VII and the Maine Human Rights Act (MHRA), and for liability under the federal RICO statute and under a Maine statute that permits criminal liability against an organization. DiGiacomo and Caudill also alleged discrimination on the basis of sexual orientation in violation of the MHRA. Huard alleged disability discrimination. Plaintiffs sought to hold Kennebec County and the individually named defendants liable.

Defendants first moved for dismissal pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings. This type of review replicates a motion to dismiss pursuant to Rule 12(b)(6), in which a court looks at the factual allegations to determine whether, if proven true, they plausibly give rise to liability. Dismissal is warranted where the factual allegations cannot plausibly give rise to relief.

Applying the foregoing, Judge Singal first addressed defendants' motions for dismissal for plaintiff's claims for individual liability under Title VII against the personally named defendants. This group comprises of plaintiffs' colleagues, supervisors, and administrative personnel who oversaw plaintiffs at KCCF, as well as the three-elected county supervisors. However, First Circuit precedent holds that "there is no individual employee liability under Title VII." *Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009). Accordingly, those claims against the individual defendants were dismissed. Plaintiffs' claims for liability under the MHRA failed for the same reason. While plaintiffs cited a 2013 Maine Human Rights Commission memorandum in support, Judge Singal did not view this as sufficient to overcome clear case law to the contrary.

With respect to plaintiffs' claim for "liability against Kennebec County" pursuant to 17-A MRSA § 60, which permits criminal liability against an organization, the court concluded that this statute does not give rise to a private cause of action. That is to say, while the organization may be subject to criminal culpability, an individual cannot use this statute to seek recovery in a civil lawsuit. While plaintiffs attempted to analogize this to a plausible civil RICO claim, the court noted that those claims are already captured. Accordingly, defendants' motion for judgment on the pleadings in this regard was granted.

Next, defendants moved for summary judgment with respect to, among others, the RICO and statutory discrimination claims. Summary judgment is only appropriate where the moving party has shown through admissible evidence that there is no material issue of fact and it is entitled to judgment as a matter of law. The evidence is viewed in a light favorable to the non-moving party. If the moving party meets that burden, the non-moving party must point to a triable issue of fact.

Turning first to the RICO claims, 18 U.S.C. §§ 1961-68, generally understood as a tool for criminal prosecution, provides for a generous private right of action. Plaintiffs must allege (1) conduct, (2) of an enterprise, (3) "through a pattern of racketeering activity" that caused them injury. Plaintiffs asserted that defendants' racketeering consisted of "violations of the Hobbs Act, theft by extortion and bribery in official and political matters in violation of state criminal statutes." As cited in the court's orders, the First Circuit has held that while it may be theoretically possible for a wrongful discharge to stem directly from a RICO predicate act, success on such a claim would likely only arise in very circumscribed situations. See, *Camelio v. Am. Fed'n,* 137 F.3d 666, 672 (1st Cir. 1991). The court then points out that these claims generally do not survive a pre-answer motion to dismiss.

For DiGiacomo and Huard, the court concluded that there was no admissible evidence that extortion proximately caused either to resign or retire. That is to say, even accepting Huard's assertion that lesbian personnel were under constant threat of losing their jobs because they were lesbians, this does not constitute a predicate act to qualify as extortion. For Caudill, the evidence established that she was terminated after a documented series of alleged performance deficiencies. A reasonable factfinder, even looking at the evidence in a light favorable to Caudill, could not conclude that these write-ups were the result of Caudill being targeted because she is a lesbian, found the court.

For all plaintiffs, extortion requires a transfer of property from the victim into the possession of the extortionist. Each alleged a property right in a "right to employment free of discrimination." However, none of the evidence established that a named defendant obtained their job as to constitute a transfer of property from one to another. Hence, "the employment" per se was not obtainable property.

Turning next to DiGiacomo's and Huard's constructive discharge allegations, the court explains that such is an element of a claim for employment discrimination. Put another way, constructive discharge occurs when an employer discriminates against an employmee and makes a working condition so intolerable that a reasonable person feels compelled to resign.

For DiGiacomo, the court was unpersuaded by defendants' argument that framed her work environments as one with merely occasional inappropriate sexual comments or remarks about her religion. Rather, a factfinder would conclude that DiGiacomo proffered evidence that those comments, coupled with proof that KCCF officers encouraged inmates to call her a "rat," created a work environment so intolerable that a reasonable corrections officer would fear for her safety and be compelled to resign.

For Huard, the court concluded that the evidence would allow a factfinder to conclude that she was forced into retirement through denial of a reasonable accommodation for a medical condition. Notably, even if only a few hours a week, she was required to work overtime, but this requirement

ceased after she announced her retirement. Coupled with statements by a superior that he wanted her to retire even though she initially had no plans to do so, this would support constructive discharge.

As constructive discharge is merely an element of employment discrimination, having concluded the foregoing, the question is whether a reasonable jury could connect it to the various retaliation and discrimination claims.

Huard conceded that the record did not support her claims for gender discrimination, and, as such, the court dismissed those claims. The court concluded that her disability discrimination claims met the summary judgment burden because the meeting with her supervisor and the fact that she was no longer required to work overtime after announcing her retirement would allow a jury to conclude that she was the victim of disability discrimination. Conversely, her hostile work environment claim was dismissed because, although she was compelled to work some overtime, this was not considered so pervasive or severe as to constitute a hostile work environment.

DiGiacomo and Huard each alleged statutory retaliation in violations of Title VII and the MHRA, and that they were subject to retaliation for engaging in protected "whistleblower activity" under Maine law. Each were required to show (1) they engaged in protected conduct; (2) they were subject to adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct.

The whistleblower claim is subject to conduct that occurred for 300 days preceding the end of one's employment. For Huard's whistleblower claim, although she complained of working conditions throughout 2012, 2013, and 2014, she did not in 2015. For the 300 days prior to her retirement, she was not written up for not going through proper channels. As such, the court granted summary judgment to defendants with respect to Huard's whistleblower claim.

With respect to Huard's retaliation claim, activity preceding 2015 is considered. The record established that defendants did not accept the initial report of their own medical examiner, and that they did not tell Huard early-on what documentation would be sufficient for her disability accommodation. Those facts, coupled with her superior's comments about a firm retirement date, would permit a finding of retaliation.

For DiGiacomo, the court relied on evidence that defendants encouraged inmates to call her a "rat," thus creating a plausible threat to her personal safety, which was bolstered by the temporal proximity of the written complaint letter. Such would permit a reasonable factfinder to conclude that she was the victim of retaliation.

DiGiacomo's hostile work environment claim also survived. The court concluded that her co-workers' disregard for her request to cease their offensive behavior that occurred on a near daily basis was pervasive. Hence, this is appropriately a question for a jury.

With respect to Caudill, the court did not touch the merits of her claims because she did not exhaust administrative remedies. Unlike DiGiacomo and Huard, Caudill never registered a complaint with the EEOC or MHRC. As such, her Title VII claims were dismissed. Similarly, while her state discrimination claims were not subject to dismissal, she could only recover monetary damages if she exhausted administrative remedies. Because she only sought monetary damages, said failure mooted her claims.

To summarize, all of Caudill's claims were disposed of by the court. DiGiacomo's claims for, among others, gender discrimination, sexual orientation discrimination (under state law), sexual harassment discrimination (under state law), retaliation, and hostile work environment will proceed to trial. Huard's claims for disability discrimination and retaliation will proceed to trial.

The plaintiffs are represented by Jackie DiGiacomo, Waterville, Maine. ■

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

District Court Allows Challenge to Palatine School's Restroom Policy by Alliance Defending Freedom to Continue

By Arthur S. Leonard

U.S. District Judge Jorge L. Alonso, ruling on Township High School District 211's motion to dismiss a lawsuit brought by Alliance Defending Freedom (ADF) challenging the district's policy of allowing transgender students to use the restrooms and locker rooms of their choice, found that plaintiffs should be allowed to pursue their claim that the policy violates the rights of cistransgender (non-transgender) students under Title IX of the Education Amendments of 1972, the Illinois Religious Freedom Restoration Act, and the Free Exercise Clause of the First Amendment. However, Judge Alonso dismissed a claim that the policy violated the cisgender students' right to bodily privacy or their parents' right to direct the education of their children. *Students & Parents for Privacy v. School Directors of Township High School District 211*, 2019 U.S. Dist. LEXIS 53903 (N.D. Ill., March 29, 2019). The public school in question is in Palatine, Illinois. "The "organizational" plaintiff (called SPP by the court), was apparently formed for the purpose of bringing this case, and one individual parent joined as a co-plaintiff.

As usual in ruling on a motion to dismiss, the court must take the plaintiffs' allegations as true in deciding whether they have stated a potentially valid legal claim. The defendant, moving to dismiss, has not filed an answer to the complaint, so the plaintiffs' rather argumentative characterization of the facts has not been contravened yet. However, Illinois

Safe Schools Alliance, an organization that "advocates on behalf of lesbian, gay, bisexual, transgender and questioning young people" has been granted intervenor status, as have three students who "claim genders different from their sex at birth" and thus benefit from the challenged policy. The Alliance and the student intervenors are represented by attorneys from the ACLU of Illinois and the ACLU LGBT Rights Project based in New York.

The court was quick to disclaim any contention that it actually accepts the plaintiffs' factual allegations, stating in a footnote: "As lawyers understand, on a motion to dismiss, a Court accepts alleged facts as true. That does not mean the facts are true; that does not mean a plaintiff will ultimately be able to prove the facts. Many a plaintiff has failed to prove, at a subsequent stage of litigation, the facts alleged in a complaint. Plaintiff, however, are, within the bounds of Rule 11, the masters of their complaint; and, the Court takes the allegations in plaintiffs' complaint as true." Such a footnote is very unusual. Clearly, Judge Alonso, assuming the opinion will be read by non-lawyers in the school district, wanted to be sure nobody mistook his summary of the factual allegations as actual findings of fact.

Such precautions are necessary, because the complaint uses terminology and describes incidents in a way that sounds very much like ADF anti-LGBT propaganda.

"Plaintiffs allege that the words sex and gender mean different things," wrote the judge. "One's sex is either male or female, depending on the union of male and female gametes at one's conception. Gender, on the other hand, is a social construct and runs along a continuum from very masculine to very feminine. Plaintiffs allege that a person's perception of his or her own gender does not change his or her primary or secondary sex characteristics or his or her genes. The crux of this suit is that defendants seek to affirm the claimed genders of students by allowing male students who claim female gender to use privacy facilities (i.e., bathrooms and locker rooms) designated for use by the female sex and female students who claim male gender to use privacy facilities designated for the male sex. Plaintiffs refer to the policy as District 211's 'compelled affirmation policy.' Plaintiffs allege District 211 did not adopt the policy based on students' manifesting behaviors or appearances stereotypical of gender different from their own. Rather, District 211 adopted the policy solely to affirm the claimed genders of those students claiming a gender different from their sex at birth." Nobody else talks about "privacy facilities," but this is, of course, terminology setting up ADF's "right to privacy" argument for cisgender students.

The complaint alleges that the District's enforcement of the "compelled affirmation policy" (and surely that is now what the District calls their policy) "has caused SPP Students embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation and the loss of dignity. SPP Students are at continual risk of encountering (and sometimes do encounter), without their consent, members of the opposite sex while disrobing, showering, urinating, defecating and while changing tampons and feminine napkins. "When District 211 first allowed Student A to use female restrooms, but before it allowed her to use the girls' locker rooms, Student A used a girls' locker room anyway. SPP Girls were startled, shocked, embarrassed and frightened by the presence of a male in the girls' restroom." The complaint recounts an incident in which Student A, a transgender girl, was using the girls' locker room and a "female student (who is not a plaintiff but who had been sexually assaulted previously) was exposed to Student A's penis. District 211 failed to investigate or remediate the situation." The complaint goes on in similar vein, and notes that an SPP Parent asked that her daughter be allowed to use a private locker room, but was refused by the District.

While transgender students are allowed to use the restroom and locker room of their choice, plaintiffs complain, cisgender students are not given a choice and must use the locker rooms designated for their biological sex. "Before adopting the policy," the complaint alleges, "District 211 did not investigate the reliability of the science underlying gender-affirmation treatments. Nor did it make any effort to understand the impacts such a policy would have on students exposed to opposite-sex, same-gendered students in locker rooms and restrooms." The plaintiffs also complaint that students who have objected to the policy have been called "transphobic," "homophobic," and "bigoted," and asserts that many students are basing their opposition on their religious beliefs about sex and gender. The complaint also contends that some cisgender girls have minimized their restroom use to avoid encountering transgender girls in the restrooms, "putting themselves at risk of urinary tract infections, dehydration and constipation," and some have skipped out of class to avoid encountering transgender students in the restrooms during breaks between classes.

In many ways, the allegations are cracked mirror images of what transgender students have alleged in their lawsuits about the harms they have suffered as a result of being excluded from using restrooms consistent with their gender identities.

As a preliminary matter, the court concluded that SPP had standing to represent the interests of its student and parent members, but that an individual parent who joined as a plaintiff did not have standing, since the complaint did not include any allegations of an injury to her or her child particularly.

Judge Alonso turned first to Title IX, as to which SPP alleges that the students were subject to sexual harassment due to the "compelled affirmation policy." As have many courts, this court looked to sexual harassment claims under Title VII of the Civil Rights Act of 1964 as setting the standard for evaluating Title IX claims. "SPP has pleaded far more than necessary . . . to state a claim for sexual harassment," wrote the judge.

"Whether SPP can ultimately prevail on this claim is a question for another day, but the allegations in the complaint suffice to put District 211 on notice" so this claim was not dismissed.

However, the court rejected the Due Process bodily privacy claim. "So far," he wrote, "the right not to be seen unclothed by the opposite sex is not on the Supreme Court's list" of fundamental privacy rights. "By bodily integrity," a right recognized by the Supreme Court, "the Supreme Court was talking about physical bodily integrity, not visual bodily privacy." For example, cases challenging strip searching of individuals under particular circumstances have been found to violate Due Process. While the Supreme Court has discussed nudity and privacy in various contexts, "this Court takes seriously the cautions of the superior courts not to expand substantive due process," Alonso continued. "Although it would not shock the Court if the Seventh Circuit or Supreme Court one day recognizes the right to bodily privacy that the plaintiff seeks to enforce, this Court is not at liberty to expand the substantive rights protected by the Due Process Clause." While dismissing this claim with prejudice, the court noted the 3rd Circuit's decision in the Boyertown Area School District case, which found that such a right exists, but that it was not violated by a school's policy giving restroom and locker room access to transgender students because the district had a compelling interest in not discriminating against transgender students. The Supreme Court is still considering a cert petition filed in that case last November.

Similarly, the court rejected the claim that the policy violated the parents' right to direct the education of their children. Such a right has been recognized to some extent since the 1920s, but it was mainly directed at mandatory public education laws and was largely rejected when it came to attempts by parents to control curricular issues. "In its brief" in opposition to the motion to dismiss, "SPP argues that SPP Parents do not seek to control curriculum but rather to 'preserve their parental right to teach modesty.' The alleged compelled affirmation policy, however, does not prevent SPP Parents from teaching their children modesty," wrote Alonso. "to be sure, the compelled affirmation policy might undercut that teaching, but plaintiffs have cited no case that suggests the right to direct education includes a right not to have their teachings undermined by public school (beyond, of course, the right to choose private school instead)."

However, the court found that the complaint adequately set forth religious freedom claims. Rejecting the defendants' arguments that plaintiffs had not alleged sufficient facts for such claims, the court found that "SPP's allegations provide sufficient notice of the claim. Plaintiffs have alleged that District 211 maintains a policy allowing male students with female genders to use the girls' locker rooms and restrooms and female students with male genders to use the boys' locker rooms and restrooms. Thus, SPP Students are at risk of exposure to opposite-sex individuals while they are undressing or using the restroom, in violation of their sincerely-held religious beliefs." Alonso suggested that if this was their entire case, it might not suffice, but the addition of mandatory physical education classes and requiring students to change or shower between classes meant they could not escape possible exposure, noting as well that the locker rooms do not have private showers and changing areas. Also, the District's suggestion that students who object to the policies are "bigoted and intolerant" and heckling to which some students allegedly have been subjected over this issue add to the religious freedom claim. Although the court disclaimed deciding whether SPP can prevail on the claim, it found sufficient factual allegations to make a plausible religious freedom claim, and dismissed as premature the District's attempt to argue that it had a compelling interest for the policy, since such affirmative defenses are not pertinent to a motion to dismiss.

Similarly, the court found sufficient allegations at this stage to allow a First Amendment free exercise claim to continue. While agreeing with the defendants that the challenged policy is facially neutral, what distinguishes this case, wrote Alonso, "is that plaintiffs have alleged that District 211 conveyed to students that anyone who objects to the compelled affirmation policy is a bigot or intolerant. That sounds like the sort of 'subtle departure' from neutrality that might support a claim under the Free Exercise Clause," so that claim will not be dismissed. Without mentioning the case, Judge Alonso seemed to be reflecting the rationale used by the Supreme Court in *Masterpiece Cakeshop* to find a Free Exercise basis to vacate the Colorado Commission's finding of sexual orientation discrimination by the baker who would not make a wedding cake for a same-sex couple, labeling the decision making process tainted by hostility to religion at the Commission level based on remarks by some commissioners.

The court set a status conference for April 9 to determine how to proceed on the remaining counts. ■

District Court Adheres to 6th Circuit Precedent Barring Sexual Orientation Discrimination Claims Under Title VII

By Timothy Ramos

Last year, *Law Notes* reported on *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) in the April issue. The case marked the first time that a panel for the 6th Circuit explicitly endorsed the Equal Employment Opportunity Commission's conclusion that gender identity discrimination is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964. In so holding, Circuit Judge Karen Nelson Moore drew a direct comparison to the 7th Circuit's decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), which held that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. Thus, the 6th Circuit appeared poised to revisit the issue of whether Title VII prohibits sexual orientation discrimination.

In *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006), the 6th Circuit held that sexual orientation discrimination is not prohibited by Title VII under the gender-stereotyping theory announced by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Vickers* is primarily based on the 2nd Circuit's holding in *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), which was ultimately overruled in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018). Absent an *en banc* hearing or a Supreme Court ruling, district courts within the 6th Circuit have held that *Vickers* remains binding precedent because *Harris Funeral Homes* did not overrule the case. *See Sharp v. EMHFL, Inc.*, No. 5:17-cv-00503-JMH, 2018 U.S. Dist. LEXIS 167810, 2018 WL 4685443 (E.D. Ky. Sept. 28, 2018); *Underwood v. Dynamic Security, Inc.*, 2018 U.S. Dist. LEXIS 101026, 2018 WL 3029257 (E.D. Tenn. June 18, 2018); *Lindsey v. Mgmt. & Training Corp.*, No. 4:17-CV-00146-JHM, 2018 U.S. Dist. LEXIS 98001, 2018 WL 2943454 (W.D. Ky. June 11, 2018). U.S. District Judge William L. Campbell, Jr. reached the same conclusion in *Kilpatrick v. HCA Human Res.*, LLC, 2019 U.S. Dist. LEXIS 33086, 2019 WL 998315 (M.D. Tenn. Mar. 1, 2019). Thus, the judge granted summary judgment to HCA in a lawsuit brought by a gay, black former employee. In addition to Title VII claims of sex and race discrimination, hostile work environment, and retaliation, the plaintiff alleged tortious interference with a contract, tortious interference with business relations, and intentional infliction of emotional distress.

Montrell Kilpatrick worked as a recruitment administrator at HCA between November 2014 and March 2016. His troubles began around December 17, 2015, when he received two anonymous sexual harassment complaints against him. In order to defend himself against these allegations, Kilpatrick revealed his sexual orientation to Thomas Beck, HCA's Vice President of Labor Relations. Afterwards, other employees found out about Kilpatrick's sexual orientation and began treating him adversely. Up until his discharge in March 2016, Kilpatrick was subjected to unwarranted discipline, verbally harassed, gifted with stereotypically feminine products like pink nail polish and pink sunglasses, left post-it notes containing Bible verses telling him that he was going to hell, and assigned a seat away from his team and near a storage area.

On December 30, 2015—two weeks after he disclosed his sexual orientation to Beck—Kilpatrick submitted tuition-reimbursement requests for classes he took in the fall. HCA denied his requests and opened up an investigation into his previous reimbursement requests; the company alleged that there were discrepancies regarding the costs and time periods of some of Kilpatrick's classes. On March 1, 2016, HCA suspended Kilpatrick based on his failure to provide all of the information requested in the time and format that HCA demanded; he was fired one week later. Afterwards, Kilpatrick filed an EEOC charge against HCA on March 15th for sex and race discrimination as well as retaliation. Although Kilpatrick found a new job at Brookdale Senior Living in May 2016, he was discharged in January 2017 after Brookdale received an anonymous phone call disclosing that his employment dates at HCA did not match those on his application. Kilpatrick then filed his lawsuit against HCA.

Judge Campbell first addressed Kilpatrick's claims for sex discrimination and hostile work environment under Title VII. Although the judge noted that: (i) the Supreme Court held that Title VII prohibits sex discrimination based on gender stereotypes in *Price Waterhouse*; and (ii) the 7th and 2nd Circuits have expanded their understanding of gender stereotyping to include sexual orientation discrimination, *Vickers* remains binding precedent in the 6th Circuit. Thus, the judge granted summary judgement to HCA. Kilpatrick could not pursue his claims because he did not allege that he was discriminated against for failing to conform to traditional gender stereotypes in any "observable way at work." *Vickers*'s observable-at-work standard narrows *Price Waterhouse*'s holding to characteristics that are readily demonstrable in the workplace, such as tone and appearance; for obvious reasons, plaintiffs tend to have a difficult time alleging that their attraction to individuals of the same sex was readily demonstrable in the workplace. It is worth noting that in *Harris Funeral Homes*, Judge Moore pointed out that *Vickers*'s observable-at-work standard contradicts circuit precedent in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005). *See Harris Funeral Homes*, 884 F.3d at 580. This contradiction further reinforces why the 6th Circuit should hold an *en banc* hearing regarding *Vickers*'s lack of continued vitality.

Next, Judge Campbell granted summary judgment against Kilpatrick's

claims of race discrimination and hostile work environment. Kilpatrick alleged that his supervisors made various racial comments such as "you people" and "you guys know how to fry some chicken," while an HR employee implied that Kilpatrick must have sold drugs in order to afford his car. Judge Campbell held that the statements were not "pervasive or severe" enough to create a hostile work environment under the 6th Circuit's high bar for discriminatory conduct. Furthermore, Kilpatrick's race discrimination claim also failed because he did not provide evidence demonstrating that he was either: (i) replaced by someone outside the protected class; or (ii) treated differently than similarly situated, non-protected employees. Specifically, Judge Campbell found that black employees made up roughly half of Kilpatrick's department and Kilpatrick did not allege that non-protected employees with comparable problems regarding their tuition-reimbursement requests were treated more favorably than him.

After disposing of Kilpatrick's sex and race discrimination claims under Title VII, Judge Campbell granted summary judgement against Kilpatrick's retaliation claim under Title VII. To establish a prima facie claim of retaliation, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the exercise of his civil rights was known to the defendant; (3) thereafter, the defendant took an employment action that was adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. Judge Campbell held that Kilpatrick failed to adequately allege these last two requirements because Kilpatrick provided no evidence showing that the anonymous phone call to Brookdale originated with HCA or that the call was made in retaliation for filing an EEOC charge. Consequently, Judge Campbell also granted summary judgment against Kilpatrick in regards to his state-law claims for tortious interference with a contract and tortious interference with business relation as both claims require that a plaintiff provide evidence that the defendant's action was the proximate cause of the plaintiff's injury.

Finally, Judge Campbell granted summary judgment against Kilpatrick's claim for intentional infliction of emotional distress (IIED). Kilpatrick alleged that as a result his treatment by HCA—including the sexual harassment claims brought by two women; the pink sunglasses, pink nail polish, and Bible verses left on his desk; and the anonymous call to Brookdale—he is now undergoing therapy and taking medication for his depression. However, Judge Campbell noted that a plaintiff's burden for establishing outrageous conduct for an IIED claim is not easily met. Even if Kilpatrick stated a cognizable claim for sex or race discrimination, such discriminatory conduct would not automatically reach the level of outrageousness needed to sustain an IIED claim. Because Kilpatrick could not adequately allege discrimination at all, he has not alleged the level of outrageous conduct needed for his IIED claim to survive.

Once again, this case primarily demonstrates that the district courts' continued adherence in the 6th Circuit to *Vickers* runs afoul of the gender-stereotyping theory announced by the Supreme Court in *Price Waterhouse*. While the 6th Circuit has correctly applied the theory in cases involving transgender plaintiffs such as *Smith*, *Barnes*, and *Harris Funeral Homes*, the federal appellate court has erroneously promulgated a narrower standard—the observable-at-work standard—for plaintiffs whose gender-stereotyping claims are rooted in their sexual orientation. Thus, a reconsideration of *Vickers* is long overdue, and such reconsideration will widen the existing circuit split on whether Title VII's prohibition on sex discrimination also prohibits sexual orientation discrimination. Of course, if the Supreme Court were to grant the pending cert petition in *Harris Funeral Homes*, this picture could change dramatically.

Montrell Kilpatrick is represented by Constance A. Mann of Franklin, Tennessee. HCA Human Resources LLC is represented by Brittany Stancombe Hopper and Robert Earl Boston of Waller, Lansden, Dortch & Davis, LLP in Nashville, Tennessee. ■

1st Circuit Rules Christian Kenyan Woman Accused of Being a Lesbian Over Land Dispute not Entitled to Reopen Prior Removal Proceedings

By Bryan Xenitelis

The U.S. Court of Appeals for the 1st Circuit has affirmed the denial of a motion to reopen prior removal proceedings by a Christian Kenyan woman who claimed that she was now afraid of persecution because of an ongoing family land dispute, the fact that in connection with that dispute her uncle spread rumors that she is a lesbian, and fears of violence by Islamist extremists, in *Wanjiku v. Barr*, 2019 WL 1218736, 2019 U.S. LEXIS 7692 (March 15, 2019).

Petitioner entered the United States in 2000 as a temporary visitor and overstayed her period of authorized stay. In 2010 she entered into a marriage and sought to adjust her status to permanent resident, but the case was eventually withdrawn and Petitioner was placed into removal proceedings on both overstay and marriage fraud charges. In proceedings, the fraud charges were withdrawn but Petitioner sought no relief and was ordered removed in 2013.

In 2016, having not yet been removed, Petitioner filed a motion to reopen her proceedings to pursue "asylum and related humanitarian claims based on changed circumstances and country conditions." Petitioner explained that in 1987 she had inherited land from her grandfather contrary to prevailing custom allowing only men to inherit land, and that in 2016 her uncle, who had been "furious" with the bequest,

sought to sell her property as his own because of dramatically rising land values, and that her refusal to let him sell led him to spread rumors that she is a lesbian and to threaten Petitioner and her daughters (who remain in Kenya) with female genital mutilation. She also claimed fears of religious persecution as a Christian by al-Shabaab, an East African Islamist insurgent group.

The Immigration Judge ruled that the narrow exception to untimely motions- that country conditions have changed and a person now fears persecution-had not been established and that Petitioner's claims were "predominantly based on changed personal circumstances." Petitioner appealed the denial and the Board of Immigration Appeals affirmed the denial solely on discretionary grounds; however, on appeal, the 1st Circuit remanded to the Board to "more fully address the [Immigration Judge's] grounds for denying [the motion]." On remand, the Board ruled that the Immigration Judge "did not reversibly err in finding [that] the country conditions… were examples of continuing conditions, rather than changed country conditions." Petitioner sought review of the decision by the 1st Circuit, where a panel of judges considered the case.

Writing for the panel, Circuit Judge Norman H. Stahl explained the legal framework of motions to reopen for seeking asylum and withholding of removal relief, noting that only evidence of changed country conditions that is material and was not available at the time of the prior merits hearing could meet Petitioner's burden of proof. He noted that Petitioner did not bring any changed personal circumstance arguments on appeal and that they were therefore waived.

With respect to Petitioner's fear of persecution as a perceived lesbian, Judge Stahl cited to the Immigration Judge's discussion of record evidence showing pre-2013 anti-LGBT activity in Kenya which included the fact that homosexuality has been illegal since 1963, and State Department reports which discussed "violence, harassment, and arrests directed against Kenya's LGBT population." Similarly, Judge Stahl found the Immigration Judge addressed al-Shabaab's history of violence in Kenya; specifically, evidence showing the group's attacks began at least 2 years prior to Petitioner's first hearing. Finally, Judge Stahl found that while Petitioner argued that land prices "only increased to the point of causing violence subsequent to her first hearing," that the record contained specific evidence of an "admittedly dramatic increase in land prices [that] pre-dated [Petitioner's] initial hearing by at least 3 years" and violent land disputes going back "as far as 1983" including a killing of 139 people arising from land disputes in 2012. Accordingly, Judge Stahl found that Petitioner had not "carried her burden of making a 'convincing demonstration'" that the LGBT, religious, and land value evidence she submitted in her motion established changed, rather than continuing, conditions with Kenya.

Finding Petitioner had failed to establish country conditions changed, Judge Stahl ruled that "it is not necessary to assess [the Board's] conclusion that [Petitioner] failed to make a prima facie claim for asylum eligibility" and denied the petition for review. ■

Bryan Xenitelis is a New York attorney addition and adjunct professor at New York Law School, where he teaches "Crime & Immigration."

Impatient Christians File Suit Against EEOC's Interpretation of Title VII and Seek Exemption from Recognizing Same-Sex Marriages

By Arthur S. Leonard

The U.S. Pastor Council (on behalf of itself and others similarly situated), and Braidwood Management, Inc., a business claiming to have religious objections concerning the employment of LGBTQ people (on behalf of itself and others similarly situated), have jointly filed suit in the U.S. District Court for the Northern District of Texas (Fort Worth Division), seeking a declaratory judgment that the Equal Employment Opportunity Commission's interpretation of Title VII to protect LGBTQ people from employment discrimination violates the federal Religious Freedom Restoration Act and the First Amendment, and they seek to enjoin the federal government from enforcing these policies against any employer who objects to homosexual or transgender behavior on religious grounds. *U.S. Pastor Council & Braidwood Management Inc. v. Equal Employment Opportunity Commission*, Case No. 4:18-cv-00824-O (U.S. Dist. Ct., N.D. Texas, filed March 29, 2019). They seek class certification and nation-wide injunctive relief. Other named defendants include EEOC Chair Victoria A. Lipnic and Commissioner Charlotte A. Burrows, Attorney General William P. Barr, and the United States of America. (Lipnic and Burrows are the only currently serving EEOC commissioners, as Trump's nominees to fill three vacancies were not confirmed in the last session of the Senate, and the

Commission as a body lacks a quorum to act at present.)

The headline's reference to "impatient Christians" points to the Supreme Court's unexplained delay in deciding whether to grant writs of certiorari in three pending cases that pose the question whether Title VII can be interpreted, as it has been by the EEOC and some circuit courts of appeals, to prohibit employment discrimination because of an individual's sexual orientation or gender identity. If the Supreme Court finally takes these cases and decides them during its October 2019 Term, this lawsuit could be at least partially mooted. But the complaint ranges more broadly, tempting the court (and ultimately the Supreme Court) to reconsider two of its constitutional precedents that are not beloved by the Court's current conservative majority: *Employment Division v. Smith* and *Obergefell v. Hodges*.

The docket number of the case indicates that it has been assigned to District Judge Reed O'Connor, which means that it is highly predictable that the plaintiffs will get much of the relief they are seeking from the district court. In earlier lawsuits, Judge O'Connor issued nationwide injunctions against the federal government's enforcement of Obamacare and Title IX in gender identity cases, disagreeing that the term "discrimination because of sex" could be construed to extend to gender identity. *See Franciscan Alliance v. Burwell*, 227 F.Supp.3d 660 (N.D. Tex. Dec. 31, 2016) (Obamacare); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (Title IX). Since the current political appointees leading the Justice Department probably agree with the plaintiff's position on all or most of the claims raised in this complaint, one reasonably suspects that any serious defense can only be mounted by Intervenors, and the government would only appeal pro-plaintiff rulings by Judge O'Connor in order to get a rubber stamp approval from the 5th Circuit on the way to the Supreme Court. Trump has worked hard to cement a conservative majority on the 5th Circuit, having quickly filled five of the vacancies preserved for him by the Senate's refusal to confirm Obama nominees to the circuit courts. A new vacancy waits to be filled, and more elderly Republican appointees on the circuit (two active Reagan appointees who have been there more than thirty years) are likely to retire soon enough.

The complaint's first count argues that the government has no compelling reason to enforce a prohibition against discrimination because of sexual orientation or gender identity against employers with religious objections, and thus that the EEOC as a federal agency should be found to be precluded from doing so under the Religious Freedom Restoration Act. The second count argues that because Title VII exempts religious employers from its ban on religious discrimination, it is thereby *not* a law of "general applicability," so *Employment Division v. Smith*, 494 U.S. 872 (1990), is "inapplicable" to the question whether imposing a non-discrimination obligation on employers who are subject to the statute (those with 15 or more employees) violates their constitutional Free Exercise rights under the 1st Amendment. The complaint observes that the ministerial exemption to Title VII that the Supreme Court has found for religious institutions does not extend to businesses, and further does not extend to the non-ministerial employees of religious organizations, thus imposing a burden on both kinds of employers who are subject to Title VII's ban on sex discrimination. Furthermore, they argue that if the court disagrees with their characterization of Title VII and finds that *Employment Division v. Smith would* apply in their Free Exercise claim, that decision should be overruled (which, of course, the district court can't do, but this lawsuit is obviously not intended to stop at the district court). Justice Neil Gorsuch implied in his concurring opinion in *Masterpiece Cakeshop* last June that the Supreme Court should reconsider this precedent.

In terms of the practical impact of the EEOC's position, the complaint says in its third count that Braidwood Management's benefits administrator has amended its employee benefits plans to recognize same-sex marriages, complying with guidance on the EEOC's website, and Braidwood wants to instruct the administrator to return to a traditional marriage definition, consistent with the employer's religious beliefs. Thus, part of the declaratory judgment plaintiffs seek would proclaim that employers with religious beliefs against same-sex marriage should be allowed to refuse to recognize them for employee benefits purposes. In several counts, the complaint tempts the court to declare as illegitimate the Supreme Court's *Obergefell* decision, and to excuse religious organizations and businesses from having to recognize same-sex marriages, except possibly in states where same-sex marriage became available through state legislation, unlike Texas, where it exists by compulsion of the federal courts (and certainly against the wishes of the state government).

In terms of standing issues, Braidwood points out that the EEOC has actively enforced its interpretation of Title VII by bringing enforcement actions and filing amicus briefs in support of LGBTQ plaintiffs against employers with religious objections, most prominently in the *Harris Funeral Home* case, in which the EEOC sued a business that had discharged a transgender employee because of the employer's religious objections. The funeral home prevailed in the district court on a RFRA defense, the trial judge finding that in the absence of RFRA the funeral home would have been found in violation of Title VII. However, the 6th Circuit reversed in part, rejecting the district court's RFRA analysis and finding a Title VII violation. The funeral home's petition for certiorari was filed in the Supreme Court last July, but that Court had made no announcement regarding a grant or denial at the time this complaint was filed on March 29 – impatient Christians, again.

The fourth count claims that the EEOC's requirement that employers post a notice to employees announcing their protection under Title VII is unconstitutionally compelled speech. "Employees who read this sign and see that Braidwood is categorically forbidden to engage in 'sex' discrimination will assume (incorrectly) that Braidwood is legally required to recognize same-sex marriage, extend spousal employment benefits to same-sex couples, and allow its employees into restrooms reserved for the opposite biological sex," says the complaint, indicating that Braidwood's proprietor "is not willing to have Braidwood propagate this message without sufficient clarification."

The sixth count summons the Administrative Procedure Act to attack the EEOC's issuance of guidance on its website concerning its interpretation of Title VII, claiming that this constitutes a "rule" that is subject to judicial review under that statute. The complaint asks the court to "hold unlawful and set aside" the EEOC's regulatory guidance, invoking Section 706 of the APA. Braidwood Management also claims to speak in this count as representative of all businesses in the U.S. that "object to the constitutional reasoning in *Obergefell*, excluding employers in states where same-sex marriage was legalized through legislation."

The complaint lists as plaintiffs' counsel Charles W. Fillmore and H. Dustin Fillmore of Fort Worth (local counsel in the district court) and Jonathan F. Mitchell of Austin. The heavy gun here is Mitchell, a former Scalia clerk and Texas Solicitor General who has been nominated by President Trump to be Chairman of the Administrative Conference of the United States (ACUS). It seems ironic that Trump's nominee is suing the federal government: the Justice Department and its head (in his official capacity) and the EEOC and its commissioners (in their official capacity), but despite naming the United States as a defendant, plaintiffs are not suing the president by name (in his official capacity, of course). ■

Fourth Circuit Dodges Appeal of Case Involving Scope of Bivens Remedies for Transgender Inmate

By William J. Rold

Just over a year ago, *Law Notes* covered extensively a district court decision in the case of Benjamin "Paris" Liebelson, a transgender woman in federal prison, who was permitted to raise claims against federal defendants in a *Bivens* action brought directly under the Constitution, in *Leibelson v. Collins*, 2017 U.S. Dist. LEXIS 212026, 2017 WL 6614102 (S.D.W.Va., December 27, 2017 (reported February 2018 at pages 63-4). Now, the Fourth Circuit has vitiated that decision by dismissing in part and vacating in part in *Liebelson v. Cook,* 2019 U.S. App. LEXIS 5196 (4th Cir., February 22, 2019), without ruling on the *Bivens* cause of action on the merits. To understand the Court of Appeals' decision, it is necessary to discuss the *Bivens* remedy, the attack on it in current jurisprudence, what the district court did below, and how the Court of Appeals disposed of the appeal.

For civil rights plaintiffs who claim violation of their rights by federal defendants, sometimes the last best argument is an implied cause of action directly under the constitution, authorized by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 397 (1971). This is particularly true of transgender plaintiffs, who often lack statutory protection covering the challenged conduct – a point that is critical for transgender prisoners in federal custody, like plaintiff.

In Liebelson's case, U.S. District Judge Irene C. Berger sharply curtailed the implied *Bivens* remedy, relying on *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which involved alleged "terrorists" in federal detention challenging conditions of confinement under the Eighth Amendment as allowed by *Bivens*. Judge Berger permitted Liebelson to proceed on two claims under the Eighth Amendment, and the government appealed.

Ziglar held that a *Bivens* claim should not be allowed if there exists any way that the Court would "hesitate" to hear it, by imposing a "test for determining whether a case presents a new *Bivens* context." 137 S. Ct. at 1857. The Court wrote tautologically: "Thus, to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering . . . ." *Id*. at 1858. The Court gave sweeping examples: the case is different "in a meaningful way" from previous *Bivens* actions; the context is new; the rank of the defendants is different; the constitutional right is different; the "generality or specificity of the official action" varies; the guidance of prior judicial action is unclear; the authority under which the officer acted differs; Congress creates new remedies; Congress fails to create new remedies; or there are "potential special factors that previous *Bivens* cases did not consider." *Id*. at 1959-60. If there are "special factors counselling hesitation," the court must "weigh the costs and benefits of allowing a damages action to proceed." *Id*. at 1857-58. This writer observed at the time: "All of this 'gobbledygook,' as Justice Scalia used to write, was an effort of a six-member Court [a "majority" of 4, with Justices Sotomayor, Kagan, and Gorsuch not participating] to avoid over-ruling *Bivens* but giving district courts every reason not to follow it ever again."

As Justice Breyer pointed out in his dissent in *Ziglar,* a whole body of case law has followed *Bivens,* including *Farmer v. Brennan,* 511 U.S. 825,832 (1994), which used a *Bivens* remedy to protect a federal inmate from sexual assault by her peers, in the only transgender case the Supreme Court has ever decided. *Ziglar,* 137 S.Ct. at

1877. *Farmer* is now widely applied to state prisons, to county jails, and to subjective state of mind considerations of civil rights defendants – with no one questioning its *Bivens* origins.

Judge Berger allowed Liebelson to proceed against motions to dismiss based on both *Ziglar* and qualified immunity on Eighth Amendment claims: (1) that a rectal search of Liebelson performed by a male officer was abusive in its finger penetration; and (2) that harassment and demands for sexual favors by other inmates in the mess hall as a condition of eating meals – tolerated by correctional defendants – denied Liebelson her constitutional right to food.

In the prior article, this writer observed that the rulings allowing the case to proceed to trial necessarily rejected the *Ziglar* defense to the *Bivens* claims. The article specifically noted that Judge Berger rejected several "*Bivens*" claims under *Ziglar*, including one that Liebelson was denied Equal Protection under the Fifth Amendment based on her sexual orientation and sexual identity in the mess hall claim. Liebelson had limited her mess hall claim in summary judgment and in the pre-trial order to argue only Equal Protection, and she did not rely on the Eighth Amendment on this point. Nevertheless, Judge Berger "refashioned" the claim to include the Eighth Amendment and allowed Liebelson to proceed.

There was no cross-appeal on the dismissed claims. Liebelson died of causes unrelated to her lawsuit by the time of the appeal and her father, as administrator of her estate, became the party appellee.

The *per curiam* opinion by Fourth Circuit Judges Robert B. King, Barbara Milano Keenan, and A. Marvin Quattlebaum, Jr. (not to be cited as precedent) dismissed in part and vacated in part. It then remanded the case without ruling on any of the issues substantively. This article takes the points of appeal in reverse order.

First, on the mess hall claim, the Circuit ruled that Judge Berger should not have "refashioned" the sole Equal Protection claim to include an Eighth Amendment claim. Liebelson had counsel and had abandoned the Eighth Amendment argument. Thus, the Court vacated the decision on the Eighth Amendment, and it found that it had no jurisdiction to review the decision on Equal Protection without a cross-appeal. This ruling vacating the decision below on the mess hall point also nullifies the *Ziglar* ruling on *Bivens*, albeit "*on other grounds*."

On the rectal search claim, the Circuit found that the appeal on qualified immunity raised factual questions (primarily the intrusiveness of the search) that remove it from the narrow range of interlocutory appeals permitted on qualified immunity. Here, because qualified immunity turned on a jury question, Judge Berger should not have determined it; and the Circuit had no appellate jurisdiction on this point either. "We lack jurisdiction . . . when the district court's decision denying qualified immunity was based on questions of evidentiary sufficiency properly resolved at trial," citing *Cooper v. Sheehan*, 735 F.3d 153, 157 (4th Cir. 2013); *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 221-22 (4th Cir. 2012) (*en banc*). The effect of this ruling is to remand "for further proceedings" – presumably trial, since Judge Berger denied other dispositive motions, including dismissal under *Ziglar* as to the search. In a footnote, the Circuit wrote: "We observe that the district court did not consider whether Leibelson had a proper *Bivens* remedy with respect to her [search] claim against Cook. Because we dismiss Cook's fact-based appeal, we do not address that question." This seems odd. This writer believes Judge Berger had already addressed it, at least by implication.

Judge Berger may take the Court of Appeals' open invitation to address it again. It may not be necessary, however. All that is left is Liebelson's claim that a brief digital search of her rectum violated her Eighth Amendment rights. Now that she can no longer testify in person to convey the experience of the violation before the jury, her chances of prevailing are reduced. The case may never return to the Circuit.

A dodge is better than a Circuit decision further restricting *Bivens*. Federal cases about brutality, protection from harm, health care, equal rights for LGBT prisoners and other minorities, and general conditions of confinement are on the line. This writer is already seeing newly fashioned "Motions to Restrict *Bivens* Remedy" – like the one here – in district court dockets. A cold wind blows.

Liebelson was represented on the appeal by Fein & DelValle, PLLC, Washington, D.C. The MacArthur Justice Center, Northwestern University, and Jones Day, Chicago, supported Liebelson as amici. ■

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

California Federal Judge Approves Settlement Enjoining use of "Tank" Housing for GBT Inmates and Awarding Class-Wide Damages

By William J. Rold

U.S. District Judge Jesus G. Bernal approved a class settlement regarding GBT inmates who had been confined in an "Alternative Lifestyle Tank" [the "Tank"] in San Bernardino County, California, in *McKibben v. McMahon,* 2019 U.S. Dist. LEXIS 34110 (C.D. Calif., February 28, 2019). The exhaustive approval under F.R.C.P. 23(e) of a settlement of a case originally filed in 2014 is one of the best examples of a Rule 23(e) decision this writer has seen.

Judge Bernal certified two class: one for damages, with about 600 members, under F.R.C.P. 23(b)(3); and one for injunctive relief, which includes GBT inmates who may enter the San Bernardino County Jail in the future, under F.R.C.P. 23(b)(2). Lesbians are not part of the certified classes, which refer to "gay, bisexual, and transgender" inmates. They are not mentioned in the decision, except they are included in the training portion of the injunction, along with intersex inmates. It is unclear whether lesbians were ever confined in the sued facility or subjected to the "Tank."

The "Tank" confined inmates up to 23 hours/day in cell; it denied them programs, limited their recreation, and deprived them of time with other inmates and participation in religious or other activities. The Tank and its restrictions were the only option offered to class members for a modicum of safety other than protective custody and its stigmatizing reputation of housing "snitches."

The injunctive agreement creates a committee – jointly with the Prison Rape Elimination Act coordinator – to handle class member housing, safety, programming, religious, and job issues. The committee must meet twice monthly, maintain minutes of its actions, and review each class members' circumstances upon arrival at the jail. The agreement abolishes the "Tank," and defaults class members to general population, unless they request special confinement and/or the committee classifies them to more restrictive conditions. In the latter case, class members may be placed in a "GBTI Unit."

The settlement includes provisions to prevent the GBTI Unit from becoming the "Tank" by another name. Class members in the GBTI Unit will have the same out-of-cell time they would have in population for the same security classification. Those in the GBTI Unit will also have equivalent access to inmate jobs, education, programming, congregate religious observation, and community re-entry services. Regardless of where housed, all class members are promised safety, including access to an outside PREA hotline; and the jail is required to adopt "zero tolerance" for homophobic and transphobic behavior or verbalizations by staff, who will be required to undergo sensitivity training. The training includes jail volunteers, contractors, and (important but unusual) mandatory sessions for non-GBT inmates.

Class members shall be addressed by their preferred names and pronouns and, absent exigent circumstances, searched by officers of the gender of their choice. They shall be provided with privacy for showering and personal hygiene and dressing. Monitoring will continue for three years, including outside audits by a PREA official unconnected with the jail. According to the opinion, "Defendants estimate the resources associated with these Injunctive Terms will be approximately $500,000 per year."

The damages settlement provides for a gross amount of $950,000, to be under the control of a court appointed "administrator," to be divided among the class members who were in the "Tank" and who file claims, pursuant to a formula based on their time in the "Tank" and other factors comprising a "point" system. The rather sophisticated "point" system cannot be reported fully here, but it considers two factors deemed important: (1) those class members in the "Tank" in the earlier years suffered more restrictive conditions than those in later years because conditions were relaxed as the case progressed; and (2) class members' security and disciplinary status unrelated to the "Tank" affected how their classification would have been restricted without regard to GBT issues and the "Tank," so that inmates with good administrative records suffered more from the restrictions of the "Tank" than those who would have been restricted in conditions of confinement anyway.

There is a damages cap of $10,000 per class member, unless they elect to "opt out" of the class. Judge Bernal found that the cap was fair because class members with "outsized" claims can "opt out" and should not distort the division of the fund for the rest of the class, because they have special damages. Judge Bernal said that no one chose to "opt out." He also allowed a few class members to file claims after the deadline imposed by the original order providing notice to the class.

The fifteen named plaintiffs also receive an additional "incentive" award, ranging from $2,000 to $5,000. Judge Bernal explains the need for so many named plaintiffs (so that all experiences of GBT inmates in population and in the "Tank" would be reflected) and the reasons that incentive awards are appropriate – the latter because of the named plaintiffs' participating actively in the case and their putting themselves forward as representatives at some risk, due to their continued incarceration. Dan McKibben, who started the lawsuit, was a former county deputy sheriff from Indiana; he died of unrelated causes during the pendency of the case.

Costs for administration of the settlement, expert fees, and litigation expenses were awarded, to be deducted from the settlement fund, reducing it to just over $818,000. This fund is not reversionary; rather, all money will go to the class by increasing awards up to the cap until the fund is exhausted.

Judge Bernal also separately awarded attorneys' fees exceeding $1.1 million, noting that the amount was larger than the class award, which he said was not uncommon in prison cases and was appropriate, given the work and the value of the injunctive relief obtained. It was also a negotiated number that was "substantially" below counsel's claimable lodestar.

Judge Bernal found the settlement in the public interest under *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). He found that the conditions for approval of a class settlement under F.R.C.P. 23 (e) are met, as outlined in *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); and *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) – including a solid basis in law for the settled claims, adequate discovery, the substantial amount offered, and the concurrence of the class.

The settlement itself is a remarkable document, and readers can find it in PACER as Docket Item 78-3 of *McKibben v. McMahon,* 14-cv-2176 (C.D. Calif.) (JGB). In this writer's experience, most prisoners' rights attorneys eschew class damages cases and stick to injunctive relief under Rule 23(b)(2) in class actions, because of the Rule 23(b)(3) complexities so deftly handled here.

The plaintiffs and class are represented by Kaye McLane Bednarski & Litt, LLP, Pasadena; and the ACLU of Southern California, Los Angeles. [Note: Judge Bernal is also presiding over one of the four lawsuits challenging the constitutionality of Trump's action announcing a ban of military service by transgender individuals. He has rejected the government's motion to dismiss, and preliminarily enjoined the policy, but his injunction, which was appealed to the Ninth Circuit, was stayed by the U.S. Supreme Court on January 22, 2019.] ■

New York Jury Awards Compensatory and Punitive Damages for Failures of Jail Medical Director to Provide Adequate Transgender Health Care

By William J. Rold

In February, John Leland of *The New York Times (*2/17/19, at page MB 1) wrote a feature article entitled "The Right to Transition in Jail: A Transgender Veteran's Story Is an Exploration of Medical Ethics and the Criminal Justice System." It took six years of litigation, but plaintiff Jeremy, a/k/a Jessica, Sunderland prevailed before a federal jury in Long Island, New York, for denial to her of constitutional medical care while in the custody of the Suffolk County Jail. The jury awarded $280,000 in compensatory damages and $75,000 in punitive damages.

The jury was presented with defendants: Medical Director Vincent Geraci, Physician Dennis Russo, Psychiatrist Thomas Troiano; and, on pattern and practice claims, Suffolk County and its Sheriff. The jury awarded compensatory damages against Medical Director Geraci and Physician Russo. It also awarded punitive damages against Medical Director Geraci. Although U.S. District Judge Joseph F. Bianco allowed the jury to consider the cases of eleven other transgender inmates, whose medical records were introduced into evidence, the jury did not find pattern and practice violations against the sheriff or the county. The discovery of redacted records from other inmates for pattern and practice proof in this case is discussed at length in *Sunderland v. Suffolk County,* 2018 U.S. Dist. LEXIS 159196 (E.D.N.Y., September 17, 2018), reported in *Law Notes* (October 2018, at page 556-7).

The punitive award against the Medical Director, however, is the first of which this writer is aware in a transgender inmate health care case. As readers may know – although juries are not told this – punitive awards are not subject to indemnification under New York law (or under that of most states). Punitive awards are entered as judgments against the defendants personally and are subject to personal execution against the defendant. *But see* below.

The article in the *Times* is recommended reading to anyone following this issue for its human insight. Sunderland served in the military and obtained hormones on line while in Iraq. She was "out" at her base near Basra, during the Obama years, where she said she was assigned to work in food services and "got along" with other soldiers. Sunderland was discharged in transition to female over two years before her incarceration in Suffolk County.

In the jail, she was classified male (contrary to her presentation), and she was forced to suspend her medications and denied female grooming, clothing, and hygiene products. She was searched by male guards. Her award is more remarkable since she was at the jail for only one month before transfer to a unit for transgender women on Rikers Island.

Mateo De La Torre, an advocate at the National Center for Transgender Equality, is quoted in the *Times* as follows: "Transgender folks are criminalized in our society . . . . They get kicked out of their homes, they engage in the underground economy for survival . . . . The fact of a unanimous jury decision sends a clear signal to correctional facilities that the general public understands that this is necessary treatment and stands by transgender people."

Although the jury verdict was handed down on October 23, 2018,

Sunderland has not yet seen a dime. There has been no entry of judgment. By letter in January of 2019, Suffolk County officials informed Judge Bianco that they intended to settle the case, but the proposed amount requires the approval of the Suffolk County legislature. There are no further entries on the docket in *Sunderland v. Suffolk County,* 13-cv-4838 (E.D.N.Y.) (JFB). A settlement would undoubtedly be paid by Suffolk County and would roll the punitive award into the final amount, all of which would be paid by the county, saving defendant Geraci from personal liability.

In effect, this is indemnification by settlement. For those instances where a defendant's conduct is so outrageous that the government entity refuses to indemnify, the county may still try to control the litigation by using the same defense counsel despite this conflict of interest. Advocates should be aware that, in *Dunton v. Suffolk County,* 792 F.2d 903 (2d Cir. 1984), the civil rights plaintiff had a favorable judgment vacated on appeal because of this conflict of interest in the defense. The court held that *plaintiff's* counsel, as an officer of the court, should have raised the matter with the District Judge. *Id.* at 909 (emphasis mine). This is not a likely problem here.

Sunderland is represented by Shanies Law Office, and by Hughes, Hubbard & Reed, LLP, New York City. ■

Federal Judge Finds Arizona's "Sexually Explicit" Prison Literature Censorship Rules Unconstitutional on their Face and As Applied

By William J. Rold

This writer was observing oral argument in the United States Supreme Court in a prison literature censorship case when the issue of inmate possession of maps was addressed. Maps are considered contraband because they might assist in an escape plan. In this case, the corrections officers had confiscated a map an inmate had of the solar system. Justice Thurgood Marshall pulled his eyeglasses down on his nose and asked the state's attorney: "Don't you think if he gets that far you've probably lost him?" The same fate from overreaction struck Arizona officials in their censorship of "sexually explicit" publications in *Prison Legal News v. Ryan*, 2019 U.S. Dist. LEXIS 37684, 2019 WL 1099882 (D. Ariz., March 8, 2019). Senior U.S. District Judge Roslyn O. Silver found their regulations unconstitutional both on their face and as applied. The plaintiff [PLN] is a publisher of prison literature, including *Prisoner Legal News* and a book called *The Celling of America: An Inside Look at the U.S. Prison Industry* [Celling] (1998), which paints a bleak picture of the American prison system, describing brutality, substandard medical care, racism, LGBT-phobia, overcrowding, and the corporate profit motive that helps to foster these conditions through privatization. PLN subscribers are confined in over 3,000 correctional facilities, including more than 130 prisoners in Arizona alone.

As a publisher, PLN has standing as a plaintiff because it has a "legitimate First Amendment interest in access to prisoners." *Thornburgh v. Abbott,* 490 U.S. 401, 408 (1989). PLN has successfully litigated this issue itself. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2011). Judge Silver was presented with cross-motions for summary judgment, and she granted each side's in part and denied them in part. She did not reach the suppression of *Celling*, because it was not briefed as part of the cross-motions. Presumably, it will go to jury trial, along with the surviving parts of the case.

Arizona DOC's policies on prison literature censorship evolved from a relatively laissez-faire approach in 2010, through increasingly strict revisions. By 2018, the state was censoring with sweeping standards for what constituted "sexually explicit" material. Literature that "appears to be intended to cause or encourage sexual excitement or arousal" was forbidden. "Sexually explicit material" included: "Any publication . . . which pictorially or textually depicts nudity of either gender, or homosexual, heterosexual, or auto-erotic sex acts." Under these standards, the state prison system suppressed articles about the "Me Too" Movement, Maya Angelou's *I Know Why the Caged Bird Sings*, a *New Yorker* book review of a scholarly biography of Sigmund Freud, a Mayo Clinic newsletter with medical illustrations of a hernia, and nude self-portraits by former President George W. Bush. The latter is in the record at *Prison Legal News v. Ryan*, 15-cv-02245 (D. Ariz.) (ROS), Docket No. 218-5 at pages 34-5, for those who wish to see the former President's naked back and thighs as he *ablutes dans la salle de bain*. The painting was first published in *New York Magazine* (October 3-16, 2016 at page 49). An attempt to reprint it here crashed the *Law Notes* format program, demonstrating that LGBT people make the best art critics. It is unclear under what prohibition this hardly risqué

painting falls. As one who lived as an adult in the Bush years, it is difficult for this writer to see it as likely to "cause . . . arousal" – but almost anything can happen in a prison.

Judge Silver found the regulations unconstitutional on their face, writing: "A policy that prohibits all written and visual depictions of sex, and even prohibits content that *may* cause or encourage sexual arousal, is facially overbroad." [Emphasis by the court.] The sweeping nature of the regulations led to overbroad censorship and a finding that the policy was also unconstitutional as applied, in part because of the examples just described.

Judge Silver saves her biggest guns for suppression of PLN's reporting of court decisions about brutality and sexual abuse in prisons. She finds that Arizona officials had been "inconsistent" in applying their own standards, allowing articles that were legally indistinguishable from articles that were suppressed. She specifically criticizes withholding of accurate reporting of information available to the public in the body of court decision. She quotes in her own opinion language from other courts about: vigilante justice for sex offenders; inmate riots and the rape of guards; three-way encounters between guards and inmates; and sexual abuse of inmates – using vivid words to depict masturbation and phrases, like "gets my nipples hard," "mutual fellatio," and "ready to suck some dick." Her decision to be so graphic seems designed to make her point to defendants. She writes: "The textual depictions of sex in Prison Legal News are informative and educational in nature—some are direct quotes from court opinions. As PLN correctly points out, these descriptions of facts are essential to understanding legal matters, especially ones that involve sexual harassment and/or assault in prison."

Another fatal flaw in the regulations, both on their face and as applied, was the failure to provide PLN with notice and appeal rights. The Due Process Clause has required an opportunity for both the recipient and the sender (here, the publisher) to have notice and an appeal for censored literature since *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974), overruled on other grounds by *Thornburgh v. Abbot*, 490 U.S. 401 (1989). Indeed, PLN did not know about some of the suppression of its publications (like *Celling*) until this litigation. The sender's right to notice and appeal of censorship remains well in the Ninth Circuit. *Krug v. Lutz*, 329 F.3d 692, 697-98 (9th Cir. 2003).

Judge Silver finds that PLN is entitled to summary judgment on the constitutional challenge to the regulations and to their rights under the Due Process Clause. In granting PLN partial summary judgment, Judge Silver continues: "No reasonable factfinder would find that the excluded language in *Prison Legal News* implicated ADC's concerns about prison security, sexual harassment, and rehabilitation. Furthermore, ADC's exclusion decisions concerning *Prison Legal News* were arbitrary and inconsistent, supporting a finding of irrationality." She cites another recent PLN case: *Prison Legal News v. Stolle*, 319 F. Supp. 3d 830, 842-46 (E.D. Va. 2015).

She directs the parties to submit proposed injunctive language. She then addresses damages and rules that the case is ready for a jury, but not on all theories or against all defendants.

PLN sued everyone from the DOC Director to the line publication processing employees. A full discussion of the careful sifting here and the excellent review of the supervisory culpability and of individual capacity liability under Ninth Circuit law is beyond the scope of this article. Suffice it to say that two will face a jury and the rest will not. The Director stays, because he signed the directives found to be unconstitutional. The head of "quality assurance" for the central office publication review committee also remains in the case. Judge Silver finds that he personally denied six of the subject PLN publications. As to these incidents, Judge Silver grants PLN summary judgment on liability, so the jury will have to decide damages only as to these incidents. Despite various theories, PLN did not show enough personal involvement to survive summary judgment for the rest of the defendants.

Judge Silver does not grant summary judgment to PLN on damages, but she grants partial summary judgment to defendants. First, she rules that PLN cannot seek compensatory damages for the value of the constitutional right itself. PLN had sought $1,000 per instance for approximately 400 withheld issues. She held that the jury could consider "nominal" damages in an unstated amount. She also held that PLN could seek compensatory damages for what they deemed "frustration of mission," which involves anticipated future work to correct the damage from the violations, informing the subscribers and the public, and monitoring – after the issuance of the injunction. Finally, she finds no basis for punitive damages under *Smith v. Wade*, 461 U.S. 30, 56 (1983), and grant defendants summary judgment on this point.

Prison Legal News is represented by Human Rights Defense Center, Lake Worth, FL; Ballard Spahr LLP, Phoenix; and Rosen Bien Galvan & Grunfeld LLP, San Francisco. ■

Social Security Administration Agrees to Recognize Historic Same-Sex Marriage from 1971

By Arthur S. Leonard

One of the most infamous Supreme Court rulings relating to LGBT rights is *Baker v. Nelson*, 409 U.S. 810 (1972), in which the Court dismissed an appeal from an adverse ruling by the Minnesota Supreme Court, 291 Minn. 310, 191 N.W. 2d 185 (1971), "for want of substantial federal question." That dismissive one-liner stood as a Supreme Court precedent until the Court

expressly overruled it in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Despite their rejection by Hennepin County Clerk Gerald R. Nelson in 1970, upheld by the Minnesota Supreme Court the next year, Michael McConnell and Jack Baker decided to try a different county clerk's office. McConnell changed his first name to one that was gender-neutral on its face (Pat Lyn), and they found a clerk in Blue Earth County who mistakenly issued them a license. The men held a ceremony, but no certificate was officially filed. As far as they were concerned, however, they were married, and Jack Baker took McConnell's last name. Because there was no official recording, they were unable, when the time came, to collect Social Security spousal benefits.

So after the *Obergefell* decision, they sued in Minnesota to validate their 1971 marriage, and won a ruling from a state court judge, which was affirmed on appeal in an unpublished decision. *McConnell v. Blue Earth County*, 2017 Minn. App. Unpub. LEXIS 1062, 2017 WL 6567843 (Minn. Ct. App. Dec. 26, 2017). Judicial opinion in hand, they applied again to the Social Security Administration, and in February of this year received a letter acknowledging that they are married for purposes of spousal benefit eligibility.

Thus, the two men not only have the earliest same-sex marriage to be recognized by their state – they live in Minneapolis – but also by the federal government, but remain happily married after 48 years!

This account relies on a feature story from NBCnews.com, posted on March 7, 2019. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. COURT OF APPEALS, 1ST CIRCUIT – This seems like a common sense ruling to us. The 1st Circuit has agreed with U.S. District Judge Daniel R. Dominguez (D.P.R.) that an employer has not violated Puerto Rico's civil rights law, which bans sexual orientation discrimination, when the employer discharged a female employee allegedly because of her relationship with a male lawyer who was litigating employment discrimination cases against the company. *Villeneuve v. Avon Products, Inc.*, 2019 WL 1252851, 2019 U.S. App. LEXIS 8096 (March 19, 2019). The plaintiff claimed she was discharged because of her "ability" to have "an emotional, affectional, or sexual attachment to a person of the other gender," and thus was motivated by her "sexual orientation." Circuit Judge Ojetta Rogeriee Thompson, writing for the panel, pointed out that the "key allegation" by the plaintiff was that "Avon fired her because of her companion's litigious involvement with the company," not because they were a different-sex couple. "So she has not plausibly pled sexual-orientation discrimination in her discharge," continued Judge Thompson. "We of course take seriously our duty to interpret the definition of sexual orientation 'broadly' to achieve the statute's 'purposes.' But an employee's being in an affectionate relationship with a lawyer who has sued the employer simply is not a protected class under the statute." Thu, the sexual orientation discrimination claim – one of several claims asserted by the plaintiff – was properly dismissed. The plaintiff is represented by Juan M. Frontera-Suau and Kenneth Colon of San Juan.

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel issued a summary order on March 19 in *Patterson v. City of New York*, 2019 WL 1282991 (not published in F.3d), affirming a decision by District Judge Nicholas G. Garaufis dismissing a complaint by Taj Patterson, a gay African-American ban who was beaten up by members of the Williamsburg Safety Patrol (WSP) while walking home from a party on December 1, 2013. WSP, which receives funding from New York City, is a neighborhood watch organization of the Orthodox Jewish community in Williamsburg. Several of the men implicated in Patterson's beating have been convicted of criminal charges. Patterson sought to hold the men, their organization, and New York City constitutionally liable, arguing that because the city provides funding to WSP, it and its members are state actors who can be held liable for violations of his constitutional rights, and the city can be charged with liability for their actions. Patterson theorizes that the city refuses to hold WSP accountable because of the political influence of the Orthodox Jewish community. Judge Garaufis was not convinced, and neither was the Court of Appeals panel. The brief summary order devotes a few sentences to summarizing Patterson's legal theories of liability, and then states, "Upon review of the record on appeal, we reject these arguments and affirm the judgment substantially for reasons stated by the District court in its memoranda and orders f August 9, 2017, and February 14, 2018.

U.S. COURT OF APPEALS, 8TH CIRCUIT – The 8th Circuit has affirmed in full the May 2017 ruling by U.S. District Judge Paul A. Magnuson (see 2017 U.S. Dist. LEXIS 79551 (D. Minn.) granting summary judgment against Anmarie Calgaro, the mother of a transgender child, in her attempt to hold liable various defendants for their

actions (or lack of actions) regarding her child, E.J.K., a transgender individual who left the parental home, obtained a letter from a legal aid organization stating that E.J.K . was "legally emancipated", and used the letter to obtain various services, including transitional health care. *Calgaro v. St. Louis County*, 2019 US. App. LEXIS 8882, 2019 WL 1319705 (8th Cir., March 25, 2019). The opinion for the 8th Circuit panel by Judge Steven Colloton systematically dismantled each of Calgaro's causes of action, and declared her claims for declaratory and injunctive relief moot because her transgender child has reached age 18 and is no longer legally a minor. The essence of Calgaro's claims was that various agencies and institutions violated her parental rights by providing services for gender transition to her child and refusing her requests to see various records and provide various kinds of information to her. Calgaro, relying heavily on the Due Process Clause and 42 USC Section 1983, may yet file a cert petition in this fervently litigated case. She is represented by Thomas J. Brejcha of the Thomas More Society, a conservative litigation group, in Chicago, and Matthew F. Heffron (Omaha) and Erick G. Kaardal (Minneapolis). An amicus brief in support of Mrs. Calgaro's appeal was filed by the Foundation for Moral Law. Amicus briefs in support of the interests of E.K.J. were filed by the National Center for Lesbian Rights and the World Professional Association for Transgender Health (WPATH).

U.S. COURT OF APPEALS, 11TH CIRCUIT – A Jamaican man who is subject to removal from the United States due to criminal convictions (a point he conceded in his refugee hearing) sought the protection of the Convention against Torture based on his bisexual identity. *Watson v. U.S. Attorney General*, 2019 U.S. App. LEXIS 6932, 2019 WL 1091319 (11th Cir., March 8, 2019). The petitioner claims that he is bisexual and "If he were returned to Jamaica, he would be tortured or killed because of his sexual orientation." The petitioner "submitted country conditions evidence that Jamaica criminalizes homosexual sex and that the Jamaican LGBTQ community faces homophobia, discrimination and violence." He also introduced testimony from himself and family members that while living in Jamaica "he was forced by an angry mob to flee his hometown and live with his grandmother after neighbors learned he was in a romantic relationship with another man named Kemar, and that Kemar was killed by these neighbors shortly thereafter because of his sexual orientation." The court relates that the Immigration Judge found that this testimony was not credible, and furthermore that petitioner had not shown that it was more likely than not that he would be tortured in Jamaica due to sexual orientation. The court threw up its collective hands, saying it was without jurisdiction to review the IJ and BIA ruling in this case, had jurisdiction only to review constitutional claims, and that a possible due process claim had been waived by not being raised early enough, as a result of which petitioner had not exhausted administrative remedies.

ALABAMA – U.S. Magistrate Judge Staci G. Cornelius wrote an extended opinion and order in *Curry v. Koch Foods*, 2010 U.S. Dist. LEXIS 45477, 2019 WL 1281196 (N.D. Alabama, March 20, 2019), denying summary judgment to the employer on hostile work environment claims by a lesbian former employee under Title VII and denying summary judgment to the alleged harasser, a U.S. Department of Agriculture inspector whose shift at the Koch Foods plant overlapped with the plaintiff's regular overnight work shift, on state law tort claims. Judge Cornelius's opinion recites at length the plaintiff's factual allegations, providing a textbook account of an employer's failure to take seriously enough the hostile work environment claims of an employee who was courageous enough to bring embarrassing conduct to the attention of a supervisor, even though she had been told that Koch had no control over the USDA inspectors who worked in the plant so she should not bother complaining about them because nothing could be done. The court included a footnote explaining that the 11th Circuit favors including in such opinions the offensive language attributed to the harasser "in order to present and examine the social context in which it arose," quoting from *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010). As the 11th Circuit explained, "We do not explicate this vulgar language lightly, but only because its full consideration is essential to measure whether these words and this conduct could be read as having created 'an environment that a reasonable person would find hostile or abusive." As for the language attributed to the meat inspector here, we found it shocking that somebody would use language like this in a workplace, and suggest that the U.S. Department of Agriculture needs to provide training on appropriate language to its employees if this particular one is an example. We are not going to reproduce the language here.

ARIZONA – Lambda Legal, National Center for Lesbian Rights and attorneys from Perkins Coie LLP (Phoenix office) have filed suit against Arizona state education officials, seeking a declaratory judgement and injunctive relief against provisions of the state's public school curriculum that prohibits HIV/AIDS education that "promotes a homosexual lifestyle," "portrays homosexuality as a positive alternative life-style," or "suggests that some

CIVIL LITIGATION *notes*

methods of sex are safe methods of homosexual sex." Such restrictions are guaranteed to make such instruction ineffective for LGBTQ youth. *Equality Arizona and S.C. v. Hoffman* (U.S. Dist. Ct., D. Ariz., filed March 28, 2019). The complaint characterizes the challenged statute as "facially discriminatory and harmful," and alleges a violation of the 14th Amendment Equal Protection Clause. *Lambda Legal press release*, March 28.

ARKANSAS – *AP State News* (March 14) reported that the Arkansas Supreme Court denied a motion to reconsider its ruling that the city of Fayetteville may not enforce provisions of its civil rights ordinance banning sexual orientation and gender identity discrimination, letting stand its ruling to that effect in January. *See, Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 30 (Ark. Jan. 31, 2019).

CALIFORNIA – In *Tammi S. v. Berryhill*, 2019 U.S. Dist. LEXIS 42828 (C.D. Cal., March 15, 2019), U.S. Magistrate Judge Douglas F. McCormick reversed and remanded a decision by the Social Security Commissioner denying disability benefits to Tammi S., who is living with HIV, finding fault with the Administrative Law Judge (ALJ) decision that the Commissioner upheld in denying benefits. The court found that the ALJ did not state adequate grounds for declining to give significant weight to the opinion of Tammi's treating physician concerning her impairments, and made other errors in characterizing the evidence. In this case, the court found, a remand was necessary because the ALJ had not applied the appropriate standard to evaluate the evidence, and "it is not clear from the record that the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated." Tammi S. is represented by Stephen G. Rosales, of the Law Offices of Lawrence D. Rohlfing, Santa Fe Springs, CA.

CALIFORNIA – In *Stewart v. Wilkie*, 2019 U.S. Dist. LEXIS 38751, 2019 WL 1114866 (C.D. Cal., March 11, 2019), U.S. District Judge Otis D. Wright, II, rejected an argument by *pro se* plaintiff Marvin Stewart, an employee of the Tibor Ruben VA Long Beach Healthcare System, that the employer violated Title VII by, among other things, denying several promotion applications by Stewart. One of the grounds cited by Stewart for a retaliation claim under Title VII is his employer's unhappiness about his aggressive opposition to the agency's celebration of LGBTQ Pride Month. Wrote Judge Wright: "Plaintiff opposed Defendant's hosting of LGBTQ activities during Pride month by emailing memoranda in opposition to his co-workers and supervisors through his work email account, and by emailing and mailing memoranda in opposition to the General Counsel of the Department of Veteran Affairs, among others. He alleges that the General Counsel of the Department of Veteran Affairs referred his opposition memorandum to the VA Inspector General, and that doing so constituted retaliation against Plaintiff. He further claims that Defendant's support of LGBTQ Pride month constitutes further retaliation against Plaintiff because Defendant 'bombarded him by placards throughout the facility announcing LGBTQ activities hosted at the facility." The court held that Stewart's activities did not "implicate an employment practice made unlawful by Title VII . . . and thus do not constitute 'protected activity' under [Title VII]. Additionally, Plaintiff's allegations that Defendant's support of LGBTQ Pride month 'discriminated against Plaintiff's Religious liberties' are conclusory, do not implicate any employment practice made unlawful by Title VII . . . and accordingly fail to state a claim for retaliation . . . " (Stewart also pursued an age discrimination claim without success.) Stewart is a law school graduate, according to how he identifies himself as *pro se* plaintiff, but apparently not a member of the California bar.

COLORADO – Jack Phillips, the proprietor of Masterpiece Cakeshop, who refuses to make wedding cakes for same-sex couples or for transgender people celebrating their transition anniversaries, reached an agreement with the Colorado Attorney General's office to withdraw his lawsuit against the Colorado Civil Rights Commission, challenging the Commission's processing of a discrimination claim by a transgender person denied her transitional cake, in exchange for an agreement, unanimously approved by the Commission, to cease processing that claim against Phillips, the *Denver Post* reported on March 5. Phillips decided to declare victory after a federal trial judge refused to dismiss his 1st Amendment lawsuit. *Masterpiece Cakeshop, Ltd. v. Elenis*, No. 1:18-cv-02074-WYD-STV (D. Colo., Jan. 4, 2019) (unpublished disposition). Conservative media reported the settlement as a victory for Phillips; The on-line headline of a story by the *Washington Times*: "Jack Phillips Wins Second Round in Transgender Cake Battle as Colorado Drops Complaint."

DELAWARE – A transphobe with a heartfelt cause but no lawyer to represent him should stay out of the federal courts. That is the lesson of *Alston v. Delaware Department of Education*, 2019 U.S. Dist. LEXIS 38370 (D. Del., March 11, 2019). Eshed Alston was mightly offended to read about a proposed Regulation 225, by which the state education department proposed to advised public schools about how they should treat transgender students. He filed suit to enjoin the Department from

going forward on March 15, 2018, even though the proposal had not yet been published for public comment. That occurred on June 1, 2018, and inspired a storm of comments far in excess of what one might expect in a small state like Delaware on a proposed state regulation – but then, the issue of allowing transgender high school students to use restrooms and locker rooms consistent with their gender identity inspires great fear and religious indignation among some, including, evidently, Mr. Alston. The Education Department announced on August 2, 2018, that it was going back to the drawing board. In light of the 6,000 comments received, it was going to rethink the matter. Said the announcement, inter alia, "Recent court decisions have raised important legal questions regarding this issue, and the significant public comments make clear that we still haven't struck the right balance." Alston's suit was directed against the Department of Education and its Secretary, and Equality Delaware Foundation (the state's LGBT lobbying group) and its leader, Mark Purpura. Alston purported to base his claim for injunctive relief on 42 USC sections 1981, 1983, 1985 and 1986. Defendants moved to dismiss, but Alston filed no opposition document and, the court observed, had taken no action on this case since last April 9. But he hadn't withdrawn it, so District Judge Leonard P. Stark decided to issue a decision to close out the case. He decided that the Education Department and its Secretary enjoy 11th Amendment immunity from this lawsuit, and that Equality Foundation and its leader are not state actors so most of the cited provisions of 42 USC don't apply to them. Furthermore, Sec. 1981 is totally irrelevant, because it applies only to race discrimination claims. He also found that all claims were deficiently pled, and that amendment would be futile, so the motions to dismiss were granted in full. And Alston is out the filing fee he paid, presumably.

DISTRICT OF COLUMBIA – U.S. District Judge John D. Bates concluded that privacy concerns cut against granting a discovery request by defendant Children's National Medical Center for cell tower location data from the cellphone of H.W., a teenager who died from complications of HIV and syphilis, whose mother is suing defendant for medical negligence. *Williams v. United States*, 2019 WL 1330714, 2019 U.S. Dist. LEXIS 49025 (D.D.C., March 25, 2019). The content of H.W.'s cellphone has already been made available to defendants, but they urged that cell tower location information for the last weeks of decedent's life could be relevant to its defense of contributory negligence on his part. Judge Bates found that although locational informational might be relevant to the defense, much of the information that would be obtained would be cumulative to what had already been learned through discovery. More important, he opined, were privacy concerns. He wrote, "The Court concludes that the privacy implications of using cell phone location data to track a deceased teenager's movement to determine how he became infected with HIV – whether through sexual contact with third parties or drug use – are significant. True, concerns about decedent's privacy are mitigated to some extent by the fact that plaintiff has waived some confidentiality rights by bringing this lawsuit. However, the people with whom H.W. may have interacted in the months before his death – whether HIV-positive or not – have not waived their privacy rights. As noted by defendants, the location data is only useful insofar as it may provide a springboard for further investigation; location data, in itself, will not reveal 'how/when/from whom H.W. contracted HIV.' Any subsequent investigation might entail publicly disclosing private information, either explicitly or impliedly through a line of questioning . . . Defendants have not satisfied the court that discovery of location data is necessary or that such discovery is susceptible to limitation to mitigate the Court's privacy concern." Plaintiff is represented by Karen Elizabeth Evans of The Cochran Firm, Washington, D.C.

DISTRICT OF COLUMBIA – Here's a bizarre pro se case that we have trouble puzzling out. *Hamilton v. Stevens*, 2019 WL 1046632, 2019 U.S. Dist. LEXIS 34411 (D.D.C., March 5, 2019). Jan Hamilton, a self-described elder disabled lesbian, moved back to Washington, D.C., after having lived for some time in Aspen, Colorado. She sought to join Christ Church, Georgetown, and claims she was physically assaulted by two assistant rectors with the support of a senior warden, denied membership in the church, and presented with a notice barring her from the premises. This, she alleges violates her rights, but the only statute she seems to be relying on is the Federal Tort claims Act, under which the only possible defendant is the federal government. (Save us from *pro se* litigation . . . .) She demands as damages $250,000 "in treble in the form of cashier's checks from each guilty party, the conspirator/perpetrators under the leadership and direction of Tim Cole [the Rector of the church] . . . [and then mentions her physical assailants]." It looks like she was unsuccessful in bringing similar claims in the D.C. Superior Court, so decided to go federal, under the misunderstanding that federal courts have jurisdiction to hear tort claims against religious institutions and their officers. At any rate, Judge Colleen Kollar-Kotelly makes short work of the defendants' motion to dismiss, granting it with prejudice.

FLORIDA – In February, *Law Notes* reported on a Report & Recommendation by U.S. Magistrate Judge Amanda Arnold Sansone in *Vazzo v. City of Tampa*, 2019 WL 1048294 (M.D. Fla., Jan. 30, 2019), a lawsuit challenging

the city's enactment of an ordinance banning the performance of conversion therapy on children. Judge Sansone actually issued two R&Rs on that date, one going to the city's motion to dismiss and the other to plaintiffs' motion for a preliminary injunction. Our report focused on the judge's recommendation that a preliminary injunction be issued barring enforcement of the ordinance against the two plaintiff practitioners, but only with respect to their performance of "talk therapy" and no other method of conversion therapy, Judge Sansone finding that they had a plausible 1st Amendment free speech challenge to the ordinance as applied to the kind of therapy they described in their motion papers. At the same time, however, Judge Sansone's R&R regarding the city's motion to dismiss recommended that it be granted in part and denied in part. She found that the complaint failed to state a plausible claim under the Free Exercise Clauses of the federal and state constitutions, or a claim for relief under the Florida Patient's Bill of Rights and Responsibilities, so those claims should be dismissed. However, consistent with her recommendation concerning the plaintiffs' motion for preliminary injunction, she found that the freedom of speech claims should not be dismissed. Both parties filed objections to various aspects of the two R&Rs. On March 5, District Judge William F. Jung issued an order adopting and affirming the R&R regarding the city's motion to dismiss. This order addresses only the R&R on the motion to dismiss, not the R&R on the preliminary injunction, which apparently was still pending before Judge Jung at the end of March. Judge Jung's short Order, published at 2019 WL 1040855, 2019 U.S. Dist. LEXIS 34804, does not contain any substantive discussion of the issues raised in the R&R, apart from telling the plaintiffs that they need not file a second amended complaint reflecting the partial dismissal of their case. Instead, "the first amended complaint shall stand as delimited and truncated by the R&R." The city was directed to answer the amended complaint within fourteen days.

GEORGIA – Under the "American rule" governing awards of attorney fees to prevailing parties, there is no common law right to have such fees awarded, but some states have statutes setting out circumstances where fees can be awarded. For example, in Georgia, a prevailing defendant can be awarded fees if they are sued on a legal claim for which there is no authority under Georgia law and no potentially persuasive authority under the laws of other states. In *Hill v. Burnett*, 2019 WL 1070477, 2019 Ga. App. LEXIS 138 (Ga. App. March 7, 2019), Susan Hill sued her former same-sex partner seeking to legitimate and establishing parenting time/visitation with twin girls born during their partnership. Burnett was the birth mother. The factual allegations support a typical scenario that has been accepted in other states as entitling the non-birth mother to seek visitation or custody, but for which there is no appellate precedential support in Georgia. Hill struck out on her claims, and the trial court awarded attorneys' fees and costs to Burnett. The Court of Appeals granted Hill's application for discretionary review of the fee award, accepting her argument that under the Georgia statute, she should not be taxed fees on the visitation/custody portion of the litigation, because Hill had cited numerous appellate rulings from other states that could be persuasive precedents to support her claims. In particular, the court noted the New York Court of Appeals decision in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016). The trial court discussed *Brooke S.B.*, finding that "a close reading of the facts" in *Brooke* showed a "distinctly more clear cut showing of intent by the parties to both conceive and raise a child together." The Court of Appeals found that the trial court had failed to faithfully apply the Georgia fee statute, which provides for attorney fees only in cases "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position." "*Brooke S.B.*, and similar cases cited by Hill to the trial court, provides a basis for finding that there was not a complete absence of such justiciable issues," wrote Judge Stephen S. Goss. Thus, the court remanded the case to reconsider the amount of fees to be awarded, limiting them to the legitimation claim, as to which the Court of Appeals found that Hill cited no cases to support that claim. Hill is represented by William Brent Ney of Atlanta.

MICHIGAN – In *Waskiewicz v. Ford Motor Company Salaried Disability Plan*, 2019 WL 1306171, 2019 U.S. Dist. LEXIS 47802 (E.D. Mich., March 22, 2019), U.S. District Judge Mark A. Goldsmith, ruling on remand from the 6th Circuit, found that the plaintiff, struggling with gender dysphoria and depression, failed to comply with a filing deadline under the employer's disability insurance plan because of "the very disability for which she sought benefits," a point noted by the 6th Circuit in its reversal of the judge's prior ruling upholding the company's rejection of the disability benefits claim on the ground that the plaintiff was no longer an employee when she filed the claim. Faced with conflicting evidence for and against the proposition that Laura Waskiewicz was actually incapable of getting herself together sufficiently to file her claim before her employer discharged her for lack of attendance, Judge Goldsmith found that ultimately the evidence tipped in favor of the former employee, who contended that the company misaddressed a letter that gave her a time-limit ultimatum to respond to

a request about her condition, and she managed to respond to the information request within a reasonable time after a copy of the letter was forwarded to her attached to a notice of her discharge. The facts and evidence are complicated beyond the scope of this brief note. In reversing Judge Goldsmith's earlier decision in an unpublished opinion, see 2014 WL 1118501 (E.D. Mich. March 20, 2014), the 6th Circuit commented that "plaintiff's application was denied because she failed to follow time-sensitive provisions that were neglected because of that very illness" for which she sought benefits. The plaintiff is represented by Marla A. Linderman, Linderman Law PLLC, White Lake, MI, and Robert B. June, Ann Arbor, MI.

MICHIGAN – The ACLU announced settlement of a lawsuit against the state of Michigan, *Dumont v. Gordon & St. Vincent Catholic Charities*, No. 2:17-cv-13080-PDB-EAS (E.D. Mich., Stipulation of Voluntary Dismissal with Prejudice filed March 22, 2019), concerning discrimination against individual LGBTQ applicants and same-sex couples by child welfare agencies that receive state funding. For years, the state's practice had been to allow agencies with religious objections to serving same-sex couples seeking to adopt children or be foster parents to avoid providing such services with no consequences. ACLU's suit asserted constitutional objections to the state's practice. ACLU's plaintiffs, two same-sex couples, approached Catholic agencies that receive state funding but were turned away due to their sexual orientation. Under the terms of the settlement, the state will enforce anti-discrimination requirements contained in federal regulations by including them in contracts with child welfare agencies, including those with a religious affiliation, and the state agrees to take action to enforce these contractual requirements if an agency refuses to work with LGBTQ individuals or couples because of their sexual orientation. The U.S. District Court will retain jurisdiction to enforce the terms of the settlement agreement should problems arise. According to an ACLU press release announcing the settlement distributed on March 22, Michigan is the first state to "reverse course on this issue" and "eight states still allow taxpayer-funded child welfare agencies to use religious eligibility criteria to turn away foster and adoptive families," which have included members of minority faiths as well as LGBTQ applicants and couples. The number of states may increase as a result of bills in Arkansas and Tennessee. The settlement is also an important breakthrough because Michigan is among those states that has yet to outlaw sexual orientation and gender identity discrimination by statute.

MINNESOTA – A gay Native American man represented by counsel suffered dismissal of his Title VII and ADEA claims because of pleading deficiencies in *Bad Wound v. Zinke*, 2019 U.S. Dist. LEXIS 35499, 2019 WL 1060819 (D. Minn., March 6, 2019). Everett Bad Wound was employed by the U.S. Department of the Interior's Bureau of Indian Education. He claims to be the victim of discrimination because of his sex, sexual orientation, and age, and alleges two specific instances which he considers hostile environment harassment: a supervisor referred to his appearance once as "all dolled up," and his supervisor's assistant referred to him once as a "girl scout." He complained to the Bureau's Human Resource officer. Beyond that, details of alleged harassment and retaliation are not spelled out in the complaint, apart from the fact that he was eventually terminated. He claims the reason stated was a pretext: that he lost his driver's license due to a traffic accident, thus preventing him from performing his job. U.S. District Judge Wilhelmina M. Wright granted defendants' motion to dismiss all counts, finding that the generalized pleadings in the complaint did not suffice to state valid claims. However, as is frequently the case with such dismissals, the court will give Bad Wound another change to come up with an amended complaint that meets the pleading requirements, dismissing without prejudice. His counsel are Jeffrey D. Schiek and Philip G. Villaume of Bloomington, MN.

MISSOURI – Sounds like police brutality to us – at least as described by Tracy Fortenberry in her complaint against the City of St. Louis and several of its police officers for her treatment by the police on November 19, 2016. *Fortenberry v. City of St. Louis*, 2019 WL 1242671, 2019 U.S. Dist. LEXIS 43212 (E.D. Missouri, March 18, 2019). Fortenberry, who suffers from anxiety and post-traumatic stress disorder (PTSD), lived with her same-sex spouse. On that date she mentioned to an out-of-state friend that she had taken extra anxiety medication for stress, and believes that her friend, thinking she might have taken an overdose, called the police. Later that evening two police officers showed up at her home, stating they heard "there was an accident." Fortenberry and her wife explained there was no accident and answered a few questions while officers looked around the house and left, but they returned about 90 minutes later with medical technicians and insisted that Fortenberry had to come with them, even though she showed them her prescription bottle and explained that she had taken an allowable dosage. She claims that while she was speaking to the medical technicians, she overheard the officers making derogatory comments about her same-sex marriage. She also claims that the technicians did not accurately relate her information in their call to the hospital. Then they insisted she get in

the ambulance to go to the hospital for evaluation. She got into the ambulance, but when it stopped for a red light, she jumped out and started walking home. Police officers gave chase, cursing her out and physically restraining her, forcing her to the ground and flipping her over, causing severe injury to her elbow (later diagnosed as a break that ultimately required four surgical procedures and may have caused permanent nerve damage). The officers cuffed her arms behind her back, despite her agonized screams, and then cuffed her arms awkwardly to restrain her in the ambulance. In this lawsuit, she sues the city on municipal liability and sues the officers on constitutional and tort claims. District Judge Jean C. Hamilton, rejecting the plaintiff's evidence of numerous instances of St. Louis PD police brutality in arrest situations, including many settlements of similar claims by the city, said her pleadings did not suffice to plead municipal liability, but the judge refused to grant a motion to dismiss all the claims against the police officers. At this point, there are too many potentially disputed facts to determine whether the officers enjoy qualified immunity or could prevail on a "reasonable force under the circumstances" defense. So Judge Hamilton denied the motion to dismiss the claims against the officers, including claims of civil conspiracy, official immunity and sovereign immunity, awaiting development of a factual record. Fortenberry is represented by James R. Wyrsch, Javad M. Khazaeli, and Kiara Nayo Drake, of Khazaeli and Wyrsch LLC, St. Louis.

MISSOURI – In a rare reversal of an ALJ ruling against disability benefits, U.S. Magistrate Judge David D. Noce reversed a denial of benefits in *Hardin v. Berryhill*, 2019 U.S. Dist. LEXIS 38913 (E.D. Mo., March 11, 2019), finding that the ALJ's conclusion that plaintiff Hardin was not sufficiently disabled to qualify for benefits was not supported by the record concerning his HIV infection. Judge Noce's opinion sets out a detailed history of Hardin's treatment record, showing repeated difficulties, many attributable to his HIV infection. The ALJ's opinion had characterized petitioner's HIV somewhat dismissively: "Plaintiff had been diagnosed with HIV; however, this condition is well controlled on medications," wrote the ALJ. "With medication and treatment, the claimant's viral load decreased. The record is devoid of any HIV-related complications. In fact, the record does not support a conclusion that the claimant's HIV or AIDS caused more than a minimal vocationally relevant limitation for a period of 12 months or more." Judge Noce completely disagreed, looking at the same record and writing: "The record evidence concerning plaintiff's HIV is well-developed, referencing plaintiff's HIV impairment and how it causes more than a slight limitation." After reciting details of numerous hospitalizations, problems of adjusting to medications and side effects, and other difficulties, Noce noted that plaintiff went to a doctor for an "independent medical examination," after which the doctor opined that plaintiff "had a 40% permanent disability due to HIV/AIDS infection and accounting for peripheral neuropathy involving the upper and lower extremities." Noce wrote that "the record is clear that the general finding by the ALJ that plaintiff's HIV impairment 'caused no more than a minimal vocationally relevant limitation for a period of 12 months or more' is not supported by substantial evidence. Given the low standard for determining impairment severity, the ALJ erred at Step Two of the sequential evaluation process. Further, substantial evidence unequivocally supports a finding that plaintiff's HIV impairment is severe. The court reverses the final decision of the defendant Commissioner and remands the case for general reconsideration of plaintiff's disability applications with his HIV impairment considered severe." Plaintiff Hardin is represented by Karen Kraus Bill, of Columbia, Missouri.

NEW JERSEY – The Southern Poverty Law Center and lawyers from Lite DePalma Greenberg, LLC, and Cleary Gottlieb Steen & Hamilton LLP have filed suit in Hudson County Superior Court, alleging that an organization calling itself Jews Offering New Alternatives for Healing, is merely a new iteration of Jews Offering New Alternatives to Homosexuality (JONAH), a conversion therapy outfit that was found in an earlier proceeding to have violated the state's consumer protection law and was ordered to disband and cease providing such services. A detailed complaint in *Ferguson v. JONAH*, Docket No. L-5473-12, sets out chapter and verse about the activities of Arthur Goldberg and others who were behind JONAH and now are making prohibited referrals to conversion therapy practitioners. One big difference between then and now is that New Jersey passed a law outlawing the practice of conversion therapy on minors, at least partly due to the revelations described in the press about JONAH's operations and the determination that the organization operated in violation of the consumer protection law. The suit alleges that the defendants have "continually breached the December 2015 settlement agreement and violate this Court's December 18, 2015 Order Granting Permanent Injunctive Relief and Awarding Attorneys' Fees." It alleges that the breaches began occurring "almost immediately" and "have persisted through the present day." The new lawsuit seeks renewed injunctive relief, much more specific than that previously ordered, including damages, disgorgement of revenues, and initiation of criminal contempt proceedings against the defendants.

CIVIL LITIGATION *notes*

NEW YORK – In *Setty v. Synergy Fitness & Alfredo Rodriguez*, 2019 U.S. Dist. LEXIS 47236 (E.D. N.Y., March 21, 2019), three straight men who used to work for Synergy Fitness, a Brooklyn gym, were awarded a default judgment by U.S. District Judge Nicholas G. Garaufis, who adopted in full the Report & Recommendation submitted by Magistrate Judge Steven M. Gold. In brief, each of the men claimed that he had been subjected to hostile environment sexual harassment and retaliation for complaining about it, at the hands of Rodriguez, a gay man who became manager of the gym in February 2015. According to the plaintiffs, and accepted as true as a result of defendant's default in response to plaintiffs' motion for judgement, Rodriguez was very uninhibited about making his sexual interest known to them, amplified by unwanted touching, frequent comments about which clients of the gym he considered "hot," watching gay porn on his office computer in their presence, etc. Each of the men complained to another manager and to the gym's owner, but they asserted that nothing improved and they suffered retaliation from Rodriguez as a result, ranging from reassigning clients to other trainers to bounced checks to retaliatory discharge. Claims were asserted under federal, state and local employment discrimination law, as well as the Fair Labor Standards Act and parallel New York Labor Law provisions. The only controversy regarding the magistrate's report was the plaintiffs' contention that he should have recommended more damages for them. Judge Garaufis pointed out that plaintiffs' counsel never asserted a claim for punitive damages on their behalf, and that the magistrate's characterization of their emotional distress claim as "garden variety" was consistent with the case law, since no evidence was introduced supporting a contention that their distress was comparable to that suffered by plaintiffs in other cases who presented evidence of serious emotional distress lingering long after the fact. To the complaint by plaintiffs' counsel about the award of only $250/hour for his work on the case, Garaufis pointed out that it was not a difficult or heavily litigated case, as the defendants conceded liability and quibbled only about the amount of damages. Plaintiffs' counsel is Lonnie Hart, Jr., of Brooklyn.

NEW YORK – Osvaldo Boves has a sexual orientation discrimination claim against his employer, Aaron's Inc., but U.S. Magistrate Judge Henry Pitman ruled on March 14 that he can't pursue the claim in court because of an email he received from his employer, mandating arbitration of all claims, was valid. *Boves v. Aaron's Inc*., 2019 U.S. Dist. LEXIS 41514, 2019 WL 1206698 (S.D.N.Y., March 14, 2019). Although Boves at first claimed never to have received the email with the arbitration provision, or at least not remembering receiving it, the employer established from its computer records that it was sent to his mailbox and opened. Even in the absence of proof that he received the email with the arbitration clause, the court was willing to accept that it was sent to him through business records evidence. The court applied the normal analysis within the 2nd Circuit. If it's proved that an arbitration agreement was sent, the lack of a signature response is not dispositive of the plaintiff's clam to a right to litigate on subjects covered by the provision. Because the notice sent out said that employees who fail to opt out pursuant to its instructions would be deemed to have accepted the offer to subject all their disputes with the company to arbitration, the court found that the requisite agreement existed and was binding. Thus, the court granted defendants' motion to compel arbitration of the sexual orientation discrimination claim.

NORTH CAROLINA – In *Crowder v. North Carolina Administrative Office of the Courts*, 2019 WL 1264872, 2019 U.S. Dist. LEXIS 44691 (E.D.N.C., March 19, 2019), U.S. District Judge James C. Dever III granted motions to dismiss by all defendants in a suit by a former North Carolina magistrate who was not reappointed after she became embroiled in a controversy about one of her magistrate colleagues who did not want to perform same-sex marriages after the 4th Circuit ruled for marriage equality in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), a Virginia case, and district courts in North Carolina fell in line with that ruling. The county magistrates are appointed by the local judges in North Carolina. Sherry Crowder was first appointed in January 1, 1993, and was regularly reappointed by a series of district judges until she was informed on December 15, 2016, that she would not be nominated for a new term. In her complaint filed under Title VII of the Civil Rights Act of 1964, she appears to be making a claim that she was denied reappointment because of her support for Gayle Myrick, then a magistrate in Union County, who felt that her compliance with a guidance sent to magistrates by the North Carolina Administrative Office of the Courts (NCAOC), directing them to follow the 4th Circuit precedent regarding same-sex marriages, would violate her 1st Amendment free exercise rights. Myrick sought an "accommodation" from her appointing judge to be allowed to "avoid participation as a magistrate in a same-sex marriage," which the judge denied. Myrick filed a religious discrimination charge with the EEOC, which determined that the Government Employee Rights Act of 1991 (GERA), not Title VII, applies to a North Carolina magistrate's discrimination claim, and following GERA procedure appointed an administrative law judge to adjudicate Myrick's claim. Crowder testified in support of Myrick before the ALJ,

CIVIL LITIGATION *notes*

who eventually ruled that two judges and the NCAOC had discriminated against Myrick in violation of GERA; rather than appeal, the defendants negotiated a settlement with Myrick. During the "Myrick investigation" one of the judges who is a defendant in Crowder's case testified that Myrick, Crowder and another magistrate had come to his office and a statement was made that "in Union County there are some parts of those federal laws that we don't follow, quite like they do in other places," which the judge claimed was a surprise to him. (Crowder claimed not to recall that remark having been made, and denied that she had made it.) In any event, the judges involved in appointing magistrates conferred and decided not to reappoint Crowder. She claims that by tradition reappointments had been automatic until somebody resigned or retired. She sued the NCAOC, the EEOC, and the appointing judges, seeking to invoke Title VII. Judge Dever found that Crowder's claim for declaratory relief had to be dismissed for various reasons. For one thing, there is no statutory basis for her to sue the EEOC; the agency responded to her charge by issuing her a right-to-sue letter. The NCAOC was not amenable to suit and was not, after all, her employer. Neither are the judges. Indeed, Title VII is not applicable to appointed government officials like magistrates, Judge Dever found, so her only remedy is under GERA, a separate statute enacted by Congress that has its own enforcement mechanism. Dever expressed his confidence that the EEOC would "apply equitable tolling if GERA's 180-day requirement so that Crowder can pursue relief under GERA upon filing a new charge with the EEOC. Whether Crowder will prevail under GERA is an issue for another day," Dever continued. "Crowder should, however, be able to pursue her GERA claim at the EEOC and (if necessary) the Fourth Circuit." Crowder is represented by W. Ellis Boyle of Raleigh.

OREGON – U.S. Magistrate Judge John V. Acosta issued a Report & Recommendation that was converted into an Opinion and Order upon adoption by the district judge in *Seehawer v. McMinnville Water & Light*, 2019 U.S. Dist. LEXIS 42269 (D. Ore., March 15, 2019), a case in which the plaintiff, self-identified as a heterosexual man, claims to have been subjected to a hostile work environment founded on sexual stereotyping. Acosta was not convinced that the factual allegations rose to the level necessary to sustain a workplace hostile environment harassment claim, finding that there were non-sexual reasons for co-workers to subject Seehawer to harassment, and their treatment of him seems to have arisen from deficient performance of the job by Seehawer. The court found that Seehawer's factual allegations fell far short under Title VII because they could not meet the "because of sex" pleading standard, and the fact that co-workers may have used words or expressions with a homosexual connotation was not enough to make this into a viable hostile environment claim. However, all was not lost. Amidst the plethora of dismissals of various claims, the court kept alive an ADA claim.

PENNSYLVANIA – If you are employed by a contractor working at a state university, is it maybe not such a good idea to send naked selfies to students and to engage in sexual relations with some of them? Herein, the saga of Scott Moyer recounted in *Moyer v. Aramark,* 2019 U.S. Dist. LEXIS 37165, 2019 WL 1098951 (E.D. Pa., March 7, 2019). Moyer, a gay man, was employed by Aramark Campus LLC, a company that provides food services to institutions, including universities. Under its contract with Kutztown University, Aramark employed Moyer as Director of Retail at Kutztown, overseeing Aramark's food service locations there. A naked selfie of Moyer was forwarded by a student to a university administrator; it then passed through several administrative hands to Aramark and some Aramark supervisory employees met with Moyer to advise him of the investigation they were conducted into his conduct. The supervisors suspended Moyer pending the outcome of the investigation, then notified him a few days later that he was terminated because he violated a "company policy" (which Moyers claims is non-existent). The court doesn't mention the substance of the alleged policy: presumably, Aramark has a policy against its employees conducting sexual relationships with clients of its contract customers? According to defendants, during Moyer's meeting with the supervisors he "admitted to sending photographs to Kutztown students and having sexual relations with Kutztown students," and this was "allegedly the ultimate reason for Moyer's termination." Moyer sued in a six-count complaint alleging a violation of his rights under Title VII, with a claim of conspiracy to deprive him of constitutional rights and other claims against individual Kutztown administrators and Kutztown supervisors. Because the 3rd Circuit does not recognize sexual orientation discrimination claims under Title VII, District Judge Joseph F. Leeson, Jr., was bound to dismiss the sexual orientation discrimination claim. While acknowledging 3rd Circuit precedent upholding gender stereotype sex discrimination claims, however, he found Moyer's pleading inadequate because his first amended complaint "only makes conclusory statements regarding a possible discriminatory reason for his termination and does not allege sufficient information suggesting circumstances that would give rise to an inference that Aramark fired Moyer to punish his noncompliance with gender stereotypes." The problem was allegations of possible reasons instead of allegations of facts, and thus a failure to meet civil pleading standards. "He

only generally alleges that employees engaged in heterosexual relationships were treated differently," wrote Leeson, but apparently he didn't cite any actual examples of heterosexual Aramark employees engaging in similar conduct but not being discharged. "Ultimately, Moyer has not pled facts with at least a modicum of specificity suggesting circumstances that could give rise to an inference of intentional discrimination by Aramark employees based on Moyer not acting in accordance with gender stereotypes and norms." Despite dismissing the Title VII claim, the judge gave Moyer leave to file a second amended complaint if he could come up with factual allegations that could support a plausible gender stereotyping claim. Many of the other counts were barred on immunity grounds for the state government institution and state employees (sued in their official capacity). Moyer argued that he was suing the various Kutztown administrators in their personal capacities, but as to that again the judge found the complaint inadequately specific on facts, and it appeared that all the actions taken by the administrators as described by Moyer were really in their official capacity. The judge did not rule on the motion to dismiss state claims, preferring to hold them in abeyance while waiting to see whether a second amended complaint might preserve federal jurisdiction over the case. Moyer is represented by Charles E. Dutko, Jr., of Kuztown, PA.

SOUTH CAROLINA – The plaintiff in *Boyd v. Johnson Food Services, LLC*, 2019 U.S. Dist. LEXIS 37341, 2019 WL 1090725 (D.S.C., March 8, 2019), self-describes as an African-American woman whose "appearance is more characteristic of a man" and who "does not conform to gender stereotypes and norms about women." She was employed by two federal contractors who provide food services to soldiers at Fort Jackson, and was eventually discharged. She claims to have suffered various kinds of discrimination during her employment, including gender and race discrimination and retaliation in violation of Title VII. In seeking dismissal of her suit, one of the employers argued that she was making a non-cognizable sexual orientation discrimination claim, citing the 4th Circuit's clear precedent that sexual orientation claims are not covered under Title VII; *see, e.g., Hinton v. Virginia Union University*, 185 F. Supp. 3d 807 (E.D. Va. 2016). Plaintiff responded that there is a circuit split on that question, and she should be allowed to continue litigating this claim "until this issue is conclusively decided by the Supreme Court." The court, noting the accuracy of the employer's citation of 4th Circuit authority, sustained this objection and instructed the plaintiff, who originally filed *pro se* but now has counsel, to "strike from any amended pleading Title VII claims based on sexual orientation." But these days, that is not invariably the end of the story. "Upon review of MFB's final objection regarding the sufficiency of allegations supporting Plaintiff's Title VII claims based on gender stereotype," wrote Judge J. Michelle Childs, "the court observes that *Price Waterhouse* stands for the proposition that employers may not discriminate against women who fail to conform to conventional gender norms. The parties dispute the appropriateness of applying Price Waterhouse to this matter. However, because gender stereotype claims are protected under Title VII, the court finds that a review of Plaintiff's proposed amended complaint in the light most favorable to plaintiff demonstrates sufficient allegations to overcome MFB's arguments of futility and/or insufficiency as to her causes of actions for discrimination, harassment, a hostile work environment, and retaliation in violation of Title VII." Thus, those claims will not be dismissed. Valerie Boyd is represented by Maybeth E. Mullaney of Mount Pleasant, S.C.

TEXAS – U.S. Pastor Council has dismissed its federal lawsuit against the city of Austin, Texas, *AP State News* reported on March 24. The suit sought a declaration that the city's antidiscrimination ordinance, which bans sexual orientation and gender identity discrimination, is unconstitutional because it does not exempt religious organizations from having to comply with those provisions. U.S. Pastor Council claimed to be suing on behalf of its 25 member churches within the city limits. Although the ordinance contained standard language exempting religious organizations from the obligation not to discriminate based on religion, the plaintiff argued that to avoid violating the Free Exercise rights of its members, the ordinance should also exempt them from complying with the sexual orientation and gender identity provisions. (Under U.S. Supreme Court rulings, the churches are already exempt from any statutory antidiscrimination requirements regarding its employment of ministerial staff, so their immediate concern is concerning non-ministerial staff, such as janitors and clerical and security staff.) The city had claimed the there was no allegation that it had actually enforced the contested provisions against any church, so the plaintiffs had no injury upon which to base standing to sue. Of course, U.S. Pastor Council has bigger fish to fry, having filed a lawsuit against federal authorities during March seeking injunctive relief against enforcement of Title VII of the Civil Rights Act in any case involving LGBTQ individuals (see article above: "Impatient Christians").

WASHINGTON – *AP State News* reported on March 24 that Sequim School District has agreed to settle a sexual orientation discrimination lawsuit by former middle school teacher and athletic director Autumn St. George by paying his $850,000 to withdraw the lawsuit. A local newspaper, *Peninsula Daily News*, filed a public

records request that revealed both the settlement agreement – which had not been publicly announced – and a school district investigative report that was critical of district staff members. St. George had sued both the district and three employees, a principal, an assistant principal, and a student counselor. The settlement agreement included St. George's release of damage claims against the individuals as well as the district. She had alleged that a district official "inserted a personnel document" wrongly accusing her of engaging in "pedophilic behavior" and that she suffered harassment by staff members because of her sexual orientation, according to the *AP* report. She resigned her position on March 18.

WISCONSIN – This is a strange one. William A. Fry, a gay man represented by counsel, brought a multi-count complaint, thrice amended, in connection with his discharge from employment by a Catholic hospital, Ascension Health Ministry Services d/b/a Columbia St. Mary's. The complaint alleges discrimination because of sexual orientation in violation of Title VII and 42 USC 1981, religious discrimination in violation of Title VII and the First Amendment, retaliation for opposing sex and religious discrimination in violation of Title VII and Sec. 1981, age discrimination in violation of the Age Discrimination in Employment Act, a tort claim of negligent supervision, and discrimination in violation of the Wisconsin Fair Employment Act. The employer moved to dismiss with prejudice Counts 2, 3, 5, 6 and any claims invoking Sec. 1981 or the First Amendment, for failure to state a claim. Fry did not file any opposition to the motion. In a March 22 decision in *Fry v. Ascension Health Ministry Services*, 2019 U.S. Dist. LEXIS 47943, 2019 WL 1320320 (E.D. Wis.), U.S. Magistrate Judge Nancy Joseph granted the motion to dismiss in its entirety, leaving in place only the sexual orientation discrimination claim under Title VII and the age discrimination claim under ADEA. Reading Judge Joseph's pithy decision, one has to wonder what Fry and his counsel were thinking regarding the dismissed claims. As a Catholic hospital, defendant is not subject to religious employment discrimination claims under Title VII, and it is not a state actor, so the 1st Amendment is irrelevant to the case. Fry is not alleging race discrimination, so Section 1981 is also irrelevant. Fry is not claiming retaliation for filing his EEOC charge, but rather for employer actions predating the filing of his charge, so his failure to allege retaliation in the EEOC charge means that claim is dismissed for failure to comply with Title VII's exhaustion requirement. Under Wisconsin law, negligence claims against an employer are preempted by the Workers Compensation law, and the Wisconsin Fair Employment Act does not afford a private right of action, being enforceable only through agency proceedings (although an individual can then sue for a remedy after the agency has adjudicated a violation of the law). In other words, Fry's complaint was loaded up with multiple obviously implausible counts. Who did any legal research before framing the complaint? One wonders whether Fry's lawyer was retained *after* he filed the original complaint *pro se*? Otherwise, we really have to wonder. The complaint went through three amendments, but the court does not specify when various counts were added and whether Fry was represented by counsel at the time. The decision not to oppose the employer's motion was certainly prudent in the circumstances. Notably, the employer did *not* move to dismiss the Title VII sexual orientation claim. Fry, a nurse, cannot be claimed as a ministerial employee excluded from Title VII protection, and under 7th Circuit case law, sexual orientation discrimination is actionable as sex discrimination within the states of the 7th Circuit as of now.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. SUPREME COURT – Hope springs eternal for Charles Russell Rhines, convicted of murder and sentenced to death by a South Dakota jury in 1993, who has filed yet another cert petition with the Supreme Court (having been turned down prior to the most recent unsuccessful attempt by him to challenge the verdict on grounds of jury bias in the 8th Circuit). *Rhines v. Young*, No. 18-8029 (filed February 15, 2019), decision below, *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018), rehearing and rehearing en banc denied. The jury had evidence that Rhines was gay, and during deliberations sent out a note to the judge asking about prison conditions for Rhines if he were sentenced to life without parole. Rhines construed the note to reflect possible juror bias, but this wasn't definitely confirmed for him until one of a string of appointed defense counsel took statements from jurors relating statements during deliberations that could be construed as inappropriate. Unfortunately, these juror statements were obtained after the federal district court had rejected his habeas corpus petition, which was then on appeal to the 8th Circuit. He sought to amend the habeas petition to add this new information, but the district judge turned him down on grounds that he was entitled only to one habeas petition, and for years he has been struggling to get some court to address, on the merits, the question of juror bias taking account of the new statements. The South Dakota Attorney General's Office responded to the juror statements by assigning an investigator to interview those jurors still living, and found that there was corroboration that statements were made about Rhines' sexual orientation, but none of the jurors thought that their eventual decision was affected by that. Some of

what Rhines characterized as improper consideration of his sexual orientation was, in the opinion of some of the jurors, just jokes to relieve tension, the speakers of which promptly apologized to the other jurors. In any event, there are conflicting accounts, enough for Rhines to argue that the death penalty should be set aside, pursuant to the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which opened an exception to the general rule against inquiring into jury deliberations, for cases where there was evidence of juror bias based on the race of the defendant. Unfortunately for Rhines, *Pena-Rodriguez* significantly post-dates most of the lower court decision-making on his habeas corpus petitions, and no court has yet relied upon it to question a jury verdict in a case involving a gay defendant. The Attorney General's Office opposes the petition as procedurally barred, and objected to amicus briefs submitted by various organizations (NAACP, Law Professors, ACLU) on the ground that they focused on the juror bias issue, which the A.G. argues is procedurally barred from consideration. The A.G.'s opposition mentions its own investigation, and claims that had its investigation provided credible evidence of juror bias based on sexual orientation, it would have taken action on its own to get the death sentence set aside. Counsel for Rhines says that his Petition will be distributed to the Court for its April 12 conference. Counsel of record for Rhines on the Petition is Claudia Van Wyk, an Assistant Federal Defender for the Eastern District of Pennsylvania, with Stuart Lev of the same office listed, as well as Neil Fulton and Jason J. Tupman of the Office of the Federal Defender for the Districts of South and North Dakota.

NEW YORK – A unanimous panel of the N.Y. Appellate Division, 1st Department, upheld the conviction of Rafael Bah on charges of aggravated harassment in the second degree, in *People v. Bah*, 2019 WL 1288435, 2019 N.Y. Misc. LEXIS 1088, 2019 N.Y. Slip Op 50335(U) (March 20, 2019). The court found that the complaint was "jurisdictionally valid" in that it described "facts of an evidentiary nature establishing reasonable cause to believe that defendant was guilty" of the crime alleged, to wit: "Allegations that at a specified date, time and location, defendant approached two named individuals and stated 'America doesn't approve of homosexuals like you, I choked people like you to death in Afghanistan, if we were outside, I'd beat the shit out of you,' while defendant repeatedly pointed his finger in said individuals' faces and stood directly in front of them, were sufficient at the pleading stage to support a finding that defendant made a genuine threat to physically harm the victims and placed them in reasonable fear of harmful physical conduct, based on defendant's perception of their sexual orientation," citing N.Y. Penal Law sec. 240.30[3]. They were convicted before Criminal Court Judge Laurie Peterson, with the affirmance per curiam by a penal of Justices Shulman, Ling-Cohan, and Edmead.

WYOMING – In *Sheesley v. State of Wyoming*, 2019 WL 1253396, 2019 Wyo. LEXIS 32 (March 19, 2019), the Wyoming Supreme Court rejected an argument by Tosha Leigh Sheesley, a resident manager at an adult community correctional facility in Casper, Wyoming, that under the U.S. Supreme Court's decision in *Lawrence v. Texas*, her conviction for engaging in a sexual relationship with a resident of the facility under a Wyoming penal statute was unconstitutional. Writing for the court, Justice Kate M. Fox noted that there are serious questions about consent when a staff member of a correctional facility engages in sex with an inmate, and the Supreme Court in *Lawrence* was careful to specify that the protection for sexual activity that it found in the Due Process Clause was limited to consensual sex. Furthermore, the Wyoming court rejected the appellant's argument that *Lawrence* recognized a "fundamental right" to engage in sex, stating that "there is debate about whether *Lawrence* identified a 'fundamental right' of any sort," noting for example Justice Scalia's dissent in that case, and some law review commentaries about *Lawrence*, and quoting an 11th Circuit ruling, *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (2004), as follows: "Although many of the Court's 'privacy' decisions have implicated sexual matters, the court has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right." Also quoting a 2012 law review article that may be a bit out of date on this point, Justice Fox wrote that it stated that only "a single American jurist at the appellate level, Judge Barkett of the 11th Circuit, has accepted the argument that *Lawrence* establishes a fundamental right." The court found that the statute in question met the rational basis test, and devoted a significant part of its opinion to refuting Sheesley's contention that the statute could be attacked as overbroad because, as written, it might apply to some constitutionally protected sexual activity. In dismissing Sheesley's argument under the state constitution, Justice Fox commented, "The scope of substantive due process protections under the Wyoming Constitution remains an open question, despite textual similarity between it and the federal constitution. The Office of the Public Defender represented Sheesley on this appeal. At trial, Sheesley entered into a plea bargain and was sentenced to 3 to 5 years, suspended on condition that she complete three years of supervised probation.

PRISONER LITIGATION *notes*

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.

CALIFORNIA – *Pro se* plaintiff Damaree Rayshawn Thomas, African American and gay, did not oppose the motion to dismiss filed against him by two defendants – the San Deigo County Sheriff and a deputy – for events that transpired at the jail, and U.S. District Judge Gonzalo P. Curiel granted the motion. Despite the procedural default, Judge Curiel wrote a substantive opinion in *Thomas v. Sheriff,* 2019 U.S. Dist. LEXIS 30591, 2019 WL 927771 (S.D. Calif., February 26, 2019). It has errors and troubling dicta. Thomas raised two counts: (1) failure to protect him from assault by another inmate, after which he was denied medical care and punished with "lockdown"; and (2) sexual harassment and discrimination because of his race and sexual orientation by the deputy under the supervision of the sheriff. Apparently, Thomas sued only the sheriff on the first count. Judge Curiel said that Thomas failed to show the sheriff's personal involvement sufficiently to established individual liability. He then ruled that the sheriff had Eleventh Amendment immunity in his official capacity, as an officer of the state. This is wrong. California sheriffs (unlike those in some states, like Georgia) are county officers, not state officers. *Moor v. County of Alameda,* 411 U.S. 693, 696 (1997) (California sheriffs as county officers); *Cortez v. County of Los Angeles,* 294 F.3d 1186, 1189 (9th Cir. 2002) (same). The question for official liability of the sheriff is the standard of pattern and practice liability for the county under *Monell v. New York City Dept. of Soc. Serv.,* 436 U.S. 658, 694 (1978). It would fail as well, but it is disconcerting that Judge Curiel would get this wrong – or that the sheriff's attorneys (if they did) would brief the point so badly. On the second claim, the deputy's harassment included demanding that Thomas call himself a "Big, Black, Beautiful, Baby" or perform sexual favors in exchange for extra food or a "welfare pack." Again, the allegations against the sheriff were deemed insufficient. The deputy was apparently transferred in part because of his behavior—a fact that undercuts Judge Curiel's observation that the sheriff was not shown to know about the behavior but also supporting the argument that he did something about it. As to the deputy himself, Judge Curiel finds the action to be "mere" verbal abuse without any allegations of actual sexual touching – which is not actionable under the Eighth Amendment in the Ninth Circuit, citing *Austin v. Terhune,* 367 F.3d 1167, 1172-72 (9th Cir. 2004); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996). Finally, Judge Curiel turns to Thomas's Equal Protection claim based on his race and sexual orientation, finding Thomas to be a member of two protected classes entitled to heightened scrutiny. He nevertheless found that "Plaintiff has not specifically alleged that [the deputy] acted with an intent or purpose to discriminate against Plaintiff based on race and gender orientation." [This means that rewarding a gay black man who is enticed by an officer to parrot self-degrading remarks like a trained zoo animal allows no inference of intent to discriminate.] Moreover, Judge Curiel quotes a Seventh Circuit case that says: "Standing alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest, or deny a prisoner equal protection of the laws." *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). He leaves out the footnote that follows: "This does not mean, however, that the use of racially derogatory language is without legal significance. Such language is strong evidence of racial animus . . . . Thus, although the use of racially derogatory language, by itself, does not violate the constitution, it can be quite important evidence of a constitutional violation." *Id*. at n.3. The Seventh Circuit has since adopted a "verbal abuse plus" test for verbal harassment under the Eighth Amendment, which is not mentioned. *See Beal v. Foster*, 803 F.3d 356, 357 (7th Cir. 2015) (verbal harassment that placed inmate at greater risk of assault from fellow inmates). Judge Curiel says he is making a separate ruling on Equal Protection, but he fails to recognize that the provisions protect different constitutional interests. A prison could limit the calorie intake or recreation of only LGBT inmates, for example, and still provide them with a minimum sufficiency to satisfy the Eighth Amendment. This does not mean that the discrimination could satisfy a compelling or important correctional justification under Equal Protection heightened scrutiny. Judge Curiel's opinion conflates the two.

CALIFORNIA – *Shabazz v. Farrell,* 2019 U.S. Dist. LEXIS 42884 (E.D. Calif., March 15, 2019), by U.S. District Judge Dale A. Drozd, adopting the recommendations of U.S. Magistrate Judge Jennifer L. Thurston in *Shabazz v. Farrell,* 2019 U.S. Dist. LEXIS 24533 (E.D. Calif., February 14, 2019), are decisions only a federal civil procedure geek could love. Transgender inmate Fatima Shabazz, a/k/a Dwayne Denegal, has seen her federal litigation slowly erode, even as she has counsel. In 2017, her claims for transgender treatment were allowed to proceed in "Federal District Court Adopts Magistrate Recommendation Allowing Eighth Amendment Challenges to California's Inmate Transgender Rules," regarding *Shabazz v. Farrell,* 2017 U.S. Dist. LEXIS 156661 (E.D. Calif., September 25, 2017) (reported October 2017 at page 404), which also

noted that California had substantially amended its rules regarding transgender inmates. In 2018, counsel tried to amend the complaint to add defendants and challenge the new rules to seek triadic care, including surgery, in *Shabazz v. Farrell,* 2018 U.S. Dist. LEXIS 163463 (E.D. Calif., September 24, 2018), reported in *Law Notes* (October 2018 at pages 554-5). Judge Thurston denied the amendment as unnecessary for the injunctive claims to proceed, and objections were pending before Judge Drozd when Shabazz was released from prison in November of 2018. Counsel conceded Shabazz's release mooted her injunctive case, but they moved before Judge Thurston to vacate her decision denying the amendment, so that it could not have precedential effect. She recommended denying vacatur, holding that, as a magistrate's recommendation before a district judge on objections, it had no precedential effect and did not bind the parties. Shabazz' reliance on *United States v. Munsingwear, Inc*., 340 U.S. 36, 39-40 (1950), for automatic vacatur of judgments that become moot on appeal was unavailing for several reasons. There was no judgment here and no appeal to the Court of Appeals was pending. That WestLaw and LEXIS would still report the decision was beyond the Court's control, and Judge Thurston noted that the case should be "flagged" and would be cited at other attorneys' risk. There was discretionary authority to vacate, but in balancing the equities as required by *Dilley v. Gunn,* 64 F.3d 1365, 1372 (9th Cir. 1995), Judge Thurston did not recommend vacatur, since the subject recommendation was not dispositive and "determined no rights." Since Judge Thurston had made a recommendation on vacatur, while objections on the underlying recommendation on amendment were pending, Judge Drozd adopts both recommendations and directs the clerk to close the case as moot, noting specifically that there was no allegation that the state has released Shabazz to try to moot the case. Thus, despite extraordinary efforts (and probably several semesters of work by students) there is nothing left, except the decision holding California's old transgender regulations subject to constitutional attack. Shabazz is represented by King Hall Civil Rights Clinic, University of California School of Law, Davis.

IDAHO – In January, *Law Notes* reported on the order mandating prompt sex confirmation surgery for transgender inmate Andree Edmo in "Federal Judge in Idaho Grants Preliminary Injunction for Confirmation Surgery for Transgender Inmate" (January 2-19 at pages 7-8), reporting *Edmo v. Idaho Dep't of Corr.,* 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018). Chief U.S. District Judge Barry Lynn Winmill has now declined to stay his order pending appeal in *Edmo v. Idaho Dep't of Correction,* 2019 U.S.Dist.LEXIS 35314; 2019 WL 1027979 (D. Id., March 4, 2019). Of particular relevance to denying the stay was a finding that Judge Winmill made last January: "*Given that Ms. Edmo made increasing progress on her first two self-surgery attempts, it is likely that Ms. Edmo will be successful if she attempts self-surgery again"* (emphasis added by the judge in quoting prior opinion). Granting a stay is "an exercise of judicial discretion" that is "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433, (2009). In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the Supreme Court listed four factors bearing on the court's discretion: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. In the Ninth Circuit, the *Hilton* factors should be applied using a "sliding scale" approach in which a stronger showing of one element may offset a weaker showing of another. Judge Winmill found the defendants' arguments in support of a stay to be a "rehash" of the arguments rejected in granting the preliminary injunction in the first place, and he concluded that "Defendants have not made a strong showing that they are likely to succeed on appeal." He added: "[I]t is difficult to see how providing medical treatment to an inmate could ever constitute an irreparable injury," while a stay "will substantially injure Ms. Edmo." Recognizing the risk that Edmo may make a third attempt at self-castration, Judge Winmill found that her "medical needs are urgent. The Constitution requires Defendants to act accordingly." As of this writing, the State of Idaho has sought an expedited stay pending appeal in the Ninth Circuit. Briefing is finished, and a ruling is expected soon.

ILLINOIS – Transgender inmate Gaddis ("Kaira") Canada sued over two dozen defendants for violation of her civil rights in failing to protect her from harm in the Cook County Jail. In *Canada v. Hall,* 2019 U.S. Dist. LEXIS 47269, 2019 WL 1294660 (N.D. Ill., March 21, 2019), U.S. District Judge Sharon Johnson Coleman dismisses most of the defendants without prejudice; but she lets claims stand over a motion to dismiss against some defendants and against Cook County. Judge Coleman uses feminine pronouns throughout and chastises defendants for failing to do so: "Although immaterial to this ruling, the Court would be derelict if it failed to note the defendants' careless disrespect for the plaintiff's transgender identity, as reflected through implications that the plaintiff might not actually be transgender and the consistent use of male pronouns to identify the plaintiff. The Court cautions counsel against maintaining a similar tone in future filings." Upon her arrival at the jail,

Canada identified herself as transgender. She was nevertheless designated as male and was placed in a double cell with a cisgender male in protective custody. Her cellmate, Rayshoan Ellison, was known to have a violent history. Canada asked to be moved, and Ellison also told officers he planned to assault Canada. They were told "to work out any problems between themselves." Information escalated at least to the level of sergeants, and Canada said lieutenants and commanders were made aware. Canada had not been moved when Ellison assaulted her, knocking her unconscious, breaking her jaw, and causing "bruises covering her face." Because Canada did not use "John Doe" pleading for defendants and named them instead, she could not rely on Seventh Circuit precedent allowing discovery to flesh out identity, as in *Rodriguez v. Plymouth Ambulance Serv* ., 577 F.3d 816, 821 (7th Cir. 2009). Rather, Judge Coleman reviews the allegations against each defendant who was named, dismissing those except where Canada had specifically pleaded their involvement and knowledge, "look[ing] to the complaint for the specific and individualized applications required in order to provide fair notice of her claims to the defendants." Only two sergeants and a line officer remain in the case, but Canada is told she can amend if more specific information becomes available. Interestingly, Judge Coleman allows Canada to proceed on a *Monell* claim against the sheriff [under *Monell v. Department of Social Serv*., 436 U.S. 648, 692 (1978)], on her allegations of pattern and practice of lack of policies and training regarding transgender inmates, even without her pleading other incidents. *See Grieveson v. Anderson,* 538 F.3d 763, 774 (7th Cir. 2008) (holding that four incidents did not establish a pattern). *Grieveson,* however, was a summary judgment case. Here, on a motion to dismiss, Judge Coleman rules that "a plaintiff need only allege a policy or practice and is not obligated to put forward evidence from which a reasonable factfinder could conclude that such a policy exists." She continues: "This approach is eminently sensible, as an incarcerated plaintiff, even one represented by counsel, will rarely have access to information regarding other incidents capable of establishing a pattern of misconduct or to an institution's internal policy guidance prior to fact discovery." In this writer's experience, few judges are willing to go this far to allow a *Monell* claim. Canada is represented by the Law Offices of Irene K. Dymkar, Chicago.

KENTUCKY – *Pro se* inmate William David Isaac believes that he may be HIV+ and sues, seeking damages against multiple defendants (county and state) for repeated refusals to test him for HIV in *Isaac v. Hardin County Det. Ctr.,* 2019 U.S. Dist. LEXIS 36786 (W.D. Ky., March 7, 2019). U.S. District Judge Clara Horn Boom, on screening, dismisses the case without prejudice and with leave to amend. She notes that Isaac sued defendants only in their official capacities and did not seek injunctive relief. She explains that a claim may lie against officials in their individual capacities, if Isaac can show their personal involvement in denying his rights. She explains how municipalities, such as counties, can be found liable. Finally, she also volunteers that Isaac failed to seek injunctive relief (i.e., the HIV test) about which he complains. It is too bad that there is no procedure like that existing in some district courts whereby the corrections officials are notified about the existence of claims even when dismissed on screening (*see* standing orders in the Middle District of Florida) so that something that may be simply resolved can be handled without returning to court.

NEVADA – When *Law Notes* last covered *pro se* HIV+ inmate Lance Reberger, he had been permitted to proceed on his claim that his HIV medication was not dispensed every twelve hours per drug company package insert, despite his having acquired three previous strikes under the Prison Litigation Reform Act. Such claim was found to present "imminent danger" within the exception to three strikes found in 28 U.S.C. § 1915(g). *Reberger v. Koehn,* 2018 U.S. Dist. LEXIS 186658 (D. Nev., October 31, 2018), reported in *Law Notes* (December 2018 at page 641). Now, in *Reberger v. Koehn,* 2019 WL 1299365, 2019 U.S. Dist. LEXIS 46718 (D. Nev., March 21, 2019), U.S. District Judge Miranda M. Du adopts the Report and Recommendation of U.S. Magistrate Judge Carla B. Carry granting summary judgment to defendants. It turns out that the package insert for the medication does not have "no exceptions" language and that, while it states ingesting should be every 12 hours with food, it leaves exceptions to the treating providers. Defendants' submissions indicated Reberger was set up for dispensing of the drugs between 5 and 7 in the a.m. and 5 and 7 in the p.m. This permitted the possibility of a range of intervals of taking the meds varying from 10 hours to 14 hours, which Judge Du found presented only disagreements about what the package required and the judgments of the providers, that were within the providers' discretion and not actionable under the Eighth Amendment. Reberger was also validly denied KOP ["keep on person"] for the drugs because of his history of not taking them on time, possibly leading to a prior adverse event, according to defendants. Reberger did not file objections to the Magistrate Judge's report. Reviewing the report *de novo* anyway, Judge Du found that the submissions in summary judgment did not present a triable issue of deliberate indifference under *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), and *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006), because Reberger did not establish that the dispensing of

PRISONER LITIGATION *notes*

his HIV medications was purposefully delayed or altered in disregard of a serious risk of medical harm – or that he was harmed at all. His claim that his medication timing was in retaliation for filing grievances against officials was likewise denied, for the same reasons. Concern about Reberger's potential misdosing if left to his own devices was a legitimate and non-retaliatory reason for the defendants' conduct, citing *Shepard v. Quillen*, 840 F.3d 686, 691–92 (9th Cir. 2016).

NEW YORK – Three months ago, *Law Notes* covered the detailed Report and Recommendation [R & R] of U.S. Magistrate Judge Stewart D. Aaron in *Braxton v. City of New York,* 2018 U.S. Dist. LEXIS 215168 (S.D.N.Y., December 20, 2018), (reported January 2019 at page 31). Now U.S. District Judge George B. Daniels, having received no objections, adopts the R & R in *Braxton v. City of New York,* 2019 U.S. Dist. LEXIS 45119 (S.D.N.Y., March 15, 2019). Plaintiff, B. Braxton/Obed-Edom, self-identifies as a "gender non-conforming bi-sexual gay male." Braxton sought admission to the Transgender Housing Unit from the Manhattan House of Detention, where she felt unsafe and endured harassment and assaults. She filed letters to numerous officials requesting protection, including to the NYC Corrections Commissioner. An attorney with the Legal Aid Society also wrote on Braxton's behalf to Corrections and to the Board of Corrections, who have oversight of New York City jails. Braxton was never admitted to the Transgender Housing Unit or to protective custody. In fact, she was transferred to the arguably more dangerous Brooklyn House of Detention. Because Braxton is now incarcerated in state prison, she has only damage claims left. The careful analysis of Braxton's claims is detailed in the January issue of *Law Notes* and will not be repeated here. Judge Daniels reviews the R & R only for "clear error" since there are no objections. *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006). He allows Braxton to proceed against the Commissioner, the Warden, and the Chair of the Board of Corrections; but he dismisses claims against the members of the Board of Corrections who answered Legal Aid's letters. The judge finds the pleadings sufficient to proceed against the Commissioner and other executive defendants on personal involvement, at least until discovery shows how they responded to the complaints, relying on *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (listing five factors relevant to supervisory liability). He also denies qualified immunity at this stage, citing *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). Discovery is also needed to illuminate defendants' states of mind under the subjective test of deliberate indifference to safety under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Judge Daniels allows pattern and practice, inadequate policy, and lack of training claims to proceed against the City of New York regarding transgender inmates and protection, citing *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004). Braxton's negligence claim is denied for failure to file a timely notice of claim against the City.

NORTH CAROLINA – This is the kind of case that led to passage of the Prison Litigation Reform Act. (One can almost hear Senator Dole screaming on the Senate floor.) *Pro se* plaintiff and transgender inmate Duane L. Fox, a/k/a Jennifer Ann Jasmaine, filed a 194-page complaint against 36 defendants for alleged violation of multiple rights under the First, Fourth, Eighth, and Fourteenth Amendments, for violations of the Religious Land Use and Institutionalized Persons Act [RLUIPA], the Prison Rape Elimination Act [PREA], and the Americans with Disabilities Act [ADA], and for generalized "harassment," in *Fox v. Kinlisky,* 2019 U.S. Dist. LEXIS 48718, 2019 WL 1331748 (W.D.N.C, March 25, 2019). Chief U.S. District Judge Frank D. Whitney dismisses all claims except medical ones for misjoinder in that Fox [the Court uses "Fox" and male pronouns; this writer uses "Fox" and female pronouns] combined unrelated defendants and causes of actions in the same case, in violation of F.R.C.P. 18, 20 and 21 and the filing fee rules of the Prison Litigation Reform Act. He also observes that allowing Fox to proceed on her combined claims would undercount the statistics for volume of work in the W.D.N.C., resulting in a reduction of allocated court resources. [Maybe advocates of removing citizenship questions from the Census should have considered filing here!] Judge Whitney dismissed with prejudice "frivolous" claims about prohibitions on Fox's wearing "tight" pants, loss of her art supplies and "MAD Magazine," procedural handling of her grievances, and generalized "harassment." Other claims, such as safety (protection from harm and presumably PREA), freedom to practice Wicca religion (and the RLUIPA claim), were dismissed without prejudice to file as separate suits. Judge Whitney finds generalized allegations of failure to treat gender dysphoria too vague and too unrelated to individual defendants to state a claim, but he allows Fox to amend on this point as part of her surviving health care claims. Similarly, he finds that Fox's allegation that the doctor "refused" to see her fails because she did not plead that she was referred to the doctor and that she had a condition requiring a doctor's intervention (as opposed to an RN, PA, or NP), but she can replead on this point. Judge Whitney finds that refusing to allow Fox to see a female mental health professional – and insisting she see a male counselor or do without – states a cause of action. He also finds that Fox adequately plead denial of medical orders for necessary hearing headphones and ankle braces

that were never provided (presumably ADA claims can be heard here, although Judge Whitney does not mention it). Finally, Judge Whitney denies appointment of counsel and defers Fox's application to increase the number of interrogatories she is allowed from 50 to 720 until a scheduling order is issued.

OKLAHOMA – Transgender inmate Phoebe Renee Halliwell, a/k/a Ronny Darnell, pro se, objected to the Report and Recommendation ["R & R"] of U.S. Magistrate Judge Shon T. Erwin in *Halliwell v. Allbauch*, 2019 WL 1128761 (W.D. Okla., March 12, 2019). The crux of Halliwell's case is that, although two physicians have diagnosed gender dysphoria and medication was begun, other correctional officials removed such diagnoses from her medical records and terminated her treatment. She alleged deliberate indifference to her serious health care needs, denial of Equal Protection (because other transgender inmates at her prison are receiving hormones), and "unsafe" conditions of confinement. Judge Erwin recommended dismissal of the case in its entirety. Judge Erwin found that Halliwell's allegations met the objective arm of the deliberate indifference test (serious need) under *Lamb v. Norwood*, 899 F.3d 1159, 1162 (10th Cir. 2018). Judge Erwin also found that "a showing of deliberate refusal to provide medical care . . . coupled with falsification of medical records may give rise to an Eighth Amendment violation," quoting *Green v. Benson*, 108 F.3d 1296, 1304 (10th Cir. 1997). Halliwell failed, however, to allege which defendants interfered with her medical care and how they did it. Thus, the R & R recommended dismissal without prejudice. The R & R found the Equal Protection and "unsafe" conditions claims to be without merit. Halliwell also submitted a proposed amended complaint along with her objections. Because U.S. District Judge Timothy DeGiusti allowed the amended complaint, he refers the matter back to Judge Erwin for another R & R. [Compare the total failure to recognize an attempt to file an amended complaint with R & R objections and futile efforts by the plaintiff to alert the Court to ongoing sexual assaults, by Texas judges in the transgender case of *Perez v. Director*, 2019 WL 1112300 (E.D. Tex., March 9, 2019), this issue of *Law Notes*.] Judge DeGiusti, in his discretion, writes about the first R & R and Halliwell's objections to it as guidance for the re-referral. He finds that Halliwell has explained who allegedly directed falsification of her records and/or denied her care, and he directed Judge Erwin to reconsider this point. Judge DeGiusti adopts the R & R's Equal Protection analysis, however, writing that discrimination among transgender patients does not present an Equal Protection claim entitled to heightened scrutiny, and there is ample rational basis on its face for doctors to individualize treatment plans. The claim therefore fails under "class of one" theory. The "unsafe" conditions claim fails because it is vague and essentially a repleading of Halliwell's medical care claims. Judge DeGuisti also denied a preliminary injunction and appointment of counsel at this time.

PENNSYLVANIA – Gay inmate Mark-Alonzo Williams, *pro se,* sought and received in part an order compelling discovery from U.S. Magistrate Judge Martin C. Carlson in *Williams v. Wetzel,* 2019 WL 1206061, 2019 U.S. Dist. LEXIS 41283 (M.D. Pa., March 14, 2019). Williams' case involves a series of alleged sexual assaults that he says were arranged by correctional defendants using a confidential informant and then covered up by them, after denying Williams medical care. The opinion does not state the standard for the underlying claim, but it would involve an inquiry into the defendants' subjective state of mind under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). In such cases, what defendants knew about the risk to the plaintiff and what they did about it is key to their deliberate indifference or possible intent. Thus, knowledge about the violent propensities of the assailant (here, an inmate named Bader) would be important. Williams filed interrogatories, a request for documents, and a motion to depose defendants. (They also filed a motion to depose Williams.) Defendants never answered the interrogatories, claiming they were not timely received. They denied the document demands, objecting to them on boilerplate grounds of over-breadth and vagueness. They also claimed that certain documents did not exist or that disclosure would violate privacy or security interests. Judge Carlson said the interrogatories would be deemed timely, extended the time to answer, and directed a response. He accepted the objections that documents about confidential informants, grievances filed by other inmates, and PREA complaints would violate correctional interests or privacy. He does not mention the possibility of redaction – *see* compelling redacted medical records of inmates other than plaintiff in *Sunderland v. Suffolk County,* 2018 U.S. Dist. LEXIS 159196 (E.D.N.Y., September 17, 2018), reported in *Law Notes* (October 2018, at page 556-7). The problem is probably Williams' *pro se* status. He did not make the redaction argument, and the court would probably be unwilling to issue an "eyes only" ruling to a *pro se* plaintiff – but the information about Bader's known assault history is certainly otherwise relevant. Judge Carlson ordered defendants to produce two kinds of documents: letters in their possession in which Bader threatened Williams; and officer log notes from 3 different days on which assaults allegedly occurred, described by date, shift, and officer on duty. Judge Carlson overruled the silly objection that the latter demands for log notes

were "vague" or "overbroad." There have been no rulings on depositions.

TEXAS – *Pro se* transgender inmate Josue Perez accumulated more than three "strikes" under the Prison Litigation Reform Act in the federal courts in Texas. In *Perez v. Director,* 2019 WL 1112300 (E.D. Tex., March 9, 2019), U.S. District Judge Ron Clark's "*de novo*" review of Perez' objections to U.S. Magistrate Judge Keith F. Giblin's Report and Recommendation ["R & R"] for dismissal consists of a few sentences. Although Judge Clark wrote that he reviewed the "pleadings," the PACER docket does not support his summary treatment. The R & R of April 10, 2018, found that Perez had not shown "imminent danger" allowing her to proceed without a filing fee under 28 U.S.C. § 1915(g). After obtaining an extension of time, Perez objected on May 16, 2018; and she filed a proposed amended complaint due to imminent danger. In her complaints, which are difficult to follow, Perez's allegations include that she was harassed and threatened by an officer because of her sexual orientation, that she was moved, but that the harassment continued from other inmates because a sergeant "outed" her to the population as a sexual target. She specifically alleges imminent danger. Later, in July, August and September of 2018, Perez filed several "notices" that she had been sexually assaulted on a bus and that she was forced to perform fellatio in a bathroom. She says she was sodomized with objects and slashed with a blade. She referred to her complaints under the Prison Rape Elimination Act. She moved for a preliminary injunction. There was no response to the amended complaint, to the "notices," or to the motion for a preliminary injunction. She filed a motion asking about the "status" of her case. There is no new R & R from Judge Giblin and no other rulings of any kind. On March 9, 2019, Judge Clark adopts the R & R of April 2018 (Item 6 on the docket), without mentioning any of these other subsequently docketed items. Using male pronouns, he writes: "Plaintiff has not alleged facts showing that he was in actual imminent danger of serious physical injury at the time he filed this lawsuit . . . Plaintiff confirms that he was moved after he was allegedly verbally harassed for his transgender status. The speculative possibility of injury due to plaintiff's transgender status is insufficient to support his assertion of imminent danger." Perez's poor record of prior filings justifies an "imminent danger" inquiry, and her current circumstances demand one. She did not get it. Her submissions are rambling, include much extraneous material, and name defendants who should not have been sued. Her "imminent danger," however is not "speculative." One can see the shiny stone lying on the cluttered beach if one performs even a cursory look for it. In this writer's view, two judges in the Western District of Texas did not bother.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. CONGRESS – On March 13, the Equality Act was reintroduced in the House and Senate, with 239 House co-sponsors and 47 Senate co-sponsors. House co-sponsorship is sufficient to guarantee passage in that chamber, but Senate co-sponsorship falls short, and even if there was a majority, the likelihood that it would receive committee and floor approval in the Senate is nil. All but two of the House co-sponsors are Democrats; Republican co-sponsors are Brian Fitzpatrick (Pa.) and John Kapko (N.Y.). In the Senate, the only Republican co-sponsor is Susan Collins (Maine). The measure would add sexual orientation and gender identity to the list of forbidden grounds for discrimination throughout the U.S. Code and would add sex as a forbidden ground to the titles of the Civil Rights Act of 1964 other than Title VII (which was amended to add sex during the initial enactment of that law). Chief co-sponsors are Rep. David Cicilline (D-R.I.) and Senator Jeff Merkley (D-Ore.). The measure was expected to receive a House committee hearing in April.

U.S. HOUSE OF REPRESENTATIVES – On March 28, 238 members of the House of Representatives approved H. Res. 124, resolving that the House "(1) strongly opposes President Trump's discriminatory ban on transgender members of the Armed Forces; (2) rejects the flawed scientific and medical claims upon which it is based; and (3) strongly urges the Department of Defense to not reinstate President Trump's ban on transgender members of the Armed Forces and to maintain an inclusive policy allowing qualified transgender Americans to enlist and serve in the Armed Forces." The Resolution, on its own, is symbolic but has no legal force, and its passage – opposed overwhelmingly by House Republicans – did not sway the Defense Department from its announcement that the "Mattis Plan" would be implemented effective April 12. See story above. The lead sponsor was Rep. Joseph Kennedy.

ALABAMA – Ever since the U.S. Supreme Court announced *Obergefell v. Hodges* in June 2015, various proposals have been floated in the Alabama legislature to get the state out of the business of issuing marriage licenses. One such proposal was approved by the Alabama Senate on March 21, by a unanimous vote of 26-0. The chief sponsor, Sentaor Greg Albritton (R-Range), also sponsored the first such bill in 2015. As soon as *Obergefell* was announced, then Chief

LEGISLATIVE & ADMINISTRATIVE *notes*

Justice Roy Moore instructed the state's probate judges that they should not issue licenses to same-sex couples, and could abstain entirely from issuing licenses. The result was a prolonged period of uncertainty where same-sex and different-sex couples had difficulty getting marriage licenses, sometimes having to travel through several counties to find a probate judge willing to issues them. There was a judicial standoff between the federal district court, the probate judges, and the state Supreme Court. Ultimately Moore was suspended and subjected to disciplinary sanctions within the judicial system, resigned and ran unsuccessfully for the U.S. Senate. And the issue of ending the use of probate judges to issue marriage licenses continued to received legislative discussion. Under the bill approved by the Senate on March 21, couples seeking to marry would submit affidavits or forms to a probate judge, who would record their marriage, which would be considered to have taken place the day the parties signed the affidavit or form. There would be no ceremonial requirement for a marriage to be valid, just a requirement to submit the paperwork to a probate judge for filing. The judge would not be required to sign anything, merely to see that the form was completed and signed. Those seeking to marry according to their religion could have whatever religious ceremony they preferred, and those not interested in a religious wedding could, at their own option, hold some sort of ceremony of their own devising. *Montgomery Advertiser*, March 21.

INDIANA – Beginning in March, individuals who do not identify as fully male or female were able to get driver's licenses and identity cards with a non-binary option, designated by X. The Bureau of Motor Vehicles announced that this option came "in response to constituents requesting a non-binary marker." *Cincinnati Inquirer*, March 16.

KANSAS – On March 25, the Kansas House of Representatives voted 58-61 to defeat a measure that would have added sexual orientation and gender identity to the state's anti-discrimination law.

MASSACHUSETTS – During March both the House and Senate of Massachusetts voted overwhelming to approve bills that would ban conversion therapy for minors. The House vote came on March 13, the Senate on March 28. Because of minor differences between the two bills, they were sent to a conference committee to prepare a final version for approval by both chambers and submission to Governor Charlie Baker, who has indicated he is inclined to sign such a bill. Similar action on proposed legislation was taken in the last session of the legislature, but too late in the session for reconciliation of House and Senate versions.

NEBRASKA – At attempt to pass LB627, which would amend the state's anti-discrimination to prohibit employment discrimination because of an individual's sexual orientation or gender identity, faltered when its sponsor, Senator Patty Pansing Brooks, could not find enough votes to break a Republican filibuster. Republican members speaking against the measure cited the Bible, and claimed that passage of the measure would fail to "protect religious beliefs of employers," some arguing there was no proof that LGBT people suffer employment discrimination in Nebraska. One senator read aloud an email from a constituent, who argued that the bill would "undermine constitutional freedoms, target small businesses" (even though it would only apply to businesses with at least 15 employees), "threaten women, equality and privacy" (presumably because it would require employers not to discriminate against transgender employees regarding access to workplace facilities), and "empower the government to punish people of faith for their religious beliefs on marriage and sexuality," according to a report by the *Columbus Telegram*, March 5.

NEVADA – The Nevada Assembly voted on March 29 to approve a proposed state constitutional amendment that would remove language limiting marriage to the union of a man and a woman. A federal court held the existing provision unconstitutional in 2014, in one of several decisions affirmed by the 9th Circuit and denied review by the Supreme Court, so the existing language is merely symbolic. The proposed amendment states that "all legally valid marriages must be treated equally under the law," but allows religions and clergy to decide whether to perform particular marriages. The clergy opt-out language helped to pit up bipartisan support for the measure. The vote was 38-2, with the only opposition coming from Republican members. The same text was approved by the 2017 legislature, but must be approved by this session in order to move to the general election ballot. If the Senate approves it, it will be on the ballot for the 2020 general election in November. *Nevada Appeal*, April 1.

NEW HAMPSHIRE – *AP State News* (March 17) reported that the New Hampshire House of Representatives approved a bill under which transgender resident and those who identify as non-binary would be allowed to change their name and sex information on birth certificates. Applicants would have to provide notarized statements from health care providers stating that in the provider's opinion the individual is male, female, or neither, and is expected to continue as such for the foreseeable future, according to the

AP Report. Although new certificates would be issued, the state would also retain the original certificates issued at birth. Opponents argued that birth certificates should record "facts, not feelings." The measure was sent to the State Senate.

OREGON – The Oregon House of Representatives voted 58-2 on March 13 to approve a bill intended to modernize state law references to LGBTQ people and remove offensive language. The bill would remove the terms "transsexualism" and "transvestism" and would specify that sexual orientation is not considered a physical or mental disability, and that a person does not have a disability solely due to sexual orientation. A co-sponsor of the bill, out gay Rep. Rob Nosse, said that the objectionable language dated back to territorial days and was used to put some people into mental hospitals and the state penitentiary because of their sexual orientation or gender identity. *AP Alerts*, March 14.

PUERTO RICO – On March 27, Governor Ricardo Rossello signed an executive order banning the practice of conversion therapy on minors. He released a statement, explaining: "Today we take a step forward to raise awareness among the people about this type of practice that causes pain and suffering," emphasizing that the ban was to "protect children." He added, "Love and Respect should always prevail without distinction of sexual orientation, race or religion." *Huffpost.com*, March 28.

TENNESSEE – The Tennessee legislature has been busily working on an anti-LGBT legislative agenda. The House voted 67-22 to approve a bill that would allow faith-based child placement organizations to refuse to facilitate adoptions or foster placements based on religious beliefs, a measure squarely aimed at allowing such agencies to refuse to deal with LGBTQ individuals and same-sex couples. And a House committee has approved a "bathroom bill" intended to keep transgender people from using public restroom facilities consistent with their gender identity by labeling their presence "indecent exposure." And, as noted last month, some Tennessee legislators have introduced an abomination they call the "Tennessee Natural Marriage Defense Act" which would declare same-sex marriages "unnatural" and would instruct Tennessee courts to deny marriage licenses to same-sex couples in defiance of the Supreme Court's ruling in *Obergefell*, which the bill would declare to be "void" in Tennessee. We actually thought the nullification battle was won by Andrew Jackson almost two centuries ago, but these Republican legislators have faith that the new Supreme Court majority will see things their way . . .

UTAH – The legislature approved a hate crime bill that includes protection for victims targeted due to their sexual orientation or gender identity as well as "political expression" in addition to the categories traditionally covered by such laws. Some Republican legislators insisted on the inclusion of "political expression" citing examples of people who were attacked because they stated support for President Trump or wore his trademarked red MAGA hats, prompting headlines that the bill protects "Trump supports" as well as LGBTQ people. *LGBTQnation.com*, March 13. A bill to ban conversion therapy performed on minors seemed to be making headway, but then was gutted in committee removing mention of gender identity and limiting the ban to therapy that produces physical pain, as a result of which sponsors withdrew their support and the measure died. *Deseret News*, March 6.

VERMONT – Department of Motor Vehicles Commissioner Wanda Minoli announced on March 13 that Vermont will be offering a third gender option on driver's licenses, probably by sometime this summer. "When an ID does not match the gender identity or expression of the holder, the person can be exposed to potentially uncomfortable situations," stated Minoli, as reported by the *Burlington Free Press* (March 16). An X designation will be available for those who do not fully identify as male or female.

LAW & SOCIETY NOTES

By Arthur S. Leonard

DOW CHEMICAL – Dow Chemical, a spin-off from DowDuPont Inc. effective April 1, is the second major public corporation to have an out gay chief executive officer, **Jim Fitterling**. (The first, of course, was Apple, with Tim Cook.) Fitterling is a lifetime employee of Dow, who gradually came out and married his long-time partner, becoming very public about being gay within the corporation and helping Dow to achieve a 100% rating on its personnel policies from Human Rights Campaign. In an article about the corporate transition, Bloomberg Business Week noted the corporation's diversity efforts, other out gay executives there, and an active employee group about LGBT issues. Dow is headquartered in Midland, Michigan, in a state that does not include sexual orientation in its civil rights laws, although the civil rights agency thinks the sex discrimination provision should be interpreted to encompass sexual orientation discrimination, and the recently elected out lesbian attorney general is reconsidering an A.G. Opinion issued by her predecessor that had rejected the agency's view.

INTERNATIONAL *notes*

INTERNATIONAL NOTES

By Arthur S. Leonard

BOTSWANA – The High Court of Botswana heard arguments challenging the constitutionality of the nation's laws criminalizing gay sex during March, but disappointed those anticipating a quick ruling by stating that the Court would not issue its decision until June 11.

BRUNEI – The Sultanate of Brunei announced in 2013 that it planned to implement its version of Shariah law under which punishments of death by stoning would be meted out for adultery and gay sex. International protests led the government to delay implementing these provisions, but in March the government announced that they would be implemented effective April 3, setting off an outcry by human rights organizations and calls for boycotting of Brunei, which has investments in a wide range of western businesses. Governments issued advisories to their citizens about the dangers of traveling in Brunei as a result of these provisions, and there were widespread calls for boycotting of Brunei's business holdings. *New York Times*, March 29. There were also press reports that Brunei is one of at least eight Muslim countries in which stoning to death is the prescribed punishment for gay sex.

CANADA – *Calgary Herald* (March 29) reports that the British Columbia Human Rights Tribunal has ordered "Christian activist" William Whatcott to pay damages of $55,000 (Canadian) to Morgane Oger, a trans activist who was targeted by Whatcott with a "hate-filled flyer" when Oger was running for a provincial office in 2017. The damages include $35,000 for the defamatory flyer, and $20,000 for Whatcott's misbehavior during the Tribunal hearing, to which he wore a T-shirt with Oger's portrait on it, illuminated with derogatory statements. In an opinion for the Tribunal, Devyn Cousineau worte, "In the hearing room for this complaint, we were witness to repeated, deliberate and flagrant attakcs on Ms. Oger based on nothing more than the belief that her very existence is an affront." * * * Saskatchewan is now making available the option of an X marker for the sex designation field of their driver's licenses and photo identification cards. This follows upon a 2018 ruling by the Saskatchewan Court of Queen's Bench calling for the government to issue birth certificates without a sex identification to two minors who had requested them. This policy change brings the province into line with the provinces of Alberta, Ontario, and Newfoundland and Labrador. *Saskatoon Star Phoenix*, March 26. * * * The federal government has rejected requests by LGBT rights activists for a federal law to ban conversion therapy, on the ground that such regulation of professional practice is for the provinces to address. At present, Ontario has an outright ban on conversion therapy, Manitoba has outlawed health professional from offering such therapy, Vancouver has a law restricting businesses from offering it, and Nova Scotia makes it illegal for health professionals to provide conversion therapy to minors. Activists complain about the lack of a uniform national approach. *CBC News*, March 23.

GERMANY – Germany has expanded eligibility for payments to surviving gay or bisexual men who were targeted under Paragraph 175, the infamous anti-gay law first enacted in 1871, broadened under Nazi rule, and finally repealed in 1994. In 2017, the Parliament annulled all convictions under Paragraph 175 and authorized compensation to those convicted under the law of approximately $3400.00 per conviction and $1700.00 for each year of imprisonment. The Justice Ministry announced an expansion of compensation, authorizing $567.00 for anybody who was subjected to an investigation under Paragraph 175, $1700.00 for each year of pre-trial custody, and $1700.00 for various other "disadvantages" related to the law. *Lgbtqnation.com*, March 18.

KENYA – The Court of Appeals affirmed a ruling by the High Court ordering the Non-Governmental Agency Coordination Board to afford official recognition to the National Gay and Lesbian Human Rights Commission, so that non-governmental organization can carry out its operations lawfully. The NGLHRC was formed in 2012, but has struggled to act legally because the Coordination Board had refused official recognition. The 3-2 decision by the Court of Appeals hopefully presages success in the pending High Court ruling in a challenge to the nation's sodomy law, which dates from British colonial times. *Gay City News*, March 25. A High Court ruling on the sodomy law had been anticipated last month, but the Court announced that the decision would be issued in May.

NORTH MACEDONIA – The Parliament of North Macedonia voted on March 11 to adopt a law on the prevention and protection against discrimination, which lists as prohibited grounds of discrimination race, skin color, origin, nationality or ethnicity, sex, gender, sexual orientation, gender identity, belonging to a marginalized group, language, citizenship, social background, education, religion or religious conviction, political beliefs, other beliefs, disability, age, family or marital stats, property status, health condition, personal or social status, or any other grounds, according to *BBC*

PROFESSIONAL *notes*

International Reports, March 12. Did they leave anything out?

REPUBLIC OF CHINA (TAIWAN) – As the constitutional court's deadline for legislative action to authorize same-sex marriages draws near, the legislature voted on March 15 to send a draft bill that would limit the use of the words "marriage" and "spouse" to heterosexual couples to a second reading. This bill is titled "The Enforcement Act of Referendum No. 12," intended to put into place the results of a referendum held last year in which a majority of the public opposed allowing same-sex couples to marry. But the referendum did not amend the constitution, so the constitutional court's ruling stands. There is another bill that is also slated for a second reading, title "The Enforcement Act of Judicial Yuan Interpretation No. 748," intended to allow same-sex couples to register their marriage or divorce at any household registration office. This was supposed to respond to the constitutional court's ruling of May 24, 2017, which gave the legislature two years to act. In default of appropriate legislation by that date, the court had stated that same-sex couples would then be entitled to marry and have their marriages recognized as a matter of constitutional law. The Marriage Equality Coalition Taiwan denounced the former bill and urged the legislature to pass the measure enforcing the court's ruling.

PROFESSIONAL NOTES

By Arthur S. Leonard

THE LGBT BAR ASSOCIATION announced that it will present the **2019 DAN BRADLEY AWARD** to **CHAI FELDBLUM**, who was appointed a commissioner of the Equal Employment Opportunity Commission in 2010 by President Barack Obama and served on the Commission until the expiration of her second term at the beginning of 2019. President Donald Trump sent her name to the Senate during 2018 for a new term, but the Senate did not hold a confirmation vote and Feldblum left the Commission at the expiration of her term. Prior to service at the EEOC, where she was the Commission's first out LGBT member, she clerked for Judge Frank Coffin (1st Circuit Court of Appeals) and Justice Harry Blackmun (U.S. Supreme Court) and served as Legislative Counsel to the AID Project of the ACLU from 1988 to 1990, where she was active in the drafting of the Americans with Disabilities Act. She joined the faculty of Georgetown University Law Center in 1991, directing the Center's Federal Legislation Clinic, and also served as Legal Director for the Campaign for Military Service, an organization that was formed to oppose the enactment of the "Don't Ask Don't Tell" military policy. She took the lead in drafting the Employment Non-Discrimination Act, intended at first to ban sexual orientation discrimination and in some later iterations also to ban gender identity discrimination. ENDA achieved passage by each chamber of Congress, but unfortunately not during the same sessions, and thus was not enacted and has been superseded as pending legislation by the Equality Act, recently reintroduced in both houses. At the EEOC, Commissioner Feldblum played a key role in the Commission's decision to reverse its position of half a century and adopt the view that Title VII's ban on sex discrimination applies to discrimination because of an individual's sexual orientation or gender identity, a position that has been vindicated by several circuit courts of appeals, as to which cert petitions are pending. Chai Feldblum is a graduate of Barnard College and Harvard Law School.

THE NATIONAL CENTER FOR LESBIAN RIGHTS 2019 Anniversary Celebration, to be held in San Francisco on May 18, will include presentation of its Vanguard Awards to **CONGRESSWOMAN DEB HAALAND**, one of the first Native-American women to serve in the House of Representatives, and **REP. MALCOLM KENYATTA**, the first African-American gay man to serve in state office in Pennsylvania upon his election to the state's House of Representatives. NCLR will also present Courage Awards to three of its clients: **STEFANY GALANTE**, **DANNY ZINS**, and **KATE MCCOBB**.

On March 31 *The Advocate* profiled **HENRY SIAS**, asking if he could become the United States' first transgender man to be elected a judge. The balloting takes place in May in Philadelphia, where Sias, 42, a criminal defense and civil rights attorney, is competing for a seat on the Pennsylvania Court of Common Pleas. This is Sias' second attempt to be elected to the bench.

LAMBDA LEGAL, the nation's oldest and largest LGBT-rights public interest law firm, announced on March 28 that it has retained McCormack + Kristel, which it describes as "the nation's first and most experienced LGBTQ search firm, to work with WB&B, an executive search firm focused on diversity and inclusion, to search for a new Executive Director. Meanwhile, Richard Burns, former long-time executive director of the NYC LGBT Community Services Center, is serving as interim CEO of the organization. The Lambda board of directors is working with the search firms to develop a "job profile" for the position, which will be announced and made available on Lambda's website for those interested in applying: lambdalegal.org.

PUBLICATIONS NOTED

1. Adams, Katelyn, Playing Favorites: Challenging Denials of U.S. Citizenship to Children Born Abroad to U.S. Same-Sex Parents, 107 Geo. L.J. 747 (March 2019).
2. Araiza, William D., Animus and Its Discontents, 71 Fla. L. Rev. 155 (January 2019) (We noted various symposium articles responding to this article last month, but neglected to include the main article, so here it is, with apologies to Prof. Araiza for the delay).
3. Brown, Elizabeth, and Inara Scott, Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace, 56 Am. Bus. L.J. 55 (Spring 2019).
4. Clark, Kendra, Specters of California's Homophobic Past: A Look at California's Sex Offender Registration Requirements for Perpetrators of Statutory Rape, 52 U.C. Davis L. Rev. 1747 (February 2019).
5. Craythorne, Ashley D., Same-Sex Equality in Immigration Law: The Case for Birthright Citizenship for Foreign-Board Children of U.S. Citizens in Same-Sex Binational Unions, 97 Tex. L. Rev. 645 (February 2019).
6. DiMartino, Lauren A., The Procreation Prescription: Sexuality, Power, and the Veil of Morality, 22 CUNY L. Rev. 41 (Winter 2019).
7. Forde-Mazrui, Kim, Calling Out Heterosexual Supremacy: If *Obergefell* Had Been More Like Loving and Less Like Brown, 25 Va. J. Soc. Pol'y & L. 281 (Winter 2018).
8. Gabilondo, Jose, Holy Gender! Promoting Free Exercise of Gender by Discernment Without Establishing Binary Sex or Compulsory Fluidity, 16 Seattle J. for Soc. Just. 659 (Spring 2018).
9. Grimes, Warren S., Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied, 48 Sw. L. Rev. 37 (2019) (discusses *U.S. v. Windsor* as an example of activism by the majority of the Roberts Court, albeit a different brand of activism from the other decisions the author discusses).
10. Hudson, David L, Jr., Law and Marriage: Judges Who Wed Couples Can't Refuse Same-Sex Unions, ABA Ethics Opinion Says, 105-APR A.B.A. J. 24 (April 2019).
11. Jenkins, Bryanna A., Birth Certificate with a Benefit: Using LGBTQ Jurisprudence to Make the Argument for a Transgender Person's Constitutional right to Amended Identity Documents, 22 CUNY L. Rev. 78 (Winter 2019).
12. Jones, Holly, Contracts for Children: Constitutional Challenges to Surrogacy Contracts and Selective Reduction Clauses, 70 Hastings L.J. 595 (February 2019).
13. Nnamuchi, Dr. Obiajulu, Nigeria's Same Sex Marriage (Prohibition) Act and the Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?, 25 Sw. J. Int'l L. 120 (2019).
14. Pomerance, Benjamin, Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court, 82 Alb. L. Rev. 449 (2018-2019) (deep dive into the history of Chief Justice Roberts in attempting to discern what sort of a "swing voter" on the Court he might become).
15. Psygkas, Athanasios, The Hydraulics of Constitutional Claims: Multiplicity of Actors in Constitutional Interpretation, 69 U. Toronto L.J. 211 (Spring 2019) (Symposium: Same-Sex Marriage and the Law).
16. Read, Susan Phillips, Musings on Stare Decisis in New York's Court of Last Resort, 82 Alb. L. Rev. 693 (2018-19) (Speech by former N.Y. Court of Appeals Judge Read, including detailed discuss of the legal developments from *Alison D. v. Virginia M.* to *Matter of Brooke S.B.*, the developing law of same-sex second-parent standing to seek custody or visitation in New York).
17. Robert, Armanda, Protecting LGBTQ Minors: ABA Develops Guide for Drafting Laws to Ban Controversial Conversion Therapy, 105-APR A.B.A. J. 63 (April 2019).
18. Ryznara, Margaret, and Anna Stepien-Sporeka, Cohabitation Worldwide Today, 35 Ga. St. U. L. Rev. 299 (Winter 2019) (since only a minority of nations allow same-sex marriage or provide a civil partnership status for same-sex couples, legal treatment of cohabitation remains salient for most or the world's LGBTQ population).
19. Sager, Lawrence G., and Nelson Tebbe, The Reality Principle, 34 Const. Comment. 171 (Winter 2019) (an attempt to make the best of Justice Kennedy's opinion in Masterpiece Cakeshop).
20. Shivers, Nonnie L., A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage, 33 ABA J. Lab. & Emp. L. 175 (Winter 2018).
21. Suh, Cindy K., Reviewing a Ban on Transgender Troops from an International Perspective, 25 Sw. J. Int'l L. 155 (2019).
22. Thiel, Kathryn B., Woke Dicta: The Discord Over Statutory Interpretation, Sexual Orientation Discrimination, and the Scope of Title VII, 29 Geo. Mason U. Civ. Rts. L.J. 191 (Spring 2019).
23. Tsesis, Alexander, Data Subjects' Privacy Rights: Regulation of Personal Data Retention and Erasure, 90 U. Colo. L. Rev. 593 (Spring 2019).

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.

***** Correction Note: In the March issue of *Law Notes*, we stated that Anchorage is the capital of Alaska in a report in the Legislative & Administrative Notes section. Although Anchorage is the largest city in the state, Juneau is the capital. We apologize to Juneau which, it should be noted, also bans discrimination because of sexual orientation by local law.**