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LGBT Law Notes

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L G B T
LAW NOTES

Summer 2016

NOT WITHIN OUR CONSTITUTIONAL TRADITION

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L G B T LAW NOTES

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Federal Court Enjoins Implementation of Mississippi H.B. 1523

U.S. District Judge Carlton W. Reeves announced on June 27 that he would order Mississippi officials not to enforce part of H.B. 1523, a recently-enacted state law scheduled to go into effect on July 1, because it would circumvent the Supreme Court's 2015 ruling requiring states to afford equal marriage rights to same-sex couples. The challenged provision, Section 3(8)(a), allowed Circuit Court Clerks to "recuse" themselves from issuing marriage licenses to same-sex couples if they have a sincere religious belief opposed to same-sex marriage. The provision says that same-sex couples will be entitled to get marriage licenses, but provides no mechanism to

also a named defendant, hinted he might not be joining that appeal, suggesting that religious folks in Mississippi had been "duped" by the legislature enacting a useless and probably unconstitutional measure. Subsequently, Hood signaled that he definitely would not join the appeal, stating that the law had hurt the state's reputation and that it should expend resources on defending it when there were so many other underfunded initiatives.

On July 7, Governor Bryant filed a motion informing Judge Reeves that he intended to appeal to the 5th Circuit, and asking that the injunction be stayed and the law be allowed to go into effect pending the appeal, according to news

protection for clerks who do not want to issue same-sex marriage licenses was no more violative of the Establishment Clause than laws in more than 40 states exempting those with objections to abortions from having to participate in them. Indeed, they argued, there is a well-established practice in American law recognizing exemptions from general legal obligations for those whose religious or moral scruples compel them to refrain from actions. They cited as other examples conscientious objection from military service or from dispensing contraceptives. They also argued that H.B. 1523 avoids inflicting any harm on same-sex couples by requiring that steps be taken to assure

Judge Reeves granted a preliminary injunction against the entire statute based on his finding that it probably violated both the 1st and 14th Amendments.

make sure that they can get them in case there is nobody in a particular clerk's office who has not recused himself or herself. The Order is published as *Campaign for Southern Equality v. Bryant*, 2016 U.S. Dist. LEXIS 83036, 2016 WL 3574410 (S.D. Miss., June 27, 2016). Then, just days later, as H.B. 1523 was scheduled to go into effect on July 1, Judge Reeves issued a lengthy decision in two other pending cases, granting a preliminary injunction against the entire statute based on his finding that it probably violated both the 1st and 14th Amendments. *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120, 2016 WL 3562647 (S.D. Miss., June 30, 2016). Although Governor Phil Bryant, a Republican who is the lead defendant in all three cases, announced a swift appeal to the 5th Circuit, Attorney General Jim Hood, a Democrat who is

reports on July 8 (*Memphis Commercial Appeal*). Of course, his motion could only succeed if Judge Reeves agreed that the governor likely to prevail on the merits in his appeal. (One constitutional law professor was quoted in a local newspaper as stating that the Establishment Clause conclusion was so clear that he would not use it as an exam question.) When Reeves did not immediately issue a ruling staying his preliminary injunction, Bryant had a motion filed in the 5th Circuit on July 11, urging the court to issue a stay without waiting for Reeves to rule. At the heart of Bryant's motion was the contention that H.B. 1523 did not present any sort of serious Establishment Clause issue. His counsel (Drew L. Snyder, James A. Campbell [of Alliance Defending Freedom], and the James Otis Law Group LLC) argued that the conscience

that they are not delayed in obtaining marriage licenses as a result of a clerk's recusal (although the statute does not specify how that assurance will be implemented). They also argued that the Mississippi law does not require anybody to discriminate against gay people.

In his June 27 Order, recalling a 1962 ruling by the U.S. Court of Appeals for the 5th Circuit, *Meredith v. Fair*, 305 F.2d 343, which "chastised our State for 'a carefully calculated campaign of delay and masterly inactivity'" in response to federal desegregation orders, Judge Reeves announced that he would "reopen" the Mississippi marriage equality case "for the parties to confer about how to provide clerks with actual notice of the Permanent injunction" and for the parties "to confer on appropriate language to include in

an Amended Permanent Injunction.” As noted below, he came back to this theme in his June 30 order, comparing the language with which Governor Bryant had criticized the *Obergefell* decision and the language used by segregationist Mississippi governors in the 1950s and 1960s to criticize the Supreme Court’s ruling on racial segregation.

Robbie Kaplan, a New York attorney who represents the Campaign for Southern Equality, the plaintiff in the Mississippi case, had filed a motion seeking to reopen the marriage case in order to ensure that same-sex couples in the state are not subjected to unconstitutional discrimination because of H.B. 1523. A large team of pro-bono attorneys from Paul, Weiss, Rifkind, Wharton & Garrison, a New York firm where Kaplan is a partner, is working on the case, together with attorneys from several southern states, including local counsel from Mississippi.

Reeves is also presiding in two other lawsuits involving challenges and defenses to the constitutionality of other provisions of H.B. 1523, which was explicitly enacted in response to the Supreme Court’s *Obergefell v. Hodges* decision and which shelters public employees and private businesses from any liability or adverse consequences if they refuse to deal with same-sex couples based on their religious beliefs. The law also allows government offices and businesses to deny transgender people appropriate access to restrooms and other gender-designated facilities, once again based on a “sincere religious belief” that a person’s gender is immutably determined at birth.

Judge Reeves, an African-American man who was appointed to the district court by President Barack Obama, presided over the Mississippi marriage equality case, *Campaign for Southern Equality v. Bryant*, issuing a ruling in November 2014 that the state’s constitutional and statutory bans on same-sex marriage violate the 14th Amendment. He issued a preliminary injunction to that effect on November 25, which was stayed while the state appealed to the 5th Circuit, which, after hearing oral argument in this and

cases from other states in the circuit in January 2015, put a hold on the appeal until the Supreme Court decided the *Obergefell* case.

The *Obergefell* decision, announced on June 26, 2015, said that same-sex couples were entitled to enter into civil marriages “on the same terms and conditions as opposite-sex couples.” “This resolved the issue nationwide,” wrote Reeves, who subsequently issued a Permanent Injunction in response to an order from the 5th Circuit (see 791 F.3d 625) directing him to “act expeditiously on remand and enter final judgment.” Reeves’ July 2015 Permanent Injunction ordered that the state “and all its agents, officers, employees, and subsidiaries, and the Circuit Clerk of Hinds County and all her agents, officers, and employees, are permanently enjoined from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2).”

Shortly after Reeves issued his injunction, the Mississippi Attorney General’s office advised all 82 Circuit Court clerks to grant marriage licenses “to same-sex couples on the same terms and conditions accorded to couples of the opposite sex.” But in response to this motion, the State argued that the only Circuit Court Clerk bound by the court’s injunction was the Hinds County Clerk, who was named in that Order, because the clerks are county employees rather than state employees.

When the Mississippi legislature convened for its 2016 session, it promptly passed H.B. 1523, which was clearly intended to send a message that the state would happily tolerate and protect discrimination against same-sex couples and LGBT individuals by privileging those with anti-gay religious beliefs. This was largely symbolic when it came to discrimination by private businesses and landlords, since Mississippi law did not then forbid discrimination because of sexual orientation or gender identity in employment, housing and public accommodations. It was only *after* H.B. 1523 was enacted that the city of Jackson became the first jurisdiction in the state to legislate against such discrimination. Thus, at the time H.B. 1523 was passed,

this “privilege” was not necessary to “protect” free exercise of anti-gay religious views by Mississippians, especially as the state already had a Religious Freedom Restoration Act in place that would at least arguably protect individuals against undue burden of their religion if the state didn’t have a compelling interest to require them to comply with a generally applicable law.

The provisions in H.B. 1523 about bathroom use and marriage licenses threatened to have more significant practical effect, setting up a clash with federal constitutional and statutory requirements. Over the past few months, issue has been joined in several lawsuits in other federal districts contesting whether federal sex discrimination laws override state laws and require employers not to discriminate against LGBT people or to deny bathroom access to transgender employees and students. As Judge Reeves pointed out in his June 27 Order, states “lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.” In this case, the marriage license provision clearly violates federal constitutional requirements established in the *Obergefell* decision.

“In H.B. 1523,” wrote Reeves, “the State is permitting the differential treatment to be carried out by individual clerks. A statewide policy has been ‘pushed down’ to an individual-level policy. But the alleged constitutional infirmity is the same. The question remains whether the Fourteenth Amendment requires marriage licenses to be granted (and out-of-state marriage licenses to be recognized) to same-sex couples on identical terms as they are to opposite-sex couples.” And the precise question before Reeves was whether it was necessary to modify his 2015 injunction to make it clear that all government employees involved in the marriage process, including the State Registrar and the Circuit Court Clerks, are bound by his injunction.

Reeves concluded that the Registrar was clearly bound, but that it would be preferable to make it more explicit that the Circuit Court Clerks are bound as well, since a violation of the injunction

would subject them to potential liability, including the costs of defending lawsuits against them and possible contempt penalties if they refused to obey the court's Order.

Much of Judge Reeves' June 27 Order was devoted to technical procedural and jurisdictional issues, which he resolved in every instance against the state defendants, from Governor Phil Bryant on down.

He also agreed with the plaintiffs that they should be able to conduct discovery against the State Registrar in order to learn which Clerks had filed forms seeking to recuse themselves from issuing marriage licenses. The Registrar, who is supposed to receive those forms under H.B. 1523, had been claiming that since she was not a party to the marriage lawsuit, she was not bound by the court's injunction and thus not subject to a discovery demand in this case. Reeves asserted that "there are good reasons to permit discovery from the Registrar strictly for purposes of enforcing the Permanent Injunction. In 2016, Mississippi responded to *Obergefell* by creating a new way to treat same-sex couples differently than opposite-sex couples. That the differential treatment is now pushed down to county employees should be irrelevant for discovery purposes. The State will have the documents that show exactly where and by whom the differential treatment it authorized in HB 1523 will now occur. The Plaintiffs should be able to receive that post-judgment discovery from an appropriate State employee, like the Registrar."

Reeves rejected the technical argument that the State, as such, was not a party to the lawsuit. For technical reasons of constitutional law, the State as an entity can't be sued in federal court by its citizens without its consent, so state officials rather than the State itself are designated as defendants in cases like the marriage equality lawsuit. But this is really a technicality. The Attorney General defended the marriage ban using state funds and employees and, Reeves pointed out, it is well established that a federal court "may enjoin the implementation

of an official state policy" because the state is "the real party in interest" even though the lawsuit was brought against named state officials. Reeves signaled that the amended form of the Injunction would add language from the *Obergefell* decision to make clear that same-sex couples are entitled to the same treatment as different-sex couples because, as the 5th Circuit said last July, *Obergefell* "is the law of the land and, consequently, the law of this circuit."

"Mississippi's elected officials may disagree with *Obergefell*, of course, and may express that disagreement as they see fit – by advocating for a constitutional amendment to overturn the decision, for example," wrote Reeves. "But the marriage license issue will not be adjudicated anew after every legislative session. And the judiciary will remain vigilant whenever a named

the entire bill, not just the clerk recusal position at issue in the June 27 Order.

Unlike the earlier ruling, the June 30 Order treated H.B. 1523 as broadly unconstitutional on its face. At the heart of H.B. 1523 is its Section 2, which spells out three "sincerely held religious beliefs or moral convictions" that are entitled, as found by Judge Reeves, to "special legal protection." These are "(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at birth." According to the statute, any person or entity that holds one or more of these beliefs is entitled to be free from any sanction by the government for acting upon them by,

Reeves, who ruled in 2014 that Mississippi's ban on same-sex marriage was unconstitutional, agreed with the plaintiffs as to all of their arguments.

party to an injunction is accused of circumventing that injunction, directly or indirectly."

Just minutes before H.B. 1523 was scheduled to go into effect on July 1, Judge Reeves filed a 60-page opinion explaining why he was granting a preliminary injunction to the plaintiffs in two other cases challenging the measure, which he consolidated for this purpose under the name of *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120, 2016 WL 3562647 (S.D. Miss., June 30, 2016). According to this June 30 Order, H.B. 1523 likely violates both the 1st Amendment's Establishment of Religion Clause and the 14th Amendment's Equal Protection Clause. Reeves' lengthy, scholarly opinion expanded upon some of the points he made just days earlier, but this opinion was necessarily more expansive because it was addressed to

for example, denying restroom access to a transgender person or refusing to provide goods or services to a same-sex couple for their wedding.

The state may not override federal rights and protections, and the plaintiffs argued in these cases that by privileging people whose religious beliefs contradict the federal constitutional and statutory rights of LGBT people, the state of Mississippi had violated its obligation under the 1st Amendment to preserve strict neutrality concerning religion and its obligation under the 14th amendment to afford "equal protection of the law" to LGBT people. Reeves, who ruled in 2014 that Mississippi's ban on same-sex marriage was unconstitutional, agreed with the plaintiffs as to all of their arguments. For purposes of granting a preliminary injunction, he did not have to reach an ultimate decision on the

merits of the plaintiffs' claims. It would suffice to show that they were "likely" to prevail on the merits. But anybody reading Reeves' strongly-worded opinion would have little doubt about his view of the merits.

In an introductory portion of this opinion, he spelled out his conclusions succinctly: "The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected – the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells 'nonadherents that they are outsiders, not full members of the political community, and adherents that they are insiders, favored members of the political community,'" quoting from a Supreme Court decision from 2000, *Santa Fe Independent School District v. Doe*, 530 U.S. 290. "And the Equal Protection Clause is violated by H.B. 1523's authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons."

Much of the opinion was devoted to rejecting the state's arguments that the plaintiffs did not have standing to bring the lawsuits, that the defendants were not liable to suit on these claims, and that injunctive relief was unnecessary because nobody had been injured by the law. Reeves cut through these arguments with ease. A major Supreme Court precedent backing up his decision on these points is *Romer v. Evans*, the 1996 case in which LGBT rights groups won a preliminary injunction against Colorado government officials to prevent Amendment 2 from going into effect. Amendment 2 was a ballot initiative passed by Colorado voters in 1992 that prevented the state from providing any protection against discrimination for gay people. The state courts found that the LGBT rights groups could challenge its constitutionality, and it never did go into effect, because the Supreme Court ultimately found that it violated the Equal Protection Clause. Judge Reeves ended his introductory section with a quote from *Romer*: "It is not within our constitutional tradition to enact laws of this sort."

On June 27, Judge Reeves had alluded to Mississippi's resistance to the Supreme Court's racial integration rulings from the 1950s and 1960s, and he did so at greater length in the June 30 opinion, focusing on how H.B. 1523 was specifically intended by the legislature as a response to the Supreme Court's ruling in *Obergefell v. Hodges*. Mississippi legislators made clear during the consideration of this bill that its intention was to allow government officials and private businesses to discriminate against LGBT people without suffering any adverse consequences, just as the state had earlier sought to empower white citizens of Mississippi to preserve their segregated way of life despite the Supreme Court's rejection of race discrimination under the 14th Amendment.

Reeves quoted comments by Governor Bryant criticizing *Obergefell* as having "usurped" the state's "right to self-governance" and mandating the state to comply with "federal marriage standards – standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians." In a footnote, Reeves observed, "The Governor's remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* 'represents an unwarranted invasion of the rights and powers of the states.'" Furthermore, "In 1962, before a joint session of the Mississippi Legislature – and to a 'hero's reception' – Governor Ross Barnett was lauded for invoking states' rights during the battle to integrate the University of Mississippi." Reeves also noted how the racial segregationists in the earlier period had invoked religious beliefs as a basis for refusing to comply with the Supreme Court's decisions.

Turning to the merits, Reeves addressed the state's argument that the purpose of the statute was to "address the denigration and disfavor religious persons felt in the wake of *Obergefell*," and the legislative sponsors presented it as such, as reflected in the bill's title: "Protecting Freedom of Conscience

from Government Discrimination Act." Reeves pointed out what was really going on. "The title, text, and history of H.B. 1523 indicate that the bill was the State's attempt to put LGBT citizens back in their place after *Obergefell*," he wrote. "The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were 'put in a solitary class with respect to transactions and relations in both the private and governmental spheres' to symbolize their second-class status." (The quotation is from *Romer v. Evans*.) "As in *Romer*, *Windsor*, and *Obergefell*," Reeves continued, "this 'status-based enactment' deprived LGBT citizens of equal treatment and equal dignity under the law."

Because state law in Mississippi does not expressly forbid discrimination because of sexual orientation or gender identity, the state tried to claim that in fact the bill did not have the effect of imposing any new harm. However, subsequently the city of Jackson passed an ordinance forbidding such discrimination, and the University of Southern Mississippi also has a non-discrimination policy in place. "H.B. 1523 would have a chilling effect on Jacksonians and members of the USM community who seek the protection of their anti-discrimination policies," wrote Reeves. "If H.B. 1523 goes into effect, neither the City of Jackson nor USM could discipline or take adverse action against anyone who violated their policies on the basis of a 'Section 2' belief."

The court held that because of the Establishment Clause part of the case, H.B. 1523 was subject to strict scrutiny judicial review, and also pointed out that under *Romer v. Evans*, anti-LGBT discrimination by the state is unconstitutional unless there is some rational justification for it. He rejected the state's argument that it had a compelling interest to confer special rights upon religious objectors. "Under the guise of providing additional protection for religious exercise," he

wrote, H.B. 1523 “creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.” Indeed, he asserted, “The deprivation of equal protection of the laws is H.B. 1523’s very essence.”

Reeves found that the standard for ordering preliminary relief had been met. Not only was it likely that H.B. 1523 would be found unconstitutional in an ultimate merits ruling, but it was clear that it imposed irreparable harm on LGBT citizens, that a balancing of harms favored the plaintiffs over the defendants, and that the public interest would be served by enjoining operation of H.B. 1523 while the lawsuits continue. “The State argues that the public interest is served by enforcing its democratically adopted laws,” he wrote. “The government certainly has a powerful interest in enforcing its laws. That interest, though, yields when a particular law violates the Constitution. In such situations the public interest is not disserved by an injunction preventing its implementation.” Reeves concluded, “Religious freedom was one of the building blocks of this great nation, and after the nation was torn apart, the guarantee of equal protection under law was used to stitch it back together. But H.B. 1523 does not honor that tradition of religious freedom, nor does it respect the equal dignity of all of Mississippi’s citizens. It must be enjoined.”

In his motion to the 5th Circuit to stay the June 23 and June 30 injunctions, Governor Bryant argued, as detailed above, that Reeves erred on every one of his findings, and contended that Reeves’ Establishment Clause rulings would place in question numerous federal and statute statutes authorizing religious exemptions from compliance with general laws. He also argued that the correct standard of review for the constitutionality of H.B. 1523 was rationality review, not heightened or strict scrutiny, and that the measure easily passed the rationality test because so many religious exemption statutes have been upheld against challenge by the courts. ■

Federal Trial Courts Divided Over Title VII Sexual Orientation Discrimination Claims

Last July, the Equal Employment Opportunity Commission (EEOC), reversing its position dating back fifty years, issued a ruling that a gay man could charge a federal agency employer with sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, for denying him a promotion because of his sexual orientation. *Baldwin v. Foyx*, 2015 WL 4397641 (EEOC 2015), is an administrative ruling, not binding on federal courts, and federal trial judges are sharply divided on the issue. During May and June, federal district judges in Virginia, New York, Illinois, Mississippi, Connecticut, Indiana, and Florida issued rulings in response to employers’ motions

historical accounts suggest that Smith’s strategy was to make the bill more controversial, thus ensuring its defeat. More recent accounts have suggested that Smith, although a racist, was actually a supporter of equal rights for women and genuinely believed that sex discrimination in the workplace should be banned. (His amendment did not add “sex” to the titles of the bill addressing other kinds of discrimination.) The amendment passed, and ultimately the bill was enacted, going into effect in July 1965.

Because “sex” was added through a House floor amendment, the Committee Report on the bill says nothing about it, and the subsequent debate in the Senate

Federal trial judges in seven states issued rulings on the matter in May and June.

to dismiss Title VII claims of sexual orientation discrimination. In each case, the employer argued that the plaintiff’s Title VII claim had to be dismissed as a matter of law because the federal employment discrimination statute does not forbid sexual orientation discrimination.

Title VII was enacted as part of the Civil Rights Act of 1964. Although the House committee considering the bill took evidence about sex discrimination, it decided to send the bill to the House floor without including “sex” as a prohibited basis for discrimination, because this was deemed too controversial and might sink the bill. During the floor debate, however, a southern representative, Howard Smith of Virginia, a conservative Democrat who was opposed to the proposed ban on race discrimination, proposed an amendment to add “sex” to the list of prohibited grounds. Most

(where the bill went directly to the floor, bypassing committee consideration) devoted little attention to it, apart from an amendment providing that pay practices “authorized” by the Equal Pay Act of 1963 (which bans paying men and women at different rates for the performance of “equal work”) would not be outlawed by Title VII. As a result, the “legislative history” of Title VII provides no explanation about what Congress intended by including “sex” as a prohibited ground of discrimination.

During the first quarter century of Title VII, the EEOC and the federal courts consistently rejected claims that the law outlawed sexual orientation discrimination. In the absence of explanatory legislative history, they ruled that Congress must have intended simply to prohibit discrimination against women because they are women or against men because they are men, and nothing more complicated or

nanced than that. This interpretation was challenged in 1989, when the Supreme Court ruled in *Price Waterhouse v. Hopkins*, 490 U.S. 228, that a woman who failed to conform to her employer's sex stereotypes could bring a sex discrimination case under Title VII, adopting a broader and more sophisticated view of sex discrimination. Since 1989, some lower federal courts have used the *Price Waterhouse* ruling to allow gay or transgender plaintiffs to assert sex discrimination claims in reliance on the sex stereotype theory, while others have rejected attempt to "bootstrap" sexual orientation or gender identity into Title VII in this way. More recently, several federal appeals courts have endorsed the idea that gender identity discrimination claims are really sex discrimination claims, and a consensus to that effect has begun to emerge, but progress has been slower on the sexual orientation front.

Last summer the EEOC's decision in *Baldwin v. Foxx* presented a startling turnabout of the agency's view. The EEOC does not adjudicate discrimination claims against non-governmental and state employers, but it is assigned an appellate role concerning discrimination claims by federal employees. In *Baldwin v. Foxx*, the EEOC reversed a ruling by the Transportation Department that a gay air traffic controller could not bring a sexual orientation discrimination claim under Title VII. Looking at the developing federal case law since *Price Waterhouse* and seizing upon a handful of federal district court decisions that had allowed gay plaintiffs to bring sex discrimination claims under a sex stereotype theory, the agency concluded that a sexual orientation discrimination claim is "necessarily" a sex discrimination claim and should be allowed under Title VII.

Since that July 15 ruling, many federal district judges have had to rule on motions by employers to dismiss Title VII sexual orientation discrimination claims. The precedential hierarchy of the federal court system has required some of them to dismiss those claims because the circuit court of appeals to

which their rulings could be appealed had previously ruled adversely on the issue. In other circuits, however, the question is open and some judges have taken the EEOC's lead.

On May 5, U.S. District Judge Robert E. Payne in Virginia found that he was bound by 4th Circuit precedent to reject a sexual orientation discrimination claim under Title VII in *Hinton v. Virginia Union University*, 2016 WL 2621967, 2016 U.S. Dist. LEXIS 60487 (E.D. Va.), even though the plaintiff, an openly-gay administrative assistant at the university, had alleged clear evidence of anti-gay discrimination by the university president. Judge Payne found that a 1996 decision by the 4th Circuit, *Wrightson v. Pizza Hut of America*, 99 F.3d 138, was still binding. Payne noted that other federal trial courts were divided about whether to defer to the *Baldwin* ruling, but in any event he felt bound by circuit precedent to dismiss the claim.

A district judge on Long Island, Sandra J. Feuerstein, reached a similar result in *Magnusson v. County of Suffolk*, 2016 WL 2889002, 2016 U.S. Dist. LEXIS 64897 (E.D.N.Y., May 17, 2016), dismissing a Title VII claim by an openly-lesbian custodial worker at the Suffolk County Department of Public Works, who alleged that her failure to comply with her supervisors' stereotypes of how women should dress had led to discrimination against her. Relying on prior decisions by the 2nd Circuit Court of Appeals, such as *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2005), Judge Feuerstein refrained from discussing more recent developments and dismissed the claim, asserting that the plaintiff's "claims regarding incidents of harassment based on her sexual orientation do not give rise to Title VII liability."

Also relying on *Dawson*, U.S. District Judge Jeffrey Alker Meyer (D. Conn.) dismissed a Title VII sex discrimination in *Pelletier v. Purdue Pharma LP*, 2016 U.S. Dist. LEXIS 84099, 2016 WL 3620710 (June 29, 2016), holding that the gay male plaintiff had failed to alleged facts sufficient to fit within the narrow sex stereotyping theory that the 2nd Circuit

might recognize in a Title VII claim brought by a gay man. "Here, construing plaintiff's complaint liberally," wrote Judge Meyer, "he has alleged that his employer decided to discipline and fire him as a result of learning that he was in a long-term relationship with another man. On the facts alleged, there is 'no basis to surmise that [plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation,'" quoting from another 2nd Circuit case, *Simonton v. Runyon*. Judge Meyer granted the motion to dismiss the Title VII sex discrimination claim "without prejudice to plaintiff's filing an amended complaint within 14 days from the date of this ruling that re-pleads the claim if such facts actually exist and are alleged that would warrant a claim of gender-based sex discrimination." Judge Meyer never mentioned *Baldwin* or the alternative argument, which some other district judges have accepted, that a man having a long-term relationship with another man can be considered sufficient to state a gender stereotype claim, which is part of the EEOC's underlying reasoning in *Baldwin v. Foxx*. Plaintiff Gary Pelletier had also filed a sexual orientation complaint with the Connecticut Commission on Human Rights and Opportunities, but he did not assert a supplementary state law claim in his Title VII lawsuit, and in any event there were no allegations that he had exhausted his administrative remedies under Connecticut law. His complaint was filed pro se, but he was represented by counsel at the hearing on the motion, which may partly explain why Judge Meyer is willing to entertain a new complaint. The case also raises a claim under the Age Discrimination in Employment Act, which was not dismissed. (Imagine a supervisor telling somebody prior to his discharge that "they could get younger people to take your job.")

On May 31, a senior district judge in Illinois decided that prudence in light of the developing situation counseled against dismissing a pending "perceived sexual orientation" claim in the case of *Matavka v. Board of*

Education, 2016 U.S. Dist. LEXIS 70451 (N.D. Ill.). Judge Milton I. Shadur confronted the school district's motion to dismiss a discrimination claim by an employee at J. Sterling Morton High School, who alleged that "he experienced severe harassment from his coworkers and supervisors, including taunts that he was 'gay' and should 'suck it,' frequent jokes about his perceived homosexuality, and hacking of his Facebook account to identify him publicly as 'interested in boys and men', and an email stating 'U . . . are homosexual.'" Judge Shadur observed that the Chicago-based 7th Circuit Court of Appeals had in the past rejected sexual orientation discrimination claims under Title VII, which "would appear to bury" Matavka's Title VII claim. But, he noted, *Baldwin v. Foxx*, while not binding on the court, may prompt a rethinking of this issue, and that the 7th Circuit heard oral argument on September 30 of a plaintiff's appeal from a different federal trial judge's dismissal of a sexual orientation discrimination claim in the case of *Hively v. Ivy Tech Community College*, 2015 U.S. Dist. LEXIS 25813, 2015 WL 926015 (N.D. Ind., March 3, 2015). "Should *Hively* follow recent district court decisions in finding *Baldwin* persuasive," he wrote, "that finding plainly would affect the disposition of Morton High's motion. That being so, the prudent course at present is to stay this matter pending the issuance of a decision in *Hively*." The 7th Circuit had not issued a decision in *Hively* as of this writing. Judge Shadur stayed a ruling on the motion until July 29, and said that if the 7th Circuit had not issued a ruling by then, he might stay it further. The EEOC filed an amicus brief in *Hively*, urging the Circuit to adopt a new precedent consistent with *Baldwin*.

The federal appeals courts are not bound by any rules about how soon after oral argument they must issue opinions. Sometimes the 7th Circuit moves quickly. During 2014 it took just a week after the August 26 oral argument to rule affirmatively on a marriage equality case on September 4, giving the states of Wisconsin and Indiana time to petition the Supreme Court for

review before the start of the Court's October term. The panel that heard the *Hively* argument had not ruled in more than eight months, suggesting that an extended internal discussion may be happening among the nine active judges of the 7th Circuit, to whom the panel's proposed opinion would be circulated before it is released. Panels may not depart from circuit precedent, but a majority of the active judges on the circuit can overrule their past decisions. A 7th Circuit ruling reversing the district court's dismissal of the *Hively* complaint would be a major breakthrough for Title VII coverage of sexual orientation claims.

In an Indiana case that could be affected by a ruling in *Hively* while it is pending, *Somers v. Express Scripts Holdings*, 2016 WL 3541544, 2016 U.S. Dist. LEXIS 84268 (S.D. Ind., June 29, 2016), the plaintiff, who may or may not be gay, avoided dismissal of his Title VII sex discrimination claim by taking care never to mention sexual orientation in his sexual harassment complaint, hoping to bring his case within the Supreme Court's same-sex harassment precedent of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Brian Somers alleged that harassing co-workers called him "fat motherfucker," "faggot," "gay," and "prison bitch," and that one said that Somers "had a soft ass and he would like to poke it." Somers asserted that when he complained to a supervisor, he was told to "get over it" and no action was taken. The employer argued that Title VII did not govern the claim, because it was clearly – in the eyes of the employer – a sexual orientation discrimination claim not covered by Title VII. While acknowledging 7th Circuit precedent holding that sexual orientation claims may not be brought under Title VII, District Judge Jane Magnus-Stinson notes that Somers is not explicitly alleging sexual orientation discrimination and comments, "Express' assumption that Mr. Somers' claims must be based on sexual orientation assumes a key fact that is not alleged in Mr. Somers' complaint – namely, his sexual orientation. Instead, the only question before the Court at this time

is whether the factual allegations in Mr. Somers' complaint set forth a Title VII claim based on his sex that is both plausible on its face and gives Express sufficient notice of the nature of Mr. Somers' claims." The judge concluded that this standard had been met, and that the employer's argument "ignores the federal notice pleading standard." Since the court found that Somers had pleaded "plausible claims for harassment and constructive discharge based on his sex," the motion to dismiss must be denied. In *Oncale*, the Supreme Court said that one way a plaintiff could prove a same-sex harassment claim would be to show that the harasser was homosexual. In a footnote, Judge Stinson wrote: "To the extent that Mr. Somers suggests in his response brief that the employee who allegedly harassed him may be a homosexual, the Court will not accept that as true at this stage of the litigation because it is not alleged in his complaint."

Meanwhile, two other decisions issued in June have taken opposite views on the question. In *Brown v. Subway Sandwich Shop of Laurel*, 2016 WL 3248457, 2016 U.S. Dist. LEXIS 76526 (S.D. Miss., June 13, 2016), U.S. District Judge Keith Starrett bowed to prior 5th Circuit rulings, such as *Brandon v. Sage Corp.*, 808 F.3d 266 (2015), rejecting sexual orientation claims under Title VII, and he even claimed, somewhat disingenuously, that the *Baldwin* decision did not support the plaintiff's claim, stating that *Baldwin* "takes no position on the merits of the claim and resolves only timeliness and jurisdictional issues." While this may appear to be technically true, since the EEOC was ruling on an appeal from the Transportation Department's dismissal of the claim and not ultimately on the merits, on the other hand the EEOC definitely did take a "position" on the question whether sexual orientation discrimination claims are covered by Title VII; it had to address this question in order to determine that it had jurisdiction over the claim. The EEOC clearly stated in *Baldwin* that sexual orientation discrimination claims are "necessarily" sex discrimination claims.

By contrast, U.S. District Judge Mark E. Walker of the Northern District of Florida, finding that the 11th Circuit Court of Appeals has not issued a precedential ruling on the question, refused to dismiss a “perceived sexual orientation” discrimination claim in *Winstead v. Lafayette County Board of County Commissioners*, 2016 U.S. Dist. LEXIS 80036, 2016 WL 3440601, on June 20. Pointing out that the 11th Circuit had ruled in 2011 in *Glenn v. Brumby*, 663 F.3d 1312, that a gender identity discrimination claim could be considered a sex discrimination claim under the Equal Protection Clause using a sex stereotyping theory, Judge Walker found that the *Baldwin* ruling, which also discussed sex stereotyping as a basis for a sexual orientation claim, was persuasive and should be followed.

Judge Walker rejected the argument made by some courts that using the stereotyping theory for this purpose was inappropriately “bootstrapping” claims of sexual orientation discrimination under Title VII. “These arguments seem to this Court to misapprehend the nature of animus towards people based on their sexual orientation, actual or perceived,” he wrote. “Such animus, whatever its origin, is at its core based on disapproval of certain behaviors (real or assumed) and tendencies towards behaviors, and those behaviors are disapproved of precisely because they are deemed to be ‘inappropriate’ for members of a certain sex or gender.”

He concluded: “This view – that discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination – is persuasive to this Court, as it has been to numerous other courts and the EEOC.” He also contended that it “follows naturally from (though it is not compelled by) *Brumby*, which is binding Eleventh Circuit precedent. Simply put, to treat someone differently based on her attraction to women is necessary to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex.”

Ironically, Judge Walker turned to an opinion written by the late Justice Antonin Scalia, an outspoken opponent of LGBT rights, to seal the deal. He quoted from Scalia’s opinion for the Supreme Court in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, a 1998 decision that same-sex harassment cases could be brought under Title VII. “No one doubts,” wrote Judge Walker, “that discrimination against people based on their sexual orientation was not ‘the principal evil Congress was concerned with when it enacted Title VII,’” quoting Scalia, and continuing the quote, “‘But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.’” Scalia was opposed to relying on “legislative history” to determine the meaning of statutes, instead insisting on focusing on the statutory language and giving words their “usual” meanings.

Judge Walker concluded that his decision not to dismiss the Title VII claim “does not require judicial activism or tortured statutory construction. It requires close attention to the text of Title VII, common sense, and an understanding that ‘in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,’” a quotation from *Sprogis v. United Air Lines*, 444 F.2d 1198 (7th Cir. 1971), which had been quoted by the Supreme Court in *Manhart*, an important early sex discrimination case under Title VII that rejected the use of sex-based actuarial tables to require women to make larger contributions for pension coverage than men because they live longer on average.

Judge Walker rejected an alternative analysis proffered by the EEOC in *Baldwin*, however, observing that it would not support coverage for sex discrimination claims by bisexual plaintiffs!

Judge Walker’s decision provides the most extended district court discussion

of the merits of allowing sexual orientation discrimination claims under Title VII, but it will not be the last word, as the EEOC pushes forward with its affirmative agenda to litigate this issue in as many federal courts around the country as possible, building to a potential Supreme Court ruling. So far, the Supreme Court has refused to get involved with the ongoing debate about whether sexual orientation or gender identity discrimination claims are covered under Title VII. It refused to review the 11th Circuit’s decision in *Glenn v. Brumby*, for example, presumably because of the absence of a circuit split, as *Glenn* is so far the only case holding that gender identity discrimination claims should be dealt with as sex discrimination claims under the Equal Protection Clause. But the Court can’t put things off much longer. An affirmative 7th Circuit ruling in *Hively* would create the kind of “circuit split” that usually prompts the Supreme Court to agree to review a case. That may not be long in coming.

Although the 7th Circuit is likely to be the first to rule on this, an appeal is also pending in the 2nd Circuit from a March 9, 2016, district court ruling in *Christiansen v. Omnicom Group, Inc.*, 2016 WL 951581 (S.D.N.Y.), in which the district judge also dismissed a gay plaintiff’s Title VII claim, relying on 2nd Circuit precedents. On June 28, the deadline for amicus filings, both the EEOC and a group of 128 members of Congress filed briefs urging the 2nd Circuit to abandon its past decisions and embrace the broader understanding of sex discrimination that the EEOC described in its *Baldwin* decision. The congressional brief argued that the history of repeated unsuccessful introductions of bills to adopt an express federal ban on sexual orientation discrimination should not be construed as a belief by Congress that Title VII does not already cover this form of discrimination. Instead, the brief argues, particularly with respect to the Equality Act introduced last year, the purpose of the bill is to “clarify” and make “explicit” what is already implicitly covered in the ban on sex discrimination. ■

Restrictive Definition of Employment Presents a Challenge to Discrimination Claimants

In a 2-1 decision, the U.S. Court of Appeals for the 4th Circuit affirmed the decision of the District Court for the District of Maryland, which dismissed Karen Greene's complaint against the Harris Corporation and its employee, Harl Dan Pierce. *Greene v. Harris Corp.*, 2016 WL 3425579, 2016 U.S. App. LEXIS 11316 (June 22, 2016). Greene alleged that Harris and Pierce: (1) discriminated against her because of her sexual orientation and personal appearance in violation of Howard County, Maryland Code (HCC) § 12.208; and (2) tortiously interfered with her business relationship with Eurest Services, Inc., a cleaning contractor that employed Greene and assigned her to work at Harris Corp. Both claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b) (6), with the Court notably concluding that Greene's discrimination claim failed to allege sufficient facts showing that an employment relationship existed between herself and Harris. Circuit Judge Barbara Milano Keenan wrote for the court.

Howard County's ordinance explicitly prohibits sexual orientation discrimination by an "employer," who is defined under HCC § 12.208(I)(a) as a person engaged in an industry or business who has at least five full-time or part-time employees during a specific time period. Section 12.208(I) (a) also defines an employee as an individual employed by an employer — a definition that the court characterizes as circular. These definitions undermine the county's attempt to protect LGBT workers from workplace discrimination. Plaintiffs, who work under independent contracts, cannot easily establish that an employment relationship existed between themselves and their respective defendants; like Greene, they therefore cannot state discrimination claims that survive a dismissal motion.

In Greene's case, she had previously

operated her own cleaning company that contracted with Harris for 14 years, until Pierce terminated her contract supposedly for budgetary reasons in March 2010. Greene's complaint characterized her relationship with Pierce as "contemptuous." Since he began working at Harris in 2008, Pierce treated Greene in a rude manner and made derogatory statements about her personal appearance to other Harris employees. He also became visibly upset after learning from a co-worker that she is a lesbian, just one or two months before he terminated Greene's services.

Later that year in December, Greene was employed by Eurest, Harris's new cleaning contractor, and assigned to return to Harris as a janitor. When Pierce learned that Greene was working there, he promptly had a Harris security officer escort her from the premises on her first day. He then emailed Harris' facilities manager, stating that Greene was previously dismissed for charging too much money, inappropriately searching his office, and screaming obscenities at him. Afterwards, he told Eurest that Greene was banned from Harris and must be removed immediately from working at the office. Eurest subsequently terminated Greene's employment, which it admits it would not have done but for Pierce's statements (which Pierce ultimately recanted in this case).

By the time Greene appealed the district court's decision, the 4th Circuit was no stranger to the joint-employment doctrine or the challenges presented by staffing agency-client contracts. The Court had recently issued its decision in *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404 (4th Cir. 2015), which concerned a Title VII discrimination claim. In *Butler*, the court developed a nine-factor test to identify joint employers and prevent them from evading liability by hiding behind staffing

agencies. The *Butler* court concluded that the plaintiff had established an employment relationship necessary to sustain her Title VII claim by showing that: (1) she worked side-by-side with workers solely employed by the defendant-client; (2) she was directly engaged in producing the client's product; and (3) she was supervised by a manager employed by the client. Thus, showing these three of the nine factors was sufficient to establish an employment relationship in *Butler*.

The court came to a different conclusion when applying the nine-factor test in *Greene*, finding that Greene's allegations failed to raise sufficient facts showing an employment relationship with Harris. In support of her claim, Greene alleged that Harris contracted for various powers typically retained by employers, including the rights to: (1) accept or reject prospective janitors provided by Eurest, and remove them from their assignments "for cause"; (2) assign an on-site Harris employee to supervise Greene; (3) select which days Greene would work at the office; and (4) provide the cleaning supplies Greene must use. However, the court instead concluded that Harris' authority to accept or reject Eurest personnel merely arose from the company's right to ensure that its service contract was performed to its satisfaction. The court also rejected Greene's assertion because she *failed* to allege that: (1) her duties were related to Harris' business product; (2) she performed work also undertaken by Harris employees; (3) Eurest and Harris intended that their contract established any type of employment relationship between Eurest personnel and Harris; or (4) she met with or received direction from any Harris supervisor in the few hours she worked there.

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Federal Judge Orders Indiana to List Two Moms on Birth Certificates

U.S. District Judge Tanya Walton Pratt has ruled that Indiana was failing to comply with the Supreme Court's mandate for marriage equality in *Obergefell v. Hodges*, decided last June 26, when the state refused to list the same-sex spouses of birth mothers on their children's birth certificates. Ruling on cases brought by several same-sex couples who were married before their children were born, Judge Pratt found that the mandate to afford equal marriage rights to same-sex couples included a requirement that the "parental presumption" applied to husbands of women who give birth should also be applied to their wives. *Henderson v. Adams*, 2016 U.S. Dist. LEXIS 84916, 2016 WL 3548645 (S.D. Ind., June 30, 2016).

Judge Pratt explained that the usual procedure in Indiana for issuing birth certificates starts when hospital staff "work with the birth mother to complete the State of Indiana's 'Certificate of Live Birth Worksheet,'" which was created by the state as part of its Birth Registration System. "Staff at the hospital upload the information provided on the Indiana Birth Worksheet to a State database. The county health department then receives notification that birth information has been added to the database. A notification letter to the birth mother is generated on a form provided by the State, which indicates that information has been received by the county health department and requests that the mother notify the county health department if there is an error with respect to the child's identifying information." If the mother wants a birth certificate, she has to request one, which will then be generated out of the database.

One of the questions on the Worksheet is whether the birth mother is married. If she answers "no," she is asked whether a paternity affidavit has been completed for the child, in which case the person identified as the father will go into the database and be listed on the birth certificate. If there has been no affidavit, then the space is left blank,

even if the mother knows the identity of the child's biological father, and the birth certificate will list only the mother. If the answer is "yes," the husband's name will go into the database, and ultimately will be listed on the birth certificate. Even if the child of a married couple is conceived with donated sperm, there is a presumption that the husband is the father, unless the mother takes steps during this initial information-gathering process to make clear that her husband is not the biological father.

Even though all of the plaintiff couples in this case are married, the state refused to accept same-sex spouses into the database or to list them on the birth certificate. The state's position was that the database and the birth certificates generated from it are supposed to create a true record of the biological parentage of the child, and that because a same-sex spouse of a birth mother is not biologically related to the child, listing her in the database and on the birth certificate would create a false record. The state took the position that a same-sex spouse could only be listed in the database and the birth certificate if she adopted the child with the permission of the birth mother, a process involving expenses and delay, during which time the child would have only one legal parent.

Judge Pratt accepted the plaintiffs' argument that "Indiana's refusal to grant the status of parenthood to female spouses of artificially-inseminated birth mothers while granting the status of parenthood to male spouses of artificially-inseminated birth mother violates the Equal Protection Clause," because it was sex discrimination, pure and simple.

Furthermore, sex discrimination requires heightened scrutiny, putting the burden on the state to justify its policy and show that it advances an important state interest. Because the state presumes, without proof, that the husbands of birth mothers are the parents of their children, the policy does not, in fact, advance the state's asserted

interest of creating a "true" record of the child's biological parents. The state argued that it was the duty of the married birth mother to advise hospital staff while completing the Worksheet if her child was conceived through donor sperm so that her husband's name would be excluded from the database, but this was clearly a spurious argument, since the Worksheet does not prompt hospital staff members to ask this question.

"The State Defendant's argument that the birth mother should acknowledge that she is not married to the father of her child when she has been artificially inseminated or else she is committing fraud when she has been artificially inseminated is not consistent with the Indiana Birth Worksheet, Indiana law, or common sense," wrote Judge Pratt. "The Indiana Birth Worksheet asks, 'are you married to the father of your child,' yet it does not define 'father.' This term can mean different things to different women. Common sense says that an artificially-inseminated woman married to a man who has joined in the decision for this method of conception, and who intends to treat the child as his own, would indicate that she is married to the father of her child. Why would she indicate otherwise?"

Judge Pratt pointed out that the Worksheet, devised by the state, made no attempt to elicit the information that the State deemed to be so important, and, furthermore, "there is no warning of fraud or criminal liability." She pointed out that some other states had enacted specific statutory language to deal with the use of donor insemination by married couples and the issuance of appropriate birth certificates, but Indiana has failed to do so. She pointed out, however, that in one such state, Wisconsin, litigation is pending because that state has also been refusing to list same-sex spouses on birth certificates.

Ultimately, she pointed out, the Worksheet process as set up by the state did not achieve its articulated purpose of creating a "true" record of biological parents, and was administered in a

way that clearly discriminated against same-sex couples. Rejecting the state's argument that employing a parental presumption was not required under *Obergefell*'s mandate of equal marriage benefits, she pointed out, "the state created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* [the 7th Circuit's marriage equality ruling, which the Supreme Court declined to review] and *Obergefell*, this benefit – which is directly tied to marriage – must now be afforded to women married to women."

In addition to finding an equal protection violation, Judge Pratt found a Due Process violation because in *Obergefell* the Supreme Court referred to both clauses of the 14th Amendment as a source of the freedom to marry. Since the Supreme Court identified that freedom as a fundamental right, strict scrutiny would apply, and the state's rationale for its position of this case was obviously insufficient to meet the "compelling interest" test, and Judge Pratt so found. The judge concluded: "Given Indiana's long-articulated interest in doing what is in the best interest of the child and given that the Indiana Legislature has stated the purpose of Title 31 is to protect, promote, and preserve Indiana families, there is no conceivable important governmental interest that would justify the different treatment for female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers. As other district courts have noted, the holding of *Obergefell* will inevitably require 'sweeping change' by extending to same-sex married couples all benefits afforded to opposite-sex married couples. Those benefits must logically and reasonably include the recognition sought by Plaintiffs in this action."

Counsel for plaintiffs include Megan L. Gehring, Richard A. Mann, PC, Raymond L. Faust, Skiles Detrude; Richard A. Mann; William R. Groth, Fillenwarth Dennerline Groth & Towe LLP; and Karen Celestino-Horseman, Austin & Jones PC (all are of Indianapolis). ■

Maryland High Court Adopts De Facto Parent Standing for Lesbian Co-Parents

Overruling a 2008 precedent and reversing lower court decisions in this case, the Court of Appeals of Maryland, that state's highest court, ruled on July 7 that the same-sex spouse of a birth mother, who gave birth to their child shortly before they were married, has standing as a "de facto parent" to pursue custody and visitation in the context of their present divorce proceeding even though she never adopted the child. *Conover v. Conover*, 2016 WL 3633062, 2016 Md. LEXIS 433, reversing 224 Md. App. 366, 120 A.3d 874 (2015). The co-parent will not be required to show that the birth mother is unfit or that she can prove "exceptional circumstances" justify departing from the general rule that unrelated "third parties" do not have standing to seek custody of children.

The court found that the decision it overturned, *Janice M. v. Margaret K.*, 404 Md. 661 (2008), was based on a faulty reading by the court of the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), that failed adequately to perceive the narrow scope of that ruling, and had also relied improperly on distinguishable earlier Maryland cases. Furthermore, the court characterized *Janice M.* as an "archaic" precedent that was out of step with the trend of decisions in other states. (Ironically, on July 5 the Court of Appeals of Michigan issued a ruling on the exact same issue taking the opposite position, see below.)

Judge Sally D. Adkins wrote the court's opinion, which had the support of four judges. There were concurring opinions by three judges suggesting slightly different tests to establish "de facto" parent status, but all ultimately ruling in favor of the co-parent's right as a "de facto" parent to seek custody and/or visitation depending upon the trial court's determination of the best interest of the child.

"Child custody and visitation decisions are among the most serious and complex decisions a court must make," wrote Judge Adkins, "with grave implications for all parties. The dissolution of a non-traditional marriage

just compounds the difficulties of this already challenging inquiry." Michelle and Brittany Conover's relationship began in July 2002. They decided together that Brittany would conceive a child with anonymous donor sperm obtained through Shady Grove Fertility Clinic. She became pregnant in 2009, giving birth to their son in April 2010. The birth certificate listed only one parent: Brittany. The space for a father was left blank. When their son was about six months old they married in the District of Columbia. Maryland at that time recognized same-sex marriages contracted in D.C. but did not issue marriage licenses to same-sex couples. After a year of marriage the women separated. Brittany allowed Michelle overnight and weekend access to their son until July 2012, when she prevented further contact. Brittany filed a formal divorce action in February 2013 in the Circuit Court in Hagerstown. Her divorce complaint stated that there were no children of the marriage. Michelle filed an answer seeking visitation rights with their son, and subsequently counter-complained for divorce, again requesting visitation rights (but not custody). Brittany opposed custody, arguing that Michelle was not related to the boy and thus lacked standing under Maryland law.

Michelle asked the court to interpret Maryland's statute governing custody disputes involving children "born to parents who have not participated in a marriage ceremony with each other" to place her in the same position as a father. The statute allows a father in such circumstances to assert parental rights if four tests are met: a judicial determination of paternity, the father's acknowledgement in writing that he is the father, the father has "openly and notoriously recognized the child to be his child; or has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father." Michelle took the position that she satisfied at least three of these tests, most pertinently the last, so she should be deemed a parent. The lower

courts determined, however, that Michelle lacked standing. Since the son was conceived and born *before* they married, no presumption applied that Michelle, as the spouse of Brittany, was the boy's parent, and the court found that the statute Michelle was relying upon could not be construed in gender-neutral terms. The courts also rejected Michelle's argument that she should be deemed a "de facto" parent, relying on the precedent of *Janice M.* holding that Maryland did not recognize that doctrine. The court granted the divorce but denied Michelle's request for visitation based solely on lack of standing. Thus, the trial court never determined whether ordering visitation would be in the best interest of the child. The intermediate appellate court affirmed, and the Court of Appeals granted Michelle's petition for certiorari. The court's opinion answers affirmatively the first question posed in Michelle's petition: "Should Maryland reconsider *Janice M. v. Margaret K.* and recognize the doctrine of *de facto* parenthood?"

Ultimately the logic of the court's decision was derived from its conclusion that "the primary goal of access determinations in Maryland is to serve the best interests of the child." This must be done while respecting the constitutional right of a fit parent to have custody and to control the raising of her child, where it is claimed that a "non-parent" should be entitled to access to the child. Courts in other states have used a variety of legal theories when confronted with unmarried same-sex couples terminating their relationships and battling over access to the children they were raising. One doctrine that has emerged and achieved wide acceptance – the *de facto* parent doctrine – was first adopted by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (1995). This doctrine poses a four-part test: "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged." In other words, in order to be a *de facto* parent, somebody must be a parent in

all practical respects as a result of a relationship supported by the child's legal parent. (In a concurring opinion in *Conover*, Judge Shirley Watts would modify this test in cases where the child has two known legal parents to require that the relationship of the third party have been fostered with the consent of both of them; her reservations were not essential to deciding this case, because the son was conceived through anonymous donated sperm.)

The Maryland Court of Appeals concluded that this *de facto* parent doctrine should be adopted to determine whether an unmarried partner of a birth parent should be able to seek custody and/or visitation in the event of dissolution of the adults' relationship. Thus, the co-parent would not be obliged as a mere third party to prove that the child's legal parent is "unfit" or that "exceptional circumstances" would justify invading her constitutional parental rights. In deciding whether to award visitation in this case, the court would be concerned with the best interest of the child once the *de facto* parent status of Michelle was recognized. The court rejected Brittany's argument that the legislature has the sole authority to make this change in Maryland law, pointing out that the existing legal framework is largely the result of judicial decision-making, not legislation.

"We overrule *Janice M.* because it is "clearly wrong" and has been undermined by the passage of time," wrote Judge Adkins, making clear that "*de facto* parents are distinct from other third parties. We hold that *de facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis." Judge Adkins described the best interest of the child as being "of transcendent importance," and concluded, "With this holding we fortify the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships. We do so carefully, adopting the multi-part test first articulated by the Wisconsin Supreme Court in *H.S.H.-K.* This test accommodates, we think, the

dissonance between what is in the best interest of a child and a parent's right to direct and govern the care, custody, and control of their children."

The court returned the case to the Circuit Court "for determination of whether, applying the *H.S.H.-K.* standards, Michelle should be considered a *de facto* parent, and conduct further proceedings consistent with this opinion." Thus, it will remain for the trial court both to determine Michelle's status and, if she is a *de facto* parent, whether it is in the child's best interest to order visitation. This determination will naturally have to take into account the fact that Brittany has not allowed contact with the child, now age 6, since July 2012, four years ago, so one anticipates that the trial court will hear expert testimony from both parties about the impact of reestablishing contact after this prolonged gap in the life of a very young child.

Interestingly, Michelle Conover now identifies as a transgender man and transitioned after the divorce, but the court indicated in a footnote that "she explained that she would refer to herself using female pronouns and her former name for consistency with the record and that her gender identity is not material to any legal issue in this appeal." The court agreed to this arrangement, and Michelle's current name appears nowhere in the opinion, but a press release by Free State Legal, whose deputy director and managing attorney Jer Welter represents Michelle, identifies the appellant as "Michael Conover." One wonders whether or how the trial court will take this transition into account in making the "best interest" determination. If Brittany (who is no longer using Conover as her surname) remains strongly opposed to visitation, it would not be surprising if she sought to make this an issue in the best interest determination by the Circuit Court.

More than forty-five organizations collaborated on seven amicus briefs that were filed in support of the appellant before the Court of Appeals, including LGBT rights groups, women's rights groups, and a large group of law professors specializing in family law. ■

Michigan Appeals Court Rejects Lesbian Co-Parent Standing in Visitation Suit

A panel of the Court of Appeals of Michigan unanimously ruled on July 5 that Michelle Lake, a lesbian co-parent, lacked standing to seek “parenting time” with the biological child of her former same-sex partner, Kerri Putnam. Reversing a decision to award parenting time by the Washtenaw Circuit Court in *Lake v. Putnam*, 2016 Mich. App. LEXIS 1297, 2016 WL 3606081, the appeals court held that the co-parent was a mere “third party” who did not come within the standing requirements of the state’s Child Custody Act. Judge Colleen A. O’Brien wrote the opinion for the panel, with Judge Douglas B. Shapiro filing a concurring opinion.

Judge Shapiro’s concurrence provides a more sympathetic version of the facts than O’Brien’s. “While the parties disagree as to details,” he wrote, “it is undisputed that they lived together for about a decade as a same-sex couple, that about five years into the relationship defendant bore a child by artificial insemination, that for several years the parties each acted as a parent to the child, and that they were both viewed as parents by the child. It is also undisputed that several years later, around September 2014, defendant ended the relationship, moved out with the child, and entered into a new relationship with a different woman. Defendant initially allowed plaintiff visitation with the child, but eventually she refused to do so. In June 2015, plaintiff filed this action seeking parenting time.” In addition, as Judge O’Brien pointed out in her opinion for the court, although the women could have married in other jurisdictions, they did not do so. Neither did the plaintiff adopt the child with the consent of the defendant, although that would have been possible when the women were living with the child for some time in Florida, where the state courts had invalidated a statutory ban on “homosexuals” adopting children. (At the time, Michigan courts did not allow co-parent adoptions, which was one of the issues in *DeBoer v. Snyder*, one of the cases that was ultimately consolidated in

Obergefell v. Hodges.) Thus, the plaintiff was not legally related to the child or to the child’s mother at any time.

The Family Court judge in Washtenaw County, Darlene O’Brien, overruled the defendant’s objection to the plaintiff’s standing and awarded parenting time to the plaintiff, but the court of appeals granted the defendant leave to appeal.

The question, then, was whether some legal doctrine recognized in Michigan was available for her to assert standing to seek visitation after the women’s relationship ended. Courts in other states are divided on this question. The plaintiff pinned her hopes on the doctrine of “equitable-parent” that is recognized in Michigan. As Judge O’Brien describes Michigan’s version

crucial, and dispositive, requirement for the equitable-parent doctrine to apply – *the child must be born in wedlock.*” She pointed out that Michigan courts have consistently refused to extend this doctrine to heterosexual partners who have a child while living in unmarried cohabitation where the man is not the biological father of the child. In other words, although the court did not describe it as such, this equitable-parent doctrine is similar to the “parental presumption” that other states apply to determine a husband’s parental status when his wife gives birth, without requiring proof in every case that the husband is the child’s biological father.

Responding to the plaintiff’s argument that refusing to extend this doctrine to give her standing discriminates

The plaintiff pinned her hopes on the doctrine of “equitable-parent.”

of the doctrine, “a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child’s natural father if three requirements are satisfied: (1) the husband and the child must mutually acknowledge their father-child relationship, or the child’s mother must have cooperated in the development of that father-child relationship prior to the time that the divorce proceedings commenced; (2) the husband must express a desire to have parental rights to the child; and (3) the husband must be willing to accept the responsibility of paying child support.” If these tests are met, the husband would be deemed an equitable parent with standing to seek custody and/or visitation as part of a divorce proceeding, the determining factor in that ruling being the best interest of the child. Plaintiff asserted that she met the tests. However, O’Brien pointed out, the plaintiff “ignores one

because of her sexual orientation, the court asserted that its failure to extend the doctrine to unmarried heterosexual couples refutes that argument. As to the argument that the two women should be treated as if they were married because Michigan and Florida’s refusal to allow same-sex marriage during the time they were living together violated their constitutional rights as proclaimed in *Obergefell v. Hodges*, the court pointed out that plaintiff did not introduce any evidence suggesting that the women would have married had that option been available to them. After all, at the time their child was born, they could have married in other states or Canada (just across the border from Michigan), although their home states did not then recognize out-of-state same-sex marriages. Another part of the *Obergefell* ruling, however, was that states were obligated to recognize such out-of-state marriages.

As an alternative argument, the plaintiff urged the court to follow the persuasive precedent of *Ramey v. Sutton*, 2015 OK 79, 362 P.3d 217 (2015), in which the Oklahoma Supreme Court applied a theory of “in loco parentis” to a similar set of facts to find that a lesbian co-parent should be afforded a hearing to show that it was in the best interest of the child for her to be recognized as a legal parent for purposes of custody and/or visitation. Judge O’Brien found that Oklahoma’s version of “in loco parentis,” which had never been embraced by Michigan courts, was distinguishable from Michigan’s equitable-parent doctrine, and “our Supreme Court has squarely rejected the argument that holding oneself out as a child’s parent, alone, is sufficient to be considered that child’s parent under the equitable-parent doctrine.”

The court acknowledged that “especially in light of the *Obergefell* decision” this sort of case is “complex”, but “we simply do not believe it is appropriate for courts to retroactively impose the legal ramifications of marriage onto unmarried couples several years after their relationship has ended,” which the court said was “beyond the role of the judiciary.”

“In sum,” concluded O’Brien, “while we acknowledge that the issues presented in child-custody disputes, including those involving same-sex couples, present challenges, we conclude that the equitable-parent doctrine does not extend to unmarried couples. This is true whether the couple involved is a heterosexual or a same-sex couple.” Thus, the trial court’s visitation order had to be reversed.

In his concurring opinion, Judge Shapiro asserted that the case could have turned out differently had the plaintiff presented some evidence that the women would have married before their child was born had the states where they resided (Michigan and, briefly, Florida) allowed it. He pointed out that last year the Court of Appeals had ruled in favor of parental standing in a case where a same-sex couple had married out-of-state before having their child, using the reasoning of *Obergefell* to confer, in effect, retroactive recognition of the marriage for purposes of determining

standing of the non-biological parent. See *Stankevich v. Milliron*, 313 Mich. App. 2233 (2015). “I would not limit our application of *Obergefell* to cases where the parties actually married in another jurisdiction,” he wrote. “The fact that marriage was available in some other jurisdiction did not remove the unconstitutional burden faced by same-sex couples residing in a state that barred same-sex marriage within its borders. The impediment was defined by state law, and the existence of that law to those who lived under it should not now be treated as constitutionally insignificant because other states treated the issue differently.”

Thus, in Shapiro’s view, “plaintiff is correct that *Obergefell* demands extension of the equitable-parent doctrine,” but only if the plaintiff can show that the women would have married had the state allowed it. “My colleagues are rightfully concerned about retroactively imposing marriage on a same-sex couple simply because one party now desires that we do so,” he continued. “However, that concern is fully addressed by a factual inquiry into the facts as they existed at the time the child was born or conceived. The question is whether the parties would have married before the child’s birth or conception but did not because of the unconstitutional laws preventing them from doing so.” He referred to the Oregon Court of Appeals decision *In re Madrone*, 350 P.3d 495 (2015), to support this point. “I would adopt this approach and hold that a party is entitled to seek equitable-parent rights arising out of a same-sex non-marital relationship where the evidence shows by a preponderance of the evidence that but for the ban on same-sex marriage in the parties’ state of residency, they would have married prior to the birth of the child.” But that is not this case. “While the affidavits presented to the trial court on behalf of the plaintiff state that the parties were in a committed relationship and that while in that relationship they raised the child together as co-parents, none of the affidavits, including plaintiff’s, state or allow for an inference that but for the then-existing unconstitutional barriers to same-sex marriage the parties would have married.” Shapiro concluded

that if the plaintiff had presented such evidence, the correct move for the court of appeals would be to remand the case for a hearing by the trial court to determine whether such a thwarted intent to marry could be proven by a preponderance of the evidence.

This kind of opinion can be very frustrating to read, because it focuses on legality and avoids human issues that should, logically, weigh heavily in a family relationship dispute. The keystone of custody and visitation determinations is supposed to be what is in the best interest of the child. Asserting technical standing requirements prevents the court from reaching this issue. The trial judge in this case, having accepted the plaintiff’s argument that she could assert the rights of an equitable-parent, did get to that ultimate issue and concluded she should have parenting time with the child. The court of appeals’ insistence on the technical rules of standing override that finding, resulting in a decision that seemingly sacrifices the best interest of the child, which is contrary to the usual policy goal of family law.

The plaintiff also tried to argue that depriving the child of contact with one of her parents violates the child’s own constitutional rights, but the court quickly dismissed this argument without any serious consideration, blithely asserting, “Generally, persons do not have standing to assert constitutional or statutory rights on behalf of another person. That is precisely what plaintiff is trying to do, i.e., assert the child’s constitutional rights. Accordingly, we reject this argument as well.” One wonders whether the trial judge appointed a *guardian ad litem* to represent the child’s interest, as such a party could advance this constitutional argument on the child’s behalf. Perhaps Michigan attorneys will respond to this ruling by adopting a different litigation strategy to require the court to confront the issue of the child’s best interest free of the standing barrier. In the meantime, of course, the plaintiff could seek review of this decision in the Michigan Supreme Court.

The plaintiff is represented by Jay Kaplan of the American Civil Liberties Union of Michigan. Anne Argiroff represents the defendant. ■

Massachusetts Gay Man's Workplace Discrimination Case Survives Summary Judgment

The U.S. District Court for the District of Massachusetts has granted in part and denied in part a summary judgment motion made by Shiver Jobs Corps Center and their employee Jamie Wilson in a sexual orientation discrimination case brought against them by a former employee in *Griffin v. Adams & Assocs. Of Nevada*, 2016 U.S. Dist. LEXIS 83760, 2016 WL 3580613 (D. Mass., June 28, 2016).

William Griffin, an overnight center shift manager at Shriver's business in Devens, Massachusetts, alleged that starting in February 2012, when Wilson was made his supervisor, Wilson began to make discriminatory statements at or regarding him. In April 2012, Griffin wrote to Human Resources and an investigation into the claims was made. Months later, Griffin received a disciplinary letter for not being in the area to which he was assigned and shortly thereafter he wrote a second letter to Human Resources raising sexual orientation discrimination issues. Following an investigation that resulted in no findings of discriminatory conduct, Wilson allegedly became very upset and stated to Griffin that she was "protected" and would see that "everything that needs to happen to [him] happens to [him]" and later made graphic comments to Griffin regarding his conduct "in the bathroom and with other gay men." Upon returning to work after several months on leave, Griffin found Wilson was no longer his supervisor but now a peer, and found that a photo of him and his boyfriend was damaged and in the trash. Griffin's performance was subsequently found to be below acceptable standards and he was placed in a corrective action plan. One evening, Griffin was suspected of being intoxicated at work and it is disputed whether coworkers later found Griffin at a bar consuming an alcoholic beverage. Griffin was shortly thereafter terminated.

Griffin sued in state court asserting claims under Massachusetts' Law against Discrimination and 42 U.S.C. Section 1983. Defendants removed the case to

federal court and secured dismissal of the federal claim. Defendants moved for summary judgment on all of Griffin's state claims for unlawful hostile work environment and retaliation.

District Court Judge Denise Casper ruled on the motion for summary judgment on June 28. A preliminary issue was whether Griffin's claims were timely pursuant to Massachusetts law requiring a claim be brought within 300 days of discriminatory conduct. Judge Casper ruled that Griffin had failed to link earlier discriminatory acts under the "continuing violation doctrine" because he failed to establish that no reasonable person would have refrained from filing a complaint during the limitations period when Griffin had written a fifteen page letter to management outlining the

Griffin and defendants disagreed as to whether there was a causal connection between his protected conduct and the reason for his termination. Judge Casper noted that while the nine months between Griffin's letter and his termination did tend to undermine any causal connection, Griffin also relied on "alleged discriminatory conduct he was subjected to after his complaints and the allegedly unjustified citations for poor performance." Noting that on the evening Griffin was allegedly intoxicated at work defendants did not send Griffin to the hospital for a drug and/or alcohol test as was company policy, Judge Casper relied on a Massachusetts Supreme Court case ruling that "failure to follow established procedures or criteria . . . may support a reasonable

Griffin alleged Wilson made discriminatory statements at or regarding him.

discrimination he believed he had faced, and therefore he could not have had "good reason to believe" that the issues he encountered would cease.

With respect to Griffin's hostile work environment claim, Judge Casper noted that conduct outside the 300 days, while not actionable, could still be considered for background on the overall situation. Judge Casper found that since the alleged discriminatory acts against Griffin were more than "garden-variety expletives or annoyances," a reasonable fact-finder could find they were motivated because of gender stereotypes or Griffin's sexual orientation. She further ruled that the conduct may be found to be sufficiently severe or pervasive and that therefore triable issues of fact existed.

With respect to Griffin's retaliation claim, there was no question that Griffin engaged in protected conduct by writing a letter alleging the discriminatory conduct, and that he was eventually terminated; however,

inference of intentional discrimination." She further noted that while those who made the final determination to terminate Griffin did not know of his prior complaints, the decision was made on the recommendation of a supervisor to whom he had made his earliest complaint, and that fact coupled with the failure to have him take an alcohol test as well as Wilson's threats following the discrimination investigation were "sufficient to raise a reasonable inference of pretext." Accordingly, Judge Casper denied summary judgment against Griffin.

Having found that conduct prior to September 2012 was not actionable, Judge Casper granted defendants' summary judgment with respect to "liability regarding discriminatory acts prior to September 22, 2012," and denied defendants' motions for summary judgment on Griffin's hostile work environment and retaliation claims.

– Bryan Johnson-Xenitelis

Federal Court Agrees to Let VAWA Funding in North Carolina to Continue During Pendency of H.B. 2 Lawsuit

When the Justice Department filed suit against North Carolina for a declaration that H.B.2's bathroom provision violates the Violence Against Women Act (VAWA), it put into play a provision of that statute, 42 U.S.C. sec. 13925(b)(13) (c), which provides that upon the filing of a civil action "alleging a pattern or practice of discriminatory conduct on the basis of sex in any program or activity of a State government or unit of local government which receives funds made available under [VAWA], and the conduct allegedly violates the provisions of [VAWA] and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Office of Justice Programs shall cause to have suspended further payment of any funds under this chapter to that specific program or activity alleged by the Attorney General to be in violation of the provisions of [VAWA] until such time as the court orders resumption of payment." In other words, federal funding for a variety of rape prevention and domestic violence programs in North Carolina that depend on federal funds under VAWA would have to be suspended 45 days after May 10.

For a while nobody was really paying attention to this, but suddenly somebody woke up to the reality that before the end of June the federal money would stop flowing to these programs unless the court issued a preliminary injunction to keep the money flowing. *United States v. State of North Carolina*, 2016 WL 3561726 (M.D.N.C., June 23, 2016). The State and the Justice Department quickly reached an agreement to ask the federal court to issue such a preliminary injunction, which District Judge Thomas Schroeder did on June 23.

However, Judge Schroeder agonized through a rather lengthy opinion trying

to explain how such an injunction could be issued when the state failed to show that it was likely to prevail on the merits of the underlying issue: whether the bathroom provisions of H.B. 2 violate the VAWA, as alleged by the Justice Department. Alone among the statutes cited by DOJ in its complaint, VAWA actually explicitly defines its ban on discrimination "because of sex" to include discrimination because of gender identity; on top of that, of course, the 4th Circuit has already ruled in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (April 19, 2016), rehearing en banc denied (May 31), that the ban on sex discrimination in Title IX (and by analogy Title VII), also cited in the complaint, includes a ban on gender identity discrimination.

The state is arguing, without much credibility, that the bathroom provision does not discriminate against transgender people, "merely" requiring them to use single-gender facilities or facilities consistent with their biological sex as specified on their birth certificate when they need a bathroom. In a summary judgment motion subsequently filed on July 5, DOJ blasted that contention out of the water, but, of course, that motion hadn't been filed yet when Judge Schroeder had to decide before a statutory deadline for suspending funding that would hit on June 23.

Ultimately, he concluded that even though preliminary injunctive relief normally depends on a strong showing that the defendant is likely to prevail on the merits, there is no controlling 4th Circuit precedent that would prevent him from issuing the jointly-requested injunction in light of the practical consequences of cutting off federal funding for these important programs for the duration of the litigation. While pointing out that lack of a showing of likelihood of success "is normally fatal to any request for a preliminary injunction," this was not the usual

case. "With the consent of all parties, however," he wrote, "courts sometimes enter preliminary injunctions without any findings regarding the likelihood of success on the merits . . . The Fourth Circuit has acknowledged this practice without comment."

In stating his decision to grant the injunction, he wrote: "The court does so particularly mindful of how the entrenched positions of the parties would otherwise likely inflict substantial harm on innocent third parties if VAWA funding were to be suspended. As the parties acknowledge, the continued operation of rape crisis centers and the other VAWA-funded programs unquestionably serves the public interest. The court is also cognizant, however, that if the allegations of the complaint are correct, maintenance of the status quo will continue to inflict harm on transgender individuals under enforcement of the law." He cautioned that by agreeing to allow funding for these programs to continue, neither party was making any representation "as to any other party's likelihood of success on the merits. As a result, the entry of this preliminary injunction shall not prejudice the parties' positions in this case or further findings by the court."

Presumably, if Judge Schroeder were to grant the DOJ's motion for preliminary injunction that was filed on July 5, the State would have to cease enforcing H.B.2's bathroom provision while the litigation continued, and thus the flow of federal money would no longer be endangered. Since the *G.G.* ruling by the 4th Circuit intimated, if not actually holding, that schools receiving federal funds from the Education Department might have to let transgender students access bathrooms consistent with their gender identity, chances do not look good for the State to succeed in defeating DOJ's motion for preliminary injunction. ■

Federal Magistrate Orders Jail Officials' Personal E-Mail Searched for Evidence of Transphobic Bias in Medical Case

To prove an Eighth Amendment claim of denial of health care, a prisoner must show both a serious medical need and “deliberate indifference” to that need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1977). The “deliberate indifference” element includes a subjective inquiry into the correctional defendants’ state of mind, *Farmer v. Brennan*, 522 U.S. 825, 837 (1994), on the shoals of which many inmate plaintiffs founder. But only rarely does a court allow direct inquiry into a health care providers’ state of mind.

In *Sunderland v. Suffolk County*, 2016 U.S. Dist. LEXIS 77212 (E.D.N.Y., June 14, 2016), U.S. Magistrate Judge A. Kathleen Tomlinson ordered Suffolk County, New York, jail officials to search their personal computers for evidence of what they were thinking when they denied hormonal treatment to transgender inmate Jeremy Sunderland. While the opinion is light on medical background, it recites that jail officials failed to continue pre-incarceration hormone treatment (or any other transgender treatment) for Sunderland during 16 months she was at the jail, because they deemed it “non-essential” or “frivolous.” The complaint includes a claim against Suffolk County under *Monell v. Dep’t of Social Servs. of City of N.Y.*, 436 U.S. 658 (1978), alleging a failure in training and supervision of providers of care for transgender patients and an attitude of “let the next correctional facility” deal with it.

Judge Tomlinson granted a motion to compel discovery of the providers’ computerized business and personal e-mails and hard drive information according to a list of agreed search terms that included gender dysphoria, gender identity, transgender status, gay, lesbian, bisexual, homosexual and sexual preference, as well as more colloquial words or phrases, such as “tranny, trannie, trannies, she-male, transvestite, queer, cross-dress . . . , hermaphrodite, he-she, [and] she-he.”

She allowed a “look-back” period of five years. “The Court concludes that Plaintiff has the right to pursue emails and other correspondence the Individual Defendants may have created/saved on their personal computers or sent from their personal email accounts which reference Plaintiff or discuss issues related to gender dysphoria. This information falls within the broad scope of relevant discovery under Federal Rule of Civil Procedure 26(b) in light of Plaintiff’s allegations against the Individual Defendants and her *Monell* claim against the County.”

The decision surveys several federal decisions from the Second Circuit and from District Courts

Citing *Greene v. Netsmart Technologies, Inc.*, 2011 U.S. Dist. LEXIS 59710, 2011 WL 2225004, at *8 (E.D.N.Y. Feb. 28, 2011), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 59730, 2011 WL 2193399 (E.D.N.Y. June 2, 2011), Judge Tomlinson observed: “[C]ounsel is responsible for coordinating her client’s discovery efforts[,] both in terms of the client’s duty to locate relevant information and the client’s duty to preserve and timely produce that information.” The Court required individual affidavits if no responsive documents were found and *in camera* inspection for any documents deemed “private,” accompanied by a “cover

Judge Tomlinson did not require production of the computers themselves, nor did she order a “forensic inspection.”

in New York allowing discovery of personal computer information “which may contain information going to bias or motivation” and “may support Plaintiff’s claims of deliberate indifference” – noting in particular the Eighth Amendment state of mind cases *Chance v. Armstrong*, 143 F.3d 698, 704 (2d Cir. 1998); and *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996).

Judge Tomlinson did not require production of the computers themselves, nor did she order a “forensic inspection”; but she reminded counsel that they were “obliged to supervise and oversee the search for and production of electronically stored information and documents from the Individual Defendants’ computers and email accounts. Simply handing over the search terms to the Individual Defendants to run on their own is not sufficient.”

letter setting forth the asserted privilege for each document.”

Such broad judicial leave to explore bias is uncommon in prison medical care cases in this writer’s experience. Perhaps the court was persuaded in part by the allegations of such recent and cavalier handling of a transgender patient in a major jail. The case is useful for those contemplating discovery of defendants’ LGBT bias in civil rights cases generally.

Sunderland is represented by David Bradley Shanies and by Hughes Hubbard & Reed, LLP, New York City. – *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 Rules New York Medicaid Must Cover Medically Necessary Cosmetic Surgery for Gender Transitions

U.S. District Judge Jed Rakoff ruled on pending pre-trial motions in *Cruz v. Zucker*, 2016 U.S. Dist. LEXIS 87072, 2016 WL 3660763 (S.D.N.Y., July 5, 2016), a lawsuit brought by a team of public interest and pro bono lawyers challenging the way New York's Medicaid program provides or withholds coverage for gender transition medications and procedures. Most significantly, he granted summary judgment to the plaintiffs on their claim that a Medicaid regulation's categorical ban on "cosmetic surgery" in connection with gender transition violates the requirement under Medicaid to fund medically necessary treatment.

The named plaintiffs are four transgender individuals suing "on behalf of themselves and all others similarly situated." The lawsuit targets both the exclusion of coverage for gender reassignment surgery and hormone therapy for individuals under age 18 and the regulation that imposes, according to Judge Rakoff's interpretation, "a blanket ban on coverage of cosmetic procedures related to gender dysphoria," including procedures that plaintiff contends are "medically necessary" as part of a gender transition process.

Judge Rakoff had previously ruled in favor of class certification last year in *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015). The named defendant, Howard Zucker, the Commissioner of the New York State Department of Health (DOH), which administers the Medicaid program, asked the court to reconsider its prior decision against dismissal of the cosmetic surgery claim, contending that the program does not actually have a "blanket ban" because it has occasionally approved coverage for particular procedures on a case-by-case basis, but Judge Rakoff concluded that regardless of whatever steps the department was taking to make exceptions, the written regulation is, as he previously construed it, a blanket ban, and denied that motion, because the overriding federal Medicaid statute requires coverage of "medically

necessary" treatments for Medicaid-eligible individuals.

The defendant also sought decertification of the plaintiff class, arguing that individual issues presented by each transgender Medicaid participant predominate over common issues, making one big class inappropriate. The defendant argued that none of the named plaintiffs could represent the full range of issues presented by everybody in the proposed class. Rakoff denied this motion as well, finding that it would be appropriate to create "subclasses" to deal with different aspects of the case, but that there were enough common questions of law among all class members to justify retaining the full class certification.

Both parties filed motions for summary judgment, which are supposed to be granted if there are no material factual issues requiring trial and it is appropriate to rule as a matter of law in favor of the moving party. The defendant's motion for summary judgment argued that the plaintiffs lack standing to challenge the law. While Judge Rakoff agreed that some of the named class plaintiffs lacked standing because they had actually obtained coverage for requested services, and granted summary judgment as to them, he found that this was not true as to all of them or the entire class, so refused to grant summary judgment on the ultimate issues in the case.

As to the merits, Rakoff granted the plaintiffs' motion for summary judgment on the claim that a blanket exclusion of coverage for cosmetic surgery regardless of medical necessity violates the Medicaid statute. For some, this will be the big news coming out of this decision, since the categorical ban in the regulation presented a substantial barrier to individuals seeking coverage of all the procedures they and their doctors deemed necessary to a full, successful transition.

However, as to the issue of providing therapy for minors, Judge Rakoff concluded that there are significant material factual disputes that would

preclude a complete summary judgment, although partial summary judgment in favor of defendants was appropriate. This claim naturally fell into two distinct categories: hormone therapy and surgical procedures. The judge ordered that the case proceed to trial on contested factual issues. Significantly, he found that some of the materials upon which the defendant was relying for its position should be excluded as hearsay. As to what remains for trial, he wrote: "This case will proceed to trial to determine (1) what treatments are medically necessary for individuals under 18 with gender dysphoria and (2) to what extent DOH has consistently followed a bona fide policy of limiting coverage of drug uses to those listed in the Medicaid Compendia [an official publication of federally-approved uses for drugs] in the context of treatments for gender dysphoria." If hormone therapy and/or surgery are determined to be medically necessary for at least some members of the under-18 class, then a blanket rule against them violates the statute. The second issue is important because the governing Medicaid statute does not generally require coverage for the administration of drugs that are not in the Medicaid Compendia for the uses described therein (which greatly oversimplifies the disputed issue), and there is a lively dispute whether particular drugs should or should not be covered in the context of gender dysphoria therapy.

The bottom line, then, is that DOH cannot impose a blanket exclusion for what it labels "cosmetic treatments" in connection with gender dysphoria for adults, and yet to be determined is the extent to which DOH can deny coverage for transition-related treatments for minors.

Plaintiffs are represented by attorneys from the Legal Aid Society and the Sylvia Rivera Law Project, as well as attorneys working pro bono from various private firms and some solo practitioners. The New York Attorney General's Office represents the Department of Health. ■

Italian Supreme Court Allows Stepparent Adoption for Same-Sex Couples

On June 22, 2016 the Italian Supreme Court of Cassation (*Corte Suprema di Cassazione*) rendered an important judgment regarding the possibility, for a person in a same-sex relationship, to adopt the child of her partner. The ruling's importance lies in the fact that it addresses a matter – stepparent adoption in the context of a same-sex couples – that was expressly excluded from the scope of the recent civil union statute approved by the Parliament (*Act on Same-Sex Civil Unions and De Facto Partnerships* (Law No. 71/2016, Official Journal No. 118 of May 21, 2016, commented upon in 2016 LGBT Law Notes 226).

The petition to the Supreme Court was introduced by the public prosecutor (*Procuratore Generale della Repubblica*) against a co-mother who had sought to adopt the child of her same-sex partner. In the first instance, the Juvenile Tribunal of Rome (No. 299/14 of July 30, 2014, commented upon in 2014 *Lesbian/Gay Law Notes* 425) granted the petition, arguing that under the current law, sexual orientation is not a factor that could prevent such an adoption, and that the applicant was simply seeking to consolidate, from a legal standpoint, a situation that already existed as a matter of fact. Moreover, the Tribunal found that the child had developed a genuine bond with the applicant, so that the adoption could in no way harm the child. Upon appeal presented by the juvenile public prosecutor, the Court of Appeals of Rome affirmed the ruling (*Procuratore della Repubblica presso il Tribunale dei Minori v. X*, Dec. 23, 2015), concluding that stepparent adoption was a viable tool for same-sex couples to create a legal relationship between the biological parent's same-sex partner and her child in absence of any statutory recognition.

The application filed by the public prosecutor with the Supreme Court concerned two arguments, plus a third one that was added in the course of the hearing. The prosecutor claimed, in particular, that there was a conflict of

interest between the second mother and the child, as the former was attempting to create a relationship of a couple of the same sex that was by definition against the best interest of the latter. Second, she argued that the Court of Appeals had erred in granting the stepparent adoption, as the law requires child abandonment as a legal precondition for all kinds of adoption. Further, because of its ethical implications, the prosecutor asked the petition to be adjudicated *en banc* (i.e., before the entire Supreme Court, the so-called “*Sezioni Unite*”, as opposed to a single panel or “*Sezione*”).

of Rome has already recognized such an adoption (Juv. Trib. Rome, Dec. 23, 2015). Third, the Court excluded that a conflict of interest could exist in the case, as the respondent was simply seeking to consolidate a relationship that already existed as a matter of fact. In this regard, the Court clarified that any evaluation of such a conflict of interest is a matter for lower courts to decide on the merits, not the Supreme Court. Finally, it rejected the claim that stepparent adoption requires the child's abandonment as a precondition for adoption. In fact, the Law on Adoption

The Court of Appeals of Rome concluded that stepparent adoption was a viable tool for same-sex couples to create a legal relationship between the biological parent's same-sex partner and her child in absence of any statutory recognition.

The Supreme Court rejected all these claims and elaborated some principles to direct lower courts presented with petitions for same-sex stepchild adoption. First, the Court stated that hearing a case *en banc* is a purely discretionary decision which the Court is therefore not obliged to take depending on the case's alleged ethical implications. “The Court of Cassation,” the Court said, “has already decided through single panels on questions related to socially or ethically significant matters.” Second, it stressed that the case at stake did not concern surrogacy, because the biological mother (the respondent's partner) had recognized the child at her birth. This statement would exclude that the same plain reasoning could be applied to a couple of men seeking stepparent adoption of a child born from a surrogacy abroad, even if the Tribunal

of 1983 (Law No. 184 of May 4, 1983, Right of the Minor to a Family) provides for a residual mechanism, the so-called “adoption in particular cases”, which requires only that pre-adoption foster care not be feasible. For same-sex couples, foster care is by definition not feasible because the child already has a parent – the biological one.

At the end of the ruling the Supreme Court stated very clearly that, in the context of adoption in particular cases, courts may not consider the parent(s)'s sexual orientation to be relevant, either directly or indirectly. The judiciary made a point that the legislature hasn't even dared to take with the new law. – *Matteo M. Winkler*

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Massachusetts Appeals Court Vacates Statutory Rape Conviction Because of Improper Admission of Gay Porn in Evidence

The Appeals Court of Massachusetts ruled in *Commonwealth v. Christie*, 2016 WL 3581839, 2016 Mass. App. LEXIS 79 (July 6, 2016), that the conviction of a man on charges of statutory rape, indecent assault and battery on a boy had to be reversed because of improper evidence based on the defendant's possession of videos depicting "generic same-sex sex" involving adults. At the same time, the court affirmed the defendant's conviction on a charge of "dissemination to a minor of matter harmful to minors" for showing his 12-year-old male victim a pornographic video.

defendant "inserted the sex toy into Daniel's anus, stopping when Daniel said he was 'uncomfortable.'" Daniel also testified that defendant showed him some gay pornography depicting men having intercourse.

The court described the defendant as "openly gay." Referring to rulings at trial on admissibility of the pornography evidence, "the judge concluded correctly that evidence of a man's homosexuality is irrelevant to whether he has a sexual interest in children," wrote Judge Peter J. Rubin, "but in part in reliance on our decision in *Commonwealth v. Wallace*, 70 Mass. App. Ct. 757 (2007), he concluded that

that "these descriptions were not introduced as impermissible propensity evidence" and that the judge had carefully instructed the jury that "the challenged evidence could not be used to demonstrate the defendant's propensity to engage in such conduct in order to prove that he committed the charged acts in this case," nonetheless it was improper for the judge to tell the jury that they could rely on these descriptions of the videotapes as evidence of "sexual interest and state of mind . . . as it relates to [Daniel] and as it relates to the manner and means by which the Defendant allegedly accomplished the alleged sexual assault." While the *Wallace* case had allowed admission of heterosexual pornography, the court found the circumstances distinguishable in light of the contentions of the parties and the overall state of the evidence in that case. "As the judge in this case recognized, however," wrote Judge Rubin, "and as this court has held, evidence of an adult's homosexuality is irrelevant to sexual interest in children." Rubin cited on this point the appeals court's ruling in 2009 setting aside the conviction of Bernard Baran, a young man who was convicted of molesting children at the day care center where he work based on subsequently-discredited "rehearsed" testimony by young children and by the fact that he was openly gay. (Baran was discharged from state prison after a lengthy and debilitating incarceration and died prematurely a few years later.)

Once again citing the *Baran* ruling (74 Mass. App. Ct. 256), Rubin wrote, "the myth that homosexual men have an interest in sex with underage children has been discredited. The use of evidence of an adult's homosexuality to demonstrate a sexual interest in underage boys (or, indeed, underage children of either gender) is thus impermissible. Given this, we agree with the defendant that evidence of his interest in viewing depictions of adult males engaged in generic acts

"As the judge in this case recognized, however," wrote Judge Rubin, "and as this court has held, evidence of an adult's homosexuality is irrelevant to sexual interest in children."

In 2005, wrote Judge Rubin, Daniel "disclosed to his mother and the police a single alleged act of the defendant performing oral sex on him, and on that basis the defendant was charged with one count of statutory rape. On the eve of trial, in 2007, Daniel disclosed to the district attorney and the police all the other alleged sex acts." Police obtained a search warrant for the defendant's residence, and turned up DVDs and videotapes depicting both heterosexual and homosexual pornography depicting adults. At trial, Daniel testified that during the summer of 2005, when he was 12, he and his mother were living with the defendant, who twice performed oral sex on him and got him to penetrate the defendant anally. He also testified about waiting in the car while defendant purchased a "sex toy" (i.e., a dildo) and some pornographic DVDs, and that the

the same-sex pornography was relevant to the defendant's sexual interest in Daniel and to the manner and means by which the charged rapes and sexual assault were allegedly committed, that the risk of unfair prejudice from this evidence did not substantially outweigh its probative value, and that with a proper limiting instruction the videotapes could be admitted in evidence. The judge excluded the heterosexual pornography." As an attempt to lessen prejudice to the defendant, the trial judge refused to have the gay pornography exhibited to the jury, instead allowing the prosecution to introduce testimony describing its content.

The appeals court disagreed with the trial judge as to admissibility of the descriptions of the gay videos. While agreeing with the prosecution

of same-sex sex, absent any additional factors like the ones present in *Wallace*, is irrelevant to whether he has an interest in sexual contact with an underage boy. The impropriety of admitting this evidence to show the defendant's state of mind and sexual interest with respect to boys becomes clear if one imagines that the evidence was about heterosexual pornography and the victim were a girl. No court properly could find a defendant's mere possession of adult heterosexual pornography relevant to proving his sexual interest in a female child."

"The ingrained stereotypes and mistaken views still held by some individuals render evidence such as that introduced here unfairly prejudicial. Even though there was other evidence that the defendant here, who never disputed his sexual orientation, was gay, and that he owned pornography, the error in the admission of the explicit descriptions of his interest in same-sex sex, exacerbated by the instruction on its permissible use, was prejudicial." The court concluded that reversal was required on all counts except dissemination, "with respect to which the jury were expressly informed they could not use this evidence."

Since retrial was likely, the court addressed other flaws in the trial court's instructions. The jury had been told they could take the descriptions into account "as it relates to the manner and means by which the defendant allegedly accomplished the alleged sexual assaults." Judge Rubin rejected the prosecution's argument that the acts depicted in the videos were "unique enough" to "show that the defendant had an interest in engaging in those acts, whether with an adult or a child." This was "generic" gay porn, the judge pointed out, "the ordinary means of men having same-sex sex. It follows from our holding above that, standing alone, an interest in viewing lawfully possessed depictions of adult men having gay sex is not relevant to the question whether a male adult has an interest in engaging in sex acts of that kind with underage boys, just as, standing along, an interest in viewing

lawfully possessed depictions of adults engaged in heterosexual sex cannot support a conclusion that a male adult has an interest in engaging in sex acts of the same kind with underage girls."

Judge Rubin also commented that because it was "undisputed" that the videos seized by the police in 2007 were not shown to Daniel by the defendant in 2005, they could not be admitted in support of a theory that the defendant showed him the videos to "groom him" into accepting the idea of having sex with the defendant. "Any such corroborating value of the defendant's possession of these videotapes of generic acts of adult same-sex sex – at a different residence, two years after the crimes are alleged to have been committed – is too attenuated to overcome the risk of undue prejudice from this evidence," he wrote. "These depictions thus may not be admitted for such a corroborative purpose under the applicable standard."

One of the videos seized by the police showed the use of a dildo, and one of the counts of statutory rape "involves an allegation of the use of such a device in a similar manner on Daniel," wrote Rubin. However, he wrote, the prosecutor "has not put any evidence in the record before us to show that use of a sex toy is a sufficiently distinctive sexual act that it could be admitted to show the defendant's specific interest in this practice . . . There is nothing in the record to support a conclusion that this conduct is so unusual that the probative value of evidence that the defendant possessed a visual depiction of it is more probative of his interest in engaging in it than unfairly prejudicial. Nor is there evidence that interest in the use of such a sex toy with an adult would be probative of an individual's interest in using one with an underage child with whom he was unlawfully having sex."

The court disclaimed expressing any view about the defendant's guilt or innocence, but held that the statutory rape convictions must be reversed and the verdicts set aside, although, as noted above, the conviction on the dissemination charge was affirmed. Alexei Tymoczko represented the defendant on this appeal. ■



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ALABAMA – The Alabama Court of the Judiciary has acceded to a request by suspended Alabama Chief Justice Roy Moore to hold a hearing on his motion to dismiss ethical charges that were levied against him by the Alabama Judicial Inquiry Commission in response to complaints that he had violated judicial ethics by advising probate judges not to issue marriage licenses to same-sex couples after the U.S. Supreme Court had ruled in *Obergefell* that same-sex couples have a constitutional right to marry. Moore contends that the directive he issued was merely informing the probate judges of his opinion about the situation; he consistently took the view that the state courts, including the probate judges, were not bound by federal court rulings when it came to interpreting and enforcing the provisions of the state constitution, including its ban on same-sex marriage. The hearing will take place on August 8. Meanwhile, Moore has filed a federal lawsuit, contesting the constitutionality of Alabama’s judicial disciplinary system, under which he was automatically suspended when the JIC asserted the charge against him. He is represented in the federal lawsuit by Alliance Defense Freedom, the right-wing anti-gay litigation group that is also representing another member of the Alabama Supreme Court, Tom Parker, who has been notified that the JIC is investigating him for public comments he made about same-sex marriage. Oral arguments on JIC’s motion to dismiss the federal case, pending before U.S. District Judge W. Harold Albritton III, will be held on August 4. Moore was previously removed as Chief Justice in 2003 after he defied a federal court order to remove a Ten Commandments monument from the state supreme court building, but he was subsequently re-elected by the people of Alabama, who evidently prize spunk over judgment in their Supreme Court justices. *Huntsville Times*, June 29. * * * The *Associated Press* reported on July 16

that the Judicial Inquiry Commission had filed papers with the Court of Judiciary arguing that Moore should be removed as Chief Justice in order to “preserve the integrity, independence, impartiality of Alabama’s judiciary.” The Commission asserted that Moore had “disrespected the judiciary” by instructing probate judges in January 2016 that a state injunction against same-sex marriage remained in “full force and effect” even though the U.S. Supreme Court ruled in June 2015 that same-sex couples have a constitutional right to marry and a U.S. District Court had issued an order to probate judges banning enforcement of the state’s same-sex marriage ban. * * * The *Associated Press* (June 17) reported that Alabama Supreme Court Justice Tom Parker filed a lawsuit in federal district court, claiming that the Judicial Inquiry Commission is violated the First Amendment rights of Alabama judges to speak out against the U.S. Supreme Court’s marriage equality decision. The Southern Poverty Law Center filed a complaint before the Commission against Parker after he spoke out against the *Obergefell* decision on a conservative radio talk show in 2015. He is represented by Mat Staver of Liberty Counsel, who asserts that Parker “has a constitutional right to speak out on the case so long as he is not presently presiding over it.” Parker’s lawsuit challenges the “automatic suspension” provision, under which judges are suspended from active duty if the Commission decides to investigate charges against them.

ALABAMA – Is the Alabama marriage equality case finally at an end? On June 7, Senior U.S. District Judge Callie V. S. Granade denied a motion by Judge Don Davis to withdraw as defendant class representative and a motion by Attorney General Luther Strange to dismiss the case as moot; instead, she granted plaintiffs’ motion for permanent

injunction and final judgment in *Strawser v. Strange*, 2016 WL 3199523 (S.D. Alabama). She found no evidence in the record to justify reconsidering her prior decision to designate Davis as the defendant class representative. Responding to the mootness argument, in which Attorney General Strange conceded that *Obergefell v. Hodges* is binding on Alabama officials – a point not yet conceded by suspended Alabama Supreme Court Justice Roy Moore, who maintains that *Obergefell* is binding only on the states of the 6th Circuit – she found persuasive the plaintiffs’ argument that “none of the Defendants’ assurances provide Plaintiffs or the members of the Plaintiff Class with a formal, enforceable order should the Attorney General (or a future Attorney General) or other Defendants violate this Court’s injunction or fail to fully recognize marriages validly entered into in Alabama or elsewhere. Current or future state and county officials may disagree about *Obergefell*’s applicability to the challenged Alabama laws or otherwise resist the decision. This Court agrees that the need for a permanent injunction is clear.” She quoted from a similar ruling by the district court in Florida in *Brenner v. Scott*, stating “a government ordinarily cannot establish mootness just by promising to sin no more.” “To demonstrate the case is moot,” she wrote, “Defendants must show that both of the following conditions are satisfied: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” Those conditions have not been met in Alabama, she found. “Given the actions of Alabama state and local officials during this litigation, both before and after the Supreme Court decided *Obergefell*, it cannot be said with assurance that there is no reasonable expectation that Alabama’s unconstitutional marriage laws will not again be enforced.

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Although the Attorney General professes that he will continue to abide by the decision in *Obergefell*, like the defendant in *Brenner v. Scott*, “there has been nothing voluntary about the defendants’ change of tack.” The Defendants defended this case with vigor from the outset and the challenged statutes remain on the books.” She pointed out the technicality that these plaintiffs cannot enforce the injunction that she issued in the companion case of *Searcy v. Strange*, which is the injunction against the Attorney General, and, “It is also apparent that certain Alabama state courts do not view this Court’s ruling in *Searcy* as binding precedent, as demonstrated by the writ of mandamus issued by the Alabama Supreme Court on March 3, 2015, requiring probate judges to discontinue the issuance of marriage licenses to same-sex couples.” So there, Roy Moore, your antics have helped to prevent Strange from obtaining a mootness dismissal! She also pointed out that although Moore is currently suspended, other members of the Alabama Supreme Court in concurring opinions “also expressed disagreement with *Obergefell*” and implied in their opinions that their court’s decision finding the marriage laws constitutional was still in effect. As long as that mandamus order has not been rescinded, there is no certainty that Alabama officials will behave appropriately. Thus, Judge Granade issued a permanent injunction against enforcement of the unconstitutional statutes.

ARKANSAS – Reuters reported July 5 that the Equal Employment Opportunity Commission (EEOC) filed a lawsuit accusing a McDonald’s restaurant in Bentonville, Arkansas, of firing a worker because he is HIV-positive. *EEOC v. Mathews Management Co.*, No. 16-05166 (W.D. Ark., filed July 1, 2016). The complaint alleges violations of the Americans with Disabilities Act,

both in discharging the worker and in requiring employees to report their use of prescription medications which would reveal conditions deemed to be disabilities. The John Doe worker was hired in November 2014 to perform janitorial duties, operate a cash register, work the drive-thru window, and open and close the restaurant. Doe was not hired as a food handler.

ARKANSAS – In *Huff v. Regis Corporation*, 2016 WL 3453471, 2016 U.S. Dist. LEXIS 79925 (W.D. Ark., June 20, 2016), the plaintiff suffered dismissal of his Title VII and ADEA complaint because he waited too long after receiving a right-to-sue letter from the Equal Employment Opportunity Commission before filing his complaint in federal court. Robert Huff was employed as a stylist at a hair salon in Fayetteville from 1992 until he was discharged on January 13, 2015. In his EEOC charge he related a tale of ridicule and harassment focused on his sexual orientation and age that would possibly be sufficient to meet federal pleading requirements. However, the EEOC dismissed his charge and issued a right to sue letter on September 23, 2015. Huff then waiting until March 23, 2016, to file his *pro se* complaint in the federal district court, alleging discrimination and defamation. The employer moved to dismiss, asserting both causes of action were time-barred. Responding to the motion, Huff wrote: “I understand about the time limits clearly. It was a misjudgment to turn the EEOC Right to Sue letter in late.” But he argued his case should not be dismissed because, wrote District Judge Timothy L. Brooks, “he feels he has evidence to prove his case on the merits, and ‘everyone in the United States has a right to be heard in front of a judge and even a right to a fair trial.’” But time limits are, after all, time limits, and Judge Brooks found that this case did not qualify for any of the exceptions for equitable tolling,

either as to the Title VII/ADEA claims or the state law defamation claim. That the plaintiff is a lay person representing himself does not excuse failing to file within statutory deadlines. The discrimination statutes require that a claim be filed in federal court within 90 days after the Right to Sue letter is received, and Arkansas slander claims must be filed within a year.

CALIFORNIA – On June 27 Los Angeles County Superior Court Judge Ann I. Jones signed a settlement judgment in the coordinated actions of *Werner v. Spark Networks, Inc.* and *Wright v. Spark Networks, Inc.*, Case No. JCCP4823, in which two gay men alleged that the defendant, the owner/operator of several dating websites (including, most prominently, ChristianMingle.com), was violating the Unruh Act, California’s public accommodations statute, by providing services that only made matches for different-sex couples. As part of the settlement, Spark must allow users of the websites to seek same-sex matches, and has up to 24 months to tailor the websites to enhance its receptiveness to same-sex searches. In the words of the judgment, “Spark represents and warrants that it is updating the Mingle Sites, and to the extent Spark continues to operate any of the Mingle Sites in the future, such sites will be updated to create an experience which will allow individuals seeking same sex partners to use Spark’s matching technologies to find and be matched with others seeking same sex partners. For all of Spark’s sites to remain operational, Spark will update them within 24 months of the date of this Judgement.” Prior to this settlement, those registering on the site had to identify themselves either as “man seeking woman” or “woman seeking man.” Messrs. Werner and Wright felt unfairly left out. Media comment focused on ChristianMingle.com, and the intriguing idea that gay

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Christians might be seeking religiously compatible mates. *Wall Street Journal*, June 30; *Washington Post*, July 7.

CALIFORNIA – The 2nd District Court of Appeal, reversing a decision by Los Angeles County Superior Court Judge Michael L. Stern, ruled on June 27 that an employment discrimination plaintiff alleging, inter alia, sexual orientation discrimination in violation of California law, was required to submit his claim to binding arbitration. *Urchasko v. Compass Airlines*, 2016 Cal. App. Unpub. LEXIS 4836, 2016 WL 3597425. John Urchasko sought to avoid arbitration by claiming that when he filled out the on-line employment application he had failed to check a box acknowledging his agreement to arbitrate. There was testimony on the motion that some sort of “computer glitch” had caused the relevant box not to appear on the application completed by Urchasko. But the text of the application made clear that the applicant agreed to submit all disputes to arbitration, said the court of appeal, rejecting Judge Stern’s conclusion that failure to check the box meant that Urchasko had not agreed to arbitrate. The court also rejected Stern’s conclusion that the text of the arbitration provision was unconscionable as a take-it-or-leave-it contract in “tiny font” that was “replete with confusing exceptions, legalisms, and legal authorities” and lacked a copy of the American Arbitration Association rules to which it referred. The court of appeal pointed out that there was no dispute that Urchasko had signed the employment application, which included the text binding him to arbitrate disputes with the company. “Urchasko’s signature on that agreement, therefore, unquestionably constituted an objective manifestation of his assent to arbitration.” As to unconscionability, the court found that while there might be “aspects” of procedural unconscionability in this case, there was no evidence of

substantive unconscionability, and both must be present to provide grounds to void an arbitration agreement.

CALIFORNIA – U.S. District Judge Roger T. Benitez denied summary judgement to a man who was suing for false arrest and violation of his 4th Amendment rights as a result of his arrest by undercover police officers patrolling a known gay “cruising area” in Balboa Park. *Cobb v. Rodriguez*, 2016 WL 3585459 (S.D. Cal., May 13, 2016). Police officers Calderon and Rodriguez were “notified that an individual may have propositioned an undercover officer for sex.” While questioning two individuals, they “heard moaning of a sexual nature and rustling coming from behind some bushes.” They aimed flashlights at the bushes and saw John Cobb “walking out of the wooded area and zipping up his pants.” They identified themselves as police officers and asked Cobb to speak to them. Cobb moved away from them and they moved to block his path. They claim that he began “cursing and yelling that the officers had no right to speak to him.” They put him in handcuffs and sat him on a bench. “Calderon observed that plaintiff could not sit still, was sweating profusely on a cool night, and that his eyes and fingers were moving uncontrollably.” Calderon concluded that Cobb was “under the influence of a controlled substance” and took him to the police station, where a blood sample was drawn and Cobb was booked and spent the night in jail. The test proved negative and he was not prosecuted. Cobb sued for false arrest and violation of his 4th Amendment rights, relying in part on recorded comments Calderon made during his shift: “BTW were working Redwood Circle . . . otherwise known as Gay Sex Ville . . . we’re scoops fir he lucky UC units hahaha” and “Well at least I wasn’t the UC units getting propositioned for gay sex LMAO.” Whatever that means . . . Judge Benitez denied Cobb’s summary

judgment motion, finding that there were contested facts. For purposes of deciding the motion, he considered whether Cobb’s claims would be valid if the officers’ version of events was believed, and concluded that under those facts the officers had cause to do what they did. If their physical description of Cobb was believed, they could have reasonably concluded that he was high on something. The judge observed, in connection with Calderon’s recorded remarks, that Cobb was not arrested for a sex crime, but rather for being under the influence of drugs in public. That the police turned out to be mistaken as to that was not dispositive of the question of their legal liability to Cobb because, “where an officer has probable cause for an arrest, he cannot be liable for false arrest. As genuine issues of material fact exist and as Plaintiff has failed to demonstrate as a matter of law that Defendants did not have probable cause, he has also failed to show that he was falsely arrested as a matter of law.” The court also rejected a conspiracy claim, saying that Cobb “does little more than conclude that Calderon and Rodriguez (and others who are not a party to this action) are engaged in a conspiracy to harass homosexual men,” but that he had presented no evidence of any agreement between the officers, and Calderon testified in discovery that “no one directed him to arrest Plaintiff and the record reveals no evidence to dispute Calderon’s testimony.” Furthermore, of course, Calderon did not stop and arrest Cobb “for activity related to Plaintiff’s homosexuality” but rather for his appearance of being stoned. The court deemed Calderon’s comments irrelevant to Cobb’s case.

CALIFORNIA – The opinion by Justice Kenneth R. Yegan of the California 2nd District Court of Appeal in *Butler v. LeBouef*, 2016 Cal. App. LEXIS 480, 2016 WL 3398418 (June 20, 2016), sounds like a synopsis of an anti-gay

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noir movie plot. One gets the gist from an introductory paragraph summarizing what the case is about: “An ethical estate planning attorney will plan for his client, not for himself. A license to practice law is not a license to take advantage of an elderly and mentally infirm client. As we shall explain, the factual findings of the trial court compel the conclusion that appellant used his license to take advantage of an elderly and mentally infirm person to enrich himself. The trial court factual findings are disturbing, fatal to appellant’s contentions, and suggest criminal culpability.” What makes the case relevant for *Law Notes* is that appellant, John F. LeBouef, is a gay attorney, and the elder client, John Patton, was a gay “renowned interior designer” who was grieving the death of his domestic partner “and by the end of his life, was often emotionally out of control.” He was befriended by the appellant and the appellant’s life partner, who insinuated themselves into the client’s affairs and who instigated a change in the client’s estate plan to substitute appellant for client’s nieces as his principal beneficiary and gifted a vintage car to a friend and tenant of the appellant. “It was a radical change” in the estate plan, according to the court, and after the client died, the nieces challenged the will successfully in this case. The nieces were able to show that the appellant had pulled off similar schemes on eight prior occasions, but the trial court limited the evidence to the two most recent cases in which “appellant befriended an elderly person and drafted a will or trust naming himself or his partner principal beneficiary.” Indeed, in one case, appellant actually married an elderly woman who was a caretaker who had inherited substantial money from her patient; before the caretaker passed away, the appellant drafted her trust naming himself principal beneficiary, received the bulk of the estate on her death and collected surviving spousal

social security benefits for the next seven years! The court noted a California statute that “prohibits donative transfers to broad categories of persons who, because of their relationship with the settlor/trustor, might exercise undue influence. Undue influence is presumed where the donative transfer is in favor of the person who drafted the instrument or where the person who transcribed it or caused it to be transcribed had a fiduciary relationship with the settlor/trustor.” Of course an attorney-client relationship would qualify. The court rejected the appellant’s argument against reliance on the prior incidents, noting that a forensic expert had credibly testified to the unitary authorship of the documents in the various cases, which showed a pattern of operations. In a footnote, the court noted that the “original trust document and a laptop computer used by the appellant to prepare trust documents” had been “lost” in a suspicious “burglary” the “occurred just before appellant was scheduled to produce the documents for his deposition and a forensic examination. The police suspected it was a staged burglary because nothing else was taken and the house was made to look like it was ransacked. Expensive watches and art work were in plain sight but were not taken.” There were also discrepancies about when the client’s death was reported to 911, which the trial court found “troubling because it suggested that appellant spent hours in Patton’s house before reporting the death.” This is an amazing case to read. Somebody should consider turning it into a film. An unfortunate tale of gay people acting badly . . .

CALIFORNIA – Halliburton, a major defense contractor that earns millions of dollars from government contracts every year, is being sued by Harrison Y. Harris, an African-American transgender man, an Army veteran who holds a computer engineering degree, who, according

to his complaint, was treated in a discriminatory manner throughout his employment, both because of his race and his gender identity, was set up to fail by the work group to which he was assigned, and obtained no relief despite his frequently complaints, the last of which apparently led to his discharge. *Harris v. Halliburton Company*, 2016 WL 3255074 (E.D. Cal., June 13, 2016). But his claims will probably never see the inside of a courtroom, because U.S. Magistrate Judge Jennifer L. Thurston recommended granting the company’s motion to compel arbitration of all claims. The key ruling came in the part of her opinion discussing “governing law.” Harris pointed to a provision of the Defense Appropriations Act of 2010, under which “any government contractor which accepts a contract in excess of \$1M from the Department of Defense must agree to not enter into any new or enforce any arbitration agreement that requires arbitration of Title VII and certain employment tort claims. Thurston found this did not apply to the case. “Significantly,” she wrote, “however, the Defense Appropriations Act applies to “military contractors with contracts of at least \$1 million,” and “imposes no substantive prohibitions on arbitration.” “Because this action does not involve a government contract,” she wrote, “the Defense Appropriations Act ‘simply does not apply.’” On the other hand, she found that the Federal Arbitration Act does apply and mandates ordering arbitration so long as the arbitration agreement is not both procedurally and substantively unconscionable. In this case, Halliburton seems to have designed its forms to comply with the objections that California courts have raised at times to employment arbitration agreements as being too one-sided or imposing inequitable financial burdens on employees. She found in this case a “knowing waiver” of the right to trial by Harris, and that the arbitration agreement itself was

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not oppressive or substantively unfair. “Plaintiff and Defendants entered into a valid arbitration agreement, which encompasses the issues in dispute,” she concluded. “As a result, ‘there is a presumption of arbitrability’ and Halliburton’s motion to compel arbitration should not be denied.” Judge Thurston’s report and recommendation will go to Chief District Judge Lawrence J. O’Neill.

COLORADO – Lambda Legal filed a partial summary judgment motion in *Smith v. Avanti*, Civ. Action No. 1:16-cv-00091-RM-MJW (D. Colo., motion filed June 16, 2016), an action challenging a landlord’s discrimination against a same-sex couple, one of whom is transgender, who were denied rental housing in Gold Hill, Colorado, because, as the landlord informed them, she feared the couple’s “uniqueness” would jeopardize the landlord’s position in the small community. In terms of building anti-discrimination doctrine for LGBT people, this case is an important potential precedent to establish that discrimination because of sexual orientation or gender identity (both implicated in the case) is “discrimination because of sex” within the meaning of the federal Fair Housing Act. (If the Equality Act introduced in Congress in July 2015 were to be passed, the Fair Housing Act would be amended to explicitly prohibit discrimination because of sexual orientation and gender identity.) In its motion, Lambda Legal uses federal court decisions under other sex discrimination statutes – most prominently Title VII of the Civil Rights Act of 1964 – in arguing that the discrimination alleged in this case, if proven, should be deemed to be sex discrimination. Although the basic facts are not disputed, the motion does not seek an ultimate ruling on the merits, but focuses on getting the court to rule that the FHA applies to this case. Lambda staff attorneys working on the

case include Omar Gonzalez-Pagan and Karen Loewy; cooperating attorneys working on the case include Benjamin N. Simler and Matthew P. Castelli of Holland & Hart LLP.

CONNECTICUT – Superior Court Judge William J. Wenzel denied a motion by the Connecticut Department of Corrections to dismiss a sexual orientation discrimination claim by an employee of the Department on exhaustion of administrative remedies grounds in *Velazquez v. State of Connecticut Department of Corrections*, 2016 WL 3265950 (Judicial Dist. of Fairfield at Bridgeport, May 18, 2016). In the form complaint that Ernesto Velazquez filed with the Commission on Human Rights, Velazquez did not expressly state that he had been subjected to sexual orientation discrimination and did not identify his sexual orientation. He checked off the boxes for the general state employment discrimination statute and Title VII, but not the specific provision on sexual orientation claims. “The operable language of the Affidavit” that he submitted with his administrative complaint states “I was sexually harassed, subjected to unequal terms and conditions of my employment, and treated unfairly based on my sex (male).” In the space on the form for narrative, he “alleges being referred to as ‘homo’ and ‘faggot’ and being called ‘bitch’ and ‘crazy.’ He alleges he was intimidated and insulted by being told to provide oral sex to another male staff member. He also alleges other forms of insult or harassment not overtly sexual in nature.” The Commission “released its jurisdiction over this complaint allowing plaintiff to commence a civil action based on that complaint.” In the civil action, he alleges sexual orientation discrimination. The agency’s motion to dismiss argued that because Velazquez did not explicitly posit his administrative complaint as a sexual orientation discrimination complaint or specifically

identify the sexual orientation provision of the state law on that form, he failed to exhaust administrative remedies and his claim must be dismissed by the court. Judge Wenzel, while characterizing the issue as a “close call,” found that “the discrimination asserted in Count One was reasonably related to the allegations contained in plaintiff’s Affidavit and hence not barred by the doctrine of exhaustion.” Indeed, it is hard to credit that the agency is asserting that it was not put on notice of the nature of the claim when the affidavit refers to plaintiff being called “homo” and “faggot” and being subjected to demands to give oral sex to another male staff member! “Clearly being called ‘homo’ and ‘faggot’ immediately raise questions about sexual orientation as these are the very essence of such terms,” wrote the judge. “These terms, especially the later, are immediately recognized as almost always intended to insult and demean a person simply because of their orientation.” Furthermore, “to expect a self-represented person trying to complete this form to recognize the appropriate statutory cite is indeed asking quite a bit,” and his citation of the general statute at least invoked the state’s anti-discrimination law, “which expressly includes the deprivation of rights based on sexual orientation. Whether or not it is a perfect fit, it puts the agency on notice of all the potential claims covered by the statutory language.” In other words, Judge Wenzel was being very kind to the attorney for the Corrections Department when he called this a “close call.” The exhaustion argument strikes us as bordering on the frivolous.

FLORIDA – Florida Attorney General Pam Bondi’s office has reached a settlement with two sets of attorneys who represented successful plaintiffs in marriage equality litigation over the subject of attorneys’ fees, after U.S. District Judge Robert Hinkle

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ruled in April that the plaintiffs were prevailing parties and urged the state to negotiate a fee settlement. According to an *Associated Press* report, the total agreed upon is just under \$500,000.00. The ACLU of Florida will receive \$213,000.00, and attorneys from Jacksonville will receive \$280,000.00. *thenewstribune.com*, June 2, 2016.

HAWAII – *Honolulu Civil Beat* (June 8) reported that the Hawaii Department of Education has created guidelines and policies for use by the state's public schools in accommodating transgender students. The policies, modeled on those adopted by California and New York, "will offer transgender students alternative bathroom, uniform and locker room arrangements that correspond with their gender identity," according to the article. "Nurse's bathrooms will also be an option for transgender students or non-transgender students who are uncomfortable changing in the same locker room." The guidelines also recognize the right of students to wear clothing typically associated with their gender identity, to use their preferred names and gender identity and pronouns, but official school documents will contain the same information as legal documents, such as passports or birth certificates. A student can begin "transitioning" at school without any involvement of a doctor or their parent. DOE "also drafted an individualized, confidential support plan to make it easier for school staff to keep track of the students' legal names, preferred names and pronouns, chosen locker room/bathroom facilities, 'go-to adults' on campus and other arrangements."

ILLINOIS – In *Students and Parents for Privacy v. U.S. Department of Education*, 2016 U.S. Dist. LEXIS 77728, 2016 WL 3269001 (N.D. Ill.), U.S. District Judge Jorge L. Alonso granted a motion on June 15 to allow the Illinois

Safe Schools Alliance and several transgender students to intervene in order to defend the settlement agreement between the federal government and Township High School District 211 under which transgender students at the school will be allowed to use restroom facilities consistent with their gender identities. The case was instigated by lawyers from the Alliance Defense Fund (a/k/a Alliance Defending Freedom), an anti-gay "religious" litigation group that organized some disgruntled parents and students to form "Students and Parents for Privacy" in order to bring this lawsuit, challenging the settlement. They are arguing that the Education and Justice Departments violated the Administrative Procedure Act by adopting a "new rule" without going through the notice and hearing process, and that this "new rule" (that Title IX forbids gender identity discrimination) is not a valid interpretation of the statutory ban on sex discrimination by educational institutions that receive federal funding. They have also filed a copycat lawsuit in North Carolina, seeking to uphold that state's "bathroom bill" which is being attacked in court by the federal government and private plaintiffs represented by the ACLU and Lambda Legal. While conceding that allowing intervention might make the case more "complex" because the individual stories of the intervening students will now become relevant, Judge Alonzo wrote that it would not make it "unnecessarily complex," since the issues they will present are germane to the lawsuit, and resolving those issues in this case might stave off future lawsuits. A large team of attorneys represent the intervenors, including ACLU national and local offices and pro bono attorneys from the law firm Mayer Brown LLP in Chicago.

INDIANA – In a state where there is no law against a business discriminating against a transgender person because of

her gender identity, potential plaintiffs have to be inventive to find a cause of action. A transgender woman, Carmen Carter-Lawson, who encountered disrespectful conduct from a tow-truck driver, sought to hold the driver's employer liable under 42 U.S.C. sec. 1983, alleging sexual harassment and "misconduct of business." *Carter-Lawson v. Affordable Towing*, 2016 U.S. Dist. LEXIS 79097 (N.D. Ind., June 17, 2016). Carter-Lawson filed *pro se* and asked to have filing fees waived. District Judge Philip P. Simon pointed out that because of the requested fee waiver, he was obligated to review the complaint and dismiss it if the action is frivolous or malicious, fails to state a legal claim, or seeks monetary relief from a defendant who is immune from such relief. He decided this case fell in the second category, because there was no plausible allegation that the defendant was a state actor, a prerequisite for a suit brought under Sec. 1983, which deals with deprivations of rights secured by the Constitution by a defendant who was acting under color of state law. Carter-Lawson ingeniously suggested that because the local police department required Affordable Towing to have her sign a release in order to get her car back, there was state action involved, but the court was not buying. "In plain English," wrote Simon, "the mere fact that the Gary Police Department instructed Affordable Towing to have Carter-Lawson sign a release regarding her settlement with Gary when she picked up her car is not enough to claim that the employee was acting at the state's direction when he insulted her. For the same reasons, the 'misconduct of business' allegation – whichever constitutional right, privilege, or immunity that corresponds to – is therefore also insufficiently pled." Consequently, the complaint was dismissed for failure to state a claim, and the request to proceed without paying a filing fee was denied.

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LOUISIANA – Granting summary judgment to the employer, U.S. District Judge Susie Morgan ruled in *White v. Rouses Enterprises LLC*, 2016 WL 3127232, 2016 U.S. Dist. LEXIS 72740 (E.D. La., June 3, 2016), that a male employee’s Title VII claims of quid pro quo sexual harassment, hostile environment, and retaliation, levelled against a gay supervisor, were not supported by the summary judgment record before the court. Marcus White was employed as a butcher at defendant’s Metairie, Louisiana, grocery store from April 23, 2012, until he was discharged on September 15, 2014. White claimed that a few days prior to his discharge he encountered his gay supervisor in the restroom and was propositioned for sex, which he angrily declined. He alleged that in order to legitimate the subsequent discharge his supervisor schemed with others at the store to frame him on a theft of merchandise charge. The court found that White’s factual allegations fell short of what would be required to withstand summary judgment; the supervisor’s statement in the restroom did not constitute a clear quid pro quo statement (“So, how bad you want that raise?” with no explicit mention of a sexual demand), there were plenty of factual allegations in the record documenting the charge that White had stolen groceries, that this was brought to light by a co-worker who knew nothing about the alleged sexual solicitation, that the decision to discharge White was made by higher-level managers who were also unaware of the alleged sexual solicitation, and that the gay supervisor was merely a conduit for communicating the discharge decision to White. The supervisor denied making any sexual solicitation, alleging that White had misconstrued his statement, and White’s credibility was impaired by his failure to complain about the alleged solicitation or to mention it to anybody until after he was discharged. Judge Morgan also found that White’s

allegations were insufficient to put into play a “hostile environment” claim based on one equivocal incident.

MARYLAND – The Equal Employment Opportunity Commission (EEOC) announced a favorable settlement of one of its first lawsuits asserting that an employer violated Title VII’s ban on sex discrimination by discriminating against a person because of his sexual orientation. *EEOC v. Pallet Companies*, Civ. Action No. 1:16-cv-00595-CCB (D. Md., Consent Decree filed June 23, 2016). A BNA Daily Labor Report account of the settlement indicated that the proposed Consent Decree was subject to approval by District Judge Catherine C. Blake. The settlement requires the employer to pay \$182,000 to Yolanda Boone, the lesbian complainant who claimed she was harassed due to her sexual orientation and discharged in retaliation for complaining to management. The settlement also requires the company to donate \$20,000 to Human Rights Campaign to develop an employee training program, including a module on LGBT workplace issues. The training would have to be provided to employees at all the company’s facilities in its North Region, which covers Maryland, New Jersey, Maine, Massachusetts and Virginia. The employer agrees to post workplace notices concerning the company’s responsibilities under Title VII, including making personnel decisions “without regard” to an individual’s sexual orientation, and to provide employees copies of the company’s anti-discrimination policy with a description of how and where to report violations.

MARYLAND – U.S. District Judge Catherine Blake (D. Md.) has approved a settlement agreement in *EEOC v. Pallet Companies*, No. 16-00595, the first sexual orientation discrimination case under Title VII initiated by the Equal

Employment Opportunity Commission on behalf of a lesbian victim of employment discrimination. After its ground-breaking ruling last July 15 in *Baldwin v. Foxx*, the EEOC has added to its litigation priorities engaging in affirmative litigation to establish that sexual orientation discrimination claims can be brought under Title VII. The ultimate goal is to achieve binding appellate precedents, and the agency has amicus briefs on file in pending appeals in the 2nd and 7th Circuits in cases where gay plaintiffs suffered dismissals of Title VII suits because of adverse appellate precedents in those circuits. Under a consent decree signed by Judge Blake on June 28, 2016, the employer will pay complainant Yolanda Boone \$7,200 in back-pay and \$175,000 in damages, and will contribute \$20,000 to Human Rights Campaign. The company will also retain an expert on LGBT issues to develop a training program, provide a toll-free hotline number for employee complaints, and provide a letter of recommendation for Boone, who is seeking new employment. In a statement released in response to approval of the settlement, the company said that its decision to settle rather than litigate a challenge to the EEOC’s jurisdiction reflects a commitment by the company to its LGBT employees, and that it offered to make the donation to HRC as part of the settlement. *Reuters Legal*, June 29.

NEVADA – The widow of Tommy “The Duke” David Morrison, former world heavyweight boxing champion who was disqualified from boxing allegedly because of an inaccurate HIV test result, suffered a setback in her suit against the testing laboratory and other defendants on June 23 when U.S. Magistrate Judge Peggy A. Leen granted Defendant’s motion to strike expert report and exclude testimony from Dr. Henry Soloway, whom Patricia Morrison claimed to have retained as her expert witness in

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the case. *Morrison v. Quest Diagnostics*, 2016 WL 3475432 (D. Nevada). Plaintiff alleges that her husband was informed shortly before the first of a series of scheduled heavyweight bouts that he had tested HIV-positive and would not be allowed to fight. According to the complaint, this false diagnosis – not discovered to be false until an unrelated medical procedure was performed several years later – “led to a downward spiral of Tommy’s life and eventually what was likely his early death.” In her initial designation of expert witnesses, Morrison disclosed Dr. Soloway as her expert, providing an affidavit and CV, and sought identification of other medical personnel who had in any way treated Tommy, reviewed his medical records, or “undertaken any diagnostic or treatment procedures.” Quest moved to strike Soloway as an expert for failure to comply strictly with a requirement under the rules to file a detailed expert report laying out the testimony he was prepared to give. Opposing the motion, Morrison stated her belief that Soloway “may have been harassed, threatened, silenced, intimidated, or is ‘suffering from fear of the unknown,’” as a result of which he had disavowed being an expert in the case. The court’s discussion of the twists and turns the case has taken is too lengthy to be summarized here, but culminates in an itemization of things that are required to be in an expert report but are not included in Soloway’s affidavit. Judge Leen found that Soloway’s affidavit was not sufficient to meet the detailed expert report requirements. “Plaintiff’s opposition does not address these deficiencies or request additional time to cure the deficiencies,” she wrote. Indeed, plaintiff indicated that Soloway “has broken off communication with her.” Morrison’s counsel had told Quest’s counsel to contact Soloway directly to set up a deposition, but when contacted Soloway denied being a retained expert for Morrison. Leen rejected Morrison’s suggestion that the court compel

Soloway to appear for a deposition, finding that “the court has no authority to compel a witness to serve as an involuntary expert witness for a party, or to provide uncompensated expert opinions.” (Morrison had claimed that Soloway offered to provide his expertise pro bono.) Thus, the motion to strike was granted, possibly putting a practical end to Morrison’s case.

NEW JERSEY – Ruling unanimously in *Rodriguez v. Raymours Furniture Company*, 2016 WL 3263896 (June 15, 2016), the New Jersey Supreme Court held that an employer’s attempt to contractually require employees to accept a shorter statute of limitations than that provided by the N.J. Law Against Discrimination (which prohibits, *inter alia*, discrimination because of sexual orientation or gender identity) is unenforceable as a violation of public policy. The legislature’s judgment that individuals alleging unlawful discrimination should have up to two years to file their claims supports the important public purpose of protecting equal opportunity in employment, wrote Justice LaVecchia for the court, and the six-month limitation that the employer sought to enforce in this disability discrimination case would undermine that public policy. The plaintiff, a delivery driver, suffered a work-related knee injury and was laid off two days after he reported back for work after recovering from his injury. The employer claimed he was let go in a reduction-in-force, but the employee claimed that less senior people than him had been retained and asserted that the lay-off was also retaliatory because he had sought and obtained workers compensation benefits for his injury. The employer got the case dismissed by the Superior Court, affirmed by the Appellate Division, on the argument that the employee had waived his right to assert a discrimination claim against the company by filing it more than

six months after his claim accrued, as required by his at-will employment contract as evidenced by the written job application he had signed. The plaintiff claimed that he had not understood the meaning of the terms “statute of limitations” and “waive” on the application form, but the lower courts noted that he had signed a statement that he had read and understood the application, and rejected his public policy claim. Because the Supreme Court found the public policy analysis sufficient to decide the case, it did not have to address the plaintiff’s unconscionability and adhesion contract arguments.

NEW YORK – The New York City Council passed Local Law 40 in 2003, providing that city police may not engage in “racial or ethnic profiling,” defined as an act “that relies on race, ethnicity, religion or national origin as the determinative factor in initiating law enforcement action against an individual, rather than an individual’s behavior or other information or circumstances that links a person or persons of a particular race, ethnicity, religion or national origin to suspected unlawful activity.” Concerned that this law was ineffective, the Council acted again in 2013 and passed Local Law 71, which expanded the list of protected characteristics in the anti-profiling provision to include “actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, housing status.” The new measure added a private right of action limited to injunctive and declaratory relief and the award of attorneys’ fees and expert fees to prevailing parties. This law took effect November 20, 2013. The Patrolmen’s Benevolent Association, the police officers’ union, filed suit challenging the validity of the law. On June 23, a unanimous panel of the New York Appellate Division, 1st Department,

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ruled in *Patrolmen's Benevolent Association v. City of New York*, 2016 N.Y. App. Div. LEXIS 4910, 2016 NY Slip Op 05057, that the state's Criminal Procedure Law does not preempt the local law, citing the following two reasons: "the two laws occupy different legislative fields (criminal procedure and antidiscrimination); and second, there is no direct conflict between them." The opinion stated "great respect and appreciation for the important contributions of police officers who enforce our laws and protect us all daily at risk to their own personal safety," but recognized "the City's legitimate interest in protecting New Yorkers from discriminatory law enforcement."

NEW YORK – Although the New York Court of Appeals usually attempts to issue decisions relatively promptly after oral arguments, the court announced early in July that it would not be issuing rulings in *Brooke S.B. v. Elizabeth A.C.C.* or *Estrellita A. v. Jennifer D.* (argued at the beginning of June) before taking its summer recess. These are cases in which the court was being asked by appellants to reconsider its quarter-century-old precedent in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), as more recently reaffirmed in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), under which unmarried same-sex co-parents who have not adopted the legal or adoptive children of their partners do not have standing to seek visitation after the partnership breaks up, despite having formed a parental bond with the child. The *New York Law Journal* commented on July 6, "If the court does not make a ruling when it next convenes, beginning on Aug. 23, for its annual meeting to hear appeals over September's primary elections, the judges are not expected to make a determination until after they resume hearing cases on Sept. 6." In the meantime, trial courts continue to grapple with the difficulties of deciding these kinds of cases in the absence of

appropriate modern precedents (as to which see the article above about the Maryland Court of Appeals' recent adoption of the "de facto parent" doctrine for such cases). On July 8, the *Law Journal* reported *Matter of P.R. v. C.B.*, V-15266-15/16C (Family Ct., Suffolk County, May 26, 2016), a typical co-parent dispute in which the respondent moved to dismiss on standing grounds in reliance on *Alison D.* and *Debra H.* Judge Bernard Cheng observed that in light of the Court of Appeals precedents, he could not find standing based solely on the co-parent relationship. However, the co-parent's detailed factual allegation that the parent had been neglectful of the child's dental health resulting in serious complications (numerous cavities and an untreated abscess in the child's mouth) might support an argument that this was a case in which "parental unfitness" or "extraordinary circumstances" could justify allowing the "legal stranger" to seek custody, pursuant to *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976). "The Court must view the allegations in the petition in the light most favorable to Ms. P.R. and afford her the benefit of every inference which could be reasonably drawn," wrote the judge. "In this case the petitioner has raised sufficient issues of fact regarding the respondent's care of C.R.B. necessitating a hearing in order to ascertain whether the allegations of 'persistent neglect' or 'unfitness' rise to the level of 'extraordinary circumstances.'" The court ordered counsel to confer on setting up a hearing to determine this issue.

NEW YORK – U.S. Magistrate Judge Anne Y. Shields has filed a report and recommendation to District Judge Joan M. Azrack suggesting that a constitutional discrimination complaint by a gay public school teacher should be dismissed. *Nadolecki v. William Floyd Union Free School District*, 2016 U.S.

Dist. LEXIS 88399 (E.D.N.Y., July 6, 2016). Matthew Nadolecki, a special education teacher formerly employed by the District (which spans several towns along the south shore of Long Island), asserted three claims under 42 U.S.C. section 1983, alleging retaliation for exercise of his 1st Amendment free speech rights, and discrimination and hostile environment claims under the Equal Protection Clause of the 14th Amendment. Judge Shields found that the speech for which he was claiming protection was "employer speech" not protected by the First Amendment under the precedent of *Garcetti v. Ceballos*, because it involved formally filing grievances with his union, and that the various slights directed at him (mainly by students) concerning his sexual orientation were not sufficiently severe or pervasive to create a hostile environment. Furthermore, found the judge, the school district did take disciplinary action against students when Nadolecki complained about them. Judge Shields recognized that "an equal protection claim may be stated by alleging facts in support of a plausible claim that plaintiff was treated differently than others similarly situated, and that such treatment was motivated by an intent to discriminate on the basis of an impermissible consideration. Such impermissible considerations include disparate treatment based upon sexual orientation." However, she found that the plaintiff's factual assertions fell short in meeting the pleading standard on the equal protection claims. Nadolecki is represented by Steven A. Morelli of Garden City.

NEW YORK – U.S. District Judge Joanna Seybert ruled in *Carr v. North Shore-Long Island Jewish Health Systems, Inc.*, 2016 U.S. Dist. LEXIS 81994, 2016 WL 3527585 (E.D.N.Y., June 23, 2016), that a transgender woman who is a member of the Unitarian Universalist Church and who was working as an unpaid medical

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assistant extern at the defendant's hospital could proceed to discovery on her claim that she was discriminatorily denied employment because of her sex and religion in violation of Title VII and the New York Human Rights Law. Rejecting the defendant's claim that the complaint was "too speculative," Judge Seybert wrote that "the relevant inquiry is whether the [complaint] plausibly alleges that 'plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent.'" In this case, plaintiff alleged that almost all the externs were offered employment upon satisfactory completion of their externship, that there were several distinct incidents involving remarks or actions by her supervisor indicating discomfort with her gender and disapproval of her religion, and after a specific incident she was informed that her externship had been terminated, even though she had previously been told that her performance was satisfactory. The court found that the complaint "provides enough circumstantial evidence of discriminatory intent to allow Plaintiff's failure to hire claim to survive Defendant's motion. Although much of the conduct described in the [complaint] lacks a tangible link to a discriminatory purpose, Plaintiff claims that her supervisor made specific negative comments about her gender on three separate occasions. Specifically, Demers (1) told Plaintiff she could not use the women's restroom, (2) refused to allow her to participate in an examination, stating 'only females are allowed beyond this point'; and (3) told Plaintiff that Jesus does not recognize her religion, and told others that 'he-shes. . . and the gays will needs to answer to Jesus some day.' Moreover, Plaintiff was terminated via email on the same day Demers made her last comments about Plaintiffs gender and religion." However, the court granted defendant's

motion to dismiss Carr's separate complaint that she was subjected to unlawful discrimination during the externship. The relevant statutes pertain to discrimination within an employment relationship, but an unpaid extern is not considered to be an employee. (Had Carr's externship occurred in a hospital in New York City and more recently, she could have had a cause of action for discrimination because the City has enacted an ordinance extending its anti-discrimination law to externships, but this hospital is located out on Long Island.)

NORTH CAROLINA – On June 29, U.S. District Judge Louise Wood Flanagan (E.D.N.C.) issued an order refusing to consolidate H.B. 2 cases brought by state legislative leaders and North Carolinians for Privacy with an action that had been filed by Governor Pat McCrory in the Eastern District seeking a declaration that Section 1 of the statute – limiting access to sex-designated multiple use public restrooms to persons whose sex as indicated on their birth certificate is consistent with the sex-designation of the facility – is constitutional. At the same time, and on her own motion, Judge Flanagan ruled that these lawsuits defending the statute should be transferred to the Middle District of North Carolina, to be considered in tandem with cases pending there challenging the lawfulness of that Section. Most of Judge Flanagan's Order in *Berger v. United States Department of Justice*, 2016 U.S. Dist. LEXIS 84307, 2016 WL 3620752, is devoted to reciting the complex history leading up to the decision of the motion, including the filings of cases by Governor McCrory on May 9 and the federal government on May 10 in different districts, and subsequent consolidation and intervention motions, and specifying the different legal theories raised for and against H.B. 2 in the different cases. Ultimately,

she determined, there was enough overlap in the constitutional and statutory issues to be presented to justify putting before one judge in one district the question whether H.B. 2 violates the constitutional rights of transgender people, and also whether the state law violates the Violence Against Women Act, Title VII of the Civil Rights Act, and Title IX of the Education Amendments Act, as well as questions raised by the Eastern District plaintiffs challenging the federal government's compliance with the Administrative Procedure Act in adopting its interpretation of the various sex discrimination laws. As to whether that should be in the Eastern District or the Middle District, Judge Flanagan was inclined to give primacy to the first case filed, *Carcano v. McCrory*, No. 1:16-CV-236-TDS-JEP (M.D.N.C., filed March 28, 2016), brought on behalf of private plaintiffs by civil rights groups a few days after the legislature passed and Gov. McCrory signed the measure. When Gov. McCrory decided to defy the federal government by filing suit against it in the Eastern District at the deadline for responding to a Justice Department letter seeking a response to DOJ's determination that the state was in violation of several statutes, the federal government filed its own suit against McCrory in the Middle District, which Judge Flanagan's transfer order now fixes as the locus for resolution of the underlying issues. That still leaves Governor McCrory's lawsuit, the most narrowly focused of all those pending, dangling by itself in the Eastern District . . . Sorting this all out is a procedural nightmare. Anybody looking for a chronological history of the litigation events leading up to the present will find it in Judge Flanagan's meticulously constructed Order. Conveniently enough, also on June 29, U.S. District Judge Thomas D. Schroeder filed an order in *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 84788, 2016 WL 3626386 (M.D. N.C.), granting a motion

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by the legislative plaintiffs in *Berger* to intervene permissively in the case brought against the state by the Justice Department, having previously granted a motion allowing them to intervene as co-defendants in the private action brought against state officials by the ACLU & Lambda. *See Carcano v. McCrory*, 2016 U.S. Dist. LEXIS 73136, 2016 WL 3167180 (M.D.N.C., June 6, 2016). Noting the overlap in issues and arguments between the cases and the extent to which they have gotten under way, Judge Schroeder concluded that allowing intervention of these plaintiffs would not “significantly complicate the proceedings or unduly expand the scope of any discovery in this case” and “should not significantly delay proceedings in this case.” Judge Flanagan mentioned in her order that a preliminary injunction motion had already been briefed in the *Carcano* case, pending before Judge Schroeder. Judge Schroeder’s decision on the preliminary injunction motion could ultimately prove outcome-dispositive for all these cases, depending how many of the various legal theories he considers in determining whether to grant pre-trial relief and whether the state immediately seeks appellate review from any adverse ruling. He scheduled a hearing on the motion for August 1, 2016. * * * On July 5, the Justice Department filed a motion for preliminary injunction against enforcement of the bathroom provision of H.B. 2 in *United States v. State of North Carolina*, Case No. 1:16-cv-425 (M.D.N.C.), and requested oral argument on the motion, which was accompanied by a 68-page brief setting out in full the Obama Administration’s position that the bathroom provisions violate Title VII of the Civil Rights Act, Title IX of the Education Amendments Act, and the Violence Against Women Act (VAWA). The brief relies heavily on the 4th Circuit’s ruling in *G.G. v. Gloucester County School Board*, 2016 WL 1567467 (April 19, 2016), rehearing

en banc denied (June 1), in which the Circuit held that the Education Department’s interpretation of Title IX to apply to gender identity discrimination claims should be deferred to by the federal courts as a reasonable interpretation of ambiguous statutory and regulatory language. The *G.G.* court noted and relied up Title VII precedents on gender identity discrimination to reach this result, and observed that several different circuit courts have now found that gender identity claims can be asserted under a variety of federal sex discrimination statutes. The brief also notes that Congress has amended VAWA expressly to provide protection against gender identity discrimination by programs receiving federal law enforcement assistance under VAWA, such as co-defendant North Carolina Department of Public Safety. The motion is pending before U.S. District Judge Thomas D. Schroeder, who, as noted above, has granted a motion by state legislative leaders to intervene as co-defendants in the case. An amicus brief in support of the Justice Department’s motion was filed by Human Rights Campaign with 68 corporate co-sponsors, authored by former Solicitor General Ted Olson, who was co-counsel in *Perry v. Schwarzenegger*, the litigation that brought marriage equality back to California by successfully challenging the constitutionality of Proposition 8. * * * On July 7, U.S. Magistrate Judge Dennis Howell denied a motion by state Republican legislative leaders to intervene as defenders in a case in which some same-sex couples are challenging the constitutionality of S.B.3, a North Carolina law passed in 2014 allowing local magistrates to recuse themselves from performing same-sex marriages under a procedure which also requires them not to perform other marriages for a defined period of time. The rejected intervenors claimed that their intervention was necessary because the state’s Attorney General, Roy Cooper,

had refused to defend that state’s anti-gay marriage ban and thus could not be counted on to give a vigorous defense to the law. Interestingly, even Governor McCrory, champion of H.B.2, had vetoed S.B. 2 when it first passed the legislature due to doubts about its constitutionality. Before S.B. 2 was passed, Cooper had said that he would veto it if he were governor, asserting that it was an unnecessary law. Magistrate Howell said that the Attorney General’s office was “aggressively defending” the law, and the legislative leaders failed to show that their interests were not adequately represented. He did say that he would reconsider this motion if “the state no longer intends to defend the constitutionality” of the law. A motion to dismiss the lawsuit is pending before District Judge Max Cogburn, who has scheduled argument on the motion for August 8. *Raleigh News Observer*, July 8.

NORTH CAROLINA – Advancing its affirmative litigation strategy under Title VII, the Equal Employment Opportunity Commission announced on July 6 that it had filed a lawsuit in federal district court against Bojangles Restaurants on behalf of Jonathan Wolfe, a transgender woman who claims she was subjected to a hostile environment at the chain’s Fayetteville store because of her gender identity, and then suffered retaliation for complaining about it. A company spokesperson responded that Wolfe was discharged because of insubordination and other misconduct, not her gender identity. The company is unlikely to be able to get the case dismissed on an argument that Title VII does not extend to gender identity discrimination, in light of the 4th Circuit’s *G.G. v. Gloucester County School District* decision, which took note of Title VII precedents from other jurisdictions in holding that a district court within the circuit should have deferred to the Education Department’s

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determination that gender identity discrimination is covered by Title IX's ban on sex discrimination by educational institutions.

OHIO – The Highland School District filed a lawsuit on June 12 in U.S. District Court in Columbus against federal education department officials, seeking a declaration that it is not required under Title IX to allow a transgender grade school student to use girls' restrooms. The district claims that it stands to lose more than \$1 million in federal money, and that the Department of Education had threatened an enforcement action on behalf of the student unless the district met federal demands by June 28. Alliance Defending Freedom (surprised?) represents the school district, claiming that the threat is an illegal attempt by the Obama Administration to "rewrite" federal law. (Never mind that federal courts, including the 6th Circuit Court of Appeals, which has appellate jurisdiction over federal cases from Ohio, have been recognizing sex discrimination claims by transgender litigants for a decade now.) *Columbus Dispatch*, June 12.

PENNSYLVANIA – Should an HIV-positive plaintiff be allowed to proceed on a discrimination lawsuit using a pseudonym? Yes, ruled U.S. Magistrate Judge Martin C. Carlson in *Bonnie Jones v. OSS Orthopedic Hospital*, 2016 WL 3683422 (M.D. Pa., July 12, 2016). The plaintiff, who has adopted "Bonnie Jones" as her proposed pseudonym, has alleged that she has been denied equal access to certain facilities of the defendant because of her HIV status. The judge noted that many other courts have allowed HIV-positive plaintiffs to conceal their identification, observing: "At the outset, consistent with those cases that have considered similar claims by HIV positive litigants, we find that Jones has made a substantial showing

that disclosure of her identity will result in an social stigma in some quarters of a type which may, and should, be avoided. Further, while the issues in this litigation present matters which may garner some public interest, that public interest can be met without the necessity of disclosure of the plaintiff's identity. Therefore, all of these considerations strongly favor granting Jones' request to proceed under a pseudonym. Indeed, the presence of these factors favoring granting this request are undisputed by any defendant. Instead, one defendant simply insists that Jones did not sufficiently protect her privacy and identity during the course of the state agency proceedings to warrant granting her request in this case. We disagree. In our view Jones has persuasively demonstrated that she repeatedly sought leave to proceed under a pseudonym during these state agency proceedings. In fact, we note that such leave to proceed under a pseudonym was granted by the state agency on July 1, 2016. (Doc. 12.) Therefore, we also find that the plaintiff has made continuing efforts to protect her identity and privacy in this litigation, and in state agency proceedings. Having found that the prerequisites set by law for proceeding under a pseudonym are met in this case, the motion to proceed under a pseudonym is granted."

SOUTH CAROLINA – The U.S. Department of Education found that Dorchester County School District Two violated Title IX by discriminating against a transgender elementary school student. Negotiations ensued, and on June 23 the Department's Office for Civil Rights announced a voluntary resolution agreement, under which the district will provide the transgender girl with access to girls' bathrooms at her elementary school and take other steps to facilitate the student's enjoyment of equal educational opportunity, including revising its policies and procedures and providing training to

district and school level administrators on the district's Title IX obligations to transgender students. *U.S. Official News*, June 23.

TENNESSEE – 4th Circuit Court Judge Greg McMillan has ruled that a lesbian spouse has no legal relationship with the child born to her spouse and thus cannot seek custody upon a divorce, but has stayed his ruling to allow the plaintiff to seek review from the state court of appeals, reported the *Knoxville News Sentinel* on June 24. Erica Witt and Sabrina Witt married in the District of Columbia in April 2014, bought a home in Knoxville and decided to have a child together through donor insemination with an anonymous donor. The child was born to Sabrina in January 2015. At the time Tennessee did not recognize same-sex marriages contracted out of state, so Erica's name was not listed on the birth certificate. In February 2016 Sabrina filed for divorce and opposed Erica's standing to seek custody or visitation with the child on the ground that Erica and the child had no legal relationship under Tennessee law. Tennessee has the usual presumption that when a married woman bears a child, her husband is deemed the legal parent of the child. Erica argued that under *Obergefell* the court is required to accord her the same rights as a husband, and the court should read the statute as being gender neutral. Sabrina's attorney contended, based on the wording of the statute, that this presumption applies only to husbands, and Judge McMillan agreed, stating that it was not up to the court to enact "social policy" and, he said, "I believe as a trial court I am not to plow new ground, but to apply precedent and the law." However, he said that Erica could possibly seek visitation as a "stepparent." Sabrina is represented by John Haber. Erica is represented by Virginia Schwamm. See also *Memphis Commercial Appeal*, June 25.

TENNESSEE – Bleu Copas of Anderson

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County, Tennessee, and Caleb Laieski of Virginia, filed a complaint on June 5 in the Anderson County Chancery Court against Governor Bill Haslam, seeking a declaratory judgment that a recently-enacted Tennessee statute allowing mental health therapists to refuse treatment to patients because of the therapists' religious or personal moral beliefs is unconstitutional. *Copas v. Haslam* (Tenn., Anderson Co. Chancery Ct., filed June 5, 2016). The complaint alleges that the law singles out LGBT individuals for "discriminatory treatment," as "There is no other group which could conceivably be the target of the statute," even though it does not expressly mention sexual orientation, gender identity, or homosexuality. The statute says that counselors and therapists whose "sincerely held principles" prevent them from providing services may refrain from doing so without adverse consequences. It does provide that services may not be withheld in emergency situations, and that referrals to providers without such objections should be made. Governor Haslam stated upon signing the bill that professionals should have a right to refrain from providing services to people whose "personal beliefs" don't match their own. *Knoxville News-Sentinel*, June 8. The American Counseling Association disagrees, providing in its ethics code that counselors should set aside their personal beliefs when it comes to rendering professional services, and the organization has announced it will move a national convention previously scheduled to be held in Nashville next year to a different location.

TENNESSEE – The law firm Ropes & Gray received more than \$600,000 from the fee award in the Tennessee marriage equality litigation, having represented prevailing plaintiffs. (R&G partner Douglas Hallward-Driemeir argued the marriage recognition issue

before the Supreme Court.) The firm announced on June 24 that it would donate \$100,000 to the National Center for Lesbian Rights, and use the rest of the fee award to underwrite the firm's pro bono activities. NCLR Legal Director Shannon Minter said that this was the single largest donation that the organization had ever received from a law firm. In reporting about the donation on July 5, the *National Law Journal* noted that other firms that received fee awards in marriage equality litigation had also made donations. Perkins Coie, for example, which helped to represent same-sex marriage plaintiffs in Arizona and Oregon, made donations out of the fee awards to Lambda Legal and the ACLU.

TEXAS – Plaintiffs in *State of Texas v. United States of America*, Civ. Action No. 7:16-cv-00054-O (N.D. Tex.), which challenges the Obama Administration's interpretation of "sex discrimination" under Title VII and Title IX to include gender identity discrimination, filed a motion for a preliminary injunction on July 6, seeking to forestall enforcement of Title VII and Title IX nationwide against employers subject to Title VII and schools that receive federal financial assistance, subjecting themselves to coverage under Title IX, until a final determination can be made whether the statutes reach the issue of bathroom and locker-room access for transgender individuals. Texas picked up a few more states after filing the case, so now it is brought on behalf of Alabama, Wisconsin, West Virginia, Tennessee, Arizona, Maine, Oklahoma, Louisiana, Utah, Georgia, Mississippi, and Kentucky, although standing is premised on the tiny Harrold Independent School District, which was lured into participating by Texas A.G. Ken Paxton to facilitate his forum shopping before Reed O'Connor, a district judge who is perceived to be predisposed against the Obama

Administration's administrative actions because of his ruling enjoining the Administration's policy protecting non-citizen parents of U.S.-born children against deportation. The complaint argues that when the Administration adopted its interpretation of Title VII and Title IX, it was violating the Administrative Procedure Act because it was adopting a new rule of law without going through the procedure required for adopting regulations. The brief in support of the motion conveniently ignores the growing body of federal case law supporting the view that sex discrimination includes gender identity discrimination, almost all of which predates the Administration's embrace of this view. The brief also disingenuously contends that the Administration's position is that any person of any biological sex is free at any time to use any restroom they want to, regardless of its designation as restricted to males or females, which of course is not the position of the Administration. As such, the plaintiffs argue from the premise that gender identity is not real and that everybody is and remains the sex recorded in state records when they were born, contrary to a growing body of professional opinion and judicial rulings. While this is a position supported by some early cases under Title VII and state sex discrimination laws, it is not supported by more recent case law, most notably the 4th Circuit's decision in *G.G. v. Gloucester County School Board*, 2016 WL 1567467 (April 19, 2016), which held that the Administration's interpretation of Title IX was reasonable, not inconsistent with the state and existing regulations, and entitled to deference from the federal courts. The EEOC's ruling on point cites a wide variety of federal appellate and trial court rulings in support of the broader view of the sex discrimination ban. Of course the 4th Circuit's opinion is not binding within the 5th Circuit, a notably conservative circuit on employment discrimination issues,

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and it is possible that a ruling on this motion will generate the kind of circuit split that could capture the attention of the Supreme Court, especially as the Gloucester County defendants have announced they will file a petition for certiorari this summer. * * * Early in July there were news reports that an additional ten states had joined in a similar lawsuit, filed in the U.S. District Court in Nebraska. The collaborating states are Arkansas, Kansas, Montana, North Dakota, Ohio, South Dakota, South Carolina, Wyoming and Michigan. It seems like that eventually all of the states that lack a legislative prohibition of gender identity discrimination may end up being co-plaintiffs in one or another of the lawsuits contesting the Obama Administration's interpretation of Title IX in the context of restroom access for transgender students. *New York Times*, July 8.

TEXAS – The 6th District Court of Appeals ruled in *In the Interest of E.R.C., a Minor Child*, 2016 Tex. App. LEXIS 6231 (June 14, 2016), a bitterly contested child custody suit, that the fact that a judge had been endorsed by LGBT political groups was not by itself grounds for finding that the judge should be disqualified from hearing a case because of presumed bias. Wrote Justice Jim Moseley for the court: “Stokes [the mother] argued at the recusal hearing and on appeal that Judge Sulak was biased in favor of the lesbian, gay, bisexual, and transgender (LGBT) community and against Christians. At the hearing, Stokes introduced evidence that Judge Sulak had been endorsed in his election campaign by two groups representing the LGBT community and of the endorsement procedures of one of the groups. She also introduced evidence consisting of articles written either by or about LGBT activist groups, emails to and from Corsbie [the father], and emails to and from Stokes, none of which concerned Judge Sulak or

evidenced any bias or partiality on his part. Further, no evidence was introduced regarding Judge Sulak's involvement with the LGBT community or LGBT activist groups, or of his written or oral statements concerning LGBT rights or his religious views. Stokes' speculation that Judge Sulak was biased based merely on the fact that he received endorsement from LGBT activist groups in an election campaign is not sufficient to overcome the presumption of judicial impartiality. Further, a reasonable, disinterested observer would recognize the reality that a judge participating in a political campaign may receive many endorsements from politically active groups and individuals and that at the same time, a judge is under the ethical obligation to remain impartial.” Furthermore, the record showed that in the course of the litigation Judge Sulak had made rulings both in favor and against both parties, further undermining any contention of bias.

VIRGINIA – Responding to the 4th Circuit's reversal and remand of his prior decision dismissing a Title IX claim asserted by transgender teen Gavin Grimm against the Gloucester County School District, U.S. District Judge Robert Doumar issued a preliminary injunction on June 23 requiring the Gloucester schools to allow Grimm to use restrooms consistent with his gender identity pending ultimate disposition of the case. Protesting that it would be filing a petition for certiorari and should not be required to comply with an injunction until a final decision on the merits, the school district filed a motion asking that the injunction be stayed, but on July 6 Judge Doumar denied the motion, tersely stating, “This Court is bound by the Judgment of the Court of Appeals.” The school district immediately appealed the denial to the 4th Circuit in an “emergency motion.” On July 12, the 4th Circuit denied the motion, by the same 2-1 vote by which

the panel issued its earlier decision. *G.G. v. Gloucester County School District*, 2016 WL 3743189. Senior Judge Davis filed a concurring opinion to refute dissenting Judge Niemeyer's contention that the panel's earlier decision was “unprecedented,” pointing out that four other circuit courts had previously opened that gender identity discrimination was a form of sex discrimination. The school district has until August 29 to file a cert petition with the Supreme Court, but it might file a motion with the Supreme Court seeking its stay. If the Supreme Court were to grant a stay until it decides on the cert petition, Grimm would not be able to use restrooms consistent with his gender identity when school begins in the fall, since a decision on the petition would not be announced until shortly before the beginning of the Court's October 2016 Term, at the earliest. Judge Doumar set the case for trial on January 31, 2017. The school district's response to the complaint requests a jury trial. *Newport News Daily Press*, July 7 and 12.

WASHINGTON – U.S. Magistrate Judge John T. Rodgers denied a transgender plaintiff's motion for summary judgment in her challenge to a denial of Social Security Disability Benefits in *Herrington v. Colvin*, 2016 WL 3579222 (E.D. Wash., June 28, 2016). This is a rather complicated case. The plaintiff, identified female at birth, identifies as male, but is referred to as “she” throughout the opinion. She applied for disability benefits when she was 20 years old and has never worked. She has a high school education. At her hearing, she testified to various kinds of physical pain, claimed that “she hears voices and on average she stays in her room all day.” “Plaintiff further testified that she would prefer to be male, but that due to her health, she could not proceed with any transitional procedures,” wrote the judge. Later in the opinion, there

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is reference to a doctor having advised against hormone therapy because of the plaintiff's high cholesterol. The doctors who testified agreed that the plaintiff has "gender identity disorder" and suffers from "depression and anxiety" but did not directly opine that she was disabled from working. The occupational expert who testified contended that she could undertake various kinds of jobs, but her attempts to apply for jobs have been unsuccessful, apparently due to her lack of education, training, and ability to present herself as a desirable job candidate. She also presented testimony from a clinical social worker, who testified through two letters, the first of which stated that plaintiff "is very isolated and is avoidant of public situations due to her anxiety. She is further restricted due to her social limitations of presenting as a young man vs. the female person that she is." The social worker said that plaintiff perceives herself as unemployable; "Her negativity as well as her avoidance prohibit her from engaging in the community at large," and she concluded in her second letter, "I do not believe that she is able to present herself in a positive light regarding a job interview even if she were invited to do so." The ALJ concluded that she was capable of working and denied her benefits, a conclusion that was sustained by Judge Rodgers, who granted summary judgment to the Commissioner. Judge Rodgers found that the ALJ had provided sufficient reasons for finding the plaintiff not credible concerning the intensity, persistence, and limiting effects of her symptoms, although conceding that the ALJ may have erred in concluding that plaintiff's "self-reports" about her condition were not supported by "objective medical evidence."

WASHINGTON – Chief U.S. District Judge Thomas O. Rice granted the government's motion to dismiss Mark C. Wilhelm's lawsuit challenging the

denial of his petition to "correct" his court martial record by the Board for Correction of Naval Records. *Wilhelm v. U.S. Department of the Navy*, 2016 WL 3149710, 2016 U.S. Dist. LEXIS 72884 (E.D. Wash., June 3, 2016). The story behind this case is complicated. Wilhelm served with distinction in the Navy from 1982 until 1995, when he was released from duty with an honorable discharge. Shortly thereafter he figured out that he was gay, but this did not deter him from enlisting in the Naval Reserves, intending to keep his homosexuality a secret. (At the time, the military was operating under the recently-enacted "don't ask, don't tell" policy, under which gay people could serve so long as everybody could pretend they weren't gay and they didn't say or do anything to reveal their homosexuality.) He was designated a Chief Warrant Officer. According to Judge Rice's opinion, "However, not long after Wilhelm returned to active duty in February 2000 and was assigned to Atsugi, Japan, it was widely rumored that Wilhelm was homosexual. Wilhelm told a number of inconsequential lies about himself during this time, primarily to make himself sound more masculine and reduce suspicion about his sexuality." While Wilhelm was on leave in April 2002 he visited Moscow and engaged in consensual gay sex, leading to a confrontation with Russian intelligence officers who threatened to expose his homosexuality to the Navy unless he agreed to spy for Russia. "Wilhelm declined and reported the attempted blackmail to the U.S. Embassy." This of course led to an investigation by the Navy, during which Wilhelm eventually confessed to being gay and engaging in gay sex. He was then charged with 38 specifications of wrongdoing, three of which related to violation of the military sodomy ban, the balance relating to a wide variety of offenses under military law, some seemingly trivial. On April 9, 2003, he pled guilty at a general court-martial to nine specifications, none

of them directly involving sexual misconduct but relating to other offenses charged against him, and he was sentenced to dismissal from the Navy. At around that time, the Supreme Court ruled in *Lawrence v. Texas* that criminal bans against private, consensual adult homosexual conduct violated the Due Process Clause, and subsequently, the highest military appeals court ruled in *U.S. v. Marcum* that sodomy charges against military personnel "would be subject to a different analysis than they had previously." In essence, the military courts would only move against those who engaged in conduct that fell outside the scope of *Lawrence* or could be deemed prejudicial to the service. Wilhelm sought "correction" of his military record, but was turned down by the Naval Board and went to court. Judge Rice pointed out that judicial review would be quite limited (while rejecting the government's argument that Wilhelm's claim was not justiciable), since the courts grant substantial deference to the administrative decisions of the military on personnel matters, but what really determined the ruling to dismiss Wilhelm's case was that he pled guilty to charges that did not relate directly to homosexual conduct. The court found it reasonable for the Naval Board to omit any mention of the "homosexual" aspect of the case when it declined to change Wilhelm's military records. Wilhelm argued that the anti-gay bias of the military, and particularly of the individuals who investigated his situation, should count to invalidate his bad conduct discharge, especially in light of *Lawrence*, *Marcum*, and the repeal of "don't ask, don't tell," but the court rejected this argument. "Whether or not the Board made the *right* decision in denying Wilhelm clemency is not the focus of a reviewing court under the [Administrative Procedure Act]," wrote Judge Rice; "rather, the task is merely to determine whether the Board's decision, afforded 'all due deference,' contains 'a rational connection between the facts

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found and the choice made.’ Because it is clear based on the allegations in the Amended Complaint together with the attachments thereto that the Board did just that, Wilhelm has not stated an actionable claim.” Wilhelm is represented by Dale F. Saran of Oceanside, California and Matthew Z. Crotty of Spokane, Washington. If he cares to persist, he can appeal this to the 9th Circuit, but it doesn’t look good . . .

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U.S. COURT OF APPEALS, 6TH CIRCUIT – On July 13 the 6th Circuit issued a decision dismissing Rowan County, Kentucky, Clerk Kim Davis’s appeal from the U.S. District Court’s ruling against her on the question whether she was violating the law by refusing to issue marriage licenses to same-sex couples based on her personal religious objection to same-sex marriages. However, at the same time the court vacated the district court’s preliminary injunction on grounds of mootness, since Kentucky has modified the law governing marriage licenses in such a way that Davis no longer has objections to issuing them, as the names of county clerks have been removed from the forms. However, the 6th Circuit held that the district court’s September 3, 2015, order holding Davis in contempt of course “does not meet the requirements for vacatur” under the court’s precedents, and thus is “not vacated.” The contempt judgment stands. *Miller v. Davis*, Nos. 15-5880 & 5-5978.

CALIFORNIA – Santa Clara County Superior Court Judge Jose S. Franco has ruled that police sting operations at Columbus Park focused on the men’s restroom facility there constituted “selective enforcement in violation of the suspects’ equal protection

rights,” according to a June 17 report in *The Mercury News*. Judge Franco agreed with the argument by Deputy Public Defender Carlie Ware, who had argued for dismissal of charges on the ground that the police had specifically targeted gay men for their enforcement action. Ruled Franco: “The claim that this investigative focus was driven by complaints is minimally supported by the evidence presented, especially as it relates to the park. Unpopular groups have too often been made to bear the brunt of discriminatory prosecution or selective enforcement.” The article noted that in May a Los Angeles County judge had thrown out similar charges involving Long Beach police, and that police in several southern California communities have stopped conducting such sting operations because of judicial disapproval of the tactics.

MICHIGAN – During his trial on charges that he got straight men too drunk to consent and then performed oral sex on them, Larry Lee was dissatisfied with appointed defense counsel and wrote letters to the trial judge asking to be able to defend himself or to have new counsel assigned. He alleges that the trial judge refused to consider his requests and steamrolled him into continuing with his original appointed counsel. Lee was convicted despite his insistence that in both cases charged against him the straight men had flirted with him at parties and then had consented to have sex with him, only later repenting of the experience and contacting law enforcement to complaint against him. Appellate counsel was appointed for him, but he claims that appellate counsel provided ineffective representation by failing to raise the violation of his 6th Amendment right to self-representation as part of his direct appeal. In this habeas proceeding, after reciting the complicated procedural history of the case, U.S. District Judge Robert H. Cleland concluded that

despite several procedural faults, Lee should get habeas relief, directing the state of Michigan to appoint counsel for him so that he can file an appeal as of right to the Michigan Court of Appeals, contending that his conviction should be vacated for denial of his right to self-representation. *Lee v. Haas*, 2016 U.S. Dist. LEXIS 82194, 2016 WL 3437599 (E.D. Mich., June 24, 2016).

MISSISSIPPI – Jackson County (Mississippi) Circuit Judge Robert Krebs sentenced Josh Vallum to life in prison on July 12 after taking his guilty plea in the beating death of Mercedes Williamson, a transgender woman. The U.S. Justice Department is considering whether to lodge federal hate crime charges against Vallum, who was scheduled to go to trial just a week before he agreed to plead guilty. Vallum had told law enforcement authorities that he killed Williamson after he reached between her legs and realized she had a penis, but this was not consistent with other witnesses who said that Williamson and Vallum had dated and had an active sex life and that Vallum knew that Williamson was transgender and considered them to have a “homosexual” relationship, which he was trying to keep secret from the gang he ran with. *AP National News*, July 13.

NEVADA – The Court of Appeals of Nevada affirmed the jury conviction of Rodger O. Evans on charges of “exploitation of elderly over \$5,000” in *Evans v. State of Nevada*, 2016 WL 3586687 (June 20, 2016). On appeal Evans argued, among other things, that the trial judge erred in excluding evidence as to the victim’s sexual orientation. Evans’ theory was that the fact the victim was a gay man without children was relevant to Evans’ argument that the money to him was a gift typical of the victim’s generosity to friends. Wrote the court: “Evans contends that

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the victim's sexual orientation is relevant to show why the victim does not have children of his own and why he would give such generous gifts to Evans, rather than to his own family. But one does not need to be of a particular sexual orientation in order not to have children; many people do not have children from many reasons having nothing to do with their sexual orientation or preferences. Furthermore," continued the court, "one's sexual orientation has nothing to do with one's generosity or stinginess toward others; the victim's sexual orientation has no discernible relation to whether he did or did not voluntarily give large amounts of money to Evans or to any other person." Thus, it was not relevant and the trial judge correctly excluded the evidence. What the court does not say but seems implicit was that the court suspected Evans' aim was to get the jury to sympathize with him and against a gay victim. Didn't work . . .

NEW YORK – On June 14 New York County Supreme Court Justice A. Kirke Bartley sentenced Elliot Morales to 40-years-to-life after a jury convicted Morales of second-degree murder as a hate crime because of the victim's sexual orientation in the shooting death of Mark Carson in the West Village, Manhattan, in May 2013. *People v. Morales*. Morales shot Carson in the head while mouthing homophobic epithets. Carson and his friend Danny Robinson had been walking together on 6th Avenue near 8th Street when Morales encountered the two men and started shouting at them, pursued them, and gunned down Carson. Morales claimed he acted in self-defense because he thought Carson was armed and prepared to shoot him. (Carson was not armed.) Morales also argued he could not be convicted of a hate crime because he identified as bisexual. In addition to the murder conviction, Morales, who fled the scene of the shooting but was quickly apprehended

by a police officer, was convicted on five counts of criminal possession of a weapon, one count of menacing the police officer who apprehended him, and one count of menacing a gay bartender in a West Village restaurant prior to his confrontation with Carson and Robinson. Morales also had a prior violent felony conviction on his record, and Justice Bartley rejected his argument that it should not be taken into account in determining the sentence in this case. The murder of Carson in the heart of the heavily-gay neighborhood shocked the NYC LGBT community, leading to vigils and protests. Morales, who insisted the shooting was an "accident," represented himself at trial and announced he would appeal the convictions and sentence. *GayCityNews.com*, June 14.

NEW YORK – U.S. District Judge David N. Hurd granted a motion for acquittal at the end of the government's case against Michael J. Mahannah, who was charged with attempting to induce a young boy into having sex with him. *United States v. Mahannah*, 2016 WL 3675569 (N.D.N.Y., June 22, 2016). It is embarrassing to read Judge Hurd's summary of the testimony. It seems that a government agent, one Investigator Schmitter, was out trolling to arrest gay men and started texting Mahannah, posing as a sex-starved gay boy eager to find an adult man with whom to have sex. Schmitter was persistent, even when Mahannah dismissed him as too young and said he had previously had a relationship with somebody who was HIV positive, but finally Mahannah agreed to an assignation and was arrested. All the "inducement" here seemed to come from the government agent. Wrote Hurd, "The terms persuade, induce, entice and coerce are not defined in the statute and 'are words of common usage that have plain and ordinary meanings.' Given such meanings, Mahannah did not urge, influence or

tempt the alleged minor towards illegal sexual activity as demonstrated by the facts [in cases the government was citing]. The proof presented by the government is a very rare case where the defendant may have had an interest in performing an illegal sexual activity but did not attempt to persuade, induce, entice or coerce the alleged minor. Even viewing the evidence in the light most favorable to the government and in the context of the totality of the evidence, a jury could not find beyond a reasonable doubt that Mahannah had the requisite intent to satisfy the second element of Section 2422(b), to knowingly attempt to persuade, induce, entice or coerce a minor." He also found that the government filed to offer "sufficient evidence that Mahannah took a substantial step toward the commission of the crime." Mahannah testified that he set a meeting with the "minor" to "advise the minor that what he was doing was wrong and could result in a sexually transmitted disease." Concluded Judge Hurd, "Once the suggestive influence of the investigator was removed, there is no evidence that the defendant had any intent to persuade a minor or engaged in the proposed sexual activity." Judge Hurd noted the lack of any physical evidence "to counter Mahannah's stated reason for meeting with the minor. After text conversations with a very persuasive, very professional investigator, riding a bicycle to meet the boy to advise him that what he was doing was wrong is not a substantial step toward the commission of the alleged crime." Thus, the prosecution fell apart at the end of the government's case, and the charges against Mahannah were dismissed by the court.

WASHINGTON – Musab Mohammed Masmari was sentenced to 120 months in federal prison for attempting to set fire to a gay club in Seattle, "Neighbors," on New Year's Eve 2013. Masmari was subsequently spotted and

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identified from a security video and was apprehended when he traveled to the airport, having purchased a ticket to fly to Turkey. He was represented by counsel, who advised him to take a plea with the understanding that the government would recommend the mandatory minimum sentence of 60 months, which it did. An employee of Neighbors who was present at the bar when the fire was discovered filed a victim impact statement and addressed the court during sentencing, describing the impact that a fire set at Seattle's "largest and longest running gay club" on a crowded holiday evening had on the LGBT community in that city. Thus persuaded, the trial judge, Ricardo S. Martinez, sentenced Masmari to double the mandatory minimum for his offense. On June 15, 2016, Judge Martinez rejected Masmari's motion to set aside or correct the sentence downward to 60 months. *Masmari v. U.S.*, 2016 U.S. Dist. LEXIS 78820, 2016 WL 3780381 (W.D. Wash.). Masmari's main claim was that he suffered from ineffective assistance of counsel, because his attorney urged him to plead guilty based on the government's representation that it would seek the mandatory minimum sentence but he ended up getting sentenced to twice as long. Judge Martinez pointed out that even if the government might have had difficulty proving beyond a reasonable doubt the "knowing and malicious intent" necessary for conviction under the statute, in part because Masmari claimed to be inebriated at the time he set the fire, that was not a basis for finding defense counsel's recommendation defective. The court found that Masmari was not entitled to raise a defense of voluntary intoxication because this was a general intent crime, and that he did not dispute that despite his intoxication he had the requisite intent to set the fire, intending to cause damage to property and persons. (One consequence of the fire was more than \$87,000 in costs to fix up the damage it

caused, an amount that the court ordered Masmari to pay as restitution.) It was also noted that the government lived up to its promise, but advocating a 60 month sentence to the court. Masmari, now an inmate, represented himself *pro se* on the motion.

REFUGEE LITIGATION NOTES

U.S. COURT OF APPEALS, 2ND CIRCUIT – How bad are things for gay men in Angola? To judge by the July 6 ruling by a 2nd Circuit panel in *Silva v. Lynch*, 2016 WL 3621925 (not officially published), the BIA could plausibly resolve the question against the claims of a gay Angolan who argued that he would be persecuted if forced to return there, both by his homophobic father and by the general population. On March 17, 2015, the Board of Immigration Appeals affirmed a 2013 decision by an Immigration Judge denying Silva's application for asylum, withholding of removal, and relief under the Convention against Torture. Silva did not allege that he had been harmed in the past, but claimed "that he would be persecuted in the future by his father and by the Angolan population because he is gay." Wrote the court as to the former, "the agency reasonably concluded that there was no evidence in the record that the Angolan government would be unwilling or unable to prevent Silva's father from harming him or punishing his father if he did." The court dismissed the salience of a letter from Silva's mother stating "that she was forced to flee to the Congo to avoid Silva's father," because it "was from an interested witness who was not subject to cross-examination." The burden was on Silva to show that his father was likely to harm him because of his homosexual orientation if he was returned to Angola, and the court found that the agency could conclude Silva had

not met that burden. As to Silva's other argument, the court observed that "the record contains conflicting evidence concerning the prevalence of violence against gay men in Angola, and the task of resolving conflicts in the record evidence is 'largely within the discretion of the agency.' The 2011 State Department Report notes that gay men in Angola report facing violence and discrimination, but it does not disclose the extent of that violence or its frequency. Silva submitted an additional article stating that homosexuals in Angola do not reveal their sexual orientation for fear of stigma and social exclusion; the article also reported on one gay man who had rocks thrown at him." But the Department of Homeland Security "submitted two articles, one of which states that, although homosexuality is technically illegal in Angola, there are no reports of any prosecutions for violating the law, and that a new proposed law criminalizes discrimination based on sexual orientation. Moreover, the articles quote an HIV/AIDS activist, as well as a human rights observer, to the effect that violence against gay men is uncommon in Angola and that Angola is ahead of other African nations with respect to the treatment of LGBT individuals." The court concluded that it was up to the BIA, not the court, to decide how to resolve this conflicting evidence. These claims are supposed to be assessed based on conditions in the country when the applicant left, not present conditions. It appears, however, that since 2011 Angola has repealed express criminal penalties for gay sex and it is at least arguable that more recent legislative action might provide some protection against discrimination because of sexual orientation in that country. That is, a recent on-line search for information tends to confirm the suggestion that conditions for gay people have been improving in Angola.

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CIRCUIT – A notably unsympathetic 2nd Circuit panel rejected the contention that hundreds of murders of gay men each year in Brazil would support a claim that a gay Brazilian would have the necessary reasonable fear of persecution sufficient to justify withholding of removal from the United States in *Feitosa v. Lynch*, 2016 WL 3190549, 2016 U.S. App. LEXIS 9990 (June 2, 2016). On December 31, 2014, the Board of Immigration Appeals affirmed an Immigration Judge’s ruling denying the petitioner’s application for asylum, withholding of removal and relief under the Convention against Torture. The court’s summary order rejecting the petitioner’s appeal, assuming the parties’ familiarity with “the underlying facts and procedural history in this case,” is skimpy on details, not revealing how the petitioner came to the United States or the circumstances under which his case was initiated. The petitioner’s asylum petition was untimely, and the court held that it had no jurisdiction to review the IJ’s dismissal of the asylum petition on this ground in the absence of any constitutional or legal issues about the IJ’s decision; the petitioner “simply ‘quarrels over the correctness of the factual findings,’” wrote the court. As to the withholding of removal ruling, the petitioner’s burden would be to show that past harms he suffered in Brazil and/or evidence about conditions for gay men in Brazil at the time of his hearing would support the conclusion that he had a reasonable fear of persecution if he were deported to his homeland. “Substantial evidence supports the IJ’s conclusion that the rapes [petitioner] suffered lacked a nexus to a protected ground: [petitioner] did not allege any facts to support a nexus finding.” (Rapes?) It seems the petitioner was expelled from his family’s home when he was 17, but the court said that this “did not rise to the level of persecution” because “he found an alternate place to live and a job.” As to his fear of future

persecution, “In this case, [petitioner] did not allege any individualized fear of persecution (other than his claims of past persecution discussed above); accordingly, to prove his entitlement to relief, he had to show a pattern or practice of persecuting or torturing gay men in Brazil. His country conditions evidence consisted of two newspaper articles and one report. This evidence revealed numerous troubling incidents of violence towards gay men in Brazil. However, as the agency concluded, the evidence of approximately 188 killings of gay men based on their sexual orientation in 2012 is not enough to establish, by a clear probability, that the harm inflicted on gay men in Brazil is sufficiently ‘systematic or pervasive as to amount to a pattern or practice of persecution.’” Wait a minute: hundreds of murders in one year does not “amount to a pattern or practice of persecution”? It is mere coincidence having nothing to do with their sexual orientation that hundreds of gay men were murdered in one year?? One is struck by the irony of reading this June 2 statement by the 2nd Circuit panel, when the *New York Times* subsequently reported in depth about the alarming situation for gay people in Brazil. See *A. Jacobs, Brazil is Confronting an Epidemic of Anti-Gay Violence*, *New York Times*, July 5, 2016 (website), July 6, 2016 (print edition) (“Brazilians have been confronting their own epidemic of anti-gay violence – one that, by some counts, has earned Brazil the ignominious ranking of the world’s deadliest place for lesbians, gays, bisexual and transgender people.”) Unfortunately, under the standards governing judicial review of BIA rulings, the court of appeals is supposed to focus solely on the evidence presenting to the Immigration Judge at the time of the hearing, limiting its review to the record compiled at that time, and to ignore later evidence about actual conditions in the country at the time it is reviewing the decision. This article suggests that

the petitioner would have good reason to fear persecution were he deported to Brazil now. He was raped more than once as a teenager (the court does not mention by whom) but that does not constitute, in the eyes of the court, “persecution,” because he failed to allege that he was raped because he was gay? He was thrown out by his family, but that’s not persecution because he found a place to stay and a job until he fled to the U.S. Hundreds of gay men are murdered every year in Brazil, a situation that has become worse since 2012 and that the government seems to be powerless or unwilling to counter, but petitioner has no reasonable fear of persecution? This sounds like a system designed to evade the facts. The court also rejected the petitioner’s argument that the Immigration Judge was biased because he failed to expressly deal with all the evidence submitted by the petitioner in his written decision. “His argument that the IJ erred in failing to request additional evidence fails because it was [petitioner’s] burden to establish his eligibility for relief.” The petitioner is represented by Maria Isabel A.N. Thomas of Princeton, New Jersey. In the context of the current situation in Brazil, this ruling strikes this writer as fundamentally unjust.

U.S. COURT OF APPEALS, 5TH CIRCUIT – A gay HIV-positive man from Mexico lost his appeal of the Board of Immigration Appeals’ denial of his request for asylum, withholding of removal, or relief under the Convention against Torture (CAT), in *Elizondo v. Lynch*, 2016 WL 3402589, 2016 U.S. App. LEXIS 11086 (5th Cir., June 20, 2016). Although the court accepted the proposition that HIV-positive gay men qualify as a “particular social group” for purposes of analyzing such claims, it found that Elizondo’s evidence about his experiences in Mexico did not prove that he was persecuted because of his membership in that

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class. “Though Elizondo testified that he suffered insults from persons based on his homosexuality,” wrote the court *per curiam*, “those comments do not qualify as persecution. Elizondo’s testimony regarding the robberies he suffered and the assault he experienced also do not show that he was persecuted on account of his membership in a particular social group. Further, Elizondo did not report any incidents to the authorities, and there is no evidence in the record that the Mexican government is unable or unwilling to control the violence.” Apparently, the court proceeds oblivious to the general media reports about anti-gay violence in Mexico or the government’s limited ability to control violent acts by criminal groups, or the dismissive or abusive responses of the police to complaints by gay citizens. “The BIA’s and the IJ’s decisions that Elizondo was not entitled to asylum because he failed to establish that he suffered past persecution by actors that the Mexican government was unwilling or unable to control and based on membership in a particular social group are supported by substantial evidence,” wrote the court. “Because Elizondo fails to show that he is entitled to relief in the form of asylum,” continued the court, “he cannot establish entitlement to withholding of removal, which requires a higher burden of proof. The record evidence does not show that it was more likely than not Elizondo would be tortured if returned to Mexico,” so he was not entitled to relief under the CAT, either. Elizondo was represented by Jodylyn Marie Goodwin of Harlingen, Texas on the appeal.

U.S. COURT OF APPEALS, 9TH CIRCUIT – The 9th Circuit announced that a majority of active judges in the circuit voted to grant *en banc* rehearing of an appeal by a gay, HIV-positive Mexican man, whose petition to review the Board of Immigration Appeals’

denial of his application for asylum, withholding of removal or protection under the Convention against Torture was denied last November in a 2-1 panel decision. *Bringas-Rodriguez v. Lynch*, 805 F.2d 1171 (9th Cir. 2015), *petition for rehearing en banc granted*, 2016 U.S. App. LEXIS 10766 (9th Cir., June 14, 2016). Evidently a majority of the judges on the circuit found some merit to dissenting Judge William Fletcher’s detailed critique of the majority opinion. The petitioner recounted a lengthy history of sexual abuse perpetrated by male members of his family throughout his childhood. The petitioner, brought to the U.S. by his mother and step-father as a teenager in 2004, lived in the U.S. without incident until he incurred a 90-day jail sentence at age 20 (in 2010) on a charge of “contributing to the delinquency of a minor” in Colorado when “he was drinking at his house and a friend brought over a minor.” After he served his sentence, the Department of Homeland Security sought to deport him, and he filed his application for asylum, withholding or CAT protection in February 2012. The Immigration Judge and the BIA faulted him for not going to the authorities when he was sexually abused by family members, even though at the time these events occurred the Mexican police were notorious for abusing gays and refusing to follow up on these kinds of cases. The 3-judge panel decision relied on recent State Department country reports about recent developments concerning LGBT rights in Mexico to reject the claim that he could reasonably fear persecution in Mexico, but Judge Fletcher pointed out that since the petitioner last entered the U.S.A. from Mexico in 2004, more recent country reports were irrelevant. The question whether he had a reasonable fear of persecution as an openly gay, HIV+ man in Mexico is supposed to be judged based on the conditions in the country at the time he left. Fletcher

also noted ways in which the IJ and panel decisions had misrepresented the factual record in the case. Grants of *en banc* rehearing are exceedingly rare in cases where the government is seeking to deport undocumented non-citizens, so the grant of rehearing, which effectively quashes the panel decision as a precedent, is significant, in light of the recent trend of federal appellate decisions resisting asylum claims from gay Mexicans. (By contrast, the 9th Circuit has been very open to asylum claims from transgender Mexicans over the past few years.) In the huge 9th Circuit – there are currently 29 active judges, in addition to many senior judges who still hear cases – *en banc* rehearing is carried out in 11-member panels. In this case, the three-judge panel included a district judge sitting by designation (who was the tie-breaker on the panel), so the *en banc* panel will include the two judges from the 3-judge panel and nine randomly drawn members from among the active judges of the circuit. If Judge Fletcher’s views carry the day in the *en banc* panel, the result could be a more liberal view of asylum claims from gay Mexicans in a circuit which is home to a large proportion of the undocumented immigrants from Mexico, and thus receives a large proportion of their petitions to review BIA denials. The petitioner’s quest for *en banc* review in this case was supported by five amicus briefs that were joined by a wide array of LGBT rights groups, disability rights groups, organizations concerned with refugee issues, and the United Nations High Commissioner for Refugees, whose brief was prepared by pro bono attorneys at Williams & Connolly LLP, Washington, D.C.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Ceron-Martinez v. Lynch*, 2016 U.S. App. LEXIS 10380, 2016 WL 3212256 (June 8, 2016), one sees how critical the composition of three-judge

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panels can be to the possible success of a *pro se* refugee appeal. The petitioner is an HIV-positive man from Mexico who was denied withholding of removal by an Immigration Judge and the Board of Immigration Appeals. He sought review, arguing that the IJ and the BIA “failed to presume the truth of his testimony that the hospital [in Mexico] turned him away because he had AIDS” even though they did not make a finding that he lacked credibility. The memorandum opinion for the majority of the panel – George W. Bush appointees Consuelo Callahan and Randy Smith – engaged in an extremely technical argument disclaiming jurisdiction to deal with Ceron’s appeal on the merits, claiming he had not sufficiently “exhausted” the administrative process. In a strongly-worded dissent, Senior Judge Dorothy Nelson, a Carter appointee, sharply disagreed with the majority, finding that Ceron had “sufficiently exhausted his argument that the IJ and BIA failed to presume the truth of his testimony, and that he also sufficiently raised a pattern or practice of persecution of a group of persons claim.” She pointed out that Ceron was *pro se* for “a majority of the proceedings before the IJ and the BIA,” and that he “adequately raised to the BIA the issue of the IJ’s consideration of his credibility such that we have jurisdiction to consider the merits of his argument.” She also contended that “a fair reading of Ceron’s December 2013 and April 2014 briefs demonstrates that he has raised a pattern or practice claim,” including his submission of documentary evidence on “the persecution of individuals suffering from HIV/AIDS in Mexico, such as a news article about a gay, HIV-positive man who was tortured, beaten and suffocated, and found dead with a sign stating in part, ‘This is what happens to me for going around infecting people with AIDS.’” Ceron’s brief also described the “widespread . . . stigmatization and abuse of HIV-positive individuals or people with

AIDS in Mexico” and asserted that he “will suffer persecution if forced to return to Mexico.” Since they did not question his credibility, she wrote, “we have jurisdiction to consider Ceron’s argument that the IJ and BIA failed to presume the truth of his testimony, and that Ceron adequately raised a pattern or practice claim.” She would have granted the petition to review the BIA’s decision on the merits.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A gay man from Moldova struck out in his appeal of the Board of Immigration Appeal (BIA) denial of his petition for asylum, withholding of removal or protection under the Convention against Torture (CAT). *Zubcu v. Lynch*, 2016 WL 3079311, 2016 U.S. App. LEXIS 9944 (9th Cir., June 1, 2016). As is frequently the case in these summary proceedings, the memorandum opinion for the 9th Circuit panel does not include a detailed recitation of factual allegations. The court found that the BIA’s ruling against the petitioner on credibility grounds was supported by substantial evidence. The problem is that he submitted two asylum applications, the first grounded on a claim that he “was persecuted due to his political opinion and religion,” the second that he was persecuted “based on his sexual orientation.” BIA found that the failure to mention sexual orientation in the first or to substantiate the allegations about political persecution fatally undermined the petitioner’s credibility, both as to his asylum petitions and his CAT claim. Furthermore, there was nothing in the record to document a contention that he was likely to confront torture or serious harm if deported back to Moldova. The petitioner claimed that his first asylum petition was filled out for him by a friend to whom he didn’t want to disclose his sexual orientation. That argument cut no ice with the BIA or the court, which quoted a prior case: “the

record does not compel the finding that the IJ’s unwillingness to believe this explanation, in light of the importance of the omitted incidents in his asylum claim, was erroneous.” Petitioner’s counsel on appeal was Reynold E. Finnegan, II, of Finnegan & Diba, Los Angeles.

PRISONER LITIGATION NOTES

CALIFORNIA – On June 6, 2016, the United States Supreme Court ruled that the Prison Litigation Reform Act [“PLRA”] requires inmates to exhaust “only such administrative remedies that are ‘available’” prior to initiating federal civil rights litigation. *Ross v. Blake*, 2016 WL 3128839 at *11, 2016 U.S. LEXIS 3614 at *27. In *Johnson v. Perry*, 2016 WL 3543503 (E.D. Calif., June 24, 2016), United States Magistrate Judge Allison Claire summarized the exceptions to exhaustion, as identified by the Supreme Court, as follows: (1) when an administrative procedure “operates as a simple dead end – when officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates”; (2) when the administrative process is “so opaque that if becomes, practically speaking, incapable of use,” that is, “no ordinary prisoner can discern or navigate it”; and (3) “when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Ross*, Slip Op. at 9-10. Here, prisoner Gilroy E. Johnson alleged that officials thwarted his filing of grievances, after he suffered retaliation following complaining about officer misconduct. Screening the case under 28 U.S.C. § 1915A(b)(1),(2), Judge Claire dismissed the complaint for inadequate specificity in pleading of exhaustion under the PLRA, but the Supreme Court’s recognition of exceptions to exhaustion (particularly interference

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with remedies available in theory) is validation of where numerous Circuit Courts have been trending recently. On the merits, Judge Claire also found Johnson's allegations too vague and conclusory, but she allowed him to replead Eighth Amendment causes of action based on: (1) failure to protect; (2) purposeful contamination of his food; and (3) interference with his legal mail. The first claims bears elaboration for Law Notes readers. Johnson claimed that officials called him gay, a "snitch" and a child molester to incite others to harm him, stating a potential claim of deliberate indifference to his safety under *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Judge Claire included a nationwide string of cases finding failure to protect claims based on verbal harassment designed to incite inmate-on-inmate violence. See *Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989) (correctional officer calling a prisoner "a 'snitch' in the presence of other inmates is 'material' to a section 1983 claim for denial of the right not to be subjected to physical harm"); *Thomas v. D.C.*, 887 F. Supp. 1, 4-5 (D.D.C. 1995) (telling other inmates plaintiff was "a homosexual and a 'snitch'"); see also *Flores v. Wall*, 2012 WL 4471101, at *12, 2012 U.S. Dist. LEXIS 136668, at *41-2 (D.R.I. Aug. 31, 2012), report and recommendation adopted, 2012 WL 4470998, 2012 U.S. Dist. LEXIS 139972 (D.R.I. Sept. 25, 2012) (correctional officers "spreading rumors that plaintiff was homosexual and a snitch," citing cases from the First, Eighth, and Tenth Circuits and District Courts in Kentucky and Missouri). Judge Claire denied appointment of counsel at this juncture. *William J. Rold*

CALIFORNIA – *Law Notes* reported "California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery," as part of the settlement of the Quine litigation (November 2015

at page 489). The settlement included provision of "other" treatments and services, some of which were yet to be negotiated. The parties are still fighting about them. By Order of June 9, 2016, which appears to be available at this time only in PACER, in *Quine v. Beard*, 3:14-CV-02726 (N.D. Calif.) JST (NJV), and in news accounts, U.S. Magistrate Judge Nandor J. Vadas (who has enforcement of the settlement) ruled on some of the minutiae facing transgender prisoners on a daily basis. He found that transgender prisoners should have "at least some access" to the following: Pajama/Nightgown, Robe, Sandals, Scarf, T-Shirts, and Walking Shoes. Chains/necklaces should be allowed "in the same manner as inmates housed in female institutions"; and "supervised access" should be permitted for pumice stone, emery boards, and curling irons. By contrast, the following items allowed in female institutions "may justify a policy that does not allow . . . bracelet, earrings, hair brush, and hair clips" in male institutions. The parties were directed to continue to meet and attempt to agree about "binders." Attorneys for Quine heralded the decision as challenging "gender norms" used to discriminate against transgender prisoners, according to a report by *Associated Press*, 6/10/16. Shiloh Quine, who is serving a life sentence, is set for sex reassignment surgery in December. She is represented by Morgan Lewis & Bockus, LLP, San Francisco, and the Transgender Law Center, Oakland. *William J. Rold*

CALIFORNIA – Last fall, U.S. Magistrate Judge Michael J. Seng dismissed the *pro se* complaint of transgender inmate Dwayne Denegal, a/k/a Fatima Shabazz, for failure to state a claim in *Denegal v. Farrell*, 2015 U.S. Dist. LEXIS 122326 (E.D. Calif., September 14, 2015), reported in *Law Notes* (October 2015 at pages 462-

3), primarily because she did not then have a diagnosis of "gender dysphoria" and he regarded her claim to be a medical "dispute" about treatment that is not actionable under the Eighth Amendment (and without citing the Ninth Circuit's reversal of a summary dismissal of a transgender prisoner's *pro se* complaint protesting lack of treatment in *Rosati v. Igbinoso*, 2015 WL 3916977 (9th Cir. June 26, 2015), reported in *Law Notes* (Summer 2015 at page 299). Now Denegal is back, apparently pleading her entire history since childhood and her odyssey in prison (per the lengthy recitation in the opinion), and Judge Seng will allow her to proceed past screening, in *Denegal v. Farrell*, 2016 U.S. Dist. LEXIS 88937, 2016 WL 3648956 (E.D. Calif., July 8, 2016), so she will be able to litigate her claim that she is being unconstitutionally denied appropriate treatment for the serious medical condition of her gender dysphoria. Denegal is receiving hormone therapy, and this lawsuit is about her demand for sex reassignment surgery. In light of litigation over this issue in several cases last year in the federal courts in California, she may have a strong case. Surprisingly, the court's opinion does not mention a concession by the California Corrections system last summer that it may not maintain a blanket ban on sex reassignment surgery for transgender inmates, regardless of credible medical opinion that such surgery is "medically necessary" in a particular case. *William J. Rold & Arthur S. Leonard*

ILLINOIS – Dannel Maurice Mitchell is an HIV+ inmate and a determined litigator, with various cases before two federal judges in the Southern District of Illinois. In *Mitchell v. Pace*, 2016 WL 3087454 (S.D. Ill., June 2, 2016), United States District Judge J. Phil Gilbert reviewed under 28 U.S.C. § 1915A the sufficiency

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of a claim that Mitchell was denied a shower after accidentally defecating on himself and was forced to clean himself in humiliating fashion before other inmates and staff. Judge Gilbert found that Mitchell stated a claim against the corrections officer who said he was taking an “unauthorized” shower and forced him to leave the shower before washing, leaving him with “no other option than to clean himself in front of his peers in the common area.” Judge Gilbert reviewed the claim as one of “forced public nudity . . . evaluated under the same standard as claims of humiliating strip searches.” He found that Mitchell “plausibly alleges that the [incident] in question was motivated by a desire to harass or humiliate rather than by a legitimate justification,” citing *King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015) and other 7th Circuit cases. He found that the officer could have issued a ticket for the unauthorized shower while still allowing Mitchell to clean himself. He ordered service and directed that the defendant not waive reply under 42 U.S.C. § 1997e(g). In *Mitchell v. Fulk*, 2016 WL 3071993 (S.D. Ill., June 1, 2016), United States District Judge Staci M. Yandle addressed preliminary review of claims of denial of medical care for HIV and other conditions. Without much discussion about the actual denials of care (which recited mostly a list of complaints, including “untreated” pain), she found on “liberal” reading of the complaint “colorable” claims of deliberate indifference under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), against the individual defendants, who included physicians and nurses, as well as a consultant – if he could be shown to be a “state actor” under the standards of *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 822-30 (7th Cir. 2009). She found inadequate allegation of pattern and practice to proceed against the corporate defendants (Wexford Health Services and the University of Illinois), and she dismissed these

claims without prejudice. The opinion includes a review of standards for liability generally, including individual responsibility of nurses under *Holloway v. Delaware County Sheriff*, 700 F.3d 1063, 1075 (7th Cir. 2012). She also directed service (with addresses to be provided *in camera*, if needed) and required responsive pleadings. *William J. Rold*

LOUISIANA – U.S. Magistrate Judge Karen Roby Wells dismissed *pro se* HIV+ inmate Pernel C. Kellup’s complaint on screening under 28 U.S.C. §§ 1915(e)(2) and 1915A in *Kellup v. Gusman*, 2016 WL 3627321 (E.D. La., June 9, 2016). Judge Wells conducted a *Spears* hearing – Fifth Circuit informational interview with *pro se* inmates to screen cases under *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) – and determined that his claims of mold and sewage problems in the Orleans Parrish jail system did not amount to Eighth Amendment violations under *Wilson v. Lynaugh*, 878 F.2d 846, 849 & n.5 (5th Cir. 1989). Moreover, a one-week delay in receipt of HIV medication (while diagnosis was confirmed) did not state a claim under *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976), even though he claimed nausea and weight loss during the interval. The delay was too short and the consequences too small to constitute “deliberate indifference” (Fifth Circuit string cites omitted). *William J. Rold*

OKLAHOMA – In *Wherry v. Gunter*, 2016 U.S. Dist. LEXIS 87950, 2016 WL 3676796 (W.D. Okla., July 6, 2016), Chief U.S. District Judge Joe L. Heaton adopted the Report and Recommendation of Magistrate Judge Charles B. Goodwin, dismissing the civil rights complaint of *pro se* inmate Ronnie Wherry, Jr., on initial screening (and assessing “one strike” under the Prison Litigation Reform Act, for

frivolous pleadings) under 28 U.S.C. §§ 1915(e)(2)(B) and 1915(g). Wherry alleged that a guard threatened to “spray your black ass” and called him “Itsy Bitsy Teeny Weeny,” which he said was a homophobic slur in prison. The statements were isolated (two remarks in one day), and not accompanied by physical conduct. Calling the remarks “limited commentary” in a prison context, Judge Goodwin found violations of neither the Eighth Amendment nor the Equal Protection Clause. Wherry was a California prisoner confined at North Fork Correctional Facility [“North Fork”], a private prison in Oklahoma run by the Tennessee-based Corrections Corporation of America [“CCA”]. Although a claim was not stated against her, the guard engaged in state action under *West v. Atkins*, 487 U.S. 42, 48 (1988); but Wherry also sued North Fork, which Judge Goodwin found not to be amenable to suit. There are no appearances listed in the decision (or on PACER), so Judge Goodwin’s web page and internet recitations about North Fork and its amenability to suit apparently are derived from the court’s judicial notice and other District Court decisions regarding CCA’s operations in Oklahoma. Judge Goodwin does not discuss whether or not CCA could be sued, but it seems academic on these facts. *William J. Rold*

TEXAS – This case raises the issue of when a prisoner who has had three prior cases dismissed for failure to state a claim can nevertheless overcome the “three strikes” bar of the Prison Litigation Reform Act and proceed *in forma pauperis*, because of “imminent danger.” Plaintiff Robert Miller alleged that a sergeant persuaded medical staff to deny him HIV medication for over a month and also arranged for another inmate to assault him. United States District Judge Michael H. Schneider ruled that the “imminent danger” exception did not apply to allegations

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about “past acts” in *Miller v. University of Texas Medical Branch*, 2016 WL 3267346 (June 15, 2016), adopting the report of the reviewing United States Magistrate, who also noted that, in addition to the three prior “strikes,” the instant complaint was duplicative of yet another lawsuit Miller had pending in the Eastern District of Texas. Judge Schneider found that the allegations of denial of medical care for a fixed period in the past and the placement of an “enemy” in Miller’s cell to facilitate an assault did not meet the “imminent danger of serious physical injury” exception to the three-strikes rule of 28 U.S.C. § 1915(g), because the danger did not exist at the time the federal lawsuit was filed, citing *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003), and *Baños v. O’Guin*, 144 F.3d 883, 884-85 (5th Cir. 1998). The dismissal was without prejudice to Miller’s proceeding after paying the full filing fee, and also without prejudice to the Court’s “frivolousness analysis under 28 U.S.C. § 1915A” should Miller pay the fee and refile. *William J. Rold*

WISCONSIN – *Law Notes* has twice previously written about Wisconsin transgender prisoner Dominique Dewayne Gulley-Fernandez’s multiple lawsuits about conditions of confinement, most recently in *Gulley-Fernandez v. Johnson*, 2016 WL 1169470 (E.D. Wisc., March 21, 2016), reported in April 2016 at page 167, wherein U.S. District Judge Rudolph T. Randa denied preliminary relief but ordered consolidation of claims. Now, after defendants have answered the most recent pleadings (including two new lawsuits), Judge Randa again denies preliminary relief in *Gulley-Fernandez v. Johnson*, 2016 WL 3149714 (E.D. Wisc., June 3, 2016). Gulley-Fernandez asked for a transfer, claiming transphobic harassment and unlawful seizure of written materials. State officials filed

an affidavit describing their efforts to keep Gulley-Fernandez in general population, thwarted, they say, by her own conduct (“he continues to yell or talk at the cell front and through the air vents about his sexual preferences which has led many of the other inmates getting aggravated”). The state also says that the “seized” materials were magazines belonging to another inmate, where Gulley-Fernandez had used the law library typewriter to alter addresses in order to receive the publications herself. Judge Randa found that the submissions indicated that Gulley-Fernandez was a “troubled individual with behavioral problems . . . regularly receiving support at the prison . . . [whose] ongoing actions and behavior results in the staff moving him to restrictive housing. None of the staff’s actions resulted from retaliatory animus and instead were used to protect Gulley.” Gulley-Fernandez demonstrated neither irreparable harm nor likelihood of success on the merits sufficient for preliminary relief. Judge Randa has previously denied counsel, but he again allows the plaintiff to proceed on medical care and protection from harm claims. It seems clear that Gulley-Fernandez is foundering, and legal assistance (and an expert) would be useful – and save the court’s time in the long run. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – Rep. Jason Chaffetz (R-Utah), chair of the House Oversight & Government Reform Committee, held a July 12 hearing on H.R. 2802, a bill ironically named the “First Amendment Defense Act” that would violate the Establishment Clause by sheltering those with religiously-based objections to same-sex marriage from any adverse consequences to their employment, tax status or government contracts under federal law. The 1st

Amendment requires the government to be neutral in matters of religion, so privileging particular religious beliefs would seem to be a clear violation of such neutrality, as a federal district court ruled in preliminarily enjoining enforcement of Mississippi’s HB 1523. Proponents of the measure asserted that it was intended to accommodate the religious free exercise rights of individuals and institutions and should be allowed the same as other provisions of federal law that accommodate religious observers. The measure cannot be enacted during the current session of Congress, since Senate Democrats would filibuster it and even if it were to get through both houses, President Obama would veto it.

U.S. DEPARTMENT OF DEFENSE – On June 30, the Defense Department issued Release No. NOR-246-16, titled “Secretary of Defense Ash Carter Announces Policy for Transgender Service Members. The policy establishes “a construct by which service members may transition gender while serving, sets standards for medical care, and outlines responsibilities for military services and commanders to develop and implement guidance, training and specific policies in the near and long-term.” Which is DOD bureaucratic speak for saying that a process is being launched that will roll out over time – about a one-year period – but: “Effective immediately, service members may no longer be involuntarily separated, discharged or denied reenlistment solely on the basis of gender identity. Service members currently on duty will be able to serve openly.” This was a historic announcement, denied rather longer than had been expected when Secretary Carter announced shortly after his appointment that he would launch an effort to figure out how to allow transgender people to serve in the U.S. military. Carter designated Acting Under Secretary of Defense

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for Personnel and Readiness Peter Levine as the point person to work with the various military services to “monitor and oversee” the effort to make appropriate policy changes and physical adjustment of facilities. “The full policy must be completely implemented no later than July 1, 2017,” says the release. A “Transgender Service Member Policy Implementation Fact Sheet” can be found on the DoD website. While the announced policy will allow transgender people already in the military to remain, the “initial accession policy” governing new recruits “will require an individual to have completed any medical treatment that their doctor has determined is necessary in connection with their gender transition, and to have been stable in their preferred gender for 18 months, as certified by their doctor, before they can enter the military.” In other words, young people who have been diagnosed with gender dysphoria but have not initiated a transition process will not be welcome to enlist and initiate their transition process at the expense of the Defense Department, but those who are already in the service and receive the appropriate diagnosis from military medical personal will be covered for their transition procedures to the extent they are deemed medically necessary. After a transition is completed, marked by a change in the Service members “gender marker” in the DoD’s personnel system, they “will use berthing, bathroom, and shower facilities associated with their gender.” Any complaints of anti-trans discrimination will be handled through DoD’s established equality opportunity channels.

U.S. DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS – On June 15 the Labor Department published final regulations instructing federal contractors how to comply

with E.O. 112146, as amended by President Obama to extend the ban on discrimination by federal contractors to sexual orientation and gender identity. This was the first time since the 1970s that the Department updated its sex discrimination guidelines. According to a fact sheet issued to announce the new guidelines, the new rules bring the sex discrimination guidelines “from the ‘Mad Men’ era to the modern era.” The final regulations, which were first published as proposed rules on January 30, 2015, go into effect on August 15, 2016.

ARKANSAS – A Texarkana non-discrimination ordinance that had been adopted unanimously by the City Council was repealed in a referendum vote on June 28 by 3,409 to 881. Only 20% of the voters favored keeping the ordinance! The ordinance dealt with city employment and city contractors, and included sexual orientation and gender identity as forbidden grounds for discrimination. Opponents whipped up a storm against the measure by calling it a “bathroom bill” and raising fears that the measure would endanger women and children by allowing transgender predators into bathrooms. In reporting on the vote, the *Arkansas Times* speculated that it was prelude to a state “bathroom bill” in 2017, confirming that Arkansas voters overall are clueless about transgender people and their lives. *Arkansas Times*, June 29. * * * The Arkansas Legislative Council’s Administrative Rules and Regulations Subcommittee gave final approval on July 12 of a regulation to allow counselors to refuse to work with clients if the counselor has a “conflict of conscience.” Critics of the new measure claim it permits discrimination by counselors against LGBT clients. The rule protects counselors from sanctions for referring away clients because of an “ethical, moral or religious principle” held by the

counselor. The head of the state Board of Examiners in Counseling, defending the rule, said it was necessary to protect the rights of both counselors and clients, and that counselors would be required to perform “due diligence” by consulting with a peer before exercise their right to refuse services. The American Counseling Association’s CEO, Rich Yep, told the press that this new rule “directly violates” the organization’s standards and “creates an environment” for discrimination. “As a profession dedicated to diversity and inclusivity, we urged them not to pass this,” he wrote, stating that the ACA “remains steadfast in its opposition to this unethical law that enables prejudice.” *Little Rock Democrat Gazette*, July 13.

CALIFORNIA – Palm Springs City Council voted unanimously on July 6 to approve an ordinance to convert all single-stall restrooms in public buildings to being gender-neutral. The ordinance also applies to businesses accessible to the public, such as bars, restaurants, and retail stores. The intent is to protect transgender people who fear harassment when using public facilities consistent with their gender identity. A similar ordinance passed last year by Cathedral City took effect on January 1, 2016. The Council is also considering possible legislation to encourage businesses to increase privacy in restrooms by installing floor-to-ceiling toilet stalls. The council is also considering a bill that would require anybody doing business with the city to adopt an equal benefits plan, under which employers would be barred from discrimination because of sexual orientation in the administration of their benefit plans. *Desert Sun*, July 8. * * * The City of Long Beach Council voted 8-0 to halt “nonessential” travel to North Carolina or Mississippi until their governments repeal recently enacted anti-LGBT

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laws. The vote also called for City Hall to draft letters to the governors of those states demanding repeal of the laws. The council acted on the recommendation of the city's Human Relations Commission. *Long Beach Press-Telegram*, June 23. We wonder whether Governor McCrory (N.C.) or Governor Bryant (MI) will deign to answer the letters.

DELAWARE – The Delaware Senate gave unanimous approval on June 9 to a bill amending the definition of misconduct as ground for divorce to remove “homosexuality” and “lesbianism,” reported the *Associated Press* on June 10. “The divorce law defines marital misconduct as behavior by a spouse so destructive that a person filing for divorce could not reasonably be expected to continue in the relationship,” said the report, given other examples of conduct listing in the statute: adultery, bigamy, criminal conviction with a penalty of imprisonment for a year or more, habitual drinking or drug use, contracting a sexually-transmitted disease. The measure had already been approved by the House and was sent to Governor Jack Markell for his approval.

FLORIDA – The Florida Department of Children and Families has reinstated a proposal explicitly banning bullying and harassment of LGBT foster children in group homes, after the withdrawal of the proposal at the instance of the Scott Administration, had generated a “public outcry” by civil rights groups, child-welfare advocates and former foster youth, according to a July 7 report in the *Orlando Sentinel*. The Department announced that it is creating a position for a full-time ombudsman to deal with discrimination complaints that might be reported to an anonymous hotline

that it will operate. The proposed rule will also ban facility staff from any “attempt to change or discourage a child’s sexual orientation, gender identity, or gender expression.” The DCF Secretary, Mike Carroll, denied that the June 12 shootings at the Pulse nightclub in Orlando had anything to do with the Department’s decision to reverse its withdrawal of the proposal. Of course, the Florida Conference of Catholic Bishops, which presumably supports bullying and harassment of gay youth in order to scare them straight, announced its opposition to the proposal, purportedly basing it on concern for “other children” who might be required to share a bedroom with “someone who ‘identifies’ as the same gender but remains biologically different” and thus be subjected to assaults. Bizarre! * * * The Miami Beach Commission voted unanimously to adopt a ban on “conversion therapy” offered by licensed health care providers to minors on June 8. The vote came in the wake of the Florida legislature’s failure to pass H.B. 137, a bill that was introduced by Miami Beach’s openly gay state representative, David Richardson. *Safeguarding America’s Values for Everyone*, Press Release, June 8.

GUAM – Guam is subject to Title IX and receives funding for its public schools from the U.S. government, so efforts are under way to comply with the requirements to accommodate transgender students. *Pacific Daily News* (July 4) reported that the University of Guam and the Guam Community College have both signified that transgender students may access restrooms consistent with their gender identity, and that any newly constructed facilities will include gender-neutral restrooms in order to provide an appropriate choice of facilities to all students. Jon Fernandez, superintendent of the Guam

Department of Education, indicated that every year Guam’s educational systems receive more than \$45 million in federal funds that are essential to operation of the system.

HAWAII – On June 29, Governor David Ige signed H.B. 2084 into law, prohibiting insurers in the states from discrimination against individual because of their gender identity. *Honolulu Civil Beat*, July 2.

ILLINOIS – The Chicago City Council voted on June 22 to delete a provision of the city’s Human Rights Ordinance that allowed operators of public accommodations to require patrons to present government-issued identification if their use of sex-designated facilities such as restrooms or locker rooms was questioned. The provision was attacked as a means of “outing” and embarrassing transgender patrons.

INDIANA – The Howard County Commissioners approved on June 20 an amendment to the county’s fair housing ordinance to add sexual orientation, gender identity and marital status as prohibited grounds of discrimination, in order to be sure that the county would be able to receive pending grants from the U.S. Department of Housing and Urban Development. The measure was passed “under protest” – not because the commissioners did not want to ban discrimination against LGBT people, but because they felt that the phrase “actual or perceived” that was included to track HUD language was ambiguous and could create enforcement problems. *Kokomo Tribune*, June 22.

IOWA – Seizing upon a poorly-worded brochure published by the Iowa Civil Rights Commission, the Fort

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Des Moines Church of Christ filed a lawsuit seeking to claim a religious exemption from any obligation to allow transgender persons to use restrooms in the church consistent with their gender identity. The offending brochure, published in 2008, appeared to require churches to allow persons attending religious services that were “open to the public” to comply with the anti-discrimination law’s gender identity provision. However, in response to this lawsuit and the threat of another by the Cornerstone World Outreach Church of Sioux City, the Commission quickly issued a revised brochure clarifying that places of worship are generally exempt from the public accommodations provisions except when they are used as polling places, are operating as day care centers, or engaged in other non-religious activities. The Commission said that it has never been asked to consider a complaint against a church in a gender identity case since the statute was amended in 2007 to add gender identity protection. Indeed, the Commission’s director said that the Commission “has not done anything to suggest it would be enforcing these laws against ministers in the pulpit, and there has been no new publication or statement from the ICRC raising the issue.” One suspects that the lawsuit was brought to make a political point rather than in anticipation of having to defend discrimination claims. Such suspicions are fed by the identification of the church’s legal counsel: Alliance Defending Freedom, an organization that is busy stirring up anti-gay and anti-transgender litigation at every opportunity. *Des Moines Register*, July 9.

KANSAS – The State Board of Education voted unanimously to “ignore” the federal Education Department’s directive to school systems that receive federal money concerning their obligation under Title IX of the Education Amendments Act

to afford appropriate restroom access for transgender students. The vote left it up to individual school districts to decide whether to comply. The *Associated Press* reported that Kansas receives over \$479 million in federal assistance for its public schools, about 10% of the state’s education budget. The Obama Administration has instigated lawsuits against some school districts, but has avowed that it will not take action to suspend federal funding pursuant to Title IX until the federal courts definitely uphold this interpretation of the law.

KENTUCKY – The Bowling Green City Commission voted on July 5 to approve a syringe exchange program as a public health measure to combat the spread of disease. The program is being developed by the Warren County Health Department. The action responds to S.B. 192, passed by the Kentucky General Assembly in March, which allows local governments to set up such programs. *Bowling Green Daily News*, July 6. * * * Attorney General Matt Beshear’s office has issued a formal opinion that Rowan County Clerk Kim Davis violated the state’s Open Records Act by denying a request by the Campaign for Accountability for copies of any documents reflecting a retainer or attorney-client engagement agreement between Davis or her staff and Liberty Counsel, the anti-gay religious organization that represented her in her marriage license battle before the federal district court. Davis had incompletely replied to the request, and then refused a request by the Attorney General’s office to see the documents that she had withheld under her claim of privilege. The opinion does not state that she violated the Act by withholding documents from Campaign for Accountability, but rather that she violated it by refusing to allow the Attorney General’s Office to examine the documents she claimed to

be exempt from disclosure to a member of the public. Davis’s attorney at Liberty Counsel, Mat Staver, said that the documents covered by the Opinion would be provided to the AG’s office. Liberty Counsel has represented Davis *pro bono*, of course. *Louisville Courier-Journal*, July 6. * * * The Kentucky Department of Corrections has ended a policy that allowed prison wardens to ban incoming sexually-oriented mail for inmates if they concluded that it would “promote homosexuality.” The ACLU of Kentucky had challenged the policy on First Amendment grounds. Corrections Commissioner Rodney Ballard issued a revised inmate male policy to prison staff during the first week of June, stating that all “sexually explicit materials” (defined as “pictorial depictions of nudity” or “actual or simulated sexual acts”) would be prohibited, regardless of whether it has anything to do with homosexuality. *Henderson Gleaner*, June 9.

MAINE – A group calling itself Equal Rights Not Special Rights (very unoriginal name, derived from the people who sponsored Colorado Amendment 2 in 1992) has launched a referendum effort to repeal the provision of the Maine Human Rights Act prohibiting sexual orientation discrimination. The addition of sexual orientation to the Human Rights Act was approved by Maine voters in 2005 by a 55-45 percent margin, after a previous referendum had repealed a legislative enactment. The proponents of the new effort asserted that it was necessary to protect the religious free exercise rights of those who do not wish to associated with homosexuals or have an involvement with same-sex marriages. The Maine legislature’s attempt to enact same-sex marriage was repealed in a 2009 referendum, but then in 2012 a referendum vote approved same-sex marriage by 53-47 percent. A 2014 NY Times poll

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showed 63% support for same-sex marriage among Maine residents. The proponents have one year from the time they start collecting signatures to obtain at least 61,123 valid signatures of registered voters in order to get the measure on the November 2017 general election ballot. *Portland Press*, July 9.

MASSACHUSETTS – Negotiators from the state House and Senate reached a compromise on a bill to add protection against discrimination because of gender identity in places of public accommodation to the state’s Law Against Discrimination, and the measure passed both houses easily in a vote on July 7. Governor Charlie Baker, a Republican who had opposed the original bill, had later signaled that he would be inclined to sign the House version, which included a provision requiring the Attorney General to issue guidance and when and how action could be taken against people who assert gender identity for “an improper purpose.” This measure was intended to get at the phony objection cited by opponents that forbidding this kind of discrimination will expose women and children to danger from attack in public restrooms. A version of this provision survived in the compromise bill. *Boston Globe*, July 8. Governor Baker signed the measure into law on July 8. It becomes effective on Oct. 1, a compromise date between the Senate and House versions.

MICHIGAN – The City Council of Howell voted unanimously on June 27 to approve a new antidiscrimination ordinance that prohibits employment and housing discrimination on various grounds, including sexual orientation and gender identity. A local press report said that 38 other Michigan communities have adopted similar ordinance, and that Howell’s was patterned on one enacted three years ago

in Battle Creek. The ordinance provides exemptions for religious organizations, and does not cover places of public accommodation. *Livingston County Daily Press*, June 29. * * * The Portage City Council voted 6-1 on June 28 to approve an ordinance that would ban discrimination in housing, employment and public accommodations because of sexual orientation or gender identity. *Newschannel3.com*.

MISSISSIPPI – The Jackson City Council voted 7-0 on June 14 to include sexual orientation and gender identity in the city’s anti-discrimination ordinance covering housing, public accommodations and employment, and also to expand the hate crimes ordinance to encompass these categories. The vote was a sign of defiance to the state government, which legislated earlier this year to allow individuals and organizations with religious or moral objections to marriage equality and sex outside of heterosexual marriage to act in accord with their beliefs. As noted above, the state statute, which was to go into effect on July 1, did not do so because of a last-minute preliminary injunction issued by the U.S. District Court, finding that plaintiffs were likely to prevail on their claim that the statute violates the federal constitution. As Jackson is the only jurisdiction within Mississippi that prohibits such discrimination, the state law was largely symbolic with respect to the rest of the state but threatened to render the Jackson ordinance unenforceable.

NEW HAMPSHIRE – On June 30, Governor Margaret Hassan signed Executive Order 2016-04, expanding the state’s existing anti-discrimination executive order to include gender identity or gender expression. The order applies to state agencies in their employment practices and provision of services, and requires that executive

branch contracts and grants include anti-discrimination provisions that cover gender identity or expression. State agencies are directed to review all their policies to bring them into compliance, with the Division of Personnel charged to provide guidance to state agencies by September 15 and propose any necessary rule changes.

NEW JERSEY – After a city resident and Garden State Equality asked the town of Clifton to fly a rainbow flag to celebrate gay pride, Town Council divided evenly on the question, but Mayor Jim Anzali broke the tie at a June 6 meeting in favor of flying the flag. The mayor said he did not think that flying a pride flag “is going to hurt anybody.” A flag raising ceremony was held on June 25. *AP State News*, June 9.

NEW YORK – The State Division of Human Rights, which enforces the New York State Human Rights Law, has published a new regulation prohibiting discrimination based on an individual’s relationship or association with a member of a “protected class.” Gay people are explicitly protected under the statute, and a recent regulation promulgated by the agency provides that transgender people are also covered, both within the ambit of sex discrimination, and for those dealing with gender dysphoria, the ambit of the disability discrimination provision. In a press release announcing the new regulations, the Division gave the following example of what might be prohibited: “job seekers may not be denied employment because of the gender identity, transgender status, or other protected characteristics of their spouses.” *JD Supra*, June 29.

NEW YORK – The New York City Council approved an ordinance on June 21 that requires single-stall public

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bathrooms to be gender-neutral. The measure, which takes effect January 1, 2017, was approved by a vote of 47-2. The measure would apply to any single-stall restroom that is open to public use. Restaurants and other retail businesses in New York have already begun putting up new identifying signs on restrooms to indicate that people are welcome to use restrooms consistent with their gender identity.

NEW YORK – The New York City Civilian Complaint Review Board issued its first comprehensive report on relationships between the LGBT community and the New York City Police Department in a document titled “Pride, Prejudice and Policing: An Evaluation of LGBTQ-Related Complaints from January 2010 through December 2015.” The document is available on the Board’s website: <http://www.nyc.gov/ccrb>. It contains detailed breakdowns with graphs and charts of complaints filed with the Board concerning conduct by NYPD staff towards LGBTQ community members. Overall, the data show that the volume of complaints in this category were at a peak in 2012 and have declined in each subsequent year.

NEW YORK – Long Beach City Council voted unanimously on June 21 to add gender identity to the city’s anti-discrimination policy for its employees. The policy covers both discrimination and harassment. The city’s anti-discrimination ordinance does not cover use of bathrooms or other facilities, however. *Newsday*, June 23.

NORTH CAROLINA – The Charlotte Mecklenburg Schools updated their policies to comply with the U.S. Education Department’s requirements under Title IX, in open defiance of the

state’s H.B.2. Transgender students can either use the bathroom they prefer or can request access to a private facility (such as a restroom in a school nurse’s office). Staff members are instructed to address students by the name and pronoun corresponding to their gender identity. The governor’s office issued a statement criticizing the school district as having made a “radical change” to its policies. H.B. 2 is under attack in several court proceedings, and motions for preliminary injunctions against its enforcement are pending. *abc11.com*, June 21.

OHIO – The City Council of Newark, Ohio, voted unanimously to amend its equal employment opportunity, fair housing and ethnic intimidation laws to add “sexual orientation,” “gender identity,” and “gender expression” as protected categories. *Newark Advocate*, July 6. * * * A little “zing” to the GOP? On July 13, the City Council in Cleveland, Ohio, unanimously repealed a provision in its anti-discrimination ordinance that had allowed limitations on restroom access by transgender individuals. The city’s 2009 anti-discrimination ordinance included gender identity, but expressly allowed employers and businesses to limit restroom access based on biological sex. The proposal to change that was introduced in 2013, but remained dormant until somebody woke up and decided it would be a good idea to move the repeal measure prior to the Republican Convention. Under the revised law, transgender people can use facilities that are consistent with their gender identity in workplaces and places of public accommodation. * * * The Cincinnati Public Library Board voted unanimously to reject a request by a transgender employee to cover her gender confirmation surgery under the health insurance plan. Although costs were not discussed publicly, a member of the board asserted that it

would not be “fair” to ask “the public” to pay for the procedure. The vote affirmed a recommendation from the board’s human resources committee. *Cincinnati Enquirer*, June 15.

OREGON – The Oregon Division of Motor Vehicles stated that it may need a substantial period of time in order to modify the software used to generate drivers’ licenses in order to accommodate a court order granting an individual’s petition to get a license that does not designate them as either male or female. On June 10, Judge Amy Holmes Hehn of the Multnomah County Circuit Court granted a petition by Jamie Shupe of Portland, born with male anatomy but seeking a license that does not assign Shupe a specific legal gender. Shupe had undergone hormone therapy after retiring from the military, stating that “transitioning to female was the only option available then” but refusing to embrace the gender binary. “It feels amazing to be free from a binary sex classification system that inadequately addressed who I really am, a system in which I felt confined,” said Shupe in response to Judge Hehn’s ruling. A spokesperson for the DMV said that they had been in touch with Shupe. “At this point, we can’t fulfill the request,” said David House, “but we are studying it to figure out what computer system changes and statutory changes might need to be made.” He said that the existing database program did not support a “third kind of sex designation.” *cnn.com*, June 12; *Statesmanjournal.com*, June 22.

PENNSYLVANIA – The Philadelphia School Reform Commission voted on June 16 to approve a new policy allowing transgender students to use restrooms and joint groups – including athletic teams – that correspond with their gender identity, reported the *Associated Press*. Students will be

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allowed to determine which pronouns should be used to address them, and can wear clothing consistent with their gender identity at school. * * * The Pittsburgh School Board voted unanimously on June 22 to approve a districtwide policy outlining the rights, protections, and support systems that school must provide for transgender students, reported the *Associated Press*. The policy allows students to use bathrooms and participate in physical education classes and intramural sports that “align with their gender identity,” according to the AP report. Students may also determine the preferred name and gender pronouns to be used for them. * * * Proposals to amend the state’s anti-discrimination law to cover sexual orientation and gender identity have been blocked for many years in legislative committees with Republicans controlling both houses, but a bill to protect LGBT people from discrimination received Senate committee approval in June after the Orlando massacre. However, in order to win enough votes from Republicans to approve the measure, sponsors agreed to remove coverage of public accommodations. *Sharon Herald*, June 28. Republicans generally believe that allowing transgender people to use restrooms consistent with their gender identity will lead to the destruction of Western Civilization as we know it. (They don’t seem to have realized that transgender people have been using restrooms consistent with their gender identity since the beginning of recorded time, during which Western Civilization seems to have advanced . . .) Actually, we’re just kidding. What Republican legislators probably believe, with some justification, is that if they vote to approve such a measure, they will attract primary opponents when they seek re-election who will based their campaigns on the fear-engendering argument that letting transgender women use women’s restrooms puts cisgender women and children at risk of

violation of their privacy and possible sexual assault by cisgender men posing as transgender women in order to get fraudulent access to the facilities. In order to lend credence to such fears, some anti-transgender men have started to invade women’s restrooms in a few isolated cases in order to make this seem like a real possibility. Of course, a law that protects the right of transgender people to use facilities consistent with their gender identity would not authorize a cisgender man to use a restroom designated for women!!

RHODE ISLAND – The United Healthcare plan covering Rhode Island state employees began covering hormone therapy and sex reassignment surgery for transgender state employees as of July 1, according to an announcement by Governor Gina Raimondo on June 23. According to a report by the *Providence Journal* (June 24), Rhode Island is the twelfth state to extend such coverage to its employees. Rhode Island was among the early states to forbid gender identity discrimination, dating back 15 years. The coverage for “irreversible surgical interventions” is limited to employees 18 years or older, and surgical coverage is only available for persons who have completed twelve months of “successful continuous full time real life experience in the desired gender.”

TENNESSEE – The Nashville Metro Council voted to eliminate the requirement that businesses with single-toilet restrooms have separate facilities for labeled as being exclusively for men or women. The Council unanimously voted to “broaden exceptions for unisex restrooms, which are only allowed in Nashville businesses that fall below a square-footage threshold,” reported the *Memphis Commercial Appeal* on June 25. The measure was introduced by a councilmember

after constituents who wanted to open a vegetarian restaurant with a unisex bathroom were told by Metro codes inspectors that they could not have unisex restrooms because of the size of their establishment. Councilman Brett Withers said that he learned that several restaurants and other businesses were in violation of code provisions because they wanted to make single-user restroom facilities available to all patrons regardless of sex or gender identity. The new law authorizes “unisex restrooms at most businesses that have two or more bathroom facilities that each consist of single toilets and have locks.”

TEXAS – Responding to an inquiry from Lt. Gov. Dan Patrick, Texas Attorney General Ken Paxton issue A.G. Opinion KP-0100 on June 28, advising that the Fort Worth Independent School District’s superintendent had violated chapters 11 and 26 of the Texas Education Code by unilaterally adopting a policy providing that school officials will not advise parents about the gender identity of their children without the children’s permission. The superintendent adopted “Guidelines” on transgender students in April, which were stated to be mandatory for the current school year. The guidelines were developed by district staff and were adopted without any chance for public comment or school board vote. Paxton asserted that state law protects the right of parents to information about their children. The Guidelines, on the other hand, assert that students have a right to privacy, including “keeping a student’s actual or perceived gender identity and expression private,” and directed that school personnel “may only share this information on a need-to-know basis or as the student directs. This includes sharing information with the student’s parent or guardian.” The Guidelines also direct that students have a right to control the degree to which parents or guardians

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will be involved with the “transitioning” process of the student. Paxton opined that to the extent the Guidelines subordinate the rights of parents provided by Chapter 26, and were adopted without the input of the public and the school district’s board, they violate Chapter 11. *Austin American-Statesman*, June 29. Some of this may be sour grapes, since Patrick and Paxton were looking for an appropriately-situated school district to be a plaintiff in the law suit attacking the Obama Administration’s construction of Title IX to cover gender identity discrimination in schools, and they had hoped to enlist Fort Worth, until it developed that the school superintendent refused to play along. As a result, they ended up using a tiny rural district that does not appear to have any transgender students.

UTAH – The Utah County Board of Commissioners voted unanimously on July 5 to add gender identity, sexual orientation, and pregnancy/pregnancy-related conditions to the county’s non-discrimination policy, which makes the County’s personnel rules and regulations match up with those of the state government. In 2015, the famous “Utah compromise” resulted in the addition of gender identity and sexual orientation to the state’s civil rights law. Thus, the Commissioners’ action was mainly symbolic, since the county was already required to comply with state law. However, County Personnel Director Lana Jensen said, “We are just making sure everyone is aware those are officially part of the protected categories.” *Provo Daily Herald*, July 5.

WASHINGTON – Proponents of an initiative that would repeal a state rule allowing transgender people to use restroom facilities consistent with their gender identity failed to file petition signatures by the statutory deadline to get on this November’s ballot. In light

of current voting statistics, proponents would need at least 246,372 valid signatures from registered voters to qualify their initiative. At the rate that signatures tend to be disqualified, this means that they would actually have to get at least 325,000 signatures to survive any challenge and get to the ballot. They had scheduled an appointment to turn in the signatures by the July 8 deadline, but they contacted the secretary of state’s office on July 7 to cancel the appointment. *AP Alerts*, July 8.

LAW & SOCIETY NOTES

MASSACRE AT ORLANDO GAY BAR – On June 12, Omar Mateen brought an arsenal of weapons into Pulse nightclub in Orlando, Florida, and opened fire, ultimately killing 49 people in the crowded gay-oriented club and wounding scores more. Most of the dead were Hispanic LGBT people who were there celebrating a theme night at the bar. During the hours of his rampage and hostage taking, Mateen communicated allegiance to various Islamic terrorist groups. He died when law enforcement officers forced their way into the bar to rescue the remaining patrons and exchanged gunfire with him. Afterwards some survivors claimed that Mateen had frequented the bar in the past, and some gay individuals claimed to have had contact with him through gay-oriented cruising apps, at least one person claiming to have had sex with him. His first wife speculated that he may have been a closeted gay man. However, a month later federal investigators asserted that these claims were not substantiated. Immediate reaction from Obama Administration officials was to describe it both as a terrorist act and a hate crime, although again federal law enforcement officials a month later were insisting that there was no

evidence Mateen was anti-gay, which would seem an odd thing to say about a man who invaded a gay bar, shooting and killing people and, according to some survivors, voicing anti-gay slurs. Much remains to be learned about this occurrence, which was generally accounted the worst multiple-shooting incident in the United States for a century or more. It stimulated rallies and memorial services internationally, but did not appear to have any discernible effect on Republicans in the U.S. Congress, who subsequently sought to repeal President Obama’s executive order barring anti-LGBT discrimination by defense contractors leading to an impasse in Congress over a defense spending bill and callously scheduled exactly a month later a committee hearing on a proposed “First Amendment Defense Act” intended to “protect” individuals and institutions who sought to discriminate against LGBT people based on their religious views. (It seemed clear that a main goal of the bill was to protect non-profit educational institutions from losing their privileged federal tax status if they violated Title IX by discriminating against married same-sex couples.)

PRESIDENTIAL ELECTION – The Republican and Democrat National Conventions were scheduled to begin on July 18 and July 25, respectively. At our deadline, presumptive Republican Presidential Candidate Donald Trump had announced that he would nominate Indiana Governor Michael Pence to be his running mate. Trump has never held elective office or any government position. Pence, who served six terms in the House of Representatives before winning election as governor of Indiana, had a solidly anti-gay voting record in the House, according to Human Rights Campaign. As governor, he is most famous for having advocated and signed into law an extreme

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Religious Freedom Restoration Act that critics claims would sanction anti-gay discrimination by Indiana businesses; blowback from the business community was so severe that Pence reluctantly signed an amendment providing that the RFRA could not be raised as defense to a discrimination claim. Pence describes himself as an Evangelical Christian. Trump's views on LGBT issues are a moving target. At times in the past he voiced support for same-sex marriage, criticized attempts to police transgender access to public restrooms, and supported measures to ban anti-gay discrimination, but in the course of his current run for the Republican nomination he backed away from all those positions, announced that he would appoint Justices to the Supreme Court who would overrule the marriage equality decision, and affirmed that he would rescind President Obama's executive orders requiring federal contractors not to discriminate because of sexual orientation or gender identity. Neither Trump nor Pence raised any objection to the product of the Republican Platform Committee, which opposes the Equality Act, criticizes the Supreme Court's marriage equality decision, and endorses conversion therapy to "cure" homosexuality. As we went to press, presumptive Democratic President Candidate Hillary Clinton had not announced her choice for running mate. Clinton, who was First Lady of Arkansas and the United States during her husband's administrations, served as U.S. Senator from New York and as President Obama's first Secretary of State. She supported the repeal of the "don't ask, don't tell" military policy, the invalidation of the Defense of Marriage Act, and the Supreme Court's *Obergefell* decision, although some critics noted that DADT and DOMA were both signed into law by her husband, President Bill Clinton, and she did not endorse marriage equality until after President Obama had done so

during his 2012 re-election campaign. The proposed party platform work out by a committee dominated by her supporters calls for enactment of the Equality Act and generally endorses equality rights for LGBT people under federal law.

INTERNATIONAL SPREAD OF MARRIAGE EQUALITY

– A Melbourne-Australia based LGBT rights activist, Tony Pitman, announced that after Colombia and several Mexican states embraced marriage equality during June, the number of people in the world living in marriage equality jurisdictions had exceeded one billion. He cumulated current population estimates. The largest country by population with marriage equality is the United States, followed by Brazil, France, the U.K., and South Africa, all with populations exceeding 50 million people. The population estimates were current as of July 1, 2016. Since the first same-sex marriages took place in the Netherlands in 2001, "we've gone from zero to a billion in just 15 years," Pitman exulted. But, he said, "It's terribly disappointing that Australians will never be able to say that we were among the first billion people in the world to achieve marriage equality." samesame.com.au/news/13926/A-billion-people-now-live-with-marriage-equality.

DEPARTMENT OF HOMELAND SECURITY

– In 1975, a "rogue" local clerk in Boulder, Colorado, issued marriage licenses to some same-sex couples, including Richard Frank Adams and Anthony C. Sullivan. Adams, a U.S. citizen, then sought to sponsor Sullivan, an Australian, as his spouse for immigration purposes. The Attorney General of Colorado had disavowed the legality of the resulting marriages. Adams' petition was denied by the Immigration Service in an

outrageously insulting letter, and he lost his appeal in the 9th Circuit, which held that the federal government could define marriage as solely the union of a man and woman for federal immigration purposes, regardless what a state did. The Supreme Court's decision in *U.S. v. Windsor* (2013), holding that federal refusal to recognize a state-sanctioned same-sex marriage violates the 5th Amendment, came many years after Adams' death, but Sullivan, who survived him and was residing in the U.S. "under the radar," sought to revive that old petition with the assistance of immigration lawyer Lavi Soloway, who specializes in representing same-sex couples. Soloway pressed for an apology from the government for the way the petition was treated in the 1970s, and for a new decision. A written apology was soon forthcoming from the Homeland Security Department, and on January 5, 2016, the U.S. Citizenship and Immigration Service (USCIS) approved Adams' old visa petition. On April 21, the USCIS issued Sullivan a "green card" and a notice that his application for permanent residence in the U.S. had been approved. "It is with great pleasure that we welcome you to permanent resident status in the United States," reads the notice on a Form I-797C. The resident status is good for ten years and can be renewed at that time. The full story of how this all unfolded can be found at a website maintained by Soloway, domaproject.org.

NATIONAL PTA

– The National Parent Teacher Association adopted a resolution during its 2016 Annual Convention on Recognition of Lesbian, Gay, Bisexual, Transgender and Queer/Questioning Individuals as a Protected Class. They are for it, calling for federal policies that specifically protect LGBTQ youth and "local practices that create and maintain safe, affirming and inclusive learning environments for all students," according to their July 5 news release.

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The specific concerns mentioned in the press release are bullying and discrimination, but the release did not explicitly state a position on the bathroom access issue that is roiling the country.

HIV / AIDS – Media sources in Australia reported that Associate Professor David Harrich of QIMR Berghofer Medical Research Institute in Brisbane had achieved an experimental breakthrough with HIV, finding a protein that can be used to “switch off” infected cells, thus ending their replication. So far his discoveries have only been in vitro, and he is proceeding now to testing in animal subjects to determine the mechanism by which this discovery works. If it pans out, it could be possible to treat people with HIV infection once, rather than having to administer medication daily throughout their life. *Courier-Mail*, July 15. * * * News of Prof. Harrich’s discovery came hard on the heels of an announcement by the nation’s health officials that anti-retroviral treatment for HIV was now so widespread in Australia that new cases of AIDS are not being diagnosed. While 1,000 or more new cases of HIV infection are being reported annually, actual cases of full-blown AIDS, in which an untreated infection results in immune system collapse and the blossoming of opportunistic infections, are just not occurring, thus leading to celebratory headlines announcing that the AIDS epidemic is “over” in Australia. Well, yes and no. As long more than a thousand new HIV infections are detected each year, and as thousands of people are taking daily meds in order to suppress HIV infection, and some people are dying each year from complications resulting from the medication or the underlying infection, the epidemic is hardly “over”. It has just evolved to a different stage.

GALLUP POLL ON SAME-SEX MARRIAGE – According to a Gallup Poll published on June 22, almost half of the same-sex couples living together in the U.S. are married. A *Reuters* report summarizing the results said, “The percentage of marriage cohabiting same-sex couples, as opposed to couples living together but not married, rose to 49 percent from 38 percent before the ruling [in *Obergefell v. Hodges* on June 26, 2015].” Gallup estimated that 123,000 same-sex U.S. couples married in the year after *Obergefell*, with a high number of those unions actually taking place in states that had already legalized marriage equality as a result of prior litigation and legislative action. Gallup estimates that 9.6% of gay and lesbian Americans are now married, and that the percentage of same-sex couples living in a “domestic partnership” has declined to 10.1% from 12.8% during the same time period. Data had to be accumulated from interviews, since states do not general keep records showing which marriages involve different-sex couples and which marriages involve same-sex couples. The 2020 U.S. census should provide interesting nationwide data on the prevalence of same-sex marriage!

ARCHIVES OF SEXUAL BEHAVIOR – A study published in the journal *Archives of Sexual Behavior* claims that the percentage of American adults who say they have had at least one homosexual experience has doubled since the 1990s. The study is based on a survey of 30,000 adults. According to the survey data, the percentage of men who had sex at least once with another man had increased from 4.5% to 8.2% between 1990 and 2014, and the percent of women who had sex at least once with another woman increased from 3.6% to 8.7%. Also, the percentage of adults who said they had sex at least once with a man and

once with a woman increased from 3.1% to 7.7%. Among “millennials” – adults between ages 18 and 29 during the 2010s – 7.5% of men and 12.2% of women reported having had at least one same-sex experience. Prior to 1990, the percentage of the adult population who believed that same-sex relations were “not wrong” was 13%; in 2014, that figure had risen to 49% for all adults and 63% for millennials.

WILLIAMS INSTITUTE (UCLA) – The Williams Institute released a study, titled “How Many Adults Identify as Transgender in the United States,” which substantially increases prior estimates, conclude that 0.6% of the adult population, or approximately 1.4 million individuals, today identify as transgender. The study extrapolated from data collected in the Behavioral Risk Factor Surveillance System. In 2014, 19 states participating in that survey included a question about transgender identity. The authors of the study also used data from the U.S. Census Bureau’s American Community Survey to supplement the data from the 19 states covered in the BRFSS surveys. Thus, Williams Institute announced, “The study provides the first ever state-level estimates of the percentage of adults who identify as transgender for all 50 states. Hawaii (0.8%), California (0.8%), Georgia (0.8%), New Mexico (0.8%), Florida (0.7%), and Texas (0.7%) are the states that have the highest percentages of adults who identify as transgender.” The study found that “young adults are more likely than older adults to identify as transgender. Among adults ages 18 to 24, 0.7% identify as transgender; among adults ages 25 to 64, 0.6% identify as transgender; and among adults ages 65 and older, 0.5% identify as transgender.” The survey authors are Andrew R. Flores, Jody L. Herman, Gary J. Gates, and Taylor N.T. Brown.

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UNITED METHODIST CHURCH –

The Western District of the United Methodist Church elected an openly-gay bishop, Rev. Karen Oliveto, on July 15, despite the denomination's continuing condemnation of same-sex relationships. She is pastor of Glide Memorial United Methodist Church in San Francisco, and is the first openly-gay bishop to be elected in the 12.7 million member church. Several regional district have appointed gay clergy, some Methodist churches have allowed same-sex marriages to take place, and there is turmoil within the denomination over these issues. *AP Online*, July 16.

ROMAN CATHOLIC CHURCH –

Responding to press questioning during a flight from Argentina to Rome on June 26, Pope Francis was asked by a reporter whether he agreed with a recent comment by a Roman Catholic cardinal from Germany, reacting to the Orlando massacre, that the church should apologize to gays. According to the *New York Times* version of a *Reuters* report, "Francis, looking sad, recalled church teachings that homosexuals 'should not be discriminated against.' 'They should be respected, accompanied pastorally,' he said. Then he added that he thought the church should apologize not only to gay people it had offended, but also to the poor, to women who have been exploited, and to children who have been exploited by being forced to work. 'It must apologize for having blessed so many weapons,' he said." Critics quickly pointed out the evasive nature of these remarks, as Francis did not state any change in church doctrine regarding gay people, was willing to refer to exploitation of women but not to allowing women to participate fully in the church as priests or other high clerical officials, and referred to exploitation of children "being forced to work" but not "being forced into having sex with priests." Indeed!

STONEWALL INN: ENSHRINING GAY HISTORY –

The Stonewall Inn on Christopher Street, site of a historic "riot" in June 1969 that is now widely identified as a signal event in the modern LGBT rights movement in the United States, became the focus of federal and state attention as President Barack Obama announced on June 24 the designation of a national monument zone centered on it – the first officially designated national monument commemorating gay history – to be known as Stonewall National Monument. The White House released a statement by the President, saying that the monument would "tell the story of our struggle for LGBT rights." (Obama had prominently mentioned Stonewall in a litany of important civil rights events during his second inaugural address.) Governor Andrew Cuomo then designated it formally in a "Citation" on June 26 as a "State Historic Site." Cuomo also announced the appointment of an LGBT Memorial Commission in his Executive Order No. 158, charging the Commission with recommending a site and design of a memorial "in the vicinity of the western portion of Greenwich Village" to honor the victims of the June 12 Orlando massacre. The Commission was directed to complete its work and provide its recommendation to the governor by December 31, 2016. * * * In a separate action, on June 17 New York City dedicated the corner of 6th Avenue and Washington Place as Sgt. Charles H. Cochrane Way, in honor of a gay NYC police officer who came out publicly to testify for the NYC Gay Rights Bill in 1986 and co-founded the Gay Officers Action League to advocate for LGBT people within the New York City Police Department. Cochrane, who would lead GOAL's active participation in the annual Gay Pride March for many years, passed away in 2008. * * * In another LGBT history development, U.S. Representative Joseph Crowley (D-Queens & the Bronx) announced that the House of Representatives had passed by unanimous consent his bill,

H.R. 2607), to rename the Jackson Heights Post Office in honor of the late Jeanne and Jules Manford, co-founders of Parents, Families and Friends of Lesbians and Gays (PFLAG) and parents of LGBT rights activist Morty Manford. A companion bill has been introduced in the Senate by New York's two senators, Charles E. Schumer and Kirsten Gillibrand.

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UNITED NATIONS –

The United Nations Security Council issued a statement on June 14 condemning the June 12 Orlando gay bar massacre, specifically denouncing targeting people "as a result of their sexual orientation." This is the first such statement to be issued by the Security Council in response to a highly-publicized anti-gay incident. *eTurbonews.com*, June 14. Later in June, the United Nations Human Rights Council voted to create the UN's first LGBT rights watchdog, by a vote of 23-18 with 6 abstentions. The official title will be "independent expert" and the position is charged with monitoring "violence and discrimination based on sexual orientation and gender identity." In the past, resolutions of the Council had directed the human rights office to prepare reports on LGBT rights, but had not authorized establishing a position specifically to deal with LGBT rights issues. Opponents of the resolution were led by Pakistan on behalf of members of the Organization for Islamic Cooperation, which succeeded in amending the resolution to require respect for local values, "religious sensitivities," or domestic politics." Another amendment condemned any "coercive measures" to change national policies, which responds specifically to threats by western nations to suspend financial aid from governments that persecute people because of their sexual orientation or gender identity.

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Surprisingly, South Africa was among the abstaining voters, despite its constitutional provisions (the first in the world) forbidding sexual orientation discrimination. The South African representative said that the abstention was due to the “arrogant and confrontational” of proponents of the resolution. *BuzzFeed.com*, June 30.

ORGANIZATION OF AMERICAN STATES – The creation of a core group on the promotion of the rights of LGBTI person was announced on June 15 during the 46th regular session of the General Assembly of the Organization of American States. Brazil initiated the move with the support of Argentina, Canada, Chile, Colombia, the United States, Mexico and Uruguay. The group is committed to support OAS efforts aimed at ensuring LGBT human rights in member countries. The statement announcing formation of the group specifically referenced the Orlando massacre. *Mena Report*, June 18. Ironically, although the government of Brazil has staked out an affirmative gay rights position, news reports reflect an “epidemic” of anti-gay violence in the country by gangs that the government seems unable to control, according to a July 6 report in the *New York Times*.

EUROPEAN COURT OF HUMAN RIGHTS – The Court ruled in *Taddeucci and McCall v. Italy*, No. 51362/09, that Italy violated the European Convention on Human Rights by refusing to allow a gay man from New Zealand who is the same-sex partner of an Italian national to settle in Italy with his partner. The men have been living as a couple since 1999, and decided to move to Italy in 2003 because of Mr. Taddeucci’s poor health. McCall received a temporary residence permit as a student, but the police rejected his subsequent application for a permit as a family member. The district court upheld their appeal, but the Court

of Appeal found for the police authority. The Court of Cassation dismissed their appeal. They then moved to the Netherlands and pursued their appeal to the European Court, which found a violation of Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life). The court said that Taddeucci and McCall should not be treated the same as an unmarried heterosexual couple, because Italy provided no legal recognition for same-sex couples at the time they applied for the residence permit. In deciding to treat gay couples the same as unmarried straight couples without any form of spousal status available for gay couples, said the court, the State violated its non-discrimination obligations under the Convention. This is, of course, a transitional problem, because recently Italy has legislated to create domestic partnerships for same-sex couples that will afford residence rights.

EUROPEAN COURT OF HUMAN RIGHTS – The Court ruled in *Case of O.M. v. Hungary*, No. 9912/15, that it was improper for Hungarian authorities to hold a gay asylum applicant from Iran in detention pending the outcome of his case, since his detention was not justified by any of the reasons in the “exhaustive lists” of Article 5, Section 1 of the Convention. The authorities had stated that he was being detained to prevent him from fleeing the jurisdiction while his case was pending. The Court considered this illogical; why would the man flee the jurisdiction if he had specifically sought asylum in the country? “The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty.” The relevant provisions “contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within

one of those grounds,” said the court, which found that “the applicant’s detention verged on arbitrariness” which enabled the Court to conclude that the Convention had been violated from June 25 through August 22 of 2014 while the applicant was detained until the authorities had concluded that he was entitled to asylum in Hungary.

ASCENSION ISLAND – The Ascension Island Council voted in favor of marriage equality on May 31, according to a report by internet journalist Rex Wockner, who also reports that the population in this British dependency island is about 880 people. Wockner noted that same-sex marriage became legal in Pitcairn Islands (population 48) in May 2015, in Jersey (Channel Islands) there was a 37-4 preliminary vote in favor of in September 2015, and the Isle of Man (population almost 86,000) voted 6-3 to legalize marriage equality in April 2016.

AUSTRALIA – The High Court of Australia reversed a jury conviction under Crim. Code section 317(b) (intentional transmission of a serious disease) in *Zaburoni v. R.*, (2016) 330 ALR 49, finding that the evidence presented at the trial would not support the jury in concluding that the defendant, an HIV-positive man, had intended to transmit the virus to his female sexual partner. It was not enough for the prosecution to show that the defendant knew he was HIV-positive and was aware that the virus could be transmitted sexually. The man had pled guilty to an alternative count under Crim. Code section 320, which makes it an offence to do “grievous bodily harm to another” and would subject him to a maximum penalty of 14 years. The prosecution insisted on continuing the case under section 317(b), which would subject the defendant to a maximum prison term of life, and the jury convicted on

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this. The High Court agreed with Mr. Zaburoni that “knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code Where the accused is aware that, save for some supervening event, his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result is compelling. Nonetheless, foresight that conduct will produce a particular result as a ‘virtual certainty’ is of evidential significance and under the Code it remains that the trier of fact must be satisfied that the accused meant to produce the particular result.”

* * * The Parliamentary election held in Australia has returned the Liberal government to office. Prime Minister Turnbull reiterated his commitment to hold a national plebiscite on the subject of same-sex marriage prior to any vote in Parliament, but the leader of the Labour Party, which came very close to denying the Liberals a majority, announced consideration of pushing a private members vote in hopes of persuading the P.M. that the overwhelming support for marriage equality in public opinion polls would justify saving the expense and divisiveness of a plebiscite and allowing a free vote in the Parliament, which many observers suggest would be successful, as several opponents of marriage equality were defeated for reelection and several new supporters were successful in winning seats. *** Family Court Chief Justice Diana Bryant told the Australian Broadcasting Corporation that she hopes to change the way transgender children access hormone treatment because the current process, requiring approval of a Family Court judge, is “difficult and stressful” for the children. She said that Australia is the only country in the world that requires a court order in addition to expert medical approval, for children to access hormone therapy. She has asked the Attorney General’s Department to

organize a “roundtable” with the major hospitals to see if they can come up with a “simpler and consistent method of dealing with these matters. I would ultimately envisage an application that could be made relatively simple by consent.” *ABC Premium News*, July 5.

BERMUDA – Bermuda held a referendum on June 23 on same-sex marriage, in which opponents heavily outvoted proponents, but because fewer than 50% of the island’s registered voters showed up, the result is not binding on the government. Former Attorney-General Mark Pettingill, a proponent for marriage equality, announced that he will represent two same-sex couples who will apply for a marriage license and then file suit when they are turned down, asserting that denial of the right to marry violates the Human Rights Act, which they will argue must take priority over the Marriage Act. *Royal Gazette*, June 29.

BOSNIA & HERZEGOVINA – The Parliamentary Assembly voted on July 14 to amend the Anti-Discrimination Law to make explicit protection against discrimination because of sexual orientation or gender identity. Indeed, going beyond what other countries have done, the amended law also expressly protects intersex people, and improves the procedures available for individuals who confront discrimination to invoke the assistance of the government. Local activists claimed that the express protection for intersex people was a first for South-East Europe. The steps were taken in accord with requirements of the European Union for countries seeking to obtain or maintain membership.

BRAZIL – The *New York Times* reported on July 5 that Brazil is experiencing an “epidemic of anti-gay violence.” The article recites accounts of assaults and

murders in various parts of the country which appear to have targeted victims because of their sexuality. It reported that a local gay rights group has counted nearly 1600 murders in hate-motivated attacks since January 2011, averaging one anti-gay murder a day in a country of 200 million people. This despite the fact that the legal climate for gay people in Brazil has become very liberal, including marriage equality, gay people adopting children, and formal protection against discrimination. On the other hand, LGBT rights advocates report that the police have not been particularly cooperative, often omitting anti-gay animus from official reports on murders. The country is generally experiencing a sharp rise in street crime and homicides. There is one openly gay member of the Congress, but he said that a large coalition of Christian Evangelical legislators has blocked proposed hate crimes legislation. Local groups also report that transgender Brazilians are at heightened risk for violence, and that some assailants have videotaped their assaults against transgender people and posted them online.

CAMEROON – The Minister of Public Health, Andre Mam Fouda, announced on June 23 that HIV/AIDS screening will now be compulsory for anyone seeking medical service, as part of the new direction for combatting the HIV epidemic in the country and improving management and care for those living with HIV infection. *Agence de Presse Africaine*, June 25.

CANADA – The Court of Appeal for Ontario ruled on June 29 in *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518, that the Law Society was within its rights to deny accreditation to TWU’s new law school. The school requires staff and students to adhere to a university requirement that they sign a “community covenant”

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that forbids sex outside of heterosexual marriage. While the school claims that it does not discriminate because of sexual orientation, the covenant raised concerns by the Law Society, which maintains its own non-discrimination policy as an ethical standard for the profession. Refusal of accreditation means that the law school's graduates cannot gain admission to practice law in Ontario which, given the structure of the profession in Canada, is tantamount to saying that they are excluded from practice where most of the nation's major litigation takes place. TWU is an evangelical Christian private school, which has been seeking accreditation from law societies throughout Canada for its new law degree program. The Law Society's governing body voted 28-21 to deny accreditation, on the ground that the school's policies discriminate based on sexual orientation, gender, marital status and religion, conflicting with the ethical standards of the legal profession in Ontario. The Canadian Bar Association intervened in the case in support of the Law Society. The Court found that a "reasonableness" standard applies to the LSUC's decision, as applied to the balancing of freedom of religion and equality requirements under the nation's Charter of Rights, and that LSUC met that standard. The Court of Appeal decision conflicts with Superior Court rulings in British Columbia and Nova Scotia, where courts overturned denials of accreditation by local law societies, so there are some places in Canada where TWU graduates could practice unless those rulings were to be overturned. *Globeandmail.com*, June 29.

CANADA – The government of Ontario announced that it is introduced gender-neutral driver's licenses and health identification cards. Beginning early in 2017, drivers will be able to select one of three designations: M for Male, F for Female, and X for neither of the

above. The province has also started issuing health cards that do not display information about the person's sex on the front of the card, and ServiceOntario will issue new cards without the sex identifier at no charge. The government is also launching public consultations to develop policies on how the government collects, uses and displays sex and gender information on government forms and products, according to a June 30 news release from the government of Ontario. *Canadian Government News*.

CANADA – A meeting the synod of the Anglican Church of Canada narrowly approved a resolution to allow same-sex marriages to be performed in the denomination's churches on July 11 – but at first the news reports said that the measure had been defeated by one vote. There are three voting orders within the church – lay, clergy and bishops – and the resolution needed at least 2/3 support within each of these groups to pass. It achieved that with the lay voters and the bishops, but at first appeared to fall one vote short with the clergy. After the vote was announced, however, several members said that their votes had not been properly registered, and a reexamination on July 12 revealed that all three groups had achieved the requisite margin. The resolution must be affirmed at the next synod meeting in 2019 in order to become "church law," but some Bishops and clergy indicated that they were prepared to act on it in the interim, going ahead with same-sex marriages in their churches. *Canadian Press*, July 12. * * * Prime Minister Justin Trudeau, an outspoken supporter of LGBT rights, made history by raising a rainbow flag on Parliament Hill in Ottawa and then marching in a Pride Parade, the first Canadian head of government to do so. * * * Vancouver became the first Canadian city to adopt an inclusive transgender policy by vote of the City Council on July 13. The vote approves implementing

a series of recommendations made by a consulting group specializing in transgender issues, including gender-neutral public restrooms and sensitivity training for city government staff. A team will be appointed by the Council to oversee implementation and report annually on progress, with changes being implemented over the next 6-18 months. (Construction and remodeling of facilities may take some time.) *bc.ctvnews.ca*, July 14.

CANADA – Health Canada announced that the deferral period for gay men to donate blood has been reduced from five years to one year, consistent with the trend in other countries. The new rule will take effect on August 15, 2016. Health Minister Jane Philpott told the CBC that the Liberal government hopes to reduce the waiting period even further, acknowledged that the new policy would still disqualify many gay men from donating blood, and stated: "I would rather see Canada take a step in the right direction than stand still." *Digital Journal*, June 21.

CARIBBEAN COURT OF JUSTICE – The CCJ dismissed a suit brought by Jamaican gay activist Maurice Tomlinson challenging the validity of statutes in Belize and Trinidad & Tobago that on their face prohibit the entry of homosexuals into those countries. The court accepted an argument on behalf of the respondent countries that they did not deny entry to homosexual citizens of other countries that are signatory to the governing rules of the Caribbean Community (CARICOM). The court accepted an argument from Belize that its immigration law is intended only to bar individuals who engage in prostitution, and from Trinidad & Tobago that it does not in practice bar homosexuals from entering the country. Although his case was dismissed, Tomlinson declared it a victory because

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the two countries had gone on record stating that their statutory bans were not literally enforced. “It is now up to the international community to press for the repeal of this law so that it will be clear in relation to non-nationals of the CARICOM region,” declared Tomlinson. The court called upon the respondent states to voluntarily amend their laws to harmonize with CARICOM treating obligations, reported *dailyxtra.com*, June 10.

CHINA – Yu Hu (a pseudonym) has sued a hospital in central Henan Province for subjecting him to treatment intended to “cure his sexual orientation disorder,” reported China News Service on June 14. He alleges that members of his family forcibly admitted him to the hospital after he divorced his wife, tied to a bed, medicated, and threatened with violence. He was released from the hospital after his same-sex partner contacted LGBT rights organizations, which notified the police that he was being detained unlawfully in the hospital. His lawyer sued in the local court, alleging violation of personal freedom and being subjected to violence. He said, “They did it simply because I am gay. I don’t know how many other people have been treated like this. They must be held accountable.” There is some precedent for the case. The report says that in 2014 a court in Beijing ordered a group of psychologists in Chongqing to apologize to a man for subjecting him to sexual orientation change efforts. * * * A local labor dispute arbitration committee in Guangzhou rejected a petition by an HIV-positive man to be reinstated to his job, taking the position that “infectious disease prevention and treatment regulations stipulating that HIV-positive individuals should be quarantined until they are proven to no longer be infectious are still in effect.” The individual, using the pseudonym Ah Ming, said that he would ask the

National Health and Family Planning Commission to explain its reasons for requiring a quarantine, contending that this violates national policy. *Global Times*, June 24.

COSTA RICA – The Social Security Agency announced on June 10 that it will extend pension payments to the surviving partner of same-sex couples when one member has died. The country’s LGBT community has been lobbying for this change for many years. A member of the agency’s board, Jose Luis Loria, said that he was “satisfied” that gay people would be treated equally to heterosexual widows or widowers, according to a June 10 report by *Agence France Presse English Wire*.

CZECHREPUBLIC – The Constitutional Court has overturned a law that banned individual gays and lesbians living in a registered partnership from adopting children. The Court said that the ban was discriminatory because individual gays and lesbians who did not live in a registered partnership were allowed to adopt. However, the opinion does not approve joint adoptions by same-sex couples. *Associated Press*, June 28.

FRANCE – Following the example of the U.K. and the U.S., the French government announced on July 11 that it was modifying its regulations on blood donation to end the lifetime disqualification of anybody who had engaged in gay sex. Gay men will be allowed to donate blood provided they certify that they have not engaged in sexual activity with another man for at least a year prior to the donation date. The one-year rule has been criticized as unrealistically long, given the current level of accuracy of HIV-antibody testing and the likelihood that most gay men will continue to be excluded under its application. *New Europe*, July 12.

GREECE – *Agence France Presse English Wire* reported on June 3 that a gay Syrian man whose asylum claim was rejected by Greece would be sent to Turkey under a controversial agreement brokered by the European Union, under which failed asylum seekers would be sent to Turkey in light of the migrant crisis affecting Europe. The man’s application for asylum was rejected and a Board of Appeal ruled that it was safe for him to return to Turkey, but a representative of the Greek Council for Refugees said that they would try to appeal the ruling further. The man claimed to have fled Istanbul after living there several years because he had been threatened due to his sexual orientation. Previously the board had granted asylum to people in similar situations, but the system has been overwhelmed by the flood of migrants from Syria.

INDIA – The state of Kerala has become the first to announce a pension scheme for transgender individuals over 60 years of age, in a proposed new state budget. Kerala was also a leader in establishing a state Transgender Policy last year marking an affirmative effort by the government to hire transgender people to fill civil service vacancies, and to end stigma and discrimination against transgender residents. *Merinews*, July 9. * * * The Supreme Court on June 29 refused to take up a new petition challenging the validity of the colonial-era sodomy law, stating that it would refer the petition to the Chief Justice to decide whether it should be heard together with several curative petitions that are pending before a panel of the court. *Indianexpress.com*, June 29. * * * The sodomy law, Section 377 of the Indian Penal Code, is still being enforced, as exemplified by a ruling on June 29 by the Bombay High Court, which rejected a plea filed by a 33-year-old man who is subject to criminal proceedings for a consensual sexual relationship with a 27-year-old man. “A division bench of

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Justice Abhay Oka and Justice Amjad Sayed said it cannot be said it is not an offence against society, especially after the Supreme Court upheld the validity of the penal section,” reported the *Hindustan Times* on June 30. The police became involved because the man’s wife discovered evidence of the relationship and reported it. * * * The Supreme Court issued a statement on June 30, clarifying that its 2014 ruling concerning rights of transgender people was not meant to affect the rights of lesbians, gay men or bisexuals. The Ministry of Social Justice and Empowerment had sought clarification as to whether LGB people were included in the Court’s mandate to treat transgenders in the Other Backward Classes category for purposes of affirmative efforts in education and employment. *The Pioneer*, July 1.

ISRAEL – A planned Pride March in Beersheba was cancelled by organizers in response to an order from Israel’s Supreme Court, granted in response to an application by security officials, to abandon the planned parade route for a less prominent route. The court said that police intelligence assessments suggested that a march along the planned route would incite a violent response, and Israeli security officials are now gun-shy as a result of anti-gay violence resulting in a murder at last year’s Jerusalem Pride. The organizers said they would hold a protest rally instead of a march. This was to have been Beersheba’s first Pride March. *Thai News Service*, July 15.

JAPAN – Naha City, the capital of Japan’s Okinawa Prefecture, has become the fifth local government in Japan to adopt a measure recognizing same-sex partnerships as equivalent to marriage. Same-sex couples can obtain certificates recognizing their partnerships provided both members of the couple are age 20 or older. The certification system

is intended to aid same-sex couples in making housing applications and being recognized as next-of-kin in relevant situations. Application form are available on the city’s website, and submissions were accepted beginning July 11. *Kyodo News*, July 8.

KENYA – In a ruling that drew outraged comments from the international human rights community and suggestions that international treaties be amended expressly to address the issue, Judge M.J. Anyara Emukule of the High Court of Kenya ruled that anal examinations of individuals charged with homosexual acts are not a violation of human rights under the nation’s constitution or international treaty obligations. He rejected the contention of the petitioners that they had not freely consented to the examinations, and asserted that “the right to fair trial” guaranteed in the constitution “does not, with respect, extend to excluding an accused from medical examination.” He asserted: “on matters of sodomy or acts against the order of nature as is envisaged in Section 162 of the Penal Code, rectal or anal examination is according to current medical science, and constitution of the human anatomy, the only way of examination to show whether the anus is dry or has been subjected to application of medical lubricants for ease of anal penetration. The anus, unlike the vagina, has no natural lubrication. There is no other part of the human body which to carry out the medical examination. Whether the examination was reasonable or not is a question of fact which only the trial court or as the case may be the appellate Court after ascertaining all the facts may determine and, whether or not the person who took the samples was ignorant or negligent. Was there, was there no anal sex? Those are questions before the trial, not the Constitutional court.” *COL & GMN v. Kwale*, Petition No. 21 of 2015 (June 16, 2016).

MALTA – The government announced on July 8 that all ministries are supposed to introduce gender-neutral restroom facilities in their buildings by September, in order to “ensure a non-judgmental or exclusive environment for all,” according to an official statement. While there would still be male and female only facilities, at least a third of all restroom facilities would have to be designated as gender neutral. Under the country’s recently enacted Gender Identity Law, individuals are not required to obtain medical intervention in order to effect a legal change of gender based on their self-determined gender identity. Malta is the smallest European Union nation, but now occupies the “top spot” on the Rainbow Map of Europe charting LGBT-friendly government policies. *dpa International*, July 8.

MEXICO – Another state heard from. The Morelos state congress approved a reform of the state constitution to allow for same-sex marriage. This was subject to approval by the municipalities within the state, a majority being required. Under the rules for this procedure, a municipality that failed to act on the proposal would be counted as a yes vote. Somewhat controversially, the congress declared that the measure had been adopted, based on its claim that of the State’s 33 municipalities, 12 municipalities voted in favor, 15 were opposed, 5 failed to act, and one obtained an extension because of a delay in notification. The five that failed to act were automatically being counted as “yes” votes and establishing a majority to amend the constitution. Groups opposed to the measure protested, claiming that some of the “fictional” yes votes came from municipalities that had actually voted no but had failed to submit the certification of their vote by the deadline, and threatening to sue. Morelos became the 10th state to be added to the marriage equality list, in addition to Mexico City, and was said

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to be the first to do so by amending its state constitution. This account is based on reporting by internet journalist Rex Wockner, who maintains a running commentary on his blog about the unfolding story of marriage equality in Mexico. * * * Coalescing around the ongoing struggle to spread marriage equality nationwide, activists have formed a new national LGBT rights movement organization, MOViiMX, which can be contacted through the website www.moviiMX.org.

NORTHERN IRELAND – Health Minister Michelle O’Neill announced on June 2 that Northern Ireland was following the lead of the U.K. in lifting the lifetime ban on men donating blood. Henceforth there would be a one-year deferral period, so only men who affirm that they have not had sex with another man during the previous 12-month period will be allowed to donate blood. *WashingtonPost.com*, June 2.

NORWAY – On June 7 the Norwegian Parliament approved a new healthcare law under which transgender people can self-declare their appropriate legal gender. The measure ended requirements of compulsory psychiatric evaluations, diagnoses of gender dysphoria and sterilization surgery as a prerequisite to recognizing legal gender. A report by Human Rights Watch asserted that this made Norway the fourth country in Europe to separate medical and legal processes for recognizing gender identity, the others being Denmark and Ireland (through internal political action) and Malta (in response to a ruling by the European Court of Human Rights). According to the report, 41 states in Europe have legal gender recognition provisions in place, 35 of which require a psychiatric diagnosis and 24 requiring surgical sterilization before a legal change of status will be recognized. The Norwegian Ministry

of Health proposed the new law. *Plus Media Premium Official News*, June 8.

PAKISTAN – Local media reported on June 27 that 50 clerics had issued a fatwa (religious decree) providing that marriage with a transgender person is lawful. According to the fatwa, a transgender person having “visible signs of being a male” can marry a woman, and a transgender person having “visible signs of being a female” can marry a man. But somebody who carries “visible signs of both genders” must remain single. The fatwa also condemned any act intended to “humiliate, insult or tease” transgender people, and declared that funeral rituals for transgender people should be consistent with those exhibiting the same gender traits. *Daily Regional Times*, June 28.

PORTUGAL – President Marcelo Rebelo de Sousa vetoed a law authorizing non-compensated surrogacy where a woman cannot conceive a child, but approved a measure allowing lesbian couples and single women access to in-vitro fertilization services with donated sperm in order to have children. The surrogacy legislation had passed by a slim margin over strong opposition by the Catholic Church, which remains politically influential in Portugal. An attempt might be made for a legislative override of the veto. Surrogacy is controversial in Europe, with France, Germany and Italy prohibiting the practice. Britain, Ireland, Denmark and Belgium allow “altruistic surrogacy,” typically where a woman does a favor for a woman who cannot conceive children and is not compensated for her services apart for reimbursement of expenses. *Agence France Presse English Wire*, June 8.

SWITZERLAND – The Parliament voted June 17 in favor of stepchild adoption by a vote of 125-86 with 3

abstentions. This is expected to open up the possibility for second parent adoptions by same-sex couples raising children. *NELFA*, June 17. * * * Swiss health authorities announced their intention to end the lifetime ban on blood donation by gay men, moving to a one year deferral period as several other countries have recently done. The theory is that if a gay man has abstained from sex for at least a year, it is highly unlikely that his blood will carry HIV if it tests negative using currently available screening tests. *thelocal.ch*, June 21.

TAIWAN (REPUBLIC OF CHINA) – Changhua County is offering same-sex couples the right to record their partnerships at household registration offices. Although the record does not create legal rights, it is symbolic of the local government’s support in the ongoing struggle to achieve legal recognition for same-sex couples. The county’s action follows similar measure adopted in Hsinchu County and in the cities of Chiayi, Kaohsiun, New Tapei, Taichung, Tainan, Taipei and Taoyuan. The nine municipalities cover over 75 percent of the nation’s population, and to date more than 500 same-sex couples have taken advantage of the right to register their partnerships. *Thai News Service*, June 30.

TURKEY – Authorities in Istanbul banned an annual gay pride march on purported security grounds. Although modern Turkey no longer outlaws private consensual homosexual conduct, gay people in Turkey complain of harassment and abuse, especially as the Erdogan administration has been leading the country towards Islamisation. Erdogan has avoided addressing gay issues directly. *Agence France Presse English Wire*, June 17. Early in July there was a failed attempt by dissidents in the military to stage

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a coup. How this might affect future relations between the government and the LGBT community was uncertain.

UNITED KINGDOM – The Women and Equalities Minister, Nicky Morgan, announced on July 9 that the government would undertake a review of the Gender Recognition Act with an eye to improving the process for determining legal gender without reference to surgical procedures. The review is intended to reduce “unnecessary red tape” and adopt a streamlined process that will be easier for transgender residents to navigate. The goal will be to achieve legal and social equality for transgender people. *European Union News*, July 9. The article reporting on this, although dated July 9, did not say anything about whether the change in leadership flowing from the Brexit vote would affect these plans, possibly because as of that date it was expected that the Cameron government would function until October as the Conservative Party determined who would succeed David Cameron as Prime Minister. By July 12, however, all competition to Theresa May, the Home Secretary, had fallen by the wayside, and she took office on July 13. * * * The *Bristol Evening Post* reported July 6 that a gay man from Nigeria who had been denied asylum in the U.K. was immediately imprisoned upon being delivered back to Nigeria, and authorities there took the resettlement money that the U.K. Home Office had given to him upon his departure. He was held for seven days before being released, presumably with a warning to refrain from violating the country’s sodomy law, which carries potential penalties of imprisonment up to 14 years or stoning (quite Biblical). That the British Home Office sees no ground for asylum for gay refugees from Nigeria is incredible but unfortunately true, even in a case such as this, where the petitioner had fled Nigeria after “being

viciously assaulted with his partner, who died as a result of the injuries inflicted upon them.” It apparently made not different to U.K. authorities that Nigeria is officially one of the world’s most outspokenly anti-gay countries. * * * The new Prime Minister, Theresa May, announced the appointment of Justine Greening to be Education Minister. Greening, who had recently come out as a lesbian, is the first Education Minister who is a product of a comprehensive state secondary school.

PROFESSIONAL NOTES

THE NATIONAL LGBT LAW ASSOCIATION’S LAVENDER LAW CONFERENCE will be held in Washington, D.C., on August 4-6. The keynote speaker will be **STUART DELERY**, whose recent service as Acting Associate Attorney General, the number three position in the Justice Department, made him the highest ranking openly gay attorney in that Department’s history. The event will be held at the Renaissance Washington D.C. Downtown Hotel.

TLDEF –THE TRANSGENDER LEGAL DEFENSE & EDUCATION FUND announced that its new Executive Director is **JILLIAN WEISS**, a transgender New York attorney. Weiss is a tenured professor at Ramapo College. She earned her law degree at Seton Hall University. She maintained a law practice in addition to her teaching job, and has litigated precedent-setting cases on behalf of transgender plaintiffs. She is only the second ED in the organization’s history, following the retirement of its founding director, Michael Silverman. For their work advancing the legal rights of transgender people, both Weiss and Silverman have received the Arthur S. Leonard Award from the New York City Bar Association. Weiss’s law firm

associate, Ezra Young, will join her at TLDEF as a staff attorney.

Having wound up affairs at Freedom to Marry, Executive Director **EVAN WOLFSON** is joining the international law firm Dentons as senior counsel. He hopes to advise the firm on its internal human rights policies as well as providing counsel to clients on similar matters. In recent months Wolfson has traveled to several different countries, in some cases at the invitation of local U.S. embassies, to speak with local activists about strategies for achieving marriage equality. He will be based in the firm’s New York City office. *Wall Street Journal Law Blog*, June 23.

On June 7, openly transgender Judge **VICTORIA KOLAKOWSKI** was re-elected for a seat on the Alameda County Superior Court. She is the only openly transgender person to hold elective office in California. When she was first sworn in, she became the second openly transgender trial judge in the nation, as Houston, Texas, Associate Municipal Court Judge **PHYLLIS FRYE** was appointed and sworn in between Judge Kolakowski’s first election and her inauguration, thus becoming the first openly transgender sitting judge!

Former U.S. Solicitor General **DONALD B. VERRILLI, JR.**, who argued for the Obama Administration before the Supreme Court to invalidate DOMA and strike down state bans on same-sex marriage, was the featured keynote speaker at Lambda Legal’s annual reception in Washington, D.C., on June 15. (Previous speakers at this event included Attorneys General **ERIC HOLDER** and **LORETTA LYNCH**.) Lambda’s National Director of Constitutional Litigation, **SUSAN SOMMER**, was the other featured speaker at the event, held at the Newseum.

The **LGBT BAR ASSOCIATION OF GREATER NEW YORK** 2016 Pride Reception on June 16 included a Roundtable Discussion on the Equality Act now pending in Congress. Panelists were former LeGaL President and *Law Notes* Editor **ART LEONARD**, former NYC Council Speaker Christine Quinn, and transgender rights activist and Democratic National Committee Executive Committee Member Babs Siperstein. U.S. Rep. David Cicilline (D-R.I.), lead sponsor of the bill in the House, intended to participate, but weather conditions grounded his flight from D.C.

“Greene” cont. from pg. 273

Interestingly, it appears that the court rejected Greene’s assertion because she did not allege any of the three supporting factors discussed in *Butler*, even though the *Butler* court had weighted the nine factors equally and had not set a bright-line threshold necessary to establish an employment relationship. These observations were not lost on Chief Judge William Byrd Traxler Jr., who dissented and clarified that the first three factors listed in the *Butler* test were intended to have the most weight. Furthermore, he believed that Greene alleged enough facts to satisfy these three most important factors: that Harris (1) reserved the authority to hire and fire; (2) required day-to-day supervision of Greene, and even designated an employee to do so; and (3) furnished the equipment she used and her place of work.

As demonstrated by the 4th Circuit and its creation of a nine-factor test, both state and federal definitions of employment currently fail to encompass all the various types of contracts and arrangements existing between workers and their clients. Until these definitions are broadened to encompass the employment landscape as it is, protections enacted against employment-related discrimination—whether it is based on sexual orientation or any other type—fall short of the legislation’s intended goal: to provide workplace victims a way of obtaining relief. – *Timothy Ramos, NYLS ‘19*

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