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RESIST

Trump Administration Retreats, Dropping Interlocutory Appeals as Ten Federal Judges Unanimously Halt Transgender Military Ban

EXECUTIVE SUMMARY

L G B T LAW NOTES

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Bowing to Reality, Trump Administration Responds to Six Court Losses by Dropping Appeals in Transgender Military Cases

By Arthur S. Leonard

President Donald Trump's July 26 tweet announcing that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military," as amplified by an August 25 Memorandum, encountered unanimous resistance from ten federal judges who had an opportunity to vote on it by Christmas. Nine of the ten were appointed by Presidents Bill Clinton and Barack Obama. One, U.S. District Judge Marvin Garbis in Baltimore (District of Maryland), was appointed by George H. W. Bush. As of December 31, the Trump policies had provoked four nationwide preliminary injunctions, and two federal circuit courts of appeals had refused "emergency" motions by the government to stay the injunctions in connection with a January 1 date for allowing transgender individuals to enlist. On December 28 and December 29, the district judges in Maryland and Washington State also denied motions to stay their preliminary injunctions. Bowing to reality, the Justice Department announced on December 29 that it would withdraw an appeal to the 9th Circuit of the third preliminary injunction ruling from Seattle and would not seek an "emergency" stay from the Supreme Court to avoid complying with a quadruple mandate to allow transgender individuals to begin enlisting in the U.S. military starting January 1, 2018.

The Defense Department anticipated these developments, having already distributed instructions early in December to military recruitment and enlistment personnel on how to process applications from transgender individuals. The D.C. Circuit cited this in countering the Justice Department's argument that letting the ban expire on January 1 would create an emergency because the Defense Department wasn't ready to process such applications.

The most recent relevant court opinions are *Doe 1 v. Trump*, 2017 U.S. App. LEXIS 26477, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017); *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx) (C.D. Cal. Dec. 22, 2017); *Stone v. Trump*, No. 17-2398 (4th Cir. Dec. 21, 2017); 2017 U.S. Dist. LEXIS 212556 (D. Md. Dec. 28, 2017)(denying motion to stay preliminary injunction); and *Karnoski v. Trump*, 2017 WL 6311305, 2017 U.S. Dist. LEXIS 167232 (W.D. Wash. Dec. 11, 2017); 2017 U.S. Dist. LEXIS 213420 (W.D. Wash. Dec. 29, 2017)(denying motion to stay preliminary injunction). All the major national LGBT groups are involved in at least one of these cases, and several of the nation's major law firms are participating as cooperating attorneys.

Trump's August 25 Memorandum set out three policies: a requirement that all transgender personnel be discharged, a ban on allowing transgender individuals to enter the military, and a ban on use of Defense Department or Homeland Security Department funds to pay for sex reassignment procedures for military members. The Memorandum assigned the Defense Department the task of figuring out how to implement these policies, and to report back in writing to the President in February, and meanwhile nobody would be discharged or denied medical treatment. The Memorandum specified that the existing ban on enlistments would remain in effect indefinitely, contrary to a Defense Department announcement in June 2017 that it would be lifted on January 1, 2018.

The four lawsuits were filed in different federal district courts shortly after the policy was announced, with complaints alleging a violation of Equal Protection and a variety of other claims, but all seeking preliminary injunctions to stop the Trump policies from going into effect while the cases are litigated. They all specifically asked that the Pentagon adhere to the previously announced date of January 1, 2018, to lift the ban on transgender people enlisting. The Justice Department moved to dismiss all four cases, and vigorously opposed the motions for preliminary injunctions, which if granted would block the policies announced in the President's August 25 Memorandum from going into effect while the cases are being litigated and

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would requirement implementation of the January 1 date for allowing transgender people to enlist.

As of December 22, when U.S. District Judge Jesus G. Bernal, sitting in Riverside (Central District of California), issued a nationwide preliminary injunction, all four district judges had issued such injunctions, beginning with D.C. District Judge Colleen Kollar-Kotelly on October 30, Judge Garbis in Maryland on November 21, and Judge District Judge Marsha J. Pechman in Seattle (Western District of Washington) on December 11. The subsequent opinions all cited to and quoted from Judge Kollar-Kotelly's opinion, none stating any disagreement with her equal protection analysis. On December 21, the 4th Circuit Court of Appeals refused to stay Judge Garbis's injunction, without substantive comment, and on December 22, the D.C. Circuit refused to stay Judge Kollar-Kotelly's injunction in an opinion endorsing her reasoning. DOJ filed an appeal of Judge Pechman's ruling to the 9th Circuit, and a similar appeal was anticipated from Judge Bernal's ruling, but evidently saner thinking finally prevailed at DOJ, as getting all of these injunctions stayed before January 1 was highly unlikely. Instead, DOJ announced towards the end of the month, it would drop the appeals and concentrate on litigating the cases on the merits in the district courts. Given the wording of the preliminary injunction rulings, that sounded like a quixotic quest.

All four district judges rejected the Justice Department's argument that the cases should be dismissed because no actions had actually yet been taken to implement Trump's announced policies, which were being "studied" by the Defense Department under an "Interim Guidance" issued by Defense Secretary James Mattis in September. All four judges credited the plaintiffs' arguments that the announcement of the policies and the instruction to the Defense Department to devise a method of implementation had already thrown into turmoil and uncertainty the lives of presently serving transgender individuals as well as transgender people who were anticipating signing up for military service beginning January 1, including transgender students in the nation's military academies anticipating joining the active forces upon graduation, and they had also disrupted plans for sex reassignment surgery for several of the plaintiffs.

Judge Kollar-Kotelly found that none of the individual plaintiffs in the case before her had individual standing to contest the surgery restriction, so she granted the Justice Department's motion to dismiss that part of the complaint in the case before her, but the three other district judges all found that some of the plaintiffs in their cases were directly affected by the surgery ban, and thus denied the Justice Department's motion to dismiss that part of their cases. Ultimately, all four cases are proceeding on an Equal Protection theory. The judges all found that the plaintiffs had standing to bring these constitutional challenges, which were ripe for consideration on the merits.

As to the preliminary injunction motions, all four judges agreed that the high standards for enjoining the implementation of government policies were easily met in these cases. They all agreed that policies treating people adversely because of their gender identity should be reviewed by the same standard as policies that discriminate because of sex: "intermediate scrutiny." Under this standard, the government bears the burden of showing that it has a justification for the policy that is "exceedingly persuasive," "genuine," "not hypothesized," "not invented post hoc in response to litigation," and "must not rely on overbroad generalizations," wrote Judge Bernal in his December 22 opinion, picking up quotes from prior cases.

"Defendants' justifications do not pass muster," Bernal wrote. "Their reliance on cost is unavailing, as precedent shows the ease of cost and administration do not survive intermediate scrutiny even if it is significant. Moreover, all the evidence in the record suggests the ban's cost savings to the government is miniscule. Furthermore, Defendants' unsupported allegation that allowing transgender individuals to be in the military would adversely affect unit cohesion is similarly unsupported by the proffered evidence. These justifications fall far short of exceedingly persuasive." Bernal concluded, as had the other three district judges, that plaintiffs were likely to succeed on the merits of their Equal Protection claim, so it was unnecessary to analyze the other constitutional theories they offered.

He also rejected, as had the other district judges, DOJ's argument that the court should follow the usual practice of according "a highly deferential level of review" to executive branch decisions about military policy. Quoting a Supreme Court ruling from 1981, which said that such deferential review is most appropriate when the "military acts with measure, and not 'unthinkingly or reflexively,'" he observed, "[h]ere, the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban," referring to the RAND Corporation study commissioned by the Defense Department and other internal DoD studies undertaken before then-Secretary Ash Carter announced an end to the transgender ban in June 2016. Judge Bernal agreed with Judge Kollar-Kotelly that "the reasons offered for categorically excluding transgender individuals were not supported and were in fact contradicted by the only military judgment available at the time."

Bernal also easily concluded that blocking implementation of the policy and ending the enlistment ban on January 1 were necessary to prevent irreparable harm to the plaintiffs. This was a determination that allowing the Trump policies to go into effect would cause injuries to transgender individuals that could not be remedied by monetary damages awarded after the fact. The Justice Department argued that "separation from the military would not constitute irreparable harm because it is within the Court's equitable powers to remedy the injury," but Bernal countered, "[t]hese arguments fail to address the negative stigma the ban forces upon Plaintiffs," including the "damaging public message that transgender people

are not fit to serve in the military. There is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender. A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased." Furthermore, federal courts have frequently held that "deprivation of constitutional rights unquestionably constitutes irreparable injury."

As to the "balance of equities" and "public interest" factors that courts weigh in deciding whether to enjoin government action, Bernal found that these weighed in favor of granting the preliminary injunction. DOJ's invocation of "national defense" and "unit cohesion" were not persuasive, in light of the extended studies by DOD that led to its decision to end the ban and to set in motion a change in recruitment polices, originally to implement on July 1, 2017 (which was extended by Secretary Mattis to January 1, 2018).

Judge Bernal quoted from Judge Kollar-Kotelly's opinion: "There is absolutely no support for the claim that the ongoing service of transgender people would have any negative effect on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects." Judge Bernal saw no reason to depart from the analysis by Judges Garbis and Kollar-Kotelly in their decisions to issue preliminary injunctions.

Judge Bernal issued a two-part order. The first part enjoins the defendants "from categorically excluding individuals . . . from military service on the basis that they are transgender." The second part provides that "no current service member . . . may be separated, denied reenlistment, demoted, denied promotion, denied medically necessary treatment on a timely basis, or otherwise subjected to adverse treatment or differential terms of service on the basis that they are transgender."

The Justice Department sought to have the preliminary injunctions stayed, but so far the district judges have not been receptive, so DOJ took the next step of filing appeals in the D.C., 4th and 9th Circuits, and, claiming an "emergency" as January 1 drew near, sought particularly to stay the part of the injunctions that would require lifting the enlistment ban as of that date.

On December 21, a 4th Circuit three-judge panel rejected the motion for stay without explanation. The next day, however, a three-judge panel of the D.C. Circuit issued an opinion explaining its refusal to grant the requested stay. Wrote the D.C. panel, "Appellants have not shown a strong likelihood that they will succeed on the merits of their challenge to the district court's order. As the district court explained, 'the sheer breadth of the exclusion ordered by the [Memorandum], the unusual' and abrupt 'circumstances surround the President's announcement of [the exclusion], the fact that the reasons given for [it] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself,' taken together, 'strongly suggest that Plaintiffs' Fifth Amendment claim is meritorious.'"

The court noted in particular the adverse effect that staying the injunction would have on transgender individuals who have been attending the service academies and anticipating graduating and being accepted into the active service as officers. Indeed, the court suggested, federal law treats students in the service academies as virtual members of the military, so letting the discharge policy go into effect posed an immediate threat to them.

In seeking "emergency" relief, DOJ contended that the Defense Department was not ready to being enlisting transgender people. In an order that Judge Kollar-Kotelly had issued on December 11, denying an emergency stay motion, she pointed out that DOJ was relying on "sweeping and conclusory statements" without "explaining what precisely needs to be completed by January 1, 2018, for Appellants to be prepared to begin transgender accessions."

Totally undermining this emergency motion was the Defense Department's own action preparing to implement the requirements of the preliminary injunction! "With respect to implementation of transgender accession into the military," wrote the D.C. panel, "Appellants did not even inform this court of a Defense Department memorandum issued December 8, 2017, that provides detailed directions and guidance governing 'processing transgender applicants for military service,' directions that the Secretary of Defense's Department commanded 'shall remain in effect until expressly revoked.' That open-ended directive documenting concrete plans already in place to govern accession was issued before the district court ruled on the motion for a stay pending appeal." Thus, the government was tripping over itself in the urgency of DOJ to satisfy the President's demand that his whims be obeyed. And the court was totally unconvinced by DOJ's argument that, in the absence of the preliminary injunction, Secretary Mattis had any discretion to alter the terms set out in Trump's Memorandum. By now, it seems clear that the Defense Department is committed to implementing the change, and that the career Defense bureaucracy thinks little of the president's policy directive to the contrary.

The court noted that "the enjoined accession ban would directly impair and injure the ongoing educational and professional plans of transgender individuals and would deprive the military of skilled and talented troops," so "allowing it to take effect would be counter to the public interest."

"Finally," wrote the court, "in the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them."

In addition to denying the stay, the D.C. panel set out an expedited calendar for addressing DOJ's appeal of the District Court's decision to issue the injunction, directing that oral argument be scheduled for January 27, 2018.

Furthermore, apparently reacting to the maze of unfamiliar acronyms strewn through the papers filed with the court, making them difficult for the judges to process efficiently, "the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statues with widely recognized initials, briefs should not contain acronyms that are not widely known. The announcement late in December that DOJ would drop appeals and litigate these cases on the merits in the district courts may have been prompted, in part by the futility of pursuing a merits appeal of the preliminary injunction within the D.C. Circuit's time frame.

Perhaps the federal judges are too polite to say so, but the clear import of their opinions in this litigation is that President Trump lied in his original tweet when he said that his decision was made "after consultation with my Generals and military experts." To date, neither the president nor anybody speaking for him has actually identified any "military experts" or "Generals" who were consulted before the president decided to take this action. The Defense Department, confronted with the allegations in the complaints about the extended studies that preceded the June 2016 policy announcement by Secretary Carter, has not cited any studies to counter them, giving the lie to the president's statement, in his Memorandum, that the policy change announced on June 21 had been inadequately studied by the prior administration. Secretary Mattis, who was on vacation when the president issued his tweet, was informed that it was happening the night before, according to press reports, but is not said to have been consulted about whether this policy change should be made. Thus, the reference in the court opinions to the lack of "facts" backing up this policy, and the unanimous agreement that the usual judicial deference to military expertise is inappropriate in these cases. ■

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Supreme Court Denies Review in Title VII Sexual Orientation Discrimination Case

By Arthur S. Leonard

The U.S. Supreme Court announced on December 11 that it will not review a decision by a three-judge panel of the 11th Circuit Court of Appeals, which ruled on March 10 that a lesbian formerly employed as a security guard at a Georgia hospital could not sue for sexual orientation discrimination under Title VII of the Civil Rights Act of 1964. The full 11th Circuit denied a motion to reconsider the case on July 10, and Lambda Legal, representing plaintiff Jameka Evans, filed a petition with the Supreme Court seeking review on September 7. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), rehearing en banc denied, (July 6, 2017), cert. denied, 2017 WL 4012214 (U.S. Dec. 11, 2017).

At the heart of Lambda's petition was whether Title VII, which bans employment discrimination because of sex by employers can be interpreted to ban discrimination because of sexual orientation.

At the heart of Lambda's petition was an urgent request to the Court to resolve a split among the lower federal courts and within the federal government itself on the question whether Title VII, which bans employment discrimination because of sex by employers that have at least 15 employees, can be interpreted to ban discrimination because of sexual orientation.

Nobody can deny that members of Congress voting on the Civil Rights Act in 1964 were not thinking about banning sexual orientation discrimination at that time, but their adoption of a general ban on sex discrimination in employment has been developed by the courts over more than half a century to encompass a wide range of discriminatory conduct reaching far beyond the simple proposition that employers cannot discriminate against an individual because she is a woman or he is a man.

Early in the history of Title VII, the Supreme Court ruled that employers could not treat people differently because of generalizations about men and women, and by the late 1970s had accepted the proposition that workplace harassment of women was a form of sex discrimination. In a key ruling in 1989, the Court held that discrimination against a woman because the employer considered her inadequately feminine in her appearance or behavior was a form of sex discrimination, under what was called the sex stereotype theory, and during the 1990s the Court ruled that a victim of workplace same-sex harassment could sue under Title VII, overruling a lower court decision that a man could sue for harassment only if he was being harassed by a woman, not by other men. In that decision for a unanimous court, Justice Antonin Scalia opined that Title VII was not restricted to the "evils" identified by Congress in 1964, but could extend to "reasonably comparable evils" to effectuate the legislative purpose of achieving a non-discriminatory workplace.

By the early years of this century, lower federal courts had begun to accept the argument that the sex stereotype theory provided a basis to overrule

earlier decisions that transgender people were not protected from discrimination under Title VII. There is an emerging consensus among the lower federal courts, bolstered by rulings of the Equal Employment Opportunity Commission (EEOC), that gender identity discrimination is clearly discrimination because of sex, and so the 11th Circuit Court of Appeals ruled several years ago in a case involving a transgender woman fired from a research position at the Georgia legislature.

However, the idea that some variant of the sex stereotype theory could also expand Title VII to protect lesbian, gay or bisexual employees took longer to emerge. It was not until 2015 that the EEOC issued a decision in the Baldwin case concluding that sexual orientation discrimination is a form of sex discrimination, in part responding to the sex stereotype decisions in the lower federal courts. And it was not until April 4 of this year that a federal appeals court, the Chicago-based 7th Circuit Court of Appeals, approved that theory in a strongly worded opinion by a decisive majority of the entire 11-judge circuit bench, just a few weeks after the 11th Circuit panel ruling in the Jameka Evans case. Writing for the 7th Circuit in *Hively v. Ivy Tech Community College*, Judge Diane Wood said, "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'"

The 11th Circuit panel's 2-1 decision to reject Jameka Evans' sexual orientation discrimination claim seemed a distinct setback in light of these developments. However, consistent with the 11th Circuit's prior gender identity discrimination ruling, one of the judges in the majority and the dissenting judge agreed that Evans' Title VII claim could be revived using the sex stereotype theory based on how she dressed and behaved, and sent the case back to the lower court on that basis. The dissenting judge would have gone further and allowed Evans' sexual orientation discrimination claim to proceed under Title VII. The other judge in the majority strained to distinguish this case from the circuit's prior sex stereotype ruling, and would have dismissed the case outright.

The 7th Circuit's decision in April opened up a split among the circuit courts in light of a string of rulings by several different circuit courts over the past several decades rejecting sexual orientation discrimination claims by gay litigants, although several of those circuits have since embraced the sex stereotype theory to allow gay litigants to bring sex discrimination claims under Title VII if they could plausibly allege that they suffered discrimination because of gender nonconforming dress or conduct. Other courts took the position that as long as the plaintiff's sexual orientation appeared to be the main reason why they suffered discrimination, they could not bring a Title VII claim.

In recent years, several federal trial judges have approved an alternative argument: that same-sex attraction is itself a departure from widely-held stereotypes of what it means to be a man or a woman, and thus that discrimination motivated by the victim's same-sex attraction is a form of sex discrimination under Title VII. Within the New York-based 2nd Circuit, several trial judges have recently embraced this view, but three-judge panels of the Court of Appeals consistently rejected it. Some progress was made last spring, however, when a three-judge panel in *Christiansen v. Omnicom Group* overruled a trial judge to find that a plaintiff whose sexual orientation was clearly a motivation for his discharge could bring a sex stereotype Title VII claim when he could plausibly allege behavioral nonconformity apart from his same-sex attraction.

More recently, however, the 2nd Circuit agreed to grant en banc reconsideration to the underlying question and heard oral argument in September in *Zarda v. Altitude Express* on whether sexual orientation discrimination, as such, is outlawed by Title VII. That case involved a gay male plaintiff whose attempt to rely alternatively on a sex stereotype claim had been rejected by the trial judge in line with 2nd Circuit precedent. Plaintiff Donald Zarda died while the case was pending, but it is being carried on by his Estate. Observers at the oral argument thought that a majority of the judges of the full circuit bench were likely to follow the lead of the 7th Circuit and expand the coverage of Title VII in the 2nd Circuit (which covers Connecticut, Vermont and New York). With argument having been held more than two months ago, a decision could be imminent.

Much of the media comment about the *Zarda* case, as well as the questioning by the judges, focused on the spectacle of the federal government opposing itself in court. The EEOC filed an amicus brief in support of the Zarda Estate, and sent an attorney to argue in favor of Title VII coverage. The Justice Department filed a brief in support of the employer, and sent an attorney to argue that the three-judge panel had correctly rejected the plaintiff's Title VII claim. The politics of the situation was obvious: The Trump appointees now running the Justice Department had changed the Department's position (over the reported protest of career professionals in the Department), while the holdover majority at the EEOC was standing firm by the decision that agency made in 2015. As Trump's appointment of new commissioners changes the agency's political complexion, this internal split is likely to be resolved against Title VII protection for LGBT people.

This is clearly a hot controversy on a question with national import, so why did the Supreme Court refuse to hear the case? The Court does not customarily announce its reasons for denying review, and did not do so this time. None of the justices dissented from the denial of review, either.

A refusal to review a case is not a decision on the merits by the Court, and does not mean that the Court approves the 11th Circuit Court of Appeals' decision. It is merely a determination by the Court, which exercises tight control over its docket, not to review the case. Hypothesizing a rationale, one might note that the plaintiff here has not suffered a final dismissal of her case, having been allowed by the 11th Circuit to file an amended complaint focusing on sex stereotype instead of sexual orientation, so she can still have her day in court and there is no pressing need for the Court to resolve the circuit split in her

case. One might also note that Georgia Regional Hospital did not even appear before the 11th Circuit to argue its side of the case, and did not file papers opposing Lambda Legal's petition until requested to do so by the Court.

On October 11, the Supreme Court Clerk's office distributed the Lambda petition and some amicus briefs supporting it to the justices in anticipation of their conference to be held October 27. The lack of a response by Georgia Regional Hospital evidently sparked concern from some of the justices, who directed the Clerk to ask the Hospital to file a response, which was filed by Georgia's Attorney General on November 9, and the case was then put on the agenda for the Court's December 8 conference, at which the decision was made to deny review. The responsive papers argued, among other things, that the Hospital had not been properly served with the Complaint that initiated the lawsuit. Those kinds of procedural issues sometimes deter the Court from taking up a case.

For whatever reason, the Court has put off deciding this issue, most likely for the remainder of the current Term. The last argument day on the Court's calendar is April 25, and the last day for announcing decisions is June 25. Even if the 2nd Circuit promptly issues a decision in the *Zarda* case, the losing party would have a few months to file a petition for Supreme Court review, followed by a month for the winner filing papers responding to the Petition. Even if the Court then grants a petition for review, thus starting the clock running for filing merits briefs and amicus briefs, it is highly likely that once all these papers are submitted, it will be too late in the Term for the case to be argued, so it would end up on the argument calendar for Fall 2018.

Which raises the further question of who would be on the Court when this issue is finally before it? Rumors of retirements are rife, and they center on the oldest justices, pro-LGBT Ruth Bader Ginsburg and conservative but generally pro-gay Anthony Kennedy. If President Trump gets to nominate successors to either of them, the Court's receptivity to gay rights arguments is likely to be adversely affected. ■

Marriage Equality Developments Outside the United States in December Affected Four Countries

By Arthur S. Leonard

There were several significant developments concerning marriage equality outside the United States during December, as two more countries – Austria and Australia – joined the list of those that will be providing full marital rights to same-sex couples while, unfortunately, one country, Bermuda, might be moving off the list, and the ultimate marriage question was postponed, yet again, in Italy.

The Constitutional Court of Austria ruled December 4, Case G 258-259/2017-9, that the rights afforded to registered partners (same-sex) and married spouses (different-sex) had progressed so close to legal equality that any justification for maintaining separate systems must yield to the constitution's equality principle. Austria had established a registered partnership system that went into effect in 2010, open only to same-sex couples. Since then, legislative amendments had moved those partnerships ever closer to marriage in terms of attendant legal rights, the most recent change allowing same-sex couples to jointly adopt children and recognizing the parental status of both partners.

Several cases were pending in the Austrian courts raising the argument that the constitution's equality guarantees mandate equalizing the two institutions — marriage and registered partnerships. The court bowed to this logic, ordering that the government take the necessary steps to allow same-sex couples to marry and to allow different-sex couples to enter into registered partnerships. If the government does not act by December 31, 2018, the new legal regime will go into effect by judicial order the following day.

The handful of same-sex couples that were litigating the issue will be entitled to marry as soon as the court's mandate is published, not having to wait a year. What legislators will do is a puzzle, since negotiations were under way between two right-wing parties over the composition of the new government after recent elections in which no party achieved a majority and the former coalition government was not viable. Since the ruling is based on the constitution, however, it can't be countermanded by Austria's Parliament with procuring approval of a constitutional amendment, so there seemed a possibility that marriage equality will arrive in one year without legislative action.

Austria and Australia joined the list of those that will be providing full marital rights to same-sex couples, while Bermuda might be moving off the list, and the ultimate marriage question was postponed in Italy.

The Austria ruling took on special significance because it was reportedly the first by a European country's highest court to require the government to allow same-sex couples to marry as a constitutional right. Fifteen other countries that are members of the Council of Europe — that is, parties to the European Convention on Human

Rights — now allow same-sex marriage, including Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxemburg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. However, according to Helmut Graupner, the Viennese lawyer who heads Austria's leading LGBTQ legal organization and represents one of the couples whose lawsuits led to court's the ruling, none of those 15 nations acted in response to a constitutional ruling from their highest court.

The next major move came in Australia, where legislative approval and royal assent came swiftly after a national postal survey showed overwhelming support for marriage equality, satisfying the condition set by Prime Minister Malcolm Turnbull for allowing a bill to come to a vote without his Liberal Party exercising party discipline to require support. A detailed account by David Buchanan, an Australian lawyer who has been covering the story for *Law Notes*, follows this article.

Meanwhile, on December 14, the European Court of Human Rights, in what is only a partial victory for same-sex couples, ruled that Italy violated the rights of several same-sex couples who had married in other countries but were rebuffed by municipal authorities when they attempted to register their marriages in their Italian home cities. *Case of Orlandi and Others v. Italy*, Applications Nos. 2643/12; 26742/12; 44057/12 and 60088/12. The marriages in question took place in Toronto and Vancouver, Canada, Berkeley, California, and Amsterdam and The Hague in The Netherlands, as early as 2005 in some cases. At the time of these marriages, Italy had no institution providing a legal status for same-sex couples. Though some local authorities were willing to register them, they were overruled by the national government.

Meanwhile, Italy was being sued by same-sex couples seeking a ruling from the European Court that they were entitled to marry. The court did not offer that remedy, but did notify the Italian government that its failure to provide any legal status for same-sex couples violated the couples' right to respect for private life under Article 8 of the European Convention, a position the Court had previously taken in a case from Austria when it found that instituting registered partnerships providing most marital rights was sufficient to meet a country's obligations under the Convention. By 2014, Italy had complied with this requirement, establishing registered partnerships for same-sex couples after a prolonged legislative debate.

In its December 14 ruling, the European Court had to confront the changing situation in Europe since the earlier rulings. The Court's jurisprudence has, over time, tracked social and legal developments in the countries party to the Convention and broadened the meaning of "respect for private life" as the number of countries recognizing new rights expands. The court concluded that countries should provide at least registered partnerships for same-sex couples. The new ruling observed that a majority of the countries in the Council of Europe now provide some form of legal recognition for same-sex couples, now making that the norm for compliance with Article 8 for signatory countries.

A majority of the court concluded that even before Italy had adopted a partnership recognition law, it had an obligation under Article 8 to accept the registrations of couples who had married abroad, at least as to treat them as registered partners. The court, therefore, awarded monetary damages to those couples who had sought to register their marriages going back as far as a dozen years, even though the was not ready to require Italy to register them as "marriages" rather than "partnerships." The European Court moving to require member countries to allow and recognize same-sex marriages equally must await further developments among the member countries. From the tenor of the ruling, it sounds like that day will come when at least a majority of the signatory countries have advanced to marriage equality.

Even in taking only this half-step, the December 14 ruling was not without controversy on the court. Two judges, from the Czech Republic and Poland, were unwilling to agree that Italy had violated the Convention, refusing to concede that member countries should be obligated to establish any sort of registered partnerships as a matter of Convention obligations. The Czech Republic has a registered partner system for same-sex couples with a limited menu of rights established through national legislation, but Poland's socially conservative government has not gotten that far and resists being dictated to by the European Court.

As the end of 2017 approach, a backwards step seemed possible in Bermuda, a former British colony that is now self-governing but a member of the Commonwealth whose legislation is subject to formal assent from the British monarch. Bermuda may become the first national government to rescind marriage equality.

In May, the country's Supreme Court ruled that same-sex couples are entitled to marry and the government in power at that time complied with the ruling rather than appealing it, so same-sex couples began to marry. Elections held since, however, brought a more socially conservative majority to power. On December 8, the House of Assembly, the lower legislative chamber, voted 24-10 to approve a Domestic Partnership Act, creating a separate category for same-sex domestic partners in lieu of marriage, except for those couples who have already married. The measure then passed the Senate on December 13 by a vote of 8-3. After passing both houses, the measure, as in Australia, required royal assent from the queen's governor-general, John Rankin, an action widely considered to be a mere formality. But LGBTQ rights proponents argued it would be unseemly for royal assent to be given when the UK has marriage equality and royal assent in the other direction was given in Australia. Lobbying efforts in London were aimed at British Foreign Secretary Boris Johnson, urging him to instruct Rankin to withhold royal assent, a move that could cause a constitutional crisis in Bermuda. The local press reported that Rankin was awaiting final instruction from London before acting, and there was speculation that royal assent might be withheld. ■

Rear-view on Australia's Path to Marriage Equality

By David Buchanan

While the popular vote on marriage equality in Australia was an unpleasant experience for Australian queers, there were a few benefits from the fact that a successful national ballot preceded the introduction of legislation for same-sex marriage.

As reported in the December issue (LGBTLN, pp. 471-473), the bill for the Marriage Amendment (Definition and Religious Freedoms) Act 2017 practically sailed through the Senate after introduction there and its passage in the House of Representatives was likewise swift. Unquestionably, the relatively easy passage of the legislation was due mainly to the fact that a significant majority had voted 'Yes' in the preceding postal survey (61.6%) and, more importantly, despite the obstacles there had been an unexpectedly high participation rate (79.5%). It also helped that the government was in the middle of a crisis over a number of its MPs and Senators discovering they had dual citizenship (a constitutional no-no). The government badly needed an emotional, non-party issue to divert attention from its precarious numbers in the lower house, and marriage equality fit the bill. It also helped that it was the end of the sittings just before the Christmas break.

The ultimate vote in the House of Representatives was 4 against and everyone else either in favor or, in the case of a number of far-right MPs, abstaining. There were emotional scenes in the House of Representatives – one gay conservative MP proposed to his partner at the end of his speech. The impetus was such that a full public gallery of SSM supporters responded in good humor to even the opposing speeches, and then to the MPs' votes, with the final vote resulting in the unfurling of rainbow flags by independent and Greens MPs and the public gallery singing a popular Australian song – "We Are All Australian." The most memorable photo was of the straight government MP, an old cattle farmer, who had been publicly pushing for marriage equality for over a decade, to the detriment of his career, joyfully lifting up a left-wing Aboriginal Labor MP who had recently lost her gay son to drugs and suicide, and swinging her around the floor of the chamber.

[O]ne gay conservative MP proposed to his partner[;] a full public gallery of SSM supporters responded in good humor to even the opposing speeches, with the final vote resulting in the unfurling of rainbow flags and the public gallery singing a popular Australian song – "We Are All Australian."

The bill was signed by the Governor-General the next day and the Act commenced on December 9. All same sex marriages entered into overseas were automatically recognized and the papers for the first same sex divorces have already been filed. The mandatory 30-day notice requirement meant that the first same-sex marriages could not occur before January 9, 2018, but two lesbian couples got dispensations and married in December.

The main political tension was over the attempts by right-wing MPs to introduce amendments to "protect religious freedoms." The bill as introduced already exempted religious organizations and celebrants from any obligation to participate in a same-sex marriage. The religious right, however, wanted to go further and provide the same "protection" for the religious baker and florist, and to prevent discrimination against religious schools or churches which taught against SSM. They also wanted to piggy back a generally successful campaign by the right-wing, particularly the Murdoch-owned press, against "Safe Schools," a valuable program for school education about sexuality and gender identity. To blunt the move for amendments, Prime Minister Turnbull established a committee to review the need for enhancement of religious protections, to report at the end of March 2018.

The amendments all failed by significant margins – a typical division was 55 in favor and 87 against. However, a majority of government MPs voted in favor of the amendments, underscoring the divide within the government coalition parties and signaling that there is likely to be a bruising battle over "religious freedom protections" when the PM's committee reports.

An interesting line, however, was reported as coming from a government party meeting room when the amendments were being discussed. A senior Liberal Party (i.e. conservative) minister and marriage equality supporter vigorously attacked one of the amendments proposed by the former Prime Minister, who was the architect of the original plebiscite proposal. The amendment would have inserted into the bill a declaration that nobody should "suffer any adverse effects" from their beliefs about marriage. The minister openly described the proposed declaration as "the pious amendment". In Australian parliamentary-speak, this meant not so much overly religious as unnecessary and superfluous.

Under the legislation previously gendered forms have been changed to be inclusive of all genders. The form to register intent to marry, which must be lodged 30 days before a wedding, previously referred to the bride and bridegroom. The new form refers instead

to Party 1 and 2, with male, female and x options for gender. The x gender option is for intersex and "unspecified" gender. Marriage certificates will similarly drop bride and groom in favor of the gender-neutral Party 1 and Party 2.

THE POLITICAL CONSEQUENCES

There have, of course, been political consequences of the passing of the marriage equality law. The established churches lost. Undoubtedly, their firepower was diminished by the extensive and scarifying hearings over recent years of the national Royal Commission into Institutional Child Sex Abuse which reported at the end of 2017. A consequence of the work of the Royal Commission has been the seemingly endless parade of clergy and former clergy in the criminal courts for historical child sex abuse offences.

In party political terms, as a long-time supporter of marriage equality the Prime Minister has gained points. The fact that the postal survey (as the plebiscite became) was loathed by the LGBTIQ communities has been forgotten by the commentators. The government coalition parties gained from their Nixon-goes-to-China moment. A respected survey of economic sentiment attributed the recent rise in consumer confidence in part to the "feel good" factor said to have been generated by the result of the survey and by the passing of the legislation. The progressive Labor Party opposition, on the other hand, gained no kudos despite having a policy to vote in favor of marriage equality, despite opposing the legislation for a plebiscite (see LGBTLN p 471 under "plebiscite") and despite voting as a bloc against the "religious protections" amendments. Those with long memories have not forgotten that Labor supported the change in 2004 to the Marriage Act by a previous conservative government to outlaw same-sex marriage and that, when subsequently in government in 2007-2013, Labor had done nothing to reverse that position. When in office, Labor had balked at marriage equality and instead amended hundreds of statutes and regulations so that same-sex couples were treated the same as opposite-sex couples in areas like tax, social security and other entitlements. The political consequence though was to have removed concrete arguments in favor of marriage equality off the table, a point made regularly during the postal survey campaign by the religious right.

The more cynical commentators have suggested that MPs applauding each other at the end result had little reason to be pleased with themselves given the "pathetic parlor games" that particularly the right-wing had played for so many years to prevent the issue coming to a vote and given the other, serious issues – one of them being the MPs' constitutional eligibility issue – remaining unaddressed.

THE FIGHT TO COME

For the LGBTIQ communities in Australia, 2018 poses a renewal of the battle with the religious right wing. The membership of the PM's committee on "religious freedom protections" includes no friends of the LGBTIQ communities. As previously reported (LGBTLN, December 2017, p 473), Australia has poor human rights legal protections: no bill or charter of human rights and only thin legislative protections. The fact that the Constitution protects only against national (not state) legislation establishing any religion or imposing any religious test for office is being exploited by the right-wing to argue that citizens need protection to practice their religion and religious organizations need protection to propagate their faith.

Labor has gone silent. Discouragingly, in New South Wales (Australia's most populous state, capital: Sydney), the state Labor opposition leader came out after Christmas in an interview with a far-right commentator saying that the Safe Schools program is "dead." By contrast, the Greens are taking the opportunity to argue for Australia to enact a human rights bill covering the gamut of grounds in the International Covenant on Civil and Political Rights, not just religious freedom protections. ■

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Supreme Court Denies Certiorari Petition in Texas Employee Benefits Case

By Arthur S. Leonard

On December 4 the U.S. Supreme Court rejected without explanation a petition from the City of Houston seeking review of the Texas Supreme Court's June 30 ruling in *Pidgeon v. Turner*, 60 Tex. Sup. Ct. J. 1502, 2017 WL 2829350 (June 30, 2017), which had cast doubt on whether the City was obligated under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to provide same-sex spouses of Houston employees the same employee benefits offered to different-sex spouses.

A decision by the Supreme Court to deny review of a case is not a ruling on the merits of the case. It means that there were not at least four members of the Court, the number required under the Court's rules to grant a petition for review, who thought the Court should intervene in a lawsuit that is ongoing in the state trial court. The Court's action should not be construed as a decision approving the Texas Supreme Court's ruling. It is consistent with the Court's tight control of its docket, under which the Court sharply limits the number and type of cases that it takes up for plenary review and rarely inserts itself into a case that has not received a final disposition in the lower courts.

[T]he Court sharply limits the number and type of cases that it takes up for plenary review and rarely inserts itself into a case that has not received a final disposition in the lower courts.

Retired Texas Supreme Court Justice Wallace B. Jefferson and his law firm, Alexander Dubose Jefferson & Townsend LLP, filed the petition on behalf of Mayor Sylvester Turner and the City of Houston on September 15, several weeks after Lambda Legal had filed a new federal district court lawsuit on behalf of some Houston employees whose same-sex spouses are receiving benefits and who fear losing them in the state court litigation. Lambda's suit, *Freeman v. Turner*, No. 4:17-CV-2448 (S.D. Tex.), was quickly dismissed in an unpublished decision by the federal trial judge as not "ripe" for review because the plaintiffs were receiving their benefits and it was likely, in the judge's view, that the state trial court would rule that the benefits were legal in light of the current state of the law.

The Texas Supreme Court's June 30 decision, which reversed a ruling by the Texas Court of Appeals, was not a final disposition of that case, instead sending it back to the trial court in Harris County for a hearing on the original claim by plaintiffs Jack Pidgeon and Larry Hicks, Republican anti-gay activists, that the City had unlawfully extended employee benefits eligibility to same-sex spouses of City employees in 2013.

Pidgeon and Hick first started litigating against the City when then-Mayor Annise Parker extended benefits eligibility by executive action after receiving an opinion from the city attorney about the impact of the U.S. Supreme Court's June 26, 2013, ruling, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), which struck down part of the federal Defense of Marriage Act. Pidgeon and Hicks argued that under Texas statutory and constitutional law at the time, it was illegal for the City to extend the benefits, as the U.S. Supreme Court's *Windsor* decision, a 5th Amendment ruling, did not address the constitutionality of state laws banning same-sex marriage.

Pidgeon and Hicks had a plausible argument in 2013, enough to persuade the trial judge to issue a preliminary injunction against the City, which promptly appealed. The Court of Appeals sat on the appeal for a few years, waiting for the storm of marriage equality litigation in Texas and throughout the country to play out. Less than a year after the *Windsor* decision, a federal trial judge in San Antonio ruled in *DeLeon v. Perry* that the state's ban on same-sex marriage was unconstitutional, but the state's appeal languished in the 5th Circuit Court of Appeals until after the U.S. Supreme Court decided the *Obergefell* case on June 26, 2015. A few days later the 5th Circuit affirmed the trial court's ruling invalidating the Texas laws banning same-sex marriages, in *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). Then the Texas Court of Appeals reversed the preliminary injunction, instructing the trial court to decide the case in accord with the 5th Circuit's ruling. The City then resumed providing the benefits, which it has continued to do.

Undaunted, Pidgeon and Hicks asked the Texas Supreme Court to review the Court of Appeals decision, arguing that the Court of Appeals erred by instructing the trial court to follow the 5th Circuit's ruling because, as a technical matter, state courts are not bound by federal court of appeals rulings. (The state courts are, of course, bound by U.S. Supreme Court rulings on questions of federal constitutional law.) Pidgeon and Hicks argued, in effect, that the City was still bound to abide by the Texas state law banning recognition of same-sex marriages for purposes of public employee benefits, which had never been invalidated in the state

courts and, they argued, was technically not declared unconstitutional by the U.S. Supreme Court, whose opinion in *Obergefell* only directly struck down state marriage bans in the states of the 6th Circuit, Ohio, Michigan, Kentucky, and Tennessee.

After lengthy deliberation, the Texas Supreme Court announced in September 2016 that it would not consider Pidgeon and Hicks' appeal. This prompted a fervent campaign by Governor Greg Abbott and other elected officials to persuade the court to change its mind, stimulating thousands of Texans to flood the court with demands that it reverse the Court of Appeals decision. The court ultimately bowed to this pressure, granted review, and issued its June 30 decision.

The Texas Supreme Court agreed that the Texas Court of Appeals should not have treated the 5th Circuit's decision as binding on the trial court, and opined further that the *Obergefell* decision was just about whether same-sex couples could marry as a question of federal constitutional law, not what benefits they were entitled to if they married. This was palpably wrong, as shown by another Supreme Court ruling, just days prior, in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), a case from Arkansas involving parental names on birth certificates, in which the Court made clear that married same-sex couples are entitled to the "full constellation of rights" that go with marriage under the *Obergefell* decision. Indeed, the *Obergefell* decision mentioned health insurance as among the rights denied same-sex couples who could not marry.

At present Pidgeon and Hicks' lawsuit is still pending in the state trial court and the same-sex spouses of Houston employees are receiving their equal benefits, so it is likely that the Supreme Court justices saw no pressing reason to add this case to their docket. Perhaps they agree with the opinion by U.S. District Judge Vanessa D. Gilmore, who, in dismissing Lambda's lawsuit, predicted that the state trial court, being bound to follow U.S. Supreme Court precedent in *Obergefell* and *Pavan*, will ultimately reject the challenge to the benefits. ■

Iowa Supreme Court Finds Refusal to Disqualify a Juror with Admitted Anti-Gay Bias Is (Barely) an Abuse of Discretion, but Harmless Error Nonetheless

By Ryan Nelson

In *Iowa v. Jonas*, 2017 WL 5990018 (Iowa Dec. 1, 2017), the Iowa Supreme Court considered the appeal of a gay man who alleged that he should be granted a new trial because he was forced to use a peremptory strike on a potential juror who the trial court refused to dismiss for cause despite admitting to having bias against gay men.

Defendant-Appellant Stephen Jonas was arrested in 2014 after another man, Zachery Paulson, was found dead in an Iowa parking lot. About a week beforehand, witnesses claimed to have seen Paulsen rebuffing Jonas's attempts to hug and kiss him, although Jonas later claimed that the hugging and kissing were mutual. After Jonas texted Paulson for a week without response, Jonas met Paulson at a bar with the intent to confront him about the incident. The two then left the bar for a parking lot where a fight ensued between them. Jonas claimed that Paulson struck him with a hammer, forcing Jonas to stab Paulson multiple times in self-defense before fleeing. Paulson eventually died from the stab wounds, and Jonas was arrested and tried.

At *voir dire*, Jonas's trial counsel (an unidentified public defender) asked a slate of potential jurors whether the defendant being gay would "in any way influence your ability to be fair and impartial if you were selected to be a juror in this case." One potential juror answered, "yes," explaining that he "would try to keep an open mind, but [he] would have a hard time overlooking it" and that the defendant "probably would have better jury selection than myself." In response to further questioning about whether there would be "bias in the back of his mind," the potential juror responded, "I think there will be." However, the potential juror also stated, "I would try to be fair" and, when asked by Iowa District Court Judge Paul D. Scott whether he would be able to follow what the law says if instructed, the potential juror responded, "Yes." Jonas's trial counsel moved to strike the juror for cause, but Judge Scott permitted the juror to remain, forcing Jonas's trial counsel to use one of its ten available peremptory strikes. Ultimately, Jonas used all of his peremptory strikes and was later convicted of second-degree murder.

On appeal, Jonas (represented by Mark C. Smith and Robert P. Ranschau of the Office of the State Public Defender) argued, *inter alia*, that he should get a new trial because he was forced to use one of his peremptory strikes on this potential juror who Jonas claimed should have been struck for cause. In response, the State of Iowa (represented by State Attorney General Thomas J. Miller, Assistant State Attorney General Linda J. Hines, County Attorney John Sarcone, and Assistant County Attorney Olu A. Salami) argued that the trial court did not abuse its discretion in refusing to strike the juror for cause and, even assuming arguendo that it had, doing so was harmless error that should not result in a new trial because Jonas failed to show any bias in the empaneled jury that ultimately convicted him.

Iowa Supreme Court Justice Brent R. Appel, writing for the four-justice majority, first agreed with Jonas that the trial court unlawfully abused its discretion in refusing to disqualify the juror for cause. In reaching this conclusion, the majority relied heavily on the U.S. Supreme Court case of *Morgan v. Illinois* which held that, when actual bias is stated (as it was by the juror at issue here), generalized later promises to follow the law are insufficient to avoid disqualification. The three-justice concurrence disagreed with the majority on this point, arguing that Judge Scott did not abuse his discretion by allowing the potential juror to remain despite his bias toward gay men. Interestingly, the three

justices concurring here are the same three justices appointed to the Court in 2011 by Gov. Terry Branstad (R) after three former justices were ousted by popular vote in November 2010 in what was broadly seen as a referendum on the Iowa Supreme Court's 2009 decision striking down the state's gay marriage ban as unconstitutional. In other words, the only three justices to get their seats because of Iowa voters' bias against gay marriage are the same three justices to find that a trial court doesn't abuse its discretion for failing to disqualify a juror with admitted anti-gay bias in a case with a gay defendant.

Subsequently, the majority proceeded to a question that has split state courts around the nation: does a trial court's error in unlawfully failing to disqualify a potential juror mandate a new trial, where the defendant was forced to use all of his peremptory strikes? In answering that question, the court stated that a defendant who uses all of his peremptory strikes, proves that the trial court unlawfully failed to disqualify a juror for cause, but fails to show actual prejudice (as Jonas had failed to do here), "must specifically ask the court for an additional strike of a particular juror after his peremptory challenges have been exhausted." Absent such a request, the defendant would be incentivized to remain quiet despite believing that the empaneled jury is fair only to cry foul after being convicted. Applying that rule here, the court denied Jonas's request for a new trial as he had not asked to strike any empaneled juror.

The *Jonas* case serves as an unfortunate reminder that a juror's explicit bias against gay people can just barely (4-3) be grounds for a finding that it was an abuse of discretion to allow such a juror to hear the case of an accused gay man. *Jonas* also serves as an interesting development in the split in authority among the states asking whether harmless error in unlawfully failing to disqualify a potential juror mandates a new trial when doing so forces the defendant to use all of his peremptory strikes. ■

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Vermont Supreme Court Creates "Targeted Exception" Giving Individuals Without Biological or Legal Ties to a Child Standing in Custody Cases

By Matthew Goodwin

In a decision it characterized as "put[ting] Vermont in line with the modern trend", the Vermont Supreme Court in *Sinnott v. Peck*, 2017 Vt. LEXIS 133, 2017 WL 5951846 (Vt. Dec. 1, 2017), crafted a set of guideposts for lower courts to use in deciding whether to allow an individual to seek custody of a child where that individual lacks biological or legal ties to the child.

The 4-1 decision, opinion by Justice Beth Robinson, reversed in part the trial court's dismissal for failure to state a claim of a lesbian woman's custody petition to establish parentage of the two children legally adopted by her domestic partner. As to one child, M.P., the court reversed and remanded finding plaintiff, Sarah Sinnott, could pursue her custody claim because she alleged "that she and defendant mutually agreed to bring M.P. into their family and to raise her together as equal co-parents." The same was not true as to a second child, G.P. and so as to that child the court dismissed Sinnott's petition.

[Plaintiff] could pursue her custody claim because she alleged "that she and defendant mutually agreed to bring [the child] into their family and to raise her together as equal co-parents."

The following facts were alleged by Sinnott in her petition and, for the Court's purposes in reviewing the trial court's dismissal were deemed to be true.

Sinnott and the defendant, Jennifer Peck, began their relationship in 2003 and, until 2010, "lived together, shared meals, vacationed together, and cared for each others' aging parents. When their relationship began, [Peck] was the adoptive mother of a one-year-old child, G.P. The parties raised G.P. as an intact family. From the time she could talk, G.P. referred to [Sinnott] as 'Mom,' or 'Mama.'"

About a year into their relationship, when G.P. was two, the parties made a joint decision to adopt another child together. Because the parties wanted to adopt another infant from G.P.'s home country, Guatemala, only Peck worked with the agency as the adoptive parent. Otherwise, from the time M.P. came home with the couple in 2006, Sinnott "fulfilled the role of a parent to the children in every aspect: she took maternity leave to be the primary caretaker . . . and when she went back to work part-time, she took M.P. with her; the children called her 'Mom,' and Peck referred to her as the children's mother to friends, teachers, doctors, family, and acquaintances . . . she took care of the children's daily needs . . . plaintiff took the primary parenting role in the children's lives."

A "series of life complications" prevented the parties from entering into a civil union and kept them from completing a second-parent adoption of the children. Nonetheless, when the couple first separated in 2010,

they shared custody pursuant to an agreement that the children would be with each parent half of the time. This agreement was communicated to the children's school and the parties undertook family counseling to work on co-parenting. Both parents financially supported the children.

For unspecified reasons, in 2013 Peck began limiting Sinnott's access, sometimes for weeks at a time, and told the school not to have contact with Sinnott about the children. Sinnott maintained some access apparently and talked and texted with the children. Crucially, the court ruled that the disruption in the access schedule caused by Peck has been harmful to the children.

Sinnott filed her lawsuit in August of 2015 in which she alleged she was the "'de facto and intended mother of the children.'" The trial court *sua sponte* dismissed the case for want of jurisdiction relying on the Supreme Court's reluctance to "expand the definition of 'parent' in cases of so-called 'third-party parents' where there has been no adoption, marriage, or civil union." Sinnott then appealed, Peck filed no brief in response, and the court had no record of Peck's position as to Sinnott's parental status on appeal.

At the outset, the court noted this was the third such case it was asked to decide in the last decade and urged the Vermont Legislature to address "whether an individual who is not biologically related to a child, has not legally adopted [a] child, and is not married to [a] child's legal parent may be the child's legal parent."

The court held that parental status sufficient to seek custody or visitation was available to individuals without legal or biological ties to a child "in a narrow class of cases in which the parents intended to bring a child into their family and raise a child together, and in fact did so." In applying this rule to Sinnott's case, the court observed in relevant part that Sinnott and Peck " . . . jointly decided to bring the second child into their family through adoption; that they mutually intended that [Sinnott] would co-parent both children; that both parents acted and held themselves out to each other, the children, and the outside world – including doctors, teachers, family, and acquaintances – as the children's parents; that they mutually intended for [Sinnott] to adopt both children but failed to complete a second-parent adoption later only because life presented more urgent demands . . . "

The rule as declared by the court was in the majority's view a logical extension of a line of Vermont cases stretching back to 1993 which the court treated in great detail. The court first pointed to *In re B.L.V.B*, 160 VT 368, 628 A.2d 1271 (1993), which made second-parent adoptions available to unmarried, same-sex partners, as the court's first recognition "that in certain cases a legal status between parent and child may arise from the mutual agreement and joint conduct of the child's legally recognized parent even without a connection through marriage or biology."

The court cited *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951, for the proposition Vermont's parentage statute, lacking a definition of parent, was "'irrelevant' to determining whether [a] nonbiological mother . . . " was a legal parent to a child in common with a former same sex partner. The *Miller-Jenkins* court " . . . identified a series of factors that supported its conclusion, including not only the parties' civil union at the time of the child's birth, but also their mutual intention that they would co-parent the child, the nonbiological mother's participation in the decision that the biological mother would give birth through donor insemination, the fact they both treated the nonbiological mother as the child's parent, and the fact there was no other person claiming to be the child's parent."

In *Moreau v. Sylvester*, 2014 VT 31, 95 A.3d 416, the court rejected a parentage claim by a father who was not married to the children's birth mother nor biologically related to them, but who co-parented those children for many years. Reconciling *Moreau* with *Sinnott*, the court noted the father in *Moreau* failed to allege that he and the mother agreed in advance to bring the children into their family and raise them together and, more importantly, the children had a biological father who had standing.

The court in *Sinnott* also cited with approval the recent New York Court of Appeals decision in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 31 N.Y.S. 3d 89 (2016) and the Massachusetts Supreme Judicial Court's decision in *Partanen v. Gallagher*, 475 Mass. 632 (2016). The court held both of these cases were persuasive authority that their "framework focusing on pre-conception agreement of the parents would promote the welfare of children without undermining parental rights.

Judge Dooly dissented on the grounds that only the Legislature and not the court could define who is a parent or has standing to claim the same. The dissent characterized the judicial process as deficient for resolving the disputes of couples like Sinnott and Peck and notably remarked that the court's test "leaves all the standing decisions to retrospective litigation" which would do little if anything to further the best interests of children. The dissent was also troubled by the procedural posture of the case as it came before the court; specifically, that the decision of the majority was issued *ex parte* with no participation by Peck.

The majority saw the dissent's "suggestion that needed reform in this area must come from [only] the Legislature" as an impermissible abdication of the court's responsibility to families unless and until the Legislature filled the statutory void.

Jennifer L. Levi from GLBTQ Legal Advocates & Defenders (GLAD) of Boston, Massachusetts, argued for plaintiff Sinnott. Jenifer Wagner of the National Center for Lesbian Rights submitted and argued as Amicus Curiae. ■

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Oregon Court of Appeals Rules Against Baker in "Gay Wedding Cake" Case

By Arthur S. Leonard

A unanimous three-judge panel of the Court of Appeals of Oregon affirmed a ruling by the Oregon Bureau of Labor and Industries (BOLI) that Melissa and Aaron Klein, doing business as Sweetcakes by Melissa, violated the state's public accommodations law by refusing to provide a wedding cake for Rachel and Laurel Bowman-Cryer. *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507, 2017 WL 6613356, 2017 Or. App. LEXIS 1598 (Or. Ct. App. Dec. 28, 2017). The ruling upheld an award of $135,000 in damages to complainants, rejecting the Kleins' argument that this application of the state law to them violates their 1st Amendment rights. However, the court overruled the BOLI's determination that the Kleins' public remarks in connection with this case had also violated a section of the law forbidding businesses to announce in advance that they will discriminate in the future. Judge Chris Garrett wrote for the panel. This case is, for all practical purposes, a virtual clone of the Colorado case, *Masterpiece Cakeshop*, which was argued at the U.S. Supreme Court on December 5, 2017.

Rachel and Laurel first met in 2004 and decided to marry in 2012. Rachel and her mother, Cheryl, went to a Portland bridal show as part of their wedding planning, and visited Melissa Klein's booth at the show. Sweetcakes by Melissa had designed, created and decorated a wedding cake for Cheryl's wedding two years before, and Rachel and Cheryl told Melissa that they would like to order a cake from her. A cake-testing appointment was set up for January 17, 2013. Rachel and Cheryl visited the bakery shop, in Gresham, for their appointment. Melissa was at home performing child care, so the appointment was with her husband and co-proprietor, Aaron. During the tasting, Aaron asked for the names of the bride and groom, and was told there were two brides, Rachel and Laurel. "At that point," wrote Judge Garrett, "Aaron stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of his and Melissa's religious convictions. Rachel began crying, and Cheryl took her by the arm and walked her out of the shop. On the way to their car, Rachel became 'hysterical' and kept apologizing to her mother, feeling that she had humiliated her."

In their car, Cheryl assured Rachel that they would find somebody else to make the cake. After driving a short distance, Cheryl turned back and re-entered the bakery by herself to talk with Aaron. "During their conversation," wrote Judge Garrett, "Cheryl told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.' In response, Aaron quoted a Bible passage from the Book of Leviticus, stating, 'You shall not lie with a male as one lies with a female; it is an abomination.' Cheryl left and returned to the car, where Rachel had remained, 'holding [her] head in her hands, just bawling." Cheryl telling Rachel that Aaron had called her an "abomination" didn't make things any better. Rachel later stated that "it made me feel like they were saying God made a mistake when he made me, that I wasn't supposed to be, that I wasn't supposed to love or be loved or have a family or live a good life and one day go to heaven." When they got home and told Laurel what had happened, she recognized the "abomination" reference from Leviticus and "felt shame and anger. Rachel was inconsolable, which made Laurel even angrier." It was Laurel who filed an online complaint with the Oregon Department of Justice, but later she filed a complaint with BOLI, as did Rachel.

News of the complaints generated a wave of media attention, which resulted in death threats and adverse attention to Rachel and Laurel as well as to the Kleins. Ultimately, BOLI's investigation concluded that the Kleins violated two sections of the public accommodations law, one forbidding discrimination by businesses in providing goods and services because of the sexual orientation of customers, the other, based on statements that the Kleins had made about the case, as well as a sign they posted in their bakery, that they violated a provision making it unlawful for a business to announce its intent to discriminate against customers because of their sexual orientation. An administrative law judge (ALJ) sustained the first but not the second, finding that the comments in question related to the Klein's position on this case and was not a general announcement of intent to discriminate in the future. At the agency level, however, BOLI, disagreeing with the ALJ on this point, ruled that both provisions had been violated, and the Kleins appealed to the Court of Appeals. The ALJ and BOLI agreed on an award of $135,000 in damages to Rachel and Laurel, to compensate them for the mental, emotional or physical suffering sustained because of the discrimination. The agency rejected a claim for additional damages for mental, emotional or physical suffering stemming from the media and public response to their filing of the discrimination charges against the Kleins.

The first issue for the court was to determine whether the Kleins were correct in arguing that they had not violated the statute because, as they contended, their business does not discriminate against people because of their status as gay, but rather, in this instance, was declining to "facilitate

the celebration of a union that conveys a message about marriage to which they do not subscribe and that contravenes their religious beliefs." The court rejected this attempt to skirt the issue, commenting that "there is no reason to believe that the legislature intended a 'status/conduct' distinction specifically with regard to the subject of 'sexual orientation,'" and noted the state's passage of the Oregon Family Fairness Act, which specifically provides that same-sex couples should be entitled to the same rights and privileges of different-sex couples. "The Kleins have not provided us with any persuasive explanation for why the legislature would have intended to grant equal privileges and immunities to individuals in same-sex relationships while simultaneously excepting those committed relationships from the protections of" the public accommodations law. The court pointed out that "under the distinction proposed by the Kleins, owners and operators of businesses could continue to oppress and humiliate black people simply by recasting their bias in terms of conduct rather than race. For instance, a restaurant could refuse to serve an interracial couple, not on account of the race of either customer, but on account of the conduct – interracial dating – to which the proprietor objected. In the absence of any textual or contextual support, or legislative history on that point, we decline to construe [the law] in a way that would so fundamentally undermine its purpose."

Indeed, wrote the court, "The Kleins refused to make a wedding cake for the complainants precisely and expressly *because of* the relationship between sexual orientation and the conduct at issue (a wedding). And, where a close relationship between status and conduct exists, the Supreme Court has repeatedly rejected the type of distinction urged by the Kleins." Judge Garrett cited the Supreme Court's 2010 ruling, upholding the University of California-Hasting's refusal to extend official recognition to a Christian Legal Society chapter whose membership policies excluded gay people, in which Justice Ruth Bader Ginsburg, writing for the Court, made this point, as well as *Lawrence v. Texas*, where Justice Kennedy wrote for the Court that making gay conduct a crime was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."

Turning to the constitutional challenges, the court rejected both the free speech and free exercise of religion arguments. For one thing, the court found, while conceding there would be an element of artistic expression and creativity in the process of making a wedding cake, this did not present the type of free speech issues that would merit strict scrutiny from the court. Rather, the court found, the Supreme Court's public accommodations jurisprudence treated such laws as Oregon's as neutral laws intended to achieve a legitimate purpose of extending equal rights to participate in the community, and not specifically targeted on particular political or religious views held by a particular business person. The Kleins premised their arguments largely on the Supreme Court's *Hurley* (St. Patrick's Day Parade) and *Dale* (Boy Scouts) cases, in which the Court held that application of a public accommodations law to require an organization or association to include gay people would have to yield to the free expression rights of the organization. They also focused on the famous flag salute cases and other cases in which the Supreme Court ruled that the government cannot compel private individuals to express a message dictated by the government.

Wrote Judge Garrett, "We must decide whether the Kleins' cake-making activity is sufficiently expressive, communicative, or artistic so as to implicate the First Amendment, and, if it is, whether BOLI's final order compelling the creation of such expression in a particular circumstance survives First Amendment scrutiny." Reviewing the way the Kleins produced customized wedding cakes for their customers, the court found, "the Kleins' argument that their products entail artistic expression is entitled to be taken seriously. That being said, we are not persuaded that the Kleins' wedding cakes are entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression. To establish that their wedding cakes are fundamentally pieces of art, it is not enough that the Kleins *believe* them to be pieces of art. For First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others. Here, although we accept that the Kleins imbue each wedding cake with their own aesthetic choices, they have made no showing that other people will necessarily experience *any* wedding cake that the Kleins create predominantly as 'expression' rather than as food." Further, the court found that it would be a different case "if BOLI's order had awarded damages against the Kleins for refusing to decorate a cake with a specific message requested by a customer ('God Bless This Marriage,' for example) that they found offensive or contrary to their beliefs." Then an articulated message would be conveyed, and the First Amendment issue would be much stronger. Responding to the Kleins' concern that the wedding cake communicates a "celebratory message" about the wedding, which they did not wish to communicate, the court pointed out that "the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute that message to the Kleins." In short, wedding guests will not respond to seeing the cake at the reception by thinking that the baker is "celebrating" or "approving" this wedding. There is nothing in the law that requires the Kleins to formally endorse same-sex marriages.

However, having found that there is at least some First Amendment free speech interest involved, the court applied "intermediate scrutiny" and found that the state had a compelling interest "both in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service. That interest is no less compelling with respect to the provision of services for same-sex weddings," wrote Garrett. "Indeed,

that interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry," as established in *Obergefell*. The court concluded that "any burden imposed on the Kleins' expression is no greater than essential to further the state's interest," pointing out that "BOLI's order does not compel the Kleins to express an articulable message with which they disagree . . . . Given that the state's interest is to avoid the 'evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity,'" wrote Garrett, quoting from a prior Oregon Supreme Court case, "there is no doubt that interest would be undermined if businesses that market their goods and services to the 'public' are given a special privilege to exclude certain groups from the meaning of that word."

Turning to the free exercise of religion point, the court noted that the Supreme Court held in *Employment Division v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribed (or prescribes) conduct that his religion prescribes (or proscribes)." The "incidental effect" on religion of such laws does not violate the 1st Amendment. The court devoted most of its analysis on this point to distinguishing cases offered by the Kleins as exceptions to this rule. All of those cases involved special circumstances where it could be shown that although the laws in question were neutral on their face, they had been intended by the legislature to apply to particular religious practices and were thus not really "neutral to religion." The Kleins also pushed a "hybrid rights" theory, mentioned in passing in the *Smith* case, under which when a party's claim arises under two different constitutional rights guarantees (in this case speech and religious exercise) the burden of justification on the state should be raised to strict scrutiny. The court observed that apart from the passing mention in *Smith* that concept had not been developed by the Supreme Court, had been rejected by many other courts, and specifically had never been adopted by the Oregon Supreme Court in construing the state's constitution.

The court rejected the Kleins' arguments that recognizing a limited or narrow exception for businesses whose owners had religious objections to same-sex marriage would have only a "minimal" effect on "the state's antidiscrimination objectives," pointing out that "those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption. The Kleins do not offer a principled basis for limiting their requested exemption in the manner that they propose, except to argue that there are 'decent and honorable' reasons, grounded in religious faith, for opposing same-sex marriage, as recognized by the United States Supreme Court in *Obergefell*. That is not in dispute. But neither the sincerity, nor the religious basis, nor the historical pedigree of a particular belief has been held to give a special license for discrimination," wrote Garrett.

The court rejected the Kleins' claim for free speech and religious exemptions under the Oregon Constitution, pointing out that they had not advanced any additional arguments peculiar to Oregon constitutional jurisprudence that would justify going beyond the federal constitutional analysis in this case. The court also rejected the argument that BOLI's ruling should be set aside because BOLI's Commissioner had made public comments about the case before voting to affirm the ALJ's ruling and award the damages. The court found that the commissioner's comments "fall short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial." The court rejected the Kleins' objection to the damage award, finding that the ALJ and BOLI had scrupulously limited the award to damages flowing from the Kleins' discrimination and had an adequate basis in the trial record to award the amounts in question, which were not out of line with awards in other cases.

However, the court concluded that BOLI erred by failing to affirm the ALJ's conclusion that the Kleins had not violated a section of the law that forbids any business "to publish, circulate, issue or display . . . any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of. . . sexual orientation." The court, agreeing with the ALJ but not with BOLI, found that the Kleins' public comments about their determination to defend this case and to adhere to their religious beliefs did not specifically violate this provision. Indeed, the Kleins were careful in wording the sign they put up at their bakery and in their comments on Facebook and in the press to avoid stating that they would discriminate because of a customer's sexual orientation. (Indeed, their position throughout this case is that they were not engaging in such discrimination.) The court was not willing to interpret this section of the statute as exposing businesses to additional liability for stating publicly their belief that their past action had not violated the law. Since BOLI's calculation of damages awarded to Rachel and Laurel did not include any amount for violation of this section, however, the reversal of this part of the decision did not require any reduction in damages.

The Kleins were represented in this appeal by attorneys from several law firms, some specializing in championing socially conservative causes, so it would not be surprising to see them file an appeal with the Oregon Supreme Court. The Oregon attorney general's office represented BOLI. Lambda Legal filed an amicus brief on behalf of Rachel and Laurel. A long list of liberal religious associations and organizations joined in an amicus brief filed by pro bono attorneys, and amicus briefs were filed by the ACLU and Americans United for Separation of Church and State. ■

Arizona Court of Appeals Upholds Same-Sex Couple's Partially-Contradictory Negotiated Child Visitation Agreement

By Bryan Johnson-Xenitelis

The Court of Appeals of Arizona, Division 2, has upheld Pima County Superior Court Judge James E. Marmer's ruling enforcing all but one provision, held to be ambiguous, of the negotiated visitation agreement for the child of an unmarried now-separated same-sex couple, in *Cervantes v. Goldman*, 2017 Ariz. App. Unpub. LEXIS 1804, 2017 WL 5593483 (Ariz. Ct. App. Nov. 21, 2017)(not for publication).

Veronica Cervantes and Larissa Goldman had been in a long-term committed relationship since at least 1998. Goldman gave birth to a child in 2007, for whom they both held themselves out to be parents, but the couple separated in August 2014. Cervantes and her relatives were initially permitted to visit the child, but less than a year later, Goldman told members of Cervantes's family that they and Cervantes "would never see [the child] again."

Cervantes initiated proceedings pursuant to the Arizona Revised Statutes for third-party visitation rights, but prior to any hearings on the merits, Goldman and Cervantes submitted to the court a written agreement regarding visitation which contained a detailed school-year visitation schedule. The court set a hearing to determine a summer visitation schedule. Prior to that hearing, Goldman requested an emergency order limiting Cervantes's visitation rights based on a provision of the agreement which required following the visitation recommendation of the child's therapist. Cervantes argued that this provision applied only to summer visitation. The trial court found that the section appearing to allow the therapist to modify all visitation was at odds with the detailed school-year visitation schedule, and after a two-day evidentiary hearing, held that the section was ambiguous, severed it from the agreement, and upheld the rest of the agreement. Goldman had also petitioned requesting that Cervantes's visitation be completely terminated on the basis that she had violated the agreement by visiting in excess of the therapist's recommended visitation time, but the court denied Goldman's petition and granted Cervantes visitation of one weekend per month. Cervantes appealed and Goldman cross-appealed, but Cervantes eventually abandoned her appeal.

Despite Cervantes's abandonment, Judge Philip Espinosa of the Arizona Court of Appeals, Division Two, (in an opinion joined by Presiding Judge Cristopher Staring and Judge Karl Eppich), ruled that the court had jurisdiction over Goldman's cross-appeal. He stated that the court's interpretation of a settlement agreement was a question of law subject to *de novo* review and that "individual clauses in an agreement with particular words must be considered in connection with the rest of the agreement."

Cervantes argued that the section allowing the therapist to control visitation, headed "visitation schedule, vacations, and the Summer Break schedule" was meant to state: "visitation schedule *for* vacations, and the Summer Break schedule," particularly since a separate section of the agreement contained detailed schedules for visitation during the year. Wrote Judge Espinosa, "Had the parties intended that the therapist override the detailed visitation agreement beyond only summer vacations, either that provision would have been included in the section setting forth the visitation schedule, or it would have been explicit that the therapist's recommendations would control notwithstanding the detailed, negotiated visitation schedule," and upheld the trial court's severance of the section from the agreement.

Goldman further argued that even if the section was ambiguous, it was so material to the agreement that the entire agreement should be voided. The appeals court upheld the lower court's ruling refusing to void the entire agreement, agreeing that since the provision was found in a section of the agreement titled "Healthcare" and not in the "Visitation Schedule" section of the agreement, and because the court does not "engage in the reweighing of evidence or override the court's credibility determinations," the rest of the agreement should stand.

Citing Obergefell v. Hodges, Judge Philip noted that "permanency and stability [are] important to children's best interests."

Judge Philip rejected Goldman's statutory and constitutional arguments that the dispute should not be considered merely contractual but that the ruling violated her "fundamental" right to "determine the upbringing of her child," in which she cited to decisions upholding the notion that somebody who is not considered a "parent" under the domestic relations laws does not enjoy the same legal rights as a parent. Judge Philip found that the cited decisions applied to initial visitation determinations, not, as here, to modifications or attempted rescission of an existing agreement. Citing *Obergefell v. Hodges*, Judge Philip noted that "permanency and stability [are] important to children's best interests," and ruled that "to allow a parent to readily rescind a visitation agreement negotiated by the parties

and approved by the court, rather than requiring the party to meet the requirements for modification, would undermine the stability important to children's best interests."

He also observed: "The record reflects the trial court weighed Goldman's petition to terminate visitation against her very recent decision to allow substantial and continuing visitation, and the impact on the child of excluding Cervantes from the child's life . . . [A]fter hearing two days of testimony and evidence, the court took into account Goldman's apparent wishes based on both her earlier and her subsequent decisions. Specifically, the court entered orders limiting regular visitation with Cervantes to the amount of time suggested by the child's therapist. The court also expressly determined visitation should be continued to prevent "substantial emotional harm" to the child. And, significantly, it accommodated Goldman's desires with respect to certain parenting behaviors during Cervantes's visitation, demonstrating the court did, in fact, accord special weight and deference to Goldman's wishes."

Finally, Judge Espinosa denied Goldman's request to overturn the lower court's award of $300 in attorney's fees to Cervantes, stating that while the court had failed to cite to a provision under which it was permitted to award attorney's fees, "it is clearly inferable [that the correct] statute was the basis for the award." The final disposition stated: "Because the trial court applied well-established principles to the agreement at issue in this case and, in any event, accorded due deference to Goldman's position, we affirm the court's rulings, as well as its award of attorney fees in favor of Cervantes."

Cervantes was represented by the Arizona State University Alumni Law Group (Phoenix) and Ann Nicholson Haralambie, P.C. As noted above, Goldman dropped her cross-appeal and was not represented at argument. ■

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Federal Judge Allows *Pro Se* Transgender Inmates to Proceed in Lawsuit to Require Private Showering

By William J. Rold

Two Wisconsin transgender inmates who sued when forced to shower under conditions that exposed their breasts to other inmates and staff are permitted to proceed past screening of their complaints by U.S. District Judge James D. Peterson in *Campbell v. Bruce*, 2017 WL 6334221, 2018 U.S. Dist. LEXIS 209805 (W.D. Wisc. Dec. 1, 2017). Mark A. Campbell (a/k/a Nicole Rose Campbell) and Steven Miller are both in the second triad of their physical transition, with developed breasts and other female characteristics, although they remain confined in a male institution in Racine.

Judge Peterson allowed both plaintiffs to proceed on both Equal Protection and Eighth Amendment

Each plaintiff was permitted to proceed on the claim that the shower arrangements "increase her risk of sexual harassment, sexual assault, or a hate crime."

Both Campbell and Miller have been taking hormones for more than four years. Both are housed in units that have individual showering stalls with either doors or curtains that obscure genitalia but not breasts. Both are permitted to "shower alone." After they complained about the top exposure, officials allowed Campbell to hang a blanket neck-high over the shower opening, but others could still see her upper body by looking over the blanket. Miller's showers had solid doors, but they only covered four feet of the opening; and it was still possible to see her breasts by standing "on the stairway landing" or looking down on the showers "from the upper tier." Corrections insisted that the showers were PREA [Prison Rape Elimination Act] compliant.

Wisconsin has adopted regulations regarding transgender treatment in corrections, DIA [Division of Adult Institutions] Policy 500.70.27 (not readily available on the Wisconsin DOC website, but found in the docket of this case in PACER, 17-cv-775, #1-10). Judge Peterson ruled (as have most other courts) that neither PREA nor state policies create a federal cause of action. He nevertheless cited to both repeatedly in his analysis of deliberate indifference and equal protection, including the balancing of reasonableness – although he did not rest his decision to permit the plaintiffs to proceed on these bases.

grounds. He found that both inmates have experienced "problems" while showering. Campbell received a disciplinary ticket for covering the shower opening (which she alleges was retaliatory, since cisgender inmates covered the opening without getting tickets). Miller filed multiple grievances, which were allegedly ignored. Remarkably, each plaintiff was permitted to proceed on the claim that the shower arrangements "increase her risk of sexual harassment, sexual assault, or a hate crime" without discussion of any such events (even verbal) having transpired.

Judge Peterson begins with Equal Protection, noting that the Seventh Circuit has reserved ruling on whether transgender people comprise a "protected class," citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1. Bd. of Educ.*, 858 F.3d 1034, 1051 (7th

Cir. 2017), *petition for cert. pending*. He wrote: "For the time being, I will assume that transgender individuals do constitute a protected class. *See Doe 1 v. Trump*, 2017 WL 4873042, at *27–28 (D.D.C. Oct. 30, 2017) (collecting cases and concluding that "transgender individuals . . . appear to satisfy the criteria of at least a quasi-suspect classification")." He also allowed them to proceed under a "class of one theory" under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*). He ended by writing: "I infer that each defendant discriminated against them because of their transgender status: defendants allow male inmates to shower in a private manner, but they do not allow transgender female inmates to shower in a private manner. That is all that is required to state a claim under the Equal Protection Clause. *See Huri v. Office of the Chief Judge of the Cir. Ct. of Cook Cty.*, 804 F.3d 826, 832–35 (7th Cir. 2015)."

On the Cruel & Unusual Punishment claim, Judge Peterson found that the complaint adequately alleges that defendants "violated the Eighth Amendment by placing them at "an extremely high risk for sexual harassment, sexual assault, a hate crime, or all three." He cites here to scholarly literature showing that transgender inmates have a highly excessive risk to safety and to findings in PREA by Congress, on the same point, writing that "states that do not take basic steps to abate prison rape demonstrate deliberate indifference."

Judge Peterson cautioned that the standard would be tougher on a motion to dismiss or summary judgment and that the law is still evolving on the standard of review. He declined appointment of counsel, without prejudice. Either there was a LGBT-friendly law clerk who took an interest in their case, or these women did well so far without counsel, or both. An expert will be needed, however, as the waters get choppier. ■

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

Federal District Court Denies Preliminary Injunction Requiring School District to Segregate Restroom and Locker Facilities by Biological Sex of Students

By Arthur S. Leonard

Accepting a report and recommendation from U.S. Magistrate Judge Jeffrey T. Gilbert, U.S. District Judge Jorge L. Alonso ruled on December 29, 2017, that a group of parents and cisgender students are not entitled to a preliminary injunction blocking Illinois's Township High School District 211 from allowing transgender students to use restrooms and locker rooms consistent with their gender identity. *Students and Parents for Privacy v. United States Department of Education*, 2017 U.S. Dist. LEXIS 213091 (N.D. Ill., E.D.). The dispute grew out of prior legal action by a transgender girl at William Fremd High School in Palatine, Illinios, a suburb of Chicago, seeking to use the girls' facilities. During the Obama Administration, the U.S. Education Department responded to the student's complaint by negotiating a settlement agreement with the school district under which Student A, as she was identified, would be allowed to use these facilities. The school district's willingness to settle turned on a formal Guidance issued by the U.S. Education and Justice Departments construing Title IX to require such a policy.

Reacting to the settlement, an ad hoc group of parents of students at Fremd High School, together with some girls who attend the high school, brought this suit in May 2016, represented by Alliance Defending Freedom, asserting that the girls had a constitutional and statutory right not to have "biological boys" present in their restroom and locker room facilities where they could see girls in a state of undress. The lawsuit targeted the U.S. Departments of Education and Justice for issuing the Guidance and negotiating the settlement. The school district was also named as a defendant. Student A, together with two other transgender students in the district and their parents, were granted intervenor status as defendants. Magistrate Judge Gilbert, to whom the motion for preliminary injunction had been referred by Judge Alonso, issued his report on October 18, 2006, see 2016 WL 6134121, concluding that plaintiffs were unlikely to prevail on their claims (which included an Administrative Procedure Act [APA] claim asserting that the Guidance was an improper amendment to an existing regulation), and recommending that the motion be denied. Plaintiffs filed objections with Judge Alonso.

The lawsuit targeted the U.S. Departments of Education and Justice for issuing the Guidance and negotiating the settlement. The school district was also named as a defendant.

While the objections were pending there were several developments significantly affecting the case.

Donald J. Trump was elected president a few weeks after the Magistrate Report was issued, and he then appointed new leadership to the two Departments after his term began on January 20, 2017. The two Departments then jointly withdrew the Obama Administration Title IX Guidance, opining that it had not been properly issued and that the matter required more study, but not taking any position on whether transgender students had such protection under Title IX, commenting that these issues should be decided at the local level. Thus, the Trump Administration was, at least as of then, "neutral" on the question, although since then Attorney General Sessions and the Justice Department have gone on record as opposing an expansive interpretation of Title IX to embrace gender identity (and sexual orientation) discrimination claims. However, shortly after the withdrawal of the Guidance, the 7th Circuit Court of Appeals ruled in a similar case, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) (petition for certiorari pending), that Title IX does extend to gender identity discrimination claims, and upheld an injunction ordering a Wisconsin school district to allow a transgender boy to use the boys' restroom facilities at a public high school.

The Trump Administration actions mooted the part of the lawsuit against the federal government defendants, as the policy the plaintiffs are challenging was no longer federal executive branch policy. Their APA action, challenging the way in which the Guidance had been promulgated, disappeared from the case with its withdrawal, as did the Education Department pressure on local school districts to accommodate transgender students under Title IX. Thus, the plaintiffs agreed to drop the federal defendants from the case. Also, because Student A has graduated, the plaintiffs' specific objection to District 211's agreement with the Education Department concerning facilities access for that student was mooted as well. However, Intervenor Students B and C and their parents, and possibly other transgender students in District 211, would present the same access issues, so the plaintiffs' claims against the District under Title IX and the Constitution continue so long as the District does not disavow the access policy to which it had agreed.

In essence, Plaintiffs' Title IX complaint relies on a long-standing Title IX regulation that authorizes schools to maintain sex-separate restroom and locker room facilities, provided that the facilities are comparable in scope and quality. Plaintiffs argue that this authorization of sex-segregated facilities recognizes the privacy concerns of the students (and their parents), and that requiring students to have to share such facilities with transgender students of a different "biological" sex contradicts those privacy concerns. The Magistrate had rejected this argument in October 2016, and the 7th Circuit's *Whitaker* decision subsequently confirmed the Magistrate's understanding of this issue.

Wrote Judge Alonso, "Discrimination against transgender individuals is sex discrimination under *Price Waterhouse*, the 7th Circuit explained, because 'by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.' Following *Price Waterhouse* and its progeny, the Court reasoned that a 'policy that requires an individual to use a restroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance which in turn violates Title IX. Providing a gender-neutral alternative was insufficient to relieve the school district from liability under Title IX, the Seventh Circuit explained, because it was 'the policy itself which violates the Act." The plaintiffs tried to distinguish *Whitaker* because it addressed only restrooms, not locker rooms, and because, they insisted, the decision was so "astonishingly wrong" that its reasoning undercuts its "worth even as persuasive authority." The problem with that, of course, is that Illinois is in the same 7th Circuit as Wisconsin, so *Whitaker* is not just persuasive authority; it is binding on Judge Alonso.

The judge insisted that nothing in *Whitaker* "suggests that restrooms and locker rooms should be treated differently under Title IX or that the presence of a transgendered student in either, especially given additional privacy protections like single stalls or privacy screens, implicates the constitutional privacy rights of others with whom such facilities are shared. Plaintiffs' critiques notwithstanding," he continued, "*Whitaker* reflects a straightforward application of the long-standing line of sex stereotyping decisions, fully in line with the Supreme Court's guidance on sex discrimination claims." Thus, under *Whitaker*, plaintiffs could not meet the first test for preliminary injunctive relief: showing the probability that they would prevail on the merits of their claim. Judge Alonso devoted several paragraphs to explaining why the plaintiffs' attempts to distinguish or disparage *Whitaker* were unavailing in meeting their burden under the motion.

"Furthermore," he wrote, "even if Plaintiffs had shown a likelihood of success on the merits, they would still not be entitled to a preliminary injunction because they have not shown they are likely to suffer irreparable harm in the absence of an injunction, or that they lack an adequate remedy at law in the event that they ultimately succeed on their claims." Indeed, as far as demonstrating harm goes, "the only specific harm to which they point is the risk of running late to class by using alternate restrooms to avoid sharing with a transgender student and the 'embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity' allegedly felt by Student Plaintiffs arising from such sharing." The Magistrate [Judge Gilbert] had found that these were insufficient to establish irreparable injury, because courts routinely award monetary damages for emotional distress, and "the risk of being late to class has not been shown to have

any meaningful impact on Student Plaintiffs' education."

Judge Alonso considered it worth nothing that the District's practice of letting transgender students use appropriate facilities had been going on for nearly three years when this lawsuit was filed, but "either Student Plaintiffs did not notice that transgender students were using restrooms consistent with their gender identity, or they knew and tolerated it for several years," as no examples of actual incidents were proffered in support of their motion. "The passage of time therefore further undermines Plaintiffs' claim of irreparable harm," wrote Alonso. "This Court agrees with the Magistrate Judge's assessment, 'there is no indication that anything has negatively impacted Girl Plaintiffs' education." Judge Alonso overruled the objections, and accepted the Magistrate's recommendation to deny the preliminary injunction.

Now that pretrial motions have been disposed of, the court gave the defendants until January 30, 2018, to file an answer to the complaint, and set a status hearing for February 8. In light of the *Whitaker* case and Judge Alonso's strongly-worded opinion, one would expect the school district to promptly file a motion for summary judgment, if ADF does not decide within the next few weeks to fold up its tent and steal away. Of course, what could change the situation dramatically would be a grant of certiorari by the Supreme Court of the school district's petition in the *Whitaker* case. But the parties in that case were reportedly close to a settlement and had asked the Supreme Court to extend the time for Whitaker's counsel to file a response to the cert petition, so it appears likely that a cert grant will not be forthcoming during the month of January leading up to School District 211's court-imposed deadline to respond to the complaint in this case.

The transgender student Intervenors are represented by the ACLU of Illinois and the national ACLU Foundation, with pro bono attorneys from Mayer Brown LLP. ■

Federal Court Rejects Most of Atlanta Fire Chief's Constitutional Claims after His Discharge for Publishing Controversial Religiously-Inspired Homophobic Book

By Chan Tov McNamarah

Less than two weeks after the Supreme Court heard oral arguments in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, No. 16-111, the U.S. District Court for the Northern District of Georgia ruled on pretrial motions in a case which similarly examines the intersection between religious freedom, homophobia, and First Amendment rights. *Cochran v. City of Atlanta, Georgia*, 1:15-CV-0477-LMM (N.D. Ga. Dec. 20, 2017), considered whether the City could terminate its Fire Chief for publishing a religious "self-help" book that described homosexuals as "unclean," "wicked," "un-Godly sinners" whose deaths will be celebrated. The December 20, 2017, decision by District Judge Leigh Martin May produced mixed results on the Defendants' Motion for Summary Judgment, and the Plaintiff's Motion for Partial Summary Judgment. Two years earlier, Judge May had granted Defendants' motion to dismiss some of the claims asserted in Chief Cochran's original complaint, including an Equal Protection claim, in *Cochran v. City of Atlanta, Georgia*, 150 F. Supp. 3d 1305 (N.D. Ga. 2015).

Kelvin J. Cochran held the appointed position as Fire Chief of the Atlanta Fire Rescue Department (AFRD) between 2009 and 2015. Cochran, is self-described as a "devout evangelical Christian," who holds "historic Christian beliefs." He is a deacon at the Elizabeth Baptist Church. The record generally reflected that Plaintiff was an "excellent Fire Chief." In 2013, he wrote and self-published a book entitled, "Who Told You That You Were Naked?: Overcoming the Stronghold of Condemnation." According to Cochran, the book was written specifically to help guide Christian men "live faith-filled, virtuous lives." In the book's "About the Author" section, he identified himself as "currently serving as the Fire Chief of the City of Atlanta Fire Rescue Department (GA)." The book includes passages that classify all sex outside the confines of marriages between men and women — including homosexual acts — as contrary to God's will. Specifically, the book classifies "sodomy, homosexuality, lesbianism, pederasty, bestiality, and all other forms of sexual perversion" as "unclean." Aspects of the texts can also be construed as misogynistic. For example, the book portrays women as "issue[s]" or "challenge[s]" that men must "wrestle with." In a section entitled, "You Need To Talk to My Husband," the book goes as far as to suggest that if Eve, instead of eating

[Plaintiff's] book classifies "sodomy, homosexuality, lesbianism, pederasty, bestiality, and all other forms of sexual perversion" as "unclean."

the forbidden fruit, had consulted her husband, the "Fall from Grace" would not have occurred. Plaintiff maintained he did not intend for women to read the book, and was therefore not concerned with including examples of virtuous women.

The City of Atlanta maintained that it had pre-clearance procedures which required Cochran to seek permission from the Board of Ethics, as well as his supervisors, prior to beginning any outside employment, which it argued applied to writing and distributing a book. It was undisputed that Plaintiff did not seek or receive permission from the Board of Ethics to sell his book, nor did he discuss the book with any of his supervisors.

Cochran provided copies to several of his subordinates at the AFRD early in 2014. These included men who requested copies, as well as those who were given an unsolicited copy. The City received no complaints about the book until November 2014, when the Assistant Fire Chief — who had received a copy of the book from Cochran during a work event — brought the book to the attention of the local firefighters union president, saying that he found some passages in the book "disturbing," particularly because Plaintiff referred to himself as the Fire Chief in the book. The union president took a copy to Councilmember Alex Wan, who was particularly troubled by passages which referenced the LGBT community. Simultaneously, another member of the union board contacted a retired AFRD Chief, who then sent a letter to the Mayor's LGBT Advisor, stating that she and other LGBT firefighters were extremely "insulted and saddened by the book's discriminatory text."

On November 19, Councilman Wan brought a copy of the book to the City of Atlanta Human Resources Commissioner, Yvonne Yancy, who became concerned both by the Plaintiff's failure to get City Pre-Clearance by the possibility its contents could implicate Title VII and other anti-discrimination laws regarding gender and sexual orientation. She took a copy to Mayor Kasim Reed, who testified that he was offended by many of the book's comments that were insensitive to women and the Jewish and LGBT communities. Yancy initiated a Title VII investigation to determine if Plaintiff's views expressed in the book affected his departmental leadership. In a November 24, 2014, meeting between Plaintiff, Yancy, and other City representatives, Plaintiff was suspended for 30 days without pay. It was disputed what Plaintiff was told regarding what he could say publicly regarding his suspension. The City contended that it told him not to comment at all, but the Plaintiff contended he was told only not to conduct media interviews.

However, Cochran discussed the situation widely during his suspension. The record reflects that he publicly described the suspension as "spiritual warfare" and a "divine opportunity to suffer . . . for Christ." He spoke about his suspension at two churches, as well as at the Georgia Baptist Convention ("GBC") executive committee meeting, a gathering of 200 pastors. Subsequently, his supporters launched a large-scale media campaign designed to pressure Mayor Reed to reinstitute him. This resulted in Mayor Reed receiving thousands of angry emails, as well as numerous phone calls in which he was called racial slurs, called the Anti-Christ, and received death threats. Plaintiff denies enlisting any assistance to initiate the media campaign for his reinstatement, but he also did not deny the assistance.

The City discharged Cochran on January 6, 2015, the day his suspension ended. The reasons were hotly disputed. Plaintiff contended he was fired because of the book's contents, while the City contended he was fired because he failed to comply with Pre-Clearance Rules, and because he "falsely perpetuat[ed] the narrative that he was being punished for his religious beliefs, and encourage[ed] and facilitate[ed] a massive PR campaign against the Mayor personally." Plaintiff filed suit against the City and Mayor Reed (in his individual capacity), asserting multiple claims under 42 U.S.C. § 1983 for violation of his First and Fourteenth Amendment rights. As noted above, Judge May dismissed some of the claims on motion in December 2015, while allowing discovery to proceed on others. The Defendants then moved for summary judgment on all of Cochran's claims and the moved for summary judgment almost all of his claims.

Judge May laid out Plaintiff's numerous remaining claims, explaining that three were brought under the First Amendment for his alleged speech-based firing: (1) free speech retaliation; (2) freedom of association retaliation; and (3) viewpoint discrimination, while three contended that the City's Pre-clearance Rules were unconstitutional because: (1) they were a prior restraint; (2) an exercise of unbridled discretion; and (3) a violation of the First Amendment free exercise of religion clause and the "no religious tests" clause of article VI, cl. 3 of the Constitution. Finally, Plaintiff asserted a violation of procedural due process under the 14th Amendment.

Opposing the free speech retaliation claim, the City argued that it fails because: "(1) the City's interest as an employer outweighed the Plaintiff's interest as a citizen;" and because (2) "Plaintiff was not fired because of his book." Judge May first detailed the competing interests between Plaintiff, "as a citizen, in commenting upon matters of public concern," and the interests of the City, "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). To prevail under the four-part *Pickering* test, the employee must show that "(1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interests in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action." The City did not oppose Plaintiff's assertion that he spoke on a matter of public concern. May concluded that the balancing weighed in favor of the City. The book's distribution in the workplace (including unsolicited distribution) was

a substantial factor in favor of the City's interests. May's agreed that it raised potential Title VII implications for the City, exposing it to potential hostile work environment liability.

Plaintiff's status as Fire Chief further weighed in favor of the City. Because he expressed the opinion that the death of individuals who engaged in homosexual acts was to be celebrated, May found it reasonable for the City to expect public erosion of trust in the Department. Additionally, she could foresee future difficulty in recruiting and retaining LGBT individuals for the AFRD, which undermined the City's mission of inclusivity.

Evaluating the element of disruption and the context in which it arose, the judge found that they both supported the City's decision to fire Plaintiff. Here, she highlighted that the book was brought to the City's attention in late 2014 — specifically during mounting debates around LGBT rights in anticipation of the Supreme Court's consideration of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). It was undisputed that Plaintiff capitalized on the atmosphere surrounding LGBT rights. Indeed, Plaintiff accepted support from a social media campaign which led to Mayor Reed receiving thousands of emails, and numerous phone calls in which he was called derogatory names and threatened.

Weighing the *Pickering* factors, May concluded that Cochran's speech caused such an actual and possible disruption that it did not warrant First Amendment protection, writing: "As a private citizen, he is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a [Fire Chief]." Consequently, she granted the City won summary judgment against this claim.

Cochran's second claim asserted that the City retaliated against him for associating with his church, noting his church appearances during his suspension. May wrote that the court does not "apply the public concern portion of the *Pickering* analysis" to this claim, but otherwise would "apply the *Pickering* balancing test" to determine whether Cochran's free exercise rights outweighed the City's legitimate concerns as an employer. This led to the same result as under the free speech claim.

On the viewpoint discrimination claim, May questioned whether Plaintiff could mount separate viewpoint discrimination and retaliation claims, writing that she found the multiple claims problematic, since Eleventh Circuit precedent made it clear that "if a plaintiff cannot prove the first two *Pickering* factors, then the speech is *not protected by the First Amendment* and any firing based on that speech would accordingly be constitutional" (citing *Moss*, 782 F.3d at 618) (emphasis in original). To settle the discrepancy, May instructed the parties to address whether it was incongruent for the City to be allowed to fire an employee because of his unprotected speech — and yet be subject to a viewpoint discrimination claim for the same firing, but ultimately she found Plaintiff's position unconvincing. Based on the case law, *Pickering* would apply to Plaintiff's viewpoint discrimination claim and accordingly the City won the battle for summary judgment on this claim.

Addressing the City's Pre-Clearance rules, Cochran contended that they constitute an unconstitutional prior restraint on speech. Judge May found that *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995) [NTEU] set the standard for evaluating this claim. She summarized the relevant test as "a balance between the interests of the [employee], of a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees." (again relying on *Pickering*). She explained that "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468.

Applying *NTEU*, Judge May balanced the interests of prospective speakers and audiences in commenting on public matters, against the City's interest in promoting efficiency. The interest of Plaintiff and all other prospective speakers under the Pre-Clearance policy was "the ability to engage in any private employment — including speaking or writing on any subject — without prior approval by the City." Second, Judge May found the interests of potential audiences "manifestly great" — given the unique position of government employees. The City contended that its Pre-Clearance rules "allow the City to ensure that its employees do not have conflicts of interest or otherwise engage in outside activities that could improperly influence or interfere with their official City duties (or even appear to.)" But May found that the City's conclusory statements were insufficient support for its Pre-Clearance Rules. Thus, she found the City's interest as presented "relatively weak." Balancing all the interests, Judge May found that the

"As a private citizen, he is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a [Fire Chief]."

test weighed in favor of the potential speaker and audience. Specifically, she found that the City's Pre-Clearance Rules were not "properly tailored in light of the Defendant's stated rationale that the policy's aim is to prevent conflicts of interest." Indeed, as Judge May explained, the Pre-Clearance Rules were simultaneously both over- and under-inclusive to justify the City's proposed goal of preventing conflicts of interest. Thus, comparing the potential speakers and audience's interests against the City's failure to properly support its poorly tailored Pre-Clearance Rules, Judge May found that *NTEU* balancing cuts in Plaintiff's favor. She therefore granted Plaintiff's motion for summary judgment on his prior restraint challenge to the City's Pre-Clearance Rules, and denied Defendant's motion on the same ground.

Plaintiff contended that by disciplining him for violating the Pre-Clearance Rules, Defendants violated his right to freely exercise his religion — because the City targeted his expression of sincerely held religious beliefs regarding marriage and sexuality. In response, Defendants moved for summary judgment on the basis that the Pre-Clearance Rules were neutral regarding religion and generally applicable, and therefore do not impermissibly burden Plaintiff's religious beliefs. May quoted the a leading case on the free exercise clause, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, as instructing: "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is *neutral* and of *general applicability* need not be justified by a compelling governmental interest even if the law has an incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. 520, 531 (1993). In determining neutrality, the court should examine the text, circumstances, and context of the policy. To determine general applicability, the court must ensure that the law "does not 'in a selective manner impose burdens only on conduct motivated by religious belief." *Eternal Word TV Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1164 (11th Cir. 2016).

In determining neutrality, the court should examine the text, circumstances, and context of the policy.

As to Plaintiff's unbridled discretion claim, he argued that the City's Pre-Clearance rules were unconstitutional as content-based restrictions because they grant unbridled discretion to the City to approve or deny outside employment requests. The Eleventh Circuit instructs: "To avoid unbridled discretion, the permit requirements should contain narrowly drawn, reasonable, definite standards to guide the official's decisions." *Bloedorn v. Grube*, 631 F.3d 1218, 1236 (11th Cir. 2011). Examining the provision requiring Plaintiff to seek pre-approval, May found that it failed to define any standards for the Ethics Board to apply. In fact, even if the court were to view the provisions in a light favoring the City, the provisions would still not set out objective standards which could pass constitutional muster. Therefore, she granted Plaintiff's motion for summary judgment on his unbridled discretion challenge to the City's Pre-Clearance Rules.

Judge May found the City's Pre-Clearance rules were both neutral and generally applicable. She found that the Rules apply generally to all employees, do not address religion, and were not passed because of religious motivations. Indeed, the Rule advanced a legitimate government interest — preventing conflicts of interests and the appearance of impropriety. Consequently, May granted the City's motion for summary judgment on the First Amendment free exercise claim.

Finally, Plaintiff argued that the City and Mayor Reed violated Cochran's procedural due process rights by suspending and terminating him without advanced notice of an adverse employment action or giving him a meaningful opportunity to respond, as specified in Atlanta Ga. Code of Ordinances §§ 114-528; § 2-820. Defendants argued that Plaintiff was not entitled to any procedure, because he was an at-will public employee with no property interest protected by the due process clause. To support his claim, Plaintiff invoked City Ordinance Section 114-528, which provides "no employee may be terminated or otherwise adversely affected except for cause." However, the Defendants responded that the City Charter specifically denoted that Plaintiff's position was at will. Indeed, City of Atlanta Charter §§ 3-305(a)-301(c) stated: "the Fire Chief, as the department head, 'may be removed at the pleasure of the Mayor.'" Finding the Charter and the Code in conflict, May held that the Charter controls under Georgia law. Because the Charter clearly stated that a department head may be removed with or without cause, Plaintiff did not have a property interest in his employment and therefore could not successfully mount a procedural due process claim, and denied Cochran's motion for summary judgment on this claim, while granting the Defendants' motion.

In closing, Judge May directed the parties to file a Pre-Trial Order, clearly presenting the issues they contend remain following this decision. Cochran is represented by Alliance Defending Freedom, which strongly advocates that public employees who voice religiously-inspired anti-LGBT views should be constitutionally protected against adverse action by their government employers. Unless this case is settled, therefore, it is a likely candidate for appeal to the 11th Circuit. ■

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

Federal Court Finds New York Plastic Surgeon Violated ADA by Refusing to Operate on HIV-Positive Patients

By Matthew Skinner

U.S. District Judge Analisa Torres granted summary judgment to the federal government and an HIV-positive man suing a plastic surgeon and his former medical practice for HIV discrimination under the Americans with Disabilities Act of 1990 (the "ADA") and the New York City Human Rights Law. *United States v. Asare*, 2017 U.S. Dist. LEXIS 209392, 2017 WL 6547900 (S.D.N.Y. Dec. 20, 2017). The surgeon had argued that he does not operate on anyone taking antiretroviral drugs out of a concern for unsafe interactions between those drugs and the sedative protocol he administers before surgeries. The government filed suit and complainant Mark Milano intervened as co-plaintiff.

In 2014, Dr. Emmanuel Asare, doing business as "Advanced Cosmetic Surgery of New York," refused to provide surgical breast reductions to three men, one of whom was already on the operating table, whom he thought or knew had HIV. One of those men, Mark Milano, filed a complaint with the Department of Justice. The agency initiated an investigation and Dr. Asare admitted in a letter that HIV infection, and several other ailments, are disqualifying criteria for his services, "based on my comfort level and how much risk or stress I am willing to take!" He claimed this was "my right as a Cosmetic Surgeon!"

In May 2015, the U.S. Attorney's Office in Manhattan filed a complaint against Dr. Asare and Advanced Cosmetic Surgery under the ADA, alleging a policy of discrimination against people with disabilities, including HIV. The court granted Milano's motion to intervene; he also brought claims under the New York City Human Rights Law. After discovery, they jointly moved for summary judgment and Dr. Asare and his former practice opposed and cross-moved.

In the briefing, Dr. Asare did not dispute that he does not provide his cosmetic surgery services to HIV-positive individuals taking antiretroviral medications. Under the ADA, the remaining legal questions for the litigation were whether Dr. Asare's "screen[ing] out" of a class of individuals with a disability is "necessary" and that certain "reasonable modifications" to Dr. Asare's wholesale refusal would "fundamentally alter" the nature of the surgery.

Milano also made claims under the prohibition against discrimination based on disability in public accommodations and reasonable accommodation for persons with disabilities provisions of the New York City Human Rights Law. Judge Torres described the New York City Human Rights Law "[a]s a floor" for similarly worded federal and state laws and "therefore, any violation of the ADA is automatically a violation of the HRL."

Dr. Asare did get the court to grant him summary judgment on the claims

Dr. Asare admitted in a letter that HIV infection [is a] disqualifying criteri[on] for his services, "based on my comfort level and how much risk or stress I am willing to take!"

Although matters of first impression for the Second Circuit, Judge Torres found that the First Circuit's application of a U.S. Supreme Court precedent was dispositive for both questions. In *Theriault v. Flynn*, 162 F.3d 46 (1st Cir. 1998), the First Circuit interpreted the Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987), to mean that "what is impermissible . . . is rejecting an applicant *automatically* as a result of his disease or symptoms, without considering the individual[]." Applied to these facts, "[d]efendants' blanket refusal without individualized inquiry is insufficient to pass muster under the ADA." According to Judge Torres, quoting Dr. Asare's own medical expert, "[d]efendants cannot meet their burden when they automatically reject potential patients without 'making [a] determination based on their medical necessity.'"

unrelated to HIV. He did not concede that he applied eligibility criteria that tend to screen out individuals with other disabilities. Even taking all the facts in the light most favorable to the federal government, Judge Torres could not find anything in the documentary or testimonial evidence to avoid granting summary judgment against it beyond the HIV context. She gave the parties until January 10, 2018 to file a joint letter informing the court how they wish to proceed considering her summary judgment rulings.

Intervenor Milano is represented by Alison Ellis Frick and Matthew D. Brinckerhoff, of Emery Celli Brinckerhoff & Abady LLP, and Armen Hagop Mergian of Housing Works, Inc. ■

Matthew Skinner is the Executive Director of The Richard C. Failla LGBTQ Commission of the New York State Courts.

Federal Magistrate Recommends Denial of Motion to Dismiss in Protection from Harm Case Where Transgender Inmate Seeks Permanent Single Cell Assignment

By William J. Rold

This is a noteworthy case for transgender inmates who are simply shuttled through a multiple-facility system after sexual assaults. In *Becker v. Sherman*, 2017 U.S. Dist. LEXIS 203501, 2017 WL 6316836 (E.D. Cal., Dec. 11, 2017), U.S. Magistrate Judge Michael J. Seng recommended that a transgender inmate, Joseph Becker, be permitted to proceed to discovery on her claim that her civil rights were violated by the risk that her current temporary single cell arrangement could be revoked at any time, subjecting her to the risk of sexual assault. Her institutional history shows many rapes, occurring in at least six institutions – the usual response to which was to transfer Becker to a new institution. Most of the rapes occurred while she was double-celled.

Her institutional history shows many rapes, occurring in at least six institutions – the usual response to which was to transfer Becker to a new institution. Most of the rapes occurred while she was double-celled.

She is currently temporarily assigned to a single cell. Defendants, including the wardens at a former prison and at her current one, are mostly cell assignment officials. Defendants moved to dismiss on two bases: lack of subject matter jurisdiction under F.R.C.P. 12(b)(1), arguing that Becker has no standing because she cannot show she will be raped again; and failure to state a claim for relief under F.R.C.P. 12(b)(6), because the elements of an Eighth Amendment violation have not been met. The former warden, sued individually for damages, also moves to dismiss separately. The other defendants are sued in their official capacities.

On subject matter jurisdiction, defendants argue that the revocation of single cell status may never occur and that a subsequent rape is "too speculative to confer subject matter jurisdiction." Judge Seng distinguishes all four cases on which they rely: *City of L.A. v. Lyons*, 461 U.S. 95, 105, 110 (1983); *Ashcroft v. Mattis*, 431 U.S. 171 (1977) (per curiam); *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974). The relevant inquiry is not the plaintiff's "subjective apprehensions," but the "likelihood of a recurrence of the allegedly unlawful conduct." *Lyons*, 461 U.S. at 107 n.8. Becker argued that temporary single cell status "means that Plaintiff continues to be at risk of being double-celled and placed in danger again. She contends that future assaults are not speculative but instead, given the frequency with which they have occurred over the years at multiple institutions, practically inevitable if she is not in a single cell status." Judge Seng agreed.

All of defendants' cited cases, involving police misconduct, share the failed assumption that plaintiffs will be placed in the same situation again and suffer the same violations of their rights. *O'Shea* involved the speculation that the plaintiffs, whose rights had not previously been violated, would find themselves involved with the police in some unknown future situation. 414 U.S. at 485-7. *Rizzo* presented defendants who had not violated any rights and a policy argument "even more attenuated" than *O'Shea*. 412 U.S. at 371-2. *Mattis* involved a suit by a father whose son was killed by police in a chase who lost a damages case on good faith immunity but who tried to continue with a suit for a declaratory judgment, which the Supreme Court found to amount to an illegal advisory opinion. 431 U.S. at 171-2.

Here, Becker's future risk does not depend on her conduct; it occurs simply by her *being* transgender and put in general population. On this record, Judge Seng found these circumstances sufficient to satisfy subject matter jurisdiction. In so doing, he judicially noticed studies, including one placing the incidence of rape of transgender inmates at 59% – the majority of which "were likely to occur in personal spaces (e.g., dorms or cells)." Her alleged risk is "in no way speculative." Judge Seng summarily rejected defendants' callous argument that Becker was not assaulted every day she was double-celled: 4 assaults in 3 years, "all related to her housing assignment and status as a transgender inmate," are enough.

The foregoing largely disposes of the motion to dismiss for failure to state a claim, except that Judge Seng found the pleadings to show insufficient personal involvement of the prior warden in cell assignments or knowledge to impose individual liability for damages. As to the other defendants (except the current

warden), Judge Seng finds a viable claim for injunctive relief, based on *Ex parte Young*, 209 U.S. 123, 162-63 (1908), which allows a federal court to enjoin state officials to comply with federal law, notwithstanding sovereign immunity under the Eleventh Amendment.

Liability here is found on the need to conform behavior to the requirements of federal law, where, for example, officials have a law, policy or custom that violates it. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). While official California policy is to protect transgender inmates, "officials repeatedly tried to double-cell [Becker] or transfer her after assaults." Becker has sufficiently alleged a "custom" (not isolated acts) to "overcome dismissal." Her loss of temporary single cell status is "not a hypothetical concern": she has been transferred or had her cell assignment changed at least 18 times and therefore remains at risk.

Judge Seng therefore allows an official capacity (injunctive) case to proceed against the classification defendants, but he dismisses the claim against the current warden, essentially because of lack of allegations of personal involvement in cell assignments. In this writer's view, this is plainly wrong. Sometimes it helps to read *Ex parte Young* again. The protesting defendant in that case was the Attorney General of Minnesota, who was ordered by a federal judge to stop his office's interfering with federal regulations governing interstate railroad shipment of freight. It is doubtful he knew the details. If there is a custom here, as Judge Seng found, then the warden would seem to be a proper defendant. Indeed, given the scope of the transfers, the State Commissioner of Corrections would seem to be a proper *Ex parte Young* defendant as well.

Judge Seng granted leave to amend, and his recommendation can be appealed to the District Court. Becker is represented by appointed counsel, Latham & Watkins, LLP, San Francisco. ■

Ohio Appeals Court Orders New Trial of Ethnic Intimidation Case Involving a Gay Victim

By Arthur S. Leonard

An incident at a California Fitness gym in Columbus, Ohio, led to the prosecution of Michael D. Smith on counts of misdemeanor assault, aggravated menacing, ethnic intimidation and disorderly conduct. A jury convicted him on all but the assault count, and he appealed, raising a variety of points, a few of which are directly relevant here. *State v. Smith*, 2017 Ohio App. LEXIS 5749 (10th Dist. Ct. App. Dec. 28, 2017).

The principal victim in the incident, Michael Harris, is a gay man who, like Smith, was a member of the gym. worried look on her face. Harris then saw Smith jump off of his treadmill and "come after" him at "high speed." Harris testified that he felt "threatened by" Smith's body language, as his face looked angry and there was "a lot of huffing and puffing coming from him." Harris then removed his headphones and heard Kemp and another person ask Smith to calm down and saw them grab him.

Kemp, who worked as a state corrections officer, testified that after Harris passed by her on his way to the treadmill, Smith started to scream

Smith started to scream that he "hated fags, he'd kill all the fags" and would not "go in the locker room no more because of all the fags in there."

According to the summary of evidence in the opinion by Court of Appeals Judge Timothy Horton, Smith and Harris were not personally acquainted. Evidently Smith was unhappy at the number of gay people working out at the gym, and for some reason something set him off on August 23, 2015, when Harris came into the gym to work out on an exercise machine and stopped to say hello to Laverne Kemp, an acquaintance who was working out on a treadmill near one being used by Smith. Smith yelled at Harris as Harris was working out, but Harris could not hear what he was saying because he was using headphones playing loud music. However, he heard "someone yelling" and, according to his testimony, he turned around and saw Smith running on his treadmill while looking at Harris, and Kemp stopping her machine with a that he "hated fags, he'd kill all the fags" and would not "go in the locker room no more because of all the fags in there," even though "nobody had done anything to" Smith. Kemp said that she and the man on the other side of Smith "just kind of looked at him because we didn't know why he just went crazy." At first she was "stunned," but then realized that Smith was talking about Harris. Kemp saw Harris get up, take his headphones off, start to approach them, but then turned around and walked away. At that point, Smith "jumped off his treadmill" and said that he wanted to ask Harris if he wanted to "fight him" before starting to approach him. Kemp and the other man restrained Smith, who then went back to his treadmill. Kemp described Smith as "enraged," and stated that Smith had gone "from zero to a hundred in a second." After

the incident, Kemp found Harris in the activity room, where she "tried to explain to him" that Smith had gone after him because he was gay.

An employee of the gym who had witnessed this, Sean Scott, went to the owner, Dana Rocco, and told Rocco that Smith had come into the gym and "threatened to shoot up all the faggots and gay people in the gym and just come shoot the gym up." Rocco contacted a police detective and talked to several people about the incident, and canceled Smith's gym membership. When he could not contact Smith by phone, he emailed him and received a hostile email reply: "pussy ass honkey don't be sending me no mutha fuccin emails you fuccin HOMO. You bitch." A few minutes later came a second email from Smith: "fuck your faggot ass gym you bitch. I will see you again. Small world." Rocco was scared by the email and obtained police protection for the gym for the next several days. About fifty members cancelled their memberships when they heard about the incidents and threats.

The problem with the ethnic intimidation conviction, as it related to Harris as the victim, was that it relied heavily on Kemp's testimony, since Harris had not directly heard what Smith had yelled at him, and Kemp's testimony was inadvertently bolstered by another witness, the police detective who had investigated and who improperly commended her as a source because of her employment as a corrections officer. The court found that having one witness vouch for the credibility of another witness had tainted the evidence on the counts that relied on Kemp's testimony (although one dissenting judge demurred from this conclusion), and necessitated a remand for a new trial on those counts.

Smith argued on appeal that he could not be convicted on the ethnic intimidation count because Harris had not heard Smith's statements. The court rejected this argument, observing that "there is no requirement in Columbus City Code 2331.08(A) that the victim actually hear discriminatory language from a defendant. The ethnic intimidation ordinance is concerned with the defendant's motive, while the underlying offense contains the element of injury to the victim that a prosecutor must prove. Through Kemp's testimony describing Smith's anti-gay remarks made at the time he threatened Harris, the city provided adequate evidence to support its allegation that Harris' sexual orientation was the motive or purpose of the offense." Further, wrote Judge Horton, "Through Harris' testimony, the city proved that Smith caused Harris to believe that Smith was going to cause him physical harm. Based on Smith's 'facial expression and body language,' Harris believed that Smith was going to attack him. Harris' testimony was legally sufficient to prove the offense of menacing. Accordingly, we reject Smith's argument that the city's evidence was legally insufficient to prove the ethnic intimidation charge."

"The ethnic intimidation ordinance is concerned with the defendant's motive, while the underlying offense contains the element of injury to the victim that a prosecutor must prove."

The court also rejected Smith's argument that the complaint of ethnic intimidation was defective because it failed to allege that he had "uttered any spoken threat" to the victim. The court determined that the complaint as worded provided sufficient notice to Smith of the offense on which he was being charged and the conduct at issue. "The utterance of spoken threat is not a required element of ethnic intimidation" under the ordinance, wrote Horton. "Smith was on notice that the city intended to prove that Harris' sexual orientation motivated Smith to commit menacing. The city identified the victim, the date, and jurisdictional location of the offense. The language of the complaint tracked the ethnic intimidation statute and referenced the underlying offense. This was sufficient to provide reasonable notice to Smith of the nature of the charge against him.

The court also rejected Smith's hearsay objections to some of the testimony. The court found that Rocco's testimony about what Scott had said to him about Smith's threatening statements "was not offered to prove the truth of the matter it asserted because Smith never committed a mass shooting of the gym's homosexual patrons. Rather, the statement was a threat – 'words constituting conduct that are not hearsay,' according to the Staff Notes to Evid. R. 801(C). In addition, Smith's statement to Scott was also not hearsay because it was a statement by a party opponent under Evid. R. 801(D)(2)." The court also found that Scott's statement came within the "excited utterance" exception to the hearsay rule, given the circumstances.

Another problem that arose with Kemp's testimony was that the prosecutor, perhaps inadvertently, elicited her knowledge that Smith had done time in prison. Smith had been discharged a decade ago after serving a prison sentence. Although the context of Kemp's testimony was a bit ambiguous, the court concluded that all those present who heard the testimony seemed to understand that it referred to Smith having done time. The court found that the jury should not have heard this, as it was not relevant to the facts of this case.

At a new trial, a jury will hear Kemp's testimony without any express commendation of her acuity and honesty by a police witness and all mention of Smith's past criminal record will be kept out of evidence. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. SUPREME COURT – The Supreme Court heard arguments on December 5 in *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, No. 16-111, the so-called "gay wedding cake" case from Colorado, in which that state's court of appeals had affirmed a ruling by the state's Civil Rights Commission that the respondent had violated the state's public accommodations law by turning away a gay male couple who sought a cake for the in-state celebration of their out-of-state same-sex marriage back before marriage equality had become the law in Colorado. The baker, Jack Phillips, rejected their business as soon as he learned that the cake was for the same-sex couple sitting before him; their conversation never got to the point of discussing the design or any inscription on the cake. In the subsequent litigation, Phillips' counsel argued that he had not discriminated because of the customers' sexual orientation, and that he was privileged to reject this business based on 1st Amendment protection of his freedom of speech and free exercise of religion, all three points rejected by the Civil Rights Commission and the state's court of appeals. (The Colorado Supreme Court denied review.) The argument generated widespread national media comment, and numerous amicus briefs were filed on both sides. Four lawyers provided oral arguments. Kristen K. Waggoner of Scottsdale, Arizona, an attorney for Alliance Defending Freedom, spoke for Masterpiece Cakeshop. Noel J. Francisco, Solicitor General of the U.S. in his first Supreme Court argument, presented the views of the Trump Administration, which naturally sided with the Christian baker because . . . . he is a Christian baker, although curiously the administration argued in support only of the free speech claim. Colorado Solicitor General Frederick R. Yarker argued in support of the Civil Rights Commission, and David Cole, National Legal Director of the American Civil Liberties Union, argued on behalf of Charlie Craig and David Mullins, the gay couple who sought the wedding cake. In many ways the argument went along predictable lines, with questions and comments from Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor appearing to favor respondents and Chief Justice John Roberts, Samuel Alito and Neil Gorsuch appearing to favor petitioners. As usual, Justice Clarence Thomas said nothing, but nobody expects him to support the respondents. As usual in LGBT rights cases, the decision will likely turn on the vote of Justice Anthony Kennedy, whose questions and comments both encouraged and perturbed both sides. He was clearly troubled at the idea of allowing discrimination against gay couples exercising their right to marry, but he was also clearly troubled about the failure of the state to "respect" the sincere religious convictions of such as Jack Phillips. How Justice Kennedy would ultimately vote was a puzzle as the argument came to a close. He has been the author of all of the Court's big pro-gay rights opinions of the past two decades - *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges* - but he has not always taken the gay rights side, including in two cases where the Court held that state public accommodations laws had to yield to the 1st Amendment rights of the organizers of Boston's St. Patrick's Day Parade (*Hurley*, where a unanimous Supreme Court decision reversed a divided Massachusetts Supreme Judicial Court opinion) and of the Boy Scouts of America (*Dale*, where a 5-4 Supreme Court decision reversed a divided New Jersey Supreme Court opinion). It appeared to this writer that his vote would turn on whether he saw significant distinctions between *Hurley* and *Dale* and this case; particularly, that in *Hurley* and *Dale* the petitioners were non-profit expressive associations, while this case involves a business, and further that recognizing private religious or conscience exemptions from complying with generally applicable civil rights laws would substantially undermine the ability of state and local governments to protect minorities from discrimination in the public square. Since it is unlikely that this case will produce a unanimous ruling, it may take the Court several months, perhaps stretching towards the end of the term, to issue a decision. As of the end of December, a petition for certiorari presenting much the same issues was pending from a Washington state florist who that state's highest court ruled against on a similar claim of 1st Amendment exemption from complying with a public accommodations law. A case strikingly similar to *Masterpiece Cakeshop* was decided on December 28 by the Court of Appeals of Oregon, reaching the same result that the Colorado Court of Appeals reached in *Masterpiece*. It is reported separately, above. * * * It appears likely that the Supreme Court will not be deciding this term whether Title IX forbids gender identity discrimination by schools that receive federal money, because a settlement may be impending in the dispute between Ashton Whitaker and the Kenosha Unified School District. The 7th Circuit ruled on May 30, 2017, in *Whitaker v. Kenosha Unified Sch. Dist. No. 1. Bd. of Educ.*, 858 F.3d 1034, 1051, that the school board violated Title IX by refusing to allow Whitaker to use the boys' bathroom facilities at the school, and the school district filed a petition for certiorari on August 28 (Oct. 2017 Term, No. 17-301). However, rather than respond to the petition, Whitaker's counsel sought an extension of time, which was granted by the Supreme Court on November 9.

CIVIL LITIGATION *notes*

Whitaker's response was due to be filed by December 27, but on December 18, his counsel, Sasha Samberg-Champion, filed a letter with the Court requesting an additional extension. Noting that the district court had responded to the 7th Circuit's order by directing the parties to submit to mediation, Samberg-Champion wrote that "the parties participated in mediation sessions on October 31, 2017, and November 21, 2017. At this time, the parties are in advanced settlement negotiations and expect a final resolution of this case in the near future." The letter requested a further 30-day extension, which will effectively keep the Court from consider the cert petition until it is too late for a merits ruling this Term. Of course, if the case settles, as now seems likely, the cert petition will be withdrawn.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *State of Hawaii v. Trump*, 2017 U.S. App. LEXIS 26513, 2017 WL 6547095 (Dec. 22, 2017), the 9th Circuit, largely affirming a ruling by U.S. District Judge Derrick Kahala Watson (D. Haw.), found that President Trump's Proclamation announcing his third ban on travel to the U.S. by citizens of several countries, mainly in the Middle East, exceeded the scope of his authority to act unilaterally on issues of immigration and entry into the United States. Among the specific findings on which the court rested its conclusion were those concerning the impact of the Proclamation on LGBTQ people. Wrote the court: "The Proclamation also risks denying lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals in the United States the opportunity to reunite with their partners from the affected nations. See Brief of Immigration Equality et al. as Amici Curiae, Dkt. No. 101 at 17-20. LeGaL joined Immigration Equality and a host of allies as signatories to the *amicus brief*. The Proclamation allows that it 'may be appropriate' to grant waivers to foreign nationals seeking to reside with close family members in the United States. 82 Fed. Reg. at 45,168-69. But many of the affected nations criminalize homosexual conduct, and LGBTQ aliens will face heightened danger should they choose to apply for a visa from local consular officials on the basis of their same-sex relationships. Brief of Immigration Equality at 4. The public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them."

U.S. COURT OF APPEALS, 9TH CIRCUIT – As conditions for LGBT people improve in Mexico, it becomes much more difficult for gay people seeking protection against removal to that country to make their case for refugee status. In *Ramos v. Sessions*, 2017 U.S. App. LEXIS 25309, 2017 WL 6379133 (9th Cir., Dec. 14, 2017), the court rejected a claim by a gay man who was facing removal proceedings after being convicted on a felony drug offense, which clearly rendered him subject to removal. The plaintiff sought protection under the Convention against Torture (CAT), which requires a showing that it is more likely than not that the individual will be subjected to torture if removed to his home country. An Immigration Judge denied CAT protection, and was affirmed by the Board of Immigration Appeals. The 9th Circuit panel, affirming, explained: "To qualify for deferral of removal under the CAT, an applicant has the burden of showing that he 'is more likely than not to be tortured in the country of removal.' Evidence of past torture, although relevant, does not create a presumption of future torture. Although reports of conditions in Mexico suggest that gay individuals continue to suffer discrimination in the country, [petitioner] has not established a greater than 50 percent chance of being tortured if returned. 'Torture is an extreme form of cruel and inhuman treatment.' It signifies more than mere discrimination or persecution." In a prior case, *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013), the court had defined torture, in part, as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." Continued the court, "Although [petitioner's] history of abuse suffered as a child in rural Mexico is undeniably serious, he has not established that he is more likely than not to suffer *future* torture if returned to Mexico." Thus, the court denied his petition for deferral of removal under the CAT. The 9th Circuit panel included Judges Reinhardt, Gilman (6th Circuit, sitting by designation) and Wardlaw, all appointees of Democratic presidents, not untypical for a 9th Circuit panel. Petitioner is represented by Judith Marty, The Legal Edge, Fullerton, CA.

ALABAMA – An employee who is the victim of outrageous misconduct by a supervisor – particularly a gay employee – has limited courses for redress in a state like Alabama, where the law (outside of one municipal ordinance) lacks any express protection for LGBT people. Thus, the discharged employee victim and his attorney have to get creative, and may strike out on a first attempt, but hope that a sympathetic federal district judge will point out in detail the pleading deficiencies and give them an opportunity to file an amended complaint. Such is the situation in *Craighead v. Austal USA, LLC*, 2017 U.S. Dist. LEXIS 210891, 2017 WL 6559917 (S.D. Alabama, Dec. 21, 2017), but it means some lawyers are going to work overtime hours during the holiday season, since District Judge William H. Steele gave the plaintiff only two weeks, from December 21 to January 4, to file an amended complaint. Ameri-Force, an "employee staffing company," placed Craighead in a technician position with Austal USA LLC in June 2015. Everything seemed

to go well until Austal transferred him to the crew of an anti-gay supervisor, one Brian Fore, in February 2016. "Immediately thereafter," wrote Judge Steele in summarizing the allegations of the complaint, "Fore initiated a campaign of 'sexual harassment and hostility' directed towards Craighead. Such harassment was manifested in the form of 'hostile and sexually explicit text messages and pictures' that Fore sent to Craighead, as well as sexually explicit comments (including comments about oral sex, Craighead's sexual orientation and male genitalia) directed at Craighead." He asked an Austal supervisor for a crew transfer on March 21 without mentioning any harassment, but the supervisor told him to "speak with Fore directly, after which Fore's harassing conduct worsened. On March 29, 2016, Craighead finally reported the sexual harassment, in response to which Tally [the Austal supervisor] instructed Craighead to notify Ameri-Force." He promptly did so, and the Ameri-Force branch manager said he would "address the harassment with Austal. Later that afternoon, Austal notified Ameri-Force that Austal 'had terminated Plaintiff's service' and provided no reason for doing so. Ameri-Force did not request that Austal take any further action" and Craighead was unable to find a new job for six months. He filed a seven-count complaint against both companies, asserting Title VII discrimination and retaliation claims and a variety of state law tort claims. Ameri-Force moved to dismiss, persuasively arguing that the factual allegations did not establish any liability on its part. Austal, which at first answered the complaint, reacted to Ameri-Force's motion by filing its own motion for judgment on the pleadings, largely adopting Ameri-Force's arguments. Judge Steele found that Ameri-Force's contention was largely correct; virtually everything that Craighead was complaining about was attributable to Austal and its employees, not Ameri-Force, and even as to Austal in many respects the factual allegations were too vague and general to meeting current federal pleading requirements. Thus, Judge Steele granted both employers' motions. Noting that Craighead had anticipated this possibility, asking in advance for the opportunity to file an amended complaint to try to correct any flaws or omissions found by the court in his first complaint. "Defendants have advanced no persuasive ground for denying such an opportunity to Craighead here," wrote the judge, giving the plaintiff two weeks, as noted above, to get an amended complaint on file. Craighead is represented by Adam Matthew Milam, of Milam & Milan, LLC, Daphne, Alabama.

ARKANSAS – The U.S. Supreme Court reversed an Arkansas Supreme Court ruling in *Pavan v. Smith*, 137 S. Ct. 2075 (June 26, 2017), ruling *per curiam* that Arkansas was required to treat same-sex couples the same as different-sex couples regarding parental names on birth certificate. The issue was sent back to the Arkansas courts for implementation, and the Arkansas Supreme Court passed the baton back to Pulaski County Circuit Judge Tim Fox. Frustrated at the failure of the state to move ahead on compliance, Fox threatened to bar the issuance of any birth certificates on the ground that the existing formal law and policies were unconstitutional. (The state issues 400 to 500 new, amended or replacement birth certificates each business day, according to a department spokesperson.) Judge Fox issued an order on December 8, requiring the state to comply without further delay and suspending issuance of any certificates pending resolution of this issue. Governor Asa Hutchinson responded by issuing a directive within hours, ordering state health officials to treat married lesbian and heterosexual couples the same when listing parents on a birth certificate. Issuance of birth certificates was blocked for only two hours. In his order, Fox wrote: "This case has been pending for over two years and it has been more than six months since the United States Supreme Court ruled the Arkansas statutory scheme unconstitutional. There are citizens and residents of the state of Arkansas whose constitutional rights are being violated on a daily basis." Hutchinson's order provided that the Health Department must list the spouse of the woman who gives birth as the child's parent, regardless of the spouse's gender. Hutchinson also directed the Department to issue corrected birth certificates at no charge to married lesbian couples who should have both been listed but were refused by the Department, and to notify hospital administrators of the new procedures. *sfgate.com*, Dec. 8.

CALIFORNIA – What takes place in the fabled Armory in downtown San Francisco? Among other things, Cybernet Entertainment, LLC, leases space from Armory Studios, LLC, to shoot their gay male BDSM pornographic videos (Bound Gods, etc.) under the Kink.com brand. And, according to three men who have performed in such videos, the filmmaker's negligence cause them to contract HIV, alleging that Armory Studios and its managing member, Peter Acworth, failed to exercise reasonable care to prevent HIV transmission on the sets. They charged the state court defendants with negligence, negligence per se, negligent supervision, negligent hiring and/or retention, negligent supervision, and premises liability, including failing to enforce universal precautions to prevent HIV transmission during filming. The three, one proceeding as John Doe and the others identifying themselves as Joshua Rodgers and Cameron Adams, filed suit against "Kink.com" in San Francisco Superior Court, naming,

among others, Armory Studies and Acworth as defendants, even though one would assume that the party most responsible for their injuries would be Cybernet Entertainment, as Armory and Acworth were merely landlords and presumably not directly involved in the actual video production activity. Armory and Acworth notified Atain Specialty Insurance Company, which had sold them a general liability policy, seeking to have the insurer defend them in the action and indemnify them for any damages that might be awarded against them. Atain, in turn, brought a declaratory judgment action against Armory Studies and Acworth in federal district court, seeking a determination that the underlying claims by the three men were excluded from coverage under the insurance contract, thus relieving the insurer of any defense and indemnity obligation. *Atain Specialty Insurance Co. v. Armory Studios, LLC*, 2017 WL 6405616, 2017 U.S. Dist. LEXIS 207686 (N.D. Cal., Dec. 15, 2017). Attain rested its defense on the policy's "Physical-Sexual Abuse Exclusion," which provides, "This insurance does not apply to any 'occurrence,' suit, liability, claim, demand or causes of action arising out of or resulting from . . . sexual abuse . . . or sexual behavior intended to lead to, or culminating in any sexual act, whether caused by, or at the instigation of, or at the direct of, or omission by: (a) The insured or the insured's employees; (b) Patrons of the insureds' business; (c) Agents of the insured; (d) 'Volunteer workers'; (e) Subcontractor or employee of any subcontractor; (f) 'Independent contractor' or employee of any 'independent contractor'; or (g) 'Leased worker'." Finding this language unambiguous, and the underlying claims clearly arising out of "sexual behavior," U.S. District Judge James Donato granted summary judgment to the insurer. Donato rejected the defendants' arguments as to their "reasonable expectations" that the policy covers these claims, finding that the clear contract language controls. Further, "Defendants' arguments that the conduct they are alleged to have engaged in 'does not constitute sexual abuse or sexual behavior' and that the alleged sexual behavior was instead that of insured's tenant (i.e., Cybernet), are similarly non sequiturs in light of the clear language of the exclusion. The exclusion does not require the sexual behavior to have been perpetrated by the insured in order to apply." Further, Donato rejected defendants' argument that this interpretation of the policy rendered coverage illusory. "As Atain has expressly acknowledged, the example given by defendants – of a videographer being injured by a falling brick while filming a sex scene – is in fact an example of exactly the kind of injury that would be covered by Atain's insurance policy." The court also rejected defendants' counterclaim seeking reformation of the insurance contract along the lines of their "expectations." They argued that Atain knew of "Cybernet's tenancy and its business activities at the premises." Donato insisted that this is "not enough to support a reformation claim." He found defendants' arguments on this point "entirely too vague and conclusory." Furthermore, one would observe, knowing what activities – films of BDSM activity - were taking place on the premises, Atain clearly did not agree to contract to insure against claims arising from such activities, and seemed to have drafted their policy specifically to avoid assuming such liability! Donato directed the parties to meet and agree upon an amount to be awarded to reimburse Atain for its costs of this litigation.

HAWAII – The unusual structure of public education in Hawaii, as described by Senior U.S. District Judge Alan C. Kay in *K.S.-A. v. Hawaii School District*, 2017 U.S. Dist. LEXIS 207764, 2017 WL 6452417 (D. Hawaii, Dec. 18, 2017), required dismissal of a complaint against "Hawaii School District" alleging that the plaintiff students, enrolled in Hawaii public schools, had been subjected to "ongoing pervasive harassment because they were perceived by other students to be gay or bisexual or to identify with being gay or bisexual." The complaint alleged that "this persistent harassment is often committed in the presence of Defendant's administrators, teachers, and counselors who fail to take appropriate required action." The complaint asserted federal claims under Title IX and the Equal Protection Clause, and asserted state tort claims of invasion of privacy and negligent infliction of emotional distress. The Hawaii attorney general's office, served with the complaint, moved to dismiss, arguing that there is no entity named "Hawaii School District" and thus the complaint failed to identify the proper defendant. Judge Kay found this contention to be correct. Unlike all the other states, Hawaii is not subdivided into local school districts that can be sued under Title IX, other statutes, or common law theories, and neither is the state organized as a "school district." Instead, the state Department of Education is charged by the Hawaii constitution with the responsibility of providing education to Hawaii children, which it does through administrative units broken down along geographical lines that are not individual entities amenable to suit. Which opens the question of how Title IX can be enforced in the Hawaii public schools? Judge Kay's conclusion is that plaintiffs have to sue the State of Hawaii, Department of Education. "Although Defendant argues that Plaintiffs should not be granted leave to amend their FAC, the Court disagrees," wrote Judge Kay, who allows plaintiffs to file an amended complaint against the state's Department of Education within thirty days of the entry of order in this case. It seems odd that the battery of lawyers representing plaintiffs, as listed in the court's opinion, had not figured this out before filing suit. They include

Brooks L. Bancroft of Bancroft Law LLC, Hilo; Christina M. Gattuso of Kilpatrick Townsend & Stockton LLP, Washington, D.C.; Rob Roy Smith of the Kilpatrick firm's Seattle office, and Scott Kolassa of the Kilpatrick firm's Menlo Park, California office.

IDAHO – Chief U.S. District Judge B. Lynn Winmill found that various Athletic Department employees of Idaho State University enjoyed qualified immunity from constitutional discrimination claims by Orin Duffin, a student who has asserted various federal and state law claims against the University and three of its employees. Winmill also found that the University would enjoy governmental immunity under the 11th Amendment, but had effectively waived that defense by not raising it until its motion for summary judgment, years after the complaint was filed; indeed, so long that time has run out for the plaintiff to attempt to assert the same claims in a state court action. "The court can only conclude that this was a tactical attempt to deny Duffin his day in Court," wrote Winmill. "The Court will not allow Eleventh Amendment immunity to be used that way." *Duffin v. Idaho State University*, 2017 U.S. Dist. LEXIS 211296, 2017 WL 6543873 (D. Idaho, Dec. 21, 2017). Duffin, who was a freshman on the men's tennis team, claims that he was harassed by the head coach and a graduate assistant because of his religion (Mormon), to wit: he was told that his decision to serve on an LDS mission was insane, that he was disparaged because he would not drink alcohol, that he was harassed about his sexual orientation, that he was harassed about whether he watched pornography, had sex with women, or masturbated, and that two girls were sent to his hotel room in Las Vegas during a tennis tournament to proposition him for sex." After he was scratched from participation in an out-of-state tournament, he quit the team and filed this lawsuit. Various deadlines were extended while he went on his two-year mission for the LDS church, so the cross-motions for summary judgment were not filed until well over a year after the complaint was filed, and there apparently was no motion to dismiss in the interim as discovery was carried out. After reviewing the merits of Duffin's federal claims, the court decided he did not have a federal case. Although normally that would end the case in federal court, with the court declining to assert jurisdiction on state tort claims, Judge Winmill decided that "to send the case to state court now would undermine the purpose of Eleventh Amendment immunity, judicial economy, convenience and fairness," so the court would exercise supplemental jurisdiction, which required analyzing Duffin's tort claims. The court decided that it should certify a question to the Idaho Supreme Court of whether there is a "special relationship" between a student and the state university that would fulfill the duty prong of a negligence claim, so any summary judgment on the negligence claim is deferred for now. While the court found a question of fact as to whether the defendants' alleged misconduct towards Duffin was sufficient extreme or outrageous to fulfill the requirements of an intentional infliction of emotional distress claim, he concluded that Duffin's deposition testimony about his emotional distress would not support a finding of severe emotional distress required to sustain such a claim, and granted summary judgment against Duffin. However, he found that the pleadings were sufficient to ground a negligent infliction of emotional distress claim. As to Duffin's cross-motion for summary judgement, Judge Winmill found that Duffin was not entitled to summary judgment yet, having not adequately addressed the remaining federal claims or the negligent infliction of emotional distress claim, and also noting that the court was awaiting response to the certified question on negligence, so the motion was denied. The court also put off figuring out whether the individual coaching staff members were sued in their individual or official capacities until after it returns to the merits in this case.

MARYLAND – While holding that 4th Circuit precedent requires the court to dismiss a lesbian public school teacher's Title VII sexual orientation discrimination claims, U.S. District Judge Paul W. Grimm found that plaintiff Jira Churchill had sufficiently alleged facts for a gender stereotyping claim, so the court would not dismiss her Title VII sex discrimination hostile environment claim. *Churchill v. Prince George's County Public Schools*, 2017 U.S. Dist. LEXIS 197713, 2017 WL 590718 (D. Md., Dec. 1, 2017). Churchill, whose teaching contract was not renewed as she completed one stormy academic year with the school district, supplemented her Title VII claims (discrimination, hostile environment sexual harassment, wrongful termination, retaliation) with claims under the Maryland Fair Employment Practices Act (MFEPA), which expressly forbids sexual orientation discrimination, but the survival of her claim in federal court turned on being able to maintain a federal cause of action, so the gender stereotyping aspect of her claim was crucial. She began working at Thurgood Marshall Middle School in August 2014 on a one-year contract, but was reassigned to DuVal High School as a classroom teacher on September 19 of that year. "The principal of Thurgood Marshall Middle School was aware of Churchill's sexual orientation," wrote Judge Grimm, summarizing factual allegations of the complaint, "and informed [Principal Mark] Covington and [Assistant Principal Shanay] Wheeler, who informed Churchill's students. Churchill informed teachers at her new school about her sexual orientation, who in turn also informed students." Students quickly began to

subject Churchill to harassment. In addition, although it was common practice for students to eat their lunch in their classrooms, Assistant Principal Wheeler, noting that most of the students eating lunch in Churchill's classroom were female, told her "the school can't have the female students being in your classroom." There were a series of incidents in which Churchill was subjected to unequal treatment, and several occasions where her supervisors made comments reflecting gender stereotypes about lesbians. The school's principal attempted unsuccessfully to get Churchill's one-year contract terminated early, money was withheld from her paycheck to which she claimed to be entitled, she was removed from the classroom before the end of the academic year and assigned administrative duties, and her contract was not renewed. Churchill filed more than one charge with the EEOC under Title VII, and claimed that some of the adverse actions were retaliatory for filing her first charge, including the pay withholding. The school district moved to have her federal claims dismissed on the ground that Title VII does not extend to sexual orientation discrimination. While agreeing that 4th Circuit precedent supports that position, Judge Grimm noted that *Price Waterhouse* and 4th Circuit cases recognize the possibility of sex-stereotyping claims, and found that Churchill's allegations were sufficient as to that. Where they fell short, however, on some of the discrimination claims, was in failing to expressly allege in her complaint all the elements of a *prima facie* case, as required where a complaint does not allege direct evidence of discriminatory intent (the so-called *McDonald Douglas* pleading requirements), so Grimm dismissed those claims without prejudice, allowing Churchill to file an amended complaint with the necessary allegations to raise an inference of discriminatory intent. (This was a similar problem with respect to some of the MFEPA claims.) Ultimately, however, Churchill's federal case survives the dismissal motion, providing her counsel (Denise M. Clark and Jeremy Greenberg of Clark Law Group PLLC, Washington D.C.) a short deadline set by the court (Dec. 22) to get her amended complaint on file and thus preserve all of her federal claims.

MINNESOTA – A divided three-judge panel of the Minnesota Court of Appeals affirmed a ruling by the Blue Earth County District Court denying a writ of mandamus and a request for injunctive relief by James Michael McConnell and Richard John Baker, the first same-sex couple in the United States who sued for the right to marry back in 1970, who now seek state recognition of their 46-year-old marriage. Therein hangs a tale! *McConnell v. Blue Earth County*, 2017 Minn. App. Unpub. LEXIS 1062, 2017 WL 6567843 (Dec. 26, 2017) (unpublished opinion). McConnell and Baker applied for a marriage license in Hennepin County on May 18, 1970, but were turned down on the ground that Minnesota did not allow same-sex marriages. They instituted a lawsuit. While their appeal was pending in the Minnesota Supreme Court, they went to Blue Earth County and, with Baker being identified on the application as Pat Baker (female), obtained a license to marry on August 16. They were married by a clergyman on September 3. However, sometime after August 16, the Earth County Attorney's Office, acting apparently *sua sponte*, determined that the marriage license was defective and invalid, and the district court clerk mailed a notice of same to Baker and McConnell at the addresses listed on the license application, but the letters were returned by the postal service as undeliverable. (It seems that Baker, who was not a resident of Blue Earth County, may have given a false address. As a non-resident of the county, he was not entitled under local law to apply for a marriage license there. Why McConnell did not receive the letter is unexplained.) When McConnell and Baker sent the marriage certificate signed by the clergyman to the Blue Earth County clerk for filing, the clerk, pursuant to the county attorney's direction, did not formally file it, but instead placed it in a correspondence file, where it sat for the past 46 years. McConnell and Baker have identified themselves as married since then. While these events were taking place, the Minnesota Supreme Court held that they were not entitled to marry in *Baker v. Nelson*, 291 Minn. 310 (1971), with the Supreme Court dismissing their petition to review in 1972, stating that it did not present a substantial federal question. The Supreme Court expressly overruled *Baker v. Nelson* in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), disavowing its statement that the question of same-sex marriage did not present a substantial federal question! Rather than take advantage of *Obergefell* to get married anew, McConnell and Baker, insisting that they have been married for 46 years, sued the Blue Earth County clerk upon discovering that their 1971 marriage certificate had not been filed and the clerk would not provide them with a certified copy attesting to their 1971 marriage. The trial court held that questions about the legality of their 1971 marriage precluded issuing a writ of mandamus, and two members of the Court of Appeals panel agreed, over an extensive dissent by Judge Peter M. Reyes, Jr., who insisted that Baker and McConnell are entitled to a certified copy of that 1971 marriage certificate. Reyes disputed the district court's contention that Baker and McConnell could solve their problem by marrying now. Perhaps the next step for this case is a return to the Minnesota Supreme Court. But maybe McConnell and Baker might be better advised to assure the legality of their union in the interim by marrying again, although that might be seen as a concession that their earlier marriage was not valid. They argue

that having retroactive recognition of their marriage is significant for benefits purposes, among other things. Richard D. Snyder, Cynthia A. Moyer and Anupama D. Sreekanth of Fredrickson & Byron, P.A., Minneapolis, represent McConnell and Baker.

MINNESOTA – Reversing a dismissal-summary judgment by the Hennepin County District Court of a public accommodations discrimination claim asserted against Starbucks by a transgender customer, the Court of Appeals of Minnesota ruled on December 26 in *Bray v. Starbucks Corporation*, 2017 WL 6567695, 2017 Minn. App. Unpub. LEXIS 1087, that plaintiff Paul Allen Bray had alleged facts sufficient to meet the pleading test under the state's Human Rights Law, whether his allegations were evaluated under the direct evidence or indirect evidence method of analysis. Bray showed that a counter-server who had been friendly to him and provided good service suddenly turned hostile upon learning that Bray is a transgender man. Although Bray continued to receive service from other Starbucks staff, this employee shunned him. Also, he alleges that when he told another Starbuck employee in confidence that he was transgender to avoid problems in using his debit card in the wake of his name change, that employee apparently spread the word to others, which led to this particular employee turning hostile. Bray alleges complaining to the manager but getting nowhere. When he shifted his patronage to a different Starbucks store, he received friendly service until after he spotted an employee from the earlier store sitting in the new store; thereafter, service turned unfriendly. Among other things, in both stores Bray alleged that the speed of service to him declined after staff learned he was transgender, and certain staff members would back away from the counter when he approached, leaving service to others. The trial judge, likening this to a hostile environment employment case, set a high bar under which Bray's pleading was insufficient for failing to allege that he was denied service outright. The court of appeals rejected this standard of pleading. Wrote Judge Michelle A. Larkin, "Starbucks acknowledges that there is no precedent establishing a threshold level of adverse conduct necessary to sustain a public-accommodation discrimination claim. And Starbucks does not cite any precedential public-accommodation caselaw stating that, so long as a person is provided access to and service from a place of public accommodation, that person cannot sustain a public-accommodation discrimination claim." The court noted the text of the public accommodations provision, which speaks of denying "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation." "Neither the MHRA nor caselaw expressly limits public-accommodation discrimination claims to those in which a person is denied access or refused service by a place of public accommodation," said the court. "Given the broad 'full and equal enjoyment' language" in the statute, "it is not apparent why, as a matter of law, this court should read that provision so narrowly, especially when the legislature has indicated that the MHRA should be liberally construed to accomplish its anti-discrimination purpose." The court took note of a non-precedential federal court decision, *Longen v. Fed. Express*, 113 F. Supp. 2d 1367 (D. Minn. 2000), as supporting this point. "We agree with the reasoning of the federal district court: the plain language of the MHRA allows claims based on denial of equal enjoyment, even if service was provided. Thus, the fact that the Eden Prairie and Edina Starbucks did not deny Bray access to their facilities or refuse to serve him does not prevent Bray from establishing a prima facie case of public-accommodation discrimination." The court noted that at oral argument Starbucks had failed to provide any authority supporting its contention that the higher standard of workplace hostile-environment cases should apply, but the court noted that it would have an opportunity to do so later in the case. "In sum," wrote Judge Larkin, "Bray has established a prima facie case of discrimination. Yet Starbucks has not articulated a legitimate, nondiscriminatory reason for its employees' actions. Indeed, Starbucks did not attempt to do so, relying instead on its assertion that Bray failed to establish a prima facie case. Bray's discrimination claim therefore survives summary judgment . . . " However, the court found that Bray's negligent-retention and negligent-supervision tort claims, because they arose from the same facts underlying the discrimination claim, were preempted under the MHRA's exclusivity provision, which states that "the procedure herein provided shall, while pending, be exclusive." This has been construed to preempt tort claims arising from the same facts of the MHRA claim where the tort claims require the same elements of proof and address the same injuries as the MHRA claim. Bray is represented by Zorislav R. Leyderman of Minneapolis.

MISSOURI – This is a "tough luck" case, involving a gay man who lives in a jurisdiction that does not ban sexual orientation discrimination, and which is in a federal circuit that has not yet agreed to extend Title VII to sexual orientation discrimination claims. *Horton v. Midwest Geriatric Management LLC*, 2017 U.S. Dist. LEXIS 209996, 2017 WL 6536576 (E.D. Mo., Dec. 21, 2017). Mark Horton, employed as V.P. of Sales & Marketing at Celtic Healthcare, received an inquiry from a corporate headhunter trying to fill an identically-titled position at Midwest Geriatric Management (MGM). Horton agreed to submit to MGM's hiring process,

and came out of the process with a written offer of employment from the proprietors, Judah and Faye Bienstock. The offer said that it was "contingent upon successful completion of background checks and references" and emphasized that MGM was an at-will employer, so that "either you or MGM are free to end the employment relationship at any time, with or without notice or cause." Things seemed to be going along well until April 21, 2016, when Horton was informed that the company retained by MGM to handle the background checks was having trouble verifying Horton's educational credentials. It turned out that one college he attended had been sold and the inquiry had to be sent to a new entity; the other college did not have computerized records and required more time to respond. Horton relayed this information back, indicating it would take four to six weeks to obtain the requested information. According to Horton, neither the headhunter, MGM, nor the background check company stated any concern about this delay. Horton signed the written job offer and returned it to MGM and the headhunter by email on May 4, 2016, receiving in response an effusive email from Faye Bienstock: "Wonderful! Congratulations! We are so excited! When will be your anticipated start date?" Based on this email, Horton gave notice to Celtic that he was resigning, and advised Faye by email on May 10 that Celtic had agreed to release him early from his employment. She responded by email: "We are ready for you whenever works for you!" and two days later sent another email suggesting a meeting date of May 16. However, on May 13, Faye sent another email, telling Horton that he needed to complete the documentation regarding his education and complete a pre-hire assessment before attending orientation the following week, after which MGM and Horton could agree on a new start date. Horton successfully completed the pre-hire assessment, and updated Faye on the status of getting the educational documentation, but he made a fatal error by including in that email the statement: "My partner has been on me about [my MBA] since he completed his PhD a while back." Oops! This was the first time Horton revealed to the Bienstocks that he was gay. (He had married his partner in Illinois in 2014.) Then things went sour. Faye sent an email on May 20, asking if Horton could come in that afternoon because "We would like to discuss the status of your employment." Horton was out of town then, but suggested another date. On May 22, Faye emailed: "Mark – I regret to inform you that due to the incompletion of the background check of supportive documentation – we have to withdraw our offer letter for employment at MGM. We wish you much luck in your future endeavors." Eventually Horton obtained the requested college records, and upon learning that the V.P. position at MGM was still not filled, contacted the Bienstocks again, reiterating his continuing interest. But they were not interested, emailing him that they were considering other candidates and that they would "contact you if we wish to pursue a relationship." Horton filed a Title VII charge with the EEOC, which issued a Right to Sue letter on August 23, 2017, and he filed his federal court complaint a few days later, which provoked a prompt motion to dismiss by MGM, arguing that Title VII does not cover Horton's allegations of sex or sexual orientation discrimination. District Judge Jean C. Hamilton agreed, granting the motion. She found that binding 8th Circuit precedent from 1989, *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, refused to allow sexual orientation discrimination claims under Title VII, and that subsequent district court decisions had rejected any of the alternative arguments for covering sexual orientation, or treating this as a sex discrimination case, these being as recent as 2014. While noting the 7th Circuit's *Hively* decision to the contrary, Hamilton observed, "To date the Eighth Circuit has not changed its position on the issue, and so the Court must dismiss this portion of the Plaintiff's claim pursuant to *Williamson*. Judge Hamilton also noted widespread rejection of Horton's alternative sex discrimination theory, relying on *Loving v. Virginia*'s reasoning, pointing out that *Loving* predated *Williamson* by over twenty years, "and so cannot be construed to overrule *Williamson*." Horton had also alleged religious discrimination. The court noted that the Bienstocks are observant Jews who presumably had a negative view of same-sex marriage, but that this did not make it into a religious discrimination case. She also rejected the supplementary state law fraudulent inducement claim, finding that MGM had never explicitly stated that Horton's acceptance of the offer was final before the educational records were received, thus his reliance on the purported contract in resigning his employment with Celtic was not warranted. (Furthermore, it would not be reasonable to rely on an at-will contract, which could be terminated for any or no cause.) An appeal to the 8th Circuit might provide an opportunity to get another circuit on-board with the new, more expansive view of Title VII, but query whether this is the best case to do it in light of the facts and the lack of smoking gun direct evidence? Horton is represented by Mark S. Schuver and Natalie T. Lorenz, of Mathis and Marifian, LTD, Belleville, IL.

NEW JERSEY – The Appellate Division rejected an attempt by a student from a Catholic school and his parents to get around an explicit statutory exemption in the state's public accommodations law to seek redress for the school's failure to deal effectively with sexually harassing bullying by fellow students in *G.A. v. St. Mary of the Lakes School*, 2017 WL 6507730 (Dec. 20, 2017) (unpublished disposition). The *per*

curiam opinion relates that the parents contracted with the school to admit and educate their child when he was five years old. "Two older students began to verbally harass plaintiff shortly after plaintiff entered the fifth grade. We need not repeat the content of the verbal abuse detailed in the amended complaint. Suffice it to say the verbiage was disturbing, disgusting, and deviant. We accept for purposes of the issues presented on this appeal that the older students' persistent taunting of plaintiff constituted sexual harassment." Despite contact from the boy's parents, school officials failed to take effective action to stop the bullying, and after repeated contacts, both the school principal and teachers were nonresponsive, and the Monsignor responsible for oversight of the school blew them off. Indeed, the principal actually accused the plaintiff, in an "exit interview," of "making all of this up" and causing "a lot of trouble for nothing," and making the principal "look bad" in front of her superior. Trying to get around the exclusion of "bona fide religious educational institutions" from the public accommodation provisions of the Law Against Discrimination (LAD), the plaintiffs alleged that their son was the intended beneficiary of a contract to provide educational services, and that sexual harassment of such a beneficiary by the other contracting party violations the LAD's prohibition against refusing to contract with a person because of that person's gender identity or expression, or affectional or sexual orientation. But the Burlington County Superior Court dismissed their complaint, and was affirmed by the Appellate Division. The court explained that "a school falling within the definition of a place of public accommodation could be found to violate the LAD based on bullying by its students," but the express exclusion for religious schools exempts a Catholic parochial school from such liability. The courts found that the school officials' action or inaction did not constitute a refusal to contract. "Moreover," wrote the court, "we agree entirely with the trial judge, Janet Z. Smith, J.S.C., that plaintiffs' strained interpretation of N.J.S.A. 10:5-12(1) would render meaningless the explicit exemption for parochial schools from the LAD's definition of a place of public accommodation. The Legislature certainly did not intend to render meaningless a section of the LAD." Plaintiffs are represented by Deborah L. Mains, Costello & Mains LLC.

NEW YORK – The N.Y. Appellate Division, 1st Department, affirmed a decision by Supreme Court Justice Lynn R. Kotler that rejected a demand by a former New York City police officer seeking additional discovery in his sexual orientation harassment claim against the NYPD. *Doe v. New York City Police Department*, 2017 WL 6375439 (Dec. 14, 2017). The "John Doe" plaintiff seeks to recover damages for alleged on-the-job harassment due to his sexual orientation. During a deposition of a fellow officer, "plaintiff's counsel battered the witness, a nonparty female officer, with questions that were so 'grossly irrelevant' and 'improper' that they were not required to be answered," wrote the court. Plaintiff sought a further deposition of that officer, and disclosure of the officer's disciplinary file. The court noted that police disciplinary files are "protected by Civil Rights Law Sec. 50-a, and plaintiff failed to provide a clear showing of facts sufficient to warrant even an in camera review of those records." The court found that the trial court had "providently exercised its discretion in denying plaintiff's requests for additional discovery." Doe was also appealing Justice Kotler's rejection of a discovery request to disclose the disciplinary file of another NYPD employee, but the court rejected this appeal as well, commenting that such discovery "was not warranted, as she was not similarly situated with plaintiff and thus is not comparable for the purpose of showing discrimination." The inclusion within the *unanimous* five-judge panel of one openly-LGBT judge suggests that the decision has nothing to do with the sexual orientation of the appellant or the fact that he is claiming harassment because of his sexual orientation. Doe is represented by Ismail S. Sekendiz of Sekendiz Law Firm P.C.

NEW YORK – *Pro se* federal civil litigation is complicated enough; more so when running up against the complex of federal statutes pertaining to non-citizens seeking relief from removal orders. In *Joseph v. U.S. Attorney General*, 2017 WL 6001776 (E.D.N.Y., Dec. 4, 2017), the petitioner, a gay man from Trinidad and Tobago who alleges he is "being 'held in indefinite detention' at the Hudson County Correction Facility in New Jersey pursuant to a detainer by United States Immigration and Customs Enforcement (I.C.E.)," found this out the hard way. Presumably he sought relief in the federal court in the Eastern District of New York because he resides in that district. Wrote District Judge Pamela K. Chen, "He states that he has a removal order from August 22, 2007, and that he was taken into immigration custody on July 19, 2017. He does not say where the removal order was entered. Prior to his detention in immigration custody, he was 'on I.C.E. Supervision Relief for the past 5 years from which I was detained when I last reported.' Petitioner did not previously appeal the removal order, file a grievance, or seek an administrative remedy." Judge Chen ruled that petitioner was in the wrong court, seeking the wrong form of relief and, despite the strong evidence that he would be in mortal danger if removed back to Trinidad & Tobago, there was basically nothing that Judge Chen could do for him. She pointed out that her court "does not have jurisdiction to consider Petitioner's claims, which may only be raised in the Court of Appeals for the judicial circuit in which his final

removal order was entered" under the REAL ID Act. Petitioner was seeking a stay of removal, not a review of the removal order, but, wrote Judge Chen, "Since District Courts cannot review removal orders, they also cannot consider requests for stays of removal." However, she noted, given his claim that he was being held in "indefinite detention," he might have a constitutional claim that could be vindicated through a petition for a writ of *habeas corpus* once he had passed six months in detention, which will occur if he continues to be held past January 19. However, she pointed out, since he was being detained in New Jersey, he could not file such a petition in the Eastern District of New York, at least according to the uniform practice of the district courts of that district on a practice question as to which there is not a clear Supreme Court precedent. The court suggested that Petitioner contact Immigration Equality, the LGBT immigration legal services group, for assistance, even helpfully supplying the organization's URL in a footnote. Clearly, Judge Chen was sympathetic to the plight of a gay man from an intensely-homophobic country who was detained as part of the Trump Administration's stepped-up immigration enforcement actions, not because of having engaged in any criminal activity or wrongful conduct other than being undocumented, and who could possibly present a viable petition in an appropriate form with proper legal representation to avoid being returned to a place where he legitimately "fears for his life," to quote the court.

NEW YORK – The *Buffalo News* (Dec. 6) reports that Erie County has agreed to pay $239,000 in damages to former Holding Center Lt. Jacqueline Kretzmon and her lawyer to settle a lawsuit that charges the Sheriff's Office with failure to abide by a prior settlement agreement of discrimination claims by Kretzmon, a lesbian who was the victim of hostile environment harassment by co-workers at the Center. Under the terms of the settlement, Kretzmon was never to be in Chief Michael Reardon's direct chain of command. Reardon was reassigned to another facility, but eventually he was returned to the Holding Center in Buffalo and placed in a position of authority that directly contradicted the settlement agreement, sparking Kretzman to file a new discrimination suit in federal court. A U.S. Magistrate Judge, ruling last summer, upheld Kretzmon's claim that the agreement had been violated. Under the new agreement, reached through mediation, the county will pay $239,000 but will not admit liability. Most of the money will go to pay back wages to Kretzmon, who is now retired.

NORTH CAROLINA – The Transgender Legal Defense & Education Fund (TLDEF) has filed suit on behalf of Charlene Bost, a transgender woman who alleges that she was wrongfully discharged after complaining about harassment at a Sam's Club store in North Carolina where she had been employed for eleven years. *Bost v. Sam's East Inc*. was filed on December 27 in the U.S. District Court for the Middle District of North Carolina, Case No. 17-01148. The complaint invokes the theory, accepted in several other parts of the country, that discrimination against transgender individuals is sex discrimination forbidden by Title VII of the Civil Rights Act of 1964. That proposition has yet to be firmly established within the 4th Circuit, and this case may provide the vehicle to obtain such a ruling.

SOUTH CAROLINA – In *Doe v. State*, 2017 S.C. LEXIS 113, 2017 WL 3165132 (S.C. July 26, 2017), the South Carolina Supreme Court ruled that the 14th Amendment's Equal Protection Clause requires the state to provide the same protection against domestic violence to unmarried same-sex couples as it provides to cohabiting different-sex couples, so its relevant statute, failing to do that, was unconstitutional. On July 28, the court granted a joint request from the parties to stay its ruling so as to avoid leaving unmarried cohabitants unprotected while the court considered arguments that it should have adopted the remedy urged by two partially dissenting judges. On November 17, the court substituted a new decision, 2017 WL 5907363, curing this problem by reframing its holding so as to find the statute unconstitutional *as applied* rather than on its face. (Oddly, although Westlaw published the text of the new decision, Lexis assigned it a citation but did not publish the text, at least as of December 31.) Thus, the statute remains in effect, and unmarried same-sex couples are included in its protection. In a partial dissent, one judge held that because the statute as now construed by the court would extend equal protection to same-sex couples, the Acts in question should not be deemed unconstitutional.

TEXAS – Pity the LGBT plaintiff who seeks to assert a Title VII hostile environment sexual orientation harassment claim in Texas. In *Stevens v. University Village Assisted Living and Memory Care*, 2017 U.S. Dist. LEXIS 201924, 2017 WL 6065286 (W.D. Tex. Dec. 7, 2017), U.S. Magistrate Judge Andrew W. Austin recommended that District Judge Lee Yeakel grant the employer's motion to dismiss on the ground that 5th Circuit precedent rejects sexual orientation discrimination claims under Title VII. Tomisha Stevens, a lesbian, alleged that her supervisor at University Village "made inappropriate comments to her about her sexual orientation," and that "three co-workers also harassed her about her sexual orientation and mental disability" (bipolar and anxiety disorder). Harassment continued despite

her complaint to her supervisor until she quit her job. She claims in her lawsuit that she was constructively discharged "after being severely harassed by her coworkers and could no longer handle the harassment due to her disability." She originally alleged violations of the Americans with Disabilities Act (ADA) and Title VII (both harassment and retaliation claims), but in response to the defendant's motion to dismiss she dropped the ADA and retaliation claims, resting her case entirely on her Title VII hostile work environment claim. Wrote Magistrate Austin, "The Fifth Circuit has concluded that 'Title VII in plain terms does not cover 'sexual orientation.' *Brandon v. Sage Corp.*, 808 F. 3d 266, 270 n. 2 (5th Cir. 2015); see also *Blum v. Gulf Oil Corp.*, 297 F.2d 936, 938 (5th Cir. 1979) ('Discharge for homosexuality is not prohibited by Title VII or Section 1981.'). District courts in the Fifth Circuit that have addressed the issue – including the undersigned – have followed this precedent and have dismissed Title VII claims based on sexual orientation. Further, the majority of the circuit courts have similarly found that sexual orientation is not a protected class under Title VII." In a footnote, Judge Austin listed cases from (in reverse chronological order) the 11th, 6th, 10th, 3rd, 2nd, 1st, 4th, and 8th Circuits supporting this statement. Stevens had argued that instead the court should follow the persuasive precedents of the 7th Circuit's recent *Hively* decision and the EEOC's *Baldwin* ruling, but Judge Austin explained that the district court was bound to follow 5th Circuit precedent. "Until the Fifth Circuit reverses itself, or the Supreme Court holds to the contrary, this Court must follow and apply Fifth Circuit precedent," he wrote. Thus, "Stevens has failed to allege a *prima facie* hostile work environment claim under Title VII and her case must be dismissed under Rule 12(b)(6)." Assuming that Judge Yeakel accepts the recommendation and grants the defendant's motion to dismiss, this case might be a good vehicle to get the issue of reconsidering its precedent up to the 5th Circuit. Stevens is represented by Michael J. Hindman, of Hindman Bynum PC, Dallas.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

TEXAS – The Texas 4th District Court of Appeals (San Antonio) held in *Fisk v. State*, 2017 Tex. App. LEXIS 11311 (Tex. Crim. App. Dec. 6, 2017), that Judge Kevin M. O'Connell of the Bexas County District Court erred in applying the Texas two-strike law to the sentencing of Walter Fisk, who had been convicted under Tex. Penal Code Ann. Sec. 22.011 on three counts of "indecency with a child." The prosecution presented evidence that in 1990, during his military service, Fisk had been convicted at a court martial of violating UCMJ Section 125, the military sodomy law, also with a minor. Under the Texas statute, a person who has a prior conviction of a sex crime involving a child is subject to a mandatory life sentence, and the earlier conviction can have occurred in a different state, provided that the statutes were "substantially similar" in their elements, interests protected, and penalty ranges. Court-martial convictions are considered to be criminal convictions in other states for this purpose. Judge O'Connell apparently accepted the argument that because Fisk was convicted for similar acts, this was an appropriate two-strike case, and sentenced him to three life terms. On appeal, Fisk argued that it was improper to count this as a two-strike case, because UCMJ Section 125 was not substantially similar to the Texas statute under which he was convicted. The court of appeals agreed with Fisk, doing a close comparison of the two statutes. The Texas statute is not limited in its coverage to sodomy (oral or anal sex), but also takes in genital-to-genital contact. The military sodomy law under which Fisk was convicted, on the other hand, is limited to sodomy, and extended to adult consensual sex and sex with animals as well as sex involving minors. The court of appeals found that although there was overlap in coverage, it was incorrect to say that the two statutes were "substantially similar" as that term is used in the Texas statute for determining the application of the mandatory sentence enhancement provision. The Texas statute and the military sodomy law both authorized sentences ranging up to 20 years, although the UCMJ penalties also involved forfeitures of rank and other military consequences. "While the punishments are extremely similar," wrote the court, "the elements and the interests protected by the two statutes are not. Article 125 was designed to protect against a certain type of sexual activity – penetration of the mouth or anus by the sexual organ of another – regardless of whether that activity was between consenting adults, between adults and children, or between persons and animals. Section 22.011 sets out protections against nonconsensual contact or penetration of the mouth, anus, or sexual organ of any adult or any sexual acts against children. We therefore conclude the trial court erred in finding that Fisk's prior court-martial convictions under Article 125 were substantially similar to sexual assault pursuant to Texas Penal Code section 22.011. Accordingly, we reverse the trial court's judgments as to punishment and remand this matter to the trial court for a new sentencing hearing." Fisk had also claimed that the state failed to satisfy its burden to show that the Walter Fisk who was convicted at the court martial was him, but the appeals court noted consistent identifying information as well as fingerprints provided a sufficient basis for concluding that it was, indeed, he who had been convicted at court martial! Fisk is represented by San Antonio Assistant Public Defender Michael D. Robbins.

PRISONER LITIGATION *notes*

VIRGINIA – The U.S. Court of Appeals for the 4th Circuit affirmed the denial of a habeas corpus petition filed by Adam Toghill, who when 32 years old in 2011 exchanged email with a police officer posing as a 13 year old girl advertising for sexual activity on Craigslist and, having suggested engaging in oral sex, was convicted of violating a law prohibiting a person 18 years of age or older from using electronic media to solicit a person less than 15 years old to engage in conduct outlawed by the state's sodomy law, which included oral sex. *Toghill v. Clarke*, 2017 WL 6391157, 2017 U.S. App. LEXIS 25369 (4th Cir. Dec. 15, 2017). The Virginia Supreme Court sustained Toghill's conviction, and he then resorted to the federal courts seeking a writ of habeas corpus, relying on *Lawrence v. Texas* and the intervening decision in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), where the 4th Circuit had granted a habeas petition sought by a Virginia man who was convicted of engaging in oral sex with a 17 year old woman, reasoning that Virginia's sodomy law, as it then read, was facially unconstitutional under *Lawrence* because it broadly outlawed all oral or anal sex, regardless of the age of the participants, the locus of the performance, and whether the acts were consensual. The Virginia legislature ultimately responded to the *MacDonald* ruling, which had been repeatedly rejected by the state courts, by reforming its sodomy law to bring the overall penal code in line with the ruling in *Lawrence*. But the state courts have continued to deny relief to people convicted under the old law, even after the *MacDonald* ruling and the legislative reform (which was prospective only). Federal court of appeals rulings are not binding precedents on the state courts, but the question arises in this case whether they will be treated as precedential in a federal habeas action. Toghill sought to persuade the federal district court to follow *MacDonald* and void his conviction, but District Judge Michael Urbanski (W.D. Va.) refused to do so. Affirming Urbanski's ruling in an opinion by Judge William Byrd Traxler, Jr., the 4th Circuit panel explained that the Virginia Supreme Court had, in affirming Toghill's conviction, adopted a limiting construction of the old sodomy law to avoid penalizing conduct protected under *Lawrence*, and, of course, the Virginia criminal statutes had long outlawed sex between adults and minors, so the court held that it was now appropriate to deny the writ, as Toghill's conviction did not clearly violate federal constitutional law as articulated by the Supreme Court in *Lawrence*, in which Justice Kennedy's opinion stated that the case before the Court did not involve sex between an adult and a minor. This new 4th Circuit ruling must be a disappointment for people serving time for convictions under the old law who hoped to use *MacDonald* as a vehicle to win release from prison or, in more cases, to get old convictions quashed and thus clear their criminal records. Toghill was represented by Gregory Dolin of the University of Baltimore School of Law.

PRISONER LITIGATION NOTES

By William J. Rold

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

ARIZONA – We've all read about jail conditions maintained by "Sheriff Joe" Arpaio, in Phoenix, who was recently pardoned for criminal contempt of court by President Trump. This *pro se* case by inmate Bobby S. Thompson, an HIV+ inmate, illustrates in simple terms, in *Thompson v. Arpaio*, 2017 WL 6001695 (D. Ariz. Nov. 3, 2017), the plight of those incarcerated in Maricopa County. U.S. Magistrate Judge Eileen S. Willett recommends that a claim against the county be permitted to proceed. Judge Willett quotes from Thompson's second amended complaint: "[I] was housed in a cell with three other inmates that was built for one. There were two bunk beds stuffed into a 5 ft by 7 ft room. In the morning we were served two pieces of bread one 2 ounce pack of peanut butter one orange and a six ounce 2% milk and no lunch. Afternoons we were given a stew like substance served from a 6 ounce serving spoon . . . one 6 ounce cup of instant juice and a small package of single serving ginger snap cookies . . . . There were 112 inmates housed in an area approximately 45 ft by 50 ft with two showers 2 urinals and 2 toilets not nearly enough for 112 inmates." During his months in the jail, Thompson lost 30 pounds, and his viral load went from undetectable to alarming, with a dramatic T-cell drop. Judge Millet wrote: "[T]he undersigned finds that Plaintiff alleges facts to support that Maricopa County maintained a policy or custom that resulted in a violation of Plaintiff's constitutional rights. The undersigned also finds that Plaintiff has alleged facts to support that any constitutional injury was the result of a municipal policy or custom." Former Sheriff Arpaio is the lead defendant in the case; the County was added as a municipal defendant in the amended pleading. The court had already allowed Thompson to proceed on a retaliation claim in an earlier decision, which is mentioned, without details. If this is to become a lead damages challenge to conditions in the Maricopa County Jail, counsel is needed.

CALIFORNIA – U.S. Magistrate Judge Barbara A. McAuliffe dismisses *pro se* transgender inmate Jared Richardson's complaint on screening under F.R.C.P. 8 for failure to present a "short and plain statement of the claim" in *Richardson v. Corizon Health Care*, 2017 U.S. Dist. LEXIS 205254, 2017 WL 6371330 (E.D. Cal. Dec. 13, 2017). Yet, Judge

McAuliffe seems to have no trouble describing Richardson's claims. The plaintiff protests lack of any transgender treatment during the winter of 2015-2016 while at the county jail in Fresno under a policy of Corizon (contractual health provider) not to initiate hormone treatment for patients not already on such treatment prior to incarceration. Judge McAuliffe sets forth Richardson's efforts to obtain care, and her nine-page complaint in PACER shows by grievance number her numerous efforts and the persons she contacted. The court is also able to divide the lawsuit into three discrete claims, including one for failure to protect Richardson from self-harm, as she tried to self-castrate. Judge McAuliffe correctly denies injunctive relief, since Richardson is no longer at the jail; but this complaint does not strike this writer as violating F.R.C.P. 8, and the court seemed to know clearly enough what Richardson is alleging. Judge McAuliffe also notes that Richardson does not link each defendant clearly to each allegation, and the complaint could certainly be cleaned up in this regard; but in this writer's view, the conclusory allegations are not Richardson's but the court's use of boilerplate summaries of the law (e.g., no *respondeat superior liability* under § 1983). Judge McAuliffe's statement that Richardson does not clearly identify the policy of Corizon that she challenges is simply untrue. There is also unnecessary discussion of what standard applies in the Ninth Circuit to the second arm of deliberate indifference (subjective or objective analysis of disregard of risk) since the developments on this point in protection from harm cases in *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070-71 (9th Cir. 2016) (*en banc*) (*interpreting Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015)) dispose of this issue. In this writer's view, this fine distinction is not relevant to a screening determination. Judge McAuliffe gives Richardson 30 days to amend. Like many *pro se* inmate plaintiffs who move to state prison custody, their jail complaints frequently are abandoned to more pressing issues in light of this kind of dismissal.

CALIFORNIA – Julio Palomino and Jackie Robinson, plaintiffs *pro se*, are domestic partners under California law and incarcerated as "sexually violent predators." They lost their efforts to share a cell/room in *Palomino v. Brazier*, 2017 Cal. App. Unpub. LEXIS 8653, 2017 WL 6462910 (Cal. App., 5th Dist. Dec. 19, 2017). The decision is based almost exclusively on California statutory law, with a passing reference and no follow-up to *Loving v. Virginia*, 388 U.S. 1 (1967). They won a preliminary injunction at the trial level, but ultimately summary judgment was granted against them by Judge Alan M. Simpson of Superior Court, Fresno County. The Court of Appeals, Fifth District, affirmed, in an "unpublished" opinion by Justice Rosendo Peña, Jr., with concurrence by Justices Brad R. Hill and Jennifer R. S. Detjen. After extensive discussion of whether the preliminary injunction had any binding or collateral impact and finding that it did not, the opinion focuses on which regulations govern the rights of these "patients": Title 22, governing intermediate care facilities; or Title 9, governing state hospitals. Title 22 contains much broader patient rights, including the provision allowing: "patients at intermediate care facilities who are married or legally registered domestic partners with the right to share a room." The plaintiffs shared a room initially, but Robinson was transferred to stricter custody after repeated rules violations. Thereafter, they could not live together, but they had visiting rights under Title 9. Justice Peña was persuaded that the reasons for Robinson's transfer were genuine (and he continued to violate rules after his transfer, including fights, aggression towards staff, and possession of alcohol). The trial court's finding that there was no triable issue on discrimination based on race (the couple are interracial) or sexual orientation was affirmed by the Court of Appeals. These underlying issues regarding gay and lesbian couples in prison are waiting, but this is not a good test case.

CALIFORNIA – *Pro se* plaintiff Steven R. Miller, a federal prisoner confined in the Fresno County Jail, brought a *Bivens* claim [*see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] against the United States Marshal and county officials after he was raped multiple times while in jail custody in *Miller v. Najera*, 2017 WL 6538998 (E.D. Cal. Dec. 21, 2017). Chief U.S. District Judge Lawrence J. O'Neill granted defendants summary judgment on all claims. Miller was first raped in 2010, and he was permitted to proceed in 2015 after filing three amended complaints. During his months in the jail in 2010, there were multiple rapes by various assailants, despite Miller's requests for protection. At one point, he was transferred to what is colloquially called the "Gay Pod" – where he was gang-raped. A few months later, he tested HIV+. Miller filed numerous "white sheets" (prison slang for complaints about other inmates), but he did not invoke the formal grievance system for complaints about staff failing to protect him. Staff, however, were fully aware, up to the acting warden; and Miller receiving medical treatment and counselling with a "rape victims advocate." Addressing first the summary judgment motion of the U.S. Marshall for the Eastern District of California, Judge O'Neill found that no jury question was presented by the rapes because Miller failed to come forward with more than speculation about what the marshal knew about conditions in the Fresno County Jail or the behavior of its staff and officers. Miller relied on a "had to know" argument and on published reports about the Fresno County Jail,

all of which Judge O'Neill found insufficient. It is doubtful that *pro se* Miller was able to depose the Marshal or obtain documentary discovery from the Marshal's Service to buttress his claims against the District's Executive Marshal. As to the Fresno County officials, their summary judgment was based solely on Miller's failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA]. Judge O'Neill found the submission of "white sheets" insufficient for exhaustion, since the grievance system was available and not invoked. Judge O'Neill found that Miller had received a prisoner rule book and that defendants had no obligation to explain it to him or to assist him affirmatively in filing a grievance, so long as they did not thwart him from doing so. "The process here requires that complaints about jail conditions be pursued through the grievance process, not through 'white sheet' inmate requests or informal channels." Thus, the exhaustion requirements of 42 U.S.C. § 1997e(a) are not satisfied even if defendants were fully aware of the civil rights violation. Plaintiff had to show not only that he did not know of the remedies but also that he "could not have discovered the grievance process with reasonable effort." Judge O'Neill raises a final issue: whether there was time to file a grievance. Counting from the last rape, Miller had a month to file a grievance. This is enough time. *Compare Pauls v. Green*, 816 F. Supp. 2d 961, 968 (D. Idaho 2011) (transfer from county jail to state prison within a few days of a sexual assault did not leave an adequate opportunity to exhaust); *see also, Alonso-Prieto v. Pierce*, 2014 WL 250342, at *4 (E.D. Cal. Jan. 22, 2014) (a plaintiff transferred out of a state facility within two days of an incident and not situated in a federal facility until after the close of the ten-day window for filing grievances established by the state facility did not have a meaningful opportunity to exhaust his administrative remedies). Judge O'Neill notes that Miller had far more than six months to file a grievance, if the clock starts with the first rape. Although the record is unclear, apparently there may be no time limit on filing a grievance at the Fresno County Jail, even if the inmate has been transferred. Judge O'Neill dismisses these claims on summary judgment without prejudice. Good luck on that one. This is a horrendous case; in this writer's view, it was not the purpose of the PLRA to weed out such legitimate claims. This case languished for nearly 8 years. There is no discussion in Judge O'Neill's opinion about the Prison Rape Elimination Act (2003) or its implementing regulations, 200 C.F.R., Part 115 (2014). The regulations attempted to mitigate the harshness of the PLRA's exhaustion rules (*see, .e.g. id*. at § 115.52), but there is also no discussion of their possible retroactive application. A Pennsylvania inmate fared far better under the PLRA in *Frye v. Wilt*, 2017 U.S. Dist. LEXIS 206389 (M.D. Pa. Dec. 15, 2017), reported in this issue of *Law Notes*.

CALIFORNIA – In November *Law Notes*, we reported (at page 460) that U.S. District Judge Jon S. Tigar (N.D. Cal.), had denied a stay of his order directing the state to provide transgender inmates such items as pajamas, nightgowns, rovers, scarves, bracelets, earrings, hair brushes, and hair clips – and he directed the state to pay for compression tops and binders for inmates who cannot afford them. *Shiloh Heavenly Quine v. Beard*, 2017 U.S. Dist. LEXIS 169100, 2017 WL 4551480 (N.D. Cal. Oct. 12, 2017). Now, in a split decision, the Ninth Circuit has granted a stay pending appeal. In *Quine v. Kernan*, 2017 U.S. App. LEXIS 26580 (9th Cir. Dec. 26, 2017), Circuit Judges Atushi Wallace Tashima and Sandra Segal Ikuta voted to grant the stay and ordered expedited briefing to conclude in February. Circuit Judge Richard A. Paez dissented, writing he would deny the stay.

CALIFORNIA – Sometimes *pro se* inmates' cases flounder. Here, the jail case of HIV+ inmate Ryan Bigoski-Odom seems to have lived long after the plaintiff had been transferred to state prison and had ceased all contact with the court sometime in 2015. In October 2017, *Law Notes* (page 421) reported that U.S. Magistrate Judge Craig M. Kellison had granted summary judgment against Bigoski-Odom on his health care claim, but found a jury issue on his transfer from the infirmary to general population. Judge Kellison had previously required the plaintiff to file four complaints before one passed screening, and the district judge had remanded dispositive recommendations twice. The September recommendation granting summary judgment in part and denying it in part, *Bigoski-Odom v. Firman*, 2017 WL 3953944 (E.D. Cal. Sep. 8, 2017), was summarily remanded (the third remand) by the district judge (who would have had to try the case) because Judge Kellison did not adequately explain his reasoning on granting a trial on the claim of deliberately indifferent discharge from the infirmary. Now, in *Bigoski-Odom v. Firman*, 2017 U.S. Dist. LEXIS 199257, 2017 WL 5998226 (E.D. Cal. Dec. 4, 2017), Judge Kellison apparently has the last word in recommending granting of summary judgment on all claims (unless the district judge remands again). Bigoski-Odom did not appear or file papers in any of this recent litigation. The first remand was *sua sponte* because Judge Kellison left out one defendant; the second remand followed objections by that defendant on requiring a trial on the infirmary discharge claim. In the current decision, Judge Kellison basically filed the same opinion as previously, but now he found (mostly in a new footnote) that the uncontested expert affidavit supporting the infirmary discharge warranted summary judgment on this point against Bigoski-Odom because he was on medication, he was monitored, and he improved – the same facts he found insufficient three months

ago. All of this appears to be a rather public turf war between the District and Magistrate Judges, in which the real party in interest had lost interest in this five-year-old case.

ILLINOIS – Having counsel makes all the difference for prisoners seeking to vindicate their rights. In November, *Law Notes* reported that transgender inmate Deon Hampton was permitted to proceed by Chief Judge Michael J. Reagan on protection from harm claims in *Hampton v. Meyer*, 2017 U.S. Dist. LEXIS 172310, 2017 WL 4699269 (S.D. Ill. Oct. 19, 2017), reported November 2017 at pages 461-2; but the judge found her complaint incoherent and mostly "illegible." Now, Hampton has filed a new suit with counsel, *Hampton v. Baldwin*, 2017 U.S. Dist. LEXIS 196054 (S.D. Ill. Nov. 29, 2017), after allegedly retaliatory transfer to another prison, where she continues to face discrimination and physical danger and assault. Reviewing the amended pleading, District Judge David R. Herndon barely recites boilerplate before allowing her to proceed on ten counts in a short opinion. Judge Herndon notes that Hampton has been allegedly subjected to "constant sexual harassment" since her transfer and attacks from other prisoners, occasionally while officers stood by and watched. According to PACER, Hampton is scheduled to have a preliminary injunction hearing on her claim for preliminary relief before Judge Herndon in January. Hampton is represented by the McArthur Justice Center and the Uptown People's Law Center. Chicago. The Second Amended Complaint is recommended reading for counsel with incarcerated transgender clients facing safety issues.

NEW YORK – *Pro se* HIV+ inmate Damien Michael had all of his privacy claims dismissed for failure to state a claim by United States District Judge Vincent L. Briccetti in *Michael v. Perez*, 2017 U.S. Dist. LEXIS 196054, 2017 WL 5991794 (S.D.N.Y. Dec. 1, 2017). According to the complaint, Michael experienced chest pain and officers escorted him to an emergency "sick call." They remained by his side as a physician's assistant found an abnormal EKG and had Michael sent to a hospital emergency room. During this time, his HIV and hepatitis C status were revealed to the officers. Upon his return from the hospital, a nurse dispending medication also referred to Michael's HIV status to inmates and others who were nearby after Michael asked a question about his medication. Judge Briccetti found that it was penologically appropriate for the officers to overhear the discussion at emergency sick call and that the information in the pharmacy encounter was divulged in response to a question and without malice, even if the nurse should have been more careful. He found no question of personal involvement by the prison's superintendent, whom Michael also sued. Judge Briccetti discussed the potential liability of each defendant in turn. He recognized inmates' interest in informational privacy about their HIV status, citing *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994); but he applied the penological balancing test of *Turner v. Safley*, 482 U.S. 78, 89 (1987), finding the disclosures not actionable under the circumstances, writing that the disclosure was not "gratuitous" and that "having officers present during medical treatment serves the legitimate penological interest of protecting civilian staff from the threat of violence." For this proposition, Judge Bricetti cites *Murray v. RC II Nephew*, 2015 U.S. Dist. LEXIS 49211, 2015 WL 1730178, at *6 (N.D.N.Y. Apr. 14, 2015). In *Murray*, however, the inmate was brought for evaluation by mental health security personnel because of his aggression towards staff. Judge Briccetti's application of *Murray* is overbroad, as is his quotation, since it reaches beyond what was necessary to decide this case. Emergency sick call is different from regular sick call. The clinic is not operating, and normal security is not in place. Generally speaking, national standards for accreditation provide that encounters occur "without being overheard by inmates and non-healthy staff." National Commission on Correctional Health Care, Standard P-A-06 (2014). There is also no evidence that Michael needed "close" security coverage. Even patients requiring "escort" are entitled to "confidentiality" in their encounter. *Id*. at P-E-10. Michael would probably lose under a properly applied test, but the generality of the court's dicta is capable of misuse.

NORTH CAROLINA – *Pro se* inmate Daniel Rogers claims that she is a practicing Muslim and a transgender woman who faces risks to her safety and life from other Muslims in the prison unless she is placed in protective custody. She alleges: "Homosexuality is forbidden in Islam [and] [p]unishable by death . . . . Muslims not just at this facility, but throughout the world would try to harm or kill me by being this way." There are no allegations that Rogers has been threatened or harmed by other inmates or staff. There is no discussion of the attire Rogers wears, her bodily presentation, or its effect on other male inmates. U.S. Magistrate Judge Robert T. Numbers recommends dismissal of Rogers' complaint without prejudice on screening in *Rogers v. Bennett*, 2017 WL 6540048 (E.D. N.C. Oct. 30, 2017). On these allegations, Judge Numbers finds Rogers' allegations of "substantial risk of serious harm" to be "speculative." Thus, Rogers' claims do not meet the first arm of the test in *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994), that there be a serious risk of harm – so it is not necessary to reach the second arm: whether defendants were deliberately indifferent to that risk. Judge Numbers appears offended by the sweeping language of the complaint. "Rogers's allegations fall far short of meeting this standard [*Farmer*]. Her allegations

are entirely speculative and rely on the court accepting a violent stereotype about an entire religious group. She has not alleged that any inmate has actually threatened her or that there is a history of assaults against transgender inmates at her prison. And she does not identify any prison official who specifically knew of and ignored an excessive risk to her safety. Instead, she contends that every member of the Muslim religion poses a serious risk of physical harm to transgender individuals. This sort of ugly, conclusory allegation is, to say the least, insufficient to state a claim." Also, Rogers did not name the correct defendants, suing only an uninvolved supervisor and the grievance officer.

PENNSYLVANIA – United States Magistrate Judge Martin C. Carlson ruled that defendants had not established that gay inmate Devon Frye had failed to exhaust administrative remedies under the Prison Litigation Reform Act ["PLRA"] and denied defendants summary judgment on this basis in *Frye v. Wilt*, 2017 U.S. Dist. LEXIS 206389, 2017 WL 6405623 (M.D. Pa. Dec. 15, 2017). Frye was brutally raped by his cellmate, Brian White, who later pled guilty to criminal charges arising from the rape. Frye sued, alleging that state officials knew of White's propensities, double-celled him with effeminate inmate Frye, ignored Frye's protests (and his cries for help on the night of the rape), and were generally deliberately indifferent to his safety. Judge Carlson bifurcated the defendants' summary judgment motions (one under the PLRA; one on the merits), and this decision rules solely on the PLRA's exhaustion requirements. Pennsylvania has a general prisoner grievance system of three levels (ADM 804), which Frye did not invoke. Instead, he complained under a different system, for allegations of sexual abuse, established by Pennsylvania in compliance with Prison Rape Elimination Act [PREA] – ADM 008, the exhaustion requirements of which are not clear from the opinion, but which relieves inmates of the responsibility of bringing PREA claims under ADM 804. There are also at last two other grievance systems that may be applicable: ADM 802 (administrative custody) and ADM 801 (inmate abuse) Defendants only argued that Frye's failure to use the general grievance system (ADM 804) was fatal under PLRA, 42 U.S.C. § 1997e(a). Omitting Judge Carlson's comprehensive discussion of the PLRA's exhaustion requirements generally, this report concerns whether Pennsylvania's adoption of a specific grievance system for sexual abuse (and the existence of other remedies) renders exhaustion under ADM 804 (the general grievance system) not available and therefore not required under the second exception to PLRA exhaustion announced by the Supreme Court in *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). Judge Carlson found the second exception (practical unavailability) to apply, since the sexual abuse grievance rules said the general grievance system need not be used, creating a conflict. Even though *Ross* noted that ambiguities in grievance procedures should be resolved in favor of exhaustion, "[w]hen the rules are so confusing that no reasonable prisoner can use them, then they are no longer available." *Id*. at 1860. Similarly, where "an administrative process is susceptible of multiple reasonable interpretations," a remedy becomes "essentially 'unknowable'—so that no ordinary prisoner can make sense of what it demands, then they are no longer available." *Id*.; *see also, Brown v. Croak*, 312 F.3d 109, 110 (3d Cir. 2002) (holding that prisoner with failure to protect claim was entitled to rely on instruction by prison officials to wait for outcome of internal security investigation before filing grievance) [other Third Circuit citations omitted]. Since exhaustion is an affirmative defense, defendants here have not shown entitlement to summary judgment on PLRA exhaustion under ADM 804. They remain free to argue exhaustion under other remedies on consideration of the rest of their motion for summary judgment. This is another case of a state corrections department that failed to provide a clear, comprehensive grievance system to inmates who are sexually harassed or assaulted. It is curable if there is the will, but PREA compliance with blinders, as shown here by the sloppy layering of PREA remedies on top of one (or perhaps three) other sets of remedies, will not satisfy the PLRA. It only creates confusion. Defendants should abandon their PLRA defense in this case, fix their regulations, and settle – given the horrendous failure to protect Frye and White's conviction. Frye is represented by Martin Stanshine, of Stanshine & Signal, PC, Philadelphia.

PENNSYLVANIA – This very long opinion presents a Kafkaesque recitation of several months of the state incarceration of Ryan J. Bloom, a Hispanic inmate who is at high risk of harm from other inmates due to his mental disabilities, former gang membership, and characteristics making him a target for sexual assault. It is not possible to report all aspects of this decision, *Bloom v. Hollibaugh*, 2017 U.S. Dist. LEXIS 211252 (M.D. Pa. Dec. 21, 2017), which reviews a 274-paragraph, 55-page Amended Complaint and had some 14 Causes of Action. U.S. Magistrate Judge Karoline Mehalchick recommended that Bloom be found to state a claim on numerous federal counts against several defendants. Bloom was initially double-celled with a violent cellmate, who assaulted him with a razor, raped him, and extorted him for commissary money – all of which were reported, without remedy. By the time Bloom was moved, he suffered "extensive bleeding and tearing tissues of [his] anus and groin." Officers did not allow access to genuine medical care for some ten days, although Bloom was seen by a nurse and a PA, who did not

note his injuries or examine him. He was ridiculed and harassed. He was denied a requested rape kit. After he attempted suicide, he was moved to a psychiatric facility, where the harassment continued, even worse than previously. Bloom plead that the violations of his rights were encouraged by the superintendents and their deputies, giving officers the green light to abuse inmates and use intimidation and beatings and sexual and racial bigotry as a means of control. On one occasion, Bloom used an epithet in return, for which he was shackled and severely beaten by a group of four officers, calling him a "spic" and a "faggot" and causing peripheral numbness and fractured ribs. He says he was then put in 4- or 5-point restraints for some 16 hours – well beyond standards for such restraints, while the officers taunted him and denied him care for his injuries. Judge Mehalchick first addressed a claim for "state-created danger," finding it inapplicable as a substantive due process claim under the Fourteenth Amendment under Third Circuit law, if there were a claim under the Eighth Amendment on the same facts. Judge Mehalchick then turned to the allegations about the 4-5-point restraints and defendants' argument that they were untimely because they first appeared in the amended complaint more than two years after the incident. The court found that the allegations merely elaborated on other counts that were timely filed, noting also that defendants had apparently tried to conceal this violation by altering records about this event – so the time would run from when Bloom reasonably found out his rights were violated, not from the date of the event. Judge Mehalchick sustained a claim for failure to protect against assault under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), against the corrections officers who knew about the sexual danger in advance and had an inmate whose characteristics made the risk obvious. On his claims of failure to provide medical care, Judge Mehalchick sustained claims against the officers who prevented Bloom from receiving care – continuing (unusually) even after Bloom was seen by a nurse and a P. A. – because the allegations showed that the officers knew the "examinations" were perfunctory and the retention of Bloom in restraints was direct interference. "[N]on-medical prison officials are not entitled to a *de facto* imposition of immunity simply because a physician has been provided to a prisoner at some point," citing *Davis v. Pennsylvania Dep't of Corr.*, 2006 WL 2927631, at *7 (W.D. Pa. Feb. 6, 2017). Judge Mehalchick also recommends that claims against the warden and deputy at the psychiatric facility be sustained on a failure to train theory: that they did not prepare officers to deal with mental patients, or knowingly tolerated plainly unconstitutional methods of behavioral control. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir. 2010) (acquiescing in subordinates' violations); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997) (acquiescence may be inferred). "This ostensibly led to the CO's wrongful practice of beating patients for speaking out of turn and expressing racial and homophobic hostility." Judge Mehalchick was also influence by allegations that the executive staff knew of and looked the other way at past violations. There is no discussion of excessive force as such (except in the state battery claims), but Judge Mehalchick upholds a conspiracy count against the officers who participated in the gang beating of Bloom. There are also no claims against health staff for falsifying medical records – perhaps a tactical decision to use them as adverse plaintiff's witnesses. Judge Mehalchick allowed most state law claims to proceed against most defendants. Pennsylvania lawyers may wish to review the court's comprehensive discussion of state tort remedies arising in this context, as well as Pennsylvania public employee immunity and how it is overcome. This case is a good judicial response to a situation where the officers are permitted to run the asylum. Bloom is represented by the Law Office of Mairanna Sawicki, Huntingdon, PA.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES – Great controversy was stirred up by reports that staff members in agencies within the Department of Health and Human Services had been instructed to avoid using certain words or phrases in documents prepared as part of the annual budget process, including vulnerable, diversity, entitlement, fetus, transgender, evidence-based, and science-based. At first, the instruction was reported in the press as a prohibition on using such words, but responding to the controversy a department spokesperson said that no words have been "forbidden." Rather, staff members had been cautioned that these words should be avoided to minimize the likelihood of stirring up opposition to the agency's budget requests in Congress, as these terms had been identified as those which were likely to set off certain members. Rep. Tom Cole (R-Okla.), chair of the House Appropriations Committee, told the *Washington Post* (Dec. 19) that he was "alarmed" by reports about this "guidance," be speculated that "what we're looking at is more silly than sinister," suggesting that the agency was just trying to use language that would find favor with lawmakers. "I think this is more the bureaucracy trying to react to what they think the new administration wants to hear." But others disagreed. Sen. Patty Murray (D-Wash.) and Rep. Frank Pallone (D-N.J.) asked HHS Acting Secretary Eric Hargan to provide "information and documents regarding how the prohibition is being implemented across the Department" and express concern

LEGISLATIVE & ADMINISTRATIVE *notes*

that the "prohibition has the potential to freeze scientific advancement at the agency and across the Department, and it sends a clear message that the Trump Administration is yet again prioritizing ideology over science."

ALASKA – The Sitka Assembly voted unanimously on final reading to approve an ordinance to add civil rights protections for local residents on grounds not covered by state law: sexual orientation, gender identity, and gender expression. The vote on December 12 approved a measure that excludes coverage of companies with fewer than four employees, gyms and ministerial organizations. The measure was patterned on an ordinance recently adopted in Juneau. *Daily Sitka Sentinel*, Dec. 14.

FLORIDA – Gainesville city commissioners, acting as a "general policy committee," met on December 14 and agreed to create an ordinance that would ban the practice of conversion therapy on youth, imposing fines on practitioners who violate the policy. The proposal would require formal adoption by the Commission in 2018. The commissioners also agreed that the city should oppose any statewide legislation that would protect the practice of conversion therapy, as proposals have been put forward to that effect in the legislature. *Gainesville Sun*, Dec. 15. * * * The Palm Beach County Commission voted to approve a measure banning conversion therapy on December 19, with the *Palm Beach Post* (Dec. 20) reporting that eight cities within the county had approved similar bans, and that Tampa was being sued over its ban. The county's ban imposes a fine of $250 on licensed therapists who are found to have attempted to change a person's sexual orientation, and repeat offenders would face $500 fines. The measure does not apply to parents or clergy who themselves try to alter a person's sexual orientation. Proponents relied on studies showing that conversion therapy is harmful and ineffective in "changing" a person's sexual orientation. * * * The suit against Tampa, *Vazzo v. City of Tampa*, filed by Liberty Counsel on behalf of two conversion therapy practitioners in the U.S. District Court for the Middle District of Florida, argues that the measure violates the plaintiffs' free speech and free exercise of religion rights, as well as various state statutory rights. The plaintiffs assert that since enactment of the Tampa ban, they were unable to take on new clients or treat current ones. Similar lawsuits in several other jurisdictions have produced rulings upholding the laws and rejecting the constitutional challenges, and the U.S. Supreme Court has denied certiorari in several of those cases.

ILLINOIS – A measure passed by the legislature in May went into effect on January 1 bar the use of the "gay panic defense" in criminal prosecutions. Defense attorneys will not be able to argue in court that their clients should be excused from criminal liability, or be convicted on lesser charges, because discovering somebody is gay or transgender triggers a violent involuntary response on their part. Although the defense is rarely invoked, an *Associated Press* report on December 28 indicated that it has been attempted in about half of all U.S. states and sometimes has resulted in conviction on lesser charges. Illinois is the second state after California to enact such a ban. Similar measures are pending or planned for introduction in several other state legislatures during 2018. * * * The Cook County Board of Commissioners unanimously voted on December 13 to pass an ordinance strengthening the county's commitment to a strong anti-harassment effort among its workforce, creating specific training requirements for all county employees, and directing agencies to submit quarterly reports to the Office of Inspector General summarizing their activities under the Ordinance. The measure goes into effect on January 17, 2018.

KENTUCKY – Although he has resigned from the bench in response to controversy over his categorical refusal to handle adoption cases involving same-sex couples, the Kentucky Judicial Conduct Commission went ahead with announcing a public reprimand of now-former Judge W. Mitchell Nance. Nance offered no defense when the Commission held a disciplinary hearing on the charges against him, and neither he nor his attorney attended the session, reported the *Associated Press* on December 19. Nance had presided over family court cases in Barren and Metcalfe Counties.

NEW HAMPSHIRE – Governor Chris Sununu signed Executive Order 2017-09 on December 14, creating a new Governor's Advisory Council on Diversity and Inclusion, and calling for creation of a new Civil Rights Division within the state Department of Justice. The Council, made up of a specified list of public officials plus individual citizens to be appointed by the governor, is to meet monthly and recommend ways to advance the goals of diversity and inclusion along the lines embodied in the state's human rights statute, which specifically forbids discrimination because of sex, sexual orientation, and a host of other characteristics (although it does not expressly mention gender identity).

PENNSYLVANIA – Reading City Council voted on December 18 to approve a ban on the performance of conversion therapy in that city, joining Philadelphia, Pittsburgh, and Allentown in banning the practice. According to

a report in the *Harrisburg Patriot-News* (Dec. 19), the count as of now of jurisdictions banning the practice includes nine states, the District of Columbia, and 28 municipalities.

WEST VIRGINIA – The Fairmont City Council has set a ballot vote for November 2018 on a proposal to repeal the Human Rights Commission ordinance that it enacted on September 12. The ordinance, NO. 1751, was put back on the Council agenda after a group organized to repeal it successfully obtained sufficient petition signatures to require the Council either to reconsider its vote or to place the matter on the general election ballot. Opponents were specifically concerned with the inclusion of "sexual orientation" and "gender identity" in the ordinance. *Times West Virginian*, Dec. 13.

LAW & SOCIETY NOTES

By Arthur S. Leonard

In a year-end "LGBT Data Overview," the **WILLIAMS INSTITUTE AT UCLA SCHOOL OF LAW** estimates the LGBT adult population of the United States as approximately 10 million people, asserting that "nationwide, 4.1% of adults identify as LGBT," and that breaking these percentages down by states, the highest percentage of adults identifying as LGBT live in Washington, D.C. (8.6% of the adult population), and the lowest percentage (2.0%) live in South Dakota. The other leading states are Vermont (5.3%), Massachusetts (4.9%) and California (4.9%). North Dakota (2.7%) and Idaho (2.8%) are the next lowest. The source is the Gallup polling organization. Based on the American Community Survey and the Behavioral Risk Factor Surveillance System, Williams reports that the percentage of adults identifying as transgender is 0.58% and the percentage of self-identified transgender youth (ages 13-17) is 0.73%.

CALIFORNIA STATE SENATOR TONI ATKINS (D-San Diego) has become the first woman and out gay person who will serve as Senate President pro tem – the majority leader - when the new session begins in 2018. She is also only the third person to serve as both Assembly speaker and Senate President pro tem. *Los Angeles Times*, Dec. 8.

INTERNATIONAL NOTES

By Arthur S. Leonard

UNITED NATIONS – A Costa-Rican jurist, Victor Madrigal-Borloz, was appointed on December 4 to be the new U.N. Independent Expert on Sexual Orientation and Gender Identity, a position created by the U.N. Human Rights Council. Madrigal-Borloz currently serves as Secretary-General of the International Rehabilitation Council for Torture Victims, and spent years in the Inter-American Court and Commission of Human Rights. He is appointed for an initial but renewable three-year term. His predecessor, Thai international law professor Vitit Muntarbhorn, was appointed as the first such Independent Expert in September 2016. He tendered his resignation recently for health reasons. *ilga.org* (Dec. 5)

BOTSWANA – Following on a landmark ruling in November requiring the government to recognize a transgender man's identity and issue appropriate new identity papers, the High Court issue a ruling in favor of Tshepo Ricki Kgositau, a transgender woman who is director of Gender Dynamix, a transgender rights organization, directing that she be issued official identity papers as a woman. Justice Leatile Dambe on December 12 gave the government seven days to comply by changing Kgositau's gender identification in the national registry to female. *Cape Community Newspapers* (Dec. 13); *independent.co.uk*, Dec. 18.

CANADA – The House of Commons has approved a bill that will expunge the records of people convicted under anti-gay criminal laws, backing up Prime Minister Justin Trudeau's promise to offer redress to those who had been prosecuted because of their sexual orientation. Bill C-66 is titled the "Expungement of Historically Unjust Convictions Act." Some criticized the action as too hasty, contending that due to inadequate study and care in drafting the law it was too narrowly focused and would not extend to all the instances in which people suffered criminal prosecution for gay-related reasons. However, some of those flaws may be corrected through amendments when the measure is taken up by the Senate. *Globe and Mail*, Dec. 14.

CHECHNYA – Responding to reports about repressive actions undertaken by the government against, among others, gay men, the U.S. Treasury has invoked the Magnitsky Human Rights Law to impose financial sanctions on Ramzan Kadyrov, whose name was added to the Treasury's Office of Foreign Assets Control list on December 20. Listing subjects the individuals to various financial and travel restrictions. Kadyrov was targeted for "gross violations of internationally recognized human rights. Also sanctioned was Ayub Katayev, a law enforcement officer in Chechnya identified with Kadyrov's actions. *Radio Free Europe Documents*, Dec. 20.

CHILE – In a ruling being hailed as an important "win" by Chilean LGBT rights activists, the 4th Chamber of the Supreme Court found a violation of constitutional rights when the Mayor

INTERNATIONAL *notes*

of Lampa, Graciela Ortuzar, subjected a transgender ex-councilor, Alejandro Gonzalez Pino, to discriminatory treatment. The Mayor insisted on referring to Gonzalez by her legal name, not her "social" name, and made fun of her gender identity. The court imposed a fine on Mayor Ortuzar, and Gonzalez expressed satisfaction with the outcome. According to a Google translation of an article from a local newspaper reporting on the decision, the president of Iguales, an LGBTI rights group in Chile, said: "In this sentence, for the first time in Chile, the Supreme Court says that not treating a trans person in accord with their gender identity is discrimination that attacks their dignity and that has no reasonable justification. With this, the right of persons to their gender identity is expressly recognized." The law invoked in this case is Articulo 2 of the Ley No. 20.609, which prohibits arbitrary discrimination that causes deprivation, perturbation or threat in the legitimate exercise of fundamental rights established in the Political Constitution of the Republic or in international treaties on human rights to which Chile is a party. The opinion specifically cites in this connection the Interamerican Commission on Human Rights' rulings on transgender identity and expression.

CHINA – The Taipei High Administrative Court (Taiwan) rejected an appeal by two women who were challenging the Taipei City Government's refusal to approve their marriage. Their request to be registered as a married couple was rejected by the Household Registration Office in Zhongzhen District in 2014. Since then, Taiwan's Constitutional Court has ruled that same-sex couples have a right to marry, but has put off mandatory implement until the spring of 2019, unless the government moves to implement it sooner. In the meantime, the courts are refraining from ruling for same-sex couples in individual cases. There has been some indication that the government may introduce appropriate legislation in 2018. *focustaiwa.tw*, December 27.

INDONESIA – The Constitutional Court rejected an application by a conservative group, Members of Family Love Alliance, which sought a declaration that all sex conduct outside of heterosexual marriage is illegal. A bare majority of the 9-member panel agreed that it was not the role of the Court to criminalize private behavior or to usurp the jurisdiction of the parliament to make criminal laws. The same conservative group is pushing a legislative proposal to accomplish the same end. Outside of one semiautonomous province that has adopted Sharia law and outlawed homosexual conduct, there is no legal prohibition on private consensual gay sex in the rest of the country. The four dissenting judges joined an opinion arguing that same-sex relations and sex outside of marriage should be prohibited on morality grounds. *Associated Press*, Dec. 14. * * * *Associated Press* reported that ten men arrested in a police raid on a gay club and sauna had been sentenced to 2-3 year terms. They were among 140 men detained in the raid. Although gay sex is not illegal in Indonesia as such, law enforcement officials have used an anti-pornography law to charge men arrested in gay venues, and some have been subjected to forced HIV testing. Police charged that those sentenced had performed oral sex acts in the club in the presence of spectators.

NAMIBIA – A marriage between a Namibian man and his same-sex partner, a South African, has generated litigation challenging Namibia's refusal to recognize their marriage. Johann Potgeiter and Daniel Digashu filed an urgent application against the government in the Windhoek High Court on December 12, asking for a ruling that would forbid the Ministry of Home Affairs and Immigration from treating Digashu and the couple's son as prohibited immigrants under the Immigration Control Act, reported *namibian.com* on Dec. 18. A court hearing scheduled for Dec. 15 was put off after government lawyers advised the judge that an agreement had been reached that expiration of Digashu's temporary work visa on January 8 would not prevent him from against entering the country on a new visitor's permit to rejoin his spouse and son while the case is pending. The matter will be taken up by the court early in 2018.

NORTHERN IRELAND – The same-sex couples whose lawsuit seeking the right to marry was rejected in August by a trial judge have launched an appeal to the Northern Ireland Court of Appeal, according to a December 19 report on *Irishnews.com*. The court treated the matter as a non-justiciable political question, but the legislative process in Northern Ireland is stalled by the failure of any party to be able to construct a coalition to put a new government into office. The issue of same-sex marriage is one of the sticking points, preventing the formation of an effective governing coalition. Even though a majority of the legislature voted in favor of a marriage equality bill under the previous government, the power-sharing accord gives a veto power to the conservative minority. The plaintiffs argue that same-sex marriage is a question of equality rights that must be resolved by the court.

PAKISTAN – The Transgender Persons (Protection of Rights) Bill 2017, recently passed by the Senate Functional Committee on Human Rights, has received criticism from transgender rights advocates as containing a definition of transgender "that is misleading and inaccurate according to international standards and the UN," according to a member of the Chief Minister's Special

INTERNATIONAL *notes*

Committee on Rights of Transgender Persons, Qamar Naseem. The difference seems to be about a requirement in the bill that a chromosome test be used in determining whether somebody can claim a transgender identity, which was seen as in conflict with a Pakistan Supreme Court ruling. There was also criticism that the bill has not been published in Urdu translation, as a result of which much of the transgender community is not able to read it. Transgender rights activist Mazhar Anjum remarked that the bill "has failed to address the issues of the transgender community." The bill is reportedly modeled heavily on similar legislation that was proposed in India in 2016, which was drafted by the Indian government but has not been enacted. *Pakistan Express Tribune*, Dec. 26.

SAINT HELENA – The legislative council of St. Helena voted 9-2 in favor of a marriage equality bill in December. A legal challenge to the existing marriage law was due to be heard in the Supreme Court in January, but is no longer necessary. The law was expected to receive Royal Assent from the Governor-General, Lisa Phillips, which would bring the rights of same-sex couples in line with other UK overseas territories, including Ascension and Tristan da Cunha in the Caribbean. *St. Helena Online*, Dec. 19.

SOUTH AFRICA – Judge Ronel Tolmay in the Gauteng High Court (Pretoria) turned down an application by a gay male couple to approve a gestational surrogacy contract, having concluded that it would not be in the best interest of the child. She based her conclusion on information concerning one of the men, who was apparently hesitant about becoming a father as part of a same-sex couple because he is not fully open about his sexual orientation in his profession. She found that he wanted to be "discreet" about being the new child's father, based on a psychologist's report required as part of the approval process. The man had told the psychologist that although he does not hide the fact that he is gay, he "needs to be discreet about his sexual orientation" because of concern that becoming a parent in a homosexual relationship would have an adverse impact on his practice as a medical specialist, due to the conservative views of patients and other doctors. Indeed, although a long-time couple, the two men did not live with each other when the application was made, and only recently contemplated moving into a common household. The judge said she had to put the interest of the child first over the interests of the two intended parents. *AllAfrica.com*, Dec. 1.

UGANDA – A gay and lesbian film festival was forced to shut down over the weekend of December 9-10 after police "stormed the venue and film-goers fled, fearing arrest," according to organizers quoted in a report in *AllAfrica.com* on Dec. 12. The article reported: "Homosexuality is illegal in the socially conservative East African country and violence against lesbian, gay, bisexual and transgender people is common." A government spokesperson denied knowledge of the incident.

UNITED KINGDOM – Mr. Justice Warby of the High Court of Justice, Queen's Bench Division, ruled in *GYH v. Persons Unknown*, [2017] EWHC 3360 (QB) (Dec. 19, 2017), that a transgender sex worker is entitled to respect for her private life, granting an injunction to an escort who had suffered harassment as a result of online publications about her sex life, physical and mental health. These included untrue allegations that she is infected with HIV. Identified in court papers as GYH, she brought proceedings against "persons unknown," being unable to identify who had posted the material. Justice Warby said that an injunction in this case was "amply justified," and that her profession as an escort did not disqualify her from protection for her private life. "The claimant's role inevitably means that she is likely to have made public or placed beyond her control some information about her sexual life and, on the evidence, she has plainly done so. Someone who makes information about herself public may have no reasonable expectation of privacy in relation to that or similar information and hence no right to prevent others from disclosing it," wrote the judge. However, he continued, "There is no public interest in the distribution of false information of this kind, nor is it reasonable to publish false allegations to this effect. On the contrary." The court heard testimony about posts on a series of websites made allegations that she had spread sexually transmitted diseases, was anorexic and mentally ill, reported the *Daily Telegraph* in a story about the case published on December 20. The posts began after she received a text message from somebody representing himself as a student who wished to meet her socially, which she decline to do when the individual indicated unwillingness to pay for her escort services, which led to further text exchanges that turned abusive. The court's injunction may be presented to third party online service providers to put them on notice not to publish similar statements about GYH. The court gives GYH 28 days to attempt to identify the person who has been posting these statements and serve him with the injunction. * * * The Advocate General of the Court of Justice of the European Union issued a non-binding opinion on December 5 in the case of a transgender woman's claim for a women's state pension. The U.K. had denied the claim on the grounds that the woman is still married to her cisgender spouse. Advocate General Michal Bobek opined that this is discriminatory, because marital status does not play a role in accessing state retirement pensions for non-transgender people.

"This amounts to direct discrimination on the basis of sex, which is not open to objective justification," according to a news release issued by the court about his opinion. The dispute arose because the U.K. awards such pensions to women at age 60 but not to men until they reach age 65. According to a *Reuters* report published December 5, her application was denied because she didn't apply for a full gender recognition certificate when she transitioned due to the fact that she remained married to a woman and her marriage would have been annulled at the same time as same-sex marriage was not then legal in the U.K. She applied for the pension when she reached age 60 in 2008. With the advent of marriage equality in the U.K., this issue has faded into the past as transitional. * * * On December 20 the U.K. Court of Appeal reversed the decision of a Family Court judge who had ordered that the Orthodox Jewish father of five children, who left the family to live as a transgender woman, could have no direct contract with the future with his children, according to a report on the Religion Clause blog on December 21, 2017 WLNR 39509802. The Family Court remanded the case, suggesting that some compromise be found that would allow the father to have some future contact with the children. The court suggested that the family's religious objections to gender transition would have to bend, and that an order requiring that the father be allowed some future contact would not violate the family religious freedom rights under Article 9 of the European Convention. * * * Education Secretary Justine Greening is having second thoughts about a legislative proposal to allow adults to change their legal gender without a doctors approval, as a result of which there is a delay in the expected parliamentary consideration of the measure. A source close to the Education Ministry told the *Sunday Times* that the proposed changes will be subject to further public hearings and consideration during 2018.

PROFESSIONAL NOTES

By Arthur S. Leonard

JON DAVIDSON announced that he had resigned as Legal Director of Lambda Legal, effective December 15. He had been a member of Lambda Legal's staff for 22 years, the last 13 as Legal Director. During his tenure with Lambda Legal, Davidson played a key role as a strategist and litigator, participating in numerous important cases, including the lengthy struggle for marriage equality and continuing efforts to secure protection against discrimination for LGBT people. Under his leadership the legal department staff grew significantly and expanded to regional offices in several different parts of the United States. Lambda announced that staff attorney Camilla Taylor would serve as Acting Legal Director while the organization decided how to proceed in light of Davidson's surprise announcement. Prior to joining Lambda, Davidson had been a staff attorney doing LGBT rights work with the ACLU of Southern California, and prior to that had been a partner at leading California law firm. He indicated that he was taking some time at age 62 to think about what he expected to be his next and last career position.

CHAI FELDBLUM has been nominated to serve another five-year term as a commissioner of the Equal Employment Opportunity Commission (EEOC) by President Donald J. Trump. The White House announced the nomination on its website on December 11, far in advance of the expiration of Feldblum's current term on July 1, 2018. The five-year term would extend to July 1, 2023. Feldblum, the first – and thus far, only – openly LGBT person to serve as an EEOC commissioner received a recess appointment from President Barack Obama in April 2010, after which she was confirmed by the Senate to fill out an uncompleted term through July 1, 2013. Then she was nominated for a full term by President Obama and confirmed by the Senate. Before her service on the EEOC, Feldblum was a professor at Georgetown University Law Center and, prior to that, legislative counsel at the ACLU in Washington. A graduate of Harvard Law School, she clerked for Supreme Court Justice Harry Blackmun. Feldblum played a leading role for the ACLU in helping to shape the Americans with Disabilities Act and later played a leading role in getting the 2008 amendments to that Act through Congress. At the EEOC, she has been instrumental in getting the agency to rethink its approach to sex discrimination, leading to Commission opinions holding that gender identity and sexual orientation discrimination are forms of sex discrimination outlawed by Title VII of the Civil Rights Act of 1964. Other federal agencies enforcing sex discrimination bans relied on the EEOC opinions to expand the scope of coverage under their statutes as well. However, the Trump Administration has been disavowing those positions in administrative guidelines and court briefs. During the last few years of the Obama Administration, the EEOC initiated litigation on behalf of LGBT plaintiffs with the goal of establishing these interpretations in federal case law, and have recently achieved several successful conclusions through trial settlements and a first jury verdict, reported in *Law Notes* last month. Feldblum's nomination by Trump was not expected in light of the position on these issues announced by his administration, but there were news reports that the nomination was part of a deal to obtain expedited Senate treatment of Trump's nominations of new EEOC commissioners to maintain a Republican-appointed majority on the Commission.

PROFESSIONAL *notes*

ELIZABETH A. GARRY was appointed, by Governor Andrew Cuomo, to be the Presiding Justice of the New York Appellate Division, Third Department. Garry, who is openly lesbian, is the first openly LGBT person to serve as a Presiding Justice in any Appellate Division Department of New York.

THE ACLU OF ILLINOIS' Lesbian Gay Bisexual Transgender Queer/ Questioning (LGBTQ) & HIV Project has announced an opening for a fulltime attorney in the Chicago office with substantial advocacy experience (at least 5 years preferred). "The Staff Attorney will work to develop and implement advocacy strategies in identified areas," with job responsibilities including legal research, drafting of pleadings and briefs, discovery, motion practice, and trials and appeals in state and federal courts, as well as developing and implementing non-litigation advocacy campaigns. The initial appointment would be for two years subject to renewal. For full details, check the organization's website at *https://www.aclu-il.org/en/jobs/lgbtq-hiv-project-staff-attorney*. Applicants should send a resume, letter of interest, list of litigation experience, references, law school transcript, and legal writing samples to *jobs@aclu-il.org* with the subject line: LGBTQ & HIV Project Staff Attorney. Applications opened on December 5 and remain open until the position is filled. ACLU of Illinois is an equal opportunity employer.

LGBT LAW ASSOCIATION OF GREATER NEW YORK (LEGAL) announced on December 29 that attorney **ERIC LESH**, previously the Fair Courts Project Director at Lambda Legal, will become Executive Director of LeGaL in 2018, succeeding **MATTHEW J. SKINNER**, who resigned to accept an appointment as Executive Director of the New York State Court System's Richard C. Failla Commission on LGBTQ Issues in the Courts. Lesh, a graduate of Hofstra University Law School, was recognized by the National LGBT Bar Association in 2017 as one of the "40 Best LGBT Lawyers Under 40." Among Lesh's duties as Executive Director of LeGaL are supervising production of the monthly *LGBT Law Notes* and participating in the monthly Law Notes Podcast. * * * LeGaL announced the election of new board members to the 2018 Association and Foundation Boards: **RICARDO DORIOTT**, associate at Arnold & Porter Kaye Scholer LLP; **SARAH FILCHER**, Staff Attorney at the Brooklyn Bar Association Volunteer Lawyers Project; **CONCEPCION MONTOYA**, Partner at Hinshaw & Culbertson LLP; and **ANTHONY J. PEROTTO**, Assistant District Attorney, Bronx County.

The *Washington Blade* reported (Dec. 29) that the staff of **LAMBDA LEGAL** voted overwhelmingly (42-8) to designate the Washington-Baltimore News Guild to represent the employees in collective bargaining with the public interest law firm. The National Labor Relations Board-supervised election was sparked by a petition filed by employees, who expressed a desire to have a "seat at the table" when decisions are made about their terms and conditions of employment. The *Blade* reported said that a "source familiar with the workplace environment at Lambda Legal said much of the staffer discontent was directed toward the leadership of Rachel Tiven, who took over as CEO last year." Tiven's predecessor, Kevin Cathcart, had piloted the organization for a quarter century and was the only CEO that most of the staff had ever worked under. An earlier report in the *Blade* about the impending union election said that the staff effort to form a union came "amid complaints over cuts to benefits and high turnover at the organization." Lambda was formed in 1973 and is the oldest and largest LGBT public interest law firm in the nation, with offices in several cities and a large national board of directors. It has played a prominent role on most of the major issues in LGBT and HIV-related law, including leading roles in *Lawrence v. Texas*, *Boy Scouts of America v. Dale*, and several major marriage equality rulings.

The **AMERICAN BAR ASSOCIATION (ABA)** Commission on Sexual Orientation and Gender Identity will present its **2018 STONEWALL AWARDS** at a reception at the ABA's midyear meeting in Vancouver, Canada, on February 3. This year's recipients are: Eduardo Juarez, a supervisory trial attorney with the San Antonio Field Office of the EEOC, past chair of the LGBT Law Section of the State Bar of Texas and past President of the National LGBT Bar Association; **JENNIFER LEVI**, Director of GLAD's Transgender Rights Project and Professor of Law at Western New England University School of Law; and Honorable **PHYLLIS RANDOLPH FRYE**, Associate Judge of the Municipal Court, Houston, Texas, the first openly transgender judge in the United States, a leading organizer of the transgender legal community and past board member of the National LGBT Bar Association.

The **TRANSGENDER LAW CENTER**, headquartered in Oakland, California, announced on December 7 three staff attorney openings: Staff Attorney or Senior Staff Attorney, Bilingual Immigration Staff Attorney, and Legal Services Project Staff Attorney. Full details can be found on their website: transgenderlawcenter.org. Click on the "about" tag and scroll down and click on the "careers" tag. Although the organization is headquartered in Oakland, some of the legal staff positions can be performed remotely from other locations.

PUBLICATIONS NOTED

1. Barry, Kevin, and Jennifer Levi, *Blatt v. Cabela's Retail, Inc*. and a New Path for Transgender Rights, 127 Yale L.J. Forum 373 (Oct. 12, 2017) (how the Americans with Disabilities Act can be called into service to protect transgender people from discrimination).
2. Cranmer, Frank, Same-sex marriage in Northern Ireland again: Close, Law & Religion UK, 27 December 2017.
3. Eskridge, William N., Jr., Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections, 127 Yale L.J. 322 (November 2017) (Leading scholar of the marriage equality movement explains why the application of Title VII to sexual orientation discrimination is a logical development from case law, statutory amendment, and evolving understanding of human sexuality).
4. Eskridge, William N., Jr., Nan D. Hunter, and Courtney G. Joslin, Sexuality, Gender, and the Law (4th edition, Foundation Press).
5. Fallon, Richard H., Jr., Tiers for the Establishment Clause, 166 U. Pa. L. Rev. 59 (December 2017) (criticizes the confused and amorphous Establishment Clause jurisprudence of the Supreme Court, suggesting a tiered approach to judicial review similar to that followed under the 14th Amendment).
6. Garrett, Brandon L., Constitutional Reasonableness, 102 Minn. L. Rev. 61 (Nov. 2017).
7. Gilfoil, Charly Shane, More Than Just "Sex:" Title VII, the Expanding Meaning of Sex Discrimination, and the Court's Role in Correcting Injustice, 19 Geo. J. Gender & L. 135 (Fall 2017).
8. Harrison, Jack B. 'To Sit or Stand': Transgender Persons, Gendered Restrooms, and the Law, 40 U. Hawaii L. Rev. No. 1 (2017).
9. Khan, Mudasar, Kelly McLaughlin, Peter Mezey, and Daniel Robertson, Challenges Facing LGBTQ Youth, 18 Geo. J. Gender & L. 475 (2017) (Eighteenth Annual Review of Gender and the Law - Annual Review Article).
10. Liu, Honorable Goodwin, State Constitutions and the Protection of Individual Rights: A Reappraisal, 92 N.Y.U. L. Rev. 1307 (November 2017) (State Supreme Court Justice considers when state courts should interpret their state constitutions as being more protective of individual rights than the U.S. Constitution).
11. Marschilok, Caroline, Jessica Moran, Danna Seligman, and Aislinn Toohey, Equal Protection, 18 Geo. J. Gender & L. 537 (2017) (Eighteenth Annual Review of Gender and the Law - Annual Review Article).
12. McKechnie, Douglas B., @POTUS: Rethinking Presidential Immunity in the Time of Twitter, 72 U. Miami L. Rev. 1 (Fall 2017) (constitutional scholar suggests that presidential tweets that amount to malicious defamation of individuals may not be entitled to immunity from tort liability).
13. Medley, Shayna, Not in the Name of Women's Safety: *Whole Woman's Health* as a Model for Transgender Rights, 40 Harv. J. L. & Gender 441 (Summer 2017).
14. Phillips, Lauren E., Impeding Innovation: State Preemption of Progressive Local Regulations, 117 Colum. L. Rev. 2225 (Dec. 2017) (examining state laws intended to preempt localities from adopting progressive legislation, such as bans on sexual orientation and gender identity discrimination).
15. Sanders, Steve, *Pavan v. Smith*: Equality for Gays and Lesbian in Being Married, Not Just in Getting Married, Supreme Court Rev. 2016-2017, page 161 (American Constitution Society, 2017).

SPECIALLY NOTED

Georgetown Journal of Gender and the Law has published its Eighteenth Annual Review of Gender and the Law, containing annual review articles covering a wide range of topics. This is the Journal's December 2017 issue. Individual articles are noted above.

Lesbian/Gay Law Notes
Podcast

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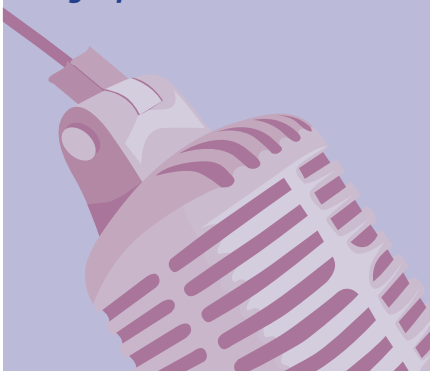

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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