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LAW NOTES

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*New York Governor Announces Broader Interpretation of State
Human Rights Law as Houston Voters Scrap Equal Rights Ordinance*

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Civil Rights through Administrative Action: Can It Be Effective?

When legislatures refuse to act on proposals to protect LGBT people from discrimination, can civil rights agencies and executive officials extend such protection on their own by embracing broad interpretations of existing laws banning sex discrimination? Some recent events put this question sharply into play.

In July 2014, President Obama signed an executive order requiring federal contractors to adopt policies banning discrimination because of sexual orientation or gender identity and extending protection against gender

on prior federal circuit and district court decisions allowing transgender plaintiffs to pursue discrimination claims under Title VII, usually relying on sex stereotyping theories.

This past summer, the EEOC took a further step, ruling administratively in the case of a gay air traffic controller who had been denied a permanent position by the Federal Aviation Administration under circumstances suggesting that homophobia may have influenced the decision. David Baldwin filed an internal discrimination claim within the U.S. Department of Transportation, asserting a violation

remand from the EEOC, or he could, with the authorization of the EEOC, take his dispute to federal court. Baldwin's attorney announced that he will pursue his Title VII claim in federal court.

On October 22, New York Governor Andrew Cuomo announced that the New York State Division of Human Rights will be publishing a proposed regulation in the state register on November 4, interpreting the state's Human Rights Law ban on discrimination because of sex or disability as providing protection against discrimination for transgender

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identity discrimination to applicants and employees in the executive branch of the federal government. (Prior executive orders first adopted during the Clinton administration by agency heads as well as the president extended protection against sexual orientation discrimination to executive branch employees.) Subsequently implementing regulations were published and put into effect in the spring of 2015. Even before President Obama's action, the Equal Employment Opportunity Commission (EEOC) had issued an administrative ruling in 2012 that the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 prohibits discrimination because of gender identity, a conclusion that was later confirmed by a Justice Department ruling in the same case, *Macy v. Holder*. The EEOC administrative ruling relied

of Title VII's sex discrimination ban as applied to the federal sector. That agency said Title VII didn't apply, but the EEOC reversed the ruling, holding that sexual orientation discrimination claims can be raised under Title VII, in an opinion announced on July 15. *Baldwin v. Foux*, 2015 WL 4397641 (EEOC). The EEOC also had some trial level federal court decisions to rely upon, but as yet there is no appellate authority adopting a straightforward interpretation of the sex discrimination ban in Title VII to apply to sexual orientation discrimination, although some courts have allowed gay plaintiffs to proceed on sex stereotyping claims. The EEOC's action left Baldwin with a choice: he could litigate his discrimination claim administratively within the Department of Transportation on

people. The Division will treat "gender dysphoria" as the kind of diagnosable medical condition that falls within the statutory definition of a disability, and it will take the position that discriminating against somebody because of their gender identity is the same for legal purposes as discriminating because of their sex. The proposed regulation will be published as Section 466.13 of the SDHR Rules & Regulations, relying for authority on N.Y. Executive Law Sec. 295.5, which authorizes the Division to promulgate "appropriate" rules to carry out the provision of the Human Rights Law. This rule is likely to be challenged in the courts, where the question whether the "sex" and "disability" provisions can be given so broad an interpretation will be confronted.

These actions by President Obama,

Governor Cuomo, the EEOC and the New York State Division come in the face of the failure by Congress or the New York legislature to approve pending legislative proposals to adopt these policies expressly through statutory amendments. They are arguing, in the face of legislative inaction, that the existing laws already provide a basis for acting against such kinds of discrimination. These executive and administrative actions can have concrete consequences. Companies with substantial federal contracts will have to adopt non-discrimination policies if they want those contracts renewed. Employees who encounter gender identity or sexual orientation discrimination will be able to file charges with the EEOC and the State Division of Human Rights, those agencies will investigate the charges, and if they

or administrative agencies. The EEOC and the State Division of Human Rights can interpret existing laws, but they can't manufacture "new" substantive legal rules. Some defendants in these lawsuits can be counted on to raise the objection that the relevant statutes do not forbid this kind of discrimination. Courts will have to determine whether these new interpretations are legitimate, and that will turn heavily on the judicial philosophies of the particular judges deciding these cases.

Shortly after Title VII went into effect in July 1965 the EEOC was faced with the question whether gay or transgender people were protected from discrimination by that statute and its unequivocal answer was "no," in line with the response of numerous federal courts in early cases. The EEOC maintained that position through half a century, even as the

stereotyping theory in discrimination cases brought by gay people, and the EEOC seized upon some these opinions this summer, as it celebrated its 50th anniversary of enforcing Title VII, when it ruled on David Baldwin's discrimination complaint.

One of the biggest barriers to getting trial judges to accept these new interpretations is the system of precedent followed in the court system. A trial judge is bound by the rulings of the appellate courts. A federal district court is bound by the rulings of the court of appeals in the circuit in which it is located, and many of the circuit courts have ruled in older cases that have never been explicitly overruled or disavowed that Title VII may not be construed to forbid discrimination because of sexual orientation or gender identity.

On September 9, a sexual orientation discrimination plaintiff confronted this problem in a federal lawsuit in Florida, which is within the 11th Circuit. Barbara Burrows sued the College of Central Florida claiming that her sexual orientation was one of the reasons she was fired and argued that the EEOC's recent decision supported her claim that Title VII applied to her case. District Judge James Moody, observed that although "the EEOC's decision is relevant and would be considered persuasive authority, it is not controlling." He evidently considered either that he was not free to accept her argument or that he was unwilling to strike out into new territory, writing, "Until the Supreme Court or Eleventh Circuit recognizes the opinion expressed in the EEOC's decision as the prevailing legal opinion, the Court declines to reconsider in light of the EEOC's decision." *Burrows v. College of Central Florida*, 2015 U.S. Dist. LEXIS 119940, 2015 WL 5257135 (M.D. Fla., Sept. 9, 2015). Another district judge in the 11th Circuit did not feel so inhibited, however, perhaps because he ultimately granted summary judgment to the employer. See *Isaacs v. Felder Services*, 2015 U.S. Dist. LEXIS 14663 (M.D.

The important question now is whether the courts will cooperate when an alleged discriminator resists the agencies' interpretations?

find them meritorious, may attempt to negotiate settlements on behalf of the individuals, take their claims to court, or authorize them to file their own lawsuits, as David Baldwin is doing against the FAA. *Bloomberg Daily Labor Report* recently reported that the EEOC had administratively resolved 846 discrimination claims nationwide on behalf of LGBT plaintiffs during 2014, the last year for which the agency has complete statistics, on the basis of these internal policy interpretations.

The important question now is whether the courts will cooperate when an alleged discriminator resists the agencies' interpretations? After all, both the federal and state constitutions give the power to make new laws to the legislatures, not to elected executives

courts were "evolving" on the issues in light of a Supreme Court decision in 1989, *Price Waterhouse v. Hopkins*, finding that "sex stereotyping" by an employer could be evidence of unlawful intentional sex discrimination. By early in this century, several federal courts — include courts of appeals — had accepted this sex stereotyping theory on behalf of some gay and transgender discrimination plaintiffs, and a consensus seemed to be emerging among federal courts that gender identity discrimination could violate Title VII's sex discrimination ban. The EEOC relied on these rulings in 2012 when it issued its opinion in *Macy v. Holder*, 2012 WL 1435995. Over the past few years, a handful of federal trial judges have also used the sex

Alabama, Oct. 29, 2015), discussed in a separate article below. In *Isaacs*, District Judge Myron Thompson found the EEOC's reasoning in *Baldwin* persuasive, rejecting a magistrate's recommendation to dismiss a gay man's Title VII claim on jurisdictional grounds, instead premising the grant of summary judgment on the failure to allege facts giving rise to an inference of discriminatory intent.

Several other federal court rulings issued since the EEOC's July 15 *Baldwin* opinion have not even mentioned *Baldwin* while reaffirming that sexual orientation discrimination claims cannot be asserted under Title VII. For example, in a dispute between Julio Rodriguez and the New York City Health and Hospitals Corporation, U.S. District Judge Brian M. Cogan in Brooklyn wrote on September 8, "The Second Circuit has decided the question of whether 'sex' under Title VII includes 'sexual orientation' as a protected class. It has explained that 'the law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation.' Therefore, plaintiff's argument that he 'is clearly a member of a protected class, because he identifies as bisexual,' is wrong." *Rodriguez v. N.Y. City Health & Hosps. Corp.*, 2015 U.S. Dist. LEXIS 119040, 2015 WL 5229850 (E.D.N.Y., Sept. 8, 2015).

Another federal district judge in Brooklyn, John Gleeson, issued a decision on October 16 in a discrimination case brought by Steven D. Moore against Greyhound Bus Lines. Moore alleged discrimination because of his "sexual preference" and religion. While finding that Moore's factual allegations did not meeting the requirements for a discrimination claim in any event, Judge Gleeson dropped a footnote at the end of his opinion reminding Moore that "Title VII does not apply to allegations of discrimination on the basis of sexual orientation," referring to the same 2nd Circuit opinion from 2000 that Judge

Cogan relied on in his ruling, *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000). *Moore v. Greyhound Bus Lines*, 2015 WL 6128874 (E.D.N.Y., Oct. 16, 2015).

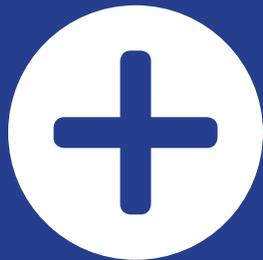
Similarly, in a suit by Jameka K. Evans against Georgia Regional Hospital in the U.S. District Court for the Southern District of Georgia, decided on September 10, U.S. Magistrate Judge G.R. Smith undertook a lengthy discussion of the numerous federal court rulings rejecting sexual orientation claims under Title VII, not once mentioning the EEOC's *Baldwin* decision and ignoring the handful of trial court rulings going the other way. *Evans v. Georgia Regional Hospital*, 2015 U.S. Dist. LEXIS 120618 (S.D. Ga., Sept. 10, 2015).

Furthermore, in *Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 2015 Ind. App. LEXIS 692, 2015 WL 6447550 (Oct. 26, 2015), the Indiana Court of Appeals, in the course of upholding the rejection of a Title VII retaliation claim, commented that "sexual orientation" does not represent a "protected class" under Title VII, with no mention of the EEOC's *Baldwin* decision or any substantive analysis or discussion.

To make some headway on this issue a case has to go to the court of appeals. Lambda Legal announced that they have taken that step, urging the 7th Circuit Court of Appeals in Chicago to reverse a lower court ruling and allow a lesbian, Kimberly Hively, to litigate her sex discrimination claim against Ivy Tech Community College. Ivy Tech had persuaded the federal district court in the Northern District of Indiana to dismiss Hively's Title VII case, successfully arguing that Title VII does not apply to sexual orientation claims. *Hively v. Ivy Tech Community College*, 2015 WL 926015 (N.D. Ind., March 3, 2015). In a hearing before a three-judge panel of the 7th Circuit held on September 30, Lambda argued that the EEOC *Baldwin* opinion, together with a handful of earlier federal trial court decisions cited by the EEOC, provide persuasive reasons for the 7th Circuit to set aside its own prior

precedents on this issue and embrace the new approach to interpreting "sex" broadly under Title VII. A three-judge panel of the 7th Circuit may consider itself bound by prior circuit precedent, but Lambda could then petition for *en banc* rehearing by the full 7th Circuit bench, which could overrule its old precedent. Or this case could be the vehicle to get the issue before the Supreme Court.

On October 19, the *New York Law Journal* published a column titled "Sexual Orientation Discrimination in the Summer of #LoveWins" by Nancy V. Wright and Janice P. Gregerson, a partner and associate at Wilson Elser Moskowitz Edelman & Dicker, asserting: "Contrary to the position taken by some commentators, *Baldwin* did little to impact the debate regarding whether Title VII prohibits sexual orientation discrimination. Until the U.S. Supreme Court resolves the conflicts in the federal courts, or until Congress amends Title VII, this issue will continue to be litigated in the courts with conflicting results based on jurisdiction. To be sure, protecting individuals against discrimination based on sexual orientation in the employment context is a matter of 'when' not 'if.' The 'when,' however, is not the summer of 2015." This seems a fair summary of the current situation. Although the EEOC may accept complaints of sexual orientation discrimination and seek to resolve most of them through conciliation and settlement agreements, attempts to litigate on the theory embodied in its July 15 ruling in *Baldwin* are likely to meet mixed results in the district and circuit courts, and an ultimate resolution will turn on how long it takes for the issue to come before the Supreme Court, and who is on that Court when it does, making the results of the 2016 election for President and the Senate crucial factors in light of the ages of Supreme Court justices and likely trajectories toward retirement. Of course, the congressional and presidential elections are crucial as well to the fate of the Equality Act. ■



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Houston Voters Reject Equal Rights Ordinance

More than sixty-percent of those casting ballots in Houston on November 3 voted to reject the Houston Equal Right Ordinance, which had been passed by the City Council but never went into effect pending the vote. Although only about 28% of registered voters participated in the balloting, the final overnight count showed only 39% of ballots favored allowing the measure to go into effect.

The flashpoint in the voting was the ban on gender identity discrimination, particularly as it might apply to

Furthermore, the governor and lieutenant governor both endorsed the repeal effort. Despite strong support for the Ordinance by the business community, fear won out.

The vote engendered worried discussion in the LGBT political community about the potential for similar repeal efforts in other jurisdictions. Nineteen states ban gender identity discrimination (although two of those omit coverage for places of public accommodation), as well as scores of cities and counties, and a measure to prohibit

Opponents of the measure, which was put on the ballot by order of the state's Supreme Court in litigation challenging the petitioning and subsequent wording of the ballot question, quickly demonized it as a bathroom bill, broadcasting outrageous scare advertisements.

access to restroom facilities in workplaces, schools, and places of public accommodation. Opponents of the measure, which was put on the ballot by order of the state's Supreme Court in litigation challenging the petitioning and subsequent wording of the ballot question, quickly demonized it as a bathroom bill, broadcasting outrageous scare advertisements contending that the bill would allow men to follow girls and women into restrooms to molest them. Supporters of the Ordinance ran the kind of polite civil rights campaign that has proven ineffectual in many other initiative/referendum battles on LGBT rights. There was never a really forceful response to the factual distortions.

such discrimination is the subject of intense debate in the Massachusetts legislature. (A similar measure has been approved by the New York State Assembly several times but stalled in the State Senate, prompting Governor Andrew Cuomo to direct the State Division of Human Rights to issue an interpretive regulation that would extend protection under the existing ban on sex discrimination, a move likely to be tested in the courts.) Hopefully, the fact that the existing bans have not led to an outbreak of sexual assaults in restrooms may persuade voters elsewhere not to repeal the measures, but a skillfully constructed media campaign will be needed to get that message across. ■

California Appeal Court Grants Habeas Relief to Gay Inmate Who Served 35 Years for Double Murder as Adolescent

A unanimous panel of the 4th District Court of Appeal of California granted habeas corpus relief to gay inmate Kent Wimberly, finding that a decision by Governor Edmund G. Brown, Jr., to deny parole to this convicted murderer lacked “some evidence” of current dangerousness, in *In re Wimberly*, 2015 Cal. App. Unpub. LEXIS 7533, 2015 WL 6387951 (October 22, 2015). The decision, written by Associate Justice Richard D. Huffman, extensively discusses homophobic repression and lack of emotional outlet that underlay Wimberly’s crime. While the case turns mostly on California law, it may be useful for other gay prisoners with a battered history who are incarcerated with indeterminate life sentences for youthful crimes.

Judge Huffman mostly focused on the “nature of the life crime” and Wimberly’s current “insight.” Wimberly had served 35 years of a 25-to-life sentence for the brutal killing at age 17 of his friend Eric’s father and girlfriend. He had a sexual encounter with Eric while camping, after which Eric became distant. Wimberly participated in a supposed plan with Eric for the double homicide (for which Eric was not convicted) in an attempt to impress Eric and to “cement” their “bond.” At the time, Wimberly was “physically, emotionally, and socially immature,” the victim of molestation and bullying, with a homophobic father, a “babying” mother, and no one with whom he could discuss his sexuality (or his “rage and hurt”) except Eric, with whom he had a “fantasy” emotional relationship, in a “desperate need” to connect with a male.

Wimberly was twice recommended for parole by the California Parole Board. Each time, however, Governor Brown overruled the Board, relying on the nature of the crime and Wimberly’s failure to accept full responsibility. Between the Governor’s first and second denials, Wimberly spent “a

great deal of time and emotional energy” examining his crime, and he gained “a significant amount of insight into the casual [sic: causal] factors of the life crime,” for which he accepted “full” responsibility. He developed “credible remorse” and “empathy,” as well as self-acceptance as a gay man. Wimberly’s case had other factors (all of which pointed toward parole) that the court mentions in passing: no serious misconduct in prison since 1988, educational achievements, successful programming, and community plans. All evaluative experts found him not to be currently dangerous. Perhaps most significant to the court, by his most recent parole hearing, “Wimberly finally realized and conveyed that he equated killing the victims to killing his own parents.”

Under California law, parole is “the rule, rather than the exception” (even for murder) unless the sentence is “without parole”; and section 3051 of the Penal Code requires that a juvenile offender be given “a meaningful opportunity to obtain release within his . . . lifetime.” While judicial review of denials is very deferential, it is “not toothless.” Here, Governor Brown’s second decision was without “some evidence” because there was no evidence that Wimberly was currently dangerous or that he lacked “insight” into his offense. Reliance on the “immutable” and “shocking” nature of the crime without evidence of these additional factors does not alone support reversal of the Parole Board’s decision to grant parole, where the inmate has served the suggested base term and when there is strong evidence of rehabilitation and no other evidence of current dangerousness, although the crime itself can be enough justification to deny parole if the defendant has achieved no insight.

The court of appeal applied the leading California decision, *In re Rosenkrantz*, 128 Cal. Rptr.2d 104 (2002), wherein the California Supreme Court set the “some

evidence” standard but denied habeas relief; then-Governor Gray Davis denied parole to a gay inmate whose youthful homicides arose in a setting of bullying and outing. The court found “some evidence” for denial of parole when the defendant showed a “current lack of remorse,” “lying,” and “continued efforts to mitigate his role.” *Id.* at 152-3. (Later, California’s continued reliance only on the severity of Rosenkrantz’s underlying youthful offense despite new and unrefuted evidence of rehabilitation resulted in federal habeas relief in *Rosenkrantz v. Marshall*, 444 F. Supp. 2d 1063 (C.D. Cal. 2006).)

Here, the “mountainous amount of evidence” (the court’s phrase) shows that Wimberly was “an immature, vulnerable 17-year-old, struggling with his sexuality and isolated from his parents and peers.” He was molested, bullied, and frightened of his father’s homophobia – suffering “guilt, shame, humiliation, low self-esteem, hopelessness, and thoughts of suicide.” He killed in a “desperate, irrational, and immature attempt to win Eric’s affection and tie him and Eric together forever.” The court’s remarkably empathetic opinion chastises the Governor (and the California Attorney General) for an “astonishing” failure to address this evidence.

It remains to be seen whether Wimberly’s case can be replicated for other gay youthful offenders. Counsel outside California should parse their own state law on youthful offenders and the federal habeas case in *Rosenkrantz*. Wimberly was ably represented by attorney Charles F.A. Carbone, San Francisco, who assembled a nearly “perfect storm.” – *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.

Federal Judge Agrees With EEOC that Sexual Orientation Discrimination is Actionable under Title VII

U.S. District Judge Myron H. Thompson (M.D. Alabama), rejecting the recommendation of a U.S. Magistrate Judge that a sexual orientation discrimination complaint under Title VII be dismissed on jurisdictional grounds, determined that the Equal Employment Opportunity Commission (EEOC) was correct this July when it ruled that sexual orientation discrimination is a form of sex discrimination under Title VII. *Isaacs v. Felder Services, LLC*, 2015 U.S. Dist. LEXIS 146663 (Oct. 29, 2015). However, this determination did not do any good for the plaintiff, Roger Isaacs, because the court concluded that his factual allegations included neither direct nor indirect evidence of discriminatory intent in his discharge or treatment by his employer on this ground.

Isaacs, a gay man, worked for Felder Services as a dietician for about six months. Felder provides various services to healthcare facilities. Isaacs was assigned to work at Arbor Springs Health and Rehabilitation Center under a contract that Felder had with that organization. He complained that he was subjected to a discriminatory hostile environment at Arbor Springs, and relayed this complaint back to Felder, which asked Arbor to investigate and report. Meanwhile, Isaacs had also been assigned by Felder to provide dietician services at another facility, in Florala, Alabama, once every three weeks. Isaacs had been injured in a car accident and asked for permission “for a man he identified as his brother but who was actually his husband to drive him to Florala, and for the two to stay overnight there,” wrote Judge Thompson, observing that there was a “dispute” about whether Isaacs was authorized to seek expense reimbursements on behalf of his “brother” for these expeditions. He submitted these

expenses, and also brought his mother along on some of these trips and submitted for her expenses as well. An administrative assistant at Felder Services raised questions about these expense reimbursements leading to an internal investigation at Felder. This investigation led to the conclusion that Isaacs was submitting unauthorized expenses for reimbursement, and then Felder’s human resources director received the result of Arbor’s investigation of Isaacs’ allegations about harassment, which found his charges to be unsubstantiated. The results of the expense reimbursement investigation were brought to Felder’s president by the HR director, and they decided to terminate him “based on the improper reimbursement requests.”

Felder asserted Title VII claims of discrimination (by firing him) on the basis of his sex, gender non-conformity, and sexual orientation, hostile environment sexual harassment, and retaliation for claiming about the harassment. The company’s motion for summary judgment was referred to a magistrate judge, who recommended granting the motion as to all three claims. Among other things, the magistrate judge asserted that the sexual orientation claim should be rejected as not actionable under Title VII.

Judge Thompson, conducting de novo review of the record before the magistrate judge, granted summary judgment to the company on all claims, but for some different reasons from those stated by the magistrate judge. Most importantly, Thompson rejected the contention that a sexual orientation discrimination claim could not be brought under Title VII.

“The court rejects the magistrate judge’s conclusion that ‘sexual orientation discrimination is neither included in nor contemplated by Title VII,’ wrote Thompson. “In the

Eleventh Circuit, the question is an open one,” he wrote, citing to a recent ruling from the Southern District of Georgia, *Evans v. Georgia Regional Hospital*, 2015 WL 5316694 (Sept. 10, 2015) (where the judge noted that the 11th Circuit hadn’t decided this issue yet). “This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII,” Thompson wrote, citing the July EEOC decision in *Baldwin v. Federal Aviation Administration*. In that case, he wrote, “the Commission explains persuasively why ‘an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.’ Particularly compelling is its reliance on Eleventh Circuit precedent,” he continued, noting the EEOC’s invocation of *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986), where the 11th Circuit held that discriminating against an employee based on an interracial marriage or association was a form of race discrimination; by inference, Thompson was making an analogy to same-sex marriage or associations as sex discrimination. Judge Thompson also cited a 1994 law review article by Northwestern University Professor Andrew Koppelman titled “Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,” 69 N.Y.U. L. Rev. 197, which made the same argument by analogy to the racial association cases in the wake of the Hawaii Supreme Court’s ruling in *Baehr v. Lewin* that a ban on same-sex marriage was sex discrimination.

Thompson continued, “To the extent that sexual orientation discrimination occurs not because of the targeted individual’s romantic or sexual attraction to or involvement with people of the same sex, but rather based

on her or his perceived deviations from ‘heterosexually defined gender norms,’ this, too, is sex discrimination, of the gender-stereotyping variety,” here again citing *Baldwin* as well as a concurring opinion in *Latta v. Otter*, the 9th Circuit’s 2014 marriage equality decision, in which Circuit Judge Marsha Berzon argued that a state ban on same-sex marriage was a form of sex discrimination in violation of the Equal Protection Clause. Judge Thompson quoted a passage from Berzon’s concurring opinion that included a citation to a 1975 law review article by then-professor (now Supreme Court Justice) Ruth Bader Ginsburg titled “Gender and the Constitution” (44 U. Cin. L. Rev. 1), which had helped to provide the theoretical underpinning for the Supreme Court’s subsequent adoption of the view that sex-stereotyping is evidence of sex discrimination.

While determining that the magistrate judge’s recommendation to reject Isaacs’ sex discrimination claim on the basis that Title VII did not apply was incorrect, however, Thompson concluded that Isaacs had failed to allege facts that would give rise to an inference that he was discharged *because of* his sexual orientation, and he agreed with the magistrate judge that the factual allegations were also insufficient to support Isaacs’ hostile environment and retaliation claims against Felder.

Thompson’s decision is apparently the first by a federal district judge to rely on the EEOC’s *Baldwin* decision to hold affirmatively that sexual orientation discrimination claims, if supported by sufficient factual allegations, can be brought under Title VII. Since the employer won its motion for summary judgment, there would seem to be no reason for it to seek review of Thompson’s ruling at the 11th Circuit, but the issue might get there if Isaacs were to appeal. He is represented in this lawsuit by Benjamin Howard Cooper of Cooper Law Group LLC, Birmingham, Alabama. ■

Marriage Equality in Ireland Advances in the South but Stalls in the North

The Republic of Ireland will have marriage equality by the end of 2015, but Northern Ireland, a province of the United Kingdom, will not, as a result of actions taken during October and the beginning of November.

A plebiscite in the Republic of Ireland returned a decisive majority, 62%, in favor of marriage equality in May 2015. Following up on that vote, the Parliament deliberated on the Marriage Bill 2015, introduced to implement the plebiscite result, and final approval was given on October 22. On October 29, the members

of the Republic. [Compiled from news reports from *Irish Times*, *The Guardian*, and *Agence France Presse English Wire* from October 22, 29 & 30.]

Things did not go as smoothly in Northern Ireland, the last remaining province of the United Kingdom that does not allow or recognize same-sex marriages. Past attempts to advance a marriage equality bill in the legislature had failed to gain majority support. A vote on a new measure on November 2 did achieve a slight majority of the parliament for the first time, but that will not result

A vote on a new measure on November 2 did achieve a slight majority of the parliament for the first time, but that will not result in passage because of the particular political arrangements governing legislation in Northern Ireland.

of the Presidential Commission, acting in the absence of President Michael D. Higgins, who was away on a state visit to the United States, officially signed the bill into law. The next step would be for Minister of Justice Frances Fitzgerald to issue a “commencement order” so that local officials could begin to process marriage license applications for same-sex couples. After the legislature had completed action, Minister Fitzgerald announced that the first same-sex marriages could take place by mid-November. Under the amendment to the marriage law, same-sex marriages will have the same status as different-sex marriages under the Constitution

in passage because of the particular political arrangements governing legislation in Northern Ireland. If one of the two major parties objects, a measure can’t be passed without the support of a majority of its own members, and the Unionist Party, which opposes marriage equality, suffered only a handful of defections on the vote and registered its formal opposition to passage. The extended headline posted online by *The Guardian* tells the story: “Northern Ireland assembly votes to legalise same-sex marriage: Historic vote will not trigger change in law, however, as Democratic Unionists use parliamentary veto to block motion.” ■

Council of State of Italy Voids Foreign Same-Sex Marriages Based on “the Order of Nature”

An inflamed debate escalated throughout the Italian media after the Council of State, which represents the supreme administrative jurisdictional body in the country, rendered a judgment in which it declared same-sex marriage contrary to “the order of nature.” *Ministero dell’Interno v. Sindaco di Roma et al.*, App. No. 4545/2015 (Oct. 26, 2015). The decision responded to several petitions filed by Italian same-sex couples who had married abroad, aimed at challenging an order by the Minister of Interior to the local prefects on October 7, 2014, to have the municipal registrations of such marriages cancelled. In fact,

their marriages performed abroad (for instance in New York, Spain, Portugal, Canada, and the Netherlands). In this respect, Italian law subjects the conditions to marry to the national law of either spouse. As a result, since same-sex marriage is not currently contemplated by the Italian civil code, same-sex marriages performed abroad involving Italian citizens (including by an Italian citizen and a foreigner) are not recognized in Italy. Against these provisions, the petitioners argued that the registration was necessary as a matter not of substance but rather of form, to provide their families with the evidence, valid under Italian law, that their marriage had been regularly

following a crescendo of favorable rulings of the European Court of Human Rights (for example, *Schalk & Kopf v. Austria*, Appl. No. 30141/04, June 26, 2010, on the right to a civil legal status for same-sex couples equivalent to marriage), which culminated in the ruling of July 21, 2015 against Italy, finding a violation of Article 8 in the fact that the Italian legislature has not yet enacted any appropriate legislation to recognize and protect same-sex couples (*Oliari v. Italy*, Appl. No. 18766/11 and 36030/11).

The Council of State showed no respect for these precedents and dismissed the idea of same-sex couples as families. It held, setting the clock of law and jurisprudence back one decade at least, that the difference of sex among the spouses is “an indefectible condition for marriage,” amounting to “an essentially ontologic element of the act of marriage.” Also, it stated that prefects have the power, under the Minister’s order, to effectively cancel the marriages that had already been registered upon mayors’ initiatives. The problem here is that, contrary to the Council’s conclusion, the law clearly provides for a judicial determination in this respect, as the government, from whom the prefects depend, should not be entitled to discretionally change what is registered in the civil status registry, given the importance of the latter from a viewpoint of legal certainty and security.

Despite all these contradictions, however, Italian politics seem still immovable on the question of the rights of same-sex couples. A bill is currently filed with the Italian Senate and will be presumably discussed during 2016. Meanwhile, on July 21, 2015, the ruling of the European Court against Italy has become final and therefore fully enforceable. – *Matteo M. Winkler*

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The Council of State deemed the petitioners’ marriages totally null and void and stated that the prefects who cancelled them did not exceed their powers under the law.

some mayors of major cities, such as Milan, Naples and Rome, provided the registration of the petitioners’ marriages after a court stated that such registrations are lawful. The Council of State not only upheld the Minister’s order, therefore ordering cancellation of the registrations, but also deemed the petitioners’ marriages totally null and void and stated that the prefects who cancelled them did not exceed their powers under the law. An additional controversy arose when the media disclosed, immediately after the ruling, that two of the Council of State judges that signed it are active participants either in Catholic Church-led organizations or in openly anti-gay groups.

Since 2002 Italian gay and lesbian couples have sought registration in the municipal civil status registries of

performed abroad.

Whereas at the beginning Italian courts opted for the solution of the “non-existence” of same-sex marriages, a categorization that scholars had seldom adopted in the past, in 2012 the Italian Supreme Court clarified that foreign same-sex marriages, although legally ineffective, raise a question of fundamental rights under Article 8 of the European Convention on Human Rights on the individual right to respect for private and family life. Accordingly, same-sex marriages performed abroad are not contrary to public policy (Supreme Court of Cassation, judgm. No. 4184 of Feb. 15, 2012, *Garullo & Ottocento v. Comune di Latina*).

Such a fundamental rights dynamic has been reaffirmed over and over by national courts in the last decade,

New York Trial Court Holds New York Property Acquired During a Vermont Civil Union is Not Subject to Equitable Distribution in New York Dissolution Proceeding

In a rather complicated opinion, New York Supreme Court Justice Richard A. Dollinger ruled on October 23 that New York property acquired by Deborah O'Reilly-Morshead during her Vermont Civil Union with Christine O'Reilly-Morshead is not subject to equitable distribution under New York law in the current divorce proceeding between the women, who married in Canada after the property was acquired. *O'Reilly-Morshead v. O'Reilly-Morshead*, 2015 N.Y. Misc. LEXIS 3843, 2015 NY Slip Op 25354, 2015 WL 6511931 (Supreme Ct., Monroe County).

Deborah and Christine began their relationship in 2001 while living in Indiana, where they had a "union ceremony" with no legal significance. They moved to New York in 2002, Deborah selling a house she owned in Indiana. They went to Vermont in 2003 and contracted a civil union, while continuing to reside in New York. In 2004 Deborah used the proceeds from the sale of her Indiana house and her other resources to buy a house in Rochester, New York, which was recorded in her name only. In 2006, the women ventured up to Canada to marry, continuing to maintain their residence in Rochester. Five years later, Deborah filed a divorce action in Monroe County Supreme Court, seeking equitable distribution of "marital property." She excluded from that category the house, which she had purchased with her own assets prior to the marriage. Christine countersued for divorce and dissolution of the Vermont Civil Union (calling on the equitable powers of the court for the latter), and contended that the house, purchased *after* the parties contracted their civil union, should be considered property of the civil union subject to distribution under Vermont law, and so should be included as part of the marital property

subject to dissolution in the New York proceeding. As the parties could not resolve their dispute about the status of the house, it fell to the court to decide both whether it had the power to dissolve the civil union and also whether it had the authority or power to make an order regarding ownership rights to the house.

Relying on prior court decisions finding that New York Supreme Court justices can dissolve civil unions drawing upon their general equitable powers, Judge Dollinger had no trouble deciding that he could grant Christine's request to dissolve the civil union, but dealing with the house was a more complicated matter.

The court's authority to distribute property in a divorce proceeding is not based on general equitable principles, but rather on the equitable distribution provisions of New York's Domestic Relations Law, a statute passed by the Legislature that provides that "marital property," defined as property acquired during the marriage of the parties, is subject to distribution between the parties upon divorce. Clearly, this house was not acquired "during the marriage." While it was clear to the court that if Christine brought an action to dissolve the civil union in Vermont, a Vermont court could treat the house as "property of the civil union" and thus subject to distribution between the civil union partners under Vermont law, it was not clear that a New York court would have that authority, and a review by Justice Dollinger of New York case law provided, in his view, little support for Christine's argument.

He wrote, "This court considers 'marital property' as defined by the Legislature in the Domestic Relations Law as the lynch pin on which New York's entire system of marital property distribution rests. If the property is 'marital,' the court

can equitably distribute it. If not, the court has no jurisdiction to change title or ownership to it. Because of the central importance of creating an exact context in which courts could order a transfer to title to property, the Legislature adopted a black line test for determining when 'distributable property' existed in a marriage. The date of marriage – and no other date – is the time when 'marital property' exists," citing Dom. Rel. L. sec. 236(B) (1)(c). While the courts have adopted a broad definition of "property" for purposes of enforcing this statute, Dollinger wrote, they had *not* adopted a broad definition of "marital," adhering strictly to the statutory definition. On top of this, of course, when adopting its Civil Union Act in 2000, the Vermont legislature included a provision expressly declaring that a civil union is not a marriage, and Dollinger saw no basis for arguing that a New York court should or could treat a Vermont civil union as a marriage.

He also rejected the notion that the court could apply the doctrine of "comity" in order to treat the property the way it would be treated under Vermont law, pointing out the difficulties that would ensue in dealing with property claims based on a civil unions and domestic partnerships from the various jurisdictions where those statutes were created during the period between 2000 and the Supreme Court's marriage equality decision on June 26, 2015. This would require New York courts to inquire into the nature of legal relationships in other jurisdictions and how they treated property distributions upon dissolution.

While he noted that some other states had dealt with this problem through express statutory provisions when adopting their marriage equality laws – notably Vermont and New Hampshire – and that the Massachusetts

Supreme Judicial Court had accorded marital-like status to Vermont civil unions for some purposes, he observed, “Neither the New York Legislature nor the Court of Appeals has yet moved New York’s law into the same orbit as our neighboring sister states. The Legislature, in the Marriage Equality Act, simply made same-sex marriage legal in New York. It did not mandate that same-sex couples, who were united in civil unions in other state, acquired property rights through that civil union that are equal to the property rights granted to married couples.” By contrast, Vermont’s marriage equality law says that civil unions from other states would be treated as equivalent to marriages in Vermont. If the New York legislature were to amend the NY Marriage Equality law to add similar language, this problem would disappear.

For those tracking the development of these issues in New York, Justice Dollinger’s opinion provides a useful summary of the court opinions that have had to grapple with how civil unions elsewhere should be treated by New York courts. Unfortunately, none of them provides direct guidance about how to decide this case. Most of them deal with disputes involving custody, visitation and child support.

The judge also considered an alternative theory of treating the Vermont civil union as equivalent to a contract under which the parties agreed that property acquired during their civil union would be deemed jointly-owned property. There is precedent under New York law for the enforcement of express pre-nuptial agreements, for example, that would control the distribution of property, and the Court of Appeals has extended that concept to express agreements by non-marital cohabiting couples about their property rights, but has refused to enforce “implied” agreements based on cohabitation. While acknowledging that Christine’s argument along these lines “has a power logic,” Dollinger concluded that it went beyond what he was authorized to do under current law.

“In this court’s view,” he wrote, “the proof problems and other complications that drove the Court of Appeals to deny recognition of an implied agreement for asset distribution between an unmarried couple are not present, in the same degree, in a civil union.” The Court of Appeals was worried about the problem of “amorphous” agreements that would not provide the kind of “black line” test that the term “marital property” provides. Dollinger acknowledged that this problem might not pertain to civil unions, which had well-defined contours in statutes such as Vermont’s Civil Union Act. “However,” he wrote, “whether this court should, in interpreting the Court of Appeals use of the word ‘amorphous’ in these opinions, conclude that the common use of this word was a springboard to change the definition of ‘marital property’ to include property – acquired during a statutory well-defined union in another state, but not acquired during a marriage – is, in view of this court’s limited authority, unwise. This interpretative reed – based on the use of the same word by justices more than two decades apart – is too tender to carry such weight.”

Ultimately, Dollinger concluded that the failure of the New York legislature to pass any statute recognizing out-of-state civil unions for any purpose effectively tied his hands. “There is no general common law of equity that is equivalent to the statutory creation of an equitable distribution power in the Domestic Relations Law,” he wrote, pointing out that the Court of Appeals has frequently ruled that a “marriage – of whatever type or from whatever jurisdiction – is the only touchstone for equitable distribution of property in New York.”

“In reaching this conclusion, the court is struck by the anomaly this case represents: this court is dissolving a pre-existing civil union, but only allowing equitable property distribution based on the couple’s marriage. Any ‘civil union’ property – which would be subject to distribution if this matter were venued in Vermont – remains titled

in the name of the current title holder and is not subject to distribution,” he wrote. “In short, this court provides one remedy to the couple – dissolving the civil union – but declines to provide any further remedies based on their civil union. This court has no solution for this conundrum without violating long-standing principles of New York marriage-based laws. Any further answer rests with the Legislature.”

Justice Dollinger granted Christine’s motion for summary judgment to dissolve the civil union, but held “as a matter of law, that neither party is entitled to equitable distribution of any assets, acquired in their own names during the period of the civil union, prior to the date of marriage.” He reserved to trial the issue of the cross-claims for divorce and distribution of “marital property.”

This case presents a problem that is typical of transitional periods in the law, and over time the nationwide availability of marriage for same-sex couples will obviate the need to deal with this kind of issue. However, this case shows that such transitional issues may linger for many years, so it would be helpful for the Legislature to accept Justice Dollinger’s implicit invitation to add a provision to the Marriage Equality Law specifying how out-of-state civil unions and domestic partnerships should be treated in the context of dissolution proceedings brought in New York.

Deborah is represented by Debra Crowder of Badain & Crowder, of Rochester, and Christine is represented by Vivian Aquilina of Legal Aid Society of Rochester. The women have a child, whose interests in the divorce proceeding are represented by Lisa Maslow, also of Rochester. There is, of course, the possibility that Christine could appeal Justice Dollinger’s ruling, which would go to the Appellate Division, 4th Department, based in Buffalo, and eventually to the Court of Appeals. Any legislative developments in response to the court’s invitation would be probably be too late to effect the outcome in this case. ■

Federal Judge Dismisses Failure-to-Protect Complaint of Inmate Who Alleges Daily Rapes, Despite Finding “Viable” Causes of Action

P*ro se* plaintiff Steven R. Miller alleged that at age nineteen he was knowingly housed with another inmate who had raped him in high school and that he was sexually assaulted by him and others daily for over five months. The case about these 2010 events has yet to survive screening under 28 U.S.C. § 1915A(a), and United States District Judge Ralph R. Beistline (who is Chief Judge of the District of Alaska) dismissed his second amended complaint in *Miller v. Najera*, 2015 U.S. Dist. LEXIS 135649, 2015 WL 5882711 (E.D. Calif., October 5, 2015). Miller (who was twice denied counsel by United States Magistrate Judge Michael F. Seng), is clearly floundering, suing over 100 defendants (including the United States Attorney and the Public Defender) on constitutional, statutory, tort, and conspiracy claims in what appears to be a horrendous but essentially straightforward failure-to-protect claim under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

Miller alleged that jail defendants made discriminatory remarks about his sexual orientation and then knowingly placed him on a block where it was “reasonably certain” he would be raped and abused. He plead that his injuries included rectal bleeding and required hospitalization (where a rape kit was done), that his multiple grievances were ignored, and that some defendants even watched the assaults, directly or on video. He also claims denial of post-hospitalization medical care.

Miller was a federal detainee confined in a county jail, and Judge Beistline found the pleading “clearly sufficient” to state a viable cause of action against the United States Marshall, who allegedly was aware of the unsafe conditions at the jail and had received periodic reports about the abuse inflicted on Miller but did nothing to protect him. Miller’s

allegation that the Sheriff “stood by and watched” him get raped likewise “survives screening.” He also allowed claims against twelve of the John Does.

One would expect that the court would order service, involve defense counsel, and direct county officials to help name the John Does and to produce (or at least to preserve) the claimed evidence of medical records and videos. Instead, in a hard-to-follow opinion with seventy footnotes, Judge Beistline dismisses the case again, with leave to replead, directing Miller to file a “short and plain statement” of his claim or risk “dismissal of the entire action” under F.R.C.P. 8. Judge Beistline writes that “Miller will be given a reasonable opportunity during the course of these proceedings to ascertain the true identity of those ‘Doe’ Defendants against whom he has otherwise plausibly pleaded a viable cause of action,” but he directs Miller to “identify” them in his third amended complaint.

Attorneys interested in a law-school-like recitation of “all possible issues” can read the body of the opinion to see discussion of: liability of prosecutors and defense counsel, despite usual immunity and “color of law” defenses; claims against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, including pre-filing exhaustion of remedies; using “agency” theory to hold federal defendants liable for unconstitutional conditions when they house federal inmates in county jails; liability under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); recitation of the elements under California tort law for rape, sexual assault, battery, and outrageous conduct – and some “torts” that seem not to exist independently, like “sexual enslavement,” “gang rape,” and “intentional infliction of

HIV.” Most of the claims, which Judge Beistline allows Miller to replead, are described in conclusory fashion, with a disclaimer that the court finds it “highly unlikely” or “doubtful” that they can be adequately pleaded or that there are presently “no facts” to support them.

Judge Beistline dismisses without leave to amend Miller’s claims about medical care after his assaults, as not specific enough against any defendants and as otherwise violating rules about combining unrelated claims in a single cause of action, without discussing joinder under F.R.C.P. 20(a) or the typical joinder in prisoner cases of assault and treatment of injuries claims in a single lawsuit, as arising from the same series of transactions. Oddly, he then allows Miller to replead Fourth Amendment claims, although the case presents no foundation for believing an “excessive force” claim is present, even as he reminds Miller that he cannot combine Fourth Amendment allegations in the “same cause of action as his failure to protect claim.”

In this writer’s view, it is very unlikely that Miller can improve on his second amended complaint without assistance of counsel (or even identify the John Does five years after the fact) sufficiently to correct the dozens of pleading deficiencies mentioned in Judge Beistline’s opinion, which threatens to enter judgment against Miller “without further notice” if he fails to comply with the decision. *Compare Idel v. Edwards*, 2015 WL 5794472 (W.D. La., Sept. 30, 2015) (reported in this issue of *Law Notes*), which strips fringe issues from gunshot pleadings in an inmate’s protection-from-harm case. The *Miller* opinion by the visiting district judge elevates collateral theories, while losing focus on key issues, and fails to narrow the *pro se* pleadings in a case that the court has already found to present a core claim. – *William J. Rold*

California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery

Unlike ostriches, which really do not bury their heads in the sand when threatened or frightened (instead, they dig holes to protect their eggs), corrections officials have until very recently engaged in all manner of avoidance behavior when faced with requests for sex reassignment surgery ["SRS"] from transgender inmates. Now, California, after paroling an inmate to avoid a court order to provide SRS in one case and agreeing to the surgery in another – see article on *Norsworthy* and *Quine* cases in Law Notes (September 2015) at page 348 – has issued “Guidelines” for SRS statewide, as promised in the *Quine* settlement.

issues a report, taking into account: “any current medical or mental health contraindications which would preclude any further consideration of the request”; or any treatment “other than SRS” that would “ameliorate” the patient’s complaints.

Transgender candidates for SRS must: have expressed a desire to change their body “congruent” with their gender identity for at least two years, have lived as the desired gender for 12 months, and have received “supervised hormone therapy, unless medically contraindicated” for 12 continuous months. The “Guidelines” are silent about transgender patients’

parole release.” (It is unclear whether the “Guidelines” could be effectively circumvented by recycling an inmate for parole consideration every 23 months.) There must be no “penological contraindications” to placement of the inmate after SRS.

Transgender SRS patients must sign a consent provided by Corrections, in addition to any informed consent executed in connection with the surgery itself. The patient must initial this statement: “Individuals with gender dysphoria can be successfully treated without undergoing sex reassignment surgery.”

If the subcommittee report recommends SRS, it is subject to approval, denial, or modification by the “Headquarters” committee, whose decision is “final” for purposes of exhaustion of remedies before the patient can bring legal action. Applications can be resubmitted “no sooner” than one year after denial. The “Guidelines” list the types of surgery that can be approved, which include removal/replacement of sexual organs. They do not include breast augmentation, hair removal, voice modification, or body re-countering.

An attorney for the Transgender Law Center (Oakland), which has represented a number of transgender California prisoners, called the “Guidelines” a “model” for the nation, according to the *New York Times* (Oct. 21, 2015). Perhaps they are, given the paucity of what’s out there, but they are “pretty conservative criteria” according to the office of the medical receiver appointed by the federal court to oversee medical care in California’s prisons. In this writer’s view, they are cumbersome, bureaucratic, filled with exceptions, and divorced from primary care decision-making that should be the focus of individualized professional medical judgment under the Eighth Amendment. They will undoubtedly spawn more litigation – but for a glass that has had nothing in it, it may be premature to bemoan that it is not even half full. – *William J. Rold*

The eight-page “Guidelines,” apparently the first in the nation, add specific criteria for SRS approval to a long list of otherwise “excluded” medical services under California prison regulations.

The eight-page “Guidelines,” apparently the first in the nation, add specific criteria for SRS approval to a long list of otherwise “excluded” medical services under California prison regulations – 15 C.C.R. § 3350.1.

Multiple committees are involved in approving SRS. Patient’s providers first refer the request to an institutional committee, but it “shall neither approve nor deny the request.” It refers it to a “Headquarters Utilization Management Committee,” which refers it to a “Sex Reassignment Surgery Review Committee” (a “subcommittee of the “Headquarters” committee, composed of two physicians, two psychiatrists, two psychologists, and a “chair” – and whatever “non-voting” participants from security, legal, and primary care the subcommittee deems “appropriate for the discussion”). The subcommittee

life experiences prior to incarceration, but California’s refusal to recognize transgender experience prior to imprisonment, including using “street” hormones, was part of a challenge to denial of access to SRS consideration in *Denegal v. Farrell*, 2015 U.S. Dist. LEXIS 122326 (E.D. Calif., September 14, 2015), reported in *Law Notes* (October 2015) at pages 462-3. Patients must have “significant distress” from gender dysphoria that is not attributable to confinement generally, to mental illness or to “any other factor.” The voluminous paperwork includes medical and mental health documentation, as well as the prisoner’s criminal offense history. SRS can be denied if “there appears to be any relationship between the offenses and the individual[s] being transgender.” Patients must also have two years remaining “before anticipated

Two Federal Decisions Reveal Heterosexism in Idaho's Pre-Parole Prisoner "Rehabilitation"

In decisions issued just two days apart, federal judges in Idaho examined sexuality-based claims of prisoners enrolled in "pre-parole" behavior modification programs. In the first case, *Custodio v. Idaho State Board of Corrections*, 2015 WL 5708591 (D. Idaho, September 28, 2015), a heterosexual inmate challenged being forced to engage in "homosexual" role playing; in the second, *Reyna v. Bearden*, 2015 U.S. Dist. LEXIS 134886 (D. Idaho, September 30, 2015), the plaintiff alleged anti-LGBT discrimination.

In *Custodio*, heterosexual inmate Elias Custodio, participating in a required pre-parole Therapeutic Community Program [TCP], alleged that the head counselor (Jaune Sonnier) and others violated his civil rights by "requiring men whose views are contrary to homosexuality (for religious or other personal reasons) to engage in effeminate and sexually-oriented behaviors with other men or risk losing their... tentative parole dates." Accordingly to the decision of Chief United States District Judge B. Lynn Winmill, the TCP used "shame-based" peer group therapy, including stereotypical mimicry, as part of its rehabilitative "pathways."

Raising mostly First Amendment claims, Custodio's 2013 lawsuit included Sonnier and the Director of the Idaho Department of Corrections. Judge Winmill dismissed most of the claims under the Prisoner Litigation Reform Act [PLRA] for failure to exhaust administrative remedies under the Idaho inmate grievance system; but, although he finds that Custodio has been "moved to the rehabilitative pathway he sought" – that Sonnier is no longer employed, and that the director has "no control over whether Plaintiff is granted parole in the future" – the case is not moot.

Since Sonnier had not been served, she did not participate in the motion to dismiss. Custodio alleged that she became enraged and retaliated against him after he insisted that he was not "a queer." For no apparent reason, Judge Winmill repeats Custodio's allegation

that the counselor is lesbian, orders that she be served, and publishes an address for her in the decision (something this writer has never seen in a prisoner case). He orders the action to continue against her, because Custodio had exhausted PLRA grievances as to her.

Judge Winmill then ordered the current Idaho corrections director in his official capacity to be substituted for the named defendant, holding that the case may not be moot for First Amendment injunctive purposes. Despite Custodio's individual circumstances – and Idaho's published discontinuation of its "shame-based" rehabilitative programs and "pathways to parole" – the practices he challenged may be "ongoing": TCP may still be violating the First Amendment in 2015 regarding inmates' "right to hold and express an opinion about homosexuality that differs from that of the TCP counselors, or... to be free from being forced to engage in types of behaviors contrary to their personal or religious viewpoints..."

Judge Winmill considers "several" declarations of inmates in TCP "whose views are contrary to homosexuality" stating they have been required "to engage in effeminate and sexually-oriented behaviors with other men or risk losing their place in the program." Judge Winmill lists an enumeration of "questionable behavior," including: singing "I'm a Little Teacup" and "I'm a Barbie Girl in a Barbie World"; walking down a runway like a female model; acting like a "Valley girl" or a winner in the Miss America pageant; performing a "dance off" on the floor with other men; and pretending to eat a burrito to mimic fellatio. He noted that TCP counselors "attribute homosexuality to heterosexual inmates" and "program rules prevent them from responding."

Custodio is not a class action, and Judge Winmill does not further explain his consideration of these affidavits or the continuing justiciability of the claim for injunctive relief, except to cite *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990), and *N.L.R.B.*

v. Express Publishing Co., 312 U.S. 426, 435 (1941). *Orantes-Hernandez* was a class action immigration case, and *Express Publishing* dealt with the enforcement of fair collective bargaining orders of the National Labor Relations Board. This writer is aware of no case in which non-party inmates can continue to litigate a theoretical constitutional violation after the single plaintiff's case has become moot. Compare *Norsworthy v. Beard*, 2015 U.S. App. LEXIS 17447 (9th Cir., Oct. 5, 2015), reported in this issue of *Law Notes*, which remanded on the continuing need for an injunction after a transgender inmate who won a preliminary order for sex change surgery was paroled. Nothing in *Norsworthy* suggested that other transgender inmates' affidavits could be considered.

In the second case, *Reyna v. Bearden*, self-identified bisexual prisoner Oswald Reyna was required to complete a Sex Offender Treatment Program [SOTP] to be eligible for parole because he had a prior conviction of sex with a boy. The SOTP used "socially proactive" and peer "accountability" techniques as "pathways" for rehabilitation. Reyna alleged chief clinician Larry Bearden targeted him because of his sexual orientation, writing negative reports for "brushing" another inmate and for engaging in behaviors that were "overly nice," "ingratiating" to others (including staff), or "could be interpreted as grooming others for sexual favors." According to the complaint, Bearden repeatedly told Reyna that he "had nothing against homosexuals... [Y]ou know what I'm talking about." Bearden ordered Reyna to shower alone and to so inform the other inmates. He advised Reyna to "obtain advice from two known homosexual men in the unit to come up with [a] plan" to "manage his sexual thoughts and urges." Reyna was removed, reinstated, and removed again from SOTP; finally, his "pathways" were extended and his parole eligibility was suspended for "sexually acting out."

United States Magistrate Judge Ronald E. Bush (now Chief Magistrate),

who has the *pro se* case for all purposes under 28 U.S.C. § 636(c), granted Bearden partial summary judgment, because: (1) there was “some evidence” to support disciplinary; and (2) there was a “legitimate penological purpose” to punish Reyna’s supposed attempts to ingratiate himself with staff. Judge Bush says examples of “ingratiating” or “inappropriate” behavior included inviting another inmate “to sit with him” at dinner and not reporting other inmates’ sexual behavior in the SOTP. Without discussing any law on protected classes, Equal Protection, or “mixed” motive discrimination, Judge Bush allowed Reyna to proceed past screening on amended allegations against Bearden that he retaliated against Reyna by the “sexually acting out” charges and by extending his “pathway.”

Judge Bush declined to appoint counsel, but he wrote that it is “unusual” that corrections could not produce a file for Reyna’s times in SOTP. He directed Bearden to give Reyna a summary of his anticipated testimony. He also observed that Idaho “has discontinued all of its previously configured therapeutic community rehabilitative programs and has decided to clarify its pathways to parole.” He noted that the record “reflects some odd-to-disturbing facts on both sides,” and suggested “early settlement” – even if Reyna only receives “an opportunity for a place in a new sex offender treatment program, where an inmate’s mental health concerns are taken into consideration and meaningful treatment records are maintained.”

Neither case criticizes the heterosexist assumptions of the LGBT-phobic operation of the Idaho “rehabilitation” system under scrutiny. *Custodio* is concerned not with the demeaning of LGBT people by using a clumsy mockery of stereotypes as “therapy” but with the impact of same on objecting heterosexual sensitivities. *Reyna*’s message is that it is OK to address pedophilia by suppressing adult LGBT sexuality (implicitly linking the two), so long as there is no specific “retaliation.” *Custodio* went out of its way to “protect” heterosexuals not before the court, and *Reyna* offered little protection to the bisexual inmate who was. – *William J. Rold*

Florida Appellate Court Rejects Co-Parent Standing in Visitation Case

Winning marriage equality nationwide (including in Florida) was cause for celebration this year, but it did not necessarily cure the legal problems of same-sex co-parents who had not previously been able to marry, as shown by an October 14 ruling by the Florida 2nd District Court of Appeal, which ordered the dismissal of a lawsuit by a woman seeking to restore contact with children she was raising with her former partner. *Russell v. Pasik*, 2015 WL 5947198, 2015 Fla. App. LEXIS 15177. Unfortunately, the court of appeal was not willing to commit itself in this ruling to any opinion whether this problem would disappear had the women been married to each other when their children were born, postponing any answer to a pressing question now confronting same-sex married couples in Florida (and many other states) who want to have children together.

Susan Russell and Elizabeth Pasik began their relationship in 1998 and subsequently decided to have and raise children together. Pasik obtained anonymous donor sperm through a sperm bank. The women used it to undergo alternative insemination and to both have children. Each of the women bore two children conceived from this donor sperm, so the children were all related to each other, either as full or half-siblings, and all the children were given the same last name combining the names of their two mothers. Russell gave birth to children in 2006 and 2008. The children were raised together by Russell and Pasik until their relationship ended in April 2011, when they separated, each taking their “own” children but continuing contact with the other children. Two years later, however, Russell refused court’s opinion does not mention whether Russell continued or wanted to have contact with the children born to Pasik.

At the time Russell cut off Pasik’s contact, Florida courts had not yet ruled in favor of marriage equality. Although second-parent adoptions may have

become available by then, according to the court in this case, because a Florida court ruling had invalidated the state’s statutory ban on “homosexuals” adopting children, they had not availed themselves of that option.

Pasik filed a petition in the Manatee County Circuit Court seeking a “timesharing” order, claiming to be the de facto or psychological parent of these children. Russell filed a motion to dismiss the case, arguing that Pasik was not a legal parent of the children and thus did not have “standing” to seek a visitation order. At the hearing on the motion, Circuit Judge Marc B. Gilner denied Russell’s motion, stating that “the unusual facts as set forth in the petition sufficiently set forth a cause of action.” Russell then filed a petition for certiorari with the 2nd District Court of Appeal, asking it to intervene and grant her motion to overturn Gilner’s ruling.

It is unusual for somebody in Russell’s petition to be able to appeal a decision that refused to dismiss the case against her but did not rule on the merits of Pasik’s petition, as appellate courts don’t normally intervene at this point in a proceeding. Judge Craig C. Villanti, writing for the court of appeal, pointed out that this kind of appellate relief is only available if Russell can show “a departure from the essential requirements of the law” by the trial court that would result in “material injury for the remainder of the case” which “cannot be corrected” by an appeal after a ruling by the trial judge awarding timesharing to Pasik. In other words, Russell would have to show irreparable injury to her constitutional rights in order to get the court of appeal to intervene at this stage of the case. In its October 14 ruling, the court found that Russell qualified for immediate appellate relief.

“As the mother of the children with whom Pasik seeks timesharing,” wrote Villanti, “Russell has a constitutional privacy interest in the raising of her children, including determining with whom they are allowed to spend time, that the State would necessarily be

interfering with by just allowing the case to proceed.” He cited a string of prior Florida cases finding that forcing a parent to litigate a third party’s attempt to gain visitation rights would impose an irreparable injury on the parent. The court of appeal found that the trial judge had committed “a violation of a clearly established principle of law resulting in a miscarriage of justice” when it allow Pasik to proceed with the case.

Villanti pointed out that in her initial petition, Pasik conceded that she is not a legal parent to the children. “Taking this assertion as true,” wrote Villanti, “Pasik’s claim that she is entitled to timesharing depends on a finding that her status as a de facto or psychological parent is sufficient to confer standing as a parent to seek visitation.” Although some prior Florida court rulings that Pasik cited had favorably considered this contention, they all predated a more recent ruling by the Florida Supreme Court, *Von Eff v. Azieri*, 720 So.2d 510 (1998), which involved an attempt by grandparents to win visitation rights over the objection of a child’s legal parents. In that case, the Florida Supreme Court cited “the fundamental and constitutional right of privacy” and “unequivocally reaffirmed adoptive or biological parents’ right to make decisions about their children’s welfare without interference by third parties,” according to a more recent Florida appeals court ruling relying on *Von Eff*.

“It is this unequivocal distinction between ‘adoptive or biological parents’ and others that Pasik would now have us look past in finding that the latter has the same rights as the former,” wrote Villanti. “But the law is clear: those who claim parentage on some basis other than biology or legal status do not have the same rights, including the rights to visitation, as the biological or legal parents.” The court of appeal found that Judge Gilner “clearly departed from the essential requirements of the law by finding that Pasik had standing” to seek a visitation order.

While acknowledging Pasik’s argument that Russell had invited her to raise the children together as a “united endeavor,” which would arguably make Pasik more than a mere “third party” in this situation,” Villanti wrote, “we

are uncertain that it would be sufficient to overcome the lack of standing,” pointing to analogous cases where Florida had rejected such arguments in other situations. As to Pasik’s argument that having actually acted as a parent to these children she should be held to have acquired some form of parental rights to continued contact with them, the court was unpersuaded. “When, as in the present case, there is not a biological connection between petitioner and child and it is a non-parent that is seeking to establish legal rights to a child, there is no clear constitutional interest in being a parent,” he wrote. “Thus, Pasik’s argument must fail.”

While the court of appeal disclaimed a lack of sympathy for Pasik’s “desire to visit with the children that she helped raise over the course of several years,” and acknowledged “the importance of the children being able to visit with someone who, for all intents and

did not confer on the parties any special legal status” because Florida had long ago abolished the status of common law marriage. “Because this issue is not before us,” the court continued, “we decline to comment on whether, had the parties been married when the children at issue were born, this would have been sufficient to grant Pasik standing to seek visitation. But regardless of her marital status, Pasik still could have made the decision to adopt the children, a decision that would have arguably guaranteed her the rights of a parent that she now seeks.”

The court of appeal found that Judge Gilner had failed to conduct “a thorough, front-end factual analysis to determine standing in this case,” merely looking at Pasik’s factual allegations and finding them sufficiently “unusual” to justify rejecting Russell’s motion to dismiss the case. But the court of appeal found that Pasik’s factual allegations “irrefutably

The court insisted that any change in the legal definition of a parent must come from the legislature, not the court.

purposes, they have considered to be a parent from the time they were born,” the court nonetheless refused to rule in her favor, insisting that any change in the legal definition of a parent must come from the legislature, not the court.

The court observed that “the events of this case all occurred prior to the Supreme Court’s decision in *Obergefell v. Hodges*” on June 26, 2015, which established the fundamental constitutional right of same-sex couples to marry, and as well before Florida state and federal courts had ruled in favor of marriage equality during 2014. However, the court pointed out, at the time when these women were raising these children together as a couple, they “could not have been lawfully married in the State. Likewise, the fact that they resided together in the same residence as a family unit for several years prior to the expiration of their relationship

indicate that it was legally impossible for Pasik to establish standing to petition the trial court for timesharing with the children,” and thus her petition should have been dismissed. The court of appeal granted Russell’s petition for review and quashed Judge Gilner’s order.

A long list of amicus parties filed briefs in support of Pasik’s right to seek visitation with these children, with Cristina Alonso, Jessica Zagier Wallace, Michael Sampson and Ashley Filimon appearing as her attorneys. Paul F. Grondahl represented Russell. Among the LGBT groups who supported Pasik’s claim were Lambda Legal, the National Center for Lesbian Rights, and Family Equality Council. She also had support from law school clinics and other organizations concerned with child welfare. Perhaps the next stop for this case could be the Florida Supreme Court. ■

U.S. Magistrate Who Decided Idaho Marriage Equality Case Takes Narrow View of 9th Circuit Equal Protection Precedents

In *Dew v. Edmunds*, 2015 U.S. Dist. LEXIS 138708, 2015 WL 5886184, (D. Idaho, October 8, 2015), U.S. Magistrate Judge Candy W. Dale, who previously decided in *Latta v Otter* that same-sex couples had a constitutional right to marry in Idaho, gave a narrow reading to the 9th Circuit's gay equal protection decisions in *Latta* and *SmithKline Beecham v. Abbott Laboratories* in deciding that local officials in Idaho had qualified immunity from a 14th Amendment equal protection challenge by a gay man who felt, based on his job interview with a state agency, that it was hopeless, and thus withdrew his application before

of the meeting." Edmunds questioned Dew about ReachOut USA, an LGBT organization Dew started in 2007 to help LGBT individuals with disabilities. Based on Edmunds' reaction, Dew did not believe this to be positive any longer. Edmunds also questioned Dew about a two-year gap in his employment history. Dew explained he had to take time off due to a series of infections that caused him uncontrollable seizures. Edmunds responded with a facial expression as if he "smelled a dirty diaper." Dew contended that after revealing his record of a disability, the entire tone of the interview changed.

After this meeting, Edmunds asked

Mackey, also included comments about Dew being a gay man. Dew later sent a copy of these notes to Mackey, who advised Dew that the notes contained multiple inaccuracies. Mackey told Dew she most likely used the phrase "in a relationship" during the reference interview with Parks, but Mackey never said Dew was in a *gay* relationship; therefore, Dew assumed Parks must have added the word "gay" to the notes.

Dew's complaint asserted five counts, alleging discrimination in violation of the Americans with Disabilities Act and Idaho Code §§ 67-5909(1) and 67-5901, based on having the position he applied and interviewed for made unavailable because of his disability, and alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 and Idaho Code §§ 67-5901 and 67-5907(1), on the ground that he was denied the opportunity to fairly compete for the open Administrator position because of sexual stereotyping and the negative comments he received for his involvement with ReachOut USA, and Park's reference to Dew's sexual orientation in the notes he received from the interview. Dew also alleged violation of the Equal Protection Clause of the Fourteenth Amendment, on the ground that defendants deprived him of equal protection by discriminating against him on the basis of disability in the hiring process as well as on the basis of his sexual orientation. Dew also asserted a claim for negligent infliction of emotional distress.

To establish a disparate treatment claim under the ADA, Dew must show that he is disabled, qualified, and suffered an adverse employment action because of his disability. To establish a prima facie case of discrimination under Title VII, Dew must establish that he belongs to a protected class, he was qualified for the position, he was subjected to an adverse employment action, and similarly situated individuals outside the protected class were treated more favorably. Under

Dew argued that the constitutional right to be free from discrimination based on sexual orientation was clearly established in the Ninth Circuit at the time of the alleged conduct.

being formally rejected for the job.

Plaintiff Donald Dew applied for the Idaho Commission on Human Rights Administrator position. He passed the phone interview and was invited to Boise for in-person interviews. In Boise he met first with outgoing ICHR Administrator Pamela Parks and Commissioners Camora, McNeal and Scigliano. At the end of the group interview, Commissioner McNeal said he hoped to see Dew in the Administrator's chair soon, and told Dew, "You know what my vote is," leaving him with the impression that he was going to be hired for the job.

In the second portion of the interview, Dew met with Kenneth Edmunds, Director of the Idaho Department of Labor, and Jay Engstrom, the Deputy Director. Dew described Edmunds as being "unfriendly from the beginning

Engstrom and Parks to accompany him to his office to discuss Dew's application, while Dew waited in the conference room. After approximately thirty minutes, Parks returned to the conference room and said, "Oh, you are still here? I will take you downstairs" and escorted Dew out. Upon returning to his hotel later that evening, Dew was so distraught by Edmunds' discriminatory treatment and biases that Dew sent an email to Parks on September 8, 2014, withdrawing his application from consideration.

After withdrawing his application, he obtained copies of all relevant documents from the interview process, including notes containing information Parks received from Dew's references. Dew asserts the notes revealed that two of Dew's references discussed Dew's disability, and that one reference, Karen

the Idaho Human Rights Act, it is unlawful “to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment” because of the individual’s sex and/or disability.

Under all three schemes, Dew must assert that he suffered an adverse employment action. Defendants asserted that Dew’s withdrawal of his application precluded him from making a discrimination claim because the withdrawal prevents a finding of adverse action. The court found that several courts have required that to constitute an “adverse action,” one must have encountered an affirmative act on the part of the employer and therefore, under the facts alleged, Dew sought to expand the concept of “adverse action” too far. Dew withdrew his application before any decision had been communicated to him.

Dew argued that the futile gesture doctrine provided support for his claims, arguing that he withdrew his application because he believed continuing with the hiring process would be a “futile gesture,” citing *Internat’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 366 (1977), which holds that the plaintiff must establish the inference that individual hiring decisions were made in pursuit of a discriminatory policy so pervasive so as to dissuade persons from applying for the job. The court found that the conduct Dew complained of did not meet the threshold found in *Teamsters* because he had not identified a discriminatory policy or other pervasive atmosphere of discrimination such that participation in the hiring process itself, or continuation of his competition for the Administrator’s position, would have been futile for him. The court also noted in finding this conclusion that Dew himself described the interview process as an overall positive before he met with Edmunds.

The Equal Protection clause “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated

alike.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const., amend. XIV, § 1). Dew’s equal protection claim alleged that Edmunds and Parks discriminated against Dew on the basis of his sexual orientation. Defendants contended they were immune from suit on the basis of qualified immunity and claimed they were entitled to this because the right to be free from discrimination in employment based on sexual orientation was not clearly established at the time of the alleged conduct. Dew argued that, under *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 483 (9th Cir. 2014), and Judge Dale’s decision in *Latta v. Otter*, 19 F.Supp.3d 1054 (D. Idaho May 13, 2014), *cert. denied*, *Otter v. Latta*, 135 S. Ct. 2931 (June 30, 2015), the constitutional right to be free from discrimination based on sexual orientation during the hiring process was clearly established in the Ninth Circuit at the time of the alleged conduct.

Judge Dale disagreed with Dew’s assertion, stating, “Dew’s response to Defendants’ motion highlights the tumultuous times surrounding LGBT rights in Idaho, both during the time of his application and continuing to the present.” The court noted, “It was not until July of 2015 that the United States Equal Employment Opportunity Commission ruled in a groundbreaking decision that sexual orientation discrimination by Federal employers is barred by existing Title VII law... it can hardly be said that reasonable officials would undoubtedly have known that discrimination based upon sexual orientation during the hiring process violated clearly established rights.” The court also found that Dew stretched *SmithKline* too far, finding that the case, while ruling that preemptory strikes could not be used to eliminate a potential gay juror without cause, did not indicate that the level of scrutiny applied in the context of a *Batson* challenge, applies to every case of alleged sexual orientation discrimination.

The court further explained: “Similarly, *Latta*, and by extension,

Obergefell v. Hodges, 135 S. Ct. 2584 (June 26, 2015), do not establish a broad right to be free from sexual orientation discrimination in all contexts. Rather, *Latta* and *Obergefell* involved sexual orientation discrimination in the context of categorical denials of the right to marry and substantive due process under the Fourteenth Amendment to the United States Constitution. Here, there is no evidence of any policy, rule or law imposed or followed by the Idaho Commission on Human Rights or the Department of Labor that precluded the employment of gays or lesbians.”

The court also found that the evidence put forth by Dew himself supported the inference that Parks, personally and on behalf of the ICHR, believed the law should protect LGBT individuals from discrimination in employment and was advocating for such protections under Idaho law. The court found that this, in and of itself, confirmed the law was not clearly established at the time Dew applied for the position. The court also stated that, “The mere fact that *SmithKline* and *Latta* had been decided prior to Dew’s employment interviews in August of 2014 does not establish reasonable officials in Parks’s or Edmunds’s positions would have known their alleged conduct during the hiring process was clearly unconstitutional. In fact, the debate continues, both in Idaho and elsewhere, regarding sexual orientation discrimination in contexts such as employment, housing, and consumer services.”

Consequently, the court found that even if Dew alleged facts that could prove a constitutional violation (which it did not), Parks and Edmunds would be entitled to qualified immunity with respect to Dew’s Equal Protection claim. Regarding Dew’s claim for negligent infliction of emotional distress, the court found that the state law claim for emotional distress is inextricably intertwined with Dew’s ADA, Title VII, and Section 1983 claims; thus, because those counts were dismissed, so was this claim. – *Anthony Sears*

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

6th Circuit Finds Domestic-Relations and Probate Exceptions to Federal Diversity Jurisdiction Inapplicable to Lesbian's Suit against Deceased Wife's Estate

On October 1, 2015, the U.S. Court of Appeals for the 6th Circuit reversed an Ohio federal district court judge, James L. Graham, holding that a lesbian may sue the estate of her deceased wife in federal court on contract and tort claims to recover for loans made during their marriage. *Chevalier v. Estate of Barnhart*, 2015 U.S. App. LEXIS 17232, 2015 WL 5729456. Construing the domestic-relations and probate exceptions narrowly, Circuit Judge Karen Nelson Moore wrote for the unanimous panel, joined by Senior Judge Damon J. Keith and Judge Jane Branstetter Stranch.

Caroline Chevalier and Kimberly Barnhart married in July 2007 in Ontario, Canada. During the next three years, Chevalier alleges she made a series of loans to Barnhart totaling over \$122,000. After they separated, Chevalier brought the instant action in the U.S. District Court for the Southern District of Ohio, seeking to recover on the loans, based on claims of breach of contract, default on loans, unjust enrichment, and fraud. She also asked the court to impose a constructive lien on Barnhart's house in Ohio and foreclose on the property.

Chevalier invoked federal diversity jurisdiction, as she is a Canadian citizen and Barnhart was a citizen of Ohio. Barnhart thereafter filed for divorce in Canada and then answered Chevalier's complaint, asserting the affirmative defense of lack of subject-matter jurisdiction. She subsequently moved to dismiss, citing the domestic-relations exception to federal diversity jurisdiction. Judge Graham agreed with her, dismissing the case on that ground in January 2014, as covered in the February 2014 issue of *Law Notes*. See *Chevalier v. Barnhart*, 2014 WL 198494 (S.D. Ohio Jan. 15, 2014).

Chevalier filed a timely appeal to the Sixth Circuit before Barnhart died in September 2014. The Superior Court

of Justice in Ontario then dismissed the parties' divorce proceedings without terminating the marriage or disposing of their assets. Probate proceedings, meanwhile, began in Ohio. In response to these developments, the Sixth Circuit granted Chevalier's motion to substitute Barnhart's estate as defendant-appellee and ordered the parties to address in supplemental briefing whether the probate exception to federal jurisdiction might also now prevent adjudication of Chevalier's claims in federal court.

With Supreme Court precedent dominating these areas of the law, Judge Moore relied heavily on the leading cases of *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) and *Marshall v. Marshall*, 547 U.S. 293 (2006). Starting with the domestic-relations exception, she said the message from the Supreme Court "is clear: the domestic-relations exception is narrow, and lower federal courts may not broaden its application." She saw the doctrine as asking only a simple question: "Does the plaintiff seek an issuance or modification or enforcement of a divorce, alimony, or child-custody decree?" Looking at Chevalier's claims, Moore easily found the doctrine inapplicable. "Because none of the claims or remedies requires a federal court to dissolve the marriage, award alimony, monitor Chevalier's need for maintenance and support, or enforce Barnhart's compliance with a related court order, Chevalier's claims are not subject to the domestic-relations exception to federal diversity jurisdiction."

Moore saw the probate exception as similarly straightforward and "narrowly limited to three circumstances: (1) if the plaintiff 'seek[s] to probate . . . a will'; (2) if the plaintiff 'seek[s] to . . . annul a will'; and (3) if the plaintiff 'seek[s] to reach the *res* over which the state court had custody.'" Chevalier is clearly not asking to probate or annual a will, so

only the last issue is pertinent. To make this determination, Moore examined whether each claim is an *in personam* action brought against a person or an *in rem* action determining the title to property.

As Moore noted, "[h]er first four claims-for breach of contract, default, unjust enrichment, and fraud-are *in personam* actions." Similarly, "[a] judgment imposing a constructive trust over a specified property is an *in personam* action under Ohio law, and the court need not have *in rem* jurisdiction to enter the judgment." Chevalier's foreclosure claim, however, "requires that a court assume *quasi in rem* jurisdiction of the property at issue." This does not ultimately end the matter, however, because even though the home is now part of Barnhart's estate being handled by the Probate Court in Ohio, Moore looked at similar situations in the doctrines of prior-exclusive-jurisdiction and forfeiture. She employed the time-of-filing rule and concluded that "the probate exception does not divest a federal court of subject-matter jurisdiction unless a probate court is already exercising *in rem* jurisdiction over the property at the time that the plaintiff files her complaint in federal court." Chevalier, of course, filed her complaint before Barnhart died.

In keeping with the reversal on appeal, the case will now go back to the district court for further proceedings consistent with the Sixth Circuit's opinion.

David W. Orlandini and Gary C. Safir of Davis & Young, Westerville, Ohio, represent Chevalier on appeal, and M. Shawn Dingus of Plymale & Dingus LLC, of Columbia, Ohio, represents the Estate. — *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGaL.

Woman Wins Second Ruling on Unauthorized Use of Photo in Anti-Discrimination Ad

New York Court of Claims Judge Thomas Scuccimarra has ruled that the New York State Division of Human Rights defamed Avril Nolan, a model whose photograph the Division purchased from Getty Images to use in advertisements intended to inform the public that discrimination against people living with HIV is unlawful in New York. Scuccimarra's ruling in *Nolan v. State of New York*, No. 123283, reported on October 27 in the *New York Law Journal*, was the second win for Nolan, who had also sued Getty Images in New York County Supreme Court and won a ruling on March 6, 2014, from Supreme Court Justice Anil C. Singh, refusing to dismiss her complaint against Getty Images for selling her photograph to the Division without her permission. Justice Singh's unpublished opinion is *Nolan v. Getty Images (US), Inc.*, 2014 NY Slip Op 30564(U), 2014 N.Y. Misc. LEXIS 981.

According to Nolan's complaint against the State Division as described in the *Law Journal* report, she allowed photographer Jena Cumbo to take her picture in 2011 for use in a feature on New Yorkers interested in music for an online publication, *Soma Magazine*. Nolan did not sign a model release, did not specifically authorize any other use of the photograph, and was not paid for it. Nonetheless, Cumbo sold the photograph to Getty Images, which in turn licensed it to the State Division of Human Rights for use in its anti-discrimination advertisement and poster.

The advertisement appear in April 2013 in print editions of *Newsday*, *Metro*, and *AM New York*, and was published in on-line websites by *Metro*, the *Journal News* site *LoHud.com*, and the *Albany Times Union* site *capitolconfidential.com*. Next to Nolan's photo were the captions "I AM POSITIVE (+)" and "I HAVE RIGHTS," and the advertisement also stated that people living with HIV are protected against discrimination under the state's Human Rights Law. The clear implication, alleged Nolan, was that she

is HIV-positive when in fact she is not.

The earlier lawsuit against Getty Images was a seemingly straightforward application of the state's privacy statute, which forbids the publication of a person's image without their written consent for purposes of advertising or trade usage. Getty had argued that since the Division of Human Rights is a government agency and the advertisement was not published for purposes of selling goods or services, Getty should not be held liable under the law. This argument was unsuccessful because Getty purchased the photo from photographer Cumbo in order to license its use to ultimate publishers for a fee. Justice Singh characterized Nolan's argument against Getty as

anti-discrimination advertisement, by implicitly labeling her HIV-positive, can be presumed to have caused her actual monetary injury as well as harming her reputation in society.

Judge Scuccimarra agreed with Nolan that falsely labeling somebody HIV-positive would be considered "per se" defamation under New York law. That is, the court would presume that somebody so falsely labeled would suffer an actual injury beyond harm to her reputation. An initial finding that the advertisement would harm Nolan's reputation was merely the first step to analyzing her claim. Since she did not specifically allege any particular economic injury as a result of the ads being briefly published — they were withdrawn from

Judge Scuccimarra agreed with Nolan that falsely labeling somebody HIV-positive would be considered "per se" defamation.

follows: "Nolan argues that the law places a clear duty on those who trade in photographs and advertise photographs for commercial use, to obtain the written consent of the subject." Rejecting Getty's motion to dismiss Nolan's claim, Singh wrote, "Contrary to Getty's argument, a claim lies for placing Nolan's image in Getty's catalogue, especially where plaintiff's photograph is ultimately used in an advertisement, and the use of plaintiff's likeness created a false impression about the plaintiff," that she was HIV-positive.

Nolan's lawsuit in the Court of Claims against the State Division of Human Rights, while building on the privacy statute and pointing out that State Division made no effort to determine whether Nolan had authorized the use of her photograph in its advertising campaign (of which she was totally unaware), further claimed that the

publication as soon as she complained to the State Division of Human Rights — she could only maintain her lawsuit if this case falls into the category of "per se" defamation, where the court finds that under the circumstances actual injury can be presumed.

Scuccimarra characterized this as a "thorny" issue, in light of the "shifting attitudes" of society, which have been reflected by a recent ruling, *Yonaty v. Mincolla*, 97 App.Div.3d 141 (3rd Dept., 2012), that falsely calling somebody gay is no longer deemed "per se" defamatory under New York law. Scuccimarra noted that the "per se" defamation category has traditionally included falsely stating that somebody is afflicted with a "loathsome" disease that "arouses some intense disgust in society."

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CIVIL LITIGATION

U.S. DEPARTMENT OF EDUCATION

– The Office of Civil Rights of the U.S. Department of Education, Region V, sent a letter on November 2 to the Superintendent of Schools, Township High School District 211, in Palatine, Illinois, communicating the Department's determination that the school district was in violation of Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions that receive federal funding, in its treatment of a transgender woman student by denying or restricting her access to the girls' locker rooms on the same basis as non-transgender women because of her gender identity and gender nonconformity. The finding generated headlines nationwide (including a front-page article in the *New York Times* on November 3), marking the first time that DoE has found a public school district in violation of Title IX for gender identity discrimination. The district has denied violating Title IX, asserting that it is treating the student as female in all respects but is protecting the privacy of other female students. Through the course of various accommodations, the district backed down to the extent of building a privacy curtain in the women's locker room and allowing the student to change into and out of gym apparel if she stayed behind the curtain. The school district seems determined not to compromise further, judging by a statement it released in response to the letter. The letter states that if a satisfactory settlement cannot be negotiated in 30 days, DoE may proceed to the next stage of issuing a Letter of Impending Enforcement Action. The letter is signed by Region V Regional Director Adele Rappaport. The ACLU of Illinois represented the student in filing a complaint with the Department of Education.

SUPREME COURT – The Court denied a petition for certiorari in Case

No. 15-226, *Shirvell v. Armstrong*, thus leaving in place a \$3.5 million defamation award against Andrew Shirvell in a suit brought by Chris Armstrong, the openly-gay University of Michigan student body president who was defamed by Shirvell on his website. Shirvell's antics in pursuit of Armstrong led to his dismissal as an Assistant Attorney General of the state of Michigan. A jury had awarded Armstrong \$4.5 million, but the 6th Circuit reduced the award while turning down Shirvell's request for a new trial in the case. *LGBTQNation.com*, Nov. 2.

3RD CIRCUIT COURT OF APPEALS

– In an unofficially published disposition, the 3rd Circuit affirmed a ruling by District Judge Mitchell S. Goldberg (E.D. Pa.) that the lack of legal familial relationship of a same-sex couple was irrelevant to deciding insurance law coverage issues in a dispute over the limits of coverage for uninsured driver negligence on vehicle insured by defendant. *Guglielmelli v. State Farm Mutual Automobile Insurance Co.*, 2015 WL 5813156 (Oct. 6, 2015). Achmad Jayadi and Francis Guglielmelli were cohabiting same-sex partners who obtained insurance on their various vehicles from State Farm. Their joint policy covered a 2000 Dodge Neon first owned by Jayadi and then transferred to Guglielmelli, and a 2004 Suzuki jointly owned by the men and which was later substituted with a 2007 Jeep Liberty that Guglielmelli owned. Jayadi had requested reduced uninsured and underinsured motorist limits on each car, which resulted in lower premiums. Jayadi signed and returned the forms acknowledging these elections. Guglielmelli did not sign the forms. The policy that State Farm issued listed Guglielmelli as first insured and Jayadi as second named insured. This policy was renewed nine times. Neither man ever requested to

increase the underinsured motorist limits on the policy. Guglielmelli separately applied for commercial vehicle coverage for a 2000 GMC Safari for his laundry delivery business, and for this he obtained a significantly higher level of uninsured and underinsured motorist limits. The police was issued to both men with Guglielmelli listed as first insured. While driving his Jeep Liberty, Guglielmelli was involved in an accident caused by the negligence of another driver who had low coverage limits. He settled his claim with the other driver for the amount of her coverage, and then filed a claim with State Farm for the underinsured benefits available on his policy. State Farm paid him the low level of benefits indicated on the policy covering his Jeep, but he sued claiming that he was entitled to the higher benefits from his commercial policy on the GMC Safari. The district court found him bound by the written election Jayadi made for the low level of benefits, and he appealed, claiming that the case "presents a novel issue because of the nature of the relationship" between the two men, which had no legal status in Pennsylvania at the time they obtained the policies. Wrote the court, "The type of relationship between Guglielmelli and Jayadi is not relevant to the narrow issue before us, namely whether Guglielmelli is bound by Jayadi's written request for reduced underinsured motorist coverage. Guglielmelli offers no basis for his assertion that being resident relatives or members of the same household is necessary in order to be bound by the election of another named insured on the same car insurance policy." The court found it irrelevant the prior cases involving whether somebody was bound by another's election had involved spouses. In fact, said the court, supported the opposite conclusion, since they held that one spouse's election was binding on another even after a divorce and separation.

CIVIL LITIGATION

7TH CIRCUIT COURT OF APPEALS

– In what may potentially create an important landmark ruling, Lambda Legal has argued to a panel of the U.S. Court of Appeals for the 7th Circuit that it should depart from circuit precedent and follow the lead of the Equal Employment Community Commission (EEOC) and several district courts to hold that sexual orientation discrimination claims can be brought under Title VII's ban on workplace sex discrimination. The appellant in *Hively v. Ivy Tech Community College*, in which U.S. District Judge Rudy Lozano express sympathy with the plaintiff but said he was bound by circuit precedent to grant the employer's motion to dismiss, see 2015 WL 926015 (N.D. Ind., March 3, 2015), may confront the standard circuit practice that precludes a three-judge panel from departing from the circuit precedent, but the next step would be to petition for en banc review, as a full bench of the circuit can decide to overrule decisions by prior three-judge panels. The precedent by which Judge Lozano claimed to be bound was *Hamner v. St. Vincent Hospital*, 224 F.3d 701 (7th Cir. 2000), and he noted consistent decisions in *Wright v. Porters Restoration, Inc.*, 2010 WL 2559877 (N.D. Ind., June 23, 2010), and *Hamzah v. Woodmans Food Market, Inc.*, 2014 WL 1207428 (W.D. Wis., Mar. 24, 2014). The U.S. Supreme Court has yet to weigh in, one way or the other, as to whether Title VII can be construed to forbid sexual orientation discrimination.

9TH CIRCUIT COURT OF APPEALS

– In *Archila-Mendez v. Lynch*, 2015 WL 6392007 (9th Cir., Oct. 22, 2015) (not officially published), a 9th Circuit panel denied in part and dismissed in part a petition for a review of a decision by the Board of Immigration Appeals rejecting the *pro se* petitioner's application for

asylum and withholding of removal. The petitioner, a native and citizen of Guatemala, contended that she was the victim of past persecution and had a well-founded fear of future persecution “on account of her membership in a social group of HIV positive women,” according to the court's memorandum decision. The court does not recite the petitioner's factual assertions in support of this claim, but in finding the substantial evidence supported the BIA's conclusion that she had not established these claims, it cited *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003), observing that “being ‘teased, bothered, discriminated against and harassed,’ absent physical harm, did not compel finding of past persecution.” The court also found that certain claims the petitioner made on appeal had not been raised before the BIA and thus could not be considered on appeal.

ARKANSAS – In *Beneux v. Colvin*, 2015 WL 5884897 (W.D. Ark., Oct. 7, 2015), U.S. Magistrate Judge Mark E. Ford found that a Social Security Administrative Law Judge had failed to “develop the record concerning the Plaintiff's work-related limitations.” The plaintiff suffers from HIV infection controlled by medication that produces a wide range of documented side effects, and Judge Ford found that the ALJ's conclusion about the plaintiff's ability to work appeared to give inadequate weight to the side effects suffered by the plaintiff and documented in the record. “After reviewing the evidence of record,” wrote Ford, “the undersigned has some concerns regarding the Plaintiff's ability to concentrate on and complete tasks in a timely fashion,” which seemed inconsistent with the ALJ's findings about the range of work plaintiff was capable of performing. “These jobs undoubtedly require the ability to concentrate and meet production

quotas,” Ford wrote. “Therefore, the undersigned must remand this matter for further development of the record.” On remand, Ford directed the ALJ to obtain RFC assessments from certain treating health care workers and “should include questions that will aid him in determining how the Plaintiff's fatigue, concentration deficits, and difficulty completing tasks in a timely manner will affect her ability to perform work-related activities.” The judge wrote that the ALJ should “recall the vocational expert to testify concerning how these limitations will affect her ability to perform work that exists in the national economy.”

ARKANSAS – Pulaski County Circuit Judge Chris Piazza, who ruled that the state's ban on same-sex marriage was unconstitutional, has awarded prevailing-party attorney fees to Cheryl Maples and Jack Wagoner in the amount of \$66,000, drastically reducing their claims for over \$600,000. Piazza said the fee request was “exorbitant” when making his award on Oct. 14. Piazza said each attorney would get fees of \$30,000 and \$3,000 to cover litigation-related expenses. The money will be paid out by the Arkansas Department of Health and the Department of Finance and Administration. The case is *Wright v. State of Arkansas*.

CALIFORNIA – U.S. District Judge Edward M. Chen granted summary judgment to the City of Richmond, rejecting a discharged employee's claim that she had been terminated from a position as a Police Records Specialist because of her religiously-motivated anti-gay views. *Flanagan v. City of Richmond*, 2015 U.S. Dist. LEXIS 140102, 2015 WL 5964881 (N.D. Calif., Oct. 13, 2015). The bottom line of the case seems to be that public employees with religiously-based anti-gay views should not

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express them on the job or allow them to influence their treatment of co-workers or members of the public. This would seem to be common sense, especially when the public employer has a published policy against sexual orientation discrimination and hostile environment harassment. The specified reasons for Loudesia Flanagan's discharge were "discourteous and disrespectful treatment of a volunteer intern" who is a lesbian, "inappropriate comments and conduct regarding homosexuality," and "dishonesty during the administrative interview" that was carried out to investigate the complaints against her, in which she denied making anti-gay statements that were attested to by numerous credible witnesses. Flanagan raised a due process challenge, claiming that the hearing she was given before being discharged was conducted by the police chief, who was biased against her. She didn't get very far with this, given the evidence presented against her. She claimed a violation of her 1st and 14th Amendment rights by the placement in her personnel file of the stated reasons for her discharge, claiming her anti-gay speech was constitutionally protected and that the inclusion of the discharge letter in her file was defamatory and would harm or ability to obtain new employment in law enforcement. Since anti-gay speech by a public employee in the course of her official duties is not constitutionally protected, and the personnel files are generally not open to the public, the court found this claim unavailing. Wrote Judge Chen, "Plaintiff asserts that her speech regarding Christianity and gay marriage is a matter of public concern," which would be a prerequisite to finding some kind of constitutional protection for the speech. "Plaintiff cites no case law in support of this proposition. . . . Plaintiff's personal views about Christianity and gay marriage are not a matter of public concern." For similar reasons, the court

rejected her free exercise claim under the First Amendment. "At issue here is Plaintiff's expression of her religious beliefs about gay marriage," wrote Judge Chen. "During the investigation, several people reported that Plaintiff made disparaging remarks about homosexuals, including stating that Ms. Taylor [the lesbian intern] would not go to heaven 'because God does not like gays,' that PRS Aberson's mother would 'go to hell' if she continued her relationship with another woman, and asking if Ms. Taylor used the men's or women's bathroom. These statements were not simply expressions of disagreement with homosexuality, but were inflammatory and condemning of specific individuals like Ms. Taylor and PRS Aberson's mother. Thus, these comments were comparable to speech on which the courts have permitted restrictions" upon public employees. "Based on the evidence in the record," the court concluded, "the termination of Plaintiff's employment was based not on her religious beliefs, but on whether her inflammatory comments about homosexual lifestyles was a violation of the Richmond Police Department's policies," specifically, its anti-discrimination policy. Chen asserted that restricting the "expression of beliefs does not hinder her religious beliefs," and granted summary judgment to the employer on Flanagan's free exercise claim. The court also found no basis for Flanagan's claim of religious discrimination under Title VII or the California Fair Employment and Housing Act (FEHA), since he concluded that the employer had legitimate, non-discriminatory reasons to fire her. "Based on the record," he wrote, "there is no evidence that Plaintiff was intentionally terminated for her religious beliefs, rather than Defendants' honestly-held belief that she violated the rules of conduct." Similarly, the court rejected Flanagan's retaliation claims and California constitutional claims.

CALIFORNIA – U.S. Bankruptcy Judge Scott H. Yun found in *In re Villaverde*, 2015 Bankr. LEXIS 3561, 2015 WL 6437204 (U.S. Bankr. Ct., C.D. Calif., Oct. 21, 2015), that two women who registered as domestic partners in California in 2004 but never availed themselves of the opportunity to marry, either after the California Supreme Court struck down the state's same-sex marriage ban in 2008 or after the Supreme Court's 2013 ruling in *Hollingsworth* effectively left in place a 2010 ruling holding Proposition 8 unconstitutional and allowed California to resume issuing marriage licenses to same-sex couples could not file a joint bankruptcy petition, because they are not "spouses." The judge pointed out that California law has not been changed to automatically reclassify registered domestic partners as spouses, and that there was no obstacle to this couple becoming married in light of *Hollingsworth* and *Obergefell*. The judge ridiculed as "disingenuous" the Debtors' argument that "denying domestic partners the ability to jointly file constitutes discrimination by 'requiring those who were required to wear a badge of inferiority . . . to now be told that they are still second class citizens," pointing out that "Debtors had no option other than domestic partnership in 2004, but, as of June 28, 2013, they have gained the additional option of getting married. Yet, more than two years after same-sex marriage became legal again in California, the Debtors, for reasons unknown, have chosen to stay in a domestic partnership. The Debtors have essentially elected to continue wearing California's badge of inferiority when they can easily rip that badge off by getting married. The Debtors' argument that denying same-sex domestic partners the right to jointly file amounts to treating them as second-class citizens would have carried greater weight prior to the legalization of same-sex marriage, but it no longer carries any weight in today's

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landscape where marriage has become widely available to same-sex couples.” Indeed, pointed out Judge Yun, letting same-sex couples file jointly while denying that opportunity to different-sex domestic partners would result in sexual orientation discriminations. Ironically channeling a statement by Chief Justice John Roberts in a “reverse race discrimination” case, the judge wrote: “The way to stop discrimination on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation.” By agreement of the parties made contingent on the judge’s ruling on the U.S. Trustee’s objection to the joint filing, the court dismissed the joint debtor from the case.

DISTRICT OF COLUMBIA – U.S. District Judge Amit P. Mehta granted defendants’ motion to dismiss and for summary judgment against constitutional and statutory claims asserted by a member of the Utah Air National Guard who got into trouble by emailing a West Point official to protest the conduct of same-sex marriage ceremonies in the military academy’s chapel and incurred further difficulties – including suspension of his security clearance – when he posted to his *facebook.com* page an account of the difficulties that had occurred and his unhappiness with way his superior officer had responded. *Wilson v. James*, 2015 U.S. Dist. LEXIS 138984, 2015 WL 5952109 (D.D.C., Oct. 13, 2015). After reading about the marriage ceremony, Layne Wilson used his military email account to send a protest to the chaplain, but mistakenly sent it instead Major Jeffrey Higgins, the Executive Assistant to the Commandant of Cadets at West Point, who in turn forwarded it to the highest ranking officer in the Utah Air National Guard, who then forwarded it to Wilson’s commanding officer, Lt. Col. Kevin Tobias, who cancelled Wilson’s six-year

re-enlistment, offering him a one year contract instead, and placed a Letter of Reprimand in his file. Wilson’s email raised concerns with the officers that he was unhappy about the lifting of “Don’t Ask Don’t Tell” and might not be able to function consistently with the new enlistment and retention policies for gay personnel. Wilson was upset about the foreshortened enlistment, which disqualified him and his family for various military benefits, as well as the Letter of Reprimand, and took his discontent to his Facebook page, where he had uncomplimentary things to say about his commander. Although he soon took down that posting, he was not fast enough, because another unit member made a screen capture and sent it on to Lt. Col. Tobias, who then initiated an action to lift Wilson’s security clearance. Although it was determined that procedural irregularities about canceling the original re-enlistment led to its reinstatement, the Facebook post led to a second Letter of Reprimand in Wilson’s file. Wilson’s scattershot lawsuit against various military officials, including Tobias, invokes the Religious Freedom Restoration Act, the Privacy Act, and the 1st Amendment, among other things. Judge Mehta found the complaint a bit difficult to follow, but tried to sort things out in a twenty-page opinion that ultimately granted summary judgment on all counts to the defendants. Mehta rejected the contention that the disciplinary actions taken in this case placed a substantial burden on Wilson’s religious beliefs which, in any event, would not violate RFRA, which is aimed at protecting religious practice. Mehta found that Wilson’s faith (he is a Mormon) did not require him to protest the same-sex marriage or to use his military email account for that purpose, a violation of regulations. Mehta conceded that the Letter of Reprimand “likely chilled Plaintiff’s speech regarding his religious beliefs, especially within the military setting. But nowhere does

the Plaintiff assert that LDS doctrine requires him to publicly voice his dissent about homosexuality or same-sex marriage.” As to 1st Amendment claims, the Supreme Court has recognized necessary restrictions on the speech of military personnel, and, found Mehta, “Here, the words that gave rise to the disciplinary actions taken against Plaintiff are unprotected speech.” Furthermore, “Plaintiff’s rant against his commanding officer, Lt. Colonel Tobias, is afforded even less First Amendment protection” than his original email to the West Point officer. “In the Facebook post, Plaintiff wrote about Tobias: ‘You are way out of line!!! You embarrass me, our country, and our unit!!! ... You are part [of] the problem with this country. ... Shame on you sir!!!’ Imagine a military member thinking they can get away with posting something like that on a Facebook page!! Judge Mehta rejected Wilson’s claim to due process deprivation, finding that he failed to allege “a cognizable liberty interest in his employment with the military, as he was not discharged or demoted in rank or pay.” Mehta found no viable Administrative Procedure Act claim in connection with the Letters of Reprimand placed in Wilson’s file, inasmuch as he had not taken any of the steps necessary to exhaust administrative remedies prior to filing suit, and that his claims going to the lifting of his security clearance were non-justiciable under established Supreme Court precedents. Wilson is represented by John B. Wells of Slidell, Louisiana, a retired Naval officer who specializes in representing plaintiffs with claims against the military.

FLORIDA – The Florida 5th District Court of Appeal found that Orange County Circuit Judge Theotis Bronson erred by issuing an injunction against Debra Lippens for “protection against stalking, barring her from seeing

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her daughter.” *Lippens v. Powers*, 2015 WL 6554462 (Oct. 30, 2015). According to the opinion for the court of appeal by Judge James A. Edwards, “Lippens and Cheryl Powers, both currently residents of Florida, entered into a civil union in Vermont in 2002. Powers became pregnant through alternative reproductive technology, and the couple had a child, A.M.P.-L. (“Daughter”). The couple gave Daughter a hyphenated last name to reflect her familial relationship to both women. In 2004, the couple legally married in Massachusetts. They raised Daughter together and lived as a family until Lippens and Powers separate in 2007. Lippens continued regular visitation with Daughter after the couple separated until Powers advised Lippens on September 1, 2014, that Daughter no longer wanted to see Lippens.” Evidently, however, Lippens was not convinced this was so unless she heard it directly from her 12-year-old daughter, so she sent her daughter a text message on September 3, stating: “I heard your request from mommy not to text, call or visit. I don’t understand it, but I will honor your wishes of that is what you want.” She received no response. Powers said that on September 19 she “found a letter using feigned child’s handwriting addressed to Daughter, that Powers was certain was written by Lippens. Powers immediately destroyed the letter,” apparently without opening it or confirming its source or contents. On October 2, Lippens sent a second text message saying she would like to visit and asking if Daughter would see her, but she received no response. On October 6, Lippens showed up at the Powers house, but left without seeing Daughter, and “There was no indication that Daughter was aware of this incident.” Power then sent Lippens a text telling her to stop trying to communicate with the daughter.” Then Lippens “posted a Fundly webpage” trying to raise money to help her pursue a divorce and, in that

context, a custody or visitation order. The page included a photograph of her daughter and an explanation of the situation. As soon as Powers learned of it, she contacted Lippens and asked her to remove the photo, which Lippens promptly did. After this, Powers went to court seeking an injunction against Lippens on behalf of her daughter, as described above, which Judge Bronson granted. The court of appeal found that the statutory prerequisites for issuing such an order had not been met. Judge Edwards wrote, “Taking the evidence in the light most favorable to Powers, the only two incidents that Daughter may have been aware of were the two text messages. Both messages served legitimate purposes, given the familial relationship between Lippens and daughter. Furthermore, neither text message could be considered threatening. There was no evidence presented to the trial court that either text message actually caused or was likely to cause Daughter to experience emotional distress. Those two incidents, separately or together, do not amount to stalking under the controlling statute,” Fla. Stat. Sec. 784.048(2). “Thus, it was error for the trial court to grant the injunction. We reverse and order the trial court to immediately vacate and terminate the injunction against Lippens.” Elizabeth Littrell, an attorney in the Southern Regional Office of Lambda Legal (in Atlanta) represented Lippens on the appeal with local counsel Mary Meeks of Orlando, Florida.

FLORIDA – In one of a growing number of retroactive applications of *Obergefell v. Hodges*, Lambda Legal reports that the Miami-Dade County Office Property Appraisal agreed to reinstate a spousal homestead protection for its client, Hal Burchfield, a gay widower who was previously denied protections against certain tax increases because Florida did not recognize the marriage

with his husband at the time of his husband’s death. The County will reimburse Burchfield for taxes he paid while contesting the denial of the homestead exemptions. Lambda Legal attorneys Karen L. Loewy and Tara L. Borelli handled the matter with co-counsel David P. Draigh and Stephanie S. Silk of White & Case LLP. *Lambda Legal News Release*, Oct. 22.

GEORGIA – In *Piedmont Hospital, Inc. v. D.M.*, 2015 WL 6498671 (Ga. Ct. App., Oct. 28, 2015), the court dealt with the question whether a man who tested positive for HIV after emergency surgery on May 11, 2005, but was not informed of the diagnosis by the doctor who performed the surgery or the hospital in which it took place, only learning of it six years later when he was next tested in May 2011, could assert tort claims against the doctor and hospital. At the time of his emergency appendectomy, D.M.’s blood was tested for HIV because one of the attending health care workers was exposed to his blood during the operation. There was a “presumptive positive result” but not enough of D.M.’s blood was saved from the operation for the more sensitive confirmatory test. More blood was drawn with his consent, the doctor explaining the purpose, and D.M. agreed but expressed “reluctance about hearing the results of the test at that time.” He was discharged from the hospital the next day. The confirmatory test was positive, but the doctor did not call D.M., although he “reported the results to D.M.’s primary care physician,” who evidently never conveyed the information to D.M. D.M. never scheduled a follow-up appointment with the doctor, and neither the doctor nor the hospital reached out to him with the information about the confirmatory test. According to the opinion for the court of appeals by Judge Carla McMillian, it was only after learning in May 2011 as a result

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of a new test that he was HIV-positive that D.M. obtained his records from the 2005 hospital treatment and learned for the first time that he had tested positive six years previously. He filed suit on May 10, 2013, almost eight years after the initial positive test, asserting claims for medical malpractice, negligence per se, ordinary negligence, and fraud. Had he known that he was HIV positive earlier, he could have obtained treatment, avoiding subsequent compromise to his health that ultimately led to him seeking HIV testing years later. He also claimed that the hospital and doctor had breached “duties imposed” under Georgia law to report to him and the Department of Public Health that he had tested positive for HIV. Both defendants moved for summary judgment, raising a statute of limitations defense. The trial court threw out the professional negligence and negligence per se claims on this basis, but denied summary judgment as to the remaining claims, finding that they “do not complain of ‘the propriety of a professional decision’” and thus should not be governed by the special malpractice statute of limitations of five years. At the request of the defendants, the trial court certified its ruling for immediate review to the court of appeals, which found that the trial court erred because “D.M.’s claims must be considered medical malpractice claims.” Wrote Judge McMillian, “Because the claims in this case constitute a ‘classic medical malpractice action,’ they necessarily implicate the breach of a professional duty. Thus they cannot be considered as claims arising out of administrative, clerical, or routine acts and likewise cannot be considered as claims for ordinary negligence.” Thus, the five year statute of repose for medical malpractice claims applied and the lawsuit was filed too late for purposes of that statute. But all is not lost. D.M. had also raised an equitable estoppel claim in the trial court, but that court

did not address the claim when it found that he could assert an ordinary negligence claim that would not be barred by the statute of limitations. The trial court had acknowledged that if its ruling were reversed, “it will then be necessary to address the matter of equitable estoppel.” The court of appeal decided it would not be appropriate to include a ruling on this issue as part of its review of the trial court order, agreeing with D.M. that the case should be remanded to consider the equitable estoppel claim, as the trial court had “expressly declined to rule on the issue of whether Colquitt [the doctor] or Piedmont [Hospital] are equitably estopped from asserting a statute of repose defense based on its erroneous determination that no medical malpractice claims remained.” Hunter S. Allen, Jr., Jennifer Auer Jordan, Joscelyn Marie Hughes, and Frank Anthony Hardi represented D.M. on the appeal.

GEORGIA – Fulton County Superior Court Judge Robert McBurney ruled that a same-sex female couple from Canada could not maintain a tort suit against Xytex Corp. and a sperm donor for product liability, fraud and other claims, based on their contention that they were misled by defendants into believing that their child’s biological father was a “brilliant neuroscientist” when he was, in fact, an ex-felon with no college education. Furthermore, alleged Angela Collins and Margaret Hanson, the donor may even suffer from schizophrenia. The child is now seven years old and has shown no signs of schizophrenia. Judge McBurney said that the case was in fact a “wrongful birth” case, and with the birth of a healthy child there was no cause of action under Georgia law. The judge conceded that Georgia law might need some updating to reflect the latest developments in assisted reproduction. *Daily Report on Line.com*, Oct. 21.

ILLINOIS – Legal formalism run rampant? Why isn’t the best interest of a child of any interest to the court in a dispute between lesbian co-parents about access to a child? In *In re the Visitation of J.T.H.; Phommaleuth v Hernandez*, 2015 IL App (4th) 142384 (App. Ct. Ill., 1st District), the appellate court found that the co-parent lacked standing to seek visitation with the child whom she participated in raising for the first seven years of the child’s life. Jenny and Julia were partners from 2002 to 2006, then there was a six-month break in their relationship, which resumed from 2006 to 2009. Julia became pregnant with J.T.H. during the six-month gap, but the child was born after the women had gotten back together. Jenny was present for the birth, helped select the child’s name, attended prenatal doctor visits with Julia, and resided with J.T.H. in the home they shared. Jenny alleges that she paid for half of J.T.H.’s expenses, traveled with Julia and J.T.H., was present for “milestone” events like birthdays, and that the parties publicly held themselves out as a family. The women’s romantic partnership ended in 2009, but Julia facilitated continued contact for J.T.H. with Jenny for several years after that, including coming up with a formal visitation schedule and spending times together in family-like activities like holidays, going to the beach, and attending dinners and parties with family and friends. Although Julia and Jenny agreed to cut back on the frequency of such activities in 2011, they did create calendars to keep track of the days that each of them would spend caring for J.T.H., and Jenny claims they continued to split relevant expenses, including fees for education and summer camps. Jenny alleged that J.T.H. has had a parent-child relationship with her for seven years from his birth in 2007. Before the summer of 2013, Jenny alleges that she and Julia discussed formalizing her relationship with J.T.H. through

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a guardianship or second-parent adoption, but these plans never came to fruition, and on January 10, 2014, Julia informed Jenny that she “no longer wanted Jenny to have contact with J.T.H.,” leading Jenny to file this lawsuit. The trial court granted Julia’s motion to dismiss, finding Jenny had no standing under the custody and visitation statute, and the appellate court affirmed, finding that the statute on standing extending only to blood and legal relatives, not to unmarried partners of a child’s legal parent. The court rejected Jenny’s attempt to use contract principles based on the visitation calendar the parties had made. Jenny sought to press into service the concept of “equitable adoption,” arguing that it should be found that she is in reality a parent of J.T.H., but the court found that a recent Illinois Supreme Court decision, *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, had limited the use of that concept to probate cases in which a court had to determine whether somebody who was in a parent-child relationship with the decedent had inheritance rights, so Jenny was out of luck. (This ruling resolved a conflict between the 1st and 2nd District Appellate Courts, in which the 2nd District had allowed the concept to be used in a visitation dispute.) Judge Cunningham’s opinion ends with the usual pathetic apologia found in such cases: “In so holding, we are not unsympathetic to the position of Jenny, or even that of J.T.H., having developed a loving relationship with each other that was encouraged by Julia during the first even years of the child’s life. However, we are unable to conclude that Jenny has standing to petition for visitation under the Illinois laws as they currently exist; thus, we are unable to grant her the relief that she seeks.” Shame on the court and the laws of Illinois for acknowledging the reality of these relationships but disclaiming any ability to make a decision consonant with that reality.

LOUISIANA – U.S. District Judge Jane Margaret Triche-Milazzo avoided having to decide whether a sexual orientation discrimination claim is actionable under Title VII by concluding that Romericus Stewart’s factual allegations would not be sufficient to state a prima facie case of hostile environment and discriminatory denial of a promotion, as well as retaliation. *Stewart v. BrownGreer PLC*, 2015 U.S. Dist. LEXIS 147465 (E.D. La., Oct. 30, 2015). The plaintiff identifies as an “HIV-positive, African-American gay male.” He was hired under a “temp to perm” arrangement but was not offered a permanent position. He claimed that he was subjected to a hostile environment by co-workers through their name-calling and gestures, that the employer was not responsive to his complaints, and that he was denied a permanent position after he complained. Judge Triche-Milazzo (who was appointed by President Obama) summarized the remarks and gestures attributed to co-workers in Stewart’s complaint, then wrote: “Even assuming, without deciding, that Plaintiff’s sexual orientation is a protected class, periodic incidents of talking in a high pitched voice and the isolated comments identified by the Plaintiff are insufficiently severe and pervasive to make out the required prima facie showing of harassment.” She also rejected his contention that certain facially neutral remarks were “coded” references to the plaintiff’s sexual orientation. “The Court finds that this conduct is not ‘physically threatening or humiliating,’ and would not unreasonably interfere with the work environment of a reasonable person.” After reading the court’s summary of the alleged comments and gestures, this writer might disagree and note that the court was strikingly lacking in empathy for the plaintiff, and also was imprecise in its invocation of the legal standard articulated by the Supreme Court, which is “severe

or pervasive.” She applied the same analysis to Stewart’s race discrimination allegations, and found that a single comment that “some people will not get health insurance no matter what,” treated by Stewart as an insinuation that he has AIDS, would not by itself be sufficient to support a Title VII claim. (Of course, it would be more relevant to a claim under the Americans With Disabilities Act, which presumably was not asserted by Stewart as it is not mentioned in the opinion.) At the outset, the judge related that the court had previously granted the employer’s motion for summary judgment “orally during a telephone status conference,” and the first print of the opinion from LEXIS contains no indication whether Stewart is represented by counsel, or where in Louisiana he was employed. State law there does not forbid sexual orientation discrimination, although there is municipal protection in Baton Rouge, New Orleans, and Shreveport, along with the parish of Jefferson. If Stewart was employed in one of those localities, he could have sought redress with local authorities. The judge did not mention, even in a footnote, the recent EEOC ruling that Title VII applies to sexual orientation discrimination claims. She dismissed the complaint “with prejudice.”

LOUISIANA – If the EEOC is correct in maintaining that gender identity discrimination is actionable under Title VII, this case should be a slam-dunk for the plaintiff, but in the meantime U.S. District Judge Carl J. Barbier had to deal with the employer’s contention that the case was filed in the wrong federal district court. *Broussard v. First Tower Loan*, 2015 U.S. Dist. LEXIS 134778, 2015 WL 5797833 (E.D. La., Oct. 2, 2015). Attorneys for the National Center for Lesbian Rights and the Southern Poverty Law Center are representing Tristan Broussard, a transgender man who was offered a

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job by First Tower Loan, LLC. When Broussard showed up for work at the Lake Charles office and completed paperwork, his supervisor noticed that his driver's license listed his sex as female. The Supervisor conveyed this observation to higher management, and Tower Loan Vice President David Morgan subsequently visited the office and gave Broussard a copy of the company's "female dress code." Morgan told Broussard he had to comply with this dress code because he was "born female." Morgan also gave Broussard a statement to sign, which said that Broussard's "preference to act and dress as male" was not "in compliance with Tower Loan's personnel policies." Broussard refused to sign and was terminated from employment. He filed a charge with the EEOC, which found it meritorious and issued him a right to sue letter. He then filed this suit in the U.S. District Court for the Eastern District of Louisiana in New Orleans. Lake Charles is in the Western District of Louisiana, and Tower Loan challenged venue, saying the claim should have been filed in the district where the alleged unlawful employment action occurred, and that the Western District was a more appropriate venue. Rejecting the employer's argument, Judge Barbier agreed with Broussard that the statute by its own terms says that a Title VII claim can be filed in any federal district court in the state where the alleged unlawful personnel action occurred. The legislative history shows that as passed by the House of Representatives Title VII did require filing in the district where the unlawful action occurred, but it was subsequently changed in the Senate to embrace the "any district in the state" rule. Furthermore, Barbier found unconvincing Tower Loan's arguments as to why it would be more sensible or efficient to try the case in the Western District. (What this venue dispute is *probably* really about is that the Western District bench is more

conservative than the Eastern District bench, and Tower Loan, which stands to lose the case if the court accepts EEOC's argument that Title VII covers gender identity discrimination, wants every advantage it can get. In the Eastern District, 7 of the 11 active judges were appointed by Democratic presidents, as well as all four senior judges. In the Western District, by comparison, 4 of the 5 active judges were appointed by Republican presidents, as well as 3 of the 4 senior judges! Judge Barbier was appointed by President Clinton. Of course, the likelihood of getting a more liberal judge may well be what motivated Broussard to file in the Eastern District in the first place and, in the end, this may be decided by the 5th Circuit Court of Appeals, regardless of which district court tries the case, if it isn't settled before trial – which is the usual fate of Title VII cases that survive pretrial motion practice.)

MAINE – On October 13, the Maine Supreme Judicial Court issued an "Order to Discharge as Improvidently Granted" in response to a reported question from the District Court in *Kinney v. Busch*, Docket No. Ken-14-456, as follows: "May property acquired between October 14, 2008, and December 29, 2012, by a same-sex couple married in the state of Massachusetts on October 14, 2008, be treated as marital property for the purposes of equitable division of property in a divorce action filed on January 18, 2013." The court discharged the question with a comment that the trial court "has sufficient guidance before it to answer the reported question," dropping a footnote to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and quoting from that case the following sentence: "There is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."

MARYLAND – U.S. District Judge Catherine C. Blake granted summary judgment on October 27 to the employer in a gender identity discrimination case, *Cooper v. Micros Systems, Inc.*, 2015 U.S. Dist. LEXIS 145390 (D. Md.). The plaintiff alleged violations of Title VII, the Maryland Fair Employment Practices Act and a Howard County non-discrimination ordinance. The state and county laws expressly forbid gender identity discrimination, while Title VII expressly forbids sex discrimination. In a prior motion to dismiss the Title VII claim (and thus effectively boot the case out of federal court for lack of jurisdiction), the employer argued that the federal law does not forbid gender identity discrimination, but the court found that motion moot, noting that the state and local laws would cover the claim, and the defendant did not raise this issue in its summary judgment motion. In a footnote, Judge Blake noted that another judge in that district had held that transgender discrimination claims were actionable under Title VII, and that "a number of other courts agree." Since the employer was no longer challenging Title VII jurisdiction, she said, "The court need not address the issue." However, she held, Cooper had failed to meet the requirements for a prima facie case, and even if she had ruled in favor of him on that point, the employer had stated a legitimate non-discriminatory basis for Cooper's discharge, and Cooper had failed to offer sufficient effort of pretext to preserve the case for trial. It didn't help Cooper's case that two of the three members of the committee that decided to discharge him for violation of a company rule were unaware that he is transgender. Cooper had not begun to transition, having been diagnosed with gender dysphoria in 2010 but continuing to present as male at work as of the time of the incident. He had revealed his gender identity in confidence

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to some co-workers, his immediate supervisor, and another member of the discharge committee, the company's V.P. of Human Resources, who had assured him that the company did not discriminate and that this information would not affect her investigation of an incident involving Cooper and a co-worker that eventually led to his discharge. Cooper had problems with this co-worker a few years earlier which were resolved by the co-worker apologizing to Cooper for harassing conduct in the context of a Human Resources investigation of Cooper's complaint against the co-worker. The incident that led to discharge concerned an offensive remark by the same co-worker, to which Cooper reacted with an obscene gesture, loud swearing and an invitation to "take the argument outside," which the co-worker and other co-workers who overheard the confrontation interpreted as a challenge to fight. The employer concluded that Cooper had violated a company rule and discharged him on that basis. The court found that the employer's consistent practice of discharging employees who violated its behavioral rules was legitimate and non-discriminatory. Cooper's attempt to show discriminatory enforcement or pretext was held unavailing. Cooper is represented by James Charles Strouse of Strouse Legal Services, Columbia, Maryland.

MICHIGAN – Michigan has paid \$1.9 million in legal fees to attorneys representing the plaintiffs in their successful suit challenging the state's ban on same-sex marriage, *DeBoer v. Snyder*, which was ultimately decided by the Supreme Court as part of *Obergefell v. Hodges*. April and Jayne DeBoer-Rowse originally filed suit seeking a second-parent adoption, but amended their complaint at the suggestion of the trial judge, U.S. District Judge Bernard Friedman,

who advised that in order to challenge Michigan's ban on second-parent adoptions, they needed to take on the marriage ban. The timing was crucial, as Judge Friedman's recommendation came shortly after the U.S. Supreme Court decided *U.S. v. Windsor*, striking down Section 3 of the Defense of Marriage Act and providing an analytical framework to take on state bans of same-sex marriages. This became one of the few marriage equality cases to be decided after a full trial rather than on the basis of pre-trial summary judgment motions, which undoubtedly contributed to the number of hours that the attorneys billed on the case. In addition to the payments for local attorneys Dana Nessel and Carole Stanyar, the state had to compensate attorneys from Gay & Lesbian Advocates & Defenders who joined in the case and whose legal director, Mary Bonauto, was eventually selected to argue the case to the U.S. Supreme Court by the group of plaintiffs' attorneys from the four states of the 6th Circuit. In addition to incurring the costs of plaintiffs' successful challenge, the state hired counsel to represent it during the appellate process, to the tune of \$96,000 paid to John Bursch, who won an interim victory at the 6th Circuit. The state also incurred \$148,000 in witness fees for the conservative economists and social scientists who testified at trial, and whose testimony was largely discounted by Judge Friedman, who eventually officiated at the wedding of DeBoer and Rowse at which he stated, "Every citizen of the United States that appreciates what our forefathers have done in equal protection . . . everyone of us owes you a big debt of gratitude." *Detroit News*, Oct. 7.

MICHIGAN – In *Nelson v. City of Madison Heights*, 2015 U.S. Dist. LEXIS 146646, 2015 WL 6550133 (E.D. Mich., Oct. 29, 2015), U.S.

District Judge Judith E. Levy denied a summary judgment motion by the defendants on substantive due process, wrongful death and interference with familiar relations claims brought by the surviving mother of a transgender woman who was murdered after a police officer told a drug dealer that the woman had set the dealer up for arrest. Shelly Hilliard (named Henry at birth) was handing with friends in a Motel 6 in Madison Heights sharing some good weed when a police officer conducting a narcotics investigation, defendant Chad Wolowiec, claims he saw a bag of marijuana through an open window while walking past that room in the motel. Wolowiec called backup and they knocked on the door, finding marijuana cigarettes and a bag of marijuana when they gained entry to the apartments. "To avoid arrest, Hilliard agreed to become a confidential informant and to call Raqib [her dealer] to request drugs. Hilliard called Raqib on speaker phone and ordered an 'eight ball' of cocaine and quarter-ounce of marijuana." Wolowiec even participated in the phone call when Raqib questioned Hilliard about whether she had the necessary money for that order, assuring that she did, and Raqib said he would be there in twenty minutes. Wolowiec gave Hilliard a form titled "Oakland County Narcotics Enforcement Team Confidential Source" to sign; the form stated that the Department "will use all reasonable means to protect your identity; however, this cannot be guaranteed." Raqib showed up with a passenger in his car, and they were arrested as police officers searched the car and turned up illegal drugs. Wolowiec spoke directly with the passenger, revealing that he was the person who ordered the drugs on the phone. "He also testified that he did not think that saying so would reveal Hilliard as the informant," which was pretty dumb, right, since she had placed the call to Raqib at his direction. Wolowiec

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testified that since the passenger, Ms. Clark, was not on the phone call, “he did not think about whether she would relay the information to Raqib.” She did, of course, as Clark later testified, “when they were released from jail the day after their arrest.” Raqib later participated in abducting Hilliard, and her body was later found burned and dismembered. “Defendant Wolowiec learned that Hilliard was missing at some point over the course of the next couple of weeks. He made no official report but called the missing-persons unit in Detroit to provide them with information on Hilliard. When defendant Wolowiec later learned that Hilliard was dead, he again made no official report but contacted Detroit homicide to relay the information that he had provided to the Detroit missing-persons unit.” There was testimony by Oakland county officials that although the Department had general guidelines about procedures, “Oakland County NET officers were not required to read them,” and that there were “not any official, written policies or unofficial, unwritten practices or customs regarding the use of informants.” In this case, Hilliard’s mother sought to hold the county, the police, and Officer Wolowiec accountable for the death of her daughter. Judge Levy found she had stated a due process claim under the “state-created-danger” doctrine, and that Wolowiec was not entitled to qualified immunity. “From the perspective of an objectively reasonable officer,” she wrote, “defendant Wolowiec had fair notice that it would violate Hilliard’s constitutional rights to disclose her identity directly to individuals who ‘were particularly dangerous’ to her, especially given that defendant Wolowiec was subjectively aware of the substantial risk, had no reason or governmental interest to justify taking that risk, and had agreed to take ‘all reasonable measures to protect [her] identity,’” quoting from the form he gave her to sign.

Furthermore, the municipality could be held liable for Wolowiec’s actions under a failure to train theory, she wrote, finding that “Failing to provide any training whatsoever, provide written guidelines, or even advise defendant Wolowiec where he might find such guidelines may rise to the level of constitutional inadequacy.” She found that the testimony on record at this point in the proceedings “is sufficient to establish a complete lack of training regarding the use of a confidential informant, let alone specific training as to when, how, and to whom it might be appropriate to disclose a confidential informant’s identity.” The court found that factual disputes precluded ruling on the summary judgment motion as to the deprivation of familial relations claim by a mother for the death of her adult child. The apparent bottom line here: transgender lives matter! A police officer can’t treat a transgender confidential informant as disposable, which is one inference that could be drawn from the court’s recitation of what happened here.

MICHIGAN – Finding that a Social Security Administration Administrative Law Judge had failed to devote adequate consideration to a claimant’s HIV-related condition – particularly side-effects from medication – in reaching a decision denying disability benefits, U.S. Magistrate Judge Mona K. Majzoub issued a report and recommendation remanding the case of Raseshele Pruitt back to the agency for further consideration of Pruitt’s HIV “as an impairment” under the sequential evaluation process that is supposed to be used in these cases. *Pruitt v. Commissioner of Social Security*, 2015 WL 5730023 (E.D. Mich., Aug. 24, 2015). Judge Majzoub found that the ALJ had mentioned the plaintiff’s HIV, but then it seemed to disappear from the analysis. “At the September 27, 2012 administrative

hearing,” wrote Majzoub, “Plaintiff testified that she is unable to work because of the side effects from her HIV medication, among other things. . . . A close reading of the ALJ’s decision, however, reveals that the ALJ makes no mention of the side effects from Plaintiff’s HIV medication of which Plaintiff complains. . . . [T]here is simply no mention of the nausea, diarrhea, headaches, dizziness, or lightheadedness that Plaintiff suffers as a result of her HIV medications, or any discussion of how those side effects affect her work-related abilities. Moreover, the ALJ does not discuss those side effects in her credibility assessment as she was required to do under 20 CFR sections 404.1529(c)(3), 416.929(c)(3). Most importantly, there is no reference to Plaintiff’s HIV impairment anywhere in the ALJ’s assessment of Plaintiff’s [residual functional capacity].” The judge noted circuit precedent holding “that an ALJ’s failure to adequately explain how an impairment affects an individual’s RFC may constitute reversible error . . . even where substantial evidence supports the ALJ’s ultimate disability decisions. Indeed, it is the role of the ALJ, not the court, to weigh the evidence and resolve any conflicts therein. The ALJ failed to do so here with regard to Plaintiff’s HIV impairment. Hence, while there may be substantial evidence in the record to discredit the intensity or existence of side effects from Plaintiff’s HIV medication or the symptoms of Plaintiff’s HIV impairment, it does not cure the ALJ’s failure to consider or discuss Plaintiff’s HIV impairment beyond step two in the sequential evaluation process. This matter should be remanded for further consider of Plaintiff’s HIV impairment under steps two through five of the sequential evaluation process.”

MICHIGAN – U.S. District Judge John Corbett O’Meara determined in *Doe*

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v. Etihad Airways, 2015 WL 5936326 (E.D. Mich., October 13, 2015), that under the Montreal Convention governing the liability of international air carriers, an airline could not be held liable for damages for emotional distress and mental anguish allegedly suffered by a passenger who feared she had contracted HIV infection as a result of a needle-stick injury on board an aircraft. “Jane Doe” alleges that during a flight from Abu Dhabi to Chicago, she reached in the seat back pocket in front of her, felt a sharp pain, and discovered she had suffered a puncture wound by exposure to a hypodermic syringe somebody had left in the seat pocket. On-board personnel gave her a bandage and disposed of the syringe, so it was not available for testing. The next day Jane Doe visited her doctor who ordered tests for HIV and hepatitis and prescribed a thirty-day course of anti-viral drugs. Doe was tested three times for HIV in the year following this incident, always testing negative. She sought damages from the airline for her emotional distress and mental anguish as a result of her injury, particularly citing fear of developing HIV or AIDS. As a result of her fears, she “abstained from sexual relations with her husband,” who joined the case with a loss of consortium claim. Judge O’Meara wrote that it is “well settled that purely emotional distress damages – which do not rise from a bodily injury – are not recoverable under the Warsaw or Montreal Conventions. . . . Defendant argues, and the court agrees, that Plaintiff’s mental distress damages were not caused by her physical injury. It is not the physical needle prick itself that caused Plaintiff’s distress, but the possibility that she may have been exposed to an infectious disease. Plaintiff’s emotional distress damages are not available under the Montreal Convention, which provides the exclusive remedy.” Thus, the court granted defendant’s motion for

summary judgment as to the emotional distress and mental anguish claims by Jane Doe. Apparently other claims for negligence remain alive. The court did not explicitly address the husband loss of consortium claim in this ruling.

MISSOURI – By a 2-1 vote, the Court of Appeals of Missouri, Western District, rejected a discrimination plaintiff’s argument that the prohibition of sex discrimination in the state’s Human Rights Act should be interpreted to forbid discrimination because of “sexual preference” or “sexual orientation.” *Pittman v. Cook Paper Recycling Corp.*, 2015 Mo. App. LEXIS 1090, 2015 WL 6468372 (October 27, 2015). James Pittman’s factual allegations made out a clear case of sexual orientation discrimination by his employer. Upon finding out that Pittman was gay, the president of the company called him a “cocksucker” and asked him if he had AIDS. Pittman alleged that when he broke up with a boyfriend, the company “treated him more harshly than a male who was getting a divorce from his female wife,” and that the company “caused the workplace to be an objectively hostile and abusive environment based on sexual preference” and discharged him on December 7, 2011. Pittman filed a discrimination claim under state law in the Jackson County Circuit Court, where Judge Joel Fahenstock granted the company’s motion to dismiss for failure to state claim. In affirming Fahenstock’s ruling, Judge James Edward Welsh wrote for the court that it was not the court’s role to make up new causes of action, and as legislative intent was “is the polestar of statutory interpretation and construction” and the legislature had failed to approve several proposals to add sexual orientation to the statute, Pittman’s claim must be dismissed. Welsh noted the EEOC’s recent ruling that sexual orientation discrimination

claims are actionable under Title VII as sex discrimination, but dismissed its relevance, pointing out that the EEOC was construing Title VII, a different statute, and was only an administrative agency’s interpretation of a federal statute that was not binding on the state court in its interpretation of a state law. Concurring in a separate one-sentence opinion, Judge Robert M. Clayton III wrote, “I respectfully and reluctantly concur in the opinion of Judge Welsh with respect to the result only.” Judge Anthony Rex Gabbert dissented at length, embracing all the arguments advanced by the ACLU in amicus briefs issued in support, finding the EEOC’s rationale for construing sex to include “sexual orientation” to be persuasive, and noting the various courts that have adopted a broader view of “sex” in the context of anti-discrimination statutes. In a nice move, Judge Gabbert seized upon the dictionary definition of “sex” embraced by Judge Welsh, observing that the dictionary cited by Welsh included several alternative definitions of sex, including at least two meanings that could support Pittman’s complaint of hostile environment harassment and discrimination. “Given the fact that the Missouri Human Rights Act is a remedial statute to be construed liberally to include those cases within the spirit of the law with all reasonable doubts to be construed in favor of applicability to the case,” wrote Gabbert, “I would find that Pittman stated a claim under the Missouri Human Rights Act and leave it for the jury to decide whether Pittman can prove the elements necessary to prevail on his claim of sexual harassment.” His conclusion went on to quote again from the EEOC’s ruling, and stated: “In other words, a person’s sex is *always* considered when taking a person’s sexual orientation into account. Thus, under the spirit of the law, sexual discrimination claims based on sexual orientation are actionable under the Missouri Human Rights Act.”

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NEBRASKA – The long running marriage equality litigation in Nebraska is not done yet. In *Waters v. Ricketts*, 2015 WL 6160047 (D. Neb., Oct. 20, 2015), U.S. District Judge Joseph F. Bataillon granted a motion by the plaintiffs to file supplemental papers going to the state’s resistance to treating same-sex marriages equally to different-sex marriages in the matter of issuing birth certificates to children showing the names of both of their parents. Nebraska officials argue that this case should be over and that any claims being raised by the plaintiffs are moot because Nebraska is complying with the court’s judgment on the merits that the state’s same-sex marriage ban is unconstitutional. Judge Bataillon observed that the 8th Circuit had affirmed his prior grant of a preliminary injunction against state officials, requiring them to allow same-sex couples to marry, to recognize lawful same-sex marriages, and to treat them equally under the law with different sex marriages, and had remanded “for entry of final judgment on the merits if favor of plaintiffs and for proceedings consistent with the 8th Circuit’s opinion. The 8th Circuit had rejected the state’s suggestion that it vacate the district court’s preliminary injunction as moot in light of *Obergefell*, pointing out that *Obergefell* had only directly ruled on the constitutionality of same-sex marriage bans in the 6th Circuit and not specifically on Nebraska’s challenged laws. The 8th Circuit had directed the district court to “consider Nebraska’s assurances and actions and the scope of any injunction, based on *Obergefell* and Federal Rule of Civil Procedure 65(d).” Rejecting the defendants’ argument that the plaintiff’s motion was belatedly raising new matters that were not part of the original case, the judge wrote, “The court finds the plaintiffs’ complaint broadly alleges denial of rights, responsibilities and incidents of marriage and can be construed as

encompassing the birth-certificate issue presented in the supplementary materials.” He pointed out that if that issue had not previously been presented, the plaintiffs “would be granted leave to amend their complaint to include it.” The judge pointed out that defendants would have an opportunity to respond to the plaintiffs’ submissions, and that any substantive arguments or objections they might want to raise could be addressed in pending cross-motions for summary judgment. It appears that so long as Nebraska drags its feet on according full equality, this case will remain alive and pending before Judge Bataillon. Plaintiffs are represented by attorneys with the ACLU of Nebraska and the ACLU’s national LGBT Project, as well as local counsel Angela J. Dunne and Susan A. Koenig of Omaha.

NEVADA – Patricia Harding Morrison, the widow of former heavyweight boxing champion Tommy David Morrison, suffered dismissal of her federal lawsuit alleging that a false HIV test had wrongly deprived Morrison of lucrative boxing opportunities, but the court gave leave to file an amended complaint as many of the flaws of the original complaint might be cured on a second go-around. *Morrison v. Quest Diagnostics Incorporated*, 2015 WL 5785507 (D. Nev., Sept. 30, 2015). According to the complaint, Quest Diagnostics produced a lab report in 1996 purporting to show that Tommy Morrison was HIV-positive and reported this result to the Nevada State Athletic Commission, which then disqualified him from participating in an upcoming match and caused loss of a contract worth potentially more than \$10 million. Subsequently, the complaint alleges, Quest reiterated its diagnosis of HIV-positive and an employee of the Commission, who had requested the lab report, was told by Quest that the results were “ironclad

and unequivocal.” On that basis, the employee of the Commission informed the media that Morrison’s HIV-positive status had been confirmed. Morrison had never given consent to these test results being made public. After Morrison died in 2013, an autopsy found no evidence of HIV or “AIDS-defining diseases.” Morrison’s widow filed this action, alleging negligence against Quest, defamation against Quest and the Commission and various individuals, unlicensed practice of medicine and misrepresentation against Quest, and HIPAA violation against Quest and its employee for unauthorized release of medical information. The first issue that caused the complaint to be dismissed was standing. With the exception of wrongful death actions, surviving statutory heirs in Nevada do not have standing to sue on a decedent’s tort claims unless they are official representatives of the estate, and Patricia Morrison did not allege in her complaint that she is either the executor or administrator of Tommy Morrison’s estate, asserting only that she was suing as his widow. She did show up at the hearing on the motion to dismiss with papers suggesting she was an estate representative but District Judge Richard F. Boulware, II, said that his ruling “does not consider newly submitted evidence”; in light of the permission to replead the substantive allegations, this could be presented in an amended complaint to overcome the standing problem. More to the point, Judge Boulware found that there is no private right of action for unlicensed practice of medicine or HIPAA violations, so those counts had to be dismissed outright without leave to replead. However, he found that it might be possible to surmount other flaws in the original complaint, including a statute of limitations problem, possible discretionary act immunity for the Commission, and the economic loss doctrine (under which tort claims for purely economic

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losses are generally disallowed in the absence of actual injury to persons or property). As to each of these, Judge Boulware found that it was possible that Morrison could submit amended pleadings that could get around these problems, noting particular Nevada's version of the "discovery rule" for late-discovered tort claims and the possibility that the Athletic Commission "made decisions that were not discretionary in nature or were not based on policy considerations." He also found it was possible Morrison could allege additional facts "that would demonstrate that the [economic loss] doctrine is not applicable to her claim." Morrison filed her complaint *pro se*. It sounds like she would be unable to meet the court's deadline (30 days) for filing an amended complaint that would correct her pleading errors without the assistance of competent counsel.

NEVADA – The Nevada Board of Examiners voted on October 13 to pay \$615,000 to Lambda Legal as prevailing party attorneys fees in the Nevada marriage equality case, in which Lambda represented plaintiffs who successfully appealed an adverse district court ruling to the 9th Circuit, which ruled the day after the Supreme Court denied petitions for certiorari in October 2014 in marriage equality cases coming up from the 4th, 7th and 10th Circuits. *ktvn.com*, Oct. 13. The case, originally known as *Sevcik v. Sandoval*, was consolidated on appeal with cases from other 9th Circuit states and decided as *Latta v. Otter*.

NEW YORK – Justice Robert Nahman of New York Supreme Court, Queens County, ruled in *Estate of Dill & Maureen Dill v. Werba Realty*, No. 700404-2015, NYLJ 1202738915337, 49 Misc.3d 1202(A), 2015 N.Y. Slip Op. 51363(U), 2015 WL 5658677

(Table) (Sept. 25, 2015), unofficially published disposition in the *New York Law Journal* on October 7, that the plaintiff estate had stated a cause of action for disability discrimination under the New York State and City Human Rights Laws by alleging that the decedent, Scott Gill, had answered advertisements for available apartments only to be told that no apartments were available after he had revealed that he was entitled to rent assistance from the HIV/AIDS Services Administration of New York City. This was sufficient, wrote Justice Nahman, to raise an inference of disability discrimination under the cited laws. However, the court accepted arguments by the defendants that the Dill Estate's Temporary Administrator, his mother Maureen Dill, did not have standing to claim damages as an individual plaintiff. The court set down for hearing various objections based on alleged faulty service of process and misnaming of a defendant.

NEW YORK – U.S. District Judge Michael A. Telesco has granted summary judgment to an HIV-positive man seeking Social Security Disability benefits, at least in part, by denying the Commissioner's motion for summary judgment and remanding the case for appropriate fact-finding by an Administrative Law Judge. *Wells v. Colvin*, 2015 WL 6554894 (W.D.N.Y., Oct. 29, 2015). Martin Wells applied for SSI on September 30, 2009, claiming he had been disabled due to HIV and AIDS since May 25, 2007. His application was denied and he requested a hearing, which was held before ALJ William E. Straub on July 19, 2011. Moving fast, the ALJ issued an unfavorable decision on August 15, 2011, and the Appeals Council denied review, leading Wells to file an appeal with the U.S. District Court, which apparently took several years to reach the conclusion that the ALJ's decision

was not supported by the record. According to Judge Telesco's opinion, the ALJ made fundamental errors. When Wells' treating chiropractor responded to a request for a statement by saying his office policy was not to complete disability forms, the ALJ just gave up, failing to request medical source statements from any of Wells' other treatment providers, including those who dealt with his HIV-related issues, and the ALJ also failed to request any consulting examinations. ALJ Straub evidently relied on the paper record without the benefit of any medical testimony. Judge Telesco pointed out that the applicable regulations provide that the ALJ is "responsible for developing [the claimant's] complete medical history, including arranging for a consultative examination if necessary, and making every reasonable effort to help [the claimant] get medical records from [the claimant's] own medical sources." 20 CFR sec. 416.945. In this case, however, wrote Telesco, "The ALJ's evaluation of Plaintiff's [residual functional capacity] consisted solely of his interpretation of the bare medical findings in the record, which included, among others, findings regarding plaintiff's HIV condition, objective findings of degenerative changes within plaintiff's lumbar and cervical spine, and evidence from physical examinations regarding plaintiff's limited range of motion. The ALJ was unqualified to interpret these findings, and his decision to do so rather than obtain a medical opinion regarding resulting functional limitations, if any, constituted reversible error." Telesco also faulted the ALJ for filing to provide an explanation for his conclusion that Wells was capable of performing "the full range of light work." There was no expert testimony going to this issue either. "This case is therefore remanded for proper consideration of plaintiff's RFC in accordance with the regulations," ordered Telesco. The

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court also faulted the ALJ for failing to address the record concerning Wells' HIV status and condition, embodied in a medical report completed by a Nurse Practitioner whose indications could have supported a disability finding in the view of the court. Responding to the Commissioner's argument that a nurse practitioner statement would not carry the weight accorded a treating physician, Telesco wrote, "It was the ALJ's duty to address the opinion and state what weight he gave it where there are no medical source opinions regarding the applicability of the listings to plaintiff's condition." Telesco found this was not "harmless error, because assignment of significant weight to this opinion would have resulted in a presumptive finding of disability under the listings." Thus, the court reversed and remanded the agency's decision to deny benefits. The version of the opinion that surfaced on Westlaw on October 31 contains a puzzle, however. Despite these findings and concluding statements, the introduction to the decision states that "the Commissioner's motion" for judgment on the pleadings "is granted." This writer sent an email to the judge's chambers asking about the inconsistency. No response was received before we went to press.

NEW YORK – Supreme Court Justice Cynthia Kern (a LeGaL member) faced a difficult task in ruling on summary judgment motions in *Hill v. Steinbrech*, 2015 N.Y. Misc. LEIS 3562, 2015 N.Y. Slip Op 31827(U) (N.Y. Co., Sept. 28, 2015), in which a gay male couple sued a plastic surgeon who allegedly used their before-and-after pictures and videos for commercial purposes without their consent. The men, Doug Hill and James Moritz, had work done between January and October 2012 by Dr. Douglas Steinbrech and Gotham Plastic Surgery, PLLC. "During the course of plaintiffs' treatment and

care," wrote Justice Kern, "defendants took several photographs of plaintiffs depicting their appearance before and after surgery. Defendants also made video recordings of plaintiff Hill depicting Hill in a post-operative state." Hill and Moritz allege that "on or about May 5, 2014" they discovered that the Hill photos and videos appeared on "numerous commercial websites" as advertisements for the defendants' services. They subsequently discovered photos of Moritz being used for such purposes as well. They provided the court with several photos and screen shots of videos that "they allege depict their pre and post-operative states to advertise defendants' services," and claim that they did not authorize this commercial use. Among the websites are boyculture.com, gaytube.com, youtube.com, and a commercial website known as "Men's Plastic Surgery Manhattan," as well as a printed flier advertising defendants' services "which purportedly includes a side angle shot of Moritz's buttocks in a pre and post-operative state." Hill's face and a torso tattoo are visible in YouTube videos. In still pictures, Hill's face isn't visible but his tattoos on torso and shoulder are. There is a frontal picture of Moritz depicting his body from chin to knees. Plaintiffs sued for violation of N.Y. Civil Rights Law sections 50 and 51 (the privacy statute, which prohibits commercial use of a person's image without their written consent), unjust enrichment, breach of fiduciary duty of confidentiality, HIPAA Privacy Rule and various state statutes, and public disclosure for private facts. The statutory action requires that the image be identifiable as the plaintiff. In deciding cross-motions for summary judgment, Justice Kern ruled for defendants on all but the Civil Rights Act claims, finding that there is no common law privacy right in New York and all related claims were preempted in effect by the Civil Rights Act. As to that, she found that Hill was

entitled to summary judgment because his face made him identifiable, but that there was a jury question whether he was identifiable from the other pictures (including those showing the tattoos). Since Moritz's face was never shown in the pictures, there was a jury question whether he was identifiable as to the torso shot. (The jury will have to determine whether the distinctive hair pattern on Moritz's chest is sufficient to make his torso shot identifiable as him. We hope there will be lots of gay men on that jury and that they will have an enjoyable time, if this case doesn't settle.) The defendants offered what they purported to be a release (that Hill denied having signed) authorizing commercial use, but excluding consent to show body tattoos, so Justice Kern found it inadequate. As to Moritz, the defendants' purported evidence on consent excluded use of his face, but Justice Kern noted that the photo they used showed his chin, and the dictionary definition of "face" includes the chin. "Thus," she wrote, "as the picture depicts Moritz's chin, it depicts his face and exceeds Moritz's purported written consent as a matter of law." However, she granted summary judgment against Moritz on the butt-shots, finding that Moritz is not identifiable from these pictures as a "matter of law" since "the pictures are devoid of any distinguishing or identifying features," and Moritz had "failed to present any evidence that he has actually been recognized from these pictures" so they are not actionable as violations of his right to privacy. We suspect that there are "butt men" out there who might dispute the contention that nobody can identify another man solely by reference to a butt photo. . . . The court also rejected any claim for punitive damages, finding such damages are not actionable in this kind of case. The court also struck various affirmative defenses which it did not describe with particularity in the opinion. Unfortunately, the Lexis

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report of this case did not include any of the photographs submitted in evidence!

NEW YORK – Orders of protection in the context of alleged domestic violence are not necessarily limited to cohabitants who have a sexual relationship, held the N.Y. Appellate Division, 3rd Department, as it reversed an order by the Family Court of Albany County dismissing a petition for such protection in *Arita v. Goodman*, 2015 N.Y. App. Div. LEXIS 7797, 2015 WL 6181499 (Oct. 22, 2015). Petitioner Nami Arita, a heterosexual woman, resided together with Robert Goodman, a gay man, as roommates in an apartment from April 2013 until April 2014, when Arita left the residence about four months before expiration of the lease. She alleged that she left due to incidents of domestic violence committed against her by Goodman, including that he had destroyed items of her property, thrown items at her, shoved her and threatened to, among other things, “kick her ass,” according to the Appellate Division’s memorandum opinion. The court considered that these allegations could amount to family offenses of menacing in the third degree, criminal mischief in the fourth degree, and harassment in the second degree. Upon learning that Arita was straight and Goodman was gay, the Family Court concluded that they did not have an “intimate relationship” within the meaning of the Family Court Act, and thus she was not entitled to an order of protection. The Appellate Division disagreed. “Factors relevant to determining the existence of an intimate relationship ‘include but are not limited to: the nature and type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship,’” quoting Family Court Act sec. 812[1][e]. “Considering

these enumerated factors,” wrote the court, “the Legislature unambiguously established that the phrase ‘intimate relationship’ is not limited to relationships that include sexual intimacy.” Since the Family Court based its determination solely on the lack of a sexual relationship between the parties, the record “is not sufficiently developed to permit us to determine whether the parties have an intimate relationship” within the meaning of the statute, the court concluded, so the appropriate action was to reverse the Family Court’s dismissal order and remand the case for fact-finding on this issue prior to a new determination whether there is an intimate relationship and whether the factual allegations about Goodman’s conduct would merit issuance of the order of protection requested by Arita. In a footnote, the court referred to legislative history showing that “the Legislature intended to extent the statute’s reach to unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household.” Matthew Mann represents Arita and Eric R. Gee represents Goodman.

NEW YORK – Lambda Legal has filed suit against New York City and various corrections officials and officers on behalf of Thomas Hamm, who suffered a brutal beating at the hands of corrections officers on Rikers Island after he visited his partner who was incarcerated there. According to the complaint in *Hamm v. City of New York*, No. 15-CV-06238, filed in the U.S. District Court for the Southern District of New York, and assigned at random to openly-gay U.S. District Judge J. Paul Oetken (appointed by President Obama), after Hamm, a short man who uses a cane when he walks, was singled out by corrections officers

for discriminatory treatment when he began to show affection for his partner and was beaten without provocation. The complaint alleges that a supervising officer observed the beating without interfering. Hamm was taken by ambulance to Elmhurst Hospital Center, where he was diagnosed with facial fractures and other injuries. The complaint alleges that the defendants “fabricated the implausible accusation that Mr. Hamm provoked the attack,” and instead of taking action against the officers who inflicted the beating, arrested Hamm on false charges of attacking a corrections officer. The complaint alleges that Hamm fell victim to the “notoriously rampant culture of violence – and cover-up – Defendants fostered and tolerated at Rikers, and was singled out for abuse as a gay man and for his apparent same-sex relationship.” The complaint is quite startling. Hamm is represented by David B. Rankin and Robert M. Quackenbush of Ranking & Taylor PLC and Susan L. Sommer and Omar Gonzalez-Pagan of Lambda Legal.

NORTH DAKOTA – U.S. Chief District Judge Ralph Erickson awarded attorney fees to Lambda Legal and the Faegre Baker Daniels Law Firm for their work on a marriage equality case on behalf of a Fargo couple in the amount of \$57,351, about half of what the plaintiffs had requested. Erickson wrote down their hourly fees, finding that by the time the North Dakota litigation was filed, the constitutional arguments were so well established that the case did not merit the hourly rates that plaintiffs were seeking. In his ruling, Erickson wrote that “based on the recycled and straightforward nature of the legal issues in this case,” an hourly rate over \$250 “is simply unreasonable and not justified,” reported *Forum News Service* on Oct. 28. This was Erickson’s second fee award, having confirmed the state’s

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agreement to pay \$58,000 in fees and costs in another lawsuit that had been filed on behalf of seven other same-sex couples.

OHIO – U.S. District Judge Timothy Black signed an order in *Obergefell v. Hodges*, Case No. 1:13-cv-501, on November 2, 2015, approving the parties agreement that \$1.3 million in attorney fees will be paid by the state of Ohio to plaintiffs’ lawyers in the marriage equality cases. The money is to be divided up among Gerhardtstein & Branch Co. LPA, the lead counsel in some of the consolidated cases, the ACLU, Lambda Legal, and several other Cincinnati firms. The *National Law Journal* (Nov. 2) report on this order notes that the Ohio cases were consolidated with cases from Kentucky, Tennessee and Michigan to become *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), the Supreme Court’s marriage equality case. At this point, Michigan has agreed to pay \$1.9 million in attorney fees, Kentucky officials are opposing a \$2 million fee request, and a fee request for \$2.3 million is pending in Tennessee. The Ohio lawyers claimed that they and their paralegals spent more than 2500 hours on the litigation, starting in the summer of 2013 when they represented Obergefell and Arthur in their quest to get Ohio to recognize their marriage as Arthur lay dying.

OREGON – In *Moon v. Colvin*, 2015 U.S. Dist. LEXIS 132533 (D. Ore., Sept. 30, 2015), U.S. District Judge Owen M. Panner determined that the Social Security Administration had inappropriately denied disability benefits to a transgender person who had filed for benefits alleging disability due to attention deficit hyperactivity disorder, post-traumatic stress disorder, generalized anxiety disorder, major depressive disorder, insomnia, social

anxiety/phobia, and transgender status. Rather than get into a detailed summary of Judge Panner’s analysis of the record, it suffices to say that he found that the Administrative Law Judge had not provided sufficient justification for questioning the credibility of the plaintiff’s testimony about the limitations encountered in trying to work, or for not giving significant weight to statements by medical experts in the record. The ALJ had seized upon isolated statements in the record rather than viewing the evidence in its overall context, it seems from the court’s analysis. “I have determined the ALJ erred when he concluded Plaintiff was not fully credible and when he rejected the opinions of Sandra Ford and Carol Roberts,” wrote Judge Panner. “If credited, those opinions establish that Plaintiff is disabled. Thus, the Court concludes Plaintiff is disabled based on this medical record and no useful purpose would be served by a remand of this matter for further proceedings.” Instead, the court remanded to the Commissioner “for the immediate calculation and payment of benefits to Plaintiff.” The opinion mentions in passing Moon’s transgender status without relating it to the various mental and psychological disorders underlying the disability determination.

PENNSYLVANIA – A unanimous three-judge panel of the Superior Court of Pennsylvania has affirmed a decision by the Delaware County Court of Common Pleas to award sole legal custody of a child to its gay father, over the protests of its mother, refusing to upset the trial judge’s conclusion that the mother was unable to put aside her anger at the father as needed for the welfare of the child. *J.V. v. J.V.*, 2015 Pa. Super. Unpub. LEXIS 3829, 2015 WL 6168191 (Oct. 20, 2015). The parents were married in 2009, and the child was born in 2010. In September 2011, Mother discovered by scrutiny

of credit card statements evidence that led her to conclude that Father was involved in sexual relationships with other men. “She took Child and fled to her parents’ home in New Jersey,” wrote Superior Court Judge Christine Donohue. Father promptly filed a custody petition. After a custody conference, a temporary agreement was reached giving Mother sole legal and primary physical custody and affording Father supervised visitation one afternoon each weekend, and father was required to submit to a psychosexual evaluation. Between then and the final custody hearing nearly three years later, the parties filed numerous emergency petitions and applications for special relief contending each was interfering with the other’s rights under the temporary arrangement. Most specifically, however, the trial court found that Mother was fixated on her idea that Father was a pedophile, although her reference of the matter to law enforcement did not result in any charges being filed against Father. Various experts concluded Father presented no risk to the child, and ultimately the trial court determined that it was in the best interest of the child to give Father sole legal and primary physical custody of the Child, “based in large part on its conclusions that Mother perpetually interferes with Father’s rights and access to Child; that Mother has not evidenced an ability to set aside her anger at Father for the sake of the best interests of Child; and that Father has demonstrated the ability to put Child’s best interest first despite his acrimonious relationship with Mother.” The court found that Mother had waived many of the arguments she sought to raise on appeal by not including them in the necessary documents and pressing them early enough in the proceedings. On the main point, however, the court ruled that it could not second-guess the trial court, which had complied with the statutory requirements and based its ruling on

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evidence in the record. Particularly, the court refused to overturn the trial court's credibility determinations, or to substitute Mother's proposed findings of fact for the findings made by the trial court. For example, quoting at length from the trial court's opinion, "this court heard ample testimony to believe that Mother is so committed in her belief that Father is a pedophile and so angry with Father for his lack of candor before marriage about his sexuality that she is unable to make rational decisions with Father regarding [Child's] welfare." "In concluding," wrote Judge Donohue, "we note that here, as in all child custody cases, the trial court's final determination was driven in large part by its perceptions of the parties and their actions. These are the credibility determinations that this Court is without authority to disturb so long as they are supported by evidence in the record. However, we further note that this custody determination, like all custody determinations, is always modifiable. As such, with the passage of time and harmonious cooperation within the context of the current custody arrangement, Mother can ask the trial court to revisit its determination and consider whether other custodial arrangements would be in the Child's best interest." The other two judges on the panel concurred in the result without signing Judge Donohue's decision. Given the Mother's track record, Donohue's final remarks, while stating a truism, may be unfortunate, since they may encourage Mother to instigate renewed litigation at the drop of a hat. The opinion was designated by the court as unpublished and non-precedential.

PENNSYLVANIA – The *Pittsburgh Post-Gazette* (Oct. 11) reports that Allegheny County Judge Lawrence O'Toole denied a petition to dissolve an adult adoption of Roland Bosee, Jr., by Nino Esposito so that the two men,

who have been together since 1970, can get married. Esposito adopted Bosee in 2012, at a time when it seemed unlikely that Pennsylvania couples would be able to marry in the state. In 2014, however, the U.S. District Court declared Pennsylvania's ban on same-sex marriage unconstitutional, and the governor's decision not to appeal the ruling led to marriage equality in the state. However, the marriage law forbids parents from marrying with their legal children, regardless whether they are related by blood, so the couple applied to the court to dissolve their adoption. Judge O'Toole's decision to deny the petition was surprising to many, since it was reported that some other trial judges had granted similar petitions, and O'Toole was noted as supportive generally of LGBT rights. O'Toole wrote that he was "sensitive to the situation in which Mr. Esposito and Mr. Bosee found themselves" and that he "welcomes direction from our appellate courts." Bosee and Esposito had appealed the ruling to the state's Superior Court, which has appellate jurisdiction over civil trial court rulings. O'Toole noted that adoptions may be reversed upon a showing of fraud, but asserted that reversing adoptions in other circumstances "would place in jeopardy and imperil adoption decrees generally." The appeal argues that denial of the petition works the same deprivation of constitutional rights that was imposed by the unconstitutional state ban on same-sex marriage: denial of the fundamental right to marry.

PENNSYLVANIA – In *S.K.W. v. J.C.S.*, 2015 WL 1393767 (Oct. 21, 2015) (not officially published), the Superior Court of Pennsylvania, an intermediate appellate court, affirmed decisions by Common Pleas Judge Anthony J. Vardaro (Crawford County, May 13 and June 25, 2015) in a dispute between former lesbian partners over partial custody and visitation of one of

the children they were raising together. The women began their relationship in 2007 or 2008 (testimony varied), and ultimately the defendant, J.C.S., had three children through donor insemination, the Child at issue in this case and the Child's younger twin siblings. S.K.W. adopted the Child in 2011, but had not adopted the twins. After relationship problems developed, S.K.W. moved out in August 2013, and "initially had informal visits with Child on Monday evenings and one day each weekend," according to the Superior Court decision by Presiding Judge Gantman. S.K.W. who was concerned that J.C.S. was trying to minimize her time with the Child filed a custody complaint seeking shared legal and physical custody of all three children, but soon amended the complaint to request shared custody only of the Child, acknowledging the difficulty of pursuing custody or visitation with the twins, as to whom she is not a legal parent. Judge Vardaro entered an initial custody order on Dec. 5, 2014, granting J.C.S. primary physical custody and S.K.W. partial physical custody, which basically confirmed the informal arrangement then existing of three hours on Monday evenings and 10 am to 6 pm on either Saturday or Sunday each weekend. S.K.W. sought more contact and filed a motion for a de novo hearing, following which Judge Vardaro granted a new order, giving S.K.W. physical custody of the child on the first, third and fourth weekend of every month as well as three hours on every weeknight evening (Monday through Thursday) when J.C.S. was working. J.C.S. is employed by the fire department and alternates 24-hour shifts with 48-hours off; during the time she is working, her mother (who from the court's account seems hostile to S.K.W.) cares for the children. J.C.S. appealed this order to the Superior Court, which affirmed on the ground that Judge Vardaro had carefully discussed the statutory elements that

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must be considered in determining custody and visitation disputes between legal parents. The court released its decision to Westlaw with Judge Vardaro's opinions attached, including his detailed discussion of the factors he considered. S.K.W. is represented by Barbara Mountjoy, and J.C.S. is represented by Deborah S. Higgins.

PUERTO RICO – U.S. Magistrate Judge Bruce J. McGiverin allowed a lesbian plaintiff to proceed on Title VII sex discrimination claims against her employer, the Municipality of Naranjito, upon finding that her factual allegations would support claims that she was discriminated against because she is a woman. *Maldonado-Catala v. Municipality of Naranjito*, 2015 U.S. Dist. LEXIS 145713 (D.P.R., Oct. 26, 2015). Magistrate Judge McGiverin noted that he was bound by 1st Circuit authority, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999), to reject a claim that Title VII covers sexual orientation discrimination. Luckily for the plaintiff, however, the anti-gay comments to which she was subjected suggested sex stereotyping, bringing the case within the realm of *Price Waterhouse v. Hopkins*, and she also alleged that she was treated different than male employees with respect to one of the key issues of the case involving her job assignment. Finding jury issues as to these allegations, McGiverin held that the pertinent part of the complaint should not be dismissed, after having also rejected an argument that the complaint was time-barred.

TEXAS – The Texas Supreme Court has denied review of the 1st Court of Appeals decision in *Berwick v. Wagner*, 2014 WL 4493470 (Tex. Ct. App., Houston, Sept. 11, 2015), app. denied, No. 14-0862 (Oct. 23, 2015), in which

the Texas court of appeals affirmed a decision by the Harris County District Court entering judgment on a jury verdict appointing the non-biological father of a child born from the biological father's sperm using a surrogate mother in California to the position of sole managing conservator, the biological father as possessory conservator, and rejecting the biological father's request that the child's last name be changed to eliminate reference to the non-biological father's surname. In effect this means that the plaintiff, Rick Wagner, will be able to maintain a relationship with the child he and his former partner had planned to raise together. The Supreme Court's refusal to hear the appeal by the biological father, Jerry Berwick, puts an end to eight years of litigation, which included the important ruling that a Texas court would extend full faith and credit to a California court's decision that the non-biological father is a parent of the child conceived using his partner's sperm to create a fertilized egg gestated by a surrogate. One hopes that the nationwide advent of marriage equality will reduce the complications that have ensued when male same-sex couples have used surrogates in order to have children to raise together, only to fall into litigation over parental status when the parents' relationship ends, but not every couple marries or takes the precaution of entering into express contracts to deal with these situations. In this case, the parents had a California domestic partnership and a subsequent Canadian marriage, neither of which was recognized in their domicile state of Texas prior to June 26, 2015, and of course the incidents giving rise to this case occurred many years prior to that date.

UTAH – The parties have settled a federal lawsuit in which the ACLU of Utah represented Kami and Angie Roe in their quest for a birth certificate for

their child Lucy that names Angie as one of her mothers. A joint agreement filed with the federal court acknowledged that such a birth certificate had been issued. According to the joint stipulation: "The Court further ordered that if Defendants continue to enforce Utah Code Ann. . . . with respect to male spouses of women who give birth through assisted reproduction with donor sperm, they must also apply the statute equally to female spouses of women who give birth through assisted reproduction with donor sperm." This was the essential equal protection issue in the case. At a hearing in July, District Judge Dee Benson, citing *Obergefell*, said it appeared that Utah was discriminating against the Roes by not treating Angie the same way it would treat the husband of a woman who gave birth after conceiving with donor insemination. *fox13now.com*, Oct. 18.

WASHINGTON – U.S. District Judge Marsha J. Pechman granted a motion for summary judgment by the employer on a claim of sex and sexual orientation discrimination in *Brediger v. General Nutrition Corporation*, 2015 WL 5797095 (W.D. Wash., Oct. 2, 2015). Plaintiff Bethany Brediger filed suit under Title VII (sex discrimination), Washington's Law against Discrimination (sex and sexual orientation discrimination) and the Fair Labor Standards Act and corresponding state laws, as well as asserting unjust enrichment and promissory estoppel claims. She alleged that she had been promoted to a senior store manager position by GNC but was not paid commensurately, that she suffered retaliation for raising various discrimination claims and as subjected to a hostile environment, including a manager's inquiry into her sexual orientation, and was subjected to inappropriate adverse job actions and ultimately discharge. While GNC

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contested her claim to having been promoted or promised increased pay, it did tender a payment to her, which she accepted, dropping the FLSA claim out of the case. Judge Pechman found that there was an actionable retaliation case, but that the factual allegations by Brediger were insufficient to state a hostile environment claim or claims for sex or sexual orientation discrimination. While it appeared from Brediger's allegations that her complaining about various issues was closely followed by adverse actions that may not have been merited, her factual allegations were insufficient to raise an inference that her sex or sexual orientation were motivating factors for those adverse actions, according to Judge Pechman.

CRIMINAL LITIGATION NOTES

U.S. AIR FORCE COURT OF CRIMINAL APPEALS – In *U.S. v. Gorecki*, 2015 CCA LEXIS 421 (October 8, 2015), the Air Force Court of Criminal Appeals affirmed a sentence of reprimand, forfeiture of \$4,000 pay per month for one month, 30 days of confinement, and dismissal for Lt. Col. Russell J. Gorecki upon conviction of violating a general order, wrongful appropriation, assault consummated by a battery, conducting unbecoming an officer and a gentleman, and unlawful entry. One has to read the factual recitation in the court's opinion in astonishment that an officer of such high rank would engage in sexually-inappropriate banter and conduct with both women and men under his command. Lt. Col. Gorecki told subordinates of his sexual interests in both women and men, came on to people, made embarrassing and inappropriate sexually-related comments in public, and ventured uninvited into subordinates' private quarters, also engaging in inappropriate sexually-

related touching. "By all accounts – including his own admissions – Appellant's misconduct had a deeply negative impact upon his individual victims and upon his effectiveness as a commander," wrote Chief Judge Allred for the court. "having considered the arguments of counsel, a clemency recommendation made by the trial judge, and the entire record in this case, we find the approved sentence appropriate." After reading the court's summary of the evidence, we have to ask, what was Lt. Col. Gorecki thinking?

CALIFORNIA 4TH DISTRICT COURT OF APPEAL

– California trial judges continue to impose HIV testing on people convicted of crimes without statutory authorization, to judge by the frequency with which this issue comes up. In *People v. DeLeon-Mendez*, 2015 WL 5935093 (Cal. 4th Dist. Ct. App., Oct. 13, 2015), the defendant was convicted of assault with intent to commit rape during a first degree burglary, first degree robbery, first degree residential burglary, dissuading a witness by force or threat, and using a knife in the commission of a crime. None of these offenses involved the performance of any act that could conceivably transmit HIV, yet Superior Court Judge M. Marc Kelly (Orange County) included an HIV test as part of the sentence. The defendant appealed various aspects of the conviction, including the HIV testing order, and the state conceded that the order was improper. The court stated agreement with the state's concession. "The trial court must order AIDS testing for anyone convicted of a sex crime as defined by section 1202.1, subdivision (e)," the court observed, "and may order it in various other circumstances. DeLeon was not convicted of any of the qualifying offenses listed in subdivision (e), and none of the other circumstances apply."

GEORGIA – The Supreme Court of Georgia affirmed the jury conviction of Dorville Thomas of malice murder and sentence of life imprisonment in the shooting death of Kalvin McGee, a transsexual escort who advertised her services as "Meeya." *Thomas v. State*, 2015 Ga. LEXIS 673, 2015 WL 5778820 (Oct. 5, 2015). McGee advertised as a transsexual woman, and met clients at an apartment shared with a roommate, Christian Alexander, with separate bedrooms. McGee had long hair, breasts and a "soft feminine voice" but male genitals. "Around 11 pm on the night of the murder, Alexander was returning to the apartment and had a brief telephone conversation with McGee; McGee, who was at the apartment, indicated that a client was coming over," wrote Justice Hunstein. "Alexander arrived a few minutes later and, when he arrived, he observed that the apartment was set up as if McGee had a client there. Alexander also noticed that the front door was unlocked and that a door leading to McGee's side of the apartment was open, which Alexander found strange. After getting to his room, Alexander sent a text message to McGee but received no response. Shortly thereafter, Alexander entered McGee's room and discovered him dead on the floor next to the bed." McGee suffered two gunshot wounds and his bed showed evidence of two additional gunshots. The first wound, to McGee's jaw, "could have occurred during a struggle; the chest wound, however, was fired from several feet away and likely did not occur during a struggle. Soot on McGee's hand indicated that his hand was near the gun when it was fired." Information from McGee's cellphone account led to Thomas, who was charged with malice murder. Thomas was interviewed by police investigators, at first denying knowing McGee or being in his apartment, but then admitting that he was there and was armed because he had purchased marijuana before going

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there. He told investigators that “as he was lying next to McGee on the bed, he observed that McGee was not fully female and got up to leave; as he was leaving, an agitated McGee reached for the gun in Thomas’s back pocket, and Thomas pulled out the gun. According to Thomas, he and McGee ‘tussled’ for the gun, fell to the bed, and, while struggling on the bed for the gun, it ‘went off’ three times. Thomas told investigators he never paid McGee.” The court found that the evidence of Thomas’s statements together with the forensic evidence was “sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Thomas was guilty of malice murder,” thus supporting the jury’s verdict, and the court rejected McGee’s argument that the evidence failed to support the verdict. The court also rejected various challenges to the trial judge’s charge to the jury, finding that McGee’s various objections had not been preserved by defense counsel at trial and were not clearly wrong. Furthermore, the Supreme Court found that in light of the jury’s findings, various charges of lesser offenses would not have made a difference to the outcome of the trial. The court also rejected an ineffective assistance of counsel argument to the same effect; failure to preserve issues for review was not consequential when the jury verdict indicated that the jury was convinced beyond a reasonable doubt by the evidence for malice murder. Any argument based on Thomas’s “surprise” at discovering McGee had male genitals was rejected, since “the jury heard evidence McGee clearly advertised himself as ‘transsexual’ and that Thomas was armed when he went to McGee’s apartment. Although the jury heard Thomas’s statement claiming that there was a struggle for the gun, the jury also heard evidence that the gunshot to the chest came after McGee had already been shot and that gunshot to the chest likely did not occur during

a struggle. As the jury was instructed, ‘there is no requirement that there be “premeditation” or a “preconceived” intention to kill; malice aforethought can be formed instantly.’”

PENNSYLVANIA – Kevin Harrigan and Phillip Williams pled guilty on October 15 to assault charges arising from an incident last year when they beat up a gay couple in Philadelphia. Under the plea deal, they will be on probation and are prohibited from entering downtown Philadelphia for the length of their probation. They will have to serve specified hours of community service with LGBT organizations and pay restitution to their victims. Harrigan was sentenced to three years’ probation and Williams to five years’ probation, relating to the severity of their actions. Shortly after the incident, the Philadelphia Council amended the city’s hate crime law to add sexual orientation. Harrigan and Williams have insisted that the motivation for the attack was not the couple’s sexual orientation. The plea agreement omitting jail time was concluded with the encouragement of the victims, who declined to make impact statements in court, according to the Philadelphia District Attorney’s Office. *Washington Post*, Oct. 15.

PRISONER LITIGATION NOTES

NATIONAL – Black & Pink, a support organization for LGBTQ prisoners (based in Dorchester, Massachusetts, with branches in Boise, Buffalo, Chicago, Denver, New Orleans, New York City, San Diego, and San Francisco) has published the results of a national survey of views and conditions of confinement of LGBTQ prisoners in “Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Prisoner Survey” (October

2015). The report details the responses of some 1118 prisoners in 46 states on subjects such as demographics, sexual activity, violence, relationships, segregation, discrimination, and health care. The report finds: “Once inside prison, LGBTQ people are subjected to constant violence by both prison staff and other prisoners” with incidents of sexual assault four times that of non-LGTBQ inmates, 75% of which is attributable to dangerous housing arrangements. LGBTQ inmates are twice as likely as others to be serving life sentences, with average incarceration time of 10 years, as opposed to 2.9 years for inmates in general. Almost half of respondents have children, although over 70% have no contact with them. Over 30% of transgender inmates reported denial of medical diagnosis or treatment, and only 6% said they had commissary access to gender-appropriate items. More than 70% of respondents said they were sexually active in prison, but only 2% had access to condoms. A third of those with romantic relationships reports intimate partner abuse. Another third reports being disciplined for consensual sex, with half of these serving more than 2 years in solitary confinement. Black & Pink is a self-declared prison abolition group, and its report includes numerous recommendations. Their questionnaire is attached to the report. *William J. Rold*

7TH CIRCUIT COURT OF APPEALS – A unanimous panel of the U.S. Court of Appeals for the 7th Circuit – per Judge Richard Posner, writing for himself, Chief Judge Diane Pamela Wood and Judge Ilana Rovner – reversed a 28 U.S.C. § 1915A screening dismissal of a *pro se* complaint by United States Magistrate Judge Aaron E. Goodstein of the Eastern District of Wisconsin, holding that verbal abuse of a prisoner could violate civil rights

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under 42 U.S.C. § 1983, in *Beal v. Foster*, 2015 U.S. App. LEXIS 17338, 2015 WL 5853694 (7th Cir., October 2, 2015). Plaintiff Ronald Jerome Beal's allegations against prison guard Russell Schneider were limited: Schneider directed sexual comments toward another inmate and told Beal to "place his penis inside" the other inmate; on other occasions Schneider urinated in front of Beal and others while looking at them and "smiling." Magistrate Judge Goodstein had held that, "standing alone, verbal harassment of an inmate does not constitute a constitutional violation." Judge Posner first observed that Beal's allegations did not claim only "verbal" harassment (since they included urinating); but, even if they were only verbal, a claim may have been stated. He ruled that an attempt to draw a "categorical" distinction between verbal and physical harassment is both "arbitrary" and "incorrect," citing *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012), and giving two examples of verbal harassment that would suffice to state a claim under the Eighth Amendment if false and malicious: telling an inmate that she had cancer and would be dead in three months; and informing an inmate that his wife and children had been killed in a car crash. While the statements are "syntactically simple," their effect could be devastating. While acknowledging that "most verbal harassment" did not "rise to the level of cruel and unusual punishment," Judge Posner allowed Beal to "amplify" his allegations on appeal and commented: "One can imagine how they might have been amplified had the magistrate judge not terminated the suit so abruptly." He continued: "The remarks attributed by the plaintiff to Schneider, including the "smile" references and the display of Schneider's own penis in his repeated public urinations... could have been understood by the inmates as implying that the plaintiff is homosexual.... In his appellate filings

the plaintiff further claims that other inmates would harass him by calling him names such as 'punk, fag, sissy, and queer,' all of course derisive terms for homosexuals and possibly inspired or encouraged by Schneider's comments. Conceivably the plaintiff feared that Schneider's comments labeled him a homosexual and by doing so increased the likelihood of sexual assaults on him by other inmates." He wrote: "We can imagine... that the plaintiff was seriously upset by Schneider's nonverbal as well as verbal behavior, which may have made him a pariah to his fellow inmates and inflicted significant psychological harm." Judge Posner found that the magistrate should have ordered the defendants to produce findings from Beal's grievance about the events (which "might either strengthen or weaken his case") and that he "should have considered seeking clarification and amplification" of the claim through a transcribed telephone interview of the plaintiff, if this could have been done without converting the "interview" into a formal screening or an *ex parte* dismissal under F.R.C.P. 12(b)(6) – citing *Williams v. Wahner*, 731 F.3d 731, 734 (7th Cir. 2013), and a case decided on the same day as *Beal*, *Henderson v. Wilcoxon* (7th Cir. October 2, 2015). Otherwise, the screening dismissal in Judge Posner's view was "inscrutable." This reversal, by a judge not usually sympathetic to civil rights plaintiffs or prisoners, is extraordinary. One rarely sees a federal court reversing on the basis of what it "imagines." *William J. Rold*

CALIFORNIA – Last spring, U. S. District Judge Jon S. Tigar issued a preliminary injunction requiring California correctional officials to provide sex reassignment surgery [SRS] to transgender prisoner Michelle-Lael B. Norsworthy, in *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Cal., April 2, 2015), reported in *Law Notes* (May

2015) at pages 199-200. California appealed, obtained a stay, and then paroled Norsworthy the day before oral argument in the Ninth Circuit. Now, a divided Circuit panel dismisses the appeal as moot but remands rather than vacates the injunction in *Norsworthy v. Beard*, 2015 U.S. App. LEXIS 17447, 2015 WL 5781429 (9th Cir., October 5, 2015). The *per curiam* decision agrees the injunctive case is now moot, but the majority applied an "exception" to the established practice of *vacatur* in such situations because it is not clear from the record whether Norsworthy's parole became moot "through happenstance or the defendants' own actions." In the latter case, *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir.1982), provides for a remand for the district court to determine "whether to vacate its preliminary injunction order, as well as to consider the question of the award of attorneys' fees." The majority described the circumstances of Norsworthy's parole – accelerating her parole reconsideration prior to its scheduled date in 2016 and moving up her release date to occur prior to scheduled oral argument of the state's appeal – and observed that "there is at least some chance that defendants influenced the parole process." (The *Ringsby* exception to *vacatur* also justifies remands in certain moot appeals to prevent future "vexatious actions" by defendants or attempts to avoid "collateral" usage of the decision.) Circuit Judge Consuelo M. Callahan dissented from the remand, writing that the majority ruling "approaches sophistry" and "unnecessarily prolongs" the litigation. It seems to this writer that Norsworthy has reason to be concerned inasmuch as she is on parole (which could be revoked). One wonders whether the state would be arguing mootness so strongly if it had prevailed below and Norsworthy had brought the appeal when she was paroled. Besides, it is not "sophistry" for public interest

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lawyers to be paid; that is the purpose of the prevailing party provisions of 42 U.S.C. § 1988. *William J. Rold*

CALIFORNIA – United States Magistrate Judge Michael J. Seng dismissed transgender inmate Steven Scott Marlett’s *pro se* complaint upon initial screening under 28 U.S.C. § 1915(e)(2) in *Marlett v. Harrington*, 2015 U.S. Dist. LEXIS 141319, 2015 WL 6123613 (E.D. Calif., October 16, 2015). Marlett sued the California Director of Corrections (and 3 subordinates) and her warden (and 1 subordinate) for declaratory and injunctive relief, claiming that they perpetuated policies requiring clustering of transgender inmates in housing assignments “without regard to their safety,” routinely housing them with non-transgender inmates (exposing them “to a greater risk of harm”), and punishing those who refuse such housing through administrative and punitive segregation. Marlett alleged violations of Equal Protection, of the Eighth Amendment, and of the Prison Rape Elimination Act [“PREA”]. Judge Seng ruled that Marlett’s pleading failed adequately to allege standing, because she did not explicitly identify herself as transgender and because she did not allege that she had personally suffered the contested conditions (dangerous housing, denial of equal protection, or punishment). “Without such allegations, it is impossible for the Court to determine if Plaintiff has alleged any injury as a result of the challenged practices.” Marlett also failed to show that any of the named defendants were personally involved in the deprivation of her rights, in order to sue them in their personal capacities. If suing them in their official capacities, Judge Seng found that Marlett “has alleged the existence of a policy or custom that caused the violation of rights”; but he held that “a defendant in a suit to

enjoin an allegedly unconstitutional practice must be able to appropriately respond to court-ordered injunctive relief if the plaintiff prevails,” citing *Ex Parte Young*, 209 U.S. 123, 157-61 (1908). He ruled that “Plaintiff’s complaint fails to assert that any of the six named Defendants has the ability to appropriately respond to court-ordered injunctive relief,” without explaining why the corrections director and the warden (and subordinates) could not “respond” to an order directing them to change how they treat transgender inmates. Judge Seng found that Marlett stated an Equal Protection claim, which was entitled to “intermediate scrutiny” under *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), and *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015), assuming she can show standing. He also conditionally upheld her allegations of Eighth Amendment violations for routinely placing transgender inmates in danger, assuming she can again show standing and be more specific about her individualized risk. Judge Seng held that there is no implied cause of action under PREA, observing that the statute was “enacted to study the problem of prison rape.” While the holding is in accord with numerous other decisions, the dicta likening PREA to Congressional funding of an archeological dig is plainly contradicted by the statute. In 42 U.S.C. § 15601(13), referring to deliberate indifference to risk of inmate-on-inmate assault, as enunciated by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), Congress found that “States that do not take basic steps to abate prison rape by adopting standards” risk reduction in federal law enforcement funding. Congress declared under 42 U.S.C. § 15602 that the purposes of PREA are not just to “study” prison rape but are to: “... (3) develop and implement national standards for the detection, prevention,

reduction, and punishment of prison rape;... (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; [and] (7) protect the Eighth Amendment rights of Federal, State, and local prisoners.” Marlett must file an amended complaint to cure the noted deficiencies before Judge Seng will require defendants to respond. *William J. Rold*

LOUISIANA – Gay inmate plaintiff Kenneth Anthony Idel was assaulted by another inmate (Cody), but “what should have been a fairly straightforward failure-to-protect suit” mushroomed into so many extraneous claims that the court issued an abusive filing order. Nevertheless, in *Idel v. Edwards*, 2015 WL 5794472 (W.D. La., Sept. 30, 2015), United States District Judge Elizabeth Erny Foote, adopting the Report and Recommendation [R & R] of United States Magistrate Judge Mark L. Hornsby, allowed Idel’s *pro se* lawsuit to proceed toward trial on two claims: failure to protect Idel by five defendants; and cruel and unusual conditions of confinement, as “ordered” by another defendant. Idel alleged that he contacted the defendants repeatedly to request protection, stating that Cody and others were “following me to the bathroom area... [and] getting mad because I will not sex them.” He complained about “being stalked and followed with sexual harassment,” about not feeling “safe,” and about fear of being “stuck out.” On the day of the assault, Idel fought with Cody, who struck him with a mop wringer, causing a left cheek abrasion and eye redness. Both men were charged with “fighting.” Defendants contested Idel’s version of events, but neither side filed sworn affidavits or submitted admissible evidence to support summary judgment, as required by F.R.C.P. 56. The R & R found that no one was entitled to

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summary judgment on protection from harm claims under *Farmer v. Brennan*, 511, U.S. 825, 832-3 (1994). While the allegation that defendants saw the attack “brewing soon enough that they should have intervened and stopped it before it started” may not prevail under *Farmer*, it cannot be dismissed on summary judgment given defendants’ improper submission and will “have to be resolved through trial or other means.” While Idel was in lockdown after the “fight,” a defendant allegedly directed subordinates “to cut off the heat, turn on blowers, and open all windows to punish Plaintiff.” Such conditions may not deprive “the minimal civilized measure of life’s necessities” in violation of the Eighth Amendment – see *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) – but “no party is entitled to summary judgment on this claim” either. Finally, the court dismissed Idel’s claim that he was denied Equal Protection on the basis of his sexual orientation, because he plead “nothing but a conclusory assertion that [defendants] acted or did not act based on Plaintiff being homosexual” – perhaps writing more broadly than intended: “A mere conclusory assertion that an action was taken based on membership in a suspect class is insufficient to make out an equal protection claim,” citing *Gregory v. McKennon*, 430 Fed. Appx. 306, 311 (5th Cir. 2011). The R & R reserved decision on whether Idel had exhausted administrative remedies under the Prison Litigation Reform Act. *William J. Rold*

NEW YORK – The *Buffalo News* (October 22, 2015, reported at 2015 WLNR 31339559) covered the acquittal of a New York State transgender prisoner who was criminally charged with having a contraband weapon (sharpened toothbrush) in her cell. Corrections officers searched Claudius Purifoy’s “cube” after receiving a

“tip” about her weapon. She protested that she had never seen the makeshift weapon and said it was “planted” by other inmates to “get her into trouble.” According to the news article, Purifoy’s life as a transitioning male-to-female transgender inmate in an all-male facility was “defined by harassment and discrimination by other inmates.” She isolated herself, showered separately and stayed in her cube, not socializing or using common areas. At her trial in Erie County Criminal Court, a former inmate who was housed on the same block testified that he saw other inmates in Purifoy’s cube opening her locker and “doing something” before the contraband was found. Judge Michael F. Pietruszka ended the proceedings by saying the case had not been proven beyond a reasonable doubt and found Purifoy not guilty. One can question whether Purifoy would have fared as well had her case remained in the internal prison disciplinary system and not been prosecuted in “outside” court. *William J. Rold*

NORTH DAKOTA – United States Magistrate Judge Charles S. Miller, Jr., screened gay inmate Travis L. Wedmore’s *pro se* complaint under 28 U.S.C. § 1915A and allowed him to proceed under three of his nine causes of action in *Wedmore v. Jorgenson*, 2015 WL 5793615 (D.N.D., Oct. 2, 2015). Two claims concern Wedmore’s attempted suicide and his housing in an observation strip cell following hospitalization. A third claim charges denial of Equal Protection based on sexual orientation. Judge Miller dismissed other claims, including one based on Wedmore’s classification as a sexual predator and his placement in administrative segregation. Judge Miller ruled that Wedmore “may” have a claim of laxity in response to his suicide threats (on which he acted), citing a trio of Eleventh Circuit cases applying the “deliberate indifference”

standard to suicide prevention. Upon his return from the emergency room, defendant’s placement of Wedmore in a room without even a “safety” blanket in cold weather (resulting in Wedmore’s “blacking out”) “may” also present a claim of denial of “life’s necessities” under the Eighth Amendment standard enunciated in *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), citing a string of Fourth and Seventh Circuit cases. Finally, Wedmore’s allegation that, of five inmates involved in sexual activity, only those admitting to be gay were placed in disciplinary segregation stated a viable Equal Protection claim – applying rational basis scrutiny and citing *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir.2006) (“class-of-one” case involving land use); *Johnson v. Johnson*, 385 F.3d 503, 530 (5th Cir.2004) (no “legitimate” interest justifies “giving less protection to homosexual inmates”); and *Jackson v. Raemisch*, 2010 WL 3062971 (W.D. Wisc. July 30, 2010) (“no conceivable rational basis for treating homosexuals more harshly than heterosexuals”). Cf. *Santiago v. Miles*, 774 F. Supp. 775, 787-8 (W.D.N.Y. 1991) (racial disparity in prison discipline states Equal Protection claim). It will be interesting to see what justifications/denials defendants submit now that they will be required to respond to the Equal Protection claim. *William J. Rold*

NEW YORK – All of the intricacies of federal litigation can sometimes be eclipsed by a simple state appellate decision. The Appellate Division (3rd Dept.) of the New York Supreme Court ordered New York prison officials to reinstate inmate Daniel Oliveira to his prison job after he claimed sexual orientation discrimination in *Oliveira v. Graham*, 2015 WL 5839365, 2015 N.Y. App. Div. LEXIS 7256 (Sept. 11, 2015). Oliveira lost his job after condoms were found in his work area and were presumed to be his “based

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upon his perceived sexual orientation.” (Readers are reminded that condoms are considered contraband and raise “security issues” in some prisons.) Oliveira filed a grievance protesting the action as discriminatory. While his grievance appeal was pending (no federal Prison Litigation Reform Act exhaustion here), Oliveira filed an Article 78 proceeding under the New York Civil Practice Law and Rules challenging the handling of his grievance. Specifically, correction officials referred the matter to their inspector general instead of to the Office of Diversity Management, as required by state regulations – 7 NYCRR 701.9[d][h] – when a prisoner grievance involves sexual orientation. The New York Attorney General conceded that these requirements were not met. Writing for a unanimous court, Justice Michael C. Lynch ruled that Oliveira’s grievance (which had been denied in the meantime) should have been referred to the Office of Diversity Management. On the merits, the denial of Oliveira’s grievance was also “arbitrary, capricious and without a rational basis” (New York citations omitted) because: (1) it did not address Oliveira’s claim of sexual orientation discrimination; and (2) it declined to reinstate Oliveira, despite finding no evidence to support an allegation that the condoms belonged to him. The court annulled the grievance decision and ordered Oliveira’s reinstatement. *William J. Rold*

NEW YORK – Transgender inmate Jason Lopez was denied participation in religious services on two occasions in 2014 because of her “hair” and her “sexuality.” She was also removed from a prison job with the remark that the prison was a “men’s facility” and needed “men” to do the work. U.S. District Judge Kenneth M. Karas dismissed the *pro se* claims but permitted Lopez to plead in *Lopez*

v. Cipolini, 2015 U.S. Dist. LEXIS 133799, 2015 WL 5732076 (S.D.N.Y., September 30, 2015). Lopez raised violations of the following by two defendants: the First Amendment; the Religious Land and Institutionalized Person Act (“RLUIPA”); the Eighth Amendment (harassment); and the Equal Protection Clause. After extensive discussion of exhaustion under the Prison Litigation Reform Act (with detailed focus on Second Circuit rules), Judge Karas found that Lopez failed to exhaust completely as to one defendant (because she commenced litigation prior to a grievance appeal decision); but she may have had an excuse (not understanding the procedure) as to the second, whom she did not grieve. Inasmuch as the job claim was not properly exhausted, the rest of the decision concerns the religious services denials – with Lopez first permitted Catholic but not Protestant services and then denied both. Judge Karas accepts Lopez’ religious sincerity and inmates’ residual right to participate in services – citing *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993) – but he doubts whether denial of two services was a “substantial burden” on her religious observance. Nevertheless, he grants leave to amend on this point if she can “explain why missing the two services placed a substantial burden on her religious beliefs” – noting that a stricter test (need to justify exclusion by a “compelling” government interest) applies under the RLUIPA, citing *Holland v. Goord*, 758 F.3d 215, 220 (2d Cir. 2014), and other Second Circuit law on shifting burdens of proof on this point. Judge Karas finds that the verbal comments accompanying her denials did not amount to “harassment” under the Eighth Amendment, since there was no physical injury, citing *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) – *but see* Seventh Circuit Judge Posner’s elaboration of prisoners’ claims based on verbal injury in *Beal*

v. Foster, 2015 U.S. App. LEXIS 17338 (7th Cir., October 2, 2015), reported in this issue of *Law Notes*. Judge Karas finds that Lopez stated an Equal Protection claim “because there is no obvious legitimate penological interest for Plaintiff’s exclusion from religious services based on her hair and sexuality” under a rational basis test, without determining whether a higher (“invidious”) scrutiny should apply to claims of LGBT discrimination. After all that, Judge Karas orders Lopez, who has been released and has not appeared for “the last several conferences” to notify the Court if she intends to pursue the case. *William J. Rold*

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U.S. DEPARTMENT OF STATE – The Department has announced to foreign service personnel that it is phasing out its domestic partnership benefits program in light of nationwide accessibility to same-sex marriage. *Washington Blade* (Oct. 19) reported that diplomatic and consular posts notified personnel on October 14 that the Department will begin to phase out the program on December 14, with an official end on September 30, 2018. Personnel posted to a country that does not provide for same-sex marriage can request up to ten days of administrative leave in order to travel to a jurisdiction where they can marry their partners in order to preserve their eligibility for spousal benefits coverage. The policy change was described as a direct result of the Supreme Court’s ruling in *Obergefell*. Since the policy has only been aimed at same-sex partners, the justification for it was seen to have ended with the court ruling. * * * The State Department also announced that it has recently changed its guidelines on refugee admissions to make it easier for lesbian, gay, bisexual, and transgender refugees to have their same-sex partners join them

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in the United States, by broadening the definition of “spouse” to take account of unmarried same-sex partners. The change pertains only to refugees from certain specified countries under the Process Priorities (P-3) family reunification program.

U.S. DEPARTMENT OF TREASURY

– The Treasury Department has published proposed regulations in the Federal Register to amend marital definitions in 26 CFR Parts 1, 20, 25, 26, 31, and 301 to take account of the Supreme Court’s decision in *Obergefell v. Hodges* by making clear that all legally contracted same-sex marriages will receive the same treatment under U.S. tax law as different sex marriages. Amendments are proposed to the Income Tax Regulations, Estate Tax Regulations, Gift Tax Regulations, Generation-Skipping Transfer Tax Regulations, Employment Tax and Collection of Income Tax at Source Regulations, and Regulations on Procedure and Administration. “In light of the holdings of *Windsor* and *Obergefell*,” says the proposal, “the Treasury Department and the IRS have determined that, for federal tax purposes, marriages of couples of the same-sex should be treated the same as marriages of couples of the opposite-sex and that, for reasons set forth in Revenue Ruling 2013-17, terms indicating sex, such as ‘husband,’ ‘wife,’ and ‘husband and wife,’ should be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses.”

U.S. CONGRESS – Rep. Jared Polis sought to add the proposed Equality Act to a bill pending in the House Committee on Education & the Workforce, the “Protecting Local Business Act,” which is intended by its Republican sponsors to help small businesses avoid unionization. Polis

argued that preventing discrimination by business was germane to the purposes of the bill, but Republican who control the committee objected, with Rep. David Roe raising a point of order that was agreed to by Chairman John Kline, refusing to allow consideration of the amendment. *Washington Blade*, Oct. 28.

CALIFORNIA – Governor Jerry Brown took action on several measures that had been approved by the state legislature. He approved SB 703, which prohibits state agencies from entering into contracts for \$100,000 or more with companies that fail to offer equal benefits to all employees without regard to their gender identity. He approved A.B. 960, which provides the unmarried couples using assisted reproduction to become parents will be recognized on the same basis as married parents from the birth of the child without need to go through adoption proceedings, removes the requirement that a doctor or sperm bank must be involved to avoid parental claims from sperm donors, and clarifies legal treatment of egg donors. He approved A.B. 959, which required state health and social service agencies to collect data on sexual orientation and gender identity whenever additional demographic data is collected, to help address LGBT disparities in health and well-being and to determine whether government programs successfully reach those needing care. The governor approved A.B. 827, intended to provide resources and information to aid teaching in identifying and assisting LGBT students who need support in dealing with bullying or lack of social assistance. The governor approved A.B. 329, which updates the state’s sexual health and HIV prevention curriculum for public schools to be inclusive of LGBT people and their families. The governor also approved S.B. 731, which provides that

transgender children be given foster care placements consistent with their gender identity. However, the governor vetoed A.B. 521, a measure that would have required every hospital that draws blood from emergency room patients to offer consensual HIV testing of that blood. Brown stated that the state should be focusing its testing resources on high risk populations, despite a recent recommendation by the federal Centers for Disease Control and Prevention that everybody age 13-65 should be offered HIV testing at least annually.

FLORIDA – The House Civil Justice subcommittee, determined to waste time on unnecessary legislation, approved HB 43, the Pastor Protection bill, ostensibly to protect religious authorities from being required to perform marriages of which they disapproved on religious grounds. Of course, the 1st Amendment already protects religious authorities from any state mandate to perform marriages. The chief sponsor, Rep. Scott Plakon (R-Longwood), said the measure was intended to provide an “extra layer of protection” to clergy, who of course need no protection in this respect, so the measure is clearly about pandering to an electoral base. Some clergy attending the hearing at which the vote was taken opposed the bill, among them Rev. Harold Thompson of United Church of Christ in Miami Beach, who said, “It’s not to protect the pastors or protect the churches, it’s to protect an agenda.” Rev. Brant Copeland of Tallahassee’s First Presbyterian Church said that the bill’s message to LGBT Floridians was offensive, and he urged the committee to vote it down. The measure was approved on a party-line vote of 9-4. Backers said it was necessary, among other things, to protect the tax-exempt status of churches (bizarre!), and would protect them from disqualification from

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receiving government grant money for social welfare programs. All this in a state where the state-wide public accommodations law does not prohibit sexual orientation or gender identity discrimination, a matter that the Republican-controlled state legislature has shown no inclination to address. *Palm Beach Post*, Oct. 8

FLORIDA – The Village of Wellington, which includes a large part of Palm Beach County, has enacted a civil rights ordinance that includes sexual orientation and gender identity as prohibited grounds for discrimination. The Village Council’s vote was unanimous. With a population of over 61,000, Wellington is the largest incorporated village in Florida and the fifth largest municipality in Palm Beach County. *watermarkonline.com*, Oct. 14.

FLORIDA – The Collier County School District’s Board approved changes to its policies on October 14, adding sexual orientation and gender identity to its anti-discrimination policy that already covered race, color, age, sex, and religion. Two members voted against adopting a policy that specified categories, stating that it should just generally prohibit discrimination on any basis. *Naples Daily News*, Oct. 14.

FLORIDA – The City of North Port Commission initially voted 3-1 on Oct. 27 to pass a non-discrimination ordinance that includes sexual orientation and gender identity or expression. After a few clarifying amendments were made, the measure passed again, this time on a 4-0 vote. *Charlotte Sun*, Oct. 29.

IDAHO – The Twin Falls school trustees voted 4-0 on October 12

to adopt a new gender identity and sexual orientation policy, which was to go into effect immediately. It was intended to ensure equal educational opportunity to all students regardless of their gender identity or sexual orientation, and provides, among other things, that school dress codes must be gender neutral. *Times-News*, Oct. 13.

INDIANA – The Carmel City Council voted 4-3 on October 5 to add sexual orientation and gender identity to the city’s anti-discrimination ordinance. The measure was originally sponsored by 6 of the Council’s 7 members, but ensuing controversy and battles over amendments to the original proposal ended up reducing support for the measure in the Council. Echoing the larger arguments in Indiana sparked by the passage early this year of a Religious Freedom Act that was subsequently amended to provide that it could not be used to protect discrimination, opponents of this measure claimed that it would endanger the religious freedom of Carmel citizens and businesses to conduct themselves in accord with their religious beliefs. The failure of the Indiana legislature to add sexual orientation or gender identity to the state’s civil rights law has led to legislative battles at the municipal level throughout the state over the past year, resulting in ordinances against sexual orientation and gender identity discrimination being adopted in several municipalities – Columbus, Zionsville, Terre Haute, Hammond and Muncie – in addition to some “long-standing” civil rights protections for LGBT people in Indianapolis and some other communities. *Indianapolis Star*, Oct. 6.

KENTUCKY – Blount County Commissioners rejected consideration of a proposed resolution on Oct. 7 that would ask God to spare residents

of the county from “wrath” due to compliance with the Supreme Court’s marriage equality ruling. The legislation threatened to make the county the laughingstock of the nation. Commissioner Karen Miller, the sponsor of the resolution, said she would resubmit her proposal at a future meeting. It was unclear how any governmental body in the U.S. could pass a resolution calling on God for anything consistent with the 1st Amendment’s Establishment Clause, but that lack of clarity does not impede Ms. Miller, who is convinced that the county faces the same fate as “Sodom and Gomorrah” if something is not done along this line. *Knoxville News-Sentinel*, Oct. 7.

NEW HAMPSHIRE – State Representative Eric Schleien, a Republican, has announced that he will be proposing that New Hampshire adopt a ban on sexual orientation change efforts (SOCE) therapy for minors, following the example of California, D.C., New Jersey, Oregon and Illinois. “I think our culture grows stronger when we’re able to accept different people’s lifestyles and treat people with honor and respect,” Schleien told a reporter for the *Associated Press* (Oct. 12). “You can’t convert people’s sexuality. I think most people get that.” Perhaps Schleien’s announcement presages the emergence of a bipartisan (or non-partisan) approach to the issue, although one of his colleagues, David Bates, expressed opposition to banning any therapy “for children, or a person of any age, that thinks that they are or want to be a gender other than what they biologically are,” thus signaling his misunderstanding of what Rep. Schleien is proposing. Schleien anticipates that opposition will center on parental rights to submit their children to therapy of their choosing, or religious liberty

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arguments. Addressing the first point, he said, “Just because you’re under 18 doesn’t mean that someone owns you to the point they can harm you.”

NEW JERSEY – The Mahwah Board of Education approved a new policy outlining how its school district should accommodate transgender students, voting 5-2. The policy allows students to self-identify their gender, although if a student is a minor the parents make the determination. The district will follow this determination in honoring name choices for record keeping and issues such as access to restrooms, locker rooms, physical education classes and athletic programs, all of which are traditionally segregated by sex. *Franklin Lakes –Oakland Suburban News*, Oct. 29.

NEW YORK – As noted in the lead story in this month’s issue of *Law Notes*, New York State Governor Andrew Cuomo announced on October 22 that the State Division of Human Rights (SDHR) would be publishing proposed regulations on November 4 to extend the protection of the New York Human Rights Law to individuals who encounter discrimination because of their gender identity or expression or diagnosis of gender dysphoria. The regulations rely on a statutory provision authorizing the SDHR to issue regulations interpreting the statute. A draft that was circulated subsequent to the speech indicated that the regulations would follow a now well-worn path in federal case law of defining “sex” as including gender identity or expression. In a new twist departing from the experience under federal law, the regulation would also identify gender dysphoria as a “disability” for purposes of the Human Rights Law. Unlike the Americans with Disabilities Act, which was specifically amended at the behest of

LGBT rights opponents to provide that “homosexuality” and “transsexualism” should not be deemed to be disabilities for purposes of that statute, New York’s Human Rights Law does not include any such express exclusions, and adopts a broad definition of “disability” to include diagnosable medical conditions. Being transsexual is not an illness or defect, but “gender dysphoria” is by definition a medical condition of experiencing a disjunction between anatomical sex and gender identity, so it seems an obvious move to include protection on this basis if it occurs because of an individual’s gender dysphoria, a diagnosable medical condition (for which the cure may be gender transition).

NEW YORK – The City of Buffalo has revised its civil rights ordinance, which forbids civil rights violations, to extend to a wider array of claims. The measure includes sexual orientation and gender identity or expression as prohibited grounds of discrimination, but has previously only permitted claims based on discriminatory actions that caused property damage, personal injury or death. Under the expanded law, employment and housing discrimination claims will be covered. The Council unanimously approved the amendment on October 13, and it was promptly signed into law by Mayor Byron W. Brown. Niagara District Councilman David A. Rivera was the prime sponsor of the bill in the Council. *Buffalo News*, Oct. 17.

WEST VIRGINIA – Sutton, W. Va., is the sixth city in the state to enact a prohibition on discrimination because of sexual orientation or gender identity in employment, housing and public accommodations. The Sutton City Council approved the measure on October 22. *Charleston Gazette-Mail*, Oct. 24.

LAW & SOCIETY NOTES

SUPREME COURT OF WISCONSIN

– The Wisconsin Supreme Court’s Judicial Conduct Advisory Committee issued Judicial Ethics Opinion No. 15-1 on August 18 (published at 2015 WL 5928528), opining that a judicial officer may not, because of his or her own religious beliefs, decline to be the “officiating person” at the marriage of two persons of the same sex. However, the Committee also opined that a judicial officer who did not want to officiate at same-sex weddings could withdraw altogether from officiating at weddings, since performing such a service is not strictly speaking an obligation of judicial officers. By withdrawing from officiating at any weddings, the officer will be complying with Supreme Court rules requiring impartial and diligent performance of official duties and avoiding impropriety and the appearance of impropriety. This formal opinion is “advisory only,” wrote the Committee, and was intended to respond to questions that had been posed to the committee by a petitioner who is not named in the opinion.

SAMHSA – The Substance Abuse and Mental Health Services Administration of the US Department of Health and Human Services has issued a report titled “Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth,” providing a review of research and clinical expertise related to conversion therapy. The report concludes that conversion therapy is not an appropriate therapeutic approach based on evidence, and “explores alternative ways to discuss sexual orientation, gender identity, and gender expression with young people,” according to a release from the Administration. The report includes the first publication of consensus

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statements developed by an expert panel of the American Psychological Association in July 2015. The report is available on the agency's website: <http://store.samhsa.gov/product/SMA15-4928>.

U.S. AMBASSADOR TO DENMARK RUFUS GIFFORD and **DR. STEPHEN DIVINCENT** were married on October 10 at Copenhagen City Hall in a ceremony performed by Mayor Frank Jensen, followed by a reception for more than 200 people at the Ambassador's residence. His Royal Highness Crown Prince Frederick and Her Royal Highness Crown Princess Mary of Denmark attended, as well as U.S. ambassadors to the U.K., Singapore, Hungary, Germany, Canada, South Africa, Austria, and the former ambassador to the Bahamas. The event included a traditional Danish dinner and ended with fireworks.

EEOC TARGETS ANTI-LGBT DISCRIMINATION – David Lopez, General Counsel of the Equal Employment Opportunity Commission, speaking at the annual North Carolina/South Carolina Labor and Employment Law Conference, announced the top ten priority issues for EEOC. Number four on the list is LGBT rights, and the agency has been moving aggressively to institute lawsuits or join existing lawsuits to establish that anti-LGBT workplace discrimination is unlawful as sex discrimination under Title VII of the Civil Rights Act of 1964. *Labor and Employment Law Blog*, Oct. 30, 2015.

THE KROGER CO., the largest grocery chain in the U.S. with more than 400 stores and more than 400,000 employees, will extend transgender health benefits to employees under an insurance plan provided through

Anthem Blue Cross Blue Shield, according to an Oct. 12 report in the *Cincinnati Enquirer*. Kroger is the nation's seventh largest civilian employer. It had earned an 85 out of 100 ranking on Human Rights Campaign's Corporate Equality Index, its one major fault being the lack of such benefits coverage. A Kroger employee who has been transitioning posted the information on her Facebook page on Oct. 9. The posting quoted an announcement distributed by an LGBT employee group at Kroger, which stated: "Beginning Jan. 1, 2016, medical procedures including surgery and drug therapy for gender reassignment will be covered up to a \$100,000 lifetime maximum for eligible associates and their dependents." The change does not cover employees subject to collective bargaining with the United Food and Commercial Workers, which are subject to collective bargaining.

AIDS-FREE GOAL – San Francisco Mayor Edwin M. Lee announced on October 29 San Francisco's intention to become the first city to "get to zero" in the battle against HIV/AIDS. Successful public health and education efforts in San Francisco have sharply driven down the number of newly-diagnosed cases of HIV infection. The mayor has dedicated \$1.2 million in his budget to support the Getting to Zero campaign, and announced a \$500,000 donation from the MAC AIDS Fund, a large corporate funder of HIV/AIDS work. The immediate goal is to reduce new HIV infections and HIV-associated deaths by 90% city-wide by 2020. In 2015, San Francisco had a record low 302 new HIV diagnoses, compared with 2,332 new HIV diagnoses in 1992 at the peak of the epidemic in that city. No baby has been born with HIV infection in San Francisco since 2005, according to an October 29 report in *State News Service*. The new campaign will also stress widespread distribution

of PREP medications to help avoid transmission of HIV by those who are already infected, as well as testing and treatment.

The annual meeting of the **AMERICAN SOCIETY OF HUMAN GENETICS** heard a presentation on October 8 by researchers from UCLA claiming 70% accuracy in identifying gay men based on analysis of epigenetic factors in combination with DNA analysis. The researchers studied 37 pairs of twins in which one identified as gay, and ten pairs in which both identified as gay. Based on their study, they devised a "machine learning algorithm" which found patterns in the genome that could be used to predict study participants' sexual orientation with 70% accuracy. Critics in the field urged caution in interpreting these results, pointing to the small size of the sample and that it did not establish causation, merely association. Tuck Ngun, lead author on the study, said, "The next steps are to explore how genetics and environmental factors interact to produce variations in sexual orientation over the life course." *Guardian*, Oct. 9.

A group calling itself the **AMERICAN PRINCIPLES PROJECT**, organized under the leadership of leading gay rights opponent Professor Robert P. George of Princeton University, has published a manifesto against the Supreme Court's *Obergefell* decision titled "Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*." The full text is available on the organization's website: americanprinciplesproject.org. It champions the dissenting opinions in *Obergefell*, arguing that the Court's opinion "substituted for traditional – and sound – methods of constitutional interpretation a new and ill-defined jurisprudence of identity – one that abused the moral concept of human

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dignity.” It claims that the decision will harm American society and undermine democracy, harvesting quotes from James Madison and Abraham Lincoln (his pre-presidential critique of court decisions enforcing the Fugitive Slave Laws). The Statement denies that “the Constitution is whatever a majority of the Supreme Court justices say it is” and calls on federal and state officials to refuse to recognize the *Obergefell* decision as a binding precedent apart from the plaintiffs in the actual cases that were appealed to the Supreme Court. The numerous signers – many of whom are faculty members of religiously-affiliated schools and other institutions – pledge to provide “legal and political assistance to anyone who refuses to follow *Obergefell* for constitutionally-protected reasons, can claim that they are not advocating a course of action that is “extreme” or “disrespectful of the rule of law,” once more appealing to Lincoln as having “regarded the claim of supremacy for the Supreme Court in matters of constitutional interpretation as incompatible with the republic principles of the Constitution,” this time in reflecting his criticism of the Dred Scott decision in his first inaugural address. The State concludes by arguing that the definition of marriage in the U.S. is not “settled” by the *Obergefell* decision.

GLAMOUR MAGAZINE – *Glamour Magazine* has named Caitlyn Jenner as one of its “Women of the Year” in recognition of her openness about transitioning and addressing the social issues facing the LGBT community, *UPI* reported on October 29.

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ROMAN CATHOLIC CHURCH – A three-week meeting of Cardinals in the

Vatican to consider Church policies on family law matters embraced some liberalizing proposals on divorce but stood firm against any tangible changes in the Church’s attitude towards gay people and same-sex marriage, merely repeating the existing bromides about how gay people should be treated with respect and sympathy and without discrimination, without backing away from the Church’s view that gay people are “intrinsically disordered” and that there was no ground within Catholicism for respecting same-sex marriages. The outcome was seen as disappointing for those who expected more liberalization under the leadership of Pope Francis, and even he expressed some public disappointment at the final session. Although the conclusions of this assembly were not “binding” on him as head of the Church, they would nonetheless constrain what he would be likely to do on his own initiative. Rumors were swirling about dissension within the Church, inasmuch as the overwhelming majority of Cardinals were appointed by the Pope’s more socially-conservative predecessors. American Cardinals were said to be among those pushing for the socially conservative anti-gay agenda, unsurprisingly.

ZIONIST CONGRESS XXXVI – The World Zionist Congress, meeting in Jerusalem October 20-22, adopted by overwhelming vote several resolutions supporting recognition for the rights of the LGBT community in Israel. The Zionist Congress commended the action of Education Minister Naftali Bennett in announcing increased support for the LGBT Community, and called for adequate government funding for the organizations Israel Gay Youth, Jerusalem Open House, and other LGBT organizations in Israel, and further called on Minister Bennet to “ensure that all Israeli students (and in particular in the

Orthodox school systems) take part in programing that promotes diversity, inclusion and equality for the LGBT community.” (This seems unlikely, given the open hostility of Orthodox community leaders for LGBT Jews.) The Congress also adopted a resolution acknowledging the struggles against anti-gay violence and discrimination, resolving “That it supports equal rights for the GLTB community and will enforce complete equality of their admission to Zionist entities, and will encourage their activities with National Institutions.” It is worth mentioning that the Zionist Congress is not a religious organization, but rather a political organization with a tradition of social liberalism.

AUSTRALIA – The new Prime Minister, Malcolm Turnbull, a supporter of marriage equality, has promised to adhere to the timetable established by his predecessor, Tony Abbott, putting off a plebiscite on same-sex marriage until after the next parliamentary election. However, he promises to have legislation passed prior to the plebiscite that could go into effect immediately if the public votes in favor of marriage equality, rather than waiting to get the results of the plebiscite prior to Parliamentary consideration of the necessary enabling legislation. The opposition Labour Party has promised to hold a plebiscite within 100 days after the next parliamentary election, and pro-gay elements within Turnbull’s Liberal Party are pushing for the same timetable, according to an October 22 report in *Australian Financial Review*.

CANADA – National elections that took place in October were deemed a triumph for the nation’s LGBT community, as gay-friendly Liberals took over control of Parliament with their leader, Justin Trudeau, an ardent

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LGBT rights supporter, installed as prime minister. In addition, the election of openly LGBT members of Parliament equaled a former all-time high, with six openly LGBT members being elected, including the first openly LGBT members from Alberta and Saskatchewan.

ENGLAND – The England & Wales Court of Appeal has rejected a claim for death benefits from a pension fund for a surviving civil union partner where the right to benefits had been earned well before English law allowed same-sex civil partnerships, much less same-sex marriages. John Walker, who has been drawing a pension based on his former employment since he retired in 2003, was advised that his civil union partner since 2006 will not be entitled to the same benefits that a surviving wife would be entitled to claim under similar circumstances, 2/3 of Walker's own pension. An Employment Tribunal ruled against him last year, stating that his civil partner would be entitled only to death benefits that accrued after December 2005, when civil partnership became legal. On October 8 the appellate court affirmed the tribunal's ruling, noting that European Union legislation, which provided the groundwork for the British civil union statute, did not have retrospective effect, and that legislative changes in the UK only applied to the future effects of a situation which arose under the law as it stood before the amendment, according to an only report by *News Bites – Private Companies* (Oct. 9). It was unclear how pension scheme trustees will react to this ruling, as many schemes have sought to accord equal treatment to civil partnerships, which require striking a balance between equality concerns and the extra costs of providing such benefits that were not anticipated when the schemes were first set up. * * * Justice Cobb of the High

Court in London ruled that a 14-year-old girl born after donor insemination must allow continued contact with her two fathers. *Telegraph.co.uk* (Oct. 15) reported that the girl, who has been "at the center of litigation between her two 'fathers' and two 'mothers' for half her life," was represented by a lawyer at a private hearing in the Family Division of the court. She sought to persuade Justice Cobb that she should be left to "reach her own conclusions" about whether to maintain any contact with her fathers. Cobb ruled that it is in the child's best interest to have a "limited form of relationship" with her fathers. She is the biological child of one of the fathers and her birth mother. The mothers had argued against the court requiring her to be made to stay in touch with her fathers. The parties are not identified in the court's opinion, other than a Father 1, Father 2, Mother 1, Mother 2, and the child at issue as A and her sister as B.

FINLAND – On October 23 the Parliament began working on various statutory changes necessary to facilitate the same-sex marriage act coming into effect in 2017. Although a majority of Parliament has voted in favor of marriage equality, negative reactions to the legislative proposals came from members of the Finns and Christian Democrat parties. The main supporters are part of the Left Block: Greens and the National Coalition Party. Ten changes in existing laws will be necessary to effectuate final passage of the marriage equality law in 2017. *yle.fi*, Oct. 23.

FRANCE – European press reports indicated that President Francois Hollande has "abandoned" his attempt to get Laurent Stefanini accepted as the new French ambassador to Vatican City. The nomination of the openly-gay Stefanini, a well-regarded diplomat

who had served successfully as the deputy ambassador in that post from 2001 to 2005, was met by prolonged silence from the Vatican, which does not by custom reject unacceptable ambassadors but merely ignores the nomination and fails to receive the ambassador formally. The Archbishop of Paris, Andrew Vingt-Trois, had backed the appointment when it was made in January. No explanation other than Stefanini's sexual orientation has been given for the Vatican's silence. The press reports indicated that Hollande did not intend to nominate another ambassador prior to the next French national elections in 2017. *Telegraph Online*, Oct. 11.

GREECE – On October 30 representatives from "all the main parliamentary parties signed an equality pledge in Athens" stating their commitment to registered partnership for same-sex couples, family law reform, legal gender recognition and combating anti-LGBT discrimination in Greece. This followed an "in-depth panel debate at ILGA-Europe's annual conference." During this event, Minister for Justice Nikos Paraskevopoulos committed to the adoption of a civil partnership bill, with a public consultation on proposed legislation expected to begin in November. *International Lesbian and Gay Association News Release*, Oct. 30.

INDONESIA – Aceh Province put into effect on October 23 a law that makes gay sex punishable by public caning. Anybody apprehended engaging in gay sex can face up to 100 strokes of a cane, a fine of up to 2.2 pounds of gold (about \$37,400 US), and imprisonment up to 100 months. Adulterers face the same potential caning, but not the fine or imprisonment. Aceh is the only province of Indonesia which observes a

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version of Islamic Shariah law instead of a secular penal code. *Associated Press*, Oct. 23.

ISRAEL – The nation’s LGBT Association has petitioned the Supreme Court for a ruling that the state must recognize same-sex marriages. The Association’s statement issued in connection with the filing, as reported in *Times of Israel* on Nov. 1, said, “According to previous rulings, if the rabbinical court does not recognize a marriage, the High Court has the authority to approve marriages in the civil courts.” A recent poll by the daily newspaper *Haaretz* found 70% support for same-sex marriages among the Israeli public, but the complex political arrangements in the country make legislative enactment of a marriage equality law unlikely. Marriages are performed in Israel only through religious institutions, and Jewish marriages are the sole province of the Orthodox rabbinate. Israelis who don’t want a religious wedding go overseas – frequently to Cyprus – in order to marry, and the civil authorities in Israel recognize such marriages. The status of same-sex marriages performed elsewhere is controversial. Although court rulings have required civil authorities to include such marriages on national identification documents and there is a limited degree of recognition, this petition seeks equal recognition on the same basis that different-sex civil marriages from abroad are recognized.

MALAYSIA – The Federal Court of Malaysia has set aside prior rulings by the High Court and the Court of Appeal that had recognized constitutional rights of transgender individuals as prevailing over Shariah law banning cross-dressing. According to the Federal Court, those lower courts lacked authority to issue the rulings.

The court said that the respondents had failed to follow procedures specified in Malaysia’s constitution for bringing such challenges. The court said that the applicants should have initiated their challenge to the Shariah-inspired statute in the Federal Court itself. This argument had been made to the court by the representative of the Negeri Sembilan government, which had enacted the law in question. Reported *MalayMailonline.com*, “The apex court’s decision today will set a precedent on other cases where state Islamic authorities are arguing that fundamental constitutional rights guaranteed to all Malaysians cannot be applied to determine the validity of Islamic laws.” (October 8).

NETHERLANDS – The Minister of Health, Edith Schippers, announced that the permanent ban on sexually-active gay men donating blood was being lifted, and the Netherlands would embrace a new policy similar to some other countries in Europe (Finland, Sweden, the U.K.) that gay men may donate blood if they have not had sex with another man within 12 months of the donation. As announced, the ban would bar currently sexually-active men from donating blood even if they follow safer sex guidelines and test negative for HIV, so some LGBT rights advocates characterized the new policy as unscientific and “disappointing.” Schippers’ statement proclaimed: “I am a staunch supporter of emancipation and equality of people, and at the same time responsible for the safe blood supply in the Netherlands.” She said the one-year rule is necessary to “guarantee” that donated blood is safe for use. *nltimes.nl*, Oct. 28.

NORWAY – On Oct. 30 the bishops of the Church of Norway announced that they were unanimously in favor of allowing same-sex couples to marry

in religious ceremonies. Last year’s synod had rejected a similar motion. The 12 bishops called for the synod – the church’s governing body – to adopt new rulings allowing the same marriage rights for same-sex and different-sex couples. The synod will next meet in April 2016. Under the proposal, each pastor could reserve the personal right to refuse to perform a ceremony based on his religious beliefs. Norway has allowed civil unions for same-sex partners since 2009, and the church ordains openly-gay priests. *AFP*, October 30.

SLOVENIA – The Constitutional Court has ruled that a statute allowing same-sex marriage and adoption of children by same-sex couples will be put up for a referendum. Parliament passed the law in March 2015, but it has yet to be enforced because an appeal was filed with the Constitutional Court demanding a referendum. Although no date was set by the court, the referendum was expected to be held “in the coming months,” according to a *Reuters* report in late October.

SOUTH AFRICA – The Dutch Reformed Church in South Africa has voted in favor of ordaining gay ministers, abandoning the requirement of minister celibacy, and recognizing same-sex relationships, according to an online report published Oct. 10 by *enca.com*. The Church’s moderator, Nelis Janse van Rensburg, stated: “It is historical because with this decision we actually are at a point where there can be no doubt that the Dutch Reformed Church is serious about human dignity. And you know that we are living in this country where we have so many problems with the dignity of people.” However, the new report noted that the decision by the Church is not necessarily binding on local councils and congregations,

which enjoy substantial autonomy to make such decisions. Van Rensburg said that the Church will now “liaise” with the government to make it possible for Dutch Reformed pastors to become “commissioners” who can perform same-sex weddings.

SPAIN – *Digital Journal*, 2015 WLNR 29689627 (Oct. 7), reports that a Spanish court has ruled in favor of a lesbian couple in their suit against a Madrid hospital that had refused to provide alternative reproductive technology services for them in their quest to have children. The hospital had relied on an order from the Health Ministry to restrict access to in vitro fertilization procedures, making them available only to couples who had unsuccessfully attempted to procreate through “normal” sexual intercourse over a period of 12 months. The lawsuit against the hospital, the health ministry and regional authorities, attacked this policy as discriminatory on the basis of sexual orientation. According to the news report, the court held that the hospital had “infringed” on the couples “fundamental right not to be discriminated for their sexual orientation” and ordered a payment of approximately \$5,600 (5,000 euros) in damages. The court ruled that Spain’s law on assisted reproduction does not allow this kind of discrimination, and prevails over the ministry directive.

PROFESSIONAL NOTES

Lambda Legal has announced the election of **LISA SNYDER**, **JEFFERY M. CLEGHORN**, and **KATRINA QUICKER** to its national board of directors. Snyder, a graduate of Tulane Law School, is Managing Director and Senior Financial Planner at First Republic Private Wealth Management in Los Angeles. Cleghorn manages the family law practice at Kitchens New Cleghorn LLC in Atlanta, and is a graduate of George Washington University Law School. Quicker is a partner in the Atlanta office

of BakerHostetler, specializing in intellectual property law, and is a graduate of the University of Toledo College of Law. Lambda Legal has also announced the addition of Ford Fellow **CAROLINE SACERDOTE** to its HIV Project. She is a 2015 Harvard Law School graduate. * * * Lambda Legal also announced that the new Regional Director for its Southern Regional Office in Atlanta will be Simone Bell, a former Georgia State Representative and Lambda Legal Community Educator.

A one-day workshop titled **“GENDER-BASED VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX (LGBTI) IN THE MUSLIM WORLD: SIN, SHAME, AND MIGRATION,”** will be held at the Dickson Poon School of Law, King’s College London, England, on January 30, 2016. The time to submit abstracts of papers and proposals for panels expired November 6. For information about attending the workshop, contact Ferya Tas (ferya.tas@kcl.ac.uk). Unfortunately we did not receive notice of this event in time for announcement in the October issue of *Law Notes*.

ALBIE SACHS, who was appointed by Nelson Mandela to the Supreme Court under the new South African Constitution, is the subject of a documentary titled “Soft Vengeance” that will be screened at the Newseum in Washington on November 20 at 6 pm, dedicated to Robert Kennedy on the 90th anniversary of his birth. Members of the Kennedy family and US Supreme Court Justice Sonia Sotomayor are anticipated to attend. Justice Sachs was a leading advocate of lesbian and gay rights on the Court, which with his leadership and participation issued many gay-affirmative decisions, including landmark rulings on marriage and immigration rights. Abby Ginzburg, a noted documentarian who has made important films on LGBT rights, is the director of the film.

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The attorney for the state argued that there was no New York precedent holding that HIV or AIDS is a “loathsome” disease for this purpose. While implying some reluctance to label those living with HIV in this way, and noting the lack of direct New York precedent, the judge concluded that societal prejudice against HIV-positive people justifies including it within this category.

“Viewed under the current societal lenses,” he wrote, “the asserted defamatory content here, that Ms. Nolan is presently diagnosed as HIV positive, from the perspective of the average person, clearly subjects her to public contempt, ridicule, aversion or disgrace and constitutes defamation per se. It would be hoped that an indication that someone is suffering from AIDS or that she has been diagnosed as HIV positive would not be viewed as indicative of some failure of moral fiber, or of some communicable danger, however our society is not so advanced.”

Scuccimarra considered it of “no moment” that the photo was used in a public service advertisement rather than a commercial advertisement when considering the part of Nolan’s lawsuit based on the civil rights law’s privacy provision. He found that there was no dispute that she never provided written consent for this use of her photograph, beyond photographer Cumbo’s original use described above, and that State Division made no attempt to contact her and obtain her consent. Having found that Nolan stated a claim under the Civil Rights Law and defamation law, Scuccimarra indicated that the next step will be a hearing on damages.

Nolan is represented by Erin Lloyd with the firm of Lloyd Patel. Lloyd told the *Law Journal* that they had hoped the case could be resolved without the need for lengthy litigation over damages, but they were ready to go to trial if necessary. Assistant Attorney General Cheryl Rameau of the New York State Law Department defended the State Division of Human Rights. The state could obviate the need for a trial on damages by making an appropriate settlement offer. ■

PUBLICATIONS NOTED

1. Aaron, Ryann M., Outing Anti-Gay Teaching in Schools: How the Constitutional Successes of Conversion Therapy Bans Provide Viable Arguments to Defend Bans on Heteronormative Education, 16 Rutgers J. L. & Religion 580 (Summer 2015).
2. Aponte, Caleb, Diversion and Deterrence: A Practical and Cost-Effective Approach to Addressing the Demand for Commercial Sex, Sex Trafficking, and the Sexual Exploitation of Women, 83 UMKC L. Rev. 747 (Spring 2015).
3. Boucai, Michael, Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J. L. & Humanities 1 (Winter 2015).
4. Bratza, Sir Nicolas – The Christine Goodwin Case: The Long Road to Transsexual Rights in the United Kingdom, 34 Hum. Rts. L.J. 245 (Dec. 31, 2014).
5. Burda, Joan M., *Obergefell v. Hodges*: The Effect of the Decision and Estate Planning for LGBT Couples, 87-SEP N.Y. St. B.J. 10 (Sept. 2015).
6. Calabrese, Sarah K., and Kristen Underhill, How Stigma Surrounding the Use of HIV Preexposure Prophylaxis Undermines Prevention and Pleasure: A Call to Destigmatize “Truvada Whores”, 105 Am. J. Pub. Health 1960, 2015 WLNR 29293920 (Oct. 1, 2015).
7. Chemerinsky, Erwin, The Return of the Jedi: The Progressive October 2014 Term, 18 Green Bag 2d 363 (Summer 2015) (why the Supreme Court’s 2014-15 Term was the most “liberal” in recent history, and the 2015-16 Term is likely to be one of the most conservative).
8. Cooper, Elizabeth B., The Power of Dignity, 84 Fordham L. Rev. 3 (Oct. 2015) (*Obergefell* Symposium Issue).
9. Davis, Adrienne D., Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor, 103 Cal. L. Rev. 1195 (if sex work is decriminalized, to what extent should it be regulated?).
10. Devins, Neal, and Saikrishna Bangalore Prakash, Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend, 124 Yale L.J. 2100 (April 2015).
11. Gay, Maj. Velma Cheri, “50 Years Later . . . Still Interpreting the Meaning of “Because of Sex” Within Title VII and Whether It Prohibits Sexual Orientation Discrimination, 73 Air Force L. Rev. 61 (2015).
12. Godsoe, Cynthia, Perfect Plaintiffs, 125 Yale L.J. Forum 136 (Oct. 12, 2015) (examines care with which marriage equality plaintiffs were chosen for test cases).
13. Howell, Ally, Windsor, Transgender Persons and the Law (2nd ed., ABA Press, 2015) (treatise).
14. Huntington, Clare, *Obergefell’s* Conservatism: Reifying Familial Fronts, 84 Fordham L. Rev. 23 (October 2015) (*Obergefell* Symposium Issue).
15. Hyer, James L., *Obergefell v. Hodges* and Issues of Judicial Civility, 87-SEP N.Y. St. B.J. 46 (Sept. 2015) (calls out Justice Scalia for the his temper tantrum in dissent).
16. Hyman, Andrew T., The Substantive Role of Congress Under the Equal Protection Clause, 42 S.U. L. Rev. 79 (Fall 2014).
17. Johnson, Samuel, Are You My Mother? A Critique of the Requirements for De Facto Parenthood in Maine Following the Law court’s Decision in *Pitts v. Moore*, 67 Maine L. Rev. 353 (2015).
18. Joslin, Courtney G., Marital Status Discrimination 2.0, 90 Boston Univ. L. Rev. 805 (2015) (argues for renewed attention to an overlooked category of employment discrimination).
19. Kozel, Randy J., Stare Decisis in the Second-Best World, 103 Cal. L. Rev. 1139 (Oct. 2015) (uses *Lawrence v. Texas* as part of analysis of the modern role of stare decisis in constitutional adjudication).
20. Landau, Joseph B., Roberts, Kennedy, and the Subtle Differences that Matter in *Obergefell*, 84 Fordham L. Rev. 101 (2015).
21. Leib, Ethan J., Hail Marriage and Farewell, 84 Fordham L. Rev. 41 (October 2015) (*Obergefell* Symposium Issue) (Could the Court’s marriage equality decision lead some states to reconsider various aspects of marriage?).
22. Lenhardt, R.A., Race, Dignity, and the Right to Marry, 84 Fordham L. Rev. 53 (October 2015) (*Obergefell* Symposium Issue).
23. Lewis, Korey, The Road to Inequality is Paved With Good Intentions: The Effect of Language in Domestic Violence Statutes on Male Victims, 83 UMKC L. Rev. 789 (Spring 2015).
24. Lucas, Lauren Sudeall, Identity as Proxy, 115 Colum. L. Rev. 1605 (Oct. 2015) (reconceptualizing Equal Protection Doctrine to focus on hierarchy rather than status).
25. Mayeri, Serena, Marital Supremacy and the Constitution of the Nonmarital Family, 103 Cal. L. Rev. 1277 (Oct. 2015).
26. Miranda, David P., President’s Message, 87-SEP N.Y. St. B.J. 5 (Sept. 2015) (celebrating the Supreme Court’s marriage equality decision).
27. O’Rourke, Anthony, Substantive Due Process for Noncitizens: Lessons from *Obergefell*, 114 Mich. L. Rev. First Impressions 9 (Sept. 2015).
28. Oleske, James M., Jr., The Evolution of Accommodation: Comparing the Unequal Treatment of Religion Objections to Interracial and Same-Sex Marriages, 50 Harv. Civ. Rts. – Civ. Lib. L. Rev. 99 (Winter 2015).
29. Palmer, Nancie, Charlene L. Smith, Tova Verchow, and Jennifer Dale, Identity: Societal and Legal Ramifications with Special Focus on Transsexuals, 39 Nova L. Rev. 117 (Winter 2015).
30. Powell, Catherine, Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality, 84 Fordham L. Rev. 69 (2015).

31. Provost, Rene, Teetering on the Edge of Legal Nihilism: Russian and the Evolving European Human Rights Regime, 37 Hum. Rts. Q. 289 (May 2015).
32. Rubenstein, Joshua S., Unmarried Couples, 42 Est. Plan. 21 (1 November, 2015).
33. Seppera, Elizabeth, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453 (Oct. 2015) (the dangerous infiltration of *Lochner*-style analysis into free exercise of religion doctrine as a way of overriding regulation of business activity).
34. Shay, Giovanna, PREA's Peril, 7 Northeastern U. L.J. 21 (Spring 2015) (critical examination of regulations implementing the Prison Rape Elimination Act, which was intended, among other things, to enhance the safety of LGBT inmates).
35. Sifris, Ronli, Involuntary Sterilization of HIV-Positive Women: An Example of Intersectional Discrimination, 37 Hum. Rts. Q. 464 (May 2015).
36. Slone, Joshua A., Comment: Whose Morality Is It Anyway?: Recognizing the Tension Between Morality Laws and the Establishment Clause, 13 Georgetown J. L. & Pub. Pol'y 49 (Winter 2015).
37. Tchividjian, Basyle J., Catching American Sex Offenders Overseas: A Proposal for a Federal International Mandated Reporting Law, 83 UMKC L. Rev. 687 (Spring 2015).
38. Tobias, Carl, Marriage Equality Comes to Virginia, 49 U. Richmond L. Rev. 1193 (May 2015).
39. Torres, Ron, *Burwell v. Hobby Lobby Stores, Inc.*: The Art and Craft of Religious Liberty Exceptions for Conscientious Objectors, 36 Whittier L. Rev. 569 (Spring 2015).
40. Tweedy, Ann E., Tribes, Same-Sex Marriage, and *Obergefell v. Hodges*, 62-NOV Fed. Law. 6 (Oct/Nov 2015).
41. Wiik, Kenneth Aarskaug, Ane Seierstad, and Tuid Noack, Divorce in Norwegian Same-Sex Marriages and Registered Partnerships: The Role of Children, 76 J. Marriage & the Family 919 (Oct. 1, 2014), 2014 WLNR 37780241.

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