

L G B T

LAW NOTES

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TRUMP PICKS GORSUCh

*Supreme Court Nominee Has Disconcerting Record of
Favoring Exemptions For Religious Objectors Wishing
Not to Comply with Neutral Laws of General Applicability*

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Trump's Nomination of Neil Gorsuch May Endanger LGBT Rights Claims at the Supreme Court

When Associate Justice Antonin Scalia died last February 13, then-candidate Donald J. Trump said that if he were elected, he would appoint somebody in the mold of Scalia to take his place. This was in the context of Senate Majority Leader Mitch McConnell's statement, immediately after the announcement of Scalia's death, that the Republican majority in the Senate would not consider, much less confirm, anyone nominated by President Obama to fill that seat. As far as the Senate majority was concerned, Obama had gotten his two seats on the Court in his first term, with the appointments of Justices

Justice, should have gone to Lyndon Johnson, whose attempt to elevate Abe Fortas to Chief Justice on the retirement of Earl Warren misfired, resulting in Warren postponing his retirement until after Nixon took office. The four Democratic appointees on the current eight-member Court were nominated by Clinton and Obama, and the four Republican appointees were nominated by Reagan, Bush I, and Bush II. At his death, Scalia was the senior member in terms of years of service, having taken the bench in 1986.

The initial reaction to the Gorsuch nomination by some Supreme Court observers was that it essentially restores

confirmation would have reduced the deeply conservative contingent of the Court to three members, as against a Democratic majority plus Anthony Kennedy, a Reagan appointee who sits at the ideological center of the Court, tipping the balance one way or the other on a case-by-case basis. Although Garland's record on the D.C. Circuit suggests a centrist judge without strong ideological leanings, that would place him somewhere between Kennedy and the incumbent Democratic appointees on the ideological scale. Most significantly, Garland's confirmation would have given the Supreme Court a Democratic majority for the first

The opening created by Justice Antonin Scalia's death could have been of monumental significance had the Senate given the usual consideration and vote to Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland, Obama's nominee.

Sonia Sotomayor and Elena Kagan, and was entitled to no more. They saw the Scalia seat as theirs.

As a practical matter, looking back over the last several decades, presidents have generally gotten to fill at least two seats on the Court, as was the case with Presidents Obama, George W. Bush, Bill Clinton, and George H.W. Bush. Ronald Reagan got to appoint four (but had to nominate six to get there, as two nominations foundered), but Reagan came to office following a president who got to make no Supreme Court appointments, Jimmy Carter, so it is not surprising that he had more openings to fill. Carter's predecessor, Gerald Ford, had only one appointment during his partial term after Richard Nixon's resignation in disgrace, and Richard Nixon had four appointments, but his first one, Warren Burger as Chief

the ideological balance of the Court that existed prior to Scalia's death. Setting aside the many cases each term that the Court decides by unanimous or near-unanimous votes, ideological balance comes into play on issues where there is a sharp divide between progressives and liberals, generally Democrats, and conservatives, generally Republicans. Those are the cases decided 6-3 or 5-4, and since Scalia's death, the Court has deadlocked 4-4 on some significant cases, resulting in leaving lower court decisions in place without creating a new national precedent.

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time since the Lyndon Johnson administration in the 1960s.

A group of academics from the University of California at Berkeley, Professors Lee Epstein, Andrew D. Martin, and Kevin Quinn, released a study on December 14 analyzing how the Court's ideological disposition would be affected by the appointment of those on Trump's previously announced lists, which were based on suggestions he received from conservative think-tanks. They concluded that most of the sitting judges on that list, based on close scrutiny of their judicial records, would have voting patterns similar to Scalia and Samuel Alito, who was appointed by George W. Bush to the seat vacated by Sandra Day O'Connor, and whose appointment was then seen to have moved the Court rightward. They placed Alito and Scalia close

together on the ideological scale, with Scalia slightly more conservative than Alito. They rated Gorsuch as among the more conservative judges on the list, and situated him on the ideological voting scale between Scalia and Clarence Thomas, but somewhat closer to Scalia. Thus, on balance, Gorsuch's addition to the Court would move it to a more conservative disposition than it had before Scalia died, but probably without affecting how cases would have been decided had Gorsuch been sitting in Scalia's chair for the past several terms of the Court.

Based on his writings on and off the bench, it is clear that Gorsuch is a committed "originalist" more in the mold of Thomas than of Scalia, who in recent years had taken to describing himself as a "faint-hearted originalist"

In one, *Druley v. Patton*, 601 F. Appx 632 (Feb. 3, 2015), an Oklahoma state prisoner was incarcerated in 1986, at which time she had already gone through gender transition, but had been housed in a men's prison. She complained that, over the years, there had been frequent interruptions in hormone treatments provided by the prison, as well as a failure to maintain the dosages she claimed were appropriate, and that her request to be allowed to wear feminine underwear had been denied. The case came before a 10th Circuit panel after the district court denied Druley's request for a preliminary injunction, upon the recommendation of a magistrate judge. Druley was representing herself, and her complaint had obvious flaws that made it unlikely she would succeed, but the biggest problem she faced was that

Transgender Health (WPATH), which has been recognized as authoritative by many federal courts.

Furthermore, as Circuit Judge Jerome Holmes, writing for the panel that included Gorsuch, pointed out, the "Standards of Care" published by WPATH "are intended to provide flexible directions," leaving it up to individual professionals and organized programs to modify as particular cases require. As Druley had presented "no evidence that the [Oklahoma Department of Corrections] defendants failed to consider the WPATH's flexible guidelines, failed to make an informed judgment as to the hormone treatment level appropriate for her, or otherwise deliberately ignored her serious medical needs," she could not meet the 8th Amendment standard of showing it likely that she could persuade a court that ODOC was "deliberately indifferent" to her serious medical condition. She asserted that she received no hormone therapy at all from 1988 until 2011, when ODOC finally began providing therapy, but her quest for injunctive relief was to force them to increase her dosage, not to seek damages for her past deprivation.

Perhaps more significantly, the court also rejected her challenge to the prison's refusal to let her wear feminine underwear or to be moved to a different building in order to alleviate an asthma condition. These issues would not normally raise constitutional concerns under the 8th Amendment, and in the context of a 14th Amendment equal protection challenge, Druley again confronted the problem of existing 10th Circuit precedents from 2007 and 1995, holding that transgender people are not a "suspect class" and thus can be subjected to unequal treatment if there is a legitimate purpose for the treatment. See *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (2007); *Brown v. Zavaras*, 63 F.3d 967 (1995). In this case, wrote Judge Holmes, "Ms. Druley did not allege any facts suggesting the ODOC defendants' decision concerning her clothing or housing do not bear a rational relation to a legitimate state purpose."

Gorsuch has not written any opinions for the 10th Circuit on LGBT issues, although he has joined two unpublished opinions written by other judges in cases filed by transgender plaintiffs.

because of his gradual acceptance of some constitutional interpretations that depart from what the founding generation might have thought constitutional provisions meant. Thomas, as shown in his dissenting opinion in *Obergefell v. Hodges* (the 2015 marriage equality case), clings to archaic constructions of constitutional language – such as the use of "liberty" in the due process clause – because they are the meanings that American and English lawyers would have attached to the term in 1791 when the Bill of Rights was adopted.

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a 10th Circuit panel had ruled in 1986 that transgender inmates do not have a constitutional right to receive hormone therapy. See *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986).

Although 1986 is practically the dark ages in terms of federal jurisprudence about gender identity issues, that panel decision has never been overruled, and is thus binding on courts in the 10th Circuit until the issue is decided by the Supreme Court or an expanded *en banc* panel of the 10th Circuit decides to overrule it. Thus, it is not surprising that the magistrate recommended dismissing the case. In addition, Druley had not suggested to the court what the appropriate dosage of hormones would be, asserting that the prison should follow the treatment levels suggested by the World Professional Association for

Rejection of Druley's 8th and 14th Amendments claims was premised on prior 10th Circuit precedent that was binding on the court and that could only be changed by Supreme Court or 10th Circuit *en banc* overruling. It is difficult to read much into this opinion concerning the views of Judge Gorsuch, who merely signed on to this opinion.

In the other case, Gorsuch was sitting as a guest in the U.S. Court of Appeals for the 9th Circuit, which was considering a restroom access dispute involving a transgender instructor and graduate student at an Arizona community college, *Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (2009). Rebecca Kastl, a transgender woman who was presenting as female, but had not yet had sex reassignment surgery, was banned by the college from using the women's restroom after other women complained about a "man" in their restroom. After these complaints, the college did not renew her teaching contract. Kastl filed sex discrimination claims under Title IX and Title VII, but the district court in Arizona granted summary judgment to the college. See 2006 WL 2460636.

The 9th Circuit's unpublished 2009 decision is a "Memorandum" not attributed to any of the individual judges on the three-judge panel, so it could be by Gorsuch, or more likely was drafted by a clerk and then approved by the panel. The opinion acknowledges that a transgender person could pursue a sex discrimination claim under both Title VII and Title IX using a sex-stereotyping theory to come within the scope of the statute. But that is, of course, only the first step in a discrimination case. After finding that Kastl's complaint had stated a *prima facie* case of gender discrimination, the court found that the college had "satisfied its burden of production under the second stage" of the analysis by presenting evidence that "it banned Kastl from using the women's restroom for safety reasons." At that point, Kastl would have to show that this reason was a pretext for discrimination, but the court found that she "did not put forward sufficient

evidence demonstrating that MCCCD was motivated by Kastl's gender." Thus, the college was entitled to summary judgment. By the same token, the court rejected Kastl's arguments based on constitutional claims of privacy and protected expression.

The court added a footnote that tended to undermine the reasonableness of its ruling. "We note that the parties do not appear to have considered any type of accommodation that would have permitted Kastl to use a restroom other than those dedicated to men. After all, Kastl identified and presented full-time as female, and she argued to MCCCD that the men's restroom was not only inappropriate for but also potentially dangerous to her." The footnote suggests some sensitivity to Kastl's concerns, but not enough to cause the appellate panel to reverse the summary judgment.

This opinion, perhaps more than the prison ruling, might say something about Gorsuch's opinions about discrimination claims by transgender students and employees of public colleges, and more generally under statutes forbidding discrimination "because of sex," and is perhaps more salient than the *Druley* case in figuring out Gorsuch's views, since the anonymously authored opinion might conceivably be by him and, at least, he voted to adopt it. In this case, by the way, the plaintiff was represented by a Tucson attorney, Andrew Martin Jacobs, and Lambda Legal filed an amicus brief by F. Brian Chase in support of Kastl's appeal.

The most important LGBT rights decisions by the 10th Circuit in recent years, its two rulings striking down bans on same-sex marriage in Utah and Oklahoma, were decided by three-judge panels that did not include Gorsuch. Although he had already begun serving on the court, Gorsuch was also not on the panel that decided *Etsitty v. Utah Transit Authority*, a 2007 decision noted above that rejected the argument that gender identity was a suspect classification in the context of a transgender public employee's equal protection claim.

Although Gorsuch is thus not "on the record" directly on LGBT issues, his overall record suggests that there are good grounds for the LGBT community to oppose his confirmation. He was part of the 10th Circuit *en banc* panel in the infamous *Hobby Lobby* case (*see Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013)), and contributed his own concurring opinion, 723 F.3d at 1152-1163, containing language suggesting that he would support broad religious exemptions from antidiscrimination laws.

Now pending before the Supreme Court is a petition to review a case from Gorsuch's home state, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, in which the state courts upheld a ruling that a baker violated the state's public accommodations law by refusing on religious grounds to bake a wedding cake for a same-sex couple. If that petition is granted (and the Court recently requested that the record be sent up by the Colorado courts after listing the petition for discussion at its last two conferences, signaling interest in the case) and Gorsuch is quickly confirmed, it could be among the first cases argued after he takes his seat. (The Court has scheduled arguments through the end of February, and is scheduled to conclude hearing arguments for this term in April.) Gorsuch's strong solicitude for religious freedom claims suggests he would be very receptive to the baker's arguments. Already pending before the Court, and scheduled for argument on March 28, is the *Gloucester County School Board* case from Virginia, presenting the question of court deferral to agency interpretation of ambiguous regulations – a subject on which Gorsuch is an outspoken opponent of deferral – and also of the appropriate interpretation of Title IX in the context of transgender student discrimination claims. Most likely to arrive at the Court sometime soon would be the question of whether sexual orientation claims may be asserted under Title VII,

inasmuch as many observers predict that the 7th Circuit will issue an *en banc* ruling in the *Hively* case agreeing with the EEOC's interpretation of the statute, immediately creating a substantial circuit split and setting the stage for a certiorari grant if the employer appeals.

In an essay he published in 2005, Gorsuch expressed opposition to civil rights impact litigation, characterizing it as an attempt by liberal groups to advance their agenda through the courts rather than through the democratic process of legislation. He left no doubt that he would have rejected an attempt to get a court on which he sat to order states to allow same-sex marriages, based on his view that such policy issues should not be decided in the courts. His views on this are consistent with those of the four *Obergefell*

Although Gorsuch also has not ruled in an abortion case, he joined a dissent from the 10th Circuit's refusal to reconsider a panel ruling. The case involved whether a religiously-affiliated organization with religious objections to contraception methods that it deemed to be a form of abortion could be required under the Affordable Care Act to notify the government of its objections, in order that the government arrange for the contraceptive coverage through alternative means. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015). The dissent endorsed the argument that the organization's refusal to be complicit in any way with providing coverage – even through such a minimal requirement as notifying the government that the organization would not provide the coverage – placed a

should be excused from complying with antidiscrimination laws. There is also widespread speculation that the Trump Administration may release an Executive Order allowing federal contractors and federal employees to discriminate in providing services and making employment decisions based on religious beliefs. Such an Order would undoubtedly be challenged in litigation that could end up in the Supreme Court.

Gorsuch was unanimously confirmed by the Senate on a voice vote after his nomination to the 10th Circuit by President Bush in 2006. He has all the credentials that suggest an easy confirmation: elite education (Columbia, Oxford, Harvard Law), federal clerkships (including the Supreme Court), practice in a big firm, service as a federal appeals judge, no scandal attached to his name, and a reputation as a collegial judge who writes in a clear, conversational style, without the kind of hyperbole, venom, and sarcasm that Scalia employed in his dissenting opinions. Gorsuch has been a frequent dissenter on the 10th Circuit, but his dissents are temperate and dispassionate in tone and closely reasoned, although they frequently rest on conservative premises that most progressives would instinctively reject. He can't be opposed as technically unqualified, but he can be characterized as far to the right of the judicial "mainstream," justifying firm opposition to the nomination by those concerned with LGBT rights, reproductive rights, and the ability to live in a civil society that does not countenance disadvantaging people because of the religious beliefs of legislators or employers. Although Gorsuch's appointment would not change the Supreme Court line-up from the DOMA and marriage equality cases, it might well affect future LGBT rights disputes at the Court, such as the pending transgender discrimination case under Title IX and religious exemption cases and, of course, it would be a step towards the Republicans' ultimate goal of cementing an extreme right-wing majority on the nation's highest bench. ■

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dissenting justices. (Chief Justice Roberts famously stated at the end of his dissent that the Court's decision had "nothing to do with the Constitution.") He has also expressed disagreement with the Supreme Court's *Chevron* deference doctrine to administrative agency interpretations of ambiguous statutes and regulations. This would be problematic in future LGBT rights cases, although it seems likely that most of the agency interpretations during the Trump Administration will be less supportive of LGBT rights than they were during the Obama Administration. Indeed, it is possible that in future cases LGBT rights advocates may be asking the Court *not* to defer to Trump Administration interpretations of statutes and regulations!

substantial burden on the organization in violation of the federal Religious Freedom Restoration Act.

Gorsuch appears to place such heavy weight on an expansive reading of the Free Exercise Clause that it would not be much of a stretch to suggest that he might be willing to overrule the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990, opinion by Scalia), an important case holding that the 1st Amendment does not privilege people to violate neutral state laws of general application based on their religious beliefs. This ruling led to the enactment of the federal RFRA and subsequent state RFRA statutes, which are now at the heart of arguments that people with religious objections to same-sex marriage or gender transition

Houston Benefits Dispute May Bring Marriage Equality Issue Back to the Supreme Court

Conservatives eager to bring the marriage equality issue back to the U.S. Supreme Court after President Donald J. Trump has had an opportunity to appoint some conservative justices may have found a vehicle to get the issue there, in an employee benefits dispute from Houston. On January 20, the Texas Supreme Court announced that it had “withdrawn” its September 2, 2016, order rejecting a petition to review a ruling by the state’s intermediate court of appeals that had implied that the U.S. Supreme Court’s 2015 marriage equality ruling, *Obergefell v. Hodges*, 135 S. Ct. 2584, might require Houston to provide the same spousal health benefits to same-sex as different-sex spouses of City workers. Instead, announced the Court, it had reinstated the petition for review and scheduled oral argument for March 1, 2017. *Parker v. Pidgeon*, 477 S.W.3d 353 (Tex. 14th Dist. Ct. App., 2015), review denied, *sub nom. Pidgeon v. Turner*, 2016 WL 4938006 (Texas Supreme Ct., September 2, 2016), No. 16-0688, Order withdrawn, motion for rehearing granted, petition reinstated (Jan. 20, 2017).

The plaintiffs in the Houston benefits case, Houston taxpayers Jack Pidgeon and Larry Hicks, had filed a motion for rehearing with active support from Governor Greg Abbott and Attorney General Ken Paxton, both ardent marriage equality opponents eager to chip away at the marriage equality ruling or even to get it reversed. The Texas Supreme Court’s order denying review had been issued over a fervent dissenting opinion by Justice John Devine, who argued for a limited reading of *Obergefell*, and the Republican leaders’ amicus brief in support of review channeled Devine’s arguments.

Trump’s nomination of a conservative to fill the seat left vacant when Justice Antonin Scalia died last February would not change the Supreme Court line-up on marriage equality.

Obergefell was decided by a 5-4 vote, with Scalia dissenting. However, it is possible – even likely, if rumors of a possible retirement by Justice Anthony Kennedy at the end of the Court’s 2017-2018 Term are accurate – that Trump will get an opportunity to replace the author of the *Obergefell* decision with a more conservative justice in time for the Court’s 2018-19 Term. Regardless how the Texas Supreme Court rules on this appeal, its interpretation of the scope of *Obergefell* could set up a question of federal constitutional law that could be appealed to the U.S. Supreme Court, and once the issue gets to the Court, it is possible that the *Obergefell* dissenters, strengthened in number by new conservative appointees, could take the opportunity to narrow or even overrule the marriage equality decision.

The Houston dispute dates back to 2001, when Houston voters reacted to a City Council move to adopt same-sex partner benefits by approving a City Charter amendment that rejected city employee health benefits for “persons other than employees, their legal spouses and dependent children.” In 2001 same-sex couples could not legally marry anywhere in the world, so this effectively denied benefits to any and all same-sex partners of City employees. Texas was also one of many states that put firm bans on same-sex marriage into both its constitution and family law statute.

After the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act in June 2013, Houston Mayor Annise Parker, an openly-lesbian longtime LGBT rights advocate, announced the extension of health benefits to same-sex spouses of City employees. Although same-sex couples could not then marry in Texas, they could go to any of a number of other states to get married, including California and New York and, most conveniently as a matter of geography, Iowa. Parker and her City Attorney concluded that

under the Supreme Court’s reasoning in the DOMA case, *United States v. Windsor*, 133 S. Ct. 2675, Houston’s city government was obligated to recognize lawfully contracted same-sex marriages of city employees and provide them the same benefits that were accorded to other city employees. Federal constitutional requirements would override the City Charter ban as well as state law.

Taxpayers Pidgeon and Hicks filed suit in state court, contending that Parker’s action violated the Texas Constitution and statutes, as well as the city charter amendment. They persuaded the trial judge to issue a temporary injunction against the benefits extension while the case was pending. The City appealed that ruling to the 14th District Court of Appeals, which sat on the appeal as new marriage equality litigation, sparked by the *Windsor* ruling, went forward in dozens of states including Texas. A Texas federal district judge ruled in 2014 in the *De Leon* case that the state’s ban on same-sex marriage was unconstitutional. The U.S. 5th Circuit Court of Appeals heard the state’s appeal of that ruling in January 2015. After the U.S. Supreme Court ruled for marriage equality in June 2015, the 5th Circuit issued its decision upholding the Texas district court, 791 F.3d 619, which in turn ordered Texas to allow and recognize same-sex marriages. This prompted the 14th District Court of Appeals to issue its decision on July 28, 2015.

The Court of Appeals ruling in *Parker v. Pidgeon*, 477 S.W.3d 353, said, “Because of the substantial change in the law regarding same-sex marriage since the temporary injunction was signed, we reverse the trial court’s temporary injunction and remand for proceedings consistent with *Obergefell* and *De Leon*.” The court did not rule on the merits, merely sending the case back to the trial court to issue a decision “consistent with” the federal marriage

equality rulings. What those rulings may require in terms of city employee benefits is a matter of some dispute.

Pidgeon and Hicks petitioned the Texas Supreme Court to review this court of appeals decision, but the court denied that petition on September 2, 2016, with Justice Devine dissenting. Devine argued that the court should have taken up the case because, in his view, the majority of the court “assumed that because the United States Supreme Court declared couples of the same sex have a fundamental right to marry, the Equal Protection Clause of the Fourteenth Amendment requires cities to offer the same benefits to same-sex spouses of employees as to opposite-sex spouses. I disagree.” He continued: “Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review. Because the court of appeals’ decision blurs these distinctions and threatens constitutional standards long etched in our nation’s jurisprudence, I would grant review.”

Justice Devine was mistaken as to the court of appeals decision. That court did not hold in its July 28 ruling that same-sex spouses of Houston employees are entitled to health benefits from the city. Rather, it ruled that because of “substantial change in the law” since the temporary injunction was issued, the injunction should be reversed and the case sent back to the trial court for “proceedings consistent with *Obergefell* and *De Leon*.” If the trial court, on reconsideration, concluded that *Obergefell* and *De Leon* did not require the City to extend benefits to same-sex spouses of its employees, as Justice Devine argued in his dissent, the trial court could still rule in favor of Pidgeon and Hicks. All the court of appeals directed the trial judge to do was to rethink the case in light of the new federal rulings.

Devine’s argument rests on a very narrow reading of *Obergefell*. He interprets the Supreme Court’s decision to be sharply focused on the right of same-sex couples to marry, highlighting the Court’s conclusion that the right to marry is a “fundamental right.” Thus, a

state would have to have a “compelling interest” to deny the right, a test that the Supreme Court found was not met. However, pointed out Devine, the Supreme Court never explicitly said that the federal constitution requires state and local governments to treat all marriages the same, regardless of whether they are same-sex or different-sex marriages. And, he argued, public employees do not have a fundamental constitutional right to receive health insurance benefits from their employer. Thus, he contended, the state could decide who gets benefits based on its own policy considerations, which the courts should uphold if they satisfy the relatively undemanding “rationality” test that is used when a fundamental right is not at stake. As to that, he argued that the state’s interest in procreation by married different-sex couples could justify extending benefits to them, but not to same-sex couples.

A contrary argument would note that Justice Kennedy’s opinion in *Obergefell* specifically listed health insurance as one of the many benefits associated with marriage that contributed towards the conclusion that the right to marry was a fundamental right because of its importance to the welfare of a couple and their children. Similarly, Justice Kennedy did not consider the “procreation” argument persuasive enough to justify denying the right to marry to same-sex couples. On the other hand, the Supreme Court did not say anywhere in its opinion that states are constitutionally required to treat same-sex and different-sex couples exactly the same in every respect, ignoring any factual distinctions between them. Justice Devine’s argument seems strained, but not totally implausible, especially in the hands of a conservatively-inclined court.

Timing is everything in terms of getting an issue before the Supreme Court, especially if the aim of Texas conservatives and their anti-LGBT allies around the country is to get the issue there *after* Trump has had two appointments. Once the Texas Supreme Court hears oral argument on March 1, it could take as long as it likes to issue a ruling on the appeal, and it could

be strategic about holding up a ruling until it looks likely that any Supreme Court appeal would be considered after the 2017-2018 Term of the Court has concluded in June 2018. After the Texas Supreme Court rules, the losing party could take up to 90 days to file a petition in the Supreme Court. If the petition arrives at the Supreme Court after the end of its term, that Court won’t decide whether to grant review until the beginning of its new term in the fall of 2018, and if the petition is granted, argument would not take place for several months, giving the parties time to brief the merits of the case. If the Texas Supreme Court decides to affirm the court of appeals, it is highly likely that Pidgeon and Hicks, abetted by Abbott and Paxton, will seek Supreme Court review. If the Texas Supreme Court reverses, the City of Houston will have to decide whether to seek Supreme Court review, or whether to adopt a wait-and-see attitude while the trial court proceeds to a final ruling on the merits of the case. And the trial court could well decide, upon sober reflection, that *Obergefell* compels a ruling against Pidgeon and Hicks, which would put them back in the driver’s seat as to the decision to appeal to the Supreme Court.

If a second Trump appointee was confirmed while all of this was playing out, the case would be heard by a bench with a majority of conservative justices appointed by Republican presidents, one by George H.W. Bush (Clarence Thomas), two by George W. Bush (Chief Justice John Roberts and Samuel Alito), and two by Donald Trump. Trump’s appointees would be joining three Republican colleagues who filed or signed dissents in the *Windsor* and *Obergefell* cases. Regardless of how the Petitioner frames the questions posed to the Court, the justices are free to rewrite the question or questions on which they grant review. If a majority of the newly-constituted Court is eager to revisit *Obergefell*, they could grant review on the question of whether *Obergefell* was correctly decided. Based on past history, they could reach that issue, if a majority wants to do so, without signaling its salience in the Order granting review.

Much of this is conjecture, of course. Justice Devine was a lone voice dissenting from the September 2 order to deny review in this case. But that order was issued at a time when national pollsters were near unanimous in predicting that Hillary Clinton would be elected and, consequently, would be filling the Scalia vacancy and any others that occurred over the next four years. The political calculus changed dramatically on November 8 when Trump was elected. Even though he has stated that he accepts marriage equality as a “settled issue,” his announced intention to appoint Justices in the image of Scalia and to seek reversal of *Roe v. Wade*, the Court’s seminal abortion decision from 1973, suggests that he will appoint justices who have a propensity to agree with the *Obergefell* dissenters that the marriage equality ruling was illegitimate. (Chief Justice Roberts wrote in his dissent that it had “nothing to do with the Constitution.”) Although the Court has frequently resisted efforts to get it to reverse highly consequential constitutional decisions, it has occasionally done so, most notably in the LGBT context in its 2003 ruling in *Lawrence v. Texas*, striking down a state sodomy law and overruling its 1986 decision in *Bowers v. Hardwick*.

After the election, many LGBT rights organizations issued statements to reassure people that marriage equality would not immediately disappear after Trump took office. That remains true. A constitutional ruling by the Supreme Court can only be changed by the adoption of a constitutional amendment, which Democrats can easily block in Congress, or overruling by the Supreme Court, which requires that a new case come up to the Court at a time when a majority of the Court is receptive to the overruling argument, which seems to be at least two years off from now. But these statements, including those by this writer, conceded that in the long run it was possible that Trump’s Supreme Court appointments and new appeals headed to the Supreme Court might come together to endanger marriage equality. This new development in the Houston benefits case shows one way that could happen. ■

Seventh Circuit Remands HIV-Positive Honduran Man’s Refugee Case for Reconsideration

A panel of the Court of Appeals for the Seventh Circuit has remanded for further consideration the withholding of removal and protection under the Convention Against Torture (CAT) case of an HIV-positive middle-aged heterosexual man who claimed that he would face persecution if forced to return to Honduras because people would believe him to be homosexual and that the police would not protect him from harm (or themselves would harm him). *Velasquez-Banegaz v. Lynch*, 2017 U.S. App. LEXIS 981, 2017 WL 21886 (Jan. 19, 2017).

Petitioner entered the United States without authorization in 2005. In 2007 he discovered he was HIV-

more likely than not that he would face persecution if returned to Honduras. The Board of Immigration Appeals (BIA) affirmed the decision, and Petitioner filed the instant suit.

Writing for the Seventh Circuit panel, Circuit Judge Richard Posner concluded that the IJ “made a hash of the record.” He noted that both Petitioner’s and the expert’s testimony were without contradiction in the record. He found that the IJ and the BIA erred in failing to take into account that Petitioner was “harmless,” with no serious criminal record, and the fact that “Honduras has the highest crime rate in the western hemisphere.” He found the IJ erred in ruling the expert’s testimony irrelevant

Expert testimony established that Hondurans would perceive an unmarried middle-aged man with HIV as being gay.

positive. Petitioner is heterosexual and has never married. He was placed into removal proceedings, where he sought withholding of removal and CAT protection. He testified without contradiction that “straight” Hondurans tend not only to despise homosexuals but also to perceive them as weaklings, and on both accounts to attack them physically,” and that “police are often complicit in, or refuse to investigate, these crimes.” His testimony and the testimony of an expert witness established that Petitioner’s HIV status would be “outed” upon any visit to the hospital for treatment, and that Hondurans would perceive an unmarried middle-aged man with HIV as being gay.

The immigration judge (IJ) ruled the expert testimony irrelevant because it was “general” and found that Petitioner did not meet his burden of proving

because it was “general,” and found it unreasonable for the judge to demand evidence that Petitioner himself would be persecuted: “The petitioner left Honduras more than a decade ago; he’s hardly in a position, living in the United States, to assess the particular risk to him if he’s deported, as compared to the average HIV sufferer in Honduras or even the average HIV sufferer in Honduras who is middle-aged yet has never married.” Judge Posner further found the IJ erred in suggesting that Petitioner would be safe if he “kept secret his HIV status,” noting that “the law does not require people to hide characteristics like religion or sexual orientation, and medical conditions, such as being HIV positive.” Finally, he noted that the IJ erred in ignoring that Petitioner testified that being middle-aged but never married would further enhance the imputation that he is

homosexual. Concluding that since the IJ and BIA overlooked “key aspects” of Petitioner’s claim, the court vacated those decisions and remanded the case for reconsideration in light of this opinion.

In dissent, Circuit Judge Kenneth Ripple disagreed that the Immigration Judge “made a hash of the record,” stating he believed the record contains evidence supporting both the government’s and Petitioner’s position, and that on appeal, a BIA decision would only be overturned if “viewing the record as a whole, a reasonable factfinder would be compelled to reach a contrary conclusion.”

Judge Ripple set forth five factors that undercut Petitioner’s claim that he would be “an imputed member of the LGBTQ community”: 1) that he was not actually gay; 2) none of the HIV-positive individuals Petitioner knew in Honduras were themselves gay; 3) Petitioner would seek treatment far from home; 4) Petitioner would be returning to his hometown where he had previously lived for 38 years; and 5) none of the articles and country conditions reports stated that HIV-positive individuals are assumed to be gay. He further stated, “It is important to note that the immigration judge considered the entire record, including ‘general’ evidence.” Judge Ripple further argued that the majority gave an inaccurate characterization about the IJ’s opinion respecting whether Petitioner could avoid persecution by “hiding” his HIV status, stating that the IJ merely noted that because Petitioner would seek HIV treatment four hours away from his hometown, this would “significantly decrease] the odds that he would run into someone he knows while seeking treatment.”

Judge Ripple concluded: “Immigration must be regulated, and, in this Country, national policy is set by Congress and enforced by the Executive. Our own task as judges is limited. Because the immigration judge’s determinations were supported by substantial evidence, I respectfully dissent.”

The Petitioner is represented by Ilan Wurman of Winston & Strawn LLP (Washington, D.C.), and Keren Zwick, National Immigrant Justice Center (Chicago). – Bryan Xenitelis-Johnson

6th Circuit Affirms Dismissal of Title IX Claim by Mother of Bullied High School Student Driven to Suicide

On January 30, a panel of the U.S. Court of Appeals affirmed the district court’s dismissal of a motion by a Catholic high school to dismiss a Title IX claim by the mother of a student who had been driven to suicide by anti-gay bullying at school. *Tumminello v. Father Ryan High School, Inc.*, 2017 WL 395106. Writing for the panel, Circuit Judge Martha Craig Daughtrey found that the court was bound by 6th Circuit precedent, under which sexual orientation discrimination would not be covered under Title IX unless there was a plausible allegation that the student was harassed for failing to comply with gender stereotypes.

Spencer Tate, then a freshman at Father Ryan High School, was, according to his mother’s complaint, relentlessly abused and harassed while on campus. “Tate was called ‘faggot,’ ‘fag,’ ‘gay,’ and ‘suffered other sexually oriented and derogatory abuse.’” Tumminello alleged that three male students were primarily responsible for the abusive behavior, which included telling Tate to “go home and kill himself.” She also alleged that students hit Tate with belts in a practice called “belt wars,” a “common practice on Father Ryan’s campus, where students would use belts as whips and hit other students with them.” She alleged that “the students responsible for mistreating Tate ‘had a history of abuse and harassment’ at Father Ryan and ‘at other schools controlled by the Catholic Diocese of Nashville.’” Tate committed suicide on February 25, 2014, during his freshman year.

Tumminello sued in Tennessee state court alleging a Title IX violation. Defendants removed the case to federal court and moved to dismiss, asserting failure to state a claim under Title IX, failure to show that the school had been negligent, and failing to show she

was entitled to the punitive damages she sought. The district court granted the motion to dismiss on all counts. It concluded that “she failed to show that Tate had been subjected to harassment on account of his sex; that she failed to make a plausible negligence claim because she failed to provide allegations from which the court could draw a reasonable inference that Tate’s suicide was foreseeable; and that she failed to establish that punitive damages were appropriate in this matter.”

The court, as noted above, agreed with the district judge that this was not a sex discrimination case under Title IX. The court noted that the 6th Circuit follows Title VII precedents in interpreting Title IX, and that so far no federal appeals court has found a sexual orientation claim actionable under Title VII. The exception recognized by some circuit courts is for cases in which the plaintiff plausibly alleges that he was subjected to discriminatory treatment because of his failure to comply with gender stereotypes as to dress, grooming, speech, etc. Unlike some creative district courts, no court of appeals has yet accepted the argument that being discriminated against as being gay or perceived as such is all about sex stereotyping, and this court would not accept that contention either.

“Discerning the line between discrimination based on gender-non-conforming characteristics that supports a sex-stereotyping claim and discrimination based on sexual orientation is difficult,” wrote Judge Daughtrey. “Despite the practical problems with the current interpretation of Title VII and Title IX, ‘a panel of this Court cannot overrule the decision of another panel.’ The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires

modification of the decision or this Court sitting en banc overrules the prior decision." She noted that the 7th Circuit recently vacated a panel decision rejecting a sexual orientation discrimination claim under Title VII and granted en banc rehearing, but that court had yet to issue its decision. She also noted that the EEOC has changed its view and now considers sexual orientation discrimination to be sex discrimination. But this panel was bound to follow existing 6th Circuit precedent, which discerns a distinction between sex stereotyping and sexual orientation.

"For Tumminello to plead successfully a claim of sex discrimination based on a theory of sex-stereotyping recognized by this circuit, she must allege facts showing that Tate did not conform to traditional gender stereotypes in an observable way and that these characteristics were the basis for his harassment. Allegations to this effect are nowhere apparent in Tumminello's complaint, nor can we construct an inference in this regard, as she asks us to do on appeal, because there is no factual support for such an inference. For all that appears in the complaint, the taunts lobbed at Tate were simply name-calling of a kind particularly odious to adolescents."

The court also found the complaint lacking as to other elements of the prima facie case, most notably the failure to allege that the school had "actual knowledge" of the harassment and was "deliberately indifferent" to it. Fixing liability on the school requires some finding of fault by the school. Daughtrey found that such a harassment case in the 6th Circuit requires an allegation of actual knowledge by the defendant, and that Tumminello's "should have known" allegation was insufficient. The court also endorsed the trial court's finding that Tumminello's negligence claim suffered from a foreseeability problem in the analysis of proximate cause, and that it relied too much on "non-conclusory facts relevant to foreseeability." ■

Federal Court Lets Transgender Employee Sue Employer for Transition Benefits Denial under Title VII

Does a transgender employee who seeks coverage under her employer's benefits plans for breast augmentation surgery have a legal remedy if her claims are denied? U.S. District Judge Sidney A. Fitzwater ruled on January 13 that a transgender woman employed by L-3 Communications Integrated Systems (L-3) may pursue a sex discrimination claim under Title VII of the Civil Rights Act of 1964, having alleged that she was denied such benefits because of her gender, but not under the anti discrimination provisions of the Affordable Care Act (ACA) or the Employee Retirement Income Security Act (ERISA). *Baker v. Aetna Life Insurance Company*, 2017 U.S. Dist. LEXIS 5665, 2017 WL 131658 (N.D. Tex.).

Judge Fitzwater rejected the discrimination claims against Aetna, the insurance company that provides the coverage and administers the plans on behalf of the employer, finding that the ACA and President Obama's Executive Order governing gender identity discrimination by federal contractors do not apply to this situation, and that the insurance company cannot be sued under Title VII because it is not the plaintiff's employer. However, Judge Fitzwater declined to grant motions for summary judgment by either the employee or by Aetna on her claim that denial of health and short-term disability benefits violates her rights under the terms of the employee benefits plans, setting that claim down for further proceedings.

According to her Complaint filed in the U.S. District Court for the Northern District of Texas in Dallas, Charlize Marie Baker is an employee of L-3 and a participant in the company's Health Plan and its Short-Term-Disability (STD) Plan, both of which are administered by Aetna Life Insurance Company. She began the process of transitioning in 2011, obtained a legal name change, and had her gender designation changed

from male to female on all government-issued documents. She scheduled breast implant surgery in 2015 after her doctor determined that it was medically necessary to treat her gender dysphoria.

Baker filed claims for coverage of the surgery under the Health Plan and coverage of her recovery period under the STD Plan. She alleges that the Health Plan denied her claim to cover the surgery, because "the plan does not cover breast implants for individuals with a male birth gender designation who are transitioning to the female gender, although the plan covers individuals with a female birth designation who are transitioning to the male gender and seeking a mastectomy." Presumably the mastectomy would be routinely covered because the Health Plan is accustomed to covering mastectomies for female employees when their doctors state that the procedure is medically necessary. Baker was denied STD benefits because the Plan administrator decided that surgery to treat Gender Dysphoria does not qualify as "treatment of an illness."

Judge Fitzwater's opinion focused on motions by L-3 and Aetna to dismiss discrimination claims brought under Section 1557 of the ACA, the Employee Retirement Income Security Act (ERISA), and Title VII of the Civil Rights Act of 1964. Section 1557 of the ACA incorporates by reference Title IX of the Education Amendments Act of 1972, which prohibits discrimination "because of sex." ERISA has its own non discrimination provision, but that does not specifically ban discrimination "because of sex." The ERISA provision instead broadly prohibits discriminating against an employee to prevent them from getting benefits to which they are entitled under an employee benefit plan. ERISA provides a vehicle for employees to claim that their benefit claims are valid, applying contract interpretation principles to the terms of the written employee benefits plan.

None of the statutes under which Baker filed her claims explicitly prohibits discrimination because of gender identity. In resisting the motions to dismiss, she relied heavily on a regulation published by the Department of Health and Human Services last spring, providing that Section 1557 of the ACA bans discrimination because of gender identity by insurers and health care providers, tracking interpretations of Title IX by the Department of Education and the Justice Department, which in turn relied on interpretations of Title VII by some federal courts and the Equal Employment Opportunity Commission (EEOC).

Baker also relied on President Obama's Executive Order 13672, which bans gender identity discrimination by federal contractors. Noting that L-3 is a federal contractor, Baker's attorneys, Michael J. Hindman and Kasey Cathryn Krummel of Hindman/Bynum PC, urged the court to make "a good faith extension of existing law that the discrimination by Defendants based on her Gender Identity is also discrimination in violation of ERISA in this context and that ERISA must be read to include the prohibition of discrimination based on gender identity."

"Baker is unable to point to any controlling precedent that recognizes a cause of action under Section 1557 [of the ACA] for discrimination based on gender identity," wrote the judge. For one thing, he pointed out, the HHS regulation on point was to become effective on January 1, 2017, long after Baker was denied benefits, and thus was not applicable at the time of Aetna's decision to deny the claims, and furthermore, one of Judge Fitzwater's colleagues on the Northern District of Texas bench, Judge Reed O'Connor, has issued two rulings rejecting the argument that Title IX, which is the source of the ACA non-discrimination policy regarding sex, should be "construed broadly to protect any person, including transgendered persons, from discrimination."

On August 21, 2016, Judge O'Connor issued a preliminary injunction against the enforcement of Title IX by the federal government in gender

identity cases, and he issued a similar preliminary injunction on December 31, 2016, against the enforcement of the HHS regulation in gender identity cases under the ACA. *Texas v. United States*, 2016 WL 4426495 (N.D. Tex. August 21, 2016). The government appealed the August 21 ruling to the 5th Circuit Court of Appeals in Houston, and announced it would similarly appeal the December 31 ruling, *Franciscan Alliance v. Burwell*, Civ. Action No. 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016). Whether those appeals will be pursued or dropped after the change of administration on January 20 is a decision for the new attorney general and secretaries of education and health. In both of those cases, O'Connor concluded that the plaintiffs were likely to prevail on their claim that Title IX (and by extension the ACA) does not ban gender identity discrimination.

Many federal courts are grappling with the question of whether federal laws and regulations banning discrimination "because of sex" should apply to gender identity or sexual orientation discrimination, but there is no consensus yet among the appellate courts. The Supreme Court has a case pending on the gender identity issue, *Gloucester County School Board v. G.G.*, under Title IX, scheduled for argument on March 28. The closest the appeals courts have come are decisions finding that "sex stereotyping" violates Title VII and other sex discrimination laws, such as the Fair Housing Act and the Equal Credit Opportunity Act, based on a 1989 ruling by the Supreme Court in *Price Waterhouse v. Hopkins*, and the 11th Circuit has ruled that gender identity discrimination may be treated like sex discrimination in a 14th Amendment Equal Protection context. Several courts have used the "sex stereotyping" theory to protect transgender employees in Title VII cases. However, Judge Fitzwater was correct in observing that as the date of his decision there was no "controlling precedent" within the 5th Circuit supporting Baker's claim that gender identity discrimination, as such, violates Section 1557 of the ACA.

Baker sought to argue that "the

'effect' of E.O. 13672 seems to be little more than to clarify the issue left somewhat ambiguous in Section 1557 that discrimination against transgender persons under this law is prohibited." She argued that when the ACA was enacted in 2010, some courts had already relied on *Price Waterhouse v. Hopkins* to find gender identity discrimination covered by Title VII.

Fitzwater found "two fallacies" in this argument. "First," he wrote, "the Fifth Circuit has not extended *Hopkins'* Title VII reasoning to apply to any statute referenced in Section 1557," and cited Judge O'Connor's August 21 ruling in support of this point. "Second, Baker is relying on an Executive Order to clarify what she characterizes as a 'somewhat ambiguous' legislative act." This was not enough to satisfy Fitzwater, who granted the motions to dismiss the ACA discrimination claim.

Aetna also moved to dismiss Baker's ERISA claim, contending that ERISA does not ban gender identity discrimination in the administration of employee benefit plans. Fitzwater agreed with Aetna, finding that "as Baker acknowledges, this claim is not currently recognized. It is for the Congress, not this court, to decide whether to create in ERISA a protection that the statute does not already provide." And because the court had already rejected her argument under Section 1557, it would not rely on that ACA provision as a basis for finding a right under ERISA.

Turning finally to the motions to dismiss the Title VII claim, Judge Fitzwater rejected Baker's argument that Aetna should be liable to suit for sex discrimination under Title VII as an "agent" of L-3 in administering the benefits plans. Fitzwater pointed to 5th Circuit precedent holding that Title VII does not apply in the absence of an employer-employee relationship between the parties. Baker argued that in the EEOC Compliance Manual, an agency publication that does not have the formal status of a regulation, there is a suggestion that an insurance company administering an employer's benefit plans is acting as the employer's agent, "but the EEOC Compliance Manual does not have the force of law," wrote

Fitzwater. "And this circuit recognizes an agency theory of employer liability only if the alleged agent had authority 'with respect to employment practices,'" which Baker did not allege as to Aetna.

However, at long last Fitzwater reached the only claim that he refused to dismiss in this opinion: Baker's allegation that the denial of coverage for her surgery and recovery period under the benefits plans provided by her employer constituted sex discrimination in the terms and conditions of her employment by L-3, in violation of Title VII. L-3 argued that Baker had failed to allege that she suffered an adverse employment action based on her gender, but, wrote Fitzwater, "The Court disagrees," continuing: "Baker plausibly alleges that she was denied employment benefits based on her sex," he wrote. "She asserts that L-3 'engaged in intentional gender discrimination in the terms and conditions of employment by denying her a medically necessary procedure based solely on her gender,'" that the company's "conduct constitutes a deliberate and intentional violation of Title VII," and that this conduct "has cause [her] to suffer the loss of pay, benefits, and prestige." This was enough, concluded Fitzwater, to allow her Title VII claim against her employer to continue. Interestingly, his opinion does not explore explicitly whether Title VII applies to gender identity discrimination claims as such, and makes no mention of the EEOC's 2012 decision to that effect, *Macy*, choosing to treat this as a sex discrimination, presumably on the basis that Baker would have been covered for this procedure had she been identified as female at birth, so clearly in that sense the denial was because of her sex.

Thus, at this point, Baker continues to have a contract enforcement claim under ERISA against Aetna, based on her allegation that Aetna's refusal to cover her procedure and recovery period violated the terms of the employee benefits plans, and an employment discrimination claim under Title VII against L-3, based on her allegation that the employer's benefit plan discriminated against her because of her sex. ■

Gay Man Can Assert Emotional Distress Claim against Cruise Line for Husband's Death at Sea

Just sit right back and you'll hear a tale—a tale of a fateful trip! This tort claim is merely the tip of the iceberg, and raises serious concerns about the negative treatment of gay individuals abroad. On January 12, 2017, U.S. District Judge Cecilia M. Altonaga granted in part, and denied in part, Royal Caribbean Cruises' (RCCL) motion to dismiss four claims filed by Erik Elbaz. *Elbaz v. Royal Caribbean Cruises, Ltd.*, 2017 U.S. Dist. LEXIS 5417 (S.D. Fla. Jan. 12, 2017). Elbaz initiated this lawsuit following the death of his husband, Bernardo Texeira Garcia, who fell overboard from the Oasis of the Seas.

extremely distraught, and recounted to Elbaz of how crewmembers called him a pedophile and other anti-gay slurs. RCCL's security officers soon came to the room and an argument ensued. News reports stated that Garcia fell from the balcony after protesting the crew's homophobic treatment towards him and his husband. He held on to a lifeboat on deck for several minutes while crewmembers attempted to rescue him. After he fell, the crew failed to follow RCCL's protocols to stop the boat and deploy a rescue boat in a timely manner. The United States Coast Guard later conducted a search, but was unable to find Garcia.

News reports stated that Garcia fell from the balcony after protesting the crew's homophobic treatment towards him and his husband.

Judge Altonaga dismissed his claims for negligence, negligent infliction of emotional distress, and damages under Bahamian Law; however, she upheld his claim of intentional infliction of emotional distress.

The opinion is relatively light on background information, but one can easily find more details from the *Miami New Times* and the *Daily Mail*'s coverage, the latter of which actually includes videos before and during the incident. Elbaz and Garcia traveled from New York to celebrate Elbaz's 34th birthday. From the moment the couple boarded the Oasis of the Seas, crewmembers subjected them to anti-gay insults such as calling them "lipstick," prompting the couple to immediately complain to RCCL management.

On the evening of November 5, 2015, Garcia returned to his stateroom

In her analysis, Judge Altonaga first discussed whether Elbaz's claims of negligence and damages under Bahamian Law survive a motion to dismiss. Both claims failed because Garcia's death occurred more than three nautical miles away from U.S. shores. This factor triggered the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302, which preempts all other wrongful death claims under State or general maritime law, and cannot be supplemented with foreign law. DOHSA also states that a decedent's spouse, parent, child, or dependent relative may only recover fair compensation for the pecuniary loss he or she sustained.

Elbaz's claim for negligent infliction of emotional distress was also dismissed because he failed to show that he was in the "zone of danger." Under maritime law, a plaintiff may only recover for a NIED claim if he either sustained

a physical impact as a result of the defendant's conduct, or was placed in immediate risk of physical harm by that conduct. Elbaz merely alleged that he was within feet of his spouse, and made no mention of threatened physical impact by the security officers at the scene.

Still, Judge Altonaga found that Elbaz sufficiently pleaded enough facts for his IIED claim. Under Florida law, a plaintiff must allege: (1) the defendant acted recklessly or intentionally; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was severe. Here, Elbaz alleged that RCCL and its crew repeatedly subjected him and his husband to anti-gay slurs, dropped Garcia into the ocean, failed to follow protocol, and confined him from other passengers against his will. Though RCCL contended that these allegations were insufficient to constitute extreme and outrageous conduct, Judge Altonaga held that the record must be further developed before the court can make this decision. *See Estate of Duckett ex rel. Calvert v. Cable News Network LLLP*, 2008 U.S. Dist. LEXIS 88667, 2008 WL 2959753, at *5 (M.D. Fla. July 31, 2008).

Although it should come as no shock, it is still incredible that the homophobic treatment alleged here is not considered objectively atrocious and utterly intolerable in many parts of the world, let alone the hospitality industry. Royal Caribbean's website boasts the diversity of RCCL's employees, with over one hundred nationalities represented throughout its global fleet. It is sobering to remember that many of those nations have yet to allow same-sex marriage, protect against sexual orientation discrimination, or even decriminalize sodomy. These shortfalls continue to foster hostile attitudes that put LGBTQ travelers at risk of disparate protections, torture, or even death.

Elbaz is represented by Ivan Izquierdo and Michael Winkleman of Lipcon Margulies Alsina Winkleman (Miami). – Timothy Ramos, NYLS '19

Transgender Inmate's Claims of Officer Assault and Cover-Up Survive a Motion to Dismiss

U.S. District Judge Michael P. Shea declined to dismiss a civil rights suit by *pro se* transgender inmate Alexander Adorno, in *Adorno v. Semple*, 2016 U.S. Dist. LEXIS 179101, 2016 WL 7469709 (D. Conn., December 28, 2016). Adorno sued correction officers (including "Doe" officers and a nurse), as well as supervisors at the institution, and the state corrections commissioner. [Note: Judge Shea does not indicate whether Adorno presents as a man or a woman but uses male pronouns throughout the opinion. For simplicity of reporting the decision, so does this writer.]

On arrival, Adorno revealed his transgender status and history of assaults and requested a transgender or gay cellmate. For the next month, Adorno had two cellmates; neither was gay or transgender, but there is no allegation they assaulted Adorno. Nevertheless, Adorno became increasingly distraught, eventually covering himself with feces out of the belief that inmates and staff were going to kill him. He was placed on suicide watch and called a "shitty fag."

Later, two officers (Ayotte and Olson) allegedly assaulted Adorno in a sally port [note: a "sally port" is a holding area between two areas of a prison, designed to restrict movement by using doors on opposite sides, which are never opened at the same time]. Adorno alleges that the force was excessive and unjustified and that he sustained injuries to his face, hands, head, and ribs. He plead that another officer (Doe #3) watched the sally port assault on video and that, instead of intervening, he called a "code orange" (assault on officer), indicating that Adorno was the aggressor. Adorno plead that a nurse refused to provide medical care and falsified his medical records.

Judge Shea first dismisses civil rights claims of negligence as not cognizable under section 1983. He also dismisses state law claims of negligence because Connecticut law (C.G.S. § 4-165) requires intentional or reckless conduct to sustain claims against state

employees. Judge Shea dismissed all claims against executive defendants because of inadequate pleading of personal involvement or knowledge or use of conclusory allegations as to lack of training – judicially noticing a Connecticut regulation requiring screening new inmates for possible sexual victimization.

Judge Shea finds the pleadings inadequate to suggest liability for any of the supervisors because of excessive force by Ayotte and Olson, since there are no allegations of history of it. The court pauses before dismissing deliberate indifference to mental health claims against the area lieutenant, but it eventually finds that Adorno plead insufficient knowledge on the lieutenant's part that Adorno would suffer a nervous breakdown from stress prior to the day he smeared himself with feces.

Judge Shea allows the case to go forward against Ayotte and Olson for excessive force, as well as against Officer Doe # 3, for deliberate indifference to Adorno's safety; but the scholarship is weak. Judge Shea does not cite either leading case on excessive force: *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); or *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). The standards from these cases, involving "malicious and sadistic" use of force versus reasonable force to restore order, apply to Ayotte and Olson – not the deliberate indifference to safety standard of *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), which applies to liability of staff for inmate-on-inmate assault. Although Judge Shea properly allows the claim against Doe # 3, he does not discuss bystander liability theory for officers who fail to intervene. *See Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995); *O'Neill v. Kreminski*, 938 F.2d 9, 11-12 (2d Cir. 1988).

Judge Shea also denies a motion to dismiss the nurse, finding sufficient allegations to sustain a claim under *Estelle v. Gamble*, 492 U.S. 97, 104 (1976); and *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (string cite omitted).

Adorno alleged serious injury and failure to treat. On these facts, the extent of the injuries and the consequence of non-treatment are best handled at summary judgment or trial.

After extensive discussion, Judge Shea finds that these facts do not present cognizable claims under either the Due Process or Equal Protection Clauses. There is no “liberty interest” separate from the Eighth Amendment claims on these facts that would invoke Due Process. On Equal Protection, Judge Shea frames the issue on traditional race/class/religion bases, not transgender versus cisgender; and he does not recognize what happened as presenting Equal Protection animus, despite evidence of slurs.

He likewise rejects “class of one” Equal Protection theory – *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) – because Adorno “does not compare himself to any other similarly situated inmates who were treated differently,” citing *Neilson v. D’Angelis*, 409 F.2d [sic: “F.3d”] 100 [, 104-106] (2d Cir. 2005). Under Judge Shea’s interpretation, in order to invoke “class of one” theory of comparisons that are “prima facie identical,” Adorno would have to find another transgender inmate who was isolated as a mental health precaution who was not beaten up in a sally port.

Counsel would have been helpful here, particularly since this case is proceeding to discovery. See “Federal Judge Defers Qualified Immunity Ruling and Orders Systemic Discovery on Policies and Failures Underlying High Rate of Gay and Transgender Inmate Assaults in Texas,” reporting *Zollicoffer v. Livingston*, 4:14-cv-03037 (S.D. Tex., March 14, 2016), in *Law Notes* (April 2016, at pages 144-5), where Lambda Legal was allowed systemic discovery, including whether policies (such as protection screening) that seemed adequate on their face were not implemented in fact.

Adorno remains on his own. His state law claims of intentional tort (assault and battery) remain in the case.
– William J. Rold

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

Maine Supreme Judicial Court Affirms Transgender Man is a De Facto Parent

The seven-member Maine Supreme Judicial Court unanimously affirmed on January 19 a judgement by District Judge Barbara Raimondi (Rockland) that Tammy J. Thorndike, “who lives as a man,” is a de fact parent of the two children born to Thorndike’s former female partner, Jessica Ann Lisio. *Thorndike v. Lisio*, 2017 Me. LEXIS 10, 2017 ME 14, 2017 WL 218165. The court found that the record supports the trial court’s conclusion that Thorndike satisfied the tests developed by Maine courts prior to the enactment of a recent statute on the subject.

Thorndike and Lisio met in 2005 when Lisio’s son, Caden, was one year old. They started living together in

and the children visited with him. By the end of 2012, Lisio had a new boyfriend and was taking the children with her to stay with the boyfriend, Joshua Cote, on weekends. When Cote found out Thorndike was a trans man, he demanded that Thorndike pay child support if he wanted to see the children. “Thorndike made some payments but did not pay regular child support,” says the court, which continued: “During the last week of June 2014, while the children were visiting Thorndike for the weekend, Caden revealed to Thorndike that Cote had been hitting him, and Caden had bruises. Caden said that Lisio had said not to tell.” Thorndike went into action, called his sister and organized a meeting with his parents

Thorndike, “who lives as a man,” was ruled a de fact parent of the two children born to Thorndike’s former female partner.

August 2008. At that time Thorndike was out of work due to a back injury, while Lisio worked as a newspaper carrier. Thorndike became a stay-at-home parent to Caden, filling the role of Caden’s missing father (to whom Lisio was not married). Thorndike and Lisio decided to have a child together in 2007 or 2008. Lisio became pregnant through donor insemination and had a daughter, Arianna. She and Thorndike registered as domestic partners in 2009 while she was pregnant. Lisio returned to work after giving birth and Thorndike was the stay-at-home parent for both children. However, the relationship of the parents soon broke down, Lisio had a brief affair with another man, their move to a different town to get a “fresh start” on their relationship didn’t work, and Thorndike began a relationship with somebody else and moved out in 2012, although he continued to call the children every day before bedtime,

and Lisio’s parents, which resulted in the children going to stay with Lisio’s parents rather than back to her home. A report was made to the Department of Health and Human Services, which substantiated Caden’s report and opened an investigation. This all angered Lisio, who turned against Thorndike and cut off his contact with the children. This led Thorndike to file this action, seeking a recognition of his parental role and establishment of regular contact with the children.

The case dragged out through procedural steps, including the trial court’s insistence on getting notice to Caden’s biological father, now incarcerated in Arkansas (!), who when he heard about it objected to Thorndike having parental rights over Caden. Mediation did not resolve all the issues between the parties and Judge Raimondi held a hearing on March 10, 2016, hearing testimony from Thorndike, his

sister, Lisio and Cote. "The court found, by clear and convincing evidence, that Thorndike was a de facto parent" and entered a parental rights and responsibilities order that provided for gradually increasing contact between Thorndike and the children, while Lisio remained their residential parent.

The opinion for the court by Chief Justice Leigh Ingalls Saufley upheld Judge Raimondi's finding that Thorndike had met the test of showing that (1) he has undertaken a permanent, unequivocal, committed and responsible role in the child's life, and (2) there are exceptional circumstances sufficient to allow the court to interfere with the legal parent's rights. As there was no doubt on the first element, in light of the history presented by the testimony, the major focus was on the second element, which requires a showing that "the child's life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role in that child's life is removed from that role." Without getting much further into detailed analysis, the court found that Thorndike met the requirement of proving both of these elements by clear and convincing evidence.

What struck this writer as noteworthy was what was missing from the opinion. Apart from the incidental and matter-of-fact mention that Thorndike, whose legal first name is Tammy, is living as a man, and the fact that Cote's demand for child support payment was triggered by his learning that Thorndike is transgender, the court does not pay any attention to Thorndike's gender identity or treat it as relevant in any way in handling this case. Thorndike is accepted as a man who serve the role of a father for the two children, is not questioned as such, and his gender identity is not mentioned as a reason cutting against recognizing him as the de facto child of the children or apparently taken into account at all. A decision responding to a fact pattern like this not so long ago would undoubtedly be obsessively focused on these issues. Times have indeed changed.

Thorndike is represented by Timothy J. Kimpton, Esq., of Gallagher, Villeneuve and DeGeer, PLLC. Lisio represented herself pro se. ■

California Appeals Court Reinstates Lesbian Teacher's Disability Discrimination and Retaliation Claims

The California 1st District Court of Appeal overturned a lower court's decision, which had dismissed a lesbian teacher's claims for failure to accommodate her disability, retaliation, and harassment in violation of California's Fair Employment and Housing Act (FEHA), in *Bikis v. Oakland Unified School District*, 2017 Cal. App. Unpub. LEXIS 198, 2017 WL 87040 (Jan. 10, 2017). Plaintiff Gwendolyn Bikis, an adult education instructor, alleges that she faced persistent discrimination in the workplace "because she sought to enforce her rights" in connection with her disability and "because of her sexual orientation."

Bikis was first employed as an adult education instructor by the School District in September 1993. Several months earlier, Bikis had been shot in the head during a robbery, and subsequently she suffered a host of disabilities as a result. Despite months of medical treatment, she suffers from cervical and thoracic degenerative disk disease, migraines, and neck and shoulder pain. Bikis claims that her disabilities, all of which were known to the District, were exacerbated by constant bending while teaching computer classes, as well as deficient classroom conditions, such as poor lighting and the absence of computer chairs.

In 2004, Bikis sought to enforce her right to tenure benefits, which she eventually received, along with back pay, in 2005. That same year, Brigitte Marshall became director of the District's Adult Education Program. According to Bikis, Marshall sought to reorganize the adult education program and rid the District of persons she deemed "trouble makers." Bikis alleges that this included persons with disabilities, persons with certain sexual orientations, and those who complained of unfair treatment.

From the fall of 2006 to January 2010, Bikis's disabilities continued to worsen and she regularly experienced

migraines, muscle spasms, and other complications, which she attributed to poor classroom conditions. Throughout this period, Bikis made repeated requests for accommodations, including medical leave, modifications of her work hours, better classroom lighting, and computer chairs. All of Bikis's requests were ignored, she alleges. Additionally, in three separate incidents Bikis's teaching materials were removed from her classroom and discarded by site administrators, allegedly at the direction of Marshall.

Accordingly, in February 2010 Bikis filed a complaint with the Department of Fair Employment and Housing, asserting that she had been discriminated against on the basis of her disability and sexual orientation. In June 2010, Bikis was laid off, giving rise to her retaliation complaint. Bikis filed the present lawsuit against the District and Marshall on December 1, 2011. The superior court sustained the defendants' demurrer as to all of Bikis's eleven causes of action, without leave to amend, effectively dismissing her complaint. Bikis then appealed.

In a unanimous opinion written by Justice Marla J. Miller, the Court of Appeals panel reversed the dismissal with respect to eight of Bikis's causes of action. The panel held that Bikis successfully alleged facts to state claims for retaliation, failure to accommodate her disability, disability discrimination, failure to engage in the interactive process, hostile work environment as against the District, hostile work environment as against Marshall, failure to prevent discrimination and harassment, and wrongful termination.

With respect to Bikis's retaliation claim, the panel noted that Bikis suffered an adverse employment action after engaging in protected activity. Specifically, Bikis alleged to have filed

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2nd Circuit Panels Hear Argument on Sexual Orientation Discrimination Claims under Title VII

As a tiny crowd (we couldn't resist) was gathering on the National Mall to witness the presidential inauguration of Donald Trump on Friday, January 20, a huge, enthusiastic coterie of LGBT rights supporters (again, we couldn't resist) jammed into a courtroom in Foley Square in Manhattan to observe the oral argument before a 2nd Circuit panel of the appeal in *Christiansen v. Omnicom Group*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016), in which District Judge Katherine Polk Failla had dismissed a Title VII sexual orientation discrimination claim by gay advertising

decision in *Simonton*," particularly noting the Supreme Court decisions striking down DOMA and state bans on same-sex marriage, but observing that in neither of those cases had the Supreme Court addressed the Title VII issue, which was not before it. Judge Failla did note the EEOC's change of position to support such claims, and recent decisions by other district courts (including a court in Connecticut within the 2nd Circuit) accepting sexual orientation claims under Title VII.

However, she concluded that the 2nd Circuit has drawn a firm line between sex stereotyping cases and

panel would have the authority to adopt a new reading of Title VII. According to one report, Chief Judge Robert Katzmann quoted from Justice Antonin Scalia's opinion for the unanimous Supreme Court in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the "same-sex harassment" case, that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," and asked the attorney for Christiansen's supervisor, a co-defendant in the case, whether sexual orientation discrimination was a "comparable evil" to the more traditional sex discrimination claims that Congress sought to address in Title VII, receiving an affirmative response. The *New York Law Journal* published a report on the argument on January 20.

A three-judge panel of the 11th Circuit heard argument on the same question in December, and the 7th Circuit heard argument *en banc* at the end of November. Press reports of the 7th Circuit argument suggest a good possibility that the 7th Circuit will break the unanimity of existing circuit precedents and adopt the EEOC's new reading of the statute by a divided vote. A different 2nd Circuit panel actually heard argument in *Zarda v. Altitude Express*, presenting the same question, earlier in January. *Zarda* is an appeal from a little-noticed unpublished dismissal of a Title VII sexual orientation claim by a different district judge. It would be logical, one would think, for the circuit to consolidate the two appeals and go *sua sponte* to an *en banc* argument if any significant portion of the active 2nd Circuit bench is inclined to reconsider the question. The EEOC has weighed in as an amicus in some of the pending cases, and presented its views to the 2nd Circuit in the *Christiansen* case.

President Trump's appointments to fill a current EEOC vacancy and then a new vacancy that will occur in July may tip the agency in the other direction, however. A ruling finding

It seemed that the panel was struggling with the question of whether it could get around prior Circuit precedent or whether only an *en banc* panel would have the authority to adopt a new reading of Title VII.

executive Matthew Christiansen against DDB Worldwide Communications Group, having concluded that the district court was bound by 2nd Circuit precedent to dismiss the claim. (The complaint also alleged sexual orientation discrimination in violation of state and local law, but Judge Failla dismissed all of the plaintiffs' federal claims and did not retain jurisdiction over the supplemental claims.)

"In *Simonton v. Runyon*, 232 F. 3d 33 (2nd Cir. 2000), the Second Circuit unequivocally held that 'Title VII does not proscribe discrimination because of sexual orientation,' wrote Judge Failla, also noting some subsequent 2nd Circuit panel decisions citing *Simonton* as controlling, but at the same time acknowledging that "the broader legal landscape has undergone significant changes since the Second Circuit's

sexual orientation cases. "In light of the EEOC's recent decision on Title VII's scope," she wrote, "and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask – and, less there be any doubt, this Court is asking – whether that line should be erased. Until it is, however, discrimination based on sexual orientation will not support a claim under Title VII; Plaintiff's Title VII discrimination claim must therefore be dismissed."

In the argument before the 2nd Circuit panel, according to press reports, it seemed that the panel, sympathetic to the plaintiff's arguments, was struggling with the question of whether it could get around prior Circuit precedent or whether only an *en banc*

sexual orientation claims actionable under Title VII by *any* circuit court will create a circuit split likely to generate a grant of certiorari and Supreme Court consideration of the issue. By then, of course, it seems likely that the Trump Administration will be arguing against a broad reading, with the Solicitor General, not the EEOC, determining the government's position in the high court. Meanwhile, the Court has announced an argument date of March 28 for *Gloucester County School Board v. G.G.*, in which it granted a petition for certiorari on October 28, present the logically related question whether Title IX's ban on sex discrimination by educational institutions that receive federal funds includes gender identity discrimination. Title VII and Title IX are relatively contemporary statutes in which Congress did not define "sex" and in which courts are now struggling with the argument that "sex" should be broadly defined to encompass both sexual orientation and gender identity discrimination, forms of discrimination that federal legislators in 1964 and 1972 were unlikely to think they had addressed when enacting those laws.

Meanwhile, while the EEOC has a 3-1 majority of Democratic Commissioners appointed by President Obama, it has continued to initiate new sexual orientation discrimination lawsuits, including one filed on January 20 as the 2nd Circuit argument was taking place, *EEOC v. Scottsdale Wine Café, LLP*, 2:17-cv-00182-BSB (D. Arizona), and the Commission has published a proposed guidance on best practices for employer investigations of sexual harassment claims that includes reference to sexual orientation and gender identity harassment. Since the EEOC is an "independent administrative agency," it is questionable whether President Trump's order to the Executive Branch to hold up on promulgating new regulations or policies would necessary stay the agency's hand, although Trump has appointed the sole remaining Republican Commissioner as "Acting Chair" in place of Democrat Jenny Yang, whose term as a Commissioner expires in July. ■

Prisoner Receives Sex Reassignment Surgery in California

Law Notes has closely followed the legal saga of 57-year-old transgender prisoner Shiloh Heavenly Quine's efforts to have sex reassignment surgery ["SRS"], as well as the developing law in this area. See "California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery," *Law Notes* (November 2015 at page 489). Now, Quine, who is serving a life sentence, has had surgery, at state expense, becoming (we believe) the first transgender woman to receive SRS while incarcerated, as reported by the *Digital Journal*, 2017 WLNR 682238 (January 17, 2017).

Quine's lengthy legal battle is belied by the statement issued by California authorities, as quoted in the Journal: "The 8th Amendment of the U.S. Constitution requires that prisons provide inmates with medically necessary treatment for medical and mental health conditions including inmates diagnosed with gender dysphoria." In fact, California fought almost desperately to prevent this outcome, even paroling another inmate, to avoid an adverse decision from the Ninth Circuit.

SRS for Michelle-Lael B. Norsworthy, in *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Cal., April 2, 2015), was ordered by U.S. District Judge Jon S. Tigar (who also has Quine's case), as reported in *Law Notes* (May 2015, pages 199-200). California Attorney General Kamala D. Harris (now United States Senator) appealed that ruling and obtained a stay. The day before oral argument on the appeal, California Governor Jerry Brown approved Norsworthy's parole application. The state promptly moved to dismiss the case as moot; but the Circuit remanded without vacating the injunction in *Norsworthy v. Beard*, 2015 U.S. App. LEXIS 17447 (9th Cir., October 5, 2015), reported in *Law Notes* (November 2015 at pages 517-18).

California later adopted the guidelines for SRS, as part of a settlement of Quine's case, with regulations at 15 C.C.R. § 3350.1. Quine had surgery at an undisclosed hospital in San Francisco, and she will

be relocated to a women's penitentiary after recovering.

According to the Journal, a prison psychologist who recommended the operation for Quine said the patient would experience a "drastic, internal completeness" when her genitals matched her gender identity. Quine suffered from severe depression and tried to cut or hang herself five times, most recently in 2014 when her surgery request was first rejected. She also once tried to amputate her own genitals and had been self-medicating with illegally purchased female hormones.

Neither case was a class action, but according to the *L.A. Times* (August 10, 2015) there were nearly 400 transgender inmates in California. It appears for now that California has averted a Ninth Circuit merits decision on prisoner SRS. This also avoids the potential of a Ninth Circuit clash with the First Circuit decision denying SRS to prisoners in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), *cert. denied*, 575 U.S. ___ (2015), reported in *Law Notes* (January 2015, pages 3-4), and the prospect that the Supreme Court will address the issue in the near future. The Ninth Circuit has perhaps tipped its hand in *Rosati v. Igbinoso*, 2015 WL 3916977 (9th Cir. June 26, 2015), reported in *Law Notes* (Summer 2015, page 288), when it summarily reversed a screening dismissal of a transgender prisoner's claim for "medically necessary treatment."

In addition to developments in California, see also the discussion of voluntary regulatory changes for transgender prisoners in Iowa in *Law Notes* (September 2106 at page 395). The California developments represent a slow advance in transgender prisoners' health rights. Plaintiffs Norsworthy and Quine were represented by attorneys from Morgan Lewis & Bockius, San Francisco, and the Transgender Law Center, Oakland. A copy of the settlement in *Quine v. Beard*, C 14-02726 JST (N.D. Cal., Aug. 7, 2015), is available on-line at transgenderlawcenter.org. —
William J. Rold

Arizona Appeals Court Rejects Lesbian Co-Parent's Bid to Be Recognized as Adoptive Parent Based on Her Spouse's Adoption When They Were Married

The Court of Appeals of Arizona, Division 1, affirmed a ruling by Maricopa County Superior Court Judge Suzanne E. Cohen, holding that the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), does not require Arizona to retroactively deem a woman to be a legal parent of children adopted by her same-sex spouse at a time when Arizona did not recognize their same-sex marriage or allow second-parent adoptions. Judge Jon W. Thompson wrote the opinion for the unanimous panel in *Doty-Perez v. Doty-Perez*, 2016 WL 7477722 (Dec. 29, 2016).

Susan and Tonya began living together in October 2010. Tonya adopted a child, who is not the subject of this appeal, two months later. Susan and Tonya were legally married in Iowa in July 2011, but at all relevant times for this case were residents of Arizona. After their marriage, they agreed that Tonya would adopt four special needs children from foster care, intending to raise the children together as co-parents. If Arizona had allowed for same-sex couples jointly to adopt children, they would have done so, but at the time of the adoptions, Arizona did not recognize their Iowa marriage and prohibited same-sex partner adoptions.

Their relationship later eroded. Susan alleges that on April 8, 2014, as their relationship was ending, she asked Tonya for consent to adopt the children through a second-parent or step-parent adoption, but Tonya refused. Susan moved out of the marital residence on April 12, 2014, and did not file a petition to adopt the children, which would have been futile without Tonya's consent. On October 7, 2014, the 9th Circuit, which covers Arizona, struck down same-sex marriage bans in *Latta v. Otter*, 771 F.3d 456, and on October 17, 2014, in *Majors v. Horne*, 14 F. Supp.3d 1313 (D. Ariz.), the federal district court struck down Arizona's ban and enjoined its enforcement. The state decided not

to appeal the district court's order. Susan subsequently filed a "Petition for Dissolution of Non-Covenant Marriage Without Minor Children" and requested *in loco parentis* visitation rights with the children, on April 14, 2015, subsequently amending her petition to "Marriage WITH Children" and requesting joint legal decision making and parenting time.

Just months later, the U.S. Supreme Court decided *Obergefell*, holding that same-sex couples had a fundamental due process and equal protection right to marry and to have out-of-state marriages recognized, and Susan followed up in July 2015 with a new "Motion to Find Petitioner a Parent of Minor Children and Memorandum in Support of Amended Petition for Dissolution With Children." Judge Cohen denied Susan's petition to be declared a legal parent of the four children, finding that although she had proven by a preponderance of the evidence that the parties would have jointly adopted the children had Arizona allowed such adoptions, Susan had failed to file a second-parent adoption request after October 17, 2014, when Arizona came under an obligation to recognize the Iowa marriage and afford Susan the rights that a step-parent would have to seek to adopt her spouse's children, and that Tonya, the legal parent, had refused to consent to a step-parent adoption by Susan, as she had the right to do.

The appellate panel agreed with Tonya's argument that there was no support in Arizona case law for the concept of *de facto parent*, thus disposing of one of Susan's arguments out of hand. (See above our report on the Maine Supreme Judicial Court's contrary opinion on the *de facto parent* issue in *Thorndike v. Lisio*, 2017 ME LEXIS 10, 2017 ME 14, 2017 WL 218165 (Jan. 19, 2017).)

"We find the dispositive issue is whether, as a matter of law, if a married person adopts a child, that person's

spouse is also deemed or presumed to be a legal parent, with all the legal rights and obligations attached to that status, merely because the couple intended to adopt together," wrote Judge Thompson. "We think not."

In light of *Obergefell*, Susan could effectively argue that Arizona's failure to recognize the women's Iowa marriage or to allow legally-married same-sex couples to adopt at the time Tonya adopted the children was a violation of the 14th Amendment, and the court conceded that point. "However," wrote Thompson, "we do not read *Obergefell* to support Susan's paramount contention that the right of same-sex couples to marry and have their marriages recognized under the Fourteenth Amendment of the U.S. Constitution requires that states retroactively modify adoptions by individuals in same-sex marriages who would have jointly adopted, if they had been allowed to do so."

The court held that applying ordinary rules of statutory construction to the Arizona adoption law, Susan was "not entitled to parental status or full legal parental rights under any of the relevant statutory provisions," because under Arizona's statute there is no presumption "granting legal parental rights or obligations to a non-adoptive spouse merely because of her marriage to a person who has adopted a child. To be vested with such rights and to be so beholden," Thompson continued, "an individual, either separately, or, if married, jointly with another individual, must formally adopt the child. To be sure, in light of *Obergefell*, [the statute's] language that 'a husband and wife may jointly adopt' must be interpreted to also mean that 'a wife and wife' or 'husband and husband' may jointly adopt. However, the adoption statute's use of the permissive 'may' indicates there is no presumption of parentage for a non-adoptive spouse. To apply such a presumption would be

to ignore an adoptive parent's spouse's individual agency to decide whether to directly and deliberately assume the role of a legal parent by taking the steps necessary to establish a legal relationship with the adopted child."

Thompson pointed out that the statute provides that upon adoption the adopting parent and the child have a legal parent-child relationship, but it does not state that upon adoption the child automatically has such a relationship with the adopting parent's legal spouse, and that Susan's attempt to get the court to adopt such a meaning would be contrary to the legislature's intent in passing the statute. "Additionally," wrote Thompson, "the clear interpretation of [the statute's] definition of a legal parent is that, except in the case of biology, the only legal mechanism that may establish legal parenting status and attach the associated rights and obligations is an order of adoption. Thus, we cannot order legal parent status for Susan, despite the fact that the parties intended to adopt the children together, but did not only because it was legally impermissible at the time, and Tonya later refused to consent to Susan petitioning for adoption of the four children, prior to their divorce and after same-sex adoptions were legal in Arizona."

Thompson asserted that the court was "without authority to confer legal parent status on Susan when she *never actually petitioned* the court to acquire that status while she was still married to Tonya." (Emphasis in original) "While we empathize with Susan because our holding leaves her without parental rights and obligations for four children she loves, provided and cared for," concluded Thompson, "the relevant statutes do not support a contrary conclusion."

Susan is represented by Leslie A.W. Satterlee and Markus W. Risinger of Gregg R. Woodnick PLLC, Phoenix. Tonya is represented by Keith Berkshire and Megan Lankford of Berkshire Law Office PLLC, also in Phoenix. Susan could seek review from the Arizona Supreme Court. ■

Magistrate Judge Remands Denial of Disability Benefits to HIV-Positive Man

On January 11, U.S. Magistrate Judge Charles S. Coody reversed and remanded an Administrative Law Judge's decision denying Social Security Disability Benefits to Corderal Summers, an HIV-positive woman living in Alabama. *Summers v. Colvin*, 2017 U.S. Dist. Lexis 4236, 2016 WL 119473 (M.D. Ala.). Judge Coody's opinion was significant for its highly detailed treatment of the errors committed by the ALJ in denying disability benefits. In reversing and remanding, Judge Coody wrote: "The problem with the ALJ's analysis can be succinctly stated. The ALJ failed to adequately develop the record regarding the limitations imposed on Summers by his HIV status and the side effects of his medications which include diarrhea."

Coody's analysis set forth the standard of review for an ALJ's determination regarding disability benefits. Under 42 U.S.C § 423(d)(1) (A), Summers would be entitled to disability benefits so long as he was unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . ." To make this determination, the ALJ was to employ a five-part sequential evaluation process. Judge Coody was not to disturb the ALJ's decision if it was found to be supported by "substantial evidence," but he was also obligated to "scrutinize the record in its entirety to determine the reasonableness of the [ALJ's] factual findings."

Summers sought disability benefits based on his contraction at age 23 of Human Immunodeficiency Virus (HIV). Summers specifically contended that his HIV medications, Zithromax and Stribild, cause him to experience nausea and excessive

diarrhea which necessitate frequent, unplanned, and excessive breaks daily and which impair his ability to work in an ordinary setting during a normal work week.

The ALJ concluded Summers was not disabled because "he has the residual capacity to perform sedentary work" while at the same time acknowledging that Summers' HIV status could cause nausea, vomiting, and diarrhea which, in turn, could cause "significant functional limitations." The ALJ further opined that there were a number of jobs in the national economy that Summers would be able to perform, such as charge account clerk, order clerk, and table worker. Summers, who has a 12th grade education, had prior work experience as a customer service representative.

Coody's opinion began by noting the unique aspect of Social Security proceedings as "inquisitorial rather than adversarial." Thus, while it is the disability claimant who bears the initial burden of demonstrating an inability to return to his past work, "it is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." The ALJ's error was to not adequately develop the record in this respect.

According to Coody, the ALJ asserted without basis that Summers could perform sedentary work and yet simultaneously ignored certain portions of the record that supported a determination that Summers was disabled and entitled to disability benefits. Specifically, there had been testimony of a vocational expert that Summers required "three or four bathroom breaks per day, lasting 10 to 15 minutes apiece, and two or three times a week . . . [a]nd three to four hours per workday of rest and reclining. That in combination is going to prevent him from maintaining an eight-hour day . . ." Coody noted that the jobs the ALJ identified as possibilities for

Summers would not allow for excessive breaks and that the side-effects Summers experienced from HIV treatment seemed to defy the definition of “residual functioning capacity.”

According to Coody, the ALJ failed to make the requisite finding as to whether Summers’ “nonexertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.” The ALJ had found Summers’s medications caused “nonexertional limitations” but failed to specify what those limitations were.

Second, Coody faulted the ALJ for basing her opinion on speculation and substituting her judgment for that of a medical professional. Specifically, the ALJ concluded without medical expert testimony that “Summers’ HIV is well controlled and not likely to cause significant functional limitations imposed beyond . . . some related joint pain and swelling in the hands and feet and some mild synovitis in the metacarpal phalangeal joints of the fingers.”

In addition to the other deficiencies described in the ALJ’s process, the ALJ was also required, pursuant to 20 C.F.R. § 416.917, to order additional medical tests where, as here, Summers’ medical sources did not give medical evidence to make a determination as to disability. She did not do so and this, in addition to the other failures noted, contributed to the error of the ALJ in not sufficiently developing the record.

Cumulatively, the ALJ, according to Coody, “erred as a matter of law when she failed to develop the record regarding the effects of Summers’ HIV status on his ability to perform work.” Coody indicated that if Summers is awarded benefits on remand, he will have sixty days after receiving notice of any amount of past due benefits to seek an award of attorney’s fees. —*Matthew Goodwin*

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York, specializing in matrimonial and family law.

Louisiana Appellate Dissenter Argues Sexual Orientation Discrimination Should Get Heightened Scrutiny

Dissenting from a decision by Louisiana’s 5th Circuit Court of Appeal in *State of Louisiana v. Martinez*, 2017 La. Unpub. LEXIS 12 (Jan. 24, 2017), Judge Fredericka Hamberg Wicker argued that the court should have accepted a man’s argument that the state’s domestic violence law unconstitutionally imposed stricter punishment on defendants who assault different-sex spouses than same-sex spouses. She insisted that in light of the U.S. Supreme Court’s decisions in *Windsor* and *Obergefell*, heightened scrutiny should be applied to any claim

the time this statute was first enacted, same-sex marriages could not be contracted or recognized in Louisiana, and the statute has evidently not been altered to take account of *Obergefell* and the advent of same-sex marriage in the state, even though it was amended in 2015 to expand the list of covered relationships beyond traditional marriages.

Martinez filed a motion to quash the “bill of information” against him, arguing that the definition of “household member” violates the 14th Amendment Equal Protection Clause because, as

Judge Fredericka Hamberg Wicker argued that the court should have accepted a man’s argument that the state’s domestic violence law unconstitutionally imposed stricter punishment on defendants who assault different-sex spouses.

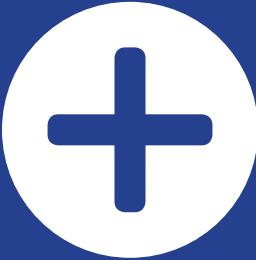
that a state law imposes differential treatment based on sexual orientation. The court refers to Mr. Martinez throughout the opinion as the “Relator,” reflecting local practice terminology for a party who files an application for a writ.

Milton Martinez was charged with “domestic abuse battery with child endangerment” in violation of La. R.S. 14:35.3(I). Domestic abuse battery is defined as “the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member,” and defines “household member” as “any person of the opposite sex presently or formerly living in the same residence with the offender as a spouse, whether married or not,” and further defines “family member” in pertinent part as “spouses” or “former spouses.” At

described in the *per curiam* opinion for the appellate panel, “it classifies unmarried persons’ cohabitation as spouses based on sexual orientation and penalizes alleged offenders in heterosexual relationships, like relator, more severely than unmarried persons in same-sex relationships for the same conduct.” The trial court denied his motion in a bench ruling without an accompanying opinion. Martinez sought a writ from the court of appeal quashing the information against him.

The opinion for the panel noted the state’s argument that sexual orientation claims receive only rationality review. The majority of the panel found “that the challenged provision in the domestic abuse battery statute withstands scrutiny under either a rational basis or heightened scrutiny analysis,” asserting that “the State’s legitimate governmental interest of

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eliminating domestic physical abuse is rationally related to the classification in the statute” because, “as noted by the State, protection for women from their husbands and current or former boyfriends was the intended purpose of the legislation to prevent the specific societal problem of familial domestic violence.” Evidently, it is of no concern to this court or the state of Louisiana that domestic violence is, in fact, a problem in both lesbian and gay male relationships. The express exclusion of same-sex couples in the 2015 amendments directly evinces a decision by the legislature to extend protection to opposite-sex partners while denying it to same-sex partners, regardless of legal marital status. But even applying heightened scrutiny, said the court, it would reach the same conclusion, accepting the State’s further argument that the statute “addresses the prevalent issue of domestic violence between opposite sex couples and ‘created a specific remedy for a specific dilemma and was not designed to cure every social problem in the area.’ Further, as the State noted, ‘a legislature may deal with one part of the problem without addressing all of it,’ concluded the court.

Dissenting, Judge Wicker wrote that Martinez “has standing to challenge the statute on the basis that he is subject to a more severe penalty as a person involved in a heterosexual relationship than he would face if he were in a same-sex relationship.” She noted Martinez’s argument that “classifications based on sexual orientation are subject to heightened scrutiny,” referencing a determination to that effect by the U.S. Court of Appeals for the 9th Circuit in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014), in which that court construed *Windsor* to have actually used some form of heightened scrutiny in striking down the Defense of Marriage Act and, consequently, rendering it unconstitutional for a court to allow counsel in a civil proceeding to exclude a juror from being empaneled on the basis of his sexual orientation. She acknowledged that neither the Louisiana Supreme Court nor the 5th

Circuit had addressed the question of heightened scrutiny for sexual orientation claims since the *Windsor* and *Obergefell* decisions. In the absence of such rulings, she was ready to tackle the issue directly, and evidently found the *Beecham* ruling persuasive, going on to quote from *Obergefell*, which post-dates *Beecham*: “In interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”

“The United States Supreme Court’s recent holdings in *Windsor* and *Obergefell* reflect that classifications based upon sexual orientation are subject to heightened scrutiny in an equal protection analysis,” she wrote. “In a brief to this Court, the state argues that La. R.S. 14:35.3 passes constitutional muster even under heightened scrutiny because it addresses the prevalent issue of domestic violence between opposite-sex couples and contends that ‘the legislature may deal with one part of a problem without addressing all of it.’ However, a review of the statutory language in La. R.S. 14:35.3, specifically as recently amended in 2015, reflects that nearly all domestic relationships are contemplated, recognized, and protected in the statute and that same-sex couples are specifically excluded. La. R.S. 14:35.3 prohibits domestic abuse battery between household member as well as ‘family members,’ who are defined as ‘spouses, former spouses, parents, children, stepparents, stepchildren, foster parents, and foster children.’ Consequently, by expanding domestic abuse to include various family members, the legislature’s purpose was to ‘deal with’ all familial and domestic abuse concerns, specifically excluding from ‘family’ those offenders or victims involved in same-sex relationships.” As a result, the ordinary assault penalties are enhanced for all “familial” relationships except those involving same-sex partners. This, she concluded, was unconstitutional, and she would have granted the writ application and reversed the trial court’s decision. ■

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U.S. SUPREME COURT – The Supreme Court received a petition for certiorari on January 5 seeking review of *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), in which the court of appeals upheld a district court decision rejecting constitutional challenges to California S.B. 1172, a measure making it unlawful for state-licensed health care practitioners to perform “sexual orientation change efforts” on minors. In several challenges to this and similar laws in some other states, plaintiffs have argued that the law violates their 1st Amendment rights, most particular their right to provide “therapy” consistent with their religious beliefs. The Court has denied similar petitions in the past. The case is docketed as No. 16-845. *** Although no public announcements were made, there were signs of some interest by the Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, petition filed July 25, 2016. This involves a baker who refused to make a wedding cake for a gay male couple, who sought it for a celebration planned to take place after they had an out-of-state wedding, at a time when Colorado did not allow or recognize same-sex marriages. The Colorado Supreme Court announced on April 25, 2016, that it would not review a decision by the state’s court of appeals to affirm the Civil Rights Commissions’ conclusion that the baker had violated the public accommodations law and did not have a free exercise privilege to do so. The petition has been listed for discussion at two conferences of the Court, and the clerk’s office has contacted the Colorado courts for the full record. This case could be a vehicle for the Court to clarify a point left open in its notorious *Hobby Lobby* decision, which relied on interpretation of the federal Religious Freedom Restoration Act to hold that the federal government could not compel a religious employer to provide birth control materials to women under its employee benefits

plan. The open question is the degree to which a proprietor of a place of public accommodation could assert a claim to be free of state anti discrimination law when the law is construed to compel him to perform a service that offends his religious beliefs.

U.S. COURT OF APPEALS, 7TH CIRCUIT – Timing is everything. Petitioner Alvarez, a gay man from Mexico, entered the U.S. in 1991 “without admission or inspection” and was convicted in 2009 of robbery and sentenced to six months in jail. This brought him to the attention of immigration officials, who initiated removal proceedings in 2016. Alvarez waived his right to counsel before the Immigration Judge, admitted that he had entered the U.S. illegally, that he had been convicted of robbery, and that this was a crime of moral turpitude, making him removable. “The IJ then determined that he was not eligible for any relief; in reaching this determination, the IJ confirmed with him that he was not afraid of being harmed if he returned to Mexico.” Alvarez appealed to the Board of Immigration Appeals, claiming the IJ did not give him a “chance to speak of my fear to return” and raising, for the first time, the issue that he is gay, had previously been kidnapped and tortured in Mexico because of his sexuality, which was why he fled to the U.S., and that “his removal would place an extreme hardship on his U.S.-citizen daughter, whose mother had died, leaving him as the sole parent.” (So why didn’t he speak about any of this during his hearing before the IJ?) While conceding that an IJ “must inform an alien of the availability of relief when circumstances reflect his or her ‘apparent eligibility’ for that relief, or when one expresses a fear of harm upon return,” the court concluded that this was not such a case. Since Alvarez didn’t raise the issue of his sexuality and his past persecution before the IJ, and did not express any

fear of being returned to Mexico, there was no “apparent eligibility” for relief and no basis for the IJ to have suggested that he petition for withholding of removal or CAT protection. (He had been in the country much too long to file an asylum claim.) The court found that the Board’s review of an IJ decision is “limited to the record before the IJ,” which of course did not include any of this highly pertinent information. “The record before the IJ did not reflect that he feared harm in Mexico or that he experienced any persecution in the past,” said the court, denying the petition for review. Yet another case showing why aliens need counsel in removal hearings!!! *Alvarez v. Lynch*, 2017 U.S. App. LEXIS 658, 2017 WL 129942 (7th Cir., Jan. 13, 2017).

U.S. COURT OF APPEALS, 9TH CIRCUIT – Policing the statute of limitations for asylum applications, a 9th Circuit panel ruled in *Dominguez v. Lynch*, 2017 WL 78415, 2017 U.S. App. LEXIS 372 (Jan. 9, 2017), that in the absence of “extraordinary circumstances” that would excuse a lengthy delay in filing an asylum petition, the petitioner in this case had forfeited her right to seek asylum in the United States. Rodriguez entered the U.S. in 1989 as a non-immigrant visa visitor with authorization to remain until March 11, 1992. She did not file her asylum application until 2007, despite the one-year deadline after arriving in the U.S. for filing such petitions. She presented an expert who testified that she “was undergoing a low-grade depression” related to coping with her homosexual orientation, but the court did not consider this a “serious mental disability that would prevent her from filing for asylum within one year of arrival in the United States.” The expert suggested that her depression began as early as Rodriguez’s childhood, yet Rodriguez testified that she graduated from college in 1983 with honors

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and obtained a visa to work in the U.S. in 1989, so, by implication, her depression was not deep enough to be truly disabling, although the court did not expressly connect the dots in its opinion, merely reciting these facts. She was represented in this appeal by Nancy Ellen Miller of Reeves & Associates, APLC, Pasadena.

U.S. COURT OF APPEALS, 11TH CIRCUIT – A three-judge panel affirmed the district court's decision (S.D. Fla.) to uphold a ruling by the Social Security Commissioner to deny disability benefits to the plaintiff, a man living with HIV who asserted that his HIV infection, together with visual and mental impairments, rendered him disabled from working. *Teigen v. Commissioner*, 2017 U.S. App. LEXIS 1203, 2017 WL 343522 (Jan. 24, 2017). In recent years *Law Notes* has largely stopped reporting on routine determinations by federal district and/or magistrate judges to reject challenges to disability benefits denials by HIV-positive plaintiffs (usually in unofficially published opinions available on electronic databases), since they are merely duplicative of older rulings and tend not to have much substantive discussion of the HIV-related issues. This case stood out because the Plaintiff pursued it to the court of appeals, and the *per curiam* opinion actually has some discussion of the HIV-related issues. Teigen claimed that his HIV infection, which was discovered after he had eye surgery to correct a rhegmatogenous retinal detachment, met the requirement for disability. He alleged that he was virtually blind in his right eye and visually compromised in his left eye, requiring the assistance of readers as he pursued his program of study to become a paralegal. "To establish a disability based on HIV," wrote the court, "Teigen must present proper documentation showing an HIV diagnosis," as well as one of a

list of symptomatic manifestations. "There is no dispute that Teigen has documentation showing that he has been diagnosed with HIV. Teigen's claim appears to be based on repeated manifestations of HIV infection under Sec. 14.08(K). Section 14.08(K) provides the following: Repeated (as defined in 14.0013) manifestations of HIV infection, including those listed in 14.08A-J, but without the requisite findings for those listings . . . or other manifestations...resulting in significant, documented symptoms or signs . . . and one of the following at the market level: 1. Limitation of activities of daily living. 2. Limitation in maintaining social functioning. 3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace," citing to 20 C.F.R. Part 404, Subpt P, App. 1 Sec. 14.08(K). "Here, substantial evidence supports the ALJ's implicit finding that Teigen's HIV condition did not meet or equal the listed criteria under Sec. 14.08(K). The medical record shows that following Teigen's HIV diagnosis in October 2010, he was asymptomatic, consistently had a low viral load, and high CD4 cells. Moreover, in the years following his diagnosis, Teigen was not required to take anti-viral medication. Dr. Besen also testified that Teigen suffered 'minimal symptoms' related to his HIV diagnosis. What's more is that the record does not contain evidence showing that Teigen has marked limitations in activities of daily living, maintaining social functioning, or completing tasks in a timely manner." Indeed, in a March 2012 report, he had stated that "he lives alone, cooks for himself, has no difficulty caring for himself, cleans the apartment, manages his finances, attends college, and takes public transportation." Teigen asserted qualms about his ability to get a job upon certification as a paralegal due to his reliance on readers because of significant visual impairment, and he was previously employed as a food server at a hotel before moving to

Miami to enroll in a paralegal program. Ultimately, the benefits claim relied more on his visual impairment, and it seems Teigen threw in his HIV-status to try to bolster his case, but ultimately it made no difference. The important take-away, of course, is that although being HIV-positive would be considered a disability under the Americans with Disabilities Act for purposes of protection against discrimination by employers and others, asymptomatic HIV infection will not qualify an individual for Social Security disability benefit unless it causes symptoms of conditions that would actually prevent the individual from being able to hold down a job and function at a reasonable level of productivity.

CALIFORNIA – Under California's Fair Employment and Housing Act, there are distinctly separate causes of action for discrimination and for harassment. In *Ames v. City of Novato*, 2017 U.S. Dist. LEXIS 5504 (N.D. Cal., Jan. 12, 2017), U.S. District Judge Jon S. Tigar granted the city's motion to dismiss portions of the Second Amended Complaint filed by Jeffrey Ames, a gay police officer, who alleged that he suffered discrimination and harassment from the actions of a supervisor, Lieutenant Collins. The problem, Judge Tigar pointed out in evaluating the motion to dismiss the harassment claim, is that under California law evidence of discrimination and evidence of harassment are separate things. In order to survive a motion to dismiss, Ames would have to allege facts relating to "conduct outside the scope of essential personnel management duties," but the judge concluded that Ames' allegations related to conduct of the lieutenant that fell within the scope of his essential personnel management duties, and thus could not provide the basis for a harassment claim. "The Second Amended Complaint alleges only discriminatory conduct, not harassing

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conduct,” he wrote. “Again, Ames alleges that Lieutenant Collins performed his official duties in a discriminatory manner by treating Ames differently than similarly situated, heterosexual officers. For example, Ames alleges that Collins did not allow Ames to tint the windows of his patrol vehicle, denied Ames’ training opportunities, denied Ames’ use of his canine vehicle, scrutinized Ames’ uniform, and wrote Ames up for misconduct on various occasions. All of these allegations relate to bias in the exercise of official actions on behalf of the employer. The same is true of Ames’ allegation that Collins copied other officers on emails in which he reprimanded Ames. None of this conduct falls within the FEHA’s definition of harassment. And Ames fails to allege additional factual content to support his vague allegations regarding ‘bullying’ or ‘unwarranted emails.’” Tigar also rejected the contention that the alleged conduct would support a harassment claim because it was intended to convey a hostile message to Ames. He also rejected Ames’ attempt to support a claim of widespread bias, observing that all the factual allegations related solely to Collins’ treatment of Ames. Tigar dismissed the harassment claim without leave to amend, noting that he had already given Ames one chance to amend in light of his rejection of the original complaint. There is a co-plaintiff in the case, Sasha D’Amico, but this opinion dealt only with Ames’ allegations of harassment. Ames is represented by Fulvio Francisco Cajina and Mary Shea Hagebols, both of Oakland.

FLORIDA – Equality Florida and the National Center for Lesbian Rights announced a settlement of their lawsuit on behalf of same-sex couples who were denied accurate birth certificates for their children by the state, *Chin v. Armstrong*, Case 4:15-cv-00399-RH-CAS (N.D. Fla., filed August 13,

2015). In a January 11 press release, the organization said that under the terms of the settlement, the Department of Vital Statistics agrees to treat same-sex spouses the same way it treats different-sex spouses for purposes of birth certificates and will issued corrected certificates at no charge, both for couples married in Florida and those married out of state before their children were born in Florida. The Department also agreed to pay some attorneys’ fees to the lawyers representing the couples who brought the law suit. Florida attorneys Mary Meeks and Elizabeth Schwartz joined with NLR in representing the plaintiffs.

FLORIDA – In *Ge v. Dun & Bradstreet, Inc.*, 2017 U.S. Dist. LEXIS 9497, 2017 WL 347582 (M.D. Fla., Jan. 24, 2017), U.S. District Judge Carlos E. Mendoza granted the employer’s motion for summary judgment on a transgender woman’s claims of sex discrimination and unlawful retaliation under Title VII and state law banning sex discrimination. Judge Mendoza acknowledged that within the 11th Circuit transgender plaintiffs can sue under Title VII using the sex stereotype theory. This was a mixed-motive case, he found, in that Valentine Ge’s evidence of discriminatory motive for her discharge was countered by the employer’s evidence that she was fired in response to serious deterioration in her sales representation work and complaints about unprofessional behavior, culminating in her largest client asking the company to take her off their account, leaving her with – in management’s judgment – too small a caseload to justify continuing her employment. As Thomas Gersbach, the plaintiff was first employed by defendant as a managing director from January 2000 to December 2007, but was laid off when her position was eliminated. She was rehired in a sales position early in 2012. In 2013 she began to transition,

and had her first reassignment surgery in December 2014. Although she reported to the company’s Naperville, Illinois, office, she mainly worked from home and traveled extensively, seeing her direct supervisor, Amy Hutchinson, only a few times a year. Hutchinson did not learn about plaintiff’s gender identity issues until around February 2013, in circumstances that are disputed but may have something to do with Hutchinson’s spouse, a guidance counselor for the company who “counseled Plaintiff regarding her gender identity issues.” After learning about the transition, Plaintiff claims, Hutchinson became hostile as reflected in email comments, remarks at meetings, and other behaviors. On the other hand, the falling off in Plaintiff’s sales record through 2013 and into 2014 was well-documented, as were instances of her engaging in unprofessional behavior, including in meetings with clients, for some of which she apologized in writing to Hutchinson. Her job evaluation ratings declined from “exceeded expectations” to “has not met expectations,” and she was characterized as “underperforming” in her 2013 mid-year review. The decision to dismiss her was ultimately made by the Human Resources department with input from various supervisors, including Hutchinson, but also others who were unaware of her gender identity issues. This seems to have been a genuine mixed-motive case; under Title VII, a plaintiff can win a mixed motive case, even if the employer shows it had valid nondiscriminatory reasons for its action, if the plaintiff shows that a forbidden ground of discrimination was a “motivating factor,” although remedial life could be sharply limited as a result of the employer’s proof. If the Plaintiff had shown to the court’s satisfaction that her gender identity and transition were “motivating factors” in her discharge, she could have won a partial victory, but because the employer could show legitimate reasons for letting her go based on her performance, any remedy

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under Title VII would have been limited, although it could include a declaratory judgement, a partial attorney fee award, and perhaps some compensatory damages. Ultimately, however, the court found Plaintiff failed to meet her burden of showing by a preponderance of the evidence that Hutchinson's bias should be attributed to the company as a motivating factor in the discharge, a decision made by others based largely on her performance issues. Further, as to retaliation, the judge found that Plaintiff failed to show a causal nexus between the complaints Plaintiff had made about her supervisor earlier in 2013 and her discharge in the spring of 2014. Valentine Ge is represented by Gregory A. Owens and Miguel Bouzas of Bouzas Owens, P.A. (Trinity, Florida). Although anybody reading Judge Mendoza's summary of the evidentiary record with an open mind would see arguments that could be made for Plaintiff, it seems unlikely in the nature of appellate review of heavily fact-based summary judgment decisions that an 11th Circuit panel would be likely to reverse this decision, as the result came largely from judgment calls about how to weigh the evidence to evaluate the significance of Hutchinson's role in challenged decisions that were ultimately made by other officials. Judge Mendoza did not expressly discuss the possibility of a "cat's paw" type of argument in this case, but from his description it did not sound like Hutchinson exerted the kind of influence that would meet the standard set out by the Supreme Court for such cases.

FLORIDA – U.S. Magistrate Judge Patrick M. Hunt issued a Report and Recommendation in *Watkins v. Central Broward Regional Park Manager, Dunkin Finch*, 2017 U.S. Dist. LEXIS 7596 (S.D. Fla., Jan. 18, 2017), recommending a grant of summary judgment to Mr. Finch, who is being sued by Eric Watkins, a loud-mouthed

homophobe who likes to sit in the park singing an "anti-gay song" at the top of his lungs, and then suing any park or police official who tries to interfere with him. Judge Hunt characterized Watkins as "a serial filer in this district," having located with some cursory research in the court files at least twenty prior actions filed by Watkins, all pretty much along the same lines. This particular case arose from an incident on May 6, 2013. Watkins came into the park and, because the shelter where he usually set up shop was being used by somebody else, decided to "work on his cases" in his parked car. He started singing his "anti-gay song" very loudly, and a park employee working in the area came by and asked him to stop, which he refused. She reported to the police, and an officer from the local police department arrived and asked Watkins to leave, telling him "And you can never come back to this park. You are trespassing from here. And if you come back to this park, I will arrest you." Watkins decided to sue the park employee, but didn't have her name, so he called the park office and asked to speak to the manager, Finch. Finch responded to Watkins' inquiry by stating his familiarity with the incident and the decision to call the police, which he endorsed. He declined to "reinstate" Watkins as a park user or to give the employee's name. Watkins followed up with a written letter to "appeal" Finch's decision, and filed suit claiming a violation of his 1st and 14th Amendment rights. Judge Hunt, noting that the lyrics of Watkins' "anti-gay song" included implicit threats to shoot and burn up "faggots," found that there was a possibility of deeming the song "fighting words" ineligible for First Amendment protection, but conceding that even if it was uncertain whether the song was protected, that was enough to shield Finch with qualified immunity. (He clearly rejected any contention that singing the lyrics instead of speaking or shouting them somehow affected the 1st Amendment analysis.) Judge Hunt also

found no due process or equal protection violation based on the facts alleged by Watkins, who, of course represented himself and, not having legal training, made various pleading errors adding to the difficulties he faced.

FLORIDA – An HIV-positive man whose frequent absences led to his discharge could not maintain claims under the Florida Civil Rights Act or the federal Family and Medical Leave Act because the supervisors with whom he dealt were not aware of his HIV situation, and there was no indication that the company administered its FMLA obligations in a discriminatory manner, ruled U.S. District Judge Marcia G. Cooke, granting the employer's motion for summary judgment in *Guasch v. Carnival Corp.*, 2016 U.S. Dist. LEXIS 3564, 2017 WL 87163 (S.D. Fla., Jan. 10, 2017). Baldomero Guasch was employed by Carnival Corporation, a cruise operator, from October 2000 through October 2014. He handled telephone inquiries relating to existing cruise bookings and travel plans, and worked almost entirely from his home, having only occasional and sporadic personal contact with supervisors. Explained Judge Cooke, "Instances where a Solutions Specialist is unavailable to take calls during a regular workday, such as for restroom breaks or personal calls, are known as 'AUX time.' Excessive use of AUX time on multiple days can result in unsatisfactory phone productivity ratings, and disciplinary action, including termination." Such was the case with Guasch, who failed to meet the company's phone productivity standards "many times" during his employment, with the situation accelerating during 2014, when he received written reminds and a final warning in September. He exceeded his AUX time allowance on three separate days in September and was terminated after an in-person meeting with the Director of the department. Guasch had applied for and

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been approved for intermittent FMLA leave in July, but it was disputed between the parties exactly when leave was given and whether it was sufficient to meet his needs. They also disagreed about whether his supervisors were aware of his HIV-positive medical condition. “Carnival asserts that its Human Resources Department does not share an employee’s medical information with his or her supervisors.” There was also some dispute about whether Guasch’s “earlier AUX time entries were properly adjusted to account for computer glitches and FMLA leaves.” But, setting all that aside, the court found that under the Florida statute a disability discrimination plaintiff must show that “the decision-maker of the adverse employment action was aware of the disability,” and that “neither statements revealing a general health problem nor a general appearance of being sick are sufficient to put an employer on notice of an employee’s disability.” Cooke referred to “conclusory and speculate comments” in Guasch’s filings, and said apart from that there was no evidence his supervisors, who made the discharge decision, “had knowledge of his medical condition,” and that there was no record of him “being harassed, treated poorly, or even complaining before about workplace misconduct due to his medical condition.” Consequently, the court found that his state law disability discrimination claim failed. As to the federal FMLA claim, she wrote, “Terminating an employee for violating a company policy like Carnival’s AUX time guidelines is a permissible, nondiscriminatory reason that does not animate a retaliation claim.” While failing to grant full leave when intermittent leave was insufficient could be a statutory violation, in this case Guasch only requested intermittent leave and “no cited record evidence suggests Carnival’s granting of intermittent leave was ill advised or unilaterally executed . . . The record evidence does not bear any discriminatory

reason for Guasch’s termination,” the court concluded. Guasch represents himself *pro se*. The main point here is that disability discrimination law provides some protection against employment discrimination to people with disabilities, but only so long as they can perform essential job functions and meet the employer’s reasonable productivity standards with reasonable accommodations when the need for them is obvious to the employer. If Guasch’s supervisors were unaware of his HIV condition and he didn’t raise the need for an accommodation, he is out of luck.

GEORGIA – Columbia County Superior Court Judge J. David Roper abused his discretion by denying name-changes to two transgender men, ruled a unanimous panel of Georgia’s 4th Division Court of Appeals on January 20 in *In re Feldhaus; In re Baumert*, 2017 Ga. App. LEXIS 14, 2017 WL 253649. After separate hearings on the two petitions, Judge Roper (who is not named in the court of appeals decision) denied them both, even though they were unopposed and there was no evidence that either petitioner sought to confuse or defraud anybody, based on the judge’s own apparent disbelief that a person identified as one sex at birth could actually have a different gender identity and should be allowed to “mislead” the public about his or her identity. In his findings, as related for the court of appeals by Judge Elizabeth Branch, he stated that “by ‘claiming to be a person of the opposite gender’ from his or her birth gender, a transgender person ‘presents problems for the person and the general public’ in that his or her assumed name could ‘confuse and mislead . . . emergency personnel, actuaries, insurance underwriters, and other businesses and relationships where the sex of an individual is relevant.’ The court added that ‘third parties should not have to contend with the quandary,

predicament and dilemma of a person who presents as a male, but who has an obviously female name[.]’” (Stop and think about that last statement. Was Judge Roper confused? If he granted the petitions, these two transgender men would have names consistent with the way they were presenting themselves to the world. Now imagine that either of them comes in contact with an actuary! What’s the problem? This writer’s brother and niece are actuaries, and he doubts that either of them would have problems setting up a pension plan for either of the petitioners just because their names were inconsistent with the sex recorded on their original birth certificates. Actuarial tables show that women on average live longer than men, a fact that perhaps an actuary would take into account in doing the calculations to set up a pension plan, but one doubts that the person’s name, as such, is going to mislead them into rendering defective service.) Roper had also distinguished between the petitions based on his perception that one petitioner was seeking a name that was “gender neutral” while the other was seeking a name which Roper did not consider to be “gender neutral.” Roper concluded that “name changes which allow a person to assume the role of a person of the opposite sex are, in effect, a type of fraud on the general public” and that such changes “offend the sensibilities and mores of a substantial portion of the citizens of the state.” Judge Branch pointed out that the statutory test on name changes was whether the petitioner sought the change “with a view to deprive another fraudulently of any right under the law,” which the Georgia Supreme Court has construed as meaning that “there is nothing in the law prohibiting a person from taking or assuming another name, so long as he does not assume a name for the purpose of defrauding other persons through a mistake of identity.” Continued Judge Branch, “We have affirmed the denial of a petition for a

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name change only when some evidence at the hearing on the petition showed that the petitioner was acting under an ‘improper motive,’ such as intentionally assuming another person’s name for the purpose of embarrassing that person or avoiding the petitioner’s own criminal past.” In this case, the two petitioners followed the procedures specified by law and “there was no evidence before the trial court to authorize a conclusion that either of them were acting with any improper motive against any specific person. Further, no objections were raised at the hearings on the petitions. It follows that the trial court abused its discretion when it denied these petitions.” The court ordered that on remand the trial court “enter an order changing petitioners’ names” to those they had requested. In light of this disposition, the court found no need to address constitutional arguments that had been made by petitioners’ lawyers from Lambda Legal’s Southern Regional Office in Atlanta.

ILLINOIS – In a case that appears to revolve around sharply different perceptions of the facts and underlying legal theories, U.S. District Judge Samuel Der-Yeghiayan granted a motion to dismiss a sex and sexual orientation discrimination claim brought under the Fair Housing Act (FHA) and Illinois housing discrimination law against a senior living community by a lesbian resident represented by Lambda Legal. *Wetzel v. Glen St. Andrew Living Community, LLC*, 2017 U.S. Dist. LEXIS 6437 (N.D. Ill., Jan. 18, 2017). A local newspaper article (*Lincolnwood Review*, Jan. 26) supplies some facts left out of the court’s opinion. Marsha Wetzel moved into the facility after her longtime same-sex partner died. Wrote the judge in the brief “background” section of the opinion, “Wetzel alleges that over fifteen months, she was subjected to a severe and pervasive pattern of discrimination, threats,

harassment, and intimidation because of her gender and sexual orientation.” She further alleged that although the management was aware of the problem, they took no effective steps to protect her. The defendant argued that Wetzel had failed to introduce evidence showing that it had any discriminatory intent against her, all the factual complaints relating to discriminatory and harassing activity by other tenants of the facility, not by the management or staff. The court, characterizing this as a disparate treatment case, said the absence of such evidence of discriminatory intent meant that Wetzel failed to meet the burden of establishing a *prima facie* case against the defendant and must suffer dismissal. Wetzel argued that this is a disparate impact case; that the failures of the management and staff to protect her had the effect of discriminating against her by subjecting her to a hostile environment, and that under a recent Supreme Court ruling upholding the disparate impact theory in the context of the Fair Housing Act, *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015), she did not have to show discriminatory intent by the defendant. Wrote the judge: “Wetzel argues that holding landlords liable for tenant-on-tenant discrimination where the landlord was aware of the discrimination is consistent with the underlying purpose of the FHA. However, Wetzel fails to cite controlling precedent establishing this legal standard and the Seventh Circuit precedent indicates that intent to discriminate should be pled,” citing *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009). He also noted that she continued to live there, and thus couldn’t contend that the management’s failure to act would support a constructive eviction theory, in effect that they had failed to provide her with suitable housing. And, having dismissed her FHA claims, the judge declined to keep the case alive by asserting jurisdiction over her state law claims. The newspaper report quoted

Karen Loewy, a senior attorney at Lambda, as being disappointed by the decision and feeling that the judge “got it quite wrong.” Lambda immediately announced that it would appeal the dismissal to the 7th Circuit. Ironically, because the district judge focused entirely on whether Wetzel had met the burden of pleading facts from which an inference of discriminatory intent by the defendant could be drawn, he never discussed the question whether the FHA’s prohibition of discrimination because of sex includes sexual orientation discrimination claims. That is ironic because less than two months earlier another Lambda attorney was arguing this very question before an en banc panel of the 7th Circuit, posing the same question under Title VII of the Civil Rights Act of 1964.

ILLINOIS – U.S. District Judge Robert W. Gettleman ruled in *Doe v. Aetna, Inc.*, 2017 U.S. Dist. LEXIS 4866 (N.D. Ill., Jan. 12, 2017), that a Jane Doe plaintiff’s claim that her state law privacy rights were violated when her employer’s disability benefits insurer requested and received medical records disclosing her HIV-status and mental health history without her consent was preempted by the Employee Retirement Income Security Act, so the matter, which the insurer removed to federal court with the consent of co-defendants (a clinic that had rendered service to the plaintiff and one of the clinic doctors) within the time limits specified by the removal statute. Jane sought treatment from the defendant clinic and doctor after a car accident, and then sought short-term disability benefits to cover the period when her injuries kept her from working. When she filed her benefits claim, the insurer issued “medical information requests” to the clinic and doctor, who informed Doe about the requests. Doe informed Aetna that it lacked authority to make such requests, and confirmed with a clinic representative that they

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would only send the Attending Provider Statement to Aetna. However, despite this assurance, some error was made and Aetna's entire request was complied with, turning over to Aetna such information as Doe's social security number, social history, mental health and/or developmental disabilities, and her HIV/AIDS status. She sought to sue in state court under the Illinois Mental Health and Developmental Disabilities Confidentiality Act and AIDS Confidentiality Act. Judge Gentleman concluded that the potential liability of the defendants was subject to ERISA fiduciary rules concerning conduct by entities responsible for administering employee benefits plans and providing services thereunder. He wrote that "plaintiff's claims are governed by ERISA, specifically its fiduciary requirements, as well as the fiduciary requirements of plaintiff's employer-sponsored ERISA benefits plan, because the foundation of plaintiff's complaint is Aetna's request for and use of her medical records in processing her disability claim." As such, the matter was removable even though the complaint was drafted to avoid any mention of federal law, as Supreme Court caselaw holds that all claims against employee benefits plans are governed by the ERISA preemption provision. Assuming defendants' removal papers affirmed that the claims related to an employee benefit plan, removal was proper and the plaintiff's motion to remand back to state court was denied.

INDIANA – The Attorney General's Office filed a notice of appeal with the U.S. Court of Appeals for the 7th Circuit on January 23, seeking review of a decision by District Judge Tanya Walton Pratt in *Henderson v. Adams*, 2016 WL 3548645 (S.D. Ind., June 30, 2016), opinion amended and clarified, 2016 WL 7492478 (S.D. Ind., Dec. 30, 2016), holding that birth certificates

for children born to married lesbian couples should be issued showing the names of both mothers. Pratt ruled that the state's insistence that the non-birth mother had to go through an adoption proceeding in order to get an amended birth certificate showing both mothers was a violation of equal protection and due process, relying heavily on *Obergefell v. Hodges* as precedent for the contention that equal parental rights would flow from the marital status. The state continues to argue that the women lacked Article III standing to challenge the constitutionality of the adoption statute, but the judge insisted that what was being challenged was the constitutionality of requiring recourse to the adoption statute in order to get an appropriate birth certificate. The state's persistence in litigating this issue seems bizarre. Why make life more difficult and complicated than it already is through bureaucratic pettifogging? Because the state legislature, Republican-dominated, insists on pursuing every last possible appeal in order to avoid full compliance with *Obergefell* in all its manifestations?

KENTUCKY – The Court of Appeals of Kentucky unanimously affirmed a ruling by Fayette Circuit Court that Bobby Russell's suit seeking damages from health care institutions and doctors who had misdiagnosed him as HIV-positive beginning in 2004 was time-barred when he filed suit in August 2013. *Russell v. Gundelly*, 2017 Ky. App. Unpub. LEXIS 20, 2017 WL 128605 (Jan. 13, 2017). Russell, an air force veteran who, it seems, had a bone marrow transplant around 1996 after completing his military service, "presented himself to the Emergency Department at University of Kentucky Hospital with complaints of perianal abscesses and perirectal fistulae as well as flu-like symptoms" on September 17, 2004. He said that he had been ill and was bleeding and had had unprotected sex with a man who might be HIV-positive. He was admitted as a patient began undergoing HIV antibody tests, which turned up positive several times. Blood was drawn for a confirmatory Western Blot test, which had to be sent to an external lab as the UK lab was not equipped to do it. (That test, it turned out, was negative, but somehow the result did not catch up with Russell, who was discharged from the hospital before it was returned.) Because of the repeated positive tests, he was referred for treatment to a doctor at Bluegrass Care Clinic, and ultimately submitted to eight years of anti-retroviral therapy, with all the attendant costs, side effects, etc. However, after about five years of this, he "began doubting his diagnosis" and started to attribute the immune deficiency that was detected during his treatment as stemming from the old bone marrow transplant. He submitted to more HIV antibody testing, and continued to test positive, but he later insisted "that the results were falsified by U.K. and its employees," presumably to cover their tracks. By October 2009, he was telling social workers, doctors, and reporting on social media like Facebook, that he believed he had been misdiagnosed. He filed for benefits with the Veterans Administration that year, and he claims that they told him that all his tests there "returned negative result for HIV." He began threatening to file a lawsuit against U.K. and its employees in January 2010. He claims that he went to the federal Centers for Disease Control in February 2010 and that CDC offered him HIV testing which came back negative. He made several Facebook posts during 2011 and 2012 alluding to his possible lawsuits, and began seeking counsel to recommend him as early as 2011, but several attorneys turned him down and the suit was ultimately filed by an out-of-state attorney who was admitted *pro hac vice* for purposes of the case, but was no longer representing him as the case proceeded to motion practice. Many of the defendants were

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thrown out on immunity grounds, but ultimately the trial court concluded that Russell just waited much too long to file suit. He said that the time to sue should be measured from when he finally discovered in January 2013 a physical copy of the Western Blot test report that the hospital failed to communicate to him back in 2004, but the court disagreed with him. “Weighing the facts in a light most favorable to Russell, we nonetheless cannot ignore the dates of Russell’s negative test results (some of which he performed himself and declared were ‘99 percent accurate’) beginning, according to him, as early as 2009. He was receiving legal advice as early as 2010-2012. Russell fails to convince us that receiving a paper copy of his 2004 Western Blot results in January 2013 is the only way of determining when he ‘knew or should have known’ of his alleged misdiagnosis . . . He cannot have it both ways: Russell cannot claim that all the negative test results amounted only to mere skepticism on his part rather than actual proof. He knew or should have known well before January 2013 of his alleged misdiagnosis.” The court also refused to consider his “continuous course of treatment” argument, finding that it had not been properly preserved for appellate review. “We decline further discussion of the continuous course of treatment doctrine in order to avoid unnecessary analysis of what might be considered facts in controversy,” concluded the court, upholding dismissal of the case.

KENTUCKY – The Kentucky Judicial Conduct Commission has sanctioned Fayette Circuit Judge Timothy Philpot with a public reprimand, based on information from a preliminary investigation showing that he requires married couples with children to participate in special hearings to determine whether their marriage is irretrievably broken but does not

require hearings with couples who do not have children. The Commission also received reports that Philpot “was providing third parties with facts about the cases that were not part of the public record to assist them in research and teaching duties.” The January 6 opinion concluded “that Philpot violated a rule that requires judges to perform their duties fairly and impartially, and another which prohibits judges from lending the prestige of their office to advance the private interests of others and from disclosing non-public information acquired in a judicial capacity.” This is according to a January 10 article in the *Courier-Journal* (Louisville), which reports in its lead sentence that Philpot has “called gay marriage an ‘oxymoron’ like ‘jumbo shrimp.’” The newspaper had previously reported on an appearance by Judge Philpot before the Francis Asbury Society in Wilmore, Kentucky, during which he said he loves homosexuals but their relationships are “sterile” and “just entertainment.” Wrote the newspaper, “He also called the U.S. Supreme Court’s decision in 2015 legalizing gay marriage ‘pretty close to insane’ and warned that ‘there is no question that polygamy is on the way.’” No question? Philpot responded to the earlier newspaper report by insisting that “my views on the deep spiritual nature of marriage have never stopped me from following the law and being fair to all people, including those who identify themselves as LGBT.”

MARYLAND – An administrative law judge (ALJ) who takes too many shortcuts in writing an opinion may suffer reversal, according to a January 18 ruling in *Walters v. Commissioner*, 2017 U.S. Dist. LEXIS 6557, 2017 WL 211491 (D. Md.), in which U.S. District Judge Stephanie A. Gallagher denied cross-motions for summary judgment on Erin Walters’ disability benefits claim and remanded the case back to the agency for further consideration.

Walters, who is HIV-positive, also suffers from degenerative disc disease and major depressive disorder. The ALJ found that she was capable of working and not eligible for benefits. That conclusion might be correct, Judge Gallagher acknowledged, but you really couldn’t figure out whether it was from the ALJ’s opinion, which “did not engage in a proper listing analysis” to determine whether Walters’ HIV could support a disability determination. “It is clear that the ALJ believed there to be ample evidence to identify and discuss Listings 1.04, 12.04, and 14.08 [which pertains to the HIV analysis]. However, after identifying those listings, the ALJ did not discuss any of the relevant criteria for Listing 14.08 . . . Notably, the ALJ does not address whether Ms. Walters has evidence of infection, malignant neoplasms, skin lesions, HIV encephalopathy, or HIV wasting syndrome. Moreover, the ALJ’s general commentary on Ms. Walters’s HIV diagnosis does not suffice to constitute ‘specific application of the pertinent legal requirements to the record evidence,’ as required by 4th Circuit precedent, *Radford v. Colvin*, 734 F.3d 288 (2013). “Accordingly, remand is warranted for further analysis that might permit appellate review.” The judge also faulted how the ALJ dealt with the residual functional capacity analysis that is crucial to determine whether the plaintiff is sufficiently disabled from working to qualify for benefits. “On remand,” wrote the judge, “the ALJ should consider the impact of Ms. Walters’s limitations on the RFC determination, and explain the reasons for that finding, citing substantial evidence.” In brief – no shortcuts, please! (On the other hand, Walters raised other objections to the ALJ’s decision which did not persuade Judge Gallagher. But she considered the flaws discussed above sufficient to require a remand for reconsideration.) Walters is represented by Andrew N. Sindler of Severna Park, MD.

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MISSOURI – The *St. Louis Post-Dispatch* (Jan. 10) reported that Missouri State University has settled a federal 1st Amendment lawsuit filed by a counseling student who claims he was removed from the master's degree counseling program because he said he would not counsel gay couples. The story reports that the University has agreed to pay \$25,000 to Andrew Cash, who filed suit last April, represented by the Thomas More Society, a Catholic non-profit litigation firm. The Missouri State Board of Governors approved the settlement in December, but it only became public on January 9 in response to an open records request that had been filed by *The Springfield News-Leader*. The damage award is the estimated cost of Cash completing a counseling program at a different school, and under the settlement agreement Cash will not seek employment or admission at Missouri State, while the University disclaims any legal liability.

NEW JERSEY – Lambda Legal filed a lawsuit against a Catholic hospital in New Jersey that refused to perform a hysterectomy on a transgender man, claiming that the refusal violates the hospital's obligation under the Affordable Care Act (ACA) not to discriminate because of gender identity.

Conforti v. St. Joseph's Healthcare System (D.N.J., filed Jan. 5, 2017). Although Section 1557, the non-discrimination provision of the ACA, does not mention gender identity as a prohibited ground of discrimination, the Department of Health and Human Services has construed the statute to cover such discrimination, although it is anticipated that the Trump Administration may withdraw that interpretation. On December 31, a federal district judge in Texas issued a nationwide injunction against the enforcement of the gender identity regulation by the federal government, but the injunction does not affect private

plaintiff's litigation. According to a Lambda press release, "On the advice of his doctor, Jionni [Conforti] decided to undergo a hysterectomy as medically necessary treatment for his gender dysphoria and based on his possibly increased risk of cancer. Although hospital personnel initially confirmed that scheduling a hysterectomy as treatment for gender dysphoria would be no problem, Jionni later learned there might be an issue with scheduling the procedure and sought confirmation from hospital leadership." Conforti received an email informing him that the hospital would not allow the surgeon to schedule the procedure. Because Conforti's surgeon has admitting privileges only at that hospital, Conforti will have to find a new surgeon to perform the procedure elsewhere. The hospital will undoubtedly try to rely on RFRA to avoid having to comply with Section 1557. Federal courts are divided about whether RFRA provides a defense against a discrimination charge in a case brought by a private plaintiff, as opposed to a case filed by the government. Conforti is represented by Lambda Legal Staff Attorney Omar Gonzalez-Pagan and Transgender Rights Project Attorney Demoya Gordon, with assistance from cooperating attorneys from Quinn Emanuel Urquhart & Sullivan, LLP.

NEW YORK – What's the secret? It is so frustrating when a court issues a decision consisting of rote recitation of legal principles without giving a clue as to the facts of the case. In *Andaya v. Atlas Air, Inc.*, 2017 N.Y. App. Div. LEXIS 139, 2017 WL 99642, 2017 NY Slip Op 00141 (N.Y. App. Div., 2nd Dept., January 11, 2017), Todd Andaya claimed that Atlas Air discriminated against him in violation of the NY Human Rights Law (Executive Law Sec. 296) because of his sexual orientation, and retaliated against him for his complaints about workplace discrimination. Atlas moved

for summary judgment, contending that it had a legitimate non-discriminatory reason for discharging Andaya. So finding, Supreme Court Justice William J. Giacomo (Westchester County) granted the motion. The Appellate Division said: "The defendant established its *prima facie* entitlement to judgment as a matter of law dismissing the cause of action to recover damages for employment discrimination pursuant to Executive Law sec. 296 by showing that it had a legitimate, nondiscriminatory reason for terminating the plaintiff's employment, and that there were no triable issues of fact as to whether its explanation for the termination was pretextual. In opposition to the motion, the plaintiff failed to raise a triable issue of fact as to whether the reason proffered by the defendant was merely pretextual." The court ruled similarly on the retaliation claim, and dismissed "the plaintiff's remaining contention" as being without merit. The opinion, presumably drafted by a court attorney and approved by the eight judges listed in the report of the case, tells us nothing whatsoever about Andaya's factual allegations, the "nondiscriminatory reason" for his discharge, or even what his "remaining contention." One has to question why the office that passes on whether to publish opinions authorized the publication of this one, since it could have been copied out of a hornbook. As the court cites prior cases for each of its boilerplate statements, it appears this ruling does not break new ground or establish new points of black letter law. So what's the story?

NEW YORK – U.S. Magistrate Judge Cheryl L. Pollak issued a report and recommendation on January 26 in *Lombardi v. Choices Women's Medical Center, Inc.*, 2017 U.S. Dist. LEXIS 11935 (E.D.N.Y.), recommending that the motion to dismiss be granted without leave to amend. Christine Lombardi alleged violations of Section

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504 of the Rehabilitation Act (based on her having multiple sclerosis) and the New York State and City Human Rights Laws, reiterating the disability claim and adding a claim of sexual orientation discrimination. She claimed that she was discharged without just cause under circumstances supporting an inference that it had something to do with her M.S. The big problem in the case is a late filing of the complaint, and Judge Pollak determined that the plaintiff's claimed emotional distress as a result of her discharge was no so severe as to excuse her failure to file a complaint within the time limits of the rules. She also found unsupported the claim of sexual orientation discrimination, which seemed to hang not on any direct connection to the plaintiff being a lesbian with a same-sex spouse, but rather on a stray homophobic comment directed at another employee, the bisexual Human Resources Director. Indeed, she focused in on plaintiff's allegation that "Defendants' sole motivation was to avoid having someone on the payroll who had M.S." Judge Pollak concluded that Lombardi had a plausible disability discrimination claim on the merits, and recommended that if the court found the complaint was not time-barred, it should allow the disability discrimination claim. Lombardi is represented by Aaron David Frishberg.

NORTH CAROLINA – AP State News reported that Lonnie Billard, a gay man who had worked as an English and drama teacher full-time at Charlotte Catholic High School before transitioning to a regular substitute teaching position after 2012, has filed a Title VII suit against the school in federal district court after he was told by an assistant principal that he would no longer be employed because he had posted on facebook.com about his upcoming wedding to a same-sex partner in October 2014. A spokesperson for the local archdiocese released a public statement that Billard

was removed from the active substitute list for "going on Facebook, entering into a same-sex relationship, and saying it in a very public way that he does not agree with the teachings of the Catholic Church." Billard responded with a statement, "I know that the Catholic Church opposes same-sex marriage, but I don't think my commitment to my husband has any bearing on my work in the classroom. I have never hidden the fact that I'm gay and my relationship with my partner was no secret at school." Of course, the problem is that Billard violated the "don't ask, don't tell" policy that Catholic institutions have followed for many years, employing openly gay people in a wide variety of roles so long as the Church was not confronted with public statements or announcements. The advent of same-sex marriage, and the natural desire of LGBT individuals to announce their nuptials, has upset this policy and led to discharges of longtime, highly valued employees. (Billard, for example, won the school's 2012 Teacher of the Year Award.) The EEOC, per its current interpretation of Title VII, issued Billard a right-to-sue letter, authorizing him to initiate litigation in federal district court. The EEOC's position has been that religious organizations can give employment preference to members of their faith but cannot otherwise discriminate on grounds prohibited under Title VII, and the agency considers sexual orientation discrimination to come within the sex discrimination prohibition under the statute. Whether the agency's position will change as Donald Trump begins appointing new Commissioners is open to question.

RHODE ISLAND – The *Providence Journal* (Jan. 7, 2017) reported that Chief Judge Michael Forte of the Rhode Island Family Court ruled in an adoption case involving the same-sex spouse of a child's birth mother that because he found that the spouse was a *de facto*

parent of the child, there was no need to attempt to find the sperm donor to get his consent for the adoption. Bryce Helie, the birth mother, and her partner Cara Millett, were not married when their daughter Meyer was born in June 2013. They did subsequently marry when it became possible in Rhode Island, but their attempt to get a second-parent adoption was affected by an old Rhode Island statute requiring them to attempt to find the sperm donor to obtain his consent to the adoption, even though at the time of donation he had waived all parental rights. They had obtained the sperm at a Cryobank in Virginia from an anonymous donor, known to them only by a number on a form. However, their lawyer from GLBTQ Legal Advocates & Defenders (Boston), Jennifer Levi, found an earlier Rhode Island precedent from 2000, *Rubano v. DiCenzo*, 759 A.2d 959, which recognized that the same-sex partner of a birth mother could, depending on the circumstances, be deemed a *de facto* parent, who could thus theoretically adopt without getting the consent of anybody other than the birth mother. They convinced Judge Forte to adopt this application of the *Rubano* precedent. The newspaper reports that he said, "This follows in the court's tradition of protecting the best interest of the child. The court's goal is to create families and to protect them whenever possible." He authorized that a birth certificate be issued identifying Cara Millett as a parent of the child.

TEXAS – A gay man who quit his job as a correctional officer in a prison operated by a corporation in Bridgeport, Texas, lost his Title VII claims of sexual harassment, sex stereotyping and retaliation when District Judge John McBryde granted a motion for summary judgment by the corporation that runs the prison. *Smith v. Management & Training Corp.*, 2017 U.S. Dist. LEXIS 660, 2017 WL 57843 (N.D. Tex., Jan. 4, 2017). Isaiah Smith claimed that he

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was repeatedly harassed and subjected to a hostile work environment and ultimately constructively discharged. "In particular," wrote Judge McBryde, "plaintiff's complaints focus on the alleged refusal of defendant to allow him to conduct strip searches of male inmates at the Bridgeport facility." Smith, who began working in the facility on June 2, 2014, lasted less than five months in the job. Evidently a stoic, he refrained from complaining to the human resources manager or the facility director about the harassment he claimed to be experiencing. He was disciplined three times for failing to follow proper call-in procedures. Finally, on October 14, he sent emails and attached copies of notes regarding his allegations to the human resources department. Two days later, management notified him that it would transfer him to a day shift away from the alleged harassers, while investigating his complaint. Although Smith responded affirmatively by email, he did not return to work. The corporation assigned a warden from a different facility to investigate Smith's charges. After an investigation of just a few days, the warden submitted his report, which stated, among other things, that offenders who refused to be strip-searched by Smith were disciplined, that Smith never told anyone in authority that he believed he was being harassed because of his sexual orientation until October 14, that he was not told, contrary to his allegations, that he could not conduct strip searches, but rather that he was removed from searches when inmates "became agitated," and that the assignments he received were not punishment. Smith challenged the good faith of the investigation. The corporation responded to his suit by arguing that Title VII does not ban sexual orientation discrimination. Judge McBryde declined to decide "whether the subset of homosexual males is a separate protected class" under Title VII, preferring to focus on the requirement of the *prima facie*

case for plaintiff to plead that he was qualified for the position. "Although defendant does not address the issue," he wrote, "it appears that an argument could be made that plaintiff was not qualified for the position he held given his apparent fixation on, and possible prurient interest in, strip searching male inmates." With this prejudicial statement, which is not referenced to anything in the evidentiary record, Judge McBryde may be engaging in his own stereotyping of gay men. Judge McBryde also asserted that Smith failed to allege facts supporting a claim that he suffered an adverse personnel action, in that after management reassigned him to a different shift in response to his complaints, he failed to return to work. "Plaintiff cannot establish that he was constructively discharged," wrote the judge. "There is no evidence of a demotion, reduction in salary, reduction in significant job responsibilities, reassignment to menial or degrading work, or any other conduct that would have given a reasonable person in plaintiff's position no choice but to resign." McBryde also stated that Smith failed to produce evidence that he was "treated differently from any similarly situated co-worker." As to the hostile environment claim, McBryde wrote: "Here, the facts pale in comparison to cases where a hostile working environment was found. That is, a reasonable person in plaintiff's position – a guard at a prison – would not have found the environment to be objectively hostile or abusive." And, even if Smith were able to meet the pleading bar, his failure to complain to the employer over a long period of time would relieve the employer of liability, where it had established a non-discrimination policy and a mechanism to deal with complaints, as it did deal with the charge belatedly filed by McBryde. "Plaintiff had no opportunity to succeed in the workplace," wrote McBryde, "because he declined the opportunity. This is simply the case of a

young man barely out of high school who thought he knew better than defendant how to run a correctional facility and when defendant declined to kowtow to his demands, decided that he would pursue legal action rather than return to work." Smith is represented by Michael J. Hindman, of Hindman/Bynum PC, Dallas. Judge McBryde, appointed to the bench by George H.W. Bush in 1990, has been a controversial federal district judges who is characterized as being in a continuing state of war with the 5th Circuit.

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U.S. COAST GUARD COURT OF CRIMINAL APPEALS – The court rejected an argument that the Uniform Code of Military Justice's adultery provision is unconstitutional since, on its face, it appears to apply only to heterosexual adultery. The per curiam opinion in *U.S. v. Henderson*, 2017 CCA LEXIS 3 (Jan. 5, 2017), stated: "The fact that the Manual for Courts-Martial, United States (2012 ed.) (MCM) sets forth elements of adultery in heterosexual terms under Article 134 does not preclude a specification under Article 134 alleging a similar offense involving a married homosexual, which would most likely be subject to the same maximum sentence as that established for adultery in MCM, Pt. IV, para. 62e."

IDAHO – The Court of Appeals of Idaho ruled in *Thomas v. State*, 2017 Ida. App. LEXIS 7, 2017 WL 382726 (January 27, 2017), that an HIV-positive man who pled guilty to two counts of transfer of bodily fluid which may contain HIV, a violation of Idaho Code Sec. 39-608, did not suffer from ineffective assistance by his trial counsel, and so was not entitled to post-conviction relief. Thomas alleged that his trial attorney's representation

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was ineffective because the attorney failed to investigate the affirmative defense of medical advice, i.e., that Thomas had been advised by his doctor that his viral load was not detectable, so it was “extremely unlikely” that he could transmit HIV to somebody else sexually. Relying on this advice, argues Thomas, he could have beaten the rap that he had exposed somebody to HIV infection by having sex with them. Writing for the unanimous appellate panel, Judge Sergio Gutierrez pointed out that the affirmative defense recognized by the statute (Sec. 39-608(3)(b)) provides: “It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a license physician that the accused was noninfectious.” Gutierrez observed that “neither of the doctor’s affidavits indicates that Thomas is noninfectious. Thus, there is no reasonable probability that, but for counsel’s alleged deficiency, the result of the proceedings would have been different.” In other words, as the Idaho court reads the statute, only somebody who is advised by their doctor that they present *no* risk of transmitting an infectious agent can benefit from the statutory affirmative defense. A literal reading of the statute would support this reading, even though, as a practical matter, it seems counter to the message being sent by public health officials that people living with HIV who comply with anti-retroviral therapy and reduce their viral load to an undetectable level do not, as a practical matter, present any real risk of infection to their sexual partners.

IDAHO – Kelly Schneider has agreed to plead guilty to a federal hate crime charge in the death of a gay man. Under the plea bargain, he hopes to avoid a life prison sentence. He admitted in court documents filed in the U.S. District Court in Boise that he lured Steven Nelson to a remote area and use steel-toed boots to kick Nelson 20 or 30 times

while Nelson begged for his life. The documents assert that Schneider had posted a sex solicitation ad online to set up a meeting with Nelson, and that Schneider admitted stripping Nelson of his clothes after the assault and stealing his car, leaving him alone in a wilderness area. Nelson eventually got to a home about half a mile away, but died from his injuries. *Canadian Press Broadcast Wire*, Jan. 26.

NEW YORK – No constitutional privacy violation took place when a rape victim testified about her knowledge of the defendant’s HIV-positive status, ruled the unanimous N.Y. Appellate Division, 3rd Department, in *People of New York v. Serrano-Gonzalez*, 2017 N.Y. App. Div. LEXIS 44, 2017 NY Slip Op. 00043 (Jan. 5, 2017), since constitutional privacy rights run only against state actors, and the victim was not a state actor. The Appellate Division also found, in an opinion by Justice William McCarthy, no error by the trial court letting the victim testify about the defendant’s HIV status, rejecting the argument that prejudice would outweigh its probative value. “Defendant’s HIV status was directly at issue in regard to whether he and the victim engaged in consensual intercourse,” wrote the court. The victim testified that she and defendant had previously had a consensual sexual relationship. Thereafter, defendant was diagnosed with HIV. The victim indicated that, as a result of defendant’s diagnosis, she and defendant discussed their relationship and agreed that it would thereafter be ‘platonic.’ Thus, defendant’s HIV status as highly probative evidence as necessary background information regarding the victim’s choice to stop having sexual intercourse with defendant. Moreover, County Court instructed the jury that defendant’s HIV status could not be considered as propensity or disposition evidence in relationship to the charged crimes.” The court’s brief summary

of the evidence is horrific: “The charges stemmed from allegations that defendant threatened and choked the victim while forcibly raping her all before he continued to threaten her at knife point until she escaped and ran to a nearby police station.” The court also rejected the defendant’s challenge to the trial court’s refusal to allow testimony by a nurse that the victim planned to “stay together” with the defendant after learning of his positive HIV test.

PENNSYLVANIA – The Superior Court rejected the attempt by a man convicted in 2007 of murder and sentenced to life without parole to use the U.S. Supreme Court’s *Obergefell* decision as a “hook” to challenge his sentence on equal protection grounds because a majority of states, but not Pennsylvania, would allow for the possibility of parole from a life sentence for the crime of which he was convicted. *Commonwealth of Pennsylvania v. Byrd*, 2017 WL 281021 (Jan. 23, 2017). Jacquin Jaron Byrd filed his petition for collateral relief shortly after the Supreme Court issued the *Obergefell* decision on June 26, 2015. The Court of Common Pleas rejected the petition as untimely, since many years had passed since Byrd was sentenced, but he argued that *Obergefell* had announced a new rule of constitutional law, thus reviving his time to seek collateral review of his sentence. The Superior Court quotes his contention: “The holding in *Obergefell* that United States Citizens who are same-sex couples and allowed to marry in some states but denied the right to marry in other States violates equal protection of the law does, in principal [sic], equate to the fact that individuals convicted if first degree murder in the majority of States but given the privilege of parole, but individuals convicted of the exact same crime in other States, such as Pennsylvania, are denied this privilege also violates equal protection of the law.” Nice try, Jacquin, but no cigar! The

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court rejected Byrd's argument on two substantive grounds: first, that there was "nothing in *Obergefell* demonstrating an intention on the part of that Court to recognize a new principle of constitutional law that is to be accorded retroactive effect to criminal cases on post-conviction collateral relief," and, second, that even if it could be applied retroactively, "the holding in *Obergefell* relating to the rights of same-sex couples does not apply to individuals convicted of first degree murder."

WISCONSIN – The Wisconsin Court of Appeals refused to provide post-conviction relief to Britton R. Saunders, a gay man (then 45 years old) who was discovered by police officers in "a car with fogged up windows parked in an unlit corner of a store's otherwise empty parking lot" evidently late at night, engaged in "reciprocal sexual activity with N.P.W., a sixteen-year-old Saunders had mentored in regard to personal struggles, including about his sexual orientation." Saunders pled guilty to two felony counts of exposing genitals or pubic area and two misdemeanor counts of sexual intercourse with a child over sixteen, and was sentenced to jail time, probation, a withheld prison sentence, and to register as a sex offender. Saunders sought post-conviction relief from the registration requirement, which the trial court denied. In this appeal, the court found no abuse of discretion by the trial court. Even though the court found that there was no physical harm to N.P.W., and accepted expert testimony that Saunders could not be labeled a pedophile and was unlikely to reoffend, nonetheless the trial court – and the appeals court – emphasized the substantial age difference, rejected Saunders' apparently incredible argument that the incident did not meet the statutory requirement of being "sexually motivated" (pointing out that they were engaged in oral sex and Saunders had

ejaculated) and also rejected Saunders' argument that the trial court had to accept the psychologist's opinion because it was uncontested. The trial court had found that Saunders' conduct had "exacerbated" N.P.W.'s "prior depression and suicidal thoughts," and "despite Saunders' prosocial attributes, good character, and educational and employment accomplishments, he still victimized a child." The trial court was concerned with protecting the public, and "requiring registration was justified to protect the public," concluded the court of appeals in *State of Wisconsin v. Saunders*, 2017 WL 218363 (Jan. 18, 2017).

PRISONER LITIGATION NOTES

CALIFORNIA – *Pro se* plaintiff Dylan J. Wagstaff, is a Jewish transgender person, identifying as a woman, who filed a civil rights case as an application for a writ of habeas corpus and whose case was dismissed without prejudice in *Wagstaff v. Price*, 2017 U.S. Dist. LEXIS 4998 (C.D. Calif., Jan. 11, 2017). Wagstaff, incarcerated in Atascadero State Hospital, a maximum security mental institution for men, alleged, *inter alia*: sexual assault, sleep deprivation, denial of kosher meals, harassment, and placement on "line of sight" status, where she is watched at all times, ostensibly for her own safety. The case is handled under Central District of California Local Rule 72-3.2 ("Summary Disposition of Habeas Corpus Petitions"), which allows a magistrate judge to present an order to the district judge to dismiss the matter if it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Magistrate Judge Karen L. Stevenson "presented" such an Order to United States District Judge Philip S. Gutierrez, who signed it, along with a certificate of denial of appealability. The "opinion" refers to Wagstaff throughout as "s/he" and

states that "s/he" has not presented a cognizable habeas claim. The failure to allow the plaintiff to see the opinion and respond to the district judge (as would apply normally to a magistrate judge's Report and Recommendation) precludes Wagstaff from even objecting to the offensive pronoun usage. The opinion inexplicably discusses habeas under § 2241, although Wagstaff is not a federal prisoner. The discussion of § 2254 habeas (state prisoners) is germane, but the court declines its authority to convert the habeas to a civil rights § 1983 case – *see Wilwording v. Swenson*, 404 U.S. 249, 251 (1971), *overruled on other grounds by Woodford v. Ngo*, 548 U.S. 81 (2006) – because Wagstaff has not complied with the Prison Litigation Reform Act. Yet, the opinion does not state the circumstances of Wagstaff's incarceration at Atascadero, which is a mental hospital. Whether Wagstaff is a "prisoner" covered by the PLRA may depend on her status: was she "not guilty by reason of insanity"; or "guilty but insane"; or held as a sexual predator; or committed while incarcerated? *See, generally, Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000). The decision seems right about the habeas point – *see Nelson v. Campbell*, 541 U.S. 637, 643 (2004) – but "on its face," the opinion does not answer these PLRA questions. *William J. Rold*

CALIFORNIA – Transgender *pro se* prisoner Joseph Becker sued the Lieutenant in charge after she was returned to a double cell over her objections after being raped. The new cellmate then attempted to rape her. Although she originally filed a broader complaint, U.S. Magistrate Judge Michael J. Seng, who has the case for all purposes, found that she had only stated a claim against the lieutenant; but Judge Seng suspended pre-trial deadlines and sent the case to the Pro Bono Coordinator to try to find counsel for Becker "in light of the seriousness

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of the allegations and the serious potential for future harm.” Becker was then transferred to a different prison. After four months without success finding an attorney, Becker moved to proceed; and Judge Seng allowed her to try to file an amended complaint in *Becker v. Sherman*, 2017 U.S. Dist. LEXIS 11817 (E.D. Calif., January 27, 2017). Judge Seng also denied preliminary relief because of the transfer, relying on *Zepeda v. United States Immigration Service*, 753 F.2d 719, 727 (9th Cir. 1985). He granted her an extension of time to amend and waived the requirements of electronic filing. While her case’s future is uncertain, it appears that Becker achieved some protection by the act of filing and gaining the attention of a federal judge, who sent a message by describing the case and trying to find counsel. *William J. Rold*

the supposed behest of a non-party (and was therefore not “in concert” with defendants before the court) and was not likely to cause “irreparable” injury. Judge Rosenstengel found Dent unlikely to succeed on the merits, so the other factors for preliminary relief under F.R.C.P. 65 were mentioned only in passing. The ruling is without prejudice to Dent’s filing a motion to retrieve legal papers he believes are still being held from him. *William J. Rold*

PLRA’s “three strikes” bar – 28 U.S.C. § 1915(g) – has been used successfully on specific medical care in terms of dosage denials. *William J. Rold*

NEVADA – U.S. District Miranda M. Du applied the “imminent danger” exception to the Prison Litigation Reform Act’s [PLRA] “three strikes” rule to allow a prisoner who had dosing problems with HIV medication to proceed *in forma pauperis* despite dismissals of three prior cases, in *Reberger v. Koehn*, 2017 U.S. Dist. LEXIS 8994, 2017 WL 343639 (D. Nev. January 23, 2017). Lane Reberger, *pro se*, alleged that his two HIV medications (Norvir and Invirase) must be taken with food every 12 hours, and it is being delivered to him “anywhere from 9-1/2 hours to 16 hours apart” without regard to meals. He says his T-cell count has dropped 500 “points” as a result, and attaches copies of a statement from the manufacturer indicating that: (1) twice daily means every 12 hours; and (2) “with meals” means just that, with reduced efficacy if taken more than two hours after meals. Defendants conceded the alleged dosing times and relied only on packaging inserts, which were less specific. Judge Du found that Reberger had sustained his burden to show “imminent danger” for PLRA purposes, without ruling on the merits of the claim, specifically denying consideration of summary judgment at this time, despite the consideration of matters outside the pleadings on the PLRA issue. This is the first case this writer has seen where the “imminent danger” exception to the

WEST VIRGINIA – Transgender prisoner Benjamin (Paris) Leibelson brought two cases concerning assaults she suffered while in federal custody in West Virginia: a *Bivens* action – see *Bivens v. Six Unknown Federal Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) – and a Federal Tort Claims Act suit, in which she alleges tort liability of the United States, arising from the same actions. U.S. District Judge Irene C. Berger consolidated the cases for pre-trial purposes in *Leibelson v. United States*, 2017 U.S. Dist. LEXIS 9357, 2017 WL 359202 (S.D. W. Va., January 24, 2017). Judge Berger also denied most of the defendants’ motion to dismiss. Leibelson alleges that she had a history of being assaulted in custody and that defendants “took no action” to protect her despite such history; and they permitted officers to engage in homophobic and transphobic slurs and discrimination, putting her safety at risk, leading to extortion and assaults, and denying her participation in programs. Leibelson agreed to dismissal of claims for attorneys’ fees, punitive damages, and loss of consortium. Judge Berger deferred ruling on whether a claim is stated under the Prison Rape Elimination Act [PREA], relying on two 4th Circuit cases for the proposition that a Rule 12(b)(6) motion tests only the sufficiency of the facts and that the case should proceed if there is *any* legal theory to support it – emphasis by the Court, *citing Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); and *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988). While these cases do say that, in both cases legal claims were dismissed for failure to state a claim – Equal Protection in *Edwards*, 178 F.3d at 250; and Due Process and

ILLINOIS – In a brief memorandum opinion U.S. District Judge Nancy J. Rosenstengel denied a preliminary injunction to *pro se* gay inmate Charles Dent, in *Dent v. Nally*, 2016 U.S. Dist. LEXIS 180386 (S.D. Ill., December 30, 2016). Dent alleged harassment at Big Muddy Correctional Center, including retaliation for filing grievances, interference with mail and legal papers, and placement with a cellmate who was an aggressive homophobe. In response to his lawsuit, Dent was transferred to another prison, but he alleged that retaliation continued because a non-party at Big Muddy told officials at the successor institution about Dent’s activities, resulting in a heightened security classification and deprivation of a “pass” for three weeks. Judge Rosenstengel found the request for injunctive relief moot as to Big Muddy, because of the transfer and lack of evidence that Dent would be returned to that prison. She also found the subsequent “retaliation” too vague, and unconnected because it began at

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the Administrative Procedure Act in *Harrison*, 840 F.2d at 1155-6, which affirmed a complete dismissal. Almost all courts that have considered the issue have dismissed claims asserting a private cause of action under PREA as not stating a claim. The distinction here, although not explicitly made, may be that Leibelson, in suing under the Federal Tort Claims Act, is permitted to plead what amounts to common law claims of tort (battery, assault, negligence, failure to perform), where standards of care and duty are key determinations in liability. Judge Berger declined to dismiss the relevance of PREA to such claims. Leibelson is represented by Fein & Delvalle, Washington, D.C., and by Goddard & Wagoner, Clarksburg, WV.

William J. Rold

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PRESIDENT OBAMA – In the waning days of his administration, President Barack Obama commuted the remaining prison sentence of Chelsea Manning, who, as Bradley Manning, was charged with the violation of national security laws and came out as transgender during her court martial process, which had resulted in a 35 year prison sentence. During her incarceration at Fort Leavenworth, Kansas, she has succeeded in obtaining a legal name change, but struggled to get the Army to provide treatment for her gender dysphoria or to allow her to groom and dress as a woman in the all-male prison in which she was confined. Upon her anticipated release, she will have served longer than any other person convicted if this offense, and the president indicated his view that the sentence was excessive. The commutation does not affect her conviction, so she will be released as a convicted felon with a bad conduct discharge who is not entitled to veteran's benefits or free treatment in VA

hospitals despite her overseas service, and is likely to encounter significant difficulties in civilian life as a result. *NY Times*, Jan. 17; *Chelsea Manning's Troubles Are Just Beginning*, *Courier News* (Bridgewater, N.J.), Jan. 28. *** Also in the flurry of end-of-term activities, the President appointed Jason Collins, the first openly gay man to play in the National Basketball Association, to the President's Council on Fitness, Sports and Nutrition. Such Council appointments are not subject to Senate confirmation and are for a two-year term. The Council was established through an executive order by President Dwight Eisenhower. The Order was most recently revised and updated by President George W. Bush in 2002. There have been no reports yet about whether the Trump Administration plans to rescind the Order or defund the Council, which operates under the ambit of the Department of Health and Human Services. Obama made 27 appointments on January 18, 25 of which do not require Senate confirmation. In addition to Collins, Obama appointed Gabby Douglas and Kareem Abdul-Jabar to the panel. At the same time, Obama appointed White House Senior Advisor Valerie Jarrett, who had focused on LGBT issues for the White House, and National Security Advisor Susan Rice, to the Board of Trustees of the John F. Kennedy Center for the Performing Arts. Obama also announced appointments of two transgender officials: Raffi Freedman-Gurspan, who was serving on the White House staff, was appointed to the U.S. Holocaust Memorial Council, and Shawn Kelly was appointed to the National Commission on Military, National, and Public Service. Kelly is a Navy veteran. *Indo-Asian News Service*, Jan. 18. (The unusual source for this item is due to Obama's appointment of two Indian-Americans, Maneesh Goyal to the J. William Fulbright Foreign Scholarship Board, and D.J. Patil to the National

Infrastructure Advisory Council. Otherwise, these appointments received little notice to the press, especially since the White House website was wiped clean of Obama Administration announcements on the stroke of noon, January 20, as Donald J. Trump took the oath of office.)

PRESIDENTIAL LGBT EXECUTIVE ORDERS

– In advance of the January 20 inauguration there were press reports that the Trump Administration would quickly, perhaps on “Day One,” repeal all of President Obama’s Executive Orders, or perhaps more selectively those that many Republicans had attacked as “unconstitutional” or “overreaching” or that were deemed contrary to President Trump’s policy preferences. Many assumed that President Obama’s Executive Orders protecting LGBT executive branch employees and employees of executive branch contractors from discrimination would be among those repealed. Although there was no official word from the White House during the first week of the administration, and Press Secretary Sean Spicer disclaimed any knowledge of such a move at a January 30 press conference, the LGBT blogosphere was awash with stories that such an EO was imminent in the days after Trump’s immigration EO was signed on January 27. Early on January 31, the White House released a statement that President Trump had decided to leave the Obama LGBT executive order banning discrimination by federal contractors in place. The statement mentioned that Trump had been the first Republican nominee to ever speak affirmatively about LGBT rights in his convention acceptance speech. It was not completely clear from the White House statement whether Trump was also continuing in place the EO protecting executive branch employees from discrimination because of sexual orientation and gender identity, although

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that seemed likely. Rumors continued to circulate that Trump, who endorsed last year's First Amendment Protection Act bill that will be re-introduced in the current session of Congress, was likely to issue an executive order, possibly during February, which would allow federal employees, contractors, and programs receiving federal money to operate consistently with their religious beliefs in discriminating against LGBT people. This would rip a big hole in any existing anti discrimination protection, and due to the ubiquity of federal financial assistance in health care, education, law enforcement, and other private sector activities could have a devastating effect on LGBT rights. Stay tuned to the continuing story.

DEPARTMENT OF STATE – Outgoing Secretary of State John Kerry released a statement on behalf of the State Department on January 9, apologizing for the Department's past institutionalized discrimination against gay and lesbian diplomats. Kerry said such discrimination dated back to the 1940, and that denying people jobs and forcing them out of the foreign service because of their sexual orientation was "wrong then" and "wrong today." He stated that the Department is committed to "diversity and inclusion for all our employees, including members of the LGBTI community." After the inauguration of Donald Trump, statements by Secretary Kerry on the Department's website were relegated to the archival section, but as of February 1, 2017, his statement appeared in that archive. The link for current Department press releases and statements for 2017 begins with January 22 . . .

DEPARTMENT OF DEFENSE – The Department has upgraded the discharge of Edward Spires to "honorable." Spires was tossed out of the Air Force in 1948 for being gay, with a dishonorable discharge

that would disqualify him from being buried in a military cemetery. Now age 91 and in poor health, Spires filed an application for correction of his military record. After DADT repeal in 2010, Spires became eligible for the upgrade, but the Air Force denied his application. He filed a motion to reconsider, and was notified on January 5 that the Air Force had agreed to reconsider its decision and had concluded that Spires' record should be corrected to show an honorable discharge. Yale Law School's legal clinic had filed a lawsuit in November to "expedite" Spires' question, after being contacted by U.S. Senator Richard Blumenthal's office on Spires' behalf. *The Hour*, Norwalk, Jan. 10.

majority on the Commission. EEOC is charged with the enforcement of all federal employment discrimination statutes. Assuming the president follows the practice he has established in recent weeks, expect him to appoint and designate as chair somebody with a career record of hostility to employment discrimination law. Alternatively, he could cripple the ability of the agency to act by failing to nominate anybody and allowing terms to expire until there are only two confirmed commissioners left, at which point the EEOC will be disempowered from acting at the Commission level due to lack of a quorum.

EEOC – President Trump has appointed Victoria A. Lipnic, the sole Republican commissioner on the EEOC, to serve as Acting Chair. She was a dissenter from the EEOC's decision in *Baldwin v. Foxx, Secretary of Transportation*, which held that sexual orientation is prohibited under Title VII's ban on sex discrimination. However, she co-authored with Commissioner Chai Feldblum the EEOC's proposed Enforcement Guidance on Unlawful Harassment, which includes mention of harassment because of sexual orientation and gender identity as a violation of Title VII. She joined the majority in *Macy v. Holder*, the landmark case in which the EEOC followed federal circuit court precedents and ruled the gender identity discrimination violates Title VII, but she did not join the more recent *Lusardi* decision on facilities access for transgender employees. There are three Democratic commissioners, and there is one vacancy because of the Senate's failure to vote on President Obama's reappointment of the other incumbent Republican commissioner. The term of Commissioner Jenny Yang, who served as Chair during the past few years, will expire in July, at which time President Trump could achieve a Republican

EEOC – In what may be the first significant litigation consequence of change at the EEOC, the agency filed a motion with the 6th Circuit Court of Appeals, requesting a 30-day extension of its deadline to file its opening brief appealing the district court decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*, 2016 U.S. Dist. LEXIS 109716, 2016 WL 4396083 (E.D. Mich., Aug. 18, 2016). The district court found that under the Religious Freedom Restoration Act, the funeral home was entitled to summary judgment against the discrimination claim of a transgender mortician, based on the funeral director's religious objection to allowing a transgender woman to dress in accord with the funeral home's dress code for female employees. The EEOC had asserted a discrimination claim under Title VII and argued against the RFRA defense. The agency announced an appeal to the 6th Circuit and had filed its preliminary appeal papers, but at the end of January sought the extension of time due to "Administration-related changes" at the agency, according to a January 28 report by Slate. Meanwhile, the ACLU has filed a request to intervene as an appellant on behalf of Aimee Stephens, the real party in interest, questioning whether the EEOC

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would adequately represent her interest on appeal, arguing that “based on the change of federal administration as well as the federal government’s actions over the past few days, Ms. Stephens is reasonably concerned that the EEOC may no longer adequately represent her interests going forward.” One may anticipate that similar problems will arise with the ongoing litigation in *EEOC v. Scott Medical Health Center*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa., Nov. 4, 2016), in which the EEOC survived a motion to dismiss a sexual orientation discrimination claim. Will the agency as reconfigured for the Trump Administration press forward appropriately on behalf of the real party in interest, Dale Baxley, who quit under a barrage of homophobic comments by his manager?

EEOC – The EEOC’s mission to advance protection against discrimination for LGBT people has resulted in a significant increase in the agency’s docket, according to the Annual Report issued by the agency on January 18, as summarized in *The National Law Journal* on January 19. The agency began keeping statistics on LGBT-related charges in 2013. During fiscal year 2016, which ended last September 30, the EEOC received 91,503 discrimination charges, of which 1768 were filed by LGBT individuals. The agency resolved 1649 charges in this category during the fiscal year – a figure that includes charges filed in earlier years but resolved last year. The charge numbers represented a 25% increase in LGBT-related charges over the 2015 fiscal year, and a 119 percent increase over the 2013 partial fiscal year. The resolutions of charges jumped 45% between FY 2015 and FY 2016, and the agency recovered \$4.4 million in remedies in this category, compared to \$3.3 million the previous year. In total, the agency has recorded nearly 4,000 LGBT-related charges since it

began breaking out this category from the sex discrimination charges during FY 2013. It was not until July 2015 that the agency formally took the position that sexual orientation discrimination is actionable under title VII, but it had extended Title VII to gender identity claims several years earlier, following up on developing federal court case law.

INTERNAL REVENUE SERVICE (DEPARTMENT OF THE TREASURY)

– The Service has published Notice 2017-5 on January 17, providing “special administrative procedures for allowing certain taxpayers and the executors of certain taxpayers’ estates to recalculate a taxpayer’s remaining applicable exclusion amount and remaining GST exemption to the extent an allocation of that exclusion or exemption was made to certain transfers made while the taxpayer was married to a person of the same sex.” The Notice will appear in IRB 2017-15 dated Feb. 6, 2017.

ALASKA – *Alaska Dispatch News* reported on January 19 that the Anchorage City Attorney’s Office had disqualified a ballot initiative, Initiative 2017-1, intended to carve out exceptions from the city’s recently enacted ban on sexual orientation and gender identity discrimination. City Attorney Bill Falsey said that the proposed initiative violates the “single subject rule” contained in the Anchorage Municipal code, subsection 2.50.020B.3, which specifies that an initiative must “include only a single subject.” It was filed on January 4, under the title “Protect Our Privacy Initiative.” It would require that people use public restrooms based on their sex designated at time of birth, it would allow businesses to refuse to participate in marriage-related activities or adoption services, or to make employment decisions, according to their views of marriage and premarital sex, and it would allow

public accommodations to refuse to post any signs or messages with which the owner or operator disagrees “as a matter of conviction.” Falsey wrote that only the first of these relates to privacy, and the measure asks voters to say yes or no to a “compound question.”

ARIZONA – Rep. Anthony Kern has introduced House Bills 2293 and 2294, which would prohibit the use of state Medicaid funds to pay for sex reassignment surgery, and any state funds for sex reassignment procedures for state prison inmates. The measure responds to developments in neighboring California, which recently became the first state to alter its policies so as to provide gender reassignment procedures, including surgery, for transgender inmates when found to be medically necessary. California’s move was undertaken in the face of pending litigation that seemed likely to produce a 9th Circuit ruling that the state was obligated to provide such services. The Medicaid measure would violate a regulation of the federal Department of Health and Human Services that recently went into effect on January 1. *Arizona Republic*, Jan. 25. A federal judge in Texas issued a nationwide injunction against enforcement of that regulation on December 31, which the federal government was to appeal, but all bets are off with the advent of the Trump Administration on January 20. It seems possible that HHS will begin the process to revise the regulation, which would lose its legislative authorization with the ultimate repeal of the Affordable Care Act in any event.

CALIFORNIA – State Senators Toni Atkins (D-San Diego) and Scott Wiener (D-San Francisco) have introduced a bill that would establish a new nonbinary gender marker for official state documents, according to a January 31 report by the *Los Angeles Times*.

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This would be available for driver's licenses and birth certificates as a third option for those who don't identify as either male or female. Atkins stated that SB 179 would "keep California at the forefront of LGBTQ civil rights." The measure would also "streamline" the process of getting gender designations changed on official documents, by eliminating the existing requirement that an application submit a sworn statement from a physician certifying medical treatment for gender transition, and would create a process for people younger than 18 to apply for a change of gender on their birth certificate. * * *

The California Attorney General's Office has posted a notice required by AB 1887 to list states that are subject to California's ban on state-funded and state-sponsored travel because they have enacted laws that authorize or require discrimination against same-sex couples or their families on the basis of sexual orientation, gender identity, or gender expression or create exemptions from compliance with laws that prohibit such discrimination. The banned states, as of now, are Kansas, Mississippi, North Carolina, and Tennessee. The notice can be found on the Attorney General's website: <http://oag.ca.gov/ab1887>.

COLORADO – On January 25, the House State, Veterans and Military Affairs Committee voted to reject an attempt by Republicans to enact a law that would bar business owners to discriminate based on their religious beliefs, rejecting a proposed state Religious Freedom Restoration Act. The bill was co-sponsored by Representatives Stephen Humphrey and Dave Williams, responding to the state courts' ruling against the proprietor of Masterpiece Bakery, who was fined by the Civil Rights Commission for refusing to bake a wedding cake for a gay couple and is now knocking on the Supreme Court's door seeking review. *Colorado Independent Blog*, Jan. 26.

CONNECTICUT – State Comptroller Kevin Lembo announced that the American Family Association of Tupelo, Mississippi, an organization that focuses much of its efforts at opposing legal recognition, rights and benefits for LGBT families, had been removed from the list of charities eligible to receive donations through the Connecticut State Employees Campaign Committee, because AFA refused to provide a copy of the required non-discrimination policy, which must cover the categories in the state's human rights law, including gender identity or express and sexual orientation. *cipost.com*, Jan. 7.

IDAHO – Once again, Idaho Democrats are trying to persuade the legislature to pass a bill that would add "sexual orientation" and "gender identity" to the state's Human Rights Act. Departing from past attempts that went through legislative committees, this year's version was introduced as a personal bill by one member which will bypass committee. The *Spokesman-Review* (Jan. 31) reported that Senate President Pro-Tem Brent Hill (R-Rexburg) met with former Sen. Nicole LeFavour (D-Boise) to discuss the bill, and that Hill stated, "We are probably closer than most people think we are. Nobody wants discrimination, but there are fears out there that we need to address on both sides."

INDIANA – Rep. Bruce Borders, a Republican from Jasonville, has agreed to withdraw his proposed legislation that would prohibit gender changes on birth certificates, at the behest of Rep. Cindy Kirchhofer, a Republican from Beech Grove who chairs the House Public Health Committee. She had issued a statement on January 13 that she would not give the bill a hearing in committee. Borders said his bill was not intended to "create controversy" and would not affect a person's ability to

change other identity documents, such as driver's licenses, and would allow for corrections of clerical errors or gender-designations based on chromosomal testing in cases of ambiguity. *Courier & Press*, Evansville, January 14.

MAINE – Regional School Unit 9 directors voted on January 10 to adopt guidelines to ensure that transgender students have equal access to educational programs and activities. The school superintendent said that the guidelines are not required by federal law, as such, but are needed for the school to be in compliance with state and federal non-discrimination laws, including Title IX. Students identified as transgender will be able to use restrooms assigned to "the gender which the student consistently asserts at school." Alternative facilities will be provided to transgender students who request them for privacy purposes. Students will not be required to use alternative facilities over their objections. The same is true of locker room use. *Sun Journal*, Lewiston, Maine, Jan. 11.

MASSACHUSETTS – *AP State News* reported on January 16 that the University of Massachusetts-Amherst had received a grant from the U.S. Department of Labor of nearly \$250,000 to "analyze sexual orientation and gender identity discrimination in federal contracts." No word on whether this grant will survive the change of administration that took place on January 20.

MISSOURI – The office of Secretary of State Jason Kander issued a press release, announcing that an initiative petition submitted by Emily Waggoner of Columbia, Missouri, had been approved as to form, for circulation to collect signatures to put it on the ballot for 2018. The ballot title reads: "Shall the Missouri Constitution be amended to:

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prohibit discrimination in employment based on race, color, age, disability, religion, gender, sexual orientation, national origin or ancestry; and exempt entities owned and operated by religious organizations?" To get on the November 2018 ballot, the proponents must gather valid signatures from at least 8 percent of the total votes cast in the 2016 governor's election from at least six of the state's eight congressional districts, by May 6, 2018.

NORTH CAROLINA – Although a special session of the legislature in December failed to repeal or modify H.B. 2, Governor Roy Cooper said on January 16 that he has had conservations with GOP Senate Leader Phil Berger and House Speaker Tim Moore since then to discuss the continuing controversy and lawsuits. (Although the Trump Administration might abandon the lawsuit filed by the Justice Department, suits filed by private parties represented by the ACLU and LGBT groups will continue.) The issue, he said, is that "legislative leaders want a majority of Republican lawmakers on board before voting on repeal," according to an AP report. They are not willing to put to a vote a measure that would pass with Democratic votes and a sprinkling of Republicans. *AP Alerts*, Jan. 16.

NORTH DAKOTA – The Republican majority in the State Senate decisively rejected a bill that would have amended the state's marriage law to use gender neutral terminology to bring it into harmony with the same-sex marriage regime required by the federal Constitution. Although the state is complying with the Supreme Court's ruling in *Obergefell v. Hodges*, the Senate Judiciary Committee voted 4-2 to recommend against passage, and the full Senate voted down the bill, 15-31. The chair of the committee stressed that the vote was purely symbolic, since the

state was complying with the Supreme Court ruling. *AP State News*, Jan. 10. The result, of course, is to make the Republican majority look like craven homophobes who are playing to their constituents instead of protecting the constitutional rights of all their citizens. Sending messages of disapproval of a class of citizens is not a legitimate function of a legislature operating under the Constitution of the United States. *** Fargo Democrat Rep. Josh Boschee, the state's first and only openly gay legislator, has reintroduced a thrice-rejected bill to add sexual orientation to the state's law against discrimination. He has bi-partisan sponsorship for his bill, and noted that former governor Jack Dalrymple, a Republican, had criticized the legislature for failing to pass the bill the last time around. The current governor, Doug Burgum, also a Republican, has "long been critical of the GOP-led Legislature's stance on social issues, including its failure to pass the anti discrimination bill," reported the Associated Press on January 30. Hope springs eternal.

SOUTH DAKOTA – A bill that would have restricted which locker rooms South Dakota transgender students could use was withdrawn from the State Senate by its sponsor on January 31. The sponsor, Senator Lance Russell, would have required public school students to use locker rooms, shower rooms, and changing facilities matching their gender identified at birth, but would not have required them to submit to strip searches or to wear diapers so that designated usage monitors could verify that they were in the correct facilities. (Not so, that last bit, but we couldn't resist it.) The bill would allow schools to provide alternative facilities for transgender students. Governor Dennis Daugaard, who vetoed a similar measure last year after meeting with a delegation of transgender citizens, threatened to veto this one as well. Opponents of transgender equality are working on a possible ballot measure for 2018 that would restrict bathroom use in schools based on gender identified at birth. *AP National News*, January 31.

OHIO – The Kettering City School District is altering bathrooms to "increase privacy for all students" in the boys' bathrooms at Fairmont High School. Principal Tyler Alexander told the *Dayton Daily News* (Jan. 16), "The reason we made this change was to give more privacy to those students using the urinals from people in the restroom who are using the sinks and for those who are finished using the toilet." The district added partitions inside the bathrooms to separate the sinks and stalls area – "the area a transgender boy would use" – from the area that contains a row of four urinals. In other words, they did the common sense, relatively low-cost thing that schools can do rather than risk litigation over misguided policies discriminating against transgender students. Someone get word of this to Gov. Kasich!!

TEXAS – The proposed bathroom bill, S.B. No. 6, has encountered opposition from an unusual source, Texas House Speaker Joe Straus, which publicly condemned the measure on January 18. At a conference of the Texas Association of Business, Straus acknowledged his opposition to the bill, stating, "Many people where I come from get concerned about anything that can slow down the overall job-creating machine. I think we should be very careful about doing something that can make Texas less competitive for investment, jobs and the highly skilled workforce needed to compete." He got a standing ovation from the audience. The Association has calculated that the bill could cost Texas as much as 185,000 jobs and \$8.5 billion in economic losses, looking to what has happened in North Carolina in response to H.B. 2 and scaling up the numbers

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for the much larger state of Texas. *The Business Insider*, Jan. 20. * * * Senate Bill No. 242, proposed by Senator Konni Burton, would in effect end the ability of students to get confidential counseling about their personal problems at school, by requiring educators to divulge any “general knowledge” they obtain about students to their parents, be it “personal, direct, or incidental.” Under the bill, educators who fail to divulge such information could be subject to loss of certification and their jobs. *Corpus Christi Caller Times*, Jan. 25.

VIRGINIA – On January 5 Governor Terry McAuliffe, a Democrat, issued an executive order banning state contracts with firms that discriminate because of sexual orientation or gender identity, applicable to all executive branch contracts, but not to those entered into by the legislature or the courts, over whom the governor has no authority. In a signing statement, McAuliffe stressed that this executive order, his 61st, built on the first executive order he issued as governor, which banned discrimination in the state workforce because of sexual orientation. House Speaker William Howell, a Republican, criticized the order, asserting that it would violate the religious liberty of state contractors who might have religious objections to providing goods or services to LGBT people, and invoked Thomas Jefferson, author of the Virginia Statute of Religious Freedom, in support of his argument. The Family Foundation of Virginia, an organization formed to oppose LGBT rights, called the order an “unconstitutional act of intimidation and bullying of businesses and charities that are operated by people of faith.” McAuliffe stressed that the order brought Virginia in line with federal procurement policy, although by the end of January it appeared that President Trump was poised to change federal procurement policy to allow contractors with religious objections to discriminate

against LGBT people. The full text of the order can be found on the website of the governor’s office. * * * Virginia Attorney General Mark Herring is seeking enactment of an expanded definition of hate crimes, to include the categories of disability, gender, gender identity and sexual orientation. At present, Virginia’s law addresses only “racial, religious or ethnic animosity.” The proposed legislation would authorize the attorney general’s office to use grand juries to prosecute hate crimes. Herring also announced a new website – NoHateVa.com – to serve as a “resource clearinghouse” for hate-crime victims. *Washington Post*, Jan. 14.

VIRGINIA – The School Board in Loudon County, Virginia, presented with measures to clarify that the school district’s antidiscrimination policy would cover sexual orientation and gender identity, voted the measures down, with opponents citing the unsettled situation as the Supreme Court has taken a Title IX case for review and the Trump Administration is expected to reverse U.S. Education Department policy. The *Washington Post* (Jan. 26) reported that this was the third Virginia school board to delay or decline to add “LGBT protections” to their formal policies, based on the contention that current litigation makes it “unclear” whether such discrimination is unlawful. The newspaper reported that the Virginia Supreme Court is soon to hear a challenge to the Fairfax County School Board’s decision to add sexual orientation and gender identity to its antidiscrimination policy. The measures voted down in Loudon County would have amended the equal opportunity policy and the anti-harassment policy.

VIRGINIA – Of course, Virginia has its own “bathroom bill,” H.B. 1612, which one hopes is going nowhere. It would certainly be vetoed by Gov. Terry

McAuliffe if passed by the legislature. Similar measures have died in previous sessions.

LAW & SOCIETY NOTES

FEDERAL JUDICIAL APPOINTMENTS.

President Donald J. Trump took office on January 20 with an unprecedentedly large number of federal judicial vacancies to fill. According to a report by the American Constitution Society, “There are now 121 Article III vacancies, 107 of which are current. There are 42 judicial emergencies.” Judicial emergencies are vacancies that have been unfilled for a long time in districts or circuits that are experiencing significant backlogs as a result of being understaffed. New administrations usually take considerable time to begin making judicial appointments, due to the need to identify prospective candidates, fully evaluate their credentials and practice and/or judicial records, and have them vetted by federal law enforcement agencies before submitting nominations to the Senate Judiciary Committee. Because of the staffing emergencies in many parts of the country, dedicated judges may have been putting off taking senior (part-time) status or resigning, so it is possible that the new administration will be met with a surge of retirements from older judges who were appointed by Ronald Reagan and George H.W. Bush and may have been awaiting the election of a Republican president to appoint their replacements. It usually takes a new administration several months to begin nominating court of appeals and district court judges, especially if the transition team did not establish a process for identifying potential candidates and getting the necessary background investigations completed well before the inauguration. There is also a tradition that Senators from the president’s party take the lead in recommending

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district court candidates to the White House, and Republican senators who were shut out of this process during the Obama administration have just had a few months since the election to begin identifying potential appointees from their states. There were no indications that the Trump transition team had focused on judicial vacancies other than the Supreme Court vacancy.

BOY SCOUTS OF AMERICA – Responding rapidly to a controversy that arose late in 2016 when Joe Maldonado, a transgender boy, was expelled from a Cub Scout troop in New Jersey and went public about his disappointment and humiliation, the Boy Scouts of America announced on January 30 that it would accept as members for its boys-only operations (Cub Scouts, Boy Scouts) transgender boys, abandoning its previously announced policy limiting membership to individuals identified as male on their birth certificates. According to a statement posted on the organization's website: "For more than 100 years, the Boy Scouts of America, along with schools, youth sports and other youth organizations, have ultimately deferred to the information on an individual's birth certificate to determine eligibility for our single-gender programs. However, that approach is no longer sufficient as communities and state laws are interpreting gender identity differently, and these laws vary widely from state to state." In a recorded statement also released on January 30, Chief Scout Executive Michael Surbaugh said, "After weeks of significant conversations at all levels of our organization, we realized that referring to birth certificates as the reference point is no longer sufficient." Transgender individuals who identify and consistently present themselves as boys will be welcome. Transgender youths were already welcome in the Scouts' Explorer Program, which has never been a single-gender program.

New York Times website, Jan. 30 & 31; *NBCnewyork.com*, Jan. 30.

GALLUP POLL – A Gallup poll published on January 16 had startling news: the number of Americans self-identifying as LGBT community members has increased by a statistically significant amount in recent years. Gallup's 2016 poll numbers show that 4.1 percent of American adults, about 10 million people, identified as LGBT, compared to 3.5 percent in 2012, the last time Gallup surveyed on this issue. The numbers are based on interviews with 1.6 million American adults who participate in Gallup's daily tracking poll on public issues. More than 49,000 respondents answered "yes" when asked if they were LGBT, the increase coming mostly from millennials (those born between 1980 and 1998). 7.3% of millennials answer "yes" to this question, up from 5.8% in 2012. The percentage for "GenXers," the previous generation, stayed stable at 3.2%, while "baby boomers" (the post WWII generation) went from 2.7% down to 2.4% (people going back in the closet as they get older??), and "traditionalists" going from 1.8% down to 1.4%. According to a January 17 report on the poll in *International Business Times News*, 2017 WLNR 1585375, "Gallup said research indicates millennials may be more willing to admit their sexual preference4s because they are less concerned about privacy than their elders." Broken down by ethnicity, the largest increase was seen among Asian-American respondents, going from 3.5% to 4.9%, followed by Hispanics, going from 4.3% to 5.4%. According to Gallup's latest data, racial and ethnic minorities make up about 40% of the self-identified LGBT population.

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ESTONIA – A court in Tallinn, the capital of Estonia, recognized the

foreign marriage of two men, who wed in Sweden but reside in Estonia. The authorities in the District of Harju, which includes Tallinn, had refused to enter the men's marriage in the civil register, but in December the District Court ruled in their favor, saying that there was "nothing in the way" to register the two men as married, and the civil authorities decided not to appeal the ruling. On January 31 the couple was officially registered, becoming the first male same-sex couple to be recognized as legally married in the country. In 2016, Estonian had become the first former Soviet Union country to legal civil partnerships through the device of cohabitation agreements. However, conservative parties within the ruling coalition have blocked efforts to legislative for full same-sex marriage. *gaystarnews.com*, Jan. 30; *European Union News*, Jan. 25 (reporting on the court opinion).

INDIA – On January 16 a 5-judge bench of the Supreme Court of India heard arguments on a curative petition challenging the earlier ruling of the court that had overturned a judgment by the High Court in Delhi that the country's sodomy law was unconstitutional. The petitioners on the curative petition included the NAZ Foundation, a gay rights organization that had instigated the original litigation seeking invalidation of the criminal statute, which derived from a British colonial law that was enacted at a time when Indian law had no such prohibition. The Supreme Court had rejected direct appeals from the original meeting by a two-judge bench of the Supreme Court. The decision induced great tension in the LGBT community, as many people had "come out" in response to the High Court ruling and now felt that their status was endangered. Many prominent celebrities protested the ruling. The current government is hostile to the litigation, as shown by its refusal to vote in the UN Human Rights

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Commission in support of setting up the office of the independent expert to end discrimination against LGBTQ people. *Asian News International*, Jan. 16, 2017.

INDIA – The government in West Bengal announced that it will assist transgender people in obtaining sex reassignment surgery at no charge. A special review committee will deal with applications to obtain the procedures, to determine that prerequisite diagnoses have been made and that the individual genuinely seeks to change their gender of their own free will. Specialist doctors from the SSKM Hospital, the only state-run hospital in Bengal, will perform the procedures. *United News of India*, Jan. 16.

IRELAND – The Health Ministry announced that the Republic of Ireland will no longer ban gay men from donating blood, replacing the lifetime ban with a “deferral period” of one year, following the trend set in other European countries and most particularly in Northern Ireland. Health Minister Simon Harris stressed the need to increase the number of blood donors, citing the statistic that only 3% of the eligible population in the Republic of Ireland were active blood donors, but that as many as one in four people would require a blood transfusion at some time in their lives. People who have contracted a sexually-transmitted infection will have a five year deferral period from when their treatment ends rendering them non-infectious. *irishnews.com*, Jan. 16.

JAPAN – The municipal government of Sapporo in Hokkaido has released draft rules on January 31 for officially recognizing same-sex partnerships for LGBT couples. If the draft is formally adopted, Sapporo would be Japan's first major city to set such rules. It would also, according to a report by *BBC International Reports* (Jan. 31), be the

first municipality to certify partnerships between heterosexual couples with gender identity disorder, according to the city's announcement. City residents at least 20 years old can enter into a “partnership vow” in writing, submit it to the local government, and receive a receipt and an official copy of their vow. The certification would not confer special legal rights or obligations on the couple, but they would acquire eligibility for insurance benefits and discounts that pertain to family members. The program is intended to go into effect with the city's new fiscal year in April.

LEBANON – Ghenwa Samhat, the executive director of Helem, the Lebanese LGBT organization, hailed a January 26 ruling by Beirut Judge Rabih Maalouf, invoking Article 183 of the Penal Code to reject criminal charges against a gay couple under Article 534. Article 183 states “the act committed is not considered to be a crime if exercised as a right without exceeding its limits.” Article 534 prohibits sexual intercourse “against the order of nature,” and has traditionally been the vehicle for prosecuting people engaging in gay sex. Samhat explained that Judge Maalouf's ruling holds, in effect, that “sexual orientation is not a crime,” and described it as a progressive ruling that might be followed by other judges. Samhat said that there have been three previous rulings since 2009 where courts refused to apply Art. 534 in case of private consensual activity, by adopting a particular construction of “nature.” In this case, however, the judge took an important step by “invoking rights to privacy” in its justification for the ruling. Samhat said, “The judge actually talked about privacy of the individuals in Lebanon, that we should respect people's privacy and this is a huge step forward. This has not been talked about before.” *The Daily Star*, 2017 WLNR 3089313, Lebanon, Jan. 31.

MALAYSIA – The Court of Appeal in Kuala Lumpur has set aside a High Court order that a transgender man receive a new identity card with the last digit, which signifies gender, to be changed. The court granted an appeal by the government, stating that it would write up an opinion to be released later explaining the reasoning behind the ruling. The applicant had undergone sex reassignment surgery in Bangkok, Thailand, in 2009, following which an application was made for a new identity card, which had been rejected. The government's position was that the identity card must be in accord with the individual's chromosomal sex. The applicant's lawyer pointed out to the court that his client's name was a woman, but having undergone the surgery, the applicant now acted as man and needed an appropriate identity card. *New Strait Times*, Jan. 6, 2017.

MEXICO – Internet journalist Rex Wockner reported on January 29 that the Supreme Court of Mexico had ruled on January 27, in a case creating constitutional jurisprudence binding on all lower court judges, that same-sex couples have a right to access assisted reproduction/procreation. A couple denied access can seek a court order, and the judge would be compelled by this precedent to require that the couple receive the same access that would be available to a different-sex couple. * * * Wockner also reported on January 11 that “marriage equality did indeed make it into Mexico City's new (and first-ever) constitution on January 10 by a 68-11 vote of the Asamblea Constituyente (City Council).”

NORWAY – On January 30 the leadership of Norway's Lutheran Church voted to approve newly-proposed ceremonial language to be used by pastors to perform same-sex marriages. The annual conference of the Church

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had approved performance of same-sex marriages last April, but had not agreed on the wording for ceremonies. Almost three-quarters of Norwegians responding to surveys have indicated that they are members of the Norwegian Lutheran Church. Norway was, in 1993, the second country in the world to allow same-sex registered partnerships, and the country has allowed civil marriage for same-sex couples since 2009. Now religious marriage in the national church will be allowed. *Reuters.com*, Jan. 30.

PAKISTAN – Lahore High Court Chief Justice Mansoor Ali Shah issued an order on January 9 that authorities conducting the census to be held in March must count transgender people as such in their enumeration of the population. The order responded to a petition by a transgender person seeking to “enforce his community’s basic rights, including inclusion in upcoming census and national identity cards with mentioning their gender,” according to a Jan. 10 report in *Daily Times*, 2017 WLNR 816715.

PERU – Peru has been lagging behind neighboring countries on the issue of legal recognition for same-sex relationships, but a small step forward was taken when a court ordered local authorities to register the Mexican marriage of Oscar Ugarteche, a Peruvian gay rights activist, with a same-sex partner who is a Mexican national. Ugarteche tried to register the marriage in 2010 so he could have his marital status changed on his passport. The ruling on January 9 was deemed “historic” in this “stauchly Roman Catholic country,” reported *AP Alerts* (Jan. 10), and the government agency charged with registering marriages indicated that it would appeal. The court’s ruling did not declare that Peru must allow same-sex marriages, but merely that local authorities must accept

for registration a same-sex marriage of a Peruvian national that takes place in a country that authorizes such marriages. It’s a start

SRI LANKA – The cabinet rejected a proposal to end discrimination based on sexual orientation, opponents arguing that such a step might “legitimize homosexuality” in a country that makes homosexual acts a crime. The 1883 Penal Code, a “legacy” of British colonial rule, makes sex between men punishable by 12 years in jail, even if it is private and consensual, but the law is “rarely enforced,” reported *Agence France Presse English Wire* on Jan. 18. The government had agreed in 1995 to review the Penal Code following “intense campaigning” by a gay rights group, but the agreement backfired. Instead of repealing the old law, they amended it to extend to same-sex activity involving women, so as to afford equal treatment!!

SWITZERLAND – The Swiss Agency for Therapeutic Products (Swissmedic), a federal regulatory agency, has responded to an appeal from Swiss Transfusion SRC, a division of the Red Cross, and agreed to abandon the lifetime ban on blood donations by men who have sex with men, instead substituting the policy that has been adopted in several other countries of allow gay men and bisexual men to donate blood if they affirm that they have not engaged in gay sex in the past year. The Swiss ban on gay blood donations actually predates the discovery of the AIDS crisis, going back to 1977, and was adopted because of data showing that gay and bisexual men were picking up a variety of blood-borne pathogens. Swissmedic noted that although men who have sex with men are still “disproportionately” at risk of contracting HIV, the new guidelines “will not lead to an increased risk for recipients of blood transfusions” because testing improvements have

made it “dramatically” easier to detect infections. *Digital Journal*, 2017 WLNR 3130898 (Jan. 31).

THAILAND – The government deported a suspected HIV virus carrier to his country of origin following his arrest in Phuket, reported *Thai News Service* on Jan. 25. The man, Czech national, arrived in Thailand at Suvarnabhumi Airport in June 2015 on a visitor visa, and overstayed the visa. He admitted that he had traveled to many provinces of Thailand and had sex with some Thai women, but since none of the women sought to charge him, he was not charged with sexual offenses, and the deportation was legally promised on the expiration of his visa. The story of his arrest and deportation caused a sensation locally, generating numerous press reports.

UNITED KINGDOM – The government has enacted a law granting posthumous pardons to men who were convicted under subsequently repealed anti-sodomy laws, and allowing those still living to have their criminal records expunged. The Ministry of Justice said on January 31 that pardons apply to men who were convicted of engaging in consensual same-sex relations, and those living with those convictions on their record can apply to the government to have their names “cleared.” Justice Minister Sam Gyimah said that although the “hurt caused” by those convictions can never be undone, “we have apologized and taken action to right these wrongs.” The conviction of computer and codebreaking hero Alan Turing, who died an apparent suicide in 1954, has been frequently invoked in the campaign to get this legislation passed, after he received a posthumous royal pardon in 2013. Turing’s story is the subject of biographies, plays, television programs and feature movies. He is credited with the intellectual

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breakthroughs leading to the digital computer. *AP Online*, Jan. 31.

UNITED KINGDOM – Justice Peter Jackson has ruled that a transgender woman who is an orthodox Jew who was previously married and the father of five children cannot insist on resuming personal contact with the children. Jackson heard testimony from a variety of religious and cultural authorities and experts and came to the reluctant conclusion that requiring resumed contact would be harmful to the children, who are being raised in an orthodox community that does not approve of gender transition. The key paragraphs of the decision state: “In balancing the advantages and disadvantages of the children being allowed to see their father, I apply the law of the land. Some witnesses in these proceedings assert that gay or transgender persons have made a lifestyle choice and must take the consequences. The law, however, recognizes the reality that one’s true sexuality and gender are no more matters of choice than the color of one’s eyes or skin. It has also been said that transgenderism is a sin. Sin is not valid legal currency. The currency of the law is the recognition, protection and balancing out of legal rights and obligations. In this case, to be recognized and respected as a transgender person is a right, as is the right to follow one’s religion. Likewise, each individual is under an obligation to respect the rights of others, and above all the rights of the children.” Jackson concluded his decision, stating, “with real regret, knowing the pain that it must cause,” that the father’s application for direct contact should be refused. Instead, he ordered indirect contact four times a year.” The opinion is dealt with at greater length in F. Cranmer, “Gender dysphoria, family breakdown and Ultra-Orthodox Judaism,” in Law & Religion UK, 31 Jan. 2017, <http://www.lawandreligionuk.com/2017/01/31/gender-dysphoria-family-breakdown-and-ultra-orthodox-judaism/>.

orthodox-judaism/. *Daily Telegraph* (Jan. 31) published a brief article about the ruling, also on Jan. 31.

UNITED KINGDOM – New figures show that the number of migrant being granted asylum in Britain because they are gay has increased sharply, according to a report published on January 17 by *Express*, 2017 WLNR 1573871; see also *Daily Mail Online*, 2017 WLNR 1609025 (Jan. 17). In 2009, it was reported, fewer than 200 refugees said their sexuality put them in danger in their home country, but in 2014 the number had risen to 1,115, a 40% increase. The largest number of such claimants came from Pakistan, a Muslim country where homosexuality is harshly dealt with by the public. Other countries from which significant numbers of gay migrants came seeking asylum were Nigeria, Jamaica, and Ghana. The Home Office, responding to the statistics, stated: “Where someone is found to be at risk of persecution or serious harm in their country of origin because of their sexuality or gender identity, refuge will be granted.”

VENEZUELA – *Venezuelanalysis.com* (Jan. 31) reports that the National Electoral Council had issued the first Venezuelan birth certificate recognizing a lesbian couple as legal parents of the child born to one of them. This resulted from a landmark Supreme Court ruling won by the LGBTQ rights organization Venezuelan Equality Association, which represented Migdelis Miranda, Giniveth Soto and their son. The decision was issued in December. The court’s official statement ordered that “the registration be with the last names of both mothers in the civil registry, with Venezuelan nationality.” The women had married in Argentina in 2011, where Miranda gave birth to the child, who was conceived with donated sperm used to fertilize Soto’s fertilized ovum, so one is the genetic mother and the other is the birth

mother. Although they were recognized as married and both parents of the child in Argentina, when they returned to Venezuela, local authorities had refused to allow registration of the child showing both women as parents. Soto was murdered in 2014, and her family filed for custody of the child and dispossession of property against Miranda, and she returned to Argentina with the child, while instituting the litigation.

PROFESSIONAL NOTES

We note the passing of **WILLIAM A. NORRIS**, a retired federal judge (9th Circuit Court of Appeals) who wrote an important early gay rights decision, *Watkins v. United States Army*, 721 F. 2d 687 (9th Cir. 1983), holding that the Army’s refusal to allow a gay man, Perry Watkins, to re-enlist violated his equal protection rights. Norris opined that sexual orientation discrimination should be subjected to strict scrutiny by the courts. However, his opinion for a three-judge panel was vacated for rehearing *en banc*, and the expanded panel, while ruling for Watkins on estoppel grounds based on his prior re-enlistments that were allowed by his commanders despite their knowledge that he was gay, did not adopt Norris’s reasoning, which he reiterated in a concurring opinion. See 875 F.2d 699 (9th Cir. en banc 1989), cert. denied, 111 S. Ct. 384 (1990). Norris was appointed by President Jimmy Carter, serving from 1980 to 1997, when he retired to go back into private practice. He was an important civic leader, serving on the California State Board of Education (1961-1966) and the Board of Trustees of California State Colleges (1966-1972). He was also founding president of the board of the Los Angeles Museum of Contemporary Art (1980-1992). He attended Princeton and Stanford Law School, and clerked for Supreme Court Justice William O. Douglas. The *Los Angeles Times*

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published a lengthy obituary on January 26, which emphasized his important gay rights decision.

PAUL SMITH has resigned his partnership at Jenner & Block to teach at Georgetown University Law Center and litigate for voting rights and campaign reform at the Campaign Legal Center. Smith argued the successful challenge to the constitutionality of sodomy laws in the Supreme Court as a cooperating attorney for Lambda Legal in *Lawrence v. Texas*, and subsequently served as a member of Lambda's national board. He specialized in appellate advocacy at J&B, arguing in 19 cases before the U.S. Supreme Court and chairing the firm's appellate and Supreme Court practices, and is the most prominent openly-gay member of the Supreme Court bar. Since the most important voting rights cases are sure to arrive at the Supreme Court's doorstep, Smith is likely to be presenting many more crucial arguments to that Court in addition to possible participation in LGBT rights cases.

THE AMERICAN CIVIL LIBERTIES UNION announced an **OPENING FOR A STAFF ATTORNEY** at its **LGBT & HIV PROJECT**, based in New York. Details about the position can be found on the ACLU's website: www.aclu.org/careers/. Paper credentials include a J.D. degree, admission to practice in at least one state, and willingness to sit for the NY bar if not already admitted there. Significant litigation experience (including federal litigation) is preferred. Familiarity and experience with LGBT, HIV/AIDS, constitutional issues, legislation, community outreach preferred. To apply, send a letter of interest, a resume, a writing sample, and a list of three references to: hrjobsLGBT@aclu.org. Reference [LGBT-18] in the subject line. This is not the general ACLU applicant email

address, but a dedicated address for this job announcement. You can expect to receive an automatic response that acknowledges your submission. Please indicate in your cover letter that you learned of this job announcement from LGBT Law Notes. Applications will be accepted until the position is filled.

THE LGBT BAR ASSOCIATION OF GREATER NEW YORK has announced new members on its Association and Foundation Boards. **KRISTEN PRATA BROWDE**, a solo practitioner based in Westchester County, and **CAMERON SMITH**, a partner in the Labor & Employment Department of Seyfarth Shaw LLP's New York office, will join the board of directors. **EDWARD E. AUGUSTINE**, a solo practitioner in New York City, and **MATTHEW PUTORTI**, a commercial litigation and insurance recovery associate at Pillsbury Winthrop Shaw Pittman, will join the board of the LeGaL Foundation.

"Bikis" continued from page 59

an internal grievance after she was replaced with "a Caucasian, heterosexual male, who was not known as a 'trouble maker.'" The grievance further complained that Marshall was "misplacing teachers in order to eliminate other teachers including [Bikis] and as retaliation." Bikis was not rehired for the 2010-2011 school year after submitting the grievance. According to the appellate panel, these facts demonstrated a causal link between the District's knowledge of Bikis's engagement in protected activity and its retaliatory employment decision.
— Michael Leone Lynch

Michael Leone Lynch is a law clerk for Justice Paul Feinman of the Appellate Division of the Supreme Court of the State of New York, First Department.

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EDITOR'S NOTES

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

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