

L G B T LAW NOTES

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**SCOTUS Rules On Trump's
Trans Military Ban**

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Supreme Court Stays Two Preliminary Injunctions Against Transgender Military Ban, Leaving Only One Injunction in Place

By Arthur S. Leonard

On January 22 the U.S. Supreme Court granted applications by Solicitor General Noel Francisco to stay two nationwide preliminary injunctions that were issued in December 2017 by U.S. District Judges on the West Coast to stop President Donald Trump's ban on military service by transgender individuals from going into effect. The vote was 5-4, with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan indicating that they would have denied the applications for stays. Although the stays mean that the Trump Administration's transgender military ban is no longer blocked by those two injunctions, it is still blocked by an injunction issued by a federal judge in Baltimore in November 2017. The injunction issued by the district court in the District of Columbia in October 2017 was vacated earlier in January 2018 by the U.S. Court of Appeals for the D.C. Circuit, but the court delayed issuing its mandate to the district court while members of the panel worked on drafting opinions, so it also remains in effect. (see immediately following story). The D.C. Circuit found in a short memorandum opinion issued on January 4 that District Judge Colleen Kollar-Kotelly erred in concluding that the version of the ban announced by Defense Secretary James Mattis in February 2018 was essentially the same ban on transgender military service announced the previous summer by President Trump (in July 2017 tweets) and the White House (in an August 2017 memorandum).

The Supreme Court issued these two stays "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought." As of the end of January, the 9th Circuit panel,

having heard oral argument on October 10, had not ruled on the government's appeal of the district courts' refusal to dissolve their preliminary injunctions. The 9th Circuit panel had put the appeal in *Stockman v. Trump*, the case pending in the Central District of California, on hold, pending its decision in *Karnoski v. Trump*. Reacting to the Supreme Court's stay of the preliminary injunctions, on January 30 counsel for plaintiffs in *Karnoski* suggested to the court that it issue a summary order vacating the preliminary injunction because, in light of the Supreme Court's stay, the plaintiffs were no longer opposing the relief requested by the government in this appeal. Plaintiff's filing noted that still pending before the court is the government's request opposing Judge Pechman's discovery order. The plaintiffs' suggestion to the court may forestall the likelihood that the 9th Circuit panel would issue a ruling similar to that issued on January 4 by the D.C. Circuit, thus leaving in place, for now, Judge Pechman's findings concerning the characterization of the policy that Mattis had formally issued on March 23, 2018, in place of the policy articulated in the White House's August 2017 memorandum.

At the same time as it granted the stays, the Supreme Court *denied* the Solicitor General's petitions to leapfrog the 9th and D.C. Circuits and directly take its appeal of three district court actions refusing to dissolve the preliminary injunctions for direct review. *Trump v. Karnoski*, 2019 WL 271944; *Trump v. Stockman*, 2019 WL 271946; *Trump v. Jane Doe* 2. These petitions were practically rendered moot, at least for now, by the Supreme Court's granting of the stays and the D.C. Circuit's action earlier in the month. When the Court made its announcement at 9:30 am on January 22, the 9th Circuit had not yet ruled;

if the 9th Circuit panel acts on the Notice filed by plaintiffs in *Karnoski* on January 30, and acts similarly on the *Stockman* appeal, a possible return to the Supreme Court on the issue of the preliminary injunctions would be avoided, particularly if U.S. District Judge George L. Russell, III, in Baltimore, moves quickly as requested by the government to grant its motion to dissolve the one remaining preliminary injunction in *Stone v. Trump*. He had made no ruling by the end of January. To grant the government's motion would be to contract, in letter and spirit, a ruling he had issued in November affirming the reasonableness of conclusions reached by a magistrate judge ruling on discovery issues in August.

The Supreme Court's action did not immediately allow the Defense Department to implement the ban, because Judge George L. Russell (D. Md), was still considering the government's motion to dissolve a nationwide preliminary injunction issued on November 21, 2017, by now-retired U.S. District Judge Marvin J. Garbis in *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md.) That case was reassigned to Judge Russell after Judge Garbis retired in June 2018. On November 30, Judge Russell issued his only written opinion in the case so far, mentioned above, largely affirming an August 14 ruling by Magistrate Judge A. David Copperthite on disputed discovery issues in the case, but staying discovery pending a ruling by the 9th Circuit on a government appeal of similar discovery rulings by District Judge Marsha Pechman (W.D. Wash). 2018 WL 6305131 (D. Md.). However, in this ruling, Judge Russell rejected the government's contention that certain "findings of fact" by Magistrate Judge Copperthite were "unreasonable." Among those were Copperthite's finding that the version of the ban

announced by Mattis in February 2018, which Trump authorized but did not direct Mattis to put into effect, was still a ban on military service by transgender people, despite differences from the version described by the White House in its August 2017 memorandum. Now that the D.C. Circuit has ruled to the contrary, and that the Supreme Court has stayed the other preliminary injunctions, it seemed highly likely that Russell would either dissolve or stay Judge Garbis's injunction, and, the last brick falling into place, the Defense Department would be free to implement some form of the ban. It is worth noting that President Trump did not direct Secretary Mattis to implement the ban that Mattis had recommended; rather, he authorized Mattis to adopt whatever policy he deemed appropriate, while expressing support for the policy that Mattis had recommended to him. While this drama was playing out in the courts, Acting Defense Secretary Patrick Shanahan did not announce publicly what steps he would take to implement that ban once free of judicial constraint, but it was likely the Defense Department would need some time to put into place appropriate guidelines for determining which transgender personnel were subject to discharge and which could continue to serve. It is also possible that the Defense Department would conclude, based on some of the district court opinions, that certain parts of the Mattis policy are not particularly defensible and should be rethought before implementation.

The government's position in all four of the pending cases challenging the constitutionality of the ban has been that the "Mattis Policy" announced in February 2018 was significantly different from the version of the ban described in Trump's August 2017 Memorandum, and thus that the four preliminary injunctions against the August 2017 version should be vacated as moot. The government takes the position that the "Mattis Policy," which bans service by individuals who have been diagnosed with gender dysphoria, is no longer a categorical ban of all transgender service members, as

described in Trump's original tweets. The Mattis Policy carves out exceptions, allowing transgender individuals who are already serving to continue doing so despite being diagnosed with gender dysphoria, although those who have not transitioned when the new policy goes into effect will not be allowed to transition and still remain in the service. (This exception, of course, contradicts the government's argument that individuals diagnosed with gender dysphoria are not fit to serve, especially given the reasons cited in the "Task Force Report" accompanying Mattis's policy recommendation.) For another thing, the Defense Department contends that because not all individuals who identify as transgender have either been diagnosed with gender dysphoria or desire to make a medical transition, the basis for the disqualification for military service has effectively been *shifted* by the Mattis Policy from gender identity to gender dysphoria. As such, the government argues, the district courts' conclusions that the ban discriminates on the basis of transgender status in violation of the 5th Amendment's Equal Protection requirement no longer applies. Instead, argues the government, the ban is now based on a medical condition, as to which the courts should defer to military expertise, because courts generally refuse to second-guess the military's determination that people with a diagnosed medical condition may be unfit to serve. This argument also suffers from internal inconsistency; it seems likely that the semantic switch was engineered to escape the district courts' Equal Protection rulings and preserve as much of the categorical ban as might appear defensible under a non-status standard.

The Supreme Court's action does *not* grant the government's request to dissolve as moot the preliminary injunctions that were issued in December 2017 by District Judges Marsha J. Pechman (Seattle) and Jesus Bernal (Riverside, California), and thus should not be interpreted as taking a position on whether those injunctions should have been issued or kept alive, but rather grants the government's

request to stay their *effect* while the 9th Circuit decides how to rule on the government's appeal from those district judges' denial of the government's motions to dissolve the injunctions. But the stays send a strong signal that a majority of the Supreme Court, at least based on the record before it in the Solicitor General's motions and the briefs filed in opposition, feels that the prerequisites for *staying* a preliminary injunction have been met. Since the Court did not explain its action, however, it is unclear whether a majority of the Justices believe that plaintiffs are unlikely to prevail on the merits, or rather believe that some other test has not been met. Indeed, the justices who voted to grant the stay motions may not all agree as to the reasons for granting, but we will never know since they did not release any explanation, either collectively or individually, for their actions, and there were no written dissents, which might at least hint at the reasons behind the stays. In the meantime, all four district courts are dealing with contentious arguments as the government refuses to comply with the plaintiffs' discovery demands, making it difficult for the courts to proceed with the cases on the merits. These discovery disputes are raising significant issues about the extent to which the government should be forced to disclose details of its decision-making process that are crucial to determining whether the policy they are now defending was adopted for constitutionally impermissible reasons.

If the district judges are persuaded by the D.C. Circuit's opinion in *Jane Doe 2 v. Shanahan*, as described below, however, some of the discovery requests might be mooted, since part of Solicitor General Francisco's argument to the Supreme Court in support of his Motions to Stay, was that shifting the basis of the ban from sexual orientation to gender dysphoria changed the case to a rational basis case with deference to military judgment. [The name of the case has changed, inasmuch as Trump has been dismissed as an individual defendant; the case was briefly known as *Jane Doe 2 v. Mattis*, but now

Acting Secretary Patrick Shanahan has been substituted for Mattis, who resigned over policy differences with Trump.] The biggest factual question at this point is whether the decision to abandon the prior policy under which transgender individuals can serve in the military was an exercise of military judgment or a political decision by the President, or some combination of the two, and how that would play out in terms of constitutional analysis. This is the stumbling point in the discovery disputes, as plaintiffs seek documents that would reveal whether and the degree to which the policy was generated as a result of professional military judgment as opposed to the President's erratic political judgments and short-term legislative goals.

Assuming the 9th Circuit panel agrees with Karnoski counsel suggestion to summarily dissolve the injunctions in the West Coast cases in light of the Supreme Court stays, attention turns to Judge Russell in Baltimore, whose ruling on the government's motion to dissolve Judge Garbis's preliminary injunction may decide in the short term whether the transgender ban goes into effect or remains blocked while the litigation continues. If Judge Russell finds the D.C. Circuit's analysis to be persuasive and the Supreme Court's stays to be a message to him, the ban may go into effect, even as all four cases challenging the ban continue to be fiercely litigated by the plaintiffs. If Judge Russell decides to stick with the position articulated in his November 2018 ruling approving the magistrate's report and recommendation, he might take a stand that would require the government to go to the 4th Circuit in search of a stay. Meanwhile, the main focus of pending litigation shifts to the ongoing discovery disputes. The government is appealing various orders to get appellate review of trial courts' rejection of its position that much of what the plaintiffs are seeking is privileged. ■

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D.C. Circuit Panel Holds District Court Should Have Dissolved Preliminary Injunction Against Implementation of Mattis's Proposed Transgender Military Policy

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled on January 4 that U.S. District Judge Colleen Kollar-Kotelly should not have denied a motion filed in 2018 by the Justice Department to dissolve a preliminary injunction she had issued in October 2017 to block the Trump Administration's ban on transgender military service, as articulated in a tweet and a White House memorandum, from going into effect. The court did not issue a formal opinion, instead releasing a "Judgement" that was not designated for publication, although it indicated that "separate opinions" by the judges "will be filed at a later date." *Jane Doe 2 v. Shanahan*, 2019 WL 102309, 2019 U.S. App. LEXIS 397 (D.C. Cir., January 4, 2019). Such opinions had not been filed by the end of January, and the court notified the parties that the time for seeking further review would extend for three weeks after those opinions are issued. In the meantime, the preliminary injunction remains in effect.

The ruling, although quickly described in the press as a victory for the Trump Administration, had no immediate effect, because nationwide preliminary injunctions against implementation of the ban issued by three other U.S. District Courts remained in effect, although preliminary injunctions issued by West Coast district courts were stayed by the Supreme Court on January 22 (see lead story, above). As of the end of January, one preliminary injunction against the ban, issued by now-retired District Judge Marvin Garbis in *Stone v. Trump* in November 2017, remained in effect, as District Judge George L. Russell, III, who inherited the case from Garbis

upon his retirement, was pondering the government's motion to dissolve that injunction as moot.

In her October 30, 2017, ruling granting the plaintiffs' motion for a nationwide preliminary injunction against implementation of the ban, Judge Kollar-Kotelly found that the plaintiffs were likely to prevail on the merits of their claim that the ban announced by Trump in July and amplified in the August 2017 memorandum violated their equal protection rights under the 5th Amendment, and allowing the ban to go into effect would cause irreparable injury to the plaintiffs while not shown to be harmful to national security, as alleged by the government. Indeed, the judge found that implementing the ban would be harmful to the military, due to the disruption it would cause, the loss of investment in the thousands of transgender personnel now serving, and the need to replace them. Judge Kollar-Kotelly was the first of four judges to enjoin the ban. Three other district courts issued similar opinions authorizing virtually identical nationwide preliminary injunctions over the ensuing weeks, from courts located in Baltimore, Maryland, Seattle, Washington, and Riverside, California.

While the litigation was ongoing in the district courts, Defense Secretary James Mattis appointed a "task force" as directed in the White House memorandum to devise an "implementation" plan for the ban. The resulting plan was submitted to the president in February, 2018, in response to which he issued a new memorandum *revoking* his prior memorandum and authorizing (but not directing) Mattis to implement the plan he had proposed. Mattis's plan was accompanied by a Report purportedly devised by this

task force of “experts” (none of them named in the document or otherwise), although knowledgeable observers noted striking resemblances to articles published by conservative think-tanks opposed to transgender rights generally and military service in particular.

After Mattis adopted the plan for implementation, the Justice Department filed motions in the four district courts arguing that the preliminary injunctions should be dissolved because they were directed at a policy that had been revoked, and the “new” Mattis policy was sufficiently different from what Trump had originally announced to change the legal analysis. Thus far, three of the district courts have denied the Justice Department’s motion, which is still pending in the fourth court. The three judges who denied the motion all concluded that the Mattis policy was substantially the same as the Trump policy that they had preliminarily enjoined, and that no new development justified allowing the ban to go into effect while the lawsuits played out. In the fourth case, the judge who issued the injunction retired in June 2018 and the case was assigned to a new judge, who has yet to rule on the motion.

The Justice Department appealed the three rulings to the D.C. and 9th Circuit Courts of Appeals. As of January 4, the 9th Circuit had not issued a ruling on the appeal, but had refused to stay the injunctions issued by the district judges in Seattle and Riverside. The 9th Circuit had still not ruled as of the end of January.

Impatient at the pace of litigation, the Solicitor General filed Petitions in the Supreme Court late in November seeking to leapfrog the courts of appeals and have the Supreme Court directly address whether the preliminary injunctions should be lifted, and then filed motions with the Court in all three cases in December, seeking a “stay” of the injunctions or their narrowing to apply only to the plaintiffs rather than to have nationwide effect. Those petitions and motions had been scheduled by the Court to be discussed in its private conference on January 11, but ultimately were not acted upon

until January 22, almost three weeks after the D.C. Circuit issued the opinion discussed below in this article.

The D.C. Circuit panel that ruled on January 4 consisted of Judges Thomas B. Griffith (appointed by George W. Bush), Robert L. Wilkins (appointed by Barack Obama), and Senior Judge Stephen F. Williams (appointed by Ronald Reagan).

The panel found that Judge Kollar-Kotelly had “clearly” erred in concluding that the Mattis plan adopted in February 2018 was substantially the same as the Trump policy that she had preliminarily enjoined in October 2017. The court pointed out that unlike the original policy, Mattis’s plan was not a total ban. It “grandfathers” currently serving transgender personnel who had “come out” in reliance on former Defense Secretary Ashton Carter’s lifting of the long-standing ban on transgender military service effective July 1, 2016, many of whom then initiated transition, including in some cases complete surgical gender affirmation, and were successfully serving in the gender with which they identify. Mattis would let them continue to serve, although those who had not initiated transition would not be allowed to do so, restricted to serving in their gender as identified at birth.

Furthermore, seeking to escape the Equal Protection arguments that the plaintiffs made, which were preliminarily accepted by the district judges in ruling against government motions to dismiss or for summary judgment, Mattis’s “experts” had reconfigured the ban to be based not on transgender *identity*, but rather on a diagnosis of “gender dysphoria,” the term used in the most recent edition of the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM) for the condition of the individual’s strong discordance between their gender as identified at birth and the gender with which they now identify. The government argued that the Mattis plan was disqualifying people who had been diagnosed with a professionally recognized medical condition, which the DSM describes

in terms of symptoms that – at least as described in the DSM – would sound disabling, although the DSM’s description would probably seem inaccurate to many transgender people.

Under Mattis’s version of the policy, anybody diagnosed with gender dysphoria would be disqualified from enlisting or from continuing to serve, unless they were “grandfathered” under the policy. Individuals who identify as transgender but have not been diagnosed with gender dysphoria would be allowed to enlist and serve, provided they did not seek to transition and would serve in the gender with which they were identified at birth, called by the policy their “biological sex.” Those who had been diagnosed with gender dysphoria but were in process of transitioning or had completed the transition process were allowed to serve in their preferred gender, provided they otherwise satisfied all requirements for service.

Lawyers for the plaintiffs in the four cases have pointed out that this is a semantic game, but the D.C. Circuit panel in this opinion indulges the government’s distinction between status and medical diagnosis, pointing out that the lawyers for the plaintiffs had stated in their briefs and arguments at earlier stages in the case that not all transgender people are diagnosed with gender dysphoria or seek to transition. Thus, in the view of the panel, agreeing with the Justice Department, the policy does not ban service by transgender people, as such – just by those diagnosed with gender dysphoria or who wish to transition and serve in other than their sex identified at birth.

The district judges found that in practical terms this amounted to the same transgender ban that Trump had proclaimed, with the exception of the “grandfathered” personnel, estimated at about 900 people according to the January 4 D.C. Circuit ruling. But the court of appeals disagreed, finding it to be different. Furthermore, said the court, since Mattis claimed to have adopted this policy on the recommendation of an “expert” task force that had produced a report, it was entitled to the

judicial deference normally accorded to military personnel policies. For purposes of deciding on preliminary injunctive relief, the court of appeals found that the district court should have essentially taken the Justice Department's representation of the policy at face value and not concluded that the plaintiffs were likely to prevail on their equal protection claim when a deferential standard is used. But the issue of whether a deferential standard should apply is a hotly disputed issue in these cases, which will require expert testimony to resolve as well as discovery of how the policy was formulated, as to which the government has been stalling, raising claims of privilege which may need resolution at an appellate level.

The D.C. panel said that it was not ruling on the ultimate merits of the case. The court said that it was vacating the preliminary injunction but "without prejudice," which means that it is possible that after discovery has been concluded, the plaintiffs could come back and try to persuade the district court that the policy was not entitled to deference and was not justified for the purposes cited by the government. The January 4 ruling would not in itself allow the ban to go into effect, because nationwide preliminary injunctions remained in effect in the three other cases.

The D.C. Circuit's ruling gave the government exactly what it sought in its appeal, so the Solicitor General communicated with the Supreme Court that its petition for certiorari before judgment, filed in November 2017, may be mooted. However, the Solicitor General noted the possibility that the plaintiffs would seek en banc review of the panel's decision, so he asked the Court not to rule on the Petition but to "hold it" pending further proceeding in the D.C. Circuit, with a similar recommendation concerning the motion for a stay of the preliminary injunction that the S.G. had filed in December. In the event, however, the Court rejected his request by denying the petition for certiorari on January 22

and dismissing the motion for stay. As of the end of January, the plaintiffs had yet to file a petition for *en banc* review, because the court had not issued the "separate opinions" that it said it would be issuing "later" when it ruled on January 4, and had not sent a mandate to the district court. In a notice to the parties at the end of January, the court indicated that time for filing a motion for rehearing would be open for three weeks after the opinions are issued. The question whether the Mattis policy might go into effect still hinged on whether District Judge Russell would grant the government's motion to dissolve or stay the preliminary injunction in *Stone v. Trump*, pending the District of Maryland.

The plaintiffs are represented by Kevin Matthew Lamb, Paul Reinherz Quitma Wolfson, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, Washington, DC, Adam M. Cambier, Christopher R. Looney, Harriet Hoder, Wilmer Cutler Pickering Hale & Dorr LLP, Boston, MA, Alan E. Schoenfeld, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY, Amy Whelan, Christopher F. Stoll, Shannon P. Minter, National Center for Lesbian Rights, San Francisco, CA, Claire Laporte, Daniel L. McFadden, Kathleen M. Brill, Matthew E. Miller, Michael J. Licker, Rachel C. Hutchinson, Foley Hoag, LLP, Boston, MA, Jennifer Levi, Mary L. Bonauto, GLBTQ Legal Advocates & Defenders, Boston, MA, and Nancy Lynn Schroeder, Wilmer Cutler Pickering Hale & Dorr LLP, Los Angeles, CA. ■



7th Circuit Remands to BIA a Bisexual Jamaican's Claim for Relief Under Convention Against Torture

By Bryan Xenitelis

The U.S. Court of Appeals for the 7th Circuit granted a Jamaican man's petition for review of the Board of Immigration Appeals' refusal to *sua sponte* reopen his removal proceedings based upon additional evidence of his bisexuality, in *Fuller v. Whitaker*, 2019 U.S. App. LEXIS 2162, 2019 WL 290267 (7th Cir., January 23, 2019).

Petitioner had initially entered the United States as a fiancé, subsequently married his now-ex-wife, and obtained conditional permanent residence. Years later he was convicted of attempted criminal sexual assault for which he eventually was sentenced to four years imprisonment. The Department of Homeland Security initiated removal proceedings against Petitioner and the Immigration Judge found him ineligible for political asylum and withholding of removal because of his conviction and the fact that it was "particularly serious." Petitioner sought deferral of removal under the Convention Against Torture (CAT), claiming he was bisexual and had previously been disowned by family members on account of his sexual orientation and had suffered violence perpetrated against him by those who perceived him to be gay.

The Immigration Judge denied Petitioner's claim, finding him to not be credible on many bases, including basic facts about his family, the timing of a shooting incident, and which of his former boyfriends was present at the incident, and that corroborating letters for which affiants were not present to testify before the Immigration Judge "contained the same centered, dotted signature line." Petitioner appealed to the Board, which upheld the credibility determination. The 7th Circuit denied

the Petitioner's first petition for review, ruling that while "some of the [Immigration Judge's] stated reasons for disbelieving [Petitioner] were off the mark... others were sound."

Petitioner later filed a motion to reopen with the Board, arguing that he had testified without contradiction that he was bisexual and that he had been able to obtain affidavits from individuals who supported his claim, which had not been available to him previously. The Board refused to *sua sponte* reopen, stating that Petitioner "has not submitted such evidence with the motion, nor has he shown that a different outcome may be warranted based on the new evidence." Petitioner submitted a new filing to the Board, this time including the new letters, which the Board treated as a second motion to reopen and denied, stating the motion "does not challenge our conclusions regarding his credibility or his eligibility for deferral of removal, and we do not find that his letters of support would materially alter these findings."

Petitioner filed a petition for judicial review, alleging the Board failed to treat his submission as a motion to reopen challenging the credibility determination, and further sought a stay of removal. Writing for a panel of the court, Circuit Judge Ilana Rovner noted that the court initially denied Petitioner's stay request but subsequently granted the stay and appointed him counsel to assist in briefing the case on appeal. Judge Rovner noted that the Board was not required to reopen *sua sponte* absent "exceptional situations," for which there was "no meaningful standard of review," and therefore the court could not review the merits of the motion and its review was limited solely to "recognize and address constitutional transgressions and other legal errors that the Board may have committed in disposing of such a motion."

Judge Rovner held that the Board's ruling that Petitioner's motion "does not challenge our conclusions regarding his credibility or his eligibility for deferral of removal" was legal error, because the majority of the court believed that his filing – Petitioner stated: "I have new evidence to submit to the court

to help to prove my case. I pray that I will be given the chance to prove my credibility in court with the help of the new evidence." – did challenge the credibility determination. She further held that since "we cannot be confident that the Board's additional half-sentence as to the import of [Petitioner's] new evidence represents an independent and well-considered alternative ground for the Board's judgment," the correct action was to grant the petition for review and return the matter to the Board for reconsideration.

Circuit Judge Daniel Anthony Manion dissented, stating: "The Court's opinion admirably attempts to toe the thin line between reviewing a decision of the Board of Immigration Appeals to ensure it exercised its discretion and reviewing the Board's exercise of discretion itself. But it strays from the former into the latter." Judge Manion believed that Petitioner's filing "is ambiguous about whether it 'challenges' the Board's determinations" and stated that "we should not be in the business of interpreting 'the spirit' of motions made to the Board." While he would have ruled the Board already exercised its discretion and dismissed the petition for review, Judge Manion agreed with the majority that on remand "the court acknowledges it has no authority to direct how the Board should exercise that discretion" in deciding whether or not to *sua sponte* reopen Petitioner's case. ■

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



California Court of Appeals Upholds Robbery Conviction Where Victim's HIV Status Was Excluded from Evidence

By Bryan Xenitelis

The Second Appellate District, Division Six of the Court of Appeal of California has upheld the conviction for first degree robbery of a man who sought to impeach the credibility of his victim, who minutes before the robbery had performed oral sex on him but had failed to disclose his HIV positive status, in *People v. Pollak*, 2019 Cal. App. Unpub. LEXIS 15, 2019 WL 91545 (Ct of App. California, 2nd App. Dist., Div. Six, January 3, 2019).

Christopher Pollak answered a Craigslist ad by T.R., who was seeking to perform oral sex on a man. T.R. is HIV positive and did not disclose his HIV status to Pollak. Pollak went to T.R.'s home and T.R. performed oral sex on him. After the sex act, Pollak "grabbed a metal dinner fork," "threatened T.R. saying that he would put the fork in his neck" and forced T.R. to "give him his cell phone, wallet, keys, computer, and other property." Pollak claimed he thought he had sent nude photos of himself to a woman, that when T.R. tried to put his hands in Pollak's pants that Pollak's fanny pack fell off, and that Pollak took T.R.'s property to exchange it for his fanny pack and its contents.

During the trial, the prosecutor informed the court that he had disclosed privately to defense counsel a medical condition that T.R. had at the time he engaged in oral sex with Pollak without identifying the condition (T.R. is HIV positive), implying that Pollak learned of T.R.'s HIV status only at trial. Defense counsel declined an

evidentiary hearing on the HIV status: “the only evidence that is relevant is that he failed to disclose... which is a misrepresentation by omission.” Defense counsel sought to admit the fact of the “condition” which defense counsel characterized as a “non-curable and life-threatening” condition to show that T.R. had acted with moral turpitude for impeachment purposes by failing to disclose the “condition” to Pollak prior to engaging in oral sex with him. However, the court refused to admit evidence of the condition, stating that the exploration of issues such as T.R.’s state of health and likelihood of transmission would “get us down [an Evidence Law] rabbit hole.”

After he was found guilty of the robbery, Pollak appealed his conviction on the ground that the failure to admit proof of T.R.’s HIV positive status excluded evidence relevant to T.R.’s credibility. On appeal, Acting Presiding Justice Kenneth R. Yegan issued an unpublished opinion with which three additional Justices concurred. He stated that to establish “moral turpitude,” the burden was on Pollak to prove T.R. knew he had a medical condition that could be transmitted to Pollak by performing oral sex on him. Justice Yegan noted that defense counsel had declined the court’s offer to hold an evidentiary hearing, but ruled that “even if at the time of its evidentiary ruling the court had been informed of T.R.’s HIV status, it could not have assumed that he had put [Pollak] at risk of contracting the disease. As noted by the People in the brief, the Centers for Disease Control and Prevention unequivocally states that HIV is not transmitted by saliva.”

Since Pollak failed to show that the excluded evidence was relevant to T.R.’s credibility, Justice Yegan ruled the trial court did not abuse its discretion by refusing to admit evidence of T.R.’s HIV status at trial. Finding the HIV status not relevant to T.R.’s credibility, Justice Yegan ruled that Pollak was not deprived of his Sixth Amendment right to confront witnesses against him and accordingly affirmed the judgment. ■

Washington Federal Court Dismisses Challenge of Gender Reassignment Surgery Policy by Transgender Inmate

By Farrington Yates, Alice C. Hu, and Soo Yeon Choi

U.S. District Judge Benjamin H. Settle has denied a transgender inmate’s *pro se* complaint alleging the unconstitutionality of the gender dysphoria policy of the Washington Department of Corrections (DOC) on its face, sending the case back to the originating magistrate court for future proceedings. In *Goninan v. Washington Department of Corrections*, 2019 U.S. Dist. LEXIS 1987, 2019 WL 102156 (W.D. Wash. Jan. 4, 2019), Plaintiff Nathan Goninan, a.k.a. Nonnie Lotusflower (“Lotusflower”), who had been diagnosed with gender dysphoria, challenged DOC’s Gender Dysphoria Protocol (GDP) for its alleged unconstitutional “blanket ban” on gender reassignment surgery for inmates. The matter came before the district court on the Report and Recommendation (Report) of United States Magistrate Judge J. Richard Creatura, who recommended that the court deny the plaintiff’s motion for partial summary judgment based on her failure to prove that the GDP explicitly prohibited reassignment surgeries that were medically necessary in all circumstances. The court adopted the Report on January 4, 2019.

As discussed in Judge Settle’s decision, Lotusflower, a transgender woman currently incarcerated by DOC, filed a *pro se* complaint on October 27, 2017, claiming that “DOC’s failure to provide her with medically necessary gender reassignment surgery violates the Eighth and Fourteenth Amendments to the United States Constitution.” After she obtained representation, the parties filed a stipulated motion to stay the case until April 2018. However, before the stay ended, DOC revised its Offender Health Plan (“OHP”), changing surgical intervention for gender dysphoria from Level III (not medically necessary or not provided under the OHP) to Level II (medically necessary under certain circumstances).

On April 19, 2018, Lotusflower moved for partial summary judgment on the facial unconstitutionality of DOC’s GDP, an internal protocol. (A facial challenge contends that a government law, policy, or regulation is unconstitutional as it is written, or unconstitutional on its face, in other words.) DOC responded that the revised OHP “does not prohibit sex reassignment surgery when it is found to be medically necessary.” Lotusflower then countered that despite moving gender reassignment surgery to Level II, the revised OHP “still incorporates by reference 2 DOC’s GDP—and that protocol maintains the blanket ban,” which was found unconstitutional in a different district court in *Norsworthy v. Beard*, 87 F.Supp. 3d at 1191 (N.D. Cal. 2015). Indeed, the revised OHP still referred to the GDP, which explicitly prohibited “elective or cosmetic surgical procedures for the purpose of reassignment” – leading to uncertainty over whether the OHP in fact prohibited reassignment surgery, even with the revision.

On June 14, 2018, Magistrate Judge Creatura ordered DOC to supplement its briefing on the inter-relationship between the OHP and the GDP. DOC then revised the GDP on June 19, 2018, and proceeded to provide its supplemental brief that the original GDP had permitted gender reassignment surgery when medically necessary and that it was revised “to include language addressing the criteria for gender confirmation surgery when such treatment has been found to be medically necessary.” Lotusflower replied that DOC had been attempting to evade judicial review through the revisions to the OHP and GDP and also that, by hiring a doctor who believed gender reassignment surgery was never medically necessary to conduct readiness assessments for gender reassignment surgery, DOC had “simply replaced one ban with another.”

On August 25, 2018, Magistrate Judge Creatura issued the Report recommending that the court deny Lotusflower’s motion for partial summary judgment due to her failure to establish that DOC’s gender dysphoria policy was unconstitutional on its face. According to the magistrate judge, when viewed in the light most favorable to non-moving party DOC, the original GDP only prohibited transgender inmates from accessing cosmetic or elective surgical procedures, rather than banning medically necessary gender reassignment surgery. Furthermore, both the original and the revised GDP included a pathway to gender reassignment surgery when medically necessary. The magistrate judge further rejected Lotusflower’s claim of “blanket ban as applied” because the plaintiff failed to demonstrate that “the doctor categorically denies every request for gender reassignment surgery.”

Lotusflower objected to the Report five days later, arguing that the Report failed to seriously consider the voluntary cessation doctrine, namely “foreclosing efforts by defendants to evade judicial review by [...] modifying their behavior in the short term in an effort to moot ongoing litigation.” *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013). She further argued that the issue before the Court was a facial challenge, and not an as-applied challenge. (Unlike a facial challenge, an as-applied challenge contends that a government law, policy, or regulation is unconstitutional as it is applied to the litigant as opposed to everyone.)

On January 4, 2018, Judge Settle adopted the magistrate judge’s Report, denying Lotusflower’s motion for partial summary judgment and sending the matter to the magistrate court for further consideration.

FACIAL CHALLENGE – The court acknowledged that Lotusflower’s voluntary cessation objection held some merit. As explained in the decision, the Report’s brief discussion of the voluntary cessation doctrine did not address why DOC’s revisions of

the GDP and OHP did not implicate “efforts by defendants to evade judicial review by [...] modifying their behavior in the short term” in an attempt to moot Lotusflower’s complaint. More crucially, Magistrate Judge Creatura relied on the revised GDP’s explicit pathway to reassignment surgery to refute the plaintiff’s argument that the original GDP banned reassignment surgery, thus seemingly negating the very purpose of the voluntary cessation doctrine. However, the court ultimately agreed with the Report’s conclusion that the original GDP permitted medically necessary gender reassignment surgery when viewed in the light most favorable to DOC, and thus was not an unconstitutional blanket ban on its face. As DOC stated, regardless of the language of the original GDP, the revised OHP would not prohibit a transgender inmate from receiving reassignment surgery if surgery was deemed medically necessary following a readiness assessment.

Under the revised OHP, reassignment surgery in those instances would also be covered at Level I (medically necessary), according to the DOC Assistant Secretary for Health Services. Moreover, the original GDP did not explicitly prohibit medically necessary surgery—including reassignment surgery that was deemed medically necessary. Thus, the court found that the Report was correct in concluding that Lotusflower failed to meet her burden to establish the unconstitutionality of the original GDP on its face. This conclusion then obviated the need for the court to discuss the voluntary cessation doctrine in the context of the revised GDP, and therefore the plaintiff’s related objection was also denied.

AS APPLIED CHALLENGE – The court agreed with Lotusflower’s argument that an as-applied challenge was not the issue before the court. The plaintiff presented a facial challenge in her initial motion for partial summary judgment. Notably, she later alleged that the revised GDP was a “de facto” ban because DOC chose a doctor who

allegedly believed gender reassignment surgery was never medically necessary for any inmate, a claim that resembled a masqueraded as-applied challenge. However, according to Judge Settle, Lotusflower’s argument still continued to challenge the policy relative to all DOC inmates, consistent with a facial challenge. The court concluded that Lotusflower’s de facto ban argument, which the Report correctly denied, was merely a “supplement” to her facial challenge. Specifically, in response to the plaintiff’s de facto ban argument, Magistrate Judge Creatura opined in a section of the Report titled “Blanket Ban as Applied” that Lotusflower failed to demonstrate that she was absolutely barred from ever qualifying for surgery under the alleged de facto ban. The phrase “as applied” in the Report may have then led to confusion over whether Lotusflower had presented an as-applied challenge, an idea Judge Settle refuted. Importantly, the court also found that since the dispositive motion deadline did not expire until March 2019, further proceedings before Magistrate Judge Creatura were warranted. In other words, Lotusflower can file further motions in the magistrate court relating to an as-applied challenge.

Goninan v. Washington Dep’t of Corr. is yet another example that illustrates the challenges inmate litigants face when establishing the unconstitutionality of a prison policy on its face. First, policies such as the Washington Department of Corrections’ GDP may have ambiguous or unclear language that makes it difficult to prove that they are explicitly unconstitutional as they are written. Secondly, given that the policy is reviewed in the light most favorable to the non-moving party—often the government agency operating the prisons or a government employee—the pro se litigant must be able to present the case in a way that precludes any reasonable interpretations of the policy that favor the non-moving party, also an onerous feat. ■

Farrington Yates, Alice C. Hu, and Soo Yeon Choi are attorneys at Kobre & Kim LLP.

Federal Court Allows Born-Again Christian Employee to Challenge Employer's Failure to Accommodate His Anti-Transgender Religious Beliefs Under Title VII

By Cyril Heron

U.S. District Judge Ellen L. Hollander (D. Md.) dismissed two counts on a Title VII case brought by an employee who alleges he was disciplined and fired based on religious discrimination. The plaintiff, Fredrick Brennan, asserts that he faced discrimination against his Christian religion when his employer's ethics quiz required the answer that misgendering a transgender male colleague is impermissible. *Brennan v. Deluxe Corporation*, 2019 U.S. Dist. LEXIS 9758, 2019 WL 280391 (D. Md., Jan. 18, 2019).

Frederick J. Brennan's Complaint contains three counts under Title VII: discrimination on the basis of plaintiff's religion; failure to accommodate the plaintiff's religious belief; and, failure to engage in interactive process to arrive at an accommodation. In response, Brennan's former employer, Deluxe Corporation, filed a 12(b)(6) motion to dismiss. Judge Hollander granted in part and denied in part, leaving the second count of Failure to Accommodate to continue through the litigation process (into which she collapsed the third claim).

Around July 13, 2004, Payce Inc. hired Fredrick Brennan, a born-again Christian, as a software engineer. Payce, Inc. was Brennan's true employee, but Deluxe was a joint employer that managed the day to day operations and employee relations, i.e., it controlled compensation, hours, terms of employment, and human resource functions. As a condition of employment, Deluxe requires its employees to follow Deluxe's Code of Ethics and Business Conduct, which it teaches through a required online course with mandatory multiple-choice questions. One of the questions concerns "Alex," a hypothetical employee who is transitioning from male to female and asks: "Which of Alex's coworkers'

behavior would likely constitute harassment?" The question was designed to reflect Deluxe's inclusive policy which requires employees to address their colleagues by the pronouns reflecting the sex with which the person identifies.

In an email exchange with Deluxe's human resource manager, Petra Ott, Brennan began by stating he found at least two questions on the quiz "offensive and discriminatory towards [his] faith in God." In that email dated May 24, 2017, he characterized Deluxe's policy as being "tantamount to brainwashing." Ott responded to Brennan on June 15, 2017 saying that Deluxe is an inclusive employer whose purpose is not to change the views and values of their employees but to inform them of Deluxe's behavioral expectations. Brennan found this response unsatisfactory.

Brennan addressed Ott's email on June 16, 2017 with a gusto reminiscent of Jonathan Edwards' sermon Sinners in the Hands of an Angry God. Brennan professed that he was a born-again Christian whose God created male and female as immutable, concrete, and distinguished sexes that cannot be overcome by someone who "[cuts] off body parts and [injects] him/herself with hormones." Moreover, Brennan's vitriol continued with a vow to never follow the guideline in the manual for using the appropriate pronoun for his colleague—even going so far as to invoke Caitlin Jenner as an example and purposefully calling her Bruce. In the concluding paragraph of the June 16 email, Brennan threatened that any disciplinary action or termination resulting from his incomplete ethics course is religious discrimination and in violation of state and federal laws.

True to form, Deluxe levelled a penalty on Brennan for failure to

complete the ethics course in the form of a one-percent reduction in his salary on January 19, 2018. Brennan retaliated by filing a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), which issued a dismissal and notice of right to sue 23 days later. On April 20, 2018, Deluxe directed Payce, Inc. to terminate Brennan.

Brennan's claim needed to fulfill the requirements for a well-pled complaint in order to survive Deluxe's motion; that is, Brennan would have had to assert more than conclusions, accusations, and speculations. Judge Hollander had to determine whether the complaint traversed the delineation between conceivable to plausible while drawing all reasonable inferences in favor of Brennan. In the context of Title VII actions, Brennan's complaint needed to plausibly claim religious discrimination based on the two theories of disparate treatment or failure to accommodate. Judge Hollander assigned the two different theories to each of Brennan's counts respectively and disposed of count three as redundant per the presence of count two.

Judge Hollander explained that Brennan's first count of disparate treatment failed to state a claim upon which relief can be granted. She began by setting out the elements of a Title VII disparate treatment case: 1) membership in a protected class; 2) satisfactory job performance; 3) adverse employment action; and 4) different treatment from similarly situated employees outside the protect class. The second and fourth elements ultimately proved fatal for Brennan's assertion of disparate treatment.

Judge Hollander relied on various Fourth Circuit precedents that allowed the court to review documents incorporated into the pleadings asserted

for their truthfulness and documents unattached but still integral to the complaint with undisputed authenticity. Through that precedent, the court included the EEOC's Dismissal and Notice of Rights, the Notice of Charge of Discrimination, and the email exchange between Brennan and Ott. Simultaneously, through Federal Rule of Evidence 201, the court took judicial notice of EEOC Questions and Answers and the EEOC Manual, because they are said to constitute relevant public records allowable in a motion to dismiss consideration without converting it into a motion for summary judgment. Using those exhibits, the judge opined that count one could not be supported because Brennan failed to assert facts that would suggest disparate treatment, or that he was performing his duties in a satisfactory manner. Despite the freedom from the burden of pleading a prima facie case, Judge Hollander deduced that none of the aforementioned evidence raised count one's allegations beyond the speculative level.

To be sure, the court must view the evidence in the light most favorable to the plaintiff and cannot take into account the merits of the claim at the motion to dismiss stage. But one cannot help but contemplate how mere termination and reduction in pay, in blatant opposition to inclusivity training, amount to adverse actions by the employer. In many ways, this alternative interpretation from between the lines seems to harken to the disjointed onus placed on minorities to be respectful of the discordant and, often, hurtful views of the majority while the same responsibility or duty is hardly shared by the majority.

Pivoting to count two, Judge Hollander held differently. A prima facie showing of a Title VII violation of failure to accommodate is composed of three elements: 1) he or she has a bona fide religious belief that conflicts with an employment requirement; 2) he or she informed the employer of this belief; 3) he or she was disciplined for failure to comply with the conflicting employment requirement. Relying on the cases *Abeles v. Metro. Wash. Airports Auth.* and *Chalmers v.*

Tulon Co. of Richmond, the court reiterated that notwithstanding the legitimate non-discriminatory reason for discharge or the legitimacy of the ground for discharging the defendant based on conduct, an employer must actively attempt to accommodate the religious expression of its employees. *Abeles v. Metro. Wash. Airports Auth.*, 676 F.3d App'x 170, 176; *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018. Thus, Brennan has satisfied the elements of his prima facie case of Deluxe's failure to accommodate his religious beliefs. The emails between Brennan and Ott reflect his bona fide belief that God created two immutable and unchangeable sexes, and one cannot change the physical sex into which one is born. Additionally, the court concluded that the appended emails sufficed to demonstrate that Brennan informed Deluxe of his belief. Naturally, the final element was the easiest to prove to the court, because Deluxe reduced Brennan's salary for failure to complete the ethics course.

The preclusion of a factual analysis at the motion to dismiss stage was the greatest boon to Brennan's bellicose Title VII action, because no further inquiry is needed to survive the motion. Notwithstanding the state and federal law and EEOC guidance which firmly legitimizes and upholds Deluxe's actions, they were not enough to show that Brennan failed to state a claim upon which relief can be granted. The case will continue through the stages of litigation where the motion to dismiss stage could do away with Brennan's action for good. But the truly terrifying fact remains, a belief in God apparently equates to a bona fide belief that we owe our colleagues no common courtesy, collegiality, and decency in the workplace.

Brennan is represented by John B. Stolarz of The Stolarz Law Firm of Baltimore, Maryland. Deluxe Corporation is represented by Byron Flood of the firm Ogletree, Deakins, Nash, Smoak & Stewart of Washington D.C. ■

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

Gay Ohio Newspaper Delivery Person's Title VII Sexual Orientation Claims Survive Motion to Dismiss

By Ryan Nelson

In *Varner v. APG Media of Ohio, LLC*, 2019 WL 145542, 2019 U.S. Dist. LEXIS 4109 (S.D. Ohio Jan. 9, 2019), Chief District Judge Edmund Albert Sargus, Jr. of the Southern District of Ohio (appointed by President Clinton) considered the case of a gay newspaper delivery person who alleged harassment, retaliation, and termination based on his sexual orientation in violation of Title VII of the Civil Rights Act of 1964. Plaintiff Gary Varner (represented by The Spitz Law Firm, LLC) worked for APG Media of Ohio, LLC d/b/a *The Athens Messenger* (represented by Littler Mendelson P.C. and The Zinser Law Firm, P.C.) for roughly 16 years.

Varner alleged that during his tenure he was harassed verbally and physically based on sexual orientation multiple times. Among other things, Varner alleged that his coworkers repeatedly called him a "faggot" and screamed at him in front of his daughter; that he repeatedly reported such harassment to Human Resources to no effect; and that the day after one such incident his supervisors terminated his agreement and his employment without explanation or cause.

Accordingly, Varner alleges that he was fired without cause in breach of his Independent Contractor Newspaper Delivery Agreement; harassed, retaliated against, and terminated based on his gender and sexual orientation in violation of Title VII and Ohio's analog employment antidiscrimination law (neither of which expressly lists sexual orientation as a prohibited ground of discrimination); and subjected to the intentional infliction of emotional

distress in violation of Ohio tort law. Defendant moved to dismiss the Title VII claim on grounds that: 1) Varner allegedly was an independent contractor and not an employee (and therefore beyond the reach of Title VII); and 2) Title VII's prohibition of sex discrimination does not prohibit sexual orientation discrimination. Finally, Defendant argued that if the Title VII claim is dismissed the federal court would thus be divested of subject matter jurisdiction, since this case was premised solely on federal question jurisdiction.

As a threshold matter, the court denied Defendant's first argument, holding that it would reserve decision on whether Varner was an independent contractor or an employee for summary judgment (i.e., after discovery had better illuminated the underlying facts). With that issue resolved for the time being, the court proceeded to Defendant's argument that sexual orientation discrimination lies beyond the ambit of Title VII. Chiefly, Defendant argued that Varner's Title VII claim was foreclosed by *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006), which held that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII."

However, Chief Judge Sargus concluded that *Vickers* did not foreclose Varner's claims here in light of more recent circuit precedent. Specifically, while *Vickers* forecloses sexual orientation discrimination claims under Title VII in the Sixth Circuit, *Vickers* does *not* foreclose sex stereotyping claims in the vein of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), so long as those claims allege that "gender non-conformance is demonstrable through the plaintiff's appearance or behavior." Indeed, the *Vickers* court dismissed the Title VII claim of a man who had been perceived as gay by his coworkers because he had failed to allege "behavior observed at work or affecting his job performance." Yet, more recent circuit precedent (i.e., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018)) has clarified that the *Vickers* court's "observable-

at-work" standard was at odds with prior case law and thus was effectively overturned. Thus, Chief Judge Sargus determined that a gay plaintiff alleging a Title VII claim could survive a motion to dismiss if he pleaded harassment or some other adverse employment action motivated by sex stereotyping and/or gender non-conformance.

Applying that precedent to the instant case, Chief Judge Sargus held that Varner had alleged "that he was verbally and physically attacked and threatened with assault, terminated, and retaliated against on the basis of sex" which "may be reasonably construed as motivated by sex stereotyping and/or gender non-conforming behavior." Therefore, the court concluded that Varner had pleaded a viable Title VII claim, so it denied Defendant's motion to dismiss.

First, this case highlights the possible death of the unworkable standard that the *Vickers* court had invented out of thin air (i.e., that viable sex stereotyping claims must be demonstrable through the plaintiff's appearance or behavior at work). Not only did the *Harris* court expose the novelty of the *Vickers* standard and its baselessness when considered alongside the text of Title VII (which says absolutely nothing about at-work behavior or appearance), but courts have repeatedly struggled to distinguish between discrimination based on appearance- or behavior-based sex stereotypes and discrimination based on plaintiffs' non-heterosexual status. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 738–39 (2010) (collecting cases). As such, this case is refreshing as it, like *Harris* before it, confirms that *Vickers*' sex stereotyping standard is a dead letter and that claims of gender non-conformance are viable in the Sixth Circuit.

Second, this case also serves as a triumph of intersectionality. The only reason that Varner's claim survived is because of *Harris*—a Title VII sex stereotyping case brought by a transgender woman. Indeed, when it

comes to sex stereotyping Title VII claims, transgender individuals raise the exact same argument as non-heterosexuals—discrimination against us because we eschew prescriptive sex stereotypes violates Title VII as per *Price Waterhouse*.

Third and finally, this case serves as an unfortunate reminder of the absurdity of the current state of federal antidiscrimination law. In the Sixth Circuit, *Vickers*' holding that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII" remains "good law," as it has not been overruled by an en banc panel of the circuit. Yet, this case confirms that the exact same plaintiff can shoehorn a sexual orientation discrimination claim into Title VII's prohibition on sex discrimination by styling it as a claim of gender nonconformance because, after all, "homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus." *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016). What results is akin to Schrödinger's cat—the famous thought experiment where a theoretical cat is posited to be both alive and dead at the same time. To wit, *Vickers* is somehow both alive (because sexual orientation discrimination claims are not viable under Title VII) and dead (because such claims nonetheless survive when styled as gender nonconformity claims) at the same time.

Once again, we are reminded of the need for our recalcitrant Congress to clarify the law and confirm, once and for all, that sexual orientation discrimination violates federal antidiscrimination laws. Of course, we are reminded that a Supreme Court opinion endorsing the approach taken by the 2nd Circuit in *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. en banc 2018) or the 7th Circuit in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. en banc 2017), would obviate the need for new legislation. ■

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Distinction Without a Difference? Federal District Court Judge Frustrated by Arbitrary Pleading Requirement for Sexual Orientation and Gender Stereotype Discrimination Claims

By Vito John Marzano

On January 24, 2019, U.S. District Judge Gerald Austin McHugh Jr., (E.D. Pennsylvania), “question[ed] whether forcing litigants to replead essentially the same case under different labels is mere artifice.” *Guess v. Philadelphia Housing Authority*, 2019 U.S. Dist. LEXIS 11645, 2019 WL 316723. Following recent decisions from the 2nd and 7th Circuit Courts of Appeals holding that Title VII’s prohibition on workplace discrimination because of sex necessarily proscribes discrimination because of sexual orientation, the court explains the inescapable fallacy of distinguishing gender stereotyping from sexual orientation. In so doing, the court encourages the 3rd Circuit to revisit its precedent to the contrary.

Importantly, however, District Judge McHugh reminds attorneys of the importance of a properly pleaded complaint in the light of these unnecessary arbitrary distinctions. This also implicitly provides a workaround in the event that the Supreme Court, with its regressive majority, reverses the lower courts and concludes that Title VII does not prohibit sexual orientation discrimination.

The court is bound by the decisions of the U.S. Supreme Court and the 3rd Circuit. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that Title VII’s prohibition on workplace discrimination because of sex necessarily precludes discrimination based on gender stereotypes. In common parlance, an employer cannot discriminate against a person who does not conform to gender stereotypes; for instance, an employer cannot discriminate against a male who displays traditionally effeminate attributes, or a female who displays traditionally masculine attributes.

Similar to other federal appellate courts, the 3rd Circuit previously held

that the prohibition on discrimination based on gender stereotyping does not contemplate discrimination because of sexual orientation. *See, Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001). An employer cannot discriminate against a male employee because he conforms to traditionally more feminine behaviors, but the employer can discriminate against a male employee because he is gay.

For several years, the Equal Employment Opportunity Commission (EEOC) has interpreted Title VII’s prohibition on workplace discrimination because of sex to prohibit discrimination because of sexual orientation. It relies on three premises for this interpretation: (1) there lacks a meaningful distinction between gender stereotyping and sexual orientation discrimination; (2) sexual orientation discrimination is necessarily a form of sex discrimination; and (3) borrowing the association discrimination doctrine generally found in discrimination because of race, discrimination because of an actual or perceived relationship that an individual has with a member of the same sex constitutes discrimination based on sex. To elaborate on association discrimination – an employer that discriminates against a white employee because they are married or in a relationship with a black person has discriminated because of race; thus an employer that discriminates against an employee because the employee is married to or in a relationship with someone of the same sex has discriminated against the employee because of sex. Since adopting the foregoing, the EEOC has investigated and successfully litigated sexual orientation claims. Both the 2nd and 7th Circuit Courts of Appeals overturned prior precedent and concluding that Title VII prohibits discrimination

because of sexual orientation, relying on and quoting from the EEOC’s decision in a federal employment case.

Turning to this underlying matter, plaintiff Shaun Guess alleges that defendant Philadelphia Housing Authority subjected him to a hostile work environment because of his perceived sexual orientation, and that defendant paid him less than similarly-situated female counterparts on the basis of sexual orientation. With respect to the hostile work environment claim, defendant moved to dismiss on the basis that plaintiff failed to exhaust administrative remedies. Specifically, defendant argued that plaintiff’s sexual orientation allegations do not fall within the scope of the investigation by the EEOC. The District Court, noting the EEOC’s history as outlined above, was unpersuaded by this argument. Accordingly, that part of defendant’s motion was denied.

Defendant also moved to dismiss both allegations for failure to state a claim. Because a motion to dismiss is generally made pre-discovery, a federal court must accept plaintiff’s factual allegations as true and determine whether they plausibly stated a claim upon which relief can be granted. The issue here was whether Title VII’s prohibition on discrimination because of sex proscribes discrimination because of perceived sexual orientation.

The District Court summarizes the factual allegations as follows. Philadelphia Housing Authority employed plaintiff from June 2014 until August 31, 2017. During that time, plaintiff received less compensation than similarly situated female counterparts, and he was instructed to perform manual, labor-intensive tasks that his abled-bodied female counterparts were not. Subject to this lawsuit, on July 26, 2017, plaintiff’s supervisor told him

to move some heavy items. Plaintiff objected and his supervisor called him a “Fucking Faggot.” He reported this incident to the Director and Executive Vice President. On August 2, 2017, plaintiff’s supervisor sent him a text message stating that plaintiff could have spoken to her about the incident and warning him about who he spoke to. At a meeting with Human Resources on August 27, 2017, he was informed that the supervisor likely violated internal policy but the conduct did not constitute an Equal Employment Opportunity violation. Two days later, another female employee who had previously called plaintiff “Girl” approached him about the incident with the supervisor, stating that she did not know if plaintiff was or was not gay. Plaintiff resigned that day. Human Resources then sent plaintiff a formal letter confirming its assessment. Plaintiff does not identify as gay.

On September 6, 2017, the supervisor again texted plaintiff, stating in part, “[a]ll of this over something you started . . . yeah I slipped and said you were acting a certain way and I apologized for it but for you to go this far!” She threatened to spread false information about plaintiff and went on to state, “[y]ou’re not even gay to be that hurt that I said your [sic] acting that way . . . I’m beyond hurt!”

As noted, plaintiff alleges discrimination because of perceived sexual orientation by creating a hostile work environment, and for compensation disparity. The operative inquiry in this matter is whether defendant’s conduct constitutes intentional discrimination because of sex within the meaning of Title VII. As noted above, in *Price Waterhouse*, the Supreme Court concluded that discrimination based on gender stereotyping falls within the meaning of discrimination because of sex. In *Bibby*, the Third Circuit declined to extend gender stereotyping to sexual orientation.

The defect in the plaintiff’s pleading is literally the arbitrary distinction between “gender stereotyping” and “sexual orientation” for purposes of Title VII. As reasoned by the District Court, “the facts involving

discrimination based on sexual orientation, perceived or otherwise, quite often support claims of gender stereotyping discrimination.” Hence, because sexual orientation is somehow distinct from gender stereotyping, using the former instead of the latter compels dismissal, even though there would be no factual distinction that would support one without supporting the other.

Judge McHugh Jr. then asks the obvious question: is there any meaningful difference between the two? He answers that “[a]ny assumption about another person’s sexuality, correct or not, necessarily seems to rely on assumptions or stereotypes about how members of that person’s gender typically conduct themselves. . . . Thus, gender stereotypes appear to lie at the heart of sexual orientation discrimination cases.” To expand on this, the very basic attraction to someone of the same sex inherently places someone outside of gender stereotypes. Societal gender norms require that women be attracted to men and men be attracted to women. Any person who deviates must therefore act outside of what is expected of their gender’s stereotype/expectation.

As an aside, there are many who would argue that society’s acceptance of gays and lesbians renders this moot. But consider for a moment how pervasive heteronormativity is in our culture – that we have gender reveal parties; that we joke with parents (mostly dads) about confronting what will happen when his daughter starts dating (the assumption being that she needs protection from boys); that mothers are still expected to perform most domestic chores while maintaining full-time jobs; or that a traditionally masculine male wearing a wedding band is assumed to be married to a woman. One simply cannot, without irony, argue in good faith that the very act of a male being attracted to another male does not mean he is outside of gender stereotypes.

Turning back to the case, and agreeing with the foregoing, Judge McHugh states, “I am at a loss to conceive of a sexual orientation discrimination claim that could occur in so much of a vacuum as to be free of any gender stereotyping.”

Simply, it requires a certain amount of mental gymnastics to divorce sexual orientation discrimination from gender stereotyping discrimination.

Notwithstanding, and frustratingly, the District Court concludes that because of the 3rd Circuit’s binding precedent in *Bibby*, it must dismiss plaintiff’s claims because he alleged discrimination because of perceived sexual orientation. But it does so without prejudice, essentially allowing plaintiff to amend his pleading by changing “sexual orientation” to “gender stereotyping.” Because, as the court stated, the facts to support either are essentially the same. While this illustrates an instance where the arbitrary line drawn by the Circuit Courts merely wastes judicial resources, there are two important lessons to be learned: (1) attorneys need to pay more attention to how they word their client’s pleadings; and (2) a Supreme Court holding that Title VII does not prohibit discrimination because of sexual orientation might not foreclose future claims provided that they are labeled gender stereotyping.

Judge McHugh concludes, “It will soon be two decades since the 3rd Circuit decided *Bibby*. Social and scientific understanding of sexual orientation has evolved and the law with it. In one of the cases in which the Housing Authority relies heavily, Judge Dubois concluded that *Bibby* compelled him to dismiss the plaintiff’s claim, but he did so ‘with the recognition that “the nature of injustice is that we may not always see it in our own times.”’ *Coleman v. Caritas*, 2017 WL 2423794, at *5 (E.D. Pa. June 2, 2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)). Although *Bibby* similarly compels me to dismiss Plaintiff’s claims of sexual orientation discrimination, I question whether forcing litigants to plead essentially the same case under different labels is mere artifice.”

Guess is represented by Justin F. Robinette of Philadelphia. ■

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

Judge Allows Masterpiece Baker's Discrimination Case against Colorado to Proceed but Against Fewer Defendants

By Matthew Goodwin

On January 4, 2019, Senior Judge U.S. District Judge Wiley Y. Daniel (D. Colo.) denied in part defendant's motion to dismiss a lawsuit brought by Jack Phillips (Phillips), the baker at the center of the recent U.S. Supreme Court decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct 1719 (2018) (*Masterpiece I*), raising the same issues at the center of the group in a new dispute arising from Phillips' refusal of an order to bake a custom cake. *Masterpiece Cakeshop Incorporated v. Elenis*, Civ. Action No. 18-cv-02074-WYD-STV (D. Colo.).

Phillips filed suit (hereafter *Masterpiece II*) against the Colorado Civil Rights Commission (Commission), the Colorado Civil Rights Division (Division) and various government officials a short time after his victory in the Supreme Court in *Masterpiece I*. *Masterpiece I* held the Commission acted with hostility toward Phillips' sincere religious beliefs during the process by which Phillips was found to have impermissibly discriminated against a gay couple by refusing in 2012 to bake a custom-made cake to celebrate the couple's wedding.

The story of *Masterpiece II* began on June 26, 2017, the same day the U.S. Supreme Court granted Cert. in *Masterpiece I*. That day, Transgender attorney Autumn Scardina telephoned Phillips' business, Masterpiece Cakeshop, requesting a cake to celebrate her transition from male to female. Scardina requested a blue cake exterior with pink interior and explained to Masterpiece the occasion the cake was meant to celebrate. As in *Masterpiece I*, Masterpiece refused the order citing "religious beliefs"—here, that gender cannot be changed or chosen—but invited Scardina instead to purchase pre-made baked goods if she wished.

Scardina filed a discrimination charge against Phillips and Masterpiece with the Division, alleging Phillips violated Colorado's public accommodation law

(P.A.L.) prohibiting discrimination on the basis of sex and gender identity — similar to the allegation brought by the couple in *Masterpiece I*.

In Colorado, such a complaint is investigated by the Division which, upon finding probable cause for the alleged violation, refers the matter to the Commission for the filing of a formal complaint and the scheduling of a hearing. The Division found probable cause for the violation alleged by Scardina approximately three weeks after the Supreme Court announced its *Masterpiece I* decision in favor of Phillips, without resolving the underlying question whether a business is privileged under the 1st Amendment to refuse to provide a service when doing so was contrary to the religious beliefs of the business's proprietor.

Phillips filed this lawsuit in August 2018 after the probable cause finding, and amended his complaint in late October after the Commission formally charged him with violation of the P.A.L. Phillips' suit named several members of the Commission, the director of the Division, Colorado's then-Attorney General and then-Governor.

Phillips asserted four claims: (1) and (2) that defendants violated his First Amendment right to free exercise of his religion and free speech by their interpretation and enforcement of Colorado's public accommodation law; (3) facially and as applied to him, Colorado's P.A.L. violates his Fourteenth Amendment right to due process, and the Commission and the statute constituting it violates his due process rights by "vesting the Commission with significant prosecutorial discretion[;]" (4) defendants' interpretation of the P.A.L. runs afoul of the Fourteenth Amendment right to equal protection because defendants treated Phillips' "decisions to create speech and their religious exercise differently from those similarly situated to him" and because the Commission by statute must be

composed of members chosen through "non-neutral selection criteria."

The defendants individually and collectively moved to dismiss Phillips' complaint under Fed. R. Civ. P. 12(b)(1), i.e. arguing that the court lacked subject matter jurisdiction over Phillips' claims, which are an attempt to provoke federal judicial interference with a pending state administrative proceeding. Much of Judge Daniel's opinion focused on defendants' argument that the court should abstain from exercising jurisdiction, based on any one of four different abstention doctrines handed down from the Supreme Court.

Initially the court declared that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), would apply unless a recognized exception was present. *Younger* held: "[e]ven when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain where a federal-court judgment on the claim would interfere with an ongoing state proceeding impacting important state interests." While *Younger* abstention "remains an extraordinary and narrow exception" on which a federal court may decline to hear a case, the court acknowledged its three-prong test was satisfied here. The court went on to recognize that Phillips had a "heavy burden" to avoid *Younger*. Nevertheless, the court did not abstain on this or any of the other proffered doctrines. As to *Younger*, the court held that Phillips had demonstrated extraordinary circumstances to avoid the doctrine, namely, his allegation of "bad faith" on the part of defendants in bringing the discrimination claim against Phillips.

Judge Daniel wrote: "[c]onsistent with *Masterpiece I*, Phillips alleges Director Elenis and the Defendant Commissioners acted in bad faith and with 'animus toward Phillips' religious beliefs because they 'disregarded Colorado's practice of allowing other cake artists to decline requests to create

custom cakes that express messages they deem objectionable and would not express for anyone.’[...] Specifically, Phillips alleges that the Division and the Commission excused [three other bakeries] from baking cakes with messages the bakers deemed offensive, while, in this case, Phillips was not provided with that same excuse, even though the Division and the Commission recognized Phillips declined to create the blue and pink cake because of his religious objection to the cake’s message.”

The “three other bakeries” were Colorado cake shops that refused to make baked goods bearing anti-gay marriage messages requested by a man named William Jack in 2013. Mr. Jack filed his own complaint with the Division alleging the refusal of the three bakeries to make his cakes ran afoul of Colorado’s P.A.L. In of Mr. Jack’s cases, the Division found no probable cause for his discrimination complaints, in part because the “three other bakeries” would not create cakes bearing Mr. Jack’s messages for *any* other customer but would create cakes expressing different messages for people of faith.

On this distinction the defendants argued that Phillips failed to allege disparate treatment sufficient to invoke *Younger’s* bad faith exception. The defendants noted that Phillips never refused categorically to make a blue and pink cake for anyone, just that he would not make it for anyone celebrating their gender transition.

The court disagreed, citing Justice Neil Gorsuch’s concurring opinion in *Masterpiece I*: “...the suggestion ‘that this case is only about ‘wedding cakes’—and not a wedding cake celebrating a same-sex wedding—actually points up the problem”. From the court’s perspective then, the defendants “define[d] the type of cake [Scardina] requested too generally.”

The defendants also argued that *Younger’s* bad faith exception could not save Phillips because his allegation that *Masterpiece II* was retaliation against him for his victory in *Masterpiece I* was conclusory. The court recognized the Division and the Commission assumed

jurisdiction over Scardina’s claims well before the Supreme Court handed down its opinion in *Masterpiece I*. Nevertheless, wrote the court, “Phillips is not alleging the Division investigated him in bad faith...[r]ather he is alleging the Division and the Commission acted in bad faith when they exercised to formalize the discrimination charge [against him in 2018 after *Masterpiece I*].

The court ruled the other abstention doctrines similarly failed, noting the narrow circumstances in which they could be relied upon, especially in cases where First Amendment violations were alleged.

The Court did dismiss certain defendants. Division and Commission officials were named defendants both in their official capacities and as individuals. The court dismissed the defendants in their individual capacities, because they were acting as prosecutors and adjudicators who enjoy immunity from such personal liability for their official acts. Governor John Hickenlooper was dismissed as a defendant because he did not have an active role in enforcing the P.A.L., that being the job of the Commission and the Division, but the Attorney General remains in the case. Ironically, the dismissal of Gov. Hickenlooper came just days before the end of his term, to be followed by the nation’s first out gay man to be elected governor of a state: Jared Polis. ■

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



Federal Court Rejects Application of New York Sex Offender Registration Act to Defendant Who Did Not Commit a Sex Crime

By Arthur S. Leonard

U.S. District Judge Alison J. Nathan granted a preliminary injunction to Equan Yunus, Sr., who was seeking to escape the requirement that he register as a sex offender under New York’s Sex Offender Registration Act (SORA), because he pled guilty to a crime – kidnapping of an unrelated minor under the age of 17 – that automatically rendered him a sex offender under SORA, subjecting him to parole conditions designed to “control the threat posed by sex offenders.” Judge Nathan approved a recommendation by Magistrate Judge Moses to grant a preliminary injunction on Yunus’s claim that SORA, as applied to him, violates his substantive due process rights under the 14th Amendment. Denying the state’s motion to dismiss the due process claim, Judge Nathan also followed the Magistrate Judge’s recommendations to dismiss his procedural due process claim, and to dispose of several other claims. *Yunus v. Lewis-Robinson*, 2019 WL 168544, 2019 U.S. Dist. LEXIS 5654 (S.D.N.Y., Jan. 11, 2019). (Judge Moses’s Report & Recommendation can be found at 2018 U.S. Dist. LEXIS 110392.)

After he entered his guilty plea, Yunus appeared at a “SORA hearing” to determine what classification level would be set, which would affect the conditions to which he would be subject. The presiding judge found that “there was virtually no likelihood that [Yunus] would ever commit a sex crime” so he was designated level 1, the lowest level of risk to commit a sex crime and still be considered a sex offender. However, under SORA, the requirement that he register as a sex offender was automatic for the crime to which he pled guilty even though he had not committed any sexual

offense. Chafing under the conditions imposed by his parole officers, he began this federal case contesting the registration requirement *pro se*, but then obtained *pro bono* counsel, who filed a motion for preliminary injunction and a second amended complaint, expanding the grounds under which he was challenging the registration requirement as applied to him and seeking relief for the restrictions under which he was living. His motion, and motions filed by defendants, were referred to Magistrate Moses for a Report and Recommendation.

Before getting to the substance of the ruling, Judge Nathan approved Judge Moses' conclusion that the court had appropriate jurisdiction over this case, although the individual named defendants were found to enjoy qualified immunity from Yunus's damage claims. Significantly, the judge approved the magistrate's conclusion that this lawsuit is not barred under the *Rooker-Feldman* doctrine, which prevents defendants who have lost on an issue in state court from inviting a federal district court to review and reject the state court judgment on its merits. In this case, Yunus was not claiming that he was injured by the state court's judgment, but rather that his injury was imposed by the statute, which made his designation and registration requirement automatic, not requiring the state court judge to make a judgment as to whether he would be deemed a sex offender required to register and comply with the restrictions of the statute.

Judge Nathan accepted the magistrate's recommendation to grant the defendants' motion to dismiss Yunus's procedural due process claim, finding that he had received all the procedural process that the Constitution requires, and that his complaint about the incongruity between the acts to which he pled guilty and the sex offender registration requirement presents only a substantive due process issue.

Judge Nathan concurred with Judge Moses's conclusion that "designating Plaintiff as a sex offender bears no rational relationship to the purposes of SORA." Since SORA was intended to "combat the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit

predatory acts characterized by repetitive and compulsive behavior, and to assist the criminal justice system to identify, investigate, apprehend and prosecute sex offenders," there seemed little reason to apply SORA to Yunus, especially in light of the state trial judge's conclusion that "he never has and near certainly never will commit a sexual offense." Nathan rejected the defendant's argument that Judge Moses erred in finding that Yunus had a substantive liberty interest in not being misclassified as a sex offender and required to register and submit to the restrictions on his life that would come along with registration. She rejected the argument that the legislature "could have rationally concluded that the sex offender label should be applied in a blanket manner to various crimes involving minors, even when a sexual element is not evident, to avoid any dangerous sex offenders 'slipping through the cracks.'" While Nathan conceded there might be some logic to that argument, at least when the defendant had perpetrated a "high risk crime" toward a minor, when "it is ambiguous whether their specific offense was sexual." But Yunus is not bringing a facial challenge to SORA, but rather as as-applied challenge. Thus, "the exceptionally narrow question before the Court for the purposes of these motions is whether there is a rational basis for designating someone a sex offender solely in virtue of an offense that was undisputedly non-sexual. A case involving any suggestion or allegation of sexual misconduct – or even just ambiguity – would present a different question that need not be resolved here."

Judge Nathan concluded that the lack of a sexual element in Yunus's offense "can safely be termed conclusive," in light of the trial judge's findings. Indeed, defendants conceded in this case that "there was no sexual component to Plaintiff's offenses." Thus, the "slipping through the cracks argument is therefore insufficient to provide a rational basis for imposing extensive civil and stigmatizing burdens on Plaintiff." She found support for this conclusion in cases from other jurisdictions: *State v. Robinson*, 873 So.2d 1205 (Fla. 2004); *State v. Reine*, 2003-Ohio-50, cause dismissed, 795 N.E.2d 686. She rejected that argument that it was rational for the legislature to

impose all the burdens of registration on individuals who have committed serious non-sexual offenses, because of the non-sexual risk they might present to minors, because the argument "ignores that both the stated purpose of SORA and the way it is designed are focused on preventing sexual offenses rather than all crimes that are dangerous to minors." Further, she found that the heavy costs imposed on Yunus should be taken into account. "SORA imposes significant civil burdens, as Plaintiff's case well illustrates," she wrote. "His life and liberty have been drastically limited in many ways, from where he can live to what speech he can engage in. SORA has also branded Plaintiff with one of the most stigmatizing labels that exists in our society, in this case doing so without a factual basis. . . . These significant harms to Plaintiff and the risk that labeling him as a sex offender actually undercuts public safety further support the conclusion that SORA as applied to Plaintiff lacks a rational basis."

The rest of the opinion goes step by step through Yunus's due process and first amendment challenges to specific restrictions imposed by his parole officers pursuant to the sex registration scheme, granting defendants' motions to dismiss as to some, denying as to others, but this essentially relates to liability for the period prior to the issuance of the preliminary injunction, which extends over several years during which he was subjected to the restrictions imposed under SORA. Some relate to damage claims against individual named defendants, as to whom qualified immunity applies. Going forward from the grant of the preliminary injunction, Yunus will not be subject to the requirements of SORA pending a final merits ruling in the case. Judge Nathan sent the case back to Magistrate Judge Moses for any remaining pretrial motion practice. At this point, it would undoubtedly make sense for the state to settle the case rather than go to trial.

Yunus is represented by David Benjamin Berman, Emery Celli Brinckerhoff & Abady LLP, New York, NY. Judge Nathan, who was appointed by President Barack Obama, is one of several out lesbian or gay judges serving in the federal district courts. ■

Divided Minnesota Appeals Court Upholds Conviction of Man Suckered by Police Decoys on Social Media Twice

By Arthur S. Leonard

This man failed to learn from experience. Having already been caught up in an internet sting operation previously, Brian James Wilkie nonetheless fell for the same kind of law enforcement scam a second time, as recounted in *State of Minnesota v. Wilkie*, 2019 Minn. App. Unpub. LEXIS 88, 2019 WL 333483 (Minn. Ct. App., Jan. 28, 2019).

Wilkie was on Grindr on November 14, 2016. He initiated a conversation with a police decoy who was posing as a man looking for sex, who at Wilkie's request sent Wilkie "a 'selfie' photograph depicting the head and torso of a youthful-looking male in a tank-style t-shirt," according to Judge Louise Bjorkman's opinion for the court. At Wilkie's request the decoy followed up with two close-ups, one of an erect penis and the other of "an anus with cloudy liquid on it." The decoy then messaged, "I'm 14... is that ok?" Wilkie then sent two close-up photos, similar to those the decoy had sent him, and asked the decoy if he was "really 14" and if he "had sex before" and urged him to send more nude photos. The decoy asked Wilkie what he wanted to do the next day, and Wilkie answered "F—k" and "Sex." The decoy answered "Really!," and Wilkie responded, "Yes Do u." A few more back and forth similar messages culminated in the decoy giving Wilkie a cell number. Wilkie repeatedly expressed concern about getting caught, wrote Judge Bjorkman, mentioning in a footnote that "just three days earlier he had pled guilty to a felony prostitution offense based on his December 2015 agreement to pay \$150 to have sex with a 17-year-old-male" whom he had arranged to meet online." (emphasis supplied). In fact, Wilkie messaged the decoy, "Can I believe you that you are not going to get me in a trap" and "If we meet its no going to be a trap Right bro." He also messaged that he did not want to get the decoy in trouble and that he hated cops. The conversation resumed on Grindr the next day and they had a

live cellphone conversation confirming where they would meet. Of course when Wilkie knocked on the door at the agreed address, a police officer opened it and arrested him.

Wilkie waived a jury and was convicted by the court of attempted third-degree criminal sexual conduct, solicitation of a child through electronic communication to engaged in sexual conduct, and distribution of material that describes sexual conduct to a child via electronic communication. He was sentenced to 35 months on the third-degree criminal-sexual-conduct charge.

On appeal, Wilkie contended that the facts did not support conviction of the crime of criminal sexual conduct. The court said the issue under case law construing the statute was whether the defendant's conduct "constitutes a substantial step toward commission of a crime," and found that test met here. "Wilkie concedes that the evidence is sufficient to prove that he intended to commit third-degree criminal sexual conduct," wrote Judge Bjorkman, "But he asserts that 'none of my acts, alone, constituted a substantial step and all of the acts taken together amount to nothing more than mere preparation.'" A majority of the three judge panel was not convinced by his attempt to distinguish cases where there was some physical contact or conversation in person or an attack. "We acknowledge that the cases upon which Wilkie relies involve physical contact," wrote Bjorkman, "words delivered in person, or an attack. But we are not convinced that these factual distinctions preclude a determination that Wilkie took a substantial step toward achieving his intended goal – sexual penetration of a juvenile. The advent of social media has abbreviated or eliminated some of the courtship rituals in our society, including how people initiate sexual relationships and arrange for sexual encounters. Actions that historically demonstrated a substantial step toward commission of a sex crime, such as

preliminary physical contact, may no longer apply when social media is used to initiate the sexual encounter. But we are persuaded that other actions by a perpetrator in furtherance of a sexual offense may establish that a substantial step was taken. Such is the case here."

Chief Judge Edward J. Cleary dissented. He quoted a Minnesota statute, Sec. 609(17), subd. 1, stating that a person attempts to commit a crime when, "with intent to commit a crime, he does an act which is a substantial step toward, and more than preparation for, the commission of the crime." "In explaining that each case depends on its own particular facts and inference, the supreme court has stated 'as a general proposition that to constitute an attempt to commit a crime there must be an intent to commit it, followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be something more than mere preparation' (quoting from *State v. Dumas*, 136 N.W. 311, 314 (Minn. 1912) (emphasis added).

"The appellant conceded," wrote Cleary, "that there is sufficient evidence to prove his intent to commit the offense. The majority concludes that the totality of the appellant's conduct – exchanging messages and explicit photographs via social media, arranging to meet the decoy to engage in a sexual encounter, arriving at the agreed-upon location, and knocking on the front door – constitutes a substantial step toward committing third-degree criminal sexual conduct. I disagree." Cleary agreed with Wilkie that the case law construing this statute always involved more than the conduct of Wilkie in this case. "In the instant case," wrote Cleary, "the appellant's conduct falls short of this standard, and instead, remains in the realm of 'mere preparation.'" Although Cleary agreed that Wilkie's conduct would satisfy the requirement for "illegal solicitation of someone the appellant believed to be a

minor, they amount to preparation for, not an attempt to commit, the act of third-degree criminal sexual conduct, a crime that involves 'sexual penetration.' To hold otherwise is to greatly expand the legal definition of 'attempt' in the context of felonious sexual assault, as expansion the majority concedes when it suggests the 'factual distinctions' found in the relevant caselaw do not 'preclude' a different determination here."

Cleary insisted that "technological changes cannot be allowed to eviscerate constitutional protections in an effort to convict suspected sex offenders without sufficient proof of the elements of the crime charged. In this case, a knock on the front door is insufficient to establish that the appellant took a substantial step toward committing a crime that requires sexual penetration. In holding that his conduct amounts to a substantial step, the majority conflates the appellant's intent to commit the crime – which he has conceded – with his conduct in arriving at the decoy's house and knocking on the front door. In so doing, the majority expands the caselaw and characterizes historically preparatory conduct as an overt act." Clearly would have reversed the conviction on the third-degree count and remanded for sentencing under one the other counts on which Cleary was convicted.

Cathryn Middlebrook and Julie Loftus Nelson, attorneys for the Minnesota Appellate Public Defender's Office, represent Wilkie on the appeal. Perhaps the dissent will inspire them to seek review in the state's supreme court. ■



Alliance Defending Freedom Files Constitution Challenge to NYC Law Banning Conversion Therapy

By Arthur S. Leonard

Alliance Defending Freedom (ADF), the anti-gay Christian legal organization based in Scottsdale, Arizona, filed a lawsuit in U.S. District Court in Brooklyn on January 23, challenging the constitutionality of New York City's Local Law 22 of 2018, which prohibits the practice of conversion therapy in the City. The law was a project of the City Council, which enacted it on November 30, 2017. It was returned to the Council unsigned by Mayor Bill De Blasio within thirty days, and became law without his approval on January 5, 2018. *Schwartz v. City of New York*, Case 1:19-cv-00463 (E.D.N.Y., filed Jan. 23, 2019). The Complaint was filed just two days before Governor Andrew Cuomo signed into law S. 263, a state measure which outlaws some (but not all) of the activity covered by the New York City law.

The measure is probably the most broadly-sweeping legislative measure against conversion therapy to be enacted in the United States. State laws on the subject, including the one enacted in January in New York State, limit their bans to provision of such therapy to minors by licensed health care professionals, and designate the offense as professional misconduct that can subject the practitioner to discipline for unprofessional conduct. The City law, by contrast, applies to "any person" who provides such therapy for a fee to any individual, not just minors. The City law imposes civil penalties beginning with \$1,000 for a first violation, \$5,000 for a second violation, and \$10,000 for each subsequent violation, which can be imposed by the city's Office of Administrative Trials and Hearings. Its enforcement has been assigned to the Department of Consumer Affairs.

For purposes of this law, "conversion therapy" is defined as "any services, offered or provided to consumers for a fee, that seek to change a person's sexual orientation or seek to change a person's

gender identity to conform to the sex of such individual that was recorded at birth." The measure does not contain any express exemption for religious counselors or clergy, but presumably if they do not charge a fee for their services they are not subject to this law. From the definition, it is clear that it is, among other things, a consumer protection measure, the Council having found that claims to achieve a change of sexual orientation or gender identity through "therapy" are bogus, and practitioners are exploiting credulous people.

Legal challenges to the various state laws, of which there are now more than a dozen, have so far been unsuccessful, but it is not clear that the sweeping New York City law will benefit from some of the legal doctrines that states have successfully marshalled to defend their laws. Most importantly, the state laws fall comfortably within the traditional state role of regulating the provision of health care by licensed practitioners, and by being restricted to minors, they rest within the state's traditional function of *parens patriae*, caring for the welfare of minors, which can mean at times defending minors from the well-meaning but harmful actions of their parents, such as refusing blood transfusions or medication for serious illnesses.

ADF is asking the court to issue a declaration that the law is unconstitutional and to issue an injunction against its enforcement by the City. The law does not authorize individuals to file suit against conversion therapy practitioners, but instead leaves enforcement to an administrative process, triggered by complaints to the Consumer Affairs Department.

ADF has found a seemingly sympathetic plaintiff, Dr. David Schwartz, a "counselor and psychotherapist practicing in New York City who has a general practice but who

has regularly had, and currently has, patients who desire counseling that the Counseling Censorship Law prohibits.” The Complaint also describes him as a “licensed clinical social worker” who “resides and practices in Brooklyn.” When this writer first read the Complaint, he was alarmed to think that the New York City Council would title a measure “Counseling Censorship Law,” but upon retrieving a copy of the Local Law 22, saw that the title was an invention of ADF for the purpose of framing its 1st Amendment challenge, as the word “censorship” appears nowhere in the legislation, which does not have an official title.

According to the Complaint, Dr. Schwartz is an Orthodox Jew whose patients come mainly from the Chabad Lubavitch ultra-orthodox community. He avows that he provides counseling and psychotherapy attuned to the needs and desires of that community, and cites the late Lubavitcher Rabbi, Menachem Mendel Schneerson, as an authority supporting the practice of conversion therapy. The description of his practice does not mention child patients, stating: “Dr. Schwartz works only with willing patients – patients who voluntarily walk into his office and talk with him because they want and value his counsel. And Dr. Schwartz does nothing to or with his patients other than listen to them and talk with them.”

Schwartz fears that the City law will be used against him, and the Complaint focuses on the \$10,000 civil penalty like a sword of Damocles hanging over his head. ADF was smart to avoid mentioning minors, since it filed this lawsuit during the time between the state legislature’s approval of its conversion therapy ban and its signing into law on January 25 by Governor Cuomo. If Schwartz practices on minors as a licensed psychologist, he will be violating the state law, possibly setting up another lawsuit by ADF.

ADF has positioned this case primarily as a challenge to government censorship of free speech and free exercise of religion. The Complaint insists that the only therapy Schwartz provides is “talk therapy,” eschewing the bizarre and cruel practices that were

describe in a New Jersey court a few years ago in a case brought by emotionally damaged patients of JONAH, a Jewish conversion therapy organization that was found in that case to be in violation of the New Jersey consumer protection law. ADF has crafted the Schwartz Complaint to distinguish this case from the JONAH case, which involved Jewish parents effectively forcing their teenage children to subject themselves to bizarre “therapeutic” procedures to “change” their sexual orientation.

By contrast, without ever indicating the age range of his patients, the Schwartz Complaint says that he “does not view it as the psychotherapist’s role to rebuke patients or to tell them the direction they ‘ought’ to go.” The Complaint describes a practice in which patients come to Schwartz “with a very wide range of issues. However,” it continues, “his practice regularly includes a few individuals who experience undesired same-sex attractions. In some cases, patients come to Dr. Schwartz seeking his assistance in pursuing their personal goal of reducing their same-sex attractions and developing their sense of sexual attraction to the opposite sex.” Schwartz insists that he “does not attempt to increase opposite-sex attraction or change same-sex attraction in patients who do not desire his assistance in that direction. In working with patients who desire to decrease same-sex attraction or increase their attraction to the opposite sex, Dr. Schwartz never promises that these goals will be achieved.”

The Complaint also insists that “Dr. Schwartz engages in no actions other than talking with the patient, and offering ways of thinking about themselves and others that may help them make progress towards the change they desire. Dr. Schwartz does not use electro-shock therapy, he does not recommend that patients view heterosexual pornography or that they subject themselves to painful or other adverse stimulations in response to undesired sexual thoughts. Dr. Schwartz simply listens to what his patients share with him, and talks to them.” The Complaint concedes that some patients do not achieve the goal, and “some have

chosen to stop pursuing it,” but claims that Schwartz has had success with an unspecified number of patients who have “over time” experienced “changes” that “have enabled Dr. Schwartz’s patients to enter into heterosexual marriage that they desired.”

The Complaint recites the traditional arguments put forward by conversion therapy proponents, about how patients who are “strongly motivated to change” can achieve their goal. Interestingly, the Complaint refers repeatedly to “reducing” same-sex attraction without ever asserting that Schwartz claims to have “eliminated” such attraction in his patients. And, of course, proponents shy away from any sort of formal documentation, insisting that patient confidentiality precludes providing concrete examples. It also cites no published scientific authorities supporting the efficacy of talk therapy in changing sexual orientation.

Several paragraphs are devoted to statements attributed to Rabbi Schneerson relating to this subject, without any citation of published sources.

ADF’s legal theory here is that the city’s “Counseling Censorship Law” is a content-based regulation of speech that is “aiming to suppress the dissemination of ideas and information about human sexuality and the human capacity for change in this area” and “does not adopt the least restrictive means to pursue a compelling government interest,” arguing that the government “has no cognizable interest at all – let alone a compelling interest – in preventing citizens from hearing ideas that those citizens wish to hear in a counseling relationship.” The Complaint argues that the law both prohibits and compels speech, in the sense that it “effectively requires Dr. Schwartz to tell the patient that no change is possible, which Dr. Schwartz does not believe to be true.”

The Complaint also claims that the law is “unduly vague” in violation of the Due Process Clause, picking apart various phrases and terms and suggesting that their ambiguity make it difficult for a practitioner to know what he can or cannot say to a patient. The Complaint also argues that the law violates the 1st

Amendment rights of patients who want to receive talk therapy to change their sexual orientation. And, of course, it focuses at the end on the Free Exercise Clause, arguing that Schwartz “has a right to use his professional skills to assist patients to live in accordance with their shared religious faith, including the religious mandates of the Torah and the teachings of the Lubavitcher Rebbe and other respected Orthodox Jewish authorities based on the Torah. The Counseling Censorship Law purports to be justified, in its legislative history, by a supposed finding that ‘changing’ sexual orientation is impossible. The Lubavitcher Rebbe, whose teachings inform the core of Dr. Schwartz’s religious convictions, taught exactly the opposite.”

The Complaint argues that because the Council enacted the law knowing that “it was hostile to and targeting practices particularly associated with persons and communities adhering to traditional religious beliefs,” it is “not a neutral law of general applicability,” even though it nowhere mentions religion. This is an attempt to establish that Schwartz’s 1st Amendment claim is not governed by the U.S. Supreme Court’s holding, in *Employment Division v. Smith*, that individuals do not have a right based on their religious beliefs to be exempted from “neutral” laws of “general applicability.”

Interestingly, all the attorneys listed on the Complaint are staff attorneys of ADF based in Scottsdale, Arizona. No member of the New York bar is listed, although a footnote indicates that one of the attorneys, Jeana J. Hallock, will be applying for *pro hac vice* admission to the bar in the U.S. District Court for the Eastern District of New York. The lead attorney signing the Complaint is Roger G. Brooks. The defendants are The City of New York and Lorelei Salas, the Commissioner of Consumer Affairs, whose department has issued regulations on enforcement of the law, and who is sued only in her official capacity. The New York City Law Department will defend the City and Commissioner Salas in this case, which is likely to attract amicus briefs on both sides. ■

Federal Magistrate Recommends Limited Preliminary Injunction Against Enforcement of Tampa Conversion Therapy Ban

By Arthur S. Leonard

On January 30, U.S. Magistrate Judge Amanda Arnold Sansone (M.D. Fla., Tampa Div.), issued a Report and Recommendation to the U.S. District Court, recommending that the court issue a limited preliminary injunction barring the City of Tampa, Florida, from enforcing its Ordinance banning licensed health care professionals from performing conversion therapy on minors. The Ordinance forbids all kinds of therapy for the purpose of attempting to change a person’s sexual orientation or to reduce or eliminate same-sex attraction. Judge Sansone concluded, relying on the 1st Amendment’s free speech provision, that the plaintiffs were likely to prevail regarding the type of therapy they claim to provide: non-coercive, consensual “talk therapy,” eschewing electro-shock or other aversion therapy methods, and that failure to enjoin the Ordinance would cause irreparable injury to the plaintiffs by restraining their freedom of speech. *Vazzo v. City of Tampa*, Case No. 8:17-cv-2896-T-02AAS. Plaintiffs are represented by Liberty Counsel, a right-wing Christian advocacy law firm.

In addition to Robert L. Vazzo, a Florida-licensed marriage and family therapist, plaintiffs include David Pickup, who holds a similar license from California, where his practice of conversion therapy has been prohibited by state law. Pickup alleges that he is seeking Florida licensure. Also suing is New Hearts Outreach Tampa Bay, a Christian organization that refers people to licensed therapists for conversion therapy. Equality Florida, a state-wide LGBT rights advocacy group, sought to intervene in defense of the Ordinance, but its attempt was rejected by Judge Sanson and District

Judge Charlene Edwards Honeywell, so it is participating only in an amicus capacity. Of course, the City of Tampa’s legal representative is defending the Ordinance. As a preliminary matter, Judge Sansone concluded that plaintiffs were unlikely to succeed on their claim that the Tampa City Council lacked subject matter jurisdiction to pass the law. She found that the legislature’s regulation of mental health services does not expressly preempt the field, and that implied preemption is disfavored.

Judge Sansone’s recommendation for injunctive relief flies in the face of rulings by the U.S. Courts of Appeals for the 3rd Circuit and the 9th Circuit, which rejected 1st Amendment challenges to similar state laws. In *Pickup v. Brown*, 740 F.3d 1208 (2014), the 9th Circuit rejected Dr. Pickup’s 1st Amendment attack on California’s conversion therapy ban, finding that the statute was primarily a regulation of conduct by health care providers, which only incidentally affected professional speech. Subjecting the statute to rational basis review, the court found the state’s interest in protecting minors from harmful effects of conversion therapy that were documented in the legislative process by studies and reports and professional opinions were sufficient to meet the rational basis test. In *King v. Governor of New Jersey*, 767 F.3d 216 (2014), the 3rd Circuit differed from the 9th Circuit and decided the state was a content-based regulation of speech, but that it was “professional speech” in the context of a pervasively regulated profession – health care – and was thus subject only to heightened scrutiny, not strict scrutiny. The 3rd Circuit found that New Jersey had a substantial interest in protecting its citizens from harmful professional practices, relying

on the same kind of evidence that was considered in the California case. Thus, in both cases, the 1st Amendment challenges were unsuccessful because the courts found sufficient justification for the legislature's action. Both cases were denied review by the U.S. Supreme Court.

While acknowledging these 2014 rulings in other circuits, Judge Sansone put greater weight on two more recent cases. In *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (2017), the 11th Circuit, with binding appellate authority on a Florida District Court, found that Florida's law prohibiting doctors from asking their patients whether they had firearms in their homes was a content-based regulation of speech that failed heightened scrutiny. As described by Judge Sansone, "the challenged provision failed to address concerns identified by the six anecdotes the legislature relied on when passing the law." However, the more weighty recent precedent is *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018), in which the U.S. Supreme Court ruled that a California law that requires "pregnancy centers" to inform their patients that free or low-cost abortions are available from the state government was unconstitutional as a form of compelled speech. California sought to defend its law using the same sort of argument that prevailed in the *Pickup* case: that the statute was a regulation of health care practice, only incidentally affecting professional speech, but this argument did not save the statute.

Wrote Judge Sansone: "*NIFLA* expressly rejected the analyses in *Pickup* and *King* recognizing 'professional speech' as a separate category of speech subject to differing constitutional analysis. Instead, professional speech is usually given less protection if it is commercial speech or if a law regulates professional conduct that incidentally involves speech. Although stating traditional strict scrutiny analysis applies to a content-based law that regulates neither commercial speech nor conduct that incidentally involves

speech, *NIFLA* applied intermediate scrutiny to the California law requiring pregnancy centers to post notices." The Supreme Court had stated that it was not necessary to determine whether strict scrutiny should be applied because, in its view, the law did not even survive intermediate scrutiny.

Taking these cases together, Judge Sansone concluded that the Tampa Ordinance is, at least as applied to "talk therapy" as described by the plaintiffs, a content-based regulation of speech that should be subject to strict scrutiny. She noted in support of this conclusion that the Tampa Ordinance itself refers to the counseling at which it is aimed as "professional speech" in a findings provision explaining that it would be "subject to a lower level of judicial scrutiny." Judge Sansone's assertion that this is thus a strict scrutiny case appears to go beyond the authorities upon which she claims to rely, since neither of them applied strict scrutiny or held it was appropriate in a comparable context.

However, proceeding to apply strict scrutiny, she found the plaintiffs were likely to succeed on the merits, at least as to talk therapy that is non-coercive and consensual, even though she found that the Ordinance serves a compelling governmental interest in protecting the physical and psychological well-being of minors. This is because in a strict scrutiny case, the content-based law has to be "narrowly tailored to serve a compelling government interest." She continued, "The court will not assume plausible alternatives will fail to protect a compelling interest," and found nothing in the legislative record to suggest that this law was enacted as "the least restrictive means" to achieve the government's purpose. "If a less restrictive means would serve the compelling governmental interest," she wrote, "the government must use that alternative." She found plaintiffs were likely to prevail on their argument that an across-the-board ban of all kinds of SOCE techniques was unduly broad, giving credence to their suggestion that the City could accomplish its goal by

banning aversion therapy techniques while allowing talk therapy, and by requiring informed consent from minors and their parents. Without explaining why, Judge Sansone appeared to accept the plaintiffs' argument that "talk therapy" seeking to change sexual orientation is not harmful to minors, a point that the defendant and amici will sharply contest in a trial of the merits of this case. Also contestable is the contention that there is meaningful consent by minors whose perhaps parents persuade or compel them to submit to conversion therapy.

She also found that plaintiffs were likely to prevail on their claim that the ordinance is a form of viewpoint discrimination and is overbroad. Once again, she appears to buy into the plaintiffs' contentions that "talk therapy" is not a waste of the patient's time or potentially harmful. (This despite a ruling she does not discuss, the *JONAH* case, in which a New Jersey trial court found that SOCE practitioners' representations of being able to change people's sexual orientation is a form of fraud in violation of the state's consumer protection law.) She also considered the ordinance to be potentially a prior restraint of protected speech and unconstitutionally vague.

As to the other grounds for preliminary injunctive relief, she found that any restraint on protected speech causes irreparable harm to the persons whose speech is suppressed, and that the equities in this case tipped in favor of the plaintiffs because the harm to them outweighs any harm to the City. "The City, however, failed to show any harm it may suffer if enforcement of Ordinance 2017-47 is enjoined," she wrote. "The City and Equality Florida instead focus on potential harm to non-defendants, especially minors, if the Ordinance is enjoined." But this overlooks the traditional role of government as a protector of the health and welfare of minors under the *parens patriae* doctrine; the Ordinance was adopted in pursuit of that function, based on evidence offered in the legislative process that conversion

therapy is not merely fraudulent but also harmful to minors. The court exclaimed that it is not in the public interest to enforce an unconstitutional statute, but there has been on finding on the merits after trial that this statute is unconstitutional, and there surely is a public interest in protecting minors from harm.

Reciting the doctrine that injunctions should be “no broader than necessary to avoid the harm on which the injunction is based,” Judge Sansone recommended that the injunction be narrowly focused on protecting the practice of “non-coercive talk therapy,” and allow to be enforced against therapy that is coercive or goes beyond talk. As she phrased it, “The plaintiffs’ motion for preliminary injunction should be granted to the extent that the City should be enjoined from enforcing Ordinance 2017-47 against mental health professionals who provide non-coercive, non-aversive SOCE counseling – which consists entirely of speech, or ‘talk therapy’ – to minors within city limits.” The City will have an opportunity to contest this recommendation when it is presented to the district judge. ■



Federal Judge Refuses to Dismiss Civil Rights Claim by Gay Inmate Who was “Outed” for Receiving LGBTQ Publication and Suffered Retaliation When He Complained

William J. Rold

Gay inmate Corey Bracey, *pro se*, has been the plaintiff in numerous *Law Notes* reports in the past. See summary of previous four articles in *Bracey v. Park*, 2018 U.S. Dist. LEXIS 160093 (M.D. Pa., September 19, 2018), published in October 2018, page 557. Those cases (all related) concerned involuntary taking of blood to test for HIV. This one is something different.

Here, Bracey, brings multiple federal civil rights allegations after an issue of “Black & Pink” (a newsletter supporting LGBTQ prisoners) was deliberately diverted by an officer (Choi), to an inmate with whom Bracey was having trouble, in order to “out” Bracey and cause him difficulty in the Diversionary Treatment Unit [DTU] – a special housing pod for inmates with serious mental health needs. Other inmates began harassing Bracey, saying, among other things: “Look, Bracey gets a fag mag.” Officers joined in the harassment.

Bracey filed a complaint under the Prison Rape Elimination Act [PREA]. Another inmate (Gilchrist) submitted a supporting affidavit. The PREA complaint caused officers Baratta and Andrews (who were assigned to DTU with Choi) to harass both Bracey and Gilchrist and to label Bracey a snitch for filing PREA complaints, using prison slang “Master Splinter” (taken from the “rat” in the cartoon strip *Teenage Mutant Ninja Turtles*). Bracey became increasingly despondent, telling the DTU sergeant (Myers) that he was suicidal. He requested transfer to the “psychiatric unit,” whereupon Baratta told him: “Go ahead and kill yourself, faggot.” Bracey attempted suicide by hanging, but he was cut down before completing the act. He was then moved to the psychiatric unit. While Bracey was in the psychiatric unit, Andrews

assaulted a handcuffed Gilchrist, as another officer said the violence was for “riding with Bracey about that fag mag.” Gilchrist suffered a dislocated shoulder, and he later declined to participate in this action.

In *Bracey v. Link*, 2019 U.S. Dist. LEXIS 8076 (E.D. Pa., January 16, 2019), U.S. District Judge Nitza I. Quiñones Alejandro granted a motion to dismiss in part, but she declined to dismiss several of the claims. This report addresses first those claims that will proceed.

Judge Alejandro found that the pleadings stated a claim against Baratta and Myers for deliberate indifference to the risk that Bracey would self-harm. See *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir. 1991) (applying *Farmer v. Brennan*, 511 U.S. 825, 843 (1994), to risk of suicide). Here, evidence was sufficient to plead that Bracey was at high risk of attempted suicide, that the officer and sergeant knew it, and that they ignored it – one even egging it on. As to Baratta, the pleadings also established that he was deliberately indifferent to Bracey’s safety at the hands of other inmates, by labelling him a “snitch.” Judge Alejandro wrote: “District courts in the Third Circuit have found that the mere act of labeling a prisoner a snitch constitutes a substantial risk of harm,” quoting *Williams v. Thomas*, 2013 U.S. Dist. LEXIS 60430, 2013 WL 1795578, at *6 (E.D. Pa. Apr. 29, 2013) (collecting cases). “In this Court’s opinion, the same risk exists for labeling someone a rat.”

With respect to First Amendment retaliation against Baratta and Andrews, it is a split decision. Judge Alejandro finds sufficient evidence that filing a PREA complaint was protected activity under *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003). She also found that

the defendants' actions were temporally related to such activity. Only the case against Baratta will go forward, however. He took action directly against Bracey, while (according to Judge Alejandro) Andrews' action was against Gilchrist.

Although the rest of her opinion is carefully supported by case law, Judge Alejandro states here without authority that retaliation that takes the form of harassing a plaintiff's witnesses does not constitute retaliation because it was not taken because of the *plaintiff's* speech (emphasis by the court). She writes: "This Court finds that the loss of a third party's participation in future litigation does not constitute an 'adverse action' for the purposes of a retaliation claim." This seems wrong, and this writer is not surprised that Judge Alejandro could not find a case to support it. It is a fundamental principle of whistleblower law that the defendant cannot retaliate by going after the whistleblowers' witnesses. Moreover, although it would not be expected that a *pro se* inmate would know this, 42 U.S.C. § 1985(2) specifically prohibits attempts to impede federal witnesses. No racial animus is required. *Kush v. Rutledge*, 460 U.S. 719, 723 (1983); *cf. Malley-Duff Asso. v. Crown Life*, 792 F.2d 341, 355 (3d Cir. 1986) (section 1985(2) includes attempts to intimidate witnesses' "willingness or ability to provide discovery"). *See also*, discussion of access to court claim, below.

Regarding Choi's diversion of the issue of "Black & Pink" (which started everything), Judge Alejandro found that this "single" incident of interfering with Bracey's mail did not rise to a constitutional violation. She also found that Choi did not interfere with Bracey's associational rights under the First Amendment because: (1) Bracey's right here was not a fundamental or intimate one; and (2) he failed to plead that his "expressive association" with the LGBTQ group had been impaired, citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Nevertheless, Judge Alejandro found that Bracey was retaliated against for his association with LGBTQ groups by the harassment from defendant Choi, because he purposely

used the publication to "out" Bracey, citing *Allah v. Seiverling*, 229 F.3d 220, 224-25 (3d Cir. 2000); and *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (*en banc*).

Judge Alejandro dismisses claims against all supervisors (from the warden through the PREA coordinator and the director of the DTU). She finds that they were not personally involved in the deliberate indifference or retaliation. Moreover, she finds conclusory the allegations that they had inadequate training and supervision policies and that Bracey's injuries were the result of such failures.

Finally, regarding the allegation that Bracey was denied access to court by the alleged intimidation of Gilchrist, Judge Alejandro finds that Bracey was not "chilled" because he is still in court. He has not alleged that he lost a claim because of the actions taken against Gilchrist. He therefore has not shown "actual injury," required by *Christopher v. Harbury*, 536 U.S. 403, 415 (2002); and *Bounds v. Smith*, 430 U.S. 817 (1977). Since Bracey's rights were not violated by the actions against Gilchrist, Bracey has lost no claim.

In this writer's view, the error made in the analysis of the intimidation of Gilchrist from being Bracey's witness is repeated here. Judge Alejandro writes, myopically: "Should Gilchrist wish to participate, there is no reason why he would not be able to do so." [Provided, of course, that he is willing to undergo dislocation of his other shoulder. . .] One can wonder if the result would be the same if the issue had been cover-up or destruction of evidence – which the Supreme Court said raised access to court issues in *Christopher*, 536 U.S. 411 – rather than witness intimidation. To rule that beating up a civil rights plaintiff's witnesses is not actionable as a matter of law seems beyond proper use of F.R.C.P. 12(b)(6); discovery should have been allowed. ■

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New Governors Issue Executive Orders Banning Sexual Orientation and Gender Identity Discrimination in State Employment

By Arthur S. Leonard

As new governors took office in several states in January, new executive orders banning discrimination because of sexual orientation or gender identity began to issue from executive chambers.

On January 7, Governor Gretchen Whitmer of Michigan and Governor Tony Evers of Wisconsin, both Democrats taking over state houses from Republican predecessors, issued such orders among their first actions after taking office. Whitmer's is Executive Directive 2019-09. Evers' is Executive Order No. 1. Both cover the employment practices of government contractors as well as state agencies and departments. Neither Evers' nor Whitmer's Order expressly exempt religious organizations that contract with the state to provide services to the public. In an interesting twist, Governor Whitmer, following the lead of the Michigan Civil Rights Commission, which last year issued a formal determination that the state's statutory ban on sex discrimination applied to discrimination because of sexual orientation or gender identity, did not include sexual orientation or gender identity in the list of prohibited grounds for discrimination, but instead, in the Definitions section of the Directive, stated that Sex "includes sexual orientation and gender identity or expression."

On January 14, to the surprise of many, Mike DeWine, Ohio's new Republican governor, issued Executive Order 2019-05D, which preserved the protections adopted by his Republican predecessor, John Kasich. Kasich

had included sexual orientation in the executive order issued earlier in his administration, and added gender identity in December 2018. The Ohio order, however, does not mention government contractors.

On January 15, Kansas Governor Laura Kelly, a Democrat, restored the ban on sexual orientation discrimination that had been withdrawn by her two Republican predecessors, and expanded it to include gender identity and to extend to the employment practices of government contractors. Executive Order No. 19-02 does not mention any exemption for religious organizations that are state contractors.

However, newly-elected Florida Governor Ron DeSantis issued Executive Order No. 19-10, titled “Reaffirming Commitment to Diversity in Government,” but omitted sexual orientation or gender identity from the forbidden grounds of discrimination by the state, as had his predecessor, Rick Scott. ■

Washington Appeals Court Affirms Termination of Gay Biological Father’s Parental Rights

*By Toria Isquith and
Brett Figlewski*

On January 22, the Washington State Court of Appeals issued a decision in the case of *In re Dependency of G.M.*, 2019 Wash. App. LEXIS 159, 2019 WL 296188 (Wash. Ct. App. Div. 1). A lower court decision had terminated the parental rights of the biological father, a gay man with a same-sex partner, referred to at times in the opinion as his spouse. Judge Lori Smith authored the Court of Appeals’ unanimous decision affirming the lower court’s ruling.

Judge Smith’s opinion explained that despite efforts by state social service, medical, and mental health specialists, D.M. remained “unfit to parent his children.” The children in question—triplets — were born prematurely with severe birth defects related to their biological mother’s use of cocaine and methadone during pregnancy. Her parental rights had been terminated prior to the action in the lower court.

The children’s birth defects are severe and life threatening. Among other conditions, all three were born with severe respiratory problems, developmental and cognitive issues, gastrointestinal and feeding issues, and eye issues. All were diagnosed with asthma and require constant supervision in addition to the administration of different and complicated medications requiring training from a medical professional. The court found that D.M. was unable adequately to care for the myriad needs of his children and unable properly to administer the emergency respiratory medications despite one-on-one instruction, parenting classes, mental health evaluations, and supervised visitations with state social workers.

In his appeal, D.M. claimed that the State failed to provide all the available forms of parental assistance he required and failed to prove that he was unfit. D.M. argued that, as a Hispanic and as a gay man, providers had discriminated against him and his partner for their sexual orientation, culture, ethnicity, and marital status.

LGBT parents have long faced obstacles and discrimination which their heterosexual counterparts do not. Prior to the Supreme Court’s decision in *Obergefell v. Hodges*, it was commonplace for judges – notably Antonin Scalia – to base opposition to marriage equality and LGBT rights more broadly on supposed “consequences” for children raised by same-sex couples.

In his appeal, D.M. argued that Washington State was acting based on a legacy of anti-LGBT intervention in citizens’ private lives. The court found this argument unpersuasive in

this instance, as there was no credible evidence to support D.M.’s claims of bias or discriminatory treatment on the part of the State or its actors with respect to his sexual orientation. In contrast, there was overwhelming evidence citing D.M.’s inability adequately to care for his children and to make necessary adjustments to his parenting style and behavior based on the children’s manifold needs. The lower court had likewise found that D.M.’s “alleged lack of English speaking and understanding . . . lacks merit and is not given any weight” and D.M. made no challenge to this finding. According to Judge Smith’s account of the factual record, state social workers repeated attempts to reunification between D.M. and the triplets were unsuccessful due to D.M.’s inability to meet their specialized needs.

The termination of a person’s fundamental right to be a parent is one of the severest a state can undertake to protect the health and safety of minor children. Given historic abuses by state actors against the families of racial, ethnic, and sexual minorities, advocates are right to ensure that such curtailment of parent-child bonds is not ever the result of animus or a disparate and discriminatory impact of child welfare policies. However, when due process yields overwhelming evidence of the unfitness to parent and consequent risk of harm to minor children, the state rightly intervenes as it did in the instant case to terminate parental rights to allow children both the right to safety and the hope of flourishing.

The appellant father, D.M., was represented by Nielsen Broman Koch PLLC, while the respondent—Washington State’s Department of Social and Health Services—was represented by the Office of the Attorney General for Seattle. Guardians ad litem were represented by the Dependency Casa Program of King County. ■

Toria Isquith is a student at Middlebury College (class of 2019) and Winter 2019 Intern at The LGBT Bar Association of Greater New York (LeGaL); Brett M. Figlewski is the Legal Director of LeGaL

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, 9TH CIRCUIT

– A 9th Circuit panel doubles down on the circuit’s position that transgender refugees should probably not be removed to Mexico, in *Lorenzo-Lopez v. Whitaker*, 2019 U.S. App. LEXIS 282, 2019 WL 102305 (Jan. 4, 2019). In this case, the applicant, represented by Karla L. Kraus, suffered dismissal of her asylum application as untimely. She filed 5 years after her last arrival in the U.S., and two years after her removal proceedings began. As justification, she pleads her “mental health” and “reliance on statements by Border Patrol that she could not apply for asylum.” Not good enough for the BIA, and not good enough for the court to excuse missing the one-year deadline. But as to withholding of removal or CAT relief, there is no one-year deadline and the BIA is not going to win by issuing a decision stating that it found “no error in the Immigration Judge’s conclusion that the respondent did not establish that the Mexican government is unwilling or unable to protect her from violence or that a pattern or practice of persecution exists against transgender persons” or “that it is more likely than not she will be tortured by or with the acquiescence of a government official.” Read *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015). Since then, the 9th Circuit, at least as presently constituted, remains convinced that life is generally too perilous for transgender people to send them back to Mexico. “Although there is a lack of evidence of past persecution or torture in this case,” wrote the panel in its Memorandum decision, “that is not dispositive of Lorenzo-Lopez’s claims for withholding of removal or CAT relief.” The court pointed out that

“neither the Immigration Judge nor the BIA discussed the record evidence submitted in this case concerning the conditions faced by transgender persons in Mexico. The question for the agency on remand is whether this record evidence, either alone or in combination with evidence of Lorenzo-Lopez’s past experiences, is sufficient to establish that it is more likely than not that she will be persecuted or tortured upon return. . . . On remand, Lorenzo-Lopez may seek leave to update the evidence of country conditions.”

U.S. COURT OF APPEALS, 9TH CIRCUIT

– The 9th Circuit ruled on January 25 that California’s State Insurance Fund was not required under the Workers Compensation Law to defend Cybernet Entertainment LLC, a porn producer, against a pending state law suit by several actors claiming that they were the victims of intentional/fraudulent misrepresentations and conspiracy to commit fraud by Cybernet and others who made “various false representations concerning the safety of Cybernet shoots (e.g., that protection could be used on request) to the plaintiffs to induce them to participate in those shoots.” The performers allege that Cybernet required them to engage in unprotected sex, and “did not provide adequate personal protective equipment, such as condoms, to performers; did not test certain performers; and otherwise violated California regulations meant to prevent the spread of STDs and HIV in pornographic shoots.” In a memorandum opinion, the 9th Circuit panel stated, “We hold that the acts and injuries alleged in the foregoing causes of action fall within the compensation bargain because the gravamen of each is that Cybernet did not maintain a safe workplace. The remedy for such workplace-safety claims is workers’ compensation.” However, found the court, there are policy exclusions in the Employer’s liability portion of

the Insurance Policy, which extend to “an intentional wrongful act in which the harm is inherent in the act itself.” That sounds an awful lot like bareback sex!! The court found that this policy exclusion “bars coverage for those claims. Plaintiffs allege that Cybernet intentionally misrepresented to plaintiffs that it had safety measures in place to protect them during shoots. A performer induced to perform by a false representation that Cybernet had safety measures in place to protect performers could foreseeably contract an STD as a result of the false inducement. And because the complaint alleged that the misrepresentation was intentional, Cybernet acted ‘with knowledge that damages were highly probable or substantially certain to result.’” Furthermore, state court plaintiffs also alleged intentional infliction of emotional distress and sexual battery, intentional torts not covered by Workers’ Compensation. Thus, the court found that the insurance policy taken out by Cybernet to comply with its obligations under the Workers’ Compensation Law does not apply to these claims, and the State Insurance Fund is not required to provide a defense in the state court action. Cybernet is undoubtedly better known to gay porn consumers under the website kink.com.

ARKANSAS – The Arkansas Supreme Court gave a little lecture to Washington County Circuit Judge Doug Martin in a decision issued on January 31 in *Protect Fayetteville F/K/A Repeal 119 & State of Arkansas v. The City of Fayetteville*, 2019 Ark. 30, 2019 WL 393793. At issue is Judge Martin’s decision to reject a motion by Protect Fayetteville, an organization opposed to the city’s ban on LGBT discrimination, seeking to stay the effect of the ordinance while intervenors in defense of the ordinance challenge the constitutionality of a state statute, Act 137 of 2015, that was enacted specifically to preempt municipalities

CIVIL LITIGATION *notes*

from banning discrimination “on a basis not contained in state law.” Act 137 was passed in response to continuing efforts by the local government in Fayetteville to outlaw sexual orientation and gender identity discrimination. In 2017, the Arkansas Supreme Court ruled quite clearly and definitely in *Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49, that the Fayetteville ordinance “violates the plain working of Act 137 by extending discrimination laws of the City of Fayetteville to include two classifications not previously included under state law,” to wit, sexual orientation and gender identity and expression. That case was remanded back to Judge Martin in the circuit court. Although the city had raised a question about the constitutionality of Act 137 as an affirmative defense, there was no counterclaim to that effect before the circuit court at the time, and so the state Supreme Court had declined to address the constitutionality question in its 2017 decision, observing “that the matter had not been addressed by the circuit court and that issues unresolved by the circuit court are not preserved on appeal.” After that remand, Judge Martin granted a motion for intervention by PFLAG of Northwest Arkansas and several individuals, who filed a counterclaim challenging the constitutionality of Act 137. It was at that point that *Protect Fayetteville* and the State of Arkansas sought a preliminary injunction to block enforcement of the ordinance, which Judge Martin denied, finding that they had not demonstrated a likelihood of success on the merits or that they would suffer irreparable harm if the junction were not granted. Their appeal of Martin’s ruling denying the preliminary injunction is the subject of this new opinion. Justice Robin F. Wynne wrote that the court’s 2017 opinion, having conclude that the ordinance violates Act 137, determines this appeal: “Appellant’s request for an injunction was resolved by Act 137’s constitutional supremacy over the

ordinance, which renders the ordinance void and therefore unenforceable.” Furthermore, she wrote, “Directions by an appellate court to the trial court as expressed by the opinion and mandate must be followed exactly and placed into execution. Indeed, the jurisdiction of the trial court on remand is limited to those directions,” citing and quoting from *Dolphin v. Wilson*, 335 Ark. 113 (1998). Thus, held the court, Judge Martin was precluded from allowing new parties to intervene and keep the case alive, “as the sole controversy between the parties was conclusively resolved by this court on appeal.” Thus, wrote Wynne, “Any proceedings on remand that are contrary to the directions contained in the mandate from the appellate court may be considered null and void.” As far as the Arkansas Supreme Court is concerned, there is no need for a preliminary injunction against the operation of the ordinance, because the ordinance is null and void and of no effect pursuant to the Supreme Court’s 2017 ruling. Anything Judge Martin did after the remand is “void,” said the court, which concluded that “the matter is dismissed in its entirety.” Time for the City of Fayetteville to file a new suit seeking a declaratory judgement that Act 137 is unconstitutional. . .

CALIFORNIA – U.S. District Judge William Alsup (N.D. Cal.) denied a motion to dismiss a Title IX lawsuit against a California school district that was brought by two middle-school students who had been sexually harassed and abused by a fellow student, called “Bully” in the opinion. *J.R. v. Lakeport Unified School District*, 2019 U.S. Dist. LEXIS 5024, 2019 WL 174557 (N.D. Cal., Jan. 10, 2019). The complaint plausibly alleges that the school was on notice of Bully’s actions and reputation but effectively did nothing to protect the students. The victims who sued include one boy and one girl. This led the school district to

raise as a defense that Title IX did not apply to the situation because Bully was harassing students of both sexes, and thus was not “discriminating.” Judge Alsup was unpersuaded. “This absurd argument is the equivalent to arguing that one is not racist for discrimination against all other races,” he wrote. “Taken to its logical conclusion, anyone could escape Title IX requirements by ensuring they discriminated ‘equally.’ Moreover, defendant Lakeport glosses over that Bully did plausibly target plaintiffs for sexual assault because of J.R.’s gender and Bully’s perception that O.G. did not conform to a gender stereotype (Bully would call O.G. ‘gay’). The middle school, and by extension defendant Lakeport, therefore plausibly ‘on the basis of sex. . . excluded from participation in . . . denied the benefits of, or . . . subjected to discrimination’ plaintiffs J.R. and O.G. ‘under any education program or activity receiving Federal financial assistance,’” quoting the language of Title IX, 20 USC 1681(a). Interesting, in the context of Title VII of the Civil Rights Act of 1964, some federal courts have refused to apply the ban on employment discrimination because of sex in cases where an individual harassed both men and women, which is probably why counsel for the school district thought this argument would carry water. Plaintiffs are represented by Deborah Hall Barron, Barron Law Corporation, Sacramento.

CALIFORNIA – On January 30, California Attorney General Xavier Becerra announced the settlement of a claim that the Aetna Insurance company violated state health privacy laws by using a window envelope for letters to insureds taking HIV-related medications that revealed the nature of the communication to anyone looking at the envelope. Under the terms of the settlement, Aetna will pay \$935,000 to the state, and victims nationwide (an

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estimate 12,000 people) have received over \$17 million in compensation through a private class action settlement, according to Becerra's news release. Under the terms of the settlement, Aetna must complete an annual privacy risk assessment for three years. Aetna issued a statement claiming that it has since implemented measures to ensure that this kind of screw-up does not happen in the future. Becerra commented: "A person's HIV status is incredibly sensitive information and protecting that information must be a top priority for the entire healthcare industry." *Hartford Courant*, Feb. 1, 2019.

COLORADO – In *Ybarra v. Comprehensive Software Systems, LLC*, 2019 WL 266310, 2019 U.S. Dist. LEXIS 9206 (D. Colo. January 18, 2019), U.S. Magistrate Judge Nina Y. Wang granted the defendant employer's motion to dismiss Adrian Ybarra's supplementary state law claim of wrongful discharge in violation of public policy, finding in the absence of controlling Colorado Supreme Court authority, based on lower-level Colorado and U.S. District Court rulings that are divided on the issue, that this common law claim cannot be asserted when a statutory remedy is available. In this case, Ybarra, who has what sounds like legitimate discrimination, sexual harassment, and retaliation claims against his employer, sued on three counts: Title VII, Colorado Anti-Discrimination Act (CADA), and state law tort of wrongful discharge in violation of Colorado public policy. The state public policy he relies upon is embodied by CADA, which bans discrimination because of sex and sexual orientation, as well as retaliation against employees who assert their statutory rights. The employer moved to dismiss just the common law claim, arguing that the anti-discrimination statutes provide the exclusive remedy. Presumably, Ybarra sought to append the common law claim in order to get a bigger

damage award under tort principles than he could get through the statutes, or perhaps to benefit procedurally in some way, but the court was unwilling to go that route. There was argument as to whether the availability of Title VII remedies would also preclude the state wrongful discharge tort suit, and Judge Wang concluded that it did. The sexual orientation of the plaintiff is not expressly stated in the opinion. The allegations of the complaint are in essence that plaintiff was an exemplary employee who had received raises and offers of promotion and had never been criticized, but then an internal reorganization left him with a new supervisor and, "Not soon after, Plaintiff noticed 'concerning behaviors from Mr. Moran and subsequently Mr. Ybarra's co-workers, including sexual and religious based jokes.'" This degenerated into what Ybarra experienced as sexual harassment, and he "believed that the harassment stemmed from Mr. Moran's perception of Plaintiff as a homosexual." When confronting the supervisor did not improve matters, Ybarra filed a formal harassment complaint, and the supervisor's response was to retaliate, of course. "Roughly five days after his discussions with TriNet [a contractor providing HR services to the employer, Talisys], Talisys issued a 30-day behavior improvement plan to Mr. Ybarra – his first disciplinary action at Talisys – based not on his work performance but his 'attitude.' Mr. Moran allegedly stated that he was aware of Plaintiff's complaint with TriNet and that the behavior improvement plan was Defendant's response." In other words, here – allegedly – is the kind of supervisor that keeps HR people awake at night, oblivious to exposing their employer to retaliation claims. Ybarra complained about retaliation, but he said neither the contractor nor the internal HR officer investigated his claim, and then he was terminated, the company claiming that it was outsourcing his job (but subsequently hiring somebody else

to "handle some of Mr. Ybarra's prior responsibilities.") If Ybarra can prove his allegations, it sounds like he has a slam-dunk winner under Colorado's Anti-Discrimination Law, although it is not immediately clear how far he can get under Title VII, as the 10th Circuit hasn't yet taken the plunge to find actual or perceived sexual orientation discrimination to violate Title VII. Be that as it may, Ybarra might still have a good retaliation claim under Title VII if 10th Circuit precedent is not stingy on the point. But under Magistrate Wang's decision, he will lose the chance of also pursuing a state law wrongful discharge claim based on the same facts. Ybarra is represented by Denver lawyer Katherine W. Beckman of Bryan E. Kuhn, Counselor at Law, P.C., Denver, CO.

KANSAS – In *Foster v. Anderson*, 2019 U.S. Dist. LEXIS 12207, 2019 WL 329548 (D. Kan., Jan. 25, 2019), Lambda Legal's challenge to the refusal of Kansas to let transgender people correct the gender markers on their birth certificates, U.S. District Judge Daniel D. Crabtree granted an uncontested motion by one of the individual plaintiffs to be allowed to proceed pseudonymously as C.K. "He explains," wrote the judge, "the fact that he is transgender is not known publicly outside a limited number of people, mostly close and personal relationships. Otherwise, most people in his workplace and community do not know that C.K. is transgender. C.K. asserts that his transgender status is sensitive and highly personal information. Also, he contends that disclosing his transgender status in public court records in a lawsuit asserting his constitutional rights (including the right to privacy) will expose him the very harms he seeks to remedy and prevent in this lawsuit. And, C.K. argues, public disclosure of his transgender status will subject him to significant harm, including stigmatization, discrimination,

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harassment, and even violence. Thus, C.K. asserts that all three of [Raiser v Church of Jesus Christ of Latter-Day Saints, 182 F. App'x 810 (10th Cir. 2006)]'s exceptional circumstances exist here. And, he argues, the need for his anonymity outweighs the presumption of open court proceedings. The court agrees." In addition to meeting the tests set out by the 10th Circuit for allowing parties to proceed under a pseudonym, Judge Crabtree wrote, "the relief sought by this motion will not prejudice defendants," since C.K. would not withhold his identity from defendants but "only wishes to prevent disclosure of his identity in public documents." As noted above, the motion is not contested by defendants.

KENTUCKY – Until the U.S. Court of Appeals for the 6th Circuit decides to reconsider *en banc* its prior rulings that sexual orientation discrimination claims may not be brought under Title VII of the Civil Rights Act, a district court is required to dismiss any such claims, ruled U.S. District Judge Karen K. Caldwell in *Briener v. Board of Education*, 2019 U.S. Dist. LEXIS 12031 (E.D. Ky., Jan. 25, 2019). Plaintiff Nicholas Charles Briener claimed that he was subjected to disparate treatment and fired by the Board after becoming open about being bisexual, and claimed to be a victim of sex discrimination in violation of Title VII. Wrote Judge Caldwell, "Briener recognized that the Sixth Circuit has ruled that 'sexual orientation is not a prohibited basis for discriminatory acts under Title VII,'" citing *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (2006), a ruling reiterated in *Gilbert v. Country Music Association*, 432 F. App'x. 516 (2011). Nonetheless, his attorney argued in response to the District's motion to dismiss that the court "has the authority to make a determination, independent of Sixth Circuit precedent." "This is incorrect," wrote Caldwell,

explaining that although the 6th Circuit had recognized "practical problems" with its interpretation of Title VII, *Vickers* "remains controlling authority unless an inconsistent decision of the United States Supreme Court required modification of the decision or this Court sitting *en banc* overrules the prior decision," quoting from *Tumminello v. Father Ryan High School*, 678 F. App' 281, cert. denied, 138 S. Ct. 121 (2017). "Thus, this Court is bound by it," she concluded, failing to mention a 6th Circuit panel's ruling last year in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (2018), petition for cert. pending, No. 18-107, in which a panel of the circuit ruled in favor of a transgender plaintiff under Title VII in a case that certainly undermines the reasoning of older cases such as *Vickers*, by its capacious interpretation of Title VII's sex discrimination ban to extend to gender identity discrimination. Technically Judge Caldwell is correct; the *Harris Funeral Home* panel was able to take action because that case involved gender identity rather than sexual orientation. But some discussion of the *Harris Funeral Home* panel's approach to discerning the meaning of the sex discrimination ban would have been welcome, as it ventures far beyond prior 6th Circuit case law. In any event, this case would provide an opportunity to appeal to the 6th Circuit to reconsider its past precedent. Briener is represented by Edward E. Dove of Lexington, KY, and Mark A. Mantooth of Levy Mantooth PLLC, New Orleans.

MARYLAND – Psychotherapist and gay conversion therapy practitioner Christopher Doyle has filed suit in U.S. District Court in Baltimore against Governor Larry Hogan and Attorney General Brian Frosh, attacking the constitutionality of Maryland's recently enacted ban on performance of conversion therapy on minors. Doyle claims the ban violates his freedom of

speech and free exercise of religion, and also violates the "right" of clients "to prioritize their religious and moral values above unwanted same-sex sexual attractions, behaviors, or identities." During 2018 Maryland became the 11th state to enact such a ban, and this month New York has become the 12th. Doyle is represented by Liberty Counsel, which specializes in litigating anti-gay causes. *Baltimore Sun*, Jan. 19. Several federal district and circuit courts of appeals have rejected constitutional challenges to similar statutes. See, e.g., *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.), cert. denied, 134 S. Ct. 2871 (2014); *King v. Governor of New Jersey*, 767 F.3d 216 (3rd Cir. 2014), cert. denied, 135 S. Ct. 2048 (2015); *Pastors Protecting Youth v. Madigan*, 237 F. Supp. 3d 746 (N.D. Ill. 2017).

MICHIGAN – An attorney's attempt to be "creative" backfired in *Gibson v. MGM Grand Detroit*, 2019 WL 330505, 2018 U.S. Dist. LEXIS 12161 (E.D. Mich., Jan. 25, 2019). Teresa Gibson claimed she was discriminated against because she was a woman with respect to various denials of transfers and promotions. In combating her claim, the employer noted that the same decision-makers did promote Amy Winton, a woman in the same department. "Plaintiff's response to that fact was to file a *motion in limine* to exclude introduction into evidence of comparator female Engineer Amy Winton's promotion," wrote District Judge Paul D. Borman. "Plaintiff asserted that Winton's promotion was really not that of a female because she was a lesbian. Plaintiff Gibson's *motion in limine* stated that Winton was not a comparable because 'Amy Winton as a homosexual female is not similarly situated as a straight married female. As a gay woman Ms. Winton does not share the same traditional stereotypes with Plaintiff as it pertains to romantic and sexual relationships.' The Court rejects this noxious argument

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by Plaintiff. This Court considers Ms. Winton a comparable female in the same Engineering Department. This fact significantly undermines Plaintiff's claim of gender discrimination, and her further assertion that Defendant's articulated response is pretextual for unlawful gender discrimination." We wonder whether Gibson's counsel, Scott P. Batey of Bingham Farms, MI, blushed upon reading that final paragraph of the opinion.

NEW YORK – N.Y. Supreme Court Justice Denis J. Butler granted a motion for summary judgment to the New York State Workers' Compensation Board, which is being sued by Timothy Sullivan, a gay man who has worked for the Board since 2006 as a Verbatim Reporter 1 in the Queens District Office. Sullivan applied for a promotion to a vacant Verbatim Reporter 2 position, and interviewed with Senior Law Judge Henry Stevenson in June 2016. Ultimately Stevenson promoted another applicant, Timothy Basile, one of Sullivan's non-gay co-workers. Sullivan, convinced that he was denied the promotion because he is gay, sued under the New York State and New York City Human Rights Laws. *Sullivan v. New York State Workers' Compensation Board*, 2019 WL 255514 (N.Y. Sup. Ct., Queens Co. January 14, 2019). After discovery, the Board moved for summary judgment, asserting that Judge Stevenson chose Basile because of his superior qualifications. According to Justice Butler's summary of the evidence submitted by the Board in support of its motion, "his fellow employees viewed him as the 'go to' person for computer issues." Basile had completed a two-year course of study at Cooper Union in mechanical engineering and had learned "at least two computing programming languages: C and Visual Basic." Four candidates were under consideration for the position, and Basile had the highest score on "the requisite Civil Service

Exam for the Verbatim Reporter 2 position," and had also completed "a more comprehensive set of online training courses on the 'Essentials of Supervision'" than had Sullivan. In addition, the Board submitted a deposition by Lorraine Bucalo, a former Verbatim Reporter 2, who verified Basile's "go to" status in the office, stating under oath that "anytime anybody had an issue, myself especially, because I had lots of them, he was very—he knew the program in depth... He was the guy that everyone in the office went to when they had an issue. He was, from my point, the most familiar with the ins and outs of the system." Justice Butler explained that courts dealing with employment discrimination issues under the state and city laws generally follow the evidentiary analysis that federal courts apply under Title VII. Although Sullivan had easily pled a prima facie case which can be done without direct evidence of discriminatory motive, putting the burden of explaining the decision on the employer, in this case Butler found the employer's unrefuted explanation sufficient to defeat Sullivan's claim, writing that "the evidence submitted by defendants is sufficient to demonstrate a legitimate, nondiscriminatory reason for Basile, as opposed to plaintiff, being selected for the Verbatim Reporter 2 position." He found that Sullivan had failed to show in opposition to the motion that there were any material genuine issues of fact "as to whether defendants' stated reason was pretextual." Indeed, he concluded, defendants had made a "prima facie showing that there is no evidentiary route that could allow a jury to believe discrimination played a role in their challenged actions" because Sullivan had not come forward with any evidence that the defendants' stated reasons for their decision were false. Ultimately, the burden falls on the plaintiff to prove a discriminatory motive, and all he had done here was to assert his belief that he was discriminated against without

supporting proof, at least as explained by Justice Butler. Sullivan is represented by Russel S. Moriarty of Levine & Blit PLLC, New York City.

NORTH CAROLINA – U.S. District Judge Graham C. Mullen granted summary judgment to the employer in a same-sex harassment case, *Roberts v. Glenn Industrial Group, Inc.*, 2019 WL 356809, 2019 U.S. Dist. LEXIS 14634 (W.D. N.C., Jan. 29, 2019). Chazz J. Roberts was hired in July 2015 by Glenn Industrial, which did underwater inspection and repair services, to be a diver/tender. Glenn's handbook includes a comprehensive "no harassment" policy and requires complaints of sexual harassment to be directed to the CEO of the company, Richard L. Glenn. Roberts contends that his supervisor, Andrew Rhyner, "engaged in a continuous practice of ridiculing and demeaning plaintiff by calling him gay, using sexually explicit and derogatory remarks towards him, and physically threatening him. Plaintiff was physically slapped, put in a headlock, and pushed by Rhyner. Plaintiff specifically identified the following comments he heard over the course of his employment: he was 'gay'; he was a 'retard'; 'how much dicks would I suck for money'; 'I have retard strength.'" Roberts claimed to have reported this to Rhyner's supervisor, Bruce Evans, and to Glenn's wife, Ana Glenn, the VP and person in charge of HR. But he never mentioned alleged sexual harassment to Glenn. Glenn discharged Roberts after two incidents, the first of which involved a workplace accident that earned Roberts a lecture about the necessity of wearing protective equipment, the second when Roberts was acting "erratically" and his supervisor suspected he was on drugs or alcohol, which Roberts subsequently denied. As a result, Roberts only lasted at the company less than 10 months. He sued under Title VII for "sexual harassment and retaliation" and added a

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state law claim for intentional infliction of emotional distress, as well as a wage and hour claim that he dropped prior to the employer's summary judgment motion. Judge Mullen characterized this as a "same-sex sexual harassment case." Relying on the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), Mullen found that Roberts failed to satisfy any of the methods specified by the Court for proving a claim of same-sex harassment. Since this was an all-male workplace, there were no female comparators, and there was no evidence Rhyner was generally hostile to males in the workplace. Finally, "the only evidence in the record is that Rhyner is straight," wrote Mullen. "Plaintiff does not allege otherwise. Moreover, there is no evidence that Rhyner made 'explicit or implicit proposals of sexual activity.' Plaintiff does describe comments made by Rhyner that are certainly vulgar and inappropriate, but none could be characterized as a proposal of sexual activity. Conduct that is 'merely tinged with offensive sexual connotations' is not sufficient; rather, a plaintiff must show discrimination because of his sex. Moreover, the physical conduct allegedly directed at the Plaintiff by Rhyner, slapping on the face and putting him in a 'chokehold,' while inappropriate, was not of a sexual nature. Accordingly, summary judgment in favor of the Defendants is appropriate as to Plaintiff's sexual harassment claim." And, because many months had passed between the time Roberts complained about the harassment, he didn't complain directly to Glenn as required by company policy, and the company had legitimate reasons to fire him, the retaliation claim fell short as well. Finally, Mullen did not deem Rhyner's treatment of Glenn sufficiently outrageous to meet North Carolina's standard for liability for intentional infliction of emotional distress. Roberts is represented by Geraldine Sumter of Ferguson, Chambers & Sumter PA,

Charlotte, NC. One suspects that if Title VII were authoritatively construed by the 4th Circuit or the Supreme Court to comprehend hostile environment claims because of actual or perceived sexual orientation, this case might have come out differently.

OHIO – In January we reported on *John Doe One v. Caremark LLC*, 2018 U.S. Dist. LEXIS 215149, 2018 WL 6715471 (S.D. Ohio, Dec. 21, 2018), in which Chief U.S. District Judge Edmund A. Sargus, Jr., refused to dismiss most of the claims asserted by anonymous people living with HIV against an insurance company that used a window envelope to mail communications about their medications, designed (inadvertently) in such a way as to disclose the fact of their HIV status to anyone handling the envelope. On January 17, Judge Sargus approved motions to consolidate several cases concerning the same alleged violations, finding that they had "common question of law or fact" and finding that the balance of pros and cons on consolidation weighed in favor of granting the motions. "As applied here," wrote Judge Sargus, the Court sees little downside to consolidation. Consolidation poses little risk of prejudice or confusion. The court acknowledges that there are additional defendants named in Doe I that are not a party of Doe II. Different parties, however, do not prevent the court from consolidating otherwise similar cases." He found that consolidation would save time, expenses, and judicial resources, because of the commonality of the factual issues to be resolved, and rejected some of the defendants' objections to the timing of the motions. So this now becomes a much bigger case.

SOUTH DAKOTA – Transgender rights activist Terri Bruce died in December, leading to the dismissal of his lawsuit against the South Dakota

State Employee Health Plan, which had refused to cover Bruce's transition costs. He was an employee of the South Dakota State Historical Society Archaeological Research Center, whose employees receive health insurance under the state employee plan. Bruce had been scheduled for a mastectomy to treat his gender dysphoria, but the procedure was cancelled when the state health plan denied coverage, even though it routinely covers mastectomies for women dealing with breast cancer. Bruce had helped lead the opposition to a bill approved by the legislature that would have required transgender students in grades Kindergarten through twelve to use bathrooms by the gender they were assigned at birth. Gov. Dennis Daugaard vetoed the bill. According to the motion filed seeking dismissal of the lawsuit, Bruce committed suicide. *Argus Leader*, Jan. 23.

TEXAS – Chief U.S. District Judge Lee H. Rosenthal granted a motion to dismiss a complaint filed by several Houston taxpayers seeking injunctive relief against the Houston Public Library against continuing to hold a monthly event called "Drag Queen Storytime." *Christopher v. Lawson*, 2019 WL 93300, 2019 U.S. Dist. LEXIS 616 (S.D. Tex., Houston Div., Jan. 3, 2019). At the Library sponsored event, drag queens take the platform to read stories selected by the library for the entertainment of young patrons. The plaintiffs, all Houston taxpayers, claim that holding this event violates the Establishment Clause of the First Amendment by unlawfully advancing an "alleged religion, secular humanism." Among other things, the plaintiffs allege that the Library is "intolerant of anyone who finds homosexuality to be immoral." "The plaintiffs lack standing because, as the defendants correctly argue, 'eliminating [Drag Queen Storytime] will not cure their perceived feelings of persecution,'" wrote Judge Rosenthal.

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Furthermore, found the judge, although they alleged that they were Houston taxpayers, they did not allege that they were city residents, but, setting that aside, the complaint “fails to allege facts that could show that the Library expended more than a *de minimis* amount of taxpayer dollars on ‘Drag Queen Storytime.’” As a result, the court concluded, there was no subject-matter jurisdiction. Also, Judge Rosenthal found a failure to state a valid claim under the Establishment Clause. He observed that in order to state an Establishment Clause claim, the plaintiff must allege facts that could support an inference that the challenged action is somehow a religious activity. The plaintiffs claimed that the Supreme Court has recognized “secular humanism” as a religion for Establishment Clause purposes, and assert that Drag Queens are associated with the LGBTQ community, which, according to plaintiffs, “subscribe to secular humanism.” They explain: “Being a member of the LGBTQ community goes into the realm of semi-religious identity narratives that are a commentary on truth.” Run that by the next drag queen you happen to meet. The plaintiff thinks that makes the challenged activity a “religious event” that is being paid for with their hard-earned dollars as taxpayers, to their consternation. Judge Rosenthal was not buying it, writing, “They fail to raise a constitutional claim because, even accepting that secular humanism could be a religion for Establishment Clause purposes, the plaintiffs fail to allege any facts or basis showing that ‘Drag Queen Storytime’ is a religious activity. There is no allegation that a reader discussed secular humanism at the event, or that any story the Library selected invoked secular humanism or any religion at all. The plaintiffs instead make only conclusory statements associating secular humanism with the event. The statements are not entitled to be taken as true.” Plaintiffs also claimed that the event is about “brainwashing

the children of Houston to a religious worldview.” It is to cry. Anyway, it is amazing that the court produces a fairly lengthy opinion, when a sane response to the complaint might just be a terse “Hell, no.” But then, Judge Rosenthal has to worry about his dismissal being appealed to the 5th Circuit; need we say more? And we bemoan the lack of “Drag Queen Storytime” at the Public Library where we grew up; it would have given our Rabbi something to complain about to the Board of Education apart from singing Christmas Carols in public school. (Do they still do that in our secular humanist age?) Sorry, we are getting carried away here, but this case sounds too much to us like the guy who keeps suing for a marriage license to consummate his relationship with his laptop. . .

TEXAS – U.S. District Judge Sam A. Lindsay denied a motion by plaintiff Stacy Bailey to file a surreply in response to a pending motion to dismiss for failure to state a claim by defendant school district and two district employees who are named defendants. *Bailey v. Mansfield Independent School District*, 2019 U.S. Dist. LEXIS 5127 (N.D. Tex., Jan. 10, 2019). Bailey, an art teacher employed by the school district who is a lesbian, got in trouble when she showed a photograph of her “same-sex fiancé” as part of a “First Day of School” PowerPoint presentation to second-grade students, and later “discussed the sexual orientation of certain artists with her fourth-grade art class.” She was given an 8-month administrative suspension and then transferred to another school, admonished not to do these kinds of things again. She sued in federal court under 42 USC 1983 claiming several violations of her constitutional rights, including “violation of the Right to Marry” under the 14th Amendment, Equal Protection, Procedural Due Process, and state Constitutional violations of equal

protection. The defendants’ motion to dismiss asserted that she had failed to allege facts sufficient to plead municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). After the motion was fully briefed, Bailey sought leave to file a surreply to the defendants’ brief, arguing that defendants had failed “to cite and discuss applicable legal authority in the form of Defendant ISD policy that delegates policy making authority to Defendant Vaszauskas (the District Superintendent) relating to sweeping powers regarding suspension, reassignment and other personnel actions concerning teachers, thus making Defendant Vaszauskas a policymaker for purposes of section 1983.” Plaintiff claimed that it was after her brief responding to the motion was filed that her counsel “became aware” of the district policies she wanted to raise in her surreply. The court refused to allow the surreply brief, pointing out that the district’s policies were published and available when plaintiff’s earlier brief was filed. Moreover, said Judge Lindsay, the plaintiff has not properly understood the concept of municipal liability. Although the superintendent may have been delegated sweeping authority to implement policy, he does not make the policy, a role restricted to the district board by Texas law. Bailey is represented by Jason C. N. Smith of Fort Worth.

WASHINGTON – The ACLU of Washington and PeaceHealth, a Catholic non-profit health care organization that operates St. Joseph Medical Center in Bellingham, announced settlement on December of a federal lawsuit in which a longtime Bellingham hospital employee sued over PeaceHealth’s refusal to cover her son’s gender reassignment surgery in October 2017. ACLU filed the lawsuit on behalf of Cheryl Enstad, mother of Paxton Enstad, who was covered under his mother’s employment-related health insurance policy. Paxton’s doctors

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said the surgery was necessary to treat Paxton's gender dysphoria and its effects. Enstad and her husband took out a second mortgage on their home and took money from Paxton's college savings account to pay more than \$10,000 for the surgery. As of January 1, 2017, PeaceHealth changed its medical plan to cover transgender services when medically necessary pursuant to Aetna's gender reassignment surgery policy, when PeaceHealth switched to Aetna to provide insurance for its employees. Aetna's policy does not cover people under 18, however, and Paxton was 16 when Enstad applied for coverage for the surgery, so they would have had to wait until Paxton turned 18 to be covered. The lawsuit rested on the Affordable Care Act's ban on sex discrimination and the Washington Law Against Discrimination, which bans discrimination because of sex, sexual orientation and gender identity. The settlement of the lawsuit includes an undisclosed cash payment to the Enstads. Attorneys representing the Enstads include Lisa Nowlin, a staff attorney with the ACLU of Washington, Joshua Block and Leslie Cooper of the ACLU LGBT & HIV Projects based in New York, and Denise Diskin and Beth Touschner of Teller & Associates.

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By Arthur S. Leonard

CALIFORNIA – The California 4th District Court of Appeal granted a motion by Vincent Johnny Avalos to relieve him of an obligation imposed by the trial judge after his conviction and sentencing in 2007 on charges of attempted premeditated and deliberate murder, assault with a firearm, and discharge of a firearm with gross negligence, to submit to HIV testing prior to his eventual release from prison, with the results to be transmitted to the clerk of the trial court. *In re Avalos*,

2019 Cal. App. Unpub. LEXIS 139, 2019 WL 151549 (Jan. 10, 2019). Avalos, then age 24, had fired some gunshots at his landlord after a court proceeding in which he was evicted for non-payment of rent. After the jury verdict went against him, the trial judge sentenced him to life with the possibility of parole plus 20 years. The judge added a handwritten order to the abstract of judgment, stating that prior to release, he must "submit to HIV/AIDS test pursuant to 1202.1 PC/1202.6 PC to be conducted by med staff w/[illegible] results to be forwarded to clerk of court for distribution." More than ten years later, the Department of Corrections wrote to the court to inquire about this testing order, noting that it seemed to be in error since Avalos was not convicted of any of the offenses enumerated in the cited Penal Code Provision. Corrections asked "the court to review its records to determine whether the blood test was ordered in error or whether the court intended [us] to perform the blood test pursuant to a different statute." In an *ex parte* hearing, the trial court determined that "no further action was necessary because the blood test results had been sent to the court previously, citing to a November 12, 2015 letter from the Department of Corrections," which was marked as "confidential" in the trial docket and is not included in the record. In the context of a new petition for a writ of habeas corpus, Avalos sought both a new hearing to introduce information of his youthful status at the time of the crime and a removal of the HIV test requirement. The Court of Appeal granted both requests. Presiding Justice Manuel Ramirez wrote that the trial court "did not have authority to require Avalos to submit to HIV testing while in prison." Indeed, there is a general statutory ban against involuntary HIV testing in California, with a narrow exception for people convicted of certain sexual offenses that might involve transmission of HIV, but Avalos was not convicted of any crime on

that list. Furthermore, the judge's oral pronouncement of judgment in court did not mention HIV testing, which was only added by the judge later. "An abstract of judgment 'may not add to or modify the judgment it purports to digest or summarize,'" wrote Ramirez, citing to a prior California Supreme Court decision. Furthermore, this matter was not rendered moot by the fact that the Corrections Department did test Avalos in 2015 and sent the results to the court clerk. "As ordered," wrote Justice Ramirez, "the blood test must be taken prior to Avalos's release from prison, which has not yet occurred. Nothing in the order indicates that the requirement is satisfied once one blood test was taken nor is that how it has been construed by the Department of Corrections. Avalos was forced to submit to another blood test based on this order. And, the record on this point is far from complete, so he may have been required to endure additional procedures." What was the trial judge thinking? Perhaps that in prison young Avalos might be sexually assaulted and become HIV positive, so testing would be needed before his release so that the court could "distribute" the results as a warning to the public? That certainly would not fall within the language or meaning of the narrow statutory exception to the general ban in California on involuntary HIV testing. Avalos was represented on appeal by Matthew A. Siroka by appointment of the Court of Appeal.

TEXAS – No, Jody Lynn Morris, the Supreme Court's ruling in *Lawrence v. Texas* doesn't mean that you have a constitutionally protected liberty interest under the 14th Amendment to have sex with your biological daughter. Thus saith the Texas Court of Appeals (El Paso) in *Morris v. State of Texas*, 2019 WL 396807 (Jan. 31, 2019), in a particularly odd case. Morris's brother's ex-wife wanted to have a kid, but her boyfriend had a vasectomy and couldn't

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afford an operation to reverse it, so she asked Morris if he “would be willing to impregnate her” with the understanding that he would not be responsible for the child’s care or to play any parental role. He was 19 at the time. He agreed, they had sex several times, she became pregnant, and subsequently delivered a girl. Morris was not in the picture at that point, since five weeks into her pregnancy, Morris moved to Arizona to live in his parents’ home there. Morris didn’t even learn that the child was born until he was informed by the mother when the child was five months old. The mother’s boyfriend is listed as the father and the birth certificate. Fast forward 16 years. The daughter, A.W., learned about how she was conceived and contacted Morris through Facebook, and they exchanged messages. The mother became concerned that A.W. was “acting out”, running away, and had told her she wanted to live with Morris. The mother allowed A.W. to visit Morris in Arizona. A.W. ended up staying with Morris for six months, enrolling in high school in Arizona. Morris then called the mother to say he had lost his job, and asked if he and A.W. could move back to El Paso and live with A.W.’s mother and stepfather. She reluctantly agreed, and after they moved back, she saw signs of an inappropriate relationship between Morris and A.W. According to A.W., she and Morris had sex together both in Arizona and Texas. After Morris physically assaulted her, she went to a police station and was taken to a hospital to have a rape kit performed. It became a police matter, and Morris was convicted of two counts of incest. In his appeal, he argued that the right of privacy identified in *Lawrence* should be construed to extend to this situation. Nothing doing, wrote Justice Yvonne T. Rodriguez for the court. “In the years immediately after *Lawrence* was issued,” she wrote, “multiple lower courts held that *Lawrence* strictly applied only to decriminalize homosexual conduct and that the case did

not announce a broader right to freedom from state intrusion into the realm of sexual privacy or autonomy. . . These courts’ narrow definition of the right identified in *Lawrence* seem to belie both the broad language of *Lawrence* itself and later statements from the United States Supreme Court apparently confirming the wide scope of the sexual liberty/privacy interest protected by the substantive due process clause. . . Still, a wide individual freedom to engage in ‘intimate association’ free from criminal liability does not mean that the State cannot impose criminal sanctions on *any* sexual activity, as Morris asserts.” The court found that *Lawrence* left subject to State prosecution “sexual activity that involves minors, injury or coercion, relationships where consent might not be easily refused, public conduct, or prostitution.” While acknowledging academic commentaries suggesting situations in which incest might not be subject to prosecution, the court found that a facial challenge to the incest statute had to fail. “It is sufficient for our purposes to recognize that there are situations such as this one in which a direct-line family relationship can lead to coercion and situations in which consent might not be easily refused, and that such situations fall outside the ambit of *Lawrence*” to uphold the incest statute. This is not to rule out the possibility of an as-applied challenge in the future involving an appropriate case.

TEXAS – Anthony Michael Bowden, a former soldier who was stationed at Fort Bliss, has been sentenced to 35 years in prison for the stabbing death of Erykah Tijerina, a transgender woman, on August 8, 2016, in El Paso. A jury deliberated for six hours before announcing the sentence after Bowden was convicted of the murder. Bowden, who was 21 at the time of the stabbing, could have received a life sentence. The trial was held in the 384th District Court with Judge Patrick

Garcia presiding. Tijerina, a transgender woman, was working as a prostitute at the time. Bowden’s attorneys claimed that Bowden killed Tijerina in self-defense, arguing that she raped him and attempted to blackmail him by telling military officials that he had slept with a transgender woman and that he was her pimp. Prosecutors argued that Bowden willingly had sex with Tijerina and went back to her apartment with the intent of killing her. Bowden had purchased a chisel in a hardware store prior to meeting Tijerina. He left her apartment, purportedly to retrieve some money from his car, but came back with the chisel and fatally stabbed her multiple times. *El Paso Times*, Jan. 24.

VIRGINIA – No, said the Court of Appeals of Virginia, the U.S. Supreme Court’s decision in *Lawrence v. Texas*, holding that the state could not criminalize consensual private gay sex between adults, does not provide a basis for finding a constitutionally protected right for people to have sex with animals. In *Warren v. Commonwealth of Virginia*, 69 Va. App. 659, 822 S.E.2d 395 (Jan. 15), the court ruled, in an opinion by Judge Wesley G. Russell, Jr., that Pittsylvania County Circuit Judge Stacey W. Moreau did not err in refusing to dismiss an indictment against Arthur Anderson Warren, who was convicted in a bench trial of soliciting another person “to carnally know a brute animal or to submit to carnal knowledge with a brute animal,” acts that violate Code sections 18.2-291 and 12.2-361(A). According to the opinion, “The evidence established that, in October of 2016, Warren videotaped on his cellphone encounters he had with K.H. and her dog. The videos were sexual in nature and showed, among other things, the dog’s tongue penetrating K.H.’s vagina while K.H. performed oral sex on Warren. Warren can be heard on the videos encouraging the dog and directing K.H. to position her legs so as to give the dog improved

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access to her body. The videos were played at trial.” (We wonder whether the video was exhibited to the spectators in the courtroom, or just viewed up close on a cellphone by the judge, as this was, after all, a bench trial.) “In March of 2017,” wrote Judge Russell, “Deputy Sheriff Adam Reynolds spoke with Warren on an unrelated matter. Unprompted, Warren asked Reynolds if “bestiality type stuff” was “legal or illegal,” described the cellphone videos, and offered to show them to Reynolds.” Reynolds did not view the videos but contacted an investigator, who got a search warrant before removing the videos from Warren’s cellphone. An investigator testified that she viewed the videos and recognized the voices of K.H. and Warren. So, no doubt, Warren did encourage the dog. Whether the dog needed encouragement is an open question. Warren moved to dismiss, citing *Lawrence v. Texas* and arguing that “the conduct depicted in the videos could not be subject to criminal sanction because it amounted to nothing more than consensual sexual conduct involving adults.” (As if the dog wasn’t present?) Warren’s only argument on appeal is that the constitution protects this conduct. The court noted that the Virginia Supreme Court, in cases following upon *Lawrence v. Texas*, had rejected the argument that *Lawrence* rendered the sodomy statute facially unconstitutional – differing in this regard from the 4th Circuit Court of Appeals in *MacDonald v. Moose*, 710 F.3d 154 (2013) – providing a narrowing construction to save the statute, which was subsequently repealed by the legislature. The statute originally covered both sodomy and bestiality; as a result of the repeal, a separate bestiality statute was created. The court of appeals said that the Virginia Supreme Court’s rejection of the facial invalidity of the state’s sodomy law effectively disposed of Warren’s argument that the bestiality law was facially unconstitutional. Warren also challenged the statute “as

applied” – After all the dog seemed perfectly happy engaging in this activity, and none of the humans present objected. Well, no, that wasn’t exactly his argument; instead he seems to argue that so long as the activity takes place in private and nobody is forced to do anything, a person’s right to engage in sexual activity with an animal comes within the liberty protected by the 14th Amendment as a fundamental right. But the court found that a “claimed right to engage in sexual conduct with animals” fails the “historical test” of rights “deeply rooted in this Nation’s history and tradition,” and so rooted as to be deemed fundamental. By determining that the right Warren was claiming was not a fundamental right, the court ruled, this was a rational basis case. “Assuming without deciding that Warren is correct that *Lawrence* removed morality as a legitimate reason for criminalizing certain sexual conduct such as bestiality,” wrote the court, “additional rationales exist for the General Assembly’s decision to ban sex with animals. First, there can be no serious argument that the Commonwealth does not have a legitimate interest in preventing cruelty to animals.” (But Your Honor, Warren might insist, the dog was having a great time!!) But the court pointed out that “sexual molestation of animals by humans may physically injure or kill the animal victim.” The court also cited a public health concern, as “scientists estimate that more than 6 out of every 10 known infectious diseases in people are spread from animals, and 3 out of every 4 new or emerging infectious diseases in people are spread from animals.” Judge Russell wrote that “interspecies sexual contact does provide a means of such transmission. Accordingly, numerous commentators have recognized that there is a public health justification for bestiality prohibitions.” And because this is a rational basis case, it doesn’t matter that none of the legislators articulated such a reason at the time they passed the statute; it is enough that the

court can conceive a rational basis for a legislature passing it. Thus, the court found that the criminal bestiality law has a rational basis, and rejected Warren’s challenge to its constitutionality. Warren is represented by Glenn L. Berger of Berger & Thornhill, who will be living off stories about this case for years. No word yet on whether an appeal has been filed in the Virginia Supreme Court, or whether Warren’s cellphone production has gone viral on the internet.

PRISONER LITIGATION NOTES

By William J. Rold

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

U.S. COURT OF APPEALS – ELEVENTH CIRCUIT – Last September, *Law Notes* reported that U.S. District Judge Mark E. Walker, of the Northern District of Florida, issued a *tour de force* opinion on “freeze frame” policy for transgender prisoners in that state. See “Recognizing Humanity of Transgender Prisoners, Florida Judge Permanently Enjoins ‘Freeze Frame’ Policy,” reporting *Keohane v. Jones*, 2018 U.S. Dist. LEXIS 142640, 2018 WL 4006798 (N.D. Fla., August 22, 2018) (September 2018, Pages 422-23). Even though Florida had abandoned its policy of keeping transgender inmates in the “stage” of transition in which they arrived in custody [“freeze frame”], Judge Walker refused to accept this “voluntary cessation” as a defense to permanent injunctive relief. Moreover, he ruled that Florida’s refusal to make individualized decisions for grooming and clothing for transgender presentation also violated the Eighth Amendment. The *Florida Times Union* (2019 WLNR 548678, January 7, 2019) reports that the state has appealed the decision to the Eleventh Circuit. It is No.

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18-14096, and the briefing is complete on PACER. The state is challenging both the need for injunctive relief after voluntary cessation and the underlying Eighth Amendment claim, saying that it has “done enough” to satisfy Keohane’s serious medical needs. This is one to watch. Keohane is represented by the ACLU, New York and Miami; and by DLA Piper, Miami and Atlanta.

ILLINOIS – There is a lot happening in prison health care in Illinois! December *Law Notes* reported on the pendency of a class action on behalf of transgender inmates for health care and related issues there. See *Monroe v. Rauner*, 2018 WL 6259248, 2018 U.S. Dist. LEXIS 203410 (S.D. Ill., November 30, 2018) (reported December 2018 at pages 640-1). In this issue, we report of the transfer of a transgender male-to-female inmate to the women’s prison in Illinois. *Hampton v. Baldwin*, 18-cv-550 (S.D. Ill. December 2018), reported by *Newsroom* 2018 WLNR 40053643. The reporting characterized this as a “first” for Illinois. Now, more generally, a long-standing health care class action is in settlement, according to the *Chicago Tribune* (2019 WLNR 239750, January 4, 2019). The case, filed almost a decade ago, is *Lippert v. Baldwin*, 10-cv-4603 (N.D. Ill., January 3, 2019; Docu. # 803). It represents a settlement on behalf of all Illinois prisoners in a certified class, and it guarantees basic health care rights and appoints an independent monitor to oversee them. The article characterizes it as a “sweeping overhaul of the health care system at prisons across Illinois.” Reports from court-appointed experts in 2014 and 2018 cited “pervasive problems” and numerous avoidable deaths. The proposed consent decree, currently under approval procedures incident to F.R.C.P. 23(e), covers medical, dental, and mental health services for male and female inmates. A word-search of the documents indicates that sexual orientation of inmates is

not mentioned, nor are the specific needs of LGBT or transgender inmates specifically addressed. The coverage by the *Tribune*, however, ends with the following: “The decision [to settle] comes two months after a federal judge in southern Illinois mandated that the state Corrections Department develop training on transgender issues for all staff statewide, spurred by a lawsuit filed by a transgender inmate who requested to be moved to a women’s prison, alleging abuse at various men’s facilities. Corrections officials last month granted that transfer.” The plaintiff class is represented by the Roger Baldwin Foundation of the ACLU and the Uptown People’s Law Center, Chicago; and the following Chicago law firms: Loeb & Loeb, LLP; Seyfarth Shaw, LLP; Locke Lord, LLP; Edwards Wildman Palmer, LLP; Dentons US, LLP; Eimer Stahl, LLP; Ackerman, LLP; the Quinlan Law firm, LLC; and Steptoe & Johnson, LLP.

ILLINOIS – This is the third *Law Notes* report on the continuing efforts of transgender Illinois inmate Deon (“Strawberry”) Hampton to be transferred to a women’s prison. She has been sexually brutalized by other inmates and staff while incarcerated in men’s prisons. See, e.g., *Hampton v. Meyer*, 2017 U.S. Dist. LEXIS 172310 (S.D. Ill., October 19, 2017) (*Law Notes*, January 2018, at page 43), where a preliminary injunction hearing was ordered. That case was “settled” by an agreement to transfer Hampton to another prison, site to be determined by a “committee.” The decision made was to transfer Hampton from the men’s facility at Menard to Lawrence Correctional Facility – also a men’s facility. Hampton initiated another lawsuit, because the abuse occurred unabated. In *Hampton v. Baldwin*, 18-cv-550 (S.D. Ill., filed 3/8/18), Hampton sought transfer to a women’s prison. The solid complaint is strong stuff and recommended reading

on PACER. It clearly places Illinois DOC in the “when will they learn” category. Now, *Newsroom*, 2018 WLNR 40053643 (December 28, 2018), reports that Hampton is being transferred to the Illinois women’s prison at Logan Correctional Center, in central Illinois. Hampton’s lawyers say this is a “first” for Illinois. Hampton is well-represented by the MacArthur Justice Center, Chicago.

ILLINOIS – *Pro se* gay inmate Benjamin D. Danneman sued an officer (Diarccio), a sergeant, the superintendent, and the Cook County Sheriff alleging that Diarccio harassed him in front of other inmates – saying such lewd things as Danneman “must have jacked off to his father” – and the other defendants took no action in response to Danneman’s complaint under the Prison Rape Elimination Act [PREA]. In fact, Danneman alleges that he was reassigned after his PREA complaint to a cell where he would have more contact with Diarccio. In *Danneman v. Dart*, 2019 WL 109378, 2019 U.S. Dist. LEXIS 1994 (N.D. Ill., January 4, 2019), U.S. District Judge John J. Tharp, Jr., granted a motion to dismiss in part and denied it in part. In so ruling, Judge Tharp relied on Danneman’s supplementation to his complaint in his affidavit in response to the motion to dismiss, without converting the proceeding to summary judgment, citing *Smith v. Dart*, 803 F.3d 304, 311 (7th Cir. 2015), which allows such procedure where the additional allegations are consistent with the complaint. Judge Tharp found that the allegations against Diarccio, involving public statements in front of other inmates, met what is often called the “verbal abuse+” test of the Seventh Circuit in *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015), where words can be actionable when intended to inflict injury or make it more likely. The sergeant was not identified correctly, according to defendants, so Judge Tharp

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orders the superintendent to identify him correctly, based on the allegations and their records, by the time of the next conference. Judge Tharp denies dismissal of the claims against the jail's superintendent, based in part on allegations that she failed to adhere to the requirements of PREA once a complaint had been made. Specifically, she failed to move Danneman to a "safe location" and did not arrange for "mental health counselling" for Danneman in response to his allegations of sexual harassment – both requirements of PREA. Judge Tharp noted that PREA does not itself create a private cause of action, but he held that its requirements can be considered in evaluating the potential liability of supervisory defendants as to whether in their own behavior they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye," quoting *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001). Applying this test, Judge Tharp declines to dismiss against the jail superintendent but grants dismissal against the sheriff without prejudice. Because discovery will proceed, Danneman can continue to build his case, identify the sergeant, and revisit the liability of the supervisors. This is one of the very few cases that explicitly uses PREA standards to inform Eighth Amendment liability for failure to protect (here, actually Fourteenth Amendment liability, since Danneman was a pre-trial detainee – but the same standards apply).

NEW JERSEY – Transgender inmate Christopher Shorter, *pro se*, was sexually assaulted at knifepoint after requesting protection for months – and weeks after the transgender "committee" recommended her transfer from Fort Dix to more secure confinement where the cells had locks. She sued for failure to protect her under the Eighth Amendment, using *Bivens* theory [from *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 358

(1971), implying cause of action directly under the Constitution] and for negligent protection under the Federal Tort Claims Act [FTCA]. She also sued for violation of her Due Process rights under the Fifth Amendment, alleging that the investigation into the assault was so botched that she could not legally pursue her assailant. The claim, sounding in negligence, was also made under the FTCA. The claim awaiting screening for six months, until U.S. District Judge Renée Marie Bumb dismissed it without prejudice in *Shorter v. United States*, 2018 U.S. Dist. LEXIS 60270 (D.N.J., April 9, 2018), reported in *Law Notes* (May 2018 at page 260). Shorter filed an amended complaint in July of 2018, and in *Shorter v. United States*, 2019 U.S. Dist. LEXIS 9882, 2019 WL 287280 (D.N.J., January 22, 2019), Judge Bumb screens it. Judge Bumb finds insufficient pleading that Shorter meets the first element of a protection-from-harm case under *Farmer v. Brennan*, 511 U.S. 825 (1994); and she grants a *sua sponte* dismissal of this claim without prejudice. While at times Judge Bumb appears to confuse the objective element under *Farmer* (existence of risk) with the subjective element (deliberate indifference to that risk), it appears that she is dismissing on screening under the first element. In so doing, she finds the risk was not "pervasive" because the notices of heightened violence issued by the warden did not mention "sexual assault" specifically, and the verbal harassment experienced by Shorter (comments about her "nipples," e.g.) were isolated. This ignores the fact that the transgender committee specifically recommended that Shorter be sent to closer custody weeks prior to the assault and that she was denied permission to put a "makeshift" lock on her cell. Judge Bumb relies on a series of unpublished opinions that speak of unpredictable assaults, ignoring the warning of *Farmer*: "[I]t does not matter whether the risk comes from a single source or multiple sources, any

more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.... It would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." *Id.* at 843-4 (internal quotations and citations omitted). This strikes this writer as particularly wrong in a *sua sponte* screening decision. Judge Bumb allows a claim under the FTCA to proceed past screening regarding the assault. As to the Fifth Amendment Due Process claim, Judge Bumb says it may proceed for now, but is subject to a motion after service that it is a new application of *Bivens* theory that may be barred under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Judge Bumb dismisses the FTCA negligent investigation claim because Shorter did not allege physical injury in connection with the negligent investigation, as required by 28 U.S.C. § 1346(b) (2). This provision of the Prison Litigation Reform Act was amended in connection with the renewal of the Violence Against Women Act in 2013, making prisoners eligible for mental and emotional damages if either of two conditions are met: (1) they have had physical injury; or (2) they are victims of a sexual act. Shorter meets the second category. This issue is currently under litigation before the United States Court of Appeals for the Sixth Circuit in *Lucas v. Chalk*, 18-6272. Briefing is complete and available on PACER. While Shorter is free to amend her Eighth Amendment claim, Judge Bumb has provided no guidance as to how Shorter can persuade the court to let the claim proceed.

NEW YORK – Screening a *pro se* complaint from a gay prisoner alleging excessive force and verbal abuse, U.S. District Judge Elizabeth A. Wolford dismisses the case with prejudice in *Webster v. Gaylor*, 2018 WL 6809515 (W.D.N.Y., December 27, 2018). Plaintiff Daiquon Webster alleges that,

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while confined at Attica, he was subject to homophobic slurs and assaulted by corrections officers. Webster says that officers “slammed” him on the floor and threatened to break his thumb and to “slam” his neck, while laughing at him. Judge Wolford applied the standards of *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992); and *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997). She also found that Webster had failed after two chances to show that his alleged assaults were more than “*de minimus*” uses of force. While probably a correct outcome on these facts, Judge Wolford’s failure to cite or recognize more recent authority is disconcerting. She applied subjective analysis to the issue of quantum of force: that is, did the officer believe that the amount of force used was reasonable? In *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015), the Supreme Court held that the amount of use of force against a pre-trial detainee was governed by a reasonable officer test, not the subjective belief of the restraining officer. It left open the question of whether this Fourteenth Amendment due process standard should also apply to the quantum of force used against convicted inmates under the Eighth Amendment, despite *Hudson*. In *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015), the Second Circuit held that *Boddie* had been too broadly applied by the district courts and that a single incident could form the basis of physical sexual abuse. Neither case is specifically applicable to Webster’s claims here, but readers should keep them in mind.

NORTH CAROLINA – *Pro se* transgender prisoner Jonathan David Huskins brought a federal civil rights lawsuit in March 2017, alleging her rights under the Eighth Amendment were violated by denial to her of hormone therapy and female undergarments in *Huskins v. Fox*, 2019 WL 252456, 2019 U.S. Dist. LEXIS

8515 (W.D.N.D., January 17, 2019). She asked for a preliminary injunction against the nursing supervisor and the mental health supervisor – who is a master’s degree level practitioner. Chief U.S. District Judge Frank D. Whitney did nothing on the case for 16 months. The PACER docket shows that Judge Whitney finally screened the case in August of 2018, denying a preliminary injunction without service or hearing but allowing the case to proceed under the Prison Litigation Reform Act. By the end of November of 2018, the two defendants were served, and they moved for dismissal on subject matter jurisdiction. They argued that the case was moot because Huskins was already receiving hormones and female undergarments. They also argued that they were not proper defendants in that they did not have authority to prescribe medication or make decisions about undergarments for transgender inmates, as such decisions were the province of the DOC’s transgender “committee,” which had acceded to Huskins’ request. Judge Whitney did not convert the motion to one for summary judgment, although he relied upon the affidavits of the two named defendants. One of them, by the nurse, is multiple hearsay: she states what the doctor said the endocrinologist said. . . . According to PACER, Judge Whitney issued a “*Roseboro* Order,” from the Fourth Circuit case of *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975; *see also, Norman v. Taylor*, 25 F.3d 1259, 1261 (4th Cir. 1994) (*pro se* plaintiffs entitled to notice of motion that may result in entry of judgment against them). Although these were summary judgment cases, Judge Whitney held that *pro se* plaintiffs were also entitled to *Roseboro* notice in motions to dismiss. The docket shows that the “*Roseboro* Order” was received at the prison where Huskins was incarcerated 20 months earlier, but it does not show whether she was still there or if she received it. The “Return Receipt” is in

the PACER record. It was addressed to “J. David Huskins” without her inmate number. The address has only the street number and zip code without town and state. Moreover, it is signed by a person unknown who is not Huskins. None of this is mentioned, but Judge Whitney notes that Huskins did not respond to the motion. Perhaps Huskins, having received some relief on her own, gave up on the courts. Perhaps she never got the word that her case was about to be dismissed. There is no way to tell whether anyone cared either way.

PENNSYLVANIA – U.S. Magistrate Judge Richard A. Lanzillo, who had the case for all purposes, granted summary judgment against *pro se* inmate Kareem Armstrong in *Armstrong v. Diraimo*, 2018 WL 6788524, 2018 U.S. Dist. LEXIS 216067 (W.D. Pa., December 26, 2018). Armstrong alleged that Officer Diraimo fondled him by stroking his penis and scrotum while conducting a pat search and making comments: “I do what the fuck I want” and “You felt bigger.” Armstrong filed a complaint under the Prison Rape Elimination Act [“PREA”]. About six months later, Armstrong says that he encountered Diaroma again and that Diaroma said to him (without touching him): “you enjoy the way, I touch you and the way you stick your ass out got my dick hard. Your PREA complaint don’t work and when, I caught you alone I’m gonna show you what a real dick looks like.” Armstrong alleged that his case presented a jury question of sexual harassment under the Eighth Amendment and denial of Equal Protection based on sexual orientation under the Fourteenth Amendment. Judge Lanzillo disagreed on both points. Judge Lanzillo noted that the Third Circuit had joined the Second Circuit in condemning inmate sexual harassment. *See Ricks v. Shover*, 891 F.3d 468, 473 (3d Cir. 2018), *quoting Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (“sexual abuse of prisoners, once

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overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment”). Nevertheless, Judge Lanzillo applied earlier tests to such conduct, requiring both “intolerable” cruel behavior and a subjective “culpable” state of mind, specifically relying on *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997), which was limited by *Crawford*. Basically, Judge Lanzillo found no jury question on the random pat search and no improper extension of the search beyond touching incidental to discovering contraband. He found the comments made during the search did not convert the lawful search into one that was intended to “gratify” the officer in the way prohibited by *Crawford* or *Ricks*. He wrote that the first comment (“I do what the fuck I want...”) “suggests an intent to perform an overzealous search, rather than a sexualized one.” He found the second comment (“you’re bigger”) to be “best characterized as an immature taunt.” These are unfortunate findings. It is not the job of the judge at summary judgment to determine what the testimony “suggests” or how it is “best characterized.” This is what juries do. Judge Lanzillo also omits any reference to the comments six months later, which could be understood to sexualize the earlier encounter. Other discussion supports Judge Lanzillo’s ruling that the entire matter may not violate the Eighth Amendment because it is not sufficiently severe, even giving Armstrong all favorable inferences – an appropriate F.R.C.P. 56 ruling. He also finds verbal harassment alone, without actionable touching, not violative of the Eighth Amendment. The opinion has a good recitation of many cases of similar or more serious allegations throughout the country. As to Equal Protection, Armstrong did not claim to be gay in his pleading, raising the point at summary judgment. Judge Lanzillo also refers to an earlier case, *Armstrong v. Wetzel*, 2015 WL 2455418 (W.D. Pa. May 22, 2015), where Armstrong’s sexual

orientation was “called into question” as “faking homosexuality in order to secure single cell status.” Again: jury question? It would have been better to rule that, even assuming he is gay, Armstrong presented insufficient evidence that he had been singled out based on his sexual orientation for a pat frisk that had already been found not actionable on the entire *res gestae*, despite inappropriate comments. This kind of sloppy adjudication in *pro se* cases fosters bad law.

VERMONT – Transgender jailhouse lawyer Serendipity Morales, *pro se*, sued various defendants of the Vermont criminal justice system for violation of her First Amendment rights and for denial to her of Equal Protection of the Laws based on her self-identification as “female, gay, mentally ill, Puerto Rican, and transgender.” In *Morales v. Burke*, 2019 WL 277591 (D. Vt., January 22, 2019), U.S. Magistrate Judge John M. Conroy denied a motion for summary judgment by defendants for alleged failure to exhaust administrative remedies under the Prison Litigation Reform Act. Morales alleged that a state prosecutor persuaded two corrections officers to batter her because she was assisting five inmates with their criminal cases. Judge Conroy’s recommendation that the prosecutor be dismissed is currently pending before the District Judge. It appears that the same prosecutor had earlier attempted to charge Morales with the unauthorized practice of law for her activity. The Supreme Court of Vermont quashed the prosecution. *In re Morales*, 151 A.3d 333, 340-1 (Vt. 2016) (citing Supreme Court’s holding that it was unconstitutional to ban non-lawyer inmate from assisting his peers with habeas petition in *Johnson v. Avery*, 393 U.S. 483, 487 (1969), and writing at length about value of “jailhouse” lawyers). This motion concerns exhaustion as to the correction officers. It appears that

the state simply failed (or refused) to respond to Morales’ grievances at any stage. She attached copies of all her grievances and appeals, which the state denied ever receiving. Judge Conroy found a factual issue as to whether the appeals were made that could not be resolved at summary judgment. While he noted that the Second Circuit had not “conclusively” held that a state’s failure to respond to a grievance made the grievance system unavailable within the rules of exhaustion – citing *Hemphill v. New York*, 380 F.3d 680, 686 n.6 (2d Cir. 2004), *abrogated on other grounds by Medina v. Napoli*, 725 F. App’x 51, 53 (2d Cir. 2018) – he cited several district court cases in the Circuit that have adopted this rule. He does the same. Judge Conroy declines to recommend appointment of counsel. Here, Morales’ expertise comes back to bite her.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES – On January 23, the Department of Health and Human Services (HHS) granted a waiver to federally funded child welfare contract agencies in South Carolina to act on their religious beliefs in making placement decisions into foster or adoptive care. This came in the form of granting a request by Governor Henry McMaster that taxpayer-funded agencies who contract with the State to provide child welfare services be exempted from complying with federal rules prohibiting discrimination, freeing them to impose a religious test in determining which families are qualified to receive children who are wards of the state. Lambda Legal, anticipating this move, quickly published a statement by its Out-of-Home Care Project Director, Currey Cook, explaining why the decision was both bad policy and unconstitutional.

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The statement accused the Trump Administration of violating “the most basic principles of the freedom of religion by allowing these agencies to prioritize their beliefs and ignore nondiscrimination laws. Freedom of religion is a fundamental value in the United States, but none of our religious beliefs should come at the expense of our children. While this waiver is specific to South Carolina and the licensing of foster and adoptive parents, it has enormous implications for the rights and well-being of LGBTQ youth in the child welfare system and religious minority children or those who are not part of any faith community.” Pending legislation, the “Every Child Deserves a Family Act,” would if passed override this waiver system, but probably stands little chance in the Senate as presently constituted and would undoubtedly be vetoed by President Trump were it to pass Congress. (As previously announced, Senator Mitch McConnell’s standard for bringing bills to a vote in the Senate is generally that a bill the President has signaled he would not approve will not be brought to a vote in the Senate. Although this rule appeared to be breaking down in the context of the “shutdown” of the government for over thirty days due to an 11th hour change by the president concerning what kind of a compromise bill he would sign.)

UNITED STATES CONGRESS –

Representative Susan Davis (D-CA) and Senators Jeanne Shaheen and Susan Collins (D-NH and R-ME) have introduced the Jury Non-Discrimination Act, a bipartisan measure that would prohibit discrimination against jurors in the federal jury selection process because of sexual orientation or gender identity. Some courts have already come to the conclusion that such discrimination is unconstitutional – in particular, the 9th Circuit – but the legislation would establish a uniform rule throughout the country. Nobody

expects that Senator Majority Leader Mitch McConnell would ever let such a measure come to a vote in the Senate, however, so the introduction is just a first step, with some hope for approval by the House of Representatives. * *

* Adopting rules and procedures for the new 116th Congress, the House of Representatives, under Democratic control for the first time since January 2011, included sexual orientation and gender identity among the prohibited grounds of discrimination for representatives and employees of the House. Unfortunately, House rules don’t apply to the Senate! The measure overall rules measure passed by a vote of 234 to 197 mainly along party lines. Two Democrats – Alexandria Ocasio-Cortez (NY) and Ro Khanna (CA) voted against the package because it included a pay-as-you-go provision, originally adopted by Republicans, that requires new spending or tax cuts to be offset with spending cuts or tax increases. The Republican House majority in the last Congress skirted the rule by voting for Trump’s big tax cut bill, based on phony predictions that the bill’s tax cuts would generate enough income from national economic activity to make up for the decline in tax revenue – with the result that unprecedentedly large deficits are now projected far into the future if future Congresses do not make major adjustments in the law.

ARIZONA – A bill has been introduced in the Arizona legislature to add “sexual orientation” and “gender identity” as forbidden grounds for discrimination under the state’s anti-discrimination law. The measure has bipartisan support. A substantial portion of the state’s population is already protected against discrimination by local laws in several large cities, so the main impact would be in smaller towns and rural areas. The close election of an out bisexual U.S. Senator in November may add to the support for the bill.

COLORADO – Denver’s City Council unanimously passed a measure on January 7 making it illegal for licensed health care providers to practice conversion therapy on minors. *AP State News*, Jan. 8. State-licensed practitioners found in violation would face fines. Mayor Michael Hancock stated, “We will never allow our LGBTQ+ youth to be the targets of these dubious practices,” but when questioned, his office said that they were unaware of anyone practicing conversion therapy in the city or county of Denver. One suspects they haven’t look hard enough. * * * In a ceremony on January 4, the Boulder County Courthouse was placed on the National Historic Register as the site of the first marriage license issued to a same-sex couple in the United States, in March 1975, when Boulder County Clerk Clela Rorex decided to issue a license to a same-sex couple who had been turned down by the El Paso County Clerk in Colorado Springs. Rorex, 75, who was present at the January 4 ceremony, issued about half a dozen such licenses until Attorney General J. D. MacFarlane instructed her to stop, stating that Colorado law limited marriage to different-sex couples. Rorex was very sensitive about sex discrimination, because when she decided to run for County Clerk, she was opposed by the local Democratic Party, whose leaders insisted that a man fill the position. When she was approached by the couple, she saw it as a matter of sex discrimination. Among those attending the event were all three county commissioners, Boulder city council members, and Governor-Elect Jared Polis, the nation’s first out gay man to be elected governor of any state. *Boulder Daily Camera*, January 4.

DISTRICT OF COLUMBIA – District of Columbia Attorney General Karl A. Racine announced on January 16 that Cuba Libre restaurant will pay a fine

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of \$7,000 as a settlement of charges that it violated the D.C. Human Rights Law for stopping a transgender woman customer outside a restroom and asking for her ID before allowing her to use the facility. According to an Associated Press report, “Restaurant workers asked Charlotte Clymer for identification in June when she tried to use a women’s bathroom, then followed her inside and told her to leave. The restaurant later apologized and says it has complied with requirements to train staff on district law and post signs saying people can use bathrooms aligning with their gender identity.” *AP Washington Report*, January 18.

FLORIDA – After Governor Ron DeSantis issued his non-discrimination executive order, omitting protection from discrimination because of sexual orientation or gender identity, the state’s Agriculture Commissioner, Nikki Fried, announced on January 18 that she had revised her department’s personnel policy to add “sexual orientation and gender identity” to the forbidden grounds of discrimination within the state’s Agriculture Department. In a statement to the press, she said: “This is a brand new day in which our Department and its 4,000 employees are making a strong statement – we will not tolerate discrimination in our workplace on any basis, including sexual orientation and gender identity. We are pledging today that our Department is committed to an inclusive culture of equality, in which every employee is hired, promoted, and respected on the basis of their merit. This is a common-sense, long-overdue measure that the majority of Fortune 500 companies have implemented, and the majority of Floridians agree with.” Fried, a Democrat, was elected Agricultural Commissioner in November. * * * LGBT rights organizations in Florida are divided about whether to support the Florida Inclusion Workforce Act

(FIWA), a measure introduced in the Florida Senate by State Senator Joe Gruters (R-Sarasota), the chair of the Republican Party of Florida. The bill represents Gruters’ view that there is a possibility of bipartisan support for an antidiscrimination measure including sexual orientation and gender identity that applies only to workplace discrimination. Presumably Gruters wants to avoid a debate over transgender access public restrooms, but the restroom issue would inevitably surface in discussion of his bill if it does not expressly exclude application to workplace restrooms! Equality Florida, the state-wide LGBT rights political group, attacked the bill for not also applying to places of public accommodation, and thus particularly failing to meet the needs of transgender Floridians. Some Democratic legislators have signed on as co-sponsors. Equality Florida supports the Florida Competitive Workplace Act which takes a broader view of the kind of discrimination to be addressed. The debate within the community echoes arguments in New York when the state Human Rights Law was amended to add sexual orientation but not gender identity, and it took almost a generation until the legislature added gender identity to the law in January 2019.

ILLINOIS – Governor J.B. Pritzker has announced the appointment of Jim Bennett to be director of the state’s Department of Human Rights. Bennett, a member of Chicago’s Gay and Lesbian Hall of Fame, has served as Midwest Regional Director for Lambda Legal, and in 2013 chaired Illinois Unites for Marriage, the political coalition that succeeded in getting the legislature to approve a same-sex marriage bill. Bennett, a non-lawyer, holds a master’s degree from the University of Illinois at Springfield. *Executive Appointments Worldwide*, 2019 WLNR 1895776 (Jan. 19, 2019).

MICHIGAN – Michigan’s new Attorney General, out lesbian Dana Nessel, met with the Michigan Civil Rights Commission after the Commission voted on January 28 to seek a formal opinion from Nessel about the validity of its position that the state’s ban on sexual orientation prohibits discrimination because of sexual orientation and gender identity. Nessel’s predecessor, Republican Bill Schuette, issued an opinion after the Commission took this position, disagreeing with it. A new opinion from Nessel would be helpful to the Commission, which acted after the legislature repeatedly refused to amend the law to add these categories. Nessel indicated that she would look into issuing a new Attorney General Opinion. *Bloomberg Law*.

NEW JERSEY – Governor Phil Murphy signed into law LGBT-inclusive curriculum legislation on January 31, making New Jersey the second state “requiring Boards of Education to include instruction, and adopt instructional materials, that accurately portray persons with disabilities and LGBTQ individuals” (*insidernj.com*, Jan. 31).

NEW YORK – Two measures that have been approved numerous times by the New York State Assembly, under Democratic leadership, but stalled in the New York State Senate, under Republican leadership, were finally approved on January 15, just days after a new Democratic majority took charge of the Senate. One was the Gender Identity Non-Discrimination Act, which adds “gender identity or expression” to the list of forbidden grounds for discrimination in the New York State Human Rights Law and other laws dealing with discrimination, including the Civil Rights law and the Education Law, and also amends the Penal Law and the Criminal

LAW & SOCIETY *notes*

Procedure Law to add these categories to the state's hate crime sentencing enhancement law. The State Division of Human Rights had previously issued a regulation stating that gender identity or expression claims could be litigated under the sex discrimination provision of the law, but some question remained whether the state's courts would accept that interpretation, so the enactment of express statutory language was considered to be important to ensure the coverage. Passage makes New York the 20th state to include gender identity in its anti-discrimination law. The other measure is a law banning the performance of conversion therapy, sometimes referred to as "sexual orientation change efforts," on minors by licensed health care professionals. New York becomes the 14th state (plus the District of Columbia) to enact an anti-SOCE measure. Groups of SOCE practitioners have brought lawsuits challenging the constitutionality of these laws, but have so far been unsuccessful, as some courts have characterized them as falling within the traditional state regulation of the medical profession and others have found that even if one credits the idea that anti-SOCE laws may be vulnerable to 1st Amendment free speech claims, the state legislatures had sufficiently strong interests to justify abridging professional speech in this connection. The Supreme Court has refused to review court of appeals decision rejecting challenging to anti-SOCE laws from New Jersey and California. Governor Andrew Cuomo was a vocal supporter of both efforts. * * * The New York City Council passed a bill adding "sexual and other reproductive decisions" to the list of forbidden grounds of discrimination under the city's Human Rights Law. The measure applies to any business employing four or more people.

NORTH DAKOTA – The North Dakota Senate voted 27-20 on Jan. 25 to defeat

a bill that would have added "sexual orientation" and "gender identity" to the state's anti-discrimination law.

SOUTH DAKOTA – A legislative committee voted 5-2 to postpone consideration of a bill that would have barred transgender students from participating in athletics consistent with their gender identity, Human Rights Watch reported on January 25. The vote effectively killed the bill for the current session of the legislature. Various bills targeting transgender youth have been filed each year for the past five, but none have been enacted.

TEXAS – The U.S. Supreme Court declared Texas's Homosexual Conduct Act unconstitutional as applied to private consensual same-sex conduct between adults in 2003, but the state legislature has never acted to amend or repeal the Act to remove its unconstitutional aspects. Some local police officers have continued to enforce the law by harassing and arresting individuals, citing the Texas Penal Code, leading Representative Joe Moody, a state legislature from El Paso, to introduce House Bill 84, which would repeal "homosexual conduct" as a criminal offense. Moody insisted that the bill should be easily passed since it does not change the law, merely clarifies that sexual conduct is not criminal just because it involves people of the same sex. But the bill probably has a snowball's chance in hell of being approved by the Texas legislature, which is firmly controlled by Republicans in both houses. *The Daily Texan*, Jan. 24.

WEST VIRGINIA – The city of Beckley, West Virginia, has added "sexual orientation" and "gender identity" as forbidden grounds for discrimination by a 4-2 vote of the Common Council on January 22. The measure

covers housing and employment discrimination, and exempts churches from compliance. A similar measure was proposed in 2014, but was tabled due to public opposition. A proposal by one of the opposing council members to exempt business owners and employers with religious objections failed to receive a second and was not submitted to a vote. *The Register-Herald*, January 23. In the 2010 Census, Beckley had almost 18,000 residents. The city dates to the 1830s.

LAW & SOCIETY NOTES

By Arthur S. Leonard

AMERICAN BAR ASSOCIATION – The House of Delegates of the ABA, meeting on January 28, approved Resolution 113, opposing laws, regulations, and rules or practices that discriminate against LGBT individuals "in the exercise of the fundamental right to parent," urging lawmakers in jurisdictions with such laws to "promptly repeal them and ensure the equal protection of LGBT individuals under the law," and urging bar associations and attorneys to "defend victims of anti-LGBT discrimination, and to recognize and support their colleagues taking on this work."

OUT LGB FEDERAL JUDGES – President Trump startled conservatives when he nominated out lesbian Mary Rowland, a U.S. Magistrate Judge in Chicago, to a district court seat in the Northern District of Illinois, and out gay conservative Patrick Bumatay of San Diego to the 9th Circuit Court of Appeals. Rowland was part of a negotiated package with Illinois's Senators. Both of California's Senators strongly opposed Bumatay. Despite Judiciary Committee approval, neither nomination was brought to a floor vote by Majority Leader Mitch McConnell, so the

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nominations died with the adjournment of Congress. During January, Trump submitted a new slate of nominees for the 9th Circuit, which included two very young nominees whose nominations also failed to receive a floor vote last year, but not Bumatay, who instead was nominated for a district court seat in the Southern District of California. As of the end of January, Trump had not re-nominated Rowland, having broken up the package previously negotiated and nominate somebody else for the seat.

YALE LAW SCHOOL – A campaign by the school's LGBT student group – Outlaws – that included litigation against the state challenging a refusal to waive plumbing regulations has culminated in the addition of multiple-user gender neutral restrooms at Yale Law School. Although the school has 14 gender-neutral single-stall units – four of which added as recently as August 2018 – the old buildings were not capable of supporting more than that number, but State's deputy building inspector was initially unbending about a regulation requiring multiple-user restrooms to be designated for one sex or the other, putting a virtual physical cap on the potential number of gender-neutral restrooms on campus. The school took an appeal to the Superior Court in June 2017, and, reports the *Yale Daily News* (Jan. 31), "Outlaws convinced over 25 Connecticut organizations to support their proposed amendments to the Connecticut Plumbing code, including clauses to count gender-neutral bathrooms towards the total number required in a building." This brought the issue to the attention of the governor's office, and intervention led to settlement, and a celebration of the newly labelled restrooms late in January.

OUT GAY PRES. CANDIDATE – On January 23, South Bend, Indiana, Mayor

Pete Buttigieg announced that he had launched an exploratory committee to run for president on the Democratic ticket. Mayor Buttigieg came out in an op-ed in a local South Bend newspaper in 2015, in the midst of his campaign for re-election. Despite being located in a relatively conservative community, he was re-elected with 80 percent of the vote, a huge jump from his first-term margin of victory, and his record of accomplishment in reviving the community, which had been devastated by a major plant closure years before, has driven his local popularity. If he is successful in winning the nomination, he would be the first out gay candidate on a major party presidential ticket and, if elected, on top of that, he would be the youngest person ever elected president. In anticipating mounting a presidential campaign, "Mayor Pete" as he calls himself to relieve pressure on constituents who struggle with pronouncing his surname announced in December that he would not run for a third term. *Buzzfeed News*, Jan. 23.

OUT LGB FEDERAL JUDGES – Barack Obama appointed numerous highly qualified lesbian and gay attorneys to the bench during the early years of his presidency, but the Senate majority elected in 2010 soon put a stop to the confirmation process. President Donald Trump surprised many by nominating an out lesbian, U.S. Magistrate Judge Mary M. Rowland, for a district court seat in Chicago, as part of a package deal negotiated with Democratic Senators so that some Republican appointees for that court could be confirmed by unanimous consent in the Senate. Similarly, there were some expressions of surprise when Trump nominated Patrick Bumatay, an out gay federal prosecutor, to the 9th Circuit Court of Appeals. (There was less surprised when it turned out that Bumatay is a staunch conservative, whose appointment was opposed by

both California Democratic senators.) Both nominations failed to receive floor votes during the 115th Conference, and thus expired when the new Congress convened in January. After several weeks, Trump renominated Bumatay, but for a district court seat in San Diego rather than the 9th Circuit. It was uncertain whether Rowland would be renominated, but she was not listed among the 50+ re-nominations sent to the Senate Judiciary Committee on January 23. *National Law Journal*, January 25.

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By Arthur S. Leonard

PARTNERSHIP FOR GLOBAL LGBTI EQUALITY – The Partnership for Global LGBTI Equality was announced at the World Economic Forum's Annual Meeting in Davos on January 23. The Partnership is being launched by a consortium of leading multinational companies in collaboration with the World Economic Forum, seeking to spur corporations to align their policies with the United Nations LGBTI Standards of Conduct as a model framework for companies to advance equality for LGBTI people in their employment and other functions. *Eurasia Review*, January 23.

EUROPEAN COURT OF HUMAN RIGHTS – In *X v. 'The former Yugoslav Republic of Macedonia'*, Application No. 29683/16 (Jan. 17, 2019), the ECHR ruled that Macedonia's failure to provide a mechanism for transgender people to have the sex/gender marker on their birth certificates changed, was a violation of the European Convention on Human Rights, focusing particularly on Article 8, requiring member nations to respect the private and family lives of their residents. The ruling criticized the "arbitrary imposition

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of a requirement for genital surgery” to make such a change, as well as the lack of an established administrative mechanism for obtaining such a change. This is a one-chamber judgment which could be appealed. Non-pecuniary damages of 9,000 euros is authorized to the applicant, a Macedonian national born in 1987 who lives in Skopje, was registered at birth as a girl, but claimed a male identity from an early age and was diagnosed by a psychologist and a “sexologist” at a specialist clinic in Belgrade with “transsexuality.” X started taking hormones and applied for a name change, which was allowed, but the Minister of the Interior refused to authorize an official designation of “male” for X on his documents. Even after X completed “top surgery,” the Ministry refused his request, insisting that genital surgery is a prerequisite, although no such requirement is expressed in any statute. The Court’s opinion, which was rendered in English, is available on the Court’s website.

ANGOLA – The Republic of Angola, a former Portuguese colony in southwest Africa, has repealed its “vices against nature” statute and adopted a ban on discrimination because of sexual orientation. Under the new prohibition, anybody who refuses to employ or provide services to individuals based on their sexual orientation may face up to two years in prison. These changes were made on January 23 when Angola’s parliament adopted a new Penal Code, the first since it gained independent from Portugal in 1975. Although there are no recorded prosecutions under the sodomy law, its very existence was deemed a threat that kept LGBT people in the closet and served to justify discrimination. As prelude to the reforms, last year the government extended legal status to Iris Angola, an LGBT rights advocacy group that was established in 2013. Reporting on the change in a January

23 news release, Human Rights Watch contrasted the action of Mozambique, another former Portuguese colony, which decriminalized gay sex in 2015 but declined to give legal status to Lambda, the country’s biggest LGBT rights group. Human Rights Watch cited several other countries in Africa that have decriminalized through legislative reform: Sao Tome and Principe (2012), Cape Verde (2004), Lesotho (2012), and Seychelles (2016).

BELARUS – The Prosecutor-General will not bring any action against Interior Minister Ihar Shunevich, who was charged by human rights activists with uttering hate speech against gay people in a televised interview late in December 2018. The P-G’s office concluded that Shunevich’s use of homophobic language “constituted no elements of a criminal offense,” according to a statement by the Vyasna Human Rights Centre. According to a *BBC International Reports* account (January 21, 2019), Shunevich stated that there was a “certain category of citizens whom I call ‘dyryavye.’” This can be translated as “those with a hole,” a term used by prison inmates to refer to homosexuals. He continued, “Some of them have made holes in places not designed by nature for the purpose, some of them are using these holes for the wrong purpose.” Vyasna had urged the P-G to treat these remarks as hate speech aimed at inciting hatred and discrimination against gay people, which would be punishable under Article 130 of the Belarus Criminal Code. But the P-G refuses to take action.

BRAZIL – Newly-elected President Jair Bolsonaro, an avowed homophobe, quickly announced on his first day in office removed LGBT issues from the remit of the human rights ministry, throwing a chill into the nation’s huge

LGBT community. However, Juliana Maggi, an LGBT community lawyer, told *Agence France Presse* (Jan. 3) that although the move was an “affront” to the community, it would take a constitutional change to overturn gay rights that have been recognized in connection with partnerships and family. * * * The country’s first out gay congressman has resigned and announced he is moving abroad, as a result of receiving death threats since his election in October. Jean Wyllys was due to be sworn in next month, but he sent a note to his party from overseas, stating he was tired of having to live with bodyguards and was worried about harm to his family. The party announced it would give his seat to Rio Councillor David Miranda, who is also gay. *Daily Mail Online*, Jan. 25.

BRITAIN – The *Herald* (Glasgow, Scotland) reported on January 28 that two gay men had been offered IVF treatment by the National Health Service (NHS) in “what is thought to be the first case of its kind in Britain.” Until April 2017, the NHS did not pay for surrogates to conceive using IVF. The Scottish government altered criteria to allow same-sex couples the same right as different-sex couples to use the procedure to have children with the assistance of a surrogate as part of the government-funded health care program. * * * Richard Page, a magistrate who publicly stated his disapproval of same-sex couples raising children while presiding in a same-sex adoption case in 2014, was fired for “serious misconduct” in March 2016 by Justice Secretary Michael Gove and Lord Chief Justice Lord Thomas. But he decided to contest his discharge, arguing that judges are permitted to hold “intolerant views” so long as they did not affect their rulings. In December, Judge Katherine Tucker upheld Page’s application to bring his case before an Employment Appeal

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Tribunal, where the case was argued early in January. * * * Health Secretary Matt Hancock made an announcement that the government was committed to a goal of no new HIV cases by 2030. Speaking at the AIDSfree Cities Global Forum, Hancock said the government would direct funding to risk reduction measures. “HIV and IADS are challenges that we must rise to,” he said. “The injustice, the unfairness, and the sadness they have brought must be tackled by us all.” *Evening Standard Online* (Jan. 31).

CHILE – Despite a settlement agreement entered by the government before the Inter-American Commission on Human Rights in 2016, under which the government is supposed to achieve marriage equality, the current president, Sebastian Pinera, is an open opponent of marriage equality and the government has stalled implementing the agreement. In addition to this agreement, Chile is subject to the Inter-American Court of Human Rights ruling on a case brought by Costa Rica, in January 2018. A marriage equality bill has been pending in Congress since 2017, so it is up to the governing parties to bring it forward unless they want to disavow the international human rights commitments made by their predecessors in office. A new lawsuit has been filed seeking to hold the government to its commitment, noting a decision in December by the Supreme Court stating: “Constitutional norms and international convention provide that every person who inhabits the State of Chile is the holder of the right to marry and to found a family.” (That case concerned the denial of marriage to a different-sex couple because the woman was a foreign national who did not possess a Chilean identity card.)

EGYPT – Television show host Mohamed al-Ghaiti ran into trouble

with the government when he invited a “purported homosexual” to appear on his program to talk about “secrets of the underground world of Egypt’s LGBT community,” reported the *BBC Monitoring Service* on January 20. The interviewee, whose actual sexual orientation was not confirmed, stated on the air that he regretted being a homosexual, urged other young Egyptians not to follow his example, and mentioned that he had earned a living as a gay prostitute. The broadcast led to a complaint being filed against al-Ghaiti by Samir Sabry, described in the *BBC* report as a “controversial lawyer,” who accused al-Ghaiti of “promoting homosexuality” by revealing the financial gains of “practicing homosexuality” in a manner that would attract an audience. Although *BBC* reported that homosexuality, *per se*, is not illegal in Egypt, the police regularly go after suspected homosexuals under the prostitution law on charges of “debauchery.” A misdemeanor court adjudicating the charge against al-Ghaiti sentenced him to prison for a year at hard labor and a fine of 3,000 Egyptian pounds (approximately \$168.00).

GERMANY – A German court ruled on January 28 that a public health insurance company must cover beard removal treatment for a transgender woman. The individual, identified as male at birth, had been “certified transsexual” by a doctor in 2015, but her transition has been difficult due to heavy beard growth, which is causing her psychological distress as she sports an afternoon shadow. She sought insurance coverage for hair removal treatment by a beautician, but the insurer insisted it would only cover services rendered by a doctor. Reported *Deutsche Welle Germany* (English language edition on-line), “Hair removal treatment from a dermatologist had given the patient skin inflammation,

the court found, but similar treatment from a trained cosmetician did not cause any skin reaction,” so she was justified in seeking coverage for the cosmetician’s treatment under her insurance plan. The ruling followed the lead of an earlier ruling by the Federal Administrative Court that health insurance companies must go beyond medical transition coverage to treatments that reduce psychological suffering for transgender people during their transition process, and allowing them to achieve the appearance of their “target gender.”

GREECE – A criminal court has imposed a 7-month prison sentence on a Greek Orthodox Bishop, Bishop Amvrosios (whose name is Athanassios Lenis), for inciting violence against homosexuals and abuse of his office, reports *Agence France Presse English Wire* (Jan. 28). The bishop labelled gay people the “dregs of society” and called on his followers to “spit on” and “blacken” them in a written address released in 2015, according to press reports. He had been found not guilty and released by a court in Aigio in March last year, but prosecutors appealed to the criminal court, which handed down the sentence, but suspended three months of it. Human Rights groups had protested against the acquittal, noting that the bishop “has been known to publicly appear alongside leaders of Greek neo-Nazi party Golden Dawn.

JAPAN – Ai Nakahima and Kristina Baumann, who live in Yokohama, attempted to register their marriage with local authorities, having married last year in Germany, Baumann’s native country. Their attempt was rejected, and they have decided to join as plaintiffs with a planned lawsuit challenging Japan’s failure to allow same-sex couples to marry or to recognize same-

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sex marriages contracted in other countries. Although consensual gay sex was decriminalized as long ago as 1880, Japanese society has generally not been supportive of LGBT rights, although a few municipalities have in recent years allowed gay couples to register and receive a limited list of rights. According to a *Reuters* report (January 18), foreigners working in Japan who are in a same-sex civil partnership or marriage with another foreigner can obtain a visa for their partners, but a gay Japanese national married to a foreigner cannot. The lawsuit that Nakajima and Baumann plan to join will be filed in mid-February, claiming that Japan is not meeting its obligation under international human rights law. * * * The prefecture of Chiba held a ceremony on January 29 to issue certificates recognizing the partnerships of sexual minority and common law couples, according to a January 30 report by *japantoday.com*. Mayor Toshihito Kumagi presided at the ceremony for six couples. According to a statement by the Chiba local government, the system of recognition it has introduced for LGBT couples as well as mixed-gender common law couples is “the first of its kind in Japan,” although other municipalities – Sapporo, Fukuoka, and Osaka – have formalized some recognition for LGBT relationships. * * * Japan’s Supreme Court ruled January 23 that a law requiring transgender people to be sterilized before they can obtain an official change of gender on government documents is not in violation of the country’s constitution. The law requires that an applicant for a change of gender designation must not have genitals capable of reproduction, and must have a body configured to resemble the “genital organs of those of the opposite gender.” This runs contrary to the emerging trend in many countries to acknowledge that gender identity does not reside in the genitals, and also imposes a significant barrier,

especially to transgender men, as it seems to require a surgically created male phallus – an expensive procedure which many deem unnecessary – in order to get an official change of gender designation. The panel of four judges ruled unanimously to reject the constitutional challenge, but in a separate opinion, Presiding Justice Mamoru Miura and another justice stated that although the law does not violate the constitution, “doubts are undeniably emerging. Suffering related to gender, felt by people with gender identity disorder, is also the problem of society as a whole, which should encompass the diversity of sexual identity,” they said. Lawyers for the plaintiff, a transgender man named Takakito Usui, said that the decision could boost a campaign to get lawmakers to change the rule. *Agence France Presse English Wire*, Jan. 24.

KENYA – The Constitutional Court announced that it will issue a ruling on February 22 in a pending challenge to the law penalizing “carnal knowledge.... against the order of nature.” The challenge was brought by Eric Gitari, who was until recently the executive director of the National Gay and Lesbian Human Rights Commission, a local organization that provides free legal services to the country’s LGBT community. As with other former British colonies, Kenya’s sodomy law is a relic of colonial times, dating from the 1895 penal code imposed by the British (using language similar to the penal law recently declared unconstitutional by India’s Supreme Court). *Thomson Reuters Foundation*, January 18.

MEXICO – The Supreme Court of Justice ruled on January 9 that the Mexican Social Security Institute erred by denying a widowhood pension to the same-sex partner of an insured individual, stating that Article 130 of

the Social Security Law, which limits such pensions to opposite-sex couples, is unconstitutional, and the Institute’s action also violated constitution guarantees of family protection, equality, and non-discrimination, according to a news bulletin posted to the internet on January 10 by journalist Rex Wockner.

SINGAPORE – Choong Chee Hong, better known as Bryan Choong, according to a Jan. 23 report in *The Straits Times*, has filed a lawsuit against the Attorney-General, arguing that Section 377A of the Penal Code – which criminalized sex between men – is “inconsistent” with provisions of Singapore’s Constitution and should be declared void. Choong relies on Article 9 (“No person shall be deprived of his life or personal liberty save in accordance with law.”), Articles 12 (equal protection of the laws), and Article 14 (freedom of speech and expression and the “right to form associations”). As the numbering of the provision indicates, Section 377A is a descendant of the sodomy law Britain imposed on many of its colonies during the 19th century. Mr. Choong is hoping to build on the momentum created by the Supreme Court of India when it declared unconstitutional Section 377 of the Indian Penal Code last year. His legal team includes Senior Counsel Harpreet Singh Nehal from Cavenagh Law Firm and a team from Peter Low & Choo law firm.

UNITED KINGDOM – The House of Lords voted to approve the Civil Partnerships, Marriages and Deaths (Registration) Bill, introduced by Baroness Hodgson of Abinger, for the purpose of equalizing access to civil partnerships. Under the Civil Partnership Act 2004, only same-sex couples could form civil partnerships. Now that full civil marriage rights have

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been extended legislatively to same-sex partners, the policy question was whether to eliminate civil partnerships or to broaden that status to allow different-sex couples to register and enjoy the benefits of a legally recognized non-marital partnership. The bill, previously approved by the House of Commons, would both extend civil partnerships to different-sex couples and make provisions for a mother's name to be included on marriage and civil partnership certificates, according to a U.K. Press Association report on January 18. This fulfills a promise made by the government in October. Home Office Minister Baroness Williams of Trafford commented, "while we highly value marriage, we do know that for many reasons this isn't an arrangement that suits everyone." Concluded the press report, "The bill, which has cross-party support, was given an unopposed second reading and goes forward for further detailed committee stage debate at a later date."

PROFESSIONAL NOTES

By Arthur S. Leonard

KRISTEN PRATA BROWDE has been elected 2019-20 President of the LGBT Bar Association of Greater New York (LeGaL), becoming the first transgender president of the organization, which continues to celebrate the 40th anniversary of its founding at its annual dinner on March 7. Browde is a solo practitioner specializing in family law.

JAMES B. LEVIN, an early member of the New York Law Group (earliest predecessor of LeGaL), died in Texas on January 24, age 78. Jim earned a bachelor's degree from the University of Maryland, and both a PhD and JD from Columbia University, and was a member of the NY Bar. He was an

English professor for many years at City College of New York, where he introduced one of the first gay studies courses in the nation and published a book in 1983 about gay novels. He was a founding member and early president of Gay & Lesbian Independent Democrats, and a president of the Gay Academic Union. He marched in NYC's first Gay Pride March in 1970, and many subsequent marches. He was on the Executive Board of Americans for Democratic Action. Mayor Ed Koch appointed him to the NYC Human Rights Commission in 1983, and he was active in achieving passage of the NYC Gay Rights Law, finally accomplished in 1986. He was a board member of the Bar Association for Human Rights of Greater New York during the 1980s, and an active volunteer for BAHF's Pro Bono Panel, providing services for people living with AIDS. In retirement he moved to Texas, where he is survived by his husband, Leath Nunn. An obituary notice published in the *New York Times* on February 3 asked that memorial donations be made to the American Civil Liberties Union.

At the **ASSOCIATION OF AMERICAN LAW SCHOOLS (AALS)** annual meeting in New Orleans in January, the Second on Sexual Orientation and Gender Identity sponsored or co-sponsored several well attended panels and elected leadership for 2019: Chair: **JEFFREY A. DODGE**, University of Idaho College of Law; Chair-Elect: **JACK B. HARRISON**, Northern Kentucky University Salmon P. Chase College of Law; Secretary: **SHAAKIRRAAH SANDERS**, University of Idaho College of Law; and Treasurer: **ELIZABETH SEPPER**, Washington University in St. Louis School of Law. Sixteen members of the Section volunteered to be on the Executive Committee. The main function of the Section leadership is to devise programs for the next annual meeting of the AALS, to be held in

Washington, D.C., during the first week of January, 2020. How times change! When the Section was organized in January 1983, there were probably no out LGBT faculty at any of the schools where this year's Section leaders teach. . . .

The **NATIONAL ASSOCIATION FOR LAW PLACEMENT** has released its annual report on diversity in the legal profession. As to LGBT lawyers, NALP reports: "There are wide geographic disparities in these numbers, and in fact about 55% of the reported LGBT lawyers are accounted for by just four cities: New York City, Washington, DC, Los Angeles, and San Francisco. The percentage of LGBT summer associates continues to suggest that there is still potential for some growth of the presence of LGBT associates at these firms. In firms of more than 700 lawyers, the percentage of LGBT associates has exceeded 5% in the five most recent years. In firms of 251+ lawyers, the figures were above 5% for the first time." (Of course, these figures would only account for those LGBT associates who decide to be "out," at least in terms of responding to surveys, as to which anonymity within firms may be a bit tricky, and of course there are those who just don't wish to mix their private and public lives. We also suspect that the actual presence of LGBT associates at big firms is underreported, as it is likely that some prefer to keep their sexual orientation private while participating in the competition to "make partner.") * * * "The overall percentage of lesbian, gay, bisexual, and transgender (LGBT) lawyers reported in 2018 increased to 2.86% compared with 2.64% in 2017." NALP reported that the number of LGBT lawyers reported in their survey (which covers about 99,000 lawyers nationwide) continues to increase every year since they began enumerating this category in 2002. NALP reported that

about 90% of law firms responding to their survey claimed to have at least one LGBT lawyer, and about half of the firms claims to have at least one LGBT partner.

The **AMERICAN CIVIL LIBERTIES UNION** is accepting applications for a full-time staff attorney or senior staff attorney position in its Reproductive Freedom Project base in its New York headquarters office. For details, see the job listings at <https://www.aclu.org/careers>.

The **UNIVERSITY OF LEIDEN** is again sponsoring a **SUMMER SCHOOL ON SEXUAL ORIENTATION & GENDER IDENTITY IN INTERNATIONAL LAW**, with a stellar faculty of European and American lecturers, running from July 24 to August 2. The first week will be in The Hague (the city of international justice), and the final days will be in Amsterdam, where the annual Pride Week will be taking place, culminating in the Pride Parade sailing through the city's canals on August 3. Past iterations of this program have drawn participants from 5 continents, providing an unusual opportunity to make international connections. A reduced fee is available for those who sign up by March 1, 2019. For full information, go to <http://summerschool.universiteitleiden.nl/courses/sexual-orientation-and-gender-identity-in-international-law>.

The **WILLIAMS INSTITUTE AT UCLA LAW SCHOOL** is soliciting applications from attorneys (with at least two years of legal experience) for a full-time position as a legal and policy analyst. The position will start as soon as an applicant is selected and will be based at the law school in Los Angeles. The Williams Institute is a think-tank focusing on LGBTQ issues which publishes research in support of legislative and litigation efforts. Full details are available at the Center's website, under the tag Career Opportunities: Williams Institute Administrative Analyst, Senior.

PUBLICATIONS

1. Barnett, Matt J., *Queering the Welfare State: Paradigmatic Heteronormativity After Obergefell*, 93 N.Y.U. L. Rev. 1633 (December 2018).
2. Beery, Brendan, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 Alb. L. Rev. 121 (2018-2019) (speculation on how the Supreme Court would deal with the problem of reconciling constitutional free exercise of religion rights with statutory non-discrimination rights in a Supreme Court where Brett Kavanaugh has replaced Anthony Kennedy, the author of the *Masterpiece Cakeshop* decision).
3. Berman, Mitchell N., and David Peters, *Kennedy's Legacy: A Principled Justice*, 46 Hastings Const. L.Q. 311 (Winter 2019).
4. Clarke, Jessica A., *They, Them, and Theirs*, 132 Harv. L. Rev. 894 (January 2019) (what would the law look like if it took nonbinary gender identity seriously?).
5. Dillbary, J. Shahar, and Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. Chi. L. Rev. 1 (Jan. 2019) (empirical evidence that same-sex male couples applying for mortgage loans encounter systemic discrimination).
6. Farrell, Robert C., *Richard Posner: A Class of One*, 71 SMU L. Rev. 1041 (Fall, 2018) (considers Judge Posner's introduction of "animus" as a key factor in "class of one" equal protection claims).
7. Feinerman, Gary, *Civility, Dignity, Respect, and Virtue*, 71 Stan. L. Rev. Online 140 (Aug. 2018) (celebrating Justice Kennedy's jurisprudence).
8. Greene, Abner S., "Not in My Name" Claims of Constitutional Rights, 98 B.U. L. Rev. 1475 (Dec. 2018) (General focus on the freedom of speech issue that the Supreme Court characterized as "difficult" and did not decide in *Masterpiece Cakeshop*, which is discussed at length in a footnote that indicates the author has a forthcoming article focusing on *Masterpiece Cakeshop*).
9. Harrell, Rodney W., *State Religious Free-Exercise Defenses to Nondiscrimination Laws: Still Relevant After Masterpiece Cakeshop*, 87 UMKC L. Rev. 297 (Winter 2019).
10. Hillhouse, Raelynn, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 Geo. J. Gender & L. 49 (Fall, 2018).
11. Hudson, David L., Jr., *Justice Kennedy and the First Amendment*, 9 HLRe 49 (Houston Law Review on-line edition) (Spring 2019) (Kennedy wrote important decisions rejecting Congressional censorship of sexually-oriented material on the internet).
12. Johnson, Marc, *Bermuda's Domestic Partnership Act 2018: From 'Living Tree' to Broken Branches?*, 4 Eur. Hum. Rts L. Rev. 367 (2018).
13. Johnson, Victoria, *Schneider v. Lee: Some (Re)Assembly Required*, 71 Okla. L. Rev. 553 (Winter 2019) (Who is a parent in the age of marriage equality?).
14. Milosevic, Ashley, *The Tides of Transgressions: An Analysis of Defamation and the Rights of the LGBT Community*, 82 Alb. L. Rev. 323 (2018-2019).
15. Panel Discussion, *Using the Licensing Power of the Administrative State: Model Rule 8.4(G)*, 31 Regent U. L. Rev. 31 (2018-2019) (panel of mainly conservative commentators taking potshots at the newest revision of ABA Model Rule of Professional Responsibility 8.4(G), which requires lawyer to refrain from discrimination, including discrimination because of sexual orientation or gender identity; panelists include one of the leading openly homophobic public officials in the U.S., Texas Attorney General Ken Paxton).
16. Patterson, Charlotte J., and Carlos A. Ball, *Perspectives on Sexual Orientation and Gender Identity in Family Law*, 56 Fam. Ct. Rev. 361 (July 2018).
17. Perez, Barbara, *Coexistence of Codedestruction? Balancing the Competing Interests of Same-Sex Couples and the Free Exercise Rights of Religious Business Owners*, 24 Trinity L. Rev. 1 (Fall 2018) (argues that because businesses are allowed to refuse to provide goods and services to customers for "secular purposes," they should be allowed to refuse to provide marriage-related goods and services to same-sex couples for "religious purposes").
18. Primus, Richard, *Second Redemption, Third Reconstruction*, 106 Calif. L. Rev. 1987 (December 2018) (reflecting on the stages of evolution of Equal Protection doctrine, characterizing *Obergefell v. Hodges* as more of an equal protection case than a due process case, and viewing with some alarm the attitudes of Republican justices appointed during the 21st century towards equal protection claims).
19. Shealy, Miller W., Jr., *U.S. Supreme Court Review: 2017-2018*, 30-NOV S.C.

- Law. 18 (Nov. 2018) (discussion of *Masterpiece Cakeshop*).
20. Smith, Tracy, Stretching the First Amendment: Religious Freedom and Its Constitutional Limits Within the Adoption Sector, 46 Pepp. L. Rev. 113 (Dec. 2018).
 21. Sparling, Tobin, Clay Pigeon or Trojan Horse: *Pigeon v. Turner* and the Intersection of Gay Rights and Judicial Ethics in Texas, 17 Conn. Pub. Int. L.J. 255 (Spring-Summer 2018).
 22. Tang, Aaron, Rethinking Political Power in Judicial Review, 106 Calif. L. Rev. 1755 (Dec. 2018) (includes cogent discussion of the salience of political power in the same-sex marriage cases).
 23. Volokh, Eugene, The Law of Compelled Speech, 97 Tex. L. Rev. 355 (Dec. 2018).
 24. Waldman, Emily Gold, The Preferred Preferences in Employment Discrimination Law, 97 N.C. L. Rev. 91 (Dec. 2018) (When is customer preference a viable defense in a Title VII employment discrimination claim?).
 25. Yi Wei, Towards the Full Promise of Liberty: A Comparative Approach to the Decriminalization of Male Homosexual Sex in Singapore, 20 Asian-Pac. L. & Pol'y J. 50 (Dec. 18, 2018).

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.