

L G B T
LAW NOTES

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JUSTICE
KENNEDY
OUT

Retirement Could Doom LGBT Rights Legacy and Agenda

EXECUTIVE SUMMARY

- 339 Kennedy Retirement from Supreme Court May Doom LGBT Rights Agenda
- 342 First Application of *Masterpiece Cakeshop* by Lower Court Goes Against Discriminatory Wedding Vendor
- 345 Sessions Asylum Decision Will Create Difficulties for Some LGBTQ Asylum Applicants
- 348 Supreme Court Rejects Gay Death Row Inmate's Appeal
- 349 Supreme Court Orders "Further Consideration" by Washington State Courts in Wedding Flowers Case
- 351 Juror Anti-Gay Bias in Horrific Florida Death Penalty Case Justifies Evidentiary Hearing
- 352 3rd Circuit Explains Dismissal of Cisgender Students' Challenge to School District's Trans-Affirmative Facilities Policy
- 354 Idaho Federal Judge Declines to Dismiss Transgender Inmate's Civil Rights Suit, including Claims under the Americans with Disabilities Act, the Affordable Care Act, and State Tort Law
- 355 Massachusetts Federal Judge Refuses to Dismiss Transgender Inmate's ADA Claims Despite Statutory "Gender Identity Disorder" Exclusion; Ramifications Go Far Beyond Corrections
- 357 Justice Department's New Request to Implement Transgender Policy Denied by Seattle District Court
- 358 11th Circuit Remands Imputed Gay Salvadoran Case on Unrelated Criminal Immigration Issue
- 359 Obscure Brooklyn Appellate Ruling Protects Transgender People from Discrimination without Saying So
- 361 Federal Court Rules against Cosmetic Surgeon Who Refuses to Treat People with HIV Taking Antiretroviral Medications
- 363 Gay or Lesbian Plaintiffs Cannot Overcome Adverse 6th Circuit Precedent in Sexual Orientation Claims Under Title VII
- 366 Nebraska Supreme Court Decides Gay Man Gifted Dog to His Partner Prior to Their Break-up
- 368 Georgia Court of Appeals Reverses the Conviction of an HIV-Positive Defendant on Evidentiary Grounds
- 369 "Spouse" in European Union Free Movement Law Includes a Same-Sex Spouse
- 370 N.Y. Appellate Division Remands *Gunn v. Hamilton* for Equitable Estoppel Hearing in Co-Parent Contest
- 372 Canadian Supreme Court Rejects Religious Exceptionalism to Discriminate against LGBTQ Law Students
- 374 Iowa Trial Court Strikes Iowa's Refusal to Provide Gender Affirming Surgery to Transgender Medicaid Recipients

376 Notes

404 Citations

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Editor-In-Chief

Arthur S. Leonard,
Robert F. Wagner Professor of Labor and Employment Law
New York Law School
185 West Broadway | New York, NY 10013
(212) 431-2156 | arthur.leonard@nyls.edu

Contributors

Brett M. Figlewski, Esq.
Matthew Goodwin, Esq.
Katie Hansson, Univ. of FL '18
Bryan Johnson-Xenitelis, Esq.
Eric Lesh, Esq.
Vito John Marzano, Esq.
Chan Tov McNamara, Cornell '19
Ryan Nelson, Esq.
Shayla Ramos, Hofstra '19
Timothy Ramos, NYLS '19
William J. Rold, Esq.
Carl Rogers, Esq.
Joseph B. Rome, Esq.
Deborah Sparks, Esq.
Robert Watson, Esq.
Matteo M. Winkler, Esq.
Prof. Robert Wintemute

Production Manager

Leah Harper

Circulation Rate Inquiries

LeGaL Foundation
@ Centre for Social Innovation
601 West 26th Street, Suite 325-20 | New York, NY 10001
(212) 353-9118 | info@le-gal.org

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Kennedy Retirement from Supreme Court May Doom LGBT Rights Agenda

By Arthur S. Leonard

Justice Anthony M. Kennedy's announcement on June 27 that he would retire from active service on the U.S. Supreme Court as of July 31, 2018, opening up a vacancy that President Donald J. Trump can fill with the approval of a bare majority of the U.S. Senate, whose political balance is now 51-49 Republican, portends a serious setback for LGBT rights in the years ahead. Kennedy cast a crucial vote and wrote powerfully emotional opinions to establish the dignity of LGBT people under the Constitution's 5th and 14th Amendments. Justice Kennedy will be remembered as the author of four major

the same time signaled to LGBT rights litigation groups that it was time to return to the federal courts to challenge sodomy laws.

Before his opinion for the Court in *Lawrence v. Texas*, 539 U.S. 558, was announced on June 26, 2003, the Court had never used the Due Process Clause to strike down an anti-gay law. In *Lawrence*, Kennedy wrote for five members of the Court that the Texas Homosexual Conduct Law, by making private consensual adult gay sex a crime, had unconstitutionally abridged the liberty of gay people. (Justice O'Connor concurred in an opinion focused solely

sex couples to marry. In *Windsor*, Kennedy wrote that the Defense of Marriage Act, a statute requiring the federal government to refuse to recognize same-sex marriages that were valid under state law, violated both the Due Process and Equal Protection requirements of the 5th Amendment, emphasizing the affront to the dignity of gay married couples. In dissent, of course, Justice Scalia accused the Court of providing a framework for lower courts to strike down state bans on same-sex marriage. Scalia's dissent was prophetic. Just two years later, the Court ruled in *Obergefell* that the

Justice Kennedy will be remembered as the author of four major Supreme Court opinions that worked toward a revolution in United States constitutional law concerning the rights of sexual minorities.

Supreme Court opinions that worked toward a revolution in United States constitutional law concerning the rights of sexual minorities.

Before his opinion for the Court in *Romer v. Evans*, 517 U.S. 620, was announced on May 20, 1996, the Court had never ruled in favor of gay litigants in an Equal Protection Case. In *Romer*, the Court invalidated a Colorado constitutional amendment, adopted in a voter initiative that banned the state from protecting gay people from discrimination. Kennedy condemned the measure as an attempt to render gay people as "strangers to the law," and found it to be an obvious violation of equal protection, in an opinion speaking for six members of the Court. This led Justice Scalia to complain in dissent that the Court's opinion was inconsistent with its ruling a decade earlier that sodomy laws were constitutional, and at

on the equal protection clause.) This time, Justice Scalia's dissent denounced the Court's opinion as opening the path to same-sex marriage, signaling to LGBT rights litigation groups that the Court's opinion would be helpful in the already-launched marriage equality project. The *Lawrence* opinion was prominently cited by the Massachusetts Supreme Judicial Court just months later when it issued the first ruling by a state's highest court in favor of marriage equality (albeit based on the state's constitution, not the 14th Amendment). See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

Kennedy's opinions in *United States v. Windsor*, 570 U.S. 744 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), both 5-4 cases, established a right to marriage equality for LGBT people in the United States, the most populous nation so far to allow same-

sex couples to marry. In *Windsor*, Kennedy wrote that the Defense of Marriage Act, a statute requiring the federal government to refuse to recognize same-sex marriages that were valid under state law, violated both the Due Process and Equal Protection requirements of the 5th Amendment, emphasizing the affront to the dignity of gay married couples. In dissent, of course, Justice Scalia accused the Court of providing a framework for lower courts to strike down state bans on same-sex marriage. Scalia's dissent was prophetic. Just two years later, the Court ruled in *Obergefell* that the

opinion in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), rejecting a 1st Amendment challenge to a public university law school's refusal to extend official recognition to a Christian student group that overtly discriminated against gay students.

When LGBT litigants lost Kennedy's vote, however, they lost the Court. In his most recent LGBT-related decision, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2018 WL 2465172, 2018 U.S. LEXIS 3386 (June 4, 2018), while reiterating his concern for the dignity of gay people to be able to participate without discrimination in the public marketplace, Kennedy apparently could not bring himself to reject the religious free exercise claims of a Christian baker, and so engineered an "off ramp" by embracing a dubious argument that the Colorado Civil Rights Commission was so overtly hostile to the baker's religious beliefs that he had been deprived of a "neutral

forum" to decide his case. (Kennedy's concern for the dignity of the baker was signaled during oral argument, when Kennedy lectured Colorado's solicitor general about the hostility to the baker's religious beliefs that Kennedy believed had been shown at the state civil rights commission's hearings.) Thus, Kennedy was able to assemble a 7-2 vote to overturn the Colorado Court of Appeals ruling in that case, without directly ruling on whether the baker's religious objections would override the non-discrimination requirements of Colorado law, leading to oversimplified media headlines suggesting that the baker had a 1st Amendment right to refuse to make the cake.

had a 1st Amendment right to deny membership to an out gay Assistant Scoutmaster, based on BSA's rights of free speech and expressive association. He was part of the unanimous Courts that rejected a constitutional challenge to the Solomon Amendment, a law denying federal money to schools that barred military recruiters (mainly because of the Defense Department's anti-gay personnel policies), in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), and that, reversing the Massachusetts Supreme Judicial Court, held that a gay Irish-American group could be barred from marching in Boston's St. Patrick's Day Parade in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). However, in those cases all of the more liberal members of the Court joined in the unanimous opinions, so Kennedy's vote did not make a difference to the outcome.

law scholars and students, such as "suspect classification," "heightened scrutiny," "compelling state interest" and the like, leaving doubt about the potential application of these rulings. Indeed, three justices dissenting from the *per curiam* ruling in *Pavan v. Smith* in an opinion by Justice Gorsuch claimed that the Court's *Obergefell* ruling had left undecided the question in *Pavan* – whether Arkansas had to list lesbian co-parents on birth certificates – and the Texas Supreme Court expressed similar doubts about the extent of *Windsor* and *Obergefell* in refusing to put an end to a dispute about whether the city of Houston had to extend employee benefits eligibility to the same-sex spouses of city employees. At the time of writing, this case is still "live" in the Texas courts, and might well provide a vehicle for a more conservative Court absent Kennedy to chip away at marriage equality, as could several pending wedding vendor cases. While some courts, such as the 9th Circuit Court of Appeals, saw Kennedy's opinions as extending protected class status to gay people for equal protection purposes, others insisted that those rulings had produced no such precedent, and plenty of lower courts have rejected the idea that *Lawrence* recognized a fundamental right for private, adult, consensual sex in contests other than homosexuality! The problems created by Justice Kennedy's judicial writing style were expounded in detail by law professors Kent Greenfield and Adam Winkler in an op-ed article published in the *New York Times* shortly after Kennedy's announcement was released, title "Without Kennedy, the Future of Gay Rights is Fragile" (June 28).

During his last term on the Court, Kennedy seemed to have abandoned his willingness to "swing" from time to time into alliance with the four Democratic appointees to produce a progressive result. Rather, it was Chief Justice Roberts or Justice Gorsuch who joined with more liberal judges in a handful of 5-4 decisions where Kennedy was with the conservative dissenters, and all the other 5-4 decisions were strict party-line votes, 5 Republican

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forum" to decide his case. (Kennedy's concern for the dignity of the baker was signaled during oral argument, when Kennedy lectured Colorado's solicitor general about the hostility to the baker's religious beliefs that Kennedy believed had been shown at the state civil rights commission's hearings.) Thus, Kennedy was able to assemble a 7-2 vote to overturn the Colorado Court of Appeals ruling in that case, without directly ruling on whether the baker's religious objections would override the non-discrimination requirements of Colorado law, leading to oversimplified media headlines suggesting that the baker had a 1st Amendment right to refuse to make the cake.

Kennedy also joined the majority (without writing) in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), a 5-4 ruling holding that the Boy Scouts

While Justice Kennedy's majority opinions in the four major LGBT rights cases were triumphs for LGBT rights, they were not viewed as unalloyed triumphs in the halls of legal academe. Commentators who agreed with the results were frequently harshly critical of Kennedy's opinions in terms of their articulation of legal reasoning and doctrinal development. The *Romer* decision left many scratching their heads, trying to figure out whether the Court had applied some sort of "heightened scrutiny" to the Colorado constitutional amendment, puzzled about the precedential meaning of the ruling for later LGBT-related equal protection challenges. There was similar criticism of the opinions in *Lawrence*, *Windsor*, and *Obergefell*. Kennedy failed to use the doctrinal terminology familiar to constitutional

appointees (including Kennedy) versus 4 Democratic appointees in dissent.

Justice Kennedy's announcement of retirement, effective July 31, 2018, most likely portends a retreat from LGBT rights leadership by the Supreme Court, and a possible opening for conservative justices to cut back in various ways on the precedents created by Kennedy's major LGBT rights decisions. Assuming that President Trump nominates and the Republican majority in the Senate confirms a justice with the ideological and doctrinal profiles of Neil Gorsuch or Samuel Alito, the crucial fifth vote to make a pro-LGBT majority would seem to be missing.

However, Supreme Court appointments are a tricky business. In the past, presidents have sometimes been astounded at the subsequent voting records of their appointees. President Dwight Eisenhower called his appointment of William J. Brennan one of the worst mistakes of his presidency, as Brennan went on to be a leader of the Court's left wing. Had he lived long enough to see it, President John F. Kennedy might have been similarly disappointed by the rightward drift of Byron R. White, his nominee who wrote the blatantly homophobic decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia's felony sodomy law, calling a claim to constitutional protection for gay people to be "at best facetious." President Richard Nixon was undoubtedly disappointed with the leftward drift of Harry Blackmun, author of *Roe v. Wade*, 410 U.S. 113 (1973), the Court's key abortion rights decision, and a vigorous dissenter in *Bowers v. Hardwick*. President Ronald Reagan appointed Anthony Kennedy assuming that he would provide a vote to strike down abortion rights, but Kennedy was part of a moderate Republican coalition (joining with Justices Sandra Day O'Connor and David Souter) that voted to reaffirm those rights in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). President George H. W. Bush's appointment of Souter ended up being a massive disappointment to conservatives, as Souter frequently voted with the

Democratic appointees and the leftward veering John Paul Stevens, who had been appointed by President Gerald Ford and ended up being much more liberal than Ford likely expected. Souter became so disillusioned by the Court's 5-4 decision in *Bush v. Gore*, 531 U.S. 98 (2000), handing the presidency to George W. Bush after Albert Gore decisively won the national popular vote and may well have been entitled to the Florida electoral votes needed to put him over the top, that he retired from the Court prematurely, to judge by the more usual retirement ages of his colleagues.

Thus, the past records of Supreme Court nominees are not inevitably accurate in predicting how they will vote on the Court over the long term. Supreme Court justices frequently serve for several decades (Kennedy's

time, making long-term predictions can be difficult. But the examples of Brennan, Souter and Kennedy have caused the confirmation process to change drastically, and the possibility of an appointee turning out to be a total surprise appears to have diminished sharply ever since the controversy over Robert Bork's nomination by Reagan in 1987, but it is not entirely gone. One can hope that a Trump appointee will not be totally predictable in the Alito/Gorsuch mold, although that may be unduly optimistic when it comes to LGBT issues. In his first full term on the Court, Justice Gorsuch has not cast 100% predictable votes, but his dissent in *Pavan* and concurrence in *Masterpiece* do not suggest that his views of LGBT rights have mellowed in his short time on the Court. Only time will tell, and

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service stretched to 30 years), and the looming constitutional issues at the time of their appointment are inevitably replaced by new, unanticipated issues over the course of their service. Also, past records as federal circuit or state appellate judges are not necessarily good predictors of how justices will vote on constitutional issues on the Supreme Court, when they are not constrained as lower court judges are by Supreme Court precedents. The Supreme Court is like no other court in the United States, in which the constraints of constitutional precedent faced by lower court judges are significantly loosened. Because the Supreme Court can reverse its prior holdings and in theories and trends in constitutional and statutory interpretation evolve over

commentators speculating particularly on how this change on the Court will affect LGBT rights have tended to focus more on the Chief Justice – whose concern for institutional legitimacy may override his politics at times – as possibly providing the fifth vote against outright overruling of important LGBT-related precedents, despite his dissents when they were rendered. A slender reed, indeed . . .

CNN reported on June 29 that the White House expected a nomination to be forthcoming by July 9, after this issue of *Law Notes* goes to press. ■

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

First Application of *Masterpiece Cakeshop* by Lower Court Goes Against Discriminatory Wedding Vendor

By Arthur S. Leonard

The precedential meaning of a Supreme Court decision depends on how lower courts interpret it, and how the Supreme Court deals with it in subsequent cases. Media headlines reported a “win” for baker Jack Phillips as the Supreme Court reversed the Colorado Court of Appeals ruling that Phillips and his business violated the state’s public accommodations law by refusing in 2012 to make a wedding cake for a same-sex couple. *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, 2018 WL 2465172, 2018 U.S. LEXIS 3386 (June 4, 2018). But it may have been only a superficial “win,” to judge by its first application

be found in *Litigation Notes*, below. On June 25, the Supreme Court granted certiorari in *Arlene’s Flowers v. State of Washington*, No. 17-108, vacated the Washington Supreme Court’s decision ruling against a florist who refused to provide floral decorations for a same-sex wedding, and remanded the case for “further consideration” in light of *Masterpiece Cakeshop*, thereby potentially muddying the waters about the meaning of the Court’s holding. This development is addressed in the next article below.

Alliance Defending Freedom (ADF), the same anti-LGBT legal outfit that represented Jack Phillips before

As described in the Court of Appeals’ opinion by Judge Lawrence F. Winthrop, the owners “believe their customer-directed and designed wedding products ‘convey messages about a particular engaged couple, their upcoming marriage, their upcoming marriage ceremony, and the celebration of that marriage.’ And they did not want any part of it. They “also strongly believe in an ordained marriage between one man and one woman, and argue that they cannot separate their religious beliefs from their work. As such, they believe being required to create customer-specific merchandise for same-sex weddings will violate their religious beliefs.”

They not only wanted to be assured that they could reject such business without risking legal liability; they also wanted to post a public statement explaining their religious beliefs, including a statement that they would not create any artwork that “promotes any marriage except marriage between one man and one woman.” They haven’t posted such a statement yet out of concern that it would violate a provision of the Phoenix ordinance, which forbids a business from posting or making any communication that “states or implies that any facility or services shall be refused or restricted because of . . . sexual orientation . . . , or that any person, because of . . . sexual orientation . . . would be unwelcome, objectionable, unacceptable, undesirable, or not solicited.”

Judge Mullins rejected the motion for preliminary injunction, finding that the business did not enjoy a constitutional exemption. The Court of Appeals held up ruling on ADF’s appeal until the Supreme Court issued its *Masterpiece Cakeshop* ruling on June 4, then quickly incorporated references to it into an opinion evidently already in the works by Judge Winthrop and issued it on June 7.

After reviewing the unbroken string of state appellate court rulings from

The court rejected the motion for preliminary injunction, finding that the business did not enjoy a constitutional exemption.

by a lower court in *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 418 P.3d 426, 792 Ariz. Adv. Rep. 4 (Arizona Ct. App., Div. 1, June 7, 2018). The Arizona appeals court affirmed a ruling by Maricopa County Superior Court Judge Karen A. Mullins rejecting the plaintiffs’ claim that the city’s public accommodations law would violate their constitutional rights if it required them to provide goods and services for same-sex weddings, and cited and quoted from *Masterpiece Cakeshop* in support of its decision.

In a separate ruling, the Oregon Supreme Court announced on June 23 that it would not review the state court of appeals ruling against a baker in *Klein d/b/a Sweetcakes by Melissa v. Oregon Bureau of Labor and Industries*, 410 P. 3d 1051, 289 Or. App. 507 (Dec. 28, 2017), another wedding cake case. More details on this development can

the Supreme Court in *Masterpiece*, represents Brush & Nib Studio, LC, a for-profit company that sells both pre-fabricated and specially designed artwork. The company provides retail goods and services to the public, so it comes within the coverage of the city of Phoenix, Arizona’s, public accommodations anti-discrimination ordinance. Although Brush & Nib had not received any requests to produce invitations for a same-sex wedding since such marriages became legal in Arizona, the owners had determined, based on their religious beliefs, that they would not provide their goods and services for such ceremonies. Represented by ADF, they sued in the state trial court in Phoenix, seeking a preliminary injunction to bar enforcement of the ordinance against them in case such a customer should materialize in the future.

around the country that have rejected religious and free speech exemption claims in such cases over the past several years, Judge Winthrop wrote: “In light of these cases and consistent with the United States Supreme Court’s decisions, we recognize that a law allowing Appellants to refuse service to customers based on sexual orientation would constitute a ‘grave and continuing harm,’” citing the Supreme Court’s marriage equality ruling, *Obergefell v. Hodges*.

He continued with a lengthy quote from Justice Anthony Kennedy’s opinion for the Supreme court in *Masterpiece Cakeshop*. Significantly, in citing that case, the judge used the Colorado Court of Appeals citation, following by *reversed on other grounds*. Thus, the Arizona Court of Appeals made clear that the Supreme Court’s ruling in *Masterpiece Cakeshop* did not hold that wedding vendors enjoy a 1st Amendment right to refuse to provide their services to same-sex couples.

“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” wrote Justice Kennedy for the Supreme Court. “For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, ‘[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.’ Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v.*

Piggy [Piggie] Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam); see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”).”

The cases cited by Justice Kennedy in the quoted paragraph evidently sent a strong message for lower courts. *Piggie Park* is a classic early decision under the Civil Rights Act of 1964, holding that a restaurant owner’s religious opposition to racial integration could not excuse him from serving people of color in his barbecue restaurant. *Hurley* was the famous St. Patrick’s Day Parade case from Boston, where the Supreme Court upheld the 1st Amendment right of parade organizers to exclude a gay Irish group from marching under their own banner proclaiming their gay identity. The quoted language from that decision made clear that states may pass laws forbidding sexual orientation discrimination by businesses, but in this case the Court found that the parade organizers were *not* a business selling goods and services, but rather the non-profit organizers of an expressive activity who had a right to determine what their activity would express.

The points are clear: States can forbid businesses from discriminating against customers because of their sexual orientation, and businesses with religious objections will generally have to comply with the non-discrimination laws. The “win” for baker Jack Phillips involved something else entirely: the Supreme Court’s perception that Colorado’s Civil Rights Commission did not give Phillips a fair hearing because members of the Commission made public statements which a majority of the Supreme Court believed could be seen as denigrating Phillips’ religious beliefs at the hearing. Justice Kennedy insisted for the Court that a litigant’s dignity requires that the tribunal deciding his case be neutral and not overtly hostile to his religious beliefs, and that was the reason for reversing

the state court and the state agency. Kennedy’s discussion of the law clearly pointed in the other direction, as Justice Ruth Bader Ginsburg observed in her dissent, joined by Justice Sotomayor. And the Arizona Court of Appeals clearly got that message.

Turning to ADF’s free speech argument, Justice Winthrop wrote, “Appellants argue that [the ordinance] compels them to speak in favor of same-sex marriages. We disagree. Although [it] may have an incidental impact on speech, its main purpose is to prohibit discrimination, and thus [it] regulates conduct, not speech.”

The court found this case similar to *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), a case in which the Supreme Court rejected a free speech challenge by an organization of law schools to a federal law that required schools to host military recruiters at a time when the Defense Department’s policies discriminated against gay people. The law schools claimed that complying with the law would violate their 1st Amendment rights, but the Supreme Court said that the challenged law did not limit what the schools could say, rather what they could do; that is, conduct, not speech.

“We find *Rumsfeld* controlling in this case,” wrote Winthrop. The court found that the “primary purpose” of the city ordinance is to “prohibit places of public accommodation from discriminating based on certain protected classes, i.e., sexual orientation, not to compel speech . . . Like *Rumsfeld*, [the ordinance] requires that places of public accommodation provide equal services if they want to operate their business. While such a requirement may impact speech, such as prohibiting places of public accommodation from posting signs that discriminate against customers, this impact is incidental to property regulated conduct.” (No comment by the court on the irony of invoking *Rumsfeld*, a case rejecting a gay rights claim, in support of the City’s right to require a business to provide services on an equal basis to a same-sex couple.)

Further distinguishing this case from *Hurley*, the court said that requiring the business to comply with the law “does

not render their creation of design-to-order merchandise for same-sex weddings expressive conduct. The items Appellants would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public. Take for instance an invitation to the marriage of Pat and Pat (whether created for Patrick and Patrick, or Patrick and Patricia), or Alex and Alex (whether created for Alexander and Alexander, or Alexander and Alexa). This invitation would not differ in creative expression. Further, it is unlikely that a general observer would attribute a company's product or offer of services, in compliance with the law, as indicative of the company's speech or personal beliefs. The operation of a stationery store – including the design and sale of customized wedding event merchandise – is not expressive conduct, and thus, is not entitled to First Amendment free speech protection.”

The court also rejected an argument that the ordinance violated the right of expressive association. “We do not dispute that some aspects of Appellants’ operation of Brush & Nib may implicated speech in some regard,” wrote Justice Winthrop, “but the primary purpose of Brush & Nib is not to convey a particular message but rather to engage in commercial sales activity. Thus, Appellants’ operation of Brush & Nib is not the type of expressive association that the First Amendment is intended to protect.” Certainly not like a parade, which the Supreme court in *Hurley* described as a “quintessential” expressive activity.

However, the court found that the portion of the ordinance dealing with forbidden communications used vague language that was overbroad and unclear about which statements might constitute violations. “We are unable to interpret [the ordinance’s] use of the words ‘unwelcome,’ ‘objectionable,’ ‘unacceptable,’ and ‘undesirable’ in a way that would render [it] constitutional,” wrote Winthrop. “The presence of one invalid prohibition, however, does not invalidate all of [the ordinance].”

“Here, by striking the second half [of the offending section] – which bans an owner of a place of public

accommodation from making a person feel ‘unwelcome,’ ‘objectionable,’ ‘unacceptable,’ and ‘undesirable’ based on sexual orientation – does not render the remainder of the ordinance unenforceable or unworkable . . . The remainder of [the provision] operates independently and is enforceable as intended.”

Turning to the free exercise of religion issue, the court had to deal with the state’s Free Exercise of Religion Act, which prohibits governmental entities in Arizona from substantially burdening a person’s exercise of religion “even if the burden results from a rule of general applicability” unless the rule is both “in furtherance of a compelling government interest and is the least restrictive means of furthering that governmental interest.” The statute’s language is taken verbatim from the federal Religious Freedom Restoration Act.

The court rejected the argument that requiring the business to provide goods and services for same-sex weddings imposed a substantial burden on the religious beliefs of the business owners. “Appellants are not penalized for expressing their belief that their religion only recognizes the marriage of opposite sex couples,” wrote Winthrop. “Nor are Appellants penalized for refusing to create wedding-related merchandise as long as they equally refuse similar services to opposite-sex couples. [The ordinance] merely requires that, by operating a place of public accommodation, Appellants provide equal goods and services to customers regardless of sexual orientation.” They could stop selling wedding-related goods altogether, but what they “cannot do is use their religion as a shield to discriminate against potential customers,” said the court. Although providing those goods and services to same-sex couples might “decrease the satisfaction” with which they practice their religion, “this does not, *a fortiori*, make their compliance” a substantial burden to their religion.

And, even if it did impose such a burden, the court found that the city of Phoenix “has a compelling interest in preventing discrimination, and has done so here through the least restrictive

means. When faced with similar contentions, other jurisdictions have overwhelmingly concluded that the government has a compelling interest in eradicating discrimination.” The court quoted from the Washington Supreme Court’s decision in *Arlene’s Flowers*, but could just as well have been quoting Justice Kennedy’s language in *Masterpiece Cakeshop*.

Finally, the court rejected an equal protection challenge to the ordinance, finding that it did not treat people with religious beliefs about marriage differently than others, and that the owners of the business could not claim that they are members of a “suspect class” for purposes of analyzing their equal protection claim. “Phoenix has a legitimate governmental purpose in curtailing discriminatory practices,” wrote Winthrop, “and prohibiting businesses from sexual orientation discrimination is rationally related to that purpose.”

A spokesperson for ADF promptly announced that they would seek review from the Arizona Supreme Court, which has discretion whether to review the decision. Seeking review is a prerequisite to petitioning the U.S. Supreme Court for cert. ADF is clearly determined to get this issue back before the Supreme Court, and would be especially excited to do so after Justice Kennedy’s retirement from the Court. ADF also represents *Arlene’s Flowers*, whose petition was still pending when the Arizona court ruled (see article directly below), and it also represents a videography company, Telescope Media Group, in a case similar to *Brush & Nib Studio*, affirmatively litigating to get an injunction against the Minnesota Human Rights Law so as to allow the company to expand into wedding videos without having to do them for same-sex weddings. The district court’s ruling against them in that case is on appeal in the 8th Circuit. *Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), appeal pending. One way or another, it seems likely that this issue will get back to the Supreme Court before too long, and before a cast of characters altered since *Masterpiece* was decided. ■

Sessions Asylum Decision Will Create Difficulties for Some LGBTQ Asylum Applicants

By Arthur S. Leonard

Attorney General Jeff Sessions issued an opinion on June 11, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), binding on Immigration Judges (IJ) and the Board of Immigration Appeals (BIA), toughening the standards for granting asylum to persons seeking to live in the United States by claiming that they had to flee their home country because of persecution. The particular focus of Sessions' opinion was cases where women sought asylum based on past abuse by their husbands or domestic partners, and this factual setting received most of the media attention, but, depending how broadly his opinion is interpreted, it may also pose barriers to LGBTQ people, particularly minors, fleeing from actual or feared violence at the hands of their families and neighbors.

Sessions' decision was presented as part of the Trump Administration's commitment to the president's political base to reduce immigration to the United States and to sharply limit the number of people who can gain admission to live here based on refugee status.

The statutes governing asylum claims give the Attorney General (AG) significant authority to establish the legal interpretations and precedents followed within the administrative process. The IJ's are Justice Department employees, not members of the independent judicial branch established under Article III of the Constitution. Similarly, the BIA functions as an administrative unit within the Justice Department whose decisions are subject to review by the AG.

While the AG's opinions are not binding on the federal courts, the asylum statute gives the courts a very limited role in reviewing refugee decisions: to correct clear legal errors. The court may not reject the factual and legal conclusions of the IJ's and the BIA unless there is clear error, not just a difference of opinion about what

the evidence shows. Sessions' opinion emphasized that the BIA is also very limited in reviewing IJ decisions, and must defer heavily to IJ rulings on the credibility of witnesses and findings of fact. Furthermore, the ultimate decision to grant asylum in any particular case is up to the discretion of the Attorney General, who is not bound by the BIA's decisions.

In this case, Sessions not only overturned a decision by the BIA to grant asylum to the petitioner, but also overruled a 2014 BIA decision that had been treated as precedential on the question whether women who are

important advance by designating as precedential a BIA opinion that had been issued in 1990, *Matter of Toboso-Alfonso*, 20 I & N Dec. 819, which found that gay people could constitute a "particular social group" for this purpose, depending on whether they were viewed as a distinct social group in the country from which an individual gay person was seeking asylum. During the Obama Administration, the Justice and Homeland Security Departments issued guidance documents recognizing protected status for LGBT people more generally, in line with policy statements emanating from the White House.

Sessions also expressed disapproval of decisions that have too easily allowed the applicants to assert that the government is indifferent to the harms they suffer.

victims of domestic violence are entitled to asylum in the United States, although federal appeals courts have been divided over whether to follow that 2014 ruling as a correct interpretation of the statute.

The asylum statute explicitly protects people who have suffered persecution in their home country on account of their race, religion, nationality, political opinion, or membership in a "particular social group." The statute does not define "particular social group," the meaning of which has been developed by the BIA and the courts over decades. The A.G. may designate particular decisions by the BIA as "precedential," and past Attorneys General have done so with cases that have attempted to describe particular social groups entitled to protection.

During the Clinton Administration, Attorney General Janet Reno made an

Since then, there have been many refugee cases in which IJ's, the BIA and various federal appeals courts have considered LGBT applicants to be members of a "particular social group" for this purpose. Indeed, in recent years, the U.S. Court of Appeals for the 9th Circuit has issued a series of decisions finding that transgender people in Mexico are a particular social group that is highly vulnerable to persecution, to the extent of being presumptively entitled to protection under the Convention against Torture, taking particular note of the propensity of Mexican police officers and soldiers to sexually assault and severely beat transgender women. These 9th Circuit opinions have routinely reversed rulings by the BIA, criticizing both the Board and Immigration Judges for inappropriately relying on civil rights advances by the gay community

in Mexico that have not necessarily benefited transgender people in that country, and for failing to consider sexual assaults by police and military personnel to be government actions.

In his June 11 opinion, Sessions stated that an applicant for asylum has the burden to show “membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; that her membership in that group is a central reason for her persecution; and that the alleged harm is inflicted by the government of her home country or by person that the government is unwilling or unable to control.” Furthermore, he wrote, “when the applicant is the victim of private criminal activity, the analysis must also consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.”

For LGBT asylum applicants whose main persecutors are family members – parents, siblings, uncles, cousins – or neighbors, fellow students, or co-workers, there have been some cases where IJ’s, the BIA and the courts have accepted evidence that the government was unconcerned and would not provide protection. Such evidence usually takes the form of showing that the persecuted individual either unsuccessfully sought help from law enforcement or practically could not seek such help in light of the well-documented negative attitudes of law enforcement officers in their country towards LGBT people. In some cases, however, the applicants have not been able to connect the necessary dots to make these showings and, even though having suffered severe persecution, were unable to win asylum.

These cases can be difficult and complicated for many reasons, including language barriers, lack of documentary evidence, and a predisposition by many IJ’s and the BIA to be skeptical about the undocumented claims of applicants, which will be exacerbated by recent reports that the Justice Department was contemplating imposing some sort of quota system on the IJ’s to speed up the hearing process. Another

frequent problem is that individuals first confronted by a government official upon entering the United States, not being well informed about the evidentiary requirements, not assisted by a lawyer and, in some cases, speaking a dialect in which available interpreters may not be fully conversant, may give a version of their story that varies – or seems to vary – from what they may state later in writing or as a hearing witness before an IJ, and IJ’s and the BIA frequently make adverse credibility determinations based on such discrepancies even when they don’t directly relate to the subject of persecution. It doesn’t help their case that most applicants do not have legal representation, resulting in the spectacle in some cases of young children representing themselves without any adult assistance.

Sessions’ decision sought to tighten up the requirements for qualifying as a member of a “particular social group.” Although he focused on a decision involving a woman seeking to claim asylum as a victim of domestic violence in her home country, some of the more general language he used suggested possible disagreement down the line with past decisions that have granted asylum to LGBT people. The courts have been divided in their handling of domestic violence cases, noting that the explicitly listed categories in the statute do not include sex, and that women, as such, do not constitute a particular social group that is “socially distinct within the society in question.” One of Sessions’ apparent goals in this decision is to try to bring some order to the case law by imposing a strict analytical test, under which women who suffer domestic violence are seen as individual victims rather than members of a particular social group. Evidence that a society has a “culture” of tolerating physical abuse of wives by their husbands did not strike him as a basis for finding that women finding themselves in such a situation could be seen as a “social group” for purpose of this statute.

Sessions also expressed disapproval of decisions that have, in his view, too easily allowed the applicants to assert, without adequate proof, that the government is or would be indifferent

to the harms they suffer. In the case he chose to review, a BIA decision from 2016, he noted evidence that the applicant had sought and obtained orders of protection from the courts, and lived in a country, El Salvador, whose criminal laws do address violence within families.

A recent decision by the Philadelphia-based U.S. Court of Appeals for the 3rd Circuit, denying refugee protection to a gay applicant from Honduras, illustrates some of these problems in an LGBT context. In *Martinez-Almendares v. Attorney General*, release on May 2, the three-judge panel went to some lengths to explain why it was rejecting a challenge by the Petitioner to the BIA’s adoption of an IJ ruling denying his petition for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). (Petitioners denied asylum because they fail to prove that they have suffered past persecution may still attain a form of relief called “withholding of removal,” under which they are allowed to stay in the United States but not to apply for citizenship, if they can show that it is probable that they will suffer persecution if returned to their home country. If they can show that the persecution is likely to take the form of torture or serious physical harm, they may be qualified for protection under a treaty to which the U.S. is a party, the Convention Against Torture.)

As in many such cases, the Petitioner did not have legal representation at any point in the process, including his appeal to the court. All but a very small proportion of such refugee appeal cases are decided entirely on the basis of written submissions to the court, which rarely provides an opportunity for the Petitioners to present their case orally in a hearing before the judges, and most of the resulting opinions are not officially published by the courts. Some of the circuit courts have been so flooded with immigration appeals in recent years that they have set up special procedures to expedite the cases. There are substantial backlogs in some of the circuit, as there have historically been at the BIA.

Mr. Martinez-Almendares tried to enter the U.S. on October 8, 2015,

when he was taken into custody by Customs and Border Patrol agents and then sought to claim refugee status. Immigration Judge Silvia A. Arellano rejected his claims and the BIA affirmed her decision.

The Petitioner grew up in a small town where he was not “out” to anybody and feared a violent response from his father if he came out, but his mother had a close friend who was a gay man who according to the hearing record before the IJ lived openly in the town without any problem. The Petitioner claimed that he knew only two gay men in Honduras, just one person other than his mother’s friend. Thus, it would be difficult to characterize him as a “member” of a “social group.”

He had moved to a city where he worked as a clerk at a transportation company. He was the victim of a robbery by an armed gang member at his workplace, but there was no evidence that his sexual orientation had anything to do with it. He was not personally acquainted with any gay people who encountered difficulties in Honduras because of their sexual orientation. However, based on television reports about gay men being targeted for violent crimes and his belief that the government would not be able to protect gay people from gang violence, a pervasive problem in Honduras, he decided to leave for the United States.

The court observed that the Petitioner had not personally suffered any persecution in Honduras on account of his sexual orientation, so he was not qualified for asylum. The court also found that the evidence he presented would not compel a conclusion that he would suffer such persecution, much less torture, because of his sexual orientation, if he was returned to Honduras. The BIA pointed out, based on the testimony about his mother’s gay friend, that the Petitioner could apparently live as a gay man in his hometown without fear of persecution, and it rejected his argument that the BIA was improperly requiring him to remain closeted in order to avoid trouble.

The court also noted that Honduras had amended its laws in recent years to ban sexual orientation discrimination.

Because the Petitioner could not document having suffered any persecution himself or any objective basis for believing he would be persecuted in Honduras in the future, he fell far short of making a case for asylum or withholding of removal. His argument was based on more general evidence that Honduras was afflicted with out-of-control gang violence and there were media reports of gay men being victims of such violence, but the court did not deem that as sufficient to meet the stringent standards for refugee relief. He proffered such evidence to try to establish that he would be in danger of torture or serious physical injury because of his sexual orientation if he were forced to return, but the court doubted that he would necessarily be more at risk because he is gay, since the reports about gang violence were more generalized.

Among other things, the court agreed with the BIA that the Petitioner had failed to show that the violent gangs in Honduras would necessarily know he was gay, or that they would single him out for persecution on that basis. The gangs went after everybody who might appear vulnerable, regardless of their sexual orientation. And it is clear from this case that the U.S. refugee system is not set up to automatically grant refugee status to gay people from Honduras based solely on generalized reports about the dangerous situation in that country and the flailing attempts by the government to deal with it.

As Sessions emphasized in his June 11 decision, evidence of individualized risk based on a listed characteristic or membership in a particular social group is the keystone of the refugee system. It is difficult, in many cases virtually impossible, for an asylum applicant (especially one held in detention under the Trump Administration’s announced “zero tolerance policy” for unlawful entrants) to succeed without the assistance of a lawyer to assemble the necessary evidence and present his case to meet this standard. The court’s opinion anticipated many of the statements Sessions made in his June 11 opinion to justify the conclusion that applicants whose claim for asylum

rested on past persecution by their family members or criminal gangs should usually not be found qualified for asylum in the United States.

Although gang violence was not a focus of the decision Sessions was reviewing, he addressed it in his opinion. “Generally,” he wrote, “claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes – such as domestic violence or gang violence – or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.”

Taking a hardline position on behalf of the government, Sessions wrote, “An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune. It applies when persecution arises on account of membership in a protected group and the victim may not find protection except by taking refuge in another country.”

One notes, in this respect, that the treatment of LGBT people as a “protected group” relies at present on administrative interpretations subject to change by the anti-LGBT Trump Administration. The Justice Department has already gone on record in amicus briefs and court arguments opposing attempts to find protection against discrimination for LGBT people under federal sex discrimination laws, reversing positions taken by federal agencies during the Obama Administration. It would not be surprising were Sessions to overrule past BIA precedents extending protection to LGBT asylum applicants as well. ■

Supreme Court Rejects Gay Death Row Inmate's Appeal

By Arthur S. Leonard

The Supreme Court has denied a petition from South Dakota gay death row inmate Charles Russell Rhines, who challenges the fairness of his death sentence in light of evidence that some jurors were taking anti-gay stereotypes into account while determining his sentence. In line with its normal practice, the Supreme Court merely listed the case as “certiorari denied” without an explanation on June 18. *Rhines v. South Dakota*, 2018 WL 2102800 (No. 17-8791).

Rhines was convicted on murder and burglary charges in January 1993. His homosexuality featured in the testimony of several witnesses during the guilt phase of the trial. Rhines was charged with viciously hacking to death a man who blundered onto the crime scene where Rhines was committing a burglary. After Rhines was convicted, the court took evidence on the penalty phase, which included testimony by one of Rhines’ sisters that he was gay and had “struggled with his sexual identity.”

The jury began deliberating on the penalty on the afternoon of January 25, and sent out a lengthy note to the judge early on January 26. “In order to award the proper punishment we need a clear perspective on what ‘Life in Prison Without Parole’ really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole. The questions we have are as follows: (1) Will Mr. Rhines ever be placed in a minimum security prison or be given work release. (2) Will Mr. Rhines be allowed to mix with the general inmate population. (3) Allowed to create a group of followers or admirers. (4) Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.). (5) Will Mr. Rhines be allowed to marry or have conjugal visits. (6) Will he be allowed to attend college. (7) Will Mr. Rhines be allowed to have or attain any of the common joys

of life (ex TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment.) (8) Will Mr. Rhines be jailed alone or will he have a cellmate. (9) What sort of free time will Mr. Rhines have (what would his daily routine be). We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is Death, and on the other hand what is life in prison w/out parole.” The judge responded by telling the jury that “all the information I can give you is set forth in the jury instructions” and he refused a defense request to tell the jury not to base its decision “on speculation or guesswork.” Eight hours later, the jury returned a death sentence.

Seizing upon these questions, Rhines appealed his sentence arguing that the jury acted under the influence of passion, prejudice, and other arbitrary factors, but the South Dakota Supreme Court affirmed his sentence, relying on statements by the potential jurors during the selection process that they could be fair, and the court’s view that none of the questions in the note reflected anti-gay bias.

Still on death row a quarter century later, and having failed in every attempt so far to get post-conviction relief from the state or federal courts, Rhines took new hope from a decision issued by the Supreme Court on March 6, 2017, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). In that case, the Court recognized an exception to the general rule against inquiring into a jury’s decision-making process or allowing jurors to testify about how bias may have affected the process, finding that the 6th Amendment right to a fair trial requires an exception to the rule “where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant.”

In his newest appeals, Rhines sought to introduce affidavits (sworn statements) from several jurors indicating that

Rhines’ homosexuality appeared to contribute to the jury’s decision for the death penalty. According to Rhines’ petition to the Supreme Court, one juror referred to Rhines as “that SOB queer,” and that this made other jurors “fairly uncomfortable.” A juror swore, “One of the witnesses talked about how they walked in on Rhines fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between two men.” This juror continued that if sentenced to life in prison, Rhines might be “a sexual threat to other inmates and take advantage of other young men in or outside of prison.” One juror swore that the jury “also knew that he was a homosexual and thought that he shouldn’t be able to spend his life with men in prison.” A juror declared that “one juror made a comment that if he’s gay, we’d be sending him where he wants to go if we voted for [life without the possibility of parole].” Yet a third juror said, “There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. There were lots of folks who were like, Ew, I can’t believe that.”

Responding to the affidavits, the state got an investigator to interview nine of the jurors. Although they denied that they had based the death sentence on Rhines’s homosexuality, their interviews with the investigators yielded more evidence tending to support Rhines’ contentions. For example, one of the jurors “recalled a comment to the effect that Rhines might like life in the penitentiary with other men,” while another said that “one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men.”

Rhines argued that when these sworn juror statements were viewed together with the questions posed by the note, it became clear the his homosexuality was a factor in the jury’s determination of his death sentence, and that this violated his right to be tried by an unbiased jury on the issue of sexual orientation.

In *Pena-Rodriguez*, the Court had emphasized that race discrimination raises particularly strong issues, and did not state that exceptions to the usual rule should be made for all possible kinds of bias. The Court, in an opinion by Justice Anthony Kennedy, said that racial bias “implicates unique historical, constitutional and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice.” The vote in the Court, reduced to eight members as the Senate Republican leadership stonewalled against President Obama’s nomination of appeals court judge Merrick Garland to fill the seat vacated by Justice Scalia’s death, was 5-3, with Chief Justice Roberts and Justices Alito and Thomas dissenting. Kennedy was joined by the four Democratic appointees, Justices Ginsburg, Breyer, Kagan and Sotomayor.

In reopening his case with a new round of state court and federal appeals following the *Pena-Rodriguez* opinion, Rhines hoped to persuade the court to recognize a broader exception to extend, at least, to sexual orientation, and further to extend it to the penalty phase of the jury’s deliberations. (*Pena-Rodriguez* went to the issue of racial bias influencing the jury to reach a guilty verdict, and did not rule on whether a challenge focused solely on the penalty phase should invoke the same exception.) The lower courts were unwilling to take up the issue, seeing *Pena-Rodriguez* as adopting a narrow exception to the general rule, based on the special concerns raised by race discrimination, and many of Rhines’ disappointments were due to procedural issues blocking the courts from considering this new argument.

The Supreme Court’s denial of review is not a ruling on the merits, and could well have been due to the same procedural complications that caused lower courts to reject Rhines’ new attempt to reopen his case. However, it is possible that lower courts may construe it as reinforcing the narrowness of the exception created in *Pena-Rodriguez*. Meanwhile, on May 25 the 8th Circuit Court of Appeals filed an Order denying Rhines’ petition for a writ of habeas corpus, also seeking to reopen the jury verdict. ■

Supreme Court Orders “Further Consideration” by Washington State Courts in Wedding Flowers Case

By Arthur S. Leonard

On June 25, the Supreme Court finally acted on a petition for certiorari filed last summer in *Arlene’s Flowers, Inc. v. State of Washington*, No. 17-108, 2018 WL 3096308, in which Alliance Defending Freedom (ADF) sought review of the Washington Supreme Court’s ruling that unanimously affirmed the Benton County Superior Court’s decision that Arlene’s Flowers and its proprietor, Barronelle Stutzman, had violated the state’s Law Against Discrimination and its Consumer Protection Act by refusing to sell wedding flowers to a same-sex

of this business and had established a personal relationship with the proprietor, Barronelle Stutzman. When he asked her to provide the flowers for his wedding, however, she told him that she could not design flowers for his wedding because of her relationship with Jesus Christ. She gave him the names of three other florists, and claims he said he understood her decision and “they hugged before he left.” Ingersoll and Freed decided to scale down their wedding plans as a result of this and evidently talked about their experience to others, generating news reports that

Within days of the *Masterpiece* ruling, ADF had filed a supplementary brief in the Supreme Court on behalf of Arlene’s Flowers.

couple. The Petition was docketed at the Supreme Court on July 14, 2017, after the Court had recently granted review in *Masterpiece Cakeshop v. State of Colorado*. The Court did not place this Petition on the agenda for any of its certiorari conferences until after rendering its decision in *Masterpiece Cakeshop* on June 4, 2018. Then on June 25, it granted the petition, vacated the lower court’s ruling, and sent the case back for “further consideration” in light of the *Masterpiece* ruling.

This case arose from an incident that occurred shortly after Washington began to issue same-sex marriage licenses as a result of the marriage equality litigation within the 9th Circuit. Robert Ingersoll and Curt Freed, a same-sex couple planning their wedding, went to Arlene’s Flowers to order floral decorations for what they planned to be a big event. Ingersoll had been a frequent customer

spurred the state’s Attorney General to action. Around the same time the state’s lawsuit was filed, Ingersoll and Freed, represented by the ACLU, filed their own suit, and the two cases were consolidated, resulting in *State v. Arlene’s Flowers*, 2015 WL 720213 (Wash. Super. Ct., Benton Co.), and *State v. Arlene’s Flowers*, 187 Wash. 2d 804, 389 P.2d 543 (2017). (Washington State allows direct action to enforce the statutes in question without requiring exhaustion of administrative remedies, and the Washington Supreme Court accepted Arlene’s Flowers’ petition for direct review, bypassing the state’s intermediate appellate court.) The state courts found that the defendant had violated the statutes, and that she was not entitled to any 1st Amendment defense.

Within days of the *Masterpiece* ruling, ADF had filed a supplementary

brief in the Supreme Court on behalf of Arlene's Flowers and Stutzman, urging the Court to grant certiorari, vacate the state court ruling, and remand for consideration in light of *Masterpiece*. The Respondents (State of Washington and Ingersoll and Freed) quickly filed responding briefs, arguing that certiorari should be denied because there was nothing in the history of this case that suggested anything like the grounds on which *Masterpiece* had been decided.

In its supplementary brief, ADF mounted several arguments in support of its contention that *Masterpiece* could require a reversal in this case because of "hostility" to religion by the State of Washington. First, ADF argued that the Attorney General's action in filing suit against Barronelle Stutzman in both her professional and personal capacities, reacting to news reports and without the same-sex couple having filed their own discrimination claim, evinced hostility to religion. Second, ADF argued that the trial court's reliance on and quotation from a case cited by the Attorney General in which the court ruled against a retail store that refused on religious grounds to serve African-Americans was, in effect, comparing Barronelle to the "racist" owner of the store, further evincing "hostility" to her religion. Based on this, ADF argued, "the State, in short, has treated Barronelle with neither tolerance nor respect," quoting Justice Kennedy's phrase from *Masterpiece*. ADF also pointed to the state's failure to initiate litigation against a coffee-shop owner in Seattle who, according to a radio talk show, had "profanely berated and discriminated against Christian customers," apparently seeking to draw an analogy to a situation described by Kennedy in *Masterpiece*, of the Colorado Civil Rights Commission dismissing charges against three bakers who had refused to bake anti-gay cakes in the wake of the Commission's ruling against Masterpiece Cakeshop.

The State of Washington and the ACLU quickly filed responsive briefs, disputing the accuracy and relevance of ADF's supplementary brief. For one thing, unlike Masterpiece Cakeshop,

Arlene's Flowers did not raise any issued in its original Petition about "hostility to religion" by the state and, Respondents argued, could not now introduce a new issue into the case. For another, they pointed out, a party to litigation citing a case that supports its legal position cannot be considered "hostility to religion." After all, Justice Kennedy cited a similar federal case involving a restaurant that refused to serve African-Americans in his opinion in *Masterpiece* to support the point that it is well established that there is no general free exercise exemption from complying with public accommodations laws. This doesn't show hostility to religion by the court. Furthermore, the A.G.'s filing of a discrimination complaint, in itself, is no evidence of animus or hostility, but merely doing his job, and the A.G. "played no adjudicatory role in the process of deciding this case." What *Masterpiece* required was that the forum not be hostile religion, and the forum is the court, not the parties to the case.

Furthermore, the A.G.'s brief pointed out, there was doubt about the accuracy of the talk radio report cited by ADF, but notwithstanding that, even though nobody filed a discrimination claim against the coffee shop owner, the chair of the Washington Human Rights Commission "publicly announced that she would send a letter to the business owner explaining Washington law," and the owner subsequently announced, unlike Barronelle Stutzman, that "he will no longer refuse service to the customers he initially turned away." Contrast this with the situation in *Masterpiece*, where Justice Kennedy counted as evidence of hostility that the Colorado Commission had rejected discrimination claims against three bakers who declined to make anti-gay cakes while ruling against Jack Phillips for refusing to make a same-sex wedding cake. (As Justice Breyer explained in his concurring opinion joined by Justice Kagan, there was no inconsistency here as the two situations were clearly distinguishable.)

In any rate, a strong argument can be made that there is no basis for order

"further consideration" of Arlene's Flowers in light of *Masterpiece*. In the days following a Supreme Court decision, the Court usually moves quickly to dispose of petitions in other cases that had been "on hold" pending its ruling. It is not uncommon in such "mopping up" situations to send cases back to the lower courts for a determination whether the Supreme Court decision would require a different result. But it is also common to merely deny the petition if the lower court ruling is clearly consistent with the new Supreme Court decision. In this case, the Court's action may be reacting to ADF's assertion in its supplementary brief that there is evidence of hostility to religion in the proceedings in the Washington courts, and to a common practice by the Court of sending cases back for reconsideration if any member of the Court is troubled about possible inconsistency. On the other hand, it may signal some ambiguity about exactly what the Court was holding in *Masterpiece*, and a desire by the Court, ultimately, to consider the underlying legal questions on the merits without any complications involving the nature of the lower court proceedings.

The Supreme Court's decision to vacate the Washington Supreme Court's ruling is certainly cause for concern, since that ruling is totally consistent with what Justice Kennedy said about the free exercise and free speech arguments that ADF advanced in *Masterpiece*, and a careful reading of Kennedy's opinion shows that the Court did not back away, at least overtly, from its prior precedents holding that there is not a free exercise exemption from complying with laws banning discrimination in public accommodations. Time will tell whether a firm majority of the Court is actually ready to reassert that position on the merits in an appropriate case. Meanwhile, opponents of religious exemptions can take some comfort from the actions by the Arizona Court of Appeals and the Oregon Supreme Court (refusing to review a court of appeals ruling in another wedding cake case) in the weeks following the *Masterpiece* rule. ■

Juror Anti-Gay Bias in Horrific Florida Death Penalty Case Justifies Evidentiary Hearing

By Eric Lesh

The underlying facts of *Patrick v. State*, 2018 Fla. LEXIS 1213, 2018 WL 2976307 (Fla. Sup. Ct., June 14, 2018) (*per curiam*), which involved the brutal murder of a gay senior, are disturbingly difficult to recount. The issues on appeal in this case are interesting, as they, at least in part, center on likely anti-gay bias by a member of the jury. For this reason, if you would like to skip the next paragraphs and go right to the issues on appeal, please jump forward to the asterisk.

In 2005, Eric Kurt Patrick had just been released from prison and was homeless when he met Steven Schumacher underneath a park pavilion, where the two men were both sheltering from a rain shower. Schumacher took Patrick home with him. On the night of Sunday, September 25, “Patrick and Schumacher drank beers and went to bed. Patrick gave Schumacher a massage, then they both lay naked in bed. According to Patrick, Schumacher attempted anal sex, which Patrick refused. Patrick stated that Schumacher was ‘riding up on [him] squeezing [him].’ After Patrick told him to stop, Schumacher stopped but tried again later. Patrick then explained that he ‘cut loose on [Schumacher].’”

Patrick began hitting Schumacher with his fists but also “beat him with a wooden box because his hands hurt so badly.” Schumacher’s nose was broken and his face was cut. He was hit so hard that his teeth were broken. Patrick then tied up Schumacher using a telephone cord at the base of the bed, then taped his mouth when Schumacher yelled for help. Patrick put Schumacher in the bathtub on his side where Schumacher was later found dead.” Patrick stole money and other items, which he packed in a duffel bag. After the police discovered the body, Patrick was arrested on an outstanding warrant.

In 2009, a jury convicted Patrick of the kidnapping, robbery, and first-

degree murder of Schumacher. The jury recommended a death sentence by a vote of seven to five, which the trial court accepted and the Florida Supreme Court affirmed on appeal. In this new appeal, the Florida Supreme Court granted Patrick’s petition for a writ of habeas corpus, relying in part on *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), in which the U.S. Supreme Court held that Florida’s former capital sentencing scheme violated the Sixth Amendment because it “required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty” even though “[t]he Sixth Amendment requires a jury, not a judge, to find each

Patrick argued that his trial counsel was ineffective for failing to challenge this juror, who could be biased against him based on his participation in sexual acts with the male victim. In a laughable move, the State actually argued that this juror’s bias was not “against the defense, as there was no evidence that Patrick was homosexual, and instead suggested more bias against the victim.” The State also suggested that “the evidence and arguments at trial indicated that, while Patrick denied being homosexual, he willingly participated in sexual and intimate acts with the male victim before the encounter in question and that he had engaged in similar activity in the past with other men.”

The underlying facts of *Patrick v. State*, which involved the brutal murder of a gay senior, are disturbingly difficult to recount.

fact necessary to impose a sentence of death.” Thus, the court found Patrick was entitled to a new penalty phase, but it also went on to address other issues Patrick raise in his petition, including ineffective assistance of counsel for failing to challenge a potential juror for cause.

The juror in question showed actual bias stemming from Patrick’s sexual activity. During *voir dire*, that juror stated that he “would have a bias if [he] knew the perpetrator was homosexual.” When asked if he would still hold the prosecutor to the proper burden of proof, he answered, “Put it this way, if I felt the person was a homosexual, I personally believe that person is morally depraved enough that he might lie, might steal, might kill.” The juror said “yes” when asked if this bias might affect his deliberations.”

The Florida Supreme Court rejected the State’s argument, noting “the evidence and arguments at trial indicated that, while Patrick denied being homosexual, he willingly participated in sexual and intimate acts with the male victim before the encounter in question and that he had engaged in similar activity in the past with other men.” Thus, the Court rightly concluded that the juror’s *voir dire* answers concerning homosexuality met the test for establishing prejudice and that defense counsel’s failure to challenge the juror justified reversing the post-conviction court’s denial of this claim and to remand for an evidentiary hearing. ■

Eric Lesh is the Executive Director of the LGBT Bar Association of Greater New York (LeGaL).

3rd Circuit Explains Dismissal of Cisgender Students' Challenge to School District's Trans-Affirmative Facilities Policy

By Chan Tov McNamarah

A June 18 opinion from a unanimous three-judge panel of the U.S. Court of Appeals for the 3rd Circuit affirmed that Title IX covers gender identity discrimination claims and supported the Boyertown (Pennsylvania) Area School District policy aimed at maintaining a safe and respectful environment for transgender students. *Doe v. Boyertown Area School District*, 2018 U.S. App. LEXIS 16323, 2018 WL 3016864 (June 18, 2018), unanimously affirms U.S. District Judge Edward G. Smith's ruling rejecting attempts to keep transgender students out of the public facilities that match their gender identity. (*See* 276 F. Supp. 3d 324 (E.D.Pa. 2017)). The 3rd Circuit's formal written opinion came almost one month after the panel of judges announced their dismissal of the appeal hours after the oral argument.

Over the past few years, cases involving transgender students and public facilities have become all too typical, with bathrooms becoming 'battlegrounds' as transgender students fight for the right to be treated with respect. In an interesting turn of events, the plaintiffs in *Boyertown* were not—as is typically the case—transgender students demanding recognition and equality, but cisgender students (and their parents) who sought to overturn the Boyertown Area School District's efforts to implement policies that promoted inclusion and dignity for all students.

Prior to 2016, the Boyertown Area School District ("School District") required that students at Boyertown Area Senior High School ("BASH") use locker rooms and bathrooms that aligned with their sex-assigned-at-birth. Thereafter, the School District adopted the policy of allowing transgender students to use facilities consistent with their gender identity on a case-by case basis. To do so, transgender students

were required to meet with counselors and school administrators. Once the student received permission and was approved for use consistent with his or her gender identity, the student could no longer use facilities corresponding with the student's sex-assigned-at-birth. Accompanying the policy change, BASH undertook renovations order to make its locker rooms and bathrooms transgender-inclusive. This process included converting "gang showers" into single-user units with privacy curtains, and providing single-user restrooms for student use.

The plaintiffs—all proceeding under pseudonyms – sued the School District, seeking to enjoin the policy of allowing transgender students to use facilities that aligned with their gender identity. The plaintiffs' legal arguments were threefold: the policy "violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law." District Judge Smith issued an 83-page opinion carefully reviewing the plaintiffs' arguments and ultimately rejecting them all. The plaintiffs appealed.

Writing for the panel, Circuit Judge Theodore A. McKee began his opinion with a lengthy background summarizing recent scientific and social science findings on gender identity and transgender youth. Setting the stage for the remainder of the court's analysis, McKee noted that transgender individuals often undergo a "social gender transition," in which they present themselves as being the gender with which they most strongly identify. As a part of this social gender transition, it is important that transgender persons be allowed to use sex-segregated spaces and engage in sex-segregated activities that correspond with their gender identity, rather than birth-determined-sex. Scientific consensus finds that where transgender individuals are

not allowed to use privacy facilities consistent with their gender identity, they face "detrimental effects on the physical and mental health, safety, and well-being."

With that background, Judge McKee laid out the standard for the preliminary injunctive relief sought by the plaintiffs. He noted that the remedy of preliminary injunction is granted when a party shows "(1) a likelihood of success on the merits; (2) that [the movant] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharmacies, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

Turning to the likelihood of success on the merits, Judge McKee found that the District Court was correct to conclude that none of the plaintiffs' claims were likely to succeed. The appellants contended that the District Court's holding was erroneous because it had: (1) failed to recognize the contours of the right to property; (2) failed to recognize that the policy of opening up facilities to persons of the opposite sex necessarily violated that right; (3) erroneously concluded that the School District's policy advanced a compelling interest; and (4) incorrectly found that the policy was narrowly tailored to serve that interest. The 3rd Circuit panel rejected all these arguments.

Judge McKee acknowledged that persons have constitutionally protected privacy interests in their own bodies, but, he wrote, the privacy right is not absolute. Instead, the right must be weighed against important governmental interests, and infringement is allowed if sufficiently tailored to serve a compelling state interest. In the present case, the School District's policy served a compelling interest—preventing discrimination against transgender

students – and was narrowly tailored to that interest. As a result, appellants’ claim that their right to privacy was violated because “the policy permitted them to be viewed by members of the opposite sex while partially clothed” did not give rise to a constitutional violation.

The court then dismissed the appellants’ contention that a more tailored solution would be to provide single-user facilities and require transgender students to use either those facilities or those that correspond with their sex-assigned-at birth. Judge McKee’s opinion characterized that suggestion as “not only unpersuasive” but also failing “to comprehend the depth of the problems the School’s District’s policy was trying to remedy or the steps taken to address them.”

First, the judge pointed out, BASH *already* provided single-user facilities for students who felt uncomfortable changing in communal facilities. If at any point appellants felt uncomfortable sharing facilities with their transgender counterparts they were more than free to use these facilities. Second, the transgender segregated policy that the appellants suggested, would be to “very publicly brand all transgender students with a scarlet ‘T.’”

The appellants’ second constitutional privacy argument was that the policy essentially “force[d] minors to endure the risk of uncontested intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy.” Judge McKee rejected this contention, pointing again to the school’s single-user facility options, and noting that it is not only common to encounter peers in various stages of undress in school locker rooms, it is expected. And, as noted above, the District undertook renovations to enhance individual privacy in its multi-user facilities. Thus the court dismissed the appellants’ constitutional privacy claim.

Turning its attention to the appellants’ Title IX claims, the opinion stated that Title IX prohibits discrimination based on sex in all educational institutions that receive funds from the federal

government. Title IX also supports a cause of action for hostile environment harassment. That is, the plaintiff may recover if he or she faces sexual harassment or sexually offensive conduct that is so severe, pervasive, or objectively offensive that it “effectively deny[es] equal access to an institution’s resources and opportunities.”

Judge McKee reasoned that the School District’s policy did not discriminate on the basis of sex, and therefore did not offend Title IX. Moreover, the judge rejected the appellants’ claim that the mere presence of transgender students in the same bathroom or locker room with the appellants constitutes sexual harassment so severe that it could deprive them of equal access to the institution’s resources and opportunities. Illustratively, as part of their allegations a plaintiff alleged that they had been harassed simply by a transgender student washing that student’s own hands in the bathroom. Judge McKee barely stopped short of calling this assertion preposterous.

McKee pointed out that the plaintiffs had offered no authority to establish that the mere presence of a transgender student in a locker room or bathroom rises to the level of harassment. Instead, the plaintiffs cited cases that involved egregious sexual harassment, not comparable in any way to what they had experienced. After distinguishing the plaintiffs’ authorities, Judge McKee affirmed Judge Smith’s finding that the District’s policy did not discriminate based on sex, did not create a hostile environment, and thus did not violate Title IX.

The court similarly dismissed the appellant’s privacy tort claim as unlikely to succeed on the merits. Under Pennsylvania tort law, “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” *Tagouma v. Investigative Consultant Services, Inc.*, 2010 PA Super 147, 4 A.3d 170, 174 (Pa.

Super Ct. 2010). Judge McKee made quick work of this argument by noting that a reasonable person would not find the mere presence of a transgender individual in a bathroom or locker room highly offensive.

Finally, the court considered whether the appellants had necessarily demonstrated that the failure to issue an injunction would result in irreparable harm. Here, the court agreed with the District Court opinion that the school’s privacy protections were more than sufficient to address any of the appellants’ privacy concerns.

Finding the Boyertown Area School District’s policy both thoughtful and carefully tailored, and the appellant’s allegations of violations of their privacy, Title IX and Pennsylvania tort law rights totally without merit, the 3rd Circuit affirmed the District Court holding and upheld the denial of the requested preliminary injunction.

Boyertown is a much needed salve to soothe the sting of the Supreme Court’s *Masterpiece Cakeshop* decision, and twin certiorari snubs in *Arlene’s Flowers* and *Rhines v. South Dakota*. In echoing and extending the District Court’s well-reasoned opinion, the panel in *Boyertown* added to the growing number of Title IX and Title VII appellate rulings extending protection for the transgender community. Where this author parts company is that *Boyertown* did not go far enough. Specifically, the court declined to consider the School District’s argument that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination against them in violation of Title IX. This author believes that the court missed an important opportunity to more clearly define the Title IX rights of transgender students, and expand supportive policies for LGBT youth students. Hopefully future cases consider this important question, to ensure that no *queer* child gets left behind. ■

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

Idaho Federal Judge Declines to Dismiss Transgender Inmate's Civil Rights Suit, including Claims under the Americans with Disabilities Act, the Affordable Care Act, and State Tort Law

By William J. Rold

Chief U.S. District Judge B. Lynn Winmill wrote a comprehensive opinion on transgender inmate Adree Edmo, a/k/a Mason Edmo's, civil rights and other claims in *Edmo v. Idaho Department of Correction*, 2018 WL 2745898, 2018 U.S. Dist. LEXIS 97090 (D. Idaho, June 7, 2018). In so doing, he expanded the notion of adequate exhaustion under the Prison

Her complaint alleges violations of: (1) the Eighth Amendment by failing to protect her from harm and its prohibition on cruel and unusual punishment; (2) the Fourteenth Amendment's guarantee of equal protection; (3) the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act by discriminating in provision of medical

Idaho's three-tiered grievance system in detail, he turns first to whether Edmo had exhausted her claims for damages for the two castration attempts. Finding that they were not explicitly exhausted, he nevertheless ruled that they were "indicia" of claims for lack of medical care that need not be explicitly exhausted because the grievances that were exhausted put defendants on notice of the problems with medical care being grieved and an opportunity to correct them, citing *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016). A grievance is not the "equivalent" of a summons and complaint in adversarial litigation, and it need not "contain every fact necessary to prove each element of an eventual legal claim." *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). Similarly, he ruled that Edmo's grievance about hair length covered her claim for access to make-up. He declined to stretch the grievances to include claims made in court for a name change and for transfer to a women's facility, dismissing them without prejudice.

Judge Winmill found that the ADA's statutory exclusion from protected disabilities for "gender identity disorders not resulting from physical impairments" did not necessarily include "gender dysphoria." He found without elaboration that the point presented a genuine dispute of material fact for which discovery was needed.

Litigation Reform Act [PLRA], and he allowed claims under the Americans with Disabilities Act and the Affordable Care Act to proceed to discovery.

Judge Winmill began by noting that Edmo's medical records contain diagnoses of both gender identity disorder and gender dysphoria and that she identifies as female but has male genitalia. She is incarcerated in a male prison. "Edmo requested treatment including access to feminizing hormones, evaluation for sex affirming surgery, and the ability to live as a woman while incarcerated. Edmo alleges that Defendants denied certain necessary medical treatment resulting in Edmo's suffering harm, including two attempted self-castrations."

treatment and participation in programs and services; (4) the non-discrimination provision of the Affordable Care Act (ACA) by discriminating based on sex, sex stereotyping, and/or gender identity; and (5) Idaho tort law by negligently failing to provide treatment. Several defendants, including the State, were dismissed; but the corporate provider, Corizon, Inc., and other individual defendants remain in the case.

Judge Winmill begins by addressing whether Edmo has fully exhausted under the PLRA all claims brought before the court, noting that the defendants have the ultimate burden on exhaustion and that summary judgment must be denied if there are genuine issues as to exhaustion. After describing

Judge Winmill found that the ADA's statutory exclusion from protected disabilities for "gender identity disorders not resulting from physical impairments" – 42 U.S.C. § 12211(b) (1) – did not necessarily include "gender dysphoria." He found without elaboration that the point presented a genuine dispute of material fact for which discovery was needed. For a much more complete analysis of this point, see "Massachusetts Federal Judge Refuses to Dismiss Transgender Inmate's ADA Claims Despite Statutory 'Gender Identity Disorder' Exclusion; Ramifications Go Far Beyond Corrections," in this issue of *Law Notes*.

Judge Winmill next addresses at length whether a private cause of action and remedy can be found in the Affordable Care Act's [ACA] civil rights provision, 42 U.S.C. § 1557. He observed that the section incorporated other civil rights acts provisions but also contained its own "similar rights-creating language." He found that this indicated a Congressional intent not to limit the ACA's protections to the four other statutes cited but to layer the ACA protection on top of them. Thus, there was evidence of Congressional intent to provide both a private right and a private remedy for violations of Section 1557. [Note: There is no discussion of the Obama-era regulations that extend coverage under the ACA to "gender identity" and the like, whose future in the Trump Administration is shaky.]

Idaho's two-year statute of limitations, applicable to claims under § 1983, bars Edmo from claiming damages for events earlier than two years before filing her case, even when federal accrual rules are applied. Here, Edmo knew of the conditions about which she sued when they happened, so the accrual dates coincide with the dates of injury.

Judge Winmill also proceeds on state law claims under Idaho's Tort Claims Act, which has a 180-day notice of claim requirement. Applying these rules, Judge Winmill ruled that Edmo could proceed on some of her claims, including the second but not the first castration attempt.

Thus, Edmo is permitted to proceed past a motion to dismiss and to discovery on most of the significant portions of all of her causes of action. Edmo is represented by the National Center for Lesbian Rights, San Francisco; Ferguson Dunham, PLLC, Boise; and Hadsell Sturmer & Resnick, LLP, Pasadena. ■

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.

Massachusetts Federal Judge Refuses to Dismiss Transgender Inmate's ADA Claims Despite Statutory "Gender Identity Disorder" Exclusion; Ramifications Go Far Beyond Corrections

By William J. Rold

The dissenters in the First Circuit's *en banc* reversal of an injunction ordering sex reassignment surgery for a transgender inmate in *Kosilek v. Spencer*, 774 F.3d 63, 115 (1st Cir. 2014), predicted that the Eighth Amendment decision would be a "one-off" without lasting precedent. In *Doe v. Massachusetts Department of Correction*, 2018 U.S. Dist. LEXIS 99925, 2018 WL 2994403 (D.

incarceration, she lived her life as a woman. The case does not deal with her medical treatment, which apparently was continued without objection by corrections officials. Rather, it focuses on her confinement in a male institution, and on search procedures, privacy, and the like. Judge Stearns had previously issued a limited preliminary injunction regarding: (1) showering alone, with a guard to keep other inmates away; and

Doe v. Massachusetts Department of Correction, is a case about a transgender female inmate confined in a male institution.

Mass., June 14, 2018), a case about a transgender female inmate confined in a male institution, *Kosilek* is not even mentioned, and neither is the Eighth Amendment. Rather, plaintiff Jane Doe raises issues under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment. U.S. District Judge Richard G. Stearns' scholarly opinion, denying defendants' motion to dismiss, advances legal theory in the First Circuit in these areas in a way that has wide potential ramifications for transgender plaintiffs in all settings potentially subject to these statutes and/or constitutional due process and equal protection.

Doe, now 53, designated as male at birth, has identified as female since she was a youngster. Prior to her

(2) search procedures by female guards – later modified to allow male officers to search below the waist, if necessary, and female officers to search above the waist. [How the modification would work as a practical matter is unclear to this writer, and it is not explained in the decision – Judge Stearns concedes it does not fully satisfy Doe's claims of privacy.]

Judge Stearns also judicially noticed a new Massachusetts statute, effective December 31, 2018, that, with some exceptions for correctional imperatives, mandates searches of transgender inmates by officers of the same identified gender and housing of transgender inmates with inmates of the same identified gender. Mass. Acts of 2018, c. 69, § 91 (amending Chapter 127 of Mass. Gen. Laws by inserting a new Section 32A). [This is the first such statute this writer has seen.] Doe is due

to be paroled in September of 2018. Judge Stearns could easily have dodged this case. Instead, with a full court press from Doe's counsel, he issued an opinion that is unlikely to be reversed on the merits after Doe's release, even if it is vacated as moot. Thus, it will be published and remain influential.

Judge Stearns began by noting the primary issue as being whether the exclusionary language for "gender identity disorders" in the ADA, 42 U.S.C. § 12211(b)(1), precludes Doe's disability discrimination claims. The statute says that the word "disability" shall not include, *inter alia*, "gender identity disorders not resulting from physical impairments." Finding that exclusion presents a potential constitutional issue, Judge Stearns certified the question to the U. S. Attorney General, but the Department of Justice declined to intervene or file a Statement of Interest. [It is worth noting, however, that Attorney General Sessions has issued a Memorandum rejecting the contention that gender identity discrimination is actionable under federal sex discrimination laws. – Editor]

Exploring the American Psychiatric Association's evolution of diagnoses from "gender identity disorder" (DSM-IV) to its new criteria for "gender dysphoria" (DSM-V), Judge Stearns found that the changes were "more than a semantic refinement" and that, at least for purposes of a motion to dismiss, a factual question existed as to whether "gender dysphoria" was within the statutory exception for "gender identity disorders." Secondly, he notes that the exception also has itself an exception: "gender identity disorders *not resulting from physical impairments*" (emphasis added). Judge Stearns cites the body of literature showing endocrine associations (perhaps beginning *in utero*) with gender dysphoria, which he says he cannot assess at this stage without expert testimony. He finds that the DSM-V diagnosis has "independent clinical significance" that calls into question whether Congress in 1990 meant to include in the exclusions of the ADA disabling features of gender

dysphoria. This is by far the best analysis of this point this writer has seen.

Judge Stearns also finds that a plausible statutory construction of the exception provision not to exclude gender dysphoria serves the doctrine of avoidance of constitutional questions whenever possible, citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The listing of "gender identity disorders" together with "pedophilia, voyeurism, exhibitionism, kleptomania, pyromania, compulsive gambling, and illegal drug use," indicates that Congress sought to exclude from ADA coverage "activities that are illegal, dangerous to society, or the result of harmful vices" and that to include gender dysphoria within that group raises constitutional questions of animus against transgender people – with a reference to *Romer v. Evans*, 517 U.S. 620, 635 (1996), and to "discrete and insular minorities" from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Judge Stearns concluded on this point: "It is virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on antiquated or prejudicial conceptions of how they came to their station in life."

Judge Stearns found that Doe had established *prima facie* claims under the ADA. Defendants argued that Doe was not being excluded from or denied services at the men's prison. Judge Stearns wrote that this was a "categorization error": "Doe's Complaint is not about being denied services at MCI-Norfolk, but about being housed there in the first place . . . Doe's Complaint adequately states that, unlike other female inmates, she was assigned to a men's prison by virtue of her gender assignment at birth and denied access to facilities and programs that would correspond with her gender identification."

The court continued: "Doe also has made out a claim that the DOC's biological sex-based assignment policy has a disparate impact on inmates with GD because it injects them into a prison environment that is contrary to a critical aspect of their prescribed treatment (that

they be allowed to live as, in Doe's case, a woman)," citing *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) (*en banc*) (state policy with "disproportionate impact" on disabled persons). Judge Stearns concluded: "Doe has adequately pled that she has been denied the reasonable accommodation of a transfer to a woman's prison," citing *Loneragan v. Florida Department of Correction*, 623 F. App'x 990, 993-994 (11th Cir. 2015) (ADA claim upheld where inmate with dermatology condition averse to sun was denied transfer from prison where he was forced to work outside).

For Equal Protection purposes, Judge Stearns found that Doe was subjected to a classification based on transgender status that was entitled to "heightened judicial scrutiny." Judge Stearns found that the "crux" was how the Equal Protection case was framed: Doe versus other transgender inmates; or Doe versus other female inmates. He ruled the latter was the proper analysis and that, at least at this stage, the government had not come forward with a showing of an important governmental objective and the careful tailoring of its rule to achieve that objective in denying Doe placement in a women's prison, citing *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Doe's constitutional claim of privacy, arising under the Due Process Clause of the Fourteenth Amendment, is also allowed to continue. The parties were directed to confer and try to reach at least partial agreement on injunctive relief and to report back to the court promptly during July.

Jane Doe is ably represented by Goodwin Procter, LLP, Boston (Tiffiney F. Carney, Washington, D.C., lead counsel, *pro hac vice*); other appearances by co-counsel and amici: GLBTQ Legal Advocates & Defenders (GLAD); Prisoners' Legal Services; National Center for Transgender Equality; Massachusetts Transgender Political Coalition; Disability Rights Education and Defense Fund; Bazelon Center for Mental Health Law; Quinnipiac University School of Law Legal Clinic; Health Law Advocates, Inc. ■

Justice Department's New Request to Implement Transgender Policy Denied by Seattle District Court

By Arthur S. Leonard

U.S. Senior District Judge Marsha J. Pechman issued an opinion on June 15, rejecting another attempt by the Trump Administration to get her to lift her preliminary injunction in *Karnoski v. Trump* and allow the latest version of President Trump's ban on military service by transgender individuals to go into effect while they appeal her earlier rulings to the 9th Circuit Court of Appeals. Hope springs eternal at the Justice Department, as their new motion does not really make any arguments that Judge Pechman did not reject in her earlier opinions. The new opinion in *Karnoski v. Trump*, 2018 U.S. Dist. LEXIS 100789 (W.D. Wash.), rejects the same arguments emphatically.

Last July, the President tweeted his declaration that transgender people would not be allowed to serve in the U.S. military in any capacity, purporting to reverse a policy on transgender service adopted by the Obama Administration and in effect since July 1, 2016. A month later the White House issued a memorandum setting out the President's new policy in greater detail, including an implementation date in March 2018 and a permanent postponement of the January 1, 2018, date that had been set by Defense Secretary James Mattis last June for allowing transgender individuals to apply to join the service. Four lawsuits were filed by different groups of plaintiffs in District Courts in Washington, D.C., Baltimore, Seattle, and Riverside (California), challenging the constitutionality of the policy. All four federal district judges found that the plaintiffs were likely to win on the merits and issued preliminary injunctions intended to have national effect, forbidding implementation of the policy while the litigation proceeded. None of the district judges were willing to stay their injunctions pending appeal, and the D.C. and 4th Circuit Courts of Appeals also rejected motions to stay, at which point

the Justice Department temporarily desisted from further appeals.

Meantime, Trump had ordered Mattis to come up with a written plan for implementation of the August Memorandum, to be submitted to the White House in February. After Mattis submitted his proposal, which departed in some particulars from the August Trump Memorandum, Trump "withdrew" his Memorandum and tweets and authorized Mattis to adopt his plan. The Justice Department then argued to Judge Pechman that her preliminary injunction should be lifted,

Department has filed a motion with the 9th Circuit asking it to stay the preliminary injunction pending appeal, but as of June 15 the 9th Circuit had not responded to the motion.

Judge Pechman's June 15 opinion said that "each of the arguments raised by Defendants already has been considered and rejected by the Court, and Defendants have done nothing to remedy the constitutional violations that supported entry of a preliminary injunction in the first instance." She pointed out that she was no more persuaded now than she had been

The judge concluded that the new policy was just a slightly modified version of the earlier policy.

because the policy at which it was directed was no longer on the table.

The judge concluded, however, in line with the plaintiff's arguments, that the new policy was just a slightly modified version of the earlier policy, presenting the same constitutional flaws, so she refused to vacate her injunction. Instead, responding to motions for summary judgment, she ruled that the case should proceed to discovery and a potential hearing on contested fact issues. The Justice Department filed a notice of appeal to the 9th Circuit on April 30, and filed a motion with Judge Pechman seeking an expedited ruling on the plaintiffs' motion for summary judgment so that it could be appealed. However, the judge declined to issue an expedited ruling, as discovery was supposed to take place and disputed facts might require a hearing to resolve. Discovery has been delayed by the Justice Department's insistence that much of the information the plaintiffs seek is covered by Executive Privilege, a dubious claim at best. The Justice

Department has previously argued that Mattis's Implementation Plan was a "new and different" policy.

The Justice Department also argued that "the Ninth Circuit and/or this Court ultimately are highly likely to conclude that significant deference is appropriate," but Judge Pechman responded, "whether any deference is due remains unresolved. Defendants bear the burden of providing a 'genuine' justification for the Ban. To withstand judicial scrutiny, that justification must 'describe actual state purposes, not rationalizations' and must not be 'hypothesized or invented post hoc in response to litigation.'" To date," she observed, "Defendants have steadfastly refused to put before the Court evidence of any justification that predates this litigation."

She also pointed out that there are four nationwide preliminary injunctions in effect, not just hers. "As a practical matter," she wrote, "Defendants face the challenge of convincing each of these courts to lift their injunctions before they may implement the Ban."

The Justice Department also argued that failure to let the government implement the ban “will irreparably harm the government (and the public) by compelling the military to adhere to a policy it has concluded poses substantial risks.” But, Judge Pechman pointed out, at a hearing of the Senate Committee on Armed Services held after her injunction went into effect, both the Army Chief of Staff, General Mark Milley, and the Chief of Naval Operations, Admiral John Richardson, had testified that there were no problems with transgender people serving, as thousands are now doing. Milley testified that he “monitors very closely” the situation and had received “precisely zer” reports of problems related to unit cohesion, discipline and morale. Similarly, Admiral Richardson testified that he had received no negative reports, and that, in his experience, “it’s steady as she goes.”

The judge had already found that staying her injunction would likely cause irreparable injury to the plaintiffs, and that, in fact, “maintaining the injunction pending appeal advances the public’s interest in a strong national defense, as it allows skilled and qualified service members to continue to serve their country.” She also rejected the Justice Department’s argument that her injunction should just apply to the nine individual transgender plaintiffs in the case, stating, “The Ban, like the Constitution, would apply nationwide. Accordingly, a nationwide injunction is appropriate.” And, she wrote, “The status quo shall remain ‘steady as she goes,’ and the preliminary injunction shall remain in full force and effect nationwide.”

The plaintiffs in the Karnoski case are represented by a small army of lawyers affiliated with Lambda Legal, Kirkland & Ellis (Chicago), Outserve-SLDN, and Seattle local counsel Newman & Du Wors LLP. The state of Washington, co-plaintiff in the case, is represented by attorneys from Kirkland & Ellis and the Washington Attorney General’s Office. Fifteen states and the District of Columbia, the Constitutional Accountability Center, and Legal Voice (formerly known as the Northwest Women’s Law Center) are also participating in this case as amicus on behalf of the plaintiffs. ■

11th Circuit Remands Imputed Gay Salvadoran Case on Unrelated Criminal Immigration Issue

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the 11th Circuit has denied in part and remanded in part the case of a Salvadoran-born U.S. permanent resident convicted of a Florida child abuse offense who had claimed that he would face persecution if returned to El Salvador because he feared gang members would believe him to be homosexual and would harm him for that reason, in *Villalobos v. U.S. Attorney General*, 2018 WL 3025401, 2018 U.S. App. LEXIS 16317 (11th Cir., June 18, 2018).

Petitioner was born in El Salvador and obtained his lawful U.S. permanent residence through marriage to his wife, with whom he has children. He pleaded guilty in 2015 to a Florida child abuse crime. In 2016, he was placed in removal proceedings on three separate grounds of removability relating to the 2015 conviction: under a ‘child abuse’ ground, and under two ‘aggravated felony’ grounds: having a conviction for ‘sexual abuse of a minor’ and a ‘crime of violence.’ He conceded removability under the child abuse crime grounds and the Immigration Judge found him to be additionally removable under the ‘crime of violence’ ground, but not to a ‘sexual abuse of a minor’ crime because the statute did not ‘reference sexual gratification or sexual abuse of any kind.’ As an aggravated felon, Petitioner was barred from seeking ‘cancellation of removal’ or political asylum and was left merely with the availability of deferral of removal under the Convention Against Torture. Pursuant to that limited form of relief, Petitioner argued he would be imprisoned as a criminal deportee and could be harmed by gangs who would perceive him as homosexual for having abused a child. The Immigration Judge denied all relief. The Board affirmed the Immigration Judge’s denial of all relief. Petitioner timely appealed to the 11th Circuit.

Recently, in *Sessions v. Dimaya*, 138 S. Ct 1204 (2018), the Supreme Court

ruled unconstitutional for vagueness the second (known as the ‘residual clause’) of the two subsections of the ‘crime of violence’ definitional statute, which classified an ‘offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person may be used in the course of committing the offense’ as an aggravated felony. On appeal, Petitioner argued that his case should be remanded for further consideration in light of that ruling.

A *per curiam* panel of the 11th Circuit agreed that since the Immigration Judge and Board had ruled Petitioner to be an aggravated felon under the ‘residual’ clause of the crime of violence statute, the Board’s decision must be vacated and remanded. However, the panel further ruled that on remand the Board must decide whether Petitioner’s crime fit the first (non-vague) provision of the ‘crime of violence’ statute defining a ‘crime of violence’ aggravated felony as ‘an offense that has [as] an element the use, attempted use, or threatened use of physical force against [a] person.’

With respect to Petitioner’s Convention Against Torture case, the panel held that the Immigration Judge and Board had given ‘reasoned explanations’ for denying Petitioner’s application for deferral of removal, finding that the Board considered his contentions that he would be harmed as a child abuser or presumed homosexual or that he might be extorted by gangs who might assume he was wealthy, and ruled that Petitioner had identified no evidence in the record which the Immigration Judge or Board had failed to consider. Accordingly, the panel denied this portion of the Petition for Review and remanded to the Board the ‘crime of violence’ aggravated felony issue. ■

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

Obscure Brooklyn Appellate Ruling Protects Transgender People from Discrimination without Saying So

By Arthur S. Leonard

Talk about “hiding the ball!” On June 6, a unanimous four-judge panel of the New York Appellate Division, 2nd Department, based in Brooklyn, confirmed an Order by the State Division of Human Rights (SDHR), which had adopted a decision by an agency administrative law judge (ALJ) ruling that a Port Jervis employer violated the human rights law when it discharged a transgender employee. The case is *Matter of Advanced Recovery, Inc. v. Fuller*, 2018 N.Y. Slip Op 03974, 2018 N.Y. App. Div. LEXIS 3969, 2018 WL 2709861 (N.Y. App. Div., 2nd Dept., June 6, 2018). But nobody reading the court’s short memorandum opinion, or the short agency opinion and order, would have any idea that the case involved a gender identity discrimination claim. Surprisingly, given the novelty of the legal issues involved, only the administrative law judge’s opinion, an internal agency document, communicates what the case is actually about.

Erin Fuller, a transgender woman, was fired by Mark Rea, the owner and chief executive of Advanced Recovery, Inc., the day Fuller presented a supervisor with a copy of a court order authorizing her change of name from Edward to Erin and the supervisor passed the document to Rea. Rea called Fuller into his office and, according to Fuller, said in the presence of the supervisor, “Now I have a problem with your condition. I have to let you go.”

Rea and other company officials had been aware for some time that Fuller was transitioning, since she had presented them with a letter from her doctor in 2009 explaining her gender dysphoria diagnosis and how she would be transitioning, and on at least one occasion Rea had reacted adversely to Fuller’s mode of dress, but it wasn’t until he was presented with the legal name change that Rea apparently decided that he had enough and no longer wanted

Fuller, a good worker who had been with the company more than two years.

When Fuller went back later to pick up her final paycheck, a supervisor told her that “he felt bad, but your job would be waiting for you as long as you came in wearing normal clothes.”

Attempting to escape possible liability, Rea and the company’s lawyer later came up with a termination letter that cited other reasons for terminating Fuller and said nothing about her name change, mode of dress, or gender identity, but they never sent her that letter, which first surfaced when it was offered as evidence at the SDHR law judge’s

allege retaliation, unfortunately, waiting until the hearing to raise the issue, by which time the judge had to reject her motion because she waited too long to assert the retaliation claim.

The agency concluded, after investigation, that it had jurisdiction over the discharge claim and set the case for a public hearing before an ALJ. At the hearing, Fuller was represented by attorneys Stephen Bergstein and Helen Ullrich, who persuaded the judge that Fuller had a valid claim and that the reasons given by the employer for firing her were pretexts for discrimination. The same lawyers represented Fuller when

One can fairly criticize the court for failing to play its proper role in a system of judicial precedent to produce a decision that can be referred to by later courts.

hearing on Fuller’s discrimination claim.

The discharge took place on August 4, 2010, several years before Governor Andrew Cuomo directed the SDHR to adopt a policy under which gender identity discrimination claims would be deemed to come within the coverage of the state’s ban on sex discrimination.

Fuller filed her complaint with SDHR on October 13, 2010. On the complaint form, she checked the boxes for “sex” and “disability” as the unlawful grounds for her termination. After the company was notified of the complaint, it apparently prompted local police to arrest Fuller for altering a medical prescription, a spurious charge based on her changing the pronouns on the note written by a doctor on a prescription form after she missed a few days of work due to hospital treatment. At the time, she didn’t think of amending her discrimination charge to

the company appealed the judge’s ruling to the Appellate Division.

Relying on a scattering of trial court decisions holding that transgender people are protected from discrimination under the New York Human Rights Law, ALJ Robert M. Vespoli concluded that Fuller “states a claim pursuant to New York State’s Human Rights Law on the ground that the word ‘sex’ in the statute covers transsexuals.”

“Complainant also has a disability,” wrote Vespoli, “as that term is defined in the Human Rights Law.” The New York Human Rights Law’s definition of “disability” is broader and more general than the federal definition in the Americans with Disabilities Act, and New York law does not have the explicit exclusion of coverage for people with “gender identity disorders” that is in the federal law. Under New York’s

law, a disability is “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” The statute provides that a disability may also be a “record of such impairment or the perception of such impairment.”

“During the relevant time period,” wrote Vespoli, “Complainant was diagnosed with gender dysphoria. This condition falls within the broad definition of disability recognized under the Human Rights Law,” citing a 2011 decision by the agency to recognize its jurisdiction in a transgender discrimination case. The employer could not claim ignorance about Fuller’s transition, because in 2009 she had presented the company with her doctor’s letter explaining the situation, after which she began to dress and groom differently.

In his opinion dated February 20, 2015, Judge Vespoli rejected the employer’s evidence of other reasons for the discharge, finding that the proffered letter was a document created after the discharge for the purpose of litigation, that it had never been delivered to Fuller, and that the reasons it offered were pretexts for discrimination. The judge recommended awarding Fuller \$14,560.00 in back pay and \$30,000.00 for mental anguish caused by the discrimination. He also recommended imposing a civil penalty on the company of \$20,000.00.

The company filed objections to Vespoli’s recommendations with the Commission, but did not specifically object to Vespoli’s finding that Fuller had a disability or that the agency had jurisdiction over this case on grounds of sex and disability. The Commission’s Notice and Final Order of April 1, 2015, overruling without discussing the company’s evidentiary objections and adopting the judge’s recommendations and findings, said nothing about the details of the case, beyond noting that Fuller had complained of discrimination because of sex and disability.

The company’s appeal to the court again did not explicitly contest the ruling that the statute covers the case, instead urging the court to find that the ruling was not supported by substantial evidence of discrimination. Perhaps because the company’s appeal did not raise the question whether the Human Rights Law bans discrimination because of gender identity, the Appellate Division’s ruling also did not mention that the complainant is a transgender woman, and did not discuss the question whether this kind of case is covered under the disability provision. Rather, the court’s opinion recites that the complainant alleged “that the petitioners discriminated against her on the basis of sex and disability,” and that the agency had ruled in her favor. “Here there is substantial evidence in the record to support the SDHR’s determination that the complainant established a prima facie case of discrimination, and that the petitioners’ proffered reasons for terminating the complainant’s employment were a pretext for unlawful discrimination. The petitioner’s remaining contentions are either not properly before this Court or without merit.”

The court wrote that there is “substantial evidence in the record” to support the agency’s ruling, so the court presumably looked at the record, including the ALJ’s opinion, and was aware that this was a gender identity discrimination claim. Furthermore, the issue would have been raised in the responsive brief by Fuller’s attorneys, and was addressed as well by the SDHR’s cross-petition for enforcement of its Order. The appellate panel surely knew that this was an important issue in the case.

Cursory research in published New York court opinions would show that there is no prior appellate ruling in New York finding that a gender identity claim can be asserted under the Human Rights Law’s prohibited grounds of “sex” and “disability.” The court took its time on this case, waiting until June 6, 2018, to issue a ruling upholding an administrative decision that was issued

on April 1, 2015. Despite taking all this time, the court produced an opinion that never mentions these details, that provides no discussion of the ALJ’s analysis of the jurisdictional issue, and that does not expressly state agreement with the trial court ruling that Judge Vespoli specifically cited in support of his conclusions.

This may be the first case in which a New York appellate court has affirmed a ruling holding that an employer violated the state’s Human Rights Law by discriminating against an employee because of her gender identity, but you wouldn’t know it by reading the court’s opinion. While the court’s failure to mention the doctrinal significance of its ruling may be explainable because the employer did not raise the issue on its appeal, its omission nonetheless renders the decision basically useless as an appellate precedent.

One can fairly criticize the court for failing to play its proper role in a system of judicial precedent to produce a decision that can be referred to by later courts. The judges whose names appear on this uninformative opinion are Justices Mark C. Dillon, Ruth C. Balkin, Robert J. Miller, and Hector D. LaSalle.

Governor Cuomo’s directive, issued while this case was pending before the Appellate Division, actually reinforced existing practice at the State Division of Human Rights, as the earlier opinions cited in Judge Vespoli’s opinion show, but in the absence of an explicit appellate ruling, enactment of the Gender Identity Non-Discrimination Act remains an important goal and its recent defeat in a Senate committee after renewed passage by the Assembly is more than merely a symbolic setback for the community.

A legal team of Caroline J. Downey, Toni Ann Hollifield and Michael K. Swirsky represented SDHR before the Appellate Division, which had cross-petitioned for enforcement of its decision. Port Jervis lawyer James J. Herkenham represented the company, and Stephen Bergstein of Bergstein & Ullrich presented Fuller’s response to the appeal. ■

Federal Court Rules against Cosmetic Surgeon Who Refuses to Treat People with HIV Taking Antiretroviral Medications

By Arthur S. Leonard

U.S. District Judge Analisa Torres granted summary judgment to the government in an enforcement lawsuit contending that a plastic surgeon in New York violated the Americans with Disabilities Act (ADA) by screening out and denying services to persons living with HIV. *United States v. Asare*, 2018 WL 2465378, 2018 U.S. Dist. LEXIS 93023 (S.D.N.Y., June 1, 2018). There are three complainants in the case, Mark Milano, John Doe 1 and John Doe 2; Milano has also intervened as a co-plaintiff with the government.

During 2014, Milano and the two John Does all sought cosmetic surgery services from Dr. Emmanuel O. Asare of Springfield Medical Aesthetic P.C. d/b/a Advanced Cosmetic Surgery of New York. When Milano went to the doctor seeking a gynecomastia procedure, the doctor asked him what medications he was taking, and he disclosed that he was taking HIV-related medications. Dr. Asare then asked him if he had HIV and Milano answered affirmatively. Asare said Milano was not a suitable candidate for the surgery and declined to perform the procedure.

In the case of John Doe 1, surgery was scheduled but then cancelled by the doctor “after test results suggested that John Doe 1 might be HIV positive.” John Doe 2 was scheduled for a procedure, showed up for the appointment and was sedated. “Before beginning surgery, however, Asare canceled the procedure. Asare’s notes from May 21 indicated that John Doe 2 had an elevated white blood count and tested positive for HIV. Asare scratched out the ‘operative report,’ noting the procedure was ‘cancelled due to lab results.’” Asare wanted Doe 2 to get a confirmatory HIV test because the test he had done was inconclusive. It was clear in all three cases, however, that Asare appeared to have a general policy of not performing cosmetic surgery on HIV-positive people.

Complaints to the Justice Department led to an investigation, in which Asare sent a letter stating “any condition that a patient has that to the best of my knowledge will potentially have any negative effect on the outcome of the surgery or recovery process will disqualify the patient.” He wrote that “just like any other Cosmetic Surgeon, I have some qualifying and disqualifying criteria based on my comfort level and how much risk or stress I am willing to take! I think that is my right as a Cosmetic Surgeon!” In the letter Asare mentioned several different conditions

not involve a material disputed fact. The government’s theory was that Asare’s policy “impermissibly imposes eligibility criteria that tend to screen out individuals with HIV and, in applying his policy, Asare “failed to make or even consider reasonable modifications” to his services to accommodate individuals with HIV. Federal and city disability discrimination law imposes an obligation on service providers to make reasonable accommodations if necessary in order to provide services to people with disabilities. Milano’s summary judgment motion also extends

“Defendants admit that they do not operate on ‘HIV+ patients taking antiretroviral medications’ out of concern of causing oversedation.”

that might cause him to refuse to perform cosmetic surgical procedures on a patient.

The government’s complaint alleges a “pattern or practice” of discrimination on the basis of disability, including HIV as well as other disabilities that appeared on Dr. Asare’s list. The complaint alleged that Asare had specifically discriminated against Milano because he is living with HIV, a disability. The complaint did not mention John Does 1 & 2 specifically, since they had not been identified as potential “persons aggrieved” at the time the government filed its complaint on May 6, 2015. After Milano’s motion to intervene was granted, he added claims under the New York City Human Rights Law. Plaintiffs moved for summary judgment, arguing that Asare was not contesting the allegation that he had a “blanket policy” of refusing to perform cosmetic surgery on people living with HIV, so that key factual finding did

to the NYC ordinance. Defendants cross-moved for summary judgment.

Responding to the motions, Asare argued that he did not have a policy of categorically denying services to people living with HIV, but rather that he denied services to people who are taking anti-retroviral medications for HIV, which he characterized as a “reasonable medical judgment” on his part based on his belief that there would be risks to the patient from cross-reaction between the anesthesia he uses in his office and such medications.

Analyzing the motion for summary judgment, Judge Torres wrote, “Defendants admit that they do not operate on ‘HIV+ patients taking antiretroviral medications’ out of concern that antiretrovirals will interact with the sedative cocktail Asare administers to patients will thereby cause oversedation.” Asare admitted this was the reason he denied service to Milano. As to the John Does, in both

cases he didn't know whether they were taking antiretrovirals, having canceled their procedures because "each of their lab results raised the suspicion that they 'may have been HIV positive.' In the case of John Doe 2, Defendants claim that John Doe 2 decided to cancel the surgery after discussing the possibility of an HIV diagnosis with Asare at two appointments. In the case of John Doe 1, the HIV test was inconclusive and it is not clear what happened next." In light of the record at this point, Judge Torres decided she could not determine whether Asare "made a final and conclusive decision to reject John Does 1 and 2 as candidates for gynecomastia surgery based on the possibility that they might be living with HIV," so it was not appropriate to make a summary judgment decision as to them, however, the judge decided that her opinion could address Asare's "undisputed policy

care professionals without deferring to their individual judgments," placing the burden on defendants "to show their criteria are 'necessary,' not on Plaintiffs to show that Defendants' reasons for the criteria are pretextual. To conclude otherwise," wrote Torres, "would do violence to the language and purpose of the ADA." Thus, plaintiffs were entitled to summary judgment "if they can demonstrate that Defendants failed to present evidence to support necessity."

"Here, there is no evidence that Defendants' policy of rejecting individuals who take antiretrovirals is *necessary*," Torres asserted. "Defendants categorically refuse to provide cosmetic surgery services to patients taking antiretrovirals. As Asare testified at his deposition, when a 'person comes to [him and says], oh, okay, I'm HIV positive,' he then asks that person 'Are you on the cocktail?"

of the risks involving the particular plaintiff." Furthermore, Torres found, Asare was actually arguing that he did not have to show necessity, but merely that his "purported concern about oversedation is 'reasonable.' But, as explained in the Court's discussion of *Bragdon*, the question is not whether the purported concern of oversedation is *reasonable*. The question is whether a blanket rejection of individuals taking antiretrovirals is *necessary*. Defendants cannot meet their burden to demonstrate necessity while admitting that not all drugs are contraindicated with Asare's sedative protocol. They have, therefore, run afoul of the ADA."

Plaintiffs also pointed to the "reasonable modification" rule that would apply if there was a genuine patient safety risk. In this case, they suggested that Asare could hire an anesthesiologist to "monitor or assist in the surgery," refer patients to another physician in the same practice, or adjust his sedative protocol. The court focused on the first suggestion. Normally, Asare would self-administer his sedative protocol without the assistance of an anesthesiologist, as is generally done by cosmetic surgeons when performing procedures on an out-patient basis in his office. He claimed that bringing in an anesthesiologist would "fundamentally alter the nature of the surgery" and thus was not mandated by the ADA. Torres rejected this argument. She found that it was clear that Asare could not meet the burden of proving that having an anesthesiologist present to monitor the procedure would produce a fundamental alteration in the service provided by the doctor. Although having an anesthesiologist present would, in some sense, be an alteration of the procedure, this did not affect the "very nature of the procedure," as Asare argued. "After all," wrote the judge, "the sedative protocol would still be 'self-administered by the treating physician,' with an anesthesiologist present to assist only if oversedation, in fact, occurred. Because Defendants fail to provide any evidence that using an anesthesiologist would fundamentally alter the procedure, the Court concludes, as before, that Defendants have violated

Plaintiffs also pointed to the "reasonable modification" rule that would apply if there was a genuine patient safety risk.

of denying services to individuals taking antiretrovirals and the policy's application to Milano."

Asare was asserting a "necessary" defense – an argument that medical necessity justified his refusal to perform cosmetic surgery on HIV-positive people taking antiretroviral medication. He argued that the plaintiffs should be required to show that his defensive argument was a pretext for discrimination, and that as a medical professional his judgment as to this was entitled to deference from the court. Torres rejected this argument, which she characterized as "Defendants' attempt to turn the 'necessary' defense on its head" because it did not account for the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998), which, she wrote, "establishes that courts should assess the objective reasonableness of the views of health

If yes, 'case closed.' This policy of automatic rejection, however, is not based on *necessity*. Asare admits that some antiretroviral drugs are not contraindicated for the drugs in his sedative protocol, but he does not investigate further because, as he testified, 'I just don't feel comfortable. And, despite this admission, Asare still declines to investigate what type of antiretroviral drug a potential patient is taking or its possible effects."

Judge Torres concluded that the summary judgment record supports the conclusion that "Defendants apply their knee-jerk policy without making an individualized inquiry as to its necessity." But central to the Supreme Court's decision in *Bragdon* (a case involving a dentist's refusal to provide service to an HIV-positive woman) is the requirement that necessity be based on an individualized determination

the ‘reasonable modification’ provision of the ADA.” The court saw no reason to address the other two modifications that the plaintiffs had suggested.

However, the court accepted Asare’s argument that the summary judgment should extend only to the alleged pattern or practice of discriminating against people living with HIV, and not more broadly to the list of disqualifying criteria that Asare had submitted during discovery. After all, the government’s evidence in support of its motion focused entirely on the denial of service to Milano because he is a person living with HIV taking antiretrovirals. “Unlike their policy of rejecting patients taking antiretrovirals,” wrote Torres, “Defendants have not conceded that they have a policy against individuals with other disabilities,” and there was also testimony from Asare during his deposition that he had performed procedures on some individuals who had other disabilities. So the scope of the summary judgment was narrowed down essentially to Milano’s claim, and “the court concludes that Defendants are entitled to summary judgment on the Government’s claims premised on disabilities other than HIV.”

In a footnote, Judges Torres explained that she had issued the June 1 Order as an amended version of an original Order dated December 20, 2017, which she was vacating. She also briefly address motions by the defendants and the government for reconsideration of some of the conclusions stated in her December order. Judge Torres directed the parties to file a joint letter by June 8 informing the Court “how they wish to proceed.” Presumably there is some question whether the plaintiffs would be satisfied with an award of relief on the issues as to which they have won summary judgment, or whether they wish to continue the case to address the issues as to which the court found remaining material factual disputes – for example, as to John Does 1 and 2. Of course, this case was initiated by the Justice Department in 2015, and it is possible that the Department, under “new management” since January 2017, may have different views about how to proceed in this case. ■

Gay or Lesbian Plaintiffs Cannot Overcome Adverse 6th Circuit Precedent in Sexual Orientation Claims Under Title VII

By Arthur S. Leonard

Characterizing a lesbian plaintiff’s sex discrimination claim under Title VII and the Kentucky Civil Rights Act as a sexual orientation discrimination claim, Chief U.S. District Judge Joseph H. McKinley, Jr., granted an employer’s motion for partial dismissal, finding that 6th Circuit precedent from a decade ago expressly rejected using a sex stereotype theory to find sexual orientation discrimination actionable under Title VII or the Kentucky statute. *Lindsey v. Management & Training Corporation,*

R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), had not “implicitly” overruled *Vickers* when it ruled in favor of a transgender funeral director’s Title VII sex discrimination claim, holding that discrimination because of gender identity is form of sex discrimination.

Terry Lindsey alleged that she was terminated because she is an African-American, noting that she and other African-American employees in management positions were either removed or encouraged to

“The characteristic upon which she claims she was discriminated is not a protected classification.”

2018 WL 2943454, 2018 U.S. Dist. LEXIS 98001 (W.D. Ky., June 12, 2018). A week later, in *Underwood v. Dynamic Security, Inc.*, 2018 U.S. Dist. LEXIS 101026, 2018 WL 3029257 (E.D. Tenn., June 18, 2018), Senior U.S. District Judge Thomas W. Phillips also granted a motion to partially dismiss a Title VII claim brought by a lesbian employee, who alleged hostile environment harassment and retaliation in violation of Title VII, based on the court’s view that some of the plaintiff’s allegations amounted to a sexual orientation discrimination claim not actionable under Title VII. In both cases, the judges found that the 6th Circuit’s ruling in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), stood in the way of following recent persuasive precedents from other circuits and the EEOC to find sexual orientation claims actionable, and that a 6th Circuit panel decision earlier this year in *EEOC v.*

resign from management prior to her termination. She also alleged that she was terminated because she was seen by another employee with her female “significant other,” who is a former employee of the company. Lindsey pointed to inconsistent enforcement by the company of its rule against co-workers forming romantic relationships, pointing out that the company “never took disciplinary action against employees who were engaged in opposite-sex relationships with other employees. The company moved to dismiss the sex discrimination claim as well as a retaliation claim which had not been administratively exhausted prior to filing suit.

The company’s motion asserted that Lindsey had not pled a cognizable sex discrimination claim, as “the characteristic upon which she claims she was discriminated, her sexual orientation, is not a protected

classification” under either Title VII or the Kentucky law, wrote Judge McKinley. One might argue that this mischaracterizes Lindsey’s claim. She is not alleged that she was discriminated because she is a lesbian, but rather she is being discriminated against because of the sex of the person she is dating, observing that the company treats same-sex and different sex relationships differently, thus having a policy based on sex. But the court, without any discussion of the matter, accepts the company’s characterization of the claim, and comments, “The Sixth Circuit has categorically held that ‘sexual orientation is not a prohibited basis for discriminatory acts under Title VII,’ citing *Vickers*. “Further,” he wrote, “the Sixth Circuit, in applying Title VII precedent to the KCRA, has held that the KCRA also does not protect individuals from discrimination based on sexual orientation,” citing *Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009). “Lindsey’s complaint alleges that M & T took adverse action against her because of her same-sex relationship. Because of the Sixth Circuit’s opinion in *Vickers*, this claim is foreclosed both under Title VII and the KCRA.”

But the judge acknowledges that there is some logic to viewing this as a sex stereotyping case, writing, “Lindsey’s arguments to the contrary, while foreclosed by *Vickers*, are not without some merit. Title VII’s protection against sex discrimination allows for claims ‘based on gender nonconformance that is expressed outside of work,’” citing *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), and some earlier 6th Circuit cases allowing sex discrimination claims to be brought by transgender plaintiffs using a sex stereotype theory. “If the court were simply required to apply this framework,” the judge continued, “Lindsey’s claim would likely survive. Lindsey’s behavior that was at the root of the alleged discrimination (dating another woman) fails to conform to the stereotypical female behavior of dating men. The *Vickers* court seemed to acknowledge that such claims based on sexual orientation discrimination

fit within the framework for analyzing sex discrimination claims, stating that, ‘in all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.’ But the *Vickers* court removed claims based on sexual orientation from ever being put through this analytical framework by declaring that ‘a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII,’” in this instance quoting the 2nd Circuit’s opinion in *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2005). In a footnote, Judge McKinley notes that *Dawson* “was recently overruled by *Zarda v. Altitude Express, Inc.*,” 883 F.3d 100 (2nd Cir. 2018).

Nonetheless, despite these developments since *Vickers*, Judge McKinley states that “because *Vickers* remains good law [citing *EEOC v. Harris Funeral Homes*], the court must dismiss Lindsey’s Title VII and KCRA claims for sex discrimination.”

Lindsey also tried to argue in opposition to the motion to dismiss that M&T is a federal contractor and thus bound not to discriminate because of sexual orientation as part of its contract with the federal government under Obama Administration Executive Order 13672, which has not been expressly rescinded by Trump. Judge McKinley notes that the complaint filed in this case “makes no mention of this Executive Order as a legal theory under which she is seeking relief,” nor could it, really, because the E.O. is only enforceable administratively within the department with which the employer has its contract. There is no general right for an employee to sue an employer in federal court to enforce a provision in a contract between the employer and the government. And, of course, raising new legal theories that were not mentioned in a complaint in opposition to a dismissal motion just does not work as a matter of civil procedure.

However, Judge McKinley may not have read *Harris Funeral Homes* closely enough. He cited it for the proposition

that *Vickers* remains “good law” in the 6th Circuit, but the paragraphs in *Harris* dealing with the *Vickers* precedent may lead one to doubt whether *Vickers* remains on such solid ground as circuit precedent. In *Harris*, admittedly a gender identity rather than a sexual orientation case, the court cast doubt on the viability of the *Vickers* panel’s narrow approach to the sex stereotyping theory, citing to the earlier circuit gender identity cases of *Smith v. City of Salem* and *Barnes v. City of Cincinnati*, which had taken a broader view of sex stereotyping theory than the *Vickers* panel had embraced. (The *Harris* panel criticized *Vickers* for engrafting an additional interpretive test to the theory that went beyond what the Supreme Court had done in the seminal sex stereotyping case of *Price Waterhouse*.) Furthermore, of course, the 2nd Circuit case on which *Vickers* relied, *Dawson*, has been overruled in *Zarda*, as Judge McKinley noted. And the *Harris* court cited the 7th Circuit’s ruling in *Hively*, overturning that circuit’s adverse precedent under Title VII in a sexual orientation case, acknowledging the difference between sexual orientation and gender identity cases but apparently finding the approach to interpretation by the *Hively* court to be persuasive. Which is a long way around to saying that if Judge McKinley were willing to stick his neck out, there was sufficient diversity of approach in 6th Circuit sex discrimination precedents for the court to decline to dismiss the sex discrimination claim as it related to sexual orientation.

It is unfortunate that Lindsey is apparently litigating *pro se*, because this seems like the kind of case that might be used to persuade the 6th Circuit to abandon *Vickers* and, in light of the broader view of sex stereotyping and flexibility in interpreting “sex” in Title VII exhibited in *Harris*, to adopt an interpretation that could encompass Lindsey’s claim. By contrast, Carla Underwood, the plaintiff in *Underwood v. Dynamic Securities, Inc.*, is represented by counsel, so maybe an appeal will be in the offing.

In this case, the plaintiff, a security officer assigned by Dynamic Security to

work on the Hardin Valley campus of Pellissippi State Community College, is a lesbian who claims that she was subjected to same-sex sexual harassment by her female supervisor, Angela Garrett, whom she believes is also either a lesbian or bisexual. According to her complaint, as summarized by Judge Phillips, Underwood “claims Ms. Garrett ‘flirted’ with her and harassed her ‘on account of my sex and/or sexual orientation.’ In support of this assertion,” continued Phillips, “plaintiff claims Ms. Garrett punched her in the arm, kicked her in the back of the legs, and groped her breast. Plaintiff protested this behavior, but Ms. Garrett ‘continued her conduct, unabated.’ Comparing Ms. Garrett’s conduct toward a male employee, plaintiff believes the difference ‘was due to Garrett’s sexual orientation (lesbian or bisexual) and her resulting desire to actively ‘flirt’ with and/or sexually pursue me on account of my sex and/or sexual orientation.’ Plaintiff complained to Dynamic Security about Ms. Garrett’s unwanted attention and Dynamic Security reassigned plaintiff to the Blount County campus of Pellissippi State Community College in August 2016.” There, Underwood encountered a male supervisor, Mr. Gibson, who she claims subjected her to sexual harassment. She complained repeatedly to Human Resources about Gibson’s conduct. She alleges that the office manager “lambasted” her for contacting Human Resources to report the sexual harassment and the company’s “mishandling” of her complaints. She was then terminated.

“Plaintiff’s claim of hostile work environment harassment relates solely to the conduct by Mr. Gibson [the male supervisor at the Blount County campus] and she describes the harassment as ‘on account of her sex,’” wrote Judge Phillips. The retaliation claim is based on her repeated protests about Gibson’s conduct and her claim that the protests precipitated her discharge, as well as about the response to her complaining about Garrett. Her claims were based both on Title VII and the sex discrimination provision of Tennessee’s Human Rights Act (which does not

expressly cover sexual orientation claims). However, in her complaint and her EEOC charge, she claimed to have been discriminated against because of her “sex and/or sexual orientation.”

Dynamic Security moved to dismiss part of Underwood’s retaliation claim under both statutes, arguing that 6th Circuit and Tennessee precedent requires dismissing the claims “to the extent Plaintiff’s retaliation claim stems from a complaint of sexual harassment on the basis of sexual orientation.” As in the *Lindsey* case, Underwood argued that the recent panel opinion in the *Harris Funeral Homes* case had “implicitly overruled” the prior 6th Circuit case law “and thus implicitly recognized a cause of action for discrimination and retaliation on the basis of sexual orientation.” Underwood’s argument relied on the 6th Circuit panel’s citation to *Hively*. “In reply,” writes Judge Phillips, “Dynamic Security contends that [*Harris*] did not – and could not – overrule prior Sixth Circuit precedent,” and he finds this argument to be correct, resting on the argument that *Harris*, as a gender identity case, could not be held to have implicitly overruled circuit precedent regarding sexual orientation claims, which present a different issue as sexual orientation and gender identity are distinct concepts.

“The [*Harris*] opinion did cite to *Hively*, but noted that *Hively* addressed ‘a different question than the issue before this court.’ More significantly, for purposes of this motion, the [*Harris*] opinion described *Vickers* as not controlling because it ‘concerned a different legal question . . . whether Title VII forbids sexual orientation discrimination.’ The [*Harris*] court continued: ‘While it is indisputable that “a panel of this Court cannot overrule the decision of another panel” when the “prior decision [constitutes] controlling authority,” . . . one case is not “controlling authority” over another if the two address substantially different legal issues After all, we do not overrule a case by distinguishing it.’ Thus, the [*Harris*] court addressed a different legal issue than that presented by *Vickers*, and did not – and could not

– overrule *Vickers*. It follows then that [*Harris*] did not alter the law in the Sixth Circuit with respect to Title VII claims of discrimination based on sexual orientation. Absent contrary guidance from the Sixth Circuit or the Supreme Court, a claim of discrimination based on sexual orientation does not state a claim for relief under Title VII and this Court is obligated to follow that precedent. Further, because the conduct plaintiff opposed – Ms. Garrett’s alleged harassment because of plaintiff’s sexual orientation – was not prohibited by Title VII, plaintiff’s retaliation claim based on that conduct must also fail To the extent that plaintiff’s retaliation claim is based on her complaint of harassment due to her sexual orientation, plaintiff fails to state a viable claim for relief under controlling Sixth Circuit and Supreme Court authority.”

However, Judge Phillips wrote that this did not entirely eliminate Underwood’s Title VII retaliation claim when it came to Ms. Garrett’s actions, since her complaint was that she was harassed because of her “sex and/or sexual orientation.” The court was dismissing only as to sexual orientation, not sex. And, of course, under Supreme Court precedent (*Oncale*), same-sex harassment can be actionable if the victim was harassed because of her sex. The Supreme Court specifically held in *Oncale* that same-sex harassment by a “homosexual” supervisor of an employee of the same-sex could be seen as sex discrimination, since the victim was chosen because of her sex (not necessarily or just because of her sexual orientation). “The Court does not have testimony or exhibits as to the details of plaintiff’s complaints about Ms. Garrett or what Dynamic Security understood to be the basis of her complaints,” wrote Phillips. “Thus, the Court does not intend to predetermine the scope of plaintiff’s testimony.”

Underwood is represented by James W. Friauf of Knoxville. As noted above, it may be time to push the Title VII question up to the 6th Circuit and seek *en banc* review if a three-judge panel declines to find *Harris*’s criticism of *Vickers*’ methodology to be an implicitly overruling. ■

Nebraska Supreme Court Decides Gay Man Gifted Dog to His Partner Prior to Their Break-up

By Arthur S. Leonard

Nowhere in Justice Stephanie Stacy's opinion in *Zelenka v. Pratte*, 300 Neb. 100, 2018 Neb. LEXIS 100, 2018 WL 2768981 (June 1, 2018), is there any mention of the monetary value of any of the items in dispute, but one suspects that a reason this ended up being a case litigated to the Nebraska Supreme Court was that "Princess Pot Roast," a/k/a "Pavlov," is a valuable show dog. In any event, Pavlov appears to be pedigreed, which suggests as much, and is described as a French bulldog.

The dispute is between Peter Zelenka and Jason D. Pratte, who were involved in a "romantic relationship

property allegedly wrongfully held by Pratte, but in the end it did not make any difference how the cause of action was named. Zelenka wanted his stuff and his dog back, not damages.

Douglas County District Judge Kimberly Miller Pankonin held a bench trial in January 2017. Jill M. Mason of Kinney Mason, P.C. (Omaha), represented Zelenka, and Ryan J. Lewis and Thomas C. Dowart of Govier, Katskee, Suing & Maxell, P.C. (Omaha), represented Pratte. (We rather fancy an attorney with the surname Suing – that is, assuming that Suing usually represents plaintiffs – but in this case the firm is representing the defendant!)

after Zelenka made his selection, she had the puppy spayed and microchipped at a local veterinary clinic, after which Zelenka returned alone to pick up Pavlov. At that time, she provided him with the adoption contract, registration forms for the American Kennel Club, and photographs of the puppy (from which this writer deduces the puppy is pedigreed and potentially a show dog and thus probably more valuable than a "mere" pet). The breeder's testimony confirmed Zelenka's claim that Pavlov was bought by Pratte as a birthday gift for Zelenka.

Zelenka's mother also testified that Pavlov was a birthday gift from Pratte. "When asked how she knew the puppy was a birthday gift, Zelenka's mother testified that Pratte told her so."

Pratte's story was that he did not intend to buy Pavlov as a gift, and that before he brought Zelenka to see the litter, he had visited the breeder to "assess whether any of her puppies would be a good companion for his dog," and that he had narrowed the options before bringing Zelenka to choose from those options, "because he wanted Zelenka to feel included in his decision to add another dog to their household. Pratte testified that he paid for Pavlov, and the dog has always lived at his residence."

Judge Pankonin found the testimony offered in support of Zelenka's claim to be more credible than Pratte's testimony, and ordered Pratte to surrender Pavlov within 48 hours. As to the various other items of personal property, the judge found Zelenka had failed to meet his burden of proof and ordered that the property remain with Pratte.

Both parties appealed. Justice Stacy provides a description of the law of gifts under Nebraska's common law. She outlines the essential elements of donative intent, delivery and acceptance, and the requirement that "the person asserting the gift must prove all the essential elements by clear, direct,

According to the breeder's testimony, when Pratte contacted her to arrange to visit, he said "he was looking for a puppy as a gift for his boyfriend."

from 2010 until 2015" and "lived together in a house owned by Pratte from July 2011 until they separated in June 2015." Zelenka moved out and "took only a few items of personal property with him, believing the move was temporary to allow the parties to work on their relationship," but he evidently misjudged Pratte's feeling on the matter, since when he returned the following week, he discovered Pratte had changed all the locks and Zelenka was unable to retrieve items of personal property he claimed to be his, as well as Pavlov.

Zelenka sued Pratte in Douglas County District Court, alleging conversion of his property and seeking its return. Pratte filed a general denial. Justice Stacy expends some paragraphs discussing whether the action should more properly have been styled as one for replevin, since Zelenka was allegedly seeking the return of his own

The most hotly contested issue was the ownership of Pavlov, as to which the parties' testimony was supplemented by that of Zelenka's mother and the dog breeder. Zelenka contended that Pratte purchased Pavlov as a birthday gift for Zelenka. Pratte contended that the dog was purchased to be a companion dog to Pratte's Labrador retriever. There was no dispute that Pratte paid for the dog. Zelenka testified that "several weeks before his birthday, Pratte surprised him by taking him to a local dog breeder to pick out a puppy as a birthday gift" and that he selected one out of the litter that was available from the breeder and named it "Pavlov." Zelenka came back to the breeder some days later to pick up the puppy that Pratte had purchased. According to the breeder's testimony, when Pratte contacted her to arrange to visit, he said "he was looking for a puppy as a gift for his boyfriend." According to the breeder,

positive, express, and unambiguous evidence.” Here, she found, there was “clear and unmistakable evidence of Pratte’s donative intent” from the testimony of Zelenka, Zelenka’s mother and the dog breeder, which the trial judge found to be more credible than Pratte’s testimony that he never intended a gift. As to the other elements, Justice Stacy wrote, “Here, the evidence shows that both delivery and acceptance of the gift occurred when Zelenka picked Pavlov up from the breeder and took possession of the dog. Ordinarily, for a gift to be delivered, it must be shown that the owner parted with dominion and control over the gift. But in this case, the breeder, not Pratte, had dominion and control over Pavlov before the gift was made. We have recognized that delivery can take place through a third party, and here, the evidence was uncontroverted that once Pavlov was ready to be adopted, the breeder relinquished possession directly to Zelenka and gave Zelenka the necessary paperwork to prove ownership of Pavlov. Zelenka accepted both the dog and the paperwork and thereafter generally held himself out as the owner of the dog.”

The court rejected Pratte’s argument that because the dog resided in Pratte’s house, Zelenka’s “dominion” was not established, stating that “this fact is not incompatible with Zelenka’s dominion and control over Pavlov, especially since Zelenka moved from an apartment into Pratte’s home shortly thereafter. This court has recognized that the subsequent possession of a gift by the donor, while it may call for an explanation, is not necessarily incompatible with the donee’s dominion over the property, and will not necessarily operate to make the gift ineffectual. Here, the fact that Pavlov was kept at Pratte’s home after the gift was made is adequately explained by the fact that, for much of the relevant time period, Pratte and Zelenka were living together as a couple. We reject Pratte’s suggestion that this fact operates to make the gift ineffectual.”

Although the Supreme Court thus rejected Pratte’s appeal of the decision concerning Pavlov, it found that some

of Judge Pankonin’s other rulings had to be reversed in response to Zelenka’s cross-appeal. It turned out that Zelenka had shown by uncontroverted evidence that he had purchased some of the items in question, and he testified he purchased them for his own use, not as gifts for Pratte. Pratte claimed that all the items had been gifted to him, but, wrote Justice Stacy, “Pratte offered no evidence going to the essential elements of donative intent, acceptance or delivery,” and thus the district court erred in finding Zelenka failed to meet his burden of proof, since in fact the burden of proof of establishing the elements of a gift falls on the person asserting that the property in question was a gift. The default assumption is that the person who bought it owned it.

As to a leather couch, in particular, Pratte was relying on a printout from a social media post he made including a photograph of “a fully furnished living room with a leather couch, side chairs, a coffee table, an entertainment center, and related furnishings.” (This was marked exhibit 27.) Pratte had captioned the post: “Early birthday surprise!!! Check out this amazing f**cking living room!!! Love you Peter Zelenka.” The responses to this post included one from Zelenka: “Its [sic] not quite finished but its [sic] a good start.” Pratte argued that this supported his claim the couch was a gift to him. But, contrary to the trial court, the Supreme Court concluded this evidence was not sufficient to establish a gift. “Here, the social media posting and Pratte’s limited testimony about it were insufficient to establish the leather couch was a gift. Pratte conceded as much on cross-examination when he admitted that Zelenka’s comment in exhibit 27 ‘doesn’t acknowledge intent, delivery, and acceptance’ regarding the leather couch.”

Ultimately, the Supreme Court concluded that Pratte should have to return several lamps and the leather couch to Zelenka. However, as to the other personal property claimed by Zelenka, the Supreme Court would not overturn the trial judge’s resolution as to contradictory testimony about who purchased the other items. “The district court’s findings in this case have the

same effect as a jury verdict and will not be set aside unless clearly wrong. Due to the contradictory nature of the evidence regarding the other items of personal property, there is no basis on which to set aside the district court’s finding that Zelenka failed to meet his burden of proving ownership.”

We thought it interesting that although the court used the term “adopt” regarding the transfer of ownership of Pavlov from the breeder to Zelenka, there is no mention in the court’s decision about whether there was documentary evidence regarding the “adoption.” Did Zelenka never file the registration form with the American Kennel Club identifying himself as the owner of Pavlov? If he had, one would think the document would be entered in evidence and mentioned by the court, as tending to confirm Zelenka’s claim that although Pratte paid for the dog, Zelenka was the registered owner. It is also interesting – again reflecting on the word “adopt” rather than “sell” – that there is no discussion about whether confirming ownership in Zelenka is in the “best interest” of Pavlov. We are reminded of some litigation over the ownership of a dog between former gay partners that took place in New York, in which the trial judge initially decided that the “best interest of the dog” should be taken into account, but ultimately concluded that ordinary principles of property law should apply. See *Gellenbeck v. Whitton*, 2015 N.Y. Misc. LEXIS 637 (N.Y. Sup. Ct., N.Y. Co., 2015). That was also a case in which one of the men contended the dog had been a gift to him from his former partner. Ultimately the court decided they were joint owners and should negotiate a settlement. But there are other New York cases suggesting that although dogs are not children, nonetheless they are not inanimate property and it would be appropriate for a court to consider what is in the best interest for all concerned, taking into account the welfare of the dog, in resolving such a dispute. Who could assert the better ownership claim under property law would not necessarily be dispositive in a jurisdiction taking that approach. ■

Georgia Court of Appeals Reverses the Conviction of an HIV-Positive Defendant on Evidentiary Grounds

By Timothy Ramos

A laboratory result based on reliable procedure and methodology is crucial in a reckless conduct charge involving a defendant who allegedly failed to disclose his or her HIV-positive status to a sex partner. Under a number of states' penal codes, a defendant's later admission of his or her HIV status is not enough for a conviction. A conviction may depend on whether an HIV test—specifically approved by the appropriate state department—confirmed the defendant's HIV-positive status. As a result, prosecutors must take more precautions when preparing evidence of a defendant's HIV-positive status. Just take note of the following case.

On June 1, 2018, the Georgia Court of Appeals reversed the conviction of James Propes, who was sentenced to 10 years in prison in September 2016 after a Gwinnett County jury found him guilty of violating § 16-5-60 of the Official Code of Georgia Annotated (OCGA). *Propes v. State*, 2018 Ga. App. LEXIS 315, 2018 WL 2454706. OCGA § 16-5-60 makes it a felony to knowingly engage in sexual intercourse without disclosing one's HIV-positive status to the other person. It applies to people who are "HIV infected persons." Writing for the court, Presiding Judge John J. Ellington concluded that the evidence presented by the State during Propes' trial was insufficient to convict him under the statute, even though it appears from multiple sources that he is living with HIV infection.

Propes was arrested on July 30, 2016, after he became the subject of a domestic dispute between two female roommates. In 2014, Propes arranged to have sex with one of the women via a personal ad on Craigslist. Ultimately, he began sexual relations with both roommates. About one week after their dispute, the roommates conducted a search of Propes' name on Google and

discovered that in 2012 he was charged in Oregon and Indiana for reckless conduct in reference to having sex with other women without telling them beforehand of his HIV-positive status. According to the police report in this case, Propes had unprotected sex with both roommates and actively convinced at least one of them not to use a condom. There is no mention in the opinion of either of these women having tested HIV-positive.

During Propes' trial, the State introduced testimony from two investigators—one from an Indiana prosecutor's office and the other from an Oregon sheriff's office—in order to show that Propes was HIV-positive during the relevant time. The Indiana investigator testified that he investigated Propes in 2012 for a case involving failure to warn regarding a communicable disease. The investigator received a number of documents from the Indiana Department of Health regarding Propes' HIV-positive status, including two notices ultimately signed by Propes who acknowledged his duty under Indiana law to notify sex partners of his HIV-positive status prior to engaging in any sexual acts. The trial court admitted all of these documents over Propes' objections. The Oregon investigator also testified that he arrested Propes for reckless endangerment in 2012. However, no relevant lab reports were introduced during the investigator's testimony.

On appeal, Propes contended that the evidence presented by the State during trial was insufficient to convict him. Specially, he argued that the State failed to present any laboratory test results or other evidence from which the jury could find that he was an HIV-infected person under OCGA § 16-5-60. Under the statute and the definitions set forth in Georgia's Health Code (OCGA § 31-22-9.1), an "HIV infected person" is an individual determined to be infected

with HIV by at least two separate types of HIV tests. Such tests are defined in the Health Code as "any antibody, antigen, viral particle, viral culture, or other test to indicate the presence of HIV in the human body, which test has been approved for such purposes by the regulations of the department." In short, a conviction requires the State to prove that the defendant was determined to be infected with HIV *by an HIV test approved for such purposes* by Georgia's Department of Community Health (DCH).

The Georgia Court of Appeals reversed Propes' conviction because the record was devoid of any evidence that Propes was determined to be an HIV infected person by an HIV test approved by the Georgia DCH. The court found that the only evidence of Propes' HIV status was a one-page laboratory testing report that did not purport to satisfy the DCH's regulations or licensing requirements. Furthermore, the State failed to introduce testimony by a physician or other competent witness to explain the test report's origin, methodology, meaning, or how it satisfied OCGA § 31-22-91's criteria for demonstrating that a person is an HIV infected person. Thus, Propes' conviction was reversed in spite of evidence showing that he admitted he was HIV-positive and understood that he could be penalized for failing to disclose his status to a partner prior to engaging in sexual intercourse. Even so, stricter standards of proof regarding a defendant's HIV status have spared many others from unjust results. This case stresses the reality that, as we approach proof of HIV-status from a more scientific perspective, prosecutors must take more care in using the appropriate tests and verifying those tests at trial. ■

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

“Spouse” in European Union Free Movement Law Includes a Same-Sex Spouse

By Robert Wintemute

On June 5, 2018, in *Coman & Hamilton v. Inspectoratul General pentru Imigrări* (Case C-673-16), the Court of Justice of the European Union (CJEU) advised the Constitutional Court of Romania that “the term ‘spouse’ within the meaning of Directive 2004/38 [on free movement of EU citizens and their family members] is gender-neutral and may therefore cover the same-sex spouse of the [EU] citizen concerned” (para. 35).

Applying this interpretation to the situation of Adrian Coman (a citizen of Romania) and Clabourn Hamilton (a citizen of the USA), two men who were married in Belgium in 2010, the CJEU gave the following answer to the Romanian court’s first question (para. 51): “In a situation in which [an EU] citizen [Coman] has made use of his freedom of movement by moving to and taking up genuine residence . . . in a Member State other than that of which he is a national [working for over two years in Belgium], and, whilst there, has created and strengthened family life with a third-country national of the same sex [Hamilton] to whom he is joined by a marriage lawfully concluded in the host Member State [Belgium], Article 21(1) [of the Treaty on the Functioning of the European Union or TFEU] must be interpreted as precluding the competent authorities of the Member State of which the [EU] citizen is a national [Romania] from refusing to grant that third-country national [Hamilton] a right of residence in the territory of that Member State [Romania] on the ground that the law of that Member State [Romania] does not recognize marriage between persons of the same sex.”

The question of the definition of marriage or spouse in EU law first arose in *D. & Sweden v. Council* (Joined Cases C-122/99 P and C-125/99 P), which

concerned an employment benefit for a male employee (D.) of an EU institution (the Council of the EU) who had entered into a registered partnership with another man in Sweden. At the time of the judgment (May 31, 2001), only one of fifteen EU member states (the Netherlands) allowed same-sex couples to marry. The CJEU therefore ruled (paras. 34, 37) that “according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex,” and that the CJEU could not ‘interpret the [EU] Staff Regulations in such a way that legal

category “registered partner”, in Article 2(2)(b)), and therefore “different-sex spouse only” in the six Member States that still do not recognize same-sex couples (Latvia, Lithuania, Poland, Slovakia, Romania, Bulgaria)?

In 2013, Coman and Hamilton began proceedings in the Romanian courts, challenging the state’s refusal to grant a residence permit to Hamilton because he is a same-sex spouse. In 2016, the Constitutional Court of Romania referred four questions of EU law to the CJEU, including one regarding the interpretation of the term “spouse”.

Developments in national family

The CJEU’s reasoning stressed “liberty” right of an EU citizen to move freely, rather than “equality” for same-sex and different-sex spouses.

situations distinct from marriage are treated in the same way as marriage’.

When Directive 2004/38 was adopted (April 29, 2004), the term “spouse” in Article 2(2)(a) was not defined. The European Parliament (one “house” of the EU legislature, consisting of directly elected representatives) had wanted to make it clear that “spouse” included a same-sex spouse, whereas the European Commission (the executive) and the Council of the EU (the other “house” of the EU legislature, consisting of representatives of Member State governments) preferred to leave the interpretation of “spouse” to the CJEU. Would it mean “different-sex or same-sex spouse” in all EU Member States (28 since Croatia joined in 2013)? Or would it mean “spouse in accordance with the legislation of the host Member State” (as in the case of the separate

law in EU Member States since 2001 made it easy for the CJEU to depart from *D. & Sweden* and rule as it did in *Coman & Hamilton*. By June 5, 2018, 14 of 28 EU Member States allowed or planned to allow same-sex couples to marry (same-sex marriage will begin in Austria on January 1, 2019 after a decision of the Constitutional Court of Austria on December 4, 2017). A further 8 EU Member States provided some form of registered partnership or civil union to same-sex couples. This meant that a judgment in favor of Coman and Hamilton would only require changes to the immigration laws of the 6 Member States listed above.

The CJEU’s reasoning stressed “liberty” (the Article 21(1) TFEU right of an EU citizen “to move and reside freely within the territory of the Member States”), rather than “equality” for same-sex and different-

sex spouses. The CJEU did not use the word “discrimination” and did not cite Article 21(1) of the Charter of Fundamental Rights of the EU, which expressly prohibits discrimination based on sexual orientation, including in the interpretation of EU legislation (such as a Directive or a Regulation). Nor did the CJEU cite *Taddeucci & McCall v. Italy* (European Court of Human Rights or ECtHR, June 30, 2016), which required that a same-sex partner have some means of qualifying for a residence permit, to avoid indirect or disparate-impact discrimination based on sexual orientation. The Advocate General had cited *Taddeucci & McCall* several times in his Opinion of January 11, 2018 in this case.

Coman & Hamilton resembles *United States v. Windsor* in its effect on the national immigration law of EU Member States. But the judgment only applies to EU citizens who are moving with their same-sex spouse to another Member State (a Spanish woman who is married to a Brazilian woman decides to move to Romania, for example), or are returning with their same-sex spouse to their own Member State after exercising their right to reside in another Member State (*Coman* and *Hamilton*’s situation). The judgment does not apply, for example, to a Romanian citizen seeking to sponsor a same-sex spouse who is a US citizen, if the Romanian citizen has never resided in another EU Member State. (*Taddeucci & McCall* does apply in that situation.) As for a judgment resembling *Obergefell v. Hodges*, this will take a few more years. The CJEU has no jurisdiction over access to marriage in EU Member States. The ECtHR does, but will not require equal access until at least 24 of 47 Council of Europe member states have changed national family law voluntarily. At the moment, only 16 member states (14 including Austria in the EU plus Norway and Iceland) provide equal access or plan to do so. ■

Robert Wintemute is a Professor of Human Rights Law at King’s College London Dickson Poon School of Law.

N.Y. Appellate Division Remands *Gunn v. Hamilton* for Equitable Estoppel Hearing in Co-Parent Contest

By Brett Figlewski

After many months of anticipation, the N.Y. Appellate Division for the First Department issued a late Pride-month decision in the heavily-publicized case of *In re K.G. v. C.H.*, 2018 N.Y. App. Div. LEXIS 4617, 2018 WL 3118937, 2018 N.Y. Slip Op 04683, known more generally as *Gunn v. Hamilton*. Justice Judith Gisch wrote for the unanimous five-judge panel.

The case had been one of the first in which the lower courts had applied the holding of *Brooke S.B. v. Elizabeth A.C.C.*, 28 NY3d 1 (2016), which was decided by New York’s highest appeals court in August 2016, shortly before this case was filed. *Brooke S.B.* broke new legal ground for New York by allowing for the possibility of standing in custody and visitation proceedings for non-biological/non-adoptive parents. Since the start of the *Gunn* case, it has been featured in numerous general-audience media, including, especially, feature-length articles in the *New York Times* and *The New Yorker*; as such, the identities of the parties, Kelly Gunn and Circe Hamilton, and of the little boy at its center, Abush, are well known.

Kelly Gunn is represented by Kaplan & Company LLP (Roberta A. Kaplan and John C. Quinn), Morrison Cohen LLP (Danielle C. Lesser and Andrew P. Merten), an Chemtob Moss & Forman LLP (Nancy Chemtob and Jeremy J. Bethel). Circe Hamilton is represented by Cohen Rabin Stine Schumann LLP (Bonnie E. Rabin, Gretchen Beall Schumann, Tim James and Lindsay Pfeffer).

The LGBT Bar Association of Greater New York (LeGaL) was the sole amicus curiae in the case and was represented by the law firm of Latham & Watkins, LLP (Virginia F. Tent, Matthew J. Pickel, Iris H. Xie and Naseem Faquih Alawadhi). LeGaL filed its amicus brief in support of neither party but rather in support of its understanding

of the equitable principles undergirding *Brooke S.B.*, and, in particular, for the application of an equitable test along the lines of what had been suggested to the Court of Appeals at oral argument in *Brooke S.B.* but which the Court of Appeals refrained from adopting at the time, while acknowledging its possible application in future cases with different facts. LeGaL, along with the law firm of Blank Rome LLP and Lambda Legal, had represented Brooke before the Court of Appeals.

Within days of the ruling in *Brooke S.B.*, Ms. Gunn filed an action in Supreme Court, New York County, arguing that, although she was not the biological or adoptive mother of Abush, she had standing under the new precedent, and Ms. Hamilton, the child’s adoptive mother, was immediately prevented by the court from returning with the child to her native England until the issue could be litigated and resolved. This preliminary action by the court indicated the power of the change wrought by *Brooke S.B.* and also marked the beginning of lengthy proceedings in *Gunn*, which presented some of the complex factual and legal questions arising in the wake of *Brooke S.B.* and engendering robust discussion among practitioners, advocates, and community members alike regarding the scope of the precedent and, more broadly, just what it is that makes a parent a parent.

The parties began a romantic relationship in 2004 and, by 2007, they had an agreement to commence the process of international adoption to raise a child together. They initiated the application in February 2009, though it was solely Ms. Hamilton who was listed on the application in order to avoid the restrictions on international child adoption by same-sex couples. By the end of 2009, the parties’ romantic relationship had

deteriorated, and the principal factual dispute in the case concerned whether the subsequent statements and actions of the parties indicated a continued desire by the parties to adopt and raise a child jointly despite the end of the romantic relationship, or whether Ms. Hamilton was intended to be the child's single parent. Ms. Hamilton's adoption of Abush was finalized in 2012, but, although permissible in New York State since the 1995 Court of Appeals decision in *Matter of Jacob*, 86 NY2d 651, there was no second-parent adoption by Ms. Gunn. Nonetheless, once the child was adopted, Ms. Gunn played a significant role in his life, and there is no dispute that the relationship between Ms. Gunn and Abush is a loving and affectionate one with extensive access time and significant undertaking on behalf of the child's well-being. Whether this relationship is *parental* is what is disputed.

After a 36-day hearing on standing before Justice Frank Nervo, the court found that the pre-adoption agreement of the parties to raise a child together had not been "unabated," and therefore, Ms. Gunn did not have standing for purposes of custody and visitation under the holding of *Brooke S.B.* In other words, the court found that there was no longer an agreement regarding joint adoption at the time Ms. Hamilton went forward with the adoption. Having found no standing, the court rejected Ms. Gunn's attempt to introduce evidence going to the question of equitable estoppel.

In her opinion for the Appellate Division, Justice Gische reviewed the jurisprudence leading up to *Brooke S.B.*: in the opinion authored by the late Judge Sheila Abdus-Salaam, the Court of Appeals had overruled the precedent set in the 1991 case of *Alison D. v. Virginia M.*, 77 NY2d 651, and reaffirmed in 2010 in the case of *Debra H. v. Janice R.*, 14 NY3d 576, under which same-sex co-parents were deemed "legal strangers" to the child and thus lacked standing to seek custody or visitation. The statutory provision in question, Domestic Relations Law Sec. 70(a), states that "either parent" may petition the court for custody of a child,

and it was *Alison D.* which established the "bright lines" of parentage based solely on biology or adoption. Then-Chief Judge Judith Kaye's dissent had foreseen that bright lines would fall most harshly on the children of "non-traditional" families, including LGBT families, and this concern, now highlighted by two and a half decades of impressive advancement in LGBT rights, including the affirmation of the equal dignity of LGBT families in the marriage equality cases, undergirded the *Brooke S.B.* holding: where it could be shown by clear and convincing evidence that parties had a pre-conception agreement to raise a child together, the non-biological/non-adoptive parent would have standing to seek custody and visitation.

Though the court in *Brooke S.B.* declined to adopt an estoppel test similar to that of other jurisdictions, the court explicitly recognized that, under different facts, different legal principles could be brought to bear to confer standing. Indeed, in the companion case to *Brooke S.B.*, *Matter of Estrellita A. v. Jennifer L.D.*, 27 N.Y.3d 987, the court affirmed that custodial standing could be conferred based on the doctrine of judicial estoppel, namely having been adjudged a parent in prior proceedings for purposes of child support. And the decision explicitly envisioned the doctrine of equitable estoppel as a potential means of establishing standing for a parent whose role in a child's life had been facilitated and fostered by the biological or adoptive parent.

In *Gunn*, the Appellate Division now clarified a number of important aspects of the law as laid down in *Brooke S.B.* First, with respect to a pre-conception (or, in this case, a pre-adoption) agreement, the court did not find persuasive the argument that, once a plan is made, it is in effect in perpetuity, and rejected such a "sweeping interpretation". Though the court did not draw a direct comparison, it is important to note that its reasoning means that a pre-conception or pre-adoption plan under *Brooke S.B.* is not equivalent to the genetic foundation for parentage in the moment of conception in heterosexual intercourse: "The purpose of *Brooke* is to protect parental

relationships in nontraditional families, not to mechanically confer standing at a time when (and for children that) the parties never intended to co-parent," wrote Justice Gische. Hence, the trial court permissibly determined that the parties' mutual intention to raise an adopted child together did not survive the end of their romantic relationship and that Justice Nervo's verbal formulation requiring an "unabated" plan was appropriate under *Brooke S.B.*

Second, the court affirmed the importance of the consideration of equitable estoppel in parentage cases brought under *Brooke S.B.* Though the Appellate Division declined to spell out what substantive factors are necessary to establish equitable estoppel, it unequivocally held that a full hearing on relevant factors was essential to any final determination of parentage, and so remanded the case to the trial court for a continued hearing on equitable estoppel. The court emphasized, in particular, the critical importance of assessing the best interests of the child by means of appointment of an attorney for the child or a forensic expert, or by conducting a *Lincoln* hearing, which is an *in camera* meeting of the judge with the child: "In New York State," said the court, "even the youngest of children is entitled to have his or her point of view heard in cases involving custody and/or visitation. Thus, even a child as young as A. at the time of the hearing should have had his interests expressed to the court, separate and apart from those of the adult parties to the proceeding."

The court's focus on absence of the child's voice from the record exemplified its understanding that equitable considerations must be paramount in any proceeding which purports to determine the best interests of a child. Its decision in *Gunn* empowers advocates for LGBT families to use estoppel as a powerful tool that mandates careful assessment of a child's relationship with someone with whom strong emotional – and perhaps parental – bonds may have been formed. ■

Brett M. Figlewski is the Legal Director of The LGBT Bar Association of Greater New York (LeGaL).

Canadian Supreme Court Rejects Religious Exceptionalism to Discriminate against LGBTQ Law Students

By Vito John Marzano

On June 15, 2018, the Supreme Court of Canada issued 7-2 companion decisions in *Law Society of British Columbia v. Trinity Western University*, 2018 SC 32, and *Trinity Western University v. Law Society of Upper Canada*, 2018 SC 33, rejecting religious exceptionalism as a basis for proposed law schools to impose their religious beliefs on students. The Court held that the Law Society of British Columbia (“LSBC”) and the Law Society of Upper Canada (“LSUC”) struck a proportionate balance between religious freedom,

from, *inter alia*, all sexual intimacy outside of marriage between one man and one woman, regardless of whether the student engaged in such behavior in the privacy of their own home while off-campus. Students found in violation of the Covenant could face disciplinary action up to expulsion.

British Columbia and Ontario delegate self-regulating authority to the respective societies to govern the practice of law and to protect the public interest in the administration of justice (*see* Legal Profession Act, S.B.C. 1998; Law Society Act, R.S.O. 1990). The

law school that would enshrine discrimination into its education. To that end, the Court reasoned that the public interest contemplates that “[a] bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public confidence in the same. A diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar.” By denying accreditation, the LSBC and LSUC acted reasonably to achieve their statutory objective because the determination ensured that all segments of society can seek to participate in the legal profession, and such disparate groups create a stronger bar that enhances justice.

The Court also rejected TWU’s argument that the LSBC and LSUC needed to provide reasons for their determinations. The LSBC invited all members to vote on whether to grant accreditation and adhered to the result of that vote. As such, the vote itself furnished the reasons for the determination. Likewise, the LSUC addressed the issue in speeches made at convocations in April 2014, establishing that the members had notice of the issue and their statutory duties.

The Court then addressed whether the determination breached the Charter under the *Doré/Loyola* proportionate balancing framework (*see Doré v. Borreau de Québec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12). This assessment requires a threshold determination as to whether the administrative decision engaged in the rights and the values of the Charter. To do so, the claimant must establish a nexus between the sought practice and their religious beliefs and then demonstrate that the infringement was either substantial or not trivial (*see Syndicat Northcrest v.*

The Covenant compelled students to abstain from, *inter alia*, all sexual intimacy outside of marriage between one man and one woman, regardless of whether the student engaged in such behavior in the privacy of their own home while off-campus.

as enshrined in § 2 of the Canadian Charter of Rights and Freedoms (“Charter”), and the overarching objective of the enabling statutes of the LSBC and the LSUC to protect the public interest in the administration of justice, when the law societies withheld accreditation to a proposed evangelical law school on the basis of anti-LGBTBQ discrimination.

Trinity Western University (“TWU”) is a postsecondary evangelical Christian institution located in British Columbia. It sought to establish a law school and applied for accreditation from various law societies throughout Canada. TWU would mandate that students sign and adhere to its Community Covenant Agreement (“Covenant”) while studying law. The Covenant compelled students to abstain

Court acknowledged that when the legislature invests a self-regulating body with authority to protect the public interests, it expects the judiciary to defer to the institutional expertise of the regulatory body. As such, a court assesses the record to determine the reasonableness of the body’s decision.

Applying this deference, the Court rejected TWU’s argument that the LSBC and LSUC usurped the role of a human rights tribunal and exceeded their statutory authority by focusing on conduct they find objectionable. Rather, the public interest in the administration of justice envisions ensuring equal access to a legal education for all individuals in society, including LGBTQ students. This responsibility encompasses approving or denying accreditation to a proposed

Amselem, 2004 SCC 47). The Court recognized that religious freedom entails both individual and profoundly communitarian components, and that the Charter contemplates those adherents who seek to form cohesive communities of belief and practice. By relying on, *inter alia*, the strong link between evangelicalism as a belief and the desire to form a cohesive community of practitioners to enable spiritual growth, TWU satisfied the first prong. Moreover, TWU satisfied the second prong on the basis that by denying accreditation, the LSBC and the LSUC necessarily limited TWU's ability to form a cohesive community in which to study law.

Having met the threshold burden, the Court then considered whether the LSBC and the LSUC determinations struck a proportionate balance between the law societies fulfilling their shared statutory objective and the impact of such on the Charter protections. The proportionate balancing inquiry does not prefer the least restrictive measure, but only whether the measure fell within a permissible range. Notably, TWU refused to amend its Covenant, which placed the law societies with two options —approve or reject. By choosing the latter, the LSBC and the LSUC fulfilled their statutory objective to maintain equal access and diversity in the legal profession. The Court concluded that denying accreditation on the basis of the mandated Covenant did not limit the free practice of religion, therefore striking the proportionate balance.

The Court explained that evangelicals remain free to practice their religion and to create cohesive communities without state-sponsorship. While the Covenant and TWU's proof evinces a strong preference among evangelicals that studying law under the Covenant would assist spiritual growth, a preference is not a requirement. Although evangelical students may prefer this type of community to study law, their continued spiritual growth does not necessitate it. As the Court went on to explain, TWU did not advance a strong

argument to overcome the LSBC and the LSUC statutory objective. Rather, it explained that, when compared to other claims, TWU's preferential argument meant that "prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court."

The Court found that the Covenant harms LGBTQ students in several ways. With respect to TWU's argument that it welcomes all students who would adhere to the Covenant, the Court pointed out that the practical implication of deterring LGBTQ applicants renders this argument fruitless, thus harming LGBTQ people and the profession. Likewise, the Court concluded that the argument that an LGBTQ student could merely go elsewhere "undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents the violation of essential human dignity and freedom and eliminates any possibility of a person being treated in a substance as less worthy than others. The public confidence in the administration of justice may be undermined if the [law society] is seen to approve a law school that effectively bars many LGBTQ people from attending."

Unequivocally rejecting that the Covenant does not harm LGBTQ students, the Court stated that "it is not possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood." Forcing an LGBTQ student to adhere to the Covenant causes harm to the student's dignity, self-worth, confidence and self-esteem, causing stigmatization and isolation. By adopting such strong language, the Court emphasized that the public interest in the administration of justice obligated the law societies to prevent harm to LGBTQ person(s).

Within the religious freedom context, the Court expressly disavows

religious exceptionalism that seeks to impose religious beliefs on others. TWU did not seek only to set up a religious community, but also to impose its beliefs on others in a way that humiliates LGBTQ students. The Court explained that "[b]eing required by someone else's religious belief to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion." Thus, the Court concluded that the LSBC and the LSUC had no choice but to deny accreditation in order to fulfill their statutory objective.

Chief Justice McLachlin concurred, but would have sought to refine the *Doré/Loyola* framework. Justice Rowe concurred in the conclusion but warned the Court against conflating *Charter values* with *Charter protections*. The dissent (Côté and Brown, JJ.) would have held that a contextual and purposive reading of the respective statutes does not permit the law societies to consider anything other than whether a law school would produce graduates eligible for admission. The enabling statutes do not grant authority to "police human rights standards in law schools," they argued. Rather, they contend that the statutory objective to protect the public interest does not overpower Charter protections.

Comparatively speaking, while the Canadian Supreme Court expressly rejects religious exceptionalism, the United States Supreme Court left the issue unresolved when, in analogous cases, it punted on procedural grounds (*see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 201 L. Ed 2d 35 [2018]), and subsequently remanded a similar case to a lower court for reconsideration (*see Arlene's Flowers Inc. v. State of Washington*, No. 17-108, 2018 WL 3096308 [June 25, 2018]). ■

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

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Iowa Trial Court Strikes Iowa's Refusal to Provide Gender Affirming Surgery to Transgender Medicaid Recipients

By Matthew Goodwin

On June 6, 2018, Polk County Chief District Judge Arthur E. Gamble ruled that a categorical refusal to cover gender transition surgery under the state's Medicaid program violates both the Iowa Civil Rights Act (ICRA) and the state constitution's equal protection requirement. *Good v. Iowa Dept. of Human Services*; *Beal v. Iowa Dept. of Human Services*, CVCV054956; CVCV055470 (consolidated) (5th Jud. Dist.)(slip opinion).

The Iowa chapter of the American Civil Liberties Union (ACLU) filed suit in September 2017 against the Iowa Department of Human Services (DHS)

be a quasi-suspect classification, thereby subjecting the Regulation to heightened scrutiny in an equal protection analysis. The court ruled that the Regulation could not withstand heightened scrutiny, intermediate scrutiny, or even rational basis scrutiny and was a violation of the Iowa constitution's equal protection clause. The court also agreed with petitioners that the Regulation in question violated the ICRA's prohibition against gender-identity discrimination.

The court set forth the following facts in its ruling. Good is a 27-year old transgender woman who has been presenting as female full-time and

Significantly, Judge Gamble's decision determined gender identity to be a quasi-suspect classification.

on behalf of petitioners EeriAnna Good and Carol Beal, transgender individuals who sought and were denied coverage of surgical procedures related to their gender dysphoria under Iowa Medicaid. Petitioners' cases survived a pre-answer motion to dismiss earlier in the litigation.

Petitioners' suit raised four claims against DHS: (1) that Iowa Administrative Code rule 441-78.1(4) (the Regulation) relied on to deny petitioners gender transition surgery violated the ICRA's prohibition against sex and gender-identity discrimination; (2) that the Regulation violated equal protection provisions of the Iowa constitution; (3) that DHS's decision resulted in a disproportionate negative impact on private rights; and (4) that DHS's denial was arbitrary and capricious.

Significantly, Judge Gamble's decision determined gender identity to

using female pronouns since 2010, and in 2013 was officially diagnosed with gender dysphoria. In 2016 Good legally changed her name and related legal documents to reflect her gender identity. Good daily endures extreme physical pain and discomfort in order to better present herself as female. In 2017 physicians treating Good determined that sex reassignment surgery was medically necessary to treat her gender dysphoria. She was denied such surgery under the state's Medicaid program in which she was enrolled. Beal is a 42-year old transgender woman who has been living as female full-time since the age of ten; she was diagnosed with gender dysphoria in 1989 and began hormone therapy at that time. By 2014, Beal had legally changed her name and related legal documents to reflect her gender identity. Similar to Good, Beal's healthcare providers in 2017 determined sex reassignment surgery

to be medically necessary to treat her gender dysphoria, which caused her great anxiety and depression. Beal, likewise, was denied the medically necessary surgery by Iowa Medicaid.

Both Beal and Good receive Medicaid from managed care organizations (MCO's) operating under the Iowa Department of Human Services (DHS). The Regulation in question had prohibited gender-affirming surgeries to be covered under the state's Medicaid program since 1995, following the Eighth Circuit's 1980 decision in *Pinneke v. Preisser*, 623 F.2d 546, 549-50, which held that sex reassignment was an effective treatment for "transsexualism" and thus fit within Medicaid's coverage of "medically necessary" treatments. In response, the state agency decided, despite the court's ruling, that Iowa should not cover such procedures, and eventually issued its Regulation explicitly excluding coverage for such procedures.

The court reviewed DHS's denial of Good and Beal's claims for gender reassignment surgery under a *de novo* standard of review. The court first sided with DHS on petitioners' sex discrimination claim under the ICRA, citing Iowa Supreme Court precedent holding sex discrimination did not include "transsexuals." Petitioners prevailed, however, on their claim that DHS had violated the ICRA's gender-identity protections. Here the court cast aside DHS's argument that the Regulation "treats everyone the same by excluding coverage for surgery for the purposes of treating psychological conditions for everyone alike." The court agreed with petitioners' expert, Dr. Ettner, who argued that medical consensus currently holds that gender dysphoria has a strong biological component, is in many ways an immutable trait, and is not primarily psychological in nature. It was improper for DHS to expressly refuse sex reassignment surgery on psychological grounds, given the weight of medical evidence that gender dysphoria is a biological condition. In addition, the court agreed with Petitioners that the Regulation's exclusion of gender reassignment and cosmetic surgeries

related to "transsexualism" was a violation of the ICRA. Petitioners and the court pointed out in support of this holding that these exclusions were an explicit reaction to the holding of the Eighth Circuit that absent such express language, gender reassignment surgeries would have to be covered by Medicaid.

Turning to the equal protection arguments, the court first had to determine what level of scrutiny was appropriate, since the Iowa Supreme Court had not yet done so in equal protection cases involving discrimination against transgender individuals. The court considered four factors: "(1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is 'immutable' or beyond the class members' control; and (4) the political power of the subject class."

Respecting invidious discrimination, the court found that "studies documenting the history of gender-identity-based discrimination, as well as the inclusion of gender identity as a protected class within ICRA and anti-bullying laws" militated "strongly in favor of finding gender identity to be a quasi-suspect class, akin to sexual orientation." As to gender identity and contributions to society, the court again found this factor to suggest a quasi-suspect class. The court analogized to sexual orientation cases to hold that "gender identity is unrelated to a person's ability to contribute to society—a point DHS did not refute. Turning to the immutability of gender identity, the court first noted "the general principle that disparate treatment against someone for a trait or characteristic out of their power is less likely to be valid." The court adopted petitioners' arguments and evidence indicating "that a person's gender identity is developed in early childhood, has a strong biological basis, cannot be altered, and is not subject to change through outside influence." Finally the court found transgender individuals to lack political power sufficient to give them the ability to reverse a historic

legislative burden against them through "traditional political means" and that this also suggested a quasi-suspect class.

The DHS did not provide the requisite justification to explain "how the disparate treatment of transgender individuals in need of sex reassignment surgeries under the Regulation [was] substantially related to an important governmental interest." DHS argued in sum and substance that transgender Medicaid recipients were denied coverage for surgical treatment for gender dysphoria to further the government's interest in keeping down "excessive costs" of the procedures. The court pointed out that DHS had not provided evidence of cost projections concerning surgical treatment of gender dysphoria and that "[t]ransgender individuals who qualify for surgery are only a subset of transgender Medicaid beneficiaries."

The court rather quickly dealt with the last two theories offered by petitioners as to why it should strike down the Regulation. The court agreed that the Regulation's negative impact on the rights of transgender Medicaid recipients disproportionately outweighed any sort of public interest served. Relying on the prior rulings of the opinion as to the unlawfulness of the Regulation, the court determined the Regulation and subsequent exclusion of coverage to Good and Beal for medically necessary gender affirming surgery was made without regard to the law and facts and the exclusion of coverage was, therefore, unreasonable, arbitrary and capricious.

The Department of Human Services and the Attorney General's Office declined to comment on the decision in its immediate aftermath, according to local press reports. An appeal would have to be filed within 30 days.

Rita Bettis and Seth Horvath of the Iowa ACLU represented Good and Beal. ■

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York, specializing in matrimonial and family law; Austin Alvarado, a Brooklyn Law student, assisted in the preparation of this article.

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. COURT OF APPEALS, 2ND CIRCUIT

– A 2nd Circuit panel denied a petition for review of the Board of Immigration Appeals (BIA) decision to affirm an Immigration Judge (IJ) denial of relief under the Convention Against Torture (CAT) for a man from Jamaica who claimed to be bisexual. *Chambers v. Sessions*, 2018 U.S. App. LEXIS 17571, 2018 WL 3156924 (June 27, 2018). Chambers had been convicted of drug offenses in the U.S. that precluded withholding of removal based on fear of persecution in Jamaica, so his only hope for relief was under the CAT. Actually, Jamaica is a fearsome place for LGBT people, so he might have prevailed but for the IJ's conclusion, accepted by the BIA and the court of appeals, that he failed to meet his burden of proving his claim to be bisexual. The IJ found that inconsistencies in his testimony, together with the failure to produce any evidence from or about same-sex partners and the failure of "corroborating testimony" from his family members, which was found to be lacking in detail, combined to produce an adverse credibility ruling. Chambers had legal representation from Brian A. Sutherland (with Devin M. Misour) of the Reed Smith LLP (Pittsburgh), but not at the IJ hearing stage, during which he was *pro se*. He protested that he had not been advised prior to the hearing that he would be expected to present corroborating evidence as to his same-sex partners, but the court rejected this argument, writing that "the fact that Chambers proffered statements and testimony from his mother, sister, and a family friend to corroborate his claim that he is bisexual

demonstrates that Chambers was aware that he should provide evidence of his sexual orientation, and that he was provided an opportunity to present such evidence. The IJ was not required to give advance notice that Chambers should also provide statements or testimony from his past same-sex partners given that the IJ was 'not able to decide sufficiency of evidence until all the evidence has been presented.' In fact, if the evidence that Chambers submitted to the IJ had been consistent and detailed, that evidence alone might have been sufficient to corroborate Chambers' claim. Because Chambers was aware that he might need witness testimony to support his claim that he is bisexual and he was provided an opportunity to present witnesses, Chambers' due process claim is without merit."

U.S. COURT OF APPEALS, 9TH CIRCUIT

– An unsympathetic panel of the 9th Circuit denied a petition for review filed by a lesbian from Mexico who sought protection against removal under the Convention against Torture (CAT) in *Sandoval-Nunez v. Sessions*, 2018 WL 3030765, 2018 U.S. App. LEXIS 16497 (June 19, 2018). The typically terse opinion says virtually nothing about the facts of the case, apart from relating that the Petitioner sought protection under the CAT, which was denied by the Immigration Judge (IJ). The court found that "by considering the ability to relocate as only one of many factors pertinent to whether 'it is more likely than not that [Petitioner] will be tortured if removed' to Mexico, the BIA's decision in this case complied with the principles of *Maldonado [v. Lynch]*, 786 F.d 1155 (9th Cir. 2015), a prior circuit precedent on the issue of the possibility of relocation as a factor in a CAT analysis. The court held that the Board of Immigration Appeals (BIA) did not violate the Petitioner's due process rights "by failing to explicitly address legal arguments advanced on appeal to the

BIA." The court said that by adopting and affirming the IJ's decision, the BIA was signifying that it had "conducted an independent review of the record and had exercised its own discretion in determining that its conclusions were the same as those articulated by the IJ." Finally, the court found that "substantial evidence supports the denial of [Petitioner's] application for deferral under CAT. [Petitioner] argues the BIA and IJ failed to consider evidence that she would be tortured due to her sexual orientation or by individuals who abused her as a child or the Sinaloa cartel. Accepting [her] testimony as truthful, the record does not compel a finding that [she] is more likely than not to be tortured at the 'acquiescence of a public official or other person acting in an official capacity' if removed to Mexico." This, of course, tracks the language of a federal regulation and some prior cases, and is consistent with Attorney Jeff Sessions' recent ruling (see above) that it is just fine to send non-citizens back to countries where they are likely to be tortured, or even killed, by vengeful family members or other civilians or criminal gangs, since the CAT was only intended to protect against state-sanctioned torture. When Republican senators proclaimed that it is inappropriate for judges to have empathy for parties in the cases before them (during the confirmation hearings on Justice Sotomayor), maybe this is what they were talking about. So, according to the unanimous view of Court of Appeals Judges Jay Bybee and N. Randy Smith (both appointed by President George W. Bush), and Senior District Judge John Antoon III of Florida (sitting by designation; a Clinton appointee), assuming the truth of [Petitioner's] contentions that she is likely to be tortured, it is appropriate to send her back because the torture would be perpetrated by non-governmental actors. Are we being unfair in thus characterizing their decision? Thus viewed, is this decision not Dickensian in its cruelty?

CIVIL LITIGATION *notes*

ARIZONA – A hospital discovered that a surgical technician it employed was under investigation in another state for misuse of drugs intended for patient use. The hospital undertook to notify patients who had undergone surgery at the time this technician was employed that they might have been exposed to HIV or hepatitis B or C during the surgery and should get their blood tested. One of the patients who received this notification was Amy Amari. The letter was sent to her on February 29, 2016. She had her blood tested on March 8, 2016, and learned the results were negative two days later. But she claims to have suffered severe emotional distress, sleeplessness, and various other complications as a result of this incident and thus, being a red-blooded American out to obtain a pot of gold, sued the hospital. She was allowed to file an amended complaint when the hospital claimed her original complaint failed to allege sufficient physical symptoms to make out a claim, but the trial judge eventually dismissed her amended complaint, refusing her to file another as “futile.” The court of appeals found that she should have been allowed to file the second amended complaint, and decided to treat her affidavit in support of her appeal as the equivalent of same, but still found it insufficient to ground her tort claim. Her affidavit responded a variety of symptoms and severe anxiety she claimed to have suffered, and added that some of the symptoms were alleviated by learning she had tested negative, but that some had returned when she learned that the surgical technician had tested HIV-positive. However, wrote the court, “She has not alleged she suffered ‘long-term physical illness or mental disturbance’ or physical manifestations of distress sufficient to constitute ‘bodily harm.’ Rather, she has only alleged ‘transitory physical phenomena’ that cannot sustain a cause of action for emotional distress.” The court of appeals did disagree with the trial court’s reason for dismissal

– failure to meet the “impact rule” for emotional distress claims – but held that it could affirm on the other grounds stated in this opinion. *Amari v. Scottsdale HealthCare Hospitals*, 2018 WL 2928040 (Ariz. Ct. App., June 12, 2018).

ARIZONA – Transitional problems continue to arise in child custody and visitation disputes that predate the final arrival of marriage equality in particular jurisdictions. Consider the Arizona Court of Appeals ruling June 12 in *Torrez v. Bombard*, 2018 WL 2928174, 2018 Ariz. App. Unpub. LEXIS 886. Sandra Torrez and Rhonda Bombard had twins through donor insemination, with Bombard the birth mother. They made a written co-parenting agreement, intending to raise the children together. The agreement set forth a parenting plan in the event their relationship were to end. Eventually Torrez moved out but continued to see the children regularly, says the court. Bombard eventually informed Torrez that she would no longer be permitted to see the children and moved with the children to New York. Torrez promptly filed a petition in the Maricopa County Superior Court, seeking to establish legal decision-making, parenting time, and child support orders or, alternatively, visitation rights. She also sought a temporary parenting order. Judge Chuck Whitehead, concluding that she stood *in loco parentis* to the twins, entered an order in October 2014 awarding Torrez “skype visitation” twice each week and weekend visitation once each month. Bombard failed to comply with the Order, and Torrez filed a petition for contempt, which was granted by Judge Whitehead, who ordered Bombard to allow visitation per the October 2014 order and to pay Torrez an attorney’s fee award. Bombard objected to the fee award, arguing that the court had not issued a final order, just a temporary one. Whitehead then concluded that the 2014

Order was a final ruling on the petition, and that only the visitation scheduled was temporary. He awarded Torrez fees of \$12,662.50, and Bombard appealed. This unofficially published opinion, written for the court by Judge Kent E. Cattani, first dwells on jurisdictional issues, ultimately rejecting Bombard’s contention that the Arizona trial court did not have jurisdiction because the twins were residing with her in New York. The court found that a uniform law on interstate jurisdiction in child custody cases applied and would provide for custody as the twins had resided in Arizona until shortly before Torrez filed her petition. Thus, the question is whether the October 2014 order was properly issued, since the validity of the fee award would in part turn on that determination. The court said that under Arizona statutes this was a third-party visitation case, and thus as Bombard’s parental fitness was never at issue, “her determination to deny visitation was controlling unless it ‘clearly and substantially impaired’ the children’s best interests. Although the superior court acknowledged its obligation to presume Bombard’s decision to deny visitation was in the children’s best interests and that her decision was entitled to ‘special weight,’” wrote Judge Cattani, “the court nonetheless rejected Bombard’s decision on the basis that she did not prove a reason for denying Torrez visitation. The superior court’s analysis was flawed because ‘a nonparent who seeks visitation carries a substantial burden to prove that the parent’s decision is harmful. It is not enough merely to show that the nonparent stands *in loco parentis* to the child,’ or ‘that a reasonable person could disagree with the parent’s decision to deny visitation.’” Furthermore, a subsequent October 2016 Order following trial “did not address the third-party visitation framework” set forth in the statute and Arizona cases construing it. And the appeals court disagreed with Whitehead’s conclusion

CIVIL LITIGATION *notes*

that the temporary October 2014 order could be considered a “final order,” so “the superior court’s reliance on the Order as a basis for granting visitation deprived Bombard of her right to have the superior court issue a final ruling applying the proper analysis.” The court also noted that although Arizona statutes require trial courts to make written factual findings on the children’s best interests in disputes between legal parents, this was not required in third-party visitation cases. As Torres was not a legal parent of the twins, this is a third-party visitation case. “Although such [written] findings would assist on appeal or in a future modification, they are not statutorily required.” Because the court of appeals reversed the underlying visitation order, it also vacated the fee award. The court also declined to award fees to Bombard, but it did award her costs as the prevailing party on appeal. The court remanded to the superior court for “reconsideration of the third-party visitation petition consistent with this decision.” The court declined to address Bombard’s constitutional challenge to the statute that allows third-party visitation claims. Revisiting our opening sentence, it seems this is a transitional issue in the sense that same-sex partners can marry in Arizona and case law now recognizes that both women would be legal parents of children conceived during the marriage. However, inasmuch as not all same-sex couples will be married when they decide to have children, the issues raised in this case remain salient even with the advent of marriage equality. Torres is represented by Davis Faas Blasé, PLLC, Scottsdale, and the National Center for Lesbian Rights. Bombard is represented by Best Law Firm, Phoenix.

ARIZONA – Applying its 2017 ruling that “the statutory presumption of parentage applies to same-sex spouses” recognized in *McLaughlin v. Jones*, 243

Ariz. at 31 (2017), the Arizona Court of Appeals ruled in *Ezell v. Tapia*, 2018 WL 3062108 (June 21, 2018), that Samantha Ezell, who married Tiffany Tapia in May 2012 in Canada, is the legal parent of their son, who was born in Arizona several months after they had married. At the time, the women agreed that both this child, born by Tapia through donor insemination, and a child born to Ezell in 2009, would be raised a siblings by both parents. Because Arizona did not recognize the marriage at that time, only Tapia was recorded as a parent on the child’s birth certificate. Ezell filed a petition for dissolution of the marriage in January 2015, several months before *Obergefell* but after the 9th Circuit had ruled in 2014 that same-sex couples are entitled to marry and same-sex marriages had begun to be performed in Arizona, pursuant to a district court decision that the state had decided not to appeal. She sought an order recognizing her parentage of the child, as well as legal decision-making and parenting time. The Maricopa County Superior Court (Geoffrey H. Fish, J.) rejected her request, because there was no dispute that she had no “biological” connection to the boy and, on its face, the marital paternity presumption statute did not apply to her. Even if it did, the court held that Tapia had rebutted the presumption by showing the lack of a biological connection between Tapia and the child. In *McLaughlin*, the Arizona Supreme Court decided that the presumption statute must get a gender-neutral interpretation in light of *Obergefell*. Wrote Judge Kent E. Cattani for the Court of Appeals, “Given the Arizona Supreme Court’s holding in *McLaughlin* that the Sec. 25-814(A)(1) marital presumption of parentage applies to same-sex couples, we reverse the superior court’s ruling to the contrary. And based on *McLaughlin*’s holding that a parent may be equitably estopped from rebutting the presumption of parentage, we vacate the superior court’s ruling that Tapia had rebutted

the presumption. Because there are facts suggesting that Tapia may be equitably estopped from rebutting Ezell’s presumption of parentage, we remand to permit the superior court to consider the applicability of the equitable estoppel doctrine to the facts of this case.” Ezell is represented by Claudia D. Work of Campbell Law Group Chartered, Phoenix. Tapia is apparently *pro se*.

CALIFORNIA – In a very technical decision concerned with the scope of releases in the settlement of Workers Compensation claims, the California 4th District Court of Appeal ruled in *Camacho v. Target Corporation*, 2018 Cal. App. LEXIS 529, 2018 WL 2750784 (June 8, 2018), that a gay man was not barred from pursuing a variety of claims against Target under the state’s Fair Employment and Housing Act (which expressly forbids employment discrimination because of sexual orientation) by his prior execution of a settlement agreement for compensation for physical injuries he alleged arose from the sexual harassment he suffered at Target prior to his constructive discharge. The court noted that the Workers’ Compensation system is intended to deal with injuries that arise within the normal scope of employment, and that being subjected to unlawful harassment does not fall within the normal scope of employment. In this case, however, Target was not resting its argument solely on the standard form release for a WC settlement, but rather on an Addendum to the agreement that it prevailed on Camacho to sign. The trial court was persuaded by this, and granted judgment to Target. The court of appeals disagreed, giving a close reading to the forms Camacho had signed. Judge Cynthia Aaron, writing for the appellate panel, pointed out California Supreme Court precedent requiring that such a release of claims that might arise outside the scope of the WC system had to be “in clear and non-

CIVIL LITIGATION *notes*

technical language.” In this case, she wrote, neither the standard WC release form “nor Addendum A contains any reference to nonworkers’ compensation claims, let alone any language that purports to release such claims in clear and nontechnical language. The language that Target insists constitutes a sweeping release of all of Camacho’s claims, both workers’ compensation claims and nonworkers’ compensation claims, appears in the fine print of an attached addendum to a worker’s compensation C&R, it is not underlined, bolded, or capitalized, in contrast with the other substantive portions of the document that are highlighted through formatting.” Camacho is represented by Robert A. Rodriguez, Stephen A. King and Richard A. Apodaca of Rodriguez & King, Ontario, CA.

DISTRICT OF COLUMBIA – U.S. District Judge Rosemary M. Collyer disagrees explicitly with those courts that have ruled that sexual orientation claims are actionable under Title VII, and says as much in her summary judgment decision in *Jones v. District of Columbia*, 2018 U.S. Dist. LEXIS 93189, 2018 WL 2538992 (D.D.C., June 4, 2018). Referring to Title VII’s enactment in 1964, she wrote: “Whether it should have then, or should be amended to so do now, the Court finds no suggestion that the Congress of 1964, or the Supreme Court cases, intended the language of Title VII to be so broad. Rather, this Court agrees with the District that sexual orientation is a separate class of protected individuals and notes that Plaintiffs make such allegations in Count I. A change in federal law awaits congressional action. For this reason, as well as the untimeliness of Ms. Jones’ Title VII charge, the lack of merit to Ms. Weeks’ Title VII sex-discrimination charge, and the lack of merit to Plaintiffs’ DCHRA charge of sex discrimination, this Court will grant summary judgment to

the District on Counts III and V.” The case involves two women employed as D.C. police officers. Jones, then an “out” lesbian, began dating her squad car partner, Weeks, then perceived as heterosexual, having previously been married to a man. Judge Collyer explains, “The unexpected relationship between the two women created a wave at MPD (Metropolitan Police Department), and Ms. Jones and Ms. Weeks now allege that the ripples from that wave created a hostile work environment for them, in violation of Title VII and the D.C. Human Rights Act (DHCRA). Plaintiffs allege that they were subjected to harassment and hostility on the basis of sexual orientation and sex, as well as retaliation for complaining. Because the claims all emanate from allegations related to Plaintiffs’ lesbian relationship, and they have not raised a genuine issue of material fact as to harassment based on sex, the Court will grant D.C.’s motion for summary judgment as to Plaintiffs’ sex discrimination claims under Title VII and the DCHRA. However, because there are disputes of material fact concerning Plaintiffs’ claims of a hostile work environment due to their sexual orientation and retaliation for protected activities under DCHRA, the Court will deny summary judgment on those claims.” The bulk of the opinion is taken up with a detailed summary of the factual allegations, with Judge Collyer expressing some frustration that the Plaintiffs were recounting every slight and departure from usual practice in an attempt to bolster their case, but taking a holistic view of the allegations, it was clear that if the allegations were believed various supervisors had not reacted well to the revelation that these two women were dating and had subjected them to a hostile environment. Collyer expressly disagreed with the employer’s contention that the alleged facts were insufficiently severe or pervasive to clear the bar of actionable hostile

environment. Plaintiffs are represented by Michael J. Kator (lead attorney), Cathy Ann Harris, and Juliette Markham Niehuss, of Kator, Parks, Weiser & Harris, of Washington, D.C.

DISTRICT OF COLUMBIA – Creative Family Connections LLC issued a press release on June 20, announcing that it had obtained the first Order of Parentage in a surrogacy case initiated under D.C.’s recently-enacted Collaborative Reproduction Statute, D.C. Code Sec. 16-401 (2017). Superior Court Judge Carol Dalton granted parentage orders on June 15 for the prospective parents who are expecting twins, one order for each of the twins, granted in response to a petition jointly filed by the Intended Parents and the Gestational Carrier – terms used in the statute. The intended parents are a married gay male couple. Diane Hinson, owner and founder of Creative Family Connections, acted as counsel for the intended parents. Jennifer Fairfax, of Family Formations Law Office in Maryland, represents the gestational carrier and her husband.

GEORGIA – Dueling courts? In *Smith v. Bell*, 2018 WL 2731275, 2018 Ga. App. LEXIS 341 (Ga. Ct. App., June 7, 2018), the court reversed a decision by the DeKalb County Superior Court, which had *sua sponte* granted summary judgment in favor of Martha Jean Bell, who was being sued by her “former girlfriend,” Simone Smith, who was trying to enforce an alleged oral agreement concerning the house Bell had purchased in which the two of them resided together during their 14-year relationship. Smith alleged that the trial court incorrectly ignored her sworn statements concerning the oral agreement, under which Smith would be entitled to a 50% equitable interest in the house as long as she paid a portion of the purchase price, equally shared in the bills and mortgage

CIVIL LITIGATION *notes*

payments for the property, and made repairs to the property. Smith also alleged that the parties agreed that if the relationship ended before they married (which they could not do when this alleged agreement was made in December 2001), Bell would sell the house and the equity would be split between them, or at least Smith would be compensated for her contributions. Smith claimed that during their 14-year relationship she had contributed equally to mortgage payments, paid half of the bills and expenses and performed home improvements. Smith sued in Superior Court after the relationship ended, and Bell denied the agreement. Bell counterclaimed to dispossess Smith and recover unpaid rent and attorney fees. At around the same time, Bell filed suit against Smith in the Magistrate Court, seeking to evict her and recover unpaid rent. Then ensued a jurisdictional battle between the two courts, with Bell claiming that Smith's allegations, deficient with regard to statute of frauds, should be asserted as a counterclaim in Magistrate's Court, and the Superior Court judge granting summary judgment to Bell, asserting that Smith had no evidentiary support for her claims. Nonsense, says the court of appeals: she submitted affidavits as to all her factual claims. "We note that we cannot affirm the trial court's order based on the reasoning contained therein," wrote M. Yvette Miller. "The trial court entirely disregarded Smith's affidavits, which were sufficient to create a factual dispute as to the existence of an oral agreement between the parties and performance under that purported agreement. Consequently, the trial court erred in basing its ruling exclusively on a lack of sworn evidence supporting Smith's contentions." The court also found that "we are required to find that Smith's claims in superior court were not barred by res judicata because those claims could not have been litigated in magistrate court" because that court did not have jurisdiction over these claims

as they were for more than \$15,000, a statutory jurisdictional cap. Of course, it was possible that Smith asserted her claims as counterclaims in magistrate's court (since as counterclaims, they would not be subject to the jurisdictional cap), but, wrote Miller, "The record is devoid of any properly submitted evidence demonstrating what transpired in the magistrate court. We cannot ascertain whether Smith asserted any claims in magistrate court, the timing of any such claims as compared to the timing of claims asserted in the superior court, or the current status of the dispossessory proceeding other than to note that neither party contends that the magistrate court entered a disposition on any of Smith's claims. Consequently, we cannot determine whether Smith's claims were compulsory counterclaims and, if so, whether they were filed in magistrate court and properly preserved. Accordingly, we must vacate the trial court's order and remand this case with instructions for the trial court to make both a factual determination as to the status of the dispossessory proceeding and a legal determination as to the impact such status has on Smith's ability to pursue her claims before the superior court." Wouldn't a simple telephone call resolve this issue of figuring out what was going on in the magistrate court? Legal formalism here getting in the way of efficient justice? Smith is represented by Stephen Heuron Robinson. Bell is represented by Barbara Jo Call.

INDIANA – Dennis Borrousch was employed as Director of Operations of a casino and hotel for Boyd Gaming from 1988 to July 31, 2013, when he retired due to chronic symptoms of HIV. Under the long-term disability insurance policy that Boyd provides to its employees through Aetna, Borrousch was entitled to disability benefits for up to 24 months if he could not perform the material duties of his occupation due to illness and, after some initial dispute,

Aetna provided those benefits. But after the 24 months, the benefits entitlement becomes more demanding, requiring proof that the individual cannot carry on any gainful activity consistent with his education, training or experience that would generate an income of more than 60% of his adjusted pre-disability earnings. Aetna moved to cut off benefits after the 24 months under this standard, and successfully fought off Borrousch's ERISA lawsuit in *Borrousch v. Aetna Life Insurance Co.*, 2018 WL 25607080, 2018 U.S. Dist. LEXIS 94506 (N.D. Ind., June 4, 2018). Aetna based its decision on the responses of its own and Borrousch's doctors (one of whom, upon receiving a letter setting out the conclusions of Aetna's doctor that Borrousch was capable of working, checked a "yes" box stating agreement with that conclusion, but then when Borrousch found out about it, wrote a conflicting opinion) and, perhaps more significantly in the eyes of the court, Aetna's on-line researched produced evidence that Borrousch was engaged in a real estate business that was throwing off enough income to meet the 60% test. Rather hard to maintain that you are too disabled to work when you are actually working, one would think! Furthermore, under the terms of the LTD plan, Aetna was allocated discretion to make eligibility determinations, and under ERISA case law, there is a rather limited role for judicial review in such circumstances. The test is not whether the court would have made the same decision as the insurer, but rather a deferential "arbitrary and capricious" standard. After reviewing the information available to Aetna at the time it made its decision to terminate benefits, District Judge Philip P. Simon wrote, "I cannot say that Aetna's action was 'downright unreasonable.'" The judge rejected Borrousch's argument that Aetna had disregarded the opinion of his primary care physician, noting that Aetna's doctor had telephoned Borrousch's

CIVIL LITIGATION *notes*

doctor, who had said that Borrousch's "underlying HIV was controlled and that his emotional condition was not affecting his physical condition. What's more," wrote the judge, "in determining whether Aetna's decision was arbitrary and capricious, one of the most telling things in the record is Dr. Gonzales' completion of the form sent by Aetna on January 13, 2016. In this letter, Aetna is up-front that it is assessing Borrousch's medical conditions, level of functionality, and ability to work in any reasonable occupation for his claim of Long Term Disability benefits. It then details the independent review by Dr. Swain, thanks Dr. Gonzales for speaking with her, and encloses a copy of Dr. Swain's physician review report for Dr. Gonzales' review and comment. Dr. Gonzales checked 'yes' that he agreed with the conclusions outlined in Dr. Swain's report . . . and 'yes' that he agreed Borrousch is capable of performing full-time sedentary physical demand level work from a physical and cognitive perspective." Judge Simon concluded that Aetna's letter to Borrousch terminating his benefits "offers a reasonable explanation for the outcome of termination of benefits, which is based upon facts in the record." That's all that is required in judicial review of an ERISA benefits claim. As to the internal appeal from Aetna's determination, the court was impressed by Aetna's discovery that Borrousch had an active real estate license, and was working as a registered real estate agency for a company he had incorporated, had filed for two new businesses, and his business was generating a six-figure annual revenue stream. The court rejected the argument that Aetna's on-line research violated his due process rights, noting that he was afforded the opportunity to respond to it as part of the appeal process; it was not "sprung" on Borrousch for the first time in the district court lawsuit. Borrousch is represented by Bridget L O'Ryan, of O'Ryan Law Firm, Indianapolis, IN.

IOWA – A child was born to a married lesbian couple in Iowa in 2013, with both women listed on the birth certificate as parents. The birth mother's substance abuse, and domestic violence in the home, led the Department of Human Services (DHS) to become involved in 2015. DHS initially placed the child with the birth mother's mother, but then early in 2017 DHS transferred custody to the other mother, referred to in *In the Interest of M.L.*, 2018 WL 2725407, 2018 Iowa App. LEXIS 516 (Iowa Ct. App., June 6, 2018), as the legal mother. The state petitioned to terminate the birth mother's parental rights in November 2017. The guardian ad litem appointed to represent M.L.'s interests recommended the termination in a report to the juvenile court, which held a hearing in February 2018 and entered an order terminating the birth mother's parental rights. The birth mother appealed, and the Court of Appeals affirmed the juvenile court's ruling. It found that the hearing record provided clear and convincing evidence to support the court's conclusion that reasonable efforts to effect reunification between mother and child had been defeated, mainly by the mother's continuing misbehavior, and her incarceration had not helped matters. "Clear and convincing evidence shows termination of the biological mother's parental rights is in the child's best interests," wrote Judge Richard H. Doyle for the appellate panel. The child was described as "thriving" in the care of the legal mother, and the child "exhibited 'extreme anxiety' and 'disconnect' during phone calls with the biological mother," who is incarcerated, according to testimony from the child's therapist. "The therapist stated that the child 'continues to display a bond and connection to [the legal mother]' and 'sees her forever family as being with her new baby brother, [the legal mother,] and her brother's bio father.'" The birth mother is represented by Randall L. McNaughton, of Davenport. The Attorney General's office represented

the state agency, and Timothy J. Tupper of Davenport is guardian ad litem for the child.

IOWA – In *Planned Parenthood of the Heartland v. Reynolds*, 2018 Iowa Sup. LEXIS 79 (June 29, 2018), the Iowa Supreme Court held that a state statute imposing a 72 hour waiting period for women seeking abortions within the state violated the due process and equal protection provisions of the Iowa constitution. The opinion for the court by Justice Mark Cady noted that the state sought to rely on the U.S. Supreme Court's opinion in *Bowers v. Hardwick* for part of its due process argument, and observed that *Bowers* had been reversed by the Supreme Court in *Lawrence v. Texas*. One wonders about what the Iowa A.G.'s office thought they could get away with here. At any rate, score one for Planned Parenthood (and their assisting attorneys from the ACLU) in the effort to keep abortion services available for women of limited means in Iowa, where the legislature has gone to some lengths to make access to such services as inconvenient an expensive as they can get away with. The court's opinion, packed with carefully assembled data, shows that the state's efforts have imposed a substantial burden, both financial and otherwise, on unemployed or poor women seeking abortion, in the absence of any evidence that a 72 hour waiting period accomplished any legitimate policy goal of the state in terms of the health and safety of its women.

MARYLAND – U.S. District Judge Marvin J. Garbis in *Squire v. FedEx Freight, Inc.*, 2018 WL 3036474, 2018 U.S. Dist. LEXIS 101923 (D. Md., June 19, 2018), denied the employer's motion to dismiss a Title VII sexual orientation claim brought by a transgender plaintiff. Miko Squire, who has identified as a transgender man "his entire adult life,"

CIVIL LITIGATION *notes*

according to the judge, was hired to be a FedEx driver in January 2014 and “worked for over two years without complaint.” However, to complete his transition he needed a hysterectomy and requested time off for this from a Human Resources representative, Terrika Martin, which was granted. When he returned to work, he “faced discipline and criticism by FedEx, even though his performance remained the same as before his surgery, according to the allegations of his complaint. He believed that this was due to his “gender, gender identity, and/or sexual orientation,” according to the charge he ultimately filed with the EEOC. He feared that Martin had informed FedEx about the reason for his medical leave and gender change, or which the company was presumably not aware. Martin had advised him “not to report his hysterectomy to the Department of Transportation.” According to the Complaint, when Squire “expressed concern to Martin that he was being discriminated by FedEx, Martin stated that based on the factual circumstances of each incident, Squire should not have faced discipline,” wrote Judge Garbis. Squire was discharged when he declined an overtime assignment that, according to his understanding of company practice, he could decline because there were more junior drivers on his shift who could have performed the work. But the company claimed it was against policy to refuse extra work, although nothing is said about this in FedEx’s on-line manual, “which is several hundred pages long.” Squire completed an EEOC intake questionnaire the day he was discharged, but did not respond to the question asking the basis for his claim of discrimination, and did not check the box asking EEOC to file a charge on his behalf. However, on May 11, 2017, he completed an EEOC Charge of Discrimination Form. The only box he checked on the form was “SEX”. (The form does not have boxes to check for gender identity or sexual orientation).

The EEOC issued him a Dismissal and Notice of Rights on August 10, 2017, and he filed suit in federal court, alleging, as noted above, discrimination because of gender, gender identity, and/or sexual orientation, and also pleading supplementary claims under the Maryland Fair Employment Practices Act, which expressly prohibits sexual orientation and gender identity discrimination. He also asserted a retaliation claim in his complaint, which Judge Garbis dismissed because Squire never checked the box for RETALIATION or mentioned anything about retaliation in the administrative process. FedEx moved to dismiss the discrimination claim based on sexual orientation. “In this motion,” wrote Judge Garbis, “FedEx does not seek dismissal of the gender or gender identity discrimination claims.” In support of its motion, FedEx pointed to the EEOC charge form, on which Squire did not mention anything about sexual orientation. “Other courts have looked at whether a relationship exists between sex, sexual orientation, and gender in Title VII claims,” wrote Judge Garbis, “and whether a plaintiff must make a separate claim for each. However, no case law definitely states that these terms are either distinct from one another (and thus, must be specifically claimed), or closely related to one another (and thus, do not require separate claims).” Judge Garbis spends several paragraphs reviewing case law from other jurisdictions and noting the trend at the EEOC and some other federal jurisdictions to equate sexual orientation discrimination claims with sex discrimination claims. Although Squire is represented in his Complaint by Jennifer Sutherland Lubinski of The Heyman Law Firm (Baltimore), presumably he filled out the EEOC forms on his own. “Courts are to view EEOC charges very liberally, especially because the complainant often is not represented by a lawyer,” commented Garbis. “Here, the Court must permit

Plaintiff even more latitude, as the relationship between sex, sexual orientation, and gender is a disputed issue. Additionally, the Court agrees that ‘society’s views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years. Likewise, the Court is mindful that the legal landscape is transforming as it relates to gender identity, sexual orientation, and similar issues, especially in the context of providing expanded legal rights,’” quoting from *Johnston v. University Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. 2015). Observing that the EEOC charge form did not have a box to check for sexual orientation, “the Court finds that it is reasonable that Plaintiff would consider ‘sex’ to encompass ‘sexual orientation,’ based on the close relationship of the terms and the fact that there was no separate box specifying sexual orientation.” Beyond the exhaustion requirement, of course, federal civil pleading standards require that the plaintiff plead facts that, if believed, would ground a plausible claim under the plaintiff’s legal theory. Although, on the face of it, this appears to be a gender identity discrimination case rather than a sexual orientation discrimination case, Judge Garbis found that at this stage the pleading standard has been met for sexual orientation. “The Court finds that it is plausible that FedEx, now aware that Plaintiff was born a woman, and is married to a woman, took discriminatory action against Plaintiff based on his sexual orientation.” FedEx’s motion to dismiss was denied. The judge ordered that the parties set up a July 17 telephone conference to “discuss further proceedings in this case.” Judge Garbis’s name will be familiar to those who are closely following the litigation concerning President Trump’s attempt to ban military service by transgender people, as he is one of the four federal district judges who have issued preliminary injunctions against the proposed policy.

CIVIL LITIGATION *notes*

MARYLAND – The parties have reached a settlement in transgender high school student Max Brennan’s lawsuit seeking to use boys’ restroom and locker room facilities at his high school in Talbot County. In March, U.S. District Judge George L. Russell III denied defendants’ motion to dismiss the case, finding that Brennan had stated a claim under Title IX and the federal and state constitutions. See *M.A.B. v. Board of Education of Talbot City*, 286 F. Supp. 3d 704 (D. Md. 2018). The settlement agreement resolves the case without any finding of liability on the part of the school district. In the agreement, however, the defendants “acknowledge the likelihood of liability in light of the Court’s Memorandum Opinion and Order dated March 12, 2018.” Under the agreement, Brennan will have permanent access to restrooms, locker rooms, and other facilities owned and/or operated by the Board of Education that are otherwise designated for boys or men, according to a press release from FreeState Justice and the ACLU, circulated on June 18. Jennifer L. Kent, Managing Attorney for FreeState Justice, represents Brennan.

MASSACHUSETTS – The *Boston Globe* (June 19) reported that a federal jury in Boston awarded Sean Stentiford \$18.4 million against two doctors and the Lahey Hospital & Medical Center in Burlington on a claim that their negligent care caused his undetected HIV infection to cause brain damage that destroyed his legal career. Stentiford, who is gay, had worked as a paramedic before going to law school. He developed symptoms in 2007 that a resident at the clinic told him was “highly suggestive of HIV infection, but although he then consented to an HIV test as part of a battery of tests attempting to diagnose his problems, the doctors never had the HIV test performed on the blood drawn, as Dr. Kinan K. Hreib disagreed with the resident, noting in Stentiford’s medical records that there was “no

risk of HIV,” and he cancelled the test without telling Stentiford. He later told Stentiford that his tests “looked good.” It was not until three years later, amidst recurring symptoms, that another doctor recommended HIV testing, which this time turned out positive resulting in a diagnosis of “full-blown AIDS.” Plaintiff presented evidence that as of 2006 the CDCP was recommended that all patients between ages 13 and 64 be screened for HIV at least once for sexually active gay and bisexual men, at least annually; this would be relevant evidence of the appropriate standard of medical care. The jury believed expert testimony that the three-year delay in treatment had contributed to brain damage and cognitive impairment stemming from his HIV-infection, which had forced him to leave his law practice. The clinic’s medical records reflected that the doctors who had decided not to go ahead with having his blood draw tested for HIV had known that Stentiford was gay, as his records included a note from a social worker describing him as a “somewhat closeted gay man.” Reacting to the verdict, a spokesperson for the clinic said that the hospital did not agree with the “presentation of the facts” in the case and planned to appeal the jury decision. It is usual in cases of this type for damage awards to be reduced in response to post-trial motions or appeals, but very unusual for a jury verdict based on expert testimony to be reversed. According to the *Boston Globe*’s report on the case, Stentiford, who now lives in Bronx, N.Y., has responded to current HIV-related meds and is not now suffering for HIV-related symptoms. The article does not state whether he resumed law practice, but leaves the impression that his legal career is over. Stentiford is represented by David P. Angueira, Swartz & Swartz, Boston.

MISSOURI – Jaimie Hileman, a transgender woman, filed employment

discrimination claims with Missouri authorities against Internet Wines & Spirits Co., and later sued IWS in federal court in Illinois. That case was resolved with a settlement agreement including a provision that Hileman would not disparage IWS. After the case had been resolved, Hileman was interviewed by Mandy Murphey, a reporter for Fox 2 News in St. Louis who was preparing a story that was eventually broadcast under the title “Transgender Community Facing Discrimination in the Workplace.” In the broadcast, Hileman spoke about the discrimination she had experienced, without in any way identifying her employer. But IWS felt that the non-disparagement provision had been violated, and filed a state court breach of contract action against Hileman, which the state court rejected on summary judgment, concluding that as Hileman never mentioned IWS in the broadcast interview and the news report never mentioned IWS either, there was no violation of the settlement agreement. Now Hileman sued IWS in federal court in Missouri, claiming that IWS had retaliated against her by bringing the breach of contract lawsuit. IWS sought to depose reporter Murphey, requesting in its subpoena that she produce “all documents, files, impressions, recording, interview notes, etc., related to Murphey’s preparation for the interview of Jaimie Hileman and Murphey’s interview with Jaimie Hileman.” Murphey filed a motion to quash the subpoena, arguing that the information sought was irrelevant to the lawsuit between Hileman and IWS. U.S. District Judge Audrey G. Fleissig agreed with Murphey, and granted the motion in *Hileman v. Internet Wines & Spirits Co.*, 2018 U.S. Dist. LEXIS 94481, 2018 WL 2557577 (E.D. Mo., June 4, 2018). “IWS did not know at the time it filed its lawsuit what Murphey and Hileman discussed off the air,” wrote the judge. “Instead, it appears IWS filed suit on the basis of the news story alone. Thus, none of the materials sought from Murphey

CIVIL LITIGATION *notes*

by IWS have any relevance to its reasons for filing its lawsuit against Hileman.” Having decided the case on relevance, the court abstained from analyzing whether Murphey was entitled to assert a reporter’s privilege against testifying.

NEW JERSEY—*nj.com* (June 20) reports that former Union Township high school teacher Jenye “Viki” Knox will receive \$132,000 in settlement of her tort suit against the school district, which arose out of her posting homophobic comments on her facebook.com page in 2011. The posting caused her to be removed from the classroom, suspended without pay in December 2011, and she resigned in June 2012. She had previously agreed to a three-year suspension of her teaching certificate. Knox’s posting was a reaction to an LGBT History Month display at the high school where she was teaching. She described homosexuality as a “perverted spirit” and a “sin” that “breeds like cancer” and wrote, “Why parade your unnatural immoral behaviors before the rest of us? I DO NOT HAVE TO TOLERATE ANYTHING OTHERS WISH TO DO. I DO HAVE TO LOVE AND SPEAK AND DO WHAT’S RIGHT!” Knox sued in state court in October 2013, claiming she had suffered “irreparable harm” including “humiliation, embarrassment, emotional distress, and damage to her reputation.” As reported in *NJ Civil Settlements*, which publishes a partial list of settlements paid by NJ government agencies and their insurers, Knox will receive \$24,500 in back wages, \$63,833.33 for emotional distress, and \$44,166.67 for her attorney’s fees. The settlement, signed on June 5, is covered by a confidentiality clause.

NEW YORK — In the case of *LuxuryBeachFrontGetAway.com, Inc. v. Town of Riverhead*, 2018 U.S. Dist. LEXIS 106809 (E.D.N.Y., June 25, 2018), U.S. Magistrate Judge Steven I.

Locke recommended to District Judge Sandra J. Feuerstein to dismiss a lawsuit brought by the owners of some properties in the City of Riverhead whose business, which includes making short-term rentals to LGBTQ vacationers, would be adversely affected by a new town zoning ordinance that forbids short-term rentals of residential property (i.e., rental for 29 days or fewer). Plaintiffs brought suit under the Fair Housing Act, the Due Process and Equal Protection Clauses, and the New York Human Rights Law. They claimed, *inter alia*, that the Town’s action makes it “all but impossible for the vast majority of families with children to rent a residential Riverhead house” for family vacations. The Town actually instituted enforcement action against plaintiffs regarding premises at 70 Creek Road in the Wading River area; in connection with this action, plaintiffs alleged that “the Town is selectively enforcing the Ordinance against members of the lesbian, gay, bisexual and transgender (LGBT) community.” Although Magistrate Judge Locke found, contrary to the Town’s argument, that the plaintiffs had Article III standing to bring many of their claims, ultimately he concluded that they had failed to state a claim under federal law, and that federal abstention doctrines should prevent the district court from issuing injunctive relief against the Town’s enforcement action, since the same legal claims could be raised in that forum. Part of the problem in applying federal housing discrimination law was that the FHA applies to “dwellings” and, found Locke, was not intended to apply to buildings used for transient residence, such as hotels or motels or buildings that were rented for short-term stays. There was also the issue, regarding the claim that the zoning policy would have an adverse effect on LGBTQ renters, whether the FHA’s ban on sex discrimination even applies. Locke noted that there was district court precedent in New York rejecting sexual minority discrimination

claims under the FHA, but flagged the possible application of the reasoning of the 2nd Circuit, *en banc*, in *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018), holding that sexual orientation discrimination is a subset of sex discrimination forbidden in the employment context under Title VII. However, he found, it was unnecessary to take on the question whether sexual orientation discrimination is actionable under the FHA, in light of his finding that the property in question would not be considered “dwellings” for purposes of the FHA. Under Judge Locke’s interpretation, the town’s zoning rule against short-term rentals of residential property would evade FHA coverage.

OHIO — In May 2018 *Law Notes* we reported on U.S. Magistrate Judge Stephanie K. Bowman’s Report and Recommendation to the district court regarding a summary judgment motion filed by the employer in *Hoover v. Chipotle Mexican Grill, Inc.*, 2018 WL 1899166, 108 U.S. Dist. LEXIS 66624 (S.D. Ohio, April 20, 2018), in which a gay former employee was suing for disability and gender discrimination, as well as retaliation and violation of public policy. Adam Hoover, sole support of his mother and two younger siblings, took a part-time job at Chipotle while attending college full time, and eventually cracked from overwork and stress resulting from anti-gay bullying at school. Feeling suicidal after the bullying, he staged a fake “kidnapping” of himself which was, in essence, a cry for help, was hospitalized and diagnosed with “adjustment disorder with mixed anxiety and depressed mood” and “sleep disturbance,” and counselled to reduce his work hours. When he returned to Chipotle his supervisors were reluctant to allow him to resume his regular schedule after a week of reduced work, and he perceived that he was being treated differently from before the incident. He met with two

CIVIL LITIGATION *notes*

current and one former co-worker to discuss his situation and asked if they would support him if he got a lawyer and sued Chipotle. One of these employees reported this conversation to a supervisor and Hoover was promptly fired, because apparently Chipotle's local management did not educate its supervisors about the possibility of retaliation claims under employment discrimination law. Hoover sued under the Americans with Disabilities Act and Ohio anti-discrimination laws on disability and gender stereotype theories. The magistrate judge recommended dismissing the gender discrimination claim, noting that Ohio does not ban sexual orientation discrimination and that federal courts within the 6th Circuit had not yet ruled that sexual orientation claims are actionable sex discrimination claims, and concluded on the ADA claim that Hoover did not qualify either as a person with a disability or as a person perceived as having a disability, accepting the employer's argument that since Hoover had completed treatment for his mental condition within four months it was at best a "transitory" impairment not covered by the anti-discrimination statute. On June 22, U.S. District Judge Susan J. Dlott ruled on the motion, 2018 U.S. Dist. LEXIS 104535, 2018 WL 3092902 (S.D. Ohio, June 22, 2018), mainly agreeing with the magistrate judge's recommendations. However, Judge Dlott, disagreeing with the magistrate, found that it was not appropriate to grant summary judgment on the federal and state disability claims, because "contradictory evidence creates genuine issues of fact concerning whether Plaintiff was 'regarded as disabled' and whether the disability Plaintiff was regarded as having was 'transitory and minor.'" Judge Dlott accepted the magistrate's recommendation to deny summary judgment on the retaliation and public policy claims, and to grant summary judgment on FMLA and gender discrimination claims,

without any further discussion of the question whether sexual orientation discrimination claims might be actionable, even on a gender stereotype theory, under sex discrimination laws. Hoover is represented by Kelly Mulloy Myers (lead attorney), Elizabeth Asbury Newman, Erin M. Heidrich, and Randolph Harry Freking, of Freking Myers & Reul LLC, Cincinnati.

OREGON – The Oregon Supreme Court announced on June 23 that it will not review the Oregon Court of Appeals' decision in *Klein, d/b/a Sweetcakes by Melissa v. Oregon Bureau of Labor and Industries*, 410 P. 3d 1051, 289 Or. App. 507 (Dec. 28, 2017). This was yet another wedding vendor case, involving, as in *Masterpiece Cakeshop*, a baker's refusal to produce a wedding cake for a same-sex couple's celebration of their marriage. The court of appeals decision was similar to those by other state appellate courts that have ruled against wedding vendors that had refused to provide goods or services for same-sex weddings. The baker here, as in *Masterpiece Cakeshop*, sought to rely on religious freedom and compelled speech arguments. The petition to review sat for a long time as the Oregon Supreme Court apparently waited to see what would happen at the U.S. Supreme Court. As is usual, the court did not explain why it was not granting review, but the obvious interpretation is that they were willing for the case to rest on the court of appeals opinion after considering the possible impact of *Masterpiece Cakeshop*. Thus, this is a second appellate court that appears to construe *Masterpiece* as a narrow ruling that does not require extending a religious or free speech exemption in same-sex wedding cake cases. Interestingly, this case presented the court with an argument that a Commissioner should have recused himself from the case because of public remarks he had made. The respondents argued that

"BOLI's Commissioner, Avakian, 'the ultimate decision maker in this case, violated the Kleins' due process rights by failing to recuse himself despite numerous public comments revealing his intent to rule against them.'" They referred to comments on a Facebook.com post and in an article published in *The Oregonian*. The court, however, agreed with BOLI that the comments reflected "general views about the law and public policy" and thus were not the kind of comments requiring recusal. On Facebook, Avakian posted: "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives." In the article, Avakian was quoted as saying: "Everybody is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate." He was also quoted stating: "The goal is never to shut down a business. The goal is to rehabilitate. For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon." Interesting that after the U.S. Supreme Court reversed the Colorado Court of Appeals in *Masterpiece* due, in part, to comments by two of the Commissioners, the Oregon Court of Appeals evidently did not think that comments by one of the Oregon Commissioners would need further scrutiny before a decision could be made on whether to affirm the ruling below. The Oregon appeals court did agree with the Kleins on one point: that the commission's injunction in their case was overbroad in seeking to restrict them from making any public comments about the case, which did raise 1st Amendment concerns. The Commission relied on a provision, similar to one struck down by the Arizona Court of Appeals in the *Brush & Nib* case, that prohibits public accommodations from advertising or announcing that they will not provide goods or services to people

CIVIL LITIGATION *notes*

on account of the various prohibited grounds of discrimination. However, the provision in the Phoenix ordinance at issue in *Brush & Nib* contained generalized language that the court found unduly vague – language that is not present in the Oregon statute. The *Klein* case drew several amicus briefs, including one filed by Lambda Legal on behalf of Rachel and Laurel Bowman-Cryer, the couple who had been refused the wedding cake. Counsel for the bakery (which has since gone out of business) announced they would petition the U.S. Supreme Court for review.

TEXAS – The 5th Circuit Court of Appeals passed on an opportunity to reconsider the question whether sexual orientation discrimination claims are actionable under Title VII, when it affirmed a district court dismissal of such a claim on the ground that the gay plaintiff failed to allege facts showing that “any decision-maker [at the school district] discriminated against him based on his sexual orientation.” *Rodriguez v. Brownsville Independent School District*, 2018 U.S. App. LEXIS 17027, 2018 WL 3097197 (5th Cir., per curiam, June 22, 2018 (summary calendar, designated as not for official publication). The court quoted from *Brandon v. Sage Corporation*, 808 F.3d 266, 270 n.2 (5th Cir. 2015): “Title VII in plain terms does not cover ‘sexual orientation,’” and stated, “As in *Brandon*, we do not now decide whether sexual orientation is a protected class.” The court notes that Francisco Javier Rodriguez’s allegations about “anti-gay comments” and accusations that he had “inappropriate relationships with the students” were all made by co-workers, not supervisors or management officials of the school district, and that the tangible employment actions that he was challenging in this case were decided by individuals as to whom there was no record evidence of anti-gay bias. He alleged a failure to

promote and a retaliatory transfer, as well as the complaint against him for “inappropriate relationships” which was found to be non-meritorious. The court found that he had never applied for the promotion in question, that the transfer came at a time when the school district was not yet aware of his EEOC charge, and that the complaint against him was filed by a co-worker, not a supervisor, and, indeed, he was exonerated. Furthermore, the transfer was said to have been undertaken because he and another teacher had a very contentious relationship, and both were transferred to other schools without any reduction in pay or rank. The court’s opinion did not note counsel, and its criticism of the briefing on the appeal may indicate that Rodriguez is *pro se*.

TEXAS – The Texas Court of Appeals in Austin rejected a novel interpretation of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in *Lecuona v. Lecuona*, 2018 WL 2994587 (June 15, 2018). Mark Lecuona filed for a divorce from his wife, Shawn, under the Texas no-fault statute. She opposed on religious grounds, stating that the no-fault divorce law, as applied to her marriage, “unconstitutionally infringed her protected interests in what she viewed as an immutable ‘blood covenant’ among the couple and the Almighty,” wrote Justice Bob Pemberton for the Court of Appeals panel. She contended that inasmuch as *Obergefell* identified the right to marry as a “fundamental right inherent in the liberty of the person” protected by the 14th Amendment, there is thus a constitutional restriction against “Mark’s unilateral invocation of Texas’s no-fault divorce law to end a marriage that she, for professed religious reasons, desires to continue.” The court refused to agree that *Obergefell* reaches so far as to create “an affirmative constitutional right of one spouse to compel an unwilling other spouse to remain married, in derogation of both the

other spouse’s liberty and state divorce laws.” Pemberton wrote that Shawn’s contention “represents a significant and novel expansion of *Obergefell* that is not properly undertaken by this intermediate state appellate court.” The court also rejected other grounds on which Shawn sought to challenge the trial court’s granting of a final divorce decree.

TEXAS – U.S. District Judge John McBryde granted summary judgment in *Klocke v. University of Texas at Arlington*, 2018 U.S. Dist. LEXIS 96168 (N.D. Tex., June 7, 2018), to the University on a Title IX claim brought by the father of a male allegedly “straight” UT student who committed suicide while embroiled in a disciplinary proceeding arising from an incident where the student allegedly responded to an “unwelcome sexual advance” from a gay classmate by typing on his computer “gays should die” and showing it to the gay student, calling him a “faggot.” The gay student, who disclaims having made any sexual advance, complained to the teacher, posted about the incident on Facebook, and took a Title IX complaint to the school’s dean of students, who assigned a staff member to investigate. The staff member, finding the gay student’s allegations credible, barred the “straight” student from attending the class and barred both students from any contact with each other, and arrangements were made for the “straight” student to be able to complete the course with the assistance of the professor. While the investigation was going on, the “straight” student purchased a gun, and shot himself to death after turning in his final exam paper. His father, as administrator of his estate, brought this Title IX lawsuit, claiming that his son was the victim of a false discrimination claim by the gay student, and that the school’s investigation of the case constituted selective implementation of a grievance

CIVIL LITIGATION *notes*

resolution process that was deliberately indifferent to the “straight” student’s rights under Title IX. Both parties had moved for summary judgment. Judge McBryde, after providing an extended narrative of the facts he found to be credibly alleged, wrote, “In this day and age, it should go without saying that when one student says to another, ‘people like you should die’ or ‘you should kill yourself,’ the school must take such statements seriously.” In a footnote, he wrote, “That one student bought a gun the day after the incident underscores the seriousness of the situation.” He concluded, “In this case, no matter the theory, the evidence simply does not support a finding that defendant intentionally discriminated against [the “straight” student] on the basis of his sex,” and, of course, Title IX is only violated if somebody suffered discrimination by the educational institution because of their sex. “Ultimately, for no known reason, the student committed suicide,” wrote McBryde, but there was no evidence that this was because of a Title IX violation by the University. “Plaintiff has not shown that any female in circumstances similar to [the “straight” student] was treated more favorably. In fact plaintiff has not pointed to any comparator in nearly identical circumstances. And, even if he had identified such a comparator, he has not shown that the same decision-maker was involved.” Plaintiff had asserted two theories of the case: “First, he says that UTA failed to follow its own policies and procedures in investigating [the gay student’s] complaint. Second, he says that UTA was deliberately indifferent to [the “straight” student’s] claim of harassment by [the gay student]. Neither is supported.” UTA did consider the “straight” student’s allegations, and found them to be “incredible,” wrote Judge McBryde, noting that the student’s allegations – one incident of an unwanted sexual advance in the form of an alleged remark that the “straight” student was “beautiful” – would not be

sufficient to constitute sexual harassment in any event. The court found that the gay student’s version of events was corroborated, the “straight” student’s was not, and plaintiff had presented “no evidence to raise a genuine issue of material fact as to gender bias.”

VIRGINIA – In a Title VII same-sex harassment case, U.S. District Judge Elizabeth K. Dillon applied 4th Circuit precedent to reject a hostile environment lawsuit by Thomas W. Dooley, who alleged that Curtis Howe, his male supervisor, had pinched his buttocks and made offensive sexual jokes, poisoning the workplace atmosphere for Dooley, who also alleged that he suffered retaliation for complaining about Howe’s actions: his subsequent termination. *Dooley v. Capstone Logistics, LLC*, 2018 U.S. Dist. LEXIS 101784, 2018 WL 3040029 (W.D. Va., June 19, 2018). Ruling on the employer’s motion for summary judgment, Judge Dillon found that disposition of the hostile environment claim came down to whether Dooley had adequately shown that the harassment he suffered was “because of . . . sex.” Dillon related that under *Oncale*, the Supreme Court’s same-sex harassment precedent, there are three routes to meet this requirement: (1) establishing ‘credible evidence that the harasser [is] homosexual’; (2) establishing that the victim is harassed in such sex-specific and derogatory terms by [a member of the same sex] as to make it clear that the harasser is motivated by general hostility to the presence of [the same sex] in the workplace’; or (3) establishing ‘direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.’” Dillon found that the second and third methods did not apply in this case involving essentially a single-sex workplace, so everything devolved on Dooley’s belief, shared by some other workers, that Howe was gay, and thus

that his conduct was motivated by sexual desire. Such a belief was not enough, ruled Dillon, citing 4th Circuit authority. “In this case,” wrote the judge, “there is no credible evidence that Howe is gay; indeed, there is nothing other than Dooley’s belief and the speculation of co-workers to support any finding that Howe is gay . . . [E]vidence based on subjective beliefs and the harasser’s conduct is insufficient to allow the case to go to a jury. That is especially true where, as here, the conduct did not involve any solicitation by Howe of a sexual act. There is simply no evidence from which a reasonable jury could find that Howe was soliciting Dooley. Dooley’s subjective belief that Howe was doing so is not sufficient.” However, the judge did find that disputed material facts as to the retaliation claim precluded a grant of summary judgment, since Dooley did suffer an adverse employment action of termination after he had raised complaints about Howe’s conduct, and there was some issue whether the adverse employment action could be connected to the complaints or was legitimately due to other incidents whose meaning and occurrence were sharply contested by the parties. Dooley is represented by Brittany Michelle Haddox and Terry Neill Grimes of Terry N. Grimes, ESQ, P.C., Roanoke. The company’s law firm is Fisher & Phillips LLP, Charlotte, NC.

VIRGINIA – They just won’t give up. HRC’s AM Equality daily email news reported on June 6 that the Gloucester County, Virginia, School Board has filed an appeal with the 4th Circuit, seeking to overturn a ruling by U.S. District Judge Arenda L. Wright Allen on May 22 refusing to dismiss the latest version of Gavin Grimm’s lawsuit under Title IX and the Equal Protection Clause, challenging the Board’s policy refusing to let transgender students use restroom facilities consistent with their gender identity. *Grimm v. Gloucester County*

CRIMINAL LITIGATION *notes*

School Board, 302 F.Supp.3d 730 (E.D. Va.). In the absence of controlling 4th Circuit precedent, Judge Wright Allen had relief on *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), as a persuasive precedent, and also cited a ruling by another district court within the 4th Circuit, *M.A.B. v. Board of Education of Talbot City*, 286 F. Supp. 3d 704 (D. Md. 2018). Of course, the school district has the Trump Administration on its side; Attorney General Jeff Sessions prevailed on the Education Department in 2017 to “withdraw” the Obama Administration’s interpretation of Title IX to cover such claims, and later in 2017 Sessions issued a Memorandum emphatically rejecting the proposition that sex discrimination laws can be interpreted to ban gender identity discrimination. So far, however, federal courts seem to be persuaded otherwise.

CRIMINAL LITIGATION NOTES

By *Arthur S. Leonard*

CALIFORNIA – In *People v. Joya*, 2018 Cal. App. Unpub. LEXIS 4333, 2018 WL 3122154 (Cal. 5th Dist. Ct. App., June 26, 2018), the defendant, convicted on five counts of “lewd or lascivious conduct with a child under 15 years of age,” sought to appeal, among other things, the trial court’s order that he submit to HIV testing along with serving a lengthy prison sentence. The reasoning of his appeal was that the trial court had not made an express finding on the record that the conduct for which he was convicted could have resulted in the transmission of HIV. The court commented that when a trial court orders HIV testing, “the trial court is presumed to have made an implied finding of probable cause,” but the court went on to note that Joya had also been charged with rape in the form of vaginal intercourse with his niece. He pointed out that he was

acquitted by the jury on that charge, but this did not bother the court, which quoted California precedent stating: “A jury verdict acquitting a defendant of a charged offense does *not* constitute a finding that the defendant is factually innocent of the offense or establish that any or all of the specific elements of the offense are not true.” *In re Coley*, 55 Cal. 4th 524, 554 (2012). One of the victims (he were Joya’s minor nieces) “testified to having vaginal intercourse with Joya for ‘ten minutes,’ explaining the time estimate was based on the number of songs on her ‘playlist’ that had played while he was raping her. There was no indication Joya used a condom, and the testimony strongly suggested he did not. If accepted as true, the testimony could lead a person of ordinary care and prudence to entertain an honest and strong belief that semen was transferred from the defendant to the victim. Therefore, the challenged order cannot be reversed for insufficient evidence.” The events in question happened in 2012. If the ordered HIV testing was put on hold while Joya was appealing (and the appeal also extended to various other evidentiary issues), one wonders what purpose will be served by testing him now, five or more years later. If protecting the victim is the issue, she should have submitted to HIV testing, and should have done so closer to the time of the sexual contact. Testing of Joya now could be in his interest, as learning whether he is HIV-positive would open the possibility of accessing appropriate treatment. There is no indication in the court’s opinion of any basis for believing that Joya was HIV-positive, the trial court having merely followed the routine of ordering HIV testing upon conviction of any crime on the statutory list, and overlooking the statutory finding requirement as a prerequisite to ordering HIV testing.

NEW YORK – In *People v. Ellis*, 2018 WL 2436455, 2018 N.Y. Slip Op. 03873

(May 31, 2018), a unanimous five-judge panel of the N.Y. Appellate Division, 3rd Department, reversed a conviction for violation of the state’s Sex Offender Registration Act, which had been premised on the failure of a registered sex offender to register his Facebook account. Giving a strict interpretation to the rules concerning internet use by sex offenders, the court found that the registration obligation was satisfied by the offender’s registration of all the email addresses and screen names he was using. The statute in question, Correction Law Sec. 168-f(4), provides that a “sex offender shall register with the [Division] no later than [10] calendar days after any change of . . . Internet accounts with Internet access providers belonging to such offender or Internet identifiers that such offender uses.” The statute defines “internet access provider” as “any business, organization, or other entity engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet.” Wrote the court: “Inasmuch as Facebook does not provide its customers with Internet access, it is not an Internet access provider.” Consequently, the statute does not require registered sex offenders to notify the Division when they open an account on Facebook. The court points out that there is a system for social media networks such as Facebook to access the registered screen names of sex offenders, and then to use that information to block their access, and that by requiring offenders to register the “identifiers” they use on-line, the statute does require them to register any screen name they are using on the Internet (including within Facebook). But entities such as Facebook are not deemed to themselves be Internet service providers within the meaning of the registration statute, so opening a Facebook account is not a triggering event for a new registration under the statute.

PRISONER LITIGATION *notes*

NEW YORK – *Gay City News* has been providing ongoing coverage of proceedings in Bronx County Supreme Court in the prosecution of Abel Cedeno, a gay teenager charged with manslaughter for having stabbed a classmate, Matthew McCree, who was bullying him. Cedeno, represented by defense attorneys Christopher R. Lynn and Robert J. Feldman, is claiming he acted in self-defense. McCree’s brother, Kevon Dennis, and co-defendant Jonathan Espinal, have been charged with armed robbery of the witnesses to the classroom incident, having allegedly taken their cellphones at knifepoint, according to a June 21 article by LGBT rights activist Andy Humm, a contributing writer to the newspaper. There are allegations that McCree and Dennis were gang members, and defense counsel sought orders of protection for Cedeno, out on bail, and his family members, who have been living in hiding due to threats against them from the gang. Bronx District Attorney Darcel Clark said that it was up to Judge George R. Villegas whether to issue such orders, but he has required proof of actual threats before issuing orders against any individual. The LGBT Caucus of the City Council wrote to Clark asking her to help obtain orders of protection. McCree’s mother has denied that her sons were gang members. The situation described in Humm’s article is quite complicated.

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.

ALABAMA – A romantic relationship between two inmates ending in a stabbing in *Hendrix v. Davenport*, 2018

U.S. Dist. LEXIS 100011 (M.D. Ala., June 13, 2018). Gay plaintiff Kenneth Wayne Hendrix, *pro se*, sued various prison officials for failing to protect him from a stabbing assault from his “ex” (who he claims was known for prior violent attacks on “homosexuals”) and then unconstitutionally delaying medical care after the assault. U.S. Magistrate Judge Susan Russ Walker granted defendants summary judgment on all counts. The lengthy opinion is almost all boilerplate citations to what constitutes a claim in such circumstances; one is over two-thirds through reading it before it is possible to glean what actually happened. The opinion also repeatedly refers to Hendrix’s burden as to what is needed for his claim “to survive,” rather than the more neutral tone and formulation: what is needed to present a jury question. Judge Walker found that Hendrix presented only general concerns about fear on his unit. He did not request protection on the day of his break-up with the assailant. She found that the unit was adequately staffed with security. While the assailant was known to have been violent in the past, it was not known to defendants either generally or by Hendrix’s telling them, that he posed a serious risk to Hendrix. Judge Walker found that the defendants believed subjectively that the assailant posed no risk to Hendrix – something about which he failed to raise a jury question, having previously had a “romantic” relationship. The delay in medical care was only eight minutes, by Hendrix’s admission, which defendants explained by the need for taking pictures and securing the assailant. Hendrix failed to show that this short delay had any medical consequences. This simple case was filed in 2015 and somebody wrote an 18-page opinion for Judge Walker three years later. Hendrix was given 15 days to object.

ARIZONA – U.S. District Judge David G. Campbell dismissed the third

amended complaint and the case of *pro se* HIV-positive inmate Juan Lito Valladolid in *Valladolid v. Arizona*, 2018 U.S. Dist. LEXIS 93371 (D. Ariz., June 1, 2018). Although Valladolid raised claims about cell searches and access to court, only his claim about denial of work in the jail kitchen because of his HIV status will be discussed in this report. This is another case where a twenty-four-year-old Ninth Circuit antiquated decision accepting discarded notions about HIV transmission and perpetuating unreasonable fears – *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994) – continues to be used to discriminate against HIV-positive inmates in the many states covered by the Ninth Circuit. It is undisputed that Valladolid was denied work in the kitchen because he is HIV-positive, in the absence of any evidence that HIV-positive food handler present even a negligible risk of transmitting HIV to consumers of the food they are preparing or serving. Relying on *Gates*, Judge Campbell dismisses the claim, finding the action “reasonably related to legitimate penological interests,” citing to two other more recent district court decisions in accord. For various reasons, this is not a good test case, but this issue needs to be heard by an *en banc* panel of the Ninth Circuit.

ILLINOIS – This is the second screening dismissal for *pro se* transgender inmate Robert Nickie Ezell Quillman, a/k/a Robert N. Quillman, who alleges that she was denied protective custody for her safety; was subjected to “public humiliation, discrimination, bullying, [and] physical and mental abuse”; “raped, sexually assaulted, and beaten by male inmates and by staff at Lawrence [Correctional Facility]”; and had attempted suicide. In *Quillman v. IDOC*, 2018 WL 2694476, 2018 U.S. Dist. LEXIS 94417 (S.D. Ill., June 5, 2018), U. S. District Judge Nancy J. Rosenstengel dismisses her case again,

PRISONER LITIGATION *notes*

with leave to refile. Quillman requests injunctive relief and damages. After filing her first complaint, she was transferred to Pontiac Correctional Facility – one of the places where she had requested protection – so her filing appears to have had some effect on her safety. Characterizing her decision as appropriate but “unfortunate,” Judge Rosenstengel dismisses again, with leave to amend. In her first amendment, Quillman attached grievances as part of her complaint, but she failed to state a claim in two respects: either to name the people responsible for her assaults, etc., or to explain what the people she named had done personally to violate her rights. Judge Rosenstengel gives this *pro se* plaintiff specific advice if she chooses to file a second amended complaint: “Plaintiff should tell the Court if she complained to [named defendants] about a specific, impending, and substantial threat to her safety. If she did complain to these individuals, Plaintiff should describe how each individual responded (or failed to respond). Plaintiff’s grievances also suggest that staff members have assaulted and/or sexually harassed her. If that is true, Plaintiff must name those individuals as defendants in her case caption and describe what each individual did in her statement of claim.” This is yet another example of where it appears that absence of counsel could mean everything.

MICHIGAN – About 10,000,000 people live in Michigan, but only 300,000 in its Upper Peninsula. Yet, the Upper Peninsula houses over 30% of Michigan’s prisoners. Its population has shrunk in 14 of its 15 counties, and its residents are overwhelmingly white, northern European, and heterosexual. Corrections is one of its biggest employers. What a strange world to find oneself incarcerated from Detroit or Flint! What a management problem bridging the cultural, racial

and sexuality differences! In *Blevins v. Michigan Department of Corrections*, 2018 WL 2928190, 2018 U.S. Dist. LEXIS 97893 (W.D. Mich., June 12, 2018), *pro se* transgender inmate Scott Blevins found herself incarcerated in Manistree, Michigan (population ~ 2300), when she complained that the Latin Kings gang was forcing her to prostitute herself. Not finding help through official complaints, she resorted to violating orders (so she would be put in segregation) and threatening suicide (so she would at least be put on “watch” for two or three days). She specifically identified those who threatened her, but each time she was returned to her unit the harassment and sexual abuse continued. Eventually, she was moved to Alger Correctional Facility in northwest Lower Michigan (population 6000). Her suit about conditions in Manistree was allowed to proceed past screening by Chief U.S. District Judge Robert J. Jonker against four officers who managed her housing unit and the segregation pod. Each was involved directly in her complaints. At least one remaining defendant responded by saying: “Why don’t you quit being such a pussy, fag, bitch and fight?” Judge Jonker dismissed claims against supervisors and department executives as lacking specificity and based primarily on unpermitted vicarious liability theory. In this writer’s view, however, based on reading case after case, there is a need for counsel to bring a pattern and practice class action case on behalf of racial and sexual minorities against departmental defendants for lack of training and perpetuation of unlawful customs in Michigan’s rural prisons.

OHIO – This is another case where only the line officers in a gay harassment lawsuit stay in the case. One can glean little from the brief adoption by U.S. District Judge Michael R. Barrett of the Report and Recommendation [R &

R] of U.S. Magistrate Judge Karen L. Lifkowitz in *Rhodus v. Harris*, 2018 U.S. Dist. LEXIS 104526, 2018 WL 3092920 (S.D. Ohio, June 22, 2018), without reading the R&R on PACER. When one does, it reveals that *pro se* gay inmate Michael J. Rhodus alleged outrageous homophobic harassment by two officers (Swain and Story) which included: (1) forcing him to stand on a table in the dayroom holding a sign reading: “I LOVE BIG DICK”; and (2) making him scrub the floor with a toothbrush while he was subjected to anti-gay slurs. This activity, reminiscent of Nazi anti-Semitic behavior 80 years ago, caused other inmates to harass Rhodus with homophobic taunts and physical assaults. Rhodus filed grievances and a complaint under the Prison Rape Elimination Act [PREA]. There was an investigation, which apparently included videotape review of the incidents. Rhodus was moved to another dorm, but the PREA investigator found that the sign incident was “non-sexual” and did not invoke PREA. After moving Rhodus, two other officers (Ray and Vetere) called Rhodus a “snitch” in front of the new dayroom, allegedly in retaliation for complaining about Swain and Story. The staff and inmate harassment and anti-gay slurs began again. Judge Barrett approved allowing Rhodus to continue his case against both sets of officers for discrimination and retaliation, respectively. The PREA officer and grievance investigators were dismissed in the R & R on the authority that failure adequately to process Rhodus’ complaints creates no cause of action, citing the pre-PREA case of *Shohee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). The warden and other supervising officers were dismissed for lack of personal involvement. There is no recognition in either opinion of the inference that officers Swain and Story must have felt free to engage in such behavior, even though they knew that it was being videotaped, because their supervisors would not care. In this

LEGISLATIVE & ADMINISTRATIVE *notes*

writer's view, this conduct had a green light from higher authority, who should not have been dismissed so summarily on screening.

PENNSYLVANIA – Transgender inmate Sparkles Wilson, a/k/a Steven Fritz, received hormone therapy while in state custody in Pennsylvania, which she continued after her release, until she found herself under arrest and incarcerated in Lackawanna County. She pleads in *Wilson v. Lackawanna County*, 2018 U.S. Dist. LEXIS 96 (M.D. Pa., June 6, 2018), that her hormone treatment was interrupted and then stopped completely. She sued the county, the jail's chief physician, and the warden and deputy warden. A primary claim against the wardens was that they failed to respond to her grievances other than to refer them to the medical department. She raises Eighth Amendment deliberate indifference to serious health care needs (which U.S. Magistrate Judge Martin C. Carlson takes seriously in his description of the consequences of abruptly stopping hormones), as well as a state tort claim that includes an allegation of civil conspiracy among the named defendants. Judge Carlson recommends that the civil conspiracy count be dismissed. The opinion has extensive discussion of what states a claim under the Supreme Court's well-known decisions of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), familiarity with which is assumed or can be gleaned from the opinion. Judge Carlson found that charges of conspiracy must be plead "with particular force" and detail to satisfy *Iqbal* and *Twombly*. Conclusory allegations of "concerted action" and the like cannot suffice. [Multiple Third Circuit citations omitted]. Judge Carlson found that Wilson's allegations about a conspiracy among the wardens and the doctor failed this test. Here, absent further showing, the wardens did exactly what

the Eighth Amendment expects them to do with medical grievances: refer them to the medical department. *Spruill v. Gillis*, 372 F.3d 218, 236 (3d. Cir. 2004); *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993). That leaves just the doctor, who cannot conspire with himself. Under Pennsylvania law, Judge Carlson found that the Pennsylvania Supreme Court required the following showing for a civil conspiracy (which seems typical of most states, as well as federal civil conspiracies): an agreement of two or more persons to perform an unlawful act, malice, absence of justification, overt act in furtherance, and actual damages. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979). Wilson may have suffered an unlawful act and was damaged, but the conspiracy count fails on these pleadings. The opinion only recommends dismissal of the conspiracy claims; the Eighth Amendment claims and state tort claims remain, so discovery may reshape the case. Wilson has counsel: she is represented by Comerford Law, Scranton.

WISCONSIN – Last April, *Law Notes* reported the case of transgender inmate Lonnie L. Jackson, *pro se*, who filed a lawsuit claiming discrimination on the basis of race and sexual orientation/identity and also complained that officers were putting soap and cleaning products in her medically prescribed ice bags. She was in segregation and ingested liquid from the bags and got sick. See *Jackson v. CO II Kuepper*, 2018 U. S. Dist. LEXIS 40874 (E.D.Wisc., March 13, 2018) (April *Law Notes* at page 211). U.S. District Judge Lynn Adelman screened the complaint and ruled that Jackson had combined claims in violation of F.R.C.P. 18 and 20, allowing her to replead, separating them into separate cases. Now, in *Jackson v. CO II Kuepper*, 2018 U.S. Dist. LEXIS 93297, 2018 WL 2561017 (E.D. Wisc., June 1, 2018), Judge Adelman screens

the amended complaint, which only deals with the adulterated ice bags. The judge allows Jackson to proceed against the officer who tainted the bags and the two supervising officers who condoned it, dismissing all executive defendants for lack of personal involvement. There is no mention of racial or sexual orientation animus. At this point, it is unknown whether Jackson will bring another case, with the additional expense, risks of "strikes," etc. In this writer's view, creative pleading by a lawyer could have kept the two cases together, with the tampering with her medical bags characterized as one example of the overall racial and sexual identity hostility Jackson faced in segregation. This is another example of the problems facing *pro se* litigants as they try to navigate the screening process.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

CALIFORNIA – Governor Jerry Brown signed AB 1985 into law on June 14. The measure, which takes effect in January 2019, sets minimum standards for how local law enforcement agencies investigate and report hate crimes based on race, gender and sexual orientation. It is intended to address deficiencies in investigating and reporting on such crimes that were documented by a state audit of local law enforcement practices, according to a report in the *Los Angeles Times* (June 15). "The new law seeks to improve reporting to the state Department of Justice and the quality of training that police officers receive on recognizing hate crimes," reported the *Times*. * * * Attorney General Xavier Becerra announced a ban on state-funded travel to Oklahoma, in response to the enactment of a new law allowing adoption agencies to deny adoptions and foster placements to LGBTQ parents.

LEGISLATIVE & ADMINISTRATIVE *notes*

Oklahoma is added to the list of 8 other states subject to a similar travel ban under a California statute enacted in 2017, which prohibits state-funded or sponsored travel to states that have laws that affirmatively discriminate on the basis of sexual orientation, gender identity, or gender expression. The travel restrictions apply to the state government, the University of California, and California State University. The other states with travel bans are Alabama, Kansas, Kentucky, Mississippi, North Carolina, South Dakota, Tennessee and Texas. A spokesperson for Oklahoma Governor Mary Fallin, who signed the measure at issue into law on May 11, said, “With our state’s economy being as strong as it is, we won’t miss a few Californians travelling on state business showing up in our state.” Some university athletic teams affected by the bans have nonetheless gone to states on the lists to compete, relying on private donations rather than state money to fund their travel.

FLORIDA – Acting in its administrative capacity, the Florida Supreme Court approved revisions to Family Law Forms on June 21, announcing its actions in *In re: Amendments to the Florida Supreme Court Approved Family Law Forms – 12.951(a) and (b)*, 2018 WL 3062201. As relevant here: “In form 12.951(b), we replace several instances of ‘mother’ with ‘the other parent’ so that the form will be appropriate for use in cases with both same-sex and opposite-sex parents, following the United States Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

LOUISIANA – NEW ORLEANS – Mayor Latoya Cantrell announced the formation of a Task Force to submit recommendations to the city’s Human Relations Commission on issued affecting LGBTQ people in the city, particularly ones that disproportionately

affect those of color. The commission will oversee the work of the Task Force and recommend candidates to serve on it, reported *AP State News* (June 26). The mayor made the announcement during a special memorial service at St. Mark’s United Methodist Church to mark the 45th anniversary of the UpStairs Lounge fire, an arson crime that killed 32 men at a well-known gay bar in the French Quarter.

MAINE – Maine’s Secretary of State has issued a statement that “upon receipt of a completed Gender Designation Form, the Bureau of Motor Vehicles will issue a sticker for the license or ID that will read: ‘Gender has been changed to X-Non-Binary.’ At this time, the face of the credential will still show an ‘M’ for male or ‘F’ for female. In conjunction with a system for upgrade and new design for licenses and IDs, which will be available by July 2019, the gender information on the front of the card will be displayed as ‘M’, ‘F’, or ‘X’ and the sticker will be phased out. Prior to issuance of the new credential design in 2019, non-binary gender stickers will be issued by the main office of the BMV, located at 101 Hospital St. in Augusta. Customers can submit the gender designation form at any BMV branch office.” Maine thus becomes the third state in the U.S. to offer non-binary gender identification on driver’s licenses and IDs. *towleroad.com*, June 11.

MASSACHUSETTS – The state Senate approved a bill that would add a non-binary option for designating gender on driver’s licenses, reported the *Boston Globe* on June 29. The measure would make “X” an option in place of “M” or “F”. “The Registry of Motor Vehicles also confirmed its new computer system has a non-binary gender option but has yet to roll it out,” reported the *Globe*. Similar legislation has been proposed in the House. Governor Charlie Baker

has not announced a position on the measure. Opponents of the Senate measure voiced concern about whether allowing this option would make the state non-compliant with federal Real ID standards. The response was that the federal standards require that licenses have a gender marking, but do not specifically state that it must be either “M” or “F”. * * * A ballot question is pending in November on whether to repeal the addition of gender identity or expression to the state’s antidiscrimination law, which was enacted in 2016. Proponents of the ballot measure are public restroom alarmists. Public opinion polls taken in June showed opinion sharply split on the initiative with a plurality in favor of keeping the gender identity provision in the law, but enough people being “undecided” to leave the outcome in doubt. * * * The *Globe* also reported that the House had approved a measure making it illegal for licensed counselors and therapists to practice “conversion therapy” on minors regarding gender identity or sexual orientation. The Senate was expected to take up this bill during the summer. Opponents claim the measure violates the 1st Amendment rights of counselors and therapists, an argument that federal courts have rejected in challenges to similar laws in enacted in other states. Although such therapy frequently involves speech, the federal courts have seen these measures as a regulation of medical practice, not targeted on speech as such.

MONTANA – A proposed initiative, I-183, intended to exclude transgender people from using public facilities consistent with their gender identity, will not be on the ballot, has proponents failed to obtain sufficient petition signatures by the statutory deadline. The legislature had rejected a similar measure last year. Last year, the ACLU of Montana successfully challenged the legal sufficiency of the ballot

LAW & SOCIETY *notes*

statement submitted by proponents, as a result of which the Montana Supreme Court invalidated the statement, which knocked some wind out of the sails of the proponents. Then ACLU of Montana filed a lawsuit challenging the proposal as unconstitutional, with the cities of Missoula and Bozeman joining as plaintiffs. The failure of the ballot measure will likely result in withdrawal of the lawsuit. At present, Montana's Human Rights Act does not cover sexual orientation or gender identity, although it does forbid sex discrimination. No definitive ruling yet on whether barring transgender people from using appropriate public facilities would be construed to violate the Human Rights Act (or, in the case of facilities in government-owned buildings, the constitution). *ACLU of Montana*, press release, June 30.

NEW HAMPSHIRE – On June 8, Governor Chris Sununu signed into law a measure outlawing the practice of conversion therapy on minors, and a measure amending the state's anti-discrimination law to add gender identity to the forbidden grounds of discrimination in employment, housing, and public accommodations and services. (Prior to this enactment, the state's human rights commission had recently considered gender identity complaints to come under their sex discrimination jurisdiction.) Sununu's stated, on signing the measures, "Discrimination – in any form – is unacceptable and runs contrary to New Hampshire's Live Free or Die Spirit. If we really want to be the 'Live Free or Die' state, we must ensure that New Hampshire is a place where every person, regardless of their background, has an equal and full opportunity to pursue their dreams and to make a better life for themselves and their families." New Hampshire becomes the 13th state to ban conversion therapy for minors, and the 22nd state

to ban gender identity discrimination (although coverage of types of discrimination varies among states).

NEW YORK – The State Register published a notice on June 20 from the Supreme Court, Appellate Division, that Rule 8.4 of the Attorney Rules of Professional Conduct has been amended, effective as of June 1, 2018, to add "gender identity and gender expression" to the list of forbidden grounds for discrimination in the practice of law, including in hiring, promoting or otherwise determining conditions of employment. The same notice announced that the Statement of Client's Rights has been amended to add "gender identity and gender expression" to the provision stating "You may not be refused representation on the basis of . . ." These rules were amended many years ago to include "sexual orientation." * * * New York State Governor Andrew Cuomo issued a proclamation making June 20, 2018, Edie Windsor Day in the State of New York. A few days earlier, the Governor's Office announced that he had created a fellowship program, named in honor of "icons" Marsha P. Johnson, an early transgender rights activist, and Edith Windsor, plaintiff in the case that led to the Supreme Court invalidating the Defense of Marriage Act, a statute requiring the federal government to withhold recognition from same-sex marriages.

LAW & SOCIETY NOTES

By Arthur S. Leonard

COLORADO & TEXAS – On June 26, out gay U.S. Rep. Jared Polis (D-Colorado) made history by winning a Democratic primary contest to be the party's nominee for Governor of Colorado this fall. Polis finished far ahead of the second-place candidate

in a four-candidate race. If successful in November, he will be the first out gay man to be elected governor of a state. (Democrat Jim McGreevy came out while serving as Governor of New Jersey, at the same time that he resigned from office.) Lupe Valdez, an out lesbian who is also a primary winner, is the Democratic candidate for Governor of Texas, and thus also a history maker as the first out lesbian to head a major party ticket to be elected governor of a state. She is the former elected Sheriff of Dallas County. She is up against a popular incumbent Republican in a "red state," so the odds are long. Polis, on the other hand, is running to fill the seat of a term-limited Democrat governor in a state that bans sexual orientation discrimination by statute, and is given a decent chance to win by political commentators.

TRUMP NOMINATES OUT GAY MAN TO SUBCABINET POST (WITHOUT MENTIONING HIS GAY-RELATED HISTORY)

– On June 28, the White House announced that President Trump has nominated R. Clarke Cooper of Florida to be an Assistant Secretary of State for Political-Military Affairs. The announcement includes the following biographical information: "Mr. Cooper currently serves as the Director of Intelligence Planning for Joint Special Operations Command's Joint Inter-Agency Task Force – National Capital Region. A combat veteran, Mr. Cooper's active duty assignments include tours with United States Africa Command, Special Operations Command Africa, Joint Special Operations Task Force Trans-Sahara, and Special Operations Command Central. His background in intergovernmental affairs, foreign policy, counter-terrorism, and rule of law is coupled with his extensive operational experience. Mr. Cooper's civilian and military postings include security cooperation and capacity building in Africa, the Levant, and

INTERNATIONAL *notes*

the Middle East. He served in the Department of State as United States Alternate Representative to the United Nations Security Council and as the United States Delegate to United Nations Budget Committee from 2007 to 2009, Senior Advisor in Near Eastern Affairs Bureau from 2006 to 2007, and Advisor at United States Embassy-Baghdad from 2005 to 2006. Mr. Cooper earned a bachelor's degree from Florida State University." According to the *Washington Blade* (June 28) report about the nomination, Cooper was the head of Log Cabin Republicans, an LGBT Republican political organization, from 2010 to 2012, a fact not included in the White House's news release. While Cooper was head of Log Cabin, the organization oversaw a lawsuit challenging the "Don't Ask, Don't Tell" military policy, and helped persuade congressional Republicans to vote for the 2010 statute repealing the statutory ban. Log Cabin endorsed Mitt Romney for President in 2012, says the *Blade*, after Cooper and out gay former U.S. Representative Jim Kolbe (R-Ariz.) met with Romney privately to discuss his views on LGBT issues.

TRANSGENDER HEALTH CARE – *Pharma & Healthcare Monitor Worldwide*, 2018 WLNR 19882041 (June 29), reported that Starbucks is the first corporation to have consulted with the World Professional Association for Transgender Health to revised its employee benefits policies to provide comprehensive care coverage for transgender employees and their family members. Most significantly, the new health care packages, titled "Starbucks Transgender Medical Benefits," cover procedures that many health plans refuse to cover as "cosmetic," such as hair grafts, voice therapy, facial feminization and breast augmentation, which under the WPATH standards of care are considered medically necessary in appropriate cases to effect

a full transition. According to the story, Starbucks is happy to share the details of its new benefits package with other employers who are determined to provide full and appropriate coverage for transgender health plan participants.

MARRIAGE INEQUALITY IN ALABAMA – Following the lead of former Alabama Chief Justice and failed Senate candidate Roy Moore, probate judges in eight Alabama counties – Autauga, Clarke, Cleburne, Covington, Elmore, Geneva, Pike and Washington – are not issuing marriage licenses to anyone in order to avoid having to issue them to same-sex couples, reported *AL.com (Alabama Media Group, Birmingham)* on June 26, the third anniversary of the Supreme Court's ruling in *Obergefell v. Hodges*. Because it would be illegal to issue licenses to different-sex couples but to refuse them to same-sex couples under that ruling, these probate judges, usually citing religious objections, have seized upon the fact that they are authorized but not required by statute to issue marriage licenses. According to a political consultant to Pike County Judge Wes Allen, one Angi Horn Stalnaker, "No one is being denied anything, there isn't a marriage license office" in the county. Although U.S. District Judge Ginny Granade issued an order to probate judges to begin issuing licenses to same-sex couples on February 9, 2015, then-Chief Justice Moore issued a command to the probate judges not to issue licenses a few weeks later. "Many probate offices stopped issuing licenses for all couples in response to Moore's order," reports the cited news source, "which ultimately led to his suspension in September 2016." Moore subsequently resigned to run for office, winning the Republican Senate primary but losing the general election in the wake of media reports about his sexual peccadillos as a younger man. The article reported

that 1,392 same-sex couples married in Alabama in 2015 and 939 same-sex couples married there in 2016. Final figures for 2017 are not yet available. The State Registrar's office stated that it did not receive any marriage licenses from seven of the eight counties in 2016. There are at least seven other counties in Alabama where the licenses will be issued but the probate judge will not perform any marriage ceremonies. According to polling by the Public Religion Research Institute's American Values Atlas Project, Alabama is the only state in the United States where a majority of the public remains opposed to same-sex marriage. A measure has been proposed in the legislature to do away with marriage licenses entirely, allowing couples to fill out registration forms and file them with the option to forego other formalities, but so far it has not been successful. If passed, it would position Alabama close to the handful of states that still have common law marriage – District of Columbia and Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and, for probate purposes only, New Hampshire – where, however, registration of a marriage with a government office is not required. There is no move to amend the Alabama law to require probate judges to issue licenses and perform marriage ceremonies.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – Watch out, Grindr users in Australia. The vice cops are out to get you! In *R. v. Addley*, [2018] QCA 125 (Queensland Supreme Court – Court of Appeal, June 19, 2018), the court reversed a conviction of a man who used Grindr to contact another user, "Mack," who represented himself as being at least 18 and who had posted a rear-view upper body photo that could

INTERNATIONAL *notes*

be seen as consistent with that age, albeit subject to interpretation. Actually, the profile was fictional, created by a female vice cop, for the purpose of luring men into propositioning boys, thus subjecting themselves to criminal prosecution. In this case the defendant Addley followed up the initial contact by sending semi-clothed pictures of himself and engaging in back-and-forth messaging, during which “Mack” slipped in – “ha, ha” – that he was 14. (This was, of course, a lie, because Detective Sergeant Catherine Ford, playing the role of Mack, is an adult.) Addley made a date to meet “Mack,” and was met by vice cops who arrested him. He was prosecuted for sending the pictures and for agreeing to meet a “minor” for sex. At a jury trial, Addley’s defense was that he believed “Mack” was at least 18, going by the posting, the picture, and Grindr’s rules on minimum age to register, and that the subsequent statement by “Mack” that he was 14 was a gambit to make meeting him more enticing as a fantasy. There was quite a bit of confusion, apparently, about the appropriate charge to the jury regarding burdens of proof in a case where no real minor was involved, since the statute provides for a “reasonable belief” defense. The court of appeal says that the prosecution’s burden was to show beyond reasonable doubt, in a case where the “minor” was fictional, that the defendant believed him to be underage, but the affirmative defense that the defendant reasonably believed his on-line correspondent was an adult could be achieved by a preponderance of the evidence. The trial judge admitted, after giving a lengthy and complicated instruction on who had to prove what by which standard, “So it’s a bit of a complex picture, I suppose, ladies and gentlemen.” This after the court told the jury that it should first focus on whether Addley proved his affirmative defense, and if he did not, then turn to considering whether the prosecution met its burden of proving

guilt beyond a reasonable doubt. The jury’s confusion was reflected in a note they sent out for further instructions: “What is the consequence of failing to prove the defense, on the balance of probabilities, that Addley thought Mack was over 16?” Says the court of appeal, “The correct answer was that the defense was a red herring and had no bearing whatsoever upon the task that the jury had to perform.” But the trial judge instead gave a further extended explanation, reinforcing the confusion. Addley was acquitted on the charge of exposing a minor to indecent matter without legitimate reason, but convicted on the charge of using an electronic communication with the intent to procure “Mack,” a person he believed was under 16, to engage in a sexual act, even though the court in its original instruction had characterized the burdens of proof on the age issue as essentially the same for the two counts. (Of course, it is possible that the jury believed that the pictures Addley sent failed to meet the statutory test of “indecent matter.” Wrote the court of appeal: “It is accepted by the Crown in this appeal that these were misdirections. However, the Crown submits that these misdirections did not result in a substantial miscarriage of justice.” The appellate court disagreed, reversing the conviction on the second count. The court said there should be a new trial solely on the second count with proper instructions, so the jury would not be misled into thinking that the defendant should be convicted if he failed to prove his affirmative defense, even though the prosecution failed to prove beyond a reasonable doubt that he believed “Mack” was 14. B.J. Power appeared for the appellant, with Legal Aid Queensland having provided counsel. (The terminology used by Australian courts is different enough from that used by U.S. courts that we submit this summary with some trepidation, having sought to translate into U.S. terminology for

the bulk of our readers, but we hope we’ve captured the essence.) * * * The New South Wales government issued a bulletin on June 13 announcing the passage of the Miscellaneous Acts Amendment (Marriages) Bill 2018 on June 6, which will amend the laws in New South Wales to take account of marriage equality by systematically altering 53 different New South Wales Acts and Regulations. There are no substantive legal changes, just technical amendments to ensure that wherever marriage or marital status is involved, the law will reflect the existence of same-sex marriages and spouses. The measure was awaiting Royal Assent at the time of this bulletin and would come into effect once assent is given.

AUSTRIA – Austria’s Constitutional Court ruled on June 15, in an opinion released on June 29 (G 77/2018), that individuals who reject the gender binary are entitled to an option other than male or female when completing official forms, and are not required under the Constitution to make a selection in any event. Responding to a request from intersexual activist Alex Juergen (a pseudonym for litigation purposes), the court invoked the European Convention on Human Rights, which provides that “everyone has the right to respect for his private and family life.” The court referred back to *Kuck v. Germany*, a decision by the European Court of Human Rights that identified individual freedom to define one’s gender identity as a basic essential of self-determination, according to a summary of the new decision circulated on-line by Dr. Helmut Graupner of Rechtskomitee LAMBDA. The court stated that this provision guarantees to individuals the right to “an individual sexual identity” and protects, “in particular, people with an alternative sexual identity.” Intersexual individuals are identified as having special need for protection as a very small group and their perceived

INTERNATIONAL *notes*

“otherness.” Addressing a point as to which there are but a handful of judicial rulings anywhere in the world, the court rejected the designation of intersex status as a pathological development, indicating that “sex-assigning medical interventions in newborns and children should be avoided as much as possible and could only be justified in exceptional cases of sufficient medical indication,” wrote Dr. Graupner in his summary of the ruling. The petitioner commented, “For the first time in my life, I feel like I am being recognized as what I am, how I was born.” *Agence France Presse English Wire*, June 29; press advisory by Rechtskomitee LAMBDA, June 29.

BERMUDA – On May 5, 2017, the Supreme Court of Bermuda (a trial court of superior jurisdiction) ruled in *Godwin and DeRoche v. Registrar General*, [2017] SC (Bda) Civ (5 May 2017), that the prohibition of sexual orientation discrimination by the government in the Human Rights Act 1981 was violated by the state’s refusal to allow same-sex couples to marry. The government did not appeal the ruling and marriage equality went into effect. However, the decision was not popular with the public, and an organization calling itself Preserve Marriage Bermuda (PMB) was formed to mobilize opposition and make this a central issue in national elections, which were held on July 18, 2017, with a clear majority being elected to the Parliament that was opposed to same-sex marriage. After much debate and negotiation, Parliament passed the Domestic Partnership Act 2018 (DPA), which rescinded the right to same-sex marriage (although respecting those same-sex marriages contracted since the court’s decision), provided that same-sex marriages performed elsewhere would be treated in Bermuda as domestic partnerships, and created a domestic partnership institution for same-sex couples with

what was purported to be an equal status to different-sex marriage. In other words, “separate but equal.” Intense lobbying took place to get the Governor General to withhold Royal Assent to the measure, but ultimately the British Government decided not to intervene and the GG gave assent on February 7, 2018, to take effect June 1, 2018. Meanwhile, litigation challenging the enactment was consolidated into a proceeding before Chief Justice Ian RC Kawaley in the Supreme Court. He missed the deadline by a few days, issuing his ruling in *Ferguson v. The Attorney General*, [2018] SC (Bda) 45 Civ (6 June 2018), holding that the DPA is invalid, on June 6. The 52-page single-spaced slip opinion is extremely thorough, convoluted and complicated. Ultimately, the court acknowledged the binding effect of the Human Rights Act on the government, such that ordinary legislation could not simply reverse a decision of the Supreme Court construing the Human Rights Act. (The Human Rights Act in Bermuda is, by its terms, supreme almost in the way a constitutional amendment is in U.S. law.) Additionally, however, the court focused in on the Constitutional guarantee of freedom of conscience, and the clear evidence that religious motivations were behind the movement to overrule the prior decision. In his concluding section, Chief Justice Kawaley explained, “The Applicants were entitled to complain that their beliefs in same-sex marriage as an institution which deserves legal protection have been hindered and that those same beliefs have been treated by the DPA in a discriminatory manner. They have established that those protected fundamental rights have been contravened in a way that qualifies for judicial protection because Parliament’s legislative power may not validly be used to override the fundamental rights protected in Chapter I of the Constitution.” Judge Kawaley indicated that he would hear further from counsel

“as to the form of the final Order and as to costs.” The decision could be appealed to the Court of Appeals, and since the present government was elected in part due to opposite to the court’s prior ruling, it would not be surprising if the government appeals it. That various “Applicants” challenging the DPA are represented by Mark Pettingill, Ronald Myers, Katie Richards, and Rod Attride-Stirling.

BRAZIL – The General Synod of the Anglican Episcopal Church of Brazil will now permit its clergy to perform same-sex marriages, as a result of revision to its canons. Brazil has allowed same-sex civil marriages since 2012, but it is up to religious bodies to decide whether they will perform the ceremonies. *EpiscopalNewsService.com* (June 4) reports that the Synod members voted 57-3 in favor of the change to the canons.

CANADA – In the province of Alberta, people now have three options for specifying their gender on driver’s licenses and other identity documents, reported the *Victoria Times Colonist* on June 15. Since 2015, the province’s Human Rights Act has prohibited gender identity discrimination, and recently the government decided that this required it to allow those who don’t identify fully as male or female to be able to have an X as their gender marker on all vital statistics records for which gender is recorded, which will include birth and death certificates as well as identification records. Premier Rachel Notley also stated that the government is going to make it easier for people to change their gender identification in official records. This action makes Alberta “the fourth Canadian jurisdiction, including the federal government, to offer non-binary gender options on officials documents,” reported the *Colonist*. * * * Also in

INTERNATIONAL *notes*

Alberta, Court of Queen's Bench Justice Johnna Kubik ruled on June 27 against a motion for a preliminary injunction by the Justice Centre, representing a group of faith-based schools, parents and public interest groups who are opposed to a new law that forbids schools from informing parents that their children are participating in a Gay-Straight Alliance at the school. Justice Kubin found that the benefits to LGBTQ youth of being able to participate in such activities without their parents being informed outweigh any potential harm. She rejected the argument by plaintiffs that GSA's are "ideological sexual clubs" and that the law violates parental rights under the Canadian Charter. "The effect on LGBTQ students in granting an injunction," she wrote, "which would result in both the loss of supportive GSAs in their schools and send a message that their diverse identities are less worthy of protection, would be considerably more harmful than temporarily limiting a parent's right to know and make decisions about their child's involvement in a GSA." John Carpenter, a lawyer for the Alberta government, said that he took particular issue with the Justice Centre's characterization of GSAs as "secret societies. "You shall not out children. It's as simple as that," he said. Under the law, schools had until the end of June to file information with the government documenting their compliance with the law. *Calgary Herald*, June 28; *StarMetro Edmonton*, June 28.

CAYMAN ISLANDS – Chantelle Day, a Cayman Islands lawyer, and her life partner Vickie Boddan Bush, a U.K. national, have filed a writ in the Grand Court seeking review of the government's decision to deny their application to marry, reports *CaymanCompass.com* on June 20. They argue that Cayman's Marriage Law, which defines marriage as between "one man and one woman," is incompatible

with the country's Constitutional Bill of Rights, which guarantees the right to private and family life, the right to freedom of conscience and the right to be free from discrimination. They also invoke the European Convention on Human Rights, to which Cayman is a signatory through its territorial relationship with the U.K. The writ application asserts that Cayman Island residents are entitled to the same rights as other British citizens, and note that the U.K. (with the exception of Northern Ireland) and most of the U.K. territories now have marriage equality. The women are living in a committed relationship in London, where they are raising an adopted child together. They have lived in London because of the lack of protection for same-sex couples in the Cayman Islands, but they hope to return to Cayman to live. The law firm McGrath Tonner is representing them. Cayman Islands (in the Caribbean) is an autonomous British overseas territory with a population of about 61,000.

COSTA RICA – Responding to a January ruling by the Inter-American Court of Human Rights on marriage equality and gender identity, President Carlos Alvarado issued a decree and directive on June 28 implementing the transgender portion of the ruling. He ordered all state institutions to modify anything that a transgender person wishes to change involving their name, picture, sex or gender identity, on such official documents as passports, driver's licenses, diplomas, identification cards and the like. Any change must be made within five days of the request, and, as per the court's opinion, does not require medical documentation. Although the court's opinion was technically advisory, it is binding as a treaty obligation on all nations that acknowledge the court's jurisdiction, which includes Mexico and all but a handful of the countries in Central and South America and Caribbean island states.

CZECH REPUBLIC – The Czech Republic has been allowing same-sex couples to enter registered partnerships since 2006. Now dueling bills have been introduced in the parliament. One calls for opening up full marital status for same-sex couples, while the other seeks to adopt a formal definition of marriage as the union of one man and one woman, to be enshrined in the constitution. The same-sex marriage bill could be enacted by a simple majority; the constitutional amendment would require 120 votes in the 200-member house. A poll conducted in May showed about 50% public support for allowing same-sex marriages, with 74% support for the existing registered partnership option. Prime Minister Andrej Babis announced on June 22 that his government backs the proposed marriage equality bill, but it is uncertain when or whether the measure will come to a vote, as Babis' party is running a minority government and new legislative initiatives await the formation of a new cabinet represented a coalition of parties. If the Czech Republic does adopt marriage equality, it will be the first eastern European country to legislate for this. *Reuters*, June 22.

DENMARK – The government was reported to have launched an LGBT Action Plan to identify steps that can be taken to address issues of discrimination and to promote equal opportunity and security for the LGBT community.

ESWATINI – The first Pride March ever held in this African country, previously known as Swaziland, took place on June 30, and U.S. Ambassador Lisa Peterson told the press, "We are thrilled to see this happening today." About 500 people turned up for the march in Mbabane, the country's largest city. The country is Africa's last remaining absolute monarchy, ruled by King Mswati III, who, according to a press

INTERNATIONAL *notes*

account of the event, has “reportedly described homosexuality as ‘satanic,’” and the penal law outlaws male homosexual conduct. *www.news24.com/Africa*, June 30.

HONG KONG – On June 1, the Hong Kong Court of Appeal reversed a trial court ruling that had granted health benefits to the husband of a male civil servant, according to a report by *VOANews.com* (June 7). (The marriage took place in another jurisdiction, of course, since Hong Kong is not yet a marriage equality jurisdiction.) And on June 4, the government asked the Court of Final Appeal to reverse a decision by which the Court of Appeal ruled that the government had engaged in “indirect discrimination” when it refused to issue a visa to the same-sex spouse of a British lesbian. Thus far, the appellate courts in Hong Kong have affirmed the government’s argument that protecting “traditional marriage” requires refusing to extend legal recognition to same-sex relationships.

HUNGARY – A Hungarian LGBT rights group, Hatter Society, reports that the Hungarian Constitutional Court has ruled that an Iranian transgender man represented by Hatter Society is entitled to recognition of his gender and legal name change, despite the lack of legislation on this issue. The man arrived as a refugee in the summer of 2015, seeking asylum. Hungarian authorities found he had been persecuted in Iran due to his gender identity and recognized him as a refugee, but refused to issue new identity documents that would identify him as male or authorize a legal name change. The Hungarian authorities said that he would have to submit his request to Iran, and he sought judicial review. The trial court rejected his claim, but the Constitutional Court, in a decision published on June 21, found that it is an

“unconstitutional omission” that there is no law for providing legal gender recognition and related name change for a person who is residing legally in Hungary. The unanimous decision states principles that theoretically apply to anybody seeking such a change, not just refugees from countries where it would not be practical to request it. The Constitutional Court set a deadline of December 31, 2018, for the government to enact appropriate legislation. There is a brief provision that was adopted in 2017, but, according to the Hatter Society press release, it “is unclear on both the requirements of legal gender recognition and the procedure to follow, and has been interpreted by authorities in an arbitrary manner.”

IRELAND – The government has agreed to introduce legislation to allow same-sex couples to register both their names on their baby’s birth certificate and passport, *Irish Times* reported on June 26. Minister for Health Simon Harris will seek approval to draft a bill to that effect. At present, only those related biologically or by adoption are listed on birth certificates, even though the country has marriage equality. The proposed bill would allow for retrospective registration of same-sex couples on a child’s birth certificate and passport. Although the 2015 legislation enacted in response to a public referendum to allow marriage equality was supposed to provide same-sex couples with full parental rights, the parts of the bill dealing with donor-assisted reproduction and its legal consequences were never enacted, resulting in the inability of same-sex couples both to be registered as legal parents of their children. Previously in June, Prime Minister (Taoiseach) Leo Varadkar issued an apology on behalf of the State to gay men who had been criminalized due to their consensual sexual activity prior to sodomy law reform.

JERSEY – Jersey, a self-governing republic in the English Channel that acknowledges the British sovereign but is not officially part of the U.K., has marriage equality effective July 1. According to a *BBC News* report (June 27), “The law has been in the works since 2015 but faced delays while the legislation was reviewed and religious groups invited to share their concerns and views.” At least twelve same-sex couples have been waiting for the law to take effect so they can marry, but the marriages will not take place until late in July because the new law extends the existing advance notice period from 15 to 25 days. The government rejected a request to include a “conscience clause” that would excuse companies with religious/moral objections to refuse to deal with same-sex couples. The current population of Jersey is estimated at about 100,000.

MEXICO – Journalist Rex Wockner reported on June 21 that the city of Ensenada in Baja California State has decided to issue marriage licenses to same-sex couples without requiring them to get a court order. Instead, they can file a complaint with the State Human Rights Commission and then the city will allow them to marry. Although the Supreme Court of Mexico has now ruled in many cases that state laws limiting marriage to different-sex couples are unconstitutional, this does not create nationwide law under Mexico’s court system, as the definition of marriage is a state function. In some states, the legislatures have amended the laws or there have been sufficient appellate rulings so that same-sex couples can get marriage licenses without jumping through various judicial hoops, but in others a court order, called an amparo, must be obtained, which requires pointless litigation, since the judges are obligated to issue such orders in compliance with the Supreme Court’s rulings. Mr.

INTERNATIONAL *notes*

Wockner's blog maintains a current list of the marriage equality situation world-wide with particular detailed attention to the steady progress in the spread of marriage equality in Mexico, a particular point of interest for him since he lives in San Diego, just north of the border.

NORTHERN IRELAND – The Department of Justice announced that a law agreed by the Assembly in November 2016 came into effect on June 28, making it possible for people convicted of homosexual offences in Northern Ireland under long-repealed laws will be able to get their convictions expunged from police and court records. Northern Ireland legalized gay sex in 1982, 15 years after law reform in England and Wales. Expungement is not automatic; people will have to apply to the Department of Justice, which has opened up a space on its website with directions on how to proceed. *Belfast Telegraph*, June 28.

PHILIPPINES – The Supreme Court held oral arguments during June on a petition filed by lawyer Jesus Nicardo Falcis III, seeking a declaration that Family Code provisions limiting marriage to different sex couples violate the Constitution. He did not get a particularly affirmative reception from the judges, who expressed doubts that the matter was properly before them, and questioned why he had not initiated litigation in a trial court as opposed to filing a petition directly in the high court. Solicitor General Jose Calida, representing the government respondents, argued for dismissal, saying that the 1987 Constitution does not allow for same-sex marriage. Both parties were directed to file written memoranda of law within thirty days after the end of arguments on June 26. *news.abs-cbn.com* (June 26).

POLAND – Poland's Supreme Court ruled on June 14 that a print shop employee who refused to print banners for an LGBT business group because he did not want to "promote" gay rights had violated the law. This upheld a ruling by the Regional Court in Lodz, which held that under principles of legal equality the printer did not have the right to withhold services from the LGBT Business Forum. The Justice Minister, Zbigniew Ziobro, appealed that ruling to the Supreme Court, arguing that it was a violation of religious freedom, and he reiterated the point in a statement responding to the opinion, saying, "The Supreme Court has stood on the side of state violence in the service of the ideology of homosexual activists." Well, yes. Poland is signatory to the European Convention of Human Rights, which has been construed to ban sexual orientation discrimination, although its principles depend for enforcement on national law. *APNews.com*, June 15. Human Rights Watch also issued a news release about this decision, *States News Service*, June 21.

RUSSIAN REPUBLIC – *BBC International Reports* (June 22) reported that Russia's Constitutional court has ordered that an HIV positive woman's rejected application to adopt a child be re-examined, citing Fontanka new website. The June 20 ruling came on an appeal by a couple whose request to adopt a 3-year-old child they are raising had been rejected because of the woman's HIV status, relying on a provision of the Family Code. The court said that the Family Code provision is unconstitutional. The child was conceived through donor insemination and the use of a surrogate, the HIV-positive woman's sister. The woman became infected with HIV and hepatitis C while undergoing treatment in a hospital. (Poor hospital sterility procedures have contributed significantly to the spread of blood-

borne infections in Russia.) The Constitutional Court ruling stated that a court must not reject an application for adoption or fostering of "a child who on account of the already existing family relations is living with this person if it follows from the whole of the circumstances established by the court that adoption allows to legalize these relations and is in the child's interests."

SOUTH AFRICA – The Equality Court found that Pastor Oscar Bougaardt is in contempt of a settlement agreement he signed in 2014, by which he acknowledged that public statements he had made concerning gays and lesbian constituted hate speech and promised to refrain from future statements along similar lines. The court received evidence of articles and on-line postings by Bougaardt containing further hate speech. Since the 2014 settlement agreement had been adopted as a court order, Bougaardt was ruled to be in contempt by Judge Lee Bozalek of the Western Cape Equality Court. The court rejected the pastor's defense that he was merely expressing his religious views and exercising his freedom of speech, and did not intend to incite hatred and harms towards gays and lesbians. Rejecting this defense, the court found that Bougaardt had gone beyond the bounds allowed under the court order, which said that he could not make comments about gays and lesbian that go beyond what the Bible actually says about homosexuality (which is very little and, depending how one interprets ancient languages, almost nothing). The comments in question by Bougaardt were a statement in a news article that "99% of pedophiles stem from homosexuality," and an online statement in the comment section of a news website discussing Nigeria's anti-gay laws, that homosexuals are an "abomination to God", should be locked up in cages and that "they behave worse than animals in bed." He also

INTERNATIONAL *notes*

stated, “Homosexuals make me sick and I wish South Africa will deal with them like Nigeria.” In another on-line posting, he called on ISIS to come rid South African of homosexual curse.” The court sentence him to 30 days in prison, suspended for a period of five years. Thus, if Bougaardt refrains from spouting or posting hate speech against gays and lesbians for five years, he will avoid having to serve the prison time. *AllAfrica.com English*, June 15.

TAIWAN (REPUBLIC OF CHINA)

– President Tsai Ing-wen, who has supported legalization of same-sex marriage, faces charges that her government is dragging its feet, after the first anniversary of a Constitutional Court decision that gave the government two years to enact appropriate marriage equality legislation. Under the May 2017 court order, if new legislation is not adopted, same-sex marriage will automatically become legal without enabling legislation. Marriage equality advocates were hoping that the government would beat the deadline and have appropriate legislation in place. But the President remained non-committal in an interview published on June 25. When she was asked in an interview whether she planned to “push the issue,” she said that the government would “bridge the differences society holds on this issue in order to propose a comprehensive bill,” but saw a generational divide. “Same-sex marriage is also a reflection of the generational gap,” she said. “In Taiwan, those above 40 tend to have different views to those under 40.” She did say that the government recognizes the obligation imposed by the court’s decision. *Straits Times*, June 25.

TRINIDAD & TOBAGO – The High Court of Justice ruled on April 12, 2018, in *Jones v. Attorney General*, Claim No. CV2017-00720, that certain sections

of the penal law are “unconstitutional, illegal, null, void, invalid, and are of no effect to the extent that these laws criminalize any acts constituting consensual sexual conduct between adults.” The lengthy opinion by Justice Devindra Rampersad runs almost 60 pages and ranges widely over the case law of numerous countries, grounding its ruling in the nation’s constitution and interpretations of similar constitutional provisions in many other jurisdictions having a similar common law heritage. Trinidad & Tobago is a twin-island Caribbean republic, originally colonized by Spain but becoming a British colony in the 19th century. It achieved independence in 1962 but continues as a member of the British Commonwealth, with a current population of almost 1.5 million.

TUNISIA – A law revision commission appointed by President Beji Caid Essebsi to bring the legal code in line with the 2014 Constitution has recommended decriminalizing homosexual sex, and banning “anal tests” to determine whether a suspect is gay. Muslim religious leaders immediately announced their opposition to the proposal and such other as abolishing the death penalty, claiming that they would “eradicate Tunisian identity, by leaving the people without religion.” Tunisia is a majority-Muslim country, but President Essebsi’s goal is to establish a civil government along the lines of the 2011 revolution that overturned the rule of long-time dictator Zine El Abidine Ben Ali and led to the adoption of a modern constitution. *Daily Mail*, June 20.

UNITED KINGDOM – The U.K. is the loser in *MB v. Secretary of State for Work and Pensions*, Case C-451/16 (European Court of Justice, June 26, 2018). MB is a transgender woman, born in 1948, who married while still living as a man in 1974.

She began to transition in 1991 and had sex reassignment surgery in 1995, remaining married throughout (and still today). MB applied for a certificate of recognition of her change of gender, but under the U.K.’s gender recognition statute, she would have to divorce her wife to obtain the certificate and, allegedly for religious reasons, they remain married, so she was denied the certificate. Under the U.K.’s national pension scheme, women born before 1950 are eligible for state pensions upon reaching age 60. (The age for men is 65.) Upon reaching age 60, MB applied, presenting herself as a woman, and was turned down because she did not have the gender recognition certificate. She sued in the English courts, losing at several levels, but the Supreme Court of the United Kingdom submitted to the European Court of Justice the question whether denial of the pension at age 60 violates European Union law. The Court’s answer is yes. To the Court, the issue of the certificate is not the crucial issue. Rather, said the court: “Persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.” The sex discrimination issue comes in, according to the Court, because “that marriage annulment condition does not apply to persons who have retained their birth gender and are married, who accordingly may receive a State retirement pension as from the statutory pensionable age for persons of that gender irrespective of their marital status. It appears, therefore, that that national legislation treats less favorably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married. Such less favorable treatment is based on sex and may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.” The problem here is clearly transitional; now that the U.K.

PROFESSIONAL *notes*

has marriage equality, there should be no need for transgender persons to divorce their existing spouses upon transitioning in order to get a gender recognition certificate. And we are informed that there is a legislative proposal to equalize the pensionable age for men and women. This opinion by the Court is an advisory opinion to the U.K. courts. Ultimately, one expects, MB will be entitled at least to five years of unpaid pension benefits as compensation

UNITED KINGDOM – The High Court has rejected a challenge to the government’s refusal to issue gender-neutral, so-called X, passports. Ruling in a suit brought by Christie Elan-Cane, Justice Jeremy Baker acknowledged Elan-Cane’s argument that under the European Human Rights Convention’s mandate of respect for private life, they had a possible claim, but the judge accepted the government’s argument that it had reasonable grounds for sticking with the current policy, including potential effect on other legislation, costs to change computer records, and increased need for consular support abroad for gender-neutral British citizens for whom an X passport might cause problems when traveling in countries that had not yet accepted the concept of gender neutrality. Baker noted in his decision: “The government is currently collecting and collating research material with a view to undertaking a comprehensive review of the issue both surround and those raised directly by the claimant in this case [who] will be entitled to scrutinize with care the results of the government’s current review, which will be required to be undertaken without any undue delay.” Elan-Cane was represented pro bono by the law firm Clifford chance, and is considering taking an appeal. *The Guardian*, June 22. * * * The Supreme Court of the United Kingdom ruled on June 27 that a heterosexual

couple, Rebecca Steinfeld and Charles Keiden, are entitled to register for a Civil Partnership under the 2004 legislation that was intended to provide a mechanism for legal recognition of same-sex couples. The court said that limiting civil partnerships to same-sex couples was incompatible with the European Convention on Human Rights, which forbids sex discrimination. The ruling, which overturns a judgment of the Court of Appeal from last February, is limited to the petitioners, who expressed the hope that the government will take action to open up the Act. There had been some speculation that with marriage equality there was no longer a need for the civil partnership status, but Steinfeld and Keidan insisted that there is still a place for an alternative to marriage. They have been a couple since 2010 and have two children, but they said that the “legacy of marriage” which “treated women as property for centuries” was not something they wanted for themselves. They described civil partnership as “a modern, symmetrical institution” which they thought would set a better example for their children. *BBC.com*, June 27.

UNITED KINGDOM – Prime Minister Theresa May, responding to a recent survey of LGBT people in the U.K., announced that the government will public an action plan on advancing the rights of LGBT people. Among other things, there have been demands that people who were persecuted under anti-gay laws should receive compensation, not just the formal apology that was already extended under a prior administration. LGBT rights leader Peter Tatchel stated that there were an estimated 10-20,000 gay men still living in the U.K. who deserve both an apology and compensation for convictions under anti-gay laws that have long since been repealed. May stated, “The survey results show we have more to do to improve the lives of

LGBT people and make this a country where no-one feels they need to hide who they are.” Equalities Minister Penny Mordaunt will be in charge of coordinating the government’s effort. *Press Association*, June 26.

PROFESSIONAL NOTES & AVAILABLE LGBT RIGHTS MOVEMENT POSITIONS

By Arthur S. Leonard

The **NATIONAL LGBT BAR ASSOCIATION** announced June 29 that it will present this year’s **DAN BRADLEY LIFETIME ACHIEVEMENT AWARD** to **JUSTICE ROSALYN H. RICHTER** of the New York Supreme Court, Appellate Division, First Department. After graduating from Brooklyn Law School, Justice Richter was the first full-time employee at Lambda Legal, serving as its Executive Director and sole staff attorney, in which capacity she authored an influential report on the proposed Family Protection Act on the agenda of the incoming Reagan Administration in 1981. She subsequently worked as a prosecutor in the Brooklyn District Attorney’s Office, became a NYC Administrative Law Judge, an elected state trial judge, and, by designation of the governor from her elected position as a N.Y. Supreme Court Justice, a judge of the Appellate Division, where she has served since March 2009. Justice Richter was one of the nation’s earliest out LGBT appellate judges, and has taken the leadership role on various judicial committees and bar association initiatives, as well as being an inspiring adjunct law professor. Justice Richter will receive the award at the Lavender Law Conference Awards Lunch on August 8 in New York City. The award is named in honor and memory of Dan Bradley, an out gay attorney who was the first president of the U.S. Legal Services Corporation and an effective advocate

PROFESSIONAL *notes*

for LGBT rights within the American Bar Association, leading efforts to get the ABA to endorse the repeal of criminal sodomy laws and protection against discrimination because of sexual orientation. * * * The LGBT Bar had previously announced on June 26 that it will present the **FRANK KAMENY AWARD** posthumously to **MAJOR CHRISTOPHER “TRIPP” ZANETIS**. This award salutes people who have made extraordinary contributions to the fight for LGBT legal equality, even though the recipient need not be a lawyer. Kameny was a meteorologist whose discharge by the federal government for homosexual conduct led him to a career of LGBT rights activism and one of the earliest attempts to challenge such discharges in the federal courts. Although Zanetis was a 2017 law school graduate (Stanford), the award recognizes his prior accomplishments as a New York City firefighter after 9/11, and as a leader of both LGBT and veterans organizations at Stanford Law. He previously received the LGBT Bar’s Student Leadership Award. He began work as an associate at Debevoise & Plimpton shortly after graduation, but tragically died in a helicopter accident on March 15, 2018, while doing national guard duty in Iraq. This had been his third tour of duty since joining the guard in 2008, and he had received numerous commendations and awards for his military service.

Following up on last year’s surprise nomination of out lesbian **CHAI FELDBLUM** to another term as a Commissioner of the Equal Employment Opportunity Commission, the White House announced on June 7 that President Trump has nominated another out lesbian, **MARY ROWLAND**, to be a U.S. District Judge for the Northern District of Illinois. Out of more than 100 judicial nominations that Trump had made thus far, Rowland was the first out “LGBTQ judicial nominee,”

as described in *Huffington Post* (June 7), in an article that, like the White House announcement, did not receive much immediate comment from either LGBT or “mainstream” media outlets. Rowland had been recommended for the appointment by a screening panel formed by Democratic Illinois Senators Richard Durbin and Tammy Duckworth, who issued a press release providing biographical information about the nominee. Rowland is a U.S. Magistrate Judge in the court to which she is being nominated, having previously been a partner in the Chicago firm of Hughes, Socol, Piers, Resnick & Dym, LTD, and before that an attorney in the Chicago office of the Federal Defender, first as a staff attorney and then as the office’s Chief Appellate Attorney. A graduate of the University of Michigan and the University of Chicago Law School, Judge Rowland clerked for U.S. District Judge Julian Abele Cook, Jr., of the Eastern District of Michigan, and is a member of Chicago’s LGBT Bar Association, which released a statement praising her appointment. According to one media source, she won a famous victory representing African-American plaintiffs challenging racially discriminatory hiring practices in the Chicago Fire Department. In other words, she does not sound at all like the typical Trump judicial appointee, and one can only wonder what prompted this appointment, without in any way questioning its merits.

MANATT, PHELPS & PHILLIPS, LLP, a major national law and consulting firm with over 450 attorneys in nine major metropolitan areas, has announced that out lesbian partner **DONNA L. WILSON** will become the firm’s CEO and Managing Partner effective July 1, 2019. Over the next year, Wilson will work collaboratively with outgoing CEO Bill Quicksilver to assure a “well-managed” transition. Quicksilver has been CEO and Managing Partner since

2007. Wilson joined the firm as a lateral partner in 2013, and chairs the firm’s privacy and cybersecurity practice as well as co-chairing the financial services group and litigation and enforcement practice. She has been recognized in several legal publications as among the leading practitioners in California and in her fields nationwide. Wilson earned her law degree at University of Virginia, and clerked on the 9th Circuit (Judge David R. Thompson) and in the District of New Jersey before beginning practice. *Health Policy & Law Daily* (June 26) reporting on this development stated: “Wilson is a long-time advocate for diversity and inclusion and a member of the LGBTQ community.”

KAPLAN & COMPANY, the boutique litigation firm started by **ROBERTA KAPLAN**, who represented Edith Windsor in the Supreme Court in the 2013 case that struck down the Defense of Marriage Act, has expanded with the addition of more partners and is now known as **KAPLAN, HECKER & FINK**. In an article reporting on the firm’s expansion in *The New York Law Journal* (June 26), Kaplan indicated further growth is expected, with five incoming associates who are finishing up federal clerkships, and the firm is still hiring.

THE RICHARD C. FAILLA LGBTQ COMMISSION OF THE NEW YORK STATE COURTS presented its 2018 LGBTQ Pride Month Program on June 19 in the Rotunda of the New York County Supreme Court Building. The program was titled “July 3, 1973: The Day the Court of Appeals Made Pride Possible in New York,” and focused on two decisions by the Court of Appeals issued on that date: *Application of Harris L. Kimball for Admission to Practice as an Attorney*, 33 N.Y.S.2d 586, and *Application of William J. Thom for Approval of the Incorporation*

PROFESSIONAL *notes*

of *Lambda Legal Defense & Education Fund*, 33 N.Y.2d 609. In both cases, the Court of Appeals reversed Appellate Division rulings. **HARRIS KIMBALL** had been disbarred in Florida in 1957 after effectively pleading no contest after being caught in a police sex sting on a beach, and had applied for admission in New York after the legislature reformed the Penal Law to reduce consensual sodomy to a misdemeanor offense. The Appellate Division, 2nd Department, refused to admit him, but the Court of Appeals, reversing, did not deem it dispositive that he was an out gay man who said he had violated the sodomy law in the past and would continue to do so in the future, since the Character Committee found him fit to practice, thus formally opening the door to out LGBT people being able to practice law in New York. The Appellate Division had denied Lambda's charter application, finding no evidence that there was an unmet need for lawyers to represent gay people or that Lambda's proposed public interest practice met the requirements for a not-for-profit public interest law firm. The Court of Appeals reversed, finding the Appellate Division's conclusions to be "unsupportable." Lambda co-founder **WILLIAM J. THOM**, New York's first out gay judge during the Koch Administration of the 1980s, who has long since retired from legal practice, participated in this program with a first person account of the struggle to incorporate Lambda and win approval to practice as a public interest law firm. Kimball is deceased, but your editor provided an account of his case. Other speakers reflecting on the significance of the two cases included **JUSTICE ROSALYN H. RICHTER**, the first out LGBT Appellate Division judge in New York and a former executive director of Lambda; **JUDGE PAUL G. FEINMAN**, the first out gay member of the New York Court of Appeals (the state's highest court), **RACHEL B. TIVEN**, Lambda's current Executive Director, and Retired

ACTING JUSTICE MICHAEL R. SONBERG, who was active as a leader in the International Association of Lesbian and Gay Judges and in efforts to encourage LGBT lawyers to seek judicial positions in New York.

TRANSGENDER ASYLUM SEEKERS ASSISTED BY WESTERN MASS. LAWYERS – The *Greenfield Recorder* (June 26), reported on efforts by a group of lawyers in Western Massachusetts' Pioneer Valley to join together to demand the release of 20 transgender asylum seekers who are being detained by ICE at the Cibola County Correctional Center in New Mexico. Eighteen volunteer lawyers filed petition with ICE via the Santa Fe Dreamers Project. All of the asylum seekers in question identify as transgender women, and all have been determined based on their initial interviews with Homeland Security agents, to have a credible fear of persecution in their home country as members of an identifiable social group subject to persecution there. Prior to the Trump Administration's "zero tolerance" policy for asylum seekers who do not arrive at designated ports of entry but instead attempt to cross the border elsewhere (in this case from Mexico into California), these determinations would have led to their release from detention pending a final determination of their asylum status. The pro bono lawyers are trying to get them released on the ground that there has been no determination by ICE that they pose a flight risk or danger to the public. Northampton attorney **MEGAN KLUDT**, of Curren & Berger, is leading the effort.

AALS SECTION ON SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES has announced a call for proposals for papers to be presented at the Section's program, co-sponsored with the Section on Poverty Law, at the

AALS Annual Meeting in New Orleans in January 2019. The program panel is titled "LGBTQ Rights, Poverty, and Public Policy." Those interested in being panelists and contributing papers should submit an abstract (up to 500 words) and a paper draft, if available, and a CV to Prof. David Cruz at dcruz@law.usc.edu. A proposal can involve one or two presenters, who should be listed in the abstract. The deadline for proposals to be received is July 31, 2018, at 11:59 pm, so DON'T wait until midnight to send your proposal!! "The AALS Section on Sexual Orientation and Gender Identity Issues supports and nurtures careers of law professors at every stage, but we also seek diversity from members of underrepresented demographics."

GLBTQ LEGAL ADVOCATES & DEFENDERS (GLAD) announces an opening for a full-time Staff Attorney for its work in the six New England states. The position will involve the full range of GLAD's core litigation work. Requirements are a minimum of 3-5 years of litigation, legal research and writing, and policy experience. The candidate must have a passion for and interest in LGBTQ and/or HIV work, strong analytical skills, open-mindedness, and public speaking. "Independence, as well as the ability to work as part of an integrated team, is a must." New England bar admission preferred, salary dependent on experience, "excellent benefits." "GLAD is committed to building and maintaining a diverse staff. People of diverse racial and ethnic backgrounds and language abilities, transgender individuals, people living with HIV and people living with disabilities are particularly encouraged to apply." Send confidential resume, cover letter and writing sample to Gary Buseck, GLAD, 18 Tremont St., Suite 950, Boston, MA 02108, or by email to gbuseck@glad.org. Applications will be considered on a rolling basis until the position is filled.

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8. Gonzalez, Jarod S., The New Batson: Opening the Door of the Jury Deliberation Room After *Pena-Rodriguez v. Colorado*, 62 St. Louis U. L.J. 397 (Winter 2018) (Unfortunately, the Supreme Court proved unwilling to take this on concerning sexual orientation discrimination by denying certiorari in *Rhines*).
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12. Ijoma, Samone, False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as Victims of Intimate Partner and Gendered Violence, 18 U. Md. L.J. Race, Religion, Gender & Class 255 (Spring 2018).
13. Larsen, Allison Orr, Constitutional Law in an Age of Alternative Facts, 93 N.Y.U. L. Rev. 175 (May 2018) (marriage equality litigation as an example of constitutional disputes turning heavily on contested factual contentions).
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15. Lesh, Eric, and James Castle, New York, It Is time to Put an End to the Use of Gay and Trans "Panic Defense" in Our Courts, NY Law Journal, June 15, 2018.
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18. Maurides, William Peter, The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill, 69 S.C. L. Rev. 977 (Summer 2018).
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EDITOR'S NOTES

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

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