

L G B T
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Administration Continues to Target Transgender Community

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Federal Government Asks the U.S. Supreme Court to Delay Deciding Whether Title VII Bars Gender Identity Discrimination

By Arthur S. Leonard

The Trump Administration has asked the Supreme Court to hold off for now on deciding whether gender identity discrimination is covered under the ban on employment discrimination “because of sex” in Title VII of the Civil Rights Act of 1964. Solicitor General Noel Francisco and several other Justice Department attorneys are listed on a brief filed with the Court on October 24, ostensibly on behalf of the Equal Employment Opportunity Commission (EEOC), arguing that the Court should not now grant review of a decision by the Cincinnati-based 6th Circuit Court of Appeals, which ruled earlier this year that Harris Funeral

excluding “gender identity” as part of the definition of sex for purposes of federal law.

The Solicitor General’s brief argues that instead, the Court should focus on one or both of two Petitions now pending that seek review of decisions by the 2nd Circuit and the 11th Circuit on the question whether sexual orientation discrimination is prohibited by Title VII. In the former case, *Zarda v. Altitude Express*, the en banc 2nd Circuit reversed prior circuit precedents and ruled that sexual orientation claims are covered by Title VII, following the lead of the 7th Circuit in *Hively v. Ivy Tech Community College*

protection against discrimination to LGBTQ people because of their sexual orientation or gender identity as form of “discrimination because of sex.” This argument, for those preoccupied with the presumed legislative intent of the drafters and adopters of legislation, is based on the proposition that the Congress of 1964 did not intend to protect LGBTQ people from discrimination when they voted to include “sex” as a prohibited ground of employment discrimination in Title VII.

Referring to the pending sexual orientation case petitions, General Francisco’s brief argues, “If the Court

[T]he central question is whether Title VII’s use of the term “sex” should be construed as the Trump Administration contends that it should be . . . or whether it should receive a broad interpretation that the EEOC and some lower federal courts have embraced.

Homes violated Title VII by discharging Aimee Stephens, a transgender employee, who was transitioning and sought to comply with the employer’s dress code for female employees. The proprietor of the funeral home objected on religious grounds to having an employee whom he regards as a man dressing as a woman at work. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107.

The government’s move came as something of a surprise, in light of recent news that a memorandum, originating from the Civil Rights Office in the Department of Health and Human Services (HHS), is circulating within the Trump Administration proposing to adopt a regulation defining “sex” in terms solely of genitals and chromosomes and thus, effectively,

(2017). In the other case, *Bostock v. Clayton County*, an 11th Circuit three-judge panel rejected a similar sexual orientation discrimination claim, and the circuit court turned down a petition for rehearing by the full circuit. In the Supreme Court, these cases are *Bostock v. Clayton County Board of Commissioners*, No. 17-1618, and *Altitude Express v. Zarda*, No. 17-1623.

In those two cases, the central question for the Court to decide is whether Title VII’s use of the term “sex” should be construed as the Trump Administration contends that it should be, as the simple difference between male and female as identified at birth, usually by the doctor’s visual inspection of genitals, or whether it should receive a broad interpretation that the EEOC and some lower federal courts have embraced, extending

grants plenary review in *Zarda*, *Bostock*, or both to address that question, its decision on the merits may bear on the proper analysis of the issues petitioner raises [in this case]. The court of appeals here relied on the reasoning of decisions (including *Zarda*) holding that Title VII’s prohibition on sex discrimination extends to sexual-orientation discrimination. Accordingly, the Court should hold the petition in this case pending its disposition of the petitions in *Zarda* and *Bostock* and, if certiorari is granted in either or both of those cases, pending the Court’s decision on the merits.” If the Court were to grant review in *Zarda* and/or *Bostock*, oral argument would be held sometime in the Spring with a decision expected by the end of June 2019, at which time the Court could send the Funeral

Homes case back to the 6th Circuit for reconsideration in light of its decision in the sexual orientation cases, avoiding deciding the gender identity question itself. The Supreme Court has yet to issue a ruling on the question whether either the Constitution or federal statutes protect transgender people from discrimination because of their gender identity.

Francisco's brief also argues that the Court should not grant review in the Funeral Home case even if it decides not to review the sexual orientation cases. "To be sure," says the brief, "the United States disagrees with the court of appeals' decision. As relevant here, the court's analysis of whether petitioner engaged in improper sex stereotyping reflects a misreading of

of Aimee Stephens and is nominally the respondent on this petition at the Supreme Court.

President Trump has nominated three commissioners, one of whom, out lesbian Chai Feldblum (who was first appointed by President Obama and whose current term expires at the end of this year), has inspired fervent opposition from several Republican Senators. The other two nominees are Republicans whom the current Senate leadership would eagerly approve, but the three nominations were presented as a package, in recognition of the statutory requirement that no more than three of the five EEOC commissioners may be members of the same party, and the package has not moved in the Senate because of opposition to Feldblum.

Setting aside the politics for the moment, however, the Solicitor General's pragmatic argument is that there is a significant split among the circuit courts on the sexual orientation issues, which requires the Supreme Court to resolve with some urgency. But, says the brief, "Fewer circuits have addressed the questions presented in this case, and the panel decision here appears to be the first court of appeals decision to conclude in a Title VII case that gender identity discrimination categorically constitutes discrimination because of sex under that statute. If the Court determines that the question raised in *Zarda* and *Bostock* does not warrant plenary review at this time, the questions presented here would likewise not appear to warrant review at this juncture."

"Fewer circuits have addressed the questions presented in this case, and the panel decision here appears to be the first court of appeals decision to conclude in a Title VII case that gender identity discrimination categorically constitutes discrimination because of sex under that statute."

Attorneys from the ACLU representing Aimee Stephens also filed a response to the Harris Funeral Homes' petition on October 24. They argue that the Court should deny the petition.

They note that the Funeral Homes petition's first "Question Presented" is "Whether the word 'sex' in Title VII's prohibition on discrimination 'because of sex' meant 'gender identity' and included 'transgender status' when Congress enacted Title VII in 1964." They argue that this case is a "poor vehicle for addressing petitioner's first question because deciding it would not affect the judgment" of the lower court. This is because, simply stated, the 6th Circuit decided this case on alternative grounds, one of which was relying on a sex stereotyping theory (that the Funeral Home fired Stephens for not complying with the employer's stereotype about how a genitally-male person should groom and dress), the other of which identified discrimination because of gender identity as a form of sex discrimination. So answering the first question in the negative would still leave the lower court's judgment intact on the first – and widely-accepted – sex stereotyping theory. Note that this first "Question Presented" is only relevant at all if the Court attributes any special

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The court's further conclusion that gender-identity discrimination necessarily constitutes discrimination because of sex in violation of Title VII – although it was unnecessary to the ultimate result the court reached in this case – is also inconsistent with the statute's text and this Court's precedent. Both of those questions are recurring and important."

This immediately raises the question why the Court should refuse to grant review to decide questions that are "recurring and important"? The Solicitor General's response to that question appears to be improvised to cover over a difficult political transition that will eventually take place at the EEOC, the agency that filed suit against the Funeral Home on behalf

As of now, the EEOC has three commissioners – two Democrats and one Republican – and continues to take discrimination complaints under Title VII from LGBTQ people. If the package of nominees is approved, the new Republican majority of commissioners would likely come into line with the Justice Department's position that Title VII does not cover such claims. If the "package" is not approved during the lame duck session of Congress, the EEOC will not be able to decide cases beginning on January 1, because it will lack a quorum of at least three Senate-confirmed commissioners. And the question of which party controls the next Senate will certainly affect which Trump nominees can be approved after January 3 when the new Senate convenes.

weight to what the adaptors of statutory language thought it meant at the time they adopted it: an originalist approach to statutory interpretation that the Court itself rejected in *Oncale v. Sundowner Offshore Services* in 1998.

The second question in the Funeral Homes petition is whether *Price Waterhouse v. Hopkins* “prohibits employers from applying sex-specific policies according to their employees’ sex rather than their gender identity.” As to that, the ACLU’s brief argues that the second question “was not adjudicated below and is not properly presented” to the Court in this case, because, first, the 6th Circuit held that Stephens was fired “based on multiple sex stereotypes, not only those related to the dress code,” and second, that the 6th Circuit “expressly did not address the lawfulness of sex-specific dress codes” in its decision, and that “sex-specific restroom policies” – an issue alluded to in the Funeral Homes petition – “are not at issue in this case.” Citing cases from many different circuits, the brief also argues that the 6th Circuit’s ruling “does not conflict with *Price Waterhouse* or any court of appeals.” Over the years since 1989, numerous circuit courts have accepted transgender discrimination claims using the sex stereotyping theory that the Supreme Court articulated in *Price Waterhouse*.

The government’s brief is undoubtedly disappointing to Alliance Defending Freedom (ADF), the right-wing religious litigation group that is representing the Funeral Homes and urgently seeks review in this case, seemingly confident that the newly constituted Republican majority in the Supreme Court would likely overturn the 6th Circuit’s decision. After the Supreme Court Clerk listed the two sexual orientation petitions on the agenda for the Court’s end-of-September conference, ADF sent a letter to the Clerk, suggesting that the Court defer deciding whether to review those cases until after briefing was completed on the Funeral Homes petition – which was delayed because

the Solicitor General twice requested and received from the Court an extension of time to file its response on behalf of the EEOC. ADF argued that the underlying questions in all three cases were related, so the Court should take them up together. Shortly after the letter was entered on the Court’s docket, the sexual orientation cases were removed from the agenda for the Court’s cert conference, and they had not been relisted for consideration. Now ADF finds the government arguing that the Court should not take up the cases together, and that the gender identity case should be deferred until the sexual orientation cases are decided, and should not even be addressed by the Court now if the Court decides not to take up the sexual orientation cases! ADF would likely see this as a lost opportunity to get the new Supreme Court majority to cut short the successful campaign by Civil rights litigators to get federal courts to find protection for LGBTQ people under federal sex discrimination laws, an easier route to protection than passage of the Equality Act, which has been languishing in Congress for several years, denied even a hearing by the Republican-controlled chambers.

Although the S.G. attributed its requests for extensions of time to the need to deal with many other cases, it is possible that the S.G. was stalling in hopes that the new majority of EEOC commissioners would be quickly confirmed, and that the Commission would bring its position in line with the Justice Department (DOJ). Attorney General Jeff Sessions issued an internal DOJ memo on October 4, 2017, rejecting any interpretation of Title VII (or other federal sex discrimination laws, such as Title IX of the Education Amendments Act or the Fair Housing Act) that covered gender identity or sexual orientation. During the early months of the Trump Administration, the Justice Department and the Education Department (DOE) abandoned the Obama Administration’s interpretation of Title IX, getting the Supreme Court to cancel an argument

under that statute in transgender teen Gavin Grimm’s lawsuit against a Virginia school district over bathroom access, and DOE has stopped accepting and process discrimination claims from transgender students. Thus, DOJ may feel that it can overturn the Obama Administration’s expansive interpretation of sex discrimination laws without having to win a case in the Supreme Court. The government’s brief devotes several pages to restating the Sessions memorandum’s interpretation of Title VII and criticizing the 6th Circuit’s decision on the merits.

Court watchers noted something interesting about the brief filed by the Solicitor General. The list of attorneys on the brief does not include any lawyers from the EEOC, which is unusual when the government is representing a federal agency in a Supreme Court appeal of one of their lower court victories. In this case, of course, DOJ and the EEOC have a strong disagreement about the correct interpretation of Title VII, so DOJ, representing the Trump Administration’s position, is not inclined to let the lingering Democratic majority at the Commission have any say in how this case is argued at the Supreme Court.

With the government opposing its own victory in the lower court, the only party left to defend the lower court’s ruling is Aimee Stephens with her counsel from the ACLU, whose brief is signed by attorneys from the ACLU Foundation in Chicago, the ACLU Fund of Michigan, the ACLU LGBT Rights Project headquartered in New York, and the ACLU Foundation’s office in Washington.

Of course, if the Supreme Court ultimately decides to grant review in any of these Title VII cases, it can expect a barrage of amicus curiae briefs similar to the record-setting number filed in last term’s *Masterpiece Cakeshop* case. ■

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U.S. Supreme Court May Decide Another Gay Wedding Cake Case

By Arthur S. Leonard

Melissa and Aaron Klein, proprietors of the now-defunct “Sweetcakes by Melissa” custom-cake business in Gresham, Oregon, filed a petition for certiorari on October 19, asking the U.S. Supreme Court to strike down the \$135,000 penalty imposed by Oregon authorities for their refusal to make a wedding cake for Rachel Cryer and Laurel Bowman in January 2013. *Klein v. Oregon Bureau of Labor and Industries*, No. 18-547, seeking review of *Klein v. Oregon Bureau of Labor and Industries*, 410 P.3d 1051, 289 Or. App. 507 (2017), rev. denied by Oregon Supreme Court, June 21, 2018. The Kleins claim in their Petition that the Oregon ruling violates their

1719 (2018). Both Oregon and Colorado forbid businesses in the state from discriminating against customers because of their sexual orientation. In *Masterpiece*, baker Jack Phillips refused, initially on religious grounds, to make a wedding cake for a gay male couple, and Colorado officials found that he had violated the law, rejecting his First Amendment defense. In his appeal of the Colorado Court of Appeals’ ruling affirming the Commission, Phillips asserted protection under both the Free Exercise and Free Speech Clauses of the First Amendment, claiming that the government may not compel a “cake artist” to express a message contrary to his religious beliefs, both as a matter of

a general free exercise right to refuse to comply with state laws of general application that do not specifically target religion. Kennedy’s opinion avoided dealing with Phillips’ argument that as a “cake artist” he also had a valid free speech claim. Two justices dissented, while others concurred in the result.

Justice Kennedy cited *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), to support the Free Exercise point. In that case, a restaurant owner cited his religious beliefs to refuse to comply with Title II of the Civil Rights Act of 1964, which forbids businesses affecting commerce from refusing to serve customers because of their race. The Supreme Court affirmed the 4th Circuit, which had reversed the district court’s refusal to enjoin the restaurant’s discriminatory policy. Kennedy could have just as well cited *Employment Division v. Smith*, which the Colorado Commission’s Administrative Law Judge had cited in his *Masterpiece* ruling, but *Piggie Park* may have seemed more apposite, as it involved enforcement of a general anti-discrimination law over religious objections. *Smith*, by contrast, involved a Native American man who had consumed peyote in a religious ritual and subsequently flunked his employer’s drug test, suffering discharge and denial of unemployment benefits. The Supreme Court rejected *Smith*’s religious freedom challenge to his disqualification for benefits, finding that the incidental burden this posed on his free exercise of religion did not excuse him from complying with his employer’s lawful policy against employee drug use or require that an exception be made to the state’s unemployment insurance law, which denies benefits to employees discharged “for cause.” In a concurring opinion in *Masterpiece Cakeshop*, Justice Neil Gorsuch (joined by Justice Clarence Thomas) described the *Smith* ruling as “controversial,” implying that it deserved reconsideration.

The Kleins devote a large part of their Petition to arguing that they are “cake artists” whose creations are expressive works, entitling them to the same vigorous constitutional free speech protection normally provided to artists in less digestible media.

constitutional rights of free exercise of religion and freedom of speech.

The Kleins also claim that they did not discriminate against the lesbian couple because of their sexual orientation, contrary to the finding of the Commission that was affirmed by the state appeals court. And, perhaps most consequentially, they asked the Supreme Court to consider whether to overrule *Employment Division v. Smith*, 494 U.S. 872, which holds that the Free Exercise Clause does not exempt people with religious objections from complying with state laws of general application that do not specifically target religious practices.

The Kleins ask the Court to revisit a controversy it confronted last year in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct.

freedom not to speak and protection for religious freedom.

The Court did not rule directly on these questions in disposing of Phillips’ appeal, instead deciding that comments by some of the Colorado Civil Rights Commissioners, and the Commission’s rejection of some other discrimination claims filed by a provocateur who charged bakers with discriminating against him by refusing to make explicitly anti-gay cakes, showed that the state had not afforded an appropriately “neutral forum” to Phillips for consideration of his defense. On that basis, the Court reversed the state court and commission rulings and dismissed the case against Phillips. However, in his opinion for the Court, Justice Anthony Kennedy reaffirmed that people and businesses do not enjoy

The Kleins have followed up on Gorsuch's signal by asking the Court to reconsider *Smith* or, alternatively, to "reaffirm" some comments Justice Antonin Scalia made in his opinion for the 5-4 Court majority in *Smith*, suggesting that when somebody raises a free exercise of religion claim in a case that also implicates "other fundamental rights," such as freedom of speech, the Court should apply "strict scrutiny" to the challenged state action in order to vindicate the other fundamental right. The Klein's Petition points out that lower federal courts are divided about whether to follow Scalia's suggestion for handling so-called "hybrid rights" cases – a suggestion the Oregon Court of Appeals expressly rejected in the Kleins' case – and urges the Court to resolve a split of lower court authority by taking this case.

The Klein's Petition also argues that they did not discriminate against Cryer and Bowman because of their sexual orientation; they would refuse to make a cake for a same-sex wedding regardless of the sexual orientation of the customer who sought this service. They related that just a few years earlier, they had produced a wedding cake ordered by this very lesbian couple, to celebrate the marriage of Rachel's mother to a man, and that it was because Rachel and Laurel "liked the Kleins' work so much that they wanted to commission a custom cake from Sweetcakes for their own wedding." The Petition also notes that the women quickly found another baker to make their wedding cake, and that a celebrity chef even gave them a second custom-designed cake for free.

On the other hand, it was reported that when the Kleins posted about the discrimination claim on their Facebook.com page, showing the image of the actual discrimination charge with contact information for the lesbian couple, the women received nasty messages, including death threats, which contributed to the Oregon Bureau's decision to assess substantial damages for emotional distress.

The Kleins devote a large part of their Petition to arguing that they are "cake artists" whose creations are expressive

works, entitling them to the same vigorous constitutional free speech protection normally provided to artists in less digestible media. As such, they claim the Oregon court erred in failing to apply strict scrutiny to the Bureau's decision against them, as the Supreme Court has repeatedly held that the First Amendment protects an individual's refusal to speak a message with which they disagree, the prime example being the Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which, overruling a 4-3 decision by the Massachusetts Supreme Judicial Court, the Court held that parade organizers had a right to exclude a group whose message they did not desire to include in their parade, which the Court deemed to be a "quintessential expressive association." Whether the Court is willing to deem baking a wedding cake the free speech equivalent of staging a parade with thousands of people on a state holiday is an interesting question.

If the Court grants the Petition, the most consequential issue could be the Kleins' challenge to *Employment Division v. Smith*, in which the Court cast aside decades of First Amendment precedent to hold that general laws that place a heavy burden on somebody's free exercise of religion must generally be obeyed nonetheless. Under prior rulings, the government had the heavy burden of meeting the "compelling government interest" test in order to justify applying a general law that incidentally but substantially burdened somebody's free exercise of religion.

Justice Gorsuch was correct in calling *Smith* a "controversial" decision. Congress was so incensed by Justice Scalia's opinion (which drew dissents from liberal members of the Court) that a bipartisan coalition soon passed the first version of the Religious Freedom Restoration Act (RFRA), introduced by Chuck Schumer (House) and Ted Kennedy (Senate) and eagerly signed into law by Bill Clinton in 1993. RFRA provided that any law imposing a substantial burden on somebody's free exercise of religion

could be challenged using the strict scrutiny standard. The Supreme Court subsequently ruled that Congress did not have authority to overrule the Court's constitutional ruling, but the Court later upheld a revised version of RFRA that applied only to federal laws that burden religious free exercise, holding that Congress could create a legislative exception to federal laws when they incidentally impose a substantial burden on religious exercise. Federal RFRA provided the example for more than twenty states to pass their own versions, similarly restricting the application of their state and local laws. State court decisions in several other states have interpreted their state constitutional religious freedom provisions to the same effect, rejecting the Supreme Court's narrower interpretation of Free Exercise in *Smith*.

If the Supreme Court were to overrule *Smith* and restore the previous precedents, RFRA and its state counterparts would be rendered superfluous, as the First Amendment would once more restrict states from enforcing general laws that substantially burden a person or business's free exercise of religion in the absence of a compelling state interest. The impact on LGBT rights could be enormous, prompting new claims that application of anti-discrimination laws to people and businesses with religious objections to LGBT people violates the businesses' constitutional rights – one of the claims the Kleins are pursuing in this case.

Oregon state officials have thirty days to file a response to the Petition, and Petitioners can file a Reply to the Response, which means that the Supreme Court's file in the case will not be completed for consideration by the Court until at least early December and maybe longer if the Oregon Attorney General's Office requests an extension of time to respond. But if the petition is granted in December, that would leave plenty of time for the Court to hear arguments and render a decision during its current term, which runs through the end of June. ■

U.K. Supreme Court Holds that a Bakery Did Not Discriminate Against a Gay Man When It Refused to Supply a Cake with a Pro-Equal Marriage Message

By Vito John Marzano

On October 10, 2018, the Supreme Court of the United Kingdom (UKSC) unanimously held that a bakery that refused to provide a cake that contained a pro-equality marriage message did not constitute discrimination on the basis of sexual orientation, because the bakery objected to the message but not to a characteristic of the person. *Lee v. Ashers Baking Company Ltd and others*, [2018] UKSC 49). Although the judgment has evoked comparisons to the decision by the Supreme Court of the United States (SCOTUS) in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), which concerned a self-

the ECHR protect a person's freedoms of religion and expression respectively. As an aside, Brexit will not impact the authority of the ECHR on the United Kingdom as it is a separate treaty from the European Union.

With respect to this case and writing for the U.K. Supreme Court, Lady Hale, President of the Court, summarized the facts as follows. The McArthurs interpret their Christian beliefs to mean that marriage constitutes a union between one man and one woman. They have operated a bakery since 1992 and, since 2004, have done so through Ashers Baking Company Ltd. (Ashers), which derives its name from

About three days later, she contacted Mr. Lee and explained that, per her interpretation of Biblical scripture, she could not fulfil his order, and she refunded his payment.

With the backing of the Equality Commission for Northern Ireland, Mr. Lee filed a claim that Ashers discriminated against him on the basis of sexual orientation in violation the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SORs). Further, Mr. Lee asserted that the Ashers' refusal to supply the cake violated the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) protections of religious beliefs and political opinion. For context, FETO stems from the Good Friday Agreement, which ended the ethno-religious struggle between Catholic/Republicans and Protestant/Unionists that plagued Northern Ireland from the 1960s to 1998. Both sides engaged in acts of "Christian terrorism." Widespread discrimination in areas such as employment and public housing resulted in a segregation drawn along religious/political lines. FETO seeks to address the discrimination that many people suffered and continue to suffer.

Lady Hale framed the substantive question as whether Ashers unlawfully discriminated against Mr. Lee on the grounds of sexual orientation, or on the grounds of religious belief or political opinion, when it refused to supply a cake with the aforementioned message because such a cake would contravene the sincere beliefs of the Bakery's owners. Answering affirmatively on either ground requires a determination of what, if any, the Bakery owners' ECHR articles 9 and 10 protections impact that answer. This repudiated the county court's finding of direct discrimination on all three grounds that did not require a balancing against

Ashers did not object to Mr. Lee's religious beliefs; rather, it objected to promoting a political message on a cake which, as such, would violate Ashers' religious beliefs.

described "Christian" baker refusing to bake a wedding cake for a same-sex couple, the UKSC preemptively sought to distinguish the two judgments.

By way of background, the USKC is a relatively young court, having only first heard matters in October 2011. The British Parliament transferred jurisdiction over devolved legislation from the Judicial Committee of the Privy Council and the judicial functions of the twelve Law Lords of the House of Lords as part of the Constitutional Reform Act of 2005. Devolved legislation are those laws passed by the parliaments of Northern Ireland, Wales, and Scotland, which derive authority from disparate acts passed by the British Parliament to govern local matters. Also relevant here, the United Kingdom is a party to the European Convention on Human Rights (ECHR). Articles 9 and 10 of

the following scripture, "Asher's food shall be rich, and he shall yield royal delicacies" (Genesis 49:20). Ashers offers a "Build-a-Cake" service, wherein a customer may submit an image for printing on a cake. While Ashers advertised this service, the bakery did not advertise any political or religious restrictions and does not advertise its self-described Christian beliefs.

In May 2014, Mr. Lee wished to bring a cake to a private event hosted by QueerSpace, an organization for the LGBT community in Belfast at which he volunteers, at the end of Northern Ireland's anti-homophobia week. He visited Ashers and placed an order for a cake that said "Support Gay Marriage" with an image of the Sesame Street characters Bert and Ernie. Mrs. McArthur raised no objection, accepted the order, and took Mr. Lee's money.

ECHR protections. It further rebuked the Northern Ireland Court of Appeal's finding of discrimination on the ground of sexual orientation that need not be weighed against the bakery owners' religious beliefs.

Addressing initially the sexual orientation claim under the SORs, the Court found Mr. Lee's argument that Ashers discriminated against him because of his sexual orientation to be unpersuasive. Mr. Lee contended that by refusing to supply the cake as ordered, Ashers discriminated against him because of his actual or perceived sexual orientation. Rather, the UKSC concluded that Ashers' objected to the cake's message, not to a personal characteristic of their customer. That is, one's support for equal marriage does not serve as a proxy for one's sexual orientation. The message benefits not only same-sex couples, but their families, friends, and the wider community. Accordingly, as Ashers objected to a message, not a personal characteristic, it did not discriminate against the person because of his sexual orientation.

Turning next to FETO, Lady Hale explained that these protections have constitutional status in Northern Ireland. As it relates to protections based on religious beliefs, to invoke FETO's protections, the alleged discrimination must stem from a source other than the discriminator. Ashers did not object to Mr. Lee's religious beliefs; rather, it objected to promoting a political message on a cake which, as such, would violate Ashers' religious beliefs. Hence, Mr. Lee did not suffer discrimination comparable to those people refused employment or services because of their religious beliefs.

With respect to discrimination based on political opinion, because this constituted an arguable political message, the meaning and effect of FETO must be balanced against the McArthurs' ECHR rights. Articles 9 and 10 protect against manifesting beliefs one does not hold. As the Court reasoned, while Ashers could not discriminate against Mr. Lee because of his sexual orientation, Ashers was not obliged to supply a cake with a

message that profoundly disagreed with their own interpretation of Christian scripture. FETO should not compel speech that contravenes these articles unless justification is shown, which was not done in this case. As such, the UKSC reversed the lower courts and found that Ashers did not discriminate when it refused to supply the cake.

In a postscript, the Court felt it necessary to distinguish this opinion from *Masterpiece Cakeshop*. As understood by the UKSC, "[t]he important message from the *Masterpiece Bakery* [sic] case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics." The UKSC seemingly suggests that Ashers may not rely on this ruling if a same-sex couple sought to have their wedding cake supplied by the bakery. However, this does leave unresolved a number of questions; equal marriage, recognized in Scotland, Wales, and England, remains unrecognized in Northern Ireland, although Civil unions are recognized. The ECHR does not currently require that signatory countries provide equal marriage rights for same-sex couples. Would the UKSC countenance an objection by Ashers to supplying a cake for a same-sex wedding ceremony when no right to equal marriage exists under the ECHR or the laws of Northern Ireland? How would these issues be resolved in other areas of the UK that are not subject to FETO? Unfortunately, these questions remain unanswered, although the UKSC's attempt to distinguish this case from its U.S. counterpart does provide some hope of a favorable decision under different circumstances. ■

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Proposed Trump Administration Anti-Transgender Regulation Provokes Opposition

By Arthur S. Leonard

On October 21, the *New York Times* reported that the U.S. Department of Health and Human Services (HHS) has been floating within the Trump Administration a proposal to adopt a uniform regulatory definition of "sex" that would be limited to genital and chromosomal sex. This would be consistent with the position that Attorney General Jeff Sessions took in a memorandum he circulated within the Justice Department in October 2017, rejecting the argument that laws prohibiting discrimination "because of sex" would extend to discrimination because of gender identity or sexual orientation. HHS is seeking the Justice Department's endorsement for its proposal, and hopes to persuade other departments and agencies to adopt the same definition. HHS's primary concern is with federal anti-discrimination laws in the health care field, including the Medicare and Medicaid programs and provisions of the Affordable Care Act concerning discrimination in health insurance programs.

The *Times* report described the effect of the proposed regulation in its headline as "defining transgender out of existence." This is perhaps a bit overblown, but roughly accurate for purposes of administrative interpretation and application of federal statutes and regulations, and it helped to spark a furious response from the nation's civil rights community, leading to demonstrations at federal office buildings and the White House and campaigns to lobby Congress and the Administration.

The proposed regulation would have to go through an extended process required by the Administrative

Procedure Act (APA) before it could be officially “promulgated” and published as part of the Code of Federal Regulations (CFR). A proposed regulation must first be published in the Federal Register and opened up to public comment. The proposing agency may also hold public hearings on a proposed regulation. After the conclusion of this “publication and comment” period, the agency would study the submitted comments and any hearing records, and then publish a final regulation for inclusion in the CFR, accompanied by an explanation of what it means and is intended to accomplish, summarizing the comments received and the proposing agency’s response to

challenge as being “arbitrary and capricious” because it declares as a “fact” something that is contrary to widely held professional opinion in relevant fields of science and medicine. It is also inconsistent with the way numerous courts have been interpreting federal laws and rules that prohibit discrimination because of sex.

The notion that sex can be reduced to a simple matter of chromosomes or genitalia, and that everybody can be easily and permanently classified as male or female based on a notation on their birth certificate reflecting a doctor’s visible observation of a newborn’s genitals, has been widely rejected in recent decades in numerous

viewed as probably unconstitutional by a federal judge, partly on the ground of violating the constitution’s prohibition on an “establishment of religion” as well as “equal protection of the laws,” and was preliminarily enjoined from going into effect, although the 5th Circuit Court of Appeals subsequently held that the plaintiffs in that case lacked formal standing for their lawsuit, vacating the injunction on that ground. *See Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss, June 30, 2016), *reversed on grounds of standing*, 860 F.3d 345 (5th Cir. 2017), *cert. denied*, No. 17-547, 2018 WL 311355 (U.S. Jan. 8, 2018), and *cert. denied sub nom. Campaign for S. Equal. v. Bryant*, 138 S. Ct. 652 (U.S. Jan. 8, 2018). A new version of that lawsuit continues.

Perhaps more relevantly, on September 19, a federal judge in Denver ordered the State Department to issue a gender-neutral passport to Dana Zzyym, an individual who was identified as female on their birth certificate, but who does not now identify either as male or female and who sought a passport with an “X” rather than an “M” or an “F.” *Zzyym v. Pompeo*, 2018 U.S. Dist. LEXIS 160018, 2018 WL 4491434 (D. Colo.). The State Department insisted that everybody must identify as M or F to get a passport, but the court found that to be “arbitrary and capricious” in violation of the Administrative Procedure Act and beyond the State Department’s authority under the passport statute, and ordered that the “X” passport be issued. Having ruled on that statutory basis, the court declined to address the constitutional issues raised by Zzyym’s complaint.

A regulatory definition adopted by an executive branch department or an independent administrative agency must be based on documented facts, not on religious or ideological beliefs. Otherwise it is not validly adopted and courts will not defer to it or enforce it. And, of course, an executive branch department or agency does not have authority to amend statutes or overrule court interpretations of

HHS’s proposed regulation would adversely affect the rights of transgender people under numerous federal laws, and is subject to serious challenge as being “arbitrary and capricious” because it declares as a “fact” something that is contrary to widely held professional opinion in relevant fields of science and medicine.

the comments. It would not be “law” until its final publication in the Federal Register and the CFR.

However, final publication is never the end of the story for a controversial regulation. Individuals and organizations affected by a newly-issued regulation may immediately challenge it in federal court. Claims could be made that it violates constitutional rights or, on a more mundane level, that it is “arbitrary or capricious” and thus invalid and not enforceable under the APA. Challengers can also argue that it is not authorized by the statutes that it is intended to interpret, and is inconsistent with the policies and purposes of those statutes.

HHS’s proposed regulation, whose text has not been officially released, would adversely affect the rights of transgender people under numerous federal laws, and is subject to serious

peer-reviewed scientific journals and treatises and – as significantly for purposes of evaluating this regulation – by numerous federal courts.

The contention by its HHS authors that their proposed definition is “scientific” is laughable. It is a definition inspired by politics and religious ideology, and is of a piece with the spurious “factual findings” of the Mattis Memorandum on transgender military service that was submitted to the president last February, and which several federal courts have already rejected as probably violating the constitutional rights of transgender people.

A similar definition adopted as part of a Mississippi statute, which purports to protect those who hold the view that sex is a simple and unchanging matter of chromosomes and genitalia from any adverse treatment under state law, was

statute by adopting rules or regulations administratively.

Furthermore, the HHS proposal is late to the game, as numerous federal courts, including many courts of appeals, have already ruled, for example, that the ban on sex discrimination in insurance coverage subject to the ACA – the immediate focus of attention by HHS – extends to gender identity claims. Federal trial courts have ruled, for example, that Wisconsin must cover gender transition medical costs for transgender state employees because of the ACA, Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the 14th Amendment, *Boyden v. Conlin*, 2018 WL 4473347, 2018 U.S. Dist. LEXIS 158491 (W.D. Wis., Sept. 18, 2018), and that a Minnesota employer’s self-funded health plan must cover gender transition costs to comply with the ACA, *Tovar v. Essentia Health*, 2018 U.S. Dist. LEXIS 16065 (D. Minn., Sept. 20, 2018).

There is also a mountain of federal court decisions recognizing the existence of transgender people in the context of prison conditions, employment discrimination, housing discrimination, and equal opportunity to get loans or to benefit from educational programs. Federal statutes even refer explicitly to gender identity in the context of violence against women and victimization in hate crimes.

In short, recognition of the concepts of gender identity and transgender individuals are now deeply woven into the texture of federal law, although Alliance Defending Freedom’s petition for certiorari in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107, asks the Supreme Court to reject that reading of Title VII’s ban on discrimination because of sex in the case of a transgender funeral director (see above). If the Supreme Court takes the case and decides it adversely to the Equal Employment Opportunity Commission, it is possible that HHS’s proposed regulation would become superfluous. ■

Hawaii Supreme Court Says Marital Presumption of Legitimacy Applies to Children Born to Same Sex Spouses

By Matthew Goodwin

Following the lead of a number of other jurisdictions post-*Obergefell*, Hawaii’s Supreme Court on October 4th extended the marital presumption of parentage to “women in same-sex marriages.” *L.C. v. M.G.*, 2018 Haw. Lexis 210, 2018 WL 4804417. In other words, when a child is born to a married couple, regardless of the sex of the spouses, those spouses are both presumed to be the legitimate parents of that child. From this presumption flows equal rights and responsibilities of both spouses, including not only legal parentage but duties of support and care as well (i.e. child support).

The parties—identified only by their initials in the court’s decision—met in 2010 and then married in 2013. Prior to and after marriage, the parties discussed having a child. The couple apparently decided that M.G. would carry the child—although, as explained below, L.G. unsuccessfully claimed to have revoked her consent on this score. Regardless, through assisted reproduction involving an anonymous sperm donor, M.G. became pregnant in early 2015. Shortly after M.G. became pregnant, however, the couples’ relationship deteriorated. In the fall of 2015, L.C., the non-biological mother, filed for divorce and sought a court ruling that she was not a parent of the child. At the time the child was born, the divorce was pending and the parties were still legally married.

Relying on The Uniform Parentage Act (UPA) and Hawaii’s Marriage Equality Act (MEA), the trial court denied L.C.’s attempt to disestablish parentage. L.C. appealed and the case was transferred to the Supreme Court from the Intermediate Court of Appeals.

L.C.’s appeal raised three issues: (1) L.C. claimed it was error to decide L.C. was the legal parent of the child when she had no genetic link with the child; (2) L.C. argued it was error to apply the marital presumption of parentage to LC because Hawaii’s MEA did not expressly

extend the presumption to same-sex couples; and, (3) L.C. claimed that if the marital presumption of parentage did, in fact, apply, she successfully rebutted it at the trial level.

Because the UPA’s marital presumption of parentage is rebuttable, the evidence and testimony at trial focused upon L.C.’s consent or non-consent to M.G.’s undergoing fertility treatments to become pregnant.

L.C., a naval officer, was deployed when M.G. underwent the intrauterine insemination (IUI) which led to her pregnancy. L.C. claimed that, beginning in March 2014, she told M.G. several times that she did not want to go forward with having a child. L.C. testified that she was not involved with the fertility center that M.G. used, and that she did not sign the consent form of the fertility center for M.G. to become pregnant. L.C. also relied heavily on a text exchange from February 25, 2015, claiming that it showed explicit non-consent to the pregnancy. In this text, L.C. wrote to M.G. that she “want[ed] to make sure we are truly good before we start a family . . . want[ed] a child more than anything but [wanted] them to have parents that adore each other as well as them.”

M.G.’s witnesses included the office manager of the fertility center as well as her OB/GYN. The office manager testified that the fertility center never received L.C.’s consent, but neither did they receive a withdrawal of consent from L.C. L.C. attempted to introduce into evidence a fax she claimed to have sent to the fertility center on January 1, 2014, withdrawing consent to M.G.’s IUI. However, the fax appeared to have been received by the Center after the baby was born and after L.C. filed for divorce.

The OB/GYN testified that L.C. participated in one of M.G.’s appointments via videoconference in July 2015, and that during the

appointment neither L.C. nor M.G. expressed to her that they no longer wanted to go through with the pregnancy.

M.G. also introduced the texts between her and L.C. in which M.G. informed L.C. she was pregnant. L.C.'s response was enthusiastic, congratulatory, and expressed excitement at the possibility of rubbing M.G.'s "tummy and feel our baby[.]" Similarly, M.G. undercut L.C.'s reliance on the February 25, 2015, text exchange by pointing out in that same exchange M.G. asked L.C. if she was "backing out" and L.C., in turn, responded "What are you talking about backing out? I have always wanted a child." M.G. also introduced evidence of L.C.'s attendance at an ultrasound appointment and a Lamaze class.

The court affirmed the trial court's decision in all respects, except that the majority held, over a dissent, a spouse cannot rebut the marital presumption of parentage by proving non-consent to a spouse's use of artificial insemination.

First, the court addressed L.C.'s contention that the UPA required a biological connection in order for a person to be presumed the legal parent of the child. The court called this position "simply incorrect." Here, the court pointed to "[t]he UPA's statutory language [which] indicates that legal parentage may arise even if there is no biological connection to the child." Wrote the court: "The UPA's presumption of paternity provision . . . describes six different ways in which a person is presumed to be the legal parent of a child. But only one . . . court-ordered genetic testing, is plainly based on biology . . . the presumption at issue here – marriage to the child's natural mother – [is] not." The court also looked to its own precedents which held the UPA did not require a biological connection to the child.

Second, the court disposed of L.C.'s claim that the MEA did not extend the UPA's marital presumption of parentage to same sex couples. The MEA includes a provision for gender-neutral interpretation of statutes: "[w]hen necessary to implement the rights, benefits, protections, and responsibilities of spouses under the laws of this State, all gender-specific terminology, such as 'husband', 'wife', 'widow', 'widower'

shall be construed in a gender-neutral manner. This shall apply to all sources of law . . ." "The general-neutral provision speaks for itself," wrote the court: "All laws regarding the rights and responsibilities of spouses must be interpreted in a gender-neutral manner. The marital presumption of parentage is a 'source of law' regarding marriage, and therefore it must be construed in a gender-neutral manner . . ."

L.C. had contended that applying the MEA's gender-neutral provision to the UPA "would unfairly discriminate against women attempting to disprove legal parentage . . . if we replace every instance of the word 'father' with 'mother' in that provision, only three of the seven listed types of evidence could be used by a woman to rebut a presumption of parentage, while a man would still be entitled to use all seven." The court pointed out that L.C.'s contention ignored a catch all provision of the UPA's marital presumption and that such provision "permits the use of any relevant evidence to prove (or disprove) parentage."

The court diverged 3-2 on the question of how or if a putative parent can rebut the marital presumption of parentage in cases of a child born through artificial insemination.

The majority ruled that the UPA "bars evidence of a lack of consent to an artificial insemination procedure as a means to rebut a presumption of parentage." In coming to its conclusion, the majority analyzed the drafts of what eventually was adopted to be Hawaii's UPA in 1975. An earlier draft of the UPA included a clause that "if a husband consented in writing to his wife's artificial insemination procedure, he would be treated as the natural father of the child conceived by that procedure." From this removal "the majority conclude[d] that the Legislature 'specifically rejected a requirement of consent to artificial insemination for a husband to be recognized as the father of his wife's child conceived through artificial insemination.'"

The minority first claimed it was error for the majority to take up this issue *sua sponte* even though L.C., M.G. and the trial court agreed that clear and convincing evidence of non-consent to

artificial insemination could rebut the presumption of parentage. Regardless, the minority disagreed that removal of the above clause from the final draft of Hawaii's UPA could conclusively establish that the legislature intended to reject non-consent as a means of rebuttal of the presumption. The minority was disturbed by the fact the majority opinion seemed to provide "no other meaningful way in which to rebut the marital presumption of parentage in a case involving an artificial insemination procedure."

In any event, the minority and the majority agreed—albeit for different reasons—that L.C. had not rebutted the presumption of her parentage of the child.

As noted, a number of states have had to rule that the marital presumption of parentage applies to same-sex couples with equal force as it does to heterosexual couples, even though it would seem this question was settled in the first instance by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As Arizona's Supreme Court ruled in *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017), "[t]he marital paternity presumption is a benefit of marriage, and following *Pavan v. Smith*, 137 S. Ct. 2075 (2017) and *Obergefell v. Hodges* . . . the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses." In this connection, M.G. raised this same constitutional argument in her case, i.e. that not applying the marital presumption of parentage to same-sex spouses violates the Fourteenth Amendment of the U.S. Constitution. The court in *L.C. v. M.G.* did not address M.G.'s constitutional arguments but did, in a footnote, lay out the Arizona court's rationale on the question.

M.G. was represented by Peter Renn and Christopher D. Thomas for Lambda Legal's Western Regional Office in Los Angeles. The State of Hawaii participated as amicus curiae. Rebecca A. Copeland represented the petitioner, L.C. ■

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North Carolina District Court Issues Mixed Decision in Bathroom Bill Case

By Vito John Marzano

On September 30, 2018, U.S. District Judge Thomas D. Schroeder issued an order in *Carcaño v. Cooper*, 2018 U.S. Dist. LEXIS 169735, 2018 WL 4717897 (M.D.N.C.), which, among other things, dismissed parts of plaintiffs' challenges to North Carolina statute HB142. Plaintiffs originally commenced this action in March 2016 in response to the passage of North Carolina's transphobic statute known as HB2 (i.e., "the Bathroom Bill"), which amended the state's existing antidiscrimination statute to limit "sex" to "biological sex," defined as the "physical condition of being male or female, which is stated on a person's birth certificate." Additionally, HB2 compelled public facilities (including privately-owned places of public accommodation) that had multiple-occupancy restrooms or changing facilities ("facilities") to segregate and specify use based on "biological" sex. The draconian statute would subject a person who used a facility that did not correspond with their "biological" sex to prosecution.

The state enacted HB2 as a response to a Charlotte ordinance prohibiting discrimination based on, among other things, gender identity or gender expression. After significant national backlash engendered by the passage of HB2, and an election in which the backlash was said to have contributed to the defeat of the incumbent governor, the state enacted HB142, a "compromise" statute between the legislature, the newly-elected governor, Roy Cooper, and the Charlotte City Council. Section 1 of HB142 repealed HB2; section 2 preempted state agencies, including the University of North Carolina ("UNC"), from regulating access to multiple occupancy facilities, except in accordance with an act of the state General Assembly; section 3 did the same for local governments; and section 4 provides that section 3 expires on December 1, 2020. Notably, HB142

did not include language that would subject a person who used a facility that matched their gender identity/expression to prosecution.

Plaintiffs initially challenged HB2 by arguing, among other things, that prior to its passage, a transgender person could use a facility that correlated with their gender identity without fear of prosecution. Further, plaintiffs, relying on the U.S. Department of Education's interpretation of "sex" (as of that time) to include gender expression and gender identity, contended that HB2 violated Title IX protections at the University, by denying equality of educational opportunity because of sex. The Fourth Circuit Court of Appeals, whose jurisdiction includes North Carolina, had previously held in a different case that the DOE's interpretation warranted deference by the district court. But the Trump administration rescinded that guideline after taking office in 2017, and, on appeal, the Supreme Court vacated the Fourth Circuit's decision and remanded the issue back to the district court. *See, Gloucester Cty. Sch. Bd. v. G.G. ex. Rel. Grimm*, 137 S. Ct. 1239 (2017).

Thereafter, plaintiffs moved, with consent, to serve a fourth amended complaint ("amended complaint"). The amended complaint names several North Carolina executive department secretaries and the governor, Roy Cooper ("Executive Branch Defendants"), as well as UNC and UNC-President Margaret Spellings ("UNC Defendants"). Previously, the court permitted Republican legislators Senator Phil Berger and Tim Moore, Speaker of the North Carolina House of Representatives, to intervene ("Intervenor-Defendants"). Following service of the amended complaint, Intervenor-Defendants and UNC Defendants each moved to dismiss plaintiffs' claims for lack of standing and, alternatively, for failure to state a claim.

Addressing first the issue of standing, plaintiffs were required to establish that: (1) they suffered an "injury-in-fact;" (2) the injury is fairly traceable to defendants' actions; and (3) a favorable decision will likely result in redress for the injury. To prove an injury-in-fact, plaintiffs must point to an incursion into a "concrete and particularized" and "actual and imminent" legally protected interest. Additionally, a "certainly impending" injury or a "substantial risk of harm" may establish a "future injury."

Plaintiffs first alleged injury in that HB142 lacks clarity as to which facilities a transgender person could use, and whether state trespass laws could be used to prosecute a transgender person who uses a facility that corresponds with their gender identity/expression. Intervenor-Defendants argued in favor of dismissal on the basis that (1) uncertainty does not manufacture injury; (2) plaintiffs' self-inflicted their alleged injury by refraining to use facilities that matched their gender identity/expression, because HB142 does not contain the same prosecution language as HB2; and (3) HB142 is not vague, because it clearly preempts local governments and private employers from regulating facilities not in accordance with a General Assembly act. The UNC Defendants advanced similar arguments, but also contended that any uncertainty regarding the law does not establish an injury-in-fact and that state trespass laws do not establish standing to challenge HB142.

The district court agreed with the defendants, noting that HB142 returned plaintiffs to the same position they were in prior to the passage of HB2, which was a potentially desirable outcome prior to the repeal of HB2. Although certain Republican state officials had made public statements that state trespass laws could be used to enforce HB142, the court found persuasive that this did not pose a threat in light of contrary statements by the Executive Branch

Defendants, including Democratic Governor Cooper's Executive Order directing state agencies not to prohibit any individual to use a public facility in accord with their gender identity/ expression. Thus, Plaintiffs failed to point to a clear and concrete injury. Further, the court declined to adopt plaintiffs' position that injury was not imminent but ongoing, concluding that plaintiffs attempted to "bootstrap their way to injury[-]in[-]fact by harming themselves in the present when future prosecution they allegedly fear is not sufficiently imminent."

The court went on to explain that even if it had accepted the plaintiffs' position, they could not trace it to the challenged action by the defendants, as opposed to an independent action of some third-party. Moreover, even if HB142 were struck down on constitutional grounds, it would not alleviate the fears that state trespass laws could be used against plaintiffs. Accordingly, plaintiffs lacked standing to pursue their substantive due process, equal protection, Title VII and Title IX claims on this issue.

Plaintiffs next alleged injury on the basis of unequal treatment by the state, in that HB142 prevents them from engaging in the democratic process at the local level to lobby for protective ordinances. The court rejected the Intervenor-Defendants' argument that plaintiffs sought to re-characterize their injury. Rather, the imposition of a barrier is per se an injury in equal protection cases. While HB142 may foreclose proponents of HB2 from lobbying local governments or state agencies successfully, the question is whether the minority is injured, not the majority. Additionally, plaintiffs sufficiently traced this injury to Executive Branch Defendants because (1) HB142 prevents local protections; (2) Governor Cooper signed and negotiated the statute; and (3) the Executive Branch Defendants must enforce and uphold the law. Notwithstanding, since UNC President Spellings lacked any involvement in drafting, passing, or enforcing HB142, plaintiffs could not trace the injury to her. Finally, the court held that because it has the power to enjoin enforcement of HB142, redressability was established.

Accordingly, the plaintiffs' equal protection challenge on this basis can proceed, except as asserted against UNC President Spellings.

Next, the court addressed defendants' arguments that those challenges to HB2 should be dismissed for lack of ripeness. To determine ripeness, the court "balances the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." Although challenges to HB2 remain premature, should plaintiffs succeed on their claims against HB142, the possibility, no matter how remote, that the court must then address the challenges to HB2 establishes their ripeness. To put it another way, because the HB2 claim is contingent on the HB142 claim, it can continue.

Defendants next moved to dismiss for failure to state a claim as it relates to plaintiffs' claim that HB142 was passed with discriminatory intent. Applying the non-exhaustive list of factors enumerated in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), as discussed below, the court rejected plaintiffs' challenge to section 2 of HB142 but permitted their challenge to section 3 to proceed.

In first considering whether the official action disparately impacted plaintiffs, the court rejected their argument that, with respect to section 2, UNC imposes one rule for transgender individuals and another for cisgender individuals. Even if UNC lacks transgender-specific facilities, the signs designating a gender have no legal impact. Moreover, UNC has no specific policy regulating which facility a transgender person can use, thus leaving it to the individual's discretion. Conversely, section 3 satisfied this factor because, prior to HB2, some local ordinances had protected transgender individuals from discrimination. HB142, while repealing HB2, prohibits those ordinances while permitting protections for other classes of people (e.g., race, sex, ethnicity, etc.). It matters not that HB142 forecloses on the proponents of HB2 from seeking local ordinances in favor of their position, because they do not constitute the class that is impacted by HB142.

The next factor examines the historical background of the challenged decision. North Carolina enacted HB2 in response to the Charlotte ordinance that provided protection against discrimination for transgender individuals. HB142, although repealing HB2, still forecloses on that protection. Further, the General Assembly was presented with a "clean repeal" bill, but chose to enact the preemption language, notably after Charlotte agreed to repeal its transgender-protective provision.

Turning to whether the state departed from its usual procedures in order to pass HB142, the General Assembly utilized a process known as "gut and amend, where an existing bill that had passed one house was stripped out and used as the vehicle for passing HB142." The Intervenor-Defendants argued that the procedure is not unusual and was "merely the result of a bipartisan political compromise." To accept this argument, the court noted, would require a factual determination inappropriate at the pleadings stage because of the well-established legal standard that plaintiffs' factual assertions are accepted as true when evaluating a motion to dismiss for failure to state a claim.

The court then addressed the relevant legislative history but concluded that plaintiffs insufficiently pleaded legislative history to show discriminatory intent. This was not fatal because the Arlington Heights factors are disjunctive.

Concluding that plaintiffs plausibly pleaded discriminatory intent, the issue turned to whether the disparate treatment finds justification under the applicable level of scrutiny. Noting that the Fourth Circuit has not yet determined the appropriate level of scrutiny for gender identity discrimination claims, the district court declined to adopt a stricter level of scrutiny, because plaintiffs plausibly pleaded that HB142 fails the lowest standard: rational basis. Said review determines "whether the end that the state seeks to achieve is a legitimate governmental purpose." Although this means that state action will generally win if any set of facts reasonably

may construct a justification for the government's action, it cannot be used for the purposes of a motion to dismiss for failure to state a claim.

In any event, plaintiffs needed to plead facts to overcome the presumption of rationality. The Intervenor-Defendants did not offer any possible government purpose for HB142's preemption provision, and HB142 is not accompanied by any policy statement. Plaintiffs, thus, presented the most plausible argument: HB142 intended to preempt an uneven patchwork of anti-discrimination laws across the state, but this is defeated by the fact that HB142 leaves in effect nondiscrimination local ordinances that extend nondiscrimination protections to other classes of people beyond the state statute, thus defeating uniformity. To the extent that it creates uniformity in this instance, section 4 causes section 3 to expire in December 2020. The court, while deciding in favor of plaintiffs, noted that this was a close call. Accordingly, plaintiffs' challenge to section 3 of HB142 survived.

Ultimately, the district court issued a mixed decision. Plaintiffs' equal protection claim against section 3 of HB142 can proceed, except as asserted against UNC President Spellings. The scrutiny issue raises concern and certainly portends a summary judgment motion. Nevertheless, plaintiffs could still argue for a higher level of scrutiny, as the court has not ruled on the merits of that issue yet. Notwithstanding, prior to the motions to dismiss, plaintiffs and Executive Branch Defendants filed a joint motion for entry of a consent decree, which would, among other things, permit transgender individuals to use public facilities that align with their gender identity. While the order claims otherwise, it does suggest that a subsequent motion for summary judgment will likely favor defendants on the issue of rationality of the government's conduct.

The plaintiffs are represented by attorneys from the American Civil Liberties Union (both the national LGBT Rights Project and the ACLU of North Carolina), Lambda Legal, and local cooperating attorneys. ■

North Carolina Court of Appeals Affirms Dismissal of Third Parent's Custody Action

By Timothy Ramos

Nontraditional family structures have challenged the predominance of the nuclear family throughout history; for instance, society in general has accepted the fact that children may be raised by single parents, stepparents, grandparents, or others. Even so, courts continue to struggle with nontraditional family structures as they relate to advances in reproductive technology and/or the legal rights of same-sex couples. Earlier this year, we reported on a case in New York brought by a third parent who successfully obtained custody and visitation rights for a child who already had two legal, biological parents. *Matter of David S. v. Samantha G.*, 74 N.Y.S.3d 730 (N.Y. Fam. Ct. Apr. 10, 2018). In contrast, we now turn to *Chavez v. Wadlington*, 2018 N.C. App. LEXIS 981, 2018 WL 4701492 (N.C. Ct. App. Oct. 2, 2018), in which a three-judge panel of the North Carolina Court of Appeals voted 2-to-1 to affirm a district court decision holding that Emily Chávez lacked standing to seek custody of B.J.W. and C.A.W., the two biological children of Serena and Joseph Wadlington. Writing for the court, Judge Ann Marie Calabria held that Emily failed to allege sufficient facts showing that: (1) she established a parent-child relationship; and (2) either Serena or Joseph acted inconsistently with their constitutionally-protected status as parents. The opinion solely focused on Emily's custody claim concerning 15-year-old C.A.W. because B.J.W. is no longer a minor.

Emily and Serena began a long-term, committed, and exclusive relationship soon after Serena and Joseph separated in 2007. Although separated, Serena and Joseph never divorced and continue to share physical and legal custody of their two children without a court order. Even though Emily and Serena could not legally marry for much of the duration of their relationship, nor had they pursued marriage after North Carolina recognized same-sex marriage, they lived together with the children and

shared in parental responsibilities such as taking the children to school, accompanying them to appointments and activities, signing paperwork, and purchasing household necessities. The couple separated on March 4, 2015, and Emily left their shared residence. While not stated anywhere in Judge Calabria's opinion or the accompanying dissent by Judge John S. Arrowood, Emily testified that the separation was due to an incident of physical domestic violence. Four months later, Emily filed an action to evict Serena and the children from the residence. After the court dismissed the action, Emily resorted to self-help, changed the locks, and relocated Serena and the children's belongings to a storage unit while they were away. From the time of the separation to the time she filed this action on November 4, 2016, Emily's attempts to reestablish communication with the children were unsuccessful.

On appeal, Emily contended that the district court erred when it held that she lacked standing to sue for custody under N.C. Gen. Stat. § 50-13.1(a) and the case law interpreting the provision. §53-13.1(a) states that "any parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." The relationship between the third party and the child is the relevant consideration for the standing determination, and a parent-child relationship—even in the absence of a biological relationship—will suffice to support a finding of standing. *Ellison v. Ramos*, 130 N.C. App. 389, 394 (1998). Furthermore, a non-parent who seeks custody against a natural parent must also allege some act inconsistent with the latter's constitutionally-protected status. *Yurek v. Shaffer*, 198 N.C. App. 67, 75 (2009). However, the inconsistent act does not have to be a "bad act" demonstrating that the natural parent was unfit. See *Moriggia v. Castelo*, 805 S.E.2d 378 (N.C. Ct. App. 2017).

Even though Judge Calabria recognized that Emily's allegations demonstrated that she had a parent-child relationship with the children during her relationship with Serena, the judge held that this was insufficient for the purposes of conferring standing, because Emily had ended her relationship with the children by evicting them from the residence in July 2015. Quoting another custody case, *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123 (2009), Judge Calabria held that "standing is measured at the time the pleadings are filed," and that "when standing is questioned, the proper inquiry is whether an actual controversy existed when the party filed the relevant pleading." Thus, the

the child at issue when they filed their pleadings.

In his dissent, Judge Arrowood rejected the majority's holding that Emily lacked standing simply because her relationship with the children ended in July 2015. He found that the majority inappropriately used Emily and Serena's relationship with—and separation from—each other in order to determine whether a parent-child relationship existed between Emily and the children at hand. Pointing to *Moriggia*, the judge stated that the actions and intentions of the parties before the estrangement carry more weight than those afterwards, because "the right of the legal parent does not extend to erasing a relationship between

so because she "never alleged that either defendant is unfit or has abandoned or neglected the children." Once again, Judge Arrowood's dissent pointed out the flaw in the majority's holding: specifically, the majority forgot that inconsistent acts encompass more than "bad acts." State case law holds that a natural parent acts inconsistently with his or her protected status as a parent by inviting a third party into a child's life and ceding a significant amount of parental responsibility. See *Estroff v. Chatterjee*, 190 N.C. App. 61, 70 (2008). Here, Emily alleged enough facts to show that Serena invited her to assume the role of a parent and that they raise the children together for several years. Emily also alleged that during this time, Joseph was in a position to know that Serena held Emily out as a parent and intentionally created a parent-child relationship between Emily and the children. Because Serena and Joseph ceded a significant portion of parental responsibilities to Emily, they had acted inconsistently with their constitutionally-protected status as parents. Thus, Judge Arrowood would have held that Emily had standing to seek custody of C.A.W.

[T]he judge stated that the actions and intentions of the parties before the estrangement carry more weight than those afterwards, because "the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and fostered simply because after the party's separation she regretted having done so."

judge essentially determined standing by taking a snapshot of Emily's strained relationship with the children as of November 4, 2016, discarding everything before Emily and Serena separated.

This writer questions the appropriateness of the rule stated in *Quesinberry*, in which the North Carolina Court of Appeals affirmed that the consent judgment between a father and mother in a custody dispute did not divest the district court of its jurisdiction to grant the maternal grandparents' visitation claims because the grandparents' pleadings were filed while the custody dispute was ongoing. The actual controversy discussed in *Quesinberry* referred to the ongoing custody dispute that the grandparents sought to join as intervenors, not whether they had a relationship with

her partner and her child which she voluntarily created and fostered simply because after the party's separation she regretted having done so." Thus, the majority should not have used Serena's decision to remove the children from Emily's life as grounds to erase the parent-children relationship that Emily created with them while she and Serena were a couple. Judge Arrowood found that Emily asserted sufficient facts to establish a parent-child relationship and standing by showing that she and Serena publicly held themselves out as the children's parents and shared parental responsibilities.

As previously stated, a non-parent in a custody action must also allege that the natural parent acted inconsistently with the latter's constitutionally-protected status. Judge Calabria ultimately held that Emily failed to do

In addition to the oversights in the court's opinion, it is interesting to note that Judge Calabria recited the district court's findings that Serena and Joseph were still legally married, shared legal and physical custody together in a peaceful and cooperative manner, and never found it necessary for either to seek a court order regarding custody. These facts appear irrelevant to the issues at hand and suggest that both courts would have found it impossible for Emily to obtain custody rights, partially because the children already had two biological parents. The district court even went so far as to state that the defendants and their children are an intact family, despite their separation.

Emily is represented by Rebecca K. Watts of Collins Family Law Group. Serena and Joseph represented themselves and filed no brief. ■

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

Federal Magistrate Denies Restraining Order to Protect Transgender Inmate Despite Allowing Her to Proceed on Claims of Sexual Assault, Brutality, Retaliation, and Conspiracy

By William J. Rold

On first blush, this case looks like a failure of a *pro se* transgender inmate to make an adequate case for a temporary restraining order for protection. U.S. Magistrate Judge Patrick A. White found the allegations in the motion too vague and conclusory to support such extraordinary relief. Judge White's recommendation, however, in *Minnis v. Geo Corp.*, 2018 U.S. Dist. LEXIS 171898 (S.D. Fla., October 3, 2018), omits almost all of plaintiff Bobby Minnis' history – and the restraints of this reporting render it impossible to recount all of it. What follows is a simplification.

According to PACER, Minnis has filed at least six federal actions in Florida in the last three years: one in the Northern District, three in the Middle District, and two (including this one) in the Southern District. Judge White screened both Southern District cases and allowed them to proceed on multiple claims.

In *Minnis v. Secretary, DOC*, 17-cv-20575 (S.D. Fla.), Minnis alleged that she was retaliated against for her "Jacksonville" litigation, claiming she was beaten by at least nine officers, sodomized with a broom handle until internal organs burst, had one of her testicles tied to a rope and her scrotum stretched to her knee, had bleach poured into her eyes and mouth, and was kicked with steel boots until her ribs cracked. She said the officers told her this was her fate unless she stopped her litigation. Then, she was placed in a holding cell and transferred the next morning.

Her second case against GEO Corp, et al., cited above, picks up when she arrived at a transit center, bleeding from the rectum and scrotum and unable to walk. She claims nurses and doctors refused to evaluate her or document her injuries, telling her that if officers did this she "must have had it coming." She was also told that the Department

of Correction would see that she was transferred to the most violent prison in the "Panhandle," if she persisted in suing. At some point, the Florida Inspector General got involved and ordered x-rays, which revealed recently broken ribs.

Judge White recommended that Minnis be allowed to proceed in both Southern District cases. He cleared claims of violation of her Civil rights and retaliation (for the assault), deliberate indifference to her serious medical needs (for the refusal to evaluate, document and treat), and conspiracy (for the group beating and the supervisory allegations of punishment and retaliatory transfer). The Department of Correction made

magistrate who has been dealing with litigation by Florida prisoners for 15 years does not know the group to which Minnis refers.]

Minnis said that a guard called her a "faggot" before the entire compound and said it was "open season" on her. Another DOC official told her it would remain so until she dropped her cases. Minnis quotes another guard as saying she had "accidentally" been housed with an "Unforgiven," before she was housed with another one.

Minnis says part of the incidents are on cellblock videotape, but Judge White does not ask for it or order it to be preserved as evidence of the retaliation claims that he has allowed to go forward.

Minnis said that a guard called her a "faggot" before the entire compound and said it was "open season" on her.

good on its threat to transfer Minnis from medium security to maximum security in the Florida Panhandle, where all her legal work on the two cases was destroyed and where she was placed in a cell with an "Unforgiven," who assaulted her "within ten minutes." [Note: Judge White's opinion has no indication that he recognizes that Minnis is referring to the "Unforgiven," a white supremacist gang, widespread in Florida, which takes its name from a song of the heavy metal band *Metallica*. The judge uses the word several times, noting Minnis' complaints that she is being housed repeatedly with the most violent homophobic sexual predators of the "Unforgiven" – without mentioning the significance in this context and apparently clueless about the nature of the risk of deliberately placing Minnis in this environment. This writer found the group in 30 seconds on Google.com. It is impossible to believe that a federal

Instead, he finds that her allegations are too vague and that she fails adequately to plead physical injury.

Minnis also wrote in her current petition: "I only have nine months of prison left in which to be 'accidentally' murdered by inmates." Minnis again wrote "accidentally" in quotation marks – like a speaker who emphasizes a single word with finger "air quotes" to show the word is being used in a special sense or means just the opposite. Judge White's opinion changes this meaning by altering the placement of the quotation marks to say: "accidentally murdered."

Minnis also wrote: "If the court does not act fast the plaintiff will likely soon end up dead." Judge White said of Minnis: "This prospect troubles him" (But not enough to do anything about it . . .) Minnis continued: "DOC . . . purposely keep sending me to the most violent camps;

as recommended by those involved in the plaintiff's two lawsuits in this court. A DOC representative even called me and made a threat that this will continue if the plaintiff does not stop reporting them and withdraw his lawsuits." Judge White found these allegations "vague" and Minnis' fear of death after nearly encountering it in the cases before him to be "speculative."

Corrections' tactics seem to be working. On August 31, 2018, Minnis, without explanation, withdrew her "Jacksonville" litigation, two days after the judge in that case referred the matter to pro bono counsel. *Minnis v. Pittman*, 15-cv-1200 (M.D. Fla., August 31, 2018).

In his petition to Judge White, Minnis asked the judge to contact the DOC and the Florida DOC Inspector General about Minnis' fears. [Note: There is a Standing Order to this effect in the Middle District of Florida, signed by all the judges in the Jacksonville Division. The Standing Order requires notification to the warden of the prison at issue and to the DOC Inspector General by the Clerk of Court (and confirming same on the docket) of the filing of pleadings by a *pro se* inmate plaintiff saying that the inmate is suicidal or in physical danger, regardless of the legal merits of the papers filed.] This request was denied by Judge White, who declined to interfere with the "wide-ranging deference" due to prison administrators.

Minnis' papers probably do not meet the stringent requirement for a TRO under F.R.C.P. 65, but it is not a fair reading of her *pro se* application to dispose of it in isolation. Judge White is not screening a new case. His perfunctory treatment (bordering on mockery) of Minnis' plea about further retaliation from cases he is supervising is shocking. He does not need a Standing Order to provide Minnis with the healthy glare of a federal court on what is happening to her. Cases like this make one rue absolute judicial immunity. ■

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 Magistrate Dismisses Transgender Inmate's Claim for Surgery on Screening, Effectively Granting Summary Judgment without Notice or Service

By William J. Rold

If the name U. S. Magistrate Judge Patrick A. White of the Southern District of Florida seems familiar to *Law Notes* readers, it is because his hostility to LGBT *pro se* plaintiffs has been reported repeatedly. There is another article in this issue of *Law Notes*: "Federal Magistrate Denies Restraining Order to Protect Transgender Inmate Despite Allowing Her to Proceed on Claims of Sexual Assault, Brutality, Retaliation, and Conspiracy." In June of this year, *Law Notes* reported that Judge White had misapplied Eleventh Circuit law in multiple ways in mishandling claims against corporate private prison operator GEO in a case arising from

and dismisses the case on screening, without leave to amend.

This is the third case *pro se* transgender inmate Christopher Shorter has had before Judge White. In *Shorter v. Romero*, 2017 U.S. Dist. LEXIS 168920 (S.D. Fla., October 11, 2017), reported in *Law Notes* November 2017 at page 461, Judge White ignored Shorter's claims of denial of access to mental health services or transgender discrimination and focused instead on denial of congregational religious services, on a theory she had not pleaded. In the second case, *Shorter v. United States*, 2018 U.S. Dist. LEXIS 65425 (S.D. Fla., April 17, 2018), reported in

This is the third case *pro se* transgender inmate Christopher Shorter has had before Judge White.

the homophobic assault of an inmate in an understaffed yard. *Brown v. GEO Group*, 2018 U.S. Dist. LEXIS 68819 (S.D. Fla., April 23, 2018) (reported June 2018, at pages 323-4). In *Brown*, the U.S. District Judge, responding to correspondence about Judge White's opinion, invited the editor-in-chief of *Law Notes* to submit an *amicus brief*, which we did, with LeGaL as co-counsel.

Now, in *Shorter v. United States*, 2018 U.S. Dist. LEXIS 182571 (S.D. Fla., October 23, 2018), Judge White again summarily dismisses an LGBT case, this one involving a transgender prisoner seeking surgery, who submitted voluminous medical records with her complaint. Judge White proceeds to analyze over 300 pages of physician, psychiatry, and lab notes – without benefit of counsel or an expert – or notice to the plaintiff that her screening review would become summary judgment –

Law Notes (May 2018 at pages 257-8), Judge White found that a four-month delay in treatment for a suspicious lump in her breast was not actionable because the delays were due to security understaffing. He also found that a nurse's refusal to send her to a doctor because of "hate" of transgender people warranted only nominal damages, writing (incorrectly) that such "hate" failed to show sufficient animus for punitive damages. This second case was also dismissed on "screening."

In the present case, the LEXIS report recites that notice was sent to the "2241/Bivens US Attorney," but no one ever appeared for the Government in PACER. After no action was taken for two months despite her symptoms, Shorter filed a motion to expedite. A month later, she filed a motion to recuse Judge White, referring to his hostility to transgender plaintiffs, his past deliberate refusal to follow Eleventh Circuit law

(particularly *Rothmann v. Rosario*, 558 Fed. Appx. 907, 911 (11th Cir. 2014)), and his delays in this case. He denied the motion to expedite in an “unwritten order,” and he never ruled on the motion to recuse.

Judge White declares in his decision that he is basing his dismissal on the complaint, not the attached medical records, unless “reference to [them] is made in relation to a given allegation.” He then proceeds to refer to over 100 different medical record entries, cherry-picking what supports his analysis. For example, he finds that certain treatment was “consistent with WPATH standards” [referring to World Professional Association for Transgender Health], but he omits references where treatment allegedly departed from WPATH standards, as alleged by Shorter. Either finding requires expert testimony and is beyond judicial notice.

He addresses outside reports from a specialist, referring only to lab work, medication, and a follow-up appointment. A full reading of the 3-page note of Dr. Estes indicates a finding of “florid breast hyperplasia” (worsening of the condition not addressed in second case, above); inconclusive lab results, with need to suspend hormones as increasing risk of breast cancer; and overall: “The patient’s gender transition remains poorly addressed” [emphasis added]. Judge White interprets a genetic breast cancer test result (“BRCA”) in the medical record as “negative,” although the report says the result was not conclusive, that more tests were needed, that false negatives exceed 10% of subjects, and that clinical and further genetic correlation were required because Shorter’s sister had died of breast cancer despite a negative “BRCA.”

There are scores of similar examples. Judge White’s 10,000-word screening opinion continues in this vein for pages, seemingly oblivious to the fact that he is speeding along the highway outside of his lane of expertise without any professional guidance.

The opinion is replete with diary-like entries, mostly about Shorter’s mental state: whether she is or is not currently suicidal or at risk of self-harm. There

is discussion of “supportive therapy” and Shorter’s “coping skills,” without addressing her major claim: that she needs bilateral orchiectomy (removal of testicles as source of testosterone, due to her inability to continue estrogen hormones without increasing her breast cancer risk); and that she needs breast implants in connection with her transition.

Buried in the opinion is the key legal issue: that the Federal Bureau of Prisons, through its central committee on transgender care, refuses to approve either treatment. Testicular surgery, as third triad care, must follow a year of hormone treatment and “life experience” as a woman. Breast implants are considered “elective” or “cosmetic” unless caused by medical injury – and the warden has authorized “falsies.” The committee insists it is still evaluating Shorter. Ironically, if Shorter’s breast hyperplasia does turn to cancer and require mastectomy, she would qualify for breast implants.

Nearly all of Judge White’s legal analysis on deliberate indifference to prisoners’ medical needs is at least twenty years old, except for reference to Rothman, as holding that gender identity disorder is a serious medical need. A tsunami of medical and legal change has occurred since the cases Judge White cites. He also makes no distinction between cases decided on the merits, after trial, on summary judgment, on motion to dismiss, or upon screening.

This is not an easy case, medically or legally. That itself should have counselled against screening dismissal. Judge White does not seem to recognize that he has, in part, the same complaint of poorly attended breast mass by the same plaintiff he had before him last April. This writer submits that most judges would ask: Why is this back in front of me?

Faced with a Magistrate’s recommendation of this length and “documentation,” in a pro se case, this writer thinks it unlikely that a District Judge will invest the effort needed to look behind Judge White’s belabored obfuscation. Woe to LGBT plaintiffs in this court! ■

HIV-Positive Laborer Loses ADA Claim Against Former Employer

By Arthur S. Leonard

An HIV-positive plaintiff suffered summary judgment of his Americans with Disabilities Act (ADA) claim against his former employer, the Sewerage and Water Board of New Orleans, in *Jones v. Sewerage & Water Board*, 2018 U.S. Dist. LEXIS 174190, 2018 WL 4909911 (E.D. La., Oct. 10, 2018).

As part of his hiring process for an outdoor grounds-keeping job, Lewerence Jones submitted to a physical examination and completed a medical questionnaire with the assistance of a nurse. Contrary to the truth, he stated on the questionnaire that he did not take prescription medication and had never been hospitalized. The questionnaire explicitly stated that falsification could be grounds for discharge. Actually, Jones is and was HIV-positive, and his medical records, offered in evidence in this lawsuit, show that prior to his employment he was diagnosed with acute systolic heart failure, congestive heart failure, and atrial fibrillation. So, clearly, he was well qualified to do grounds-keeping work during the oppressively hot summer months in New Orleans – not!

Unsurprisingly, in the period of his active employment from May 16 through November 14, he had about 40 unexcused absences. On November 14, the last day he actually worked, his foreman received a report that Jones had complained of chest pain. He was instructed to obtain a note from a medical doctor in order to return to work. He did not obtain such a note until December 6, and the note was deemed insufficient by the employer because it did not address his cardiac fitness, just stating generally that he was fit to work. He was instructed to get a note from a cardiologist. Meantime, in light of his accumulated absences, the employer issued him a Notice of Pre-Termination Hearing. Although by then he had received a cardiologist’s note stating that he was fit to resume work, he failed to offer the note at the hearing on

January 11, 2017, and, a week later, the employer issued a letter terminating his employment.

Jones subsequently filed for Social Security disability benefits, in an application on which he checked the box stating that he had stopped working for the Board because of his “physical and/or mental condition(s).” He then filed an ADA charge with the EEOC, which issued him a right to sue letter, and he followed up with a timely court complaint. The EEOC did not make a probable cause finding in his case. As is not unusual, the agency will issue a right-to-sue letter without such a finding if the statutory time for exhaustion of administrative remedies has run and, as a practical matter, such time is too short for a full investigation of every charge the agency receives.

The defendants sought to dispose of the lawsuit on a technicality: Jones had not signed the charge form he filed with the EEOC. The court blew this one aside, pointing out that the ADA does not expressly require that a complainant sign the charge filed with the agency, and, after all, Jones did have a right-to-sue letter from the agency, which is usually construed as satisfying any administrative exhaustion requirement.

On the merits, however, Judge Carl J. Barbier found that Jones failed to support a prima facie case, the second element of which is that the plaintiff is qualified for the job in question. “A disabled individual is qualified for the job in question if, inter alia, he can perform the essential functions of the job with or without reasonable accommodation,” wrote Barbier, quoting the statute. This means plaintiff must show that he could perform the essential job functions in spite of his disability or that a reasonable accommodation of his disability would have enabled him to perform the essential functions of the job. “Here,” wrote Judge Barbier, “the only evidence with respect to the ‘essential functions’ of an outdoor laborer is the job description provided by the Defendant. Plaintiff’s job duties included cutting grass, using weed-eaters, and cleaning up outdoors as needed. Plaintiff asserted that the work environment was ‘very hot.’ His work as a laborer required ‘strenuous activity outdoors.’ Thus, these are

essential functions. Rather than offer summary judgment evidence to contest Defendant’s assertions that Plaintiff’s cardiac issue which he concealed from Defendant made him unqualified for the position at issue, Plaintiff simply stated that ‘Defendant offered no facts whatsoever to support a position that he is incapable of performing the essential functions of a laborer and cannot do so.’” In summarizing the evidence on this point, however, Barbier pointed out that the defendant “offered evidence to show that Plaintiff was not qualified for the position due to his cardiac issues and Plaintiff produced no evidence to the contrary,” so Jones had “failed to show that he satisfies the second element of his prima facie case.”

In addition, Barbier credited the employer’s contention that Jones was fired because of his terrible attendance record. It is hard to argue with forty absences between May and November. Even if the prima facie case were made out, it seems clear that such an attendance record would provide a legitimate, non-discriminatory reason to discharge a worker. The court found that were the case to proceed that far, Jones “would be unable to satisfy his burden of showing that Defendant’s proffered reason is pretextual.”

Jones had also argued that the employer’s demand of medical evidence of Jones’ fitness before he could return to work violated the ADA. As to this, Judge Barbier found that the employer had “presented uncontroverted evidence that Plaintiff performed strenuous labor outdoors in very hot conditions. Thus, the report that Plaintiff experience chest pains at work was a ‘safety concern.’ Plaintiff took more than twenty days to return to Defendant with a note that made no mention of the underlying cardiac episode that necessitated the medical documentation.” Requiring an employee with Jones’ poor attendance record, who had then suffered chest pains at work, to obtain medical documentation of fitness that specifically reference his cardiac condition was seen by the court as fully justified and not an instance of discrimination.

Jones is represented by Galen M. Hair and other lawyers at Hair & Checki, LLC, New Orleans. ■

U.S. District Court Shows Empathy for Asylum Petitioner While Disclaiming Jurisdiction to Resolve Her Case

By Arthur S. Leonard

In *Doe v. Smith*, 2018 WL 4696748 (D. Mass., Oct. 1, 2018), U.S. District Judge F. Dennis Saylor IV found that he was without jurisdiction to intervene in proceedings within the immigration system concerning a refugee claim by a woman from Uganda, but that he did have jurisdiction to determine whether her current detention while her immigration appeal was pending violates her constitutional rights.

The Jane Doe plaintiff “has an extensive history of immigration fraud,” wrote Saylor, which culminated in her conviction by a jury of having contracted a fraudulent marriage for immigration purposes. She was sentenced to a year in prison, after which ICE took her into custody and an immigration judge ordered her removal to Uganda. At this point, she moved to reopen her removal proceeding, claiming, for the first time, that she had “recently realized that she was a lesbian,” and sought asylum based on the abundant evidence that LGBT people are subject to persecution in Uganda.

In a footnote, Judge Saylor relates that the 2017 Department of State Human Rights Report on Uganda “noted that one of the most significant human rights issues in the country was the ‘criminalization of same-sex consensual conduct, including security force harassment and detention of lesbian, gay, bisexual, transgender, and intersex persons.’ It also found that gays ‘faced discrimination, legal restrictions, societal harassment, violence, and intimidation.’” Clearly, sending a lesbian back to Uganda will more likely than not subject her to persecution. But is Doe a lesbian? That has to be decided by the immigration authorities, based

on their evaluation of her credibility and whatever admissible evidence she can produce on the point; it is not up to the judge.

This case did take an unusual turn; when Doe was first ordered removed after serving her prison term, Uganda declined to issue the necessary travel documents to ICE, and so she was released from detention at that time, subject to conditions that she report in on a regular basis. However, on May 1, 2018, “ICE was notified that Uganda would issue the travel documents once Doe was taken into custody,” so she was arrested and detained and filed this habeas corpus petition seeking her release while she pursues her claim for withholding of removal before the BIA. She argued that her continued detention is unlawful and unconstitutional, raising various procedural arguments, but Judge Saylor was unconvinced.

“In short,” he wrote, “the court concludes that ICE did not violate

generally. The United States is also, of course, a safe, stable, and economically prosperous nation, and its people, on the whole, are generous and compassionate. Not surprisingly, millions of individuals attempt to enter and remain in the United States, legally and illegally, seeking to avoid discrimination, sexual abuse, torture, war, famine, extreme poverty, or even genocide. Many of those individuals apply for asylum to avoid returning to their home countries. It is no exaggeration to say that virtually all of those cases involve sympathetic facts, many to a high degree. Virtually all of the applicants will be worse off, and many will be in danger, if they are forced to return. And many, if not most, immigration matters involve separated families. But because our borders are not completely open, not everyone can be admitted. Someone – that is, some government official or board – has to decide which claims are sufficiently meritorious to be granted. So it is here.

Clearly, sending a lesbian back to Uganda will more likely than not subject her to persecution.

any relevant regulation, statute, or constitutional requirement, and that even assuming that a technical violation may have occurred, there is no basis for ordering release from detention as a remedy. And to the extent that Doe seeks to stay or prevent her removal based on the merits, this Court is without subject-matter jurisdiction to consider such a claim.”

However, Judge Saylor was clearly disturbed by the case, including some unusually sympathetic commentary in his opinion. “The persecution and mistreatment of gays and lesbians in Uganda, and throughout much of Africa and the Middle East, is well-documented,” he wrote. “It is yet another chapter in the long catalogue of human cruelty and misery across the globe. By contrast, the United States, whatever its imperfections, is a free and tolerant society – not just of gays and lesbians, but of minorities

Someone has to decide whether Doe is telling the truth in connection with her claim for asylum; whether she will be subject to persecution if she returns to Uganda; whether she should be granted asylum in the United States; and whether her removal should be stayed pending those decisions. By law, those questions are not to be resolved by a United States District Judge; they are to be resolved by immigration authorities (in this case, the BIA), subject to judicial review by the United States Court of Appeals. Put simply, there is a procedure to address such claims, and that procedure does not involve this Court. The Court is unwilling to ignore or defy the law, even in highly sympathetic circumstances. To do so would be a fundamental violation of its most basic responsibilities.”

Doe is represented by Harvey Kaplan of Greater Boston Legal Services and Melanie Shapiro, Dedham, MA. ■

U.S. District Court Lets School Authorities Off the Hook Under Title IX in Bullying Case

By Arthur S. Leonard

In *IV v. Wenatchee School District No. 246*, 2018 U.S. Dist. LEXIS 160447 (E.D. Wash., Sept. 19, 2018), U.S. District Judge Thomas O. Rice granted the defendant’s motion for summary judgment, finding that even if factual disputes are resolved in favor of the plaintiffs, they had failed to plead a case under Title IX, the federal statute requiring schools that receive federal financial assistance to afford equal educational opportunity on the basis of sex. Despite homophobic language used by a teen bully to go after his overweight young victim, the court concluded that plaintiff’s failed to show the victim was bullied because of his sex.

Title IX has been construed in numerous cases to impose liability on school districts when authorities that knew about a student being bullied because of his or her sex (and, in some cases, sexual orientation or gender identity) but did not take effective steps to remedy the situation. In this opinion, the court summarizes at length the evidence that plaintiff IV, a boy, was subjected to pervasive and offensive comments, threats, and physical assaults by Y.A.F., another boy. The name-calling included “fat,” “faggot,” “man boobs” and “gay.” This went on for several years, with minimal intervention from school authorities. Complicating matters, as so often in such cases, was the reluctance of the victim to seek help. Victims of bullying may internalize shame and refrain from complaining to their parents or school authorities, or avoid being explicit in reporting about the abuse to which they are subjected, including reluctance to name their harasser due to fear of retaliation.

In this case, it took IV years to get to the point where he was willing to name the bully. Once that happened, school authorities apparently took things much more seriously, expelling the bully from the school.

The grant of summary judgment turned on the judge's view of clashing expert testimony, as he found the plaintiffs' expert unconvincing on the issue whether the bully's motivation was the victim's sex or sexual orientation. The judge was much more convinced by the defendant's expert, and especially her assertion that teenage boys use terms like "fag" and "gay" to bully other people without necessarily intending any sexual connotations.

Wrote Judge Rice, "The evidence demonstrates YAF targeted IV because YAF was a bully, and, as bullies tend to do, he targeted a weaker student, identified a source of humiliation [in this case, the student's excessive weight and body shape], and capitalized on it." Plaintiff's expert suggested that YAF bullied IV because YAF perceived him as insufficiently masculine because of his overweight condition and "man boobs," but this did not persuade Rice, who wrote: "Moreover, Plaintiffs rely on the presumed connection between being overweight and not falling in line with YAF's view of masculinity, but it is undisputed that YAF continued to bully IV even after IV lost weight (thus falling back in line with what Plaintiffs assume is YAF's view of masculinity). Considering the 'constellation' of facts, including the context, age, and surrounding events, informed by common sense, the Court finds Plaintiffs have failed to meet their burden that YAF's conduct was 'because of sex.' Rather, the evidence submitted demonstrates YAF was a bully that [sic] targeted many in his class, regardless of gender, alleged sexual orientation (whether actual or perceived), and regardless of whether they were overweight (or otherwise did not conform with YAF's supposed view of masculinity).

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Texas Appeals Court Denies Writ to Block Same-Sex Divorce Proceeding for an Alleged Pre-*Obergefell* Common Law Same-Sex Marriage

By Arthur S. Leonard

Gustavo Noel Hinojosa is seeking a legal divorce from Steve Paul LaFredo, and filed an action in the 302nd Judicial District Court in Dallas, claiming that the men had an informal common law marriage. LaFredo twice moved without success to dismiss the action on the ground that there was no legal marriage between the men under Texas law, because they separated prior to the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that

abuse of discretion. The legal question of whether *Obergefell* is retroactive has not been determined by the Supreme Court of Texas or by the U.S. Supreme Court. The trial court, therefore, did not fail to correctly analyze or apply the law or reach an arbitrary and unreasonable decision when it determined that relator had not established as a matter of law that no legal marriage existed between him and Hinojosa, either formal or informal."

Justice Douglas S. Lang pointed out that to get the writ, LaFredo must show "both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy LaFredo failed at both the first step and the second."

Obergefell (which held unconstitutional state laws denying marriage equality to same-sex couples) should not be applied retroactively with respect to "informal marriages." LaFredo then sought a writ of mandamus directing the trial court to grant the motion to dismiss, which was rejected by the Texas Court of Appeals in *In re Steve Paul LaFredo, Relator*, 2018 WL 4561215 (Sept. 24, 2018).

Writing for the appeals court, Justice Douglas S. Lang pointed out that to get the writ, LaFredo must show "both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy." In this case, LaFredo failed at both the first step and the second.

"Based on the record before us," wrote Justice Lang, "we conclude relator has not shown he is entitled to the relief requested. First, relator has not shown an

"Moreover," continued Lang, "the existence of an informal or common law marriage is a question of fact to be resolved by the fact finder. The facts are disputed surrounding the parties' intentions, agreements, and representations concerning their marital status. The trial court, therefore, did not abuse its discretion by denying the motion to dismiss and permitting the case to proceed to trial."

The court also noted that LaFredo did not lack an appellate remedy, citing a Texas Supreme Court ruling holding that a challenge to the trial court's jurisdiction is generally considered an incidental ruling for which appeal is an adequate remedy, *In re State Bar of Texas*, 113 S.W.3d 730 (Tex. 2003). Accordingly, the court denied the writ and the divorce proceeding will move forward. The court's opinion did not mention counsel for either party. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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U.S. SUPREME COURT – The Supreme Court announced on October 9 that it will not review the Oregon Supreme Court’s decision imposing discipline on Vance D. Day, a state court judge who had announced his refusal to perform same-sex weddings, among other actions that the Commission found cumulatively to merit sanctions. *Day v. Oregon Commission on Judicial Fitness and Disability*, No. 18-112, cert. denied, 2018 WL 3625920. Day’s petition focused on the same-sex wedding issue, seeking to establish that judges have a constitutional right to refuse to perform same-sex weddings. The Oregon Supreme Court’s opinion is reported as *Inquiry Concerning a Judge re: the Honorable Vance D. Day*, 413 P.3d 907 (Or. 2018). Judge Day is represented by the Bopp Law Firm, PC, of Terre Haute, Indiana, which has specialized in representing those opposed to LGBT rights. An amicus brief supporting Day’s petition was filed by the Freedom of Conscience Defense Fund of Rancho Santa Fe, California, Charles S. LiMandri as Counsel of Record, which from its name seems to be dedicated to defending people whose conscience cries out against LGBT rights.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Ramos-Mendoza v. Sessions*, 2018 WL 4566281, 2018 U.S. Dist. LEXIS 27251 (9th Cir., Sept. 24, 2018), the court rejected petitioner’s appeal of the Board of Immigration Appeals’ denial of relief under the Convention Against Torture. Petitioner, a citizen of Mexico who was convicted of a criminal offense in Nevada and sentenced to a “term of imprisonment of

at least 5 years,” was thus disqualified for withholding of removal upon release from prison, so his only hope for relief was his CAT claim. “The record indicates that LGBTQ individuals in Mexico face discrimination at higher rates than those in the United States and that the Mexican government’s enforcement of the country’s anti-discrimination laws is sometimes inadequate,” wrote the court. “This evidence, however, does not compel the conclusion that if Ramos-Mendoza is removed to Mexico, he is more likely than not to be tortured ‘by or at the instigation of or with the consent or acquiescence of a public official.’” Thus, the court found that the BIA did not err in denying relief under the CAT. The court’s opinion does not indicate whether the petitioner grounds his claim of CAT relief on sexual orientation or gender identity, but one suspects it is more likely sexual orientation, since the 9th Circuit has frequently found over the years that transgender people are targeted for brutal treatment in Mexico with the acquiescence of law enforcement personnel.

U.S. COURT OF APPEALS, 11TH CIRCUIT – Can it be that things have improved so much for LGBTI people in Jamaica that a bisexual man from that country seeking refugee status in the United States is totally out of luck? In *Stewart v. U.S. Attorney General*, 2018 U.S. App. LEXIS 27964, 2018 WL 4775584 (Oct. 3, 2018), an 11th Circuit panel implied as much in its treatment of the petitioner’s appeal from the Board of Immigration Appeals’ affirmance of an Immigration Judge’s denial of his application for withholding of removal under federal statutory law and the Convention against Torture (CAT). The petitioner entered the U.S. on a non-immigrant visa authorizing a six-month visit on or about March 31, 1993, and overstayed his visa by about twenty years. On April 29, 2014, he was convicted in a U.S. district court on

the offense of making a false claim of U.S. citizenship, a violation of 18 U.S.C. sec. 911, and sentenced to time served. A few days later, the Department of Homeland Security began removal proceedings against him and he applied for withholding of removal and CAT protection, testifying that “he is afraid of returning to Jamaica because of his sexual orientation,” according to the court’s *per curiam* opinion. Although married to a woman and the father of several children with several different mothers, petitioner insisted that he is bisexual, and that “while attending boarding school in Jamaica he suffered verbal and physical abuse by his classmates because they perceived him as gay. He specified one incident in which he was beaten and tied up to a bed by his roommates because of his sexual orientation.” The IJ doubted his credibility, however, and decided that this evidence of past harm did not amount to the “persecution” that could ground a withholding claim. The IJ concluded that petitioner failed to prove he was more likely than not to suffer future harm or persecution if removed back to Jamaica, and rejected the idea that he was likely to suffer torture there on grounds of his sexual orientation. The BIA affirmed without addressing the IJ’s findings regarding petitioner’s credibility. Interestingly, the court notes that neither the IJ nor the BIA had rejected petitioner’s claim to be bisexual. Said the court, both “agreed that [petitioner] established his membership of a cognizable particular social group based on his sexual orientation.” But that’s not enough to gain withholding of removal. The IJ found that he failed “to provide any details of the beatings and failed to provide any other type of evidence to support his claims. He did not provide any evidence of the severity, extent, or frequency of the beatings, nor any of the injuries that he might have suffered.” Thus, the court found that BIA did not err in concluding that petitioner failed to prove by a preponderance

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of the evidence that he was a victim of past persecution on account of his sexual orientation. Withholding might be available, nonetheless, if he could show that he was more likely than not to fall victim to persecution if removed to Jamaica. Here, however, the court affirmed the BIA's finding that petitioner "failed to show that Jamaica has a current pattern or practice of persecution of LGBTI individuals, such that his life or freedom would more likely than not be threatened." This was in reliance on "recent evidence showing improvements in the conditions for and treatment of the LGBTI community in Jamaica." The court cited recent "Human Rights Reports" about signs of improvement, and lack of enforcement of Jamaica's "buggery laws" against private consensual adult sex, even though the law remained on the books. The court also found lacking any evidence that the government inflicts torture on people because they are LGBTI, finding "substantial evidence" to the contrary, thus defeating the CAT claim. "To the contrary," wrote the court, "the Jamaica 2015 Human Rights Report shows that the government, with the help of NGOs, is working on improving the conditions for LGBTI Jamaicans." If the court's (and the BIA's) conclusions are correct, this is indeed cause for celebration. But occasional media reports of anti-LGBT violence and hostility suggest that the court may be taken in by too rosy a picture. The petitioner is represented by Peter Loblack, of Orlando, Florida.

ALABAMA – Gary Wayne Wright, II, a Gulf War veteran, sued the government *pro se*, mainly about gripes concerning the medical care he received (or failed to receive) from the Veterans Administration (VA) medical system. One of his counts claims that the government violated his 14th Amendment rights to equal protection because the Justice Department revoked guidance so that businesses and healthcare providers

may discrimination against LGBT persons, and that the VA improperly deleted references to LGBT resources, and that the Secretary of the VA "has connections to various individuals and organizations that discrimination against LGBT persons and/or racial minorities such that the VA has created an unsafe environment for Mr. Wright," as Chief U.S. District Judge Karon Owen Bowdre summarized the claims in *Wright v. United States*, 2018 U.S. Dist. LEXIS 172213 (N.D. Ala., M.D., Oct. 5, 2018). Wright's claims came to grief mainly due to his ignorance about the law and the procedures for his enforcement. He ran into irrefutable arguments about sovereign immunity – you can't directly sue the federal government on claims as to which the government has not waived immunity – and, of course, that his equal protection claims can't be asserted against the federal government under the 14th Amendment, which applies only to the states. Judge Bowdre recognized that some of Wright's allegations, if properly pled under the 5th Amendment against federal officials in their personal capacity, might actually state a claim, so this count of the complaint was dismissed without prejudice. "Because the United States did not address the possibility of a *Bivens* action in its motion to dismiss and because the court cannot discern Mr. Wright's intent, the court does not presume to address a potential individual capacity claim," wrote Judge Bowdre. "The court must dismiss this count, but will do so without prejudice." One of the LGBT rights litigation groups might well get in touch with Wright to see about filing an amended complaint, if it seems like a useful allocation of litigation resources to get at the VA's desertion of LGBT veterans as alleged by Wright.

CALIFORNIA – *Mercury News* (October 17) reported that the San Jose City Council approved a \$125,000

payment to settle a federal lawsuit filed last November by five men who alleged discrimination when they were arrested by undercover policy for sexual solicitation in a city park in 2014 and 2015. Attorney Bruce Nickerson, who represented the plaintiffs, commended the City Attorney's Office and the Police Department for "being receptive to the concerns aired by the lawsuit," according to the news report. Nickerson mentioned policy changes by the police and the city's agreement to allow him to find and identify other people who might have been arrested by officers running decoy operations that have since ceased." In June 2016, Santa Clara county Superior Court Judge Jose S. Franco dismissed misdemeanor lewd-conduct charges against six men (of whom five are plaintiffs in this lawsuit) after finding that the police operation involved "selective discriminatory enforcement" in violation of Equal Protection. Part of the settlement requires the city to provide Nickerson with a five-year list of "individuals, other than the Plaintiffs, who were arrested by the San Jose Police Department, pursuant to 'string' (undercover) operations" that led to similar charges, and to cooperate with Nickerson's requests "to discover information about factually similar arrests by the SIPD during the last five years." Nickerson hopes to "resurrect" those cases and seek compensation for the individuals involved.

CALIFORNIA – Lambda Legal reported that the San Francisco Superior Court denied a motion by A.J. Boggs & Co. to dismiss a class action that Lambda filed on behalf of an HIV-positive California man living with HIV and 92 other similarly-situated individuals whose confidential medical records (including their HIV status) were compromised by a data breach of the company's California AIDS Drug Assistance Program (ADAP) online

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enrollment system. Lambda seeks to hold the company responsible for failing to secure the private and confidential HIV-related medication of California residents who rely on ADAP for access to their medication. In 2016, California contracted with Boggs to administer the enrollment program and to develop an on-line enrollment portal for that purpose. California law prohibits disclosure and dissemination without consent of various kinds of information that the enrollment program required applicants to disclose. Lambda alleges that the portal was launched without adequate testing and that discovery of security vulnerability led to the portal being taken offline. In February 2017, the California Department of Public Health discovered that “unknown individuals accessed the ADAP system and downloaded the private medical information” of the 93 class plaintiffs, and DPH then cancelled its contract with Boggs and notified the affected individuals of the data breach. The complaint alleges violation of California’s medical confidentiality laws, and seeks statutory and compensatory damages and class action certification. Lambda Legal and pro bono co-counsel from Cozen O’Connor represent plaintiffs. More details about the case can be found on Lambda’s website. This account is adapted from a Lambda Press Release of October 4. The case is denominated *Doe v. A.J. Boggs & Co.*

CONNECTICUT – In an opinion providing a detailed review of the plaintiff’s factual allegations and the various immunity theories unsuccessfully raised by defendants, U.S. District Judge Michael P. Shea refused to grant summary judgment to the defendants in *Doe v. Torrington Board of Education*, 2018 U.S. Dist. LEXIS 161165 (D. Conn., Sept. 20, 2018). Judge Shea’s opinion provides a harrowing account of the allegations

of bullying, assaults, and sexualized hazing asserted by the John Doe plaintiff based on his experiences as a special education student at Torrington High School. As described by Judge Shea, Doe claimed that the defendants, various school personnel, “failed to comply with their duties to protect him by allowing a culture of bullying and sexualized hazing to proliferate at the school, and in particular on the football team, and failing to adequately respond when he became a repeated target for abuse.” As usual, the opinion’s account of Doe’s allegations is very frustrating to read. If the allegations are accurate, then it appears that school authorities in Torrington have broad tolerance for outrageous conduct by their students and some staff members, and little concern for the well-being of those students who are targeted for harassment, bullying, and physical assaults. The events in question date began in 2011, so perhaps it is credible that the national conversation about bullying in schools hadn’t reached Torrington yet; even so, that so-called “professional educators” could act with so little regard for the safety of the students placed in their care is astounding. John Doe will get his day in court, represented by Elizabeth Knight Adams of Glastonbury, CT.

DISTRICT OF COLUMBIA – On October 30, U.S. District Judge Colleen Kollar Koteley granted a motion by the government to dismiss an action filed by Freeman William Stanton, a gay man who entered the U.S. Air Force on July 6, 1971, and was subsequently given an undesirable discharge on November 17, 1971. *Stanton v. Yount*, 2018 WL 5650016 (D.D.C., Oct. 30, 2018). Stanton had filed applications for correction of his military record, seeking an upgrade of his discharge to an honorable or general discharge, several times over the intervening years, always without success. About a month after joining the Air Force, had had

provided a statement “indicating that he had a serious personal problem and that he was a homosexual. He further stated that he had engage in numerous acts with other homosexuals prior to entering active duty and that he had been tempted to engage in homosexual acts while in the service.” But his homosexuality was only one of several reason he received an undesirable discharge, including being AWOL and revealing that he had used LSD several times before entering the service. He was told at the time that he could be discharged for a character and behavior disorder (emotionally unstable personality based on drug use). He asserted his understanding that under policies prevailing in the 1970s, his discharged could have been upgraded, but internal military tribunals kept turning him down, and his current action seems to have been brought out of frustration with the process. Judge Kollar Koteley pointed out that there were issues of “ripeness” regarding his claims, because he has an appeal pending now before the Air Force Board for Correction of Military Records. The judge said that she “sees no undue hardship to any party if judicial review were postponed” under the circumstances, and granted the motion to dismiss, rejecting Stanton’s motions to compel discovery and to hold this case in abeyance until conclusion of the administrative process.

DISTRICT OF COLUMBIA – U.S. District Judge Trevor N. McFadden ruled that the Center for Disease Control and Prevention’s decision not to award a grant to AID Atlanta, and AIDS-service organization, was not “arbitrary or capricious,” granting summary judgement to the defendant agency. *AID Atlanta v. U.S. Department of Health and Human Services*, 2018 WL 5464664 (D.D.C., Oct. 29, 2018). “AID Atlanta was one of over 130 organizations that submitted applications” for available AIDS services grants. “The Atlanta

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Harm Reduction Coalition, another Georgia-based provider, also applied for Category A funding,” wrote the court. “Because the Coalition’s application scored higher than AID Atlanta’s submission, and because the agency decided to fund only one Georgia provider, AID Atlanta was not awarded a grant. The Coalition received higher scores during both the Phase II objective review panel and the Phase III site visit.” In other words, the detailed administrative review and decision-making process, which the court described in some detail, suggested that the grant decisions were based on factual review and study, and thus, could not credibly be challenged as arbitrary or capricious. The court specifically rejected AID Atlanta’s argument that because it had performed well on prior grants, it should be able to expect renewal of those grants in subsequent rounds. “They contend,” wrote the judge, “that ‘an agency that has been receiving federal funds cannot have its program defunded as a result of any issues that can be rectified.’ They argued that ‘the CDC allegedly ‘terminated’ the organization’s funds based on a ‘wholly discretionary decision unrelated to the furtherance of the federal program’ in violation of 45 C.F.R. Sec. 75.207 et seq.” The court found this argument to be a “misapplication of the regulatory provisions it cites.” The court pointed out that past funding had been through specific grants that had expired according to their terms. The application that was the subject of this proceeding was announced “as a new opportunity to perform work that ‘builds upon previous and current HIV prevention programs.’ “AID Atlanta was not selected to receive funding under the new opportunity,” wrote Judge McFadden, “and the CDC did not terminate any funding AID Atlanta was receiving under an existing grant that it has been awarded,” rendering the cite regulation inapplicable.

INDIANA – In *Nelis v. GEPA Hotel Operator*, 2018 WL 4566722, 2018 U.S. Dist. LEXIS 162447 (S.D. Ind., Sept. 24, 2018), U.S. District Judge Tanya Walton Pratt rejected the employer’s motion to dismiss a Title VII claim brought by a man who “is a male, but does not follow traditional gender norms.” Alex Nelis does not identify as transgender, but apparently was perceived as such by a co-worker and a manager, and was subjected to “disparaging comments” such as “sissy,” “queen,” “fag,” and “tranny,” and was discharged for “creative differences.” The employer argued that dismissal of the Title VII sex discrimination claim was required under the 7th Circuit’s ruling in *Ulane v. Eastern Airlines*, 742 F. 2d 1081 (1984), which has never been explicitly reversed by the circuit court. Nelis successfully argued that although *Ulane* has not been reversed, the 7th Circuit’s *en banc* ruling in *Hively v. Ivy Tech Community College*, 853 F.2d 339 (2017), supports the argument that *Ulane* is no longer “good law” in the 7th Circuit. Judge Pratt agreed. In *Hively*, the court ruled that sexual orientation claims are actionable under Title VII as a subset of sex discrimination claims, and the *en banc* court noted the three-judge panel’s observation that “the line between a gender non-conformity claim and one based on sexual orientation is non-existent.” That would seem to indicate that if sexual orientation claims are actionable under Title VII, so are gender nonconformity claims. Furthermore, *Ulane* concerned a claim by a transgender employee, and predated the Supreme Court’s decision in *Price Waterhouse* (1989), holding that sex stereotyping by an employer can be evidence of impermissible motivation under Title VII. “Nelis is not a transsexual,” wrote the judge. “Thus, Nelis persuasively contends that *Ulane*, a case only addressing whether or not Title VII protects transsexuals, transgenders, or homosexuals is not at issue here. Nelis alleges that he was

discriminated against by a fellow male co-worker for not meeting stereotypical expectations of what a man should behave like.” The employer argued that the Complaint demonstrated a “claim for gender identity, rather than discrimination based on sex or sexual orientation,” but Judge Pratt disagreed. “While gender identity could be an issue gleaned from the Complaint,” she wrote, “the Seventh Circuit noted in *Hively*, that discrimination on the basis of failure to adhere to stereotypical gender norms is prohibited under Title VII, i.e., sex discrimination, language which Nelis has alleged in his Complaint. The Complaint squarely alleges a gender non-conformity claim, which the 7th Circuit and the Supreme Court cases have recognized.”

KANSAS – Everything is not up-to-date in Kansas about allowing transgender people to obtain amended birth certificates, charges Lambda Legal in *Foster v. Andersen*, filed in federal court in Kansas City on October 15. Kansas is one of the few states that still categorically refuse to provide amended birth certificates for people who have transitioned. The suit was filed on behalf of four transgender individuals born in Kansas and the Kansas Statewide Transgender Education Project, Inc. Lambda alleges 14th Amendment violations of due process and equal protection, as well as freedom of speech in violation of the First Amendment by forcing transgender individuals through their birth certificates to identify with a sex that is not “who they are.” Lambda Legal is working with co-counsel from Bryan Cave Leighton and Paisner LLP on the case.

MARYLAND – A now-retired former employee of the Anne Arundel County Board of Education sued the Superintendent of Schools and several other Board employees about

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three years after an incident in which the employee, who is transgender, staged a one-person demonstration on Board property to protest “the Board’s mistreatment of herself and all transgender individuals and to remonstrate against what she perceived to be the Board’s waste of taxpayer money.” *Mauler v. Arlotto*, 2018 U.S. Dist. LEXIS 174938, 2018 WL 4931488 (D. Md., Oct. 11, 2018). Before staging this protest, about one week before her retirement date, she ascertained from the president of her union the location where “groups normally held rallies or protests at the Board’s central office,” and was told about a location “under the trees just off the sidewalk on the Board’s property,” about 75-100 feet from the main entrance to the Board’s building. On the morning of June 23, 2015, she went into the Board’s Human Resources Department “to retrieve an award,” then went out to the parking lot to get some items for her protest, including her guitar, a “coup stick,” and a sign saying “AACPS is transphobic.” She went to the referenced location and began to sing her selected protest songs, accompanying herself on the guitar, while exhibiting the sign. She had noticed some Board officials watching her while she was in the parking lot. After she had sung some songs, the Board’s security supervisor came out and ordered her to move off Board property to the public sidewalk “or threatened that she would be arrested.” She insisted that she could protest there because the union had done so in the past. The Board officer, Doyle Batten, told her “let’s see how dedicated you are to your cause” and walked away. A few minutes later, police officers arrived and ordered her to put her hands behind her back and told her she was being arrested for trespass. She responded that she would obey a lawful order to move, but she alleges that Batten stated that it was not an “option” for her to move and he “wanted her arrested,” which she was. She claims other Board employees

were watching from the entryway of the building as this was happening. She filed this action over three years later, citing 42 USC 1983 and claiming that her arrest was in retaliation for exercising her rights of free speech and to be free of unreasonable search or seizure, but U.S. District Judge Richard D. Bennett granted the defendants’ motion to dismiss her claims with prejudice. He accepted defendants’ contention that the only named defendant who could theoretically be sued was Batten, because none of the other employees (including the Superintendent) had anything to do with calling the police or insisting that she be arrested. As to Batten, the court noted that he had advised her to move to the sidewalk or she would be arrested. Batten argued that he could not be held responsible for causing the plaintiff’s “allegedly illegal arrest” because the information he gave the police gave them probable cause to arrest her for trespassing, and she had acknowledged in her complaint that she was “singing on the Board’s property during regular business hours.” This was a clear violation of a state trespassing statute, since she did not have permission from the Board to conduct her activity there. “Mauler was obviously not pursuing a business related to administering public education to Anne Arundel County school children,” wrote the judge, who noted that “she was clearly permitted to continue her protest and go to a public sidewalk. When she refused to follow Batten’s instruction, it is assumed that Batten called the Anne Arundel County police. When the officers arrived, they had probable cause to believe that Mauler was violating Maryland trespass law by refusing to leave the Board property. Accordingly, Batten did not cause an illegal arrest . . .” Plaintiff Georgie Jessup Mauler was represented by Ashley Ann Bosche, Robin R. Cockey, and Laura Evelyn Hay, of Cockey Brennan and Maloney PC, Salisbury, MD.

MARYLAND – A plaintiff alleging a hostile environment because of sex in his Title VII lawsuit must have done more than check the “sex” box on the Equal Employment Opportunity charge form to adequately exhaust his administrative remedies before filing suit, ruled U.S. District Judge George J. Hazel in granting a motion to dismiss this count in a multi-count complaint in *Marley v. Kaiser Foundation Health Plan of Mid-Atlantic States*, 2018 U.S. Dist. LEXIS 160899 (D. Md., Sept. 20, 2018). Plaintiff Roberto Marley’s description of his experience working for Kaiser suggests that he has a factually viable claim of hostile environment based on sex stereotypes and perceived sexual orientation, but he acted *pro se* until after filing his first complaint in state court after receiving his right-to-sue letter from the EEOC, only obtaining counsel for the amended complaint and subsequent litigation, which was removed to federal court by the employer. For whatever reason, when he filed his charge with the EEOC, he checked off national origin and sex as the grounds for discrimination but held back in relating his story, leaving himself open to dismissal of the hostile environment claim. Judge Hazel found that the underlying EEOC charge related almost entirely to the national origin aspects of Marley’s discrimination claim. “The EEOC Charge only contains one sentence related to gender,” wrote Judge Hazel: “Mr. Richardson also told me that I am ‘too soft’ and that I need to ‘man up,’ and advised me that he would take his anger out on me because he cannot act in a hostile manner toward the Female employees.” A court inclined to a liberal interpretation of the exhaustion requirement might find this sentence sufficient, but not Judge Hazel, who wrote: “This alone is insufficient to put Kaiser on notice that its work environment is sufficiently abusive and ‘permeated with discriminatory intimidation, ridicule, and insult’ to warrant protection under Title VII.

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Plaintiff appears to argue that because he checked the ‘Sex’ box on the EEOC Charge form itself, he has exhausted any and all sex or gender-based hostile work environment or discrimination claims that he can bring against his supervisors. But such a loose application of Title VII’s exhaustion requirements would obviate the underlying policy of ensuring that first the employer, and then the EEOC, can address and rectify Title VII allegations before federal litigation ensues.” Despite this dismissal, Marley will still be able to continue the suit on other aspects of his complaints arising under Title VII (retaliation), the Family and Medical Leave Act (retaliation) and a state law wrongful discharge claim. Marley is represented by Andrew Nyomib, KNA Pearl, Silver Spring, MD; and Ikechukwu K. Emejuru, also of Silver Spring.

MICHIGAN – U.S. District Judge Paul D. Borman rejected an attempt by a religious child placement agency, which had intervened as defendant in a suit by LGBT prospective parents against the state for contracting with agencies that refuse to work with same-sex couples, to bring interlocutory appeals to the 6th Circuit from a September ruling by Judge Borman which had denied the state defendants’ motion to dismiss the case. *Dumont v. Lyon*, 2018 U.S. Dist. LEXIS 182826 (E.D. Mich., Southern DIV., Oct. 25, 2018). Plaintiffs filed their Sec.1983 complaint against Nick Lyon, Director of the Michigan Department of Health and Human Services, and Herman McCall, Executive Director of Michigan’s Children’s Services Agency, challenging the practice of contracting and providing state funding to placement agencies that “use religious criteria to screen prospective foster and adoptive parents for children in the foster care system.” The plaintiffs, same-sex couples, are prospective adoptive parents who had contacted certain faith-based agencies

and been turned away. Certification by such agencies is necessary to process papers for consideration for child placement adoption agencies in the state. The plaintiffs alleged violation of the Establishment Clause and the Equal Protection Clause, and sought declaratory relief. The court granted a motion to intervene by St. Vincent Catholic Charities, one such contractor, as well as several named individuals associated with that agency. On September 14, the court denied motions to dismiss filed by the state defendants as well as the intervenor defendants. The intervenor defendants sought certification by the court for immediate appeal of this ruling to the 6th Circuit, which Judge Borman denied. He pointed out that he had adopted a tight discovery schedule for this case, and that much could be accomplished before the 6th Circuit would ever get around to deciding an interlocutory appeal. Borman also pointed out that “the questions of law that the Intervenor Defendants seek to certify are based on the same faulty premise to which they stubbornly clung throughout their motion to dismiss – i.e. that the Plaintiffs have filed their claims against a private child placing agency, a non-governmental actor. As this Court reiterated multiple times in its Opinion and Order, the Plaintiffs have not pleaded their Establishment Clause and Equal Protection claims against a private child placing agency but have asserted those claims against State officials for action taken in their official capacity, specifically the State’s practice and procedure of ‘entering into contracts for the provision of state-contracted services, expressly acknowledging that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that the Defendants concede the State could not take itself.” The Intervenor Defendants had been granted permission to participate in the case because their

contracts with the state are at issue, but they are not directly accused of violating the Establishment or Equal Protection Clauses, because they are not state actors. Thus, the questions they seek to present on appeal are irrelevant to the action (first, “the proper standard for determining whether a plaintiff has standing to plead an Establishment Clause violation by a non-governmental actor” and second, “whether or when the state may become liable for the actions of a private adoption agency.”) Borman observed that neither of those questions are germane to the actual claims asserted by the Plaintiffs against the State Defendants. The Intervenor-Defendants are represented by lawyers from the Becket Fund for Religious Liberty, and a group of state legislators filed an amicus brief in support of their motion, represented by Alliance Defending Freedom. Becket and Alliance are both firmly dedicated to protecting the freedom of religious organizations and individuals to discriminate against LGBT people, seeing that as part of the liberty protected by the Free Exercise of Religion Clause of the 1st Amendment.

MINNESOTA – U.S. District Judge Patrick J. Schiltz dismissed all remaining claims in Kristin Naca’s suit against Macalester College, where she had been employed as a faculty member. She was discharged after the college investigated a claim against her of sexual assault by a graduating female student. Naca asserted claims against the college under Title IX, Section 1981, Title VII, and the Minnesota Human Rights Act. *Naca v. Macalester College*, 2018 WL 4516950 (D. Minn., Sept. 20, 2018). She had previously sued the student and her parents for defamation and other torts in state court, resulting in a settlement, and filed this federal suit while that case was pending. Judge Schiltz found that Naca’s factual allegations provided no direct evidence of discrimination on any of the grounds alleged. Resorting to

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the McDonnell Douglas burden-shifting framework established by the Supreme Court for dealing with disparate treatment discrimination claims where there is no direct evidence of employer discriminatory intent, Judge Schiltz found that Naca had not established a prima facie case of discrimination, and even if she had, it was clear that Naca was discharged after a female student complained of sexual misconduct by Naca against her. “Macalester carefully investigated Doe’s complaint and found that it was generally true,” wrote Schiltz. “Naca admitted that she invited Doe to her home shortly before graduation, that she offered to ‘make a pass’ at Doe, and that, a few days after graduation, she again invited Doe to her home, where the two commenced a short-lived sexual relationship. This is extremely serious misconduct – and there is nothing at all suspicious about a college terminating a professor for committing such misconduct . . . Under these circumstances, the Court cannot find that Naca’s discharge permits an inference of discrimination. Even assuming that Naca has made out a prima facie case, however, Macalester has clearly articulated a legitimate, non-discriminatory reason for discharging Naca—namely, Naca’s sexual relationship with Doe. The ultimate question, then, is whether Naca has offered sufficient evidence from which a factfinder could conclude that this explanation is a pretext for discrimination. Naca contends that Macalester did not terminate straight white male Christian professors who engaged in similar misconduct; that the proceedings were infected by procedural irregularities and intentional misconduct on Macalester’s part; and that Macalester’s explanation for its decision has changed over time.” Schiltz considered all these contentions and rejected them. Ultimately, he wrote “there is no evidence from which a reasonable jury could conclude that Macalester’s legitimate, non-discriminatory reason

for firing Naca is pretextual,” so the court granted summary judgment to the college on the discrimination claims. The court also found that the college had not failed to provide reasonable accommodations for a disability under Sec. 504 of the Rehabilitation Act, and that Naca’s attempt to claim a breach of contract premised on the college’s delay in notifying her about a sexual-assault charge was unavailing. The court dismissed these two claims “with prejudice and on the merits.” Naca is represented by Peter J. Nickitas.

NEVADA – An expensive lesson: A jury found that Delta Airlines had discriminated against Joseph Lewis, a maintenance technician, because of his HIV-status. The jury awarded him \$480,000 in compensatory damages and \$800,000 in punitive damages. Shortly after trial, plaintiff’s counsel filed a motion for damages and recovery, resulting in the court’s opinion in *Lewis v. Delta Airlines, Inc.*, 2018 WL 5283513, 2018 U.S. Dist. LEXIS 159928 (D. Nev., Sept. 19, 2018). District Judge Richard F. Boulware, II, issued the following award: “The jury verdict is capped at \$300,000 in compensatory and punitive damages” as required by the statute. “Plaintiff is awarded \$441,396 in back pay. Plaintiff is awarded \$50,607 in front pay. Plaintiff is awarded \$68,212 in interest on back pay and a tax gross-up of \$34,495. Attorney fees are granted in the amount of \$686,960 for Stone & Woodrow and \$12,600 for Segerblom. The Court also grants \$11,117.40 for statutory costs, \$7,875 for Carroll, and \$12,000 for Sloan.” Thus, even after the statutory cap was used to reduce the jury award, the total amount that Delta was ordered to pay as its cost for discriminating against Mr. Lewis is more than \$1.6 million. Lewis was represented by Thatcher A. Stone and William T. Woodrow, Stone & Woodrow (Charlottesville, VA), and Richard Segerblom, Las Vegas, NV.

NEW YORK – Reconsidering a prior ruling dismissing a gay plaintiff’s hostile environment case under Title VII, U.S. District Judge Mae A. D’Agostino ruled on October 9 that Robert A. Dollinger’s allegations in support of his hostile environment claim were sufficient to survive dismissal, in light of the 2nd Circuit’s ruling in *Zarda*, pendency of which had led the 2nd Circuit to remand the ruling in this case for reconsideration. *Dollinger v. New York State Insurance Fund*, 2018 U.S. Dist. LEXIS 173173, 2018 WL 4895845 (N.D.N.Y., Oct. 9, 2018). Gay plaintiff Robert Dollinger, proceeding *pro se*, struck out on his direct discrimination claim, however. The court observed correctly that Title VII is not construed to provide a cause of action against individual discriminatory managers, supervisors or the like, but just against the employer entity itself. Thus, several defendants had to be dismissed from the case. The court also found that Dollinger’s allegations failed to meet the “materially adverse change in terms and conditions of employment” standard for stating a straightforward Title VII discrimination case. However, as to hostile environment, the only thing that had led to the earlier dismissal was the court’s perception that sexual orientation claims are not actionable under Title VII. That no longer being the case, the court was able to focus on the practice and proof issues regarding such a hostile environment claim. She found that Dollinger’s allegations were sufficient to state a hostile environment harassment claim, and one becomes easily disgusted in reading the court’s summary about the harassment to which his co-workers subjected Dollinger. The central point in the complaint was the unwilling receipt of emails at work with homophobic and AIDS-phobic elements, including those that would automatically play audio synchronized to depictions of gay sexual activity when opened on Dollinger’s office computer without warning of the content. The court granted the plaintiff’s motion for

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leave to amend his Title VII complaint as to the Title VII allegations in order to plead this count more specifically.

NEW YORK – Missed by a day, missed by a mile . . . Cori Louis Eli Smith, *pro se*, who self-describes as “a female-to-male transgender man” who was “labeled female at birth and given a female birth name,” alleged that he encountered discrimination because of his gender identity when he sought treatment at Highland Hospital of Rochester, N.Y., on November 9, 2014 through November 11, 2014. He cites the New York Human Rights Law and the Affordable Care Act as outlawing such discrimination. *Smith v. Highland Hospital*, 2018 WL 4748187, 2018 U.S. Dist. LEXIS 170250 (W.D.N.Y., Oct. 2, 2018). He filed his lawsuit on November 14, 2017. Defendant moved to dismiss for failure to comply with the statute of limitations, citing the three-year statute of limitations that applies to both causes of action. Defendant contended that since the discrimination allegedly occurred on November 9-11, 2014, that latest date for a timely complaint would be November 11, 2017 (a Saturday), extended by operation of FRCP 6 to the next business day, November 13, 2017. An action filed on November 14 would be barred as a day late. Judge Charles J. Siragusa agreed with defendant, and dismissed the case as untimely. Smith had also argued that due to the defendant’s discrimination, he suffered complications that required further hospitalization, and he had sought treatment at a different hospital. He moved to amend his complaint to add these complications, hoping that would extend his deadline to sue, but the court concluded that amendment would be futile and denied the motion.

NEW YORK – In *Morris v. New York State Health & Hospital Corporation*, 2018 U.S. Dist. LEXIS 170198

(E.D.N.Y., Sept. 30, 2018), U.S. District Judge Margo K. Brodie accepted a recommendation from Magistrate Judge Steven Tiscione to grant in part and deny in part defendant’s motion for summary judgment on claims by Ronald Morris that he was subjected to discrimination and a hostile environment while employed briefly as a dental assistant at Bellevue Hospital Pediatric Dental Clinic. Morris, apparently straight, alleged that two of the male dentists came on to him sexually, resulting in a hostile environment when he rejected their advances, and attributing his subsequent discharge to manufactured complaints about his work by one of the dentists. Judge Tiscione found that Morris’s allegations failed against one of the dentists, but were sufficient to survive summary judgment as to the other, also noting that Morris’s allegations were sufficient to place in doubt the defendant’s “legitimate, non-discriminatory” reasons for the discharge, if it is ultimately shown that those reasons were based on retaliatory action by the second dentist. Judge Brodie sets out the allegations in some detail in her opinion accepting Judge Tiscione’s recommendation. Morris is representing himself.

NORTH CAROLINA – A lesbian employee fired by a Walmart store suffered dismissal of her ADA, Title VII and Section 1981 claims in *Brown v. Walmart Stores East, LP*, 2018 WL 4903254, 2018 U.S. Dist. LEXIS 173200 (E.D.N.C., Oct. 9, 2018). Karen Brown had been injured in an accident at work, requiring surgery and light duty restrictions when she returned to work. She was transferred to a job with lesser physical demands as a Fitting Room Associate, but she declined a request by the assistant store manager to “open her availability so she could work in other positions in the store.” After Brown declined that request, the manager told other managers not to “give her hours”

because “they could not accommodate her in the fitting room position.” She then suffered another injury, also work-related, and was subsequently suspended without pay and terminated. At the time, she had never been previously disciplined or counseled for any performance or conduct issues. Portions of her case came to grief and were dismissed due to factual pleading deficiencies, and the court gave leave for her to file an amended complaint on her ADA claim, particularly regarding accommodation. However, as to her Title VII sex discrimination claim, which was specifically premised in her Complaint on her lesbian status, Judge Louise W. Flanagan ruled out such a claim based on 4th Circuit and Supreme Court precedent. She cited *Oncale v. Sundowner Offshore*, 523 U.S. 75 (1998) for the proposition that the Supreme Court does not recognize sexual orientation discrimination claims under Title VII, which is surely not an accurate characterization of that case. In *Oncale*, the court was focused on the question whether a hostile environment sexual harassment case could go forward if the plaintiff and the harassers are of the same sex. The case did not turn on sexual orientation. The Supreme Court has yet to pronounce on this question, having turned down a case presenting the issue last term (*Hively*, 7th Circuit), and still pondering two cert petitions raising the issue as of the end of October 2018. But, more on point, Judge Flanagan cited *Wrightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996), which states the current precedent on the question in the 4th Circuit, binding on the district court in North Carolina. “Here,” she wrote, “plaintiff has failed to state a claim with regard to discrimination on the basis of sex. Apart from conclusively asserting ‘she was terminated for reasons that heterosexual females and males were not’ and ‘defendant’s disparate treatment in its discipline and termination of Plaintiff was motivated by her sex, female,’ plaintiff does not raise any

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factual allegations which would support a claim of sex discrimination. Similarly, plaintiff's claim that she was discriminated against on the basis of sexual orientation fails because it is not actionable under Title VII." (The 2nd and 7th Circuits might beg to differ on that last point.) Brown represents herself *pro se*.

NORTH CAROLINA – Accepting a recommendation from Magistrate Judge Robert T. Numbers, Senior U.S. District Judge W. Earl Britt will allow Roy Herr to assert a sex discrimination claim under Title VII, based on his allegation that his female supervisor, whose actions led to Herr's discharge, discriminated against him because he is straight. *Herr v. The American Kennel Club*, 2018 WL 4565386, 2018 U.S. Dist. LEXIS 162828 (E.D.N.C., Sept. 24, 2018). Herr described his supervisor as "adverse, confrontational, and combative" towards him, and alleged "various instances over years of [her] treating him differently than similarly situated employees," wrote Judge Britt. "Herr alleges [her] animus towards him was due to her preference to work with women and homosexual men, as opposed to heterosexual men, such as himself. He contends that [she] openly admitted this preference. Herr claims that [she] fabricated performance issues concerning his employment and falsely accused him of violating company policy, among other things," and that ultimately he was discharged after seeking FMLA leave. He sues under the Age Discrimination Act, the Family Medical Leave Act, and Title VII, and the employer moved to dismiss all claims. Magistrate Numbers agreed that the ADEA and FMLA claims should be dismissed, but recommended that the Title VII claim be allowed to proceed. "Despite Herr's factual allegations," wrote Britt, "AKC argues that plaintiff's Title VII discriminatory discharge claim is 'self-defeating' because he alleges that his position was filled by

another man, as opposed to being left open or filled by an applicant outside of his protected class." That does not seem to respond to the particular allegations in this case, where replacing Herr with another man would not defeat his claim, since he is alleging sexual orientation discrimination. "Herr asserts that Proctor openly voiced her desire to employ 'all gay men and women' Herr contends that on numerous occasions he was singled out for disparate treatment because of his sex." After reiterating Herr's contentions as described above, Judge Britt continued, "Because these facts plausibly demonstrate sex discrimination in violation of Title VII, the claim may proceed."

OHIO – An Ohio state Probate Judge, Joseph W. Kirby, rejected a petition for a name change for a transgender minor, on the ground that "the minor plaintiff was too immature to take such a drastic step at the present time, and the judge stated that the minor could reapply as an adult." The minor's parents, disagreeing with the ruling because "they believe that the name change is a critical part of the transgender process," have appealed to the Ohio Court of Appeals, which has scheduled the appeal for submission for disposition without oral argument on November 21. Meanwhile, however, the parents filed suit in the U.S. District Court for the Southern District of Ohio, seeking declaratory relief against Judge Kirby. *Whitaker v. Kirby*, 2018 WL 5622040 (S.D. Ohio, W. Div., Oct. 30, 2018). In this suit, they were not directly appealing Judge Kirby's ruling on the merits, but were instead seeking a declaration that the process by which he conducted the hearing and made his decision violated the equal protection rights of their child. They contend that the judge asked very personal and embarrassing questions "concerning the medical steps in the transgender process and whether or not the parties had carefully

through it through." They particular objected "to the judge's reference to a celebrity who had undergone a widely publicized transgender process a few years before. The judge implied that this celebrity's change had resulted in a fad, which had influenced the plaintiffs' application." They alleged that it is a denial of equal protection for the judge to ask these sorts of questions in transgender cases when he does not ask similarly intrusive questions in non-transgender name-change cases, which he routinely refers to magistrate judges for almost automatic approval. Judge Kirby responded to the suit by seeking a dismissal on grounds of judicial immunity and federal court abstention from deciding issues pending before a state appeals court. In its unsigned October 30 order, the district court granted Judge Kirby's motion. "Here," wrote the court, "Judge Kirby had no personal stake in the grant or denial of the name change, but rather he was performing his judicial duty to decide whether the name change was in the best interest of the child. As such . . . he is not amenable to a suit for declaratory relief under Sec. 1983. In other words, the defense of judicial immunity is valid, and this action must be dismissed on that ground. The doctrine of judicial immunity is essential to the proper functioning of our courts," continued the court. "If not for that immunity, the judge could be sued by the losing party in every case, especially if the judge is reversed on appeal. This would result in chaos in the court system. For similar reasons, legislators, prosecutors, and newspapers which accurately report legal proceedings are entitled to similar immunity." The court also addressed various abstention doctrines used by federal courts when presented with cases that are pending on appeal in the state courts, and determined that at least two of those doctrines – *Pullman* abstention and *Wilton* abstention – provided grounds for the court to decline to rule in this case. In a footnote,

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the court said that there were “two other sets of plaintiffs” who were also seeking transgender name changes for their minor children, within the jurisdiction of Judge Kirby; the court stated that the immunity analysis applied to them as well, and pointed out in its analysis of the abstention issues that a ruling by the Ohio Court of Appeals will likely address all these issues.

OHIO – U.S. Magistrate Judge Chelsey M. Vascura rejected defendants’ motion to stay discovery pending a ruling by the District Court on their motion to dismiss a lawsuit brought by the ACLU and Lambda Legal challenging Ohio’s categorical refusal to allow transgender people to obtain birth certificates with a gender marker consistent with their gender identity. Ohio is one of the few remaining jurisdictions that categorically refuses to make such changes in response to gender transition. Indeed, the trend among the states in recent years has been to liberalize the availability of such birth certificates by, *inter alia*, dispensing with requirements that the applicant prove complete surgical transition as a prerequisite, and allowing amended certificates to be issued based on the applicant’s declaration of their gender identity. In *Ray v. Director, Ohio Department of Health*, 2018 U.S. Dist. LEXIS 174305, 2018 WL 4907080 (S.D. Ohio, E.D., Oct. 10, 2018), four plaintiffs are alleging that the state’s categorical refusal violates their constitutional rights of due process and equal protection under the 14th Amendment, as well as First Amendment expressive rights. The defendants responded to the plaintiffs’ March 29, 2018, complaint by filing a motion to dismiss for failure to state a claim on July 6. At the same time, they sought to stay discovery while their dismissal motion is pending, arguing that if the court dismisses all or even some of the plaintiffs’ causes of action, that will narrow the scope of discovery or obviate the necessity of

any discovery at all. Plaintiffs’ public interest lawyers would like to press on and conduct discovery in order to expedite the litigation, since their clients are suffering constitutional harms that of an irreparable type. Indeed, it is entirely possible that discovery will result in settlement on terms acceptable to the plaintiffs, obviating the need for trial. The defendants argued that there would be no prejudice to plaintiffs if discovery is delayed, since there is no spoliation of evidence issue in what is a purely legal question. The judge granted the defendants’ “Emergency Motion for Interim Stay” while the motion to stay was pending, but denied the main motion, finding that the question whether to stay discovery while a dismissal motion is pending is a matter of judicial discretion, and precedents support the conclusion that “the fact that a party has filed a case-dispositive motion is usually deemed insufficient to support a stay of discovery.” The court pointed out that there is no explicit provision in the Federal Rules of Civil Procedure providing for delay of discovery in such circumstances. Such a motion might be granted if it raises an issue such as immunity, or governmental or executive privilege – in other words, if there is a legal issue concerning the plaintiffs’ right to sue or to discover the information they are seeking that needs to be resolved before discovery can commence. But nothing of that type is alleged by defendants in this case. “Defendants’ insistence that their Motion to Dismiss is meritorious” and thus time spent on discovery would impose a wasted burden on defendants is “insufficient where, as here, the Court cannot conclude that Plaintiffs’ claims are frivolous or that it is highly likely that Defendants’ Motion to Dismiss will be granted Significantly,” the judge continued, “Defendants acknowledge the possibility of one or more of Plaintiffs’ claims surviving the Motion to Dismiss. Under such circumstances, Defendants have not demonstrated

good cause for a stay of discovery.” Since litigation over this issue in other jurisdictions has been successful, it is difficult for the state seriously to argue that this litigation is without merit and does not assert actionable claims. One has a sense that they are “going through the motion” for political reasons; the Ohio legislature, socially conservative body, is not going to amend the relevant statutes, so this reform can happen only if the courts intervene on constitutional grounds.

OHIO – Emilie Olsen’s Estate and parents filed suit against Fairfield City School District and several of its officers and staff members, claiming that Emilie, “a female Asian-American, suffered bullying, harassment, assault, battery, and discrimination because of her race, national origin, and gender, and her association with Caucasian students, and also based upon sex stereotyping and upon her perceived sexual orientation and practices,” wrote U.S. District Judge Michael R. Barrett, in an opinion on defendants’ motion to dismiss the complaint in *Estate of Olsen v. Fairfield City School District*, 2018 WL 4539440 (S.D. Ohio, Sept. 21, 2018). Emilie committed suicide. Plaintiffs claim that when they asked school officials for help in stopping the bullying, the school officials failed to take effective action to do so. The suit asserts numerous counts, including constitutional, statutory and common law claims. As a preliminary matter, the court ruled that under Ohio law the school district is not an entity that can be sued on these claims, and granted the motion to dismiss the school district as a party. However, the court refused to dismiss several of the claims against school officials and employees. Judge Barrett found that it was plausible that several of the individual defendants violated clearly established constitutional rights. The court found that several of the named defendants could be sued on a municipal

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liability theory under Section 1983, and that plaintiffs had pleaded a viable substantive due process claim, citing particularly the 6th Circuit's decision in *Shively v. Green Local School District*, 579 F. App'x 348 (2014), and *Engler v. Arnold*, 862 F.3d 571 (6th Cir. 2017), in which the court had stated, "There may be scenarios where a state official increases the risk of harm by encouraging a violent actor to do something he would not otherwise have done." Wrote Barrett, "Here, Plaintiffs have alleged that the School Defendants' acts and omissions created a risk, or increased the risk that Emilie would be exposed to bullying, harassment, assault/battery, and discrimination. Therefore, the court concludes that if the allegations in the Second Amended Complaint are taken as true and all reasonable inferences are drawn in favor of Plaintiffs, Plaintiffs have stated a plausible claim for substantive due process." The court also found viable claims under Title VI of the Civil Rights Act, dealing with discrimination because of race, color or national origin in programs that received federal funding, and also found viable claims of negligence/gross negligence against individual defendants. The court rejected defendants' argument that a wrongful death claim was precluded by the decedent's suicide, finding based on plaintiffs' allegations that "suicide was a reasonably foreseeable result of the bullying suffered by Emilie." However, the court did dismiss claims that the defendants had a heightened duty of care with regard to Emilie because of her status as a student. The court also dismissed an emotional distress claim against the school district, finding that Ohio law barred such a claim, and also found that a claim under a state law against hazing activities was not viable since the law applied only to hazing during initiation activities of student organizations, not applicable here when the bullying was attributable to individual malefactors, not student organizations. The court also dismissed

a breach of contract claim against the School Defendants, and a claimed violation by the school district of an Ohio statute imposing a duty to report child abuse, finding that the duty is imposed on individual actors, not on the school district as such. The motion to dismiss did not address all the counts of the complaint, and so the opinion contains no discussion of a count under Title IX (which we assume was asserted) related to the claim regarding sex stereotyping and perceived sexual orientation. The plaintiffs are represented by Peter Lawrence Ney, Ryan J. Dwyer, and Michael J. Chapman, of Rendigs Fry Kiely & Dennis LLP, Cincinnati.

PENNSYLVANIA – Letting asylum applicants languish in detention facilities (in effect, prison) while their cases proceed through the administrative process is a recurring issue. In *Martinez v. Conner*, 2018 U.S. Dist. LEXIS 176537, 2018 WL 4999422 (M.D. Pa., Oct. 12, 2018), U.S. Magistrate Judge William I. Arbuckle dealt with a petition from Jose Noe Nunez Martinez, who is appealing a denial of relief by an Immigration Judge to the Board of Immigration Appeals. Martinez was removed to Mexico on August 18, 2010, after being apprehended in the U.S. without documentation. He subsequently found his way back into the U.S., and sought to apply for asylum, withholding of removal, or protection under the Convention Against Torture, but ICE apprehended him at the immigration office and issued a notice to reinstate the prior removal order. He did not contest the determination that he was removable, but evidently passed a reasonable fear hearing based on his sexual orientation and his case was referred to an immigration judge, who denied relief. He has appeal. Meanwhile, he is being held in detention, and his petitioned for his release. At the time of this decision, appellate briefs were due to the BIA by November 1. Martinez

has been in a detention facility since January 2018, and had not been afforded an individual bond hearing to determine whether his release would pose a flight risk or a danger to the community. The 3rd Circuit precedent on this is *Guerrero-Sanchez v. Warden*, 2018 WL 4608970, in which the court recently construed Supreme Court precedent establishing a presumption that aliens "could be reasonably detained without a hearing for six months" to mean that "the government may detain an alien subject to a reinstated order of removal in the process of withholding only proceedings whose detention has not been prolonged, or whose removal is not imminent, for six months before a bond hearing is necessitated." Since Nunez-Martinez had been held in detention for well over six months without being afforded such a hearing, the Magistrate Judge recommended that the district court grant his petition to the extent that he requests an individualized bond hearing, and the government be required to hold the hearing by the end of October. Magistrate Arbuckle further recommended that the Immigration Judge at that hearing be instructed to make an "individualized inquiry into whether detention is still necessary to fulfill the purposes of ensuring that Nunez Martinez attends removal proceedings and that his release will not pose a danger to the community," with the government bearing the burden of presenting "clear and convincing evidence and proving that continued detention is necessary." The Magistrate's opinion does not indicate whether petitioner has counsel.

TEXAS – *Texas Tribune* (Oct. 10) reported that the U.S. Pastor Council, a Houston-based conservative Christian organization, and Texas Values, another conservative Christian organization, have filed separate lawsuits in federal court, the first arguing that the city of Austin's code provision prohibiting

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employers from discrimination on the basis of sexual orientation or gender identity is unconstitutional because “it does not allow churches the religious freedom to refuse to hire gay or transgender individuals” and the second extending its argument to housing discrimination. The U.S. Pastor lawsuit explains: “Because these member churches rely on the Bible rather than modern-day cultural fads for religious and moral guidance, they will not hire practicing homosexuals or transgendered people” as clergy or general church employees, and they also will not consider or hire women to be senior pastors, so they are contesting the ban on sex discrimination as well. Of course, U.S. Supreme Court precedent would shield churches under a ministerial exemption from having to comply with any local anti-discrimination law in cases involving employees who perform a religious mission of the church. The president of Texas Values, Jonathan Saenz, stated that Austin’s anti-discrimination laws “violate the Texas Religious Freedom Restoration Act by punishing individuals, private businesses and religious non-profits, including churches, for their religious beliefs on sexuality and marriage.” The city’s media relations manager, David Green, issued a statement that the city is “proud” of its ordinance and is prepared to “vigorously defend it in court.” Texas lacks any state statute protecting LGBT people from discrimination, but moderate Republicans combined with Democrats in the legislature to block a so-called “bathroom bill” that had been a legislative priority of Republican state officials. Several other cities in Texas have anti-discrimination ordinances similar to Austin’s, and it was not clear why the plaintiffs in these cases targeted just the state’s capital city. (Houston used to have such an ordinance, but it was repealed in a voter initiative whose proponents labeled it a “bathroom bill” and scared voters with unproven claims that it exposed their children

to molestation in public restrooms.) Few observers gave these lawsuits any chance of surviving motions to dismiss, most likely on standing grounds, since there is no indication that the city is actively pursuing sexual orientation or gender identity discrimination cases against churches or religious employers.

WASHINGTON – The State of Washington’s Court of Appeals, Division One, upheld imposition of a \$5,000 fine sanctioning attorney Lincoln Beauregard under Rule 11, finding that he had filed documents with the trial court for “the improper purpose of generating publicity.” *Heckard v. Murray*, 2018 Wash. App. LEXIS 2303 (Oct. 8, 2018). Beauregard was representing Delvonn Heckard, for whom he filed a lawsuit against Seattle’s out gay mayor, Edward Murray, alleging that Murray had paid Heckard for sex years before when Heckard was a minor. Murray’s attorney denied the charges, and correspondence ensued between Beauregard and Murray’s attorney, Robert Sulkin. Sulkin had called press conferences to denounce and deny Heckard’s charges, and Murray published an op-ed in a Seattle newspaper stating that the accusations were false and made to advance an “anti-gay political agenda” as Murray was contemplating running for re-election. Beauregard sent various letters to Sulkin and filed them with the court, the letters then becoming grist for the local newspaper reports on the developing “scandal.” Murray asked the court to sanction Beauregard “under CR11 and the Court’s inherent authority for wrongly filing documents for an improper purpose.” The court held a hearing to announce an oral decision on this request, finding that the letters were filed for an improper purpose and sanctioning Beauregard with a \$5,000 fine, which Beauregard promptly paid into court. After Heckard voluntarily dismissed his lawsuit against Murray

in June 2017, Beauregard appealed the sanctions order. There was a January 2018 settlement agreement, in which Murray agreed to stipulate to an order vacating the trial court’s sanctions order, but the trial judge refused to go along with this, and ordered disbursement of the \$5,000 which had been paid into court to go to the King County Bar Foundation. A commissioner of the court of appeals refused to override the trial court’s ruling, but stayed the portion of the order on disbursing of the funds until the Court of Appeals could rule on Beauregard’s appeal. After a lengthy rehashing of the facts, the court of appeals concluded that the Rule 11 sanctions were justified. It quoted the transcript of the trial judge’s order: “Plaintiff was clearly aware that his behavior was the subject of a motion, and, nevertheless, willfully and with a flagrant disregard for established legal norms, continued to file documents that were irrelevant to the matter before the court, nonresponsive to the pleadings at issue, and for the sole purpose and intent – apparent intent of generating publicity that has the potential of prejudicing the administration of justice.” The court of appeals rejected Beauregard’s contention that filing documents to generate pretrial publicity is not sanctionable and not for an improper purpose. In the course of its discussion, the court notes that Beauregard’s own public statements indicated that he had “filed the documents at issue to help facilitate the media’s access to them. He does not claim that the court needed to review these documents to resolve any pending request for relief,” so they should not have been filed. Further, the court found that filing documents to generate publicity is an “improper purpose,” commenting: “The court file is not a bulletin board for attorneys to post information for the press. Neither is it an archive for communications between lawyers. It exists so attorneys may provide the court with documents relevant to the proceedings pending

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before it so that the court can consider this information when resolving a request for relief. Attorneys may communicate with the press through a number of avenues. But the court file does not exist for the purpose of facilitating this communication. Beauregard's written statements provide sufficient support for the trial court's conclusion that he filed the documents for the improper purpose of generating publicity." The court rejected an argument that imposition of these sanctions violated Beauregard's First Amendment free speech rights, but found that Beauregard's appeal of the sanctions order, while lacking merit, was not frivolous, so it denied Murray's request for attorney fees to cover his costs for responding to Beauregard's appeal. At the bottom line, the court of appeals found that the trial court did not abuse its discretion by imposing Rule 11 sanctions.

WISCONSIN – In *Barrett v. Seneca Foods*, 2018 WL 5456497 (W.D. Wis., Oct. 29, 2018), a previously-incarcerated plaintiff who worked for the employer for a few months in the fall of 2015, until he was reincarcerated for a parole violation, brought an action against the company under the Americans with Disabilities Act and Title VII. The Title VII count asserted that Patrick Barrett was subjected to hostile environment sexual harassment based on perceived sexual orientation. Barrett, who identifies as bisexual, says that a group leader with whom he worked, one Terry, questioned him about sex among male prison inmates and made anti-gay remarks, calling Barrett "faggot" upon occasion, of which there were approximately ten such incidents over a period of his two months of employment. He alleged that some other co-workers also made offensive comments, and that he complained about harassment to management. Eventually the company transferred him to a different work area to separate him from

Terry. Unfortunately for him, Barrett, representing himself *pro se*, did not allege facts with sufficient specificity to meet the pleading requirements for Civil litigation, being vague about dates and what was said. And, District Judge William M. Conley observed in granting summary judgment to the employer on this count, "Viewing Terry's behavior as a whole, his apparent habit of monitoring Barrett's bathroom breaks, yelling at him, and making derogatory comments about homosexuals was by any account insensitive and rude, but 'the occasional vulgar banter, tinged with sexual innuendo . . . or boorish workers' generally does not create a work environment that a reasonable person would find intolerable," citing various 7th Circuit precedents, and recurring to the Supreme Court's comment in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), cautioning that Title VII did not enact a workplace Civility code. Courts have generally seized upon this language to downplay allegations of name-calling as a basis for finding a hostile work environment in the absence of allegations of more tangible concerns. The court found that Barrett's allegations fell short of the kind of comments and actions by supervisors and co-workers that had been found actionable in the past. Furthermore, Judge Conley found that even if Barrett's factual allegations had been sufficient to pass the high bar set by precedent for finding a hostile environment, when he complained to the company, the company took action. For example, he wrote, "Accepting that Barrett reported Terry's sexual harassment at least at that point, however, his claim still fails because the record shows Seneca responded in a manner that made it unlikely Barrett would have to deal with Terry's harassment again in the future. In evaluating whether an employer's response to reports of harassment pass muster, courts are to consider whether the employer took 'effective steps to physically separate employees and limit

contact between them,' thus making it 'distinctly improbable' that there will be future harassment." The court concluded that "even assuming that Terry's behavior amounted to sexual harassment, Seneca's response entitled it to judgment on this claim." The court also rejected a retaliation claim premised on denial of a promotion in response to Barrett's complaints about Terry. The court found that the company's refusal to let Barrett retake a test that he had failed did not amount to actionable retaliation, where his earnings did not change as a result and the failure to be considered for a particular promotion would not amount to an "adverse action" necessary to ground a retaliation claim. The court also pointed out that Barrett was less senior than others who had applied for the position in question, so the company had non-retaliatory objective reasons for its actions.

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By Arthur S. Leonard

FLORIDA – *Broward Palm Beach New Times* reported on October 19 that Broward County Judge Ginger Lerner-Wren had ruled that the locked room at Pleasure Emporium, an adult establishment, was a "private space" and police should not have arrested and charged men who used the establishments "back room" for consensual sexual activity. Judge Lerner-wren dismissed a charge against one of the men involved. "The court finds that the Pleasure Emporium is not a public space under Sec. 800.03," she wrote; "The patrons who access the private viewing theaters where consensual activity occurs in the presence of other consenting adults objectively and subjectively possess a reasonable expectation of privacy." The Hollywood Police Department has been "adamantly" defending its decision to raid the establishment, stating that it was "not private, but open to the

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public.” Broward State Attorney Mike Satz stated that his office will “conduct a review of the record to determine how we will proceed.” The *New Times* reported that the arrests were publicized in the local press, including listing every man’s name and hometown, and people lost jobs over this.

KANSAS – The Court of Appeals of Kansas affirmed the jury conviction and sentence of Jason Anthony Grasle on four counts of aggravated robbery, one count of aggravated burglary, and one count of fleeing or attempting to elude an officer of the law. *State of Kansas v. Grasley*, 2018 WL 4517001, 2018 Kan. App. Unpub. LEXIS 730 (Sept. 21, 2018). Grasley cultivated a friendship with Mark Seminara, a gay man, feigning possible sexual interest, as part of a plan to enlist some confederates to carry out a burglary at Seminara’s house. The *per curiam* opinion for the court provides a well-written account of the incident from the viewpoint of the various witnesses. (It could well serve as a script for a television crime drama.) Grasley had figured out a scheme to act the part of the victim while taking part in the overall scenario he had devised. In addition to finding the various violations charged against Grasley, the jury specifically found that the crime (1) was motivated by the sexual orientation of the victim; (2) was motivated by Grasley’s belief in the sexual orientation of the victim; and (3) was committed in an especially heinous, atrocious, or cruel manner. Part of Grasley’s scenario involved his confederates – whom he had specifically recruited to rob the home of a gay man – using homophobic epithets while holding guns over Seminara and his roommates, and forcing Seminara to strip, get down on his knees and face the wall in his closet. The trial judge granted the prosecution’s motion for an upward sentencing departure and sentenced Grasley to a total controlling sentence of 391 months.

MISSISSIPPI – In *Doe v. Hood*, 2018 U.S. Dist. LEXIS 169115, 2018 WL 4761231 (S.D. Miss., Oct. 1, 2018), the John Doe plaintiff and several others similarly situated challenged the requirement that they continue to be registered in the Mississippi Sex Offender Registry (MSOR), when the basis for that requirement is their convictions long ago under the state’s sodomy law. Pointing to *Lawrence v. Texas*, in which the U.S. Supreme Court held in 2003 that criminal penalties for private consensual sodomy between adults violate the 14th Amendment, they observe, as summarized by District Judge Carlton W. Reeves, “Fifteen years later, Mississippi continues to enforce its pre-*Lawrence* prohibition on ‘unnatural intercourse.’ Mississippi requires persons convicted under the statute, or an equivalent out-of-state offense, to register with the Mississippi Sex Offender Registry. Doe asserts that the anti-sodomy law is unconstitutional on its face and as applied to him under the Due Process Clause of the Fourteenth Amendment. Alternatively, he argues that his inclusion on the MSOR violates the Equal Protection Clause. Mississippi responds that *Lawrence* does not protect non-consensual acts of sodomy, and that it may enforce its sodomy prohibition when applied to such conduct as in Doe’s case.” Judge Reeves announced agreement with Doe that the statute “appears to be unconstitutional” and continues, “He should not be subjected to the stigmatizing requirements imposed by the MSOR,” however, “this court may not be the appropriate forum for Doe to seek relief at this time. A hearing is necessary to determine whether Doe must first seek relief in state court.” Reviewing the history of the case, Judge Reeves noted that it began with several co-plaintiffs, but has now been reduced to one, as the state agreed to remove the others because they had been convicted under Louisiana’s statute and a Louisiana district judge had ordered that Louisiana remove from

that state’s registry individuals who had been convicted under that state’s “crime against nature” statute. The remaining Doe plaintiff asserts both facial and as-applied due process challenges to the Mississippi statute, which remains on the books and outlaws all acts of sodomy, regardless of consent. “The prosecutor does not have to prove that the sex was non-consensual,” wrote Reeves, and the statute “criminalizes consensual sex acts between adults and applies to both males and females.” He also noted the “sweeping requirements” that are imposed on those who are required to register under the MSOR because of a conviction under the sodomy statute. He then noted the split of circuit court authority about whether Supreme Court precedent bars a Section 1983 action in a case such as this, and advised the parties to prepare for a hearing at which the question whether the court can hear Doe’s claim on the merits will be the central issue. A complication in Doe’s case is that he entered a guilty plea “without the benefit of a plea colloquy,” so there is no official court record to support the state’s argument that his conviction was not unconstitutional because his act was not consensual. “The Court does not know whether Doe committed consensual or nonconsensual sodomy,” wrote Reeves, and “The MSOR . . . does not call for a *post hoc* inquiry into the underlying facts of an offense. Only the conviction necessitates registration,” and in this case that involves a conviction under a statute that may be facially unconstitutional because it is not limiting to prohibiting nonconsensual acts . . . A pretty tangle, indeed. Lacking any action by the Mississippi legislature to narrow the scope of the statute, “The anti-sodomy statute, as written, criminalizes sodomy broadly – and that is the very reason why it is unconstitutional.” The solution could be an action by the Mississippi Supreme Court adopting a narrowing construction of the sodomy law, as the Virginia Supreme Court did in reaction

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to *Lawrence*, but federal courts “lack jurisdiction authoritatively to construe state legislation,” wrote Reeves, noting that the Mississippi Supreme Court has already been presented with a case in which it could have done so but declined the invitation. In any event, despite an interesting discussion of the issues surrounding the unconstitutionality of the Mississippi sodomy law – all dicta at this point – Reeves wrote, “The Court will defer ruling on the constitutionality of the statute until the issue regarding Doe’s ability to seek post-conviction relief [in federal court under Sec. 1983] is resolved.” The state argues that Doe’s only route to post-conviction relief would be an action in state court. The court had previously rejected an attempt by the plaintiffs to make this a class action on behalf of all those similarly situated. Doe is represented by Alexis Agathocleous and Ghita Schwarz, Center for Constitutional Rights (New York), Jacob W. Howard and Robert B. McDuff, McDuff & Byrd (Jackson, MS), and Matthew Strugar (Los Angeles).

NEVADA – In *Mompremier v. State of Nevada*, 2018 WL 4709896 (Sept. 17, 2018), the Court of Appeals of Nevada rejected a transgender defendant’s challenge to the state’s use of a peremptory strike “to remove a prospective juror who identified as queer and who questioned his ability to be impartial” in a domestic violence dispute. Gaby Mompremier, the defendant, is identified in Court of Appeals Judge Abbi Silver’s opinion as “taking medication to transition from a male to a female” when she was arrested “for stabbing her fiancé.” During voir dire, “the prospective juror stated that his past experiences made the case ‘pretty personal’ and would ‘definitely affect my judgment,’ and he admitted that if he were the prosecutor, he would not want himself to be on the jury. He further stated his friends had been victimized by the police, and that he

did not fully trust the police as a result.” However, when asked, he did assert that “he could be fair and impartial.” The prosecutor exercised a peremptory challenge against this juror, rejecting a *Batson* challenge by Mompremier, who accused the prosecution of keeping acting to be sure there were no LGBTQ jurors sitting on her case. In rejecting her appeal on that point, Judge Silver wrote, “The Nevada Supreme Court recently extended *Batson* to recognize sexual orientation. See *Morgan v. State*, 416 P.3d 212, 224 (2018). Here, the State offered a neutral reason for the challenge, and Mompremier fails to demonstrate that reason was a pretext for discrimination. Specifically, the State asserted below that the prospective juror repeatedly expressed doubt regarding his ability to be fair and impartial because of his personal background and his distrust of police officers. The record supports the district court’s factual finding that this explanation was neutral.” Thus, the court held, the trial judge did not err by denying the *Batson* challenge. The jury, rejecting Mompremier’s claim of self-defense, returned a guilty verdict on the charge of “battery with use of a deadly weapon constituting domestic violence.”

TENNESSEE – Yet another cautionary tale about on-line hook-ups. Herbert Pritchard and Timerell Nelson first met through social media and reconnected a year later, on September 10, 2015. Pritchard knew Nelson only by his username, “Trouble-Boy-20,” which proved to be accurate. He picked up Nelson from an apartment complex so that they could “chat and ride around.” Nelson asked Pritchard for money, which Pritchard declined to give him. Instead, wrote Judge Alan E. Glenn of the Court of Criminal Appeals of Tennessee, summarizing the trial record evidence, “they went to Mr. Pritchard’s apartment where Defendant offered to ‘masturbate for [Mr. Pritchard] and [Mr. Pritchard] could film it’ in exchange for money.”

Pritchard testified that they met up again the next day so that they could “hook up again and just ride around.” Wrote Judge Glenn, “They talked about being ‘bisexual and coming out of the closet,’ and stopped at a few stores, eventually deciding to visit Mr. Pritchard’s friend, Nathaniel Woods.” But Nelson got cold feet about being seen by Woods, and Pritchard “did not want to make him feel uncomfortable,” so he decided to drive him home. Nelson “requested that Mr. Pritchard drop him off on the side of a dead-end street. Mr. Pritchard testified that when he pulled over to drop the Defendant off, he ‘punched me in my face and my jaw’.” When Pritchard turned to face Nelson to ask him why he punched him, Nelson shot him once in his neck, causing his arms to buckle. “After he shot Mr. Pritchard, the Defendant held the gun to Mr. Pritchard’s head and repeatedly told him to ‘give me your mother-fucking money’ and that he was going to kill him.” Pritchard testified that Nelson could not get at his wallet because his legs were stuck under the steering column. Instead Nelson took \$160 from Pritchard’s front shirt pocket and “walked away from the car without looking back.” Regaining some feeling in his arms, Pritchard managed to drive to the nearest police precinct, where he was found by a police officer sitting in his parked car, bleeding from the neck, and was taken to a hospital. Pritchard suffered serious ill effects from his wound, lost time at work, was referred for surgery and has permanent scarring on his neck. Pictures and videos of Nelson were retrieved from Pritchard’s cellphone and eventually led to his arrest and positive identification by Pritchard in a police lineup and then at trial. Nelson was convicted by a jury of especially aggravated robbery, attempted second degree murder, and employment of a firearm during the commission of criminal attempt second degree murder. He was sentenced to an effective 16-year sentence. Nelson did not deny Pritchard’s account of

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what happened, but on appeal sought to get his sentence reduced, arguing that the injuries suffered by Pritchard were not serious enough to support the conviction of “especially aggravated robbery.” Judge Glenn recounted the evidence concerning Pritchard’s injury and the content of his medical records and found no merit to Nelson’s claim. The court affirming Shelby County Judge Chris Craft’s sentence. The case is *State of Tennessee v. Nelson*, 2018 WL 4562934, 2018 Tenn. Crim. App. LEXIS 718 (Sept. 21, 2018).

PRISONER LITIGATION NOTES

By William J. Rold

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

CALIFORNIA – This case raises the question of whether a transgender inmate must file successive grievances alleging failure to protect her after she is repeatedly denied protection to exhaust her administrative remedies under the Prison Litigation Reform Act [PLRA]. Plaintiff Joseph Becker, a/k/a Cinnamon Becker, *pro se*, was born anatomically male, but she has identified as female since her youth. She has been incarcerated since 1999, but the events relevant to this case began in 2016, when she was transferred to a substance abuse cell and double celled with another inmate who raped her. She alleges that two defendants falsified records about the event prior to her transfer to a general male confinement facility. After her transfer, she was again double celled and raped, after which she filed a Prison Rape Elimination Act complaint and a grievance, which she completed through the third (final) tier. During the pendency of her grievance, she was “temporarily” assigned to a single cell;

but she ultimately lost the “permanent single cell designation” by a warden’s decision. Becker’s lawsuit named the officials, including the warden, who ruled against her final grievance, even though she did not name the executive defendants in her grievance, in technical violation of California grievance rules requiring naming everyone who is being grieved. In *Becker v. Sherman*, 2018 U.S. Dist. LEXIS 164564, 2018 WL 4616281 (E.D. Calif., September 25, 2018), Senior U.S. District Judge Anthony W. Ishii ruled on summary judgment that Becker had not properly exhausted against the defendants at the substance abuse facility for falsifying records, noting that this was an “independently wrongful, discrete act” under *Pouncil v. Tilton*, 704 F.3d 568, 581 (9th Cir. 2012). As to the other general confinement defendants at the male facility, however, Judge Ishii did not require that Becker re-exhaust again the defendants who made the final decision. He found that Becker was entitled to invoke the “continuing violation doctrine” that deems grievances exhausted when the problem remains the same even though particular defendants change for legal purposes. The Ninth Circuit has not specifically adopted this analysis for PLRA exhaustion, but it is consistent with decisions such as *Pouncil*, on whether notice of the nature of the complaint and opportunity to take corrective action have been satisfied. It is worth mentioning for *Law Notes* readers the large number of circuits accepting this “continuing violation” theory of exhaustion. See *Turley v. Rednour*, 729 F.3d 645, 649-50 (7th Cir. 2013) (“prisoners need not file multiple, successive grievances raising the same issue . . . if the objectionable condition is continuing.”); *Johnson v. Killian*, 680 F.3d 234 (2d Cir. 2012) (2005 exhausted grievance was sufficient to exhaust his 2007 claims based on a continuing violation on identical issues); *Parzyck v. Prison Health Servs. Inc.*, 627 F.3d 1215, 1219 (11th Cir. 2010) (prisoner “not

required to initiate another round of the administrative grievance process on the exact same issue”); *Howard v. Waide*, 534 F.3d 1227, 1244 (10th Cir. 2008) (after plaintiff had exhausted a grievance regarding harassment and threats, he was not required to file a separate grievance for the same risks identified in the first grievance); *Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004) (plaintiff not required to file separate grievances to “exhaust claims that arose from the same continuing failure to protect him from sexual assault”). Judge Ishii also found that, since the remaining claims were for injunctive relief only, qualified immunity did not prevent Becker from proceeding on her claim for a permanent injunction.

DELAWARE – Transgender prisoner Vanessa L. Naisha, *pro se*, convinces U.S. District Judge Richard G. Andrews to allow her to proceed on claims of “plausible” violation of her constitutional rights in connection with a strip search by male officers in *Naisha v. Metzger*, 2018 U.S. Dist. LEXIS 175847, 2018 WL 4955232 (D. Del., October 12, 2018). The search was conducted during a “shakedown,” and Naisha asked a female lieutenant to instruct the male officer to allow a female officer to conduct her strip search. The lieutenant declined, and the strip search by a male officer was later ratified by the warden. Naisha was also charged after the “shakedown” with prison contraband (a razor blade and some “liquid”) for which she was punished with 30 days’ loss of commissary – allegedly without according her procedural rights. Judge Andrews allows Naisha to proceed on a claim of violations of her rights in the search without saying whether transgender prisoners have a right to be searched by officers of the same identified gender as the prisoner. He finds that Naisha presents claims under both the Fourth Amendment (residual rights that a prisoner’s search

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be “reasonable”) and the Eighth Amendment (abusive searches) – citing *Jordan v. Cicchi*, 428 F. App’x 195, 199-200 (3d Cir. 2011) (explaining that excessive force claim arising from strip search may proceed under either Fourth or Eighth Amendments, but latter is “the primary source of protection after an individual’s conviction”). In certain instances, forced nudity can constitute an Eighth Amendment violation. See *Solan v. Ranck*, 2007 WL 4111424, at *7-9 (M.D. Pa. Nov. 16, 2007), aff’d, 326 F. App’x 97 (3d Cir. 2010) (“Basic right of privacy” is implicated when a prisoner is forced to be unclothed and, when done to humiliate the prisoner, can violate the Eighth Amendment.) Judge Andrews found that Naisha had pleaded claims against the searching officer, his lieutenant, and the warden (for not having policies on searching transgender inmates). On the discipline for the contraband, Judge Andrews dismissed, finding that the punishment was insufficient to implicate a liberty interest under *Sandin v. Connor*, 515 U.S. 472, 480 (1995), due to the minimal punishment not rising to the “atypical and significant” standard required to implicate a liberty interest.

KANSAS – This is another example of the anomaly the Supreme Court has created by refusing to imply a *Bivens* remedy – *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) – for prisoners in privatized federal custody, when similarly situated prisoners in state or local custody can obtain relief under 42 U.S.C. § 1983 under identical circumstances. HIV+ plaintiff Jayme Wilson, *pro se*, sued for denial of HIV medications while in the custody of the U.S. Marshal at a facility operated by the Corrections Corporation of America [CCA] at Leavenworth, Kansas, in *Wilson v. United States Marshals Serv.*, 2018 U.S. Dist. LEXIS 167593, 2018 WL 4681638 (D. Kan., September 28,

2018). In a convoluted decision with errors, Senior U.S. District Judge Sam A. Crow (92 years old; appointed by President Reagan) ruled that Wilson’s case must be dismissed because of two Supreme Court cases: *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 71-73 (2001) (holding that a *Bivens* action does not lie against a private corporation operating a halfway house under federal contract); and *Minnecci v. Pollard*, 565 U.S. 118, 120-21 (2012) (applying *Malesko* to employees of federal private contractors where state tort remedy exists). He also ruled that the “U.S. Marshal” was not a proper *Bivens* defendant and that individuals could be named in their individual capacity only if they were personally involved. Although Wilson’s Complaint in PACER says that the root of the problem is the refusal of the U.S. Marshal to pay for continuation of his non-generic drugs, there is no discussion of adding the Marshal individually – and the individuals Wilson named are all CCA employees. Judge Crow then proceeds to analyze the case under 42 U.S.C. § 1983, even though it arose under color of federal, not state, law. Wilson loses not because he failed to meet the “under color of” requirement but because the Supreme Court deprived inmates of an implied *Bivens* remedy when private corporate defendants act under color of federal law. It was established thirty years ago that corporate defendants who provide prison health care to state and local prisoners act under color of law under 42 U.S.C. § 1983 in *West v. Atkins*, 487 U.S. 42, 48 (1988). Judge Crow next addresses whether these private defendants are “persons” under § 1983, also irrelevant under the Supreme Court’s precedents about private contractors and federal prisoners. Judge Crow, however, incorrectly states that they are not “persons,” citing *McKeighan v. Corr. Corp. of Am.*, No. 08-3173-SAC, 2008 WL 3822892, at *3 (D. Kan. 2008), and writing “CCA not a ‘person’ amenable to suit under § 1983, and CCA employees not acting

under color of state law.” *McKeighan* was Judge Crow’s own case ten years ago, and this is not what it says. The defendants were dismissed because the events occurred at a privatized federal prison, not because the defendants failed to be “persons” or act “under color of” law, citing *Malesko*. The imprecision of the dicta in this decision is unfortunate, because the errors, while technical, will find their way into the Civil rights vernacular. The opinion unnecessarily quotes the Complaint, saying that Wilson is concerned that her denial of proper medication had caused her “viral load to be extremely low and has subjected her to infections due to her weakened immune system.” This writer checked the Complaint in PACER, and Wilson did write that – but even a passing familiarity with HIV/AIDS confirms that a low viral load is desirable and that Wilson must have been referring to T-cell suppressor count, which is elevated on her lab report attached to the Complaint. That the opinion repeats this error spreads misinformation. Finally, Judge Crow, again in dicta because it was not pleaded, goes on for pages about possible claims under the Federal Tort Claims Act, only to dismiss them as well, because only the United States is a proper defendant under the Federal Tort Claims Act, and Wilson had not filed an administrative claim as required by 28 U.S.C. § 2675(a). This writer will add one more faggot to the fire (couldn’t resist): inasmuch as the denials of a *Bivens* remedy to privatized federal prisoners on conditions claims in *Malesko* and *Minnecci* was based in part on the hypothetical existence of state tort remedies, perhaps cases should be commenced in state court. Guess what: federal removal could be sought under 28 U.S.C. § 1442 (federal officers) – and we will have come full circle.

MISSOURI – Pro se inmate Michael A. Murphy alleged that an officer (Jones) sexually harassed him in prison in

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Missouri by telling him he wanted “in his ass,” and by making other comments and gestures, including “winks.” Murphy filed a complaint under the Prison Rape Elimination Act, but the behavior did not change. In *Murphy v. Jones*, 2018 U.S. Dist. LEXIS 182356 (E.D. Mo., October 24, 2018), U.S. District Judge Ronnie L. White dismissed the case for failure to state a claim. There is no action for verbal abuse of a prisoner unaccompanied by physical assault or touching in the Eighth Circuit. *Howard v. Everett*, 208 F.3d 218 (8th Cir. 2000); see also *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993); *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). Judge White concluded: “It is apparent that the situation before the Court is one in which the plaintiff’s allegations simply fail to state claims of constitutional significance, rather than one involving a pleading deficiency that could be remedied by filing an amended complaint. The Court will therefore dismiss this action, without prejudice.” This writer presumes the Court meant “with prejudice,” but the Order also says “without prejudice.”

NEBRASKA – *Pro se* transgender inmate Nathaniel Gerald Serrell Mack sued some 34 defendants (and sought to amend to add eleven more) in a Civil rights case arising out of her delayed admission to and reclassification from a sex offender program in *Mack v. Ricketts*, 2018 WL 4621741, 2018 WL 4621741 (D. Nebr., Sept. 26, 2018). Senior U.S. District Judge Richard G. Kopf first limited the number of defendants to approximately seven, due to lack of personal involvement or failure to state a claim as to the others; and he denied leave to amend, since the claims against the proposed new defendants arose from a different pattern of allegations and were not properly joined. The essence of the claims against the remaining defendants was that Mack was admitted late to a

sex offender rehabilitation program necessary for her parole and that she was removed from the program in violation of her free speech rights under the First Amendment, her right to health care under the Eighth Amendment, her liberty interest under the Due Process Clause, and her right to Equal Protection. Judge Kopf found the late admission not to be actionable because there was no legal expectation that Mack would successfully complete the sex offender program, which in fact she did not, or that she would be granted parole. Turning to the free speech claims, Judge Kopf noted that Mack’s discussion of her “tendencies” to engage in S & M, B & D, and Blood-Letting had caused others in the program to send “kites” to the program leaders. [“Kites” are informal written notes, in prison slang.] Mack was given an “unsatisfactory” rating mid-way through the program, at least partially because of her remarks; and she was reassigned to begin another longer program. Judge Kopf found no first amendment violation in the use of a subject’s shared thoughts for diagnostic purposes in a sex offender rehabilitation program, citing *Johnson v. Coolidge*, 692 F. App’x 320 (8th Cir. 2017) (participation in a sex offender treatment program bears a rational relation to a legitimate penological objective and is not protected First Amendment activity). Judge Kopf similarly found no deliberate indifference to Mack’s health needs simply because she was transferred from one rehab program to another, regardless of its possible effect on parole eligibility. Likewise, Judge Kopf found no deprivation of liberty under the Due Process Clause, because Mack had no legally reasonable expectation of parole and her conditions of confinement in the new program were not sufficiently different to invoke *Sandin v. Connor*, 515 U.S. 472, 487 (1995). “Giving the Complaint its most liberal construction,” Judge Kopf found that Mack may be able to state an Equal Protection claim based on her “unsatisfactory completion”

of rehabilitation if that was due to her “gender non-conformity and/or sexual orientation.” He applies rational basis scrutiny, however, under class of one theory per *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). (There is no heightened scrutiny in the Eighth Circuit.) Plaintiff did herself no good here by noting in her voluminous complaint that officials were angry that she did not disclose her “unhealthy sexual practices” in her rehabilitation screening interview, since they were “red flags.” Judge Kopf suggests that this alone may provide a rational basis for reassignment of Mack to another sex rehabilitation program. He appears to recognize that this is a bit of a stretch in screening a *pro se* complaint where defendants have not even appeared – so he grants Mack leave to amend her Equal Protection claim.

NEW YORK – U.S. Magistrate Judge Andrew T. Baxter’s Report and Recommendation [R & R] recommends dismissal of transgender inmate Jamin (a/k/a Mia) Felder’s complaint for failure to prosecute in *Felder v. Thomas*, 2018 U.S. Dist. LEXIS 171851 (N.D.N.Y., October 3, 2018). The Complaint, filed by attorney Devon M. Wilt, New York City, is impressive, with over 100 paragraphs and running 36 pages with 12 Causes of Action, including pendent state law claims. It alleges a pattern and practice of abusing LGBT inmates by the New York Department of Corrections and Community Services [DOCCS], and it specifies sexual harassment, sexual assault, and battery – all at the hands of Correction Officer Brent Rogers at Marcy Correctional Facility – that was condoned and fostered by the actions and inactions of his superiors, including a cover-up. In October of 2017, however, the New York Attorney General reported to the court that Felder had “absconded” from DOCCS custody, while at Lincoln Correctional Facility, a work release site in Manhattan. At

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a conference with the court, Felder's counsel was told that Felder faced likely arrest and re-confinement if she turned herself in, but there is no evidence in PACER that any state official made any effort to follow-up on her last addresses or to search for her as an escapee. In fact, the Attorney General used the word "abscond" instead of "escape" in characterizing her action. The only thing the state did was move to dismiss her case. Eventually, attorney Wilt filed a motion to withdraw as Felder's counsel, because he lost contact with her. The motion was granted. Several letters to an address in Queens and to other locations, as well as e-mails, were sent by the Clerk of Court to try to locate Felder and remind her of her obligations to proceed on her own now that she was *pro se*. Felder replied only once, according to Judge Baxter, asking the Clerk to stop sending her further communications. After repeated "last chance" letters, Judge Baxter's R & R finds that Felder has abandoned her case. And so it goes: Another transgender person abused in the system, who sued – and then made the decision to walk away when she could – and the state was fine to leave it at that.

NORTH CAROLINA – U.S. District Judge Louise W. Flanagan granted summary judgment against transgender inmate Jennifer Ann Jasmine, a/k/a LeRoy Fox, *pro se*, on claims of deliberate indifference to her serious health care needs in *Jasmine v. Daugherty*, 2018 U.S. Dist. LEXIS 164821, 2018 WL 4623643 (E.D.N.C., September 26, 2018). The case includes a long procedural history and discussion of interference with Jasmine's religious freedom rights, both of which are omitted, except to note that Jasmine is now incarcerated in a prison in the Western District of North Carolina. Judge Flanagan (who had denied appointment of counsel) also denied Jasmine's request to participate in the

Western District's "*pro se* settlement program," because the case was in the Eastern District; construing the motion as a renewed request for appointment of counsel, Judge Flanagan denied it again. In North Carolina, inmates requesting treatment for "gender dysphoria" are referred to a "Gender Dysphoria Review Panel" [GDRP], which has sole authority to authorize treatment, including hormones, accommodations, and referral to an endocrinologist. Although not applying a "freeze frame" policy (under which inmates can only receive hormones if they are prescribed them prior to incarceration), the GDRP denied hormones in what they (and the court) called an "individualized" assessment. Jasmine had been taking hormones and presenting as a woman prior to incarceration; but she was using hormones from a friend, not hormones prescribed by a doctor. [Note: this is a common situation for inmates, many of whom relied on "street" medication because of low income prior to incarceration. The GDRC referred this question of whether "street" hormones should count to the Correction Department's legal department.] In any event, the GDRC denied hormones (or an endocrinology referral) because it found that Jasmine had multiple psychiatric diagnoses, that she was not compliant with antidepressant psychotropics prescribed for her anxiety, that she was not suicidal, and that she had no history of self-harm in prison. Notably, the GDRC, supposedly sensitive to its mission, referred to Jasmine as "Mr. Fox" and used male pronouns in its records. (Judge Flanagan did not.) As to the multiple diagnoses, the GDRC cited: gender dysphoria, transvestic disorder, autogynephilia, and pedophilia. Judge Flanagan cites nothing to indicate whether these diagnoses are supported by the DSM-V and its allowance for healthy and well-adjusted transgender people. Without counsel or an expert, Jasmine could not hope to counter the GDRC or contest or place its diagnoses

(all of which require a high degree of anxiety/stress) in context. For example: (1) her gender dysphoria stress was arguable caused by the defendants' refusing to allow her to transition or even to maintain what she had started on the street; (2) her transvestic disorder stress (because the DSM-V allows for healthy "cross-dressers") was also caused not because she was uncomfortable when she wears woman's clothing but because she was prohibited from doing so in prison; (3) her autogynephilia (sexual arousal caused by a man's fantasy that he is a woman – the DSM has no criteria for a woman's fantasy that she is a man) can be a normal transgender phenomenon for transgender women; and (4) her pedophilia "diagnosis" was derived from her conviction of a sexual offense with a minor years ago, without mentioning whether the victim was pre-pubescent, as required by the DSM-V for such a diagnosis. The commentary to the DSM-V emphasizes that a cluster of diagnoses such as these is very rare and should be handled by a provider sensitive to LGBT issues. Here, the GDRC could not even get the pronouns right. Jasmine said she was non-compliant with the anti-anxiety medications Vistaril and Atarax, because they did not relieve her symptoms, made her more depressed, and are not substitutes for hormones. As to self-harm and suicide attempts, nothing in the case law requires that the stress advance this far to create an Eighth Amendment triable issue. Judge Flanagan wrote that the Fourth Circuit's two decisions in *D'Lonta* – see *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013); and *De'lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) – required individualized assessments, not particular outcomes, and that Jasmine's claim was merely a disagreement about treatment that was not actionable. Jasmine could probably not do better than she did without an expert, but Judge Flanagan's allowing the defendants to serve as their own experts compounded the failure to appoint counsel.

LEGISLATIVE & ADMINISTRATIVE *notes*

PENNSYLVANIA – *Pro se* HIV+ inmate Mark French sued for objectionable conditions caused by overcrowding, and denial of his HIV medications for three weeks, during his incarceration for two months at George W. Hill Correctional Facility, naming the Facility and its managing private company, the GEO Group, as defendants in *French v. GEO Grp., Inc.*, 2018 U.S. Dist. LEXIS 174723, 2018 WL 979859 (E.D. Pa., October 10, 2018). U.S. District Judge Gerald J. Pappert dismissed the case without prejudice and with leave to amend. The Correctional Facility was not a proper defendant under 42 U.S.C. § 1983; the GEO Group was, but French failed to show a pattern or practice sufficient to sustain a claim against GEO, under the standards for a municipality in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978); and *McTernan v. City of York*, 564 F.3d 636, 658 (3d Cir. 2009). While French plead that he had to sleep on the floor for 56 days and that the institutional was rampant with violence, he did not specify that he was hurt by either condition in the constitutional sense. Triple-celling and housing of inmates in gymnasiums, both requiring sleeping on the floor, have been upheld in the 3rd Circuit for longer periods than 56 days. As to the denial of HIV meds, French failed to show that this was a pattern or practice of GEO at the facility. In this writer's view, French will not be able to create a triable issue on the HIV meds and the development of resistance over a 3-week interruption without expert testimony. Judge Pappert gave French thirty days to amend.

SOUTH CAROLINA – *Pro se* gay inmate James L. Roudabush, Jr., filed a Civil rights complaint, alleging discrimination against him based on his sexual orientation and his status as “a gay, white man who was friends with a large group of black males” in *Roudabush v. Inch*, 2018 WL 4999776 (D.S.C., September 21, 2018). He claimed

in conclusory terms that he was verbally abused and that his rights to freedom of association and religion were violated. U.S. Magistrate Judge Jacquelyn D. Austin does not discuss the merits of the claims. Instead, her Report and Recommendation [R & R] observes and takes judicial notice that Roudabush has filed over 100 *pro se* lawsuits regarding his imprisonment in the federal courts in the Third and Fourth Circuits, including over 20 appeals. She finds that Roudabush should not be granted leave to proceed *in forma pauperis* for violation of the “three strikes” rules of the Prisoner Litigation Reform Act [PLRA]. There is not much of a teaching experience here, except for one point: The R & R's recommendation of denial of IFP is not a disposition on the merits and therefore does not count as a “strike” under the PLRA. Roudabush can still proceed if he can find a way to pay the filing fee. This is the rule in the Fourth Circuit under *McLean v. United States*, 566 F.3d 391, 393 (4th Cir. 2009), which also applies if there is a dismissal with leave to amend. In other cases, where the three strikes rule is an issue, counsel should check to see if the defendants are counting as a strike a case that was dismissed without prejudice with leave to amend and then see if the rules in the pertinent circuit permit it to be counted towards three strikes.

WISCONSIN – This is the fourth reporting of litigation involving transgender inmate John H. Balsewicz, a/k/a Melissa Balsewicz, *pro se*. Previous cases are summarized in *Law Notes* (September 2018 at page 498). The current case, *Balsewicz v. Pawlyk*, 2018 WL 5313773, 2018 U.S. Dist. LEXIS 183897 (E.D. Wisc., October 26, 2018), involves protection from harm. Previously, U.S. District Judge J.P. Stradtmueller allowed Balsewicz to proceed when she was threatened in the shower, reported it, the officer did nothing, and the assault occurred.

Judge Stadtmueller allowed Balsewicz to file an amended pleading, and she pleaded a second beating by a different assailant, about which she also gave notice of the threat in advance. Judge Stadtmueller allowed Balsewicz to proceed in the current case on both beatings in the amended complaint, including adding defendants, who were implicated in the same failure to protect. Judge Stadtmueller found the allegations indicated a possible “pattern of indifference to her safety,” the details of which would have to be determined as the case progressed: “whether their alleged liability is supported by the evidence must be left for later consideration.” This writer repeats what he wrote in Balsewicz' last reporting: “Unfortunately, Law Notes is full of examples of District Court and Magistrate Judges who do not see their limited gate-keeping role under the Prison Litigation Reform Act in a similar way.” Indeed, this issue has such examples.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF LABOR – As part of the DOL's mission in the Trump Administration to shield federal contractors from any liability for discriminating against LGBT Americans on religious grounds, the Department plans to “update” its rules to reflect the exemptions available to contractors as a defense against accusations of workplace discrimination, according to an October 17 report in *BloombergBNA Daily Labor Report*, which commented, “The move mad add to growing tensions between religious liberty rights for businesses and anti-bias protections for lesbian, gay, bisexual, and transgender individuals. The DOL's Office of Federal Contract Compliance Programs was expected to issue a proposed rule on this

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as early as December. The move reflects a Trump Executive Order instructing the executive branch to maximize protection for religious liberty, as well as an August guidance issued by the DOL. The move also reflects the Trump Administration's mission to minimize the impact of the 1st Amendment's Establishment Clause while maximizing the impact of the Free Exercise Clause, as a way of pandering to the president's "political base."

CALIFORNIA – Although a long-time supporter of LGBT rights, Governor Jerry Brown does not invariably sign every LGBT rights measure passed by the legislature. Early in October, he vetoed some LGBT rights bills. AB 2153, which would have funded annual training sessions for educators on how to support LGBT student ins grades 7-12 was vetoed because, said Brown, current law already provided sufficient funding requirements to cover the purpose of the new measure. Brown also earlier vetoed AB 1247, which would have required at least one hour of LGBT cultural competency training prior to licensure of professional fiduciaries and an additional hour of LGBTQ continuing education every three years. In his veto message, Brown said that he did not believe that the mandated requirements are "warranted." These two vetoes bring to five the number of measures sought by LGBT rights campaigners that have passed the legislature but were vetoed by Brown.

NEW YORK – New York City Council has approved Intro No. 954, which amends the City's administrative code in relation to amending sex designation on birth records. Under the measure, the code adds the possibility of an "x" designation instead of "M" or "F" for individuals who do not identify as either male or female. The measure replaces existing language in the code that requires medical certification in

support of a request for a change of sex designation, instead providing that such a change can be made with "a signed and notarized statement from the registrant requesting that the sex designation be changed to female, male, or x in order to conform to the registrant's gender identity." If the registrant is a minor, notarized statements from their birth parents or legal guardians must accompany the request.

INTERNATIONAL NOTES

By Arthur S. Leonard

BOSNIA & HERZEGOVINA – *Ninfo.com* reported on October 19 that the "Federation of Bosnia and Herzegovina (FBiH) entity government adopted the request for legalization of same-sex marriages at its Friday session," and "the move was welcomed by the LGBTI advocacy group Sarajevo Open Centre, who offered expert assistance to the government in order to adopt the necessary changes as soon as possible." The proposal is for the government to form an "inter-ministerial working group" to analyze regulations that would allow same-sex couples to "realize their rights stemming from the European Human Rights commission and propose regulations which need to be adopted on the territory of the FBiH.

BRAZIL – Many LGBT rights campaigners in Brazil expressed concern at the election as president of Jair Bolsonaro, described as a "strident populist" who is an outspoken opponent of LGBT rights. He was described as "further to the right than any president in the region" in an Oct. 28 report by *The New York Times*. He is infamous for having said that "he'd rather his son die than be gay," and during his campaign circulated propaganda asserting "with no evidence that Mr. Bolsonaro's opponents encouraged schoolchildren to become

gay or reconsider their gender identity by employing sex education materials referred to as 'gay kits.'" Despite these outspoken views, it was reported that a not insubstantial minority of LGBT people in Brazil supported his campaign due to disgust with corruption of the incumbent government.

INDONESIA – The *Jakarta Post* reported on October 20 that police had arrested on October 18 a gay couple who operate a gay community page on Facebook in Bandung, accusing them of allegedly spreading "immoral content" on the internet. The move came amid an "anti-LGBT wave" reported to be "gripping West Java." This was the first reported such arrest, prompted by the government's belief that the website was being used to facilitate the formation of same-sex couples. "They connect and match-make people who want to make same-sex friendships," commented the horrified special crimes deputy director to the press. The *Post* article documented several instances of controversy sparked by a local LGBT presence on the internet.

JAPAN – The Tokyo Metropolitan Government approved a bill that prohibits discrimination on the basis of sexual orientation or gender identity on October 5. The bill commits the city government to conducting public education about LGBT rights, according to a report by *Human Rights Watch*. The bill was passed in anticipation of Tokyo hosting the 2020 Summer Olympics, and the requirements that local host cities uphold the human rights values of banning discrimination as stated in the Olympic Charter. In December 2014, the International Olympic Committee confirmed that all future host city contract would require that the city specifically ban discrimination because of sexual orientation. Although several Japanese municipalities have moved to

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expand protection for LGBT rights, the national government has no legislation protecting LGBT persons from discrimination or recognizing same-sex couples.

MALAYSIA – During a state visit to Thailand, Malaysian Prime Minister Mahathir Mohamad told an audience that his country cannot accept LGBT rights, such as same-sex marriage, labeling them as “Western” values, reported the *South China Morning Post* on October 26. In Malaysia, Islamic courts are given jurisdiction over religious and family matters for Muslim citizens, who make up more than 60% of the population. Mahathir, 93, recently came back to power in an anti-corruption campaign, which overshadowed his “controversial statements on LGBT rights and Jewish people, whom he has called ‘hook-nosed,’” reported the *Post*. However, Mahathir “recently denounced the caning of two women accused of having lesbian sex,” report the *Post*, which said that “the punishment was carried out in front of more than 100 spectators in an Islamic court in early September in the conservative northern state Terengganu. It was the first time women have been caned for same-sex relations in Malaysia, according to campaigners, heightening fears among the country’s LGBT community.”

MEXICO – The Supreme Court of Mexico ruled on October 17 that a transgender person could change their name and gender marker on official documents through a simple administrative process, based solely on their own declaration of gender identity, according to an article about the case in the *Los Angeles Times* on October 29. The case arose from Veracruz, where the states civil code requires approval of a judge for such a change. The Supreme Court found that this constitutes discrimination

because of gender identity, noting that Civil Registries make such changes in identity documents without the need for judicial authorization in other kinds of cases. Due to limitations on the power of the Supreme Court to make precedents binding on state governments, however, the state may persist in requiring judicial approval for such changes until the Supreme Court has ruled on five appeals. The drill is familiar to those who have been following the marriage equality struggle in Mexico, where the Supreme Court has declared that the constitution requires states to issue marriage licenses to same-sex couples, but most states have continued to insist that couples seek court orders (*amparos*) if local authorities refuse to issue the licenses. The battle for marriage equality has continued on a state by state basis. “In repeated cases litigated by the local organization Amicus,” reported *The Times*, “the Guanajuato circuit courts had refused to provide an administrative path to gender recognition. One the other hand, a circuit court in Baja California has ruled that people have the right to change their gender markers in Civil Registries.” Pending before the Supreme Court is a case seeking to resolve the different approaches that state courts have taken on this issue.

POLAND – The *Seattle Post-Intelligencer’s* online reporter, www.seattlepi.com, reported on October 12 that an appeals court in the city of Lublin overruled the city mayor’s ban on the holding of an “equality parade” by supporters of LGBT rights. While Poland’s conservative ruling party is officially opposed to “promoting gay relationships,” it released a statement that the party respects the court’s ruling. The proposed parade was expected to attract a counter-demonstration by right-wing groups, and the mayor of the city, Krzysztof Zuk, premised his ban on the potential for street violence, but said he would abide by the court’s verdict.

ROMANIA – A voter referendum seeking to enshrine a heterosexual definition of marriage in the constitution failed, not because a majority of voters rejected it, but because not enough voters turned out for the referendum to be valid. Only 20.41% of voters cast their votes. LGBT activists and human rights leaders had called on the public to stay away from the polls as the most effective strategy for defeating the measure which, if passed, would have barred the legislature from passing any sort of marriage equality bill.

TAIWAN (REPUBLIC OF CHINA) – Dueling referenda will be held on November 24 on the issue of same-sex marriage. Although the nation’s Constitution Court ruled that the constitution requires the government to afford equal marriage rights to same-sex couples in the spring of 2017, giving the government up to two years to enact appropriate legislation, the effort to enact such legislation has not advanced. Proposals generated by conservative groups have cleared the Central Election Commission’s review process to appear on the ballot, sparking supporters to get up their own proposal, which also attracted sufficient signatures, so Taiwan’s voters will have a clear choice. If the anti-equality measures pass, they will be subject to constitutional challenge, since they cannot amend the constitution. *Taipei Times*, *Taiwan News*.

THAILAND – *Asia.nikkei.com* (Oct. 16) reported that Thailand’s government is preparing a bill that would effectively recognize same-sex unions by the end of this year. While the proposed bill was welcomed by some in the LGBT community, others protested that it would not make full equality in marriage rights available. But it would put Thailand in the vanguard of mainland Asia in terms of LGBT rights recognition.

PROFESSIONAL *notes*

UGANDA – A proposal by LGBT rights activists in Uganda to open a Centre for LGBT People has been met by condemnation from Simon Lokodo, the Minister for Ethics and Integrity, who said that opening such a center would be a criminal act, because “Homosexuality is not allowed and completely unacceptable in Uganda. We don’t and can’t allow it. LGBT activities are already banned and criminalized in this country. So popularizing it is only committing a crime.” But organizers vowed to open the center in Kampala by the end of the year, having undertaking a fundraising campaign.

UNITED KINGDOM – An attempt in the House of Commons to put through a bill that would extend marriage equality to Northern Ireland was blocked on October 26. Because of an electoral deadlock that has deprived any of the political parties from the ability to form a coalition government – in which the staunch opposition of Unionists to same-sex marriage is a prominent factor – it was hoped that the U.K. Parliament would assert its prerogative to end Northern Ireland’s stance as the only component of the U.K. that does not recognize equal marriage rights for same-sex couples. Although the Commons voted on first reading in favor of an amendment to a pending bill to achieve this goal, it was blocked on second reading when a Conservative MP raised an objection, according to *NewsLetter.co.uk*. * * * Reacting to a Supreme Court equality ruling, Prime Minister Theresa May announced that the government will introduce a measure opening up civil partnerships to mixed-sex couples. The civil partnership law was originally passed to provide an institution other than marriage for same-sex couples. Now that the U.K. is a marriage equality jurisdiction, there was pressure from some progressive quarters to open up civil unions to heterosexual couples, so that those with

objections to the historical, religious and gender connotations of traditional marriage would have an alternative option, reported *bbc.com* on October 2.

URUGUAY – *The Associated Press* reported on Oct. 19 that Uruguay’s Congress approved a bill guaranteeing rights to the country’s transgender community. According to the AP report, “The law grants transgender people the right to get an operation that matches their sexual identity. It will be paid by the Uruguayan state along with hormone treatments. The law also ensures a minimum number of transgender people are given public jobs in the next 15 years.” (Affirmative action for transgender people? What a novel idea!) “It mandates that 1 percent of government jobs be reserved and establishes a pension to compensate transgender people who were persecuted during Uruguay’s 1932-1985 military dictatorship.”

PROFESSIONAL NOTES

By Arthur S. Leonard

LAMBDA LEGAL announced that it had received a \$1 million gift to establish the **DANIEL H. RENBERG LEGAL FELLOWSHIP**, at the instance of **EUGENE KAPALOSKI** to honor his deceased husband and celebrate Lambda’s 45th anniversary. Said Kapaloski, “My husband was deeply committed to LGBTQ rights and would be more than proud to support the extraordinary and historic work Lambda is doing.” Renberg was a California businessman, financier and philanthropist, founder of Renberg Capital Management in 1964. He and Kapaloski are longtime supporters of Lambda and other local and national LGBTQ rights organizations. The Fellowship will be based in Lambda’s Western Regional Office in Los

Angeles. The Renberg Fellow will “work closely with Lambda Legal attorneys, conducting legal research and analysis for amicus briefs, reports, policy recommendations, and other projects,” according to an October 16 press release from the organization.

LAMBDA LEGAL Chief Strategy Office **SHARON MCGOWAN** will receive the **AMERICAN BAR ASSOCIATION’S 2019 STONEWALL AWARD** along with attorneys **MARY EATON** and **MARK AGRAST** at a ceremony in Las Vegas on January 26. The award recognizes lawyers who have advanced lesbian, gay, bisexual and transgender individuals in the legal profession and successfully championed LGBT legal causes. Prior to joining Lambda, McGowan served as the Principal Deputy Chief of the Appellate Section of the Civil Rights Division in the U.S. Department of Justice during the Obama Administration. She served as co-chair of the Division’s Lesbian, Gay, Bisexual, Transgender and Intersex Working Group, and before that was a staff attorney with the ACLU’s LGBT & AIDS Projects. **EATON**, a partner at **WILLKIE FARR & GALLAGHER**, has devoted significant time and expertise to LGBT rights pro bono work, including serving as co-counsel with the Legal Aid Society and the Sylvia Rivera Law Project in a precedent-setting lawsuit vindicating the rights of transgender Medicaid recipients, and she served with other Willkie Farr attorneys as co-author of an important amicus brief filed in the *Obergefell* case. She was previously honored by the New York Law Journal with its “Lawyers Who Lead by Example” Award. **Agrast**, who is Executive Director and Executive Vice President of the **AMERICAN SOCIETY OF INTERNATIONAL LAW**, will receive the ABA’s **ROBERT F. DRINAN AWARD**. He is a former co-chair of the **NATIONAL LGBT BAR ASSOCIATION** Board, and played a leading role in creating the ABA’s **COMMISSION**

ON SEXUAL ORIENTATION AND GENDER IDENTITY, and cofounded the **LGBT CONGRESSIONAL STAFF ASSOCIATION** when he worked as an “out” member of the staff of Representative Gerry Studds of Massachusetts. During the Obama Administration, he served as Deputy Assistant Attorney General of the Office of Legislative Affairs.

LAMBDA LEGAL announced that **RICHARD BURNS**, a former Lambda board member and former executive director of NYC’s LGBT Community Services Center, will serve as Interim CEO while Lambda conducts a national search for a new executive director. Rachel Tiven resigned from the role in August. Before coming to NYC to work for the Community Center, Burns was a leading activist in Boston, having served as president of the founding board of directors of GLAD, New England’s LGBT legal rights organization, from 1978 through 1986.

FLOR BERMUDEZ announced leaving the **TRANSGENDER LAW CENTER** to take a position at a community-based San Francisco private law firm.

Always full of surprises, President Donald J. Trump has nominated **PATRICK BUMATAY**, an out gay man well-known in conservative legal circles, to a seat on the U.S. Court of Appeals for the 9th Circuit, according to an October 11 report in the *San Francisco Chronicle’s* on-line edition. Bumatay worked in the Justice Department during the Bush Administration before becoming an assistant U.S. Attorney in 2012. According to the Chronicle report, he “is on assignment in the Justice Department as a counselor to Attorney General Jeff Sessions.” The White House stated that he is a member of the Tom Homann LGBT Law Association in San Diego, a fact omitted from reporting about the nomination by conservative news outlets such as *National Review*, which instead emphasized his membership in an Asian-American lawyers group.

“Bullying” cont. from pg. 582

Although some of the complaints of conduct are arguably ‘tinged’ with sexual connotation, Plaintiffs have simply failed to demonstrate YAF’s conduct was outside of common-place insults used by bullies, in their simple quest to demean and subjugate others.”

Title IX is a sex discrimination statute, and what IV was subjected to was not sex discrimination, in the court’s opinion, but bullying *simpliciter*, not actionable under the statute. Also, Judge Rice found that what was communicated to school authorities about what was going on was insufficient to put them on notice of the full problem until shortly before they took action against YAF. The opinion would be useful evidence for anybody lobbying a legislature to pass an anti-bullying statute that does not require a finding that the bullying was motivated by the victim’s race, sex, religion, or any of the other characteristics identified as “forbidden grounds” in anti-discrimination laws; instead, a more effective law would focus on the nature of the bullying conduct rather than the reason for it. After all, our schools should be safe places in which students are not deprived of an opportunity to learn because of bullying conduct by other students, regardless of the bullies’ motivations. ■

EDITOR’S NOTES

All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please contact info@le-gal.org.

PUBLICATIONS

1. Apsani, Rishita, Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause, 106 Calif. L. Rev. 1689 (Oct. 2018).
2. Baia, Elizabeth J., Akin to Madmen: A Queer Critique of the Gay Rights Cases, 104 Va. L. Rev. 1021 (Sept. 2018).
3. Cacchio, Jennifer, Title IX and the Constitution: Equal Protection Violations and Sexual Harassment, 86 UMKC L. Rev. 627 (Winter 2018).
4. Campbell, James A., Compelled Speech in Masterpiece Cakeshop: What the Supreme Court’s June 2018 Decisions Tell Us About the Unresolved Questions, 19 Federalist Soc’y Rev. 142 (Sept. 24, 2018) (contends that the Supreme Court’s June 2018 rulings in other “compelled speech” cases suggest that the Court is likely in future to find 1st Amendment protection for wedding vendors who refuse to provide services for same-sex weddings on “compelled speech” arguments).
5. Hernandez-Truyola, Berta Esperanza, Hope, Dignity, and the Limits of Democracy, 10 Ne. U. L. Rev. 654 (Summer 2018).
6. Koffler, Jason, Laboratories of Equal Justice: What State Experience Portends for Expansion of the Penarodriguez Exception Beyond Race, 118 Colum. L. Rev. 1801 (October 2018) (Should the Supreme Court’s willingness to open up jury verdicts on evidence of juror race bias be expanded to other kinds of bias?).
7. McNamarah, Chan Tov, Silent, Spoken, Written, and Enforced: The Role of Law in the Construction of the Post-Colonial Queerphobic State, 51 Cornell Int’l L.J. 495 (Spring 2018) (We’re proud to claim the author as a contributing writer to Law Notes.)
8. Menkel-Meadow, Carrie, Why We Can’t “Just All Get Along”: Dysfunction in the Polity and Conflict Resolution and What We Might Do About It, 2018 J. Disp. Resol. 5 (Fall 2018).
9. Youngman, Julia, and Courtney Hauck, Medical Necessity: A Higher Hurdle for Marginalized Taxpayers?, 51 Loyola of L.A. Law Rev. No. 1 (2018) (questions judicial imposition of a “medical necessity” test in determining whether health insurance should cover transgender procedures).