

L E S B I A N / G A Y
LAW NOTES

April 2015

STATES' RIGHTS

*Legislative Activity in Utah and Indiana Delivers
Mixed Bag to the LGBT Community*

EXECUTIVE SUMMARY

- 133 Utah "Compromise" Is First New State Sexual Orientation Discrimination Law Since 2009
- 135 Indiana Enacts Wide-Ranging Religious Freedom Law That Could Curb LGBT Rights Protections in Major Cities; Then Governor Signals Retreat After National Outrage
- 137 New Jersey Supreme Court Unanimously Strikes Down Subsection of Bias-Intimidation Statute as Unconstitutionally Vague
- 139 Federal Judge Enjoins Nebraska Ban on Same-Sex Marriage, But 8th Circuit Stays the Preliminary Injunction
- 140 Alabama Marriage Circus Continues
- 143 First Circuit Revives Bisexual Employee's Sexual Orientation Discrimination and Harassment Claims
- 144 Fourth Circuit Reverses Trial Judge for Inadequate Consideration of Circumstantial Evidence of Deliberate Indifference to Safety of Inmate Rape Victim
- 145 Idaho Federal Judge Orders Trial on Native American Transgender Prisoner's Claims for Protection from Harm and Religious Freedom
- 147 Puerto Rico Urges Reversal of Anti-Marriage Equality Ruling
- 148 Third Circuit Refuses Withholding of Removal Relief for Gay Honduran Man
- 150 Federal Court Orders Stay of New Family & Medical Leave Act Regulation
- 151 Missouri Appeals Court Frees Gay Man from Sex Offender Registration Requirement
- 152 HIV Discrimination Case Survives Summary Judgment Motion
- 153 Federal Court Rejects Grindr Liability in Underage Hook-Up Situation
- 154 N.C. Appeals Court Revives Ex-Husband's Duress Claim Against Enforcement of Separation Agreement

155 Notes 188 Citations

L E S B I A N / G A Y LAW NOTES

Editor-In-Chief

Prof. Arthur S. Leonard
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
asleonard@aol.com
arthur.leonard@nyls.edu

Contributors

Bryan Johnson, Esq.
William J. Rold, Esq.
Daniel Ryu, Harvard '16
Tara Scavo, Esq.
Anthony Sears, NYLS '16
Matthew Skinner, Esq.
Matteo M. Winkler, Esq.

Production Manager

Leah Harper

Circulation Rate Inquiries

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

Lesbian/Gay Law Notes Archive

<http://www.nyls.edu/jac>

Lesbian/Gay Law Notes Podcast

Listen to/download the
Lesbian/Gay Law Notes Podcast
on iTunes ("search LGBT Legal"),
or at <http://legal.podbean.com>.

© 2015

The LeGaL Foundation

of the LGBT Bar Association
of Greater New York
<http://le-gal.org>

ISSN

8755-9021

Lesbian/Gay Law Notes welcomes authors interested in becoming a contributor to the publication to contact info@le-gal.org.

Utah “Compromise” Is First New State Sexual Orientation Discrimination Law Since 2009

In 2009, Delaware adopted a law banning sexual orientation and gender identity discrimination in employment, housing, and public accommodations, becoming the 21st state to ban sexual orientation discrimination and the 19th to address gender identity discrimination. Since then, several states have amended existing sexual orientation discrimination laws to add gender identity, but it was not until March 2015 that another state banned sexual orientation discrimination – although only for employment and housing – when Utah Governor Gary Herbert signed S.B. 296 into law on March 12. The measure, widely referred to

orientation discrimination laws would be broken by Utah, but in the past few years, and particularly in response to marriage equality developments, the Church has softened its public stance to some extent. It was clear that its endorsement of this measure was crucial to its passage.

In any event, as critics quickly pointed out, the measure is full of holes and should not be touted as a model for other states. The achievement of its enactment was tempered as well by the immediately subsequent passage of S.B. 297, signed into law by Governor Herbert on March 20. The signing of S.B. 296 was marked by a jubilant public ceremony; by contrast, the

that its inclusion of new forbidden grounds for discrimination is strictly cabined to the conduct covered by the existing anti-discrimination laws and does not create new “protected classes” for any other purpose. It specifically shelters from liability an employer’s “reasonable” dress and grooming standards, “reasonable” rules on sex-specific facilities, and the right of employees to voice anti-gay views without adverse consequences, including both in the workplace and outside of it. Because of the intricate “compromise” that it represents, it includes non-severability clauses, as the striking down of any particular provisions could upset the trade-offs

It tinkers with the definition of “employer” to give the most extensive exemption possible to religious bodies and all their associated or affiliated activities.

as the “Utah Compromise” because it was worked out in negotiations between LGBT rights leaders and representatives of the Mormon Church, was drafted to provide protection against discrimination because of a person’s sexual orientation or gender identity while intruding as little as possible on the prerogatives of the Mormon Church and its members, who dominate the politics of the state that was founded by church members who arrived in 1847, subsequently gaining territorial status and statehood later in the 19th century. The Mormon Church has been a staunch foe of LGBT rights, playing a leading behind-the-scenes role in funding California Proposition 8 in 2008, for example, but has occasionally allowed inroads, such as Salt Lake City’s anti-discrimination ordinance. Few would have speculated that the drought in new sexual

signing of S.B. 297 took place quietly, late on a Friday afternoon, when few were looking. Luckily, the worst of the lot, S.B. 322, which sought to provide protection against adverse consequences to people with religious objections to complying with general laws, died in the legislature.

S.B. 296, titled “Antidiscrimination and Religious Freedom Amendments,” modifies the Utah Antidiscrimination Act (which covers employment) and the Utah Fair Housing Act in various ways. It expands the list of forbidden grounds for employment and housing discrimination to include “gender identity” and “sexual orientation.” It tinkers with the definition of “employer” to give the most extensive exemption possible to religious bodies and all their associated or affiliated activities. It preempts local government remedies for discrimination, and makes clear

negotiated into the measure.

Among notable provisions, the statute defines “gender identity” with express reference to the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM-5). The statute specifically exempts the Boy Scouts of America from having to comply with its provisions. It does not cover discrimination in public accommodations, thus totally avoiding some of the problems that have become among the most pressing in anti-discrimination law in light of the recent spread of marriage equality. Same-sex marriage has been available in Utah since early October 2014, after the Supreme Court denied review of the 10th Circuit’s decision holding Utah’s ban on same-sex marriage unconstitutional, but the lack of a state law banning sexual orientation discrimination in

public accommodations has sharply diminished the possibility for gay Utah couples to bring discrimination claims against businesses that refuse to sell goods or services or rent facilities to same-sex couples for their weddings. The lack of coverage for public accommodations in this statute ensures that this will continue to be the case, especially if the preemption provisions interfere with any attempt by counties or municipalities to ban such discrimination in public accommodations.

Lack of public accommodations coverage also ensures that businesses cannot be sued for discrimination against transgender customers. The statute provides that it “may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, provided that the employer’s rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.” This was clearly aimed at giving employers wide discretion in dealing with the “bathroom issue” as it concerns transgender employees.

The religious liberty provisions in some cases merely state truisms, but in others may set up confrontations over the relative significance of banning discrimination and preserving religious freedom. The statute specifically provides that it “may not be interpreted to infringe upon the freedom of expressive association or the free exercise of religion protected by the First Amendment of the United States Constitution and Article I, Sections 1, 4, and 15 of the Utah Constitution.” Surely, no statute can limit constitutional rights as such, so this provision appears to be a sop to religionists with no operative significance. But the measure goes on to say: “An employee may express the employee’s religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of express or beliefs or commitments allowed by

the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer.” Exactly what this provision will mean in practice is quite unclear, but it would seem to rule out some claims of hostile environment harassment that might otherwise be actionable, depending how courts come to construe “non-disruptive” and “non-harassing” in the context of anti-gay speech. The measure prohibits employers from discharging, demoting, terminating or refusing to hire any person, or to “retaliate against, harass or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, for lawful expression or expressive activity outside of the workplace regarding the person’s religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the express or expressive activity is in direct conflict with the essential business-related interests of the employer.” Again, it is speculative how this might apply in particular cases, but it seems to have been designed specifically to protect outspoken anti-gay advocates – albeit, being written in neutral terms, it should also protect outspoken pro-gay advocates to the same extent if the administrative agency and the courts are evenhanded in their interpretation. Query whether the use of “non-disruptive” may generate a “heckler’s veto” on free speech?

The housing discrimination provisions specifically exempt housing operated by non-profit, charitable organizations or religious organizations and institutions, including religiously-affiliated educational institutions, thus preserving the right, for example, of Brigham Young University to discriminate based on sexual orientation or gender identity in its student housing. Indeed, given the reputedly broad holdings of the Mormon Church and its affiliated organizations in rental housing stock in Utah, this provision might exempt a large chunk of the state’s housing stock from complying with

the non-discrimination provisions. Although the broad exemptions in the employment provisions predate this statute to a significant extent, the exemptions from the housing discrimination requirements seem to have been broadened in response to including sexual orientation and gender identity as forbidden grounds for discrimination.

S.B. 297, titled “Protections for Religious Expression and Beliefs about Marriage, Family, or Sexuality,” addresses the “problem” of public employees who say their religious beliefs compel them to avoid doing their job, specifically when it comes to same-sex marriages. County clerk offices are required to have somebody available during business hours willing to solemnize same-sex marriages, but no individual with religious objections can be assigned to do so, and the person need not be an employee of the office. However, those county clerk employees who opt out of solemnizing same-sex marriages will not be allowed to solemnize any marriages. Religious officials are sheltered from any governmentally-imposed penalty for refusing to provide services to any person based on the official’s religious beliefs about marriage and families. The measure specifically provides, however, that extending broad protection to free exercise of religion should not be construed to limit the application of the state’s laws barring discrimination in employment, housing, or public accommodations (the last of which, if course, was not amended to add sexual orientation or gender identity as forbidden grounds). The statute forbids the state from using its power to license professions and activities to sanction individuals for their expression of their beliefs concerning marriage, family, or sexuality. In other words, this statute addresses the absurd fears expressed by some anti-gay ministers that they might be subjected to prosecution or punishment by the state for delivering anti-gay sermons and other pronouncements.

The bill that failed to survive the legislative process, S.B. 322, was

simply titled “Religious Liberty Act,” and was a version of the federal Religious Freedom Restoration Act, which was enacted by Congress to counter a Supreme Court decision holding that the federal government was not required by the First Amendment to exempt religiously-motivated dissenters from complying with generally applicable laws. As with the federal act, this bill would have authorized religious believers (including “a closely held business or entity”) to follow their conscience rather than the law, but, apparently contradicting itself, stated: “The lawful and proper expression and exercise of religious liberty and rights of conscience recognized and protected in the constitutions of the state and the United States and this chapter do not constitute nor shall they be applied in such manner as would result in wrongful discrimination under other laws and statutory protections, including Title 34A, Chapter 5, Utah Antidiscrimination Act, and Title 57, Chapter 21, Utah Fair Housing Act.” It is not clear whether this provision was intended to have the anti-discrimination laws take priority over individual exercise of religious beliefs. Since the measure died, this won’t be tested in the courts.

Despite the broad exemptions and fuzzy compromise language that seems likely to generate interpretive issues for the state’s administrative and judicial agencies down the road, on balance the new Utah anti-discrimination provisions do advance the ball in terms of protection the rights of LGBT people in Utah to some extent. As a matter of political pragmatism, it is an example of what you can get in the context of a state that – despite the disavowals in its constitution, which Congress required in order to admit it to the union – is in many respects a virtual theocracy. Utah can thus be added to the list of states that ban sexual orientation and gender identity discrimination (#22 and #20, respectively), but perhaps with an asterisk linking to a long footnote detailing the exceptions. ■

Indiana Enacts Wide-Ranging Religious Freedom Law That Could Curb LGBT Rights Protections in Major Cities; Then Governor Signals Retreat After National Outrage

On March 23, the Indiana House of Representatives voted overwhelmingly to approve S.B. 101, a broad Religious Freedom Restoration (RFRA) bill, which was previously approved by the State Senate. Due to some amendments in the House, the measure was sent back to the Senate, where passage was prompt, and Governor Mike Pence signed the measure into law on March 26. The measure was widely attacked as the broadest of state RFRA laws, and most likely to

Act, which was passed in 1993 without any thought to impact on LGBT people. But it makes explicit what the Supreme Court found by interpretation of the federal RFRA in the *Hobby Lobby* case: That corporations, whether religious, non-profit, or for-profit, are deemed to be “persons” under American law and have the same rights as “persons,” including the right to free exercise of religion, which in the case of a corporation is determined by its owners. This bill goes even further to define as a person *any*

The measure was widely attacked as the broadest of state RFRA laws, and most likely to lead to discrimination by businesses against LGBT people.

lead to discrimination by businesses against LGBT people. The outpouring of criticism, especially from business and tech industry leaders, and relentless media coverage led Governor Mike Pence, at first a staunch supporter of the measure, to call on the legislature to send him an amendment making clear that the measure could not be used to defend discrimination. By April 2 a proposed amendment had emerged providing that the RFRA law could not provide a defense for a discrimination claim because of any of the characteristics covered by the state’s anti-discrimination laws, plus sexual orientation and gender identity. This would not extend state-wide protection against discrimination for LGBT people, but would restore the status quo ante, which includes such protection under a dozen local laws.

The new statute is based on the federal Religious Freedom Restoration

“entity” that can sue or be sued, not just persons or corporations. It extends to any business or company or partnership, regardless of its formal legal status, as well as individual people.

The operative provision, Section 8(a), provides that “a governmental entity may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability,” unless, according to Section 8(b), the governmental entity imposing the burden “demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of further that compelling governmental interest.” This is the same basic formulation that appears in federal RFRA. The law authorizes relief against a governmental entity in the form of declaratory and injunctive relief, as well as compensatory damages

and, within the discretion of the court, costs of litigation including attorney fees. If a RFRA defense is successfully raised in private litigation, it will defeat the plaintiff's claim. The application to private litigation appears to go beyond the usual uses of federal RFRA.

The statute may be set up as a defense against the application of a general law by a person or entity claiming that the law either substantially burdens or is "likely" to substantially burden their "exercise of religion," and the government does not need to be a party for this defense to be raised, although if the defense is raised in a private lawsuit, the government *may* intervene to defend its policy. This seems to be a departure from the approach under the other RFRA's, which generally have been understood to apply mainly to actions between the government and private parties, so that the burden is not normally placed on a plaintiff complaining of discrimination to prove that the government has a compelling interest to outlaw the discrimination. Indeed, it may fall to the plaintiff asserting a right to be free from discrimination to persuade a court that the relevant government body's prohibition of discrimination, as to which a RFRA exemption is claimed by a defendant, was the "least restrictive" way to achieve a "compelling governmental interest" if the government does not elect to intervene on behalf of the plaintiff.

The religious belief upon which a claim or defense is based under this statute "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"; the "church of one" will do, apparently, so this sets up a free-floating potential religious exemption from compliance with general laws for anybody who claims that their action in defiance of a government policy is motivated by their own religious belief, again going beyond the more traditional RFRA approach. For example, a landlord with religious objections to renting an apartment to an applicant could claim immunity from a subsequent discrimination claim, as could an employer with religious objections to hiring particular people or any business declining to provide goods or services, and they would not be required to show that their particular religious objection was part of the theology of a particular

faith group, or that the faith group to which they belonged had a formal tenet that would be violated.

The state of Indiana does not provide any statutory protection against discrimination for its LGBT citizens on account of their sexual orientation or gender identity, but a dozen municipalities in Indiana do forbid such discrimination, according to a March 25 article in the *Fort Wayne Journal Gazette*. The RFRA as worded could provide a defense against a discrimination charge for an employer, landlord, or business facing such a charge under a municipal ordinance when the defendant shows that he or she is acting because of a religious belief, disempowering the local authorities from imposing any remedy or penalty for such discrimination, unless a court found that the local government had a compelling interest overriding the employee's religious free exercise interest. The local government unit enforcing the law might be a plaintiff in a case in which this defense is raised, or it could be raised in a case instituted by an individual claiming discrimination, for example in a complaint filed in a city anti-discrimination agency or local court. The proposed "fix" announced on April 2 would appear to eliminate this problem.

The clear motivation for adoption of this measure at this time was last year's ruling by the 7th Circuit finding that the state's ban on same-sex marriage was unconstitutional, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), cert. denied, 135 S. Ct. 316 (2014). After that ruling went into effect, same-sex couples began marrying in Indiana, to the horror of the Republican majorities in both houses of the legislature. Presumably this measure would provide a defense for event facilities, bakers, florists, tailors, photographers, or anybody else whose religious beliefs motivate them to deny services to same-sex couples. Discrimination claims against such businesses have been asserted in other states, always in jurisdictions that expressly banned businesses from discriminating based on sexual orientation. The lack of such anti-discrimination protection under Indiana state law means that this new law's application as it affects the LGBT community will be most likely in municipal discrimination cases, as

there seems little likelihood that Indiana is going to add "sexual orientation" or "gender identity" to its state anti-discrimination law anytime soon. Of course, it is possible in any particular case that a local judge might be persuaded that the municipality has a compelling interest that can only be achieved by banning the discrimination at issue in the case, but it is unclear how such a ruling might fare on appeal in the state's conservative court system.

Critics of the measure quickly labelled it the most strongly anti-gay "religious freedom" measure yet enacted in the U.S., even broader in its application than the notorious Arizona bill that was vetoed last year after a noisy lobbying campaign joined by major businesses in that state, fearful of the adverse impact on the business climate. Activists quickly began identifying possible pressure points to influence the Indiana Governor Pence, but he moved so quickly to sign the measure (in a private ceremony to which anti-gay religious leaders were prominently invited) immediately after its final passage by the Senate, that these efforts had little time to make their mark. At the signing, Pence asserted that the measure was not intended to encourage discrimination, but his disavowals were totally unconvincing in light of the wording of the bill and the obvious motivations of its sponsors. Reaction to its passage was swift, as criticism poured in from the blogosphere, with statements from corporate and associational leaders and talks of boycotting Indiana. Within days, Governor Pence was stating that "clarifying" amendments might be enacted, but the language of the newly-enacted statute seemed clear on its face: It provides a defense against liability for individuals, businesses, and other entities that refuse to comply with laws based on their religious beliefs, the defense may be raised in private lawsuits that don't involve the government, and given American judicial traditions of accepting at face value most religiously-based claims, it seemed likely that the bill would abet discrimination. Only an amendment providing that the RFRA could not provide a defense to a charge of unlawful discrimination would undo the damage, and legislative leaders negotiating with businesses that were critical of the RFRA produced such an amendment that was

announced on April 2. Pence expressly disavowed any interest in amending the state's anti-discrimination law to add sexual orientation as a forbidden ground of discrimination (or, as the press and politicians say in blatant disregard of how anti-discrimination law works, a "protected class").

One quick response to enactment of the bill came from Indianapolis Mayor Gregory A. Ballard, who issued an Executive Order on March 30 (E.O. No. 1, 2015), reaffirming the city's policy that city contractors may not discriminate based on sexual orientation or gender identity, requesting the state legislature and governor to add sexual orientation and gender identity as "protected classes under state law," and asking that the legislature and governor "expressly exempt the City's ordinances, resolutions, executive or administrative orders, regulations, customs, and usages from RFRA's application." (The bill as enacted provides that it applies to all laws unless expressly exempted.) Also on March 30, the American Federation of State, County & Municipal Employees, the nation's largest public sector union, announced that its national women's conference, previously scheduled to take place in Indiana in the fall, would be relocated, in order to express the organization's "disgust" at the enactment of Indiana's RFRA. On March 31, the state's largest newspaper devoted its front page to a large-font demand that the state "fix" this problem. Several governors announced restrictions on state-funded travel to Indiana for state employees, suggestions were made that some conferences previously scheduled to be held in Indiana might be relocated, and some major businesses announced reconsideration of plans for expansion in the state. All of these forces clearly contributed to the governor's decision to call for a "clarifying" amendment. They also reaffirmed the societal changes of recent years in attitudes about anti-gay discrimination, first dramatically shown in the response last year to the Arizona legislature's passage of a similar bill. What would be particularly significant would be if the controversy around this and similar bills were to revive efforts to pass affirmative protection against discrimination for LGBT people in the majority of states that lack such protection, as well as at the federal level. ■

New Jersey Supreme Court Unanimously Strikes Down Subsection of Bias-Intimidation Statute as Unconstitutionally Vague

On March 17, 2015, the Supreme Court of New Jersey unanimously struck down a subsection of the state's bias-intimidation statute as violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *State v. Pomianek*, 2015 WL 1182529, 2015 N.J. LEXIS 275. The subsection struck down was most famously used in 2012 to convict the roommate of gay Rutgers freshman Tyler Clementi, Dharun Ravi, following Clementi's tragic suicide after discovering Ravi used a webcam turned

Court struck down New Jersey's previous hate crime law in a landmark decision involving criminal sentencing and the Sixth Amendment right to trial by jury in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the state legislature enacted the current bias-intimidation statute, codified at N.J.S.A. 2C:16-1, and added subsection (a)(3). Albin describes the provision as "unique among bias-crime statutes in this nation" because "[i]t is the only statute that authorizes a bias-crime conviction based on the victim's perception that the defendant

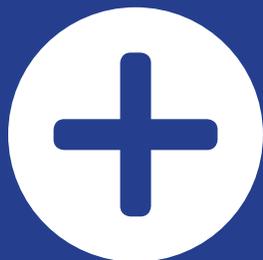
Racially-motivated harassment was at issue in this case, although New Jersey's hate crime law also explicitly prohibits targeting individuals based on their sexual orientation and gender identity.

on in their room to watch a sexual encounter between Clementi and another man. At issue in Ravi's prosecution and this case was an unusual subsection of the New Jersey bias-intimidation statute that criminalizes conduct based on "the victim's perception of the accused's motivation for committing the offense." Justice Barry T. Albin wrote the opinion, joined by his colleagues Chief Justice Stuart Rabner and Justices Jaynee LaVecchia, Anne M. Patterson, Faustino J. Fernandez-Vina, and Lee Solomon (due to a longstanding impasse between Republican Governor Chris Christie and the Democratic-controlled State Senate, the seventh seat on the court remains persistently vacant, and the judge temporarily assigned did not participate in deciding this case).

After the United States Supreme

committed the offense with the purpose to intimidate, regardless of whether the defendant actually had the purpose to intimidate."

Racially-motivated harassment was at issue in this case, although New Jersey's hate crime law also explicitly prohibits targeting individuals based on their sexual orientation (the ground for the Ravi prosecution) and gender identity. David Pomianek, Jr. and Michael Dorazo, Jr., both Caucasian, worked in the Parks and Recreation Division of the Gloucester Township Department of Public Works. On April 4, 2007, Dorazo lied in order to get an African-American colleague named Steven Brodie to enter a steel storage case, where he locked him for three to five minutes until another employee unlocked the sliding door. Several witnesses then heard Pomianek



Are you reading this in the stacks of your law library?
Wouldn't you rather be reading it at your desk?
LeGal Members enjoy current issues from the comfort
of their browsers. Join today at le-gal.org!

utter a racially-charged joke about a monkey going after a banana.

At the conclusion of a 2010 trial, a jury found Pomianek guilty of two fourth-degree bias-intimidation crimes, one for harassment by alarming conduct and the other for harassment by communication, based on a conclusion that Brodie “reasonably believed” either that the offenses were “committed with a purpose to intimidate him” or that “he was selected to be the target because of his race, color, national origin, or ethnicity.” The bias-intimidation convictions were a necessary predicate for an additional conviction on official misconduct.

On appeal, the Appellate Division reversed the bias-intimidation and official misconduct convictions and added an intent requirement into the statute, finding that without such an element, the statute would violate the First Amendment. Pomianek’s case was remanded for retrial, but the New Jersey Supreme Court accepted the State’s and Pomianek’s petition and cross-petition for certification.

Unlike the Appellate Division, the Supreme Court focused on the Fourteenth, rather than the First, Amendment. The vagueness doctrine is based on the premise that a statute fails to comport with due process if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.” *United States v. Williams*, 553 U.S. 285, 304 (2008). Albin notes that “the inherent vice in vague laws is that they do not draw clear lines separating criminal from lawful conduct.”

Unlike other hate crime statutes upheld against a constitutional challenge, Albin points out that “subsection (a)(3) penalizes the defendant even if he has no motive to discriminate, so long as the victim reasonably believed he acted with a discriminatory motive.” This is problematic because “defendant here could not readily inform himself of a fact and, armed with that knowledge, take measures to avoid criminal liability.” In particular, it bothers Albin that a “victim’s personal experiences,” of which “[t]he defendant may be wholly unaware,” could be the basis for a victim’s “flashpoint” or “emotional

triggers” and lead to criminal penalties.

With that in mind, Albin concludes that because the subsection “fails to give adequate notice of conduct that it proscribes, the statute is unconstitutionally vague and violates notions of due process protected by the Fourteenth Amendment,” making any further First Amendment analysis unnecessary. Albin does, however, take the Appellate Division to task for reading a *mens rea* element into the subsection and, thereby, performing “not minor judicial surgery to save a statutory provision, but a judicial transplant.” Pomianek’s bias-intimidation and official conduct convictions are, therefore, dismissed.

The *Pomianek* ruling, however, received much more media attention for how it might affect Ravi’s conviction, as it seemed possible that some or all of the conviction could be reversed as a result. Several charges were brought against Ravi, including under the bias-intimidation subsection now struck down. There was controversy at the time, both inside and outside of the LGBT community, about the scope of criminal charges, if any, that should be brought against Ravi. The trial judge allowed evidence about Clementi’s reactions to learning about the webcam spying to be presented to the jury, as it was relevant to the charge under subsection (a)(3), but would like have been excluded as not relevant to the other charges in the case. The jurors later commented that this evidence was some of the most convincing they heard during the whole trial. However, reflecting his own unease with subsection (a)(3), the trial judge did not enhance Ravi’s sentence to reflect the bias-intimidation conviction. Ravi received a short 30-day prison sentence and was released on good behavior after only 20 days. Prosecutors, meanwhile, appealed the judge’s failure to enhance the penalty due to the bias-intimidation conviction and Ravi’s lawyers raised similar concerns to that of Pomianek in their appeal. Those arguments have now been vindicated by the New Jersey Supreme Court. – *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGal.

Federal Judge Enjoins Nebraska Ban on Same-Sex Marriage, But 8th Circuit Stays the Preliminary Injunction

Finding that Nebraska's constitutional amendment banning same-sex marriages violates the 14th Amendment's Equal Protection Clause, Senior U.S. District Judge Joseph F. Bataillon granted a motion by seven same-sex couples to issue a preliminary injunction against its enforcement on March 2. *Waters v. Ricketts*, 2015 WL 852603, 2015 U.S. Dist. LEXIS 25869. While denying the state's request to stay his order pending appeal, Judge Bataillon agreed to delay his ruling taking effect until 8 am on March 9 to give the state a chance to ask the 8th Circuit Court of Appeals for a stay. Nebraska Attorney General Doug Peterson, a named defendant, filed a notice of appeal with the 8th Circuit shortly after the ruling was announced and filed a motion for a stay. On March 5, the 8th Circuit granted the motion, and added the case to the other three now pending before the 8th Circuit with oral argument scheduled for May 12.

Judge Bataillon, a former public defender who was appointed to the district court by President Bill Clinton in 1997 and took senior status in 2014, has a history with the marriage issue. He was the trial judge a decade ago when gay Nebraskans challenged the constitutionality of the state's initiative marriage amendment the first time around, and he then ruled that it was unconstitutional, only to be rebuffed in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). The plaintiffs in that case were not claiming a constitutional right to marry under the 14th Amendment, however. Instead, they were challenging the idea that the people of Nebraska could amend their constitution specifically to prevent gay Nebraskans from seeking the right to marry through the ordinary political process of lobbying the legislature. They argued that this improperly excluded gay people from participation in the ordinary political process. The 8th Circuit, rejecting this argument, took note of the limited scope of their claim. That has persuaded district judges in Missouri, Arkansas and South Dakota that the 2006 ruling did not prevent them from addressing the 14th Amendment right to marry claim presented in the new marriage equality

lawsuits filed after the Supreme Court's ruling in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

Bataillon took the same view, and also joined with the dozens of district courts and four federal circuit courts that have rejected the argument that a 35-year-old refusal by the Supreme Court to review a marriage equality case from Minnesota, *Baker v. Nelson*, 409 U.S. 810 (1972), would now block a lower federal court from ruling for the plaintiffs on this issue.

Some recent marriage equality rulings have been grounded in the theory of a fundamental right to marry protected as a liberty interest by the Due Process Clause. Others have preferred to base their holding on the Equal Protection Clause, finding that the exclusion of same-sex couples is a form of unjustified discrimination, either based on sexual orientation, sex, or both. Bataillon preferred the equal protection route, although his opinion also discussed the due process argument.

Because he was deciding a motion for a preliminary injunction rather than issuing a final ruling on the merits, the judge's discussion of the constitutional issues was focused on predicting what an eventual ruling on the merits might be. At this stage, the burden on the plaintiffs was to persuade him that they are likely to prevail when he makes a final ruling on the merits in response to a summary judgment motion. As to that, a simple process of counting decisions by other courts pro or con would easily suffice to meet the burden. Bataillon pointed out that the Supreme Court in *Windsor*, striking down part of the federal Defense of Marriage Act, subsequent rulings by four U.S. Circuit Courts of Appeals, and the overwhelming majority of dozens of federal district court opinions, have all rejected the justifications that states have advanced for refusing to allow same sex couples to marry and refusing to recognize their out of state marriages. Stacked up against that, a mere handful of federal trial judges and one court of appeals (by a divided vote) have rejected plaintiffs' claims. For purposes of prediction, that is sufficient to hold for the plaintiffs.

The court easily found that the other prerequisites for preliminary injunction relief were met, finding that the harms to plaintiffs massively outweighed potential harms to the state of ordering it to cease enforcing its ban.

Judge Bataillon drew heavily on the forceful marriage equality opinion by Judge Richard Posner of the 7th Circuit Court of Appeals in *Baskin v. Bogan*, 766 F.3d 648 (2014), which had focused particularly on the harms to children imposed by denying same-sex couples the right to marry. "In *Baskin*," he wrote, "the Seventh Circuit rejected the rationale that same-sex couples and their children do not need marriage because same-sex couples cannot produce children, whether intended or unintended, as an argument 'so full of holes that it cannot be taken seriously.'" He continued, "The Seventh Circuit found prohibitions on same-sex adoption particularly troubling. The refusal to allow same-sex couples to adopt 'harms the children, by telling them they don't have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent.'"

"An asserted preference for opposite sex parents does not, under heightened scrutiny, come close to justifying unequal treatment on the basis of sexual orientation," wrote Bataillon. Furthermore, he embraced the view, previously adopted by a minority of the district court judges and by one concurring judge in the 9th Circuit, that the ban on same-sex marriage is a form of sex discrimination, meriting heightened scrutiny, without any need to find that sexual orientation discrimination claims also merit heightened scrutiny. "Under existing precedent," he wrote, "Nebraska's same-sex marriage ban is at least deserving of heightened scrutiny because the challenged amendment proceeds 'along suspect lines,' as either gender-based or gender-stereotype-based discrimination. The court finds it unnecessary, in light of this conclusion, to address the issue of whether the fundamental right to marry extends to same-sex relationships."

In support of its argument that the same-sex marriage ban serves a legitimate state interest, Nebraska relied upon several widely-discredited “studies,” including two articles published by University of Texas Professor Mark Regnerus, disparaging the parenting skills of same-sex couples. Bataillon dispatched them in a footnote, observing that the federal district court in Michigan found them to be “unbelievable and not worthy of consideration,” characterizing them as a “fringe viewpoint that is rejected by the vast majority of [the studies’ authors] colleagues across a variety of social science fields.” Why are state attorneys general continuing to cite such unreliable and vigorously disparaged publications? Aren’t they embarrassed to do so?

In common with many of the other district judges who have ruled on this issue over the past year and a half, Judge Bataillon rose to a vigorously stated conclusion. “Nebraska’s ‘Defense of Marriage’ Constitutional Amendment, Section 29, is an unabashedly gender-specific infringement of the equal rights of its citizens,” he wrote. “The State primarily offers as its rational basis for this gender-specific discrimination the encouragement of biological family units. The essence of this rationale has been rejected by most courts and by no less than the Supreme Court [in *Windsor*]. With the advent of modern science and modern adoption laws, same sex couples can and do responsibly raise children. Unfortunately, this law inhibits their commendable efforts. For the majority of married couples, those without children in the home, marriage is a legal and emotional commitment to the welfare of their partner. The State clearly has the right to encourage couples to marry and provide support for one another. However, those laws must be enforced equally and without respect to gender. It is time to bring this unequal provision to an end.”

The plaintiffs are represented by the ACLU of Nebraska Foundation and the ACLU Foundation’s Lesbian and Gay Rights Project, with Omaha divorce attorneys Susan Koenig and Angela Dunn as local counsel. The ACLU attorneys working on the case include Amy Miller of the Nebraska affiliate, and Leslie Cooper and Joshua Block with the national organization. ■

Alabama Marriage Circus Continues

At the end of February, most probate judges in Alabama were issuing marriage licenses to same-sex couples, while the Alabama Supreme Court considered the submissions of the parties in *Ex parte State of Alabama ex rel. Alabama Policy Institute & Alabama Citizens Action Program*, No. 1140460, 2015 WL 892752, 2015 Ala. LEXIS 33 (March 3, 2015), in which two private non-profit organizations opposed to marriage equality had filed an “Emergency Petition for Writ of Mandamus,” purporting to represent the interest of the state government and asking the Alabama Supreme Court to order the probate judges to stop issuing marriage licenses. One of the probate judges, John E. Enslin of Elmore County, informed the court

ostensibly) to grant the Petitioners’ request. “The named respondents are ordered to discontinue the issuance of marriage licenses to same-sex couples,” ordered the court, which granted Judge Enslin’s request to join the probate judges as named respondents (instead of “John Doe” as listed in the “Emergency Petition”) to be bound by the order, excepting temporarily Judge Davis of Mobile County, who was under a direct order by U.S. District Judge Callie Granade. Even as to that, however, the court responded to Judge Davis’s request to be dismissed from this case by directing him to advise the court by 5 pm on March 5 “as to whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four

There were no parties in the case who were same-sex couples seeking marriage licenses, and thus in a position to argue that the U.S. District Court case was correctly decided.

that he agreed with the Petitioners that the probate judges should not be issuing licenses, so the court realigned him from being a respondent to being a co-petitioner. None of the parties in the pending marriage equality cases were parties to this case, other than defendant Mobile County probate judge, Don Davis, who was incidentally a respondent as one of the “John Doe” probate judges against whom relief was sought by the petitioners. Thus, there were no parties in the case who were same-sex couples seeking marriage licenses, and thus in a position to argue that the U.S. District Court case was correctly decided, making the court’s consideration of that issue, in effect, *ex parte* and non-adversarial.

Late on March 3, the court issued a *per curiam* opinion, voting 7-1 (with Chief Justice Roy Moore not participating,

marriage licenses he was ordered to issue in *Strawser v. Strange*.”

Judge Granade’s order to Davis in *Strawser* required him to issue licenses to the plaintiffs and also declared that the state’s ban on same-sex marriage was unconstitutional, implying the broader obligation not to turn away same-sex couples seeking licenses. In the other pending marriage equality case, she had ordered him to recognize the California marriage of a lesbian couple in connection with an adoption petition; he had already compromised that by refusing to issue a final order of adoption, instead issuing an “interlocutory order” granting temporary parental rights to plaintiff Searcy, in effect postponing a final ruling on her adoption petition for the child she has been raising together with her same-sex spouse until after the U.S. Supreme Court rules on marriage

equality. He then recused himself from further activity in that case, a logical move given his involvement as a named defendant in the marriage equality case.

The looming issue, of course, especially as the 11th Circuit had announced early in the month that it would not take any action of Attorney General Luther Strange's appeal of Judge Granade's decisions in *Searcy* and *Strawser* until after the U.S. Supreme Court rules on marriage equality in June, was whether the denial of stays by the 11th Circuit and the U.S. Supreme Court would mean that same-sex couples can marry and have their out-of-state marriages recognized in Alabama before the U.S. Supreme Court rules in June – which would appear to be the unarticulated intent of the Supreme Court in denying the stay – or whether marriage licenses would be unavailable due to the Alabama Supreme Court's disagreement with Judge Granade's ruling on the merits.

For the court certainly did disagree. A large part of the *per curiam* opinion was devoted to explaining why the court believed that it did have proper jurisdiction to decide this case, a lengthy and convoluted argument that need not be repeated here, other than to say that it was energetically disputed by the dissenting judge, Greg Shaw, who argued that the case was not properly before the court since it did not, in his view, fall within the court's "original jurisdiction" and was not an appeal from a judgment by a lower Alabama court. (As to this, Justice James A. Main concurred in part with the *per curiam* and concurred in the result, expressing "concerns regarding some of the procedural aspects of this highly unusual case" but finding that Judge Enslin's intervention as a co-petitioner was sufficient to create "standing," thus giving the court jurisdiction to make a decision.)

Of more moment, at least temporarily, was the portion of the court's decision devoted to disagreeing with Judge Granade on the merits of her 14th Amendment ruling – a disagreement that extended, of course, to the rulings of four federal circuit courts of appeals and several dozen federal district judges

in other states as well. In an argument that is being picked up by reluctant state court judges around the country in jurisdictions where same-sex marriage has become available as a result of a federal district court decision that has not been stayed, the court argued that state courts are not bound on the merits of federal constitutional claims by rulings of the lower federal courts. (This argument was at the heart of Chief Justice Roy Moore's "Order" to the probate judges on February 8 not to issue marriage licenses when/if Judge Granade's stay was lifted on February 9.) This is surely correct as a matter of strict precedent. Federal district court opinions bind only the parties to the case, as Judge Granade had implicitly acknowledged when she was asked to "clarify" whether her Order in *Strawser* was binding on probate judges other than Mobile County's Don Davis, who had been added as a named defendant in the amended complaint in that case. The Constitution endows state courts with concurrent jurisdiction over federal constitutional claims, but those courts are not part of the federal court system, their rulings on constitutional issues cannot be appealed to the U.S. Circuit Courts of Appeals, and thus they are not compelled to regard federal constitutional rulings from those courts as other than "persuasive precedents." On the other hand, decisions on federal constitutional questions by state courts can ultimately be brought to the U.S. Supreme Court, whose rulings on the merits would be binding on the state courts, as the Supreme Court is designated in the Constitution as the ultimate arbiter of federal constitutional questions.

According to the Alabama Supreme Court, the state has rational justifications for providing and recognizing marriages only for different-sex couples, tied to the nature of sexual reproduction, and the numerous federal court decisions holding to the contrary over the past two years are devoid of merit. Furthermore, the court rejected any argument that the line of U.S. Supreme Court cases recognizing a fundamental right to marry had anything to do with this issue, since all of those cases involved

different-sex marriages. The court also rejected any argument that the denial of marriage to same sex couples was subject to heightened scrutiny as a form of sex discrimination, asserting that as both men and women were equally denied the right to marry same-sex partners, there was no distinction based on sex involved. The court was basically incredulous that an institution dating back to the earliest days of recorded history could be ordered to be "redefined" by a federal district court. The lengthy opinion (which ran to 134 pages in its slip opinion form of 12 point double-spaced type) relied heavily on the dissenting opinions of federal court of appeals judges, pre-*U.S. v. Windsor* rulings by various courts, and a federalism-based view of *Windsor* itself, rejecting that case's use by other courts as a basis to rule for marriage equality claims. Although Chief Justice Moore officially had nothing to do with this opinion, it seemed to have his fingerprints all over it.

The bona fides of this opinion "on the merits" can be sharply questioned, among other reasons, for not being the result of an adversary proceeding in which proponents and opponents of the claimed right of same-sex couples to marry under the 14th Amendment would argue their case. In that sense, it was a totally one-sided and virtually *ex parte* proceeding, and the court was issuing what was, in a sense, an advisory opinion coupled with an injunction against a class of elected state officials, ordering them to take an action (refusing to issue licenses to same-sex couples) that had been ruled unconstitutional on the merits by a federal district judge in cases where all requisites of standing and jurisdiction had been met and the adversary process had been followed, as demonstrated by the energetic defense of the marriage bans by the state's attorney general.

As soon as the court's opinion was issued, probate judges throughout the state ceased issuing marriage licenses to same-sex couples. A few, finding themselves caught between the federal and state court orders, just kept their marriage license windows closed for everybody. Such was the case for Judge

Davis, who appeared to be caught between conflicting orders, as he had been added as a named defendant in the *Strawser* case and ordered by Judge Granade to issue marriage licenses to the plaintiffs. Davis was directed by the Alabama Supreme Court to advise the court within two days whether he was bound by the federal district court's order to issue marriage licenses to anybody other than the plaintiffs. He asked for more time to respond, then filed a somewhat confused response. On March 11, the court issued a new opinion, 2015 WL 1036064, insisting that Judge Granade's order did not require Davis to issue marriage licenses to anybody other than the plaintiffs named in the amended complaint (as of the time the order was issued), and thus he, in common with all other probate judges in the state, was bound by the Alabama Supreme Court's order not

U.S. Supreme Court rules in June. Judge Granade rejected Davis's request, finding that the criteria for obtaining a stay of a district court injunction had not been met in the case. While conceding that "developments in these same-sex marriage cases has at times seemed dizzying," she noted that Davis was not even arguing that he was likely to win on the merits, a prerequisite to obtaining such relief. The court noted in passing that another marriage equality lawsuit, pending in the Middle District of Alabama, had been stayed by the court, and acknowledged Davis's argument that the plaintiffs in this case might engage in "forum-shopping" when moving to amend their complaint, in that allowing their amendment would give the plaintiffs in the other case a way to get around the stay, should Granade issue an order against the entire defendant class of probate judges. Granade

and defendant classes. See *Strawser v. Strange*, 2015 WL 1243257 (S.D. Ala.). Attorney General Luther Strange and Judge Davis filed oppositions to the motion. Judge Granade granted the motion, finding that plaintiffs' factual allegations were sufficient to suggest that they had a plausible argument for expanding the case. But she also commented that the issue of actually certifying the plaintiff and defendant classes was not yet "ripe" for disposition, and invited the parties to submit more extensive information. She specifically notified Strange that he should file his opposition to the class certifications by March 23. She appeared eager to move things along, and not delay the implementation of her decision just because the Supreme Court will be tackling the marriage equality issue before the end of its current term in June. On March 26, acknowledging that Probate Judge Davis had recused himself from further involvement in the *Searcy* case after issuing an order giving Ms. Searcy temporary parental rights, Judge Granade granted a motion to dismiss Davis from the case as a defendant. The lead named defendant in the case, which involved a petition by Searcy to adopt the child she was raising with her same-sex spouse (joined together under California law), is Attorney General Strange.

Meanwhile, anticipating the likelihood that Alabama will have to allow same-sex couples to marry at some future time, the state's House of Representatives passed a bill on March 12 by a vote of 69-25, immunizing ministers and judges from liability if they refused to perform any marriage due to their personal objections. Democrats opposing the measure pointed out that under existing law marriage celebrants are free to decide which couples they will marry, so the apparent purpose of the new law is anticipatory gay-bashing, a favorite sport of many state legislators in Alabama and neighboring states. There is no provision of Alabama law obligating anybody in the state to refrain from discriminating based on sexual orientation or gender identity. Indeed, Alabama law has little to say about discrimination in any form. ■

Judge Granade rejected Davis's request, finding that the criteria for obtaining a stay of a district court injunction had not been met in the case.

to issue any more marriage licenses to same-sex couples until further notice. The court also noted that the relevant Alabama statute said that probate judges "may" issue marriage licenses, implying that if Davis was concerned about violating both court's orders, he could just keep the marriage window closed in his courthouse.

In the meantime, the plaintiffs in *Strawser* sought permission from Judge Granade to amend their complaint again, this time to convert the case into a class action as to both plaintiffs and defendants, seeking to extend her Order to all the probate judges on behalf of all the same-sex couples in the state who wished to marry. While pondering that, she responded on March 16 to a renewed motion by Davis to stay her outstanding Order in order to postpone any further compliance obligation until after the

concluded that the Middle District stay "has no bearing in the instant case." Thus, Davis remains bound by a federal district court ruling holding the ban on same-sex marriage unconstitutional, but he has also received a broad hint from his state supreme court that he doesn't have to issue marriage licenses to anybody. Of course, if he opened his marriage window, he would be obliged under Judge Granade's order not to discriminate against same-sex couples, even though he is under orders from the Alabama Supreme Court not to issue them marriage licenses. Thus, the safest course for him seemed to be keeping the window closed.

After responding to Davis's motion, Judge Granade responded on March 18 to the plaintiffs' motion for leave to file a second amended complaint adding additional parties and plaintiff

First Circuit Revives Bisexual Employee's Sexual Orientation Discrimination and Harassment Claims

In *Flood v. Bank of America Corp.*, 2015 U.S. App. LEXIS 3090, 2015 WL 855752 (1st Cir., Feb. 27, 2015), First Circuit Judge Kermit V. Lipez vacated part of the Maine U.S. District Court's finding, holding that a bisexual employee who brought a Maine Human Rights Act action against her employer had plausible claims against her supervisor who harbored animosity and acted out towards her due to her sexual orientation.

Shelly Flood was a customer service employee at Bank of America Corporation and FIA Card Services, N.A. About three years after working for the company, Flood met Keri, who cleaned at the bank. They soon began dating, and spent some time together at work. At a bank social event, Flood was sitting at the LGBT table, and a senior official, Diana Castle, came over to the table, saw a photo of Flood and Keri embracing, gave a "shocked look" and walked away. After seeing the picture, Castle contacted the LGBT table sponsor, complaining that the picture depicted alcohol, and it was removed. After that evening, Castle would make disparaging remarks about Flood's hair, eating habits, work product, and began to inquire into Flood and Keri's relationship. She was also told to keep conversation about her personal life "off the floor" at work. Castle told Flood that if she wanted to attain her goal of becoming a manager, it was not a good idea to have her girlfriend hanging around her desk, for "perception" purposes.

Flood contacted Castle's supervisor seeking to file an internal harassment report, but was told she cannot. Events continued to escalate, and Flood eventually did not return to work. Flood sent a letter to Castle, explaining that she had been treated differently because of her sexual orientation and described the emotional toll it took on her. She filed discrimination charges against the Bank with the Maine Human Rights Commission, attained a right to sue letter, then brought suit against the Bank in the Maine Superior Court, alleging employment discrimination in violation

of the Maine Human Rights Act (MHRA) and common law defamation.

The case was removed to federal court on the basis of diversity jurisdiction. The magistrate judge issued a grant of summary judgment to the Bank, and the district court affirmed. This appeal followed, reviewing the district court's grant of summary judgment de novo.

Flood contended on appeal that the district court misconstrued her discharge claim as "constructive discharge," because she claims she did not resign. The court agreed, finding that the Bank used "job abandonment" as pretext for improperly terminating her employment, which merely goes to the employer's burden of producing a non-discriminatory reason for the adverse action under *McDonnell Douglas*. In light of this finding, summary judgment was inappropriate because a reasonable fact-finder could determine that job abandonment was pretext, yet can still find that the Bank actually fired Flood due to her sexual orientation under the MHRA (Me. Rev. Stat. Ann. tit. 5, § 4572(1)(A)), which makes it unlawful for an employer to discharge an employee on the basis of sexual orientation. The court stated that Flood "easily" established a prima facie case for unlawful termination, and the Bank's rebuttal is an assertion that Flood was terminated for having abandoned her job.

The court found that there was sufficient evidence to conclude that the Bank knew Flood had not abandoned her job because she had sent a letter to Castle asking for an investigation at the Bank and explained that she tried to drive to work but could not make it most of the time because her anxiety was too great. Therefore, the court stated, a reasonable fact-finder could conclude that the Bank treated Flood's letter as removing the presumption that she had resigned and planned to return to work.

The court held in accordance with the magistrate judge's finding that the evidence supports a finding of discriminatory animus if there had been an adverse employment action, such as discharge. The court found

that the evidence would permit a jury to conclude that Castle harbored animosity and undermined Flood's work performance because of her sexual orientation. Also, Castle took affirmative actions to undermine aspects of Flood's employment, and was setting her up for termination. Although Castle did not personally discharge Flood, she recommended procedures she knew would result in termination of her employment if Flood did not return to work.

The MHRA makes it unlawful for an employee to "discriminate with respect to . . . terms, conditions or privileges of employment." (Me. Rev. Stat. Ann. tit. 5, § 4572(1)(A)). That provision, in turn, authorizes a claim for hostile work environment. In Flood's hostile work environment claim, she must show, among other factors, that the harassment was based on her sexual orientation (a protected class), and that it was sufficiently severe and pervasive. Contrary to the Bank's argument that no employee explicitly spewed derogatory remarks concerning Flood's sexual orientation, "discriminatory conduct unlawfully based on one's membership in a protected class need not be overt to be actionable." (*O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001)). Evaluating all the circumstances following the Bank's employees after finding out she was bisexual, the court held that a reasonable fact-finder could conclude that she was harassed due to her sexual orientation and she had endured sufficiently pervasive harassment to alter the conditions of her employment.

Ultimately, the court vacated the grant of summary judgment on the discharge and hostile work environment portions of Flood's MHRA employment discrimination claim and remand for further proceedings, and affirmed the grant of summary judgment regarding Flood's defamation claim generally due to Flood's failure to provide factual support on her claim. – *Anthony Sears*

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

Fourth Circuit Reverses Trial Judge for Inadequate Consideration of Circumstantial Evidence of Deliberate Indifference to Safety of Inmate Rape Victim

With each judge writing separately, a divided U.S. Fourth Circuit Court of Appeals vacated and remanded a magistrate's bench trial decision adopted by Chief United States District Judge Glen E. Conrad (W.D. Va.), which ruled that Virginia corrections officials were not "deliberately indifferent" to an inmate's safety prior to him suffering multiple sexual assaults in *Makdessi v. Fields*, 2015 U.S. App. LEXIS 3883, 2015 WL 1062747 (March 12, 2015). The opinion for the court by Circuit Judge

was "obvious" from his injuries (some involving stitches and rectal bleeding and one requiring 47 days in the infirmary) and repeated complaints to them and to others (including to the F.B.I.). (After one complaint, Makdessi was assigned a new cellmate with a history of aggressive behavior and sexual misconduct, despite policies requiring their separation; a defendant flushed another complaint down the toilet.)

While the district court found that Makdessi met the first prong of the *Farmer* test (serious injury)

the risk and thus must have known about it." Direct evidence of actual knowledge is not required. *Farmer*, 511 U.S. at 842-3.

It was error to require that the prisoner give "advance warning of the risk or protest his exposure to the risk." *Farmer*, 511 U.S. at 848-9 (noting that transgender prisoner Farmer did not protest her assignment to general population prior to the assault). Similarly, named defendants need not be personally informed about the risk by the plaintiff, so long as they were in a position from which it could be found they were aware of it. It was also error to rely on defendants' protest that they did not assign cells at the prison, so long as they knew: (1) "that the undisputedly vulnerable Makdessi shared a cell with an undisputedly aggressive gang member... perhaps because it was so obvious that they had to know"; and (2) "that this continued arrangement constituted a substantial risk of serious harm to Makdessi, yet did nothing."

The majority found as a matter of law that the district court erred in requiring that Makdessi show that the supervisory defendants had direct actual knowledge about his risk.

James A. Wynn, Jr., applied the risk of harm standard in *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), to the civil rights claims of a prisoner who filed numerous grievances and complaints about his safety in prison.

Judge Wynn's opinion and the concurring opinion of Circuit Judge Diana Gribbon Motz recount in detail the factual circumstances surrounding the assaults against plaintiff Adib Eddie Ramez Makdessi, and they bear close reading by counsel evaluating a "protection from harm case" in prison. The majority found as a matter of law that the district court erred in requiring that Makdessi show that the supervisory defendants (a captain, a lieutenant, and a sergeant) had direct actual knowledge about his risk, when the knowledge could be proven by circumstantial evidence because it

and that "prison officials should have been more diligent in handling Makdessi's claims of sexual assault," it failed to apply the law that "even a subjective standard may be proven with circumstantial evidence." The majority relied on *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995), which reversed a trial decision on similar facts, noting that "a defendant cannot hide behind an excuse that he was unaware of a risk, no matter how obvious." A prison official's subjective actual knowledge can be proven by showing, for example, that the "substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning

Defendants remain free on remand to attempt to rebut the "obvious" risk evidence, but the burden shifts to them.

There is not much daylight between the opinions of Judges Wynn and Motz, although Judge Motz emphasizes: (1) Makdessi was not required to show the particular identity of his assailant in order to establish defendants' deliberate indifference, citing *Farmer*, 511 U.S. at 843; and (2) a defendant could be liable for deliberate indifference if he "declined to confirm inferences of risk that he strongly suspected to exist," citing *Brice*, 58 F.3d at 105. Judge Motz wrote that prison officials cannot "take refuge in the zone between ignorance of obvious risks and actual knowledge of risks," nor are they "free to let the state of nature take its course" within their prisons. *Farmer*, 511 U.S. at 833,

842. “[W]hen the risk is obvious, the burden shifts to the prison official to rebut the inference that he must have known about it.... Naked assertions of ignorance that defy prison procedure and logic cannot satisfy this burden.”

Circuit Judge Dennis W. Shedd dissented from the majority’s remand, noting that the district court had: (1) denied defendants summary judgment on the deliberate indifference claim, letting it go to trial; and (2) found at trial where defendants’ knowledge was disputed that Makdessi had failed to prove the subjective intent element of his claim, in findings that were not clearly erroneous. Judge Shedd wrote that while the trial judge may infer actual knowledge from the “obvious,” he or she is not required to do so; and there was sufficient evidence supporting a finding of no actual knowledge to affirm. Judge Shedd relied on *Danser v. Stansberry*, 772 F.3d 340 (4th Cir. 2014), in which the Fourth Circuit granted qualified immunity to corrections officials following a single inmate-on-inmate assault in a segregation exercise cage. In *Danser*, however, there was no evidence of prior assaults or victim grievances, and the court found that the record did not suggest that the “risk was obvious.” Judge Shedd did not cite *Brice*.

All three judges agreed that dismissal as to certain defendants was not properly preserved for appeal because Makdessi failed adequately to object to the magistrate’s recommendations as to them. Makdessi was represented in the Court of Appeals by Stephen William Kiehl, of Covington & Burling, LLP, Washington, DC (but it is unclear from the opinion when counsel appeared in the case). – *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.

Idaho Federal Judge Orders Trial on Native American Transgender Prisoner’s Claims for Protection from Harm and Religious Freedom

United States District Judge Edward J. Lodge ordered a trial on *pro se* plaintiff Jessika Ellen Stover, a/k/a Jessie E. Stover’s claims for protection from harm and for religious freedom in *Stover v. Corr. Corp. of Am.*, 2015 U.S. Dist. LEXIS 24373 (D. Idaho, February 27, 2015). After merits screening under 28 U.S.C. §§ 1915 and 1915A, Judge Lodge had permitted Stover to proceed on three Eighth Amendment claims (failure to protect claim arising from multiple sexual assaults by other

to whether her breasts were “real.” They told her the “search” was valid but refused her request for a female officer. Although they conceded the “inappropriate” strip search in court, Judge Lodge found no Eighth Amendment violation, citing *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (no Eighth Amendment violation for officer’s sexual “rubbing”); and *Somers v. Thurman*, 109 F.3d 614, 616, 623-24 (9th Cir. 1997) (no violation where female officers “gawked” and “joked” at male inmates

Stover is a Native American male-to-female transgender prisoner, who receives hormone treatment and has “feminine characteristics,” living in a “male” facility.

inmates; sexual harassment claim after correction officers order her to expose her breasts; and denial of medical care claim related to her undergarments); and on a First Amendment and statutory religious freedom claim involving Native American religious observance. Only the protection from harm and statutory religion claims survive for trial. The slip opinion is lengthy (81 pages), and the reader is directed to it for full analysis of these issues.

Stover is a Native American male-to-female transgender prisoner, who receives hormone treatment and has “feminine characteristics,” living in a “male” facility. In 2012, correction officers directed her to report to a gymnasium, where they ordered her to remove her bra to settle a “bet” as

showering). Judge Lodge recognized that “calculated” sexual harassment “unrelated to prison needs,” can violate the Eighth Amendment” – quoting *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) – but he did not apply this rule because the conduct was “non-intrusive,” “isolated” and not “severe” enough. He did not address this *pro se* plaintiff’s obvious unlawful search claim, based on prisoners’ residual rights under the Fourth Amendment and the Ninth Circuit’s *en banc* decision in *Byrd v. Maricopa County Sheriff’s Department*, 629 F.3d 1135, 1140-1148 (9th Cir. 2011) (extensive discussion of cross-gender strip searches of inmates under Fourth Amendment “reasonableness” test).

Judge Lodge’s discussion of Stover’s medical claim (at 20+

pages of slip opinion) is the most comprehensive constitutional analysis of a transgender prisoner's medical needs for underwear that any reader is likely to find. Based on the need to accommodate Stover's "growing breasts" and to treat her testicular pain from an injury, Judge Lodge separately addresses bras and briefs, finding ultimately that: (1) Stover's needs were only questionably "serious" under the Eighth Amendment and *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and (2) in any event, defendants' "reasonable" efforts to meet said needs (including obtaining garments from the women's prison) were not deliberately indifferent.

Judge Lodge ordered a trial on Stover's claim of deliberate indifference to her safety under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

The opinion provides the most comprehensive constitutional analysis of a transgender prisoner's medical needs for underwear that any reader is likely to find.

Stover was housed in a special block, where she was sexually assaulted four times in 2010 by other inmates in the open dormitory unit, in which she was the only transgender inmate among 58 male sex offenders. She wrote an "anonymous" letter expressing general fear. After the fourth assault, she "broke down" and individualized her complaint, whereupon defendants moved her to protective custody. Judge Lodge found a jury question on these facts under *Farmer*, as to whether the corporate defendants providing privatized incarceration services (the Idaho Correctional Center, operated by the Corrections Corporation of America) and the individual defendants (warden and unit counselor) were "aware of that risk yet deliberately disregarded it." Judge Lodge found

the corporate defendants potentially liable for a "policy" requiring all sex offenders (including transgender inmates with feminine features) to be housed in an open dormitory, because the risk was "obvious" under *Farmer*, applying municipal defendant liability standards under *Monell v. Department of Social Services of New York*, 436 U.S. 638, 690-94 (1978). The individual defendants could also be liable (despite Stover's initial failure to individualize her fears), because they knowingly placed a transgender inmate in a dormitory of sex offenders who "might very well seek to exploit or assault" her, quoting *Farmer*: "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all

stick" did not violate either the First Amendment or Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* [RLUIPA]. Safety concerns trumped Stover's First Amendment right to "sweat" because the area was unsupervised, and defendants' "safety" concerns were reasonable.

Judge Lodge applied a more stringent test to the sweating claim under the RLUIPA, however, because of language requiring the "least restrictive means" of achieving government interests. He ordered a trial on whether defendants' refusal to allow Stover to sweat alone after escort to the lodge by a volunteer chaplain was "least restrictive" (in his formulation: "never allowing Plaintiff to sweat alone"), citing the Supreme Court's application of the RLUIPA to correctional objections to a religious beard in *Holt v. Hobbs*, 574 U.S. ____, 135 S. Ct. 853, 864 (2015), reported in *Law Notes* (February 2015, at page 69). Such use of the RLUIPA raises the concerns expressed by the dissenters in *Burwell v. Hobby Lobby*, 573 U.S. ____, 134 S. Ct. 2751, 2787 (2014), that government civil rights protections for LGBT and other plaintiffs could clash with religious objections under the RLUIPA (and potentially state legislative proposals). Judge Lodge rejected defendants' transphobic argument that some inmates might find Stover's use of the sweat lodge "desecrating," writing: "government officials cannot avoid Plaintiff's RLUIPA claim merely by citing other inmates' religious concerns, particularly where, as here, the asserted justification is based on mere speculation as to what some other inmates might find religiously objectionable."

It is remarkable that Stover got this far *pro se* against three Boise law firms representing various defendants. Now that there will be a jury trial on protection and a bench trial on the RLUIPA, Judge Lodge should reconsider appointment of counsel. – *William J. Rold*

Puerto Rico Urges Reversal of Anti-Marriage Equality Ruling

In an unusual turnabout, the Commonwealth of Puerto Rico, respondent in Lambda Legal's appeal of the anti-marriage equality ruling in *Conde-Vidal v. Garcia-Padilla*, 2014 WL 5361987 (D. P.R., Oct. 21, 2014), is urging the 1st Circuit Court of Appeals to reverse the district court's ruling that dismissed the challenge to the Commonwealth's ban on licensing or recognizing same-sex marriages.

Lambda Legal sued on behalf of several same-sex couples seeking either to marry in Puerto Rico or to have their marriages from other jurisdictions recognized there. U.S. District Judge Juan M. Perez-Gimenez granted the government's motion to dismiss the case, holding that the complaint did not state a claim because of the Supreme Court's ruling in *Baker v. Nelson*, 409 U.S. 810 (1972), which reject an appeal from an adverse ruling by the Minnesota Supreme Court, that the issue of same-sex marriage did not present a "substantial federal question." Judge Perez-Gimenez found that the Supreme Court had never overruled this decision, and as a lower federal court judge he was bound by it, rejecting the argument that subsequent rulings by the Supreme Court had rendered *Baker* a nullity. Nonetheless, he also proceeded to find that the state had a rational basis to distinguish between same-sex and different-sex couples, relying on arguments that have been repeatedly rejected by several dozen other federal courts (including four circuit courts of appeal) over the past two years. Plaintiffs appealed to the 1st Circuit, and Puerto Rico's responsive brief was due to be filed on March 20.

The brief filed under the names of Solicitor General Margarita Mercado-Echegaray and Assistant Solicitor General Andres Gonzalez-Berdecia observed that the Supreme Court's decision in January to grant petitions for certiorari seeking review of the 6th Circuit's decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), as well as the Supreme Court's refusal to stay marriage equality rulings in response to every stay petition filed since October 6, 2014 (including a stay petition filed by Alabama after the Court had granted the

cert. petition), meant that clearly *Baker v. Nelson* was no longer controlling on the district court. If same-sex marriage does not present a substantial federal question, then the Court would not have granted cert. to review the 6th Circuit's decision, which was premised in part on Michigan's contention that *Baker v. Nelson* bound the lower federal courts to deny marriage equality claims. Although Puerto Rico had won its motion to dismiss by advancing *Baker v. Nelson* as a determinative precedent, that argument is no longer available before the 1st Circuit in light of these subsequent developments.

Furthermore, wrote Puerto Rico's lawyers, they agree with the plaintiffs' contention that denying the right to marriage to same-sex couples implicates a fundamental right. If it is open to

there are some rights that have been reserved to the People directly and which no government may infringe, regardless of individual or personal views on the matter. 'Our obligation [like this Court's] is to define the liberty of all, not to mandate our own moral code.' *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992). Article 68 of the Civil Code of Puerto Rico excludes LGBT couples from the legal entitlements and rights attendant to civil marriage. Thus, the Commonwealth of Puerto Rico acknowledges that the statute in controversy raises substantial constitutional questions anent the constitutional guarantees of equal protection of the laws and substantive due process."

They continued: "Because Puerto Rico's marriage ban impermissibly

Puerto Rico's lawyers now agree with the plaintiffs' contention that denying the right to marriage to same-sex couples implicates a fundamental right.

the court to proceed to the merits, then some form of heightened or even strict scrutiny would apply. Although an equal protection claim in the 1st Circuit was accorded only rational basis review in that circuit's pre-*Windsor* cases, it was possible that heightened scrutiny might be applied to such a claim as well. Under either theory, the lawyers conceded, the ban on same-sex marriage was no longer defensible.

"It is not usual for the Executive Branch of the Commonwealth of Puerto Rico to refuse to defend the constitutionality of legally-enacted statutes," they wrote. "It is even less usual to adopt a somewhat different position at the appellate level than the one espoused before the lower court. But this is not a usual case and neither the law nor common sense requires us to treat it as such. In a constitutional democracy

burdens Plaintiffs' right to the equal protection of the laws and the fundamental right to marry, we have decided to cease defending its constitutionality based on an independent assessment about its validity under the current state of the law. . . . If History has taught us anything, it is that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.' *Lawrence*, 579 U.S. at 579. This case represents but another attempt from a politically disadvantaged group of our society to be included within the full scope of the legal and constitutional protections that most of us take for granted. Plaintiffs seek no preferential treatment; only equality. The Executive

Branch of the Commonwealth recognizes the LGBT community's right to equality under the law."

It is unclear from the brief whether the government is asking the 1st Circuit to issue a final ruling on the merits, or merely to reverse the motion to dismiss and remand the case for further proceedings in the district court. However, if the 1st Circuit were just to reverse the dismissal order, it is likely that the Supreme Court will have issued its ruling, anticipated to come by the end of June, before the district court would get around to issuing a ruling on a subsequent motion for summary judgment by the plaintiffs. In any event, if the appeal before them is unopposed, it might be appropriate for the 1st Circuit to dispense with oral argument, reverse the district court without an opinion, and remand the matter to the district court for further proceedings.

In the meantime, however, it was clear that there was not unanimous support in Puerto Rico for the government's action, as some local legislators called for action to defend the statutory marriage ban before the 1st Circuit. Although the defendants-appellees will not defend the statute, it is possible that the legislature will authorize some kind of attempted intervention to present a defense. It seems clear that relying on *Baker v. Nelson* is no longer viable; even Supreme Court Justice Clarence Thomas, no supporter of same-sex marriage, opined in his dissent from the denial of a stay in the Alabama case that the topic presents an important constitutional question, so the dismissive 1972 statement no longer applies. But the never-say-die opponents of marriage equality continue to insist, as the 6th Circuit majority held, that the question of "defining" marriage should be left to the political process, and that an institution whose heterosexual definition dates back millennia cannot have suddenly become unconstitutional, and they will undoubtedly attempt to put such arguments before the 1st Circuit – even though that Circuit has essentially rejected them in its ruling striking down Section 3 of DOMA, *Commonwealth of Massachusetts v. U.S. Dep't of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), cert. denied, 133 S. Ct. 2884, 133 S. Ct. 2887 (June 27, 2013). ■

Third Circuit Refuses Withholding of Removal Relief for Gay Honduran Man

A panel of the U.S. Court of Appeals for the 3rd Circuit affirmed a Board of Immigration Appeals decision, rejecting a claim for withholding of removal from the United States by a gay Honduran man despite his testimony about past rapes, dangerous country conditions, and past threats from a criminal gang. *Gonzalez-Posadas v. Attorney General of United States*, 2015 U.S. App. LEXIS 4945 (March 26, 2015).

The plaintiff "unlawfully entered" the U.S. on September 28, 2012. He was quickly apprehended by Homeland Security agents, found to be inadmissible, and removed back to Honduras before the end of October. But

but suffered persecution on account of perceptions that he was gay. Later in the process he stated bluntly "I'm gay" and attributed his earlier statements to the assertion that "the interview had taken place too quickly and that he did not feel comfortable disclosing that to the interviewer." Ultimately he told a harrowing tale of attempts by a criminal gang in Honduras, the Maras, to recruit him, accompanied by various threats and, at times, homophobic epithets, and of repeated rapes by a male cousin, who made threats to him in the event he disclosed the rapes to anybody. He spoke about seeking help from the police in connection with the gang solicitations, but without

The Immigration Judge ruled against him, finding that his credibility was "suspect" because his story was evolving over time.

he "unlawfully reentered" the U.S. on February 21, 2013, this time managing to elude DHS for about a week, when he was issued a Notice of Intent/Decision to Reinstate Prior Order, which means he was precluded from seeking asylum. However, he could seek withholding of removal in order to avoid being returned again to Honduras, which he did, expressing fear of returning there, and an asylum officer interviewed him. The interview persuaded the asylum officer that he had established "a reasonable fear of persecution in Honduras," and his case was referred to Immigration Judge Mirlande Tadal for a hearing.

The hearing was his downfall, however. What he told the initial asylum officer differed in some particulars from what he testified in the hearing, and his testimony evolved further as he appealed adverse rulings, detracting from his credibility. In the first interview, he said he was not gay

success due to "lack of evidence," and he introduced State Department and Human Rights Watch materials showing the hazardous conditions for gay men in Honduras. Countering this, the government introduced evidence that the government of Honduras was concerned about the anti-gay activities in the country and had set up a "special unit" to combat the problem.

The Immigration Judge ruled against him, finding that his credibility was "suspect" because his story was evolving over time – "with additional self-serving, specific details appearing in three successive amendments to his application and then in his live testimony." The IJ also focused on factual inconsistencies in the direct testimony compared to his application and testimony on cross-examination.

Although the IJ accepted his contention that he was a "member of the social group of homosexual males"

and had been the victim of rape by his cousin and extortion by the criminal gang, this evidence was “insufficient to establish past persecution or a risk of future persecution on account of his sexual orientation.” The IJ found, and the 3rd Circuit endorsed, the view that the gang sought to recruit him because of his family’s money, not because of his sexual orientation. Specifically, he presented no evidence of persecution by the government, as such, much less fear that the government would “acquiesce in his torture,” which would be necessary for extending protection under the Convention Against Torture (CAT). The Board of Immigration Appeals, dismissing the appeal, concluded that two past unreported rapes did not constitute persecution, and that he had failed to show a clear probability that he would be persecuted in the future on account of his homosexuality. “The Board agreed that any sincere fear of harm or torture harbored by Gonzalez-Posadas was speculative and that he had not established government consent or acquiescence in any post torture or the likelihood of it in the future.”

The 3rd Circuit rejected the man’s argument that the IJ and the Board had erred in concluding that he had not suffered past persecution sufficient to come within the protection of refugee law. “The problem with Gonzalez-Posadas’s argument is that it relies on a narrow and naturally one-sided interpretation of the record,” wrote Circuit Judge Kent Jordan, an appointee of President George W. Bush. “Despite the picture he paints, substantial evidence in the record – including his own prior statements – can be understood to show that the Maras were interested in him for two reasons: he had money, and he was a potential recruit. For instance, when asked point-blank by the USCIS interviewer why the Maras threatened to harm him, Gonzalez-Posadas responded, ‘Because they wanted to steal from me.’ In his application for withholding of removal, he stated, ‘My mother and I were targets of extortion by the Maras’ because the gang believed that the two of them received money from his sister in the United States. He further stated that he feared death and torture

at the hands of the Maras because he had refused to join their gang, he had reported them to the police, and he had attempted to escape from them. At no point in the application did Gonzalez-Posadas suggest that the gang had any interest in harming him on account of his homosexuality.” Judge Jordan also said that the evidence did not show that the Maras’ alleged interest in recruiting “young men” had anything to do with sexual orientation. “While it may certainly be true that the Maras used homophobic slurs and sexual threats when addressing Gonzalez-Posadas, the record can support the conclusion that the abusive language was a means to an end – namely cowing Gonzalez-Posadas into paying them off or joining their gang.”

In addition, briefly mentioning the two rapes the man claims to have experienced at the hands of his cousin, “the conclusion of the IJ that they were ‘isolated criminal acts’ that were not motivated by Gonzalez-Posadas’s homosexuality is supported by substantial evidence,” wrote Judge Jordan. Thus, they could not serve as the basis for finding past persecution.

In terms of fears of future persecution, which can sometimes serve as an independent basis for withholding of removal, the court found that the man had presented no evidence showing it was likely he would be “singled out individually” for persecution because of his sexual orientation, having failed to show a “pattern or practice of persecution of a group of persons similarly situated” to him. Countering his claim that the record showed that he “suffered homophobic mistreatment that will likely continue to worsen in the future such that it will rise to the level of persecution,” the court asserted that a view of the “entirety of the record” did not support his claim. “First, as we have already discussed, Gonzalez-Posadas did not establish that the Maras targeted him on account of his sexual orientation, nor did he show that the rapes he suffered by his cousin were related to his (Gonzalez-Posadas’s) sexual orientation,” wrote Jordan. “Second, as to the documentary evidence of country conditions in Honduras, we cannot agree that the

evidence compels the conclusion that Gonzalez-Posadas is more likely than not to suffer persecution on account of his sexual orientation, especially in light of the statements in the 2013 Human Rights Watch Report that the Honduran government has established a special unit in the attorney general’s office to investigate crimes against LGBT persons and other vulnerable groups. While the documentary evidence does demonstrate that LGBT persons may face violence at the hands of their fellow Honduran citizens and suffer indignities and discrimination, the record does not compel the conclusion that there is a ‘systemic, pervasive, or organized’ pattern or practice of persecution of LGBT persons in Honduras. Again, there is more than one way to view the record before us, but we are required to uphold the decision of the Board when there is, as in this case, substantial evidence to support it.”

Decisions like this are frustrating to read. They demonstrate the limits of refugee law in providing protection to people who may be at real risk of danger to life or limb in their home country, and also contain more than a hint of bureaucratic obfuscation in the opinions of the IJ, the BIA and the courts of appeal. To say that two anal rapes by a male cousin were not sufficiently “severe” to constitute persecution seems on some level to be absurd, and to withhold protection from a person subject to threats and extortion by a criminal gang – because a special unit is claimed to have been set up in the attorney general’s office without any evidence of its effectiveness being mentioned by the court – also seems quite harsh. Perhaps much of this is an artifact of the limited reach of the applicable law, which focuses primarily on government or official persecution, and as well due to the appellant’s inconsistent stories, which can raise credibility questions. If, as seems possible, the more recent and detailed account is closer to the truth, then it sounds like the appellant should have been a good candidate for refugee protection.

The opinion lists as counsel for Gonzalez-Posadas two attorneys with Immigration Equality: Michelle P. Gonzalez and Aaron C. Morris. ■

Federal Court Orders Stay of New Family & Medical Leave Act Regulation

U.S. District Judge Reed O'Connor, sitting in the U.S. District Court for the Northern District of Texas in Wichita Falls, issued an order on March 26 requiring the U.S. Department of Labor to stay the implementation of a new regulation that changes the definition of "spouse" under the federal Family and Medical Leave Act to include same-sex couples, wherever they reside, who were married in a jurisdiction that allows same-sex marriages. *State of Texas v. United States of America*, 2015 U.S. Dist. LEXIS 38264, 2015 WL 1378752. Judge O'Connor's order was part of a preliminary injunction awarded to the states of Texas, Arkansas, Louisiana and Nebraska, who joined together as co-plaintiffs in a case originally filed by Texas Attorney General Ken Paxton.

It was unclear from the court's order whether the regulation was stayed in all of its applications, or just as applied to the state governments acting as employers. It was also unclear whether it would apply just to the four co-plaintiff states, or to all states that do not presently recognize same-sex marriages. Responding to this lack of clarity, on March 31 the Justice Department filed a request with the court for a hearing on April 13, seeking an opportunity to argue that the preliminary injunction should not have been issued, and setting forth the government's understanding that the order only required that enforcement of the regulation be stayed as against the four plaintiff states in their roles as employers. The Labor Department posted a notice on the FMLA portion of its website advising that the new regulation is not applicable to the governments of those four states while the preliminary injunction is in effect. The Justice Department's filing takes the position that the stay does not apply to the application of the new regulation to non-governmental employers in those states, or to anywhere else in the country.

The Family and Medical Leave Act, enacted during the Clinton Administration in 1993, requires employers with 50 or more employees to make unpaid leave available for certain purposes to full-time employees after they have completed a year of service. The FMLA also applies to state governments acting as employers.

Family leave could include time off to take care of a spouse or child with health problems. The statute defined "spouse" as "a husband or wife, as the case may be." Regulations proposed by the Labor Department in 1993 provided that "spouse" means "a husband or wife as defined or recognized under state law for purposes of marriage in states where it is recognized." In 1995, the Department published a "final rule" making clear that the law of the state where an employee resides would control for purposes of determining spousal status.

After the Supreme Court struck down Section 3 of the Defense of Marriage Act in 2013, the federal government came under the constitutional obligation to recognize legally-married same-sex couples. However, many states withhold such recognition, and the existing FMLA regulation would thus withhold the federal benefit entitlement from married same-sex couples living in states that did not recognize their marriages.

The Labor Department proposed to solve this problem by issuing a new regulation, changing the definition of "spouse" to include all legally-married same-sex couples, regardless where they live. The proposed regulation was published in the Federal Register, comments were received and studied, and a final rule was published in the Federal Register (80 Fed. Reg. 9990 (Feb. 25, 2015)), to go into effect on March 27.

Texas Attorney General Paxton's lawsuit claimed that the Labor Department could not change

the definition of spouse for state government employers. For one thing, he argued, Section 2 of the Defense of Marriage Act, which the Supreme Court did not address in its DOMA decision, specifically provides that states are not required to recognize same-sex marriages performed in other states. For another, he argued, the Supreme Court's ruling acknowledged that states are entitled to decide who can marry and whose marriages will be recognized within their borders. According to this reading of the case, *U.S. v. Windsor*, Section 3 of DOMA was unconstitutional because Congress does not have authority to withhold recognition for federal purposes of marriages that states allow and recognize. This is the view, argued by Chief Justice John Roberts in his concurring opinion, that *Windsor* is essentially a "federalism" case. It's a view that Justice Anthony Kennedy specifically disclaimed in his opinion for the Court, however, and the question of how to characterize that decision is a topic of lively debate among legal scholars and lower court judges.

Paxton argued that the Labor Department can't order Texas through a regulation to recognize marriages contrary to the Texas Constitution and statutes, especially when that regulation conflicts with Texas's right, under Section 2 of DOMA, to refuse to recognize the marriages.

Although there is a respectable body of scholarly opinion that Section 2 of DOMA is unconstitutional, and many federal courts, including four circuit courts of appeals, have ruled that states are required to recognize legally contracted same-sex marriages, the Supreme Court will not speak on the merits of these issues until it rules in *Obergefell v. Hodges*, most likely in June after the April 28 oral argument in Washington. (In *Obergefell*, the federal district court held that Ohio's refusal to recognize a same-sex

marriage contracted in another state violated the 14th Amendment, and gave no weight to Section 2 of DOMA.)

Until then, Judge O'Connor pointed out, the district court is bound by existing precedents in the 5th Circuit. Although a panel of the 5th Circuit heard arguments in several marriage equality appeals early in January, it has yet to issue a decision. Since prior 5th Circuit precedents mandate that trial judges in the circuit use the most deferential standard of judicial review when considering laws that discriminate because of sexual orientation, and Section 2 of DOMA is still in effect, Judge O'Connor concluded that a state government employer cannot be compelled by a federal regulation to recognize same-sex marriages performed in other states.

This is only a preliminary injunction, and Judge O'Connor cautioned that upon a full consideration of the merits there might a different conclusion, especially if that takes place after either the 5th Circuit or the Supreme Court rules on pending marriage equality cases. So this stay may turn out to be a temporary roadbump on the path to equal treatment for married same-sex couples living in states that don't recognize their marriages.

Although Judge O'Connor's legal analysis concluded that the Labor Department could not by regulation order states to recognize same-sex marriages, his stay was phrased in more general terms: "The Department of Labor must stay the application of the Final Rule, pending a full determination of this matter on the merits." This might just mean that for now the rule does not apply to government workplaces in Texas and the other plaintiff states, but can go into effect for other workplaces. That's what it should mean to be consistent with the court's reasoning. The test will come when a private sector employee in Texas requests FMLA leave to care for a same-sex spouse, is turned down, and seeks vindication in the courts. But the entire problem may disappear when the Supreme Court rules in June. ■

Missouri Appeals Court Frees Gay Man from Sex Offender Registration Requirement

In 1988 Jerome Keeney, Jr., was arrested in a typical sting operation by a St. Louis County vice cop, and pled guilty in 1989 to the charge of attempted "sexual misconduct." His crime? Groping an undercover police officer who specifically sat with him in his parked car at a highway rest stop and chatted him up seeking to provoke such a move. The St. Louis County Circuit Court imposed a suspended sentence (no jail time) and two years' probation. So he thought that was the end of it. Flash forward to January 8, 2010, when Keeney was instructed to file a registration with

Indeed, the state produced an affidavit from the plainclothes police officer, sworn to in 2014, claiming that it was not consensual. Keeney had leaned over and groped him, said the officer, without his permission.

Keeney appealed, and the Missouri Eastern District Court of Appeals ruled in his favor on March 24, 2015, in *Keeney v. Fitch*, 2015 Mo. App. LEXIS 307, 2015 WL 1384002. A unanimous three-judge panel ruled that Keeney should not be required to register.

Writing for the court, Judge Sherri B. Sullivan filled in the history. In 2006,

He had been charged with attempting to violate the Missouri sodomy law, which became unenforceable due to the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*, and which was subsequently repealed by the Missouri legislature.

the Missouri Sex Offender Registry on account of that 21-year-old guilty plea. Outrageous, especially considering that the offense to which he pled guilty was no longer a crime. He had been charged with attempting to violate the Missouri sodomy law, which became unenforceable due to the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*, and which was subsequently repealed by the Missouri legislature.

Keeney protested and filed a Petition with the St. Louis County Circuit Court, arguing that he should not be required to register. The trial judge, Robert S. Cohen, ruled against him, holding that his conduct in 1988 was not innocent at the time, that it was "in public" and so not constitutionally protected because *Lawrence v. Texas* only protected consenting sexual conduct in "the home," and that it was not consensual.

Congress passed a law instructing states to set up sex offender registration systems and require previously convicted sex offenders to register. The definition of a "sex offender" in the federal statute is "an individual who was convicted of a sex offense," which includes "a criminal offense that has an element involving a sexual act or sexual contact with another" and "an attempt or conspiracy to commit" that sexual act or contact. The federal law specifically applies to convictions under state sex crimes laws.

Missouri had enacted its own registration law back in 1994, which was amended in 2006 to provide that anybody required to register as a sex offender under federal law was also required to register under the state law.

continued on page 189

HIV Discrimination Case Survives Summary Judgment Motion

Kathryn Zabell's employment discrimination lawsuit alleging that she was wrongfully terminated because her supervisor mistakenly believed that she was HIV-positive has survived a summary judgment motion in *Zabell v. Medpace, Inc.*, 2015 U.S. Dist. LEXIS 27069, 2015 WL 1000424 (S.D. Ohio, March 5, 2015).

Zabell was employed since November 2010 as a medical writer by Medpace, a contract research organization. In June 2011, Zabell was sexually assaulted, and in July 2011, she discovered that her assailant was HIV-positive. She claimed that her supervisor, Dennis Breen, upon learning of her HIV

qualified for the position, suffered an adverse employment decision, that Medpace knew of her disability, and that the position remained open while the employer sought other applicants or that she was replaced.

With respect to being regarded as disabled, Judge Wehrman cited the ADA, which states that a person is disabled if she is "regarded as having" a disability. Judge Wehrman noted that there have been recent medical advances in the treatment of HIV, that he was bound by a 1998 case holding that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease," and found that

Medpace argued that Zabell's termination was solely because of poor work performance, so the burden shifted to Zabell to show that poor work performance was merely a pretext. Zabell argued that the proximity of Breen learning of her HIV exposure and her termination were "suspicious timing," and further argued that Medpace had changed its reasoning for her termination, as they were no longer arguing the same reasons given to the EEOC. Judge Wehrman noted that there were three categories of evidence on the issue: testimony of Medpace employees, Zabell's testimony, and written documentation accumulated during Zabell's employment, further noting that "Medpace has produced over 80 thousand documents in this case, but only one indicates that Zabell generally failed to meet expectations – and that was an email Breen drafted on October 21, 2011, *after* he had decided to terminate her." The judge found after construing Zabell's testimony and evidence in the light most favorable to her that there was a genuine issue of material fact as to whether Medpace's proffered rational was pretextual, requiring denial of the motion for summary judgment.

With respect to Zabell's request for punitive damages, Judge Wehrman held that "given the disparity between the parties' version of events and the Court's need to construe the evidence in the light most favorable to plaintiff, summary judgment should be denied." Finally, Judge Wehrman held that "as a general rule, when a court finds discrimination it must award backpay," noting that the exceptional circumstances necessary to deny backpay are "exceedingly rare."

Accordingly, while granting Medpace's motion for summary judgment with respect to Zabell's ERISA interference claims, the judge denied summary judgment on all the other claims. – *Bryan Johnson*

"HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."

exposure, ceased casual conversation, had uncomfortable body language, tried to physically avoid her, and asked her if she wanted to move her desk away from other employees. About three months later Medpace terminated Zabell's employment. Zabell filed a charge with the EEOC, and later field the instant case in the federal district court alleging violations of the American Disabilities Act (ADA), Ohio discrimination laws and ERISA.

Medpace moved for summary judgment on all of Zabell's claims. Zabell opposed summary judgment on her ADA and Ohio state claims, waiving her ERISA interference claim.

In adjudicating Medpace's motions for summary judgment, Magistrate Judge J. Gregory Wehrman set forth the analysis: Zabell must establish that she was disabled, was otherwise

since the record reflected that Breen (mistakenly) believed that Zabell was HIV-positive and terminated her shortly after learning of her HIV exposure, there were disputed factual issues and therefore summary judgment was not appropriate.

Judge Wehrman ruled that Zabell was qualified for the position based upon her Ph.D. degree and her mid-year evaluation score, which was sufficient to support her claim that her performance was meeting Medpace's expectations. Judge Wehrman was persuaded that Zabell satisfied her burden to present a *prima facie* case, as she demonstrated that she was terminated around three months after Breen learned of her HIV exposure, that other employees scored lower than she did on mid-year evaluations and were not terminated.

Federal Court Rejects Grindr Liability in Underage Hook-Up Situation

A gay man's attempt to hold Grindr responsible for his arrest and prosecution for sex with a minor was cut short on March 13 when U.S. District Judge Jerome B. Simandle ruled that the provider of an "interactive computer service" enjoys statutory immunity from liability for harm resulting from the content posted to its service by third parties. *Saponaro v. Grindr, LLC*, 2015 U.S. Dist. LEXIS 30795, 2015 WL 1137870 (D. N.J.).

Because Judge Simandle was ruling on Grindr's motion to dismiss the complaint, he had to accept as true for purposes of deciding the motion William F. Saponaro, Jr.'s claim that he was unaware that the boy who turned up for the threesome with Saponaro, age 52, and his friend Mark LeMunyon, 24, was only 13 years old. The issue for Judge Simandle was whether Saponaro's factual allegations, if hypothetically accepted as true, would be sufficient to assert a legal claim for liability against Grindr.

According to Saponaro's complaint, LeMunyon set up the threesome after the 13-year-old boy, who was a registered Grindr user, contacted LeMunyon seeking a "sexual encounter." Judge Simandle noted, "It appears that LeMunyon and Plaintiff had some form of pre-existing relationship prior to the operative events of this case," but that the nature of that relationship was not spelled out in Saponaro's complaint. Saponaro alleged that he is not a registered Grindr user. Grindr's Terms of Use provide that the service is available only to adults. Saponaro claims that when he questioned LeMunyon about the boy's age, LeMunyon assured him that the boy had contacted LeMunyon through Grindr so he must be at least 18. Evidently Grindr does not take any steps to verify the age of those who register to use the service.

The boy contacted LeMunyon on June 21, 2012, and LeMunyon then contacted Saponaro to arrange the meeting, which "came to fruition at

Plaintiff's home in Cape May some time during the following week," wrote Judge Simandle. Saponaro and LeMunyon were arrested on June 28 and charged with sexual assault and endangering the welfare of a child. They face potential prison terms of up to 20 years.

Almost two years after his arrest, Saponaro filed his lawsuit against Grindr in New Jersey Superior Court in Cape May County, claiming that Grindr was negligent "by allowing the minor to hold himself out as an adult of consenting age on its on-line service." Saponaro claimed that he reasonably relied on Grindr's Terms of Service, and that Grindr's negligent failure to verify the age of registrants had led to Saponaro's arrest and the costs he has incurred in defending himself from the criminal charges. Saponaro also added a claim for negligent infliction of emotional distress.

Section 230 of the Communications Decency Act (CDA), a federal law, affords broad protection to providers and users of any "interactive computer service," who are not to be treated as the "publisher" or "speaker" of any information provided by "another information content provider." Translated into everyday language, this means that Grindr is not liable for information posted to its service by individuals, and can't be held responsible to perform the functions of an editor or gatekeeper regarding the content of publications. By contrast, for example, a newspaper may be held liable for printing defamatory letters to the editor. Numerous federal courts have dismissed lawsuits against internet service providers by individuals claiming to have been harmed as a result of information posted on their services, relying on Section 230 of the CDA.

Saponaro's complaint relied on a 2008 decision by the 9th Circuit Court of Appeals, *Fair Housing Council of San Fernando Valley v. Roomates.com*, 521 F. 3d 1157, upholding liability for Roomates.com, an online roommate-

matching service, for violating laws against housing discrimination. Roomates.com required applicants for its service to fill out a questionnaire that inquired about their sex, family status and sexual orientation, in violation of a local housing discrimination law. Judge Simandle found the situations distinguishable. Roomates.com's questions "develop content that facially violates a state or federal statute." By contrast, the questionnaire that Grindr users complete "asks users to enter information about themselves but these questions are facially benign." In other words, Grindr's questionnaire did not ask people for illegal information in the context of dating or match-making.

The court found that Congress had strong policy support for adopting the broad protection for ISPs, as the statute states that it is U.S. policy to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Congress considered that holding internet service providers responsible for third party content would severely stifle freedom of speech on the internet, as providers would likely err on the side of excluding material rather than risk being sued. Also, given the sheer volume of third party content posted on interactive websites, the costs of monitoring and removing objectionable posts would be overwhelming. Websites that do attempt to remove objectionable content rely on users to alert them.

Even if the CDA did not protect Grindr in this case, Judge Simandle ruled, Saponaro had also failed to assert a valid claim under New Jersey tort law. In order to hold somebody liable for harm caused by their negligence, a plaintiff has to show that the defendant violated some duty owed to the plaintiff. The scope of duty is circumscribed by foreseeability on the part of the defendant that its conduct may cause harm to the plaintiff. Perhaps LeMunyon, the Grindr user approached by the 13-year-

old for sex, might raise such a claim, but Saponaro, who is not a registered Grindr user could not.

“The communications that occurred on Defendant’s website that ultimately led to the illegal sexual encounter were exclusively between LeMunyon and the minor, both of whom were registered subscribers to the website,” wrote the court. “Plaintiff does not allege to be a subscriber to the website, nor does he allege to have participated in the communications with the minor on Defendant’s site. Indeed, there is no allegation that Plaintiff ever used Defendant’s site at all. He was not a foreseeable plaintiff in this case, and therefore Defendant did not owe a duty of care towards him.”

The court rejected Saponaro’s argument that “defendants must clearly have foreseen the potential for use by minors,” speculating that this argument might be relevant to “the question of whether harm to an underage user of Grindr was foreseeable,” but “does not show that there was a foreseeable risk that a non-Grindr user would be injured by the online actions of a minor.” Furthermore, the 3rd Circuit Court of Appeals, whose rulings are binding on federal courts in New Jersey, had previously ruled that “publishers of online content do not have the ability to exercise care over user-generated content.”

Given these conclusions, Judge Simandle said he need not address Grindr’s alternative defensive argument that Saponaro was “the intervening cause of his own harm, since it was Plaintiff who met and had contact with this 13-year-old boy, not Defendant.” Concluded the judge, “Much common sense supports this argument, but it may not be resolvable on a motion to dismiss in which Plaintiff’s allegation, that he was unaware of the boy’s age, must be accepted as true.”

The bottom line for Grindr users, of course, is not to rely on Grindr’s terms of service in drawing conclusions about the age or other salient characteristics of people they meet on-line. While it might not seem particularly erotic or romantic, asking for proof of age of a youthful on-line contact is the safest way to go. ■

N.C. Appeals Court Revives Ex-Husband’s Duress Claim Against Enforcement of Separation Agreement

In an opinion filed on March 3, 2015, by Chief Judge Linda McGee, the Court of Appeals of North Carolina overturned orders of the trial court from January 2 and March 10, 2014, which had granted partial summary judgment in favor of Plaintiff Maria Nell Pilos-Narron in a dispute about the enforceability of a separation agreement signed by her ex-husband, Gregory H. Narron. *Pilos-Narron v. Narron*, 2015 N.C. App. LEXIS 149, 2015 WL 872193. At the heart of the case is a disagreement about the conditions under which Defendant accepted a separation agreement with Plaintiff and the division of marital assets

Defendant’s appeal, we must first determine whether the orders of the trial court are immediately appealable. On this matter, both parties agreed that Defendant’s appeal is interlocutory and is thus reviewable. In her brief, Plaintiff interestingly never argues that Defendant entered into the separation agreement *free* from undue influence; rather, the claim is that Defendant did not adequately point out duress in his amended complaint. Even though Defendant indeed did not explicitly plead duress in his amended counterclaim, the court finds that the alleged facts clearly implicate Defendant’s free will and thus

At the heart of the case is a disagreement about the conditions under which Defendant accepted a separation agreement with Plaintiff and the division of marital assets under such a separation agreement.

under such a separation agreement.

As this is an appeal by Defendant from a grant of summary judgment against him, we must consider the issues in the light most favorable to Defendant. The parties were married on September 13, 1986, and they completed a separation agreement on January 27, 2012. Since executing the separation agreement, Defendant has argued that this contract is invalid because he entered into it under duress. Specifically, Defendant notes that Plaintiff threatened to negatively affect Defendant’s reputation in the professional and general community by spreading rumors of him as a “gay, narcissistic therapist who was leading a double life.” Defendant further claims that this kind of threat happened continually in order to force him into ongoing compliance with the separation agreement.

Before studying the merits of

there is an issue about duress.

In addition, Plaintiff makes the claim that Defendant’s affidavit in opposition to Plaintiff’s motion for summary judgment should be dismissed because it “simply echoed the allegations in his counterclaim.” Although Plaintiff cites a number of past cases to bolster this claim, the court finds that the relationship between this specific case and the cases that Plaintiff provided as evidence is rather weak.

In short, Defendant has established material questions of fact on the subject of whether he entered into and continued to operate under duress regarding the separation agreement. Because of this doubt, the court reverses the trial court’s previous decision of summary judgment in favor of Plaintiff. – *Daniel Ryu*

Daniel Ryu studies at Harvard ('16).

MARRIAGE EQUALITY

UNITED STATES SUPREME COURT

– On March 5, the Supreme Court announced that it will hear oral arguments on the four pending marriage equality cases beginning at 10 a.m. on Tuesday, April 28, 2015. The Court consolidated the arguments into a 2-1/2 hour span, the first part devoted to the question whether the 14th Amendment requires states to allow same-sex couples to marry, and the second part devoted to whether states are required to recognize lawfully contracted same-sex marriages from other states. The Court also announced on March 5 that both the written transcript and the audio recording of the argument will be posted on the Court's website by 2 p.m. on the argument date. The Court rarely grants requests for same-day posting of audio, although transcripts are routinely posted shortly after the argument concludes. The Court requested that Petitioners and Respondents designate one attorney to argue their side on each of the two questions. Although four states are defending their same-sex marriage bans, they got together on designating one attorney to argue on each of the two questions: John Bursch, a former Michigan solicitor general, on question one, and Joseph Whalen, a Tennessee associate solicitor general, on question two. On March 31, counsel for Petitioners sent a joint letter to the Clerk of the Court designating Mary Bonauto, Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (Boston), as their counsel to argue the first question, and Douglas Hallward-Driemeier, head of the Supreme Court litigation practice at Ropes & Gray LLP, to argue the second question. Bonauto argued the first completely successful state supreme court marriage equality case, *Goodridge*, before the Massachusetts Supreme Judicial Court in 2003, and played a leading role in bringing marriage equality to New England. Hallward-Driemeier worked in the Justice Department for a decade, much of that time as an assistant

Solicitor General, in which capacity he argued the government's position in the Supreme Court in fourteen cases and participated in bringing about 150 cases. Fifteen minutes of the Petitioner's time will be given to the Solicitor General, to present the position of the government in support of Petitioners.

8TH CIRCUIT COURT OF APPEALS

– On May 12, a three-judge panel of active judges of the 8th Circuit will hear oral argument in appeals by several states from district court pro-marriage equality rulings. The panel announced for the argument consists of Circuit Judge Roger Wellman (appointed by Ronald Reagan in 1985), William Benton (appointed by George W. Bush in 2004), and Lavenski Smith (appointed by George W. Bush in 2002). This doesn't look particularly promising for a pro-marriage equality affirmance. The 8th Circuit is probably the most Republican circuit in the United States, as only three of the eleven active judges were appointed by Democratic presidents: two by Clinton and one by Obama. On the other hand, one of the most strongly pro-marriage equality circuit court opinions to emerge thus far was written by a Ronald Reagan appointee to the 7th Circuit, Richard Posner. So, who can tell what might happen? Unless this panel is inclined to rule soon after hearing the argument, it seems unlikely that it would have issued an opinion before the U.S. Supreme Court announces its ruling in *Obergefell v. Hodges*, which would be expected during the last week of June.

ALABAMA – On March 5, the Alabama House of Representatives Judiciary Committee voted 9-4 to approve a measure that would allow judges and ministers to refuse to marry people if the marriage would violate their religious beliefs. In Alabama, elected county Probate Judges issue marriage licenses, and the ceremonies have to be

solemnized by either a religious leader or an active or retired judge. At present none of the probate judges are issuing marriage licenses to same-sex couples, despite a federal district court ruling striking down the state's ban on such marriages which was denied a stay by the 11th Circuit and the Supreme Court, because of an order by the Alabama Supreme Court that such licenses not be issued. See above. The legislative action suggests that legislators understanding they are fighting a rear-guard action in a lost cause; marriage equality may come to Alabama before long when the Supreme Court rules, and they want to be ready to protect religious dissenters from having to play a role in such weddings. *Anniston Star*, March 6.

ARIZONA – The Arizona Supreme Court's Judicial Ethics Advisory Committee issued Revised Advisory Opinion 15-01 on March 9, titled "Judicial Obligation to Perform Same-Sex Marriages." The Committee had received an inquiry about whether a judge who performs opposite-sex marriages may decline to perform same-sex marriages. Same-sex couples have been entitled to marry in Arizona since a federal district court ruling last year that the state declined to appeal to the 9th Circuit, concluding that such an appeal would be futile in light of the circuit's ruling in *Latta v. Otter*. The Committee opined that same-sex couples are entitled to equal treatment with different-sex couples at the hands of Arizona judges. If judges are performing marriages, they must extend equal treatment to same-sex couples. However, the Committee gave a "qualified yes" to the question whether a judge may "choose to conduct marriage ceremonies only for friends and relatives." The Committee concluded that a judge could restrict performance of marriages to friends and relatives because the restriction was not being placed due to the sexual orientation of the parties. "Of course, a judge who

MARRIAGE EQUALITY

performs marriages only for friends and relatives would violate Rule 2.3(B) if the judge refuses to perform marriages for same-sex friends and relatives,” opined the Committee. Furthermore, the Committee “recognizes the potential misuse of any accepted limitation on the categories of marriages a judicial officer is willing to perform,” such as a adopting an unduly broad definition of “friends” to include “all members of a social club or a church” to which the judge belongs. “This practice likely would undermine a judge’s ability to assert a non-discriminatory intent and the protection of this opinion in defense of a misconduct charge,” it stated. In such situations, rulings would have to be made “on a case-by-case basis.”

OKLAHOMA – The state’s House of Representatives voted on March 10 to approve H.B. 1125, sponsored by Rep. Todd Russ (R-Cordell), which would repeal the state’s statutory ban on same-sex marriage and eliminate the requirement that couples obtain licenses before marrying. Under the scheme proposed by Russ, the only contact with the state would come when a marriage officiant files a certificate signifying that a ceremony of marriage was performed, or a couple files a certificate asserting the status of common law marriage. Russ said the legislation was intended to protect county court clerks from having to issue licenses to same-sex couples when they have religious objections to doing so. Oklahoma is under a non-reviewable court order to allow same-sex marriages, since the Supreme Court rejected the state’s petition to review two 10th Circuit marriage equality rulings last year. However, the court order does not specify how marriages are to be performed. One suspects a system that would be different depending on whether a couple is same-sex or opposite-sex would come in for equal protection attack, but Russ’s proposal treats both kinds of marriages the same.

The bill might be vulnerable, however, for limiting the class of recognized marriage officiants to two categories: religious officiants (ordained religious authorities) or judicial officiants (current or retired judges). The bill maintains the current system of charging sharply reduced filing fees for couples who submit to pre-marital counseling. *Tulsa World*, March 11. * * * A bill that would legalize and protect gay conversion therapy, H.B. 1598, the first of its kind to be introduced anywhere in the United States, died a quiet death in the Oklahoma legislature. The measure was the brainchild of unrepentant super-homophobe Representative Sally Kern.

SOUTH DAKOTA – When U.S. District Judge Karen E. Schreier declared South Dakota’s ban on same-sex marriage unconstitutional in *Rosenbrahn v. Daugaard*, 2015 WL 144567 (D.S.D., Jan. 12, 2015), she stayed the ruling to give the state an opportunity to appeal. The state promptly filed its appeal in the 8th Circuit, where the case will be argued in May 12. In the meantime, however, the Supreme Court refused to stay a district court marriage equality ruling in Alabama, even after having granted certiorari to review the 6th Circuit’s adverse ruling on marriage equality claims in cases from four states. Counsel for plaintiffs then moved Judge Schreier to lift her stay in light of these developments, but she declined to do so in a brief order issued on March 3, *Rosenbrahn v. Daugaard*, 2015 U.S. Dist. LEXIS 25856. “Because a notice of appeal has been filed,” wrote Judge Schreier, “this court no longer has jurisdiction to modify its judgment. As plaintiffs concede, they can request that the Eighth Circuit Court of Appeals vacate the stay.” Furthermore, since the 8th Circuit had declined a request to vacate the stay in *Lawson v. Missouri*, another marriage equality case pending on appeal that will also be argued on May 12, and Judge Schreier found that “the

facts in *Lawson* are not meaningfully distinct from the facts here,” she would not be lifting the stay even if she had the authority to do so. “The Supreme Court’s refusal to impose a stay on other federal district court decisions is not precedential,” she commented.

TEXAS – A bill has been introduced in the Texas legislature that would prohibit the expenditure of taxpayer funds or government salaries for “an activity that includes the licensing or support of same-sex marriage” and absolutely prohibit any state or local government official to recognize, grant, or enforce a same-sex marriage license, suspending the pay of anybody employee who might do so. The bill goes on to proscribe any kind of state expenditure to enforce court orders in support of same-sex marriages, requiring state courts to dismiss any actions challenging the bill, and expressly asserting state immunity from suit under the 11th Amendment. This blatant repudiation of the Supremacy Clause of the U.S. Constitution would undoubtedly fall in federal litigation if it were to be enacted. H.B. 623 has sparked a fair amount of indignation, however, as an exemplar of the efforts of die-hard marriage equality opponents to throw up any roadblock they can to the possibility that same-sex marriage will become legal in Texas. A federal district court ruling in favor of marriage equality is pending on appeal before the 5th Circuit, and observers of the oral argument held in January speculated that the court would rule 2-1 against the state’s appeal, but the court had not issued a ruling more than two months after the argument. The Supreme Court granted a petition for certiorari in appeals from the 6th Circuit’s anti-marriage-equality ruling shortly after the 5th Circuit argument, and it is possible that the 5th Circuit panel will lay low and avoid ruling until after the Supreme Court issues its decision.

MARRIAGE / CIVIL LITIGATION

UTAH – The state Senate voted on March 9 to approve a bill that would allow Utah government employees to refuse to marry same-sex couples, provided they refrained from conducting any marriage ceremonies. The measure carried by a 24-5 party-line vote, with all Democrats opposed, which tells one how heavily the Utah Senate is skewed Republican. The measure would also requires counties to have a designated person on hand to marry any couple, even if the county clerk “opts out,” according to *AP State News*, March 10. Religious organizations would also be excused from any requirement to recognize marriages contrary to their beliefs.

WISCONSIN – The states unsuccessful defense of its ban on same-sex marriage in *Wolf v. Walker*, 2014 U.S. Dist. LEXIS 38554 (W.D. Wis. 2014), proved costly, as a stipulation released on March 27 provided that the ACLU, which represented plaintiffs in the litigation, will receive \$1,055,000.00 in legal fees for representing the prevailing party. The substantive part of the case ended with a decisive ruling by the 7th Circuit Court of Appeals, hearing consolidated appeals from the three states in the circuit, which was denied review by the Supreme Court on October 6. *Milwaukee Journal Sentinel*, March 28.

WYOMING – In *Guzzo v. Mead*, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797 (D. Wyoming, Oct. 17, 2014) (not reported in F.Supp.3d), District Judge Scott Skavdahl held that Wyoming’s ban on same-sex marriage violated the 14th Amendment. His ruling went into effect shortly thereafter when the state announced it would not appeal, in light of the Supreme Court’s action a week earlier denying review of two 10th Circuit opinions striking down same-sex marriage bans in Utah and Oklahoma. *AP State News*

(March 24) reported that counsel for the plaintiffs had filed a motion seeking almost \$95,000 in attorneys’ costs and fees as prevailing parties in the case. The state filed a response, arguing that the fee request was unreasonable because the plaintiffs had five to seven attorneys reviewing each pleading, and some attorneys had billed for travel to Wyoming from out of state but had not participated in the actual hearing held by the court on the summary judgment motion. The state also contended that because the Laramie County clerk was a co-defendant, the county should pay half the fee award.

CIVIL LITIGATION NOTES

U.S. SUPREME COURT – On March 2, the Court denied the petition for certiorari in *ProtectMarriage.Com v. Padilla*, 2015 WL 852423, which sought review of the 9th Circuit’s decision in *ProtectMarriage.com v. Bowen*, 752 F.3d 827 (9th Cir. 2014). ProtectMarriage.com is the organization that sponsored California Proposition 8, the initiative state constitutional amendment banning same-sex marriage that was declared unconstitutional in 2010 in *Perry v. Schwarzenegger*. The organization was irked by California’s statutory requirements to disclose the identity of donors and make them public on a state-operated web site, and particularly irked at the state’s refusal to remove that information once the entire Prop 8 saga had run its course. They asserted 1st Amendment claims that were largely rejected by the 9th Circuit, which also found some of their claims non-justiciable. As is its normal practice, the Supreme Court denied the cert petition without comment.

U.S. SUPREME COURT – A legal team representing Massachusetts inmate Michelle Kosilek has filed a petition

for certiorari with the Supreme Court, seeking review of the 1st Circuit’s *en banc* decision from December 16, 2014, in *Kosilek v. Spencer*, 774 F.3d 63. The *en banc* ruling reversed a decision by the district court holding that Massachusetts had violated Kosilek’s 8th Amendment rights by refusing to provide her with sex reassignment surgery to complete her gender transition process. A three-judge panel had affirmed the district court by a vote of 2-1. The *en banc* ruling drew impassioned dissent from the panel’s majority members. The petition suggests two grounds for granting review. First, it observes that the approach to judicial review taken by the *en banc* majority “differs from that of other circuits” and fails to articulate a coherent standard of review for a district court decision that was heavily fact-driven – a form of deference to administrative decision-making that appears on its face virtually standardless. The second ground asks the Court to determine whether, as in this case, it violates the 8th Amendment for prison officials to withhold necessary medical treatment for non-medical reasons. The *en banc* court gave considerable weight to prison officials’ contention that providing the requested treatment would leave them with a difficult problem in terms of where and under what conditions to confine Kosilek post-transition. The petition argues that prison officials are not entitled to choose between the duties to provide necessary medical care and to protect prisoners from violence while incarcerated, but rather are required to “ensure both safety and adequate medical care for all inmates.” Kosilek’s legal team includes Jennifer Levi from Gay & Lesbian Advocates & Defenders, Joseph L. Sulman of West Newton, and Abigail K. Hemani and a pro bono legal team from Goodwin Procter LLP in Boston.

U.S. SUPREME COURT – The Court denied a petition for certiorari on

CIVIL LITIGATION

March 30 in *Bronx Household v. Faith v. Board of Education of City of New York*, No. 14-354, in which the 2nd Circuit Court of Appeals held that the City had not violated the Free Exercise Clause of the 1st Amendment when it adopted a rule against the rental of public school facilities for the conduct of religious services. The decision below is *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184 (2d Cir. 2014). The Bloomberg Administration had defended the policy, which was politically controversial. Some gay rights groups had protested prior practice of allowing such rentals, on grounds that some of the religious groups conducting services preached a hard line in opposition to LGBT rights and marriage equality. Mayor De Blasio has stated his opposition to the current policy and indicated his desire to accommodate the needs of small congregations by allowing them to rent school facilities for such purposes. While the court opinions in this litigation held that the current policy banning such rentals is constitutional, there has been no ruling whether enacting a formal policy allowing such rentals would violate the Establishment Clause of the First Amendment.

ALABAMA – A female correction officer's contention that suffered hostile environment sex discrimination and retaliation because of mistaken perceptions of others about her sexual orientation came to naught in *Stevens v. State Department of Corrections*, 2015 U.S. Dist. LEXIS 33365 (N.D. Ala., March 18, 2015). A co-worker had referred to Stevens as a "dyke" in conversation with another co-worker (not in Stevens' hearing, although the fact the statement was made came to her attention), and there were some other stray remarks to that effect, although when Stevens sought to protest about it, she was told that "nobody cared" about anybody's sexual orientation.

U.S. Magistrate Judge T. Michael Putnam, granting defendants' motion for summary judgement, found that any protection against discrimination on the basis of sexual orientation in Title VII is "noticeably absent from the statute," and wrote: "Courts within the Eleventh Circuit have consistently rejected Title VII claims where the complaints were based upon discrimination that arose from the plaintiff's sexual orientation or perceived sexual orientation. In sum, there is no support for plaintiff's claim that Title VII gives rise to protection for discrimination based upon a supervisor's perception that she is a lesbian." The judge found that the comments cited by Stevens "disparage plaintiff's perceived sexual orientation, and not her gender. When asked at deposition whether she had any evidence that she was mistreated because she was female, as opposed to an alleged homosexual, she answered that she did not." The court found insufficient evidence to support a retaliation claim, and was also dismissive of her attempt to frame her claim in term of constitutional rights under 42 USC 1983: "To the extent that the plaintiff is asserting a relatively novel claim that she was discriminated against on the basis of a mistaken perception of her sexual orientation (she was believed to be homosexual when, in fact, she is not), she has failed to demonstrate that the single instance of name-calling violated the Equal Protection Clause of the Fourteenth Amendment."

ALABAMA – The Court of Civil Appeals of Alabama ruled in *E.L. v. V.L.*, 2015 WL 836916 (Feb. 27, 2015), that the Jefferson Family Court deprived the birth mother of three children of her right to due process of law by ruling without holding a hearing that the mother's former same-sex partner, the adoptive parent of the children, was entitled to periodic visitation. E.L. and V.L. were same-sex partners from 1995

to 2011. During their relationship, E.L. gave birth to three children conceived through donor insemination, for whom V.L. served as a second parent. On May 30, 2007, the Fulton County Superior Court in Georgia granted a petition by V.L. to adopt the children with the consent of E.L. in a second-parent adoption. The family resided in Alabama, however, although the Georgia court found that residency requirements had been met. Upon a subsequent breakup, V.L. alleges that E.L. had denied her the "traditional and constitutional parental rights" to which she was entitled as their adoptive parent, and filed an action in the Alabama Circuit Court, which transferred the matter to the Family Court. The Family Court denied E.L.'s motion to dismiss the case on various grounds, and without holding an evidentiary hearing, awarded V.L. scheduled visitation, subsequently denying all other requested relief (including custody) and closing the case. Upon the appeal, the Court of Civil Appeals in a *per curiam* opinion rejected E.L.'s arguments that the Family Court lacked subject matter jurisdiction, that the Georgia court had lacked subject matter jurisdiction to grant the adoption, or that the Alabama courts were entitled to deny full faith and credit to a valid Georgia adoption. However, the court found that the Family Court erred in granting visitation without a hearing. "Before visitation rights may be adjudicated," wrote the court, "each parent is entitled to due notice and an opportunity to be heard on the matter. Moreover, in a contested case, a court should award visitation only after ascertaining through an evidentiary hearing that visitation would be in the best interests of the children." The case was remanded to the Family Court to hold the necessary hearing. In the course of the opinion, the court noted E.L.'s argument that the Georgia Family Court erred in entertaining and granting a second parent adoption, as there was

CIVIL LITIGATION

adverse appellate precedent on the issue of second-parent adoptions in Georgia, but ruled that so long as the Georgia court had jurisdiction, its ruling on the merits could not be questioned in the context of a full faith and credit ruling. The court also rejected E.L.'s attempt to challenge the adoption by contending that the couple failed to meet Georgia residency requirements, finding that the Georgia Family Court had specifically found that the residency requirement was met. Furthermore, "we reject any contention by the mother that the family court should have refused to enforce the Georgia judgment based on Alabama public policy." Alabama, of course, does not allow second parent adoptions – a position that will likely change once marriage equality is firmly established in Alabama law.

ARIZONA – In a decision that seems to be channeling the spirit of Alabama Supreme Court Justice Roy Moore (see above), Pima County Superior Court Judge Sean Brearcliffe, asserting that as a state trial judge he is not bound by decision of the U.S. District Court, refused to approve a divorce for Martha Morris and Vicki Sullivan, who were married in Vermont in 2010, returned to Arizona to live, separated two years later, and seek to get unhitched. Morris still lives in Tucson, while Sullivan has moved to Maine. They seek the divorce for practical reasons; their relationship has ended, they no longer live together, and they need to dissolve their legal relationship. Last October, the U.S. District Court in Arizona struck down the state's ban on same-sex marriage, and as the 9th Circuit had recently struck down same-sex marriage bans in Nevada and Idaho, the state government leaders decided to comply with the court's ruling and not mount a futile appeal to the 9th Circuit. So same-sex couples have been marrying in Arizona since mid-October and the state has been recognizing those

marriages. But not Judge Brearcliffe. The *Arizona Daily Star* (March 4) quoted his opinion: "The general rule is that the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2) does not require state courts to follow precedent from either federal trial courts or Circuit Courts of Appeal interpreting the United States Constitution." Brearcliffe denied the divorce petition, but said it would be dismissed "with prejudice" unless Morris either agreed to request an annulment or seek a stay of his ruling. She requested a stay, and will attempt an appeal. Or she could play the waiting game, since even Brearcliffe acknowledges that he would be bound by a U.S. Supreme Court decision, and one is forthcoming in June. Since this was an uncontested divorce, it normally would have gone through default proceedings and never come before a judge, but because of the novelty of a same-sex divorce it was routed to Judge Brearcliffe. Big mistake.

ARKANSAS – District Judge Kristine G. Baker granted summary judgment against Gidget Pambianchi in her suit against Arkansas Tech University on claims of sex and sexual orientation discrimination asserted under Title VII in *Pambianchi v. Arkansas Tech University*, 2015 U.S. Dist. LEXIS 38625, 2015 WL 1399695 (E.D. Ark., March 26, 2015). Ms. Pambianchi worked in the ATU athletics department from July 2005 until she was terminated in April 2012, when she was head coach of the softball team. In a lengthy opinion that reeks of pretext, the court found that the University had a non-discriminatory reason for firing Pambianchi, based on allegations that she had violated the school's sexual harassment policy in various ways that sound dubious to this reader. Her case foundered in part on the court's refusal to entertain seriously any theory that an "out" lesbian could be protected against

discrimination by Title VII's ban on sex discrimination, manifested in part by the long line of cases rejecting any attempts to expand Title VII's sex discrimination ban to encompass sexual orientation claims, and in part by the court's determination that Pambianchi's allegations failed to include enough specific instances of distinctly sex-based discriminatory treatment of her. This is one of those decisions where one suspects much more was going on than is reflected in the court's opinion, but it certainly sounds like there was a decision at some level of the university to get rid of a lesbian coach who was deemed too controversial. For example, Pambianchi alleged that a supervisor said to her a few weeks before her termination: "Gidget, you would not be under so much trouble if you had a short haircut and you were 40 years old. But because you're a blond and because you're not ugly, you become a threat to parents and you become a threat to these kids. I mean, these kids could be attracted to you. You could be attracted to them. These parents look at you like you could be their daughter. And you're gay. And that's not accepted and-not in our society. And that's the reason why you're picked on." She also alleged that he said, "If you were 40 years old with a short haircut, nobody would mess with you." Go figure!

CALIFORNIA – The California 4th District Court of Appeal has affirmed decisions by Orange County Superior Court Judges James Waltz and Glenn Salter in *In re Domestic Partnership of Joseph E. Ribal and Lu Tuan Nguyen*, 2015 WL 998442 (March 4, 2015), leading to nullification of a declaration of domestic partnership signed by both men on January 16, 2010. Ribal divorced his wife in 1983 and soon after Nguyen moved into Ribal's house. Ribal had two children from his marriage, Tiano and David. Tiano claims that Ribal showed signs of dementia in 1999 and his

CIVIL LITIGATION

condition worsened over time. Nguyen admitted under cross-examination that he first became concerned about Ribal's mental condition in 2008, and that Ribal "stopped writing checks" in 2009. A few days after the domestic partnership declaration was signed and filed in 2010, Nguyen drafted a letter to the California State Teachers Retirement System, purported from Ribal, asking how to add Nguyen as a beneficiary for Ribal's pension. In April 2012, Tiano and David Ribal were appointed as temporary conservators for their father, and they renewed this status periodically thereafter, filing a proceeding in Orange County Superior Court in August 2013 seeking to annul the domestic partnership on the ground that Ribal was not competent to consent to it in 2010. Nguyen raised various procedural objections, which were subsequently resolved by the court's appointment of Tiano and David as guardians and then a subsequent appointment of Linda Rogers to be a conservator for Ribal. Expert medical witnesses testified at trial as to Ribal's mental deficiencies, and the court of appeal rejected Nguyen's objections to their testimony, finding that the record was adequate to support the Superior Court's determination to nullify the domestic partnership.

CALIFORNIA – Pro se employment discrimination cases rarely turn out well, and *Gabel v. Kumho Tire U.S.A.*, 2015 Cal. App. Unpub. LEXIS 2010, 2015 WL 1307316 (4th Dist. Ct. App., March 20, 2015), can stand as an example. The gay male plaintiff sought to assert claims under California's Fair Employment and Housing Act of discrimination, sexual harassment, and retaliation, as well as intentional infliction of emotional distress and general negligence, against Kumho Tire U.S.A., which is not his employer. Joshua Gabel work for Werner, and was allegedly terminated by Werner

because of his sexual orientation. But the employment by Werner involved performing services for Kumho, and he claims to have been subjected to various kinds of harassment by Kumho's employees. He sued both employers. This ruling is on Kumho's motion to dismiss the case, in response to Gabel's third amended complaint. Wrote Judge Codrington, "The court warned Gabel of the 'perils of self-representation,' advised him to contact the bar association, and provided him with an informational handout. Gabel said he was trying to find an attorney on contingency." But that was in connection with the second amended complaint. Addressing the employment discrimination cause of action, the court wrote: "we conclude the seventh cause of action is uncertain, ambiguous, and unintelligible. Although Werner was Gabel's employer and Kumho was not, Gabel seems to allege joint liability by them for Kumho's employees' conduct toward him and Werner's termination of his employment. Based on the present state of the pleadings, however, defendants cannot determine what are the essential, material facts upon which they may be held liable to Gabel or what are the nature of the legal claims against them. On appeal, Gabel cited no intelligible, pertinent legal authority to support the seventh cause of action. The trial court properly sustained the demurrer to this cause of action without leave to amend." Finding that Gabel had "not shown any reasonable possibility of curing defects by amendment after filing four versions of the complaint," the court collectively threw up its hands and sustained the trial court's determination that Gabel failed to state a claim.

CALIFORNIA – In *Brown v. Comm'r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 38006 (N.D. Cal., March 25, 2015), U.S. Magistrate Judge Donna Ryu partially reversed the Commissioner's

determination that Rudoil Brown, who is living with HIV, is not qualified for Social Security Disability Benefits. Judge Ryu agreed with Brown's argument that the administrative law judge who ruled in his case had erred in evaluating the evidence from his treating psychiatrist and treating physician by rejecting their opinions concerning the disabling effect of his HIV-related depression without an adequate explanation, and consequently also erred in conducting the evaluation of Brown's residual functional capacity. The court rejected respondent's claim that the opinion testimony was not supported by the treating notes kept by the doctors. The case was remanded for further proceedings. Lisa Lunsford of the Homeless Action Center represents Brown.

CALIFORNIA – A California attorney, Matthew McLaughlin of Orange County, filed a proposed ballot measure with the office of California Attorney General Kamala Harris accompanied by the statutory \$200 filing fee. The measure is titled "Sodomite Suppression Act," and would authorize execution of anybody who touches another person of the same sex for sexual gratification by "bullets to the head" or "any other convenient method." The measure if enacted into law would clearly violate the Supreme Court's ruling in *Lawrence v. Texas*, holding that the criminal law may not reach private consensual adult homosexual activity. However, it seems that under California precedent and practice the constitutionality of a proposed ballot measure is not a barrier for its placement on the ballot, and can be challenged only if it is actually enacted. In this way, the courts are relieved of the burden and potentially controversial task of evaluating every crackpot proposal (and there can be hundreds filed in a year), especially as most of them will not attract sufficient petition signatures to be placed on the

CIVIL LITIGATION

ballot, much less win approval from the voters. But Harris, who is an announced candidate for a U.S. Senate seat, balked at carrying out her normal statutory role, which would be to write a ballot title and summary of the proposal that would then appear on the petition forms used by signature-gatherers to attempt to qualify the measure for the ballot. (This year 365,000 valid signatures must be collected in the space of 180 days for the measure to qualify. There is no indication what resources or effort McLaughlin is prepared to undertake to gather the signatures, and it appears that he filed the proposal to make a statement, not with any serious intention of getting it on the ballot.) Harris filed an action in Sacramento County Superior Court, seeking a declaratory judgment to the effect that the measure is obviously unconstitutional that she should not have to write a ballot title and summary and release it for signature-gathering. An online petition at change.org calls for McLaughlin to be disbarred, and had attracted more than 45,000 signatures by March 25. *Los Angeles Times*, March 26, 2015.

CONNECTICUT – In *DePasquale v. Continuing Education Alliance, LLC*, 2015 WL 776932 (Conn. Super. Ct., Stamford-Norwalk, Feb. 4, 1025), Judge Trial Referee Kevin Tierney denied the defendant's motion for summary judgment on a sexual orientation discrimination claim asserted by Glenn DePasquale, Sr., arising from his termination of employment. DePasquale, an accountant trained as a CPA who had previously worked for four years as a controller of a large corporation before being hired to be the controller of defendant corporation for a salary above \$100,000, began working on July 13, 2012, on which date he met with the Human Resources Manager to complete intake information, at which time she learned that he was gay because of the sex of his domestic

partner. He alleges that this immediately changed her demeanor. Within weeks he was discharged, the CEO stating that it was “not working out” because DePasquale was “not asking enough questions.” He was replaced with a marriage heterosexual. DePasquale asserted an employment discrimination claim under Connecticut's law banning sexual orientation discrimination in employment. In moving for summary judgment, the employer did not dispute any of DePasquale's factual assertions, but claimed that it had a legitimate non-discriminatory reason to dismiss him. Judge Tierney found that DePasquale's allegations met the *McDonnell Douglas* test established by federal employment discrimination law, which is followed by Connecticut courts, of raising a presumption of discriminatory intent, focusing on excellence of his credentials, the shortness of his employment, and the rapidity of his discharge after the employer discovered that he was gay. Tierney found that there was a dispute over material facts – whether the employer had a legitimate non-discriminatory reason for the discharge – that precluded granting summary judgment.

CONNECTICUT – Jere Ravenscroft, a gay man who used to work for Williams Scotsman, Inc., survived a motion to dismiss his claim of negligent infliction of emotional distress in connection with his discharge, but suffered dismissal of his claims of intentional infliction of emotional distress regarding the outrageously homophobic conduct of a co-worker as well as dismissal of his hostile environment sexual harassment claim under Connecticut's employment discrimination law, because all of the events alleged in support of this claim occurred more than 180 days before the complaint was filed. *Ravenscroft v. Williams Scotsman, Inc.*, 2015 U.S. Dist. LEXIS 36078, 2015 WL 1311332 (D. Conn., March 23, 2015). Other claims

not subject to the employer's motion to dismiss arise under the Family & Medical Leave Act, which provides the basis for federal jurisdiction over the case. Ravenscroft alleges that everything went well in his employment with Williams Scotsman as a truck driver from 1992 until the company hired Brandon Cowles to be a co-worker. Cowles began calling him “faggot” and other anti-gay slurs “regularly,” and making “derisory comments” about “types of sexual acts that gay men engage in.” Ravenscroft complained to supervisors, but they told him they could not afford to lose a driver so he would “have to deal with it” himself. Cowles soon resigned, but a year later went to work for a subcontractor and resumed his harassment of Ravenscroft. When Ravenscroft again complained to management, Scotsman's Human Resources V.P. told him she would make sure Cowles would no longer do any work for Scotsman, and that problem ended. Almost a year later, Ravenscroft's brother passed away and he took extended personal leave until November. He received calls from work regularly asking about his status, with intimations that he had presented a false doctor's note and was abusing his FMLA entitlement. When he returned to work, he complained about these communications, and at a subsequent meeting with management, said he was “being targeted for complaining to HR.” The company's vice president screamed at him: “Try suing this company and see what happens to you. . . I'm not afraid of you.” Ravenscroft stood and said he needed to step out of the room for a moment, to which the V.P. responded, “Good. Get up, get out, and don't come back.” He subsequently received a termination notice. Analyzing these facts, District Judge Michael P. Shea found that the hostile environment claim was time-barred, because Ravenscroft alleged no facts occurring after the HR Director assured him Cowles would

CIVIL LITIGATION

not do work for Scotsman, more than 180 days before his complaint was filed, and that Cowles' harassment of Ravenscroft did not subject the company to liability under Connecticut tort law for intentional infliction of emotional distress, the company not being liable for intentional torts committed by employees outside the scope of their employment. However, Judge Shea concluded that Ravenscroft stated a claim of negligent infliction of emotional distress in connection with his termination. "Repeatedly screaming at an employee in the manner alleged by Mr. Ravenscroft is unreasonable behavior during the termination process and could be considered 'inconsiderate, humiliating or embarrassing,'" wrote Shea, quoting from a prior case describing the tort. This was sufficient to meet plaintiff's "low burden at the pleadings stage."

FLORIDA – Here's some creative lawyering. Florida does not ban sexual orientation discrimination, but does ban sex discrimination in employment. Karen Arnold, a lesbian, was a longtime dental assistant employee for Arlington River Family Dental. After thirty years of employment, she found herself with a new boss, Practice Administrator Kanisha Elmore, when Heartland Dental, LLC, acquired the practice in 2012. As soon as Elmore discovered that Arnold was a lesbian in a same-sex relationship, the harassment began, according to Arnold's complaint. But there is an interesting twist in this case. There was also a gay man in the office, and Elmore apparently had "no workplace discrimination issues with him." In fact, Arnold alleges, "Elmore characterized this male employee as 'cute' and stated that she liked him." So, Elmore got along fine with the gay man but kept on ragging on Arnold until a pretext arrived (late arrival at work due to a traffic jam) for discharging Arnold, or so Arnold alleges. She filed suit

against Heartland Dental in the federal district court in Jacksonville. It is not clear from the opinion by Magistrate Judge Monte C. Richardson in *Arnold v. Heartland Dental*, 2015 U.S. Dist. LEXIS 40340 (M.D. Fla., March 30, 2015), what the basis was for federal jurisdiction, as the only claims dealt with on this motion to dismiss were asserted under the Florida Civil Rights Act (FCRA). The FCRA does not ban sexual orientation discrimination, but does ban sex discrimination. Arnold sought to position her claim as a sex discrimination claim, pointing to the discrepancy in treatment as between her and the gay man in the office. Judge Richardson, although dubious, refused to dismiss the claim. "Although the Eleventh Circuit has not addressed this issue," wrote Richardson, "every court that has done so has found that Title VII, and accordingly the FCRA, was not intended to cover discrimination against homosexuals. However, Arnold argues that the FCRA should be construed liberally, and that her discrimination and harassment claim should not be dismissed because the claim is based not on her homosexuality but rather based on her gender given that Heartland did not discriminate against the homosexual male. The Court expresses considerable skepticism as to Arnold's contention that the facts alleged in her Complaint reflect discrimination based on her sex or gender non-conformity as opposed to her sexual orientation. But, at this stage of the proceedings, the Court declines to find as a matter of law that Arnold's claim is so lacking in plausibility as to warrant dismissal." Thus, the motion to dismiss Count One was denied. However, the court found that Arnold's allegations were insufficient to make out a retaliation claim, and dismissed that count.

ILLINOIS – An 8th grade boy alleging that he was bullied by classmates with

the encouragement of teachers suffered dismissal of some of his claims in *Eilenfeldt v. United C.U.S.D. #304 Bd. of Educ.*, 2015 U.S. Dist. LEXIS 37390, 2015 WL 1399296 (C.D. Ill., March 25, 2015), but U.S. District Judge Sara Darrow refused the school district's request to dismiss a due process claim. The court found a lack of factual allegations that would support any finding that the child was singled out because of his sex, as such, with nothing about gender non-conformity that would be sufficient to sustain a claim under federal Title IX. The judge also found questionable many conclusory allegations about the lack of a rational basis for teachers and the school principal to fail to take action against alleged harassers, finding the plaintiffs' allegations insufficiently specific. (Only one student – who had threatened to stab Eilenfeldt with a "shank" – was subjected to discipline: a brief suspension from school.) However, Judge Darrow did find that it was at least plausible based on plaintiff's allegations that he had stated a due process claim concerning actions of teachers endangering Eilenfeldt. However, the overall tone of her opinion is skeptical about the plaintiff's case, noting evidence that he "gave as good as he got" in relations with classmates. According to the court's summary of factual allegations in the complaint, certain students apparently engaged in a vendetta against young Eilenfeldt beginning while he was in 7th grade, calling him a pedophile, accusing him of being sexually interested in young boys, and engaging in name-calling all too typical among young teenagers. As noted above, there is no hint in the factual allegations that Eilenfeldt is gender-non-conforming. His mother seems to have emerged as his persistent champion, trying to get school authorities to take some action to protect him from harassment, but to no avail, according to the complaint, which alleges that teachers and the principal

CIVIL LITIGATION

were dismissive of her concerns and had in most instances taken no action in response to her complaints about the treatment of her son.

ILLINOIS – A lesbian retail mall store employee who was discharged after getting into a vulgar and loud altercation with a co-worker suffered summary judgment of her hostile environment and retaliation claims in *Guerrero v. T-Mobile USA, Inc.*, 2015 U.S. Dist. LEXIS 27466, 2015 WL 1043535 (N.D. Ill., March 6, 2015). U.S. District Judge Thomas M. Durkin found that plaintiff Alejandra Guerrero had failed to submit a response to T-Mobile’s statement of material facts, thus waiving the right to contest them, but he nonetheless reviewed her factual allegations as well as the allegations of her affidavit and response to the motion for summary judgment. He found that although Guerrero may have been subjected to anti-gay verbal harassment by Baker, the co-worker with whom she got into the altercation, she had not brought these incidents to the company’s attention in accordance with the employee handbook procedures. The company’s non-discrimination policy includes sexual orientation, and spells out how to bring complaints to the attention of management. Furthermore, both Baker and Guerrero were discharged after the company investigated the altercation and concluded that both had engaged in inappropriate behavior during that incident. Under the circumstances, Guerrero could not very well maintain that she had been subjected to discriminatory treatment by the company, as the language and conduct during the altercation would provide a legitimate non-discriminatory reason for a discharge. Furthermore, her allegations failed to support the claim that she was discharged in retaliation for bringing to the company’s attention the anti-gay harassment to which she claims to have been subjected.

Guerrero is represented by Samuel A. Shelist of Shelist Law Firm, and James E. Fabbrini of Fabbrini Law Group, both of Chicago.

ILLINOIS – In a parentage (custody and visitation) action brought by a man who was not married to his former female partner and thus not legally related to her adopted child, the Illinois Supreme Court undertook a lengthy examination of theories and arguments under which the man sought to assert such a claim, but found that none applied under Illinois law. *In re Parentage of Scarlet Z.-D. v. Maria Z.*, 2015 IL 117904, 2015 Ill. LEXIS 321, 2015 WL 117904 (March 19, 2015). The closest he came, winning endorsement from an intermediate appellate court, was equitable adoption, but the Supreme Court found that this was a theory for probate purposes (rights of inheritance), but was not applicable to actions for custody or visitation. As far as the court was concerned, any change in Illinois to accommodate the status of a person such as the man in this case, who assumed a parental role in raising a partner’s legal child without obtaining an adoption decree or marrying the child’s mother, must come from the legislature. While stating that it was “not unsympathetic” to the position of the man and the daughter, the court concluded: “Legal change in this complex area must be the product of a policy debate that is sensitive not only to the evolving reality of ‘non-traditional’ families and their needs, but also to parents’ fundamental liberty interest embodied in the superior rights doctrine,” under which a person in the position of the former female partner as legal parent would give her superior rights to determine who could have contact and assert parental authority towards her child. National Center for Lesbian Rights submitted an amicus brief. There was no dissent from the court’s opinion.

INDIANA – What the person in the street doesn’t know about the law could fill a book...which is why it is usually a bad idea for somebody to bring a claim *pro se*. While there are rare *pro se* victories (see the Alabama *Strawser* marriage equality case), those are rare exceptions. Our hearts sink when we see *pro se* LGB employment discrimination plaintiffs filing suit in federal court under Title VII, since with some narrow exceptions they are destined to run into a stone wall. Such was the fate of Kimberly Hively, who claimed to have encountered sexual orientation discrimination at Ivy Tech Community College and filed suit under Title VII and 42 USC sec. 1981. Granting the college’s motion to dismiss in *Hively v. Ivy Tech Community College*, 2015 U.S. Dist. LEXIS 25813, 2015 WL 926015 (N.D. Ind., March 3, 2015), District Judge Rudy Lozano, quoted binding precedent from the 7th Circuit: “While Title VII expressly prohibits employers from refusing to hire employees ‘because of [their] sex,’ the Seventh Circuit has held that ‘Congress intended the term “sex” to mean “biological male or biological female,” and not one’s sexuality or sexual orientation.” Continued Judge Lozano, “While this Court is sympathetic to the arguments made by Hively in her response brief, this Court is bound by Seventh Circuit precedent. Because sexual orientation is not recognized as a protected class under Title VII, that claim must be dismissed. The court also found that the Section 1981 claim must be dismissed, because “only race discrimination claims may be brought under [Section 1981].” The court also rejected Hively’s motion to amend the complaint to allege violations of the college’s employment policy and unspecified “regulations that govern both the State and the City.” Finding that “any amendment would be futile,” the court said it would not have jurisdiction over the proposed amendment, which would raise issues of state, not federal law. Once the

CIVIL LITIGATION

Federal statute claims were out of the case, there was no longer a basis for federal jurisdiction.

KENTUCKY – U.S. District Judge Karen K. Caldwell ruled in *Small v. Fetter*, 2015 U.S. Dist. LEXIS 37314, 2015 WL 1393585 (E.D. Ky., March 25, 2015), that a Veterans Administration doctor did not violate the constitutional rights of a veteran by ordering HIV and drug testing of his blood without obtaining informed consent. Harry Small visited Dr. James M. Fetter, III, a psychiatrist, for consultation at the Lexington Veterans Affairs Medical Center. Small alleges that Fetter “ordered a blood test from Small” and had the blood tested for HIV and drug use. Small claims that first he learned of this was when he received a phone call from the Center’s billing department. He says his medical file is devoid of information about this or any consent form, and that he later learned that he was tested for HIV “because he was a veteran and there had been a recent uptick in HIV cases among veterans in Kentucky.” The court concluded that there was no 4th Amendment violation because the test was not performed for law enforcement purposes, but as part of rendering health care, and that there was no 5th Amendment violation because a person does not have a constitutional right to be free of such testing in the context of health care. Of course, Small asserted only constitutional claims, but as Fetter was a federal government doctor working in a federal facility, any state laws on point would undoubtedly be preempted, which is probably why Small was trying to bring a federal constitutional claim in federal court.

LOUISIANA – Here’s an unusual one. In *Strong v. Grambling State University*, 2015 WL 1401335 (W.D. La., March 25, 2015), a tenured professor at the public university

alleged, among other things, that he suffered discrimination because he’s a heterosexual black male, particularly regarding compensation when he was serving as a department chair. He claimed that relevant management decision makers showed a preference for women and “homosexuals.” The court found that his factual allegations did not back up this claim, so it never had to grapple with the equal protection issue of how to evaluate a claim of anti-heterosexual discrimination by a public institution. U.S. District Judge Donald E. Walter granted summary judgment to the defendants.

MASSACHUSETTS – The Appeals Court of Massachusetts affirmed a Housing Court award of compensatory damages for emotional distress to Michael Larson, who is living with HIV, against his landlord, Leon Kachadorian, who upon learning that Larson was HIV-positive, angrily confronted him, asked if he had AIDS, expressed regret that he had signed verification documents that were used by Larson to get rent assistance from AIDS Project Worcester, and told Larson he wanted him to move out of the apartment. *Kachadorian v. Larson*, 2015 Mass. App. Unpub. LEXIS 224, 2015 WL 1280791 (March 23, 2015). When Larson was subsequently late with a rent payment, the landlord brought a summary eviction proceeding. “The landlord made similar statements to Larson in a confrontation on February 27, 2013, while the summary process action was proceeding, in front of a friend of Larson’s, and refused Larson’s and APW’s tender of payment for the arrears at that time.” The Housing Court Judge found that this action violated Massachusetts’s anti-discrimination laws, and trebled the damage award upon finding a violation of the unfair trade practices statute. The appeals court upheld the compensatory damages award, but not

the trebling of damages, finding that the landlord’s conduct did not come within the ambit of the unfair trade practices law, which requires conduct that is “unfair or deceptive.” As to the emotional distress damages, the court said that “the emotional stress caused by the landlord’s actions manifested in physical symptoms. Larson lost sleep for a period of two weeks and experienced vomiting and tightness in his chest. Larson also experienced ‘panic attacks,’ including when approaching the steps of his apartment, and ‘his nerves were constantly shot.’ He suffered from depression and anxiety and was prescribed medications to treat these symptoms. Larson testified that while his home had once been a ‘sanctuary,’ and a ‘place of peace,’ the landlord’s discriminatory conduct changed that – Larson home was ‘no longer a place of peace or any type of solitude.’” The damage award of \$10,000 was reduced by the amount of back-rent owned by Larson.

MINNESOTA – In a helpful ruling on a matter of first impression, U.S. District Judge Susan Richard Nelson held in *Rumble v. Fairview Health Services*, 2015 U.S. Dist. LEXIS 31591, 2015 WL 1197415 (D. Minn., March 16, 2015), that there is a private right of action under the Affordable Care Act (Obamacare) for persons encountering discrimination in health care institutions that receive federal money, either directly or through insurance payments for patients. Although the ACA has a non-discrimination provision, it is not clear from the statute that individuals can sue health care institutions, as opposed to filing administrative complaints with the federal government. (Such a complaint by this patient is on file with the Office for Civil Rights of the U.S. Department of Health and Human Services.) Additionally, although the anti-discrimination provision incorporates by reference other federal

CIVIL LITIGATION

anti-discrimination statutes rather than spelling out prohibited forms of discrimination under the ACA, and none of those statutes expressly prohibits gender identity discrimination, Judge Nelson held that the plaintiff in this case, a transgender man, could sue for the discriminatory treatment he encountered at Fairview Southdale Hospital and from Emergency Physicians, P.A., the agency that staffs Southdale's emergency room. The court noted accumulating case law under federal sex discrimination statutes finding coverage for gender identity discrimination. The court's detailed recitation of Jakob Tiarnan Rumble's factual allegations confronts the reader with a vivid tale of outrageous mistreatment by health care personnel who evidently had not received any particular training about culturally sensitive service for transgender patients. The court denied motions to dismiss by both defendants. The court also has a supplementary claim of discrimination under the Minnesota Human Rights Law. Such rulings frequently lead to negotiated settlements, so this case may not end up generating an appellate ruling, but Judge Nelson's well-reasoned officially published opinion should serve as a useful persuasive precedent. Rumble is represented by St. Paul attorneys Christy L. Hall, Jill R. Gaulding, and Lisa C. Stratton of Gender Justice, and Minneapolis attorney Katherine S. Barrett Wiik of Robins Kaplan LLP.

MISSOURI – On March 5, U.S. Magistrate Judge Terry I. Adelman granted summary judgment to the employer in a same-sex harassment case, *Barber v. Drury Dev. Corp.*, 2015 U.S. Dist. LEXIS 26912, 2015 WL 1005513 (E.D. Mo.). The plaintiff's sole allegation was that a co-worker had sexually harassed him by slapping him on the buttocks. When plaintiff brought this incident to the attention of

a supervisor, the supervisor confronted the co-worker, who denied touching the plaintiff, and interviewed other employees in the area, who claimed to have seen nothing happen. The supervisor told the co-worker to stay away from the plaintiff. Both employees were temporary workers on a construction site. The plaintiff later got into a physical fight with another employee and was told to leave; both employees were subsequently discharged. Judge Adelman found that the plaintiff's allegations fell far short of stating an actionable claim of sex discrimination under Title VII. There was only one incident, no indication that the co-worker slapped the plaintiff because of his sex or out of sexual desire or generalized hostility to male co-workers, and the employer responded promptly and effectively to the complaint. The plaintiff represented himself in the lawsuit.

MISSOURI – Every “garden variety defamation claim” is not automatically converted into a federal claim under the Lanham Act, wrote Senior U.S. District Judge Ortrie D. Smith in *Mitchell v. Joyner*, 2015 WL 1393268 (W.D. Mo., March 25, 2015), and *Mitchell v. Sanchez*, 2015 WL 1393266 (W.D. Mo., March 25, 2015), virtually identical opinions dealing with the same issue. The Lanham Act is a federal law concerned with false endorsements and false advertising, among other things. Plaintiff claims that the defendants “incorrectly stated on various media broadcasts that she has AIDS/HIV.” She filed suit in federal court, premising jurisdiction on the Lanham Act claim, but most of her complaint dealt with state laws claims for invasion of privacy, intrusion into seclusion, false light invasion of privacy, and defamation per se. The court found that the factual allegations did not fall within the scope of the Lanham Act, and declined to exert supplementary

jurisdiction over the state law claims. However, Judge Smith noted the possibility of diversity jurisdiction in this case, and ordered the defendants to “provide information on or before April 2, 2015, where they are citizens for purposes of diversity jurisdiction,” so that Mitchell could continue the case in federal court if there is the requisite diversity of state residence between her and all the defendants.

NEW YORK – If a person is mistakenly diagnosed as HIV-positive and passes this information along to a new doctor, does that doctor commit malpractice by treating the patient for HIV infection without verifying the diagnosis? No, answered the N.Y. Appellate Division, 1st Department, affirming a summary judgment granted by Bronx County Supreme Court Justice Stanley Green in *Fall v. Guseynov*, 2015 N.Y. App. Div. LEXIS 1823, 2015 NY Slip Op 01869, 2015 WL 920071 (March 5, 2015). The plaintiff's expert testified that the defendant doctors “deviated from good and accepted medical care by failing to confirm that plaintiff was HIV positive prior to prescribing him anti-retroviral medications, failing to conduct an HIV test within two to eight weeks of beginning his regimen, failing to order annual follow up testing, and by not being board certified in infectious disease” yet apparently holding themselves out as competent to provide medical care to a person with HIV. The court says that it appears that the plaintiff had been falsely diagnosed as HIV+ and passed this information along during his intake process with the doctors, who received a lab test indicating he was positive. The court found that “the opinions in plaintiff's expert affirmation are either conclusory or contradicted by the record, and fail to raise a triable issue of fact.” Really? The court said it had previously determined in another case that doctors can't be found automatically to have been liable

CIVIL LITIGATION

for malpractice in treating persons living with HIV just because they are not specialists in infectious diseases.

NEW YORK – Suffolk County Family Court Judge Deborah Poulos ruled on March 13 in *Kelly S. v. Farah M.*, V-06922, NYLJ 1202721838331 (published March 27, 2015) that under principles of comity she would recognize the parental status of Kelly S., formerly the domestic partner and subsequently same-sex spouse under California law of Farah M., the birth mother of two children in question, and thus would find Kelly had standing to seek legal visitation rights with the two children. Kelly and Farah were California residents whose relationship began in 2000. They registered as domestic partners under California’s expansive partnership law, and married during the 2008 “window period” prior to the enactment of Proposition 8. A male friend was their sperm donor for three children, the first born to Kelly, the other two to Farah. The first two children were born during the registered domestic partnership phase of their relationship, the third after their marriage. They subsequently moved to New York, and the relationship deteriorated thereafter. They separated and Farah moved with the three children, ultimately to Arizona. Disputes arose concerning Kelly’s right to visitation. The issue of visitation with her biological child is being separately litigated, as is their divorce proceeding, now pending. In this ruling, Judge Poulos rejected Farah’s argument that Kelly lacked standing to seek visitation with the two younger children, finding a parallel to the N.Y. Court of Appeals ruling in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), in which the court extended comity to a Vermont same-sex civil union, recognizing that under Vermont law both same-sex spouses would be parents of children born during the civil

union. Although the parties litigated the standing issue in relation to New York law, the judge decided that California law principles should apply, as their legal relationship was formed there and the children were born there during that relationship. Farah’s attempt to muddy the waters by drawing the sperm donor into the litigation through the filing of paternity actions was dismissed by the judge, noting that the sperm donor had not sought to assert paternity: “It is Farah M. who has hauled Anthony S. into these proceedings with the obvious goal of obfuscating and eventually terminating Kelly S.’s parentage of and parental rights to Z.S. and E.S.,” she wrote. “Therefore, this Court holds that all four paternity petitions against Anthony S. must be dismissed with prejudice.” Concluding her legal analysis, Judge Poulos wrote: “The Court holds that it is compelled to recognize the parties’ 2004 California registered domestic partnership as the legal equivalent of a California and New York marriage. Under California law, parties to a registered same-sex domestic partnership are treated the same as spouses in determining the rights and obligations with respect to a child of either of them. Likewise, this Court recognizes and affords comity to the parties’ legal marriage in California in 2008.” Even though New York’s Marriage Equality Act had not yet been passed at the time, New York courts began recognizing out-of-state same sex marriages at that time, and the *Debra H.* case supported this conclusion by recognizing a pre-2011 Vermont civil union for this purpose. “This Court recognizes Kelly S.’s parentage of Z.S. and E.S. created by the parties’ California registered domestic partnership and the California marriage. Thus, Kelly S. has standing to seek custody and visitation with Z.S. and E.S. in a best interest hearing.” However, the court did not extend comity to a California equitable estoppel statute, finding that this would

be precluded by the New York Court of Appeals’ refusal to approve an equitable estoppel theory on similar facts in *Debra H.*, where the court expressly refused to disavow its 1991 *Alison D. v. Virginia M.* precedent. Douglas Byre of Brocato & Byrne in Central Islip represents Kelly.

NEW YORK – A gay man brought suit against his employer, the New York State Insurance Fund, alleging violations of Title VII and the Americans With Disabilities Act, representing himself *pro se*. Our heart sinks whenever we see a new *pro se* gay plaintiff running into federal court attempting to assert a Title VII claim, when he lives in a state where the law bans sexual orientation discrimination. We understand, of course, that the state trial courts upstate may not be particularly receptive to what are, in essence, sexual orientation discrimination claims, but things get better at the Appellate Division and better yet at the Court of Appeals. In the meantime, federal courts are usually reluctant to entertain theories trying to stretch Title VII’s sex discrimination provision in such cases, as in this one, *Dollinger v. New York State Insurance Fund*, 2015 U.S. Dist. LEXIS 40044 (N.D.N.Y., March 30, 2015). District Judge Mae A. D’Agostino, pointing out that “the Second Circuit has drawn a strict distinction between discrimination based on sexual orientation and discrimination based on failure to comply with traditional gender roles,” was not going to buy Dollinger’s attempt to squeeze himself into the gender role theory. She found that “the basis of Plaintiff’s claim for relief is largely based on discriminatory conduct directed toward Plaintiff’s sexual orientation, and not his failure to conform to traditional masculine gender stereotypes,” and dismissed the sex discrimination claim. Dollinger’s ADA theory was that he was stereotyped as a gay man who was

CIVIL LITIGATION

therefore a “high risk for HIV/AIDS” and thus could be considered a person with a disability under the “perceived disability” category. Judge D’Agostino was willing to play along with this, but found that the complaint fell short by failing to allege facts supporting a claim that he “suffered adverse employment action because of his disability.” Similarly dismissed were the hostile environment and retaliation claims under Title VII. However, some claims did survive the defendant’s motion to dismiss: ADA retaliation and hostile work environment claims, but just barely based on a very liberal reading of the factual allegations. So Dollinger’s case survives but hangs by a thread. He would be well-advised at this point to make an extra effort to get counsel. And perhaps to amend his complaint to add a supplementary state law sexual orientation discrimination claim, since the court’s opinion appeared to suggest that if Title VII covered sexual orientation, he would probably have a decent case. If he can preserve federal jurisdiction based on the ADA claims, then he might escape the hostility of an upstate trial judge by getting the sexual orientation claim addressed in federal court.

NORTH CAROLINA – Taking a narrow view of “sex discrimination” under Title IX, U.S. District Judge Louise W. Flanagan dismissed constitutional and statutory claims against the state university by a former graduate student who claims the university’s mishandling of her request for a transcript caused her to lose an important employment opportunity. *Kirby v. North Carolina State University*, 2015 U.S. Dist. LEXIS 30135, 2015 WL 1036946 (E.D.N.C., March 10, 2105). Kendra Kirby enrolled in the Ph.D. program in Veterinary Medicine at NCSU in 1992. In April 1993 she attended an LGBT event in Washington shortly before her final exams. Although she

earned enough points on those exams for passing grades, her grade report showed failing grades and when she contacted her instructors she was told that the grades had been changed because she “attended a gay rights rally at an inconvenient time” and “was an avid Clinton supporter.” Kirby alleges that “in some conservative circles in North Carolina during this time frame, being an ‘avid Clinton support’ was considered code for being gay.” Although she attempted to attend a course the next spring, she received an anonymous letter threatening her with arrest if she continued attending the class. She alleges that she was “then prevented from dropping the class, and a grade of ‘I’ (incomplete) filed by course professors was changed to ‘F’ (failing).” She did not attempt to continue in the program. Flash forward to 2014 when she interviewed for a faculty position at her undergraduate alma mater. She was asked for a copy of her NCSU transcript, but NCSO refused to give her one, claiming she owed tuition money for the spring 1994 class from which she tried to withdraw. She claims that although she was considered well-qualified for the position she sought, her undergraduate school denied the job due to the delay in getting the transcript, and then because of “credibility issues” raised by the “failing grades” entered on the transcript. Her attempt to sue NCSO faltered on the court’s conclusion that the school enjoyed sovereign immunity on all claims except potentially a Title IX sex discrimination claim, since Congress premised receipt of federal education money on state waiver of sovereign immunity for Title IX claims. As to that, the court ruled, sexual orientation discrimination claims are not encompassed within the ban on sex discrimination under Title IX. “Nothing in the complaint suggests that a male individual would have been treated any differently for attending the gay and lesbian event,

or for being homosexual or being perceived as homosexual,” wrote Judge Flanagan. Even if the court were to follow persuasive precedent from other circuits finding protection for gay plaintiffs under a sex-stereotyping theory, wrote Flanagan, “plaintiff again fails to allege sufficient facts in support. There are no allegations of circumstances akin to those in *Price Waterhouse*, showing that plaintiff’s professors believes she was not behaving in an appropriately feminine manner,” and viewpoint discrimination would not be encompassed within Title IX. “Plaintiff’s invitation to overturn the 11th Amendment is declined,” wrote Flanagan, perhaps tongue-in-cheek, “such power being beyond this court’s authority.” Kirby represented herself *pro se*, usually a bad idea in complex federal litigation. She would undoubtedly have had a claim were Congress or North Carolina to adopt bans on sexual orientation discrimination in higher education.

NORTH CAROLINA – In *Hoffman v. Family Dollar Stores*, 2015 U.S. Dist. LEXIS 38661, 2015 WL 1399988 (W.D.N.C., March 26, 2015), U.S. District Judge Frank D. Whitney granted motions to dismiss all but one of the *pro se* plaintiff’s claims against his employer, finding viable only a claim that the employer violated medical confidentiality requirements of the Americans with Disabilities Act by failing to afford adequate confidentiality protection to medical records indicating the plaintiff is HIV-positive. The court rejected the plaintiff’s allegation of discrimination based upon “sexual preference,” finding it not to be covered under Title VII of the Civil Rights Act. Similarly, the court dismissed a claim under the Equal Pay Act, finding a lack of factual allegations that the denial of overtime the plaintiff was because of his sex. The court also dismissed the assertion of a

CIVIL LITIGATION

violation of the Genetic Information Nondiscrimination Act (GINA), finding that HIV-related information is not “genetic information” within the meaning of the act. Although plaintiff is in the protected class under the Age Discrimination in Employment Act, the court found that factual allegations of the complaint would not support an ADEA claim. As Judge Whitney summarizes the factual allegations, “Plaintiff is a 53-year-old male employee of Defendant. Plaintiff states that over the course of his employment with Defendant his store manager, Susan Murphy, would use the terms ‘faggot’ and ‘gay’ when describing the Plaintiff to others. On October 6, 2013, Plaintiff reported this behavior to Defendant’s Human Resources Department. Plaintiff states that as a result of filing a complaint with HR, Ms. Murphy denied him the ability to work certain overtime hours in 2013. Additionally, Plaintiff asserts that while employed with Defendant, Ms. Murphy disclosed confidential information regarding Plaintiff’s medical condition to Defendant’s employees and customers. Over the course of employment with Defendant, Plaintiff states he suffered from gastroenteritis and acute kidney failure as a result of having HIV. Plaintiff states this medical information was conveyed to Ms. Murphy and ultimately Defendant, when during August in 2013 Plaintiff gave a doctor’s note to both Ms. Murphy and his District Manager excusing him from missing work. Further, information regarding his health conditions was enclosed in a folder at Defendant’s store, to which Plaintiff states Ms. Murphy had access.” The court found that under a “liberal” reading of the *pro se* complaint the factual allegation “allows the Court to draw a reasonable inference that Defendant may be liable for misconduct in violation of the ADA,” so a pretrial ruling on the merits of the ADA claim would be premature.

OHIO – A unanimous three-judge panel of the Ohio 5th District Court of Appeals ruled on February 12 that the Morrow County Court of Common Pleas did not err when it changed custody of a seven-year-old girl from her father to her lesbian mother. *Combes v. Combes*, 2015 WL 1000061. The parties divorced in 2011. Under a shared parenting decree, they had joint custody of Katie with father designated as residential parent for school purposes. Things went well for the first year, with good communication between the parents. Then father remarried, and his new wife, Liz, told father she “did not like him talking to mother,” so father instructed mother to stop calling him and they were reduced to communicating through text messages. Liz assumed the role of an assertive stepmother, especially in communications with school, and mother became concerned that Katie was not properly being cared for. Father took Katie to counseling without telling mother. When mother picked up Katie for visitation, she was “always filthy,” often smelled and had unkempt and matted hair. She also claimed to be very hungry and said father did not give her food or snacks. Mother moved for a change of custody and the Common Pleas court, finding that father’s remarriage and stepmother’s assertive role constituted a change of circumstances, weighed the statutory factors on best interest of the child and decided to award mother residential custody with visitation rights for father. Father appealed, but the court of appeals agreed with the trial court’s conclusion that there were changed circumstances, and found no abuse of discretion in the trial court’s decision on the merits. “The magistrate decision thoroughly analyzed the factors and the findings were supported by the record,” wrote Judge William B. Hoffman for the panel. “The most significant factor in this case was the parents’ inability to communicate effectively due to Liz overstepping her role as step-parent. The Guardian ad Litem recommended

Mother be given custody based upon her interviews with all involved individuals.” Joseph A. Nigh of Tyack Blackmore, Liston & Nigh Co, LPA, of Columbus, Ohio, represented mother.

OHIO – Another lesson on the dangers of asserting *pro se* claims. Rodney Cottman, a person living with HIV, claims that while a patient at Horizon Health Care in 2010 or 2011 he suffered an attack by another resident and was denied care because of his HIV status by staff members. He filed a federal lawsuit against Horizon on January 29, 2015, more than two years later, submitting a hand-written form complaint leaving blank the box for “Statement of Claim” but writing a brief, barely coherent summary of his factual allegations and request for damages in the box for “Relief.” The case was referred to U.S. Magistrate Judge Stephanie K. Bowman for screening as an *in forma pauperis* complaint. She found that there was no federal cause of action that would fit the factual allegations to confer jurisdiction on the court. Horizon is a private entity, so any discrimination by it would not give rise to a federal constitutional claim, and an apparent reference to HIPPA, a federal statute, in the “Relief” box would not suffice, because that law does not create a private right of action. Bowman hypothesized that Cottman might have asserted a claim under the Americans with Disabilities Act, but as he had waited more than two years to assert a claim, he was time-barred (and ADA claims require the filing of an administrative charge before going to court). She recommended dismissal, and District Judge Timothy S. Black approved the recommendation. *Cottman v. Horizon Healthcare*, 2015 WL 959913 (S.D. Ohio, March 4, 2015).

OKLAHOMA – The U.S. Department of Justice filed suit on March 30 against Southeastern Oklahoma State

CIVIL LITIGATION

University, alleging that the school violated Title VII of the Civil Rights Act of 1964 by denying tenure to Rachel Tudor, a transgender faculty member, because of her failure to conform to gender stereotypes. The complaint also alleges that the school retaliated against her when she filed a sex discrimination charge. The case is pending in the Western District of Oklahoma. *United States v. SE Okla. State Univ.*, No. 15-324. Tudor presented as a man when hired in 2004, but started presenting as a woman in 2007. She was denied tenure despite positive performance reviews and recommendations from her colleagues and department chair. The case manifests the new approach of the Justice Department, in line with Attorney General Eric Holder's announcement in December that the Department now agreed with the Equal Employment Opportunity Commission's position that discrimination because of gender identity is a form of sex discrimination that should be recognized under Title VII. The case has been assigned to District Judge Robin J. Cauthron. *BloombergBNA Daily Labor Report*, 61 DLR A-1 (March 31, 2015).

PENNSYLVANIA – A gay state trooper suffered summary judgment of his Equal Protection Claims against several supervisors because, at bottom, he failed to specify which individuals were directly responsible for the treatment he alleged to be discriminatory. *Etheredge v. Henry*, 2015 WL 1359106 (M.D. Pa., March 24, 2015). Since Pennsylvania does not ban sexual orientation discrimination, James Etheredge brought his claim under the 14th Amendment Equal Protection clause. District Judge Robert D. Mariani devoted some of his opinion to puzzling through what the standard of review would be for a sexual orientation discrimination claim, since there was no direct 3rd Circuit precedent and other circuits are now split between

rational basis review and heightened scrutiny. However, he concluded that the discrimination claim would fail under either standard due to the lack of specificity in alleging discriminatory conduct by the individual defendants. “They” did this and “they” did that, but there were no factual allegations to tie any individual defendant to any individual discriminatory act. The court also found that Etheredge's factual allegations set back his case at certain points, essentially conceding that the “straight” comparator he used – another officer who suffered injuries in an auto accident and was out on disability leave at around the same time he was – was treated the same in certain ways. While he was able to elicit deposition testimony that he was treated adversely in some respects, the testimony was not specific enough to tie the treatment to particularly defendants.

PENNSYLVANIA – U.S. District Judge Kim R. Gibson rejected a variety of discrimination claims brought by a transgender man who was expelled from the University of Pittsburgh after extensive confrontations about his use of male-designated facilities in *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa., March 31, 2015). The opinion, which relies heavily on old cases that predate the modern law of transgender discrimination in the federal courts and seems to misread the basis for some of the most important recent cases, insists that current law and doctrine prohibiting sex discrimination (including the Equal Protection Clause) is not applicable to claims of discrimination by transgender plaintiffs. The plaintiff in this case, now known as Seamus Johnston, identified as male from an early age, but was in the midst of the legal transition process while a student at University of Pittsburgh, having applied for admission

as female but presenting from day one on campus as male, and insisting upon using male-designated restroom and locker room facilities, even after being threatened with arrest or expulsion. Johnston had taken many of the steps to acquire official documentation as male, including passport designation, but had not obtained a changed birth certificate. The school insisted that it would not treat Johnston as male without the evidence of a male-designated birth certificate, and ultimately he was expelled after a hearing before a student disciplinary board. Judge Gibson observed that the questions raised in this case were issues of first impression in the 3rd Circuit, and he found that recent precedents under Title VII from other circuits and districts were not relevant because of distinctions between the workplace and the university context. He also spent some energy in the opinion disparaging the analytical method of other courts that have recognized legal claims for sex discrimination by transgender plaintiffs, preferring to rely on older cases that rejected such claims. He found it rational for a school to balance the privacy interests of male students against whatever interest Johnston might assert to use male-designated facilities, and find the privacy interests more pressing. In the absence of 3rd Circuit precedent on transgender discrimination cases, Judge Gibson determined to follow the circuit's sexual orientation jurisprudence, which rejects the assertion of sex discrimination claims under Title VII. Judge Gibson was appointed to the district court by President George W. Bush in 2003.

PENNSYLVANIA – In a pair of decisions issued on March 31 involving two lesbian former employees of the same company, U.S. District Judge Matthew W. Brann dismissed charges of sex discrimination and sexual harassment under Title VII and sexual orientation discrimination under the

CIVIL LITIGATION

State College, Centre County Anti-Discrimination Ordinance. *Stewart v. Keystone Real Estate Group LP*, 2015 U.S. Dist. LEXIS 40912 (M.D. Pa.); *Thomas v. Keystone Real Estate Group LP*, 2015 U.S. Dist. LEIS 40896 (M.D. Pa.). The decisions are for all practical purposes identical. Judge Brann held that the plaintiffs had failed to exhaust administrative remedies under the local ordinance, and thus could not maintain the supplementary local law claim of sexual orientation discrimination (which would have been actionable on their factual allegations). He also found that under 3rd Circuit precedent there is very limited opportunity for lesbian or gay plaintiffs to assert sex discrimination charges under Title VII in the absence of evidence of gender stereotyping. Although all claims were dismissed, Judge Brann opined that with more specific factual allegations it might be possible for the plaintiffs to overcome the problems with their complaints, at least as to the hostile environment claims, so the dismissals were without prejudice and amended complaints might be filed. Similarly, Judge Brann opined that factual allegations of exhaustion of administrative remedies, missing from the complaint, might revive the sexual orientation discrimination claim under local law. Counsel representing the plaintiffs is Joseph C. Korsak of Mazza Law Group in State College, PA.

TEXAS – The 4th District Court of Appeals in San Antonio ruled that a transgender man lacked standing to seek a parentage adjudication as to the children he was raising with his former longtime female companion, because he was not legally recognized as male at the time he filed the petition in this case. *In re N.I.V.S. and M.C.V.S., Minor Children*, 2015 Tex. App. LEXIS 2282 (March 11, 2015). Plaintiff Dino Villarreal was born Diana Villarreal, but has identified

as male from childhood, being raised as a boy and then living as a man for all of his life. He began a romantic relationship with Sandra Sandoval in 1994. She knew he was transgender. Sandoval adopted two children, one in 2002 and one in 2004, and Villarreal functioned as a father to the children, who referred to him as such and were unaware that he was born with female genitals. He was known as their father in the community, and he quit his job in 2008 to become a stay-at-home dad for the children, both of whom have “special needs.” However, Villarreal and Sandoval separated in 2011, and eventually in 2013 Sandoval refused Villarreal continued contact with the children. Villarreal obtained a legal name-change on November 26, 2013, prior to filing this suit to adjudicate parentage on December 9, 2013. He filed a voluntary statement of paternity with the court on December 16, 2013, as Dino Villarreal, and the court granted him temporary possession of the children on December 24, setting the case for hearing on January 6. On January 3, 2014, Villarreal obtained a court order officially changing his legal identity from female to male. But Sandoval had filed a motion challenging the domestic relations court’s jurisdiction on the ground that Villarreal was not legally male when he filed his parentage lawsuit on December 9. Ultimately, this key fact was deemed as determinative by the trial court and the court of appeals, as the Texas Family Code’s specifications of who can file parentage suits do not contemplate that a woman can file a parentage suit with respect to children who have a legal mother, as these children do. Because of the length of time Villarreal waited to file her suit after splitting up with Sandoval, he was also barred from an alternative route involving de facto parentage, since he had not had possession of the children during the relevant time period prior to filing suit.

WASHINGTON – Florist Barronelle Stutzman of Arlene’s Flowers and Gifts has been ordered to pay a \$1,000 fine plus \$1 for court costs and fees for discriminating against Robert Ingersoll and Curt Freed, who had tried to purchase from her a floral arrangement for their wedding, only to be denied because of her religious disapproval for same-sex marriage. Benton County Superior Court Judge Alexander C. Ekstrom found that Stutzman had violated the state’s consumer protection and anti-discrimination laws by her action. The state had offered her a settlement that would have reduced her costs, but she refused to settle, stating in a letter to Attorney General Bob Ferguson that “My freedom to honor God in doing what I do best is more important.” She has been represented by Alliance Defending Freedom, the non-profit entity based in Arizona that specializes in opposing gay rights at every turn, but with diminishing success. *Huffington Post*, March 30.

WEST VIRGINIA – Lisa Marie Kerr, an attorney, enrolled in Marshall University’s Master of Arts in Teaching Program with the idea of pursuing a career as a teacher. She did well in her course work, consistent with her excellent undergraduate and law school record, but ran into trouble during student teaching in her final semester. She alleges that the troubles began after various people in the program found out she was a lesbian; after that, she got the cold shoulder and her whistle-blowing about unprofessional conduct by the public school teacher assigned as her supervisor for student teaching led to her being drummed out of the program and denied certification. *Kerr v. Marshall Univ. Bd. Of Governors*, 2015 U.S. Dist. LEXIS 38206 (S.D. W.Va., March 26, 2015). Unfortunately for her, Marshall University is in West Virginia, a state that affords no protection against sexual orientation discrimination.

CIVIL / CRIMINAL LITIGATION

Representing herself, she asserted claims against the University and various individuals under state tort law (including defamation, interference with business expectancy, and outrage), due process and equal protection violations under 42 USC 1983, and an FLSA claim for unpaid wages. Ruling on the defendants' motion to dismiss, the district court adopted a report and recommendation from U.S. Magistrate Judge Tinsley to dismiss the complaint in its entirety on various grounds, including sovereign immunity. The court found that the alleged defamatory statements about Kerr were all non-actionable statements of opinion, and that her factual allegations were insufficient to support the other claims. It appears that Kerr might have surmounted some sovereign immunity issues by including claims under Title IX, but that would depend on the court accepting an allegation that sexual orientation discrimination is actionable under that federal law, which prohibits sex discrimination by educational institutions receiving federal funds. The court noted the lack of specific allegations about when and how defendants learned of the plaintiff's sexual orientation. The court's disposition of the case illustrates the daunting pleading specificity requirements imposed by the Supreme Court on civil litigation.

WISCONSIN – U.S. District Judge Charles N. Clevert, Jr., affirmed the termination of James E. Riano, a registered nurse, by the Department of Veterans Affairs, on charges that Riano engaged in unprofessional conduct involving the manipulation of the genitals of male patients at the Zablocki VA Medical Center and used inappropriate sexual language while performing examinations for genital warts. *Riano v. Shinseki*, 2015 U.S. Dist. LEXIS 36681, 2015 WL 1311445 (E.D. Wis., March 24, 2015). We will confess

to a mixture of horror and amusement while reading the detailed account of testimony in this case as related by Judge Clevert in the lengthy opinion. It appears that the VA must have expended considerable effort and funds on expert testimony to prove that Riano's method of conducting the exams did not fall within professionally accepted parameters, and that the sexually explicit language he used (such as "pecker" and "dick" and "balls" instead of "penis" and "testicles") was inappropriate. Riano had been chosen to start a special dermatology clinic to meet the needs of male veterans for genital-wart treatment because he had "worked with genital warts as a corpsman in the U.S. Navy." Several veterans complained that they were "sexually assaulted" by Riano during examinations. His methodology involved applying Nivea cream to the penis and then manipulating it to induce partial erection, which he claimed was the appropriate methodology to facilitate finding genital warts, and that he used vulgar language in order to be able to communicate with the veterans more effectively. Some of them were offended, some ejaculated during the exams, and some thought they were being subjected to inappropriate conduct. Expert testimony during the termination hearing procedure suggested that Riano's methods were unorthodox, and the court found that the administrative record supported the agency's decision to terminate Riano. The court applied the "arbitrary and capricious" standard, and focused much of its review on Riano's due process challenge to the way the investigation of his activities was carried out, reported, and acted upon. It is likely that there was a fair amount of embarrassment all around during the testimony, but Judge Clevert provides a detailed, frank and bland recitation of the facts that seems a bit deadpan under the circumstances. Some of the opinion sounds like it might be part of a script for an episode of the cable series "Masters of Sex."

CRIMINAL LITIGATION NOTES

ARMY COURT OF CRIMINAL APPEALS – *International Business Times News* (March 6) reported that the U.S. Army Court of Criminal Appeals has ordered military lawyers to cease referring to Chelsea Manning in court papers and proceedings by her former name of Bradley Manning. The court said that previously filed documents referring to Manning will be amended to reflect her gender transition and legally approved change of name, and in future Army lawyers must refer to her using either gender-neutral terms or feminine pronouns. Manning is serving a 35-year-prison sentence for her role in leaking classified information to Wikileaks. She announced in August 2013 that she was transitioning, and obtained a legal name change in April 2014, shortly after her conviction, but military lawyers have persisted in referring to her by her former name and as "he" or "him." The Army's lawyers had opposed Manning's request to be referred to using her preferred gender identity, and there was a lengthy battle to get the Army to agree that Manning could receive hormone therapy as part of her transition process. She is now receiving the therapy, but the Army is reportedly resisting her desire to grow her hair to the length normally allowed for female military prisoners.

CALIFORNIA – In *People v. Bailey*, 2015 Cal. App. Unpub. LEXIS 2056 (4th Dist. Ct. App., March 24, 2015), the court of appeal upheld imposition of a sexual orientation hate crime enhancement sentence on the defendant, rejecting a defense argument based on a disparity between the form completed by the jury foreman and the verdict read into the record and agreed to by the jury upon polling by the trial judge, finding that the defendant had inflicted

CRIMINAL LITIGATION

a severe bodily injury on the victim. The victim, a gay man, was assaulted by the defendant with a broomstick after the defendant learned that the victim was gay and demanded that he “get the fuck” out of there because they didn’t want people like the victim around. The opinion by Acting Presiding Judge Gilbert Nares provides a detailed account of the evidence presented at trial.

CALIFORNIA – The 3rd District Court of Appeals rejected Marc Anthony Donias’s appeal of his conviction by a jury on charges of attempted murder, assault with a deadly weapon, battery resulting in infliction of serious bodily injury, and infliction of corporal injury on a former cohabitant. *People v. Donias*, 2015 Cal. App. Unpub. LEXIS 1518 (March 4, 2015). This would be an unexceptionable case which we would not normally report, except for the fact that the defendant is better known as former gay-for-pay porn star Ryan Idol. The court his various claims of errors in the trial process. Donias was convicted of assaulting his girlfriend, who testified that she ended their romantic relationship “when she discovered that defendant had given her a venereal disease and was working in the pornography industry,” but twenty years later she looked him up on the Internet and discovered he was “working on Broadway” and hooked up with him again. The court relates a somewhat convoluted story of the relationship, including a male roommate living with them who seems to have also had a sexual relationship with Donias, the two men having registered as domestic partners in California and civil union partners in New Hampshire. An interesting twisted path culminating on September 5, 2009, when, she claimed, Donias showed up drunk and assaulted her in her bathroom by bashing her with a ceramic toilet tank hood. The case received some

press notoriety at the time of the trial. Among the arguments about ineffective assistance of counsel that the court rejected as defense counsel’s decision to allow evidence about Donias’ career in gay porn. The court found that counsel made a reasonable tactical decision in line with his theory of defending the case.

LOUISIANA – In *Bella v. Cain*, 2015 WL 1311216 (E.D. La., March 23, 2015), U.S. District Judge Lance M. Africk denied a habeas corpus petition filed by a man convicted of aggravated rape and aggravate oral sexual battery on a boy who is the son of the defendant’s brother’s former girlfriend. U.S. Magistrate Judge Sally Shushan issued a report recommending the ruling. The offense came to light when the boy, J.P., then sixteen years old, was hospitalized and diagnosed with AIDS (his symptoms being condyloma and Burkitt’s lymphoma). He then alleged that he had been sexually abused by the defendant eight or nine years earlier, during the defendant’s brother’s relationship with J.P.’s mother. The defendant was then tested and was positive for HIV. He was sentenced to life imprisonment for the rape and twenty years for the battery conviction, to be served consecutively with no possibility of probation, parole or suspension of sentence, and the conviction was upheld in the state courts. In seeking the writ, *Bella* challenged the trial court’s admission of expert testimony from a young doctor who testified that the time from exposure to development of AIDS symptoms was approximately eleven years, testimony which supported the prosecution’s claim that J.P.’s exposure to HIV coincided with the defendant’s sexual assault of him. He also challenged the court’s failure to grant a challenge for cause of a juror who had been a victim of sexual assault as a boy, and alleged ineffective assistance of counsel for the failure of his defense

counsel to pursue a theory that the boy could have been infected at birth by his mother. Magistrate Shushan rejected these challenges.

MISSISSIPPI – *AP State News* (March 8) reported that Mississippi Circuit Judge Dale Harkey sentenced Brian Keith Thomas, 26, to 25 years in prison for sexually exposing a teenage girl to HIV. Thomas was diagnosed HIV-positive in 2009, according to Jackson County prosecutors, and began having sex with the girl in 2013, when she was 13, without disclosing his HIV status. His conduct is “sexual assault” because the girl is too young to legally consent to sex. The article does not state that the girl was infected, and does not state whether Thomas used condoms. Thomas pled guilty to three counts of sexual battery and causing exposure to HIV. The judge described him as “cold blooded,” even though he expression contrition and the girl said at the sentencing hearing that she had forgiven him.

NEVADA – An HIV-positive man who was convicted by a jury on charges of first-degree kidnapping, sexual assault upon a minor under the age of sixteen, battery with intent to commit sexual assault, and use of a minor in the production of pornography lost his bid for a writ of habeas corpus after failing to win reversal of his conviction in the state courts on direct appeal in *Shelton v. Skolnik*, 2015 U.S. Dist. LEXIS 34429 (D. Nev., March 19, 2015). Shawn Shelton, falsely representing himself to be a police officer, stopped a teenage boy, telling the boy he resembled somebody who had committed a crime, abducted the boy in his SUV and forced him to perform oral sex on Shelton. Shelton never mentioned to the boy that he was HIV-positive, did not offer use of a condom, and ejaculated in the boy’s mouth, commanding him to swallow.

CRIMINAL / PRISONER LITIGATION

Shelton's attorney planned to have him testify that the sex was consensual, but changed course when the trial judge would not grant a motion *in limine* to exclude any testimony about Shelton's HIV-status. Shelton was sentenced to four terms of life in prison, with the possibility of parole. The federal district court rejected, as had the Nevada Supreme Court, Shelton's claim of ineffective representation of counsel, finding that whatever shortcomings there were in his defense, the evidence of guilt in his case, including detailed testimony by the victim that was substantially corroborated by physical evidence and testimony of other witnesses, was overwhelming.

NEW YORK – A security guard employed by a private company contracted to provide security at facilities of New York City's HIV/AIDS Services Administration (HASA) was allegedly bit by an agency client while interceding in an altercation in the waiting room between the defendant and a caseworker. The defendant moved for an order precluding the complainant from referring in her trial testimony to the suggestion that the defendant is HIV-positive and that the alleged assault took place in the HASA waiting room, as well as for an order sealing this motion. NYC Criminal Court Judge Jeanette Rodriguez-Morick denied the testimonial motion, finding that defense counsel's attempt to invoke the state's HIV confidentiality law in this context was frivolous. The judge found that the law, by its own terms, applied to health care workers and social service agency employees who acquired HIV-related information about individuals through their rendition of services. The complainant in this case was not a health care worker or agency employee, and the confidentiality law did not apply in this setting. On the other hand, recognizing the sensitivity of the case, the judge decreed that the opinion on

this motion would be titled *People v. Doe* to preserve the confidentiality of the defendant, and the motion would be filed under seal. *People v. Doe*, 1 N.Y.S.3d 906, 2015 N.Y. Slip Op. 25044 (NYC Crim. Ct., Bronx Co., February 6, 2015).

TEXAS – An HIV-positive man's decision to plead guilty to a charge that he had "intentionally or knowingly committed assault by causing serious bodily injury to Q.S. by causing her to contract HIV" precluded him from challenging his conviction on appeal by proposing to prove that HIV infection is no longer a "serious bodily injury" because of effective medical treatments. *Billingsley v. State*, 2015 Tex. App. LEXIS 1915 (Tex. App., 11th Dist., Feb. 27, 2015). The Texas Penal Code defines "serious bodily injury" to mean "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Jimmy Billingsley contends that this definition does not apply to HIV infection any longer. Perhaps so, but the court found that he had executed a "Judicial Confession" in which he swore under oath that he had read the indictment "filed in this case and committed each and every act alleged therein, except those acts waived by the state." At the plea hearing, when he was asked why he was pleading guilty, he said it was "because he was guilty 'and for no other reason.'" Under the circumstances, ruled the court of appeals, "We conclude that Appellant's judicial confession covered all of the elements of the charged offense, including the element challenged by Appellant on appeal," so it denied his appeal. Billingsley was sentenced to 15 years in prison. The report of the case does not indicate whether he was represented by counsel, either at the plea stage or in mounting this appeal.

WEST VIRGINIA – U.S. District Judge John T. Copenhaver, Jr., affirmed a decision by the Social Security Administration to deny disability benefits to a transsexual man whose claim was premised primarily on psychological conditions. *Jeffrey v. Colvin*, 2015 WL 1257874 (S.D. W.Va., March 18, 2015). From the court's summary of the evidence, it seems that the ALJ concluded that the medications the claimant was received, together with his transition process, had alleviated earlier psychological problems. "The medical records reveal that the medication have been relatively effective in controlling Claimant's symptoms," wrote the court. "The ALJ stated 'Claimant's mental state has improved now that his physical appearance matches his gender identity.' The ALJ held that 'The medical evidence of record reflects that the claimant consistently tells mental health providers that he is doing well.' At the hearing, the ALJ asked Claimant if he could perform a job that did not involve social interaction, such as an office building night cleaner. Claimant responded that because of his/her fear of leaving the house and dealing with the public, his/her attendance would be poor. The ALJ appropriately points out in his decision that contrary to his/her testimony, Claimant leaves the house and interacts with the public in volunteering at a thrift store."

PRISONER LITIGATION NOTES

CALIFORNIA – United States Magistrate Judge Craig M. Kellison granted summary judgment to defendants in *pro se* plaintiff Ryan Bigoski-Odom's suite for damages for civil rights violations alleging denial of HIV medication by medical staff in the Salerno County Jail for approximately six months in 2011, in *Bigoski-Odom v. Firman*, 2015 U.S. Dist. LEXIS 26688,

PRISONER LITIGATION

2015 WL 925529 (E. D. Cal., March 3, 2015). One would think that Bigoski-Odom had abandoned her claim by not contesting summary judgment or providing sufficient information to effect service on a key defendant, but that conclusion would be at least party incomplete. Bigoski-Odom filed in February of 2012, and Judge Kellison dismissed the action upon screening under 28 U.S.C. § 1915A three times during the first year, each time granting leave to amend. Bigoski-Odom apparently filed a third amended complaint early in 2013, but according to the docket no further screening or other activity by the court occurred prior to granting summary judgment in 2015. (During this time, Bigoski-Odom was convicted in a locally notorious criminal case involving torture and murder. She was sentenced to life without parole, and presumably left the jail for state custody). Judge Kellison found that there was no triable issue of deliberate indifference by a physician's assistant, because she had "limited" involvement in Bigoski-Odom's care but nevertheless saw her several times over the six months and made appropriate physician's referrals, and the HIV medication was suspended because of Bigoski-Odom's intolerance of same due to pancreatitis. Judge Kellison dismissed claims against the treating physician (Dr. James Firman) because "plaintiff has not provided sufficient information to effect service." [Note: Compare the court's orders in *Brown* (this issue), directing the clerk of court to effect service on prison official defendants. This writer found Dr. Firman's address on the Internet in under thirty seconds. It is likely, however, that Dr. Firman would also have received an unopposed summary judgment in any event on similar arguments, since Bigoski-Odom appears to have legally abandoned her claims after Judge Kellison failed to screen her last pleading or provide any judicial oversight after she filed a third

amended complaint that could not be dismissed on its face.] *William J. Rold*

FLORIDA – The October 2014 issue of *Law Notes* reported two decisions of United States District Judge Gregory A. Presnell involving the rape of a transgender inmate in the Orange County (Florida) Jail. One involved use of expert testimony – *D. B. v. Orange County*, 2014 WL 4655739 (M.D. Fla., September 14, 2014), reported at page 438. The other, *D. B. v. Orange County*, 2014 WL 4674136 (M.D. Fla., September 8, 2014), reported at page 421, granted the County's motion for summary judgment on the 42 U.S.C. § 1983 *Monell* claim – see *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978) – finding insufficient evidence of deliberate indifference to serious safety needs by a municipal defendant but leaving for the jury the state law question of negligence by the county and the claims against individual defendants. By way of background, D.B. was denied protective custody despite repeated requests, including inmates shaking their penises at her, prior to the rape; and the rapist was convicted and sentenced to 25 years. Now, the *Orlando Sentinel*, 2015 WLNR 6488128 (March 4, 2015), reports that D. B. was awarded \$40,000 by a Florida jury as a result of the rape (\$10,000 for emotion distress; \$30,000 for costs, including future medical costs). Her attorney, Jeremy Markman, of King & Markman, PA, Orlando, promises to appeal, calling the low verdict a "miscarriage of justice" and saying: "Apparently this jury didn't have much regard for the victim. No rape causes only \$10,000 worth of emotional damages." According to the article, a jail investigator was quoted in court documents as saying that "assaults against transgender inmates had happened before"; and other court documents established that there had not been a "thorough inquiry into D.B.'s requests for protective custody."

An Orange County Jail spokeswoman said that there was a "coordinator" in charge of reducing incidence of sexual assault under the Prison Rape Elimination Act of 2003, but she "could not determine what policies or practices may have been changed after the 2008 rape," although she "believed greater screening was required when incoming inmates identify as transgender." It is likely that an appeal to the Eleventh Circuit will include the point that Judge Presnell erred when granting summary judgment in favor of Orange County in the federal protection from harm civil rights claim. *William J. Rold*

FLORIDA – The *Orlando Sentinel* (March 4) reported that a federal court jury awarded \$40,000 to a transgender woman prisoner, identified only as D.B., who was raped in a general population cell in 2008. As is commonly the case, Orange County Jail officials insisted that the inmate, still possessed of male genitals, be housed in male general population, and were apparently oblivious to the danger this presented to the inmate. The article reported that the civil judgment became final on February 27. The jury found that the county was guilty of "failure to use reasonable care" in protecting the inmate, awarding \$10,000 for emotional distress and \$30,000 for costs, including future medical costs, stemming from the rape. The inmate's attorney, Jeremy Markman, announced that an appeal will be filed protesting the low damage award. The victim made repeated requests to be held in protective custody. Her assailant, cellmate Josh Bailey, was convicted of sexual battery with a deadline weapon and sentenced to 25 years for the assault on D.B., who filed the lawsuit in 2012, alleging negligence and civil rights violations by the county. U.S. District Judge Gregory Presnell previously ruled in D.B.'s case that there was no proof that the county intentionally disregarded D.B.'s safety,

PRISONER LITIGATION

according to the newspaper report, but allowed the question of negligence to go to the jury.

GEORGIA – In a sequel to *Nimmons v. Gwinnett County*, 2014 U.S. Dist. LEXIS 118364 (N.D. Ga., August 25, 2014), reported in *Law Notes* (September 2014 at 373), United States District Judge William S. Duffey, Jr., granted transgender prisoner Jerome Nimmons default judgment against the sheriff's deputy who sexually assaulted her, in the amount of \$200,000 (\$150,000 compensatory; \$50,000 punitive), in *Nimmons v. Clark*, 2015 U.S. Dist. LEXIS 31629 (N.D. Ga., March 16, 2015). Deputy Duone Clark was convicted of "sexual assault against a person in custody and dereliction of duty by a public officer," and he was sentenced to ten years with three to be served in confinement, for multiple incidents of extorted oral sex over a period exceeding two months. After Clark failed to answer Nimmons' complaint, Judge Duffey held an evidentiary hearing, which reviewed the basis for the damages, including: (1) investigative confirmation of the assaults from a "review of videotapes of Plaintiff's cell" in a segregated unit and from the presence of semen on Nimmons' shorts and sheets; and (2) Nimmons' "trauma, sleepless nights, nightmares, depression, and psychological impact" from the assaults. Judge Duffey found a violation of due process under the Fourteenth Amendment, and he fixed damages for the "reprehensible" conduct, as indicated, relying primarily on *Mathie v. Fries*, 121 F.3d 808, 813 (2d Cir. 1997) (surveying damages in prison guard sexual assault cases). He also awarded attorneys' fees to Nimmons' counsel, Jeffrey Ross Sliz, of Sliz, Drake, Estes & Greenwald, of Lawrenceville, Georgia; and Thomas McKee West, of Atlanta. [Note: While the case is useful to the bar as a substantial award

to a transgender victim of assault, it is unclear whether anyone here will see any money, because Clark may be judgment proof and not entitled to indemnity. In the earlier decision, Judge Duffey dismissed claims against the "deep pocket" defendants (county and sheriff), holding that the county is not liable under Georgia law for occurrences at the jail and the sheriff had qualified immunity. The latter ruling is questionable on the law and in light of the videotapes, which potentially showed recognition of the risks to transgender inmates held in protective custody. Either the sheriff maintained the taping system as regular business but did not review it, or his "investigation" forced Nimmons to undergo an additional assault (that could be filmed) in order to confirm her allegations. Qualified immunity seems inappropriate under either scenario.]
William J. Rold

GEORGIA – Pro se transgender prisoner Christopher A. Lynch, a/k/a Christina Lynch, survives to fight another day in *Lynch v. Lewis*, 2015 U.S. Dist. LEXIS 35561, 2015 WL 1296235 (M. D. Ga., March 23, 2015). Nearly a year ago, Senior United States District Judge Hugh Lawson accepted a Recommendation from United States Magistrate Judge Thomas Q. Langstaff that Lynch's medical claims be allowed to proceed past initial screening under the Prison Litigation Reform Act in *Lynch v. Lewis*, 2014 WL 1813725 (M.D. Ga., May 7, 2014), reported in *Law Notes* (June 2014) at pages 254-5. Now the same magistrate and judge deny a motion to dismiss by the two defendant doctors. The court notes that Lynch (now 22) has identified as female since age 9, using "self-prescribed" hormones since age 16 until she was incarcerated at age 19, whereupon she sought prescribed treatment from the Georgia Department of Corrections. Although Lynch was supported by

prison psychological staff, physicians denied her efforts to obtain prescribed hormonal treatment under a Georgia policy that required pre-incarceration treatment with prescribed hormones in order to receive same in prison. Lynch claimed this distinction was "arbitrary," particularly in her case, and demanded its replacement by "sound medical judgment." Lynch's attached medical records showed "persistent discomfort and sense of inappropriateness in gender role of male, preoccupation with ridding self of sexual characteristics of male, significant stress and impairment in multiple areas of functioning." As a result, Lynch has "resorted to self-mutilation of his wrist, arm, thigh and genitals, is experiencing severe depression, insomnia, and an immeasurable increase of manic-anxiety, psychological breakdowns, self-loathing, and a desire to be rid of his facial hair and other male characteristics." (Although the court granted an application for use of female pronouns for Lynch in the earlier decision, it uses male pronouns in the current opinion.) The Georgia doctors interposed three defenses in their motion to dismiss: (1) they did not have "knowledge" that denying Lynch medication and other treatment posed a serious risk; (2) they are entitled to qualified immunity; and (3) Lynch's request for injunctive relief was "premature." The court found that Lynch had a serious "need" for medical treatment under *Estelle v. Gamble*, 429 U.S. 97, 103-06 (1976) (citing string of transgender cases). Applying *Kothman v. Rosario*, 558 F. App'x 907, 910 (11th Cir. 2014) – reported in *Law Notes* (April 2014) at pages 135-6 – it also found that the pleadings were sufficient to sustain a "plausible claim of deliberate indifference" because of Lynch's prior diagnoses and history (including self-harm), recognition of need for treatment in the medical community, and "knowing" refusal to provide any treatment. The court did

PRISONER LITIGATION

not rule at this point that Lynch was entitled to hormone therapy or any other particular treatment; but it rejected a qualified immunity defense, framing the issue as whether an objective defendant would know that someone in Lynch's situation was clearly entitled to medical treatment, not a particular treatment, which determination would be left until after discovery. It also found defendants' attempt to strip the prayer for injunctive relief at this stage of the case to be itself "premature." [Note: At this pace, one can expect a summary judgment decision after discovery in about another year. Having lost twice on their absolutist position in opinions that are remarkably similar, one can hope that Georgia prison officials will adopt a transgender policy more soundly grounded in individualized patient determinations, but considering who we are dealing with here, that hope may be unrealistic.] *William J. Rold*

ILLINOIS – United States District Judge J. Phil Gilbert continues to consider transgender claims from inmates at Illinois' Lawrence Correctional Facility in *Brown v. Godinez*, 2015 U.S. Dist. LEXIS 27012, 2015 WL 1042537 (S. D. Ill., March 5, 2015). See summary of four opinions from Judge Gilbert regarding Lawrence transgender inmate Dameon Cole, a/k/a Divine Desire Cole, in March 2105 Law Notes (at 120-21). In this case, involving *pro se* transgender prisoner Floyd Brown, Judge Gilbert allows Brown to proceed, after screening under 28 U.S.C. § 1915A, in claims under 42 U.S.C. § 1983. Brown can proceed under the Equal Protection Clause, alleging that she was discriminated against because of her transgender status when defendants "repeatedly" denied her a prison job, while "other inmates receiv[ed] job assignments, even though they should have been denied work under the criteria used to deny Plaintiff work." Judge Gilbert allowed

a "colorable" claim to proceed against the prison's director of job assignments at this stage on two bases: (1) under traditional scrutiny because the decision-maker may have "singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group," citing *Nabozny v. Podlesny*, 92 F.3d 446, 453-54 (7th Cir. 1996); and (2) on a "class-of-one" theory, under which a claim can proceed if there were no rational basis for intentionally treating someone differently from others, citing *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 601 (2008); and *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Judge Gilbert also allowed Brown to proceed on these theories against the prison's doctor and against the warden (both of whom are defendants in the Cole litigation), for denying Brown a bra, even though there is no "obvious constitutional right" to wear a bra. The "bra claim" is also allowed to proceed as against Dr. Coe and the contractual health care provider (Wexford Medical Health Sources) as part of a package of Brown's complaints about deliberate indifference to her serious health care needs under the Eighth Amendment and *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Judge Gilbert found that Brown's complaint about conditions of confinement (including toilets that were set to flush automatically at fixed intervals, splashing inmates with urine and feces) could proceed under *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992); and *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); but he ordered it severed as a "discrete" separate lawsuit, under *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007), noting that this claim involved many inmates and did not single out Brown because of transgender status, ruling: "Plaintiff will be given an opportunity to opt out of the severed case, thereby avoiding an additional filing fee." Judge Gilbert

dismissed claims against defendants whose only involvement appeared to be denial of Brown's grievances. Finally, Judge Gilbert issued various "housekeeping" orders, including: directing the clerk to assist Brown with service of notice and summons (with addresses to be provided *in camera*, if needed); ordering defendants to file a responsive pleading; and referring the case to a magistrate judge for further proceedings. Now that there are at least two transgender inmate cases whose claims are allowed to proceed against the Lawrence facility in downstate Illinois – involving some of the same defendants (including the warden and prison physician) before the same federal judge – it will be interesting to see what happens once defense counsel appears. Judge Gilbert has not appointed counsel for either plaintiff. *William R. Rold*

MICHIGAN – African-American prisoner Robert L. Dykes-Bey received a note threatening him and his friend Eckstein, a white inmate, concerning an alleged debt owed by Eckstein. Dykes-Bey was assaulted by an "unknown" the next day. He and Eckstein were both placed in investigative segregation, following which Eckstein received a security classification providing greater protection than that afforded Dykes-Bey, who brought a *pro se* Equal Protection lawsuit, claiming that the white inmate (Eckstein) got more protection even though he was not the one assaulted. United States District Judge Patrick J. Duggan granted the defendants summary judgment in *Dykes-Bey v. Winn*, 2015 U.S. Dist. LEXIS 34691, 2015 WL 1287465 (E.D. Mich., March 20, 2015), finding that no jury could find an Equal Protection violation based on defendants' justifications: (1) Dykes-Bey and Eckstein should be separated to avoid association that could trigger violence due to the alleged debt; (2)

PRISONER LITIGATION

officials “suspected” that the two had a “homosexual relationship” and therefore could not be housed together under prison rules; (3) Eckstein needed greater protection even though he was not the victim because he was “more vulnerable” and had been sexually exploited at a previous prison, while Dykes-Bey had no such history; and (4) the Deputy Warden “believed that it could very well be that the assault on [Plaintiff] was a fight over Eckstein.” Judge Duggan therefore found that Dykes-Bey and Eckstein were not similarly situated, the initial predicate for Equal Protection claims under *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Judge Duggan wrote: “Prisoner Eckstein was placed in level IV... due to his prior complaint of being pressed for sex and this additional assaultive situation involving his alleged homosexual lover.... Because the record contains no evidence on which a reasonable jury could rely to conclude that Plaintiff’s history included vulnerabilities similar to those in Eckstein’s history, the Court concludes that the two are not similarly situated as a matter of law.” It did not matter for summary judgment that Dykes-Bey denied the factual underpinnings of the justifications or that the defendants offered no evidence that Eckstein was being sexually victimized at his current institution. It was enough that: (1) officials “deemed” Eckstein to be at greater risk; (2) Dykes-Bey did not dispute Eckstein’s history; (3) there was a “possible homosexual relationship” between them; and (4) the defendants “believed” that the justifications were true at the time the alleged discrimination occurred. Thus, on these representations in the prison context, Judge Duggan found no “purposeful” discrimination under *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); and he rejected Dykes-Bey’s argument that there was a jury question as to whether the stated reasons were pretextual. *William J. Rold*

NEVADA – *Pro se* inmate Rickie L. Hill lost to summary judgment in his claim that an officer endangered him by telling his cellmate he was gay and a sex offender in *Hill v. Baker*, 2015 U.S. Dist. LEXIS 22898, 2015 WL 777592 (D. Nev., February 24, 2015). United States District Judge Larry R. Hicks ruled that Hill failed to comply with exhaustion of administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), when he brought suit in 2012, after only filing an “information grievance” in 2009 and not pursuing Nevada’s three-tiered grievance system to conclusion prior to starting his lawsuit. Judge Hicks granted the unopposed summary judgment, but he ruled that “Plaintiff’s claims against other defendants are not affected” without explaining in the brief opinion what these claims are or which other defendants are being sued. *William J. Rold*

NEW YORK – *Pro se* prisoner Tony McGee lost on summary judgment in his civil rights case claiming that he was denied various privileges because of his sexual orientation in *McGee v. Haigh*, 2015 U.S. Dist. LEXIS 40053 (N.D.N.Y., March 30, 2015). United States District Judge Mae A. D’Agostino wrote separately but adopted the Recommendations of United States Magistrate Judge David E. Peebles in a case that proceeded through discovery solely on Fourteenth Amendment Equal Protection claims. Judge D’Agostino’s opinion provides a lengthy analysis of exceptions to the exhaustion of administrative remedies requirements of the Prison Litigation Reform Act, eventually resolving each one against McGee. (One defendant was dismissed without prejudice for failure to serve.) McGee filed multiple grievances, claiming discriminatory or “animus” based denials of meals, law library, showers, mail and commissary (particularly, sheets).

Judge D’Agostino found that none of the grievances “contain[ed] allegations of discrimination based on his sexual orientation, and thus did not squarely place prison officials on notice of his equal protection claims.” Judge D’Agostino proceeded to consider three exceptions to exhaustion enunciated in *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004): whether administrative remedies were “available”; whether defendants prevented exhaustion; and whether “special circumstances” justified failure to exhaust. Judge D’Agostino found that remedies were “available” and not “prevented” because McGee in fact filed numerous grievances. Although McGee alleged he was constrained by “death threats,” Judge D’Agostino found that such “threats” did not explain why McGee could file grievances both before and after the “threats” but failed to mention sexual orientation specifically. McGee cited *Morris v. Eversley*, 205 F. Supp. 2d 234 (S.D.N.Y. 2002), in support of his argument that a grievance citing harassment should be sufficient for exhaustion, but Judge D’Agostino ruled that *Morris* was “misplaced” because *Morris* dealt with a prison’s failure promptly to respond to an expedited grievance. This misses McGee’s point: in *Morris*, District Judge (now Circuit Judge) Denny Chin ruled that an expedited grievance claiming “harassment” and protesting “misconduct meant to annoy, intimidate, or harm in inmate” was adequate to place officials under a duty to determine “if the grievance is a ‘bona fide’ case of harassment,” even if the plaintiff failed to invoke formal grievance proceedings following her sexual assault. *Id.* at 240. Going forward, prisoners alleging discrimination based on sexual orientation in the Northern District of New York are well-advised to be sure to incant “sexual orientation” in their grievances. Sometimes that may not even be enough: here, McGee alleged that he heard that an officer said

PRISONER LITIGATION

that the “faggot is not getting a sheet,” but this evidence was excluded because McGee could not produce admissible evidence of the statement for summary judgment. *William J. Rold*

OHIO – After the Prison Litigation Reform Act [PLRA], there may no longer be “gold in them there cells,” but there is a reasonable fee for those able to navigate an inmate’s civil rights case to a favorable outcome. United States District Judge Algernon L. Marbley awarded fees of \$46,000+ for attorneys who obtained a preliminary injunction for transgender prisoner Antoine S. (“Whitley”) Lee in *Lee v. Eller*, 2015 WL 1286038 (S.D. Ohio, March 20, 2015). Earlier stages of this case – *Lee v. Eddy*, 2014 U.S. Dist. LEXIS 17920 (S.D. Ohio, February 12, 2014) – were reported in *Law Notes* (March 2014) at pages 107-8. Although it took sixteen months (after filing), Judge Marbley ordered reinstatement of Lee’s hormone treatment in 2014, and he now grants fees. He computed a reduced lodestar award (see below) under 42 U.S.C. § 1988 based 233 hours at \$211.50/hour. He found the time expended to be reasonable and directly related to obtaining the preliminary relief, which counted as “prevailing” under the circumstances of the case, even though it was not a “final judgment.” He found that counsel’s affidavits limited their time by reducing for duplication, travel, and other “double” billing. He also applied the highest hourly rate allowed by the PLRA, which limits attorneys’ fees in prisoner cases to 150% “of the hourly rate established under [18 U.S.C. § 3006A] for payment of court-appointed counsel.” 42 U.S.C. § 1997e(d) (3). He applied this rate to all counsel, regardless of experience, because the prevailing market billing rates for the least experienced counsel exceeded the PLRA’s limitations. Judge Marbley found that the PLRA’s cap of attorneys’ fees at 150% of “any

monetary judgment” – 42 U.S.C. § 1997e(d) – did not apply “to cases in which non-monetary relief is awarded,” citing *Walker v. Bain*, 257 F.3d 660, 667 n. 2 (6th Cir.2001). Attorneys’ fees in civil rights cases not involving prisoners have no 150% caps based on court-appointed hourly rates in criminal cases or relationship to monetary judgment, so counsel who prevail can seek full lodestar for non-institutionalized clients. It is unclear from the opinion whether there was an award of expert fees as part of the costs. Lee was represented by attorneys David A. Singleton, Rickell L. Howard, and Ngozi V. Nduleu, and the Ohio Justice & Policy Center, Cincinnati. *William J. Rold*

VERMONT – Counsel considering bringing a prisoner protection from harm case in state court should read *Curtis v. Pallito*, 2015 WL 1234413 (Vermont, No. 2014-334, March Term 2015). Although the Vermont Supreme Court affirmed a summary judgment on qualified immunity in favor of two corrections officers after *pro se* plaintiff Ricky Curtis, Jr., was assaulted by another inmate, its unpublished “entry order” (that is “not to be considered as precedent”) applies a broader standard for liability than that required in federal cases by *Farmer v. Brennan*, 511 U.S. 825, 832-3 (1994). While *Farmer* requires indifference to a risk of which there is “actual knowledge” (albeit actual knowledge can be inferred from the risk’s “obviousness”), the Vermont Supreme Court, while purporting to apply *Farmer*, spoke in terms of “known” or “should have known.” Curtis protested assignment to a “dangerous living unit” where he was twice assaulted by another inmate, LaCross. Although Curtis asked for transfer after the first assault, he did not name LaCross until after the second assault. The Vermont trial court denied a motion to dismiss and allowed Curtis

discovery of his medical records, prison shift logs, and investigation reports; and he inspected LaCross’ disciplinary history *in camera*. The trial judge found insufficient evidence that the defendant officers “knew or should have known of a substantial risk of harm,” based in part on Curtis’ refusal to cooperate with the investigation (or even to speak with the officers). The investigation after the second assault indicated that Curtis had repeatedly requested “sexual favors” from LaCross, but there was no evidence that the defendant officers were aware of the “advances.” The Supreme Court wrote: “[O]n the record before us, we reject plaintiff’s argument that the defendants knew or should have known of the danger he faced in the unit.” Nevertheless, the court usefully cited: *Sanchez v. State*, 784 N.E.2d 675, 679–81 (N.Y.2002) (holding that State may be on constructive notice “from its knowledge of risks to a class of inmates based on the institution’s expertise or prior experience, or from its own policies and practices designed to address such risks”); and the Nat’l Prison Rape Elimination Comm’n Report 68–75 (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf> (noting that “certain [inmates] are more at risk of sexual abuse than others,” with risk factors including “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate’s own perception of vulnerability”). Although Curtis lost because of his “bare and very general assertion[s],” counsel should consider adding state law claims relying on “should have known” culpability when suing correctional officials in protection from harm cases, since *Farmer*’s progeny reject this theory. *William J. Rold*

PRISONER LITIGATION

WEST VIRGINIA – United States District Judge Thomas E. Johnston dismissed most of a civil rights lawsuit as failing to state a claim after “openly” gay prisoner Stephen J. Tamburo was assaulted in a bias attack by skinhead gang members in *Tamburo v. Hall*, 2015 U.S. Dist. LEXIS 34023, 2015 WL 1276711 (S.D. W. Va., March 19, 2015). Because Judge Johnston ruled on the pleadings, the facts are somewhat fuzzy as to Tamburo’s history and the role of each defendant. Tamburo’s complaint alleged that he presents in an “effeminate manner,” that he was beaten unconscious (and required hospital care) by gang members who had published a “manifesto” against gay people, and that defendants permitted the gang to operate “notoriously” and “with virtual impunity” in the prison. Tamburo alleged that the defendants knew that the attack was “ordered” but failed to monitor the scene. He also presented complaints seeking protection, including letters from his mother. After the attack, Tamburo and his assailant were both punished for “fighting,” which defendants alleged was caused by a dispute over sunglasses. (Tamburo was moved after a second incident involving threats.) Judge Johnston dismissed claims of deliberate indifference to Tamburo’s safety under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), for insufficient specificity. While there was serious injury, he held that the subjective element (defendants’ knowledge and disregard of the risk) was not adequately plead, citing only the pre-*Farmer* case of *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987), in which the Fourth Circuit actually reversed summary judgment and ordered a trial on failure to protect. The ruling is shaky in light of the Fourth Circuit’s recent decision in *Makdessi v. Fields*, 2015 U.S. App. LEXIS 3883 (4th Cir., March 12, 2015), reported in this issue of *Law Notes* – or even under Fourth Circuit post-*Farmer* precedent in *Brice v. Virginia Beach*

Corr. Ctr., 58 F.3d 101, 105 (4th Cir. 1995), which reversed a trial decision finding no deliberate indifference arising from a single-incident assault. Judge Johnston also dismissed Tamburo’s: (1) Equal Protection claim, finding he did not sufficiently allege that defendants treated him differently because he is gay; (2) substantive due process claim, finding it collapsed into his Eighth Amendment claim under *Farmer*; and (3) procedural due process claim, finding that his punishment for “fighting” was not “atypical and significant” under *Sandin v. Conner*, 515 U.S. 472, 483-4 (1995). Tamburo’s case still hangs by a thread: Judge Johnston denied dismissal of state negligent supervision and training claims under West Virginia law because it was not clear from the pleadings whether insurance coverage or other circumstances waived immunity. *William J. Rold*

WISCONSIN – United States District Judge Rudolph T. Randa granted summary judgment to multiple defendants (ranging from warden to line officials) in a protection from harm case in *Melville v. Mitchell*, 2015 U.S. Dist. LEXIS 37608, 2015 WL 1393317 (E.D. Wisc. March 25, 2015). Former inmate Rick Melville filed a *pro se* lawsuit for damages under 42 U.S.C. § 1983 after his cellmate awakened him by putting his hand down his pants and touching his penis. Initially, the Prison Rape Elimination Act [PREA] investigator concluded the complaint was unfounded because: the perpetrator (Gray) was an out gay inmate supposedly under sedation from sleep medication at the time, and Melville was homophobic and made the complaint to try to obtain a single cell. The incident occurred in a high turnover detention facility where inmates have short stays with incomplete institutional records and where Melville and Gray were

cellmates for only five days. When two more complaints about Gray were lodged within a few weeks, the PREA investigator reopened her file, eventually concluding that Gray was a sexual predator and finding: (1) Gray had a history of complaints at multiple institutions, going back four years, all of which had been deemed “unsubstantiated”; and (2) in the prior incidents, involving touching of penis or thighs, Gray had used a similar cover story to remain “under the radar” and avoid detection. The PREA officer charged Gray with misconduct, and he received 180 days in disciplinary segregation in 2012. Melville filed suit in 2013, claiming violation of his right to be free of deliberate indifference to his safety under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Judge Randa accepted Melville’s explanation that he never complained prior to the incident because he was unaware that he was at risk, but he also found that: (1) the defendants were unaware of Gray’s behavior pattern because all prior incidents were “unsubstantiated” and PREA files closed for this reason were not shared; (2) defendants had no advance knowledge of risk to Melville prior to the incident – some were unaware until Melville filed suit; (3) defendants would not have issued a “no double cell” order for Gray even if they had known of the history, because all prior incidents were deemed unfounded (which they had “no reason to doubt”); because (4) as a matter of law, the defendants’ actions were “reasonable given... knowledge of Gray at the time,” notwithstanding the PREA officer’s putting it together after the Melville incident. While there may be serious state law claims, federal claims under *Farmer* cannot be sustained based on what defendants “should have known.” See *Grievesen v. Anderson*, 538 F.3d 763, 775 (7th Cir. 2008) (“the inquiry is not whether individual officers should have known about risks..., but rather whether they did know of such risks”);

PRISONER / LEGISLATIVE

Riccardo v. Rausch, 375 F.3d 521, 525-26 (7th Cir. 2004) (same); and *Higgin v. Johnson*, 346 F.3d 788, 794 (7th Cir. 2003) (knowledge of two unfounded investigations does not equal knowledge or suspicion that the subject of the investigations was a probable sexual predator). [Note: compare Vermont Supreme Court treatment of “should have known” element under state law in *Curtis v. Pallito*, 2015 WL 1234413 (Vermont, No. 2014-334, March Term 2015) – reported in this issue of *Law Notes*.] This case contains a detailed analysis of correctional officials’ tardy response to covert predatory behavior that may be useful in formulating claims in similar cases. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

FEDERAL – During the annual marathon of amendments to budget resolutions, a measure intended to end discrimination against same-sex military couples won approval on March 26, as the Senate approved an amendment calling for repealing a statutory provision that requires the Department of Veterans Affairs to use the place of domicile rule in deciding whether a particular marriage will be recognized. The existing law is particularly problematic because many large military bases are located in southern and midwestern states that are among the last holdouts against the marriage equality movement. The necessity for this repeal may be mooted, of course, if the Supreme Court rules as expected in *Obergefell v. Hodges* that states are required to allow and recognize same-sex marriages under the 14th Amendment in June. The amendment was submitted by Senators Jeanne Shaheen (D-NH), Brian Schatz (D-HI), and Patty Murray (D-WA). *Congressional Documents*, March 26. A similar amendment was submitted in the House by a bipartisan group of

members led by Rep. Dina Titus (D-NV). At least one federal district court has already ruled that the provision in question is unconstitutional, but the Veterans Administration takes the position that it must continue to enforce the provision until it is either repealed or definitively ruled unconstitutional on appeal. * * * The problem this measure addresses was graphically illustrated in news reports early in March about a demand by the Department of Veterans Affairs that an Iraq war veteran pay back federal benefits she had been paid for her wife and child. Melissa Perkins-Fercha left active duty after five years of service, receiving a 50 percent disability rating for her injuries. She and her wife traveled to Washington for a legal wedding, and settled in El Paso, Texas, where her wife gave birth to a child. Perkins-Fercha added her spouse and daughter as dependents on her benefit plan. The VA informed Perkins-Fercha that they could not be added because the couple lived in Texas, which did not recognize their marriage. But a slip-up at the VA resulted in leaving the dependents in the computer, so the benefits she was paid included coverage for wife and child. Perkins-Fercha had appealed the decision, but the VA took its own sweet time discovering its mistake, and then demanded repayment of the benefits. Outrageous! Especially since the provision in question is probably unconstitutional per *U.S. v. Windsor*. *Advocate.com* provided a detailed account of the case on March 1. * * * Rep. Mark Pocan (D-WI), Sen. Patty Murray (D-WA), and Sen. Tammy Baldwin (D-WI) have introduced the Tyler Clementi Higher Education Anti-Harassment Act to Combat Bullying and Harassment at Colleges and Universities. If adopted, the measure would require such institutes to establish policies to prevent harassment based on actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity, or religion.

The bill would establish a grant program to support campus anti-harassment activities and programs. It is named in memory of a gay Rutgers University student who committed suicide after learning that his dorm roommate had secretly activated a webcam in their room to broadcast images of the student having sex with another man on the Internet. * * * Republican Senators James Lankford of Oklahoma and Ted Cruz of Texas introduced resolutions to disapprove to laws recently enacted by the District of Columbia City Council, the Reproductive Health Non-Discrimination Amendment Act and the Human Rights Amendment Act. The former measure requires employers in the District to include coverage for abortion services in their employee health plans, and the other measure bans religious schools from discrimination because of sexual orientation. Although the likelihood that Congress and the President would agree to disapprove both measures seems slim, they could be challenged in the courts. *Washington Times*, March 19.

U.S. DEPARTMENT OF DEFENSE – The Defense Department has instituted a change in procedure under which any discharge of a soldier for being transgender will have to be referred to the Assistant Secretary of the Army for personal approval. Before this change went into effect on March 6, field commanders were authorized to initiate and finalize discharges of such service members, according to a report by *BuzzFeed.com*. There are continuing rumors that the Defense Department is considering altering current policy, under which transgender service members in all branches are subject to discharge on medical grounds. Both former Secretary of Defense Chuck Hagel and the new secretary, Ash Carter, have indicated openness to reexamining the current

LEGISLATIVE

policy, as more military veterans have “come out” as transgender. Since this policy was adopted by regulation, no act of Congress would be required to change it, and at various times leaders at various levels of DoD have suggested an openness to reconsidering the categorical exclusion. This change in Army policy is seen as a small but real step in raising the level of scrutiny for individual discharge decisions.

ARKANSAS – State Rep. Greg Leding (D-Fayetteville), proposed a bill that would add sexual orientation and gender identity to the state’s anti-discrimination law. His proposal is a response to a recently-enacted law that forbids cities and counties from prohibiting discrimination on a basis that is not prohibited under the state’s law. Fayetteville’s City Council enacted an ordinance forbidding sexual orientation and gender identity discrimination, but the measure was repealed in a referendum. *WMCActionnews5.com*, March 9. Several other Arkansas cities have enacted such laws, some in defiance of the new state law, which they asserted was unconstitutional. On March 2, city officials in North Little Rock voted unanimously to revise the city’s equal opportunity policy to add sexual orientation, gender identity or expression, genetic information or marital status to the existing forbidden grounds of discrimination. *thv11.com*, March 5.

ARKANSAS – Arkansas’s legislature joined the recent bandwagon to enact a Religious Freedom Restoration Act, with final action on the bill occurring just as national outrage was expressed against Indiana when that state’s governor, Mike Pence, signed such a measure into law. Seeking to avoid some of the heated criticism, Arkansas Governor Asa Hutchinson,

a Republican, announced on March 30 that he might allow the Arkansas bill to go into effect without his signature, although he had previously announced that he would sign a bill that was similar to the ones passed previously in other states. The Indiana bill showed how anti-gay panic by Republican state legislators alarmed by the spread of marriage equality could lead to a broadening of the “protection” for religious freedom in RFRA legislation, beyond the modest boundaries of the earlier RFRA bills enacted in 19 states, and the Arkansas bill was similar to the Indiana bill in that regard. On March 31 the legislature reconciled versions that passed both houses and sent the bill on to Governor Hutchinson, who on April 1 called a press conference to announce that he had asked the legislature to take back the bill and revise it to be like the original federal RFRA. Hutchinson specifically mentioned that his son, Seth, was among signers of the petition calling on him to veto the measure, and the CEO of Wal-Mart, the largest company in the state, also contacted him to oppose the measure. He might also have mentioned that his nephew, Senator Jeremy Hutchinson, chair of the Senate Judiciary Committee, had crossed the aisle and joined with Democrats to vote against the measure. The governor indicated that he was considering issuing an executive order banning sexual orientation discrimination by the executive branch of the state government. Both houses agreed on April 2 to a substitute bill that cut back to something resembling the federal RFRA, and the governor signed it that afternoon.

COLORADO – The House State, Veterans and Military Affairs Committee rejected two bills that would have allowed businesses to refuse service based on the religious beliefs of their owners on March 9. All Democratic members of the

committee opposed both bills, with some Republicans crossing the aisle to join the votes against. The bills were introduced by Republican legislators in response to a ruling by the Colorado Civil Rights Commission that a baker had violated the state’s public accommodations law by refusing to make a wedding cake for a same-sex couple because of the baker’s religious beliefs. Representatives of businesses, religious groups, and LGBT rights advocates testified against the proposals, arguing that they would send a message that “conflicts with the accepting and collaborative culture here in Colorado.” *Durango Herald*, March 9. * * * On March 26 the House Health, Insurance and Environment Committee approved H.B. 1265, which would make it easier for transgender people to change the gender marking on their birth certificates. The measure would eliminate the requirement of sex-reassignment surgery as a prerequisite for such a change, although it would still require that there have been medical treatment, such as hormone therapy. In other words, the measure would not allow a change based solely on some certification concerning a person’s gender identity, which is the gold standard sought by transgender rights advocates.

CONNECTICUT – The Department of Social Services has amended its regulations to end the prohibition on paying for gender transition treatments.

FLORIDA – Continuing in a great tradition of devoting significant legislative time to stupid culture war issues, the Florida legislature is hard at work on a bill that would prohibit transgender people from using single-sex bathrooms that don’t match the gender designation on their birth certificates. HB 583 would create a second-degree misdemeanor out

LEGISLATIVE

of entering a public facility that is restricted to members “of the other biological sex.” The maximum penalty would be sixty days in jail and a \$500 fine. The House Government Operations Subcommittee approved the bill on March 17 by a 7-4 vote. *Orlando Sentinel*, March 18. Under this law, transgender women would be required to use men’s rooms, and transgender men would be required to use women’s rooms, regardless of their gender presentation. Somehow we suspect that this will lead to more social confrontations and problems than the opposite. Proponents say the measure is necessary because many local governments in Florida have been passing laws banning gender identity discrimination, setting up the possibility – horrors – of people relieving themselves in the nearest available facility regardless of their gender, a revolutionary act that would lead to massive social disorder and shake the foundations of society. Sorry, we sometimes lose patience with the fantasies entertained by hysterical politicians. . .

GEORGIA – The Georgia Senate voted overwhelming approval of a proposed Religious Freedom Restoration Act on March 5, but an amendment added in the House later in March that would preclude use of the law as a defense in a discrimination case caused it to be shelved in that chamber.

IDAHO – Feeling the sting of federal court decisions overriding the state’s anti-gay marriage amendment, members of the Idaho House took out their frustrations on March 20 by passing a non-binding memorial to Congress calling for federal judges who rule in favor of marriage equality to be impeached. The vote was 44-25. The state legislators are frustrated because only the federal Congress can

impeach a federal judge. The author of the measure, Rep. Paul Shepherd (R-Riggins), explained his reasoning: “You can’t say an immoral behavior according to God’s word, what we’ve all been taught since the beginning, is something that’s just, and that’s really kinda what this is all about,” he said on the floor of the House. “We’d better uphold Christian morals. As an example, how about fornication, adultery and other issues.” Never mind the First Amendment! *The Spokesman Review*, March 20.

IOWA – The state has a politically divided legislature. The Senate, where Democrats hold a slim margin, voted along party lines to approve a measure similar to one enacted in California, D.C. and New Jersey, banning licensed therapists from conducting gay conversion therapy on minors. The measure is given little chance of passage in the Republican-controlled House. *University Wire*, March 26.

MARYLAND – Although Human Rights Campaign has praised SB 743 and HB 862, bills intended to ease the requirements for amending birth certificates to recognize gender identity by, among other things, eliminating a requirement for sex-reassignment surgery as a prerequisite for such changes, some advocates for transgender people contend that the measures do not go far enough, since they still require some form of medical treatment as a prerequisite. Some advocates urge dispensing altogether with a treatment requirement, claiming that it unduly “medicalizes” the process, and insist that individuals be able to certify their true gender identity without submitting to medical treatment. Each bill has achieved passage in its respective house, but differences must be reconciled before they are sent to the governor.

MICHIGAN – East Grand Rapids is adding sexual orientation and gender identity to its existing anti-discrimination ordinance covering housing and employment. City leaders expressed disappointment that the state legislature had not acted on a sexual orientation discrimination measure. The local press reported that part of the proposed ordinance was copied from similar measures previously adopted in Ann Arbor, Kalamazoo and Traverse City. *AP State News*, March 3.

MONTANA – House Bill 615, a Religious Freedom Restoration measure that would allow individuals, businesses and other entities to assert a “burden upon religion” defense against enforcement (either by private suit or government) of any laws – and which was clearly motivated by its sponsors’ desires to shield businesses from possible liability for refusing to provide goods and services in connection with same-sex weddings – failed to win a majority in the House, where there was a tie vote on March 27. Lead sponsor Carl Glimm (R-Kila) said the purpose of the bill was to prioritize people’s “sincerely held religious belief” above job descriptions, thus allowing county clerks to refuse to issue marriage licenses to same-sex couples and pharmacists to refuse to fill birth control prescriptions. There was particularly strong opposition from Native-American representatives. Governor Steve Bullock (Dem.) stated opposition to the measure, commenting prior to the floor debate, “What’s happening in Indiana is something that shouldn’t be happening in Montana. We don’t need laws like that imported into our state.” *Independent Record, Montana Standard*, March 27.

NEBRASKA – A twenty-year policy of refusing to consider gay or lesbian people to be foster parents has been quietly

LEGISLATIVE

abandoned by the state government. According to a spokesperson for Governor Pete Ricketts, as quoted on *Omaha.com* (March 2), the state's current procedure does not inquire or take into account the sexual orientation of people seeking to foster or adopt state wards, and does not bar children from being placed with licensed foster parents based on the parents' sexual orientation. A spokesman for the governor said the policy hadn't changed but the department has just stopped complying with it, but the policy memo has been removed from the agency's website. Despite this change in practice, the Department of Health and Human Services continues to defend the policy in ongoing litigation in Lancaster County District court brought by three same-sex couples from Lincoln, Nebraska. A bill pending in the state legislature would forbid various grounds of discrimination in placing foster children or licensing foster homes, including sexual orientation and gender identity. The measure was not considered in committee last year, but had a hearing this year on February 4. The ACLU of Nebraska represents the couples in the lawsuit.

NORTH CAROLINA – Scare stories about public restrooms seem to be behind the 6-5 defeat of a proposal to add sexual orientation and gender identity to the municipal antidiscrimination ordinance in Charlotte. The vote on March 2 followed “hours of emotional debate,” according to the *Charlotte Observer*. Trying to make the measure more palatable, sponsors removed a section that would have expressly allowed transgender people to use the restroom consistent with their gender identity, but even that was not enough to put the measure over the top.

OREGON – The state's House of Representatives voted 41-18 on March

17 to approve H.B. 2307, the Youth Mental Health Protection Act, which would prohibit licensed medical care providers from practicing “conversion therapy” on persons under the age of 18. The measure is similar to laws passed in California, New Jersey and the District of Columbia which have withstood constitutional challenges in several cases.

PENNSYLVANIA – The state's House of Representatives voted 193-5 to approve a cyberbullying bill that would expressly protect young people online against “seriously disparaging statements or opinions about a child's sexuality or sexual orientation.” This is one of only several offenses specified in the bill. Offenders would face 3rd degree misdemeanor charges. The strong bipartisan support in the House was seen as a good omen for passage in the Senate, despite some concerns about potential First Amendment free speech issues. *South Florida Gay News*, Mar. 2.

TEXAS – Seven of the largest cities in Texas, in which 7.5 million people reside, have local ordinances forbidding sexual orientation discrimination. These would cease to be effective if the legislature enacts H.B. 1556, introduced by Rick Miller (R-Sugar Land), which provides that counties, municipalities and other political subdivisions are forbidden from designating forbidden grounds of discrimination that are not already included in state law. The measure is similar to laws that have been enacted in Arkansas and Tennessee. Such laws tend to be introduced in response to the controversial adoption of a new local ordinance covering sexual orientation and gender identity. In this case, the spark that provoked the bill was legislative activity in the city of Plano. *Texasobserver.org*, March 3.

VIRGINIA – Attorney General Mark Herring issued a letter addressed to Virginia State Senator Adam P. Ebbin on March 4, 2015, overruling formal Attorney General opinions by his predecessors that construed the state's Dillon Rule to preclude school boards from adopting policies banning sexual orientation and gender identity discrimination. The failure of the Virginia legislature to ban such discrimination was cited by Herring's predecessor as reason to opine that Virginia public educational institutions did not have the authority to adopt such policies. Herring begs to differ. “Given the broad scope of the supervisory power granted to school boards by the Constitution of Virginia and the explicit statutory grants of authority to school boards,” he wrote, “I conclude that school boards have authority to expand their antidiscrimination policies to encompass sexual orientation and gender identity. To the extent that the 2002 opinion previously mentioned is inconsistent with this Opinion, it is overruled.” In a footnote, Herring also differed from a statement in the 2002 opinion that sexual orientation discrimination “cannot be either ‘fairly or necessarily implied’ from discrimination based on sex.” “This remains an open question under Title IX,” wrote Herring, referencing some federal district court decisions and a 2014 publication by the U.S. Department of Education containing a Q&A section on Title IX and sexual violence. Herring's opinion can be found on the Attorney General's website as No. 14-080.

WASHINGTON – A measure approved by the Senate early in March prohibition to performance of anti-gay conversion therapy on minors by licensed practitioners ran into controversy in the House Health Care and Wellness Committee, mainly due to amendments made to the bill prior

LEGISLATIVE / LAW & SOCIETY

to Senate passage that would allow therapists to engage in “talk therapy” in an attempt to “limit same-sex attraction,” which had been prohibited by the original bill. Opponents of these amendments claim that the bill as amended would not do enough to protect children from quackery and the negative psychological outcomes associated with exposure to conversion therapy. *Columbia Basin Herald*, March 25.

WEST VIRGINIA – S.B. 14, a measure concerning charter schools that passed the state Senate on March 2, included an anti-discrimination provision that would include discrimination based on sexual orientation or gender identity, but an amendment approved in the House Education Committee removed sexual orientation, gender identity or any other specifically identified ground from the bill, which was then approved in committee on March 4. As amended, the bill states that “a public charter school may not discriminate against any person on any basis that would be unlawful if done by a noncharter public school.” The effect of that, of course, is to allow some discrimination claims but not others, and the amendment was clearly aimed at removing protection for gay or transgender youth and charter school employees. However, this might be at least partially superseded by Title IX, a federal statute banning sex discrimination in schools that receive federal funding. Since public schools receive such funding, the measure as amended would subject charter schools to the same non-discrimination requirements under Title IX, even if they don’t receive federal funds. Title IX has been construed in some situations to apply to anti-gay and anti-lesbian harassment and bullying. *Charleston Gazette*, March 7. So the proponents of the amendment may have partially outsmarted themselves, in the quest to enact an anti-gay

amendment that doesn’t specifically mention sexuality.

LAW & SOCIETY NOTES

PRESBYTERIAN CHURCH (U.S.A.) –

The largest Presbyterian denomination in the United States has voted to change the definition of marriage in the church’s constitution to include same-sex marriages, the *New York Times* reported on March 17. A majority of the church’s 171 regional bodies voted to ratify a proposal that will change the current definition from “a man and a woman” to “two people, traditionally a man and a woman.” This definition both respects the church’s historic tradition and accounts for the fact that today in the United States and overwhelming majority of the population resides in jurisdictions where same-sex marriages are legal. The Presbytery of Palisades, meeting in Fairlawn, New Jersey, put the measure “over the top” with its vote on March 17, when the tally stood at 87 presbyteries in favor, 41 against, and one with a tied vote.

MASSACHUSETTS – Boston’s annual St. Patrick’s Day – Evacuation Day Parade, administered by the Allied War Veterans Council, has been a flashpoint for gay rights contention, as the organizers had banned any group with a gay identified banner from marching, sparking litigation that went to the U.S. Supreme Court, resulting in a unanimous ruling that under the 1st Amendment the government could not compel a private organization operating an expressive activity to include a point of view that it did not want to include. But change has truly come to Massachusetts, the first state to have marriage equality (in 2004), and the Allied War Veterans voted this year to allow Boston Pride to participate in the parade. OUTVETS,

which honors LGBT military veterans, was a prominent inclusion this year. *Boston Globe*, March 14.

OHIO – The Roman Catholic Archdiocese of Cincinnati was reportedly considering revisions to a controversial policy it had adopted to include in teachers’ contracts a morality clause prohibiting “homosexual lifestyles” and “public support” for gay rights and same-sex marriage. The proposed revision would prohibit “advocacy” rather than “public support.” A spokesperson for the Archdiocese said that somebody writing a blog post supporting marriage equality would be violating the policy, but writing a letter to a legislator on the subject would not be considered “advocacy.” It was difficult to see how this change of language would provide any more clarity or respect for the autonomy of teachers employed by Catholic schools. *AP Business News*, March 10.

U.S. COMMISSION ON CIVIL RIGHTS –

The Commission held a “public briefing” on March 16 to hear testimony about the need for a federal law banning sexual orientation and gender identity discrimination. The 8-member commission, an independent agency chaired by Martin Castro, reports to the president and Congress on civil rights enforcement issues, according to a March 18 report about the briefing in *BloombergBNA Daily Labor Report*, 52 DLR C-1. Witnesses urged an expansion of the pending Employment Non-Discrimination Act into a full-scale civil rights law that would broadly address all the areas of discrimination currently covered under federal law. A handful of witnesses ideologically opposed to federal intervention into the private sector practices of businesses argued against new legislation.

INTERNATIONAL

INTERNATIONAL NOTES

UNITED NATIONS – Russia organized opposition to a move by Secretary-General Ban Ki-moon to provide employee benefits coverage for spouses of gay U.N. staff members, but its opposition was not sufficient to overcome the Secretary-General's strong advocacy for the coverage. On March 24, 43 countries supported a Russian-sponsored resolution calling for the benefits plan to be dropped; 80 countries opposed the resolution, and 37 abstained. Under prior policy, family benefits were determined by the law of an employee's country of origin. Under the new policy, benefits will be available for all staff members who are legally married, regardless whether their home countries allow or recognize same-sex marriages. *AP Worldstream*, March 24.

CANADA – The British Columbia Human Rights Tribunal found that Vancouver police had engaged in sex discrimination against transgender people and must change their policies, reported the *Victoria Times Colonist* on March 25. Among other things, police officers will have to desist from their practice of refusing to respect the gender identity of members of the public when using names and pronouns. The Tribunal also focused on deprivations of appropriate medical care in jails, and inadequate concern for the safety of transgender detainees.

GERMANY – A local court in Berlin imposed fines on the father and two uncles of a German teenager who says they forced him to marry a woman against his will. The youth told German media that “when he revealed his sexuality his father threatened to stab him and one of his uncles doused him

in petrol and threatened to set him ablaze,” according to *Independent News and Media Limited*, March 13.

ITALY – In the ongoing battle over whether prefects can annul the transcription in Italy of same-sex marriages contracted abroad, the Lazio regional administrative court ruled in favor of gay plaintiffs on March 9 that civil courts, not prefects, have that authority. The plaintiffs appealed the annulment of their marriage transcription by the Rome prefect, who was acting on orders of Interior Minister Angelino Alfano. Mayors in half a dozen cities have been allowing transcription (registration) of foreign same-sex marriages, and Alfano has been trying to stamp out the practice through administrative fiat. *ANSA English Media Service*, March 9.

JAPAN – Bloomberg News reports that Tokyo's Shibuya Ward has become Japan's first local government authority to recognize same-sex partnerships. The ward's assembly passed an ordinance on March 31 to issue certificates to same-sex couples, giving their relationships “equivalency to marriage” for purposes of local law, and asking residents and business to give “utmost consideration” to these certificates.

KENYA – *BBC International Reports* (March 24) reported that a three-judge panel of the High Court in Kenya had struck down as unduly vague and overbroad a criminal law provision concerning exposure to HIV. According to the news report, “As drafted, the section provided that a person who is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knows that fact and

voluntarily accepts the risk of being infected. Further, the section read that the person shall take all reasonable measures and precautions to prevent the transmission of HIV to others; and inform, in advance, any sexual contact or person with whom needles are shared of that fact, failure to which one would be jailed, if convicted by a court, for a term not exceeding seven years or a fine not exceeding 500,000 shillings [6,000 dollars], or both.” The court stated, “The said section is vague and over-broad, and lacks certainty, especially with respect to the term ‘sexual contact.’” Wrote Justice Isaac Lenaola, “To retain that provision in the statute books would lead to an undesirable situation of the retention of legislation that provides for vague criminal offenses which leave it to the court's subjective assessment whether a defendant is to be convicted or acquitted.” The ruling did not come in an appeal from a conviction; rather, the case was filed by an advocacy group called “AIDS Law Project,” which argued that the measure was “likely to promote fear and stigma as it imposed a stereotype that people living with HIV were immoral and dangerous criminals, and this would negate the efforts being made to encourage people to live openly about their HIV status.”

NEPAL – A government task force has recommended legalizing same-sex marriage. The seven-member panel was formed following a Supreme Court ruling in 2007 that ordered the government to grant equal rights to all citizens, including sexual and gender minorities, according to a March 25 report in *Himalayan Times*. The Cabinet has forwarded the task force report to the Ministry of Women, Children and Social Welfare for its consideration. The committee has also suggested policy changes concerning the Citizenship Act, the Passport Act and passport regulations in accordance with its marriage recommendations.

INTERNATIONAL

PERU – The Committee on Justice and Human Rights of the Congress of Peru voted 11-4 on March 10 to reject a proposal to allow civil unions that would be open to same-sex couples. The vote followed a debate lasting more than three hours. *EFE Ingles*, March 11.

SLOVENIA – Opponents of same-sex marriage have filed a referendum initiative with the Parliament, seeking to overturn a marriage equality measure that was approved by the parliament on March 4. The Parliament voted 51-28 to approve the measure, making the country the eleventh in the European Union to allow same-sex marriages. The measure also allows married same-sex couples to adopt children. It is possible that a referendum will not be held, as Slovenia passed a law in 2013 that prohibits referenda on issues of human rights. So it depends whether this is so classified. *Reuters*, March 4; *eTurboNews*, March 5.

SOUTH AFRICA – The *Daily Telegraph* (London) reported March 28 that a South African court has ruled that gay men who have a baby born by a surrogate mother were entitled to paid maternity leave, the same as any other new parent under South African law. The father who asserted the claim for paid leave in a labor court in Durham when his employer, a state agency, refused to provide the usual four months of paid leave, asked to be anonymous. The judge said that the needs of the child had to be taken into consideration in deciding that an existing maternity leave policy must apply equally to new fathers. The *Telegraph* noted that new legislation coming into force in the U.K. on April 5 will give parents of children born through surrogacy arrangements equal rights to maternity leave, which includes six weeks leave paid at 90% of the parent's average weekly pre-tax earnings.

SWEDEN – The Swedish Academy's official dictionary of the Swedish language is introducing a new pronoun, "hen," to be used to refer to a person without revealing their gender. The language revision adopts a word that was first used in the 1960s when attempts to remove gender from certain words for political reasons emerged in response to the movement for women's rights. Swedish generally assigns gender designation to nouns, so new terminology would be necessary to get away from the ubiquitous masculine assignment of many nouns. The word never caught on then, but is being revived in connection with increasing acknowledgement of transgender issues. One anticipated use is for statutes that should be phrased in gender-neutral terms. *Agence France Presse*, March 24.

SWITZERLAND – The parliament voted 103-73, with 9 abstentions, to approve a measure against hate speech and discrimination on account of sexual or gender identity, amending a law that already prohibited such discrimination on account of race or religion. Switzerland has recognized a legal status for same-sex couples since 2007, but has not yet legalized same-sex marriage, although the law committee of the lower house of Parliament has approved a measure in that direction. Because the Swiss constitution has a definition of marriage, a change would require a national referendum to amend the constitution. *Gay Star News*, March 12

TURKEY – The European Court of Human Rights issued a ruling March 10 in *Y.Y. v. Turkey* holding that Turkey could not condition recognition of a gender identity change on the individual agreeing to be sterilized. The version of the opinion on the court's website the day of decision was only in French.

According to a *Buzzfeed.com* (March 10) news report, the case began when a Turkish court refused to allow Y.Y. to undergo gender reassignment surgery because he had not agreed to be sterilized as required by Turkish law. A Turkish court allowed him to proceed with gender transition despite the law, but the European Court awarded him compensation for the years he was denied gender transition while pursuing his legal case. The ruling was reportedly unanimous, the court stating, "The respect due to the physical integrity of the concerned party would be in opposition to his having" to submit to sterilization. "The resulting interference in the claimant's rights with respect to his private life cannot thus be said to have been 'necessary' in a democratic society." The opinion did not address any of the other prerequisites for gender reassignment surgery under Turkish law, this being the only requirement that was under challenge.

UNITED KINGDOM – The *Daily Telegraph* (March 11) reports that a British judge, Mr. Justice Mostyn, has ordered a gay man who donated sperm to a lesbian couple to provide funding for the litigation in which they are battling over his quest for a legal right to contact the child. The man, a 62 year old academic, donated sperm to the considerably younger women (ages 35 and 45) after they contacted him through a register for gay men and women who wanted to become parents. The younger woman became pregnant, and the man because a "legal stepfather" to the resulting boy. But when his relationship with the women deteriorated, he filed suit to solidify his legal tie to the boy. The women have since separated, and they ran out of funds to continue defending the lawsuit after eight hearings. The judge, while conceding that it seemed "grossly unfair" that the man should

INTERNATIONAL / PROFESSIONAL

have to foot the women's legal bills, nonetheless held that as he was the "legal stepfather," he was required by law to provide the funding. The newspaper account did not provide the name of the case.

PROFESSIONAL NOTES

A joint Family Law Conference in England sponsored by **DURHAM UNIVERSITY** and the **UNIVERSITY OF CAMBRIDGE** titled "The Future of Registered Partnerships" will take place on July 10-11, 2015, at Cambridge University. "Bringing together experts in family law from over 14 jurisdictions," reads the conference announcement, "this two-day, CPD accredited conference will analyse the function and future of opposite and same-sex registered partnerships in Europe." Full information can be found on the conference website: www.family2015.info. The organizers, Dr. Andy Hayward (Durham) and Dr. Jens Scherpe (Cambridge) can be queried for details at family2015@law.cam.ac.uk.

A symposium on the Global Struggle for LGBTQ Rights will be held at **RUTGERS SCHOOL OF LAW - NEWARK** on April 10, 2015. The keynote speaker will be Mariela Castro, Director, Cuban National Center for Sex Education. The full-day program will present several panels of scholars who will discuss "the history, emergence and future of the global LGBTQ human rights movement." The symposium is free and open to the public but registration is required at law.newark.rutgers.edu/LGBTsymposium.

In a Huffington Post interview published March 23, **EVAN WOLFSON**, founder

and Executive Director of Freedom to Marry, announced that if the Supreme Court rules for marriage equality in the cases now pending, he expects that **FREEDOM TO MARRY** will be winding up its affairs, archiving its files, doing the requisite oral history, and going out of business. He did not foresee repurposing the organization around any other policy issues.

The new head of the Civil Division in the U.S. Department of Justice will be **BEN MIZER**, the former Solicitor General of Ohio. Reporting on the appointment on March 2, *BuzzFeed.com* stated, "Mizer, 38, is one of more than a dozen out gay lawyers Holder and the Obama administration have appointed to senior positions at the Department of Justice." His official title will be Principal Deputy Assistant Attorney General and Acting Assistant Attorney General for the Civil Division.

The **LGBT RIGHTS COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION** will hold a public program with **NEW YORK STATE SENATOR BRAD HOYLMAN** on April 20 at 7 pm concerning legislative efforts to reform New York State law to better accommodate non-traditional family formation. The title of the program is "Skim-Milk Parenthood? Reforming Discriminatory Laws Against New York Families Built Through Assisted Reproductive Technology and Recognizing De Facto Parents." The two biggest identified deficiencies in New York law are the continued failure by the Court of Appeals to recognize de facto parents (the lingering problem of *Alison D. v. Virginia M.*) and the statutory prohibition on compensated surrogacy agreements. Other speakers on the program include **CAROL BUELL** of Weiss, Buell & Bell, **NINA RUMBOLD** of Rumbold & Seidelman,

and **NATHAN SCHAEFER**, Executive Director of Empire State Pride Agenda. The program is free and open to the public at the House of the Association, 42 W. 44 St., New York, NY 10036.

The **LGBT RIGHTS COMMITTEE OF THE NY CITY BAR ASSOCIATION**, together with the **LGBT BAR ASSOCIATION OF GREATER NEW YORK** and the **CITY BAR JUSTICE CENTER**, will present a program titled "LGBT Health Care: Selected Legal Issues," on April 13 at 6:30 p.m. at the House of the Association of the Bar, 42 W. 44 St., Manhattan. Presenters include **ETHAN RICE**, Staff Attorney, Transgender Legal Defense and Education Fund; **MELISSA BRISSMAN**, Attorney and Principal, Reproductive Possibilities LLC and Surrogate Fund Management LLC; **NOAH E. LEWIS**, Attorney, Transcend Legal; and **RICHARD SAENZ**, Senior Staff Attorney, HIV/LGBT Advocacy Project, Queens Legal Services. **K. SCOTT KOHANOWSKI**, Director, LGBT Advocacy Project of the NYC Bar Association, will be the moderator. Advance registration on the City Bar's website is requested.

LAMBDA LEGAL has announced a new addition to their legal staff at National Headquarters in New York. **DEMOYA GORDON** is a new Transgender Rights Project attorney. Previously she worked as a litigation associate at Faegre Baker Daniels LLP in Minneapolis, in a practice that included pro bono work on LGBT rights cases. The National LGBT Bar Association designated Gordon as one of 2014's best LGBT Attorneys under 40, and she has won commendation from the Minnesota Bar for her pro bono efforts. Gordon's JD is from UC Berkeley. While a law student, she published an article in the California Law Review on Transgender legal advocacy.

PUBLICATIONS NOTED

1. Beh, Hazel Glenn, and Milton Diamond, Individuals with Differences in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender, 29 Wis. J.L. Gender & Soc’y 421 (Fall 2014).
2. Berkman, Benjamin, Eliminating the Distinction Between Sex and Sexual Orientation Discrimination in Title VII’s Antiretaliation Provisions, Univ. Chicago Legal Forum 533 (Vol. 2014).
3. Boyce, Bret, Sexuality and Gender Identity Under the Constitution of India, 18 J. Gender Race & Just. 1 (Winter 2015).
4. Buzuvis, Erin E., A Reasonable Belief: In Support of LGBT Plaintiffs’ Title VII Retaliation Claims, 91 Denv. U. L. Rev. 929 (2014).
5. Chiappetta, Gina M., A Battle of the Amendments: Why Ending Discrimination in the Courtroom May Inhibit a Criminal Defendant’s Right to an Impartial Jury, 83 Fordham L. Rev. 1997 (March 2015) (argues against extending *Batson* to sexual orientation peremptory challenges of potential jurors).
6. Collins, Kristin A., Federalism, Marriage, and Heather Gerken’s Mad Genius, 95 B.U. L. Rev. 615 (March 2015) (response to Gerken, see below).
7. Crawford, Phillip, Jr., The Mafia and the Gays (Self-published, 2015, available on amazon.com as a paperback or download) (Retired attorney explores the connection between organized crime and pre-Stonewall LGBT community institutions).
8. Dhooge, Lucien J., Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?, 21 Wm. & Mary J. Women & L. 319 (Winter 2015) (author says “No”).
9. Freilich, Ari, Witt-Less: A History and Analysis of the U.S. Military’s Failure to Comply with the Ninth Circuit’s Due Process Standard for ‘Don’t Ask, Don’t Tell’, 38 Harv. J. L. & Gender Online 1 (Feb. 2015).
10. Funk, Derek, Checking the Balances: An Examination of Separation of Powers Issues Raised by the *Windsor* Case, 46 Ariz. St. L.J. 1471 (Winter 2014) (“The *Windsor* case provides a fascinating illustration of how congressional inaction and gridlock can render the traditional system of checks and balances ineffective, and create a situation where efficient policy change can only be accomplished by circumventing the traditional lawmaking process”).
11. Gerken, Heather K., *Windsor’s* Mad Genius: The Interlocking Gears of Rights and Structure, 95 B.U. L. Rev. 587 (March 2015) (suggesting an alternative explanation of *U.S. v. Windsor*, as an attempt by the Court of “clear the channels” of change by striking down an obstacle to the ability of states to confer the full rights of marriage on same-sex couples).
12. Gibbs, Lisa, *EEOC v. Boh Brothers Construction Co.*: Expanding Same-Sex Sexual Harassment Jurisprudence Beyond Sexual Desire, 48 New Eng. L. Rev. 805 (Summer 2014).
13. Goldberg, Suzanne B., Risky Arguments in Social-Justice Litigation: The Case of Sex-Discrimination and Marriage Equality, 114 Colum. L. Rev. 2087 (Dec. 2014).
14. Hall, Lesley A., Stand With Sam: Missouri, Survivor Benefits, and Discrimination Against Same-Sex Couples (*Glossip v. Missouri Department of Transportation and Highway Patrol Employees’ Retirement System*, 411 S.W.3d 796 (Mo. 2013)), 79 Mo. L. Rev. 1095 (Fall 2014).
15. Herz, Zachary R., *Price’s* Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law, 124 Yale L.J. 396 (Nov. 2014).
16. Hunter, Nan D., Pluralism and its Perils: Navigating the Tension Between Gay Rights and Religious Expression, 15 Geo. J. Gender & L. 435 (2014) (Symposium: Georgetown Gay Rights Coalition 25th Anniversary Symposium).
17. Janet, Andrew, Eat, Drink, and Marry: Why *Baker v. Nelson* Should Have No Impact on Same-Sex Marriage Litigation, 89 N.Y.U. L. Rev. 1777 (Nov. 2014).
18. Jones, Trina, Single and Childfree! Reassessing Parental and Marital Status Discrimination, 46 Ariz. St. L.J. 1253 (Winter 2014) (A big issue for many LGBT people who are unmarried and have no children – discrimination based on marital and parental status).
19. King, Brittany Renai, Fired for Being Gay: Should Arkansas Ban This Form of Discrimination?, 67 Ark. L. Rev. 1019 (2014).
20. Lamparello, Adam, and Charles E. Maclean, It’s the People’s Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia’s Legacy, 45 U. Mem. L. Rev. 281 (Winter 2014) (giving the Devil his due?).
21. Layman, James, Out of the Darkness: Punishing Thought in Federal Terrorism and Hate Crime Statutes, 14 Rutgers Race & the L. Rev. 181 (2013).
22. Little, Laura E., Conflict of Laws Structure and Vision: Updating a Venerable Discipline, 31 Ga. St. U. L. Rev. 231 (Winter 2015) (includes extended discussion of same-sex marriage recognition issue).
23. Medina, M. Isabel, Derivative Citizenship: What’s Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do With It?, 28 Geo. Immigr. L.J. 391 (Winter 2014).
24. NeJaime, Douglas, Griswold’s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality, 124 Yale L.J. Forum 340 (March 2, 2015).
25. Paterno, Lide E., Federalism, Due Process, and Equal Protection: Stereoscopic Synergy in *Bond* and *Windsor*, 100 Va. L. Rev. 1819 (Dec. 2014).
26. Peebles, Burton F., Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII, 64 Emory L.J. 911 (2015).
27. Perry, Michael J., Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States, 2014 U. Ill. L. Rev. 1887 (David C. Baum Memorial Lecture).
28. Pryor, Hon. William H., Jr., The Separation of Powers and the Federal and State Executive Duty to Review the Law, 65 Case W. Res. L. Rev. 279 (Winter 2014).

29. Rankin, Sara K., Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation, 66 Rutgers L. Rev. 563 (Spring 2014).
30. Redding, Jeffrey A., Marriage = Marriage: Querying the Relevance of Equality to the Interstate Recognition of Same-Sex Relationships, 69 U. Miami L. Rev. 117 (Fall 2014).
31. Sanders, Tiffany, Cruel and Unusual: An Analysis of the Legality of Disallowing Hormone Treatment and Sex Reassignment Surgery to Incarcerated Transgender Individuals, 35 Women's Rts. L. Rep. 466 (Spring/Summer 2014).
32. Scott, Elizabeth S. and Robert E., From Contract to Status: Collaboration and the Evolution of Novel Family Relationships, 115 Colum. L. Rev. 293 (March 2015).
33. Selmi, Michael, The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions, 2014 Wis. L. Rev. 937.
34. Siegel, Reva B., How Conflict Entrenched the Right to Privacy, 124 Yale L.J. Forum 316 (March 2, 2015).
35. Stupple, Alexandra, Disgust, Dehumanization, and the Courts' Response to Sex Offender Legislation, 71 Nat'l Law. Guild Rev. 130 (Fall 2014).
36. Travis, Mitchell, Accommodating Intersexuality in European Union Anti-Discrimination Law, 21 Eur. L. J. 180 (2015).
37. Tushnet, Mark, Accommodation of Religion Thirty Years On, 38 Harv. J. L. & Gender 1 (Winter 2015).
38. Weatherby, Danielle, A Tale of Two Arguments: Same-Sex Marriage in the Arkansas Courts and the Fayetteville Fairness Ordinance, 50-WTR Ark. Law. 36 (Winter 2015).
39. Wilson, Robin Fretwell, and Anthony Michael Kreisa, Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process, 15 Geo. J. Gender & L. 485 (2014).
40. Wintemute, Robert, In Extending Human Rights, which European Court is Substantively 'Braver' and Procedurally 'Fitter'? The Example of Sexual Orientation and Gender Identity, chapter 10 in Morano-Foadi & Vickers, Fundamental Rights in the EU (Hart Publishing, Oxford, 2015).
41. Yackle, Larry, A Friendly Amendment, 95 B.U. L. Rev. 641 (March 2015) (another response to Gerken, see above).

“Missouri Court” cont. from pg. 151

Keeney had pleaded guilty to a charge of attempting to violate a Missouri law that provided that “a person commits the crime of sexual misconduct if he has deviate sexual intercourse with another person of the same sex.” The charge was that his groping of the vice cop was a prelude to oral or anal sex that would violate the statute. But, Judge Sullivan pointed out, this Missouri law was “in all relevant respects identical” to the Texas law struck down in the 2003 Supreme Court decision.

The Missouri legislature had amended the law several times after Keeney’s arrest, but the most significant amendment, in 2006, removed the reference to “deviate sexual intercourse with another person of the same sex.” As of 2006, the statute defines “sexual misconduct” to include when a “person purposely subjects another person to sexual contact without that person’s consent.” This explains why the state, in opposing Keeney’s new lawsuit, produced an affidavit from the vice cop claiming the he had not consented to be groped by Keeney.

Missouri’s old sodomy law had been challenged in state court, but the challenge was rejected in 1986 in *State v. Walsh*, 713 S.W.2d 508 (Mo.), two years before Keeney’s arrest. In 2013, in a dissenting opinion in the Missouri Supreme Court case of *Glossip v. MO. Dep’t of Transp. & Highway Patrol Employees’ Ret. Sys.*, 411 S.W.3d 796 (Mo.), several justices commented that the 1986 decision was “no longer viable in light of *Lawrence v. Texas*.”

“Homosexual deviate sexual intercourse is no longer a sexual offense in Missouri,” wrote Judge Sullivan. “As such, there is no logical existent reason to require Appellant to register on the sexual offender registry.” Although there is no procedure available for Keeney to get the court to vacate his 1989 guilty plea, he can sue to get a declaration that he does not have to register as a sex offender, contrary to what Judge Cohen had ruled in rejecting his case.

The court rejected the state’s attempt to try to expand upon the 1988 charges in order to label Keeney’s conduct as

still unprotected by *Lawrence v. Texas* because it was not “consensual” and took place “in public.” He was charged with attempting to violate the sodomy law, Sullivan pointed out. “From the defendant’s perspective,” she wrote, “for his guilty plea to be a voluntary and intelligent admission that he committed the offense leveled against him by the prosecutor, the defendant must receive real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. The prosecutor’s choice in charging Appellant in 1988 cannot be revisited or revised today. Appellant’s plea is now a part of history. Additionally, it nearly goes without saying that Respondents also cannot bring forward newly manufactured evidence, i.e., Detective Bayes’s 2014 affidavit, to support a new theory of Appellant’s culpability.”

Besides, Sullivan pointed out, Detective Bayes specifically went to that location to attract solicitations from gay men, since his goal was to “rid the area of homosexual behavior.” Getting somebody to grope him so he could make an arrest “would be considered a success by Detective Bayes,” given his mission. “To characterize himself today as a victim of unwanted sexual touching by Appellant that night is incongruous.”

The court raised the same objection to the state’s attempt to introduce the “public sex” issue, since once again that was not a focus of the 1988 charges against Keeney. Since the state did not charge him “with a crime with a public aspect to it” at that time, that was no longer relevant to whether he should have to register based on that guilty plea.

The court concluded that Judge Cohen erred in not granting Keeney’s motion for summary judgment, reversed Cohen’s judgment, ordered Cohen to grant Keeney the declaratory judgment he sought, and ordered the state officials to “remove Appellant’s name and all other registration information from the Missouri Sex Offender Registry.”

Keeney was represented by St. Louis Attorney Michael T. George. The court noted that its decision is not final until expiration of the time in which the state can file a motion for rehearing, most likely a mere formality. ■

SPECIALLY NOTED

The law firm Jones Day has created a website to provide worldwide information on how same-sex relationships are treated in nearly 300 jurisdictions. The firm undertook a massive research effort to create the website, which is freely available, and has committed to keeping it up to day, which is a gargantuan task, as any regular reader of this newsletter can appreciate! 217 members of the firm, including 139 attorneys, 29 summer associates and 49 support staff, contributed to the project, which went live on Feb. 23. The URL is <http://www.samesexrelationshipguide.com/>

EDITOR'S NOTES

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

All points of view expressed in *Lesbian/Gay Law Notes* are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please submit all correspondence to info@le-gal.org.

Lesbian/Gay Law Notes Podcast

Check out the *Lesbian/Gay Law Notes* Podcast each month to hear our Editor-In-Chief New York Law School Professor Art Leonard and Matthew Skinner, the Executive Director of LeGaL, weigh-in on contemporary LGBTQ legal issues and news.

Listen through iTunes or at legal.podbean.com!

