

L G B T LAW NOTES

April 2016

SUPREME COURT UNANIMOUSLY REAFFIRMS SECOND-PARENT ADOPTION

*Justices Conclude Straightforward Application of Full Faith
and Credit Principles Resolves Alabama Case*

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U.S. Supreme Court Unanimously Extends Full Faith and Credit to Georgia Second-Parent Adoption

On March 7, 2016, the eight-member Supreme Court of the United States unanimously reversed the Alabama Supreme Court, calling out “analysis . . . not consistent with . . . controlling precedent” in a short *per curiam* opinion that restored a lesbian mother’s parental rights to children she had previously raised with an ex-partner and adopted in Georgia. *V.L. v. E.L.*, 2016 WL 854160. After the Justices signaled their thinking by entering a stay in December, they decided the case in a summary disposition, or purely on the certiorari petition briefs, acknowledging that they saw the case

authorize second-parent adoptions, a central tenet of gay family protections before marriage equality that many family law practitioners still strongly recommend, the trial court found that V.L. had complied with all applicable requirements, and made it clear that V.L. and E.L. would henceforth both be legal parents of the three kids.

After the couple split up in 2011, E.L. denied V.L. access to the children, and V.L. headed to court to assert her parental rights. The Family Court of Jefferson County, Alabama, gave V.L. scheduled visitation. E.L. appealed and the intermediate appellate court rejected E.L.’s attack on the validity

Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” Basically, if a state court has jurisdiction under its own laws to issue a decision, then that decision is entitled to respect in the courts of every other state. Reaffirming that this command is “exacting,” the Court further explained that “[a] State may not disregard the judgment of a sister State because it disagrees with the reasons underlying the judgment or deems it to be wrong on the merits.”

The Court then eviscerated the Alabama Supreme Court’s reliance on the jurisdictional exception to full

Reaffirming that this command is “exacting,” the Court further explained that “[a] State may not disregard the judgment of a sister State because it disagrees with the reasons underlying the judgment or deems it to be wrong on the merits.”

as straightforward enough to resolve without asking for full briefing or oral argument on the issues.

V.L. and E.L., an Alabama lesbian couple, lived together from 1995 to 2011, during which time E.L. had three children via assisted reproductive technology. They raised them together until breaking up in 2011. Taking advantage of the availability of second-parent adoptions in Georgia, they temporarily rented a house in Alpharetta and V.L. successfully obtained an adoption decree from the Superior Court in Fulton County in 2006. E.L. formally consented to allow V.L. to adopt the children. After the adoption was approved, the couple and their children resumed their residency in Alabama. Although Georgia’s adoption statutes do not specifically

of the Georgia adoptions, but the Alabama Supreme Court accepted her argument that the Georgia court had no jurisdiction to even enter a judgment allowing V.L. to adopt the children. *E.L. v. V.L.*, 2015 WL 5511249 (Sept. 15, 2016).

With many commentators seeing notoriously homophobic Alabama Chief Justice Roy Moore’s fingerprints all over an opinion clearly at odds with well-settled full faith and credit jurisprudence, V.L. then sought emergency relief from the U.S. Supreme Court, and the Justices entered a stay of the Alabama Supreme Court’s decision on December 14 that would remain in place until their final resolution of the case.

Section 1 of Article IV of the United States Constitution declares that “Full

faith and credit, whereby recognition can be refused if the judgment in question is “rendered by a court that ‘did not have jurisdiction over the subject matter or the relevant parties,’” calling such an inquiry “a limited one.” The Alabama Supreme Court insisted that Georgia law required a formal surrender of parental rights from E.L. before allowing V.L. to adopt. According to that court’s logic, failing to enforce that surrender, then, stripped the Georgia court of subject-matter jurisdiction.

The U.S. Supreme Court, however, noted that “[n]either the Georgia Supreme Court nor any Georgia appellate court . . . has construed [the Georgia statutory provision cited by the Alabama Supreme Court] as jurisdictional” and “[t]hat construction

would also be difficult to reconcile with Georgia law.” Instead, a “time-honored rule” of finding ambiguous statutory language as creating rules of decision, rather than going to jurisdiction, also applies here. “The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit.”

The U.S. Supreme Court decision in this case came just three days after the Alabama Supreme Court finally conceded defeat in a separate struggle to resist complying with the nationwide constitutional mandate of marriage equality rendered last June in *Obergefell v. Hodges*, making for an extraordinary week of vindication for Alabama’s LGBT community in the face of longstanding intransigence from the state’s highest court. *In re King*, 2016 Ala. LEXIS 31, 2016 WL 859009 (March 4, 2016). A one-sentence *per curiam* order made clear that there were no straws left to grasp for the Alabama Supreme Court to continue resisting marriage equality in the Heart of Dixie, but 170 pages of bloviating concurrences, led by Chief Justice Moore, harshly criticized the legitimacy of the *Obergefell* ruling. (See page 129 for a full account.)

V.L. was represented by the San Francisco-based National Center for Lesbian Rights, which claimed victory in its second Supreme Court case in nine months—the organization also helped represent the Tennessee plaintiffs in their marriage recognition case that was ultimately decided as part of *Obergefell*—and Jenner & Block’s Paul Smith, the victorious *Lawrence v. Texas* oralist, along with local counsel from Birmingham, Alabama. — Matthew Skinner

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York (LeGaL).

North Carolina H.B. 2 Draws ACLU/ Lambda Lawsuit and Numerous Protest Actions

Within days of Governor Pat McCrory, a Republican, signing into law H.B. 2, an “emergency measure” that passed with unanimous support of the Republicans in the North Carolina legislature to restrict public restroom access for transgender people and preempt localities from legislating on LGBT rights, the ACLU’s national LGBT & HIV Project and its North Carolina affiliate, in collaboration with the Atlanta office of Lambda Legal, filed a lawsuit in the U.S. District Court for the Middle District of North Carolina, attacking the constitutionality of the measure. *Carcano v. McCrory*,

sports leagues possibly shifting championship games out of the state. Particular attention was focused on a large furniture trade fair held annually in North Carolina, organized by a gay couple, with the organizers reporting that many of the usual participants had indicated that they would not come this year due to passage of the law. Efforts to put pressure on the state legislature through a tourism and business boycott were soon well under way. Governor McCrory dug in his heels, claiming that the law was not “discriminatory” and was intended to protect the private of public restroom users, charging that Attorney

Passage of H.B. 2 was provoked by a majority vote of the Charlotte City Council to add sexual orientation and gender identity to its local civil rights ordinance effective April 1.

No. 1:16-cv-236 (filed March 28, 2016). The case was assigned to District Judge Thomas D. Schroeder. North Carolina’s attorney general, Roy Cooper III, one of the named defendants in his official capacity, soon announced that he agreed with the plaintiffs that H.B. 2 was unconstitutional and so his office would not defend it. Cooper is planning to run for governor against McCrory.

Social and political fallout responding to the new statute was swift. Governors from three states and mayors from several major cities had banned official travel by their employees to North Carolina within a week after the bill was signed, scores of corporate executives, including many from the state’s largest employers, signed letters to the governor deploring the measure, and talk had begun about professional

General Cooper’s announced refusal to defend the measure was a violation of his oath of office, a point that Cooper hotly disputed. McCrory’s position was quickly undermined as Governor Nathan Deal, a fellow Republican, vetoed an anti-gay “religious freedom” measure in Georgia just days later, to be followed shortly by Virginia Governor Terry McAuliffe.

Passage of H.B. 2 was provoked by a majority vote of the Charlotte City Council to add sexual orientation and gender identity to its local civil rights ordinance effective April 1, over protests by opponents that this would allow men pretending to be women to invade women’s restroom facilities, thus violating the privacy of their female users and posing a danger of sexual assaults. The claim was bizarre on its

face, since scores of municipalities and counties, and many states, have banned gender identity discrimination in places of public accommodation, some for a decade or more, without any such incidents being reported. Furthermore, somebody identified as male at birth but asserting a female gender identity would not likely attempt to use a woman's restroom or locker room facility if they were not expressing their gender identity as female through dress and grooming and taking female hormones through a prescription written by a doctor who has diagnosed gender dysphoria, and such is the experience under such laws in other jurisdictions. But Governor McCrory, running for re-election and seeking to energize his conservative (and presumably transphobic) base, had warned even before the Council voted that passage of the measure in the city where he had previously served as mayor would require a response from the state government. Although McCrory did not call for the special session, which was initiated by Republican leaders in both houses, he signed the resulting bill with alacrity, probably setting speed records for a controversial measure being introduced, passing both houses, and being signed into law in a single legislative day. Some state legislators protested that they did not even receive the text of the bill prior to the day's floor debates.

Although the "provocation" focused on restrooms, the legislative response ran far beyond a simple overturning of the gender identity provision of the local ordinance as it pertains to public accommodations or more narrowly to specific kinds of facilities. Instead, the legislature affirmatively enacted a *requirement* that the public schools and other government facilities throughout the state restrict access to any "multiple occupancy bathroom or changing facility" by designating each such facility as being for the exclusive use of males or females and providing that only persons identified on their birth certificates as male could use male-designated facilities and analogously for women. Since North Carolina requires proof of sex reassignment surgery before issuing new birth certificates

to applicants seeking a change to reflect their gender identity, and many transgender people don't undergo complete reassignment surgery for a variety of reasons, including the expense of a procedure not covered by their health insurance, many transgender people would be left in effect without ready access to appropriate restroom facilities. Use of facilities consistent with their birth certificates could subject them to violent reactions, especially noting the gun culture of southern states like North Carolina. (Imagine the danger to a transgender man coming into a female-designated restroom occupied by women with pistols!) The legislature apparently gave no thought to how its restroom restrictions would be enforced in practice, an issue not addressed in the statute. Indeed, the statute directs its mandate to "local boards of education" and government "agencies" to "establish" single-sex facilities and restrict their use, but does not explicitly impose penalties for failure to do so, and says nothing specifically about penalties, if any, imposed on persons apprehended using the "wrong" restrooms. We are waiting for somebody to confront Gov. McCrory in a men's restroom in the state capitol to demand that he prove his "biological sex," presumably by exposing his penis to inspection. But we digress. . . .

The legislature went even further. Not contenting itself with addressing the "bathroom" issue, it also passed a provision preempting local governments from forbidding discrimination in employment and public accommodations by declaring such issues as properly reserved to statewide resolution. Just to drive the point home and to avoid arguments about broadly defining bans on sex discrimination, the preempting statute bans discrimination on the basis of "biological sex," which is defined according to the individual's sex as designated on their birth certificate. The measure also eschews creating any private right of action for discrimination in employment or public accommodations, instead limiting enforcement to complaints to the Human Relations Commission,

which is authorized to "investigate and conciliate" but not to legislate, the goal being to resolve all complaints from "amicable resolution." This effectively preempted and wiped out all local civil rights laws, and because of the limited list of categories covered in H.B. 2, incidentally eliminated some local protections for veterans. While they were at it, the legislators threw into the bill a totally unrelated prohibition on local governments legislating on public contracting, wages and hours, child labor, and other subjects dealt with by the state's wage and hours law, including prohibiting localities from establishing a minimum wage higher than the state's rather low minimum. The thread tying these provisions together was a purported bid for "statewide consistency" in employment regulation, contracting, and anti-discrimination policies, the "theory" being that allowing localities to legislate would make life too difficult for businesses and confusing for everybody else.

The lawsuit was brought in the name of two state university employees, Joaquin Carcano (a transgender man at UNC Chapel Hill) and Angela Gilmore (a lesbian at Northern Carolina Central University Law School) and a current student, Payton Grey McGarry (a transgender man at UNC Greensboro), as well as the ACLU of North Carolina (a legal membership organization) and Equality North Carolina (a political membership organization). The named defendants are Governor Patrick McCrory, Attorney General Roy Cooper III, the University of North Carolina and its Board of Governors, and the UNC Board's chair, W. Louis Bissette, Jr.

The complaint proceeds along several lines, constitutional and statutory. The constitutional claim is that H.B. 2 violates the 14th Amendment's Due Process and Equal Protection Clauses, by imposing harms on transgender and lesbian/gay/bisexual residents of the state without sufficient justification to meet constitutional requirements. The complaint asserts that heightened scrutiny judicial review applies to these sorts of discrimination, a point not yet expressly embraced by the Supreme Court but starting to make

its way in the lower federal courts. (For example, the 11th Circuit, in *Glenn v. Brumby*, 663 F.3d 1312 (2011), found that gender identity discrimination by a public employer was sex discrimination subject to heightened scrutiny. The Obama Administration argued in the *Windsor* case that sexual orientation discrimination was subject to heightened scrutiny, a point embraced by the 2nd Circuit in that litigation.) The Due Process Clause claim includes a privacy claim, arguing that the bathroom restrictions will require transgender people to “out” themselves, thus exposing themselves to danger, and that in light of the state’s demanding criteria for issuing new birth certificates, in effect dictating to transgender people that they must undergo surgical procedures to attain equal access to appropriate public facilities for their gender, another

Colorado amendment, H.B. 2 does not single out LGBT people for exclusion from protection on its face, excluding them instead by *not* mentioning sexual orientation or gender identity as prohibited grounds of discrimination and preempting local governments from legislating on discrimination. But the rationale of *Romer* seems to apply, in that the measure was adopted for the proclaimed purpose of excluding LGBT people from the protections afforded to other groups that suffer discrimination, with no rational basis articulated other than a desire to exclude. Another argument that seems relevant here would be derived from the U.S. Supreme Court’s ruling in *U.S. v. Windsor* striking down Section 3 of the Defense of Marriage Act. The government sought to defend the refusal to recognize same-sex marriages

initially with the EEOC or designated state civil rights agencies, subject to an “exhaustion of administrative remedies requirement,” before they can be brought in federal court, so no Title VII claim was asserted in this challenge to H.B. 2. However, it is possible that transgender state and local government employees will file such complaints, generating additional litigation as the *Carcano* case works its way through the federal courts. EEOC is busy litigating, directly and through amicus briefs in private litigation, to establish its position on the interpretation of “sex” under Title VII in non-federal employment cases in the courts, and a private “bathroom” case under Title IX is pending before the 4th Circuit Court of Appeals, *G.G. v. Gloucester County School Board*, 2015 U.S. Dist. LEXIS 124905, 2015 WL 5560190 (E.D. Va. September 17, 2015). (Federal courts generally consider Title VII sex discrimination and Title IX cases under the same doctrinal rubric and freely refer to court decisions under both statutes.) Indeed, the *G.G.* appeal has been argued before a circuit panel and a ruling is imminent. Such a ruling would be direct binding precedent on the district court in the case challenging H.B. 2.

The legal team representing plaintiffs includes Christopher A. Brook for the ACLU of North Carolina, Elizabeth O. Gill and Chase B. Strangio of the ACLU’s national LGBT & HIV Project, and Tara L. Borelli, Peter C. Renn, and Kyle A. Palazzolo of Lambda Legal.

[Government officials from other states taking official action to ban state-funded employee trips to North Carolina included New York Governor Andrew Cuomo (Executive Order No. 155), New York City Mayor Bill de Blasio, Vermont Governor Peter Shumlin, Washington Governor Jay Inslee, Connecticut Governor Dannel P. Malloy, Minnesota Governor Mark Dayton, Seattle Mayor Edward Murray (Executive Order 2016-03), San Francisco Mayor Ed Lee, Chicago Mayor Rahm Emanuel, and District of Columbia Mayor Muriel Bowser. Boston Mayor Martin Walsh signed a bill passed by the City Council to the same effect.] ■

The complaint also attacks the preemption of local laws protective of LGBT rights, summoning an argument based on the Supreme Court’s 1996 decision in *Romer v. Evans*.

imposition upon individual choice and autonomy. The complaint also asserts violations of Title IX of the federal Education Act Amendments, which forbid sex discrimination by educational institutions that get federal money. This relies on recent interpretations by the U.S. Department of Education that this provision requires educational institutions to allow transgender people to access restroom and locker room facilities consistent with their gender identity.

The complaint also attacks the preemption of local laws protective of LGBT rights, summoning an argument based on the Supreme Court’s 1996 decision in *Romer v. Evans*, which struck down a Colorado constitutional amendment prohibiting the state or its political subdivisions from outlawing anti-gay discrimination. Unlike the

contracted under state law by advancing the need for a national unified definition of marriage for purposes of federal rights and programs, similar to North Carolina’s argument for “statewide consistency” in anti-discrimination law. The Supreme Court did not even find that justification significant enough to dignify it with discussion.

Since Title VII of the Civil Rights Act of 1964, which bans sex discrimination in employment, applies to state and local government workplaces, the restroom provisions likely violate Title VII consistent with the views of the EEOC, as expressed in *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (EEOC, April 1, 2015, holding that the Department of the Army violated Title VII by refusing by restricting restroom access of a transgender civilian employee). Title VII claims must be filed

Alabama Supreme Court Dismisses Pending Anti-Marriage Case

On March 4, the Alabama Supreme Court issued a one-sentence order in *In re King*, 2016 Ala. LEXIS 31, 2016 WL 859009: “IT IS ORDERED that all pending motions and petitions are DISMISSED.”

For those coming in late, this case, filed under the full title of *Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County*, sought to invoke the mandamus jurisdiction of the Alabama Supreme Court last winter after U.S. District Judge Callie Granade had ruled in January that the state’s ban on same-sex marriage was unconstitutional and ordered a local probate judge to issue marriage licenses to the plaintiffs in her case. The organizational plaintiffs in *Ex parte State*, asserting that they were filing in the interest of the state and joining a probate judge (and subsequently others) to assure standing, sought to provoke a ruling that the state’s probate judges were not required to issue marriage licenses to same-sex couples. Those rulings had already provoked Chief Justice Roy Moore to issue an “administrative order” on February 8, 2015, proclaiming that the federal court rulings were not binding on Alabama probate judges and prohibiting them from issuing marriage licenses, and a subsequent ruling by the Alabama Supreme Court in March (Moore recusing himself) upholding the constitutionality of the state’s ban on same-sex marriages. The upshot was that Judge Granade’s decision had limited local impact as everybody waited for the U.S. Supreme Court to rule in *Obergefell v. Hodges*.

After the *Obergefell* ruling on June 26, most state courts and local governments fell into line with that decision, but among the notable holdouts were Alabama probate judges, abetted by Chief Justice Moore, who promptly asserted the illegitimacy of the *Obergefell* decision and advanced the ludicrous contention that it was not binding in Alabama because the

Supreme Court was ruling on appeals from the 6th Circuit only. Several weeks after *Obergefell*, the Alabama Court requested counsel for the parties in *Ex parte State of Alabama* to submit their positions on the impact of *Obergefell*, and the petitioners in that case argued, in line with Justice Moore’s views, that the Alabama Supreme Court’s ruling was still good law, *Obergefell* was illegitimate, and the probate judges should continue to refuse to issue marriage licenses to same-sex couples. Although most probate judges in the state slowly came into line with the federal requirements, noting that Judge Granade had expanded her order to encompass all the probate judges, the Alabama Supreme Court was in no hurry to rule on this existing case. Responding to continued local uncertainty about what to do, Chief Justice Moore issued a new administrative order on Jan. 6, instructing probate judges that the Alabama Supreme Court opinion from last March was still in effect and that they should not issue marriage licenses until the Alabama Supreme Court ruled in the case. This order was widely ignored, although there remained several counties in which same-sex couples could not get marriage licenses.

The March 4 order produced no opinion for the court, but several of the justices penned “special concurrences” explaining their views. Indeed, Chief Justice Moore released two opinions, one explaining why he had recused himself from the prior ruling but “unrecused” himself for this decision and the other denouncing the *Obergefell* decision at length (almost 100 pages). In short, Moore contended that after the *Obergefell* decision the issue before the court was different, such that his prior “administrative order” no longer stood in the way of his ethical obligation not to sit as an appellate judge on a case where he had already issued a ruling in a non-appellate capacity. It was hard to conclude, however, that Moore had worked out a rationale for being able to issue his lengthy concurring opinion denouncing *Obergefell* without running

afoul with the established ethical objection to judges sitting on appeals of their own rulings.

Several other justices also denounced *Obergefell* and mourned the death of the “rule of law,” but one, Justice Greg Shaw, was more circumspect, abstaining from opining on the merits of the U.S. Supreme Court’s decision and deriding elements of Moore’s opinion as “silly,” provoking outraged response from Moore. Moore managed to find in U.S. Chief Justice John Roberts’ *Obergefell* dissent support for his contention that “marriage” is an institution created by God and thus not subject to “redefinition” by courts. Most of the concurring opinions contended that the U.S. Supreme Court had engaged in unprincipled legislating, emphasizing the traditional role of states in defining and regulating marriage, relying heavily on the dissenting opinions in the U.S. Supreme Court, and disagreeing to greater or lesser extent with the contention that substantive due process under the 14th Amendment could be construed as affording constitutional status to claims for same-sex marriage.

Justice Shaw, by contrast, suggested that the Supreme Court’s marriage equality ruling had moved the topic out of the judicial sphere and into the political sphere, where the people, if they strongly disagreed, could seek to overrule it by constitutional amendment. This seems unlikely, however, as public support for marriage equality, reflected in numerous polls, had crossed over to positive territory during the past few years, and the Democratic Party is now sufficiently committed to supporting marriage equality on the national level to prevent a proposed constitutional amendment from drawing the necessary supermajority in Congress in order to be proposed to the states for ratification. Indeed, public opinion seems to respond affirmatively to the experience of implementation of marriage equality, as most people conclude that it does not really affect them directly and does not appear to have caused the social ills predicted by opponents. ■

Federal Court Enjoins Enforcement of Mississippi's Ban on Adoptions by Married Same-Sex Couples

Finding that the ability of a couple to adopt a child is a “benefit” of marriage, U.S. District Judge Daniel P. Jordan III ruled on March 31 in *Campaign for Southern Equality v. Mississippi Department of Human Services*, 2016 U.S. Dist. LEXIS 43897 (S.D. Miss., Northern Div.), that Mississippi’s statutory ban on adoptions by same-sex couples probably violates the 14th Amendment under the Supreme Court’s ruling in *Obergefell v. Hodges*. Although Judge Jordan found that some of the plaintiffs and many of the defendants had to be dismissed from the case on grounds of standing and jurisdiction, he concluded

Among the plaintiffs are same-sex couples who sought second-parent adoptions of children born to one member of the couple by her same-sex partner, and same-sex couples who sought to adopt children not biologically related to either of them through the foster care system. The court found that one of the couples was not married at the time the complaint was filed, and dismissed them from the case for lack of standing, since the state denies adoptions to all unmarried couples, whether same-sex or different-sex. However, the court concluded that all of the remaining couples had standing to challenge the statutory ban in court,

general were appropriate defendants, since neither of those state officials plays any role in administering the adoption system. On different grounds, the court dismissed from the case several judges who were named as defendants, finding that judges whose role is to adjudicate cases are not “adverse parties” to plaintiffs seeking to invalidate a state statute. The Department of Human Services could not itself be sued, as the 11th Amendment as construed by the Supreme Court gives state agencies general immunity from being sued by citizens of the state in federal court for violations of constitutional rights. However, the Supreme Court has allowed a “work around” for that constitutional barrier, by allowing suits against the officials charged with the direction of an agency that plays a role in the enforcement of a challenged statute. Judge Jordan found that the Department plays a significant role in administering the foster care system and in investigating adoption petitions and making recommendations to the courts, and thus the Director of the Department would be an appropriate defendant. While noting that the Department has stated recently that it would not stand in the way of a same-sex couple adopting a child, the court found there was sufficient evidence in the record that same-sex couples continue to be discouraged from applying for the foster care program to discount this statement for purposes of determining who can be sued in this case, stating that “the record before the Court indicates that [the Department] has interfered with same-sex adoptions after *Obergefell*.”

Turning to the merits of the plaintiffs’ motion for a preliminary injunction, the court had to confront the doctrinal mysteries of Justice Anthony Kennedy’s opinion for the Supreme Court in *Obergefell*. While that opinion makes clear that the right to marry as such is a fundamental right under the Due Process Clause of the 14th Amendment, and that exclusion of same-sex

U.S. District Judge Daniel P. Jordan III ruled that Mississippi’s statutory ban on adoptions by same-sex couples probably violates the 14th Amendment under the Supreme Court’s ruling in *Obergefell v. Hodges*.

that other plaintiffs did have standing to challenge the law in court, and that the Executive Director of the state’s Department of Human Services was an appropriate defendant to be ordered on behalf of the state not to enforce the ban while the lawsuit is pending. The ruling came as the state’s legislature was putting finishing touches on a so-called religious-freedom bill intended to protect persons or businesses with religious objections to same-sex marriage or sex relations between anyone other than a man and a woman united in marriage from any adverse consequences at the hand of the government or any liability for refusing to provide goods or services in connection with same-sex marriages. The constitutionality of such a measure is much disputed in light of *Obergefell*.

since an employee of the Department had told one of the couples in response to an inquiry about the foster-care route that the Department would continue enforcing the ban despite the Supreme Court’s June 26, 2015, ruling in *Obergefell v. Hodges*, which held that states are required under the 14th Amendment to allow same-sex couples to marry and to accord official recognition to same-sex marriages contracted in other jurisdictions. The organizational plaintiffs, Campaign for Southern Equality and Family Equality Council, met the test for associational standing by alleging that they had members who were married same-sex couples in Mississippi with interests in adoption similar to the named plaintiffs.

The court found, however, that neither the governor nor the attorney

couples from marrying violates that fundamental right, the Court never directly addressed the question of what level of judicial review might be appropriate for claims that a same-sex couple is being denied any particular benefit of marriage, which would determine what kind of justification a state would have to present for treating same-sex couples differently from different-sex couples.

“While the majority’s approach [in *Obergefell*] could cause confusion if applied in lower courts to future cases involving marriage-related benefits,” wrote Jordan, “it evidences the majority’s intent for sweeping change. For example, the majority clearly holds that marriage itself is a fundamental right when addressing the due-process issue. In the equal-protection context, that would require strict scrutiny. But the opinion also addresses the benefits of marriage, noting that marriage and those varied rights associated with it are recognized as a ‘unified whole.’ And it further states that ‘the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the *benefits* afforded to opposite-sex couples *and* are barred from exercising a fundamental right.’”

“Of course the Court did not state whether these other benefits are fundamental rights or whether gays are a suspect class,” Judge Jordan continued. “Had the classification not been suspect and the benefits not fundamental, then rational-basis review would have followed. It did not. Instead, it seems clear the Court applied something greater than rational-basis review. Indeed, the majority never discusses the states’ reasons for adopting their bans on gay marriage and never mentions the word ‘rational.’” Thus, from a doctrinal standpoint, the *Obergefell* opinion is in some sense incomplete. But it was not puzzling enough to deter Judge Jordan from moving ahead to the logical result.

“While it may be hard to discern a precise test,” he wrote, “the Court extended its holding to marriage-related benefits – which includes the right to adopt. And it did so despite those who urged restraint while marriage-related benefits cases worked

their way through the lower courts. According to the majority, ‘Were the Court to stay its hand to allow slower, case-by-case determination of the required *availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.*’” Judge Jordan noted Chief Justice John Roberts’ response to this point in his dissenting opinion, including his contention that as a result of the Court’s ruling “*those more selective claims will not arise now* that the Court has taken the drastic step of requiring every State to license and recognize marriage between same-sex couples.” (In all these quotations from *Obergefell*, the emphases were added by Judge Jordan.)

“In sum,” wrote Jordan, “the majority opinion foreclosed litigation over laws interfering with the right to marry and ‘rights and responsibilities intertwined with marriage.’ It also seems highly unlikely that the same court that held a state cannot ban gay marriage because it would deny benefits—expressly including the right to adopt—would then conclude that married gay couples can be denied the very same benefits.” The conclusion is obvious: *Obergefell* decides this case. “The majority of the United States Supreme Court dictates the law of the land,” wrote Jordan, “and lower courts are bound to follow it,” which means the Mississippi statutory ban on same-sex couples adopting children violates the Equal Protection Clause.

In his March 31 decision Judge Jordan was not rendering a final ruling on the merits, but rather responding to the plaintiffs’ motion for a preliminary injunction against enforcement of the statutory ban while the case continues. The first step of determining whether plaintiffs can get their injunction requires the court to determine whether they are likely to win on the merits, and the foregoing discussion was directed to that point. Next Jordan considered whether allowing the ban to continue would inflict irreparable harm on the plaintiffs, which is simply answered by noting that monetary damages could not compensate a delay in being allowed to adopt a child and that a denial of

equal protection of the laws is always considered an irreparable injury. Since the current position of the Department is that “it will not impede an otherwise valid gay adoption,” it was clear that the “balance of harms” between the parties favors plaintiffs, as does the factor of how the public interest would be affected by granting or denying an injunction. Thus, the court concluded that an injunction should be issued. “The Executive Director of DHS is hereby preliminarily enjoined from enforcing Mississippi Code section 93-17-3(5),” ordered the court. There was no immediate word whether the state would attempt to appeal this grant of preliminary relief. Perhaps the court’s opinion will suffice to convince state officials that “marriage equality” as decreed by the Supreme Court means equality in all respects, invalidating any state law or policy that would treat same-sex married couples differently from different-sex married couples.

Since *Obergefell* dealt with benefits of marriage and did not rule on the rights, if any, of unmarried same-sex couples, it would not provide a direct precedent concerning attempted second-parent adoptions or adoptions out of foster care by unmarried same-sex couples, which is why one of the plaintiff couples was dismissed from the case, even though they informed the court that they had married after the complaint was filed. And it would be difficult to argue that unmarried same-sex couples are “similarly situated” to married couples in relation to the adoption of children, at least for purposes of an Equal Protection challenge. Everybody involved in the case, it appears, agrees that the sole issue is whether the challenged statute can be used to deny married same-sex couples a benefit afforded to married different-sex couples.

Lead attorney for the plaintiffs is Roberta “Robbie” Kaplan, a partner in the New York City office of Paul, Weiss, Rifkind, Wharton & Garrison, who also represented Campaign for Southern Equality in its successful legal challenge to Mississippi’s ban on same-sex marriage and Edith Windsor in her successful legal challenge to Section 3 of the Defense of Marriage Act. ■

Federal Judge in Puerto Rico Claims *Obergefell v. Hodges* Does Not Apply There

In an astonishing departure from established precedents, U.S. District Judge Juan M. Perez-Gimenez of the U.S. District Court in Puerto Rico, who had dismissed a marriage equality lawsuit on October 21, 2014, issued a decision in *Conde-Vidal v. Garcia-Padilla*, 2016 U.S. Dist. LEXIS 29651, 2016 WL 901899 (D.P.R., March 8, 2016), asserting that the U.S. Supreme Court's ruling on June 26, 2015 in *Obergefell v. Hodges*, 135 S. Ct. 2584, that the 14th Amendment of the U.S. Constitution protects the right of same-sex couples to marry in the United States, does *not* necessarily apply to Puerto Rico. On March 21, counsel for the plaintiffs filed a petition for a writ of mandamus with the 1st Circuit, asking that court to order Judge Perez-Gimenez to enter judgment for the plaintiffs in compliance with the Supreme Court's decision, demonstrating that Supreme Court precedent mandates according full constitutional rights under the 14th Amendment to persons in Puerto Rico.

Lambda Legal represents the plaintiffs in this marriage equality case. Lambda appealed the court's 2014 ruling to the 1st Circuit Court of Appeals, which has jurisdiction over federal cases arising in Puerto Rico. That court held up ruling on the appeal until after the Supreme Court ruled in *Obergefell*. On July 8, 2015, the 1st Circuit vacated Judge Perez-Gimenez's decision and sent the case back to the district court "for further consideration in light of *Obergefell v. Hodges*." In its brief order, the 1st Circuit also stated that it "agrees with the parties' joint position that the ban [on same-sex marriage] is unconstitutional." A week later, the parties filed a "Joint Motion for Entry of Judgment" with the district court, asking for a declaration that Puerto Rico's statutory ban on same-sex marriage is unconstitutional, and an injunction ordering the commonwealth government not to enforce the ban.

In a footnote to his opinion, Judge Perez-Gimenez observed that Governor Alejandro Garcia Padilla had signed an Executive Order "just hours after the Supreme Court's decision in *Obergefell*" directing Puerto Rico government officials to comply with that ruling, an action that provoked some members of the Puerto Rico legislature to file a lawsuit in the local courts challenging his action. That case has apparently gone nowhere, and the government of Puerto Rico has been issuing marriage licenses to same-sex couples and recognizing their marriages performed elsewhere.

Perez-Gimenez explained that in *Obergefell* the Supreme Court invoked the 14th Amendment's Due Process and Equal Protection Clauses to hold that the same-sex marriage bans in the four states within the jurisdiction of the 6th Circuit Court of Appeals (Michigan, Ohio, Kentucky and Tennessee) were unconstitutional because they deprived same-sex couples of a fundamental right to marry, thus abridging their liberty and denying equal protection of the laws. He also noted that some lower federal courts have acknowledged that *Obergefell v. Hodges* was technically ruling on the state constitutions and laws of those four states, and thus had not automatically mooted cases pending in the 5th, 8th and 11th Circuit Courts of Appeals involving same-sex marriage bans in other states, although those courts quickly issued rulings applying *Obergefell* as a precedent to the marriage equality cases arising from states under their jurisdiction.

More significantly, Judge Perez-Gimenez claimed that because Puerto Rico is neither a "state" nor an "incorporated territory," but rather an "unincorporated territory" with extensive self-government rights under a federal statute making it a "commonwealth," there is some

question whether the Supreme Court's ruling in *Obergefell* is a binding precedent in Puerto Rico. He pointed out that the 14th Amendment provides expressly that "no state" may deprive a person of due process or equal protection, and that because Puerto Rico is not a "state," the 14th Amendment's applicability is not clear. He cited a variety of older Supreme Court decisions making the general point that all provisions of the U.S. Constitution do not necessarily apply to Puerto Rico in all circumstances.

What he neglected to cite, however, was a case pointed out by Joshua Block, an ACLU attorney who spoke with Chris Geidner of *BuzzFeed News* shortly after Perez-Gimenez issued his ruling: a 1976 Supreme Court decision, *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976), in which the Court stated, in an opinion by Justice Harry Blackmun, "The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform. The nature of this country's relationship to Puerto Rico was vigorously debated within the Court as well as within the Congress. It is clear now, however, that the protections accorded either by the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico."

In that case, the Court was considering the constitutionality of a local Puerto Rican statute imposing a citizenship requirement before somebody could be licensed to practice as a civil engineer. The Court held that the requirement violated equal protection, based on its precedents interpreting both the 5th and 14th Amendments, under which the Court imposes "strict scrutiny" on federal or state laws that discriminate based on alienage. That is, the government

must have a compelling justification before it can deny a right or benefit to somebody because they are not a U.S. citizen. In a prior case, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court had specifically held that the due process requirements of the 5th and 14th Amendment also applied to Puerto Rico, limiting the ability of the government to restrict the rights of property-owners.

Thus, Judge Perez-Gimenez's insistence that the Supreme Court's holding concerning the rights of same-sex couples under the 14th Amendment does not apply to persons present in Puerto Rico appears contrary to a Supreme Court precedent.

Nonetheless, Perez-Gimenez, without acknowledging these Supreme Court decisions, held that "the right to same-sex marriage in Puerto Rico requires: (a) further judicial expression by the U.S. Supreme Court; or (b) the Supreme Court of Puerto Rico; (c) incorporation through legislation enacted by Congress, in the exercise of the powers conferred by the Territorial Clause; or (d) by virtue of any act or statute adopted by the Puerto Rico Legislature that amends or repeals Article 68 [the local law banning same-sex marriage]."

Had there been any doubt that the *Obergefell* ruling applies to Puerto Rico, the 1st Circuit would have expressed that doubt as part of its consideration of the appeal from Perez-Gimenez's prior ruling in the case. Instead, that court expressly stated its agreement with the joint position stated by the parties in that case that the Puerto Rico ban was unconstitutional. While the March 21 petition for writ of mandamus is pending, it should be noted that the governor's executive order remains in effect, and he issued a statement that the district court's refusal to grant the joint motion would not affect the government's current policy of issuing marriage licenses to same-sex couples and recognizing same-sex marriages performed in other jurisdictions. ■

Federal Court Finds No Substantive Due Process Protection for BDSM Sex

U.S. District Judge Thomas Selby Ellis III has rejected the argument that a consensual BDSM relationship is protected against government regulation by the 14th Amendment. Ruling in a case brought by a George Mason University student who was expelled after his former girlfriend, an undergraduate at another school called Jane Roe in the opinion, charged him with violations of the student Code of Conduct including BDSM sex, Ellis rejected the claim that the school's interpretation of its student conduct rules, so as to deem improper any BDSM relationship, violated the student's constitutional rights. *Doe v. Rector and Visitors of George Mason*

Doe had been charged with four violations of the student Code of Conduct based on Roe's allegations by Jane Roe. She claimed that, at times, he had continued in the BDSM activities after she used the "safe word" that they had agreed upon as a signal that he should desist, and that after she broke off their relationship, he continued to try to communicate with her, at one point sending a text message that if she did not respond to him, he would shoot himself. She communicated with GMU administrators and campus police, who were already monitoring Doe because of various incidents during his freshman year that had brought him to their attention as a possible

She claimed that, at times, he had continued in the BDSM activities after she used the "safe word" that they had agreed upon.

University, 2016 WL 7757765, 2016 U.S. Dist. LEXIS 24847 (E.D. Va., February 25, 2016).

The plaintiff, proceeding anonymously as John Doe, was expelled during his sophomore year, effective December 5, 2014, after university administrators overturned a decision by a hearing panel that had found him "not responsible as to each of the four charges against him concerning his 'involvement in an incident that occurred on or around October 27, 2013,'" which was the specific incident identified in the charges of which he had been notified. Roe appealed the panel decision to administrators who reversed it without giving Doe a fair opportunity to respond to additional allegations that went beyond the subjects addressed before the hearing panel.

disciplinary and safety problem. The campus police recorded a telephone conversation between Doe and Roe in which he seemed to admit that sometimes he continued despite her use of the safe word because he thought she could "handle it." However, at the hearing, when a panelist asked whether there were "instances" where the "red word" was used and Doe did not stop, he said that in "very rare" and "unusual circumstances" he would be "set in the routine of things" and Roe would need to say "red" again, at which point he would "stop immediately." He said that when hearing the safe word he "would not just blatantly ignore and then continue" with intercourse. Although the October 27 incident was the only one specifically reference in the formal charge he received, questions were asked at the hearing going beyond that

one incident, and it later developed that when Roe appealed the administrators considering her appeal had ex parte communication with Roe, probing beyond the October 27 incident without giving Doe a chance to respond to her allegations.

Doe was charged with violations of the following provisions: “(1) infliction of physical harm to any person(s) including self; (2) Deliberate touching or penetration of another person without consent; (3) Conduct of a sexual nature; and (4) Communication that may cause injury, distress, or emotional or physical discomfort.” He asserted a variety of constitutional claims, including that his expulsion was a denial of liberty without procedural due process, that the speech code provision was unconstitutionally broad, and that application of the Code to consensual BDSM activity violated his substantive due process rights under *Lawrence v. Texas*, the Supreme Court’s 2003 ruling striking down criminal penalties for consensual gay sex using language that could, depending how it is interpreted, broadly protect the rights of adults to engage in consensual sexual activity.

Judge Ellis found that the Doe’s procedural due process rights had been violated, entitling him to reinstatement as a student at GMU, although leaving to further proceedings the question whether GMU could again bring disciplinary proceedings based on the same incidents. The judge identified numerous faults with the procedures followed by GMU, including a failure to comply with the University’s own rules governing appeals from panel decisions and the appearance of bias on the part of the administrators who ruled on Roe’s appeal. Alternatively, Judge Ellis agreed with Doe that imposing discipline because of his text message to Roe threatening suicide violated his First Amendment free speech rights, because the message did not communicate a “true threat” to harm her or cause any disruption to GMU’s educational mission. Ellis pointed out that courts have been striking down campus speech codes that impose sanctions for speech that others find upsetting or uncomfortable on grounds of freedom of speech, and

cited this ground as an alternative basis to overturn Doe’s expulsion.

Ellis had previously granted a motion to dismiss Doe’s argument about substantive due process, but Doe filed a motion to reconsider that ruling and Ellis decided his reasoning deserved further explanation in this opinion. Doe argued that under *Lawrence v. Texas* the government (including a state university) could not “criminalize intimate sexual conduct between consenting adults.” Doe argued that GMU’s Code constituted a “legislative enactment that treats BDSM relationships as sexual misconduct *per se*.” Thus, he argued, “the appropriate analytical framework was the strict scrutiny analysis employed where a legislative enactment infringes on a constitutionally protected liberty interest.” Ellis rejected this argument.

He found that “the Supreme Court’s cases recognizing judicially-enforceable fundamental liberty interests” ran along two lines of precedent, one focused on history and tradition and the other on animus. Looking at the historical approach, he found that there is “no basis to conclude that tying up a willing submissive sex partner and subjecting him or her to whipping, choking, or other forms of domination is deeply rooted in the nation’s history and traditions or implicit in the concept of ordered liberty,” so that approach would not find BDSM sex to be a fundamental right. “Perhaps in recognition of the futility of his argument” under this historical approach, wrote Ellis, Doe “bases his fundamental liberty interest argument on *Lawrence*, in which the Supreme Court heavily emphasized a tradition of animus against gay people underlying the criminal sodomy statute at issue.

Ellis placed the Supreme Court’s marriage equality ruling, *Obergefell*, in the same category as *Lawrence*, observing, “*Obergefell* highlights that the decision to recognize an implied fundamental liberty interest as judicially enforceable turns, in part, on whether the liberty interest at issue has historically been denied on the basis of impermissible animus or, alternatively, on a legitimate basis aimed at protecting a vulnerable group. *Lawrence* is not to the contrary. There, the Supreme Court reasoned that a

statute criminalizing homosexual sodomy violated a judicially enforceable implied fundamental liberty interest in sexual intimacy because of the history of animus toward homosexuals. Indeed, the Supreme Court has since noted that *Lawrence* ‘acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State’ and ‘therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians.’” In *Lawrence* and *Obergefell*, the Court said that history and tradition could “guide” and “discipline” the Court’s inquiry but “not set its outer boundaries.” Instead, as Ellis saw it, there was a balancing of “impermissible animus” on one hand and “whether the government’s interest in limiting some liberty is a justifiable use of state power or an arbitrary use of that power” on the other hand.

Ellis asserted that the conclusion that “there is no deeply rooted history or tradition of BDSM sexual activity remains relevant and important to the analysis. Also relevant and important to the analysis is the *absence* of a history of impermissible animus as the basis for the restriction at issue here. Sexual activity that involves binding and gagging or the use of physical force such as spanking or choking poses certain inherent risks to personal safety not present in more traditional types of sexual activity,” he wrote. Thus, “a legislative restriction on BDSM activity is justifiable by reference to the state’s interest in the protection of vulnerable persons, i.e., sexual partners placed in situations with an elevated risk of physical harm. Accordingly, consistent with the logic of *Lawrence*, plaintiff has no constitutionally protected and judicially enforceable fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment to engage in BDSM sexual activity.”

Judge Ellis was appointed to the federal bench in 1987 by President Ronald Reagan. He took senior status in 2007 but continues to hear cases in the federal trial courts in Virginia and has occasionally participated as a substitute judge on panels of the 4th Circuit Court of Appeals. ■

Federal Courts in Connecticut and Arizona Find Transgender Plaintiffs' Sex Discrimination Claims Actionable Under Title VII

U.S. District Judge Stefan R. Underhill ruled that a transgender doctor could go forward with her sex discrimination claim under Title VII of the Civil Rights Act of 1964 against a Connecticut hospital. Noting a split of authority among federal circuit courts of appeals and the lack of a controlling ruling from the U.S. Supreme Court or the Court of Appeals for the 2nd Circuit, Judge Underhill found more persuasive the more recent opinions finding that “sex” in the Civil Rights Act should be broadly construed to include gender identity, as opposed to older rulings rejecting such an argument. *Fabian v. Hospital of Central Connecticut*, 2016 U.S. Dist. LEXIS 34994, 2016 WL 1089178 (D. Conn., March 18, 2016). By contrast, U.S. District Judge David G. Campbell, citing *Macy v. Holder*, 2012 WL 1345995 (EEOC 2012) and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), held that a transgender plaintiff’s Equal Protection claim would be actionable as a form of sex discrimination in *Doe v. State of Arizona*, 2016 U.S. Dist. LEXIS 36229, 2016 WL 1089743 (D. Arizona, March 21, 2016), without any elaborate discussion.

According to her complaint in the Connecticut case, Dr. Deborah Fabian had applied and was very nearly hired as an on-call orthopedic surgeon at the Hospital of Central Connecticut. She was recruited for the position by Delphi Healthcare Partners, a third-party provider of physicians and management services to health care institutions. Fabian, who initially presented herself in the hiring process as Dr. David Fabian, claims that she was “all but hired” and had even been sent a proposed contract, which she had signed, and that she considered the final interview with hospital officials to be a “formality.” Indeed, relying on representations from Delphi, she and her wife sold their home in Massachusetts, contemplating the move to Connecticut. During the interview she disclosed that she was a transgender woman in the process of transition and would be reporting to

begin work as Dr. Deborah Fabian. She was later informed that she would not be hired.

She took her discrimination claim and the hospital and Delphi to the EEOC, alleging a violation of the federal sex discrimination statute as well as Connecticut’s statute. At the time, Connecticut’s statute had not yet been amended to add an explicit prohibition of discrimination because of gender identity, so under both statutes her claim was that the employer failed to hire her due to her gender identity and that this was sex discrimination.

In moving for summary judgment, the hospital focused on several lines of attack. It argued that she was not being considered for a staff employee

before determining whether Dr. Fabian was applying to be an employee of the hospital. Formal titles and contractual arrangements are less significant in these types of cases than a broad array of factors that the Supreme Court has identified in determining whether somebody is an employee or an independent contractor. In the health care field, companies frequently try to structure their relationship with professional staff in such a way as to avoid the legal entanglements of an employment relationship, and some health care professionals may prefer the autonomy of not being full-time employees. The Supreme Court has identified more than a dozen distinct factors to consider in making this

Judge Underhill found more persuasive the more recent opinions finding that “sex” in the Civil Rights Act should be broadly construed.

position, but rather to be an independent contractor retained through Delphi, and thus in effect a subcontractor of a subcontractor. Since the anti-discrimination laws apply only to employment, the hospital argued that they did not apply to this case. Secondly, the hospital argued that its decision not to hire her was based on its conclusion from the interview that she was reluctant to take late-night calls to the Emergency Department, was uncomfortable with their new electronic records system, and that she wanted a job that involved performing more surgery. Finally, and cutting to the chase, the hospital argued that gender identity discrimination claims are not actionable under Title VII or under the Connecticut state law as it was when this case arose.

Attacking the subcontractor point, Judge Underhill found that many factual issues would have to be resolved

determination, with particular emphasis on the degree to which the alleged employer controls the work of the employee. The court found that there were enough disputed factual issues here to preclude making a determination based on a pre-trial motion without the benefit of an evidentiary hearing. The judge found that Fabian’s factual allegations were sufficient to create a material factual issue on such questions as “control,” so denied the motion on this ground. The judge also found that factual issues would need to be resolved concerning the hospital’s contentions, disputed by Fabian, about her willingness to handle late-night calls, deal with the information system, or enthusiastically take the job despite the amount of surgery involved.

The main question, to which the judge devoted most of his opinion, was whether Fabian was alleging a kind

of discrimination covered by these statutes. Judge Underhill reviewed the history of the inclusion of sex in Title VII and its subsequent interpretation, noting that for many decades after the statute went into effect in 1965 the Equal Employment Opportunity Commission (EEOC) and the courts had taken the view that gender identity claims were not covered. However, things began to change after the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, where the Court accepted the plaintiff's contention that her promotion had been denied because various of the firm's partners objected to her failure to conform to their stereotyped views about how a "woman partner" should act, groom and dress. With sex stereotyping accepted as evidence of a sex-discriminatory motivation, courts began to accept the argument that discrimination against transgender persons involves sexual stereotypes in violation of Title VII. By early in the 21st century, some federal circuit courts had adopted this view, which was finally embraced by the EEOC in a 2010 decision involving federal employment, which was subsequently endorsed by the Justice Department.

Judge Underhill stated his agreement with the courts "that have held that *Price Waterhouse* abrogates the narrow view" that had been taken in earlier decisions. "The narrower view relies on the notion that the word 'sex' simply and only means 'male or female,'" he continued. "That notion is not closely examined in any of the cases, but it is mistaken. 'Male or female' is a relatively weak definition of 'sex' for the same reason that 'A, B, AB, or O' is a relatively weak definition of 'blood type': it is not a formulation of meaning, but a list of instances. It might be an exhaustive list, or it might not be, but either way it says nothing about why or how the items in the list are instances of the same thing; and the word 'sex' refers not just to the instances, but also to the 'thing' that the instances are instances of. In some usages, the word 'sex' can indeed mean 'male or female,' but it can also mean the distinction between male and female, or the property or characteristic (or group of properties or characteristics) by which individuals

may be so distinguished. Discrimination 'because of sex,' therefore, is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." The judge cited historical references to support his contention that such broader understandings of sex date back as far as 1755, in Dr. Samuel Johnson's dictionary of the English language, and he found a similarly broad understanding in dictionaries contemporary with the adoption of Title VII in the 1960s. Thus, even in the absence of direct evidence about what the drafters of the "sex" amendment thought in 1964, there is indirect evidence that a broader understanding of the word and concept then existed.

The judge also quoted a favorite hypothetical case put by proponents of coverage for gender identity discrimination: just as an employer who had no bias against Christians or Jews could be held to have discriminated because of religion if she discharged an employee for converting from one religion to the other, an employer who has no particular bias against men or women could be held to discriminate because of sex if he discharged an employee for transitioning from male to female. He insisted that no court would make the mistake of finding no discrimination because of religion in the case of the religious convert. "Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself," he wrote, "discrimination against converts, or against those who practice either religion the 'wrong' way, is obviously discrimination 'because of religion.' Similarly, discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female – and that discrimination is literally discrimination 'because of sex.'"

Thus he concluded, "on the basis of the plain language of the statute, and

especially in light of the interpretation of that language evident in *Price Waterhouse*'s acknowledgment that gender-stereotyping discrimination is discrimination 'because of sex, . . . discrimination on the basis of transgender identity is cognizable under Title VII." In a footnote, he observed that he would reach the same conclusion under the pre-amended Connecticut statute. The legislature's subsequent addition of the term "gender identity" to the statute did not require a different conclusion "because legislatures may add such language to clarify or settle a dispute about the statute's scope rather than solely to expand it."

With the denial of the hospital's summary judgment motion, the case can proceed to trial unless a settlement is reached. The court noted that Delphi did not join in the motion for summary judgment. Dr. Fabian is represented by Theodore W. Heiser of Sullivan Heiser LLC, of Clinton, Connecticut.

In the Arizona case, the "John Doe" plaintiff is a transgender man employed as a Corrections Officer by the Arizona Department of Corrections. He alleged facts sufficient to depict severe and pervasive verbal harassment, including threats and vandalism of his car in the Department parking lot, based on his gender identity, and that frequent complaints to management have not led to any improvement in the situation. Indeed, he alleged that his supervisors told him that "other officers in the Department are offended by his gender, that [he] is not safe in the Department, and that they would not respond to emergency calls from him." This is rather daunting for a Corrections Officer. According to the complaint, ADOC has not conducted any investigation of Doe's complaints or disciplined any of the responsible employees. These allegations are deemed true for purposes of ruling on the state's motion to dismiss. If they are true, they suggest incompetent management in ADOC to an extreme degree. Doe filed a sex discrimination charge with the EEOC and was issued a right-to-sue letter at his attorney's request when it was apparent the agency would not complete its investigation within the statutory 180 days. Then suit

was filed in federal court asserting both hostile environment harassment and retaliatory harassment in response to Doe's filing of the EEOC complaint.

In a completely matter-of-fact manner involving virtually no discussion, Judge Campbell wrote, "The EEOC and courts have held that this provision [Title VII's sex discrimination ban] prohibits workplace discrimination based on gender identity," citing *Macy* and *Glenn*. He then described the necessary elements of a prima facie case under Title VII and stated, "The allegations in Plaintiff's EEOC Charge describe a gender discrimination claim with sufficient clarity to render the claim exhausted. In his Charge, Plaintiff states that he is transgender, thereby satisfying the 'protected status' element of a gender discrimination claim." However, the court granted the state's motion to dismiss the retaliation claim for failure to exhaust administrative remedies because Doe had not mentioned retaliation in his original charge or filed a new charge with the EEOC alleging retaliation. Campbell rejected Doe's argument that retaliation in response to the filing of a charge with the EEOC did not require a new charge with the agency in order to meet the statutory exhaustion requirement when the retaliatory harassment was similar to the pre-charge harassment. Campbell also rejected the state's argument that Doe had failed to state a claim in the absence of any tangible adverse employer actions, finding that his allegations fell well within the range of acceptable pleading for a hostile environment case. (It was rather odd of the state to make arguments that have expressly been rejected by the Supreme Court in controlling precedential rulings dating back to the last century.) The court also acknowledged that Doe's omission of certain specific details was understandable (names of specific harassers and exact dates of specific incidents) in light of his attempt to maintain the confidentiality of his gender identity in the context of this case.

Doe is represented by Stephen G. Montoya of Montoya Jimenez & Pastor PA of Phoenix. ■

Federal Court in NYC Dismisses Sexual Orientation Discrimination Claim under Title VII

In 2000, the U.S. Court of Appeals for the 2nd Circuit, which has appellate jurisdiction over cases in the federal trial courts in New York, rejected the argument that sexual orientation discrimination claims could be dealt with as sex discrimination claims under federal law, but was open to the possibility that a gay litigant who had suffered discrimination because of failure to conform with the employer's stereotypical views of appropriate gender behavior could pursue such a claim. On March 9, a gay litigant informed the 2nd Circuit that he will appeal a Manhattan trial court's dismissal of his federal sexual orientation claim, joining the trial judge in urging the appeals court to reconsider its 2000 decision. *Christiansen v. Omnicom Group*, 2016 U.S. Dist. LEXIS 29972, 2016 WL 951581 (S.D.N.Y., March 9, 2016).

Since the 2nd Circuit decided *Simonton v. Runyon*, 232 F.3d 33 (2000), the law affecting LGBT rights has drastically changed. In 2003, the Supreme Court ruled that gay sex between consenting adults could no longer be outlawed. In 2002, New York State joined New York City in outlawing sexual orientation discrimination in employment, housing and public accommodations, and the next year New York City extended the local law to gender identity discrimination claims. In 2009 the federal government added sexual orientation and gender identity to the national Hate Crimes Law, and subsequently repealed the "don't ask, don't tell" anti-gay military policy. In 2011 New York passed a Marriage Equality Act, in 2013 the Supreme Court ruled that the federal government must recognize same-sex marriages formed under state law, and last year the Supreme Court ruled that same-sex couples are entitled to marry and have their marriages recognized by state governments everywhere in the country.

Through all this change, however, the principal federal anti-discrimination law, the Civil Rights Act of 1964, has never been amended to extend explicit protection against discrimination to LGBT people. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, the employment provisions of the Civil Rights Act, has interpreted the federal ban on sex discrimination as extending to gender identity and sexual orientation discrimination, but federal courts are not bound by that interpretation, and federal trial judges have differed about how to handle sexual orientation discrimination claims. So far, no federal appeals court has ruled on the question since the EEOC issued its decision last summer, but cases are pending on appeal in several circuits.

U.S. District Judge Katherine Polk Failla, ruling on the employer's motion to dismiss the Title VII claim filed by a Christiansen, found that his attempt to squeeze the case into the sex stereotype theory was unsuccessful and dismissed his claim, concluding that she was bound by the 2nd Circuit precedent to reject a sexual orientation discrimination claim under Title VII. Reviewing the facts alleged by Matthew Christiansen against Omnicom Group (the parent company) and DDB Worldwide Communications (the business by which he is employed in New York), the judge found that all but one of the incidents he described in his complaint related to sexual orientation.

Indeed, Christiansen's allegations clearly state that his supervisor, Joe Cianciotto, was "openly resentful and hostile toward Plaintiff because of his sexual orientation." The various incidents of harassment that Christiansen described in his complaint all involved Cianciotto's expression of such hostility in some form. Only once did he refer to Christiansen as "effeminate," which might have supported a sex stereotype

claim, but most of the time Cianciotto's razzing focused on Christiansen's "big muscles" (as described by Cianciotto), pictorial invocations of exaggerated masculinity, and references to gay stereotypes.

Judge Failla focused on the difficulty of distinguishing between sexual orientation and sex stereotyping claims, quoting from several other court decisions illustrating that difficulty, and warning against using passing stereotypical references by a supervisor to "shoehorn" a sexual orientation claim into Title VII coverage.

"The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims," she wrote. "Yet the prevailing law in this Circuit – and, indeed, every Circuit to consider the question – is that such a line must be drawn. *Simonton* is still good law, and, as such, this Court is bound by its dictates. Consequently, the Court must consider whether the Plaintiff has pleaded a claim based on sexual stereotyping, separate and apart from the stereotyping inherent in his claim for discrimination based on sexual orientation. The Court finds that he has not."

Christiansen's complaint alleges that Cianciotto told a coworker that Christiansen was "effeminate and gay so he must have AIDS," but this was not enough for Judge Failla. "This is the sole mention of Plaintiff as effeminate or otherwise non-conforming to traditional gender norms in the whole of the [first amended complaint]," she wrote. "It alone cannot serve to transform a claim for discrimination that Plaintiff plainly interpreted – and the facts support – as stemming from sexual orientation animus into one for sexual stereotyping. While Plaintiff provides virtually no support in his [complaint] for an allegation of discrimination based on sexual stereotyping, he provides multiple illustrations of Cianciotto's animus toward gay individuals. The [complaint] notes, for instance, the fact that 'most

of the pictures Cianciotto drew were of men fornicating, and they always involved a gay employee'; that he repeatedly expressed a belief that gay men were reckless and disease-prone; and that he commented at a meeting that he did not want an advertisement to be 'too gay.' All of these examples lend further support to the inference that Cianciotto's harassment was motivated by sexual-orientation-based discriminatory animus, not sexual stereotyping."

Failla conceded that she might be able to "latch onto the single use of the word 'effeminate' and the depiction of Plaintiff's head on a woman's body, strip these facts of the context provided by the rest of the [complaint], and conjure up a claim for 'sexual stereotyping.' But while the ends might be commendable, the means would be intellectually dishonest; the Court would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims. In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask – and, lest there be any doubt, this Court is asking – whether that line should be erased. Until it is, however, discrimination based on sexual orientation will not support a claim under Title VII; Plaintiff's Title VII discrimination claim must therefore be dismissed."

Reading Christiansen's factual allegations, one would have to be amazed that a supervisor behaving the way Joe Cianciotto is alleged to have behaved would be tolerated by a socially conscious employer in New York, much less a large advertising agency. As far as society has advanced over the past few decades in treating gay people with simple human dignity, the facts one reads in employment discrimination complaints filed by LGBT suggest that there is still a long way to go.

Christiansen, who is HIV-positive, also asserted an Americans With Disabilities Act claim, but Judge Failla

found it was not timely, since the only incident on point occurred more than 300 days before Christiansen filed his charge with the EEOC, and in that charge he didn't even mention the ADA. She also found that his factual allegations would not support a claim under the ADA in any event, since there was scant evidence that he was mistreated by the company because of his HIV status, and that the facts also did not support his claim to have suffered retaliation for filing his discrimination charges. His complaint asserted a "constructive discharge" claim, which he had to withdraw since he was still working for the company when the complaint was filed

However, it is a fair inference from Judge Failla's characterization of the evidence that if she felt Title VII could be construed to cover sexual orientation discrimination, she would not have granted the motion to dismiss. She also granted a motion to dismiss filed on behalf of various supervisory and managerial officials of the employer, as the federal anti-discrimination laws do not pose personal liability on company officials. Having dismissed all the federal statutory claims that Christiansen made, the judge declined to extend jurisdiction over his state law claims, so he should be able to pursue his case further in state court, where the statutes do expressly forbid sexual orientation discrimination.

In the meantime, however, Christiansen's reaction to the March 9 dismissal was immediate, as his attorney filed a notice of appeal with the 2nd Circuit the same day. Little more than a week earlier, the EEOC had advanced its campaign to win judicial acceptance of the agency's interpretation of Title VII by filing its first affirmative sexual orientation discrimination claims against employers in other parts of the country. The EEOC had already intervened as a co-plaintiff in several other pending cases since last year's administrative ruling.

Christiansen is represented by Susan Chana Lask, a New York City trial lawyer. ■

Federal Judge Says Straight, but Not Gay, Students Are Protected from Homophobic Harassment Under Title IX

Ruling on pretrial motions in a case brought by the estate of a student who committed suicide after allegedly suffering severe harassment from fellow students at a public school, Chief U.S. District Judge Glenn T. Suddaby (N.D.N.Y.) allowed the plaintiff to amend the complaint to add a Title IX cause of action for sex discrimination by an educational institution, based on the homophobic nature of slurs aimed at the decedent in *Estate of D.B. v. Thousand Islands Central School District*, 2016 U.S. Dist. LEXIS 32054, 2016 WL 945350 (March 14, 2016), but only because the proposed amendment does not allege that the student was gay.

Judge Suddaby's opinion lacks any coherent narration of the facts, only mentioning individual factual allegations in passing while analyzing the various motions before the court. From what one discerns, however, the case concerns a male public school student who was subjected to bullying and harassment by fellow-students, that school officials failed to protect him, and that he committed suicide at home.

The original complaint alleged violations of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, the 14th Amendment, the Individuals with Disabilities Education Act, the New York State Education Law and the N.Y. Dignity for All Students Act. The opinion does not identify the nature of D.B.'s alleged disability. The First Amended complaint sought to add sex discrimination claims under federal and state law, most significantly Title IX of the Education Amendments Act, which the U.S. Department of Education has construed to protect gay students from bullying and harassment. There are also state law tort claims alleging infliction of emotional distress and negligent supervision. The defendants raised a variety of jurisdictional and procedural arguments in support of their motion to dismiss, and opposed the cross-motion to add new counts, including the Title IX count. The opinion is mainly interesting for the way in which Judge Suddaby

analyzed the motion to add a Title IX sex discrimination claim.

Judge Suddaby found that because of 2nd Circuit precedent rejecting the idea that sexual orientation discrimination is actionable as sex discrimination under federal statutes, a student who is harassed with homophobic slurs would have an action under Title IX if the student alleged that the harassment was due to his incorrectly *perceived* sexual orientation but not his *actual* homosexual orientation!

There is a sort of "Through the Looking Glass" quality to the judge's discussion of the Title IX claim. For example, the judge rejects the allegation that calling a boy a "pussy" could be seen as a sexually-related slur. The complaint

"gender stereotyping" claim of sex discrimination under Title IX, provided that the plaintiff was not gay! "The Second Circuit recognizes a fine line between gender stereotyping and bootstrapping protection for sexual orientation," he wrote. "Because a Title IX sex discrimination claim is treated in much the same way as a Title VII sex discrimination claim, Title VII jurisprudence therefore applies. Under the 'gender stereotyping' theory of liability under Title VII, individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class. However, courts in the Second Circuit do not recognize sexual orientation as a protected classification under Title VII or Title IX. The critical

Judge Suddaby accepted the argument that explicitly homophobic slurs could support a "gender stereotyping" claim of sex discrimination, provided that the plaintiff was not gay!

alleges: "[Another student] called the Decedent a 'pussy,' and told him 'You're a pussy and you need the shit kicked out of you.' These are the types of anti-gay and gender-related slurs Decedent was consistently subjected to." Judge Suddaby begs to differ. "As shocking as this slur may be," he wrote, "the Court is not persuaded that it is related to gender under the circumstances. Rather, as Defendants point out, the slur 'pussy' is more likely to mean 'coward' than anything gender related. Even if the other student did intend the slur to relate to gender, Plaintiff has not made a proper showing of that fact. Rather, most of Plaintiff's reference to 'gender-related slurs' are nothing more than conclusory statements."

On the other hand, Judge Suddaby accepted the argument that explicitly homophobic slurs could support a

fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible."

In this case, the plaintiff is not alleging that D.B. was gay. To the contrary, wrote Suddaby, "D.B.'s own alleged statements refer to accusations that he was homosexual as 'stupid gay rumours [sic].' Moreover, the Amended Complaint alleges that the bullying was based on D.B.'s 'actual or perceived sexual orientation' and his 'perceived and/or presumed sexual orientation.' Under the circumstances, the Amended

Complaint alleges facts plausibly suggesting a gender-stereotyping claim to survive a [dismissal] motion; and the amendment to include this claim is not futile. As a result, Plaintiff's cross-motion to amend is granted as to the inclusion of the Title IX claim."

The judge rejected the rather bizarre argument that certain federal claims should be dismissed for failure to exhaust administrative remedies, in light of the difficulty of a deceased person pursuing administrative remedies. But he accepted the argument that the negligent supervision claim could not apply to the suicide, as such, because D.B. took his life at home, not at school. On the other hand, this tort claim could extend to the alleged failures of school officials to respond to the ongoing bullying of D.B. The court rejected plaintiff's motion to add claims under the N.Y. Civil Rights Law, on the ground that statutory notice of claims had not been served on the school district as a jurisdictional prerequisite to filing suit.

The opinion reflects the retrograde state of the law within the federal 2nd Circuit as a result of a 2000 court of appeals decision, *Simonton v. Runyon*, which rejected a Title VII sex discrimination brought by a gay plaintiff subjected to sexually-oriented workplace harassment. Attempts are under way to get the Circuit to reconsider this precedent in the context of ongoing litigation asserting sexual orientation discrimination claims under federal sex discrimination statutes, in line with a ruling by the Equal Employment Opportunity Commission in July 2015 that sexual orientation discrimination is "necessarily" sex discrimination in violation of Title VII. EEOC rulings are not binding on the courts, however, and the persuasiveness of this particular EEOC ruling is somewhat compromised by the fact that it represents a reversal of almost half a century of agency precedent.

The Estate of D.B. is represented by Michael D. Meth of Chester, N.Y. Charles C. Spagnoli and Frank W. Miller of East Syracuse represent the school district. Judge Suddaby was appointed to the district court by President George W. Bush during the last year of his second term in office. ■

Arkansas Court Upholds Fayetteville Ordinance Forbidding Sexual Orientation and Gender Identity Discrimination

Washington County, AK, Circuit Court Judge Doug Martin issued a decision finding that an anti-discrimination ordinance passed in Fayetteville, AK, did not run afoul of a previously enacted Arkansas law that sought to limit the enactment of local anti-discrimination laws targeting LGBT discrimination, in *Protect Fayetteville v. City of Fayetteville*, CV 2015-1510-1 (Ct. Ct. of Washington County, AR, 1st Div.,

in state law." The Arkansas Attorney General sought to intervene in the case in support of the plaintiffs.

All parties including Plaintiffs, the City of Fayetteville as defendants, and the Mayor and several Aldermen sought summary judgment. Defendants argued both that Ordinance 5781 did not run afoul of Act 137 and also that Act 137 violates the Equal Protection Clauses of both the U.S. and Arkansas constitutions.

The Fayetteville City Council passed Ordinance 5781, subsequently ratified by the city's voters, which prohibits discrimination on the basis of sexual orientation or gender identity. A group of citizens brought suit arguing that Ordinance 5781 was prohibited by previously-enacted Arkansas "Act 137."

March 1, 2016). Arkansas' Attorney General has filed a timely appeal of the decision to the Arkansas Supreme Court, which remains pending.

The Fayetteville City Council passed Ordinance 5781, subsequently ratified by the city's voters, which prohibits discrimination on the basis of sexual orientation or gender identity. A group of citizens brought suit arguing that Ordinance 5781 was prohibited by previously-enacted Arkansas "Act 137," a statute which provides that counties, municipalities, and any other political subdivisions of the state of Arkansas "shall not adopt or enforce an ordinance . . . that creates a protected classification or prohibits discrimination on a basis not contained

Judge Martin closely examined the language of Act 137, noting that it did not refer specifically to Arkansas' Civil Rights Act, which does not prohibit discrimination on the bases of sexual orientation or gender identity, but merely that it prohibited discrimination "on a basis not contained in state law." He then cited to several Arkansas statutes affording certain classifications protecting gender identity and sexual orientation, and ruled that therefore at the time Ordinance 5781 was passed both gender identity and sexual orientation were listed as protected classes in those limited Arkansas laws and that, therefore, the Ordinance did not seek to protect on any basis not already contained in state law.

Plaintiffs further argued that the word “basis” referred to the area of law in which a prohibition was contained, for example employment law, and not to the reason why a person is discriminated against, such as gender identity or sexual orientation. Judge Martin’s analysis found that while the language likely supported Defendant’s position based “upon the ordinary and usual meaning of the language,” the language of the statute was indeed ambiguous as Plaintiff’s interpretation was not “entirely unreasonable.” After discussing Arkansas precedent on the issue of statutory interpretation, Judge Martin found that Arkansas courts were “very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent,” and there was no indication of drafting error or omission. Thus, he granted Defendants summary judgment on the issue of statutory interpretation without reaching the constitutional arguments.

As reported in a March 30, 2016 *Associated Press National News* report, Arkansas’ Attorney General Leslie Rutledge defended his decision to appeal the ruling, stating: “I disagreed with the lower court’s decision. . . . Given my duty to fully defend state law, I am seeking to appeal the ruling to the Arkansas Supreme Court.” Fayetteville City Attorney Kit Williams noted he was not surprised by the decision to appeal, stating “Fayetteville voters chose equality against discrimination and I’m going to do everything I can to defend the ordinance that was passed.” The AP reports that this decision was “the first court victory for opponents of the state’s ban on local protections for LGBT people” and noted that Arkansas’ Governor Asa Hutchinson had allowed Act 137 to be enacted without his signature, citing concerns for infringement on local government. – *Bryan Johnson-Xenitelis*

Georgia Governor Nathan Deal Vetoes “Free Exercise Protection Act”

Bowing to accumulating pressure from major national corporations and media organizations and a flood of adverse comments from members of the public, Georgia Governor Nathan Deal, a Republican, vetoed H.B. 757, the “Free Exercise Protection Act,” which had been passed by substantial majorities in both houses of the Georgia legislature but not by large enough margins to override a veto. The bill was widely criticized as authorizing discrimination against LGBT people and same-sex couples. Georgia’s state anti-discrimination laws do not and never have protected LGBT people from discrimination, but the city of Atlanta does, and one county and two smaller communities forbid discrimination in public employment. Unlike neighboring North Carolina, the Georgia legislators did not include in their bill an explicit attempt to preempt localities from legislating on discrimination and, at its heart, the bill appeared a run-of-the-mill state version of the federal Religious Freedom Restoration Act, decked out with additional terms, some apparently more symbolic than operational, that appeared on their face to apply primarily to the community of conservative religious organizations.

Section 1 of the bill would protect religious practitioners from being required to perform marriages that they believe would violate their right to free exercise of religion under the state or federal constitutions, and would bar the state from penalizing them or their institutions for such refusals. This measure would be entirely symbolic, since there is no real dispute that the 1st Amendment of the U.S. Constitution would protect any religious official or organization from being compelled to perform any sort of religious ceremony that offended their religious beliefs. Of slightly more import would be a provision protecting such officiants and their organizations from state retribution in the form of tax exempt status or penalties, or lifting of deductibility of dues and donations to such organizations. The

bill also provided that the right to free exercise of religion includes the right to decide whether to attend any particular wedding or other religious ceremony. Mainly symbolism here, since nobody can seriously contend that it would be consistent with the 1st Amendment for any government entity to require somebody to attend a wedding they did not want to attend. (But perhaps this was intended to protect florists who feared eternal damnation if they had to be present when their handiwork was used at a same-sex wedding?) Another section provides that local governments may not compel businesses to be open “on either of the two rest days (Saturday or Sunday).” This writer was not aware that governments in Georgia have sought to dictate that businesses be open on any particular day.

Section 4, a more controversial part of the bill, broadly defines faith-based organizations and excuses them from any liability or adverse consequences for refusing to do things that they believe would violate their religious beliefs. This would include refusing to let their facilities be used for ceremonies to which they had religiously-based objections, and would also extend to their provision of social, educational, or charitable services, and here is where the rubber met the road, since, as amplified in Section 5 dealing with employment, it would seem that a wide range of religiously-affiliated or identified agencies, some receiving state funding, would be allowed, in effect, to discriminate against LGBT people in employment and the provision of their services if they believed their religion required them to do so. Thus, the state would be taking sides against LGBT people who have in some places instituted discrimination cases against institutions with religious affiliations.

Section 6 incorporates a version of the federal Religious Freedom Restoration Act, requiring the state to meet the compelling state interest test if it sought to apply laws of general application to “substantially burden” any “person’s” exercise of religion, and giving

religious objectors a defense against such applications. Although this isn't spelled out in the bill, presumably the legislature intended to adopt the same meaning of "person" that the Supreme Court did in its *Hobby Lobby* decision, to include businesses. This section parallels the "Religious Freedom" bill that caused such consternation a year earlier when passed in Indiana, leading that state to amend its bill to say that it should not be construed to authorize discrimination. The Georgia legislators included a section saying that the bill should not be construed to "permit invidious discrimination on any grounds prohibited by federal or state law." Conveniently, however, this omits to mention local laws, such as Atlanta's, and of course neither Georgia nor federal law expressly protects LGBT people from discrimination (although pending litigation may eventually establish that various federal sex discrimination statutes do protect LGBT people from discrimination through their sex discrimination bans, but unfortunately the federal public accommodations law does not extend to sex discrimination). The bill also provides that although people can't be denied public employment because of their religious beliefs, the bill shall not be construed to protect public officers or employees who refuse to perform their official duties, so the legislature was not seeking to excuse local officials from the requirement to issue marriage licenses to same-sex couples, as legislators have done in other states (including North Carolina).

In announcing on March 28 that he would veto the bill, Governor Deal said that the bill did not "reflect the character of our state or of our people," suggesting a rebuke to the legislature as having passed a measure out of tune with the public sentiment. However, his statement made clear that the main motivation for his action was fear of adverse financial consequences for the state if the various businesses and associations that had condemned the bill actually withdrew from or abandoned commercial activities in Georgia. At the end of the month, legislative leaders announced they would not attempt to override the veto. ■

Washington Appeals Court Rejects Restrictions on Lesbian Mother's Contact with Her Children

In *Black v. Black*, 2016 Wash. App. LEXIS 411 (Wash. Ct. App. March 8, 2016), the Washington Court of Appeals reversed the restrictions in a parenting plan adopted by the trial court prohibiting a lesbian, who was formerly a conservative Christian, from discussing her sexual orientation and religion with her children, noting that sexual orientation, by itself, is not sufficient reason to limit the conduct of a parent in the parenting plan because there would be no adverse effect on the children.

Charles and Rachelle Black married in 1994 and provided a traditional, conservative Christian home to raise their three children. In 2011, Rachelle

until the guardian ad litem issued a recommendation.

Rachelle wanted to inform her children of her sexual orientation and its meaning, so she gave her oldest child a book and showed the two oldest a documentary about a transgendered child. The therapist asked her to refrain from having conversations with her own children outside therapy, concerned that Rachelle was not giving them time to adjust to the divorce and Rachelle's sexual orientation. However, the therapist admitted that the children were getting used to the idea that their mother was gay, and they were primarily talking about other issues

The Washington Court of Appeals reversed the restrictions in a parenting plan, noting that sexual orientation, by itself, is not sufficient reason to limit the conduct of a parent because there would be no adverse effect on the children.

informed Charles that she was a lesbian and began a romantic relationship with another woman. She eventually filed for divorce in 2013. Both parties submitted proposed parenting plan orders to the court, each seeking designation as the primary residential parent and sole decision-making authority regarding the children's education. The Trial Court appointed a guardian ad litem to investigate and report on the situation. The guardian only met with the two youngest children and did not attempt to speak with them again. The children started attending therapy, Rachelle eventually told them she was gay, and they met her partner. Upon learning this, the therapist recommended that Rachelle not allow any further contact between the children and her partner

during therapy; their mother's sexual orientation was not the main topic of conversation.

Rachelle was financially supported by her partner because she was a stay-at-home mother from her last relationship. The Trial Court designated Charles as the primary residential parent because he was "clearly more stable" to provide for the needs of the children, financially and independently, noting it will be "very challenging for them to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality." Not surprisingly, the Trial Court adopted Charles's proposed parenting plan and the guardian *ad litem*'s proposed restrictions, where the children were to

have no contact with Rachelle's partner until therapist approval, and Rachelle was ordered to refrain from having "further conversations with the children regarding religion, homosexuality or any other alternative lifestyle concept . . ." or providing them with symbolic clothing or jewelry related to those topics. Under the Agreement, Rachelle received one-half of the marriage community property and although Rachelle needed maintenance, the court denied her request. Rachelle appealed all of the findings.

The Washington Court of Appeals reviewed the rulings of the permanent parenting plan, restrictions in residential time, decision-making allocation, spousal maintenance and child support for an abuse of discretion. Rachelle argued that there was an abuse of discretion by restricting her conduct and communications with her children related to her sexual orientation, including contact with her partner and religious views during her residential time. Charles even conceded on those imposed restrictions. The Court of Appeals held these restrictions were improper.

The Court of Appeals has held that restrictions on parental conduct are barred unless the evidence shows that the conduct may have an adverse effect on the child's best interest. Restrictions on conduct are prohibited unless the conduct "would endanger the child's physical, mental or emotion health." Sexual orientation, by itself, is not sufficient reason to limit the conduct of a parent in the parenting plan. (*In re Marriage of Wicklund*, 84 Wn. App. 763 (Wash. Ct. App. December 23, 1996), wherein the Court of Appeals reversed a finding of a Jehovah's Witness restricting the children's gay father from exhibiting or participating in displays of affection with a partner in the children's presence, despite the religious condemnation of homosexuality). The court found that the trial court did not state an evidentiary basis that the restricted conduct and communications would have any adverse effect on the children, other than its belief that reconciling Rachelle's sexuality with their conservative upbringing would be

"very challenging" for the children. The court noted, "It is not the trial court's duty to craft a parenting plan, imposing restrictions, solely on the basis of making the transition easier for a child."

Rachelle also brought a constitutional First Amendment claim against the restrictions the trial court imposed on her. Courts have upheld restrictions on certain types of unprotected speech when they have served the best interest of the child, however, the trial court made no specific findings of any actual or perceived harm that the children would suffer to justify prohibiting Rachelle's speech. The trial court did not restrict Rachelle's speech to prohibit her from making defamatory statements about Charles, or to prevent her from harming the relationship between Charles and her children. The restrictions in this case, the court found, clearly violated the First Amendment, as they were "blatantly content based restrictions prohibiting Rachelle from any speech or communication about religion, homosexuality, or 'alternative lifestyle concepts'" with her children.

Rachelle also argued that the trial court improperly considered her sexual orientation and demonstrated preference for Charles's religion when it designated Charles as the primary residential parent and limited and restricted Rachelle's residential time with her children based on her sexual orientation and religious views. The court did not find evidence in the record to support this argument, however, because Rachelle gave no specific evidence showing the trial court was biased.

Rachelle further argued that the trial court abused its discretion when it allocated Charles's sole decision-making authority over the children's religious upbringing, daycare, and education. The court agreed only that the trial court abused its discretion regarding the children's religious upbringing and daycare, not education. Washington Courts have demonstrated that there must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs to restrict the free exercise of religion. The constitutional right to free exercise

does not allow sole decision-making, even if the parents are incapable of joint decision making. The trial court failed to expressly state its reason for allocating sole decision-making authority to Charles, merely maintaining he was "clearly the more stable parent in terms of...maintaining their religious upbringing," thereby failing to show actual or potential harm to the children.

Rachelle also argued that the trial court abused its discretion when it allocated sole decision-making authority to Charles regarding the children's daycare. The court found that the trial court allocated sole decision-making authority to Charles without making any findings under RCW 26.09.187(2), which governs the criteria for establishing a permanent parenting plan, and the trial court therefore abused its discretion. Regarding the children's education, the court found that the trial court did not abuse its discretion because Rachelle and Charles drastically differed in their desire for the children's education.

Rachelle was awarded no spousal maintenance based on Charles's inability to pay, and the Court agreed with this trial court finding. Rachelle argued that proper application of the statutory factors weighed in favor of maintenance, to which Charles conceded, however he admitted he could not afford maintenance. Spousal maintenance is not a matter of right, and taking into consideration Rachelle's argued dollar amount estimate that she calculated Charles's monthly income to be, he was still net-negative. Also, this finding affirmed the trial court's demand that Rachelle pay the statutory minimum of fifty dollars per child in child support to Charles.

Ultimately, Charles remained the residential custodian, with sole decision-making about the children's education. The court reversed the restrictions in the parenting plan prohibiting Rachelle from discussing her sexual orientation and religion with her children. – *Anthony Sears*

Anthony Sears ('16) studies at New York Law School.

Federal Judge Defers Qualified Immunity Ruling and Orders Systemic Discovery on Policies and Failures Underlying High Rate of Gay and Transgender Inmate Assaults in Texas

U.S. District Judge Alfred H. Bennett deferred ruling on a qualified immunity defense interposed by Brad Livingston, Executive Director of the Texas Department of Criminal Justice, in a civil rights case seeking injunctive relief and damages filed by a transgender inmate who endured twelve years of sexual assault in *Zollicoffer v. Livingston*, 2016 WL 1165776 (S.D. Tex., March 14, 2016). Plaintiff Joshua D. Zollicoffer, a/k/a Passion Star, alleges “she has been repeatedly raped, force into non-consensual sexual relationships, and assaulted when she resisted demands” while incarcerated in seven different

rights. There is no question that Plaintiff was incarcerated under conditions posing a substantial risk of serious harm. . . . They are enough to offend even the sternest of dispositions.”

Allegations that Livingston was liable as supervisor included statistical evidence from the Bureau of Justice Statistics ranking Texas prisons as having among the highest rates of prison rapes in the country (including a “shockingly high” rate for transgender rapes that is nine times higher than for other prisoners). Judge Bennett noted that the Department of Justice had contacted Livingston about Texas’ “alarming statistics” (specifically

and then failing to remedy conditions causing inmate heat strokes). He found the allegations here sufficient to state a claim against Livingston.

On qualified immunity, Judge Bennett found that the constitutional right exists, but he noted there remained a question of whether Livingston’s actions were “objectively unreasonable.” He observed that the Fifth Circuit had granted qualified immunity to the Texas prison director in *Johnson v. Johnson*, 385 F.3d 503, 524-5 (5th Cir. 2004), involving an “effeminate inmate” exploited as a “sex slave,” when the director responded to the plaintiff’s complaint by referring it for investigation, as opposed to responding to it personally.

Judge Bennett distinguished *Johnson* by stating that Zollicoffer is proceeding on a different legal theory. She is challenging not Livingston’s response to her individual complaint but rather his “policies in failing to protect gay and transgender inmates from abuse.” In this regard, an intervening Fifth Circuit decision allows a district court to permit discovery where it cannot rule on the immunity defense “without further clarification.” *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).

Again citing *Martone v. Livingston*, which deferred an immunity ruling pending discovery, Judge Bennett likewise ordered “limited discovery” on the immunity question: inmate complaints in the last five years and Livingston’s response to them; Livingston’s knowledge of “vulnerability” of gay and transgender inmates; advice Livingston “gave or received” about same; any policies, procedures, or training on the subject that Livingston “adopted or considered adopting”; and what policies were followed in Zollicoffer’s case. Judge Bennett cited the detailed requirements for LGBT prisoner safety in the implementing regulations of PREA, at 28 C.F.R., Part 115, noting that, while

Judge Bennett relied on the “deliberate indifference” safety standards of *Farmer v. Brennan*.

prisons. She sued sixteen defendants, who tried (unsuccessfully) to change venue from the Southern to the Western District of Texas (i.e., from Houston to Waco, see 2015 WL 1893737). The current decision addresses only the claims against Director Livingston.

Zollicoffer alleges that she complained verbally and in writing about sexual assaults and sought protection repeatedly. Other inmates called her a “snitching faggot” for complaining; on one occasion, she was slashed with a razor, requiring 36 stitches. Corrections officials called her a “snitch” and a “punk” in front of other inmates, which “placed her at further risk.” They told her “suck dick, fight or quit doing gay shit and you’ll be okay” and “you can’t rape someone who’s gay.” Judge Bennett found: “Plaintiff has sufficiently alleged a violation of [her] Eighth Amendment

noting the “vulnerability of gay and transgender prisoners”) and that Livingston’s own Inspector General had documented the allegations. Livingston also personally participated in hearings about prison rape under the Prison Rape Eliminate Act, 42 U.S.C. § 15601, et seq. [“PREA”].

Judge Bennett relied on the “deliberate indifference” safety standards of *Farmer v. Brennan*, 511 U.S. 825, 833-4 (1994). He noted that Zollicoffer seeks to hold Livingston liable for failing to train and supervise personnel or to implement policies to protect gay and transgender inmates, citing *Morgan v. Texas Dep’t of Criminal Justice*, 537 F. App’x 502, 509 (5th Cir. 2013) (role of supervisor in failing to train), and *Martone v. Livingston*, 2014 WL 3534696 (S.D. Tex., July 16, 2014) (liability for creating

PREA did not itself create a private cause of action, he was “reserving” ruling on the effect of the regulations. Judge Bennett also allowed discovery about whether policies that seemed adequate on their face were not implemented in fact – and whether Livingston condoned “a culture of degradation for LGBT people.”

Civil rights defendants invoke qualified immunity to avoid discovery and trial, and a denial of immunity is generally immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985). Here, by “limiting” discovery to factual development of the defense and invoking a recent Fifth Circuit ratification of this procedure, Judge Bennett effectively granted Zollicoffer the discovery needed to confront Livingston on policies regarding the safety of LGBT inmates in Texas – probably making a deposition of Livingston on LGBT safety inevitable and a pre-emptive appeal on immunity unlikely. We have come a long way between *Johnson* and *Zollicoffer*.

Judge Bennett ruled that Zollicoffer’s request for injunctive relief was not mooted by his placement in “safekeeping,” because without an order he could be moved again “at any time,” making his claim “capable of repetition, yet evading review,” under *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). He ordered Zollicoffer to remain in “safekeeping” “until such time as the Court orders otherwise.” He also found that Zollicoffer’s request for expungement of her disciplinary record (reflecting misconduct charges when she sought protection) was prospective relief and not barred by the Eleventh Amendment.

The opinion reflects a Brandeis-brief-like submission on Zollicoffer’s behalf by highly competent counsel. Zollicoffer is represented by Lambda Legal. – William J. Rold

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

Colorado Supreme Court Rejects 14th Amendment Challenge to Public Lewdness Statute

The Colorado Supreme Court issued a unanimous *en banc* ruling on February 29, reversing the Adams County District Court, which had held unconstitutional on vagueness grounds a provision of the state’s public indecency statute that makes criminal “lewd fondling or caress of the body of another person” in a public place a “class 1 petty offense.” *People v. Graves*, 2016 WL 768157.

Gary Graves had gone to Circus Cinema, described by the court as “a movie theater that shows pornographic films.” An undercover police officer was in the theater looking for people to arrest for inappropriate conduct,

the clothed penis of the other man.

His attorney argued to the county court that as the terms “lewd,” “fondling,” “caress,” and “body” were not specifically defined in the statute or clear from “ordinary usage,” no limiting construction could cabin their application, leaving law enforcement officers too much discretion for idiosyncratic enforcement. In short, Graves argued that the statute was too vague and overly broad to comply with 14th Amendment Due Process standards. The county court judge agreed with Graves that it was vague and dismissed the case without addressing the overbreadth argument.

Gary Graves had gone to Circus Cinema, described by the court as “a movie theater that shows pornographic films.”

presumably to enrich the coffers of the local jurisdiction through fines. (Sort of like a speed trap. . . . OK, maybe we should credit the argument that the undercover officer was there to try to spot thieves, muggers and drug dealers, and had to arrest Graves and the others because they were violating a statute in plain view.) The court tells the story succinctly: “According to his incident report, the deputy was standing in the aisle of the theater when he observed the defendant, Gary Graves, remove his penis from his pants, and saw another male patron begin to stroke Graves’s penis. The deputy observed Graves then reach over to a third patron who was leaning against the wall and begin to stroke that man’s erect penis through his pants. At that point, the deputy identified himself and arrested Graves and the others.” Graves was charged with a class 1 petty offense under the public indecency statute for “lewdly fondling”

Undoubtedly fearing loss of an easy way to pick up revenue at the expense of people who are normally too cowed to fight back in court, and concerned about the moral health of the community if people could actually fondle each other’s genitals in pornographic movie theaters, the prosecutor appealed to the district court, which affirmed the county court. The district court rejected the prosecutor’s argument that dictionary definitions of the challenged terms would solve the vagueness problem. The court said that the meaning of “lewd” can “change with shifting social and cultural norms” and that a “diverse and multicultural society needs a more specific definition of the terms to meet the requirements of Due Process” and “people are not required to guess what others may consider to be ‘lewd’ or ‘vulgar.’” Although the court “intimated that Graves’s conduct in this case was in fact unlawful,” the court



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concluded that “the words of the state are too broad to provide the framework for lawful conduct,” and upheld the lower court’s decision to dismiss the case against Graves.

Now evidently in full moral panic, 17th Judicial District Attorney Dave Young petitioned the Colorado Supreme Court to review the case. Review was granted, the case was considered *en banc* (by a state supreme court that normally decides cases in smaller panels of judges), and the district court’s opinion was unanimously reversed in an opinion by Justice Monica M. Marquez.

The Supreme Court rejected the findings of both lower courts that the wording of the statute was unduly vague, and also rejected Graves’s argument, reiterated on appeal, that it is facially overbroad. “The public indecency statute as a whole targets only overtly sexual activity in public,” wrote Justice Marquez. “In this vein, section 18-7-301(1)(d) does not criminalize innocuous public displays of affection; it proscribes only ‘lewd’ fondling or caressing of another person’s body in a public place. ‘Lewd’ behavior is commonly understood to be overtly sexualized behavior that is indecent or offensive; indeed, the term is defined as ‘obscene’ or ‘lascivious.’ As construed in this opinion, section 18-7-301(1)(d) does not reach constitutionally protected speech or expressive conduct; to the extent that the statute might reach protected expression under hypothetical facts not before us, such potential overbreadth is not ‘substantial’ in relation to the statute’s legitimate sweep and may be addressed by courts on a case-by-case basis. Moreover, Graves’s conduct falls well within the proscriptive bounds of section 18-7-301(1)(d) and is not shielded from regulation by the First Amendment. Because section 18-7-301(1)(d) clearly prohibited Graves’s conduct in this case, the provision is not vague as applied to him, and he cannot complain of its alleged vagueness as applied to the hypothetical conduct of others.”

In specifically rejecting Graves’s contention that the term “lewd” was too vague, standing undefined, to give fair notice of the prohibited conduct to

members of the public, Justice Marquez wrote, “The theater in this case was a venue open to the public. In view of other patrons, Graves stroked another man’s erect penis through that man’s pants. Such lascivious conduct of an overtly sexualized nature in a public venue meets any reasonable definition of ‘lewd’ and falls well within the scope of the public indecency statute as we have construed it. In short, Graves’s conduct in this case is so clearly within the ambit of section 18-7-301(1)(d) that he cannot claim that the statute failed to provide him fair warning. . . . Because Graves’s conduct in this case is clearly proscribed by the statute, he cannot complain of the vagueness of the law as applied to the conduct of others.”

The court’s rejection of the overbreadth challenge was grounded in its assertion that “sexual conduct in public is not constitutionally protected expressive activity,” citing an old U.S. Supreme Court opinion, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), in which that Court refused to find 1st Amendment protection for a pornographic bookstore in Buffalo, N.Y. Ironically, on rebound from the Supreme Court, the New York Court of Appeals found that the state constitution’s analogous provisions did protect the bookstore. Continued Justice Marquez, “Even assuming that some overtly sexual fondling or caressing may be expressive conduct protected under the First Amendment, the conduct potentially chilled by the legitimate enforcement of section 18-7-301(d)(1) is slight compared to the ‘easily identifiable and constitutionally proscribable conduct’ to which the statute applies.”

Graves was represented before the Colorado Supreme Court by Alison Ruttenberg of Boulder, Colorado. With this reversal, he will now have to stand trial in Adams County Court or plead to the petty offense and presumably pay a fine to help fund the county’s extravagant law enforcement infrastructure. (Sorry if we sound very sarcastic, but we can certainly doubt whether public funds should be expended on sending undercover police into pornographic theaters to apprehend gay men fondling each other in the dark.) ■

Federal Magistrate Finds Transgender Inmate Has Substantive Due Process “Informational Privacy” Right Not To Be “Outed,” but Grants Qualified Immunity to Defendants

Prisoners’ constitutional claims for injunctive relief are often rendered moot by their parole, transfer, or other factors, leaving only damages claims that are subject to a defense of qualified immunity. There are two issues in the qualified immunity defense: (1) was a constitutional right violated?; and (2) was the right “clearly established”? Both must be satisfied for the plaintiff to proceed, but the court can take the questions in either order under *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

The order makes a difference in development of civil rights jurisprudence. If the court takes the second question first, it can find that the constitutional standard (whatever it may be) was not “clearly established,” so it need not rule on whether a constitutional violation ever occurred. Last month, a judge found no “clearly established” right in cases from the Supreme Court or the Sixth Circuit for protection from the consequences of being labeled “gay,” in *Davis-Hussung v. Lewis*, 2016 U.S. Dist. LEXIS 16464 (E.D. Mich., February 10, 2016), reported in *Law Notes* (March 2016 at page 99). The effect is to freeze the development of constitutional law by refraining from ruling on the merits of the constitutional claim.

Later in February, also in the Sixth Circuit, in *Pullum v. Elola*, 2016 WL 749204 (M.D. Tenn., February 25, 2016), United States Magistrate Judge John S. Bryant’s Report and Recommendation [“R & R”] answered the *first* question first; finding that defendants violated a substantive “Informational Privacy” right under the Due Process Clause of the Fourteenth Amendment when they displayed a transgender inmate’s female clothing to other prisoners. When *pro se* plaintiff Larry A. Pullum was processed into jail, his property from arrest included a dress, bra, pink shoes, and hygienic products. Pullum alleged that displaying these items to other prisoners at intake caused later threats and a fight.

Although Judge Bryant ultimately found that defendants were entitled to summary judgment on the undisputed facts (which included video evidence and Pullum’s admissions), he nevertheless proceeded to discuss the jail administrator’s liability for deliberate indifference to Pullum’s need for protection against a serious risk of harm under *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Judge Bryant found that *Farmer*’s objective arm (serious risk) was satisfied when Pullum’s grievance put the administrator on notice of the danger created by displaying the female clothing. The subjective arm (deliberate indifference to the risk) was absent,

nature which define significant portions of our personhood” and concluded that “the right to prevent the dissemination of confidential and intimate details of a rape implicates a fundamental right.” Judge Bryant also cited *Powell v. Schriver*, 175 F.3d 107, 111-12 (2d Cir. 1999) (“an inmate has a protected interest in keeping his transsexualism confidential, first because the information is very private and intimate, and second because the information may expose the inmate to hostility, intolerance, and discrimination from others”); and *Hill v. Quezzerque*, 2014 WL 4385937, at *3 (M.D. Tenn. Sept. 5, 2014) (permitting an inmate’s claim

The R & R found that displaying Pullum’s “female garments in view of other inmates states a cognizable informational privacy violation.”

however, because Pullum failed either to name his potential aggressors or to show that the risk was “pervasive” in the jail.

Remarkably, Judge Bryant did not stop there but proceeded to write about several issues “not addressed” in the pending motion, including “Informational Privacy” arising from the Substantive Due Process Clause of the Fourteenth Amendment, which protects “against disclosure of certain personal matters” where release “could lead to bodily harm” or was of “a sexual, personal, and humiliating nature,” citing *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008). The R & R found that displaying Pullum’s “female garments in view of other inmates states a cognizable informational privacy violation,” citing *Bloch v. Ribar*, 156 F.3d 673, 685-6 (6th Cir. 1998), wherein the Sixth Circuit wrote “[o]ur sexuality and choices about sex, in turn, are interests of an intimate

that his sexual orientation was disclosed to inmates by a correctional officer to proceed past initial review).

Ultimately, Judge Bryant decided that Pullum could not proceed on this theory either, because the defendants were entitled to qualified immunity since the “contours of this right” (to “informational privacy”) were not so well-established at the time of Pullum’s booking that the defendants should have aware they acted unlawfully. This is the same result as *Davis-Hussung*, but that case did not recognize any constitutional right because it proceeded to the “clearly established” test first. *Pullum*’s recognition of the right to “Informational Privacy” for transgender prisoners is very useful, because it can be cited for this point and it contributes to the evolution of the law – adding to what defendants “should” know in the future. – William J. Rold

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U.S. SUPREME COURT – On February 29, the Supreme Court denied a petition for certiorari in *Doe v. Christie*, No. 15-195, 2016 WL 763249. Challengers to New Jersey’s law prohibiting licensed counselors from performing “conversion therapy” on minors asked the court to review the 3rd Circuit’s decision in *Doe v. Governor of the State of New Jersey*, 783 F.3d 150 (2015), which rejected the constitutional challenges, affirming a decision by U.S. District Judge Freda L. Wolfson, 33 F. Supp. 3d 518, which had dismissed the case on a pre-trial motion. Unlike the 9th Circuit, which has ruled that California’s similar ban did not raise any First Amendment free speech issues because it was merely a regulation of medical practice, the 3rd Circuit took the view that to the extent that such therapy involves speech, the 1st Amendment may be implicated, but that the state’s justification for the regulation outweighed any incidental free speech rights at issue.

SOCIAL SECURITY ADMIN. – Lambda Legal announced on Mar. 8 the resolution of its lawsuit against the Social Security Administration on behalf of Kathy Murphy, a Texas widow who had been denied spousal social security benefits upon the death of her wife in 2012. *Murphy v. Colvin*, filed October 2014. The women were married in Massachusetts in 2010, but lived in Texas where the state did not recognize their marriage at the time of Sara’s death. The SSA took the position prior to *Obergefell* that it could recognize marriages only when the couple resided in a state where their marriage was recognized, and they were living in Texas. Enough said. . . . Anyway, after *Obergefell* it seemed clear that SSA would have to drop this rule, because all states were constitutionally obligated to recognize valid same-sex marriages. But it took some prodding and litigation to get the

SSA to agree that this obligation, being a constitutional one, was retroactive to somebody who was widowed in 2012, even before the Supreme Court’s *Windsor* decision made clear that the federal government was obligated under the 5th Amendment to recognize same-sex marriages validly contracted under state law. Lambda had filed suit on behalf of Murphy in the U.S. District Court in the District of Columbia, with Lambda attorneys Susan Sommer and Karen Loewy handling the case with cooperating attorneys Dennis Hranitzky, Will Sachse and David Goldberg of Dechert LLP. As part of the settlement, the SSA has advised staff about the treatment of same-sex couples who married prior to the Supreme Court decisions, emphasizing that all marriages valid where contract must be recognized, regardless where the married couple lives.

U.S. COURT OF APPEALS, 1ST CIRCUIT – Lambda Legal and cooperating attorneys from Debevoise & Plimpton LLP and Wilmer Cutler Pickering Hale and Dorr LLP and local counsel from Puerto Rico filed a petition for a writ of mandamus with the 1st Circuit titled *In re Conde-Vidal et al.*, seeking an order directed to the District Court mandating entry of judgement in favor of the plaintiffs in their challenge to Puerto Rico’s statutory ban on same-sex marriage. This responds to an outrageous decision by the U.S. District Judge

U.S. COURT OF APPEALS, 3RD CIRCUIT – A unanimous 3rd Circuit panel has upheld a decision by Immigration Judge Charles M. Honeyman, affirmed by the Board of Immigration Appeals, that a gay Muslim man from Kosovo who credibly testified that his father tried to attack him with an ax after discovering that he was gay, had not adequately shown

either past persecution or a credible fear of future persecution if he were removed back to Kosovo, thus rejecting his claim for asylum in the U.S. *Sylaj v. Attorney General*, 2016 WL 851786 (March 4, 2016). The petitioner testified that when his friends spotted him embracing a male German tourist and concluded he was gay, they “mistreated him and viewed him differently” and classmates “verbally threatened him by threatening to kill him and stating that ‘soon you will not come to school again.’” Fearful of being attacked, he stopped going to school, hiding this from his family. But the teacher called his home to find out why he was not coming to school, and his father went to school to meet with the teacher. Plaintiff testifies that at that time his father “heard some of his classmate call [him] gay.” Subsequently, he testified, “his father attempted to kill him,” saying “you caused us shame. How can you do these things,” grabbing an ax from near the wood stove “and ran towards [him] in order to hit him.” His mother jumped in front of him to shield him and he ran out of the house and made his way to the U.S., where he has been living with an uncle in Pennsylvania. He filed for asylum, but Homeland Security initiated removal proceedings while his asylum case was pending. Judge Honeyman found him to be “generally credible” but denied his asylum petition, determining that what happened to him in Kosovo did not amount to past persecution and that there was no well-founded fear of future persecution, since his father’s actions were merely “unfulfilled death threats,” unlike other cases in which asylum petitioners presented credible accounts of actual physical injuries at the hands of anti-gay police officers, for example. The BIA affirmed this ruling. Sylaj obtained new counsel and moved to reopen the case, arguing that his original counsel had been ineffective for not adequately raising the argument that his father tried to

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murder him. But the BIA disagreed, and so does the 3rd Circuit in this brief opinion by Circuit Judge D. Brooks Smith. Wrote Smith, “while we do not need to decide whether attempted murder is *per se* persecution, we note that the cases cited in support of this argument involve significantly more factual detail than the case before us.”

U.S. COURT OF APPEALS, 3RD CIRCUIT

– A gay man from Jamaica who had languished in a Pennsylvania prison in federal immigration custody for several years was denied a writ of mandamus by the 3rd Circuit on Mar. 10, which was coincidentally the date when he was scheduled by Immigration Control and Enforcement for removal back to Jamaica. *In re Codner*, 2016 WL 909118. Codner’s hopes to remain in the United States were dashed by his conviction on marijuana charges, which ultimately eliminated all grounds for relief except potential protection under the Convention against Torture, and an Immigration Judge found that he had failed to qualify for such protection; this, despite media reports that conditions for gay people remain quite hazardous in Jamaica. Codner, representing himself *pro se*, managed to exhaust just about every administrative appeal route without success, and the court held that ultimately a final order of removal is not appealable to the federal courts. His attempts to get released from custody under supervision had been unsuccessful, the court finding that he presented a serious flight risk because of his familiarity with the U.S. after long residence here and his obviously strong interest in preventing being returned to Jamaica, a country that did not seem exuberantly interested in taking him back.

U.S. COURT OF APPEALS, 4TH CIRCUIT

– In *Finkle v. Howard County*, 2016 U.S. App. LEXIS 432, 2016 WL

878016 (4th Cir., Mar. 8, 2016), the court issued a brief unofficially published *per curiam* decision rejecting Tomi Boone Finkle’s appeal of a magistrate judge’s award of summary judgment against her on her sex discrimination claim under Title VII. Finkle, a transgender retired law enforcement officer, was denied a position with the Howard County Police Department’s Volunteer Mounted Patrol. She claims this was due to her gender identity, in violation of federal and state law. The magistrate found that there was no material factual dispute about the non-discriminatory reasons advanced by the defendant for selecting other applicants. The court mentioned that defendant Howard County “has not disputed that Finkle falls within a protected class for purposes of this appeal. We therefore need not decide whether transgender persons comprise a protected class under Title VII.” Thus, the court left open an important issue as to which several other circuits but not the Supreme Court have weighed in. In another part of the ruling, the court backed up the magistrate’s refusal to grant a broad discovery request for access to social media accounts of all the relevant county decision-makers in search of transphobic comments.

U.S. COURT OF APPEALS, 6TH CIRCUIT

– The 6th Circuit affirmed a decision by U.S. District Judge Pamela Lynn Reeves to grant summary judgment to the Grainger County Board of Education and school officials, who were sued by Kelly Stiles on behalf of her son, D.S., who she alleged was subjected to bullying at school in violation of Title IX and the 14th Amendment (equal protection and due process). *Stiles v. Grainger County*, 2016 U.S. App. LEXIS 5595, 2016 WL 1169099 (March 25, 2016). While it was clear that bullying was taking place, the court affirmed the trial court’s conclusion that there was

no liability under Title IX because school administrators did not respond to complaints about the bullying with deliberate indifference, instead investigating every claim and imposing discipline on perpetrators where they were identified. Furthermore, the record showed that there was very little repeat bullying after a particular perpetrator was disciplined. So, although D.S. continued to suffer from bullying due to his perceived sexual orientation, the school’s response was deemed sufficiently reasonable to avoid Title IX liability, or any constitutional liability.

U.S. COURT OF APPEALS, 9TH CIRCUIT

– Faulting the Board of Immigration Appeals for its conclusory finding that a gay man from Mexico had not suffered past persecution, a panel of the 9th Circuit granted in part and remanded a petition for review of a BIA decision denying all relief in *Gonzalez-Ortega v. Lynch*, 2016 WL 878747, 2016 U.S. App. LEXIS 4341 (March 8, 2016). While finding that the petitioner had failed to show extraordinary circumstances justifying his late filing for asylum, the court found that “the BIA improperly determined that Gonzalez-Ortega did not suffer past persecution in Mexico because the record compels the conclusion that he was persecuted ‘on account of’ his homosexuality. The BIA concluded that Gonzalez-Ortega was victimized because of his general vulnerability and not due to his sexual orientation. But ‘persecutors’ motivation should not be questioned when the persecutors specifically articulate their reason for attacking a victim,” wrote the court, citing *Li v. Holder*, 559 F.3d 1096 (9th Cir. 2009), and continued, “and his brother uttered homophobic slurs while raping him, making clear he was targeted because of his homosexuality. While his brother may have had other

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motivations for repeatedly raping him, ‘a persecutor may be motivated by more than one central reason, and ‘an asylum applicant need not prove which reason was dominant.’” Indeed, the court found, “his cousin clearly targeted him only because his closeted homosexuality made him vulnerable. Therefore, the BIA erred by concluding that Gonzalez-Ortega was not raped ‘on account of’ his homosexuality.” The court also faulted the BIA in finding that petitioner had to report his abuse to the police in order to show “government acquiescence” in his persecution, saying that the 9th Circuit has never held that a child is obligated to “report a sexual assault to the authorities.” Thus, the claim for withholding of removal was remanded. However, a majority of the panel found supportable the BIA’s determination that petitioner failed to show he was more likely than not to suffer torture if returned to Mexico, so denied the petition as to his claim under the Convention Against Torture. This drew a partial dissent from Circuit Judge Nguyen, who faulted the BIA for assuming that because the Mexican government has taken some formal steps to “protect its gay and lesbian citizens” such efforts were effective. “There is no indication that the BIA considered all of the relevant evidence on this point,” she wrote, “including evidence submitted by Gonzalez-Ortega suggesting that Mexico’s efforts have been ineffectual, and that government officials often brutalize, torture, and extort people because of their sexual orientation. When considering whether a person is likely to be tortured, the BIA must look to practical realities, not just legal obligations that may or may not be enforced,” she continued. “Beyond that, the BIA overlooked conditions in Gonzalez-Ortega’s home region and improperly placed the burden on him to show that he could not safely relocate within the country.” She would have remanded for reconsideration of the

CAT claim. The petition is represented by Erica Britt Schommer of Rios & Cruz P.S., Seattle.

U.S. COURT OF APPEALS, 9TH CIRCUIT

– The 9th Circuit affirmed a ruling by U.S. District Judge S. James Otero (C.D. Cal.) that a cancellation clause in the reservation contract used by Atlantis Events, Inc., for their all-gay cruises was not an illegal liquidated damages clause under California law. *Bauer v. Atlantis Events, Inc.*, 2016 U.S. App. LEXIS 5432 (9th Cir., Mar. 23, 2016). Dr. William Bauer and Carlos Sanchez booked on an all-gay Atlantis cruise. They cancelled their reservations 90 days before sailing date, and were charged a cancellation fee equal to 40 percent of the purchase price, as provided in the contract. Bauer and Sanchez then filed this case, seeking class action certification, alleging that the 40% cancellation charge was illegal under Cal. Civ. Code sec. 1671(d), which invalidates provisions for liquidated damages unless “it would be impracticable or extremely difficult to fix the actual damages.” The court pointed out that under California law this provision comes into play only upon a breach of contract. Since the Atlantis contract allowed people to cancel their reservations in advance for payment of a cancellation fee, the court found that this case did not involve any breach of contract on the part of plaintiffs, and thus the liquidated damages clause was irrelevant. The cancellation fee was not “damages” for a breach, but rather a fee for an agreement to cancel the reservation. “In other words,” wrote the court, “Appellants agreed to pay money in exchange for space on the cruise, but they never agreed to go on the trip. Accordingly, the district court did not err in dismissing the action for failure to state a claim. Having concluded that there was no breach of contract, we need not consider whether

the circumstances presented here fall within the ‘impracticable or extreme difficult’ exception under sec. 1671(d).” The 9th Circuit also upheld Judge Otero’s decision to award attorney fees to the defendants, applying California law allowing the award to prevailing parties in contracts suits “if the contract provides for the recovery of such fees,” which the Atlantis form reservation agreement apparently does.

U.S. COURT OF APPEALS FOR VETERANS CLAIMS

– The Court affirmed a ruling by the Board of Veterans’ Appeals rejecting Fritzer M. Davis’s renewed claim to veterans benefits in connection with his HIV infection. He alleged, among other things, that his claim was handled in a discriminatory manner because he is gay. *Davis v. McDonald*, 2016 WL 765772 (Feb. 29, 2016). Davis did two stints in the Marines during the 1980s, leaving first with an honorable discharge, the second time with a less than honorable discharge. At an earlier stage in this benefits proceeding, the Board had remanded his claim regarding his HIV infection being service-connected with instructions that the agency obtain “an opinion from a VA examiner who specialized in infectious disease to determine the nature, extent and etiology of his AIDS/HIV.” On remand, the VA obtained an opinion from Dr. Yasmin Sarfraz, who listed her title on the opinion as “Attending Physician, C & P Exams.” In this renewed appeal, Davis claimed that this did not comply with the remand, because Dr. Sarfraz did not identify herself as an infectious disease specialist with competence in HIV. The problem, wrote Judge Lance, was that he presented no evidence that Dr. Sarfraz was “incompetent to provide the opinion,” and there is a presumption that VA medical examiners are competent in the absence of clear evidence to the contrary. In this case,

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evidently, “substantial compliance” was deemed enough. As to Davis’s 5th Amendment claim, that he was being treated with animosity due to being gay, the court was not impressed. “He does not, however, provide any specific argument as to how his rights were violated or how he was prejudiced by any Board error in its evaluation of the evidence and arguments in his case. . . . Absent any supporting arguments, ‘to the extent that he has simply put a “due process” label on his contention that he should have prevailed on his claim, his claim is constitutional in name only,” wrote the judge, citing and quoting from *Helper v. West*, 174 F.3d 1332 (Fed. Cir. 1999).

(EEOC) EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Having opined last summer in *Baldwin v. Foxx* (Dep’t of Transportation), 2015 WL 4397641 (July 15, 2015), that sexual orientation discrimination is actionable under Title VII’s ban on sex discrimination in the workplace, the EEOC is moving forward on its agenda to win endorsement of this view from the federal courts. On March 1, the agency filed actions in two federal district courts on behalf of complainants who claimed to suffer discrimination and harassment because of sexual orientation. *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.* (U.S. Dist. Ct., D. Md., Baltimore Div.); *EEOC v. Scott Medical Health Center, P.C.* (U.S. Dist. Ct., W.D. Pa.). These would be simple run-of-the-mill sex discrimination cases under Title VII were it not that the EEOC is alleging that cases are being brought on behalf of a gay man and a lesbian who suffered discrimination on account of their sexual orientation. The agency has identified advancing judicial acceptance of its construction of Title VII in cases of sexual orientation and gender identity discrimination as high priority on its litigation agenda. A fact

sheet on the agency’s website indicates that it has accepted numerous charges of sexual orientation and gender identity discrimination and has managed to oversee settlements of many of those cases, resulting in damage payments to numerous LGBT employees.

ALABAMA – Illustrating the late Justice Antonin Scalia’s dictum in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), that Title VII does not establish a civility code for the workplace, U.S. District Judge Madeline Hughes Haikala granted summary judgment to the City of Falkville, Alabama, against a claim by Mr. Jady Pipes, a former police officer and chaplain in the Falkville Police Department, that he was subjected to unlawful same-sex harassment by Police Chief Christopher Free. *Pipes v. City of Falkville*, 2016 U.S. Dist. LEXIS 42992 (N.D. Alabama, Southern Div., March 31, 2016). It appears from Pipe’s allegations and some of the statements drawn from other witnesses that Chief Free would from time to time engage in a practice called “racking,” which involves grabbing or slapping the genitals of male employees or pushing a finger into their (clothed) anus as part of “horseplay.” Pipes, evidently sensitive on the matter, objected when Chief Free subjected him to this treatment, and ultimately filed suit under Title VII, alleging both sexual harassment and retaliation in response to his complaints. A magistrate judge recommended dismissing the retaliation claim but allowing the harassment claim to proceed, but District Judge Haikala determined that both claims should be rejected. Essentially, she found that nothing Pipes credibly alleged would support a claim that he was singled out for this treatment due to animus against men in the workplace or to him as a man, even though, from what the court recounts of the record, it does not appear that

Chief Free engaged in similar conduct toward female employees. The problem is that federal courts take the view that Title VII cannot be stretched to being more than an anti-discrimination statute, and they don’t consider physical horseplay among males in a workplace to be discriminatory on grounds of sex, even when the horseplay doesn’t extend to female employees. To be fair, in this opinion female employees are never mentioned and perhaps the Falkville Police Department had none, although that seems unlikely in the second decade of the 21st century. If the only employees around to be targeted by Chief Free were male, then clearly there is no discrimination “because of sex,” at least in the narrow sense.

CALIFORNIA – No, *Lawrence v. Texas* does not support a claim that state laws against prostitution, defined as engaging in sexual activity for pay, are unconstitutional. Since the Supreme Court issued the *Lawrence* decision in 2003, such claims have been uniformly rejected by both state and federal courts. Now, again, in *Erotic Service Provider Legal Education & Research Project v. Gascon*, 2016 WL 1258638, 2016 U.S. Dist. LEXIS 44178 (N.D. Cal., Mar. 31, 2106), another federal judge, U.S. District Judge Jeffrey S. White, has rejected the claim, finding no violation of the 1st or 14th Amendments of the federal constitution or analogous provisions of the California Constitution by California Penal code Section 647(b), which makes it a crime for “commercial exchange of sexual activity” to take place. The court was not willing to entertain the proposition that the relationship between a prostitute and a customer is the kind of “intimate” relationship found to be protected as within the liberty interest under the Due Process Clause, no matter how personal the nature of the service is, because it is, at its base, a commercial transaction. Wrote

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White: “The Court is not persuaded by Plaintiffs’ contention that the Supreme Court has shifted the definition of the protected liberty interest to comprise merely sexual or intimate conduct, as opposed to the relationship in which the sexual or intimate conduct occurs. The Court similarly is not persuaded by Defendant’s contention that the due process analysis here should be predicated exclusively upon an asserted fundamental right to commercial sex. Plaintiffs’ assertion of a fundamental liberty interest in sex is too broad, and Defendant’s assertion of a fundamental liberty interest in commercial sex is too narrow. Rather, this case challenges particular intimate conduct within a specific context in that courts have deemed not to afford constitutional protection.” White referred to 9th Circuit precedent finding that “a couple comprised of an escort and a client ‘possesses few, if any, of the aspects of an intimate association,’” citing *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988). While acknowledging that after *Lawrence* the prostitution law cannot survive rational basis review based solely on state moral disapproval, White accepted the state’s argument that it has other bases for continuing to criminalize prostitution, involving “promoting public safety and preventing injury and coercion.” Liberalization of laws against commercial sex is highly unlikely to be achieved through litigation. The Supreme Court specifically stated in *Lawrence* that it was not dealing with prostitution in that case, in which the alleged sexual relationship at issue was non-commercial.

CALIFORNIA – Three people living with HIV, alarmed that their insurer was going to require them to purchase HIV-related medications through its mail order pharmacy, brought a class action lawsuit in *Doe v. Aetna, Inc.*, 2016 WL 1028363 (S.D. Cal., March 15,

2016), arguing that this would “threaten HIV and AIDS patients’ health and privacy” and would require them to incur thousands of dollars a month if they had to purchase the medications at their local pharmacies outside of their insurance coverage. At the time the first amended complaint was filed, the three plaintiffs had been informed that Aetna would not allow them to opt out of the mail-order requirement, although it had responded to their complaint by extending the starting date for the program. Ultimately, Aetna never put the program into effect for its insureds covered through employer groups (two of the plaintiffs), and suspended the program after several months for the purchasers of individual coverage. Apparently Aetna hoped to save some money on HIV/AIDS medications through the mail-order requirement by cutting out the profit-margin for local pharmacies, but in the face of push back decided to avoid further litigation. Aetna sought to have this case dismissed, arguing that its decision to change court mooted the action, but District Judge Larry Alan Burns found that this argument had to be considered as of the time the first amended complaint was filed, and as of that time there was a live controversy and, as plaintiffs allege, there is nothing to prevent Aetna from attempting to revive the program, so they would still like injunctive relief. Thus Burns found that plaintiffs had standing to assert claims for prospective relief, without finding that their substantive claim was meritorious. As to damages, the court found that the two plaintiffs in employer plans had no standing to seek damages because the program was not implemented as to them. The court rejected Aetna’s argument as to these two plaintiffs that their claim was not “ripe.” “The program wasn’t an abstract idea when the relevant complaints were filed,” wrote Judge Burns. “At the time the original complaint was filed, the program was

to go into place within the next month. And at the time the FAC was filed, it had already been applied to individual plan members, including John Doe Three. Thus, it’s sufficiently concrete to evaluate against the causes of action in the FAC.” The plaintiffs also sought attorney fees on a “catalyst theory”; i.e., that their lawsuit had caused Aetna to change course, so they achieved their primary objective. Judge Burns rejected this claim, stating doubt that such a theory was viable in light of the test described by the Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598 (2001). More to the point, “their complaint that Aetna won’t promise to never implement a similar mail order program in the future cuts against a finding that they’ve achieved the benefit that they’ve sought. And at this stage, Plaintiff have given the Court no reason to believe that their claims have any legal merit,” he continued. “Plaintiffs point to Aetna’s decision to reverse the program, but that doesn’t necessarily mean that their claims are colorable. For example, even if the Court were to assume that Aetna made the change in response to this lawsuit, the response may be a business decision made to avoid nuisance-value lawsuits. Other than the possible personal preference of *some* of the class members, the Court doesn’t understand what interest it serves to receive medications at a pharmacy as opposed to through the mail in a presumably nondescript package.” Evidently, Judge Burns has never formed a personal relationship with a local pharmacist who guides and monitors a customer through a complicated medical regimen, as can be the case with HIV/AIDS. One can easily imagine how such a person would be strongly resistant to having to deal with a mail order pharmacy and to call up a stranger of unknown credentials for advice and instruction about the medications’ use and side

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effects, with the lack of continuity that such telephone call-center contacts might have.

FLORIDA – It's not over until it's really over! On March 30, U.S. District Judge Robert Hinkle granted summary judgment to plaintiffs in two pending marriage equality cases, rejecting the state's argument that the cases were moot, because there was evidence before the court that state agencies had failed to comply fully with the Supreme Court's ruling in *Obergefell v. Hodges*. *Brenner v. Scott*; *Grimsley v. Scott*, Case Nos. 4:14cv107-RH/CAS; 4:14cv138-RH/CAS (N.D. Fla., March 30, 2016). Among other things, Judge Hinkle blasted the state's refusal to treat same-sex marriages the same as different-sex marriages in all contexts, including listing both parents on birth certificates when a child is born to a same-sex spouse. "The statutory reference to 'husband' cannot prevent equal treatment of a same-sex spouse," he wrote. "So, for example, in circumstances in which the surgeon general lists on a birth certificate an opposite-sex spouse who is not a biological parent, the surgeon general must list a same-sex spouse who is not a biological parent." Hinkle blasted the legislature for failing to repeal the state's statutory ban on same-sex marriage in response to the Supreme Court ruling. One effect of this final ruling on the merits is that plaintiffs' counsel can now file their request for attorney fees and costs, which are expected to come to half a million dollars or more.

GUAM – Chief Judge Frances Tydingco-Gatewood of the U.S. District Court has ordered to government to pay more than \$85,000 in legal fees to the same-sex couple that prevailed in a marriage equality case last year. Kathleen Aguero and

Loretta Pangelinan successfully sued to overturn the territory's ban on same-sex marriage after being denied a marriage license in April 2015. They successfully argued that the 9th Circuit's decision on marriage equality was binding on the government in Guam, a U.S. territory, overcoming the local government's refusal to comply with an opinion issued by the attorney general. The marriage equality ruling was issued on June 8, 2015, and subsequently local lawmakers conformed the law accordingly, so same-sex couples began marrying in August. The governor had refused to sign the new law, allowing it to take effect without his participation. *AP Worldstream*, March 17.

IDAHO – In *Knapp v. City of Coeur d'Alene*, 2016 U.S. Dist. LEXIS 39758, 2016 WL 1180168 (D. Idaho, Mar. 25, 2016), Chief U.S. Magistrate Judge Ronald E. Bush ruled on the city's motion to dismiss the first amended complaint, in which Donald and Evelyn Knapp, doing business as Hitching Post Weddings, LLC, claimed a violation of their constitutional rights through potential enforcement against them of a local ordinance forbidding sexual orientation discrimination in places of public accommodation. The Knapps came to national attention because of their establishment's proximity to the courthouse where marriage licenses were issued to same-sex couples after Idaho's ban on same-sex marriage was declared unconstitutional and the trial judge's ruling finally went into effect. The Knapps refused to have same-sex weddings performed at their premises, stirring up a brief media storm. Both of them are ordained ministers, who were asserting their rights as ministers not to officiate weddings that violated their religious beliefs, but they had not anticipated difficulties far enough in advance by incorporating their business as a "religious" organization.

Once they undertook this act of incorporation, however, and it came to the attention of local authorities, it became clear that they would be exempt from any requirement under the local law on free exercise of religion grounds as a "religious establishment" operated by ordained ministers. However, in the confusion and missed communications they were actually shut down for a while during a period of uncertainty concerning the local ordinance's application to them. Judge Bush decided, in cutting through all the factual detail, that the Knapps' case should be dismissed with one exception. The judge found that the Knapps did have standing to seek compensatory damages for their business's closure on October 15, 2014. However, he cautioned that this resolution of the standing issue was not a decision on the merits of their claim. "Rather," he wrote, "they are simply permitted to move forward in asserting such a claim through this legal action. The actual merits and scope of this discrete claim are not addressed at this time."

ILLINOIS – U.S. District Judge Robert W. Gettleman granted summary judgment to Northwestern University, rejecting discrimination claims by a lesbian police officer who asserted claims of sexual harassment, retaliation and pay discrimination under the Illinois Human Rights Act and the Equal Pay Act (federal). *Martinez v. Northwestern University*, 2016 U.S. Dist. LEXIS 40847, 2016 WL 1213913 (N.D. Ill., March 29, 2016). The Illinois HRA prohibits discrimination because of sexual orientation, and specifically forbids "sexual harassment," defined as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when such conduct has the purpose or effect of substantially interfering with an individual's work performance or

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creating an intimidating, hostile or offensive working environment.” Haydee Martinez claimed that a male heterosexual officer to whom she reported often used the terms “fag,” “faggot,” “pussy,” “cocksucker” and “sissy” in her presence when referring to offenders or students. This was the extent of her hostile environment sexual harassment claim, which the court concluded did not fall within the definition of “sexual harassment” under the state law. Martinez became pregnant and bore a child during the period covered by her complaint, and asserted that she suffered discrimination in her attempts to access light duty assignments during her pregnancy and retaliation for filing several discrimination complaints. The court found that her discrimination claims on the light duty fell short because she failed to establish either that she was treated worse than male and/or heterosexual employees in this regards, and that she failed to assert facts tending to show that denials of light duty were related to her filing of complaints. There were significant lapses of time between the filing of her discrimination complaints and the particular personnel decisions about which she was complaining. Similarly, her complaints about shift assignments that were awkward for her fell short in meeting the pleading requirements for showing discrimination or retaliation. Her Equal Pay Act claim was premised on a comparison of her compensation with a male employee who had been promoted to a similar rank after a shorter period of employment. This claim fell short because, as it turned out, throughout the relevant time period she was compensated at a higher rate than he was, and the EPA prohibits paying women a lower rate of pay than men for the same work. That the man was being paid more than Martinez believed he was entitled to was irrelevant to her EPA claim if she was being paid more than him. Her

case was in federal court because of the Equal Pay Act claim.

ILLINOIS – The Illinois Human Rights Commission announced on March 29 that it was fining Timber-Creek Bed and Breakfast more than \$80,000 for violating public accommodations provisions by refusing to allow a same-sex couple to hold their civil union ceremony on the property due to the owner’s belief that homosexuality is “immoral and unnatural,” as Jim Walder asserted in an email in response to an inquiry by Todd and Mark Wathen about the use of his establishment for their ceremony. The Commission’s Administrative Law Judge also ordered the respondent to pay \$15,000 to each of the men as compensatory damages for emotional distress. The respondent will also be required to pay \$50,000 in attorney fees and \$1,218.35 in costs to the complainants, who had to go through a hearing before the ALJ to achieve this result. The men had contacted Timer-Creek in 2011 about scheduling their civil union ceremony, at a time when Illinois law allowed same-sex civil unions but not yet marriage. So this case has been grinding along in the Illinois administrative process for many years! *Yahoo.com* (March 29).

LOUISIANA – U.S. District Judge Carl J. Barbier refused to back down from his prior decision to stay consideration of intervenor claims in a gender identity discrimination case brought under Title VII by a private plaintiff pending arbitration of the claim between the plaintiff and his former employer, but agreed to put a tight time limit on the stay of six months. *Broussard v. First Tower Loan LLC*, 2016 WL 879995, 2016 U.S. Dist. LEXIS 29523 (E.D. La., March 7, 2016). Broussard was dismissed shortly after having been hired when a management

official learned he was transgender and sought to force him to agree to comply with a discriminatory dress code. Broussard filed a Title VII claim with the EEOC, which found his claim meritorious, issued a right to sue letter, and intervened as a co-plaintiff when he initiated suit. The employer moved to stay the proceeding, pointing to an arbitration provision in the employment form that Broussard had signed. Judge Barbier granted the motion, as to both Broussard and the EEOC. The EEOC argued that the mandatory stay governing claims subject to arbitration should not apply to it, since it was not party to any arbitration agreement was suing to vindicate public rights under Title VII. Judge Barbier said he was exercising discretionary power to stay the EEOC’s claims, and could reserve to post-arbitration review the question whether to extend collateral estoppel to an arbitrator’s findings when considering the Title VII claims asserted by the agency. However, he “recognized” that a discretionary stay “must have a reasonable time limit” under circuit precedent, and agreed to modify the previously entered discretionary stay so that “its force will be spend within reasonable limits” and cited an American Arbitration Association publication for the proposition that six months should be sufficient for an expeditious arbitration proceeding, since most such disputes “are resolved between 120-180 days” and “the average length for all arbitration matters through the AAA is about 4.5 months.” He also said EEOC was not precluded from asking the court to lift the stay earlier. “In addition, the Court will allow counsel in this case to submit status reports on the ongoing arbitration, if counsel feel that such a submission will be helpful to the Court.” The EEOC intervention was in support of its initiative to establish court precedents findings gender identity discrimination claims actionable

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under Title VII. This is an excellent case for that purpose, as the plaintiff's factual allegations strongly support a conclusion that the discharge was motivated by management's discovery that the plaintiff is transgender.

LOUISIANA – U.S. District Judge Donald E. Walter rejected an argument that as a result of the U.S. Supreme Court's decision in *Lawrence v. Texas*, striking down a state criminal sodomy law as violating the Due Process rights of same-sex couples to engage in private consensual sexual activity, deprived a public employer of the power to discipline or discharge public employees for engaging in conduct the employer considered to be immoral and detrimental to the office. *Coker v. Whittington*, 2016 WL 1064641 (W.D. La., March 14, 2016). Bossier Parish Sheriff Julian Whittington was outraged to learn that two of his officers, Brandon Coker and Michael Golden, both married to women, had with the agreement of their wives left their matrimonial homes to live with each other's wife, planning eventually to marry them. The Sheriff's Office investigated the situation and reported to Whittington, at whose direction Chief Deputy Charles Owens met separately with the two men, telling them that to continue working as a deputy each would have to move out of the houses they were sharing with the other's spouse and cease all contact with the other's spouse. Each of the men was placed on administrative unpaid leave until they complied with this order. The men rejected the sheriff's order, in effect saying that their living arrangements were none of his business. The men were ultimately discharged when they failed to comply. The sheriff relied on the office's Employee Handbook, which requires officers to conduct themselves "at all time in such a manner as to reflect the high standards" of the office and that

they "not engage in any illegal, immoral, or indecent conduct, nor engage in any legitimate act which, when performed in view of the public, would reflect unfavorably [sic] upon the Bossier Sheriff's Office." "The Court finds no basis, in Fifth Circuit or Supreme Court precedent, upon which to find that Defendants have improperly infringed upon Plaintiffs' constitutional rights, in the context of their employment as BPSO deputies," wrote Judge Walter. "Sheriff Whittington is a publicly elected official, responsible for and answerable to those who reside within the jurisdiction of Bossier Parish. The fact that Plaintiffs may disagree with, or find unfair, Sheriff Whittington's decisions, in the context of their employment with the BPSO, does not rise to the level of a constitutional violation. It is a 'common sense realization that government offices could not function if every employment decision became a constitutional matter.' Although Plaintiffs are correct in pointing out changes in the jurisprudential landscape in the wake of *Lawrence v. Texas*, this Court does not find any such shift as having as wide-sweeping an effect, as that advocated by Plaintiffs, on the courts' involvement in governmental entities' employment decisions." Ultimately, the sheriff's objection was to obvious and open adultery by law enforcement officers. "Plaintiffs could have terminated their living arrangements until such time as their divorces became final," wrote Walter, "in order to return to work. They chose not to do so, thereby causing the termination of their employment as BPSO deputies." He rejected the contention that the Handbook provisions violated First Amendment or 14th Amendment protection or were vague or overly broad. The court found that the men's conduct was not constitutionally protected, and that the Sheriff's Code of Conduct "does not offend the minimum requirements of

federal due process, especially with regard to discipline that is not in itself constitutionally protected and that was reasonably within the scope of the regulations' prohibition." Walter found that there was no argument that the men's conduct was "immoral." Walter also found that since there was no merit to the plaintiffs' constitutional claims, there was no need for him to address the defendants' qualified immunity arguments.

MISSISSIPPI – Here is a rather bizarre case. A female customer of a Sears store in McComb, Mississippi, claimed that an employee of the store (who she was told was a "homosexual") had engaged in stalking and harassing her thorough text messages, calls and passing by her house. In *Ogunbor v. May*, 2016 Miss. App. LEXIS 163, 2016 WL 1203795 (Miss. App., March 29, 2016), the court dismissed the action against Sears, finding that it had no *respondeat superior* liability in the matter, since none of the conduct complained of was performed by the alleged lesbian employee, Maleisha May, within the scope and course of her employment. Furthermore, the court dismissed the action against May, finding she had not been properly served with process. Claims against other Sears employees also fell by the wayside. The customer, Cheryl Ogunbor, claimed to have been so unnerved by May's actions that she had to seek professional care for her emotional upset. This sounds like a gross overreaction to what was alleged factually in the complaint. Somewhere buried in this case is the script for a B movie. . .

MISSOURI – Since there is no controlling precedent under Missouri law or federal constitutional law providing that discrimination because of sexual orientation is unconstitutional or illegal, a charter school in Missouri

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is entitled to sovereign immunity from any imposition of liability for discharging a bus driver because of her sexual orientation, held the Court of Appeals of Missouri in *Moore v. Lift for Life Academy*, 2016 Mo. App. LEXIS 220, 2016 WL 1086345 (March 15, 2016). The opinion is devoted almost entirely to the question whether charter schools enjoy the same sovereign immunity that public schools enjoy, a question the court answers in the affirmative. In a footnote, Judge Lisa Van Amburg pointed out that in any event the Missouri courts have made clear that sexual orientation discrimination does not violate the sex discrimination provision of Missouri's Human Rights Act (see *Pittman v. Cook Paper Recycling Corp.*, 2015 WL 6468372), and there is no credible claim that employment discrimination because of sexual orientation violates the common law of contracts or torts under some sort of exception to the employment at will rule. Matters might be different, one suspects, were the U.S. Supreme Court to have used the occasion of either *U.S. v. Windsor* or *Obergefell v. Hodges* to hold that sexual orientation is a suspect or quasi-suspect classification for equal protection purposes, but so far the Court has fought shy of opining expressly on those questions.

NEW YORK – We reported in the March 2015 issue of *Law Notes* on *Guttilla v. City of New York*, 2015 WL 437405 (S.D.N.Y., Feb. 3, 2015), in which openly-gay U.S. District Judge J. Paul Oetken dismissed a *pro se* employment discrimination case against the city school system brought by a lesbian teacher. Without obtaining counsel, Lisa Guttilla filed an amended complaint, and the City moved to dismiss again, resulting in a new opinion by Judge Oetken, 2016 U.S. Dist. LEXIS 41477 (S.D.N.Y., March 29, 2016), again dismissing the

complaint. Judge Oetken observed that Guttilla's new evidentiary pleadings were in large measure a reiteration of the prior ones. In effect, she alleges that she was victimized by a presumption that as a lesbian she couldn't keep her hands off the school children, but her allegations were found by the judge not to affect "the viability of her legal claims" or any of her other claims. And it would be difficult for her to allege an anti-gay bias by the labor arbitrator, Martin Scheinman, a vocal gay rights proponent who has been active in PFLAG on Long Island. In dismissing the case, Judge Oetken commented that various state-law claims asserted by Guttilla could be pursued in the state court.

NEW YORK – Dr. William Sher, an ear, nose and throat specialist, agreed to settle charges that he had violated the Americans with Disabilities Act by refusing to perform a biopsy on an HIV-positive patient, reported *Newsday* (March 10). The U.S. Attorney for the Eastern District of New York had filed suit against Sher on behalf of J.P., the patient, who had the biopsy performed by a different doctor three weeks after Sher declined to go ahead with the procedure. The growth on his neck was found to be cancerous when the biopsy was performed. Dr. Sher agreed to pay \$75,000 and to attend training on disability discrimination in order to settle the case, but did not formally admit to violating J.P.'s statutory rights.

NEW YORK – In a rather peculiar case, U.S. District Judge Katherine Polk Failla granted defendant's motion to dismiss an action sparked by disputes between two gay men who had a brief personal relationship in New York after meeting through an on-line dating site. *Ahmed v. Purcell*, 2016 U.S. Dist. LEXIS 32792, 2016 WL 1064610 (S.D.N.Y., March 14,

2016). According to the allegations of Ahmed's amended complaint, Shawn Ahmed, then resident in Canada, and Stephen Purcell, then resident in New Jersey, met through a dating website in July 2011 and corresponded on-line for several months before Ahmed travelled to New York City to attend a conference and they finally met in person. They spent considerable time together for the month that Ahmed was in New York, both at his hotel in Manhattan and in an apartment that a friend had rented for Ahmed. According to Ahmed, their personal relationship was punctuated by three incidents in which Purcell physically attacked him, suggesting that Purcell had a short fuse and was provoked to striking out over relatively trivial arguments. Ahmed returned to Canada on October 8, 2011, but remained in contact with Purcell from time to time between 2011 and 2013. During that time, Ahmed claims Purcell "criticized me as too feminine and overweight," and that these repeated criticisms led Ahmed to "routine starvation" of himself to attempt to lose weight. Ahmed, who was closeted to his conservative family, also asserted that Purcell threatened to "expose my homosexuality" to the family and to "out me as gay" to Ahmed's circle of friends on youtube.com. Ahmed alleged these threats were serious because he frequently travelled to countries where it would be dangerous for him to reveal his sexual orientation, but ultimately he decided that he should share his experiences of abuse with others in the gay community so he made a "public video recorded statement" concerning his sexual orientation and "the circumstances that led him to his forced disclosure of his homosexuality." Ahmed claims that Purcell had revealed to him to have watched child pornography and to have had sexual contact with at least one minor when Purcell was 19. When Ahmed learned that

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Purcell was seeking a job with a Japanese television company that produces “content for minors,” he took it upon himself to write a letter to that company warning them about Purcell’s proclivities. They replied that he was never their employee. Ahmed also blogged about Purcell’s sexual proclivities, although he claimed he never identified Purcell by name in the blog postings. This activity provoked Purcell into sending Ahmed a “cease and desist” letter threatening to sue him for defamation and seek \$700,000 in damages in federal court in Arizona (where Purcell was living) if Ahmed did not ensure that all of these postings were taken off the internet by a certain date; Ahmed responded by filing this lawsuit in the Southern District of New York, seeking a declaratory judgment that Purcell had no valid tort claims against Ahmed and asserting a claim against Purcell for intentional infliction of emotional distress, necessarily focused on Purcell’s cease and desist letter because action based on the 2011 incidents would be barred by the statute of limitations. Quite a soap opera, this! At any rate, Purcell, who now resides in Arizona, moved to dismiss for failure to state a claim, lack of personal jurisdiction and improper venue. Judge Failla granted Purcell’s motion, finding no valid claim stated on emotional distress and lack of personal jurisdiction over Purcell. New York courts set a very high bar for intentional infliction of emotional distress, and a letter threatening a lawsuit falls far short of meeting the bar. As to jurisdiction, Judge Failla found that Ahmed’s factual allegations might be sufficient to meet the constitutional test for jurisdiction in New York, but otherwise fell far short on all the practical factors that a court would consider given Purcell’s minimal contacts with the state. Perhaps the most significant potential contact, apart from that brief month in 2011, was Purcell’s attempt

to get employment with the Japanese TV production company, which did business in New York, but Ahmed’s efforts to sabotage that essentially cut it off.

NORTH CAROLINA – This is a case to watch for future developments. In *Benjamin v. Sparks*, 2016 WL 1244995 (E.D. N.C., March 23, 2016), Chief U.S. District Judge James C. Dever III cleared out the underbrush in a 19-count complaint asserted by Saul Benjamin, the former headmaster and CEO of The Epiphany School of Global Studies, by granting various motions to dismiss, narrowing down the remaining scope of the case. The Epiphany School is owned by the Nicholas Sparks Foundation, headed by lead named defendant Nicholas Sparks. Benjamin made it his mission when taking over leadership of the school in 2013 to diversify the school, both regarding students and faculty. His efforts encountered opposition from Sparks and other members of the board, who also stated opposition to Benjamin’s allowing gay students to start an organization and Benjamin’s support for those students when they subsequently encountered bullying from other students. To judge by Benjamin’s allegations, Sparks and the Foundation Board were interested in having a white, heterosexual, traditionally Christian-oriented private school, and when Benjamin, a Quaker of Jewish descent, departed from their goals, they expressed strong opposition, eventually forcing him to quit. Benjamin filed an imaginative, wide-ranging complaint, invoking Section 1981 (Jewish descent as a “racial” category, which has a ground in case law under that provision), Title VII, the Americans with Disabilities Act, and state common law contracts and torts and statutory claims, naming both organizational and individual defendants. Although various individual

defendants were dismissed from potential liability under various counts and the court concluded that Benjamin’s factual allegations were not sufficient to survive the motion to dismiss as to many of his statutory claims, a good part of the case remains intact.

OKLAHOMA – They weren’t kidding when they ruled recently that, in light of *Obergefell*, they intended to “recognize those unmarried same sex couples who... entered into committed relationships, engaged in family planning with the intent to parent jointly and then shared in those responsibilities after the child was born,” *Ramey v. Sutton*, 2015 OK 79, 362 P.2d 217 (Ok. 2015). Thus spoke the Oklahoma Supreme Court on March 1 in *Newland v. Taylor*, 2016 WL 805544, and *Fleming v. Hyde*, other cases in which lesbian co-parents who could not be legally married to their partners at the time their children were born are seeking to pursue a “best interests” hearing to establish their right to maintain parental relationships with their child after the women’s own relationships had ended. The court’s summary disposition of the appeals ordered that the district court’s dismissal of Rebekkah Newland’s and Jennifer Fleming’s petitions be vacated and the cases remanded for further proceedings.

OREGON – U.S. District Judge Ann Aiken awarded attorney fees of \$25,342.50 and costs of \$2,215.92 to counsel for plaintiff in a sexual orientation discrimination case brought under Title VII, *Wright v. Keller Lumber Co.*, 2016 U.S. Dist. LEXIS 42200 (D. Or., Eugene Div., March 30, 2016), a slight reduction from what had been requested on behalf of plaintiff’s counsel Robert K. Meyer and *Michael v. Owens*, both of Portland, Oregon. Filing of the lawsuit

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resulted in the defendant proposing an “offer of judgment” which Kenneth Wright accepted, settling the case for \$32,500.00. Since the case settled in plaintiff’s favor, and defendant didn’t attempt to get it dismissed with an argument that Title VII doesn’t cover sexual orientation claims, the court had no occasion to pass on that lively issue. However, the judgment entitled plaintiff to seek attorney fees and costs as the prevailing party. Defendant objected to the size of the requested fees, focusing its fire particularly on the plaintiff having brought in “expensive” Portland attorneys with higher hourly rates than were customarily charged by attorneys in the Roseburg area where the case originated. Judge Aiken found that plaintiff had proved that local counsel were generally unavailable for this kind of case. Furthermore, “Plaintiff’s counsel provided proof of specialized experience in employment discrimination litigation and sexual orientation discrimination through several declarations. Plaintiff’s declarations also show sexual orientation discrimination claims under Title VII are novel, adding complexity to counsel’s representation and supporting higher hourly rates,” wrote Aiken. “Based on the Portland Survey rates, supporting declarations, and this Court’s recent decision in *Robbins [v. Columbia Collection Serv., Inc.]*, 2015 U.S. Dist. LEXIS 171513, *6-7 (D. Or. Dec. 19, 2015), this Court finds Mr. Meyer’s and Mr. Owens’ hourly rates are reasonable.” On another contested issue, the court found that plaintiff had, as part of the settlement of the case, waived the right to seek attorney fees and costs attributed to post-settlement activity, including the litigation over the size of fees to be awarded!

PENNSYLVANIA – A pending appeal of a Title IX case by a transgender college student will be removed from

the 3rd Circuit’s docket as a result of a settlement reached by Seamus Johnston and the University of Pittsburgh. Johnston, a transgender man, was denied access to appropriate bathroom and locker room facilities consistent with his gender identity and expression by the University. A district court judge ruled that he did not have a valid claim under Title IX, the federal statute that bans sex discrimination by educational institutions that receive federal financial assistance, despite the U.S. Department of Education’s assertion that Title IX applies to gender identity discrimination claims. *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). He appealed to the 3rd Circuit, but agreed to settle in light of the University’s changes in its policies, including new rules allowing transgender student to use restrooms that correspond with their gender identity and the establishment of gender-neutral housing facilities for students. A joint statement released about the settlement said that the University will be establishing a working group to advise officials on transgender access issues. With the settlement of this claim, attention focuses on the 4th Circuit, which is considering an appeal by a transgender high school who was denied access to gender-appropriate facilities; that case, *G.G. v. Gloucester County School Board*, has been argued and is awaiting decision. *BuzzFeed.com*, March 29; *InsideHigherEd.com*, March 30.

PENNSYLVANIA – In *In re J. Michael Eakin, Justice of the Supreme Court of Pennsylvania*, 2016 Pa. Jud. Disc. LEXIS 24 (Pa. Ct. Jud. Disc., Mar. 24, 2016), the Court of Judicial Discipline imposed a \$50,000 fine on a justice of the state’s supreme court for improper conduct with respect to emails in which he made variety of regrettable

comments, including those tinged with homophobia and transphobia, which the Court found could cause members of the public to perceive bias, although the court found no instance in which Justice Eakin’s conduct in cases evinced bias.

TENNESSEE – At long last, U.S. District Judge Aleta Trauger has issued an attorneys fee award in *Tanco v. Haslam*, 2016 U.S. Dist. LEXIS 39403, 2016 WL 1171058 (M.D. Tenn., March 25, 2016), one of the cases ultimately consolidated into *Obergefell v. Hodges*, in which the Supreme Court reversed the 6th Circuit and held unconstitutional state bans on performance or recognition of same-sex marriages. The state posed significant objections to the fee request submitted by the parties, and Judge Trauger found merit to some of the objections, but in the end she awarded \$1,983,131.29, just a 15% reduction from the request by plaintiffs of \$2,333,095.63. In addition, the court awarded \$52,916.04 to reimburse plaintiffs for various non-fee costs of the litigation. Perhaps most significantly, Judge Trauger rejected the state’s argument that once big law firms and the National Center for Lesbian Rights came into the case, the local attorneys who had conceived and launched the litigation should be deemed superfluous and not be compensated for their continued participation. The judge noted that lead counsel Abby Rubenfeld was a nationally-known civil rights attorney, and that her reasonable billings, including costs of attending the Supreme Court oral argument and release of the decision, should be included.

TEXAS – This will sound harsh, but it seems that Administrative Law Judge Mark Dowd substantially screwed

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up in ruling on Marlon A. Dismuke's Social Security Disability claim, and so did the Appeals Council in denying Dismuke's request for review in some pro forma way without actually looking at the details of his case, or at least one might so conclude from reading the devastating opinion issued by U.S. District Judge Gray H. Miller on March 29, 2016, in *Dismuke v. Colvin*, 2016 WL 1222131, 2016 U.S. Dist. LEXIS 41524 (S.D. Texas, Houston Div.). Indeed, ALJ Dowd made so many erroneous factual findings and omissions in denying benefits to this HIV-positive applicant that any objective reader of Judge Miller's opinion would conclude that Dowd might need remedial training on how to conduct a disability benefits appeals case involving HIV, or perhaps that he is biased against HIV-positive disability benefits applicants, although one hesitates to impute bias where the problem may be ignorance or incompetence. (Further, one would have to question the credentials of the unnamed vocational expert who testified about the kinds of work that Dismuke could perform.) Judge Miller concluded that "the ALJ's errors regarding Dismuke's mental limitations, in combination with his decision to find Dismuke's HIV to be a non-severe impairment, constitutes reversible error. While the commissioner is correct that Dismuke cannot meet any Listing related to mental impairments because his limitations are only marked in one area, the ALJ did not consider this limitation in the context of autoimmune disorders. For example, Listing 14.08(K) requires repeated manifestations of HIV infection at levels below other HIV Listing, along with marked limitations in activities of daily living, social functioning, or inability to maintain concentration, persistence, or pace. Because it is conceivable that the ALJ could have found Dismuke met Listing 14.08(K)

absent the ALJ's improper finding that Dismuke's HIV was not a severe impairment, this court finds the ALJ committed reversible error." The court remanded the case back to the Social Security Administration for reconsideration "consistent with this opinion." Mr. Dismuke, who has spent much of his adult life rotating in and out of prison, experiencing deprivation of HIV-related medications for various periods of time and suffering significant side effects when he could take medication, was lucky that his appeal ended up in front of a judge who was willing to reject an administrative decision that appears on its face totally lacking in appreciation of the plaintiff's medical record. Dismuke is represented on this appeal by Donald Clifton Dewberry of Houston, Texas. Most Social Security Disability appeals are pro se; this case demonstrates the importance of effective advocacy.

TEXAS – U.S. Magistrate Judge Frances H. Stacy filed a report and recommendation on February 4, 2016, that summary judgment be granted to the employer on discrimination and retaliation claims filed by three employees of FMC corporation, one of them a gay man alleging sex discrimination under Title VII of the Civil Rights Act of 1964. *Gaspari v. FMC Technologies, Inc.*, 2016 WL 1055642 (S.D. Tex., Houston Div.). Gaspari, described by Judge Stacy as a "38 year old, white homosexual male," complained of discriminatory conduct, including a hostile work environment created by managers and supervisors "based solely on their preconceived stereotypes of male masculinity and their perception of his sexual orientation." He also claimed "reverse discrimination" based on his contention that his supervisor, a Hispanic woman, showed favoritism to Hispanic employees "and openly disparaged him for being white."

Interestingly, FMC did not argue in support of summary judgment on Gaspari's claims that they were actually premised on his sexual orientation and thus not actionable under Title VII. Judge Stacy discusses the issue only in a footnote, mentioning that the 5th Circuit does not recognize sexual orientation discrimination claims under Title VII but does recognize sex-stereotyping claims, focusing instead on whether Gaspari had alleged facts sufficient to make out a prima facie case of discrimination and retaliation under a sex stereotyping claim, and concluding that he had not, with the issue of "protected class" never really being discussed apart from the referenced footnote no. 3. Analyzing Gaspari's hostile environment claim, the judge wrote: "With respect to Plaintiff Gaspari, who was employed by FMC from July 16, 2012 to Jan. 22, 2015, when he was terminated, none of the complained of harassment was objectively severe. As for whether it was 'pervasive,' Gaspari's deposition testimony, which he has submitted in response to FMC's motions for summary judgment, and which is taken in a light most favorable to Gaspari and his hostile work environment claim, simply does not reveal the type of pervasive, or 'steady barrage' of, harassment that has been held to create a hostile work environment. Being called or considered a 'fashionista,' and having supervisors or co-workers occasionally flick their wrists when speaking to him, occasionally and vaguely refer to his 'kind,' and mention to him on a few occasions certain areas and restaurants in Houston (Montrose and the 'House of Pies') is not either the type or frequency of harassment that has ever supported a hostile work environment claim." This recounting managed to leave out another of Gaspari's relevant allegations: a supervisor who referred to him as "girl" or "sister," but later apologized for doing so.

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U.S. ARMY COURT OF CRIMINAL APPEALS –

United States v. Williams, 2016 WL 1072904 (A.C.C.A., Mar. 17, 2016), is another in a series of cases where the military appeals court finds that an HIV-positive service member entered an “imprudent” guilty plea to the crime of “aggravated assault with a means likely to produce death or grievous bodily harm” after receiving outmoded information from the judge and/or counsel in light of a ruling by the Court of Appeals for the Armed Forces, *United States v. Gutierrez*, 74 M.J. 61(2015), which took account of the latest data on HIV treatment and transmission to conclude that it was no longer accurate to assume that a person “exposed” to HIV is facing likely death from the infection. As a result of *Gutierrez*, the burden of proof on the prosecution was changed from requiring them to show “more than merely a fanciful, speculative, or remote possibility” of harm to showing “the charged conduct was ‘likely’ to bring about grievous bodily harm.” This requires that the dialogue at plea colloquies be adjusted to reflect the lesser charge to which the accused must answer, and the lesser penalties that accompany it. In the *Williams* case, the court decided there was no need to remand, as it was clear that Williams was guilty of the lesser included offense of assault, inasmuch as he had failed to disclose to several sexual partners that he was HIV-positive prior to engaging in sex with them, thus vitiating their consent. The court made a downward adjustment in Williams’ sentence in consequence of the lesser charge to which his guilty plea is directed. He still receives a bad-conduct discharge, three years in prison and a reduction in grade.

ALABAMA – Alabama has not revised its sodomy law in response to *Lawrence*

v. Texas, and the state’s courts continue to reject facial challenges to the law. In *Gilbert v. State*, 2016 WL 1084731 (Ala. Ct. Crim. App., March 18, 2016), the defendant was charged with sexual misconduct and sodomy committed with a 17-year-old boy, with evidence that both had been drinking prior to the act. Thomas Gilbert challenged the constitutionality of the sodomy law; the trial court didn’t rule on the constitutionality question at first and let Gilbert plead to a sexual misconduct charge, sentencing him to a year in the county jail, suspended in exchange for 24 months of probation. Gilbert sought to appeal on the constitutional question and was stymied because the trial judge hadn’t ruled on it; the circuit court granted a motion to withdraw his guilty plea and litigate over the constitutionality of the statute, this time resulting in a denial of his motion to dismiss on the merits; once again, there was a guilty plea to sexual misconduct, this time reserving the constitutionality question for appeal. On appeal, citing to prior Alabama rulings, the appellate court found that the statute could not fall to a facial challenge, because some of the conduct it prohibited was clearly not protected under *Lawrence*. On an as-applied challenge, the court said that the facts to which Gilbert pled guilty did not come within the sphere of protected conduct under *Lawrence* as private consensual deviate sexual intercourse between adults. The opinion as published in Westlaw did not identify counsel by name, but mentions that Gilbert was represented by an attorney at trial.

CALIFORNIA – In *People v. Reyes*, 2016 Cal. App. LEXIS 246 (Cal. 4th Dist. Ct. App., March 30, 2016), the defendant argued prosecutorial misconduct during closing rebuttal when the prosecutor mentioned that the victim in a sexual assault case was a gay woman as part of the

argument rejecting the male defendant’s contention that their sexual activity was consensual. The defendant argued that by holding back to raise this issue until rebuttal, the prosecutor had ambushed defense counsel. The court rejected this argument, finding that the issue of the victim’s sexuality was introduced into the trial by the defense when the victim was being cross-examined, so the defendant was not prejudiced by the prosecutor’s failure to refer to the victim’s sexuality during principal closing argument.

CALIFORNIA – In *People v. Aguirre*, 2016 Cal. App. Unpub. LEXIS 2105, 2016 WL 1161265 (Cal. App., 2nd Dist., March 23, 2016), the court affirmed the first degree murder conviction of Andres Garcia Aguirre, who stabbed Joseph Chacon to death on February 12, 2014, after the two men had engaged in cross-dressing and Aguirre, believing that Chacon was trying to “use” him or “set him up” in some way, stabbed him repeatedly in a parking lot in La Puente. Aguirre did not dispute that he stabbed Chacon to death, but argued that he should not be held culpable for a variety of reasons. The appeals court rejected Aguirre’s argument that Los Angeles Superior Court Judge Mike Camacho had “unduly” restricted the testimony of the defense’s psychiatric expert, that the evidence was insufficient to prove intent to kill and premeditation and deliberation, and that evidence of “diminished actuality” on the part of Aguirre required reversal of the conviction. Most of the opinion is devoted to describing how the police apprehended Aguirre after Chacon’s body was found, and the various confessions that he made to the police about the nature of his relationship to Chacon and why he felt compelled to stab Chacon to death. The dispute about psychiatric testimony was that Aguirre wanted the jury to hear the psychiatrist testify as

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to what Aguirre had told him about the events surrounding the murder, which suggested “self-defense” by Aguirre. The trial court had ruled that this would be inadmissible hearsay, especially as Aguirre was not testifying in his own defense, so allowing this testimony would be in effect letting Aguirre testify without being subjected to cross examination or having his credibility as a witness evaluated by the jury. The psychiatrist’s testimony, based on his examination of Aguirre and responding to hypotheticals put by the prosecutor, provided record support for the jury’s conclusion that Aguirre had the mental capability to premeditate this act of murder.

CALIFORNIA – California trial courts persist in the reflex action of ordering HIV testing without making statutorily required findings based on evidence that the defendant engaged in conduct that could infect a victim, to judge by the constant flow of cases in which appellate courts reverse such testing orders. Another such is *People v. Horner*, 2016 WL 748757 (Cal. 3rd Dist. Ct. App., Feb. 25, 2016). The facts are disturbing. Daniel Horner, an adult, played with little boys in the shower, handling their genitals and kissing them, but not apparently engaging in the kind of sexual activity that could result likely in transmitting HIV. He was ultimately charged many years later with committing a lewd act on two male minors, involving genital touching and kissing, as well as possession and control of child pornography. He asserted vigorously that the delay in prosecuting him justified dismissing the charges, but the trial judge determined to hold the trial and a jury convicted him on all charges. The trial court found the police were negligent in taking many years to follow up on complaints against Horner, but that he was not prejudiced by the delay in prosecution,

despite his arguments about fading memories and missing witnesses. He was sentenced to 55 years in prison and ordered to undergo AIDS testing, without any comment or objection from Horner at the sentencing hearing. While upholding the trial judge’s refusal to dismiss the case or set aside the verdict, the court of appeal agreed with Horner that the testing order was improper with pertinent factual findings by the trial judge. The Attorney General agreed in response to this point that the trial court had not made the necessary statutory findings to support the testing order, and that the issue boils down to whether “French kissing” of the boys by Horner was sufficient to require him to submit to HIV testing. Wrote the court: “Both Horner and the Attorney General cite to the United States Health and Human Services website. Citing to information on the website, Horner argues AIDS cannot be transferred through saliva. Citing to other information on the website, the Attorney General responds AIDS can be transmitted through deep open mouthed kissing if the person has sores or bleeding bums and blood is exchanged. In other words, this issue requires us to consider Horner’s oral hygiene. This we cannot do on a cold record. Thus, the appropriate remedy is to remand the matter to the trial court to give the prosecution the opportunity to offer evidence, if any exists, to support such an order.” Since the events at issue took place in 2006, one suspects that evidence as to the state of Horner’s oral hygiene at that time may be lacking. Horner is represented by appointed counsel, Steven A. Torres.

FLORIDA – Broward County Circuit Judge Elijah H. Williams improperly ordered that P.R., a juvenile defendant, be required to submit to HIV and hepatitis testing, wrote 4th District Court of Appeals Judge Dorian K. Damoorgian for a unanimous panel

in *P.R. v. State of Florida*, 183 So.2d 1163, 41 Fla. L. Weekly D134 (Jan. 6, 2016), a case that recently came to light in the Westlaw database. P.R., a minor, was charged with first degree misdemeanor battery after he “spit on a county bus driver.” He entered a no contest plea to the charge, and the trial court withheld adjudication and sentenced him to probation. The disposition order did not require P.R. to submit to any testing. The state then filed a motion to have P.R. tested for Hepatitis and HIV pursuant to Fla. Stat. 960.003, which provides that somebody charged with any of a list of enumerated offenses “which involves the transmission of bodily fluids from one person to another” could be required to be tested on request of the victim or victim’s parents (if the victim is a minor) within 48 hours after “the information, indictment, or petition for delinquency is filed.” If such testing is requested but not carried out, a court could order testing at the request of the victim “following conviction or delinquency adjudication.” In this case, there was no conviction or delinquency adjudication. Judge Williams responded to the state’s motion by ruling that 960.003 could not be relied upon for a testing order in this case. But he ordered testing under Fla. R. Crim. Proc. 3.800 (c), which, on its face, doesn’t apply to this situation, because it authorizes modifications of sentences to include probation and community control requirements, not to authorize medical testing. On P.R.’s appeal of the testing order represented by Broward County public defenders, the state conceded that Rule 3.800(c) was not applicable, but urged that the testing order be upheld under Sec. 960.003, despite its obvious inapplicability. The court of appeal found that the “plain language” of the section provides for testing “following ‘delinquency adjudication,’” but in this case there was no delinquency adjudication, so the second does not authorize the testing.

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Wrote Judge Damoorgian, “had the legislature wanted the statute to apply to those cases where the court withheld adjudication, it would have, and should have, said so. It did not and, therefore, P.R. could not be compelled to undergo testing under section 950.003(4) after the court withheld adjudication.” So, the problem here is that the bus driver failed to ask for HIV testing promptly after P.R. was charged. Will anybody in the Broward County prosecutor’s office pay any mind to this decision and revise their operating procedures accordingly?

GEORGIA – Fulton County prosecutors have charged Martin Blackwell with assaulting a couple of gay men who were sleeping in the living room of the home of one of their mothers by pouring boiling water on them, causing severe burns requiring hospitalization and operations and inflicting excruciating pain. Blackwell allegedly shouted “Get out of my house with all that gay” as he poured the water on the sleeping couple. One of the men, Marquez Tolbert, suffered second and third-degree burns on his neck, back and arms. Anthony Gooden, whose mother was Blackwell’s girlfriend (but no longer), was also severely burned. This occurred in the College Park neighborhood of Atlanta, taking place in February, but only came to light in news reports after the men were recovered sufficiently to speak to the press. *Independent Online*, March 18.

ILLINOIS – The Appellate Court of Illinois affirmed a life prison sentence and a consecutive seven-year sentence for robbery for Cortez Foster, who was convicted in a bench trial of the aggravated criminal sexual assault and robbery of an older man identified as I.E. *People v. Foster*, 2016 Ill App. LEXIS 428 (March 11, 2016). I.E., 68 years old when he testified,

immigrated to the U.S. in 1968 from Bosnia/Herzegovina. On March 25, 2011, he went to Grant Park. His memory of what happened to him there is minimal, but he was subsequently discovered lying on the ground, his pants and underwear down, bleeding and groaning. At the hospital, wooden sticks were removed from his anus and various head injuries received attention, but he was unable to relate what had happened to him, other than that his cell phone was missing. Police were able to use the missing cell-phone as a mechanism leading them ultimately to the defendant, Cortez Foster, who had sold the phone to another man whose location was secured by the police through GPS. Ultimately Foster confessed that he had encountered I.E. in the park, I.E. had “come on” to him for sex, he had beaten I.E. in the face and “used” a tree branch on him. I.E. dropped his cellphone, and Foster picked it up and took it with him when he fled the scene. Foster denied being gay or bisexual, although the man to whom he sold I.E.’s cellphone said that Foster had spoken in the past about going both ways. I.E.’s blood type was matched with a blood stain on the leg of Foster’s pants. Foster challenged the aggravated criminal sexual assault charge, arguing that in the lack of eyewitness testimony his guilt had not been proven beyond a reasonable doubt. The appellate court found that the evidence was sufficient to support the trial judge’s verdict, and affirmed the sentences passed after trial.

ILLINOIS – Stephen Bona, a gay man who objected to comments against same-sex marriage made by Republican Illinois Representative Jeanne Ives during a March 2013 radio interview, left threatening voice messages on Ives’ phone, leading to his prosecution in DuPage County Circuit Court. On March 16, jurors voted to convict him on two felony counts of threatening a

public official, while acquitting him on a count of threatening property damage. Bona was to be sentenced on April 29, and could face two to five years in prison, although it was possible that as a first offender he might be placed on probation instead of incarcerated. A tape of the second voicemail was played during the trial, in which Bona said, “We know where you live” and then said that the ban on assault weapons had lapsed, something Ives should think about. Ives testified that the message left her frightened and concerned about her children. Bona claimed he didn’t intend to threaten Ives but to communicate his anger at her inflammatory rhetoric on same-sex marriage and gun control. The first voicemail was erased; in that one, Bona testified, he spoke of his same-sex marriage to a Chicago Police officer and how they had been good citizens and neighbors in a 20-year-relationship. Bona will likely appeal and claim First Amendment privilege. *Chicago Tribune*, March 18.

KENTUCKY – In *Asbury University v. Powell*, 2016 Ky. LEXIS 100, 2016 WL 1068185 (Ky. Supreme Ct., Mar. 17, 2016), the Kentucky Supreme Court upheld a trial verdict for the former women’s basketball coach at Asbury University, Deborah Powell, on a Kentucky Civil Rights Act retaliation claim, holding that the jury verdict for Powell (and subsequent damage award) could stand, even though the jury had found against Powell on her underlying sex discrimination claim and a defamation claim. Powell had complained to school authorities about being discriminated against because of her sex. In response, she charges, they defamed her with claims that she entered into an inappropriate (sexual) relationship with a female colleague, suspended her from her duties, and prohibited her from contact with the members of the basketball team,

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falsely claiming that all the team members had asked that she no longer coach them. Although the jury ruled against her on the sex discrimination and defamation claims, it returned a verdict on the retaliation claim, awarding damages of \$88,325.97 for lost wages and benefits and \$300,000 for humiliation, embarrassment and emotional distress. The trial court rejected Asbury University's post-trial motions and awarded Powell attorney fees and costs, and the state court of appeals affirmed. The Supreme Court said that it followed Title VII case law on this, under which the jury should be instructed that retaliation requires a showing that the employer took adverse action against the employee because the employee exercised its right to speak out against discrimination. Although the trial court's charge in this case did not exactly track that language, the court found any departure minimal and unlikely to have affected the outcome. Furthermore, the court rejected the argument that a valid retaliation claim required that the jury also have ruled favorably on the plaintiff's underlying discrimination charge. The cause of action for retaliation is intended to protect the ability of employees to invoke the anti-discrimination law when they reasonably believe they have a claim, and despite the jury's verdict there can be little doubt based on Powell's factual allegations that she had reason to believe she had a discrimination claim. Her complaints were not clearly frivolous. The court rejected a host of other objections to the verdict raised by Asbury University.

MASSACHUSETTS – In *Harrington v. City of Attleboro*, 2016 U.S. Dist. LEXIS 34004 (D. Mass., March 16, 2016), U.S. District Judge Denise J. Casper refused to dismiss a Title IX sex discrimination against school officials who are alleged to have failed to respond appropriately when a female student was alleged to

have suffered severe harassment at the hands of other students beginning in middle school and continuing into high school – ultimately so severe that she withdrew from the high school after registering from treatment at a day center for psychotherapeutic cure. The harassment included calling her a “dyke” and a “faggot” when she decline demands by male students to date them, and being ridiculed for her weight and appearance. The recitation of facts in the opinion is cringe-inducing, and the alleged non-responsiveness of school officials generates contempt for their professionalism. Despite allowing the Title IX claim to go forward, Judge Casper granted dismissal of a raft of other counts under federal and state causes of action. Noelle-Marie Harrington's lead attorney is Mark F. Itzkowitz of Boston.

MISSOURI – In *State of Missouri v. S.F.*, 2016 WL 1019211 (Missouri Supreme Ct., March 15, 2016), the female defendant, S.F., appealed her conviction for recklessly exposing a person to HIV without that person's knowledge and consent to the exposure in violation of Section 191.677 of the Revised Statutes of Missouri. The statute makes it unlawful for somebody who knows they are infected with HIV to expose another without their informed consent through contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal intercourse. She argued that the statute infringed free speech and privacy rights by requiring her to disclose to potential sexual partners that she is HIV positive. She was charged with an “A felony,” which required that HIV was actually transmitted to the victim with whom she had sex without disclosing her status, but in exchange for her waiver of a jury, the charge was reduced to class B, which requires proof of exposure but not of transmission. She challenged the constitutionality of the statute at

trial, but stipulated to the facts that she knew she was HIV positive, had sexual intercourse with the victim as defined in the statute, did not disclose her status to the victim prior to intercourse, and, as a result of her actions, had recklessly exposed the victim to HIV without his knowledge or consent. In light of her stipulation, the opinion does not reveal whether the victim was infected. The trial court found S.F. guilty and sentenced her to seven years in prison. Rejecting her constitutional challenge in an opinion by Judge Mary R. Russell, the Supreme Court stated its agreement with the State that the statute “regulates conduct, not speech. The statute restricts what individuals may *do*, not what they may *say*.” The purpose is not to compel disclosure, wrote Judge Russell, but rather “the statute seeks to prevent certain conduct that could spread HIV to unknowing or nonconsenting individuals.” Although individuals could voluntarily disclose their HIV status if they wanted to have sex, “any speech compelled” by the statute “is incidental to its regulation of the targeted conduct and does not constitute a freedom of speech violation.” The court also rejected S.F.'s claim that the statute violates her fundamental right to privacy. S.F. cited *Lawrence v. Texas* on this point, but the court was not persuaded, finding that *Lawrence* does not apply to this situation. “Unlike the statute struck down in *Lawrence*,” wrote Judge Russell, “Section 191.677 does not criminalize *consensual, non-harmful* sexual conduct. Section 191.677 regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent to the conduct with knowledge of the risk of exposure.” Nowhere in the court's opinion is there any mention of PREP or of any sort of expert testimony about the odds of transmission if safer-sex practices are followed by the infected female party.

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NEW YORK – A Manhattan jury convicted Elliot Morales of murder as a hate crime on March 9 for the fatal shooting of Mark Carson, a gay man, in Greenwich Village three years ago. Eyewitnesses testified seeing Morales pull a revolver and shoot Carson in the face after an argument during which he called Carson and his friend, Danny Robinson, “faggots” and “gay wrestlers.” Morales maintained through the prosecution that he was not homophobic, was in fact bisexual, and did not target Carson because of his sexual orientation, but the jury did not believe him. Morales claimed he fired in self-defense when he thought Robinson was pulling a pistol from his pocket. But prosecutors presented evidence that Morales had “started on a violent, antigay tirade fifteen minutes earlier” when he burst into a restaurant brandishing his weapon and threatened a bartender with anti-gay slurs, according to the *New York Times* (March 9) account of the trial.

OHIO – A transgender man who pled guilty to an act of domestic violence against his girlfriend appealed the trial judge’s decision to sentence him to 180 days in jail, with 120 days suspended and two days credit for time served, resulting in an actual term of confinement of 58 days. *State v. Wood*, 2016-Ohio-1239, 2016 Ohio App. LEXIS 1133, 2016 WL 1178594 (Ohio App., 10th Dist., Franklin Co., March 24, 2016). The appellant was referred to at the outset of the opinion by Judge Horton as “Mary/Shane Wood” and in a footnote, Judge Horton stated: “Wood is a female-to-male transgender individual. The trial court record uses both Mary and Shane as Wood’s first name in various places, but in the hearing transcripts the parties consistently used male pronouns when referring to Wood. We do so as well.” Wood protested that the trial court had focused “primarily” on

the nature of the crime – attempted strangling – and ignored other factors that are required by statute to be considered. The court of appeals noted that there is a presumption that the trial court considered the statutory factors, and the fact that a particular factor was not specifically mentioned by the trial judge in Franklin County Municipal Court (Columbus, Ohio) did not necessarily mean that factor was not considered. Indeed, the court found in reviewing the transcript of the sentencing proceeding that the trial judge mentioned various factors, including the psychologist’s report recommending treatment in lieu of incarceration “that was declined,” and that the relevant statutory provision certainly included the nature of the offense as one factor to weigh, which is just what the trial judge had said on the record. Wood emphasized on appeal a provision stating that the “court shall not impose a sentence that imposes an unnecessary burden on local government resources,” suggesting that the county jail would be burdened by accommodating his transgender status, but the court found a statement by the judge on the record, “I know that the jail can make accommodations.” The appellate court pointed out that Wood had pled guilty to a first-degree misdemeanor and was ultimately sentenced to serve significantly less than the maximum jail term authorized for the offense, so the sentence was not an “abuse of discretion” by the trial judge.

TENNESSEE – In the somewhat complex context of a petition for post-conviction relief in a same-sex rape case, the Court of Criminal Appeals of Tennessee denied Jay Earl Haynes’ petition for post-conviction relief, finding that his constitutional challenge to the relevant statute, Tenn. Code. Ann. Sec. 39-13-503(a)(3), had not been preserved for review, that

his trial counsel had in fact raise the constitutional questions on direct appeal of the conviction, even though they were not directly addressed by the trial court. The court concluded that trial counsel had not performed deficiently, or that any deficiencies in his performance had prejudiced the defendant. *Haynes v. State of Tennessee*, 2016 WL 750233 (Feb. 26, 2016). Haynes was convicted on two counts of rape involving 19 year old twin brothers, who lived with their mother and “required constant adult supervision because they had the mental development of a child.” Haynes, then the boyfriend of the twins’ grandmother, initiated sex with the two boys while they were staying over at their grandmother’s house. He anally penetrated both boys after their grandmother was called away early to work and they were left alone with him. After grandmother dropped the boys off at their mother’s house, they told their mother what had happened, they were taken to hospital for examinations, and evidence of anal penetration was found. The boys’ father went over to grandmother’s house and surprised Haynes in the act of attempting to burn the blood-stained sheets on which the sexual acts took place. Haynes fled but was later apprehended by police. At trial, he alleged that the sex was consensual and protected under *Lawrence v. Texas*, arguing as well that he was also mentally impaired and so what the state was prosecuting was consensual sex among mentally impaired adults, but the trial court didn’t buy it, and neither did the appellate courts. The relevant statute defines rape as “unlawful penetration of a victim by the defendant when the defendant knows or has reason to know that the victim is mentally defective, mentally incapacitate or physically helpless.” Haynes argued, unsuccessfully, that the statute was so broad a vague that it could be “read and applied so as to prohibit two mentally defective

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individuals from engaging in private sexual conduct.” It did not appear to the court, as a matter of fact, that Haynes could claim to be sufficiently mentally impaired that he did not know that his victims were incapable of giving informed consent. Haynes was represented on appeal by Hal J. Boyd of Tiptonville, TN.

PRISONER LITIGATION NOTES

CALIFORNIA – In a rare prisoner’s victory in a case about a “disagreement” over medical treatment, United States Magistrate Judge Edmund F. Brennan’s Report & Recommendation [“R & R”] denied a motion to dismiss in *Smith v. Hawkins*, 2016 WL 775732 (E. D. Calif., February 29, 2016). *Pro se* plaintiff Bernard Smith (diagnosed with HIV, bladder cancer, and neuropathy) alleged that a prison doctor (Robert Hawkins, M.D.) over-ruled orders for pain medication (Gabapentin) from five previous physicians (including an HIV specialist), because Smith questioned his knowledge of HIV and filed a complaint against him with the state medical board. Judge Brennan found the complaint sufficient under F.R.C.P. 12(b)(6), noting that Smith also alleged that Hawkins refused to let him see the HIV specialist again. The R & R notes that this case is not a mere “difference of opinion” about medical treatment; it alleges that the discontinuation was retaliatory (which Hawkins did not address in moving to dismiss), contrary to repeated prior prescriptions, and made without substituting any other treatment, leaving Smith in pain for over six months. “These allegations permit the inference that Hawkins’s opinion that Gabapentin was not necessary contradicted not only plaintiff’s opinion but the opinions of five medical doctors and was made in reaction to plaintiff’s criticism of Hawkins.” The case has a good review

of Ninth Circuit law on deliberate indifference, including the right to be evaluated by a knowledgeable provider: “access to medical staff is meaningless unless that staff is competent and can render competent care,” quoting *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). Judge Brennan also emphasized Hawkins’ failure to provide alternative pain treatment. *William J. Rold*

ILLINOIS – Again, appellate decisions have consequences. Last fall, we reported *Beal v. Foster*, 803 F.3d 356 (7th Cir. 2015) – *Law Notes* (November 2015 at pages 516-7) – which held that verbal harassment of an inmate “could” constitute an Eighth Amendment violation under certain circumstances. Now, in *Highsmith v. Bailey*, 2016 U.S. Dist. LEXIS 33931, 2016 WL 1043015 (S.D. Ill., March 16, 2016), Chief U.S. District Judge Michael J. Reagan applies *Beal* and allows Michael A. Highsmith’s *pro se* pleading of sexual orientation harassment to proceed past preliminary review under 28 U.S.C. § 1915A. Highsmith alleged that he was harassed “on a daily basis... for being gay” while confined at Illinois’ medium security prison at Centralia, naming as defendants two corrections officers and a lieutenant to whom he complained. Chief Judge Reagan cited Highsmith’s right to “reasonable” safety under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), and wrote: “While most verbal harassment by jail or prison guards does not rise to the level of cruel and unusual punishment, it may be actionable when the conduct is ongoing and intended to inflict physical or psychological harm on the inmate, even if indirectly through provoking others to verbally, sexually, or physically harass the inmate,” citing *Beal*, 803 F.3d at 358. The defendants allegedly subjected Highsmith to “ongoing sexual harassment” for two years, “publicly mocked [his] sexual

orientation,” and “spread rumors that [he] had sexual relations with another inmate.” Chief Judge Reagan noted that Highsmith complained under the Prison Rape Elimination Act, 42 U.S.C. § 15601, et seq. [“PREA”]. Although PREA does not create a private cause of action, its existence once again is shown to be of evidentiary use to potential victims in building a civil rights case. Chief Judge Reagan found it “premature” to dismiss Highsmith’s claim upon screening in light of *Beal*, because the alleged conduct may have “increased the likelihood of sexual assault and psychological harm.” The Court referred Highsmith’s request for counsel to a Magistrate and directed the Clerk of Court to assist with service of the complaint. Unusually, Chief Judge Reagan ordered the defendants not to waive reply under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(g), which requires a finding that “the plaintiff has a reasonable opportunity to prevail on the merits.” *William J. Rold*

MARYLAND – *Pro se* prisoner Shawnte Anne Levy, a/k/a El Soudani El Wahhabi, was diagnosed with “gender identity disorder” at a secure Maryland psychiatric facility prior to her transfer to state prison. For two years, prison officials failed to obtain her records from the psychiatric facility and refused all transgender medical and mental health services on the grounds that Levy had no prior diagnosis. Corrections obtained the records only after Levy filed suit in *Levy v. Wexford Health Sources*, 2016 U.S. Dist. LEXIS 28384 (D. Md., March 7, 2016), naming as defendants the warden, the Maryland Corrections Commissioner, and Wexford Health Source, Inc., a contractual provider of prison health care in Maryland. Levy sought injunctive relief requiring Corrections to change records to reflect her chosen name and providing her

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with hormone and other transgender treatment. United States District Judge Theodore D. Chuang denied the name change relief, citing Maryland rules requiring an order from the inmate's sentencing judge prior to such a change, although the prison authorities had agreed to list the chosen name as an "alias." Judge Chuang upheld the rule as one of "general" applicability and not discriminatory against transgender inmates. He also dismissed discrimination claims under the Fairness for All Marylanders Act (Md. Code Ann., State Gov't, § 20-304), the state's general anti-discrimination statute, because prisons are not public accommodations. The ruling on transgender treatment and services was mixed, however, because by the time of decision Levy had been evaluated by an endocrinologist (who ordered hormones); and Levy was receiving psychotherapy and transgender services and what Judge Chuang called "amenities," including a sports bra. Levy maintained in a "Supplemental Complaint" that she continued to suffer "mental anguish" (and she considers self-mutilation), that her spironolactone was confiscated, and that she never received her estradiol patch. Corrections argued that the case was "moot" and that Levy's Supplemental Complaint should be stricken as "procedurally improper." This was too much for Judge Chuang, who allowed the pleading and said the case was not moot. He deferred ruling on the liability of Wexford as a corporate health care provider, the personal involvement of the warden and commissioner, or the legality of Maryland's "freeze-frame" policy limiting prison transgender treatment to those receiving it before incarceration. Instead, Judge Chuang ordered defendants to file reports in sixty-day intervals for the next six months on the progress of Levy's hormone and other treatment, after which they may resubmit their motion "if appropriate."

He denied injunctive relief, finding that although Levy "has made a substantial argument that she has a likelihood of success on the merits," she has not established irreparable injury, as defendants have begun undertaking a treatment plan. Judge Chuang did not cite the leading Fourth Circuit case on treatment of transgender prisoners, *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013). *William J. Rold*

NORTH CAROLINA – United States District Judge Louise W. Flanagan allows *pro se* transgender prisoner Duane Leroy Fox, a/k/a Jennifer Ann Jasmine, to sue under her chosen name and to proceed against a prison physician for deliberate indifference to her serious medical needs in *Fox v. Magana*, 2016 WL 843280 (E.D. N.C., March 1, 2016). Judge Flanagan declines to allow Jasmine to amend her complaint for the second (discretionary) time, however, to assert transgender-based claims of verbal harassment, retaliation, and denial of grievances. Judge Flanagan found: (1) verbal abuse is not actionable under § 1983 under *Henslee v. Lewis*, 153 F. App'x 178, 180 (4th Cir. 2005); (2) Jasmine's claims of retaliation are not specific enough to state a cause of action under *Adams v. Rice*, 40 F.3d 72, 74-5 (4th Cir. 1994); and (3) there is no right to participate in a prison grievance system (also citing *Adams*). The underlying facts are unclear from the brief opinion, which does not discuss Equal Protection. Judge Flanagan directs the United States Marshall to assist with service on the doctor, if needed. *William J. Rold*

OKLAHOMA – Some judges provide a modicum of assistance to *pro se* inmates in civil rights cases; others do not. In *Chambers v. Trammell*, 2016 U.S. Dist. LEXIS 28525 (E.D. Okla., March 7, 2016), United States District

Judge James H. Payne dismissed prisoner Timothy Chambers' case "in its entirety" for failure to serve the "John Doe" defendants and for failure to state a claim against the prison warden and Oklahoma prison director. Chambers, openly gay, alleged that four unknown officers stripped him, cuffed him, "paraded" him undressed, slammed his head into a window, twisted his wrists, hit his genitals with a crutch, tied his hair into knots (while uttering homophobic comments about "hairdressers"), covered his mouth and nose to prevent breathing, and bent his fingers backwards (threatening to break them). Chambers says that there is medical documentation but that he was threatened with retaliation if he complained and was prevented from filing a grievance. Chambers filed a claim under 42 U.S.C. § 1983 within a month of these events. Venue was moved from the Western to the Eastern District of Oklahoma in January of 2015; and the court issued an order to show cause why the "John Doe" defendants should not be dismissed for lack of service in July of 2015 – to which Chambers (who has been released) did not reply. This month, Judge Payne dismissed (without prejudice) the "John Doe" claims, as well as the "conclusory" allegations against the warden and prison director, about whom Chambers alleged no personal involvement. Judge Payne cited *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), for the proposition that a court "need not assume the role of advocate for Plaintiff." While that is true, the same case (on the previous page) endorsed the use in the Tenth Circuit of a "Martinez Report" – arising from *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978) – "When the *pro se* plaintiff is a prisoner, a court-authorized investigation and response by the prison officials (referred to as a *Martinez* report) is not only proper, but may be necessary to develop a record sufficient to assess whether

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there are any factual or legal bases for the prisoner's claims." *Hall*, 935 F.2d at 1109. While not a procedural right, use of *Martinez* Reports in the Tenth Circuit is still good law – see *Gallagher v. Shelton*, 587 F.3d 1063, 1066-7 (10th Cir. 2009) – and the failure to require one on these facts seems remiss. The teaching moment, however, is that a plaintiff ignores an order to show cause at his peril. The statute of limitations for § 1983 cases in Oklahoma is two years – see *Meade v. Grubbs*, 841 F.2d 1512, 1522 (10th Cir. 1988) – and counsel may still rescue the civil rights claims dismissed here without prejudice. *William J. Rold*

PENNSYLVANIA – In *Cabrera v. Clark*, 2016 U.S. Dist. LEXIS 36690 (M.D. Pa., March 22, 2016), U.S. District Judge Sylvia H. Rambo systematically worked her way through a rambling, disorganized *pro se* complaint filed by an inmate at the York County Prison, alleging sexual abuse or harassment by prison guards and failure to take action in response to his complaints by prison officials and a Pennsylvania state trooper to whom the plaintiff also directed a protest. She found that almost all the charges should be dismissed due to failures in pleading specific sexual acts, but found that actual physical abuse was adequately alleged against one guard, so she ruled that the complaint should be served on him, since it is an 8th Amendment violation for a guard to commit a sexual assault on an inmate.

WISCONSIN – *Pro se* inmate plaintiff Dominique Dewayne Gulley-Fernandez has filed multiple complaints in federal court against Wisconsin prison officials alleging denial of mental health and “gender dysphoria” treatment. *Law Notes* reported *Gulley-Fernandez v. Wis. Dep’t of Corr.*, 2015 U.S. Dist. LEXIS 161623 (E.D. Wisc.,

December 1, 2015), in January (at page 38), wherein United States District Judge Rudolph T. Randa allowed Gulley-Fernandez to proceed past screening on her transgender treatment claims, citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and *Fields v. Smith*, 653 F.3d 550, 555-56 (7th Cir. 2011). Now, in *Gulley-Fernandez v. Johnson*, 2016 WL 1169470 (E.D. Wisc., Mar. 21, 2016), Judge Randa orders the cases consolidated and directs Gulley-Fernandez to file a single amended complaint. Judge Randa denied Gulley-Fernandez’ request for appointment of a medical expert outside of the Wisconsin prison system to evaluate “his” allegations – Judge Randa uses male pronouns throughout the opinion – finding that Federal Rule of Evidence 706 allows such an expert “to assist the trier of fact, not to prove a party’s case” and that: “At this stage, the Court does not need an expert to understand the plaintiff’s symptoms or his claims.” Judge Randa discussed what he characterized as “consistent psychological care” provided to Gulley-Fernandez, and he listed by date over 25 mental health encounters at the prison and a 49-page institutional evaluation for “gender dysphoria” that concluded Gulley-Fernandez did not meet “diagnostic criteria.” He also denied preliminary injunctive relief on the grounds that Gulley-Fernandez was unlikely to prevail on the merits, noting a failure to plead harassment or retaliation but allowing such allegations in the amended complaint. Finally, Judge Randa denied Gulley-Fernandez’ request for mediation, because the state was not interested; and he also denied Gulley-Fernandez’ request for appointed counsel, without prejudice. It should be apparent that Gulley-Fernandez will not get anywhere without an expert. Earlier filings indicate at least 3 other prisoners with similar claims. Perhaps counsel can be found to litigate transgender prison care in Wisconsin. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – Newly introduced in Congress during February were the Jury ACCESS Act, S. 447, and the Juror Non-Discrimination Act (H.R. 864), companion bills to prevent discrimination in jury selection because of sexual orientation or gender identity. Lead Senate sponsor is Sen. Jeanne Shaheen (D-NH), with bipartisan support from Sen. Susan Collins (R-ME). The House sponsor is Rep. Susan David (D-CA-53). The National LGBT Bar Association worked with Senator Shaheen’s office in drafting the bill. *** The Senate Armed Services Committee voted to confirm the appointment of Eric Fanning, an openly gay man, to be Secretary of the Army on March 10. The nomination still awaits approval by the full Senate, where the Republican leadership has proved reluctant to bring President Obama’s executive nominations to the floor. Fanning had previously served as Undersecretary of the Air Force and chief of staff to the Secretary of Defense, and has bipartisan support for his qualifications. If confirmed, he would be the first openly gay secretary of a branch of the armed services. *Reuters News*, Mar. 10. *** On March 17, Rep. Mike Honda (D-Calif) reintroduced the Reuniting Families Act, which would reform U.S. immigration law as it deals with same-sex permanent partners. Although legal developments of the past year have led to easier recognition of same-sex marriages contracted overseas, most foreign countries do not authorize same-sex marriages, so the need for U.S. legislative response to permanent same-sex couples continues to be pressing, in the context of asylum applications as well as normal immigration of families.

ALABAMA – The Alabama Senate voted 23-3 on March 15 to end the

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requirement for marriage licenses in the state. Instead, couples would file a form recording their marriage. The measure reacts to the refusal of some probate judges to issue marriage licenses since the *Obergefell* decision, in order to avoid providing licenses to same-sex couples. It now passes to the state's House of Representative for its concurrence. *Associated Press*, Mar. 15. The probate judges have been encouraged in their defiance by Chief Justice Roy Moore of the Alabama Supreme Court, who contends that the *Obergefell* decision is illegitimate since it attempts to replace God's definition of marriage with a judicially-constructed definition of marriage, and he does not recognize the authority of the people, through adoption of the First Amendment Establishment Clause, to supersede God's law with secular law regarding an institution created by God.

CALIFORNIA – New regulations go into effect on April 1 under the California Fair Employment and Housing Act, ramping up requirements on employers to take affirmative steps to prevent discriminatory and harassing conduct in the workplace. Employers will be required to adopt written policies, institute training programs and distribute brochures produced by the Department of Fair Employment and Housing. Employers must establish mechanisms to enforce their policies, including designating persons to receive complaints and procedures to investigate and take appropriate action.

COLORADO – The Colorado House of Representatives voted to approve a measure that would allow transgender people born in Colorado to change the gender listed on their birth certificates without having to undergo sex-reassignment surgery or obtain a

court order. Under the bill, the process would be handled administratively with a certification by a health care professional. Under existing law, a court order stating that the applicant's gender has been surgically changed is required. The bill passed with bipartisan support and sent to the Senate, which is controlled by the Republicans and which rejected a similar bill last year. The proposed legislation would bring Colorado in line with nine other states and the District of Columbia, as well as the U.S. Passport Office. *A.P. State News*, March 4. On March 21, the Senate rejected the proposed birth certificate measure for the second time, again on a party-line vote. *The Journal*, Mar. 23. As usual, opponents claimed that waiving a surgery requirement could lead to fraud, because there are so many non-transgender people out there who are just itching to change the sex-designation on their birth certificates so they can. . . . What???? * * * On March 17, the Colorado Senate approved a measure that would prohibit licensed health care workers from performing "conversion therapy" on minors.

DELAWARE – The Department of Insurance issued Bulletin No. 86 on March 23, pursuant to the Gender Identity Nondiscrimination Act of 2013, providing guidance to insurance companies about the requirements of the Act as they pertain to the sale and administration of insurance policies in Delaware. It is an unlawful practice in Delaware to discriminate because of gender identity, including refusing to issue policies or charging differential rates due to a person's gender identity. The Bulletin also notes requirements of the Affordable Care Act in this connection. The Bulletin says insurers may not deny, exclude, or otherwise limit coverage for medically necessary services, "as determined

by a medical provider in consultation with the individual patient, based on the individual patient's gender identity if the service would be covered for another individual under such contract of insurance. The Department takes the position that any blanket policy exclusion for gender dysphoria, gender identity disorder, medically necessary surgeries or other treatments related to gender transition or related services is a violation of the Unfair Trade Practices Act because it is discrimination based on gender identity." Also, the Department takes the position that "determinations of medical necessity, eligibility, and prior authorization requirements for diagnoses related to an insured's gender identity are based on current medical standards established by nationally recognized transgender health medical experts."

FLORIDA – The legislature enacted and Governor Rick Scott signed into law a "Pastor Protection Act" on March 10, providing that religious organizations and clergy could not be sued for refusing to perform same-sex marriages. Opponents pointed out that the measure was unnecessary, because the 1st Amendment's Free Exercise Clause and parallel provisions of the Florida Constitution would protect against such liability, but supporters said the measure was useful to reassure potential defendants who feared liability in the wake of *Obergefell v. Hodges* because they might be charged with denying a constitutional right to same-sex couples. Clearly, those fears are generated by ignorance about how the law works. At any rate, the Senate approved the bill 23-15 on March 3, after the House had approved it 82-37 on March 2. The measure creates a new Section 761.061, Florida Statutes. *Orlando Sentinel*, March 11; *Sarasota Herald-Tribune*, March 4. * * * On March 23, Gov. Scott signed into law S.B. 242, which establishes a pilot

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program to be run by the University of Miami with private funding to provide clean needles and syringes for drug users as part of a campaign to reduce the spread of HIV infection. *Orlando Sentinel*, March 24.

INDIANA – On March 14 the Kokomo Common Council voted 5-4 to add sexual orientation and gender identity to the city’s human rights ordinance. This was a second reading, after the measure had passed by the same margin a week earlier, both times at the end of protracted, emotional hearings with lines winding outside city hall of people waiting to speak on the measure. Mayor Greg Goodnight signed the bill into law shortly after the Common Council meeting concluded. *Kokomo Tribune*, Mar. 7. Local network affiliate *cbs4indy.com* reported that Kokomo was “the latest to join a patchwork of more than a dozen other cities with similar laws” in the state of Indiana, where efforts by some moderate Republican legislators to pass a statewide sexual orientation/gender identity law with substantial exemptions from coverage and religious defenses failed earlier this year.

KANSAS – Governor Sam Brownback has signed into law SB 175, which allows public educational institutions to recognize and fund student organizations that exclude people from participation or membership based on the “sincerely held religious beliefs” of the organization. The measure reacts to the failure of the Christian Legal Society to win its lawsuit in the U.S. Supreme Court seeking recognition from a California law school, which maintained a policy that recognized student organizations must be open to all interested students in order to have the status and privileges of University-recognized organizations.

KENTUCKY – The Senate passed S.B. 180 on March 15. It is intended to shelter from adverse consequences at the hands of the government individuals and businesses that decline to provide services or goods in connection with same-sex marriages. The measure is overlaid with euphemisms about protection religious freedom, rights of conscience, freedom of speech, etc., and sheltering religious officials and organizations from any adverse consequences for actions they take in pursuit of their bigoted religious and moral beliefs. (OK, we couldn’t resist that.) The main impact would be to blast exemptions into eight local anti-discrimination ordinances, since there is no state-level protection against discrimination for LGBT people in Kentucky apart from an executive order on state government employment by former Governor Steve Beshear.

MISSISSIPPI – At the end of March, the legislature concluded work on an anti-gay bill, HB 1523, and sent it to Governor Phil Bryant, who signed it on April 5. The bill was criticized as broadly sheltering people and institutions with objections to same-sex marriage and sex outside of heterosexual marriage from having to comply with any legal requirements to provide services or goods to couples and persons of whom they disapprove, or from suffering any adverse consequences at the hands of government for doing so. The measure attracted substantial adverse comment from the business community, and there was some hope that the governor might veto it to avoid the kind of reputational damage and potential economic retribution that North Carolina was starting to attract by the end of the month as a result of its enactment of HB 2 (see above). Ironically, Mississippi is a state that has never provided protection against discrimination for LGBT people, so

the measure seemed to be largely symbolic. Although half a dozen localities have passed “inclusiveness” resolutions, these do not provide causes of action or remedies for anti-LGBT discrimination in employment, housing, or public accommodations. The bill essentially says that the government cannot do what it, in fact, does not desire to do: punish anti-gay people for refusing to open their workplaces, residential facilities, or places of business to same-sex couples and LGBT individuals.

MISSOURI – The legislature has approved Senate Joint Resolution No. 39, which will put on the ballot an amendment to Article I of the Missouri Constitution intended to shelter religious organizations and individuals from suffering any penalties at the hands of the state “because of their sincere religious beliefs or practices concerning marriage between two persons of the same sex.” The proposed amendment, which would arguably violate the Establishment Clause of the 1st Amendment of the U.S. Constitution, is intended to provide special rights for people with religious objections to same-sex marriage to refuse to comply with any laws that might require non-discrimination in connection with marriage-related goods and services, and would shelter tax exempt organizations from losing their preferred tax status due to failure to recognize the constitutional rights of same-sex couples to recognition of their marriages. The main impact would probably be in a dozen communities where local law prohibits sexual orientation discrimination, and the proposed amendment would arguably require religious exemptions from their enforcement.

MONTANA – The City Council of Whitefish, Montana, approved

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unanimously on first reading a proposed ordinance that would protect residents and visitors from discrimination because of sexual orientation or gender identity on March 21. If finally enacted, this would be the fifth such local ordinance in Montana, and the first in the northwest portion of the state. *MTN News*, March 22.

NEBRASKA – The Nebraska Senate voted 26-18 to reject a bill that would add sexual orientation and gender identity to the state's anti-discrimination law. Opponents of the proposal rejected the proponents' arguments that passing the bill would enhance economic development opportunities for the state. Opponents also argued that the bill was really about demonizing religious people who objected to homosexuality and transgenderism. *www.ketv.com*, Mar. 23.

NEW HAMPSHIRE – The House overwhelmingly approve a measure intended to open the way to needle exchange programs as a method of combating the spread of HIV and other blood-borne infections. H.B. 1681 would decriminalize the possession of syringes and would allow them to be sold in retail stores other than pharmacies. The bill does not by itself establish a needle exchange program, however. One step at a time. *New Hampshire Union Leader*, March 24. * * * H.B. 1661, approved overwhelmingly in the House, would prohibit licensed health care workers from performing conversion therapy on minors, and would give patients a right of action to sue conversion therapists "if they fail to achieve the stated goal of changing the child's sexual or gender orientation." Opponents claimed the bill improperly impaired parental rights to seek such treatment for their children, and also impeded

religious liberty. *New Hampshire Union Leader*, March 24.

NEW YORK – Mayor Bill de Blasio has signed an Executive Order that provides people access to public single-sex restroom facilities consistent with their gender identity in all city structures, without any need to show ID or other proof of gender. The Order does not apply directly to facilities of the Department of Education, which already has a policy that students are allowed to use restroom and locker room facilities consistent with their gender identity. An *Associated Press* report (March 7) contained an estimate that about 25,000 transgender or gender-nonconforming individuals reside in New York.

RHODE ISLAND – The Cumberland School District is the first in Rhode Island to have a formal policy protecting transgender students from discrimination. The School Committee voted to approve the policy on March 24. It allows students to use restrooms consistent with their gender identity, and students uncomfortable with a gender-specific restroom will be offered a safe alternative, such as the nurse's office bathroom, which is unisex. The district plans to send an email to parents explaining the policy. Unlike fearful state legislators in many jurisdictions, the Cumberland School Committee decided to conduct research before adopting a policy and concluded that accommodating transgender students made the most sense. *Providence Journal*, March 26.

SOUTH DAKOTA – On Mar. 1, Governor Dennis Daugaard (Republican) vetoed H.B. 1008, a bill intended to mandate discrimination in restroom facilities in public schools directed against transgender students, by denying them

the choice to use facilities consistent with their gender identity rather than the gender they were labelled at birth. Wrote Gov. Daugaard to the members of the legislature, "Local school districts can, and have, made necessary restroom and locker room accommodations that serve the best interests of all students, regardless of biological sex or gender identity." Daugaard insisted that imposing a mandated state policy was a bad idea, because local officials are "best positioned" to address the issue. Obliquely referring to possible loss of federal funding under Title IX, Daugaard pointed out that the bill put local school districts into the difficult position of deciding whether to comply with state law and risk losing federal financial assistance. "This law will create a certain liability for school districts and the state in an area where no such liability exists today," he wrote. A March 3 attempt by proponents of the bill in the Senate to override the veto failed. *New York Times*, March 4.

TENNESSEE – The Tennessee House of Representatives approved House Jt. Res. 529 on March 3, stating its view that the Supreme Court's decision in *Obergefell* was a case of judicial overreaching, violating federalism and separation of powers by dictating to states on the issue of marriage. The measure's sponsor, Rep. Susan Lynn (R-Mt. Juliet), acknowledged that the measure had no effect, other than to let the legislators let off steam and score points with their constituents. *Knoxville News-Sentinel*, March 4. * * * The House Education Administration and Planning Committee voted to shelve a proposed "bathroom bill" that would have required educational institutions to prohibit transgender students from using single-sex restroom facilities inconsistent with the sex indicated on their birth certificates, but there

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were reports that new efforts would be made to revive the bill because of unsubstantiated fears proclaimed by Republican legislators about men masquerading as women in order to commit sexual assaults in restrooms.

UTAH – On March 2 the Utah Senate voted 17-11 to reject S.B. 107, a measure that would have provided explicit protection against hate crimes to LGBT people. The bill's lead sponsor, Sen. Stephen Urquhart (Republican) attributed the defeat to opposition by the Church of Jesus Christ of Latter-Day Saints, which had issued a statement suggesting that passage of this bill would upset the compromise achieved last year in the enactment of a limited anti-discrimination measure protecting LGBT people.

VERMONT – The state senate voted overwhelmingly on March 16 to approve a measure that would ban "conversion therapy" practiced by licensed health care professionals on minors. The measure follows the path blazed by California, New Jersey and a few other states.

WASHINGTON – Seattle Mayor Ed Murray has signed an executive order intended to make public spaces safer for transgender people by authorizing the establishment of guidelines and training programs to assist in enforcement of the state's public accommodations law, which covers gender identity. *AP State News*, March 11.

WEST VIRGINIA – The West Virginia Senate rejected H.B. 4012, which would have privileged businesses to discrimination against people based on the business owner's religious beliefs. The vote on March 3 was 7-27.

Many prominent business leaders and institutions had lobbied against the bill, according to a press advisory issued by Human Rights Campaign.

WISCONSIN – Janesville, the hometown of Republican House of Representatives Speaker Paul Ryan, has enacted a nondiscrimination ordinance including public accommodations and employment that covers sexual orientation and gender identity, as well as just about every other classification that one could imagine. www.freedomforallamericans.org, March 29.

LAW & SOCIETY NOTES

The **WHITE HOUSE** announced that **RAFFI FREEDMAN-GURSPAN**, who became the first transgender White House staff member in 2015, has been appointed the White House's primary LGBT liaison, the first transgender person to occupy that role, according to a March 14 *Buzzfeed.com* report. Her official title is Outreach & Recruitment Director for Presidential Personnel and Associate Director for Public Engagement. President Clinton appointed the first White House liaison in 1995. There was no White House liaison for LGBT issue in the Bush Administration. (Surprised?) Freedman-Gurspan's predecessor in the role was Aditi Hardikar, who left the position in January to join Hillary Clinton's presidential campaign.

The President's nomination of U.S. Circuit Court of Appeals Judge **MERRICK GARLAND** to the Supreme Court brought generalized praise from LGBT rights groups, but it was difficult to say anything substantive about Judge Garland's record on LGBT rights. *Buzzfeed.com*

identified just four D.C. Circuit decisions in which Judge Garland was on the panel but did not write the opinion for the court where one of the parties either was LGBT or had an LGBT connection over the course of his two decades on that court, but none of the cases directly involved a question of LGBT law. Lambda Legal scoured all the published decisions in which Judge Garland participated and found nothing more. Garland's reputation was that of a centrist judge who dutifully applied precedent and sought to decide cases on narrow grounds for which a panel consensus could be formed. Lambda saw this lack of a substantive record on LGBT issues as a good reason to call for hearings on the nomination so the nominee's views could be explored before organizations take a final position on confirmation. However, the immediate response of the Senate Republican leadership upon the death of Justice Antonin Scalia was that the Senate would not hold hearings or vote on the confirmation of any nominee to the Supreme Court by President Obama. Their contention was that such a position should not be filled during a presidential election year by a "lame duck" president. (Of course, in their minds President Obama was a "lame duck" the moment he took the oath of office for his second term, to judge by the reluctance of the Senate since January 2013 to confirm any presidential appointments.) The effect of this announcement was that the Supreme Court might not be fully staffed until sometime in the late winter or spring of 2017. Given the even split between Democratic and Republican appointees on the Court, that could mean difficulty in deciding some close cases through the end of the Court's 2016-17 term, since the Court usually finishes hearing oral argument for the term in April or early May. Many Supreme Court cases are decided unanimously or with lopsided

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majorities, so many cases can still be decided by an 8 judge court. But the most contentious and highly-charged decisions are 5-4 rulings; with an 8-judge court, that would be 5-3 rulings, most likely moderate-to-progressive in tone with Justice Kennedy or Chief Justice Roberts joining with the four Democratic appointees (as in cases like *Obergefell* or the Obamacare cases where the Chief Justice joined with the Democrats. When the Court is deadlocked 4-4, the options available to it are to affirm the lower court ruling without an opinion for the Court, reschedule the case for argument in the future, or dismiss the writ of certiorari as improvidently granted. (Clearly, in the current situation, it would be improvident for the Court to grant a writ in a case that is likely to evenly divide the Court.) Some burning constitutional questions are likely to be deferred until a ninth justice can be confirmed. Although some Republican senators floated the idea that Judge Garland might be confirmed in a post-election lame-duck session, others insisted that the right of appointment should await a new president's inauguration.

The *Washington Times* reported on March 2 that **KFC** had discharged a Richmond, Virginia, franchise manager after a transgender woman, **GEORGIA CARTER**, complained that the manager had withdrawn an employment offer because of her gender identity. She claimed that the job was offered and accepted in a phone conversation, but then the manager called back and said, "My supervisor and I have a problem because on your license it says 'male,' but you're. . ." She responded, "I'm transgender" and the job disappeared. After investigating her complaint, KFC apologized, discharged the manager, and told Carter that she could work at any of their four Richmond locations. The *Detroit News* (March 8) reported

that the **CATHOLIC CHURCH IN MICHIGAN** is allowing gay couples among its Michigan employees to sign up for health benefits for their partners. The Michigan Catholic Conference, taking in more than 8,000 employees in seven dioceses across the state, began open enrollment on March 9 to workers to add a "legally domiciled adult" to their medical and dental plans. In order to avoid recognizing same-sex marriage as such, this eligibility is extended to all legally domiciled adult partners regardless of sex or sexual orientation, and can include siblings and other relatives as well as adult children living with their parents who are employees of Catholic institutions. The Conference claimed that the purpose of establishing this expanded eligibility is not to recognize non-traditional families but rather to "follow federal law." Presumably they are concerned about ERISA and ACA compliance for those of their operations that are not exempt as churches.

INTERNATIONAL NOTES

EUROPEAN UNION – A proposal to prevent discrimination against LGBT people throughout the European Union, which required unanimous consent, was stymied by the opposition of Hungary. The proposed draft called on the European Commission to tackle homophobic and transphobic discrimination, according to a March 9 report in *New Europe*, but the representatives of Hungary blocked the agreement, stating "Hungary is not in a position to agree with the list of actions to advance LGBTI equality."

ARGENTINA – During President Barack Obama's visit to Argentina in March the country agreed to join the Global Equality Fund, according to an

announcement by the White House on March 23. The Fund is a public-private partnership jointly managed by the U.S. State Department and the U.S. Agency for International Development, which helps fund efforts to support the human rights of LGBTI people around the world. Argentina became the third Latin American country to join the Fund, after Uruguay and Chile. Other countries allied in this effort include Croatia, Germany, the Netherlands and Sweden. Non-governmental participants include the Arcus Foundation and Human Rights Campaign. *Washington Blade*, Mar. 24.

AUSTRALIA – Despairing of pre-election progress under the current Coalition government, Australian Marriage Equality announced new strategy to work for the election of pro-marriage equality Members of Parliament with the idea of pushing for a vote after the election. AME said that only eight more votes are needed to reform Australia's marriage laws through federal legislation. Prime Minister Malcolm Turnbull, who claims to be a marriage-equality supporter, has resisted calls for a free parliamentary vote prior to the election, instead standing by the pledge of his predecessor to hold a national plebiscite (which would be non-binding) on the question. Rodney Croome of AME said on March 28 that if a parliamentary majority can be achieved, "it would be harder to make the case that we need a plebiscite." *Guardian*, April 1.

BERMUDA – The government has announced that it will call a referendum on same-sex marriage and civil unions. Michael Dunkley, the Premier, made this announcement at a Feb. 29 press conference, stating that the proposal will be presented to the House of Assembly during the current

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legislative session. The announcement came in the wake of a Supreme Court ruling endorsing the right of same-sex partners of Bermudians in permanent relationships to live and work in Bermuda free of immigration restrictions. *Royal Gazette*, Feb. 19.

BOTSWANA – On March 16, the Court of Appeals upheld a 2014 lower court judgment that the organization Lesbians, Gays and Bisexual of Botswana was entitled to register and campaign for legal reform of anti-gay legislation. Wrote the court's president, Judge Ian Kirby, "It is clear that the government's decision [to deny registration] interferes in the most fundamental way with the respondents' right to form an association to protect and promote their interest." There remains some question whether the government will actually comply with this ruling, as compliance is not a given in a country unused to the rule of law contradicting a government position. *Reuters*; *AllAfrica.com*, March 17.

CANADA – The Human Rights Tribunal of Ontario awarded damages to a transgender man who was beaten by a nightclub security man while using the men's restroom facilities. The Tribunal found that the nightclub was liable, even though the security man was employed by a subcontractor. *Lewis v. Sugar Daddys Nightclub*, 2016 HRTO 347 (March 17, 2016). The Tribunal's description of what happened is cringe-inducing to read. * * * The Ontario Superior Court of Justice passed sentence on March 9 on Steven Paul Boone, who was convicted on charges of intentionally becoming HIV-positive and then intentionally spreading the infection through sexual contact to other gay men. Reflecting the much more lenient sentencing practices of Canadian courts compared to American courts in comparable

cases, Madam Justice B. R. Warkentin imposed a sentence that ultimately will confine Boone for less than ten years but will add a supervision order of five years, a life-time weapons prohibition, and registration on the National Sex Offender Registry for life. *Her Majesty the Queen v. Boone*, 2016 ONSC 1626.

COLOMBIA – A Colombian gay rights organization reported on March 3 that a same-sex couple that married outside the country has been allowed to register their marriage in Columbia by presenting proof of the foreign marriage to a Columbia civil registry. This was reportedly the first time such a registration was allowed. *Colombia-diversa.org*. * * * Local media outlets claim that the Constitutional Court will render a decision soon that will bring marriage equality to Colombia. The final vote was expected to occur after Easter.

GERMANY – Guido Westerwelle, former Foreign Minister of Germany and the first openly gay politician to attain such a high rank in that nation, died on March 18 from leukemia. He was the former head of the liberal, pro-business Free Democratic Party, and had been prominent in German politics for decades when his party won sufficient votes to become part of a governing coalition in 2009, which earned Westerwelle the rank of Vice Chancellor and Foreign Minister, offices he filled until 2013. According to a press report, he "came out" as gay at Chancellor Angela Merkel's 50th birthday party in 2004, which he attended with his same-sex partner. *Agence France Presse English Wire*, March 18.

GREENLAND – Same-sex marriages began in Greenland on April 1,

pursuant to a marriage equality bill that was unanimously adopted by the Greenlandic Parliament and the Danish Parliament. (Denmark still exercises legislative authority over Greenland.) The effective date of the measure had to be pushed back from last October because of a delay occasioned by parliamentary elections in Denmark.

HONG KONG – *Agence France Press English Wire* (March 11) reported that a British lesbian, referred to as QT in court papers, lost a legal challenge seeking a visa to live and work there with her same-sex partner. The women entered into a civil partnership in Britain in 2011 and moved to Hong Kong the same year, after QT's partner was offered a job there, but QT was denied a dependent visa and has been staying on a visitor visa, which does not allow her to work. High Court Judge Thomas Au wrote, "The applicant has failed in her grounds in support of this judicial review, I therefore dismiss the application. To effectively accept a same-sex-marriage-like relationship to be equivalent to a married status in Hong Kong is not permissible under the laws of Hong Kong as they now stand." The government's position, articulated at a court hearing in May 2015, is that "marriage can only be heterosexual."

INDIA – The Parliament has again rejected a private members bill to decriminalize consensual sodomy, with an overwhelming majority of members present, 58 out of 73, voting against introduction of the bill. *Economic Times*, March 12. Meanwhile, a Supreme Court panel is pondering after hearing arguments about reconsidering a ruling that had revived the colonial-era sodomy law several years after it had been

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declared unconstitutional by the High Court in Delhi.

INDONESIA – The religiously conservative ruling party in Aceh has banned the employment of openly-transgender people at beauty parlors, expressing concern about their “influence” on young people. The party called on transgender people to conceal their gender identity if they wanted to be employed in such public occupations. *Jakarta Post*, March 21.

IRELAND – The Belfast Court will allow the attorney general to intervene in a case involving a refusal by a bakery to produce a cake with a pro-gay-marriage slogan inscribed in the frosting. A verdict against Ashers Baking Company is now on appeal. The case will be argued before the Court of Appeal in May. The main question is whether application of the non-discrimination law to the resistant bakers is a violation of their religious freedom rights. *Belfast Telegraph*, March 4.

ISRAEL – The Knesset voted 42-36 to reject a private member’s bill that would allow same-sex couples to commission a surrogate to bear a child for them. Surrogacy is allowed in Israel, but only for heterosexual couples with infertility problems. Gay men and lesbians who want to have children through surrogacy have to go abroad. *Jerusalem Post*, March 11.

ITALY – The government announced that it will prepare a separate bill on gay adoptions, after having removed a provision on gay adoptions from a civil union bill in order to make it more likely to gain enactment. The government announced that the adoption proposal would constitute an

overall reform of adoption law, going beyond the issue of same-sex couples, to allow adoptions by single people as well. At present, only married couples can adopt in Italy. *Reuters*, Feb. 28. * * * The Rome Family Court approved a lesbian couple’s request to simultaneously adopt each other’s daughters, according to a March 1 news report by *Agence France Presse English Wire*. This was said to be a first for Italy. According to the news report, since 2014 the Rome Family Court has made at least 15 rulings upholding requests by gay people to be allowed to adopt a partner’s child without terminating the partner’s parental status.

JAPAN – The city of Iga became Japan’s third local government to issue certificates recognizing same-sex partnerships as the equivalent of marriage for purposes of local law on April 1. *Japan Economic Newswire*, April 1. The city is located in Mie Prefecture, and follows Tokyo’s Shibuya and Setagaya wards in establishing similar programs.

MEXICO – Every month brings new reports of local judges issuing “amparos” to allow same-sex couples to marry. It was reported from Morelos state that a federal district judge criticized the state’s refusal to legalize same-sex marriages and ordered the state government to publish his ruling authorizing a same-sex marriage in the official government newspaper.

NORWAY – The Health Care Ministry has endorsed a proposal to allow transgender people to legally change their gender without the need for surgery, hormone treatment or sterilization. The ministry has introduced a bill for that purpose, which was expected to pass through

the parliament with broad non-partisan support. Healthcare Minister Bent Høie said that the bill “is historic because it is now the individual and not the health services that decide when he or she has changed legal gender.” *Agence France Presse English Wire*, March 18.

SCOTLAND – Nicola Sturgeon, a Scottish National Party leader, has pledged to reform gender recognition law in Scotland if the SNP returns to power after the May 5 Scottish parliamentary elections. The reform would make it possible for people to identify as neither male nor female, but instead as “non-binary gender” on identification documents, including birth certificates and passports, and will extend legal recognition to transgender people beginning at the age of 16 rather than the current minimum age of 18. *Glasgow Herald*, April 1.

SEYCHELLES – The Cabinet has approved a legislative proposal to decriminalize consensual homosexual conduct, which will be presented to the National Assembly shortly. The measure was intended to bring Seychelles into conformity with the United Nations Declaration of Human Rights. *AllAfrica.com*, March 1.

THAILAND – A western same-sex male couple is embroiled in litigation with a Thai woman who had agreed to be their surrogate mother but who has refused to give up the child that she bore for them. Gordon Lake (American) and Manuel Santos (Spanish) have been stuck in Thailand while litigation slow proceeds over their claim to custody of the child, Carmen, born in January 2015. Lake is the biological father, and the egg came from an anonymous donor, so Patidta Ksuolsang is a gestational surrogate, not genetically related to the child. Patidta released the child

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to the men after it was born, but then refused to execute papers necessary to get a passport so the child could be taken out of the country. Testimony in the case was expected to conclude by the end of March. Patidta claimed she did not know she had contracted with a gay couple, and she was concerned about the child's welfare. Lake insists they were open with her about their sexuality and relationship from the beginning. *AP Online*, March 23.

UKRAINE – The government has announced that a bill to legal registered civil partnership for same-sex and opposite-sex couples in Ukraine should be developed sometime in 2017. The status will cover property and moral rights, including inheritance, support in the case of disability, and constitutional testimonial privilege. The Cabinet approved an action plan for implement the National Human Rights Strategy in the period of 2020. *BBC International Reports*, March 11. That's planning ahead. . . . That's delaying progress. . . .

UNITED KINGDOM – The High Court in London has backed the request of a transgender teenager to cut off all contact with his adoptive parents, reported *Press Association* on March 10. Mr. Justice Keehan stated in a ruling made public on March 10 that the parents' persistent refusal to accept the transgender boy's gender identity justified allowing the boy to cut off all contact.

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THE LGBT BAR ASSOCIATION OF GREATER NEW YORK (LEGAL)'s annual dinner was held on March 24 at Capitale in Manhattan. With approximately 600 in attendance,

the organization presented awards to EEOC Commissioner **CHAI FELDBLUM** and retiring Lambda Legal Executive Director **KEVIN CATHCART**, and included a tribute to recently deceased New York Court of Appeals Chief Judge **JUDITH KAYE**, delivered by her former law clerk and close friend, **ROBBIE KAPLAN**. LeGaL President **MEREDITH R. MILLER** provided welcoming remarks, and LeGaL Executive Director **MATTHEW SKINNER** served as master of ceremonies. For a detailed account of the event, check the website AboveTheLaw.com.

FEDERAL BAR ASSOCIATION – The Federal Bar Association, which brings together lawyers whose practices focus on the federal courts, has chartered a new LGBT Law Section and has designated immigration lawyer **DANIEL L. WEISS** of Freehold, N.J., who took the lead in establishing the Section, as its first Chair. (Weiss had previously played a leadership role in establishing the LGBT Section of the New Jersey State Bar, and was one of the plaintiffs in New Jersey's successful marriage equality litigation.) Information about the Section can be found at fedbar.org/Sections/LGBT-Law-Section_1.aspx. Members of the Federal Bar are invited to join the Section.

The **NATIONAL CENTER FOR TRANSGENDER EQUALITY** will hold its 13th anniversary celebration at The Hamilton Live in Washington D.C. on May 18, 2016. The event is titled "Transvisibility: The T's Not Silent."

IMMIGRATION EQUALITY has announced that **AARON C. MORRIS** will be its new Executive Director. He has previously served as the organization's Legal Director, second in command to former E.D. Caroline

Dessert. Morris joined Immigration Equality as a staff attorney in 2008.

LAMBDA LEGAL announced that **RICHARD SAENZ** has joined its legal staff in the New York office, where he will be Lambda Legal's program strategist on criminal justice and police misconduct issues. He earned his J.D. from Fordham Law School and founded the HIV/LGBT Advocacy Project at Queens Legal Services, serving low-income LGBT and HIV-affected New Yorkers. The National LGBT Bar Association designated him one of the Best LGBT Lawyers Under 40 and Queens Pride House honored him in 2013 with a Community Leadership Award. Saenz had worked at Lambda as an intake specialist before attending law school.

The **SUPER LAWYERS** supplement to the **NEW YORK TIMES** on March 27 featured **ROBERTA "ROBBIE" KAPLAN**, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, on its cover, under the title "First Comes Love: Before same-sex marriage was the law of the land, business litigator Robbie Kaplan became a hero of the movement." Kaplan has argued marriage equality cases in several jurisdictions, most famously in the U.S. Supreme Court, where she successfully represented Edith Windsor in her challenge to the federal Defense of Marriage Act. Her memoir, also titled "First Comes Love," was published recently to widespread acclaim.

The **NATIONAL LGBT BAR ASSOCIATION** will hold an event in London, England, on April 14 as part of its Out & Proud Corporate Counsel Awards program, presenting an award to **CLAUDIA BRIND-WOODY** of IBM. Check for details on the Association's website, lgbtbar.org.

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- Title VII – EEOC Extends Workplace Protections to Gay and Lesbian Employees – *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015), 129 Harv. L. Rev. 618 (Jan. 2016).
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