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FULL OF HOLES

Judge Posner Slams Wisconsin and Indiana's Rationales for Denying Marriage to Same-Sex Couples in Unanimous Seventh Circuit Opinion

EXECUTIVE SUMMARY

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Seventh Circuit Demolishes Wisconsin and Indiana "Justifications" for Same-Sex Marriage Ban

What does it sound like when a conservative, intellectual heavyweight writing a unanimous marriage equality decision for the 7th Circuit court unloads on the remains of his political party? It sounds like this: "The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't need marriage because same-sex couples can't produce children, intended or unintended—is so full of holes that it cannot be taken seriously."

"The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't need marriage because same-sex couples can't produce children, intended or unintended—is so full of holes that it cannot be taken seriously."

What words does a brilliant writer choose for his judicial opinion when freed from any realistic chance of being grilled at a possible future U.S. Supreme Court confirmation hearing? He chooses words like this: "[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community."

And what kind of dialogue does a jurist have with sitting U.S. Supreme Court justices when it is plain he thinks some of them to be his intellectual inferiors? The dialogue goes like this: [in response to Justice Samuel Alito's *Windsor* dissent relying on the unpredictability of the impact of same-sex marriage] "But can the 'long-term ramifications' of any constitutional decision be predicted with certainty at the time the decision is rendered?"

And, finally, what kind of dripping sarcasm can that jurist employ when he is so plainly having fun adding another nail to the eventual coffin of the anti-marriage equality movement? He'll describe Indiana's motivation in reenacting its prohibition of same-sex marriage in 1997 as: "The legislature was fearful that Hoosier homosexuals would flock to Hawaii to get married."

This is Circuit Judge Richard Allen Posner writing for the 7th Circuit in *Baskin v. Bogan*, 2014 WL 4359059 (September 4, 2014), as the court affirmed two district court decisions in striking down the bans on same-sex marriage in Wisconsin and Indiana. The decision easily tackles (or is it further exposes?) the absurdity of the arguments proffered by the states in defense of their bans.

First up is the court's consideration of the states' claim that the same-sex marriages are prohibited because the main reason for encouraging heterosexuals to marry is to reduce the number of "accidental births," which when they occur outside of marriage often lead to abandonment of the child to the mother (unaided by the father) or to foster care. To this, the court provides a newsflash: "Many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married."

Where Indiana presses the notion that marriage is about channeling unintentionally procreative sex into the legal regime of marriage in which the father is required to assume parental responsibility, the court poses a few questions in response. Like wondering why then Indiana would allow an infertile person to marry?

When Indiana attempts a convoluted answer revolving around the non-procreative straight couple modeling optimal behavior for other couples capable of producing children the court has a short point to make and another question. First, "fertile couples don't learn about child-rearing from infertile couples." And, anyway, continues the court, "Why wouldn't same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?'

This is a tour de force of logic against arguments devoid of any. Judge Posner and his colleagues on the three-judge panel seem not content to add a "me-too" decision to the annals of marriage equality decisions. Writing for history (or is it for Justice Kennedy?) the decision tackles the equal protection analysis head-on, foregoing the chance to join with the 4th and 10th Circuits, which issued their pro-marriage equality rulings on a fundamental rights theory. The court says that it can easily dispose of the case because (a) there is not even a rational basis for the denial of marriage and, moreover, (b) the

discrimination at issue proceeds along "suspect lines" which would require a "compelling" showing of the benefits of that discrimination to society at large. In other words, heightened scrutiny applies and the states cannot even pass the less demanding test of rational basis.

In dismantling the states' arguments, the decision invokes science and history, and most poignantly the emotions of the children of same-sex couples. For science, the court says there is "little doubt that sexual orientation, the ground of discrimination, is an immutable [ ] characteristic rather than a choice." To history and the states' invocation of tradition, Judge Posner invokes Justice Oliver Wendell Holmes and his reflection that it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." To this, the court adds: there are such things as "bad traditions," which include things like cannibalism or foot-binding, so tradition per se is no justification for discrimination.

And the court, as it does us throughout, reminds us of what the discrimination may mean for children. The court imagines what it might be like for the child of a same-sex couple to come home from school and report to his parents that all his classmates have a mom and a dad, while he has two moms or two dads. The court notes that a child can feel uncomfortable being different and that being able to feel like one's classmates as the child of a *married couple* might enhance that child's security. And same-sex parents having to explain to their children that they cannot marry will only enhance the harm.

This is judicial writing at its best, because it remembers that behind abstract legal principles and the ornaments of argument are real people, parents, children, brothers, sisters, whose lives are being demeaned by senseless discrimination. And to hear jurists call it for what it is presents, at least to this writer, a reminder of why many of us were drawn to the law in the first place. – *Brad Snyder*

Brad Snyder is the Deputy Director of Development at New York City's Lesbian, Gay, Bisexual & Transgender Community Center.

Third Circuit Panel Unanimously Upholds New Jersey's Ban on Conversion Therapy against First Amendment Challenges

On September 11, 2014, a unanimous three-judge panel of the U.S. Court of Appeals for the Third Circuit in Philadelphia rejected First Amendment free speech and free exercise of religion challenges to a New Jersey statute that prohibits licensed counselors from engaging in "sexual orientation change efforts" (SOCE), also known as conversion therapy, on clients less than 18 years old. *King v. Governor of the State of New Jersey*, 2014 WL 4455009, 2014 U.S. App. LEXIS 17545. Judge D. Brooks Smith, an appointee of President George W. Bush, wrote the opinion for the panel that included Judges Thomas I. Vanaskie, appointed by President Barack Obama, and Dolores Korman Sloviter, appointed by President Jimmy Carter.

New Jersey Governor Chris Christie, a likely contender for the 2016 Republican presidential nomination, signed Assembly Bill A3371, as it is referred to in the decision, on August 19, 2013. Now codified at N.J. Stat. Ann. §§ 45:1-54, 55, the statute provides that "[a] person who is licensed to provide professional counseling . . . shall not engage in SOCE with a person under 18 years of age." SOCE are defined as "the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender." Though A3371 does not include explicit penalties, licensed counselors expose themselves to professional discipline for offering SOCE to clients.

Shortly after Governor Christie signed the bill into law, individuals and organizations seeking to continue providing counseling involving SOCE filed a complaint against various New Jersey executive officials in the U.S. District Court in New Jersey alleging that A3371 violated their rights to free speech and free exercise of religion under the First and Fourteenth Amendments. They also alleged constitutional claims on behalf of their minor clients and those clients' parents.

The statute provides that "[a] person who is licensed to provide professional counseling… shall not engage in SOCE with a person under 18 years of age."

The case came before U.S. District Court Judge Freda L. Wolfson. After receiving cross-motions for summary judgment, on November 8, 2013, the court granted Garden State Equality's motion to intervene and held that the plaintiffs did not possess third-party standing on behalf of their clients and those clients' parents. More substantively, Judge Wolfson relied heavily on the Ninth Circuit's decision upholding a similar California statute in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), to reject the plaintiffs' free speech claim. Like the Ninth Circuit, she determined that A3371 regulates neither speech nor expressive conduct. She also found that A3371 is not unconstitutionally vague or overbroad. Finally, she granted summary judgment to the defendants as well on the free exercise claim, concluding that A3371 is a neutral law of general applicability and is rationally related to

New Jersey's interest in protecting its minors from harm.

Much of Judge Smith's substantive analysis concerns whether SOCE constitute speech, as opposed to conduct, at all and, if they do, what level of First Amendment protection that kind of speech deserves. As to the first issue, unlike Judge Wolfson and the Ninth Circuit, Judge Smith firmly believes the "talk therapy" that characterizes SOCE does constitute speech. He cited *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), to show that the Supreme Court has already rejected the proposition that professional counseling can be classified solely as conduct when it consists of "communicating a message." "Notably," according to Smith, "what the Supreme Court did *not* do was reclassify th[e] communication as 'conduct' based on the nature or function of what was communicated."

With that conclusion behind him, he next focused on the "important constitutional inquiry at the heart of this case: the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession." Finding the authority for states to regulate certain professions "deeply rooted" and "particularly important when applied to professions related to mental and physical health," Smith concluded that "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession." He went on to find that professional speech, like commercial speech, receives diminished First Amendment protection and "that prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest."

Applying that intermediate scrutiny test to SOCE, he noted "the legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm" and, therefore, A3371 "'directly advances' New Jersey's stated interest in protecting minor citizens from harmful professional practices." With the plaintiffs "having offered no other suggestion as to how the New Jersey legislature could achieve its interests in a less restrictive manner," Smith declared that "A3371 is a permissible prohibition of professional speech."

The paramount issue handled, the other issues raised on appeal were disposed of with much less fanfare. Smith quickly dismissed the plaintiffs' contention that A3371 is unconstitutionally vague or overbroad. Moving on to their free exercise of religion claim, he found that A3371 "is a neutral and generally applicable law that is rationally related to a legitimate government interest." Finally, on the procedural side, he affirmed that the plaintiffs lacked standing to bring claims on behalf of their minor clients and that Judge Wolfson did not abuse her discretion by permitting Garden State Equality to intervene.

Mathew D. Staver of the anti-gay Liberty Counsel argued the case for the plaintiffs and Susan M. Scott of the New Jersey Attorney General's Office defended the statute. Garden State Equality was represented in the case by the National Center for Lesbian Rights and the law firms of Kirkland & Ellis LLP and Gluck Walrath LLP. David S. Flugman, a partner at Kirkland & Ellis, argued the case on behalf of Garden State Equality. Several organizations filed amicus briefs on both sides of the case, including Alliance Defending Freedom, the anti-gay religious litigation organization, supporting the plaintiffs, and Lambda Legal Defense and Education Fund, supporting the constitutionality of the statute.

In the wake of the decision, Staver promised a certiorari petition to the Supreme Court. This could put another gay rights case before the justices in a year when many court watchers believe that they will grant certiorari to review one of the numerous petitions already filed in cases raising the blockbuster issue of whether state bans on same-sex marriage are constitutional. – *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGaL.

Federal Judge Rules against Marriage Equality in Louisiana

U.S. District Judge Martin L. C. Feldman, appointed to the federal bench by President Ronald Reagan in 1983, has rejected a constitutional challenge to Louisiana's state constitutional and statutory ban on same-sex marriage. The case is *Robicheaux v. Caldwell*, 2014 U.S. Dist. LEXIS 122528, 2014 WL 4347099 (E.D. La., September 3, 2014), a consolidation of two separate cases filed on marriage recognition and the right to marry. Parting company from every federal district judge who has decided a marriage equality claim since the Supreme Court's June 2013 decision striking down a federal ban on the recognition of same-sex marriages, *U.S. v. Windsor*, Feldman insisted that existing precedents preserve Louisiana's right to treat this as a political question to be resolved by its voters and elected legislators.

The plaintiffs announced they would appeal to the 5th Circuit. Attorney General Buddy Caldwell filed a motion with the 5th Circuit, in which the plaintiffs acquiesced, requesting an expedited briefing schedule. He argued that the briefs filed before the district court could be quickly repurposed for the appeal, so the normal more relaxed schedule was not necessary. Most significantly, he urged the court to scheduled the hearing in this case to coincide with its hearing in *De Leon v. Perry*, the Texas marriage case, as to which briefing is now complete but a hearing had not been scheduled when Caldwell filed his motion. On September 25, the 5th Circuit granted his motion, so this appeal and the Texas appeal will probably be heard during the 5th Circuit's November sitting, although we expect it might be put off if the Supreme Court grants one of the pending certiorari petitions from the 4th, 7th or 10th Circuits.

Surprisingly, Judge Feldman did not premise his ruling on the Supreme Court's 1972 rejection of a marriage equality case from Minnesota, *Baker v. Nelson*, observing that the state had not sought to defend its marriage ban on that basis. Instead, Feldman concluded that no fundamental right was at stake, no heightened scrutiny was required under either the Due Process or Equal Protection Clauses of the 14th Amendment, and that Louisiana could meet the rational basis test through two state interests: "linking children to an intact family formed by their biological parents," and "of even more consequence, in this Court's judgment, defendants assert a legitimate state interest in safeguarding that fundamental social change, in this instance, is better cultivated through democratic consensus."

In effect, although giving lip service to the procreation aspect of the case, Feldman's opinion is a lengthy salute to Federalism, which, he proclaims, is "not dead." He relies, among other things, on the part of Justice Anthony Kennedy's opinion for the Supreme Court in *Windsor* that focused on the historical role of the state in defining and controlling the institution of marriage. "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," Kennedy had written. "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'" Kennedy went on at length on this, which was key to his conclusion that a federal law refusing to recognize state-approved marriages was an unusual intrusion by the federal government into a role traditionally reserved to the states. To bolster this point, Feldman cited Chief Justice John Roberts' concurring opinion, arguing that the case was essentially a federalism case that had nothing to say about whether states were required to allow or recognize same-sex marriages.

Turning to the specific equal protection and due process arguments, Feldman pointed out that the Supreme Court had notably refrained from finding that sexual orientation discrimination involves a suspect classification meriting strict scrutiny review, and that existing precedents in the 5th Circuit would use the deferential rational basis test. He rejected the argument that the Supreme Court's actual approach in *Romer v. Evans*, the 1996 case striking down Colorado's anti-gay Amendment 2, had used some form of heightened scrutiny, or that the subsequent rulings in *Lawrence v. Texas*, striking down the Texas anti-gay sodomy law or *Windsor* had used or would require heightened scrutiny. He also emphasized Justice Kennedy's statement in *Lawrence* that shielding gay relationships from criminal law did not necessarily mean extending legal recognition to such relationships.

Evaluating the standard of judicial review under the Due Process clause, Feldman parted company from most of the other district judges and the majority of judges on the 10th and 4th Circuit Court of Appeals panels in their recent marriage equality decisions from Utah, Oklahoma and Virginia, rejecting the idea that this case was about the "fundamental right to marry." Instead, he insisted, it was about a claim to a right for "same-sex marriage." As such, he asserted, such a right could not be deemed fundamental because it was not deeply rooted in our history or tradition. Again, he emphasized Justice Kennedy's statements in *Windsor* about how same-sex marriage was a recent phenomenon. And, since a fundamental right was not at stake, once again he concluded that this was a rational basis case.

Feldman also rejected the plaintiffs' argument that the marriage ban discriminated based on gender requiring heightened scrutiny, relying on *Loving v. Virginia*, the 1967 Supreme Court ruling striking down a law against interracial marriages. In that case, the Supreme Court rejected the state's argument that the statute was not discriminatory because members of both races were equally forbidden from marrying members of the other race. "Plaintiffs'

argument betrays itself," he wrote. "Heightened scrutiny was warranted in *Loving* because the Fourteenth Amendment expressly condemns racial discrimination as a constitutional evil; in short, the Constitution specifically bans differentiation based on race. Even ignoring the obvious difference between this case and *Loving*, no analogy can defeat the plain reality that Louisiana's laws apply evenhandedly to both genders — whether between two men or two women. Same-sex marriage is not recognized in Louisiana and is reasonably anchored to the democratic process. This Court is therefore satisfied that rational basis applies."

Feldman's confident assertion is factually inaccurate in one glaring respect. The 14th Amendment never mentions race — the word never appears — and expressly adopts an equal protection principle without referring to any specific grounds for discrimination. There is no express ban on race discrimination in the 14th Amendment, although the historical context of its enactment clearly supports the interpretation under which race discrimination is strongly outlawed. Thus, his statement goes well beyond the dissent in the Oklahoma case that he cites as authority for it. (Feldman cites frequently to the dissenting opinions in both the 10th and 4th Circuit cases.)

As to the rational basis argument, he wrote, "Louisiana's laws and Constitution are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents. Louisiana's regime pays respect to the democratic process; to vigorous debate. To predictable controversy, of course. The fact that marriage has many differing, even perhaps unproved dimensions, does not render Louisiana's decision irrational. Nor does the opinion of a set of social scientists (ardently disputed by many others, it should be noted) that other associative forms may be equally stable, or the view that such judgments vilify a group (even though one finds them in a majority of the states, but not in all states). Even the fact that the state's precepts work to one group's disadvantage does not mandate that they serve no rational basis. The Court is persuaded that a meaning of what is marriage that has endured in history for thousands of years, and prevails in a majority of states today, is not universally irrational on the constitutional grid."

Feldman also rejected the idea that Louisiana's democratically approved policy choice "could only be inspired by hate and intolerance." Recalling the vigorous public debate over the marriage amendment, he wrote, "All sides for and against grappled with this solemn issue. The Court declines to assign an illicit motive on the basis of this record, as have also two federal appellate judges as well," noting the dissenting opinions in the 10th and 4th Circuit cases, and particularly Judge Holmes' concurring opinion in the Oklahoma case, agreeing with the result but rejecting the idea that the Oklahoma marriage amendment was infected with anti-gay animus.

Judge Feldman also rejected an argument that requiring same-sex couples who married out-of-state to identify themselves as unmarried on their Louisiana tax forms somehow violated their 1st Amendment right against compelled speech. He pointed out that the 5th Circuit, whose rulings are binding on him, had recently rejected such an argument in *U.S. v. Arnold*, 740 F.3d 1032 (2014), specifically quoting an 8th Circuit opinion to the effect that "there is no right to refrain from speaking when essential operations of government require it for the preservation of an orderly society." The 5th Circuit opinion specifically rejected the claim that required disclosure of information on a tax form is "compelled speech" in violation of the 1st Amendment.

The concluding section of the opinion clearly signals Judge Feldman's resistance to being stampeded into ruling for plaintiffs based on the accumulation of recent marriage equality opinions. "This Court has arduously studied the volley of nationally orchestrated court rulings against states whose voters chose in free and open elections, whose legislatures, after a robust, even fractious debate and exchange of competing, vigorously differing views, listened to their citizens regarding the harshly divisive and passionate issue on same-sex marriage. The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos." However, he concluded, these courts had stepped outside of their appropriate role and "appear to have assumed the mantle of a legislative body." "It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing issue," he continued, "if this Court were confident in the belief that those cases provide a correct guide." But he has concluded that all of these many courts have misconstrued *U.S. v. Windsor*. In any event, he said, the 5th Circuit "has not yet spoken" and ultimately the Supreme Court will have to decide the issue.

"It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing issue if this Court were confident in the belief that those cases provide a correct guide."

The court listed Richard Gerard Perque of New Orleans as counsel for plaintiffs in its opinion. ■

Louisiana Trial Court Rules for Marriage Equality, Ordering Recognition and Granting Adoption of Child

In a sweeping victory for Angela Costanza and Chasity Brewer, Louisiana 15th Judicial District Court Judge Edward B. Rubin ruled on September 22 in *Costanza v. Caldwell*, No. 2013-0052 D2 (Parish of Lafayette), that Louisiana must recognize their California marriage and allow Chasity to adopt their son, N.B., who was conceived through donor insemination with Angela the birth mother. Louisiana Attorney General James "Buddy" Caldwell announced that the court's order would be appealed directly to the Louisiana Supreme Court, by-passing the state's 3rd Circuit Court of Appeals. On September 25, Judge Rubin entered his final order in the case, but granted Caldwell's motion to stay the ruling pending the appeal.

On virtually every point in his opinion, Judge Rubin disagreed with the recent decision by U.S. District Judge Martin L.C. Feldman who had ruled that a marriage equality challenge must be rejected because of *Baker v. Nelson*.

On virtually every point in his opinion, Judge Rubin disagreed with the recent decision by U.S. District Judge Martin L.C. Feldman (see above), who had ruled that a marriage equality challenge must be rejected because of the Supreme Court's 1972 ruling rejecting a marriage equality challenge from Minnesota, *Baker v. Nelson*, as not presenting a "substantial federal question." However, Judge Rubin never mentioned Judge Feldman's ruling in his opinion. On the other hand, he mentioned prominently and relied upon the U.S. Court of Appeals for the 10th Circuit's decision in a marriage equality case from Utah, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), petition for certiorari pending.

Angela Costanza and Chasity Brewer lived together as same-sex partners in Louisiana and decided to have a child through donor insemination. Their son, N.B., was born on August 1, 2004, and recently celebrated his 10th birthday. Angela was the birth mother, and sperm was obtained from an anonymous donor. Costanza and Brewer married in California in 2008, during the five-month period when same-sex marriages were being performed before the enactment of Proposition 8. The California Supreme Court ruled in 2009 that the marriages performed during the summer of 2008 remained valid despite the passage of Proposition 8, which was later declared unconstitutional by the Supreme Court, restoring same-sex marriage in California in June 2013.

After the Supreme Court's *Windsor* decision in June 2013, Costanza and Brewer's marriage became recognized for purposes of federal law. However, the Louisiana Department of Revenue issued a bulletin providing that such marriages would not be recognized under Louisiana's tax laws, and that same-sex couples required to file their federal returns as "married" would be required to file state tax returns as "unmarried."

On July 12, 2013, shortly after the *Windsor* decision, Costanza and Brewer filed a petition in the Louisiana District Court in Lafayette, seeking to have Chasity become the adoptive parent of N.B. and to have their marriage recognized in Louisiana. The Attorney General's Office received a copy of their petition, and asked the court to notify that office of any hearing in the case. Although a notice was sent, nobody from the Attorney General's Office showed up at the hearing before Judge Rubin on January 27, 2014. Judge Rubin subsequently granted the adoption, but Attorney General Caldwell appealed, contending that his office had not been notified, and the 3rd Circuit Louisiana Court of Appeals vacated the adoption order on June 11, sending the case back to Judge Rubin to hold a new hearing in which the Attorney General's Office could participate. By this time the case had taken on a broader significance, as the plaintiffs were challenging the constitutionality of Louisiana's constitutional and statutory ban on same-sex marriages, as well as the ban on recognizing their marriage or allowing their adoption.

Judge Rubin held the new hearing on September 15 and moved quickly to notify the parties of his decision on September 22, making the text of his opinion available on September 23, but crossing out the child's initials throughout the decision. However, the published opinion by the 3rd Circuit (see *Adoption of N.B.*, 140 So.3d 1263) contains those initials, so it seems odd that they would not be included in the unpublished trial court ruling, ostensibly to protect the anonymity of the child (which was effectively breached in any event since his parents are named in the opinion).

Judge Rubin granted Governor Bobby Jindal's motion to be dropped as a defendant, finding that the governor was not a proper party to the lawsuit, but in every other respect Judge Rubin ruled in favor of the plaintiffs, including finding that Attorney General Barfield was an appropriate defendant, as were the Secretary of the Department of Revenue who had issued the tax ruling and the Registrar of Vital Records, who will be required to issue a new birth certificate for N.B. showing both parents.

Rubin's ruling followed closely the recent ruling by the 10th Circuit in *Kitchen v. Herbert*, finding that the Louisiana marriage ban violates the 14th Amendment. He went beyond most of the recent marriage equality cases, however, by also accepting the plaintiffs' argument that Louisiana's refusal to recognize their marriage violates the U.S. Constitution's Full Faith and Credit Clause. That provision requires that states extend "full faith and credit" to "the public Acts, Records, and judicial Proceedings of every other State." There is some dispute among scholars and courts about whether this Clause requires states to recognize marriages performed in other states, regardless whether such marriages could be found to violate the policy of the state whose recognition is sought.

Rubin quoted from *Milwaukee County v. M.E. White Co.*, a 1935 U.S. Supreme Court decision, where the Court held that "the public policy of the forum state must give way, because the 'very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."

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Arizona Federal Court Orders State to Recognize One Same-Sex Marriage on a Death Certificate

In a ruling that eerily echoed one issued little over a year earlier, a U.S. District Court judge ordered the state of Arizona to issue a death certificate for a gay man identifying him as married to his same-sex spouse. The September 12 ruling in *Majors v. Jeanes*, 2014 U.S. Dist. LEXIS 127942, 2014 WL 4541173 (D. Ariz.) by Judge John W. Sedwick provided a close parallel to a ruling on July 22, 2012, by U.S. District Judge Timothy S. Black, who ordered the state of Ohio to issue a death certificate under similar circumstances in *Obergefell v. Kasich*, 2013 WL 3814262 (S.D. Ohio, July 22, 2013). In both cases, the couple had gone out of state to marry because their home state did not allow or recognize same-sex marriages and then returned to their home state, where a member of the couple died. In the Ohio case, however, the couple secured their court order prior to the death. In Arizona, the couple had joined other plaintiffs in a lawsuit challenging Arizona's denial of marriage equality, but the surviving spouse filed a separate motion after his husband died, seeking an order to record the death properly.

Represented by Lambda Legal, Fred McQuire argued that his constitutional rights were being violated by the state's refusal to accord any recognition to his marriage with George Martinez. The men had lived together as a couple for many years, but they were both in ill health in recent years. After the Supreme Court's dismissal of the appeal in the Proposition 8 case and the restoration of marriage equality in California, they decided to go there to get married. Perhaps they were inspired by the example of the Ohio couple, James Obergefell and John Arthur, whose quick trip to Maryland in a specially chartered plane and wedding ceremony conducted on the airport tarmac during July 2013 received extensive press coverage, as did the subsequent decision by Judge Black to grant a temporary restraining order so that Arthur could die a married man. But they took quite a while to put their expedition together, undoubtedly complicated by their health problems, and did not get married until July 2014. Martinez then died on August 28, and the resistance of Arizona officials to issuing a proper death certificate brought on the motion seeking relief from Judge Sedwick.

The state's first argument in opposition was that the Supreme Court's 1972 ruling in *Baker v. Nelson* that a claim for same-sex marriage did not present a "substantial federal question" precluded a ruling in McQuire's favor. Judge Sedwick made short work of this argument, opining that the Supreme Court's decisions in *Romer v. Evans* (1996), *Lawrence v. Texas* (2003) and *U.S. v. Windsor* (2013) had eliminated any uncertainty about whether *Baker* is still a binding precedent. Pointing out that fewer than two weeks previously the 7th Circuit Court of Appeals had ruled that *Baker* did not block a marriage equality ruling (see above), Judge Sedwick said that the old decision "is not an impediment to consideration of McQuire's claim."

In order to grant such a pretrial order, the court must find that the plaintiff is likely to succeed on the merits of his claim, that he is likely to suffer irreparable harm without the relief he is seeking, that a balance of the equities tips in his favor, and that the public interest favors issuing the relief. In reviewing the four factors, Sedwick was actually signaling the likely outcome when he eventually rules on a motion for summary judgment by the full group of plaintiffs in this case.

Arizona is in the 9th Circuit, where a court of appeals panel heard arguments in marriage equality cases from other states just days before Sedwick's ruling. He pointed out that early in 2014 a 9th Circuit panel had ruled in *SmithKline Beecham v. Abbot Laboratories*, 740 F. 3d 471 (9th Cir. 2014), that sexual orientation discrimination claims require heightened scrutiny, and the full court had denied en banc review. He rejected

the state's argument that Arizona's marriage law does not discriminate because of sexual orientation, observing that "the reason why couples such as McQuire and Martinez may not marry is precisely because of their sexual orientation." He rejected the state's contention that its marriage law was not intended to discriminate against same-sex couples. "Accepting that as true," he wrote, "it does not alter the fact that the laws do discriminate. Evidence of malignant intent might support a higher standard of review, but defendants do not explain why its absence necessarily forecloses use of a higher standard." He derided as "circular" the state's argument that the marriage law was "based upon a biological difference which reflects society's interest in the capacity to create children" so should not be subjected to heightened scrutiny, pointing out that there is now appellate authority from the 4th and 10th circuits holding that "marriage laws which discriminate between heterosexual couples and homosexual couples infringe a fundamental right," so heightened scrutiny would apply in any event.

The state also argued that the 9th Circuit's heightened scrutiny precedent did not reach the circumstances of this case because it relied on *Windsor*, in which the Supreme Court did not specify a heightened standard for review for cases "involving laws with a disparate impact on same-sex couples." He found this argument unpersuasive, finding that it was as reasonable to infer that *Windsor* "does imply used of a heightened standard of review in the case before this court as to infer the opposite," and, quoting the 9th Circuit, "there can no longer be any question that gays and lesbians are no longer a group or class of individuals normally subject to rational basis review."

"Given the wealth of case law holding that state prohibitions on same-sex marriage violate the Constitution," Judge Sedwick continued, "the court concludes that McQuire is likely to prevail on the merits." He also found that McQuire would suffer irreparable injury in the form of dignity harm and the violation of his constitutional rights if Sedwick did not order the state to recognize the marriage for purposes of the death certificate.

However, he rejected McQuire's example of economic harm in the form of loss of eligibility for social security survivor's benefits and veterans' survivor benefits. Although the men had lived together as a couple for many years, their actually marriage did not even last two months before Martinez died. As a result, Judge Sedwick concluded, McQuire could not qualify for spousal benefits because the relevant regulations and statutes require a longer period of legal marriage as a qualification. A couple must be married for at least nine months for a surviving spouse to succeed to social security benefits at the rate received by the decedent, and the qualification period is one year for Veterans' benefits. Sedwick did not specifically consider arguments that might be made to persuade federal authorities to award benefits were McQuire to apply for them, and surely there would be equitable arguments to be made. But that did not really matter to the outcome, because he found that the amount of harm McQuire would suffer from the denial of a proper death certificate was sufficient to support issuing an order in this case without reference to those economic benefits.

The state had argued that the balance of harms weighted toward denying relief, but Sedwick disagreed. He pointed out that the requested order extended only to the issue of the death certificate, and his ruling would be confined to one plaintiff, Mr. McQuire. "Because McQuire's irreparable harm inheres in a claimed violation of the Constitution — a violation which he is very likely to establish — and because the injunctive relief sought is limited to a single individual, it cannot be said that the balance of the equities favors defendants," he wrote. Finally, he concluded that it was probable that the public interest would be advanced by granting relief to the plaintiff. "Conversely," he wrote, "it is probable that the public interest would be harmed if no such relief were provided."

Thus, Judge Sedwick issued an order temporarily restraining Arizona officials from enforcing the Arizona Marriage Amendment and statutory marriage laws "and any other Arizona law against recognition of the marriage of Fred McQuire to George Martinez," and specifically ordered the prompt issuance of an appropriate death certificate recording Martinez as "married" and identifying McQuire as his surviving spouse.

Such recognition of the marriage does not necessarily mean that McQuire will qualify for the higher level of social security benefits that Martinez's surviving spouse should receive or the Veterans' benefits that Martinez earned for his surviving spouse through his military service. This will turn on the degree of stringency with which federal officials decide to enforce the timing requirements in light of the circumstances of this case and perhaps down the line similar cases. A ruling on such a pre-trial motion by a district court is not precedential outside the parties to the case. But the ruling seemed an advance confirmation, if such were needed, that Judge Sedwick is highly likely to rule for the plaintiffs on the merits, if the 9th Circuit does not beat him to the punch by issuing a decision on the Idaho and Nevada cases that would be a binding precedent on Judge Sedwick and the parties in this case. ■

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First Circuit Upholds Prison Policy Requiring All HIV Medication to Be Dispensed at Pharmacy Window

Although they had the support of two prison doctors and an "outside" expert, five Massachusetts prisoners lost their challenge to the state's modification of medication procedures to require all HIV prescriptions to be dispensed in person at a pharmacy window (the "HIV line") in *Nunes v. Massachusetts Department of Correction*, 2014 WL 4494202 (1st Cir., September 12, 2014). The First Circuit, per Judge William K. Kayatta, Jr., affirmed United States District Judge Rya W. Zobel's grant of summary judgment for defendants (reported at 2013 WL 5505364, D. Mass., October 3, 2013). Plaintiff Richard Nunes and four anonymous co-plaintiffs – all identified as having HIV -- sought to proceed for injunctive relief only for all similarly situated inmates, but there is no discussion of class certification.

Judge Kayatta's description of the facts indicates that Massachusetts adopted a unit (or single) dose pharmacy window procedure for HIV medication "to save money" because HIV medication consumed about 40% of the pharmacy's budget; and the "Keep-On-Person" (KOP) system, under which prisoner patients were issued monthly bottles of medicine to take at specified times, was perceived as creating waste when prisoners left the system or were non-compliant with instructions. Unlike the KOP system, the patient's ingestion of the medicine was directly observed at the pharmacy window for each dose, requiring standing in line sometimes two or more times daily. Both KOP and window dispensing continued for other types of medication.

The plaintiffs challenged the HIV line as: cruel and unusual punishment under the Eighth Amendment; violating their privacy under the Due Process Clause; promoting "disparate treatment" under the Americans with Disabilities and Rehabilitation Acts; and (as to Nunes), denying "reasonable accommodation" under the same statutes. The two prison doctors filed affidavits in support of the inmates, saying that patients would be "less compliant" if they have to go to a window twice a day at fixed times and had no ability to adapt their medication consumption to their daily activities. The expert, Dr. David Bangsberg, identified the practice as "substandard," but (like the prison doctors) he did not allege any specific patient harm; and he did not examine the plaintiffs.

Before making the change, corrections officials assessed its impact, finding, *inter alia*, that over 90% of HIV patients already went to the daily med line for other medications and that over 40% were non-compliant regardless of method of administration. The court found this to be a "sincere effort to gauge the effects of the policy change." Following implementation, the department said that "patient outcomes have held steady or improved," with a slight increase in the number of patients with undetectable viral load. Although the plaintiffs disputed the significance of the data, they did not contest it; and they offered "no alternative quantitative metric" and "relatively little evidence regarding their own situations."

Judge Kanyatta ruled that no Eighth Amendment claim existed because no reasonable jury could find deliberate indifference to serious medical needs within the meaning of *Farmer v. Brennan*, 511 U.S. 825, 846 (1994), on these facts. The risk of harm was not "objectively intolerable," and defendants had not disregarded substantial risks. At most, the anonymous plaintiffs' evidence showed temporary side effects (which were addressed) and "a handful of missed doses." Even if plaintiff Nunes' medical profile did offer evidence of deterioration, Judge Kanyatta found that he refused to take any HIV medication since the change, claiming that he could not stand in a line, and demanding restoration of the KOP system as to him. The department offered him a walker, a bench to sit while waiting without losing his place, and admission to the medical unit if he were too ill to go to the dispensing window. Judge Kanyatta found that these "accommodations" were sufficient, noting that Nunes offered no medical evidence supporting his claimed inabilities and that the record indicated that he "regularly walks to and from the prison cafeteria and engages in exercise, and… had jobs walking with a blind prisoner and cleaning corridors."

Judge Kanyatta found that none of the evidence, including that from the objecting doctors, showed that plaintiffs' individual treatment had fallen "below professional standards." Rather, "the undisputed facts show that the department engaged in facially reasonable efforts, well before this litigation commenced, to assess the effects of a policy change, and then concluded, with ample basis, that the change would not harm inmates."

Judge Kanyatta found that any disclosure of plaintiffs' HIV status by their presence in the medication line was "inadvertent… occurring sporadically, and sometimes unconnected to the department's policy change." He noted that the First Circuit has not held that prisoners have a constitutional right to medical privacy, but assumed for purposes of the decision that such a right existed, citing *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999); *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir.2001) (following *Powell*); and *Moore v. Prevo*, 379 F. App'x 425, 428 (6th Cir.2010) (following *Powell* and *Doe*); and the general right to privacy recognized in *Whalen v. Roe* 429 U.S. 589, 599 (1977). While there may be other means of dispensing HIV medication that had lower risk of invasion of privacy, the

government was not required to adopt a "narrower policy," or "least restrictive means" under *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 761 (2011).

While the plaintiffs' condition was a "disability" under the ADA and Rehabilitation Acts, the "HIV line" did not discriminate against them because of their disability, since patients with other conditions also had to use the pharmacy window line as well; and they retained "full access" to their HIV medication. Judge Kanyatta found "no evidence of any intent by the department to impose that burden on the plaintiffs because they have HIV," citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (holding that disparate treatment liability under the ADA "depends on whether the protected trait actually motivated the employer's decision"). Judge Kanyatta found that the HIV line was motivated by "cost savings" and had "a positive, or at worst neutral, impact on the health of the HIV-positive prison population."

This case is not a generalized endorsement of special handling of HIV patients in prison, but it comes close. Here, because the HIV line also included patients without HIV, and plaintiffs could not show individualized harm, they lost. In *Raytheon*, the Supreme Court found that a policy of refusing to rehire any employees previously fired was "neutral" and did not violate the ADA simply because it included disabled addicts who were fired for drug use. Judge Kanyatta's use of *Raytheon* to find that forcing all HIV patients into a pharmacy line at a window is not "trait"-based because it is cost–motivated seems strained.

Plaintiffs were represented by Joel H. Thompson, with Tatum A. Pritchard and Prisoners' Legal Services, Boston. – *William J. Rold*

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

Federal Court Refuses to Dismiss Discrimination Claims by Married Same-Sex Couples Denied Benefits Plan Participation

A Washington State employer that refused for almost a year to allow employees to enroll their same-sex spouses in the employer's health plan lost its motion to dismiss a discrimination lawsuit pending before U.S. District Judge Ricardo S. Martinez on September 22. *Hall v. BNSF Railway Company*, 2014 U.S. Dist. LEXIS 132878, 2014 WL 4719007 (W.D. Wash.). The employer, BNSF Railway Company, insisted that it could not provide the benefits because the employee benefits plan defined marriage as "between one man and one woman." The employer did not extend the benefits until January 1, 2014, after it had amended its plan through collective bargaining with its employees' union to adopt a more inclusive definition of marriage, most likely in response to the Supreme Court's ruling last year in *U.S. v. Windsor* and the subsequent federal recognition of same-sex marriages.

Michael Hall and Amie Garrand are employees of BNSF Railway in the state of Washington, where voters approved a marriage equality law during the 2012 general election. After that law went into effect, Hall married Elijah Uber on January 21, 2013, and sought to enroll him as a spouse under the BNSF health care plan. BNSF and its plan administrator, United Healthcare, refused to enroll Uber. Amie Garrand encountered the same problem after she married Carol Garrand. The employer rejected repeated attempts by Hall and Garrand to persuade it that under Washington law their legally valid marriages were entitled to equal treatment. Hall and Garrand have now enrolled their spouses, but brought suit seeking damages for the exclusionary period and an Order by the court determining that legally-married same-sex spouses living in a state that recognizes their marriage are entitled to equal treatment under employee benefits plans.

Hall and Garrand asserted claims under the federal Equal Pay Act, which forbids employers from discrimination in compensation and economic benefits because of the sex of an employee, the Employee Retirement Income Security Act (ERISA), which authorizes federal courts to entertain lawsuits by employees seeking benefits due to them under employee benefit plans, and Washington's Law Against Discrimination, which forbids employment discrimination because of sex and sexual orientation. Hall also added a claim under Title VII of the federal Civil Rights Act of 1964, which forbids sex discrimination in terms and conditions of employment. The railroad moved to have all claims dismissed, arguing that the federal discrimination claims were invalid because federal law does not forbid sexual orientation discrimination, that the state law claim was preempted by ERISA, and that the ERISA claim was subject to an arbitration provision in the employee benefits plan and so could not be litigated in federal court. The railroad also argued that there was no need for prospective relief, since it had changed its plan to provide equal coverage for same-sex spouses through negotiations with the union.

Judge Martinez ruled against the railway on all of its assertions except arbitration, finding that the ERISA claim must be dismissed.

The key to Martinez's ruling was his agreement with the plaintiffs that the employer's action could be challenged as sex discrimination. The railroad had argued that "Mr. Hall is really alleging a claim of discrimination based on his sexual orientation, not his sex, which cannot be maintained under Title VII."

"While acknowledging that it is often difficult to distinguish sex discrimination claims by people identifying as homosexual from those claims based solely on alleged sexual orientation discrimination," wrote the judge, "the Court disagrees with Defendant's interpretation of the instant

claims." Judge Martinez quoted from the factual allegations in Hall's complaint to show that he was actually contending that he was subjected to discriminatory treatment because he was male. Hall pointed out that had he married a woman his application would have been accepted, but that the railroad had refused to cover Elijah "based solely on the fact that Michael as male." That is, if Hall were a female employee who had married Elijah, his application to enroll his spouse would have been accepted without question. He pointed out that BNSF employs female engineers (his job classification) and provides coverage for their male spouses.

Hall's complaint concludes on this point, "The one man/one woman definition of spouse used by BNSF to limit its liability to cover spousal health benefits amounts to a BNSF policy to discriminate against Michael Hall simply because he is male; under this policy, if he were a female married to Elijah, the benefit would be paid."

Or, as Judge Martinez put it in rejecting the motion to dismiss, "Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."

Martinez found support for this conclusion in a 2009 ruling by 9th Circuit Judge Stephen Reinhardt, *In re Levenson*, 587 F.3d 925, upholding a similar claim for benefits by the same-sex partner of a male federal public defender. In that opinion, rendered as part of an internal 9th Circuit grievance procedure, Judge Reinhardt relied alternatively on the circuit court's own internal ban on both sex and sexual orientation discrimination. Martinez noted a handful of other federal trial court rulings that could be construed to have accepted similar arguments.

"While the court makes no comment with respect to the validity of Plaintiff Hall's Title VII claim in the instant matter," wrote Martinez, "it does find that Plaintiff has satisfied the initial burden of stating a claim that is plausible on its face. Accordingly, the Court denies Defendant's motion to dismiss the Title VII claim." Martinez found on similar grounds that he should deny the motion to dismiss the Equal Pay Act claims by Hall and Garrand. He also rejected the railroad's claim of ERISA preemption of the state law claim, since ERISA preempts state anti-discrimination laws only to the extent that they go beyond the protections of Title VII. Having found that Title VII could plausibly apply to this case, Martinez found the motion to dismiss the Washington state law claim to be premature.

However, the Railway Labor Act, which applies to employment disputes affecting this employer, read in conjunction with the ERISA claim, would mandate that the ERISA claim go to arbitration rather than litigation, so Judge Martinez granted the motion to dismiss the ERISA claim. That shouldn't make any difference to the plaintiffs, who are now free to pursue their Title VII, EPA and Washington state discrimination claims in the federal lawsuit. They could also file a grievance with the plan administrator and seek arbitration of their ERISA claim.

Rejecting the railroad's argument that its extension of benefits effectively mooted the plaintiffs' claim for prospective relief, Martinez observed that the railroad appeared to "misconstrue" that claim. "Plaintiffs seek, inter alia, an Order determining whether health benefit for same-sex spouses in states where same-sex marriage is legal are mandated under current law and directing Defendant to provide health benefits to such same-sex spouses as a matter of right in the future." Since the court had found the sex discrimination claims to be plausible, wrote Martinez, "the Court cannot find at this time that their claims for such prospective relief are moot."

The plaintiffs are represented by Seattle attorneys Duncan Calvert Turner and Cleveland Stockmeyer, with amicus assistance from Lambda Legal and Lambda's cooperating attorney in Seattle, Jennifer S. Devine. Lambda Legal's involvement in the case signals that this litigation is about more than just financial recompense for the plaintiffs. The public interest firm is in it for a published court order on the ultimate question of whether employers can refuse to provide benefits coverage to legally-married same-sex couples. Thus a settlement of the financial claims, which might be in the offing in light of the court's ruling on the motion to dismiss, may not be enough to end this litigation.

Interestingly, just days after this ruling, Gay & Lesbian Advocates & Defenders filed a similar Title VII claim with the Equal Employment Opportunity Commission on behalf of a Walmart employee, Jacqueline Cote, who was denied spousal health insurance for her wife, Diana Smithson. Cote and Smithson married in 2004 in Massachusetts, where Cote is an associate at a Walmart store in Swansea. Walmart denied their application for coverage repeatedly from 2006 through 2012. In 2013, reacting to the *Windsor* decision and federal recognition of legal same-sex marriages, Walmart announced that it would change its policy effective January 1, 2014, so now Smithson is enrolled in the plan. But Cote and Smithson accumulated over $100,000 in unpaid medical bills for treatment of Smithson for several problems, including ovarian cancer that required expensive chemotherapy, during the period when Walmart refused to cover Smithson, for which they are seeking compensation in their discrimination case. ■

"Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."

Federal Court Rules against Transgender Woman in Employment Discrimination Case

In *Chavez v. Credit Nation Auto Sales*, 2014 WL 4585452, 2014 U.S. Dist. LEXIS 254216 (N.D. Ga. Sept. 12, 2014), summary judgment was granted to Defendant Credit Nation by the district court after Magistrate Judge Clay Fuller issued his R&R, ruling that an employee who underwent gender transition failed to show her termination was a pretext for unlawful discrimination mainly due to the defendant providing additional reasoning for her termination.

Plaintiff Jennifer Chavez, formerly known as Louie Chavez, was employed as an automobile mechanic at Credit Nation Auto Sales in Autstell, Georgia. Plaintiff decided to go through a gender transition because she "did not want to die having lived a lie" and met with her immediate supervisor Phil Weston, and Cindy Weston, the Vice President of Credit Nation, informing them of her intention to make a gender transition, both of whom were "extraordinarily kind." Even the owner of Credit Nation and the other facility employees showed support for Plaintiff's transition. Everyone's kindness, unfortunately, did not last, and Plaintiff claims she began facing adverse treatment about two weeks later from her boss, who reprimanded her for discussing the transition with other employees while at work. Mr. Torcia also expressed "concerns, worries, and apprehensions" regarding Plaintiff's gender transition because it will potentially "impact his business," and further claimed that a new applicant for a tech position declined employment there due to the plaintiff's transition.

Problems persisted. Plaintiff would wear dresses, skirts and heels in the service department work area, which violated Credit Nation's workplace rules requiring employees to wear work pants, a uniform shirt, and rubber soled shoes. For the sex-reassignment surgery, Credit Nation approved two weeks of paid leave, although Plaintiff had accrued only a week of vacation time at that point. Plaintiff would also use the unisex bathroom that is reserved for Credit Nation's customers and office personnel, so other employees began to claim that they were being discriminated against because they were not allowed to use the customer restrooms, well aware that Credit Nation employees are required to use different bathrooms because of the accumulate oil and grease on their shoes.

Three months into the events that transpired, Plaintiff arrived at work, did not change into her required uniform, and sat in the back of one of the cars she was working on because it was a "very cold day," and Plaintiff fell asleep in the car. An employee photographed this, sent it to Mr. Torcia, and plaintiff was subsequently terminated for "sleeping while on the clock on company time."

Previously, in 2008 and 2009, Plaintiff went to the Equal Employment Opportunity Commission (EEOC) office in Atlanta to file a claim against Credit Nation for sex discrimination under Title VII of the Civil Rights Act. On both occasions, an EEOC investigator told the Plaintiff that she could not file a discrimination claim because transgender persons are not protected from discrimination on the basis of "sex" under Title VII. In April 2012, Plaintiff tried again, after hearing news reports that transgender persons had filed complaints with the EEOC, and on this occasion, Plaintiff was allowed to file a complaint for sex discrimination under Title VII. Plaintiff filed this action against Credit Nation, asserting claims of sex-based discrimination under 42 U.S.C. § 1981(a) and Title VII of the Civil Rights Act of 1964, as amended.

Credit Nation moved for summary judgment. On July 18, 2014, Magistrate Judge Clay Fuller issued his Report & Recommendation on the summary judgment motion. In the R&R, the Magistrate Judge recommended that (1) Plaintiff's sex discrimination claim be equitably tolled because the EEOC misled Plaintiff about the nature of Plaintiff's rights under Title VII, and (2) Defendant's Motion for Summary Judgment be granted because Plaintiff failed to show that Credit Nation's reason for terminating her employment was a pretext for unlawful discrimination. Plaintiff filed Objections to the R&R, arguing that there are genuine issues of fact regarding whether Credit Nation's decision to terminate Plaintiff was a pretext for unlawful discrimination. Defendant filed its reply to the Plaintiff's Objections to the R&R, and did not object to the R&R's findings and recommendations.

The court found that the Plaintiff failed to exhaust her administrative remedies because she did not file her charge of discrimination with the EEOC within 180 days of the last discriminatory act, however, the limitations period under Title VII may be equitably tolled if the EEOC misleads a complainant regarding the nature of his or her rights. In the instant matter, the Magistrate Judge concluded that the statute of limitations should be equitably tolled because the EEOC misled Plaintiff regarding her rights by informing her that transgender persons cannot file claims for sex discrimination under Title VII. Because Title VII has been interpreted to prohibit discrimination based on gender stereotypes, Plaintiff can assert a sex discrimination claim because the Plaintiff was transitioning from male to a female gender, and Plaintiff essentially claims that the failure to conform to male stereotypes caused Plaintiff's termination. The court affirmed the Magistrate Judge's recommendation that Plaintiff's sex discrimination claim be equitably tolled.

Under the *McDonnell Douglas* framework, a prima facie case of sex discrimination is established if the plaintiff shows that "(1) she is a member of a protected class, (2) she was qualified for the job, (3) she was subjected to an adverse employment action, and (4) her employer treated similarly situated employees outside her class more favorably." The court's review of the R&R assumes that the Plaintiff established a prima facie case of discrimination and the defendant in this case offered evidence of a legitimate

business reason for Plaintiff's discharge, so the court reviews de novo whether Plaintiff has offered evidence that there are disputed issues of fact regarding whether the reason for Plaintiff's termination was a pretext for unlawful discrimination.

Credit Nation articulated a legitimate, nondiscriminatory reason for Plaintiff's termination, and thus the burden shifted to Plaintiff to produce evidence "sufficient to permit a reasonable factfinder to conclude that the reasons given by Credit Nation were not the real reasons for the adverse employment decision." *Chapman v. Al Transportation*, 229 F.3d 1012, 1024 (11th Cir. 2000). Plaintiff argued that she was fired because of her failure to conform to gender stereotypes, among other things, however, in its Motion for Summary Judgment, Credit Nation further had additional reasons to justify Plaintiff's termination, including two disciplinary warnings, violation of six other work rules, and excessive absences. "If an employer offers different reasons for terminating an employee, those reasons must be fundamentally inconsistent in order to constitute evidence of pretext." *Phillips v. Aaron Rents, Inc*., 262 F. App'x 202, 210 (11th Cir. 2008).

Plaintiff was ultimately terminated for sleeping on the job, found the court, and there is no conflict between that reason for her termination and any other reason that has been offered by the Defendant in this litigation or before the EEOC. The court held that there was no evidence of unlawful discrimination in this case. Mr. Torcia's isolated remarks regarding Plaintiff's transition that were made in a meeting unrelated to the adverse employment action taken against Plaintiff were insufficient to establish discrimination in the absence of "some additional evidence supporting a finding of pretext." Based on de novo review of the R&R, the court determined that Plaintiff's objections to the final R&R are required to be overruled, and Credit Nation's Motion for Summary Judgment was granted.
– *Anthony Sears*

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

Transgender Inmate Suffers Summary Judgment in Protection from Harm Case

U.S. District Judge Gregory A. Presnell (M.D. Fla.) granted summary judgment in favor of Orange County on federal civil rights claims in a transgender inmate's protection from harm case in *D.B. v. Orange County*, 2014 WL 4674136 (Sept. 18, 2014), despite ruling on the previous day that expert testimony on transgender safety in prisons would be admissible as "helpful" to the jury (see companion case, below, in Prisoner Litigation Notes).

Plaintiff D.B. was moved to and from protective custody numerous times in the Orange County Jail. In 2009, following a year with a cell-mate, Josh Bailey, D. B. was sexually assaulted by Bailey, after which she was transferred to protective custody for the remainder of her term at the jail. Bailey was convicted of the assault and sentenced to 25 years. The county's internal review showed that officials "had not conducted a thorough inquiry into D.B.'s requests for protective custody and… decisions to deny those requests were not supported by objective facts and were not impartial."

In 2012, D. B. sued Orange County, numerous "John Doe" defendants, and her assailant for violation of her civil rights and for state law negligence.

In 2012, D. B. sued Orange County, numerous "John Doe" defendants, and her assailant for violation of her civil rights and for state law negligence. The county moved for summary judgment "solely" on the Section 1983 claims. Citing *Farmer v. Brennan*, 511 U .S. 825, 832 (1994), Judge Presnell recognized that jailers must "take reasonable measures to guarantee the safety of the inmates." He proceeded to analyze the case, however, in terms of safety for transgender inmates in general, rather than for D. B., in particular. He found that the evidence was in conflict as to whether transgender inmates faced an "excessive" risk of assault at the jail, but admissions by officers and the testimony of expert witness Valerie Jenness (see companion case) resulted in a jury question on risk.

As to the second arm of *Farmer* (deliberate indifference to that risk), Judge Presnell found that Orange County had taken reasonable steps to protect transgender inmates by establishing procedures for protective custody and issuing orders to "address the risk of sexual assault." He found D.B.'s evidence "far too vague to support a finding that at the time D.B. was attacked Orange County knew that its policies... were insufficient to address the risk of sexual assault faced by transgender inmates." Therefore, no reasonable jury could find for D. B. on the deliberate indifference claim.

Presumably, D. B. can go forward with negligence claims against Orange County and other claims against Bailey and the "John Does," although the court denied amendment to name at least one of the John Does as untimely under the statute of limitations. [Note: *Farmer* allows a single plaintiff to claim deliberate indifference. Here, the pre-assault evidence, according to one officer, included other inmates "shaking their penises" at D.B. and taunting her. Good luck reconciling the two cases; and stay tuned for a possible reversal on whether there was a jury question on the Section 1983 claim against Orange County in this case.]

D. B. is represented by Jeremy K. Markman, of King & Markman, PA, of Orlando. – *William J. Rold*

Texas Appeals Court Rules that Both Dads Should Have a Relationship With the Son They Had Via Surrogacy

Jerry Berwick, the biological father of a child conceived through surrogacy, appealed the Harris County trial court's ruling that designated appellee Richard Wagner, his former partner, as sole managing conservator and Berwick as possessory conservator of the minor child, C.B.W (CBW). The Court of Appeals affirmed that decision in *Berwick v. Wagner*, 2014 WL 4493470, 2014 Tex. App. LEXIS 10182 (1st Dist. Ct. App., September 11, 2014).

This is the second appeal to the 1st District Court of Appeals arising from the same underlying dispute. Berwick and Wagner, both gay men, were in a relationship from 1994 through 2008. They cohabited in Houston beginning in 1997. They were legally married in Canada in 2003 and later in 2005 they registered as domestic partners in California when they entered into a surrogacy agreement with a married woman there. The woman agreed to carry a child for them. The couple used Berwick's sperm and a donated egg, which resulted in a pregnancy and the birth of son CBW.

A paternity order was entered by the California court prior to CBW's birth that declared both Berwick and Wagner as legal parents of CBW, so both of their names appear as parents on the child's California birth certificate.

A paternity order was entered by the California court prior to CBW's birth that declared both Berwick and Wagner as legal parents of CBW, so both of their names appear as parents on the child's California birth certificate. Berwick, Wagner and CBW lived together in Houston as a family until Berwick ended the relationship. Shortly thereafter, Wagner filed the underlying "Suit Affecting the Parent Child Relationship" (SAPCR), seeking an order naming Wagner and Berwick joint managing conservators of CBW. Berwick counterclaimed, seeking to be named sole managing conservator and arguing that Wagner lacked standing as a parent to seek custody because only Berwick was biologically related to CBW.

Wagner, in an attempt to be recognized, filed a separate proceeding to register the paternity order from California. The Texas Family Code provides for registration and confirmation of child-custody determinations from other jurisdictions. Under that section, after proper notice and an opportunity to contest the registration are given to appropriate parties, a trial court is required to confirm the judgment. Berwick contested the registration filing. The trial court combined both Wagner's registration case and Berwick's contest concerning custody into one hearing. The issues before the court were whether confirmation of the California paternity order was proper, and whether Wagner had standing in the underlying SAPCR proceeding. The trial court concluded that confirmation was proper, and that Wagner had standing to bring the underlying SAPCR.

Berwick immediately appealed the registration of the California paternity order. It was an accelerated appeal and Berwick was unsuccessful. See *Berwick v. Wagner*, 336 S.W.3d 805, 807 (Tex.App.-Houston [1st Dist.] 2011, pet. denied). During the subsequent two-week trial on the conservatorship petition, the jury found that Wagner should be CBW's sole managing conservator. Berwick was named possessory conservator, meaning that he would have visitation rights. The trial court's decision also denied Berwick's request that CBW's last name be changed to eliminate the reference to Wagner.

Berwick brought the following six issues challenging the trial court's judgment: 1) the California Judgment of Paternity Cannot be Enforced; 2) Berwick's Paternity Claim Must Be Adjudicated; 3) prospective Jurors May Not be Challenged for their Religious Beliefs; 4) the Introduction of Evidence That Berwick is CBW's Biological Father is Mandatory; 5) CBW's Name is a Jury Issue; and 6) the Verdict is Against the Overwhelming Weight of the Evidence.

With regard to the California judgment, Berwick contended that registration of the California Judgment of Paternity in Texas "does not mean that it is enforceable." He argued that the California judgment's adjudication of Wagner as a parent should not be recognized because it "is contrary to Texas law." Berwick pointed to the Texas Family Code's provision defining "parent" as "an individual who has established a parent-child relationship under Section 160.201." Tex. Fam. Code § 160.102(11). Berwick argued that Wagner is not a parent under the Texas law and therefore the order is unenforceable in Texas. Berwick asserted he is the only father and wants to be recognized as such. Berwick interpreted the Texas law as only being able to recognize one legal father.

Berwick also made the argument

that the surrogacy agreement is void under Texas law. Wagner in response argued that enforcement of the paternity order is not at issue. Wagner saw it as recognition question. Wagner argued full faith and credit; the judgment from California should be recognized in Texas as a matter of constitutional law and both Berwick and Wagner should be viewed as legal parents pursuant to that judgment. Wagner also argued that Berwick's argument about their surrogacy agreement was irrelevant to the conservatorship issue pending before the court.

Wagner contended that Berwick's second issue was properly rejected by the court because there is already an order stating that both Wagner and Berwick are legal parents to CBW.

The court of appeals, in an opinion by Chief Justice Sherry Radack, asserted that the issue for the court was Wagner's standing to see the status of managing conservator with his parental status. The irony of this case is that when Wagner filed the underlying SAPCR seeking a possession order related to CBW, he never challenged Berwick's standing or his legal status as a parent to CBW, and indeed sought equal recognition for both fathers. Berwick, on the other hand, immediately argued that Wagner lacked standing and is not a biological parent to CBW and therefore does not have any rights as a parent. The Court found that the trial court was correct when it recognized both Wagner and Berwick as CBW's parents and gave full faith and credit to the California order. Therefore, there was no need to litigate about Berwick's paternity.

In Berwick's attempt to exhaust all of his possible arguments, he next attempted to argue that the trial court abused its discretion by excluding evidence that Berwick is the biological father. He argued that it is in the best interest of a child if one parent is appointed as the sole managing conservator or in the alternative both parents are named as joint managing conservators of the child. Tex. Fam. Code Ann. § 153.131(a).

In support, Berwick cited three cases applying this standard that involved parents and grandparents as well as parents and non-parents. *Lewelling v. Lewelling*, 796 S.W.2d 164, 166–67 (Tex.1990), *In re W.G.W.*, 812 S.W.2d 409, 413 (Tex.App.-Houston [1st Dist.] 1991, no writ) and *In re Smith*, 262 S.W.3d 463, 465 (Tex.App.-Beaumont, 2008, orig. proceeding). Berwick's reliance on these cases was misplaced because Wagner has already been recognized as a legal parent of CBW.

Berwick's argument on excluded evidence would have only been successful if he had been able to show that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment, and he failed to demonstrate that. The only evidence excluded was genetic testing and testimony that Berwick was CBW's biological father. The court's decision excluding this evidence stemmed from the fact that a judgment existed whereby both Berwick and Wagner were recognized as legal parents to CBW. Berwick tried to influence the jury by testifying that CBW was his child and the court, concerned about the possibility of a mistrial, held a bench conference. Berwick's counsel argued that the evidence had already come in and it was clear who the biological father was to the jury. Wagner's counsel could not disagree. After the dissolution of their relationship, Berwick made it clear to anyone that would listen that Wagner needed to move on because Wagner was not the child's "real dad."

The trial court instructed the jury to disregard one of Berwick's statements. The record was clear based on the California judgment and the birth certificate that both Berwick and Wagner were listed as the legal parents. The court of appeals dismissed this issue.

One of Berwick's other arguments was that the prospective jurors were challenged for their religious beliefs. Five jurors were struck because of religion, according to Berwick.

Wagner believed the strikes were proper because those five jurors had personal biases that could prevent them from being fair in their application of the law to this case. Under Texas law, if a prospective juror admits or demonstrates bias they will be disqualified to serve as a juror.

Both Berwick's and Wagner's attorneys inquired of the potential jurors whether their feelings about sexuality would effect their ability to make decisions in the best interests of the child, CBW. Berwick failed to articulate with enough specificity the issue with regard to the five jurors that received strikes. However, it was clear from the juror responses that there were jurors who had strong feelings towards homosexuality and two fathers having a child because of their religious beliefs. The trial court did not strike every potential juror with religious objections to homosexuality, but only those who said that their beliefs would interfere with their ability to base their decisions solely on the law and the evidence. The potential jurors were questioned intensely on whether they could be fair with regards to Mr. Wagner who is still a homosexual, as compared to Berwick, who married a woman he met on-line after breaking up with Wagner. This due diligence is most likely what led the court to dismiss Berwick's issue with regard to the religious discrimination of jurors.

Berwick's next challenge was to the sufficiency of the evidence to support appointment of Wagner as sole managing conservator. "Jury findings underlying a conservatorship appointment are subject to ordinary legal and factual sufficiency review." *In re N.L.D.*, 412 S.W.3d 810, 817 (Tex.App.-Texarkana 2013, no pet.). In reviewing for legal sufficiency, the court considers only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings. The court decided that the jury was properly instructed to "appoint both joint managing conservators unless you find that such appointment is not in the best interest

of the child." The jury was instructed to consider the needs and development of the child, the relationship between each with the child, the geographic factors, and the ability of the parent to make the welfare of the child their first priority. The court of appeals found the evidence legally sufficient to support appointment of Wagner as sole managing conservator for CBW for several reasons.

Wagner's testimony clearly demonstrated that it was in CBW's best interest for Wagner to be the sole managing conservator. Wagner testified in court to the entire relationship with Berwick…all 14 years of the relationship. Wagner and Berwick had CBW in 2005 via surrogacy and it was not until they decided to not have other children that Berwick told Wagner that he was questioning his sexual orientation. It was in March 2008 that Berwick confided that having CBW had caused this confusion with regards to his own sexual identity. Wagner felt that this change was sudden but they remained close friends. Berwick said he could no longer give into his homosexual desires. Berwick gave Wagner a letter confirming such. This friendly interaction was short-lived. Berwick quickly resorted to making derogatory comments to Wagner about homosexuality being disgusting and much worse. The worst part was that Berwick starting treating Wagner poorly in front of their son CBW. Berwick said negative things about Wagner in front of CBW and shared his views openly. It only was made worse by Berwick attending a retreat; his return was marked by calling Wagner the devil and wanted to kick him out of the home and out of CBW's life. Shortly thereafter, Berwick and Wagner entered a Rule 11 Agreement intended to ensure that things remained as close to the same for CBW as possible. The Rule 11 covered some basic tenets of the three of them living under the same roof at their Roseland, Texas, house. The Rule 11 provided the routines the three would live by while caring for CBW.

Within the next year, Berwick married a woman he met on the popular Christian dating site e-Harmony. Berwick approached Wagner right before the wedding hoping they could agree on what to do about their living situation. Berwick's new wife lived close by so Wagner suggested that Berwick could live there. Instead of agreeing to this arrangement Berwick moved his new wife into the house he shared with Wagner. Wagner came home one night and saw locks on some of the interior doors and Berwick and his wife taking pictures of everything in the house. Berwick and Wagner continued to argue more and more.

Wagner and Berwick had CBW in 2005 via surrogacy and it was not until they decided to not have other children that Berwick told Wagner that he was questioning his sexual orientation.

The relationship between Berwick and Wagner deteriorated further. Berwick filed a false police report against Wagner. Wagner in turn started carrying a tape recorder. The difference between Berwick and Wagner is that Wagner felt remorse and admitted that there were things he could do differently. Wagner also made attempts to cooperate with Berwick. Wagner had CBW on his health insurance since his birth, but Berwick slowly tried to break all ties CBW had with Wagner so he obtained secondary insurance and secretly switched CBW's insurance with his doctors.

The disagreements continued when it came to what school CBW should apply to and where he should be enrolled. When Wagner would try to work with Berwick on their son's best interests, Berwick would threaten Wagner with allegations that he was breaking the law in Texas. They could not agree on holiday visitation routines.

Wagner's testimony came down to Berwick being unwilling to work with Wagner and do what was in the best interest of CBW.

In the Rule 11, Wagner and Berwick agreed to seek out a psychologist to evaluate them both. Dr. J. Anderson evaluated then, researched, and reviewed information she obtained on both parties. Dr. Anderson issued her report in 2009. Dr. Anderson made a recommendation that Berwick and Wagner should be joint managing conservators. Dr. Anderson observed that Wagner was more mature. A second psychologist evaluated Wagner and Berwick as well.

After hearing all of the testimony from Wagner and Berwick, the jury evidently came to the conclusion that having both of them serve as joint managing conservators for CBW was not in anyone's best interest and specifically not in the best interest of CBW. Wagner and Berwick cannot agree on any decision involving CBW and therefore it is unlikely they will be able to agree on CBW's behalf as joint conservators. They even fought over CBW's name during the appeal. The jury ruled in favor of making Wagner the sole managing conservator, and the role of that parent is to be the exclusive decision-making parent. The court of appeals rejected Berwick's contention that this was against the weight of the evidence.

Wagner was represented on appeal by Ellen A. Yarrell. Berwick was represented by Austin R. Nimicks, an attorney associated with the anti-gay religious litigation group Alliance Defending Freedom, and by James T. Mahan. – *Tara Scavo*

Tara Scavo is an attorney in Washington D.C.

An Italian Tribunal Establishes Second-Parent Adoption in Same-Sex Family

With an unprecedented ruling filed on July 30, 2014 a panel of four judges in Rome, Italy, granted a woman's petition to adopt the biological daughter of her same-sex partner.

Currently, among European countries, Italy is alone in not having enacted any laws on same-sex couples or same-sex families thus far. Despite numerous litigation attempts in the last few years, in fact, Italian gay and lesbian citizens still live in legal oblivion in terms of their families. The only statutory provisions in force, concerning discrimination in the workplace, have been enacted in 2003, and amended in 2008 and 2011, because the European Union urged the Italian government to do so. If one excludes a recent case, where a court has ordered a notorious lawyer to pay damages for having declared in a radio interview that he would never employ a gay attorney in his law firm, this antidiscrimination law is barely enforced in domestic courts. On their part, both the Parliament and the government are still mummified by a total lack of sensitivity towards the entire LGBT Italian population. In such a difficult political environment, courts have therefore been borne with the heavy burden of protecting, through judgments stemming from single cases, the individual situations of same-sex couples and families.

The case examined by the Tribunal of Rome was brought by the co-mother of a young girl, whose biological mother she had married in Spain. The applicant requested to adopt the girl, as Italian adoption law, dating 1983, provides for the possibility of an "adoption in particular cases" where the best interest of the child involved requires the consolidation, by legal sanction, of his/her relationship with the person who mostly takes care of him/her without cutting the ties with the current parent.

The applicant argued that, together with the child's biological mother, she fully participated in the procreative project that was performed in Spain through medically assisted procreation proceedings which otherwise would be inaccessible to same-sex couples in Italy. Moreover, both mothers managed their parental role since the very first moments of the child's life. In addition, the girl always recognized and currently recognizes both as her mothers, and so she calls them. She has no problems at school and interacts with her schoolmates as much as any other child of her age. Finally, the applicant showed that the family of both women fully support them and indeed helped them with the fertilization in Spain. The biological mother supported her spouse's petition for adoption.

The Tribunal held that in such a situation no statutory limitations exist in order to prevent adoption by the co-mother. First, adoption is in the best interest of the girl, because she already acknowledges the applicant as her parent and has always lived with her. Second, it would represent a simple prejudice, baseless as such, to presume that it would be harming for a child to live in a family centered on a same-sex couple (see Court of Cassation, No. 601 of Jan. 11, 2013). Third, partly borrowing the words of the Italian Constitutional Court (No. 138 of April 15, 2010), the Tribunal stated that "the desire to have children … is included in the right to a family life, in the right to freely live one's life as a couple, which is a fundamental right." Finally, it recalled the case-law of the European Court of Human Rights (June 24, 2010, *Schalk & Kopf v. Austria*; Feb. 19, 2013, *X & Others v. Austria*), remarking that a justification for a different treatment between straight and homosexual potential adoptive second-parents must be justified: the court should explain why a same-sex couple does not constitute a suitable environment for the development of the best interest of the child. Lacking such a justification, in order to avoid discrimination based on sexual orientation, second-parent adoption must certainly be granted.

The Tribunal is clear in its reasoning and holding: the recognition of same-sex families is imposed by the law, the Constitution and the supranational norms.

The Tribunal's ruling spread heavy criticisms in public opinion. Some politicians accused the judges of overthrowing the Parliament, others asserted that the judgment was constitutionally unreasonable. Yet the Tribunal is clear in its reasoning and holding: the recognition of same-sex families is imposed by the law, the Constitution and the supranational norms. Criticizing a judgment without having read it seems, indeed, another quite disturbing Italian custom.

– *Matteo M. Winkler*

Matteo M. Winkler is an Assistant Professor at HEC Paris.

MARRIAGE EQUALITY

SUPREME COURT OF THE UNITED STATES – As September ended, the Supreme Court had seven certiorari petitions seeking review of decisions from the 4th, 7th and 10th Circuit involving marriage equality claims from Wisconsin, Indiana, Virginia, Utah and Oklahoma. As we went to press with this issue of *Law Notes*, the Court had held its "long conference" – traditionally held on the Monday prior to the start of the new term of the Court – to consider accumulated certiorari petitions, but no announcement had been made by the end of business on September 30 about grants or denials of certiorari in any of the marriage equality cases. In a speech at the University of Minnesota Law School earlier in September, Justice Ruth Bader Ginsburg had suggested that the unanimity of court of appeals rulings at that point suggested that there was "no rush" for the Court to decide a marriage equality case, but that if the pending 6th Circuit case were to uphold bans on same-sex marriage, the resulting "circuit split" would undoubtedly spur the Court to take up the issue. No word, however, from the 6th Circuit, which had held arguments almost two months earlier, by the end of September. Also pending was a decision from the 9th Circuit, which held arguments during the first week of September. So it is possible that October will prove a big month for marriage equality litigation news, with possible rulings from those two circuits, with several summary judgment motions having been argued and awaiting decision in other states, and with the Supreme Court yet to be heard from.

NINTH CIRCUIT COURT OF APPEALS – The oral argument held in the 9th Circuit on pending marriage equality appeals from Idaho, Nevada and Hawaii were described by a San Francisco legal newspaper thus: "It will be one of the greatest upsets in legal history if the U.S. Court of Appeals for the Ninth Circuit does not strike down Idaho's and Nevada's bans on same sex marriage." The panel of Stephen Reinhardt, Marsha Berzon and Ronald Gould were unfailingly polite to the attorneys who were defending state marriage bans, but their questioning and comment left few doubts that they would be reversing the Nevada decision, affirming the Idaho decision, and most likely dumping the appeal by a Hawaii anti-marriage group that was arguing that it should have a right contest the Hawaii legislature's authority to enact a marriage equality law last year in the face of Hawaii's state constitutional marriage amendment. The only really suspense left by the argument was whether the court would follow the lead of the 7th Circuit, treating this as primarily an equal protection case, or the 4th and 10th Circuits, treating it as a case about the fundamental right to marry. Either theory arises under the 14th Amendment, and the court might even embrace both, as a district court in California did in 2010 when striking down that state's marriage amendment. Although the 9th Circuit normally takes several months after an oral argument to issue a decision, it seemed likely that this one would emerge relatively quickly, although the judges might wait to see whether the U.S. Supreme Court grants review on one of the marriage equality appeals pending before it; the pendency of a Supreme Court ruling might prompt the 9th Circuit to hold its fire, on the assumption that any ruling it might issue in favor of marriage equality would be stayed by the Supreme Court pending appeal upon application by the states in question. * * * The issue in the Hawaii case represents a desperate attempt by opponents of marriage equality to get the courts to adopt a reading of Hawaii's amendment that is exactly opposite to what it says. The amendment, passed as part of the legislative compromises that also led to Hawaii's enactment of a reciprocal beneficiary statute while marriage litigation was pending in the state courts, provides that only the legislature can decide whether same-sex couples can marry in Hawaii, taking the issue out of the courts. Subsequently the legislature passed a civil union law and then, last year, after the governor was convinced by the Supreme Court's *Windsor* decision that the state would suffer reversal of a district court ruling then pending on appeal in the 9th Circuit, the legislature passed the marriage equality law after extensive hearings in which thousands of Hawaiians testified pro and con.

FIFTH CIRCUIT COURT OF APPEALS – As noted above, the 5th Circuit has agreed to expedite the briefing of an appeal of a recent anti-marriage equality ruling from a federal court in Louisiana and schedule oral argument in the case at the same time as arguments in a pending appeal by the state of Texas from a pro-marriage equality ruling rendered in February.

ELEVENTH CIRCUIT COURT OF APPEALS – The state of Florida has appealed a federal district court ruling in favor of marriage equality, although Florida's Attorney General, Pam Bondi, continued to suggest that all Florida-related marriage equality litigation should be placed "on hold" until the Supreme Court rules on an appeal from another state.

TENTH CIRCUIT COURT OF APPEALS – Colorado Attorney General John Suthers noticed his appeal in *Burns v. Suthers*, in which the district court held that Colorado's ban on same-sex marriage is unconstitutional. On one hand, appealing this ruling seems a waste of time, since the 10th Circuit has ruled over the past few months that similar bans in Utah and Oklahoma are unconstitutional. On the other hand, Suthers needed to appeal in order to

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have the district court's decision stayed while the Supreme Court ponders whether to grant certiorari petitions filed by Utah and Oklahoma. Now the decision is stayed, but on September 18 the 10th Circuit issued an order providing that "this appeal is abated pending further order of this court," and requiring the parties to notify the court within ten days of any decision on the pending cert petitions by the Supreme Court. Recognizing that the Supreme Court might sit on the cert petitions for a while anticipating new rulings from the 6th and 9th Circuits, the court also ordered "that the parties shall file status reports 30 days from this order if no decision on the pending writs has been issued by that time." Colorado Governor John Hickenlooper, also a defendant in the case, was willing to comply with the trial court's ruling and had urged Suthers not to appeal, but no dice. . .

ARKANSAS – The *Arkansas Times* reported on September 4 that the Arkansas Supreme Court had denied a request by plaintiffs in the pending marriage equality case that judges who planned to run for re-election should recuse themselves from sitting on the case. The motion had been filed in response to the passage of a Legislative Resolution proposed by Senator Jason Rapert, a same-sex marriage opponent, which was addressed to the Supreme Court stating that the legislature would pursue action to prevent the "public will" (as expressed in the vote on the Arkansas Marriage Amendment) from being thwarted by "judicial activism" including proposing to put on the ballot a mechanism for voters to recall justices of the court. Some legislators have also spoken of impeaching justices who vote for marriage equality. Of the seven members of the court, two are expected to seek re-election. Two others are leaving the court at the end of this year, and the other three are unlikely to seek re-election because of a state law that requires judges to forfeit retirement benefits if they seek election after reaching age 70. Counsel for the plaintiffs, Jack Wagoner and Cheryl Maples, had stated that they did not doubt that the justices would be impartial in considering the state's appeal of Judge Chris Piazza's decision striking down the state's marriage ban, but that an appearance of partiality might be created by the legislature's attempt to pressure the court. Wagoner stated, in response to the court's rejection of the motion, "We assume that the Justices have looked at the issue and made the right decision and that's all we asked them to do."

FLORIDA – On September 5 the Florida Supreme Court refused to accept a certified question from the 2nd District Court of Appeal in the *Shaw v. Shaw* divorce litigation, stating agreement with the dissenting 2nd District judge who contended that the case should be decided by the district court of appeal in the normal course and that there was no good reason to by-pass the intermediate appellate court. This case involves a petition to dissolve a same-sex marriage that was contracted in Massachusetts, as to which the trial court judge concluded she did not have jurisdiction since Florida does not recognize the marriage. At the same time, several same-sex divorce cases that have arisen within the 3rd District have been consolidated for appeal, after trial judges ruled that the Florida marriage ban is unconstitutional and the state sought to appeal. One speculates whether the Florida Supreme Court may have been motivated to avoid having to decide the divisive marriage equality issue in light of a pending appeal by the state to the U.S. Court of Appeals for the 11th Circuit in a federal marriage equality case, as well as pending certiorari petitions in the U.S. Supreme Court in marriage equality cases from several other states. If these cases can be tied up for many months in the intermediate appellate courts while the federal appeals move forward, the Florida Supreme Court may be able to avoid altogether having to decide a marriage equality case on the merits, which would most likely be a great relief to the judges of that court. Certainly, the Florida Supreme Court's refusal to take the *Shaw* case was consistent with Florida Attorney General Pam Bondi's repeatedly-articulated argument that all marriage equality-related litigation in Florida should be put on hold until the U.S. Supreme Court has decided the issue in appeals from other states.

INDIANA – U.S. District Judge Joseph S. Van Bokkelen has issued an order in *Romero v. Brown*, 2014 WL 4494329 (N.D. Ind., Sept. 11, 2014), denying as moot the plaintiffs' motion for a temporary restraining order requiring the state to recognize plaintiffs' out-of-state same-sex marriage, inasmuch as the parties (which include the Lake County Clerk, the commissioner of the Indiana Department of Health, and the Indiana Attorney General) had agreed not to enforce the state's statute against recognition of same-sex marriages against the plaintiffs while the state's appeal of *Baskin v. Bogan* 2014 WL 4359059 (7th Cir., Sept. 4, 2014), is pending before the Supreme Court. The court issued its order just a week after the 7th Circuit ruling was announced.

MASSACHUSETTS – The Massachusetts Commission against Discrimination ruled on August 7 that Shriners Hospital for Children had violated the state's ban on sexual orientation discrimination when it turned down Annette Whitehead-Pleaux's application to enroll her same-sex spouse in the company's non-ERISA employee benefits plans in May 2004. *Mass. Commission against Discrimination v. Shriners Hospital*, 2014 WL 4165630 (MCAD). The complainant was among the first

to marry her same-sex spouse upon implementation of the Massachusetts Supreme Judicial Court's *Goodrich* decision, and the employer responded with some confusion about what was required as between ERISA plans to which the state's anti-discrimination law could not apply because of preemption and those of its plans that were not covered by ERISA. After several phone calls and a meeting with benefits administrators, she finally prevailed in securing the coverage after a seven week delay, retroactive in coverage to the date of her application. A Hearing Commissioner ruled on November 5, 2010, that the employer had violated the discrimination statute and awarded compensatory damages for emotional distress in the amount of $30,000, as well as issuing a cease and desist order to the employer. The Commission affirmed this ruling on appeal, rejecting the employer's arguments that the seven-week delay was trivial and excusable due to uncertainty about the status of same-sex marriages under employee benefits plans, or that somehow all of the company's benefits plans were interrelated so ERISA preemption should apply to all of them. "Respondent's attempt to minimize the disadvantages experienced by Complainant overlooks the reality that health insurance is an employment benefit designed to provide peace of mind in regard to the possibility, rather than the certainty, of incurring future medical expenses," wrote the Commission. It pointed out that Massachusetts had outlawed sexual orientation discrimination in 1989; although same-sex marriage was a new development, the Supreme Judicial Court had provided a six month delay before implementation of its November 2003 ruling, so there was no excuse for the employer to have failed to anticipate the possibility of employees entering into same-sex marriages and determining the appropriate treatment under its benefits plan.

MISSOURI – Jackson County Circuit Judge J. Dale Young heard oral argument on September 25 in an ACLU lawsuit seeking recognition of out-of-state marriages for ten same-sex couples. Judge Young said at the close of the hearing that he would issue his decision "as quickly as possible. This issue has been extremely well briefed and well argued. My job is to get everybody down the road," closing with a reference to the inevitability that his decision, whichever way it goes, will be appealed. The case is *Barrier v. Vasterling*. It is one of several pending before state and federal courts in Missouri. *St. Louis Post-Dispatch*, Sept. 26.

PENNSYLVANIA – Last summer as marriage equality litigation was being launched around the country in response to the Supreme Court's decision in *U.S. v. Windsor*, Montgomery County Clerk D. Bruce Hanes got out in front of the wave by unilaterally issuing marriage licenses to same sex couples, resulting in litigation against him by the state and much disputation as to the validity of the marriages that were conducted. Ultimately several married same-sex couples sued to vindicate the validity of those marriages. The situation became more complex when a federal judge ruled that the state's ban on same-sex marriage was unconstitutional and the governor decided not to appeal, allowing marriage equality to go into effect throughout the state without any enabling legislation or appellate court order. Now a settlement has been reached in the case of *Ballen v. Wolf*, 481 M.D. 2013, under which the state's Secretary of Health agrees, with the approval of the Commonwealth Court, to recognize those marriages as valid as of the date that the federal court's order went into effect, May 20, 2014, regardless when the marriages were performed. Judge Dan Pellegrini approved the stipulated settlement on September 30, after having granted a motion to intervene by several more same-sex couples who had married with licenses obtained from Hanes but who had not been part of the original plaintiff group.

RHODE ISLAND – Gay & Lesbian Advocates & Defenders has sued the Society Security Administration for refusing to pay survivor benefits to the same-sex widow of a Rhode Island woman who died in 2011. *Tevyaw v. Colvin* (D.R.I., filed Sept. 29, 2014). Tevyaw married her partner, Patricia Baker, in Massachusetts in 2005. Baker was a career Rhode Island corrections officer. She died from lung cancer in August 2011, having spent her final months lobbying for passage of the Rhode Island marriage equality law, which was not passed until 2013. However, Rhode Island enacted a civil union law in 2011, and several years earlier the attorney general had opined that same-sex marriages performed in Massachusetts should be recognized in Rhode Island under principles of comity. Tevyaw, who was in financial straits, applied for survivor's benefits in 2012 but was turned down based on DOMA. She reapplied after the *Windsor* decision, and was turned down again on the ground that Rhode Island had not enacted marriage equality at the time of her wife's death, and being in a marriage recognized by the state is required under the statute. She is contesting this, citing both the attorney general's opinion and the passage of civil unions, asserting that failing to extend the benefit to her violates the 5th Amendment and is inconsistent with *Windsor*.

TEXAS – In *Pidgeon v. Parker*, 2014 WL 4319041 (S.D. Tex., Aug. 28, 2014), U.S. District Judge Lee Rosenthal sent back to the Harris County courts a lawsuit challenging the recent decision by Houston Mayor Annise Parker to extend life and health insurance benefits to same-sex spouses of city employer.

The city tried to remove the case to federal court, arguing that failing to extend the benefits would violate the 14th Amendment rights of gay city employees, but the 14th Amendment issue appears nowhere in the complaint, and removability is evaluated based on the claims asserted by a plaintiff, not constitutional claims a defendant might raise in response.

VIRGINIA – The House of Delegates voted 65-32 to authorize the Speaker of the House to hire outside counsel to "replace" Attorney General Mark Herring in the pending same-sex marriage litigation. After the 4th Circuit endorsed Herring's position that the state's ban on marriage equality is unconstitutional, Herring petitioned the U.S. Supreme Court to grant review and affirm the 4th Circuit's decision. The House's vote expresses the discontent of House Republicans with the possibility that the state government will appear in the Supreme Court arguing that the state's constitutional and statutory ban on same-sex marriage, which the Republicans strongly support, is unconstitutional. But elections have consequences. Herring was elected to represent the state in court. While Speaker Howell characterizes Herring's position as a "dangerous threat to separation of powers," so is the House resolution! *DailyProgress.com*, Sept. 20.

WEST VIRGINIA – U.S. District Judge Robert C. Chambers had stayed proceedings in a marriage equality case pending a decision by the 4th Circuit on the appeal of the Virginia marriage equality ruling. On September 16, he issued a new order, staying proceedings pending the Supreme Court's disposition of petitions for certiorari pending in that case "because of the overlap in issues." *Charleston Gazette & Daily Mail*, Sept. 18.

WISCONSIN – Although the 7th Circuit's ruling in *Baskin v. Bogan* is stayed while the state's petition for certiorari is pending at the Supreme Court, some married same-sex couples in Dane County have been successfully getting second-parent adoptions approved. Dane County Circuit Judge Shelley Gaylord said that she must recognize an Iowa marriage of a same-sex couple who were petitioning to adopt each other's children, and several other such cases have been successfully concluded in Dane County. The state's attorney general has not intervened, so the adoption orders will not be appealed. Whether they will be deemed valid if the 7th Circuit's decision is reversed is anybody's guess. *Buzzfeed.com*, Sept. 12.

CIVIL LITIGATION NOTES

FIRST CIRCUIT COURT OF APPEALS – On September 23 the 1st Circuit affirmed a ruling by U.S. District Judge Richard G. Stearns denying attorneys' fees and costs to the plaintiffs in *McLaughlin v. Hagel*, No. 14-1035, a case in which Judge Stearns had entered judgment in favor of plaintiffs on their claim that Section 3 of the Defense of Marriage Act violated the 5th Amendment. This case had been put "on hold" as other lawsuits challenging Section 3 went through the appellate process up to the Supreme Court, resulting in the provision's invalidation in *U.S. v. Windsor*. The district court entered its judgment in October 2013, consistent with *Windsor*, but denied a subsequent application for fees and costs on the ground that the government's position in the case was "constitutionally reasonable." The court of appeals panel agreed with this conclusion. Once the Obama Administration decided that Section 3 was unconstitutional, it had the choice of either refusing to enforce it unilaterally or continuing to enforce it but refusing to defend it in court. It chose the second course due to the desirability of obtaining a definitive Supreme Court ruling in what amounted to a controversy between the Legislative and Executive Branches (as starkly symbolized by the House Republicans hiring an attorney to defend the statute through their so-called Bipartisan Legal Advisory Group). Had the administration just stopped enforcing Section 3, there would have been no "case or controversy" for the Supreme Court to decide. Thus, the court of appeals rejected the plaintiffs' argument that inasmuch as the Obama Administration had concluded and argued that Section 3 was unconstitutional, the plaintiffs should have been awarded fees as prevailing party. (The plaintiffs' argument also elided the fact that a different litigation team, representing Edith Windsor, was responsible for taking that case through the federal judicial decision to a successful conclusion in the Supreme Court. Plaintiffs filed a complaint and did some pre-trial skirmishing with the government, but their case was put on hold and the court's final entry of judgment was a pro forma application of *Windsor*.)

SEVENTH CIRCUIT COURT OF APPEALS – A panel of the 7th Circuit Court of Appeals affirmed a decision by District Judge Michael P. McCuskey (C.D. Ill.) granting summary judgment to the employer on a hostile work environment and retaliation claim asserted under Title VII by Warnether A. Muhammad, who alleged, inter alia, that his coworkers made offensive comments to him, both orally and in writing, about his race and perceived sexual orientation. *Muhammad v. Caterpillar, Inc.*, 2014 WL 4418649 (Sept. 9, 2014). The offensive comments included one employee stating that he did not like Muhammad's "black faggot ass" and graffiti in the restroom nearest to his workstation stating that

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Muhammad "is a fag, a know it all fag," that he "sucks Kippy dick" (a reference to his supervisor), that he has AIDS, and that he is a "black nigger" who "should be killed." Muhammad reported these incidents to management, they were investigated, and steps were taken to end the problem. Muhammad suffered some suspensions due to his conduct toward his supervisor and co-workers, but ultimately was reinstated. The district court rejected his claim of sexual harassment, based on the 7th Circuit's decision in *Spearman v. Ford Motor Company*, 231 F.3d 1080 (7th Cir. 2000), which rejected the argument that homophobic harassment violates Title VII. The district court also found that the company's response to Muhammad's complaints was reasonable, and that there was no evidence that his suspensions were retaliation for the complaints he made. On appeal, Muhammad contested the district court's ruling on harassment, arguing that his co-workers would not have directed their comments "towards a female in the workplace notwithstanding her sexual preferences" and that "it is conceivable to believe that he was harassed because he was a male who did not, in the mind of his harassers, act like a male." Writing for the court, Judge Rovner rejected this argument for two reasons: it is speculative, as he provided no evidence of a comparator, and the company's reasonable response to his complaints, which satisfies any duty they would have under Title VII.

NINTH CIRCUIT COURT OF APPEALS – A three-judge panel denied a petition by a gay Sikh to reopen his asylum case before the Board of Immigration Appeals. *Singh v. Holder*, 2014 WL 4748100 (Sept. 25, 2014). Among other things, petition Singh sought to reopen "based on changed country conditions relating to Singh's sexual orientation." Wrote the court: "In connection with Singh's previous motion to reopen, both the BIA and this court held Singh had shown only a change in personal circumstances, not a change in country conditions. Singh has presented no evidentiary or legal basis for revisiting that conclusion." One wonders whether Singh's argument was premised on the India Supreme Court's ruling less than a year ago reviving the nation's sodomy law, which had been stricken as unconstitutional by a lower court. Indian gay rights activists are awaiting word on whether the Supreme Court will allow some form of reconsideration. The court also comments, concerning Singh's argument that he should be able to pursue a U-visa as a victim of domestic violence: "Singh's petition appears to raise an equal protection challenge [to the provision on asylum rights of battered spouses], arguing it should apply not only to spouses but also to same-sex partners prevented from marrying by discriminatory marriage laws. Singh, however, has presented no evidence that he would have been married if same-sex couples had been permitted to marry. He therefore has not carried his burden of showing he was similarly situated to opposite-sex battered spouses." The terse memorandum decision provides no details of Singh's factual allegations.

ELEVENTH CIRCUIT COURT OF APPEALS – A Venezuelan man who belatedly sought to claim refugee protection based on his sexual orientation failed in his attempt to win reconsideration of the Board of Immigration Appeals' rulings against him in *Albornoz Solano v. U.S. Attorney General*, 2014 U.S. App. LEXIS 18619 (11th Cir., Sept. 30, 2014). The petitioner arrived in the U.S. as a non-immigrant visitor in February 2002 and overstayed his visa. He married a female U.S. citizen in 2005 but apparently did not take steps to regularize his status based on the marriage, as he received a Note to Appear charging him with removability on January 2, 2008. He conceded removability on April 22, 2008, but sought protection in a removal hearing on January 12, 2011, at which he was represented by counsel. At the hearing, he testified that he had been physically attacked, kidnapped and subjected to sexual abuse by two men who told him that this was because of his activity against the Chavez government. On cross-examination, he admitted that he had not mentioned the sexual abuse when he was interviewed by an asylum officer, and the Immigration Judge found the asylum claim time-barred and his testimony not credible. It wasn't until he sought to have the proceedings reopened that he first raised the claim that he had been persecuted because of his perceived sexual orientation, that he was actually gay, and that he had a same-sex partner in the U.S. with whom his relationship went back several years. As he sought reconsideration, he also contended he had received incompetent legal representation because his counsel failed to raise the sexual orientation issue, but it was shown to the satisfaction of the BIA (and ultimately the court) that he had never expressly raised the sexual orientation issue with his attorney but had mentioned that he had been married to a woman, so she could not be faulted for failing to raise the issue in representing him. He argued that when his partner accompanied him to meet with the attorney, she should have picked up on the nature of their relationship, even though they did not explicitly tell her. The court was not willing to buy this argument.

EEOC – For the first time, the Equal Employment Opportunity Commission, which enforces Title VII of the Civil Rights Act of 1964, has initiated lawsuits on behalf of transgender complainants claiming to be victims of sex discrimination in violation of the federal statute. The cases are *EEOC v. R.G. & G.R. Harris Funeral Home*, filed in Michigan, and *EEOC v.*

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Lakeland Eye Clinic, filed in Florida. The Commission issued an opinion in 2012 in *Macy v. Holder*, a federal agency discrimination case, holding that gender identity discrimination claims are actionable as sex discrimination under Title VII, but the new lawsuits mark the first time that the agency has taken the next step of initiating litigation in federal court. Several federal courts (including some circuit courts of appeals) have allowed Title VII sex discrimination claims by transgender plaintiffs over the past decade, but the agency's move, first reported by Chris Geidner in a *Buzzfeed* posting on September 25, is a major step. *EEOC Press Release*, Sept. 25. * * * The *National Law Journal* reported on September 5 that EEOC had settled an HIV-discrimination case against a Popeye's Chicken franchise that had refused to hire a man because he is HIV-positive. The resulting consent decree in the case of *EEOC v. Famous Chicken of Shreveport* (Texas), which was pending in the U.S. District Court for the Eastern District of Texas, requires the respondent to pay $25,000. In its response to the discrimination charges, Famous Chicken had argued that the complainant was not a "qualified individual with a disability" protected under the Americans with Disabilities Act. EEOC takes the position, based on the legislative history and text of the 2008 ADA Amendments Act, that persons with HIV are protected under the statute. EEOC has settled several HIV-related discrimination cases over the past several months with similar results. According to the article, EEOC had receive 221 complaints of HIV-related employment discrimination during 2013. This may only be the tip of the iceberg, however, since discrimination victims may file charges under state and local anti-discrimination laws without invoking EEOC's jurisdiction.

CALIFORNIA – Denying the employer's motion for summary judgment on pending claims of sexual orientation discrimination and harassment, U.S. District Judge William Alsup order the trial to begin on October 20, 2014, in *Contreras v. UAL Corporation*, 2014 U.S. Dist. LEXIS 125649, 2014 WL 4364864 (N.D. Cal., Sept. 3, 2014). Plaintiff Julio Contreras, an openly-gay twenty-year employee of United Air Lines, was discharged in June 2008 after an incident involving his operation of a cherry picker. According to his allegations and statements offered in opposition to the summary judgment motion, Contreras was subject at work to constant anti-gay vituperation, gay bashing and obscene gestures. Both of his supervisors occasionally called him "Julia." One supervisor reportedly told another employee that Contreras was a "complainer" and he "couldn't wait to get rid of him." Another supervisor was heard to say that he "wanted to get rid of Julio." Contreras reported numerous incidents of anti-gay harassment to management to no effect. In March 2007 he suffered a nervous breakdown, attributed to "acute depression related to stress of sexually harassing environment at work." UAL did investigate and found that a storekeeper had violated its anti-harassment policies in connection with Contreras, who was placed on medical leave. He alleges that when he returned from leave, he was transferred to an isolated stockroom, referred to by the employees as "Siberia." The employer argued that the incident involving the cherry picker involved several violations of company rules by Contreras, any one of which could provide just cause for discharge, but Judge Alsup found that the evidence submitted by Contreras in opposition to the motion was sufficient to create a material issue of pretext requiring a trial. At this time this opinion was issued, it was uncertain whether this would be a jury trial or a bench trial. The case is in federal court on diversity jurisdiction; Contreras's claims are predicated entirely on provisions of California's Fair Employment and Housing Act. His attorneys are Mary Shea Hagebols, of Shea Law Offices, and Fulvio Francisco Cajina, both of Oakland, California.

CONNECTICUT – The idea that LGB plaintiffs may be able to use Title VII as a vehicle to assert discrimination claims continues to catch on, as U.S. District Judge Warren W. Eginton refused to dismiss a lesbian schoolteacher's Title VII sex discrimination claim in *Boutillier v. Hartford Public Schools*, 2014 WL 4794527 (D. Conn., Sept. 25, 2014). Plaintiff Lisa Boutillier was employed as a teacher in the Hartford school district, where her same-sex spouse works for the Board of Education. She was on medical leave for surgery and upon return to work was assigned as a "floating" first and second grade reading teacher, including at a school where she claims the assistant principal "would berate her, scream at her and criticize her after she learned about plaintiff's sexual orientation." After experiencing several instances of hostility, Boutillier took another leave of absence and was informed that her insurance coverage was being cancelled. She filed an internal harassment complaint in mid-June 2012, as well as a complaint with the Connecticut Commission on Human Rights and Opportunities, which has jurisdiction over sexual orientation discrimination claims. However, in August 2013 she was told that her teaching assignment would be changed for the upcoming school year to a position where she would be directly supervised by the assistant principle about whom she had complained. She quit and filed her Title VII charge and lawsuit, alleging sex discrimination and retaliation as and asserting supplementary state law claims. Unfortunately, her complaint cited the wrong section of the Connecticut discrimination law, so the judge granted the motion to dismiss that claim. But he rejected the defendants'

argument that Boutillier's Title VII sex discrimination claim was actually a non-actionable sexual orientation discrimination claim. "Plaintiff has stated that the discriminatory conduct commenced after certain individuals became aware of her sexual orientation and that she was subjected to sexual stereotyping during her employment on the basis of her sexual orientation," wrote the judge. "Construed most broadly, she has set forth a plausible claim she was discriminated against based on her non-conforming gender behavior." The court also rejected the defendants' motion to dismiss a constructive discharge claim, finding that the allegations "may be construed to state a claim for wrongful termination in violation of public policy, which is recognized as a cause of action by the Connecticut Supreme Court." The court instructed the plaintiff to submit an amended complaint within ten days of the filing date of the decision. Presumably the amended complaint can correct the citation problem with the state discrimination law claim and clarify the constructive discharge claim to come more clearly within the state's public policy wrongful termination cause of action. Plaintiff is represented by Margaret M. Doherty of Wethersfield, CT.

DISTRICT OF COLUMBIA – Chelsea Manning is suing the Defense Department for refusing to provide her with appropriate medical treatment for gender dysphoria. Manning, who came out as transgender during her court martial proceedings for revealing classified information to Wikileaks, is incarcerated at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. Subsequent to her incarceration she has been diagnosed with gender dysphoria, but she alleges that she has not received any treatment for her condition and alleges an 8th Amendment violation. Federal precedents hold that inmates have a right to appropriate medical treatment for serious medical conditions, and that gender dysphoria can qualify as a serious medical condition. The question whether inmates diagnosed with gender dysphoria while serving long or lifetime sentences are entitled to treatment is the matter of considerable litigation in federal courts, where the 1st Circuit is engaged in *en banc* reconsideration of a panel decision that had ordered gender reassignment surgery for a life inmate in Massachusetts, Michelle Kosilek. Manning's suit, filed as *Manning v. Hagel* in the U.S. District Court for the District of Columbia on September 23, was brought by the ACLU, with Arthur B. Spitzer of the ACLU of the Nation's Capital as counsel of recording, with the participation of the ACLU's LGBT Rights Project and the ACLU Foundation of Kansas, as well as Rhode Island attorney David E. Combs who specializes in Army court martial defense.

DISTRICT OF COLUMBIA – U.S. District Judge Amy Berman Jackson ruled in *Federal Election Commission v. Craig for U.S. Senate*, Civil Action No. 12-0958 (D. D. C., Sept. 30, 2014), that former Senator Larry Craig had violated federal election laws by converting campaign funds from his re-election campaign to pay for his legal representation in seeking to vacate his guilty plea to charges of sexual misconduct in the Minneapolis airport. Craig, a conservative Republican, was charged with soliciting sex with a male undercover police officer. The FEC had imposed a disgorgement order for the sums involves as well as civil penalties against Craig and against his campaign committee. While affirming the FEC order on the merits, Judge Jackson reduced the amount of the disgorgement and the penalty imposed on Craig, and did not enforce the penalty imposed on the Craig campaign committee, as that entity is defunct since Sen. Craig ultimately left the Senate as a result of this incident and is out of public life. The total of disgorgement and fines ordered by Judge Jackson is $242,535.

FLORIDA – U.S. District Judge Marcia Morales Howard ruled in *Whitehurst v. Liquid Environmental Solutions, Inc.*, 2014 WL 4489621 (M.D. Fla., Sept. 10, 2014), that a pro se Title VII discrimination and retaliation claim brought by an African-American man who claimed to have been sexually harassed by two white co-workers and then terminated in retaliation for complaining about the harassment, had to be dismissed as untimely, since the complaint was filed more than 90 days after the plaintiff received a right-to-sue letter from the EEOC. However, Judge Howard went on to find, in the alternative for the sake of "completeness," that the plaintiff had not alleged a prima facie case against the employer. Key to this finding was that the employer took Whitehurst's complaint seriously and ended up discharging both of the white men for their conduct towards him. Furthermore, the employer had a legitimate reason for discharging Whitehurst, as he got into a fight with one of the men resulting in the man's hospitalization. The court found no basis in Whitehurst's factual allegations for any suggestion that he was harassed because of his race or sex, noting the lack of corroboration for Whitehurst's allegation that his harassers were gay.

ILLINOIS – Contradictory jury instructions on the liability of a hospital sued over HIV transmission through a kidney transplant required that a verdict for the hospital be set aside and the case remanded for a new trial, ruled the 1st District Appellate Court of Illinois in *Doe v. University of Chicago Medical Center*, 2014 IL App. (1st) 121593, 2014 Ill. App. LEXIS 663, 2014 WL 4636026 (Sept. 12, 2014). Jane Doe was doing well on dialysis and had turned down

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two kidney transplant opportunities when she was informed that the donors' lifestyles made the kidneys "high risk." She received a call in 2007 that a third kidney was available, but the nurse who called her said nothing about the fact that the donor was a gay man whose "lifestyle" placed him at risk for HIV-infection (although he had tested negative at the time of donating the kidney). At the time, there had never been a documented case of HIV transmission through a transplanted kidney, and the odds of transmission in case where a gay donor had tested negative were deemed minimal, so this case turned out to be a first. Several months after the transplant operation, Doe was called back to the hospital for testing and was positive for HIV and Hepatitis C, both subsequently attributable to the transplant. The kidney subsequently failed and had to be removed, and she feared a new operation because she was now taken meds for her infections. She sued the surgeon who performed the transplant and the hospital, but ultimately dropped the doctor from the case when it turned out that he was unaware of the "high risk" nature of the donated kidney. She did not sue the nurse who had called her and failed to advise her about the source of the kidney. At trial, the hospital's liability was premised on *respondeat superior*. The judge charged the jury using both a charge proposed by the hospital and a charge proposed by the plaintiff, and the jury acquitted. The Appellate Court found that the hospital's charge misstated the law by implying the jury could find the hospital liable only if the doctor was negligent; the plaintiff's proposed charge identified both the doctor and the nurse as agents of the hospital whose negligence could subject the hospital to liability. Giving the jury *both* charges was prejudicial to the plaintiff under these circumstances.

ILLINOIS – Breach of warranty? Wrongful birth? These claims are being asserted by Jennifer Cramblett of Uniontown against the Midwest Sperm Bank in a suit filed in Cook County Circuit Court on September 29. Cramblett, who is Caucasian, and her same-sex partner planned to have a child using sperm from Midwest, and selected sperm from a donor from Midwest's listings. But somebody at the Sperm Bank erred and sent them a vial of sperm from an African-American donor. Surprise! Cramblett claims that they are having difficulty raising the child, now 2 years old, in the "all-white" community in which they live. Cramblett didn't learn about the mix-up until she was pregnant and ordered more vials from the same donor so the couple could have another child who was a full sibling of their first. The sperm bank sent the correct vials, which bore a different identification number from the original vials that were sent. The complaint describes their daughter as "a beautiful obviously mixed-race baby girls." Although the parents have bonded with her and love her, Cramblett alleges, "Jennifer lives each day with fears, anxieties and uncertainty about her future and Payton's future." Who knows, the kid could become President of the U.S. There is a precedent for that! But meanwhile, Cramblett and her partner seek damages for breach of warranty and wrongful birth. *Chicago Tribune*, Oct. 1.

INDIANA – District Judge Robert L. Miller, Jr., ruled on September 3 that a woman whose teaching contract with a Catholic school was not renewed because she and her husband were attempting to have a child through in vitro fertilization can maintain a Title VII sex discrimination suit against the school, denying defendant's summary judgment motion on that claim. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 2014 U.S. Dist. LEXIS 122456 (N.D. Ind.). Although Judge Miller agreed with the defendant that Ms. Herx's Americans With Disabilities Act claim must be dismissed, because she did not allege any facts suggesting that the school was discriminating against her because of her infertility condition, he found that there was a plausible case of sex discrimination, inasmuch as there was no evidence that the school had ever dismissed a man for participating in an in vitro fertilization process for his wife. The judge rejected the school's argument that application of Title VII in this situation would violate the school's free exercise of religion under the First Amendment, rejecting the argument that Emily Herx would fall under the ministerial exemption just because she accompanied students to chapel in a supervisory capacity. She is not a theologian and was teaching junior high school language arts, not religion. She also had no role in planning or leading religious services at the school. The court found that the statutory religious exemption in Title VII does not leave religiously-affiliated employers free to engage in sex discrimination against non-ministerial employees. The case is a rare illustration of a Catholic school using a "morals clause" in its teacher contract to dismiss a married heterosexual teacher for attempting to get pregnant and bear a child with her husband. The school claimed that it was acting because the Catholic Church views in vitro fertilization as gravely immoral; thus rendering the plaintiff unfit as a moral exemplar for her students.

NEW YORK – A gay man employed as a waiter by a food service company that was engaged to cater in the Barclays Center locker room for the visiting Houston Rockets basketball team could not sue the Rockets for sexual orientation discrimination because they were not his employer, ruled Senior U.S. District Judge Jack B. Weinstein in granted a motion for summary judgment by the

Rockets. *Tate v. Rocketball, LTD & Levy Restaurant Holdings, LTD*, 2014 WL 4651969, 2014 U.S. Dist. LEXIS 132211 (E.D.N.Y., Sept. 18, 2014). Judge Weinstein found that Tate's factual allegations, treated as true for purposes of the motion, would not establish that the Rockets were his employer, as he was an employee of a contractor, and his factual allegations were also insufficient to support an inference that the Rockets intentionally discriminated against Tate when members of the team subjected him to homophobic slurs and taunting as he was trying to perform his job, eventually leading to his employer ending his assignment at Barclays Center. "An implied discriminatory intent of a third party does not create the equivalent of employer-employee relationship," wrote Weinstein. "A known general culture of homophobia does not – at least as the applicable statutory provision has been interpreted to date – translate to a violation of employment discrimination statutes. The power of a third party to prevent slurs does not yet constitute a basis of liability when that power is not exercised." Weinstein rejected the claim that the Rockets were a "joint employer" of Tate together with the catering company, or that the Rockets were "aiding or abetting" discrimination. "Plaintiff alleges only that Rockets' players and staff made discriminatory comments, after which Restaurant denied plaintiff the opportunity to work with the Brooklyn Nets or at other events. He does not plead nor proffer any evidence that subsequent discriminatory events involved the Rockets. He offers no explanation as to why the Rockets, who according to defendants, visit New York only a handful of times a year and have no ongoing relationship with Barclays Center, would have an interest in keeping an employee of a food and beverage supplier out of a visiting locker room when the Rockets were not physically in the state." Although Weinstein granted the Rockets' summary judgment motion, he noted that discovery in the case against Tate's employer was "ongoing" and stayed the order of dismissal "to permit the magistrate judge to supervise discovery with respect to relationship among Rocketball and its employees and Restaurant and its employees." If discovery turns up more specific information that would support Tate's claim against the Rockets, he might yet be able to include them as a defendant in the case.

NEW YORK – The Appellate Division, First Department, has denied an employer's summary judgment motion in *Cole v. Sears, Roebuck & Co.*, 2014 N.Y. App. Div. LEXIS 6515, 2014 WL 4810323 (Sept. 30, 2014), in which a gay former employee alleges discrimination (hostile work environment) and retaliation in violation of the state's human rights law, which prohibits sexual orientation discrimination. Robert Cole claims that from the beginning of his employment as an auto center manager he was subjected to, according to the court, "a constant bombardment of anti-gay remarks and other communications, which included insulting and offensive remarks about other Sears employees who were thought to be gay; crude anti-gay humor and graphic sexual images disseminated by text and email; and anti-gay hate speech made repeatedly and openly by an operations manager in the presence of plaintiff and others." Cole alleged that anti-gay harassment got worse after he made a formal complaint, one of the harassers was subsequently promoted, and Cole received "multiple offensive emails from an email address created for the apparent purpose of harassing him, which he testified were sent by a manager in another Sears store." The court agreed with Supreme Court Justice Debra A. James that fact issues requiring resolution at trial existed about whether Cole was subjected to a hostile environment in violation of the law, as well as whether he was terminated in retaliation for his complaints. The termination came less than two months after this last formal complaint. James E. Monroe of Dupee & Monroe PC (White Plains) represents Cole.

OKLAHOMA – A case of judicial confusion? On August 18, Oklahoma County Special Judge Don Andrews, sitting to hear uncontested divorce cases, signed divorce papers for Deanne R. Baker and Julie L. Baker. Deanne had filed for divorce on July 30, two weeks after the 10th Circuit ruled that Oklahoma's ban on same-sex marriage was unconstitutional. (The 10th Circuit did *not* rule on whether Oklahoma's refusal to recognize same-sex marriages contracted out-of-state was unconstitutional, as it agreed with the district court that plaintiffs lacked standing to raise that issue, having failed to sue an appropriate defendant.) Judge Andrews was aware that he was signing papers for a same-sex couple's divorce. However, on August 19, he vacated the divorce decree "upon further review of the laws of the state of Oklahoma." The 10th Circuit's ruling is stayed pending a decision by the U.S. Supreme Court on the state's petition for certiorari. The judge "declined to comment" when the *Daily Oklahoman* contacted his chambers to find out why he had vacated the decision.

TEXAS – An employer is not liable for the misconduct of an "equal opportunity harasser," apparently, because Title VII is a discrimination statute. This is the conclusion one draws from U.S. District Judge Melinda Harmon's judgment on the pleadings in *Strickland v. Bae Systems Tactical Behicle Systems LP*, 2014 U.S. Dist. LEXIS 130300 (S.D. Tex., Houston Div., Sept. 15, 2014). The plaintiff was hired to work under a contract servicing armored vehicles for the military in Kuwait. When

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he reported there for his job, he was assigned housing with a male supervisor who, he alleged, immediately began subjecting him to sexual harassment. This harassment extended to the plaintiff's wife when she came to visit. Strickland confronted his boss about the harassment to no avail, and took the matter to the next level of supervision. Ultimately he had his housing switched, but he said that this supervisor continued to stare at him in the workplace. The supervisor warned that if he filed a formal complaint, his assignment in Kuwait would be over. When Strickland went back to the States on a break, he received a written notice that his employment had been terminated. He and his wife filed charges alleging violations of Title VII, including sexual harassment and retaliation, as well as state law tort claims. Judge Harmon, finding insufficient allegations that Strickland was targeted because of his sex, rejected the discrimination claim. She pointed out that the supervisor allegedly harassed both Strickland and Strickland's wife, so the harassment was not "because of sex." The defendant was not contesting the retaliation claim in this motion. Judge Harmon granted the company's motion for judgment on the pleadings of the sexual harassment claim, as well as his state law claims of assault and battery, but the claim was dismissed without prejudice and with leave to amend, and the retaliation claim is still alive at this point.

WASHINGTON – The Court of Appeals of Washington ruled in *Walsh v. Reynolds*, 2014 Wash. App. LEXIS 2385 (Wash. App., Div. 2, Sept. 30, 2014), that the Pierce County Superior Court had correctly applied equitable division principles concerning property of a lesbian couple who had registered as domestic partners in Washington in 2009 after having been registered as domestic partners in California, their previous state of residence, since 2001 (and having lived together as a couple since 1989). But the court of appeals found that the trial judge erred in dating the women's "equity relationship" back only to 2005, the year California domestic partnership was expanded to provide virtually all state law rights of marriage, finding that under Washington common law the court should have considered the relationship going all the way back to the beginning of the women's cohabitation as potentially qualifying for the application of community property principles. The opinion is long and complicated, reflecting the long and complicated history of this relationship, which involved children born to each of the women and adopted by the other, purchase of houses, and payments by Walsh, who had a professional medical practice, to Reynolds, who did not have a professional job, in exchange for caretaking and housekeeping duties. The opinion will be useful to counsel representing same-sex couples in Washington in thinking about how to structure ownership of relationship property in planning for the future. Among other things, although the last house purchased by the couple (with Walsh's money) was denominated as joint with right of survivorship, the court said that this characterization was inconsistent with the financial arrangements and was correctly characterized by the trial court as "tenants in common" subject to equitable distribution upon the break-up.

CRIMINAL LITIGATION NOTES

DISTRICT OF COLUMBIA – The District of Columbia Court of Appeals affirmed the conviction and sentence imposed on Russell Brocksmith, who was convicted by a jury of assault with intent to commit robbery. *Brocksmith v. U.S.*, 2014 WL 4636026 (D.C. App., Sept. 18, 2014). The victim was a transgender woman. The defendant's main argument on appeal was that Superior Court Judge Thomas J. Motley had committed reversible error by his response to a juror's note asking whether, in determining witness credibility, the jury could take into consideration the belief that the complainant had an overwhelming incentive not to report the crime for fear of discrimination and exposing herself as transgender. Brocksmith claimed that there was no record evidence that the complainant had such fears, so the trial court's "neutral" response to this inquiry "misled the jury into believing that it could consider a theory that appellant contends was unsupported by the record and speculative," wrote Judge Blackburne-Rigsby for the appeals court. "In light of the evidence and arguments made at trial," wrote Blackburne-Rigsby, "the trial court's reinstruction did not have the effect of encouraging the jury to engage in improper speculation because there was evidence to support the inference that the juror's note sought to make." The appellant also contended that the trial court had "misread the sentence enhancement statute" and "did not strictly comply with the required procedures" in handing down the sentence, but the court found that a remand for resentencing was not supported by the record.

CALIFORNIA – San Diego Superior Court Judge Dan Link has ordered Thomas Miguel Guerra, who has been charged with knowingly infecting another man with HIV, to stop using Internet dating sites, including the one on which he met his alleged victim. Guerra has pled not guilty to the charge, and made bail. The local prosecutor urged the judge to increase bail, hoping to get Guerra into confinement pending his trial, but the judge refused. According to an online report by the *Los Angeles Times* (Sept. 2), the victim

told investigators that he believed Guerra was not infected until he looked at messages on Guerra's cellphone and found that he had "joked around about being HIV-positive and other people not knowing," according to papers filed in court by the prosecutor. The victim ended their relationship, contacted police, and subsequently tested positive for HIV. Judge Link has made Guerra's abstention from Internet dating sites a condition of remaining free on bond. The misdemeanor charge pending against him carried a maximum sentence of six weeks in jail, according to the news report. This sounds rather odd, if the charge is knowingly infecting another person, which is a serious felony in many other jurisdictions.

ILLINOIS – An HIV-positive police officer, John Savage, pled guilty to reckless conduct to avoid prosecution on an accusation of criminal transmission of HIV, reported the *Chicago Tribune* (Sept. 11, 2014). Savage was charged last year on the complaint of a former male sexual partner, who came forward after learning that Savage was seropositive. The man has tested negative so far. Under this plea deal, Savage will be under court supervision for eighteen months and perform 150 hours of community service in HIV prevention work, after which the conviction will be stricken from his record. His attorney maintained that there was no evidence that Savage intended to transmit HIV; the case was, according to the lawyer, "about an act of recklessness and passion." Savage, who is a Cicero, Illinois, police detective, has been suspended from duty while these charges are pending, but will be able to return to active duty. His attorney said that Savage had been an openly gay detective for fifteen years. According to the *Tribune* report on the case, Cook County Assistant State's Attorney Sharon Kantor said that "prosecutors took another look at the law that criminalized the act of knowingly exposing someone to HIV virus and decided 'a different charge is appropriate.'"

IOWA – In *Rhoades v. State of Iowa*, 848 N.W.2d 22 (Iowa, June 13, 2014), the Iowa Supreme Court reversed the conviction of Nick Rhoades, a gay man who was convicted under the state's criminal HIV transmission law, even though he had used a condom and had not transmitted HIV to his sexual partner, on the ground that he had not disclosed to the partner (who he met on-line) that he was HIV-positive before they had sex. The statute imposed felony liability for "exposure" to HIV even though a condom was used and even though an individual, albeit infected, was unlikely to transmit the virus. Rhoades was receiving anti-retroviral therapy making his viral load undetectable and, according to current science, making him essentially non-contagious. The Supreme Court was convinced that application of the statute to him was inappropriate, and the legislature responded to publicity about this case by revising the statute to introduce an "intent to transmit" requirement and retroactively removing those convicted under the prior statute from the obligation to register as sex offenders. Now the Black Hawk County Attorney, Linda Fangman, has filed a motion to dismiss the case against Rhoades, which had continued to be pending in the trial court on remand from the Supreme Court. In its remand, the Supreme Court ordered that the prosecutors come up with additional evidence to back up the original charges by October 1. Having no additional evidence, Fangman filed her motion to dismiss the case on September 30. *AP State News*, Oct. 1.

SOUTH CAROLINA – The city of Anderson has agreed to settle a lawsuit brought by a county education official who claimed to have been unlawfully arrested in a park sex sting in 2009. According to Gary Burgess, who was at the time an Anderson School District 4 Superintendent and a candidate for the position of state superintendent of education, he never mentioned money in his conversation at a park picnic table with a plainclothes police officer about having sex. After he was arrested, the state Board of Education temporarily suspended his educator license, and he lost a new position in Hampton School District for which he had been hired. A jury acquitted him of all charges in connection with the arrest. Burgess's lawsuit against the city claimed that he had been harmed financially, defamed, and caused emotional distress and "intense mental anguish and anxiety," and he sought punitive damages, attorneys' fees, and a declaration that his arrest was unconstitutional. In other lawsuits, Burgess won monetary settlements from the state Department of Education and the Hampton school district. Burgess's attorney indicated that the amount of the settlement Burgess received from the city was "very substantial." He also commented about the arrest: "It was a setup from the word 'go'." *Anderson Independent Mail*, Sept. 16.

TENNESSEE – The Tennessee Supreme Court rejected an HIV-positive man's appeal of a virtual life sentence imposed on him for having unprotected sex with a fifteen-year-old boy without disclosing his HIV status, even though there is no evidence that HIV was transmitted to the boy. *State of Tennessee v. Hogg*, 2014 WL 4748096 (September 25, 2014). Although the jury convicted Barry Hogg on all counts charged against him of sexual misconduct and criminal exposure of another to HIV, leading the trial court to impose an effective sentence of 174 years, and the Court of Criminal

Appeals affirmed, the Supreme Court, while upholding the sentence, found upon examining the specific factual allegations that some counts under the HIV exposure statute should have been dismissed. This is because the statute only applies where the HIV-infected person "exposes" his sexual partner to HIV "in a manner that presents a significant risk of HIV transmission." In an opinion by Justice Sharon G. Lee, the court found that a few of the sexual acts charged against Hogg would not present a significant risk of transmitting HIV to the boy. "Defendant argues that his sexual acts did not pose a significant risk of transmitting HIV because he did not ejaculate during any of these sexual acts," wrote Justice Lee. "We disagree. Dr. McGowan testified that transmission of HIV may occur without ejaculation because pre-ejaculate fluid or mucosal fluid is sufficient to transfer HIV to an uninfected person." However, the court was persuaded that the defendant could not be prosecuted under this statute for rimming his sex partner, based on the doctor's testimony that this activity presented a "very low risk," and similarly that absent any evidence that Hogg's mouth "contained open sores or there was blood flowing in the mouth," there was only "very low risk" when he sucked his partner's penis. However, the court found that defendant's sticking his finger in the boy's anus "presented a chance of HIV transmission more definite than a faint, speculative risk" based on the evidence about activities coming before this, from which "the jury could infer that pre-ejaculate fluid was on Defendant's finger." The court concluded that Hogg could be prosecuted for anally penetrating his partner with his penis, and having his partner perform oral sex on Hogg, but not for "manual manipulation of the victim's penis." It sound like there was some egregious over-charging by the prosecution in this case, perhaps stemming from ignorance about HIV transmission. Having found that the convictions on some counts had to be reversed, the court reduced Hogg's effective sentence to *only* 156 years.

WASHINGTON STATE – The *Associated Press* reported that the King County Superior Court issued an order on September 4 to an HIV-positive man who has reportedly been engaging in high-risk sex without warning his sexual partners to comply with a cease and desist order from the city health department and to disclose his HIV-status to sexual partners. The man, who was diagnosed with HIV in 2008, has been named as a sexual contact by eight people diagnosed with HIV-infection from 2010 through this June. The news report, which did not name the man in question, said he had ignored a cease-and-desist order from the health department and failed to show up for medical appointments, leading the agency to bring this action for a court order to enforce its cease-and-desist order. According to a more detailed report from *Agence France Presse English Wire*, Judge Julie Spector's order informs the man that if he fails to comply to show up for counseling and medical appointments, he could be subjected to escalated fines and jail time.

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ALABAMA – Although short on analysis, Chief United States District Judge Karon Owen Bowdre's opinion in *B.C. v. Estes*, 2014 U.S. Dist. LEXIS 122290 (N.D. Ala., September 3, 2014), allowed the core claims of this transgender plaintiff to proceed to trial against most of the defendants. The plaintiff, identified only as "B.C.," will be heard on her claim that denial of hormone therapy violates her right to be free of deliberate indifference to her serious health care needs, in violation of the Eighth Amendment. Ironically, the plaintiff lost her claim that requiring her to wear a bracelet identifying her as HIV+ violated her right to privacy, even as she is permitted to proceed identified only by initials. Key to granting the trial was the court's finding that the treating doctor contradicted herself as to whether the decision to deny hormones was a medical one or one required by Alabama correctional rules. Judge Bowdre denied qualified immunity because B.C. sought only prospective injunctive relief, relying on *Gilmore v. Hodges*, 738 F.3d 266, 273 (11th Cir. 2013). Judge Bowdre granted the defendants summary judgment on an equal protection claim, without citation. The court also granted defendants summary judgment on a claimed right to a sports bra. *William J. Rold*

CALIFORNIA – A gay inmate's claim that a correction officer taunted him and then maced him in the face when he asked what the officer had against gay people stated a claim for excessive force under *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), in *Pappas v. North Kern State Prison*, 2014 U.S. Dist. LEXIS 119952 (E. D. Calif., August 27, 2014). United States Magistrate Judge Gary S. Austin, hearing the case by consent under 28 U.S.C.§ 636(c), found that pro se plaintiff Nicholas Christopher Pappas properly brought a civil rights case against an officer identified as "C/O Lopez," but not against various "John Doe" officers, whose role was not specified. The issue will turn on whether the force was "applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm" under Hudson. Judge Austin dismissed claims against the prison itself, as a suit against the state barred by the Eleventh Amendment. Pappas was given thirty days to explain how he was placed in danger, Judge Austin finding that "being a homosexual" was "not enough, of itself" to state a claim

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of violation of his right to protection from harm under *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994). *William J. Rold*

CALIFORNIA – United States District Judge Jon S. Tigar dismissed a pro se complaint from a transgender inmate seeking an injunction that the state provide sex reassignment surgery (SRS) and take steps to protect her from harm, but he appointed counsel and granted leave to amend in *Quine v. Brown*, 2014 U.S. Dist. LEXIS 121526 (N.D. Calif., August 29, 2014). Plaintiff Rodney James Quine, aka Shiloh Quine, a 54-year-old male-to-female transgender person, sued the California Governor, the state's chief of correctional medical services, the warden at her prison, and the prison's chief medical officer, claiming they were violating her civil rights but failing to specify how each was responsible. Quine has a history of anxiety and suicide attempts and her prison psychotherapist recommended SRS, because her hormone treatments were inadequate. Judge Tigar found the claims sufficient to survive screening under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(a), on the authority of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (prisoners' right to medical care); and *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (prisoners right to protection from harm). He found transgenderism to be a "serious medical condition" (with string citation). Quine must amend to show how each defendant is responsible for violation of these rights, without relying on vicarious liability. Judge Tigar noted that the "issue of whether a prison's refusal to provide SRS to treat a prisoner's GID constitutes deliberate indifference to serious medical needs in violation of the Eighth Amendment has not been resolved by the United States Court of Appeals for the Ninth Circuit" and that a case "that may answer that question is now pending in the First Circuit: *Kosilek v. Spencer*, 740 F.3d 733 (9th Cir. 2014) (reh'g en banc granted)." Judge Tigar stayed further proceedings until counsel appears. *William J. Rold*

FLORIDA – A transgender prisoner who was sexually assaulted by another inmate was permitted to submit expert testimony about her safety in her negligence and civil rights case in *D.B. v. Orange County*, 2014 WL 4655739 (M. D. Fla., Sept. 17, 2014). U.S. District Judge Gregory A. Presnell ruled that Valerie Jenness, a Dean of the University of California - Irvine, who had conducted research on prison violence against male-to-female transgender inmates, could testify about such topics as "precautions that might have been employed to prevent sexual assaults" because the same "might be helpful to the jury in determining whether the county acted with deliberate indifference" in failing to take such precautions. Orange County sought to preclude Jenness' testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), under which the court acts as "gatekeeper" to "insure that speculative and unreliable opinions do not reach the jury." Judge Presnell found Jenness' testimony admissible despite her not having herself worked in a prison or having studied Florida institutions in particular. He also found that the testimony did not take the ultimate question of "deliberate indifference" liability from the jury and that she could include factual premises about what D.B. told officials about her safety as bases for her opinions. [Note: the court narrowed D.B.'s case on the next day, by granting summary judgment in favor of Orange County. See companion case, above.] D. B. was represented by Jeremy K. Markman, of King & Markman, PA, of Orlando. *William J. Rold*

LOUISIANA – A state prisoner seeking continuing of medication prescribed for his HIV condition prior to incarceration lost his request for an injunction to continue his prior treatment in *Singleton v. Fuller*, 2014 WL 4678748 (W.D. La., September 19, 2014). United States District Judge Tom Stagg accepted the Report and Recommendation ("R & R") of United States Magistrate Judge Karen L. Hayes, which found that pro se plaintiff Rickey Singleton's prescription for Neurotin was discontinued upon the recommendation of two prison physicians and that Singleton had presented no corroborative evidence of complications from the discontinuation of the Neurotin, including the absence of sick call complaints for his "conclusory opinions" that he was subjected to pain and risk of infection. The R & R found it "manifestly obvious that plaintiff simply disagrees with the treatment decisions" of the doctors, which is not actionable under the Eighth Amendment. Singleton had no expert evidence to support his claims.

NEW YORK – The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), bars a gay inmate's claim about excessive force, but it entitles him to a hearing about whether the defendants can assert the affirmative defense of exhaustion of administrative remedies regarding his claim of sexual orientation discrimination in *Seuffert v. Pecore*, 2014 WL 4247785 (N.D.N.Y., August 26, 2014). Pro se plaintiff Phillip Seuffert, a "self-identified homosexual," filed his civil rights case against correction officer K. Pecore, claiming that Pecore beat and permanently injured him, when his grievance on these facts had not yet been decided by the highest level of New York's three-tiered administrative grievance system. Relying on *Porter v. Nussle*, 534 U.S. 516 (2002), Senior U.S. District Judge Frederick J. Scullin adopted the Report & Recommendation (R & R) of United States Magistrate Judge David E. Peebles that the failure of complete exhaustion was fatal to the excessive force claim. A final adverse

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grievance decision nine days later did not cure the failure to exhaust *prior* to commencing the federal lawsuit. As to the claim against another officer, M. Donovan, who allegedly told Seuffert that "no homosexuals" were permitted on his prison galley, the R & R discusses at length three "exceptions" to exhaustion: a grievance was "not available"; the defendant should by his conduct be estopped from asserting the affirmative defense; or "special circumstances" justify non-compliance with exhaustion. Judge Peebles found that a grievance was "available" and that estoppel did not apply since it may be invoked only when the conduct supporting estoppel arises from the defendant being sued. Seuffert is entitled to a hearing, however, on whether conduct of corrections personnel interfering with his ability to file a grievance about discrimination constituted "special circumstances" excusing exhaustion. *William J. Rold*

NEW YORK – A federal judge dismissed a male Muslim prisoner's lawsuit claiming infringement of his religious First Amendment Free Exercise rights by being forced to shower naked before a female officer and a "known homosexual" in *Woodward v. Perez*, 2014 U.S. Dist. LEXIS 121329, 2014 WL 4276146 (S.D.N.Y., August 29, 2014). United States District Judge Edgardo Ramos ruled that pro se plaintiff Shawn Woodward was not entitled to injunctive relief because he had been transferred from the facility where the incident occurred and not entitled to damages because this unsettled area of constitutional law entitled the defendants to qualified immunity. Judge Ramos nevertheless continues for pages of dicta to discuss whether Woodward's rights had been violated, even though he was entitled to no remedy and his case under 42 U.S.C. § 1983 was to be dismissed. Judge Ramos found that Woodward stated colorable claims under both the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Judge Ramos found that orthodox Muslim prohibition of nakedness before persons not one's wife was both central to his religious beliefs and sincerely held by Woodward. That defendants may meet the "relatively limited burden" of justifying the intrusion in the prison setting does not preclude Woodward's stating a claim under *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987), precluding dismissal on this ground, even though dismissal on qualified immunity and imminence was appropriate. Judge Ramos found cases granting summary judgment against prisoner's religious objections to strip searches generally and shackling next to "known homosexuals" to be inapposite. He also found supervisory defendants entitled to dismissal due to lack of allegations about their personal involvement in the incident. He reached the same result under the RLUIPA, although it "heightens the standard for both plaintiffs and defendants." Judge Ramos found that an appeal by this in forma pauperis plaintiff would not be taken in good faith. [Writer's Note: Civil rights plaintiffs, particularly prisoners, often find themselves out of court because of the procedural scissors of changed circumstances precluding injunctive relief and uncertain law creating qualified immunity, even as they argue for law reform. This is a case where a judge reached out to rule on substantive legal issues, despite finding easy dismissal on procedural grounds. The district judge declined such dicta in *Burston v. Smith*, 2014 U. S. Dist. LEXIS 20121 (E.D Mo., February 19, 2014), reported in Law Notes (March 2014, at page 122), when an inmate sought to establish privacy rights in his HIV status.] *William J. Rold*

TENNESSEE – A prisoner whose sexual orientation was disclosed to other inmates by corrections officials states a "colorable" claim of violation of his constitutional right to privacy sufficient to withstand scrutiny under the Prison Litigation Reform Act, 28 U.S.C. §§ 1915(e)(2) . Pro se plaintiff Steven Hill claimed that defendants violated his right to protection from harm under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), when they placed him in danger by informing other inmates that he was gay and that he had another lawsuit pending that involved family members of fellow inmates. U.S. District Judge Todd J. Campbell found that officials acted reasonably by placing Hill in a special custody unit for his protection and later moving him to another institution away from the family members of the defendants in the other lawsuit in *Hill v. Quezerque*, 2014 U.S. Dist. LEXIS 124010, 2014 WL 4385937 (M. D. Tenn., September 05, 2014). Hill's lawsuit under 42 U.S.C. § 1983 failed to plead any specific threats or the involvement of any named defendant in increasing his risk of harm. He was likewise unable to name any individuals who continued to place him at risk. Judge Campbell found, however, that Hill's right to "informational privacy" may have been violated when officials revealed his sexual orientation, relying on a number of 6th Circuit cases that include protection of information that is personal or sexual in nature. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir.1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir.1998). Whether Hill could ultimately prevail, the unauthorized disclosure of his sexual orientation "stated a viable right to privacy claim under the substantive due process protections of the Fourteenth Amendment." Judge Campbell dismissed claims against the defendants in their official capacities because Hill failed to allege a policy or custom of such disclosure under *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). He likewise dismissed claims against the Correctional Corporation of America, the private vendor contracted to run the prison, for the same reasons.

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U.S. CONGRESS – Responding to reports that screening software was impeding the ability of LGBT students to access information at federally funded schools and libraries, some members of Congress participate in a joint letter to the Federal Communications Commission that was released on September 26, asking the FCC to "ensure that online filtering software used at federal-funded schools and libraries does not prevent access to sites with important resources for the lesbian, gay, bisexual and transgender community. * * * The House Committee on Veterans Affairs narrowly defeated an amendment introduced by Representative Dina Titus (D-Nev.) that would have changed a provision in the veterans benefits statute so that same-sex spouses of veterans would be entitled to spousal benefits wherever they reside. At present, the statute requires that spousal status for purposes of veterans' benefits be determined by the place of domicile, meaning that same-sex spouses in a majority of states cannot qualify for the benefits and privileges of military spouses, even though they are required to pay taxes as married, which seems a bit cockeyed to us. Twelve members of the committee voted yes, eleven Democrats and Republican Jon Runyan from New Jersey (who is a co-sponsor of the Employment Non-Discrimination Act). Thirteen, all Republicans, voted no, as Committee Chair Jeff Miller (R-Fla.) argued that this amendment would interfere with state laws on marriage. The amendment had been proposed for addition to a pending bill on veterans' benefits. Critics have questioned why the Obama Administration does not just declare that the provision in question is unconstitutional in light of *U.S. v. Windsor*, inasmuch as dozens of federal trial courts and three circuit courts of appeals have agreed that the reasoning of *Windsor* compels ruling against the constitutionality of state bans on performance or recognition of same-sex marriages, but the politics of the situation is difficult.

THE OFFICE OF PERSONNEL MANAGEMENT – The federal Office of Personnel Management published a notice in the Federal Register on September 25, 79 FR 57589-01+, alerting annuitants whose same-sex spouses died prior to June 26, 2013, that they have an extended opportunity until June 26, 2015, to elect survivor annuity benefits. Those who were in marriages that would have been recognized by the federal government but for Section 3 of the Defense of Marriage Act, which was declared unconstitutional by the Supreme Court on that date, may be eligible for benefits and should file to preserve their benefits rights as soon as possible. *BloombergBNA Daily Labor Report*, Sept. 24; OPM Bulletin 6325-38. The notice states: If you are a same-sex spouse of a deceased federal employee or annuitant whose spouse died before June 26, 2013, you may submit an application for death benefits (Standard Form (SF) 2800 for CSRS and SF 3104 for FERS) to OPM at this address: Office of Personnel Management, Survivor Benefits *Windsor* Decision, P.O. Box 45, Boyers PA 16017-0045. Forms can be downloaded from OPM's website under the standard forms tab, or an email asking for application forms can be sent to retire@opm.gov with "Survivor Benefits *Windsor* Decision" in the subject line of the email. Forms can also be obtained by phoning 1-888-767-6738.

CALIFORNIA – Governor Jerry Brown has signed into law AB 2501, which was introduced by Assemblymember Susan Bonilla, co-sponsored by Equality California and Attorney General Kamala D. Harris, which eliminates the "gay panic" and "trans panic" defenses used by defendants seeking to excuse deadly violent acts asserted to have been sparked by an uncontrollable response to the victim's sexual orientation or gender identity. As explained in the introductory text of the bill: "Existing law defines voluntary manslaughter as the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion. The crime of voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years. This bill would state that provocation to support a finding of "sudden quarrel" or "heat of passion" for those purposes may not be motivated, in part or in whole, by the defendant's discovery of or knowledge about, or the potential disclosure of (1) one or more of specified characteristics, including gender, race, religion, and sexual orientation, as specified, or (2) the victim's association with a person or group with one or more of those characteristics." * * * Governor Brown also signed into law a measure called the Respect After Death Act, under which death certificates are supposed to reflect the gender identity of the deceased. The measure was advocated by the Transgender Law Center, which noted cases of people being "misgendered" on their death certificates, a prominent example being artist and transgender rights activist Christopher Lee, identified as female on his death certificate. *Advocate.com*, Sept. 28. * * * Brown has also approved a measure to protect people from being arrested as suspected sex workers simply for carrying condoms. Although the measure doesn't totally ban prosecutors from using condoms as evidence in prostitution prosecutions, it requires the court to find explicitly that condoms are relevant to a particular case. * * * Brown has also approved a measure that requires that health care professionals be trained to meet cultural competency standards that

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include "understanding and applying cultural and ethnic data to the process of clinical care, including, as appropriate, information pertinent to the appropriate treatment of, and provision of care to, the lesbian, gay, bisexual, transgender and intersex communities." *thinkprogress.com*, Sept. 30. * * * The governor also signed a measure that will make LGBT-owned businesses eligible for state programs intended to assist minority-owned businesses. *sdgln.com*, Sept. 29.

FLORIDA – The Boynton Beach City Commission voted on September 16 to allow employees to enroll their domestic partners in the city's insurance plan. The Palm Beach County Human Rights Council had contacted City Commissioner David Merker in July seeking the introduction of such a proposal. The Commission voted 4-1 to allow the benefits and to have City Attorney Jim Cherof draft a civil rights ordinance to be proposed at a later date. The measure also updates the city's non-discrimination policy. In order to qualify for benefits, couples would have to be adults with a shared residence and each partner must consider himself or herself a part of the other's family. The only dissenter was Mayor Jerry Taylor, who said "I believe that God's moral law is against same-sex marriage. I am not for same-sex marriage." Good for you, Mayor Taylor, respect the First Amendment Establishment Clause and don't cast your ballot based on religious views. *Palm Beach Post*, Sept. 17.

FLORIDA – Republican commissioners on the Hillsborough County Commission have changed their minds about creating a domestic partnership registry for the county. The County Commission voted 4-3 against creating such a registry in January 2013, but on September 17, the four Republican commissioners reversed their vote and the Commission unanimously approved establishing such a registry. At this point, that action looks decidedly retrograde, as several judges have ruled that the state's ban on same-sex marriage is unconstitutional and appeals on marriage equality are pending before the 11th Circuit and two Florida district courts of appeal. The September 17 vote was to authorize County Attorney Chip Fletcher to draft an ordinance and present it for a Commission vote before Election Day. *Tampa Bay Times*, Sept. 18.

FLORIDA – Opponents of a recently-enacted human rights ordinance in Atlantic Beach fell short of the petition signatures they need to compel a referendum. The ordinance bans discrimination because of sexual orientation or gender identity. *Fla. Times Union*, Sept. 3.

FLORIDA – On September 16 the Miami-Dade County Commissioners gave unanimous preliminary approval to a proposal to add "gender identity" and "gender expression" to the county's human-rights ordinance. The issue was then referred to the Public Safety & Animal Services Committee, which will report back with proposed legislative language after its November meeting. *MiamiHerald*, Sept. 17.

GEORGIA – Although Georgia does not allow or recognize same-sex marriages, the City Council in Marietta has voted 6-1 to recognize such marriages for purposes of city employee retirement benefits. City Manager Bill Bruton had advised the Council that if it did not make this change, the city's retirement plan would be in violation of the federal Employee Retirement Income Security Act, which provides various protections of the spouses of employees who participate in employee retirement plans. The U.S. Department of Labor has taken the position that lawfully contracted same-sex marriages must be recognized under employee pension benefit plans, regardless of the place of domicile of the employee. *Marietta Daily Journal*, Sept. 11, 2014.

KANSAS – The Johnson County legal department has ruled that a petition to repeal Roeland Park's anti-discrimination ordinance may be circulated for a 180-day period. If 472 registered voters sign it, the City Council must either repeal the ordinance or place it on a citywide ballot. The ordinance, which was approved in August, made Roeland Park the second municipality in Kansas to ban discrimination in employment, housing and public services because of sexual orientation or gender identity. It was enacted when Mayor Joel Marquardt cast his vote to break a 4-4 tie in the Council. The measure was scheduled to go into effect on January 1, 2015. The other Kansas municipality with such a law is Lawrence. *Associated Press*, Sept. 17.

MICHIGAN – The Macomb County Commissioners voted 8-5 in favor of amending the county's anti-discrimination policy to add "sexual orientation" and "gender identity" as prohibited grounds for discrimination against county employees. The September 18 vote followed the county government's action in changing its human resources handbook to include language about sexual orientation, according to an Associated Press report published September 19. Michigan is one of the majority of states that has not legislated to ban sexual orientation or gender identity discrimination, and the state government is awaiting a ruling from the 6th Circuit in its appeal of a district court decision striking down the state's ban on marriage equality. Despite the lack of protection for LGBT Michiganders on

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the statewide level, Macomb County joins 35 other Michigan communities that have adopted policies providing some degree of protection against such discrimination.

MISSISSIPPI – The issue of spousal benefits for same-sex spouses of city employees in Starkville, Mississippi, seemed to be rather up in the air, according to an Associated Press report posted on September 17. The city alderman had made a decision to allow city employees to buy health insurance coverage for one other adult, including same-sex partners, but on September 16 they voted to limit that benefit to couples who are considered married by the state, which does not recognize same-sex marriages. Mayor Parker Wiseman had indicated that he would veto the decision to so limit the benefits. Opponents of extending the benefits cited "Biblical morality" as the reason for their objection; presumably, the 1st Amendment Establishment Clause doesn't apply in Starkville. When the original policy decision was made, Human Rights Campaign had hailed Starkville, perhaps prematurely, as Mississippi's first city to offer insurance options for same-sex partners of city workers.

NEW MEXICO – The Otero County Commission voted on September 26 to amend the county's personnel policy to add all state and federally-protected classifications, including sexual orientation, gender identity, and disability. The Commission acted on the advice of Human Resources Director Debbie Alton, who stated concern that the existing policy was deficient and could lead to lawsuits. The amendment makes the local policy consistent with New Mexico law, which covers sexual orientation and gender identity discrimination. *Alamogordo Daily News*, Sept. 19.

NORTH CAROLINA – Winston-Salem Human Resources Director Carmen Caruth has announced that the city would recognize marriage licenses from other U.S. jurisdictions for purposes of city employee spousal benefits, regardless whether the benefits are for a different-sex or same-sex spouse. Caruth's announcement came in an August 28 letter to city employees, and was effective immediately. Meanwhile, the City Council was scheduled to take up a proposed ordinance, which had been discussed with no resolution at its July meeting. Caruth cited the 4th Circuit's ruling in the Virginia marriage equality case, and a recent statement by N.C. Attorney General Roy Cooper that in light of the 4th Circuit ruling he could no longer defend North Carolina's ban on performance and recognition of same-sex marriages.

WISCONSIN – With a unanimous vote at the September 2 Common Council meeting, the city of Cuday becomes the fourth community in Wisconsin to adopt a ban on gender identity expression. The city already banned sexual orientation discrimination in its Fair Housing and Human Rights ordinance prior to this vote. *BloggingBlue.com*, Sept. 4.

LAW & SOCIETY NOTES

THE INTERNATIONAL OLYMPIC COMMITTEE – The Associated Press reported on September 25 that the International Olympic Committee (IOC) will "require future Olympic host cities to abide by rules that forbid any discrimination, a move prompted by the outcry caused by Russia's adoption of a law banning so-called gay 'propaganda' ahead of the 2014 Winter Games in Sochi." The IOC informed the three candidate cities to host the 2022 Winter Games that the host city contract will include a reformulated non-discrimination provision, based on Principle 6 of the Olympic charter. The new language requires the host city and national Olympic committee to "conduct all activities in a manner which promotes and enhances the fundamental principles and values of Olympism, in particular the prohibition of any form of discrimination with regard to a country or a person grounds of race, religion, politics, gender or otherwise, as well as the development of the Olympic movement." While this was seen as a positive step by All Out, an organization promoting participation in athletic competition by openly-gay athletes, that organization as well as Athlete Ally are pushing IOC to add "sexual orientation and gender identity" to the non-discrimination language, rather than including them by implication under "any form of discrimination" and "gender or otherwise." The three finalists for the 2022 Winter Games are Almaty (Kazakhstan); Beijing (China); and Oslo (Norway). The safest choice to avoid anti-gay discrimination would certainly be Oslo, but there is significant political and public opposition in Norway, and the AP reports that the Oslo bid "remains in limbo and could still drop out." Kazakhstan is a former Soviet satellite, but has been independent since the break-up of the Soviet Union and is financially independent of Russia due to substantial oil reserves. It is also, at present, a place of some public anti-gay agitation, with certain political forces calling for enactment of legislation similar to that adopted by Russia, pointing to the flowering of gay clubs in Almaty, a cosmopolitan city whose population is a mix of ethnic Kazakhs and Russian and German nationals. (The Germans are mainly descended from World War II prisoners of war held in Kazakhstan by the Soviet forces.)

GORDON COLLEGE – A college whose president signed a joint letter

urging that the school be exempt from non-discrimination law under the Religious Freedom Restoration Act is now facing concerns about his own school's accreditation. The accrediting agency for Gordon College has given the institution a year to prove to a regional accrediting agency that its non-discrimination policy complies with the requirement to avoid discrimination based on sexual orientation or gender identity. At the heart of contention is the College's rule barring all sexual activity outside of a traditional, different-sex marriage, which has drawn the attention of the New England Association of Schools and Colleges' Committee on Accreditation. In coming with many schools that have a religious affiliation, Gordon discourages any extra-marital sexual activity among students, staff or faculty, but its president's decision to sign the lobbying letter has triggered intense scrutiny, including termination of a contract with a municipal body. *Inside Higher Ed.com*, Sept. 26.

NEW YORK CITY ST. PATRICK'S DAY PARADE – Organizers of New York City's St. Patrick's Day Parade have long banned gay groups from marching in the parade carrying banners indicating their identity. On September 3, the parade organizers announced they were lifting this ban, at least in part, for the 2015 edition of the parade, allowing a group of gay Irish NBC Universal employees to march in the parade under their own banner. NBC Universal broadcasts the parade, and indicated it might not do so if its employee group was barred from marching. This was seen as some progress, but other groups that have sought to march over the years immediately demanded equal treatment, and it was uncertain whether a total breakthrough had been achieved. Mayor Bill de Blasio boycotted the 2014 edition of the parade over this issue, as did former City Council Speaker Christine Quinn.

INTERNATIONAL NOTES

UNITED NATIONS – The UN Human Rights Council voted 25-14 on September 26 to approve a resolution calling for a report from the U.N. High Commissioner for Human Rights on combatting human rights violations on the basis of sexual orientation or gender identity. The measure had been watered down from a prior proposal, and was similar to one that passed in 2011 by a vote of 29-19. Several Council member nations that might have been expected to vote "no" based on anti-gay policies in their countries actually abstained from the vote. *Buzzfeed.com*, Sept. 26.

BOTSWANA – *Agence de Press Africaine* (Sept. 12) reports that the government of Botswana is defying a ruling by the nation's High Court that ordered the government to provide HIV anti-retroviral medications to infected foreign prisoners. The article reported, for example, that a detained Zambian national had petitioned a Francistown magistrate to help him get anti-retroviral medications, since he had run out of the supply he had when he was detained. The government has pleaded insufficient funds for this purpose, although it provides such medication for free to HIV-infected citizens, and Botswana is generally accounted to have one of the more effective programs for dealing with HIV in Africa.

BRAZIL – *BBC News* (Sept. 13) reported that Judge Rafael Pagnon Cunha had permitted a baby to be registered with two mothers and a father. The women were married two months ago, and the father was a male friend who provide sperm for conception of the child, a girl born on August 27. The women sought to have all three of their names on the birth certificate, which the judge approved, stating, "Being a father and a mother is above all about taking care and fulfilling tasks. I feel sure that for this child the possibility of happiness will be very great." He noted the involvement of all three parents during the pregnancy, and that all three had requested that the birth certificate be changed to show all three parents. The certificate also lists the child's six grandparents.

CHAD – International attention turn to the Chad, the latest African country to consider outlawing homosexual conduct. Government ministers voted to support a measure that would impose a criminal penalty of up to 20 years in jail, and international pressure built to persuade President Idriss Deby to reject the measure. Under the bill, anybody who has sexual intercourse with someone of the same sex could be subjected to 15-20 years in prison and a fine of 50,000-500,000 Central African francs (translated to 60-600 UK pounds). *Guardian*, Sept. 23.

DENMARK – A new law went into effect in Denmark liberalizing the criteria for updating gender on identification records. Under the new law, which became effective in September, transgender people over the age of 18 can update their passports, birth certificates, social security cards, and other documents after a six-month "reflection period," and will not be required to present proof of sterilizing surgical procedures. This is hailed as a change to "gender self-determination," and away from reliance on medical authorities to validate an individual's felt gender identity. However, some rights groups criticized the six-month period as too long. *Advocate.com*, September 3.

ECUADOR – Beginning on September

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15 same-sex couples in Ecuador could register their union on their national identity cards in civil registry offices, and be regarded as having the same status as "common law" marriages among heterosexual couples. President Rafael Correa, who officially opposes same-sex marriage, nonetheless order civil registries to add gay couples and to change their ID cards accordingly, in compliance with the 2008 Constitution, which promises equal protection for common law unions and civil and religious marriages. *Agence France Presse English Wire*, Sept. 15.

FRANCE – The nation's highest appellate court, the Court de Cassation, has decreed that babies born due to assisted reproductive technology to lesbian couples may be adopted by the co-parent. Some lower courts have held that such adoptions would be an unlawful evasion of the country's rules against the use of such technology by unmarried couples. Some lesbian couples have gone abroad to obtain access to these procedures and then come back to France with their child, seeking co-parent adoptions unsuccessful before this new decision. A proposal to legalize the procedure had been considered when the parliament was considering the marriage equality law, but was dropped when it appeared that it would impede passage of the measure. The new ruling, involving a couple who names were redacted to preserve their anonymity, is responsive in a sense to a June ruling by the European Court of Human Rights ordering France to end its ban on recognizing children born to surrogate mothers. *Radio France Internationale*, Sept. 23.

GREECE – The European Parliament's Intergroup on LGBT Rights reports that the Greek parliament has voted to expand the country's hate speech law to include gender identity, having previously included sexual orientation. The measure increases prison sentences for defendants found guilty of a hate crime, including hate speech. Greece is reportedly the ninth country in the European Union to address hate speech against transgender people in its legislation.

INDIA – The government has sought clarification from the Supreme Court of its decision earlier this year ordering the government to recognize transgender persons as a "third gender." In its ruling, the Court had indicated that persons could self-identify as being of a third gender, but provided no criteria for determining such status, other than to state that "any insistence" that they undergo medical procedures in order to qualify was "immoral and illegal." *Times of India*, Sept. 12. The newspaper report characterizes the court's approach as "fraught with risk" inasmuch as it doesn't at least require a medical diagnosis of any sort.

INDONESIA – The legislature in the very conservative Aceh province unanimously approved on Sept. 27 a revised criminal law adopting Sharia law on sex crimes, under which anybody engaging in non-marital sex can be sentenced to public caning. Anal sex between men will be punished by up to 100 lashes with the cane, and women found guilty of "rubbing" their bodies against each other for sexual pleasure would also be subject to caning. However, the chair of the parliamentary commission that proposed the law pointed out that it was unlikely that these provisions would actually be enforceable in many cases, since the testimony of four eye-witnesses to the illegal acts would be required for a conviction; rather, the main purpose of the statute is to stigmatize and demean as criminal those who engage in such behavior. As such, the measure drew criticism from human rights activists. Richard Bennett, Amnesty's Asia-Pacific director, asserted that the law will violate the right to privacy, and noted the particularly harsh impact on women, who are deterred from reporting rapes because then they can be prosecuted for engaging in non-marital sex. The new criminal code also applies Sharia law to all those present in Aceh province, regardless whether they are Muslim. A press report about the legislative action also noted that Indonesia was the only Southeast Asian member of the U.N. Human Rights Council that had voted against a resolution to combat violence and discrimination based on sexual orientation or gender identity. *Canadian Press*, *dpa international services in English*, Sept. 27.

KAZAKHSTAN – Anti-gay activists held a press conference on Sept. 11 to announce their quest to have enacted a measure similar to the Russian law against "gay propaganda" as part of the Kazakhstan's criminal code. They claimed that there were as many as 14 gay clubs and bars in Almaty, the nation's largest city, making it the "gay capital of Central Asia," a development they saw an undesirable, and also deplored the level of media reporting on gay issues in the country and the pressure of gay rights activists for more visibility, as exemplified by an advertising poster showing a same-sex couple kissing. Gay sex is legal in Kazakhstan, an independent republic that was formerly part of the Soviet Union and, before then, a province of the Russian Empire.

MEXICO – Coahuila has become the first Mexican state to formally approve a marriage equality statute, voting 19-3 for the proposal on September 1. Coahuila had been the first state to legalize same-sex civil unions, in 2007.

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Mexico City's City Council approved a same-sex marriage law several years ago, and the Supreme Court has ruled that same-sex marriages performed in that city must be recognized throughout the country. The Supreme Court has ruled in favor of petitions for marriage licenses by same-sex couples in several individual cases, but under Mexican constitutional law those do not create national precedents until they exceed a certain number, which has not yet been reached. Same-sex marriages have been taking place in Quintana Roo, which has a gender neutral civil code marriage provision, as a result of local rulings. One state, Yucatan, adopted an express prohibition on same-sex marriages in 2009. *GayStarNews*, September 3.

PHILIPPINES – Agusan del Norte has enacted an ordinance prohibiting discrimination because of sexual orientation or gender identity or expression. Provincial Ordinance No. 358-2014 was approved on July 21, and also prohibits discrimination because of age, disability, ethnicity, health status, physical appearance, political affiliation, religion and social status. It had been under consideration since 2013, when an original draft was submitted to the legislature on September 18. According to an LGBT online magazine from the Philippines, *Outrage*, which posted a story about the enactment, Agusan del Norte is one of the few of the country's 79 provinces to have such legislation.

RUSSIA – The Constitutional Court has rejected a challenge to the controversial law banning "propaganda of non-traditional sexual relations" that has been used by the government to prevent public gay rights demonstrations and to crack down on pro-gay political activity. The court released a statement summarizing its ruling on Sept. 25 on a complaint filed by gay activists Nikolai Alexeev, Yaroslav Yevtushenko and Dmitry Isakov, who had been convicted under the law and fined. They challenged the law as discriminatory and a violation of free speech rights guaranteed in the Russian constitution. According to the court's statement, "The contested provisions are not intended to ban homosexuality as is, and cannot be viewed as allowing to curb the rights of citizens based on their sexual orientation. They also do not imply a ban on any information concerning unorthodox sexual relations." The court insisted that the statute was aimed only at public actions seeking to promote such relationship to minors, and that legislators were trying to preserve a balance between the personal "integrity" of citizens and the public welfare. A version of the law was first enacted by city legislators in St. Petersburg, and ultimately a national statute was passed by the State Duma on June 30, 2013, according to an online news bulletin from *rapsinnews.com*.

RUSSIA – Russian officials informed the U.S. Embassy on September 30 that it was terminating participation in a high school student exchange program with the United States, claiming that some Russian students were not coming back to Russia and, damningly, that one Russian youth had stayed with a gay male couple. Russia's "child-protection ombudsman" said that the American couple had established a guardianship over the Russian youth, and this was one reason leading to Russia's decision to pull out of the 21-year-old FLEX program. *Radio Free Europe Documents*, Oct. 1.

SOUTH AFRICA – The Supreme Court of Appeal ruled in a dispute between a lesbian minister and her church that the courts would not get involved in personnel disputes within religious institutions. Ecclesia de Lange was "discontinued" from her ministry in the Methodist Church of Southern Africa in 2010 when she announced from the pulpit that she had married her same-sex partner. She sought an order of reinstatement from the Western Cape High Court without success, and appealed, the court finding that it should become involved in such a dispute only "where it was strictly necessary to do so." "Even then," wrote the court, "it should refrain from determining doctrinal issues in order to avoid entanglement" under a national constitution that recognizes a separation of church and state. Judge Visvanathan Ponnan wrote: "As the main dispute in the matter concerns the internal rules adopted by the church, such a dispute, as far as is possible, should be left to the church to be determined domestically and without interference from a court." De Lange is considering taking her case to the constitutional court or perhaps going back to an arbitration process available under church law. *The Mercury*, Oct. 1.

UNITED KINGDOM – The UK Charity Tribunal has granted the appeal by Human Dignity Trust from a ruling by the Charity Commission that disqualified it from being a registered charity. The Commission had found that too much of the Trust's work promoting gay rights was political rather than charitable in nature, and that the objects of its charter were "unclear or ambiguous." The Tribunal rejected this finding, observing: "HDT was not agitating or campaigning for law reform in the political sense, but seeking to enforce the existing international human rights norms to the extent that they are incorporated into the legal system of a member state. Given that human rights are a 'living instrument' that evolve over time with community shifts and trends and given that seeking enforcement of these rights was done

within the Constitutional framework, any policy considerations involved in HDT's activities were part and parcel of the legal system in a Constitutional democracy." Thus, advocacy of "human rights" can be treated as a charitable purpose, according to a commentary about the case by Kim Leontiev, Carol & O'Dea (Sydney, Australia), published Sept. 12 by Mondaq Ltd, 2014 WLNR 25298645.

PROFESSIONAL NOTES

MARY BONAUTO of Gay & Lesbian Advocates & Defenders (Boston) has been awarded a MacArthur Foundation Fellowship, the so-called "genius" awards, which will bring her a no-strings-attached $625,000 stipend payable over the next five years to support her ground-breaking work on LGBT rights. Also honored with a MacArthur Fellowship this year is the prominent lesbian author Alison Bechdel.

On September 16, the Senate confirmed openly-gay **GORDON TANNER** to be General Counsel of the Air Force. Tanner is a military veteran, having served as a judge advocate general from 1973 to 1977, and has served as a civilian employee of the Air Force for more than a decade. He married Robert Patlan in the District of Columbia in 2010. *Washington Blade*, Sept. 21.

At a news conference in Harrisburg, Pennsylvania, announcing proposed hate crimes legislation in the wake of a much-publicized incident that occurred in Philadelphia, a sponsor of the bill, State Senator **JIM FERLO** of Allegheny County (Pittsburgh), announced that he is gay, making him the first openly-gay member of the Pennsylvania Senate – but only briefly, because his term expires at the end of November and he is not running for re-election. There are two openly-gay members of the Pennsylvania House of Representatives, **MIKE FLECK** and **BRIAN SIMS**. The measure is Senate Bill 42 and House Bill 177.

STUART F. DELERY, an openly-gay attorney who argued on behalf of the Justice Department in the 2nd Circuit in the *Windsor* case that led to the Supreme Court's invalidation of Section 3 of the Defense of Marriage Act, was promoted to be Acting Associate Attorney General, the third-ranking position in the U.S. Department of Justice after the Attorney General and the Solicitor General. He is replacing Anthony West, who had served in that position since the beginning of the Obama Administration. Delery will oversee the Department's activities in the areas of civil rights, antitrust and environmental cases. He becomes the highest-ranking openly gay official to have ever served in the Justice Department, and would automatically be considered among those who might be nominated to be Attorney General in light of the recent announcement by Eric Holder that he is resigning as soon as a replacement can be confirmed. *New York Times*, September 4.

MAURA HEALEY, an openly lesbian former assistant attorney general, won the Democrat nomination for Attorney General of Massachusetts in a hotly contested primary election held on September 9. She was considered a heavy favorite to win the general election and because the first openly gay state attorney general in the United States. *Boston Globe*, Sept. 10.

Immigration Equality has announced that its new Executive Director is **CAROLINE DESSERT**, identified in the organization's press release as a "queer Latina" who earned her JD at UCLA Law School. She was previously employed as a Deputy Attorney General in the Public Rights Division of the California Attorney General's Office. Before getting into law practice, Ms. Dessert worked for Planned Parenthood and the San Diego LGBT Community Center. She also worked as a Regional Field Director for the No on 8 campaign in 2008.

SCOTT SCHOETTES, Lambda Legal's HIV Project Director, was appointed to the Presidential Advisory Council on HIV/AIDS. The council provides advice, information and recommendations to the Secretary of Health and Human Services regarding programs and policies concerning HIV prevention, research and treatment. Schoettes will serve a three-year term beginning on September 4, 2014. Other lawyers on the Council include Clinical Professor **ROBERT GREENWALD** from Harvard Law School, a former member of the National Commission on AIDS and the former board member of the National LGBT Bar Association, and Council Chairperson **NANCY MAHON**.

We sadly note the tragic death of **SHER KUNG**, a respected Seattle civil rights attorney who was part of the ACLU legal team that challenged the "Don't Ask Don't Tell" policy in federal court in the case of Maj. Margaret Witt, which contributed to the drive for repeal of that policy. Ms. Kung was killed while riding a bicycle that collided with a truck in downtown Seattle, just two weeks before the city was scheduled to make "major bicycle safety improvements" to the Second Avenue bike lane in which she was riding. *AP State News*, Aug. 31.

The American Bar Association announced the 2015 recipients of the

Stonewall Award honoring LGBT advancement in the legal profession: Pennsylvania General Assembly Representative **BRIAN SIMS**, Rhode Island Bar Association President **LISE M. IWON**, National Center for Lesbian Rights Executive Director **KATE KENDELL**. The awards are bestowed by the ABA's Commission on Sexual Orientation and Gender Identity, and will be presented at the ABA's Midyear Meeting in Houston on February 7, 2015.

The National LGBT Bar Association will present its Allies for Justice Award to **LORD MAYOR FIONA WOOLF**, the Lord Mayor of London, at the LGBT Bar's Business Legal Conference and London Awards Reception on November 19. Also to be honored on that occasion with the Out & Proud Corporate Counsel Award is **GILLIAN PHILLIPS**, Director of Editorial Legal Services at Guardian News & Media Ltd. Featured speaker at the event is **BARONESS SCOTLAND OF ASTHAL**. This is a ticketed event being held at Club at The Ivy in London; a link to RSVP can be found on the website of the National LGBT Bar.

LAMBDA LEGAL has announced an opening for a staff attorney to do impact litigation, public policy advocacy and education in its New York office, with a 50% focus on transgender issues and a 50% focus on Lambda Legal's other priority areas in the Northeast region. The position is open until filled and may start as soon as November 1, 2014, with interviews starting October 1. At least four years' experience as a practicing attorney are a prerequisite. Full details are available on Lambda Legal's website. Applications may be submitted by surface mail or email to Amy Shapiro, Legal Administrative Manager, Lambda Legal, 120 Wall Street, 19th Fl., New York NY 10005; ashapiro@lambdalegal.org. Emails should include the words "Staff/ Transgender Rights Project Attorney position" on the subject line.

"Louisiana" cont. from pg. 415

He noted decisions requiring courts to honor divorce decrees issued in other states, including a case where the Supreme Court wrote, "If in its application local policy must at times be required to give way, such is part of the price of our federal system."

As to the due process and equal protection claims, Rubin did not have to engage with the question whether heightened scrutiny applies to sexual orientation discrimination claims, as he followed the path of the 10th Circuit, finding that the case involves a fundamental right, and furthermore that "there is no rational connection between Louisiana's laws prohibiting same sex marriage and its goals of linking children to intact families formed by their biological parents, or ensuring that fundamental social change occurs through widespread social consensus." He pointed out that "Louisiana already allows for foster parent adoptions where there is no linkage to a child's biological parent or family. Such placements have been found to be in the best interest of the child. It would be illogical to say that intact families are only those that are formed by a child's biological parents."

As to the interest in reserving social change to a "consensus" of the people, Rubin concluded, "It is the opinion of this court that widespread social consensus leading to acceptance of same-sex marriage is already in progress. The moral disapproval of same-sex marriages is not the same as it was when Louisiana first defined marriage as a union between a man and a woman."

He rejected the state's contention that "gays and lesbians can be treated differently, and yet be considered to be equal to the rest of Americans," pointing to the pernicious "separate but equal" doctrine that had been struck down by the Supreme Court in its 1954 school segregation decision, *Brown v. Board of Education*. He also stated agreement with the plaintiffs' argument that *Loving v. Virginia*, the Supreme Court's 1967 ruling striking down a ban on interracial marriage, was relevant to this case, and quoted from the 10th Circuit's *Kitchen* opinion to that effect. "Just a few decades ago in these United States," he wrote, "miscegenation was illegal. It is now something that most Americans in today's society hardly even debate. From a historical standpoint we've not been able to find any case law analogous to petitioner's non-traditional marriage based on their sexual orientation, other than America's miscegenation laws. Those laws were eventually resolved in the Supreme Court decision in *Loving v. Virginia*."

"This court does not believe that the historical background of *Loving* is so different from the historical background underlying state's bans on same-sex marriage," Rubin continued. "One cannot look at *Loving* without recognizing that it was about racism as well as a couple's decision to assert their right to choose whom to marry." And, concluding on this point, he wrote, "This court has been asked to determine whether for purposes of the due process clause, the right to marry someone of the same sex is a 'right' deeply grounded in our Nation's history and tradition. In line with what the Tenth Circuit said in *Kitchen* in regards to *Loving*; we respond by saying, the question for this court is not whether the right to marry someone of the same sex is deeply rooted in our Nation's history and tradition; but the 'right' at issue is the freedom of choice to marry."

The dozens of marriage equality opinions produced by courts since last December in Utah have one important point in common: the passionate response of the judges reflected in the language they have used to analyze the legal claims presented to them. Judge Rubin shared in that passion, clearly reflected in this opinion issued just a week after he conduct his hearing. ■

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SPECIALLY NOTED

BloombergBNA has published *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* (see www.bna.com/bnabooks/giso). This publication brings to fruition a three-year project under the editorship of Christine Duffy that was produced with the collaboration of 125 contributors. Royalties from sale of the book will go to Gay & Lesbian Advocates & Defenders.

EDITOR'S NOTES

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

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