

8-2022

Legislative and Administrative Notes (August 2022)

Arthur S. Leonard

L G B T
LAW NOTES

August 2022



**Michigan Supreme Court Rules That State
Civil Rights Law Protects LGBTQ+ People**

LEG. & ADMIN./LAW & SOCIETY *notes*

and received. Senior U.S. District Judge James P. Jones dismissed her civil rights claim in *Taylor v. Mullins*, 2022 U.S. Dist. LEXIS 133441, 2022 WL 2966887 (W.D. Va., July 27, 2022). Taylor had no civil right in her prison job under *Altizer v. Paderick*, 569 F.2d 812, 813 (4th Cir. 1978). To the extent Taylor claims denial of equal protection based on gender identity, the claim also fails. Reading between the lines, it appears that Judge Jones does not find credible that Taylor's two days of lost work caused her "hair to fall out, triggered stress, loss of appetite, lack of sleep, headaches, and disturbances in mental and emotional stability." Judge Jones did not apply the heightened scrutiny to transgender classifications in *Grimm v. Gloucester County School Board*, 972 F.3d 586, 607 (4th Cir. 2020). He did find Taylor's complaint to be insufficiently serious. See *Faconie v. Clarke*, 966 F.3d 265, 277 (4th Cir. 2020) (applying balancing test of *Turner v. Safley*, 482 U.S. 78, 85 (1987), to inmate's equal protection claim). Judge Jones was appointed by President Carter, who holds the record number of appointments to the Article III bench for any single-term President, although he never named a Supreme Court Justice. Justices Stephen Breyer and Ruth Bader Ginsburg, named by President Carter to the First and D.C. Circuits, respectively, were elevated to the Supreme Court by President Clinton. Second Circuit Judge Jose Cabranes, appointed by President Carter to the District Court and promoted by President Clinton, is the only Carter appointee still in active service.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. HOUSE OF REPRESENTATIVES

– The House voted 267-157 on July 19 to approve the Respect for Marriage

Act, H.R. 8404, which would repeal the Defense of Marriage Act of 1996 and replace it with affirmative statutory recognition of same-sex marriages by the federal government. Such recognition would extend to all same-sex marriages that were valid where they were contracted, which would include those marriages entered into in states that were required by the *Obergefell* decision to issue marriage licenses to same-sex couples despite state constitutional or statutory provisions that purported to limit valid marriages to different-sex couples. However, Congress has no authority to overrule a Supreme Court decision based on constitutional law, so if *Obergefell* were reversed, it is likely that many states, perhaps a majority, would cease issuing marriage licenses to same-sex couples and might attempt to limit the recognition of marriages previously contracted and might try to refuse to recognize those contracted in other places. H.R. 8404, relying on Congress's authority to legislate under the Full Faith & Credit Clause, provides that states may not refuse to extend full faith and credit to marriages between two individuals contracted in other states because of the race, sex, ethnicity or national origin of the individuals. Overruling *Obergefell*, which Justice Clarence Thomas effectively called for in his concurring opinion in *Dobbs v. Jackson Women's Health Organization*, would leave many questions, even if H.R. 8404 passes the Senate. The majority in the House included 47 Republicans, an unprecedentedly high number of Republican Representatives voting affirmatively on an LGBTQ rights matter. Whether H.R. 8404 will come to the floor in the Senate is up to Majority Leader Charles Schumer, who did not make an unequivocal commitment to do so. Without at least 10 Republicans willing to vote to close debate on the measure (cloture), it will not receive a floor vote on the merits. Without a filibuster, however, it would

likely pass with majority support, although as of July 20 it had only two Republican co-sponsors in the Senate: Susan Collins of Maine and Rob Portman of Ohio. (The lead sponsor of the bill as introduced in the Senate on July 19 is Diane Feinstein of California, joined by Tammy Baldwin of Wisconsin and Collins. Portman joined signed on as a co-sponsor on July 20.)

FLORIDA – The state's Health Department is considering proposed rules to ban coverage for gender-affirming care under the Medicaid program, on the grounds that it is "experimental and investigational" rather than essential. The proposal would also direct that doctors not take account of "gender dysphoria" in recommending medical treatments. A proponent of the bans argues that this is about preventing the sterilization of teens. – *William J. Rold*

LAW & SOCIETY NOTES

By Arthur S. Leonard

TRANSGENDER LEGAL DEFENSE & EDUCATION FUND (TLDEF)

reported successful advocacy in partnership with Indiana Legal Services in getting the United Steelworkers Union and United States Steel to drop the blanket exclusion for transgender-related health care from the health insurance plan covering 17,000 hourly employees of U.S. Steel and their families. The agreement to end the exclusion is retroactive to January 1, 2022. The union also prevailed on the insurance company from whom the union and employer purchase their coverage – Highmark Blue Cross Blue Shield – to ensure that it covered the full range of necessary services for gender transition, including voice modification surgery and speech therapy, according to the July 13 press release issued by TLDEF.

INTERNATIONAL/PROFESSIONAL *notes*

INTERNATIONAL NOTES

By Arthur S. Leonard

ANDORRA – Legislation approving access to civil marriage for same-sex couples awaits a signature from French President Macron, who is one of the two foreign leaders designated as a “prince” for purposes of approving legislation, according to journalist Rex Wockner. The legislation makes clear that civil marriage and religious marriage will have the same legal status.

CUBA – On July 22, the Parliament announced that a national referendum on September 25 will put the question of allowing same-sex marriages to the electorate. In consultations with groups of voters about proposals for the new family law to be placed on the ballot, a majority favored allowing same-sex marriage, so advocates for LGBTQ rights in Cuba are hopeful. The measure would also authorize same-sex civil unions for those who don’t seek marriage but want a formal status. It will also authorize same-sex couples to adopt children, and will allow for the practice of surrogacy (although not for compensation). *DW.com*.

GREECE – *Intersex Greece* issued a press release on July 19 announcing that the recently approved Medically Assisted Reproduction Reforms Act had gone into effect. According to the press release, “surgical and other medical interventions, which until now have been carried out on intersex infants and children, secretly and without consent, to ‘conform’ their sex characteristics with the ‘typical’ male or female anatomy have been legally banned in Greece.” An intersex individual cannot give valid legal consent to the performance of such

medical interventions until they are at least 15 years old with their “free and informed consent.”

SLOVENIA – In two rulings issued on July 8, the Constitutional Court of Slovenia effectively legalized same-sex marriage and adoptions by same-sex couples, finding that the constitution’s ban on discrimination must be applied when interpreting the marriage and adoption laws, according to a July 8 report by *Total-Slovenia-News.com*. Although the country already had civil unions for same-sex couples, and individual members of same-sex couples could adopt their partner’s children, true equality would require recognizing the same legal status of marriage for same-sex couples and joint adoptions, said the court, which voted 6-3 in both cases.

TAIWAN [REPUBLIC OF CHINA] – The Taipei High Administrative Court ruled on July 21 that the Daan Household Registration Office erred by rejecting a marriage registration for Lu Yin-Jen and Elizaburo Ariyoshi, a same-sex couple, on May 7, 2021. The couple held a wedding ceremony after Taiwan legalized same-sex marriage in May 2019. But the Registration Office has refused to register same-sex marriages between Taiwan nationals and individuals who are nationals of countries that do not recognize same-sex marriages, in the case of Ariyoshi, Japan. But the Taipei High Administrative Court has been ruling favorably on appeals by same-sex couples from the refusal of the Registration Office to register their marriages. According to a July 21 report posted by FocusTaiwan.tw, as many as 467 same-sex cross-national couples have been prevented from registering their marriages based on the position of the Ministry of the Interior that such

marriages could not be registered. An amendment to the marriage law dealing with this problem has been pending in the Judicial Yuan since January 2021, but has not been moved to enactment.

PROFESSIONAL NOTES

By Arthur S. Leonard

On July 13, the White House announced that President Biden intends to nominate **JAMAR WALKER**, to be a U.S. district judge in the Eastern District of Virginia. If confirmed, he will be the first out LGBTQ judge on the federal bench in Virginia. He has been an assistant U.S. attorney in Virginia since 2015. Walker was an associate with Covington & Burling in Washington, D.C., before joining the U.S. Attorney’s office. He clerked for District Judge Raymond Jackson (E.D. Va.), now a senior judge. Walker is a graduate of the University of Virginia (both undergraduate and law).

The **ACLU OF ILLINOIS** is looking for a Project Director or Senior Supervising Attorney for its LGBTQ & HIV Project. This role will involve rebuilding the project, including hiring new staff attorneys and leading litigation. They seek a highly collaborative person with at least 8 years of experience in litigation, a demonstrated interest in protecting the civil rights and civil liberties of LGBTQIA+ people (which presumably includes knowing what each of the letters stands for!), leadership and communication skills, and experience in recruiting and maintaining a team. Of course, any applicant should be very knowledgeable about LGBTQ civil rights law. Those interested should contact Michelle Garcia, Deputy Legal Director, Roger Baldwin Foundation of ACLU, Inc., 150 N. Michigan, Suite 600, Chicago, IL 60601 – mgarcia@aclu-il.org.