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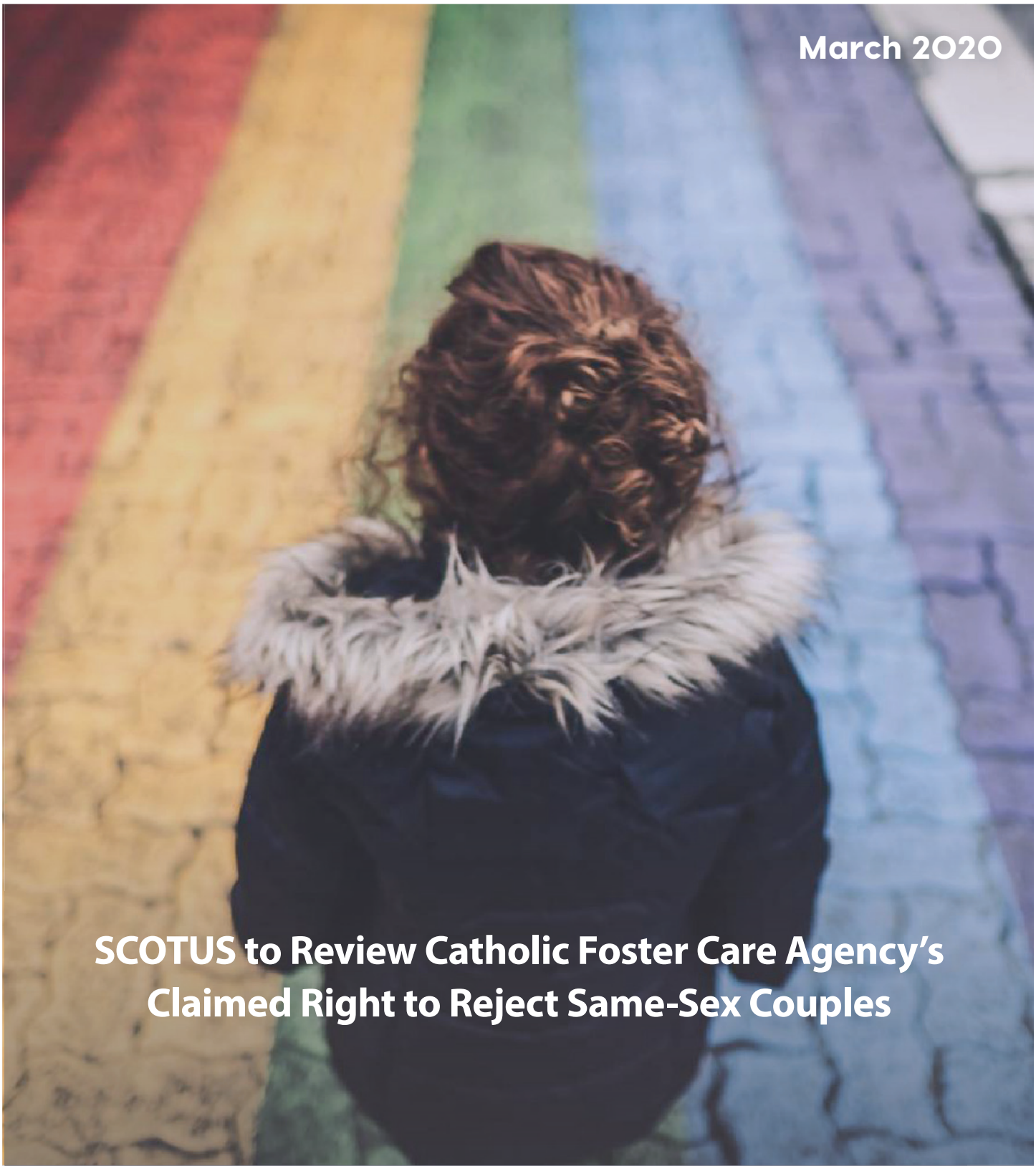

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SCOTUS to Review Catholic Foster Care Agency's Claimed Right to Reject Same-Sex Couples

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Editor-In-Chief
Arthur S. Leonard,
Robert F. Wagner Professor
of Labor and Employment Law
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
arthur.leonard@nyls.edu

Associate Editor
Prisoner Litigation Notes:
William J. Rold, Esq.

Contributors
Filip Cukovic, NYLS '21
David Escoto, NYLS '21
Corey L. Gibbs, NYLS '21
Matthew Goodwin, Esq.
Timothy Ramos, J.D.
Eric J. Wursthorn, Esq.
Bryan Xenitelis, Esq.

Production Manager
Leah Harper

Circulation Rate Inquiries
LeGaL Foundation
601 West 26th Street, Suite 325-20
New York, NY 10001
(212) 353-9118
info@le-gal.org

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EXECUTIVE SUMMARY

21 Notes **40** Citations

Supreme Court Agrees to Review Catholic Foster Care Agency's Claimed Right to Discriminate against Same-Sex Couples

By Arthur S. Leonard

The U.S. Supreme Court announced on February 24 that it will review a 2019 ruling by the U.S. Court of Appeals for the 3rd Circuit, in which that court rejected 1st Amendment claims by the Catholic Social Services agency in Philadelphia that lost its foster services contract with the City by insisting it would refuse to provide services to same-sex couples. The unanimous appeals court decision affirmed a ruling by U.S. District Judge Petresse B. Tucker rejecting a request by the Agency for a preliminary injunction against the City. *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd Cir. 2019), *petition for certiorari granted*, No. 19-123, 2020 WL 871694 (February 24, 2020).

Because the Supreme Court's last argument date of its current Term is April 29, this case won't be argued until the Fall Term of the Court beginning in October. The Petitioners have 45 days to file their principal brief, and then the Respondents have 30 days to file their principal brief, with the Petitioners then authorized to file a rely brief. By the time briefing is complete, the Court will have stopped hearing arguments for this Term.

The organizational Petitioner is Catholic Social Services (CSS), an agency affiliated with the Archdiocese of Philadelphia, which has contracted with the City to perform foster care services for more than a century. CSS was one of 30 foster care agencies that were under contract with the City when this dispute arose, of which all but a handful are religiously affiliated. All the agencies have one-year contracts that are routinely renewed from year to year, but CSS's contract was not renewed as a result of this dispute.

This case was sparked in March 2018 by a reporter for the *Philadelphia Inquirer* who was researching an article about the timely topic of whether religiously affiliated child-care agencies were recognizing and working with married same-sex couples. The reporter called the City's Department of Human Services to report that two foster care agencies, CSS and Bethany Christian Services, had stated that they would not certify same-sex couples to be foster parents, and that the newspaper would be reporting this in a forthcoming article. All of the other religious agencies contacted had stated that they did work with same-sex couples.

CSS's position, communicated to the reporters and then to City officials, was that consistent with Catholic doctrine they would certify only single people or married couples to be foster parents, and consistent with Catholic doctrine they did not recognize same-sex couples as married, even when the couples had a civil marriage under the state law. After the article appeared on March 15, the City Council passed a resolution calling on the City Commission on Human Relations to investigate the Department of Human Services policies on contracting with social service agencies that discriminate against LGBTQ foster parents, pointing out that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." The resolution said that any agency violating DHS rules and the City's Fair Practices Ordinance should have their contract "terminated with all deliberate speed."

City officials tried to negotiate a way around this problem with CSS and Bethany. Ultimately, Bethany agreed to change its policy, but CSS refused. As a result, the Department of Human Services put a "freeze" on referrals to CSS, and the City sent CSS an ultimatum: either agree not to discriminate against same-sex couples, or the freeze would continue until their contract expired and the City would not renew the contract. The City also indicated that it was revising its foster care service contracts to make clear that agencies could not discriminate based on grounds prohibited by the City's anti-discrimination law.

CSS decided to fight back through a lawsuit, enlisting some foster parents as co-plaintiffs, represented by the Archdiocese's usual legal counsel joined by attorneys from the Becket Fund for Religious Liberty, a religious advocacy group that frequently litigates on these kinds of issues.

Ironically, CSS claims that it has never been approached over the past century that it has been doing this work under City contracts by any same-sex couple. It also stated that if a same-sex couple approached CSS, they would refer the couple to another agency, and that such referrals among agencies are routine. While the City acknowledges that agencies do refer couples to other agencies, it asserted that this would be illegal if the reason for the referral was a refusal to deal with a couple who are in a "protected class" under the City's anti-discrimination law.

The CSS lawsuit made several claims. They asserted that the City's anti-discrimination ordinance, which forbids sexual orientation discrimination, did not apply to them because their agency is not a "public accommodation." They claimed that under the Free Exercise Clause of the First Amendment, they had a right to deny services to same-sex couples on religious grounds. They also made a "selective enforcement" claim, asserting a violation of the Establishment Clause, claiming that they were being targeted by the City as a Catholic agency, and that the City was retaliating against them because of their religious views. Finally, they claimed that requiring them to certify same-sex

couples as qualified to be foster parents would be a form of compelled speech prohibited by the First Amendment Freedom of Speech Clause. CSS sought a temporary restraining order or a preliminary injunction requiring the City to "unfreeze" their status as a foster care provider while the case was being litigated.

The American Civil Liberties Union (ACLU) got involved in the case as legal representative of Support Center for Child Advocates and Philadelphia Family Pride, which intervened in the case as a co-defendant with the City, and is named as a co-Respondent on the Supreme Court Petition. ACLU attorney Leslie Cooper participated in the hearing before the 3rd Circuit together with Jane Istvan, the City's Chief Deputy Solicitor.

District Judge Tucker rejected CSS's demand for preliminary relief. She found that they did not have a likelihood of winning the case, and that the City's strong interest in enforcing its anti-discrimination policy was likely to prevail. CSS asked the 3rd Circuit to provide interim relief, which that court denied, and then petitioned the Supreme Court for interim relief, which that Court also denied without comment. On April 22, 2019, the 3rd Circuit issued an opinion affirming the refusal of the District Court to issue an injunction against the City. The 3rd Circuit's three-judge panel found that CSS's 1st Amendment arguments were all without merit, relying heavily on the Supreme Court's 1990 decision, *Employment Division of Oregon v. Smith*, 494 U.S. 872. The 3rd Circuit panel included two judges appointed by President Bill Clinton and one appointed by President Ronald Reagan.

In the *Smith* case, the Supreme Court dealt with a claim by two men who were denied unemployment benefits after their employer fired them for flunking a drug test. The employer had a zero-tolerance policy on drugs. The employees said that their positive tests resulted from using peyote, a hallucinogen, during a Native American religious ceremony, arguing that denial of unemployment benefits by the government violated their right to free exercise of religion since their use of peyote should be considered constitutionally protected under the Free Exercise Clause.

Under the Supreme Court's 1st Amendment jurisprudence up to that time, an application of a state law that substantially burdened a person's free exercise of religion was considered a violation of a fundamental right, which could only be upheld if the government met the burden of showing a compelling state interest and a policy narrowly tailored to advance that interest. Writing for the Court, Justice Antonin Scalia, a devout Catholic, rejected the employees' argument in an opinion that marked a radical change in 1st Amendment law. His opinion held that individuals may not assert a Free Exercise claim against a "neutral state law of general application." If the state law did not target religion and was applied generally, the state did not have a burden to justify it against an individual's free exercise of religion claim. Scalia embraced the argument that letting people claim exemptions from complying with generally applicable state laws would substantially undermine the rule of law, leaving individuals free to decide which laws they could ignore, a chaotic situation.

The Court's opinion unleashed a storm of controversy. Congress attempted to overrule it with bipartisan legislation called the Religious Freedom Restoration Act (RFRA), which in its first version purported to restore 1st Amendment free exercise jurisprudence to where it was before the Court's decision. The Court then ruled that Congress did not have authority to overrule a constitutional decision, although Congress could enact restrictions on its own legislative power. Congress promptly enacted a new version of RFRA, under which individuals whose free exercise is substantially burdened by the application of a federal statute or regulation can raise a statutory defense similar to the constitutional test used before *Smith*. Many states adopted similar laws, including Pennsylvania.

The 3rd Circuit's decision on CSS's appeal rejected a claim under the Pennsylvania Religious Freedom law, concluding that the Pennsylvania courts would not likely rule in favor of CSS's position under the state statute. That ruling is not part of the appeal to the Supreme Court.

Smith has remained a controversial decision, and several justices of the Supreme Court have suggested that the Court should reconsider that ruling. In its Petition in this case, CSS asked the Court to "revisit" that case, and the Court's grant of review includes that question. Reconsideration of that principle – that individuals do not have a free exercise right to refuse to comply with neutral laws of general application – could create a substantial religious exemption that would be particularly harmful to the LGBTQ community in seeking protection against discrimination because of sexual orientation or gender identity.

The foster care situation in Philadelphia illustrates this point starkly. Of the 30 foster care agencies that were contracting with the City when this case began, all but a handful were religiously affiliated. Although only two said they would not deal with same-sex couples when they were contacted by the Philadelphia Human Rights Commission in the wake of the Inquirer's article, it is unclear how many religiously affiliated agencies would provide the services if they thought they had a right to refuse under the 1st Amendment.

In its ruling in this case, the 3rd Circuit faced CSS's argument that its treatment by the City showed "hostility to religion," seeking to invoke the Supreme Court's ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), in which the Court overturned a state ruling that a baker violated the Colorado civil rights law by refusing to make a wedding cake for a same-sex couple. In that case, the Supreme Court reiterated that general rule from Smith but found that the Colorado Civil Rights Commission acted inconsistently in dealing with religious freedom claims and that some members of the Commission had made remarks hostile to religion, denying the baker a "neutral forum" to consider his defense to the discrimination charge.

The 3rd Circuit rejected CSS's argument, finding that remarks by City officials, including the Mayor, did not fall within the scope of "hostility" described in the *Masterpiece* decision. "CSS's theme devolves to this," wrote Judge Thomas Ambro for the court. "The City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore, the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements." And specifically addressing CSS's reliance on particular statements by City officials, Ambro wrote: "If all comment on religious motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then Smith is a dead letter, and the nation's civil rights laws might be as well."

The other questions put to the Supreme Court by the CSS Petition sought to get the Court's attention by pointing out different approaches by the federal appeals courts to deciding how to determine whether the government was discriminating because of religion in its enforcement activity, and asked, more directly, "Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?"

The Supreme Court already has cases scheduled for hearing this Term that could provide a vehicle to narrow or overrule *Smith*, and it is a bit odd that it granted review in this case instead of "holding" the Petition until after it issues its other rulings. On the other hand, CSS also argued that the 3rd Circuit's decision was a misapplication of Smith, so perhaps the Court saw a reason to treat this case differently.

The 3rd Circuit appeal attracted sixteen amicus briefs, mostly representing the views of organizations arrayed on each side of the religious freedom issue, including more liberal or progressive religious groups opposing CSS's 1st Amendment claims. Eight states joined in an amicus brief filed by the Texas Attorney General supporting the CSS claim. Seventeen states and the District of Columbia joined in an amicus brief filed by out lesbian Massachusetts Attorney General Maura Healey, siding with the City of Philadelphia. All the major LGBTQ-rights legal organizations joined briefs supporting the City.

The groups that filed briefs in the *Masterpiece Cakeshop* case two years ago will flock to get their views on record in this case, the first LGBTQ-related case added to next Term's docket. Meanwhile, Court-watchers await rulings on three LGBTQ-related antidiscrimination cases under Title VII of the Civil Rights Act of 1964, argued before the Court on October 8, 2019. ■

Arthur S. Leonard is the Robert F. Wagner Prof. of Labor and Employment Law at New York Law School.

Ninth Circuit Denies *En Banc* Rehearing in Idaho Inmate's Gender Confirmation Surgery Case; Circuit Split Possible; Many Judges Dissent

By William J. Rold

Last summer, a Ninth Circuit panel affirmed the issuance of an injunction granting gender confirmation surgery to Idaho inmate Adree Edmo. *Edmo v. Corizon,* 935 F.3d 757 (9th Cir. 2019), *affirming Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103 (D. Idaho 2018). *Law Notes* has followed this case, as Idaho and Corizon, the contracted health care provider, have continued to resist providing the surgery.

Now the Ninth Circuit has denied a petition for rehearing *en banc*. 2020 WL 612834, 2020 U.S. App. LEXIS 4107 (9th Cir., February 20, 2020). There are no opinions from the majority voting to deny rehearing, but there are dissents from seven judges. It takes a majority of the 29 active judges of the sprawling Ninth Circuit (28 U.S.C. § 44) to grant such review, so the vote was 8 judges short, as explained below. Unlike the other circuits, the Ninth Circuit does not normally sit with all active judges if a rehearing *en banc* is granted, although all active judges vote on whether to grant *en banc*. If *en banc* is granted, a "Limited *En Banc* Court" rehears the case. This court is comprised of the Chief Judge and ten associate judges, chosen by lot. The court may order that the "full" court consider the case after rehearing. Ninth Circuit Rule 35.3.

If rehearing is not granted, the case is returned to the three-judge panel, and the clerk issues an order. The vote tally on petitions to rehear *en banc* is not made public or disclosed to the parties, but judges may express themselves.

Here, nine judges did. Two of the nine – Judges Diarmuid F. O'Scannlain (Reagan) and Carlos T. Bea (Geo. Bush) – are senior judges, and their votes did not count towards rehearing. Nevertheless, Judge O'Scannlain wrote an opinion "respecting" the denial of rehearing in which Senior Judge Bea joined. Also joining were the following active Circuit Judges: Consuelo M. Callahan (Geo. Bush), Sandra S. Ikuta (Geo. Bush), Ryan D. Nelson (Trump), Bridget S. Bade (Trump), Daniel A. Bress (Trump), Patrick J. Bumatay (Trump), and Lawrence VanDyke (Trump).

Judge O'Scannlain writes: "With its decision today, our court becomes the first federal court of appeals to mandate that a State pay for and provide sex-reassignment surgery to a prisoner under the Eighth Amendment. The three-judge panel's conclusion—that any alternative course of treatment would be 'cruel and unusual punishment'—is as unjustified as it is unprecedented. To reach such a conclusion, the court creates a circuit split, substitutes the medical conclusions of federal judges for the clinical judgments of prisoners' treating physicians, redefines the familiar "deliberate indifference" standard, and, in the end, constitutionally enshrines precise and partisan treatment criteria in what is a new, rapidly changing, and highly controversial area of medical practice."

Judge O'Scannlain then reviews at length the factual evidence and expert testimony before the District Court as if he were rehearing the matter *de novo*. (The opinion "respecting" rehearing goes so far as to reinterpret the treating physician's chart notes.) Yet, Judge O'Scannlain does not explain (or even invoke) the "clearly erroneous" standard of review of the district judge's findings and credibility determinations, which the panel found not to be clearly erroneous. 935 F.3d at 787.

Applying the law of "deliberate indifference to serious medical needs," O'Scannlain cites cases saying that "mere negligence" is insufficient legally for liability. He declares: "[E]ven most objectively unreasonable medical care is not deliberately indifferent." This is not a quotation taken from other authority, and none of the cases he cites says that.

Much of the opinion is a frontal attack on reliance on standards from WPATH [World Professional Association of Transgender Health], which he characterizes as a "controversial self-described advocacy group that dresses ideological commitments as evidence-based conclusions." Yet, both sides below relied on the WPATH standards, which are also endorsed by the National Commission on Correctional Health Care. The panel specifically rejected adoption of the standards as setting constitutional minima: "[A] simple deviation from [WPATH] standards does not alone establish an Eighth Amendment claim. But the State's experts purported to be applying those standards and yet did so in a way that directly contradicted them. These unsupported and unexplained deviations offer a further reason why the district court did not clearly err in discounting the testimony of the State's experts."

Judge O'Scannlain relies on the Fifth Circuit transgender surgery case of *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019), which relied on the record in *Kosilek v. Spencer,* 774 F.3d 63, 88 (1st Cir. 2014) (*en banc*), which found that medical professionals "reasonably differ" about confirmation surgery – ten years ago at the time the trial record as made in *Kosilek*. In support of rehearing here, he also refers to the *Kosilek* record and supposed dispute as to whether a patient can have the proper living experience in the "opposite" gender while incarcerated, which experience is a precondition to confirmation surgery under the WPATH standards. This ignores the panel observation that experts in *Kosilek* had changed their view about surgery for prisoners. 935 F.3d at 795-6.

Judge O'Scannlain is correct that there is little empirical data about the outcomes of sex confirmation surgery for prisoners. The panel, however, did not base its affirmance of the District Court on empirical data. All made clear that the injunction was entered for this prisoner, based on this record.

The opinion emphasizes that the panel decision in this case creates a split "with every other circuit to consider the issue," which really boils down to *Kosilek* in terms of an evidentiary record. The panel distinguished *Kosilek* on the record some nineteen times, but Judge O'Scannlain dismisses this as "minor differences." The panel wrote: "Our approach mirrors the First Circuit's, but the important factual differences between cases yield different outcomes. Notably, the security concerns in *Kosilek,* which the First Circuit afforded 'wide-ranging deference,' are completely absent here. [774 F.3d] at 92. The State does not so much as allude to them. The medical evidence also differs. In *Kosilek,* qualified and credited experts disagreed about whether GCS was necessary. [774 F.3d] at 90. As explained above, the district court's careful factual findings admit of no such disagreement here. Rather, they unequivocally establish that GCS is the safe, effective, and medically necessary treatment for Edmo's severe gender dysphoria."

In a single paragraph, Circuit Judge Daniel P. Collins (Trump) writes separately from all others, saying that the record established only negligence, at most, which is not actionable. He also joins in Part II of the dissent from rehearing filed by Circuit Judge Bumatay.

Judge Bumatay, twice nominated by Trump before the Senate was willing to confirm him, is the only out gay circuit judge in the country. His dissent here is joined by Judges Callahan, Ikuta, Nelson, Bade and VanDyke – and Part II by Judge Collins.

Part I of Judge Bumatay's dissent begins with the "hope" that Edmo receives "optimal" medical treatment but the declination to "take sides in matters of conflicting medical care." Thus, discussion of the record, framed as a professional dispute, is over before it starts.

Part I then continues with a lengthy exegesis about the "original meaning" of the Eighth Amendment. (This is the part that Judge Collins – and Judges O'Scannlain and Bea – do not join.) He explores the meaning of "punishment" in the 1700's and the origins and textual use of "cruel" and of "unusual." He

concludes that gender confirmation surgery and WPATH standards have no place in the development of Eighth Amendment legal theory. Once can concede that the Founders did not have transgender people in mind when they ratified the Eighth Amendment without over-ruling tens of thousands of cases over more than a century. This extreme originalist theory has never garnered more than a vote or two on the Supreme Court.

Part II of Judge Bumatay's dissent begins by questioning whether Edmo's gender dysphoria is a "serious medical need" – something the Courts of Appeals (including *Kosilek* and *Gibson*) are unanimous in recognizing. He then moves to the second arm of Eighth Amendment health care analysis: whether there is subjective deliberate indifference to the need, finding that the panel "dilutes the otherwise stringent" standard. "Such an approach is particularly troublesome because, if replicated, deliberate indifference could be inferred solely from a finding of a 'medically unacceptable' treatment." This would substitute an objective review for what should be a subjective state of mind requirement.

This analysis ignores the teaching of *Farmer v. Brennan,* 511 U.S. 825, 842 (1994), that subjective intent can be "inferred" from objective circumstantial evidence showing that the risk was "obvious." A jury (or, here, a judge) can infer that a doctor who widely departs from acceptable medical standards as shown by the record is deliberately indifferent. Judge Bumatay writes: "If courts follow the panel's reasoning, in every case of medically unacceptable treatment, courts could automatically infer deliberate indifference." This is not what the panel held. It found that the District Court assessed the credibility of the treating doctor and that his trial testimony was contradicted by his chart notes and by his deposition and that he could not explain how he "came up with" his "criteria" for surgery. This was not clearly erroneous and justified a finding of subjective intent. 935 F.3d at 791-2.

Judge Bumatay ends by quoting a dissent by Justice Clarence Thomas: "The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." *Hudson v. McMallian,* 503 U.S. 1, 28 (1992). That this dissent got five concurrences here is chilling.

Together, there are nine judges critical of rehearing *en banc*. While Judge O'Scannlain's "respecting" opinion is basically a kibitz without legal significant, it adds gravitas to the dissenters, whose length of service on the Ninth Circuit averages about two years. A "limited" *en banc* random panel could include a majority composed of these judges. More generally, the opposing views here seem calculated to lobby for a grant of *certiorari* on a circuit "split." For what it's worth at this level, this writer believes it would be wise to let the issue percolate a bit more in the Courts of Appeals so that there are more evidentiary records to consider.

Adree Edmo is represented by Lori Rifkin, of Hadsell Stormer & Renick LLP, Emeryville, California; Dan Stormer and Shaleen Shanbhag, Hadsell Stormer & Renick LLP, Pasadena, California; Craig Durham and Deborah Ferguson, Ferguson Durham PLLC, Boise, Idaho; Amy Whelan and Julie Wilensky, National Center for Lesbian Rights, San Francisco, California. ■

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

Eleventh Circuit Relaxes Standards for Inmate Victims of Sexual Acts

By William J. Rold

Inmate Jonathan Daniels objected to strip searches conducted by male officers, because some of them might be gay, in *Daniels v. Inch,* 2020 WL 906177 (M.D. Fla., February 25, 2020). U.S. District Judge William F. Jung dismissed the case for failure to state a claim. The dismissal is with prejudice because any amendment would be futile. Daniels named only the Florida corrections secretary, and he did not allege that he was "touched . . . nor [forced] to commit any act for the entertainment or pleasure of a corrections officer . . . . Nothing indicates the searches have been performed with the intent to degrade or humiliate." Judge Jung also rejected Daniels' request for a preliminary injunction requiring that all correction officers be screened for their sexual orientation.

To make the above paragraph the whole report, however, would be to bury the lead. Judge Jung notes in passing that the Eleventh Circuit has over-ruled *Boxer v. Harris,* 437 F.3d 1107, 1111 (11th Cir. 2006), which set a high standard under the Eighth Amendment for sexual abuse claims against officers. In *Boxer*, the Eleventh Circuit held that no Eighth Amendment claim was stated against a correction officer who forced an inmate to masturbate for her entertainment, because the sexual abuse was not "severe or repetitive." In *Sconiers v. FNU Lockhart*, 946 F.3d 1256, 1259 (11th Circ. 2020), the court found that the *Boxer* standard did not meet contemporary standards of decency regarding sexual victimization in prison. In light of the Supreme Court's admonition on the point in *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010), *Boxer* had to be re-evaluated; and it was abrogated.

The Second Circuit issued a similar ruling in *Crawford v. Cuomo*, 796 F.3d

252, 269-60 (2nd Cir. 2015). It overruled in pertinent part *Boddie v. Schneider*, 105 F. 3d 857, 860-1 (2nd Cir. 1997), which imposed a "severe" conduct limitation on what sexually abusive behavior is actionable under the Eighth Amendment.

The Eleventh Circuit goes further than the Eighth Amendment, however. It is the first circuit in the country to hold that the 2013 amendments to the Prison Litigation Reform Act (PLRA) allow emotional damages for prisoner victims of sexual acts. This provision was added to the PLRA as an exception to the general ban on damages for emotional distress unaccompanied by physical injury. 42 U.S.C. § 1997e(e).

This question was reserved by the Sixth Circuit in an unpublished opinion in *Lucas v. Chalk*, 2019 U.S. App. LEXIS 24561 (6th Cir. Aug. 19, 2019), reported in *Law Notes* (September 2019 at page 33). Quoting the Congressional findings in the PREA – 34 U.S.C. § 30301(1), 14(d) – that court observed: "Victims of prison rape suffer severe physical and psychological effects[,] . . . [including] post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses."

Now, in a published opinion, the Eleventh Circuit has answered the question in favor of a damages remedy for victims of sexual acts in prison. This warrants a headline. ■

11th Circuit Grants Gay Guinean's Petition to Vacate BIA's Denial of Asylum, Based on Ineffective Assistance of Counsel

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 11th Circuit ruled on February 14, 2020, that a decision by the Board of Immigration Appeals (BIA) affirming an Immigration Judge's (IJ) denial of the asylum petition a gay man from Guinea should be vacated and the case sent back to an Immigration Judge for a new hearing, because of the serious flaws in representation provided by the man's lawyer. *Sow v. U.S. Attorney General*, 2020 U.S. App. LEXIS 4765, 2020 WL 745939. Writing for the panel, Circuit Judge Charles R. Wilson found that counsel's ineffectiveness was so obvious that it was arbitrary and capricious for the BIA to affirm the IJ's decision.

The Petitioner immediately applied for asylum at the border based on his membership in a particular social group – homosexual men from Guinea. His testimony provides stark, specific evidence to support his claim that he was subject to persecution because of his sexual orientation and relationship with another man, Alpha Oumar Barry. Indeed, after he fled upon his family's discovery of his homosexuality and the relationship, a friend told him that his family and other members of the community had tortured Barry and burned him alive. The friend also reported that Petitioner's uncle, an Imam, had "instructed the community members to, once found, either kill [Petitioner] or turn him into the police for failing his family and the laws of Islam."

The Petitioner fled to Morocco, hoping to stay with a cousin, but the family had told the cousin about Petitioner's homosexuality, so he "brutally beat" Petitioner. A taxi driver then showed Petitioner kindness by taking him to a friend's home, where he was cared for and recuperated from his injuries for six months. This friend helped him to obtain a Mexican visa. After arriving in Mexico, Petitioner travelled to the U.S. and presented himself to Immigration officials, informing an officer of his fear of returning to Guinea because "he was a homosexual." This occurred on December 23, 2016.

Two friends with whom Petitioner was able to be in contact during his detention by Homeland Security put him in touch with an attorney, Joseph Gurian, who agreed to represent him in the asylum proceeding. From the detailed account of the representation as related by Judge Wilson from Petitioner's appeal, it is clear that Gurian should not have taken on the representation. According to this account, he was lax about staying in touch with his client, failed to obtain the interpreter necessary for the men to effectively communicate to each other, and apparently failed to prepare for the hearing before the Immigration Judge. Most significantly, although Petitioner's friends had put together evidentiary materials and submitted them to Gurian, Gurian brushed off Petitioner's requests to be able to see and review these materials and have Gurian come to the detention center so they could meet and discuss them. The few times the men spoke, Gurian failed to obtain an interpreter, even though Petitioner was not fluent in English and Gurian did not understand Petitioner's French. Gurian's most fatal error, which doomed Petitioner's case, was to present two affidavits from the same individual presenting conflicting accounts of what had happened to Petition's friend in Guinea, which led the IJ to make an adverse credibility determination against Petitioner. Had Gurian examined the conflicting affidavits in advance of the hearing and discussed them with Petitioner and his friends, he would have learned that one

was drafted by someone not acquainted with the facts, and should not have been submitted. Having not read them, Gurian submitted both at the hearing, as well as a statement from Petitioner's elderly, confused aunt, who had trouble remembering things and thus include statements conflicting with other documents.

The IJ was clearly troubled by the case. "In his oral decision," wrote Wilson, "the IJ said that he 'unfortunately' had to deny [Petitioner's] application based solely on an adverse credibility finding. In coming to this conclusion, the IJ specifically highlighted the inconsistencies in Djibril's and Oumou's statements. He noted that, if it were true that [Petitioner] were a homosexual, then he 'clearly should get' asylum. Likewise, he said 'if [Petitioner was] telling the truth I would in a heartbeat grant him asylum."

The court found, based on the record and Petitioner's explanations about the problems in dealing with Gurian, that the BIA had abused its discretion in upholding the IJ decision. "We acknowledge the highly deferential standard of review that the BIA is due," wrote Judge Wilson. "But the unique facts of [Petitioner's] case present the rare situation where we must find that the BIA was arbitrary and capricious in exercising its discretion." The court found that Petitioner had established "deficient performance" and that he had established that "counsel's deficiencies prejudiced his case. The IJ's denial of asylum was based entirely on the inconsistencies in the evidence, and competent counsel would have realized that the affidavits included inaccuracies and never would have submitted them." Also, in light of the IJ's final statement at the hearing, "We therefore do not need to speculate as to whether the outcome may have been different if Gurian had performed adequately. The IJ's uniquely direct statement confirms that it would have. Because the IJ explicitly said that he would have granted [Petitioner's] application but for the evidentiary inconsistencies, we have no trouble concluding that there is a reasonable probability that the outcome of [Petitioner's] merits hearing would have been different with adequate assistance of counsel."

The court granted the Petition, vacated the BIA's decision, and remanded with instructions "to remand to the IJ for reconsideration of [Petitioner's] asylum application.

Petitioner's highly competent representation on appeal came from Keren Zwick of the National Immigrant Justice Center, Chicgao, with cooperating attorneys Adele El-Khouri, Elaine Goldenberg and Jeremy S. Kreisberg from Munger Tolles & Olson, LLP, Washington, D.C. ■

Federal Court Refuses Further Delay in Trans Military Ban Discovery

By Arthur S. Leonard

On Friday, February 7, US District Judge Marsha Pechman issued yet another in a series of Orders on discovery in *Karnoski v. Trump*, 2020 U.S. Dist. LEXIS 21813, 2020 WL 606493 (W.D. Wash.), one of the four challenges to the constitutionality of Trump's transgender military service ban in its current incarnation, referred to as the Mattis Plan.

Pechman, backed up by a 9th Circuit panel, has determined that the ban discriminates based on gender identity and is subject to heightened scrutiny under the 5th Amendment's equal protection requirement, and judging from this opinion she is clearly getting fed up by the Justice Department's delay strategy in the case.

Since the Supreme Court stayed Judge Pechman's preliminary injunction (and ultimately, all the preliminary injunctions were lifted), the Mattis Plan went into effect last April while the litigation continues, including clear discrimination against applicants and service members due to their gender identity. The Justice Department's strategy now is to avoid a merits ruling against the government by stretching out discovery as long as possible.

The district courts have already determined that various deliberative process privilege claims asserted by the government are invalid in this suit, where the question boils down to whether the Mattis Plan is an expression of ideology, pure and simple, or rather is based on objective facts. Only discovery of internal communications and sources allegedly relied upon in formulating the policy can reveal the answer to the degree necessary to constitute proof in a court. But they keep stalling.

Judge Pechman issued an order late last year compelling certain disclosure by a date specified in December. Rather than comply, the Justice Department moved for "clarification" of part of her Order and a "stay pending appeal." That is, they want to keep off responding as long as they can, and then get the court to delay further while they appeal every discovery ruling to the 9th Circuit, building in several more months for delay.

Pechman is having none of it: Her February 7 order provides some "clarification" – which sounds from her description in this opinion as not really needing clarification after the December 10 conference she held with the parties, which she quotes from court reporter transcript - and denies the stay. "Because Plaintiffs have overcome the deliberate process privilege for these documents and this dispute has been pending for nearly two years, the Court will not issue a stay for an unspecified amount of time while Defendants decide whether to appeal," she wrote. "This is an ongoing process and until the process is complete it is wasteful to appeal one segment at a time." She also pointed out that the government missed a 14-day deadline if it wanted her to reconsider her prior discovery order. She ordered the government to produce all the documents covered by the order by February 14.

Karnoski and co-plaintiffs are represented by Lambda Legal and Outserve-SLDN (so named when the case was filed, now the Modern Military Association). ■

California Court Denies Release or Transfer of Transgender Woman in ICE Custody Seeking Medical Treatment and a Bond Hearing

By Bryan Xenitelis

The U.S. District Court for the Northern District of California has denied a motion by a transgender Mexican woman seeking a temporary restraining order (TRO) to release her or return her to her prior detention facility claiming that she was denied right to counsel, was not receiving gender dysphoria medical treatment, and was entitled to a bond hearing before an Immigration Judge in *Avilez v. Bar*, 2020 U.S. Dist. LEXIS 19214, 2020 WL 5709987 (N. Dist. CA, Feb. 5, 2020).

The Plaintiff was brought to the United States from Mexico as an infant, and following incarceration for a criminal conviction was placed into Immigration and Customs Enforcement (ICS) proceedings and put into removal proceedings. After being denied relief and ordered removed by the Immigration Judge and having that decision affirmed by the Board of Immigration Appeals (BIA), the Plaintiff filed a Petition for Review with the U.S. Court of Appeals for the 9th Circuit, which remains pending. Meanwhile, Plaintiff while in detention was diagnosed with gender dysphoria and was transferred from her San Francisco-area detention facility to a facility in Texas, where she has not yet begun receiving medical treatment.

Plaintiff filed both a *habeas corpus* petition and separately sought a TRO from the District Court against Attorney General William P. Barr, claiming she was denied her right to counsel because her San Fransisco-based attorney was limited or unable to communicate with or visit her. She also claimed that she was denied medical treatment, and requested that she be provided a bond hearing before an Immigration Judge. In her TRO motion, she sought either release or a transfer back to her San Francisco-area detention center.

U.S. District Court Judge Charles R. Breyer issued the court's opinion with respect to the TRO. Judge Breyer noted that a TRO is an "extraordinary remedy" that "should only be awarded upon a clear showing that the plaintiff is entitled to such relief."

Judge Breyer found that the court lacked jurisdiction over Plaintiff's claim that her 5th Amendment right to counsel was violated by her transfer from California to Texas, because under federal statute the "sole and exclusive means for judicial review of an order of removal" is "a petition for review filed with the appropriate court of appeals." Judge Breyer cited 9th Circuit case law stating that the statutory language limiting review solely to the Courts of Appeals is "breathtaking in scope," "vice-like in grip," and capable of "swallowing up virtually all claims that are tied to removal proceedings." Finding Plaintiff's claim to "arise from" her removal proceedings, Judge Breyer ruled that the District Court lacked jurisdiction over the right to counsel claim. The Plaintiff had previously argued that her transfer was unconstitutionally punitive. Judge Breyer found this to be an abandoned argument, but nonetheless meritless as her transfer was for the purpose of providing her needed medical care. He found the fact that the individual who made the decision to transfer her was not themselves a physician irrelevant, stating: "It does not take a physician to decide that it is necessary to transfer a detainee to a facility capable of providing essential medical care."

With respect to Plaintiff's claim that she was not receiving adequate medical treatment for her gender dysphoria, Judge Breyer noted that while Plaintiff claimed she was being denied hormone treatment, held in a segregated cell,

denied female clothes, and consistently referred to as a man, both parties agreed that "steps are being taken to provide her with hormone treatment." Judge Breyer ruled that the court "declines to step in to micro-manage the details, timing, or location of ICE's provision of medical care." He did, however, order the Government to file a status report with the court on a particular date: "to ensure that [Plaintiff] does continue to receive the medically necessary treatment.

Finally, with respect to the Plaintiff's argument that she is entitled to a bond hearing, Judge Breyer noted that the Plaintiff had separately filed a *habeas corpus* petition with the court in which she raised this issue, and that the *habeas* petition was the appropriate place to bring such an argument as the parties had agreed to a more "relaxed" briefing schedule than for a TRO. He ordered the parties to propose an updated briefing schedule for the *habeas* case.

Finding none of Plaintiff's arguments to justify the "extraordinary remedy" of a TRO, Judge Breyer denied the Plaintiff's TRO; however, both her *habeas corpus* petition to the District Court and her Petition for Review before the 9th Circuit remain pending.

Avilez is represented by Hector Alejandro Vega and Genna Ellis Beier of the San Francisco Public Defender's Office. ■

Bryan Xenitelis is an attorney and an adjunct professor at New York Law School.

Federal Courts Slam the Door on Gay Prisoner Victim of Serial Rape Who Contracted AIDS

By William J. Rold

Steven R. Miller was a federal arrestee held in the Fresno County (California) Jail in 2010 when these events unfolded. He was a 19-year-old effeminate gay man, who weighed 130 pounds at 5' 11". He was held near a prisoner who was awaiting sentencing for raping Miller in the past, and the prisoner raped Miller again in the jail. So did many other inmates over the course of months. Miller sustained abdominal injuries, rectal bleeding, and infection with HIV, which had turned to full-blown AIDS by the time he filed his federal lawsuit. The decision of U.S. Magistrate Judge Barbara A. McAuliffe in *Miller v. Najera*, 2020 U.S. Dist. LEXIS 25424, 2020 WL 731176 (E.D. Calif., February 13, 2020), recommended that his most recent effort at federal judicial relief be dismissed.

Miller had complained about the danger to him and the rapes at the jail to officers, to supervisors, and to U.S. Marshals who were escorting him to court. Eventually, he was moved to a "homosexual unit," where he could be "with his own kind," but he was raped there as well. By December of 2010, he was finally transferred to federal custody.

Miller's initial lawsuit, filed in July of 2012 (within the two-year statute of limitations for federal civil rights cases in California), alleged that jail staff members and Fresno County were deliberately indifferent to his safety and to his medical needs, and that the U.S. Marshal knew about conditions at the jail but was also deliberately indifferent to Miller's safety by placing him there. U.S. Magistrate Michael J. Seng denied appointment of counsel, saying it was premature because the case had not been screened, and writing: "This Court is faced with similar cases almost daily."

Judge Seng did not screen the case for over 2-1/2 years, allowing Miller's complaint to just sit apparently unattended in the judge's chambers. At last, in February of 2015, he ruled that Miller could not proceed in the same case on both his protection from harm claims and on his medical care claims. He ordered Miller to choose one or the other, or to file an amended complaint. Such orders are common in the Eastern District of California and are not processed as "Reports and Recommendations" to the district judge.

Miller then filed a First and a Second Amended Complaint, both of which were dismissed by U.S. District Judge Ralph R. Beistline, with leave to amend. Judge Beistline allowed a Third Amended Complaint to proceed in June of 2016. The case was then reassigned to Chief Judge Lawrence J. O'Neill.

In February of 2017, Judge Seng recused under 28 U.S.C. § 455(a), which provides that a magistrate judge shall disqualify herself when her "impartiality might reasonably be questioned." U.S. Magistrate Gary S. Austin was then assigned, and he recused himself, too. So did Magistrate Judge McAuliffe. Miller's case was then assigned to Chief Judge O'Neill "for all purposes."

The U.S. Marshall moved for summary judgment, claiming that Miller had made an insufficient showing that the Marshal's Office knew about conditions in the Fresno County Jail. The Fresno County defendants moved for summary judgment, arguing that Miller had not exhausted administrative remedies by grieving his danger in the jail prior to filing suit, as they asserted was required by the Prison Litigation Reform Act [PLRA]. Chief Judge O'Neill granted both motions, entering judgment in favor of the U.S. Marshal and dismissing the claims against Fresno County without prejudice in December of 2017.

Miller then tried to "exhaust" his claims by requesting grievance materials from the Fresno County Jail. According

to him, the jail staff ignored his requests and/or delayed responding for most of the next year. He finally received papers and filed grievances in October of 2018. Receiving no responses, he filed a motion before Judge O'Neill for relief from the December 2017 dismissal under F.R.C.P. 60(b). Miller argued that he did not know that he had to grieve the rapes, because the jail's written grievance procedures said actions by fellow inmates were not "grievable." In addition, he thought his complaints about the rapes on "white sheets" were enough, and that the jail responded to the "white sheets," commencing investigations, including criminal charges against some of the assailants. He also argued that his mental health issues, including PTSD, interfered with his ability to exhaust.

Judge O'Neill issued a decision in January of 2019, denying Rule 60(b) relief. He ruled that Miller had still not "exhausted," that the remedies were "available" even though he might not have "known" about them, that the "white sheets" were not exhaustion, and that jail staff had no obligation to assist him in filing grievances. (Actually, the regulations implementing the PREA, which were promulgated in 2012, *require* that jails assist inmates in filing grievances about sexual abuse. 28 C.F.R. § 115.51. They also forbid jails from imposing time limits for such grievances. 28 C.F.R. § 115.52(b)(1). A California statute has required such assistance since 2005. California Penal Code §§ 2635-2643, so clearly Judge O'Neill's assertions were incorrect.) It does not appear from the record that Miller ever received as much as an acknowledgment from the jail of his 2018 grievances.

In a footnote, Judge O'Neill notes Miller's concerns that he may have a statute of limitations problem if his case is not reopened under F.R.C.P. 60(b). He dismisses the concern, writing: "It is well established 'that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process,'" quoting *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005), without recognition that the statute may have already run if the case is not reopened.

All of this is prelude to Miller's commencement of a new lawsuit in 2019, which is the subject of Magistrate Judge McAuliffe's current ruling generating this article. There is no indication in the instant decision that Judge McAuliffe remembered her previous recusal from this case.

Judge McAuliffe finds that Miller cannot refile against the U.S. Marshal. There had been a final judgment on those claims, with identity of parties and issues, triggering *res judicata*, she wrote. While *res judicata* does not apply to the Fresno County claims, there is a statute of limitations problem, since the pertinent events occurred in 2010. Judge McAuliffe begins counting accrual of claims from March of 2011, when Miller was diagnosed with AIDS. She also allows two years tolling under California Code of Civil Procedure § 352.1, due to Miller's incarceration, still leaving him over four years short of a timely claim on his new case.

Judge McAuliffe then turns to "equitable tolling." "Under California law, tolling is appropriate in a later suit when an earlier suit was filed and where the record shows: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim." *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002). She concludes, however, that these factors do not apply to two cases filed "in the same forum," citing the unpublished decision of *Schwarz v. Meinberg*, 761 F. App'x 732, 735 (9th Cir. 2019). This point is *dicta* in *Schwarz*, however, since *Schwarz*s holding is that the court would not extend *Bivens*. *Schwarz* itself relied on another unpublished decision, *Mitchell v. Snowden*, 700 F. App'x 719, 720 (9th Cir. 2017), which remanded for an equitable tolling determination under the three factors above, notwithstanding the "same forum" issue, noting the plaintiff's transfers from the subject institution and his mental health problems. The court in that case also instructed the district judge on remand to "re-evaluate" appointment of counsel.

"Equitable tolling . . . operates . . . to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness . . . . and to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004). Judge McAuliffe recognizes that these considerations can apply even in the same forum, under what is called the "Bollinger rule," from *Bollinger v. Nat'l Fire Ins. Co.*, 25 Cal. 2d 399 (1944). Three elements apply: (1) the plaintiff must have diligently pursued his claim; (2) the fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff; and (3) the defendant must not be prejudiced by application of the doctrine. *Hull v. Central Pathology Service Med. Clinic*, 28 Cal. App. 4th 1328, 1336 (1994).

Judge McAuliffe then finds that Miller cannot satisfy the second element because he did not exhaust under the PLRA. Further, she finds that any amendment would be futile for the same reason. Thus, the litigation goes full circle.

There is enough to chew on here for any experienced counsel. It is apparent to this writer that Miller has received a raw deal: dare I say a *deliberately indifferent* treatment by several federal district and magistrate judges, beginning with the one who sat on his *pro se* complaint for 2-1/2 years before dealing with it? Miller should have been permitted to reopen his first case or, alternatively, equitable tolling should prevent this injustice to a prison multiple rape victim who sustained lifelong harm. And several magistrate judges need to develop a conscience about how they deal with *pro se* inmate claims, perhaps assuming that nobody is paying attention. We are!! ■

Ninth Circuit Panel Affirms Ruling Rejecting Challenge to School District's Policy of Allowing Transgender Students to Use Facilities Consistent with their Gender Identity

By Matthew Goodwin

On February 12, 2020, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit affirmed the Oregon District Court's dismissal of a law suit brought by parents, students, and a parent-advocacy group (collectively Plaintiffs) that claims an Oregon public school district violated Title IX and certain of their constitutional rights when it allowed transgender students to use school bathrooms, locker rooms, and showers that match their gender identity rather than their biological sex. *Parents for Privacy v. Barr*, 2020 WL 701730, 2020 U.S. App. LEXIS 4503. Circuit Judge A. Wallace Tashima wrote for the panel.

The case originated with a student of the Dallas School District who identifies as male but who was identified as female at birth, and who is referred to as "Student A" throughout the opinion. Student A wished to use a school locker room concordant with his gender identity. The School District created and implemented a plan for the student to enable his and other transgender students' participation in accordance with his request.

The Plan allows use by students of the locker room and bathroom facilities that correspond to their gender identity. The Plan further provides for staff training "regarding Title IX, that teachers would teach about anti-bullying and harassment, that the Physical Education . . . teacher would be first to enter and last to leave the locker room, and that Student A's locker would be in direct line of sight of the PE teacher in the coach's office." The Plan identifies certain "safe" adults whom Student A may approach with any concerns, and called for $200,000 - $500,000 in renovations to bathrooms and locker rooms, including the installation of privacy stalls.

Student A began to use male facilities, prompting other male students to report "'embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress,' because they had to change clothes for their PE class and attend to their needs while someone who had been assigned the opposite sex at birth was present." Apparently, these students also complained of the insufficiency of the privacy stalls because there were "visible gaps" and their or others' "'partially unclothed bodies could 'inadvertently' be seen." Female students also complained and expressed worries that they might be made to change in front of students who were born male. Student opponents of the Plan tried to circulate a protest petition, but the school principal confiscated it and threatened its proponents with disciplinary action.

Parents also opposed the Plan at school board meetings. Some of the opposition was based on concerns about biologically opposite-sexed students sharing a locker room, while other parents found the Plan to interfere with "preferred moral and/or religious teaching of their children concerning modesty and nudity."

The suit was originally brought against seven defendants: Attorney General William Barr, Secretary of Education Betsy DeVos, the U.S. Department of Education, the U.S. Justice Department, Dallas School District No. 2, the Governor of

Oregon, and the Oregon Department of Education. Basic Rights Oregon, Oregon's largest LGBTQ advocacy organization, was granted leave to intervene as a defendant in the suit, represented by the ACLU Foundation of Oregon and the national ACLU LGBT Rights Project.

The 9th Circuit panel affirmed District Judge Marco A. Hernandez's dismissal of the lawsuit as to Barr and DeVos on the basis that Plaintiffs failed to establish causation or redressability with respect to them " . . . because the [School] District had adopted the Student Safety Plan 'in response to Student A's accommodation requests, not [the] Federal Defendants' actions,' and the [School] District would 'retain the discretion to continue enforcing the Plan' notwithstanding any relief against the Federal Defendants." The parties stipulated to voluntary dismissal of Plaintiff's claims against the Oregon Governor and the Oregon Department of Education on Eleventh Amendment grounds.

Plaintiffs' suit initially relied on nine causes of action but their appeal only pursued four—i.e. that the district court's dismissal violated "(1) the 14th Amendment right to privacy; (2) Title IX; (3) the 14th Amendment right to direct the education and upbringing of one's children; and (4) the First Amendment's Free Exercise Clause."

As summarized by Judge Tashima, the Plaintiffs' first 14th Amendment Due Process argument posits that this amendment "encompass[es] a 'fundamental right to bodily privacy' that includes 'a right to privacy of one's fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.' Further, they assert that '[f]reedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is a fundamental right deeply rooted in this nation's history and tradition and is also implicit in the concept of ordered liberty.'"

The District Court and Ninth Circuit disagreed with the Plaintiffs. Here the Court found the cases upon which Plaintiffs relied did not, in fact, stand for the propositions for which they had been cited. The Plaintiffs had cited cases which "'involve[d] egregious state-compelled intrusions into one's personal privacy[.]'" For example, one case relied on by Plaintiffs "'involved a male police officer taking unnecessary

nude photographs of a female victim in provocative positions and circulating them to other officers.'" Another case relied on by Plaintiffs " . . . determined that a male parole officer violated a female parolee's right to bodily privacy by entering her bathroom stall over her objections and remaining in the stall while she 'finished urinating, cleaned herself, and dressed.'"

The 9th Circuit affirmed the District Court's recitation of Supreme Court jurisprudence holding that the liberty rights protected by the Due Process Clause is a "short list" that includes "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." The 9th Circuit agreed, and held that "'[t]he potential threat that a high school student might see or be seen by someone of the opposite biological sex while they either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation" under the 14th Amendment.

The Plaintiffs also argued and challenged dismissal of their second 14th Amendment claim: that the Plan violated parents' rights to direct the "care, education, and upbringing of their children." Parents do have such a right under *Troxel v. Granville*, 530 U.S. 57 (2000), but the 9th Circuit held in this case that it was not so broad as the parents claim.

In this connection, Judge Tashima wrote that "we have previously explained that although the Supreme Court 'recognized that parents' liberty interest in the custody, care, and nurture of their children resides 'first' in the parents, [it] does not reside there exclusively, nor is it 'beyond regulation [by the state] in the public interest.'" The court also distinguished *Troxel* on its facts, as that case "concerned a state government's interference with a mother's decision about the amount of visitation with her daughters' paternal grandparents that was in her daughters' best interests; it did not address the extent of parents' rights to direct the policies of public schools that their children attend."

The court went on to reiterate its endorsement of 6th Circuit precedent in a 9th Circuit case addressing whether parents lack a constitutional right to direct the curriculum that is taught to their children: "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or . . . a dress code, these issues of public education are generally committed to the control of state and local authorities." The court concluded by holding that "[t]his binding precedent thus directly supports the district court's conclusion that [Plaintiffs] lack a fundamental right to direct Dallas High School's bathroom and locker room policy.

As to Title IX, the 9th Circuit agreed that the Plaintiffs' claims failed insofar as the alleged sexual harassment was not "because of sex" and did not target any student on the basis of their sex. "Stating a Title IX hostile environment claim requires alleging that the school district: (1) had actual knowledge of; (2) and was deliberately indifferent to; (3) harassment because of sex that was; (4) 'so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school . . . ' The district court ruled, and the 9th Circuit agreed, that Plaintiffs had failed to establish the third and fourth elements and, on that basis, dismissed Plaintiffs' Title IX hostile environment claim."

As to Title IX's third element, the Plaintiffs alleged that the Plan created sexual harassment and a hostile environment on the basis of sex by "needlessly subject[ing] Student Plaintiffs to the risk that their partially or fully unclothed bodies will be exposed to students of the opposite sex and that they will be exposed to opposite-sex nudity . . . " According to Plaintiffs, "'[e] xposure to opposite-sex nudity creates a sexually harassing hostile environment." Plaintiffs further claimed that Title IX requires that "facilities be segregated based on 'biological' sex rather than 'gender identity.'

In dismissing the suit, both the District and Circuit courts pointed out that ""[c]ourts have recognized that the presence of transgender people in an intimate setting does not, by itself, create a sexually harassing environment that is severe or pervasive." [J]ust because the [Plan] implicitly addresses the topics of sex and gender by seeking to accommodate a transgender student's gender identity, or because it segregates facilities by gender by seeking to accommodate a transgender student's gender identity, or because it segregates facilities by gender identity, does not mean that the Plan harasses other students on the basis of their sex. As the district court explained, the Plan does not target students or discriminate against them on the basis of their sex; the Student Safety Plan treats all students—male and female—the same."

Plaintiffs argued they established the fourth element of a Title IX claim because the student Plaintiffs viewed sharing facilities with a transgender individual as subjectively harassing and it " . . . is, objectively, sufficiently severe or pervasive that a reasonable person would agree that it is harassment." Wrote the court: "However, even crediting Plaintiffs' subjective perceptions, under the totality of the circumstances, the alleged harassment is not so severe, pervasive, and objectively offensive to rise to the level of a Title IX violation. Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender."

Finally, Plaintiffs on appeal claimed that the Plan violated the Plaintiffs' constitutional rights to free exercise of religion. More specifically, Plaintiffs

argued that "[b]ecause the Student Safety Plan permits transgender students who were assigned the opposite biological sex at birth into their locker rooms, the Plan 'prevents Student Plaintiffs from practicing the modesty that their faith requires of them, and it further interferes with Parent Plaintiffs teaching their children traditional modesty and insisting that their children practice modesty, as their faith requires.'" Plaintiffs further assert that, as a result, "[c]omplying with the requirements of the Student Safety Plan . . . places a substantial burden on the Plaintiffs' exercise of religion by requiring Plaintiffs to choose between the benefit of a free public education and violating their religious beliefs."

The Plaintiffs argued for the application of strict scrutiny to the Plan, whereas the District Court had applied a rational basis test and dismissed the claim because the Plan was " . . . neutral and generally applicable with respect to religion . . . " and " . . . laws that incidentally burden the exercise of religion do not violate the Free Exercise Clause of the First Amendment."

The Plaintiffs argued on appeal that the Plan applied only to Student A and was, therefore, not generally applicable, but they failed to cite any source for this proposition. The correct analysis to assess neutrality, according to the court, was to examine whether a law specifically targets or singles out a religion. Here both the District and 9th Circuit courts observed that the Plan was developed on the basis of Student A's complaints for accommodation and was not motivated by any underlying religious question, and that the Plan made " . . . no reference to any religious practice, conduct, belief, or motivation."

The court held that "[t]he correct inquiry here is whether, in seeking to create a safe, non-discriminatory school environment for transgender students, the Student Safety Plan selectively imposes certain conditions or restrictions only on religious conduct. Because Plaintiffs have not made any showing that the Plan does so, the district court correctly determined that the Plan is generally applicable for purposes of the free exercise analysis."

The 9th Circuit also found it was not error for the District Court to dismiss the Plaintiff's claims "with prejudice." The court's analysis in this respect was much thinner than the other sections of the opinion, but succinctly stated "[a] mending the complaint will not change, for example, the extent of the rights that are protected by the Fourteenth Amendment's Due Process Clause . . . Further amendment would simply be a futile exercise."

Two of the judges on the three-judge panel were appointed by President Clinton while the other was appointed by President Obama. Whether the Plaintiffs will file for *en banc* or Supreme Court review of the decision remains to be seen.

Last year, the Third Circuit Court of Appeals rejected similar claims brought by parents and students in a case from a Pennsylvania. The Plaintiffs in that case—*Doe ex rel Doe v. Boyertown Area School District*, 897 F. 3d at 525 — also argued that letting transgender students use facilities consistent with their gender identity violated the plaintiffs' constitutional and Title IX rights; their claims were dismissed and dismissal was upheld on appeal. The *Boyertown* plaintiffs sought and were denied review by the United States Supreme Court.

The plaintiffs are represented by J. Ryan Adams of Canby, Oregon, and Herbert G. Grey of Beaverton. Attorneys from the Justice Department participated to defend the District Court's decision to dismiss the federal defendants from the case. Blake H. Fry and Peter R. Mersereau ov Mersereau Shannon LLP, Portland, defended the school district's policy. The ACLU team on behalf of Basic Rights Oregon includes Gabriel Arkles and Shayna Medley-Warsoff of the ACLU Foundation – New York, and Matthew W. dos Santos and Kelly Simon, ACLU Foundation of Oregon, with cooperating counsel Peter D. Hawkes and Darin M. Sands of Lane Powell PC, Portland. The court received nine amicus briefs, apparently all in support of the school district's policy. ■

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

Triaging Justice for Prisoners in the Eastern District of California

By William J. Rold

In December, *Law Notes* reported (at pages 40-41) that U.S. Magistrate Judge Barbara A. McAuliffe has issued a Report and Recommendation in *Solomon v. Torres*, 2019 U.S. Dist. LEXIS 206462 (E.D. Calif., Nov. 27, 2019). The judge recommended that the transgender plaintiff's case be dismissed upon a third screening of the pleadings. The Plaintiff, who is in a women's prison following gender confirmation surgery, alleged that she and another woman were issued false disciplinary reports because they appeared to be lesbians, while other heterosexual inmates were not ticketed for the same behavior (being out of place and refusing to lock in their cells). The reasons this writer believed the recommendation was erroneous are outlined in the December reporting.

Now, after a "*de novo*" review of Inmate Solomon's objections to the Report, U.S. District Judge Dale A. Drodz adopts the Report in *Solomon v. Torres*, 2020 WL 902600 (E.D. Calif., Feb. 25, 2020). The judge finds that the allegations are not "susceptible of an inference of discriminatory intent." This seems odd, because Inmate Solomon alleges that she had corroboration (an audiotape) that Defendant Torres targeted them because of his belief that they were in a "homosexual relationship."

There is another article in this issue of *Law Notes* about a case involving another recommended dismissal by Magistrate Judge McAuliffe. See "Federal Courts Slam Door on Prisoner victim of Serial Rape Who Contracted AIDS," about *Miller v. Najera*, 2020 U.S. Dist. LEXIS 25424 (E.D. Calif., February 13, 2020). In that case, Judge McAuliffe recommended against equitable tolling that would have saved the gay plaintiff's cause of action against a statute of limitations problem

that occurred while the case foundered for *years* in the Eastern District of California before a judge finally got around to issuing a decision.

The same thing is at risk here, because the actionable events occurred in July of 2017 and the California statute is two years without tolling. Here, however, Judge McAuliffe has never permitted Defendant Torres to be served, so that his potential prejudice from the delay could be an aggravating factor that was absent in *Miller*.

In both cases, Judge McAuliffe issued orders on the merits that were not subject to review by the District Court Judge. This is because District Judges are not assigned to prisoner cases in the Eastern District until the Magistrate Judge tells the Clerk of Court to assign one. E.D. Calif. Rule Appendix (k) (1). Thus, the initial work by the U.S. Magistrates in the Eastern District of California is unreviewable under what would be standard rules of local practice in most federal districts. In *Solomon* and *Miller*, Judge McAuliffe ordered the prisoner plaintiffs (both LGBT) to start over multiple times before any District Judge even knew of the case.

California has 58 counties and four U.S. District Courts. Thirty-four of the state's counties (but none of its largest cities) are in the sprawling Eastern District, which runs from the border with Oregon, south to Bakersfield, and east along the Nevada line. By contrast, the Northern District serves the coast from Monterey through San Francisco northward; the Central District serves greater Los Angeles; and, the Southern District, greater San Diego east to Arizona. The Eastern District sits mostly in Sacramento and Fresno and includes a large rural area, farmland, and desert, and well over 50% of the state's correctional institutions, including the large medical complex at Vacaville. Thus, the Eastern District receives an outsize number of prisoner complaints.

The docket in *Solomon* includes what Judge Drodz calls a "Standing Order" that is sweeping in its terms. It declares a "judicial emergency" in the Eastern District, which has only six judgeships (compared to 14 for a similar population in the Northern District) and two vacancies. He observes that the six judges carry caseloads *double* the nationwide average, but rank "among the top 10 districts in the country in cases terminated per judgeship." It is likely that the district's mishandling of prisoner cases contributes to this "achievement."

Now, the "Standing Order" provides that *all* new civil cases will be assigned only to a magistrate judge at filing. Captions will bear only the initials of the magistrate judge, as Solomon and Miller did here. All civil trials are suspended, including those already on the calendar. "[T]he setting of new trial dates in civil cases would be purely illusory . . . ." No oral argument will be heard on civil motions.

Law Notes has seen the consequences of Eastern District "triage" through the lens of civil rights filings by LGBT prisoners. What had applied previously to all prisoners is now going to plague all civil litigants. Surely, this problem warrants the attention of the Circuit Executive's Office, which can help to assign visiting judges during the crisis, as happened, for example, in the Eastern District of Missouri and the Southern District of Illinois.

Well-healed firms are likely to squawk at the "Standing Order," so its life is probably short. Let us hope that prisoners and LGBT *pro se* plaintiffs are not forgotten in its denouement. They are civil litigants, too. ■

Federal Court Denies State Department's Motion to Dismiss Gay Couple's Suit Seeking Decision on Spousal Visa Request

By Filip Cukovic

In *Thomas v. Pompeo*, 2020 WL 601788 (D.D.C., February 7, 2020), a gay couple brought an action against the U.S. Secretary of State to compel the State Department to complete administrative processing and adjudicate the Plaintiffs' visa application, which was filed over three years ago. The Plaintiffs argued that their visa application had been unreasonably delayed and requested relief pursuant to either the Mandamus Act or the Administrative Procedure Act. In late 2019, the Defendant filed a motion to dismiss, claiming that the Plaintiffs' case was moot and that the court lacked jurisdiction to hear the case. Senior U.S. District Judge Ellen S. Huvelle denied the government's motion on February 7.

To understand this case, it is necessary to go back to September of 2017, when President Donald J. Trump issued the infamous proclamation authorizing suspending the entry of any class of aliens to the United States, so long as he can find that such entry would be detrimental to the national interest. *See* 82 Fed. Reg. 46,161 (the Proclamation). The validity of the so-called Travel Ban was tested in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), where the Supreme Court ultimately upheld the Proclamation as a valid use of President's authority.

Eventually, by relying on this Proclamation, the President invoked his power and restricted the entry of nationals from seven countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. For example, subject to some

exceptions, the Proclamation suspended the entry of all nationals of Iran into the United States as either immigrants or non-immigrants, asserting that Iran regularly fails to cooperate with the United States Government in identifying security risks. Although the Proclamation itself is sweeping and controversially broad, the Proclamation provides for case-by-case waivers. An individual otherwise banned under the Proclamation may be granted a waiver if certain conditions are met.

In January of 2017, Matthew Thomas, a gay United States citizen, filed a visa petition on behalf of his fiancé, Akbar Masoumi, an Iranian citizen. The petition was approved by USCIS. Mr. Masoumi attended an interview at the U.S. Embassy in Abu Dhabi on August 16, 2017, and at the end of his interview, the adjudicating officer gave him a document which stated that his "'visa application is temporarily refused under section 221(g) of the U.S. Immigration and Nationality Act' pending the completion of administrative processing." That same day, the Embassy emailed Masoumi a questionnaire seeking such information as 15 years of travel, address, and employment history, and his social media account handles. Masoumi completed and returned the survey later that day.

Plaintiffs made several inquiries about the status of Masoumi's visa application over the course of the next several months, with no meaningful response. Eventually, Mr. Thomas reached out to U.S. Senator Tammy Duckworth (D-Wis.), who contacted the Embassy on the Plaintiffs' behalf. On October 22, 2018, Senator Duckworth's office received a response to one of its inquiries from the Embassy, which said that "Mr. Masoumi's case is undergoing administrative processing in order to qualify for a waiver under Presidential Proclamation 9645."

After waiting more than nineteen months for the adjudication of Mr. Masoumi's visa application and waiver, the Plaintiffs filed an action in the U.S. District Court for the District of Colombia in April 2019, alleging "that [they] live every day in fear that Mr. Masoumi's family, his neighbors, or his government will find out that he is in a same-sex relationship with an American and that he will suffer violence or death as a result." Plaintiffs thus requested that the court "[o]rder Defendants and those acting under them to take all appropriate action to adjudicate Plaintiffs' petition for a fiancé(e) visa without further delay" under the Administrative Procedure Act or the Mandamus Act. In response, the Defendants filed a motion to dismiss, citing a "doctrine of consular non-reviewability," mootness, and the failure of the Plaintiffs to state a claim under either the APA or the Mandamus Act.

First, Defendants argued that the court must dismiss plaintiffs' case on the grounds of consular non-reviewability. Consular non-reviewability is a doctrine that precludes substantive review of consular officers' decisions on visa applications. The doctrine can be quite far-reaching. For example, the doctrine can apply even in situations where it is alleged that the consular officer failed to follow regulations, or where the applicant challenges the validity of the regulations on which the decision was based. However, Judge Huvelle dismissed the application of consular non-reviewability in this case, as Plaintiffs here were not challenging the decision of a consular officer to deny their visa application, but rather the failure of defendants to properly and within a reasonable time perform their mandatory duty to adjudicate Plaintiffs' visa application. Moreover, the judge concluded that the doctrine of consular non-reviewability is not triggered until a consular officer has made a decision with respect to a particular visa application.

Furthermore, Judge Huvelle dismissed the Defendants' argument that the Plaintiffs' claim is moot. First, she recognized that Defendants correctly observed that when a Plaintiff seeks to compel the immigration authorities to adjudicate an application for immigration benefits, and the application is thereafter adjudicated, the case is mooted and therefore must be dismissed. However, this principle was simply not applicable in this case, since Plaintiffs' application has clearly not been finally adjudicated.

Defendants next argued that plaintiffs have not stated a claim under the Administrative Procedure Act, and that therefore their claim should be dismissed all together. Specifically, the Defendants argued that judicial review of the case is barred under the APA because waiver and visa applications are committed to agency discretion, and because the Plaintiffs have not suffered an unreasonable delay, as a matter of law.

First, the court disagreed that the issue in question was committed solely to agency discretion. This is because courts begin with the strong presumption that Congress intends judicial review of administrative action, and that the court will not deny review unless there is persuasive reason to believe that such was the purpose of Congress. Although presidential actions—such as the Proclamation—are not subject to APA review, that does not mean that the failure to adjudicate a waiver is also unreviewable.

This is especially true considering that the State Department issued a guidance saying that "[a] consular officer will *carefully* review each case to determine whether the applicant is affected by the Proclamation and, if so, whether the applicant qualifies for an exception or a waiver". Furthermore, internal guidance issued by the State Department also provides that "each applicant who meets the conditions must be considered for a waiver." These self-imposed standards are important, because it is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion. Thus, the court concluded that based on government's own pronouncements, officers do not have the discretion to fail to act on a waiver application.

Lastly, although neither the Proclamation nor any other source of law provides a timeline by which waivers are to be adjudicated, this was not fatal to Plaintiffs' claim, since a lack of timeframe alone does not render the statute optional. That being said, Judge Huvelle concluded that it would be inappropriate at this early state of

litigation to decide that Plaintiffs did not suffer unreasonable delay as a matter of law, as such inquiry is always very fact specific. Thus, Judge Huvelle rejected defendant's "no untimely delay" argument and concluded that the Plaintiffs could state a claim under the APA. As a result, the Court did not address the Plaintiffs' mandamus claim.

Although one may see this decision as a victory for Plaintiffs, there is a reasonable fear that this ruling - granting a motion to compel the State Department to make a ruling on the visa request - will only provoke the Department to deny it. If the Department indeed denies the plaintiffs' application, an appeal could be almost impossible, since the consular non-reviewability doctrine bars a review of consular visa decisions on the merits. Therefore, the Plaintiffs' faith in this case remains uncertain and at risk.

Plaintiffs are represented by Shabnam Lotfi, Lotfi Legal LLC, Madison, WI; and Brian Christopher Schmitt, Hake & Schmitt, New Windsor, MD. Judge Huvelle was appointed to the District Court by President Bill Clinton. ■

Filip Cukovic is a law student at New York Law School (class of 2021).

Victim of Rape or Victims of Homophobia: Court of Criminal Appeals of Tennessee Reversed and Vacated Rape Convictions

By Corey L. Gibbs

A young boy's mother discovered a sexual conversation between her son and another boy in November 2010. The mother "whupped" the boy (Victim) and asked him if anyone had touched him inappropriately. She put his hand on a Bible, and the boy swore that "William" touched him. A jury convicted William Edward Arnold, Jr. (Petitioner), who had been assigned as the victim's mentor through a Big Brothers Big Sisters program, on one count of aggravated sexual battery and three counts of child rape, and the court sentenced him to 25 years in prison in 2013. William Arnold claims that the trial court did not give him the opportunity to prove that another "William," the boy's teenage lover, was at fault, and that the boy implicated William Arnold out of fear of his mother's reaction. The Court of Criminal Appeals of Tennessee reversed and vacated Arnold's convictions and sentences. *Arnold v. State of Tennessee*, 2020 WL 569928, 2020 Tenn. Crim. App. LEXIS 72 (February 5, 2019).

The victim claimed that Arnold forced him to engage in fellatio in the petitioner's basement and anal sex in the den area. The victim confirmed that he had a sexual relationship with another minor named William. The victim claimed that the sexual relationship with the other William occurred in 2011, after the mentor relationship with the petitioner had ended.

In order to rebut the victim's claim that he learned about sexual matters from the sexual misconduct of the petitioner, the petitioner sought to introduce evidence that the victim had previously fondled another boy as early as 2003; evidence of the victim's relationship with the other William; and the "Source of Information for Cross Examination of Alleged Victim." The defense believed that the evidence was admissible pursuant to Tennessee Rule of Evidence 412(c)(1) and (4). "Evidence of Specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is: (1) Required by Tennessee or United States Constitution, or . . . (4) If the sexual behavior was with persons other than the accused." Tenn. R. Evid. 412(c). The court in the Rule 412 hearing stated that the defense could bring in the evidence during cross-examination, which meant that the victim would have to put the evidence at issue before the defense could act upon it. But the defense did not have the opportunity to present the evidence during trial.

Petitioner sought to appeal his conviction by filing a timely petition for writ of error coram nobis. He argued that the trial court erred in denying his Rule 412 motion, which would have allowed the evidence as rebuttal rather than impeachment. During a subsequent civil case against the petitioner, the victim offered testimony regarding the timing of the victim's relationship with the other William. The petitioner claimed that this testimony recanted the victim's criminal trial testimony and that it amounted to new evidence. The court in that hearing dismissed his petition for the writ of error coram nobis.

Almost two years later, the petitioner sought relief again. On May 3, 2016, he filed a timely petition for post-conviction relief, alleging that his trial attorneys were ineffective and that he was denied due process based on the prosecution's improper comments during the trial. On July 3, 2017, the petitioner filed an untimely petition for writ of error coram nobis. On February 20, 2018, the petitioner filed an amended petition for writ of error coram nobis. The court granted the petitioner no relief. On April 18, 2018, the petitioner appealed that judgment.

The Court of Criminal Appeals of Tennessee considered the denial of

coram nobis relief and the denial of post-conviction relief. The court agreed with the state that the writ of error coram nobis was untimely. However, the petitioner could still succeed if he showed due process concerns that require an equitable tolling of the statute of limitations. To be entitled to the tolling, the petitioner needed to demonstrate that the grounds upon which he sought relief arose after the applicable statute of limitations had run, and that the strict application of the statute of limitations would deny him a reasonable opportunity to present his claim. The court noted that the petitioner never specifically asserted that he was entitled to the necessary tolling. Therefore, the court denied the coram nobis relief.

Then the court turned to the petitioner's next set of claims. The petitioner alleged that he was entitled to post-conviction relief because his defense attorneys at trial were ineffective. The petitioner asserted five separate instances of ineffectiveness. First, the attorneys failed to obtain and preserve phone records, which would demonstrate that the victim had a relationship with the other William before 2011. Second, the attorneys did not call the other William and a detective at trial to impeach the victim's testimony. Third, the attorneys failed to renew the Rule 412 motion after the initial failure. Fourth, the attorneys did not consult with a forensic psychiatrist. Fifth, the attorneys did not object to the prosecutor's comments about Arnold during the trial.

The first claim failed because the petitioner did not establish that he was prejudiced by the failure to obtain and preserve phone records. The court agreed that the failure to attempt to obtain the phone records was deficient. However, the petitioner neither presented the phone records at the hearing nor established that the records existed when the attorneys learned of the sexual contact between the victim and the other William. The petitioner needed proof that he was disadvantaged, and he could not do that without the actual record or proof that the record was available when it was initially needed.

The second claim failed because the petitioner did not establish that he was prejudiced by the failure to call the other William and the detective. The court concluded that the attorneys were deficient by failing to call the witness, who could have presented the best defense. However, the court stated, "Neither the post-conviction court nor this court may speculate on 'what a witness's testimony might have been if introduced by defense counsel.' [*Black v. State*, 794 S.W.2d 752, 757]." The petitioner did not demonstrate what the witnesses would have said, let alone how the testimony would have altered the outcome.

The third claim succeeded because the petitioner was able to establish both a deficiency by his attorneys and the prejudicial effect of the deficiency. The court concluded that the trial court's Rule 412 order failed to distinguish impeachment evidence from substantive rebuttal evidence. Then, the attorneys proved to be deficient when they failed to renew the Rule 412 motion. The court stated, "The defense's failure to object and renew its Rule 412 motion when presented with this evidence and argument was prejudicial because it allowed the jury to infer that the twelve-year-old victim was sexually innocent prior to the Petitioner's abuse, a finding that was at odds with evidence available in this case and fatal to the Petitioner's success at trial."

The fourth claim failed because the petitioner established neither that the attorneys were deficient nor that the failure to retain a forensic psychiatrist was prejudicial. The court stated that the "criminal defendant [was] not entitled to perfect representation, only constitutionally adequate representation." The presence of a forensic psychiatrist would have bolstered the petitioner's claims. However, the court held that the failure to retain a forensic psychiatrist did not fall below the objective standard of reasonableness for criminal defense attorneys.

For the fifth claim, the court considered five separate instances when the attorneys failed to object to alleged improper arguments made by the prosecutor. The court determined the following instances to be improper: when the prosecutor vouched for the credibility of the victim; when the prosecutor mocked the petitioner; when the prosecutor characterized the petitioner as "an animal"; when the prosecutor raised unsupported inferences; and when the prosecutor injected issues broader than guilt or innocence. The court concluded that the defense attorneys were deficient by not objecting to any of these instances and that the failure to object was prejudicial to the petitioner's case. The fifth claim succeeded.

The court reversed the denial of post-conviction relief. The court then reversed and vacated the petitioner's convictions and sentences and remanded the case to the trial court. The petitioner will have a new trial and a new opportunity to fight the allegations that he raped the victim, unless the prosecutors agree to dismiss the charges in light of the information that came out on this appeal.

This case highlights the impact of homophobia and its potential to endanger those who do not identify as LGBT, as well as the relatively low standards of professional competency applied by the Tennessee courts for criminal defense counsel. The court discussed the mother's treatment of her son when she realized his homosexual behaviors. The court even seemed to side with the petitioner that the victim's accusation may have been a cover-up. While the victim admitted to a homosexual experience, he claimed that the consensual same-sex relationship was a result of the rape. Following this logic, the victim needed a source of his homosexuality to justify it to his mother. Either a child was the victim of rape or two individuals fell victim to the societal issue of homophobia.

Patrick T. McNally represented the petitioner on this appeal. Judge Camille R. McMullen wrote the opinion of the Court of Criminal Appeals of Tennessee. ■

Corey L. Gibbs is a law student at New York Law School (class of 2021).

California Appeal Court Rejects Liability for Hospital on Nurses' Charge That Gay Director "Flaunted" Homosexual Lifestyle

By David Escoto

On February 13, 2020, Justice Victoria Gerrard Chaney, writing for a panel of the California 2nd District Court of Appeal, reversed and remanded a trial court decision regarding sexual orientation discrimination and sexual harassment claims. Several nurses alleged that a gay hospital director "flaunted" his homosexuality and favored male, sometimes gay, employees, which led to their termination. However, the court holds the evidence presented at trial did not support the jury's findings and damage awards. Specifically, several prejudicial evidentiary rulings taken in their totality improperly swayed the jury in favor of the nurses. The nurses also failed to name one of the defendants in their administrative action against the hospital, leading to the court's conclusion that the nurses failed to exhaust their administrative remedies. *Alexander v. Community Hospital of Long Beach*, 2020 Cal. App. Unpub. LEXIS 1037, 2020 WL 729385 (Cal. Ct. App. Feb. 13, 2020). The court here points to a litany of procedural mistakes made by plaintiffs, and mistakes the trial court made in allowing a significant amount of prejudicial evidence.

Plaintiffs Judy Alexander, Johan Hellmannsberger, and Lisa Harris were employed as nurses by the Community Hospital of Long Beach in the Behavioral Health Unit. Two corporations oversee Community Hospital's operations. Memorial Psychiatric Health Services (MPHS), an S-Corp, runs the mental health ward. Memorial Counseling Associates Medical Group (MCA), a C-Corp, supplies the physicians for the patients in the ward. In 1989, eight physicians founded these corporations in response to a plan to shut down the psychiatric unit. Both MPHA and MCA contracted with Community Hospital to operate the Behavioral Health Unit. Under the agreement, MPHS's responsibilities included administrative services and oversight over the unit's director, Keith Kohl.

Alexander complained several times about Kohl's conduct to Adrian Taves, the director of education, alleging that Kohl discriminated in favor of male staff, especially gay men, by giving them more desirable schedules, assignments, and promotions. Alexander also alleged that Kohl would reward male employees with gift cards based on their clothing and regularly used sexually explicit language that disparaged heterosexuality. Taves responded to Alexander's concerns by stating, "Kohl was flamboyantly gay, but there was nothing inappropriate with gay mannerisms," and to avoid Kohl.

A couple of weeks before Alexander was terminated, she complained to Taves that Kohl had berated her in his office. Alexander took her complaint to Valerie Martin, the hospital's human resources director. Martin told her that the last person who had complained about Kohl was no longer employed at the hospital. Alexander did not file a formal complaint, but transferred to night shifts to avoid Kohl.

During the night shift of April 15, 2009, "Hailey," a patient, was yelling, cursing, and hitting the walls. When Hailey threatened Harris with violence, Harris and Hellmannsberger escorted Hailey by the arms to an open seclusion room. The room had only one bed with no physical restraints. Nurses Dale Ortiz and Russel Green, along with mental health worker Shenae Berry, came to assist. Hailey continued to act out, curse and yell, demanding her shot of anti-anxiety medication. Hellmannsberger obtained a physician's order for the medication but declined the offer of a physical restraint order. Hellmannsberger instructed Alexander to prepare the medication to administer to Hailey. Hailey cooperated and calmed down.

The following day, Green and Berry reported to Anthony Pace, the Clinical Coordinator, that Hailey had been placed in physical restraints without a physician's order. Pace informed Kohl, who told Martin and Tammy Alverez, the Chief Nursing Officer. Kohl, Martin, and Alverez decided to suspend Alexander, Harris, and Hellmannsberger while they conducted an investigation. Berry and Green provided Kohl with written statements corroborating that Hailey was put in physical restraints. However, Ortiz told Kohl that Hailey had only received a chemical restraint ordered by the physician. On April 20, 2009, Alexander was terminated. When Alexander said she would contest the termination, she was informed that she was also being fired for timesheet fraud. Harris and Hellmannsberger were offered a deal to keep their jobs if they corroborated that Alexander had physically restrained Hailey. Both refused and were subsequently fired.

Within two months, all three of the nurses found employment at College Hospital in Brea. However, Community Hospital notified the licensing authorities, who in turn notified the Department of Justice. In June 2010, after only one year of new employment, the Department of Justice arrested and prosecuted Alexander, Hellmannsberger, and Harris for the illegal physical restraint of Hailey. Following their arrest, College Hospital suspended the three nurses and ultimately terminated them. A jury acquitted the three nurses of the criminal charges.

Post acquittal, Alexander lost her home and had to live in her car before moving in with her aunt while looking for new employment. Hellmannsberger became employed as a staff nurse after a year and a half of actively looking for work. Harris passed away in 2014, and her son was substituted as a plaintiff.

After the three nurses had been terminated, Community Hospital received several complaints from hospital staff that Kohl had created a hostile work environment by favoring gay male employees and openly discussing his sex life. MPHS's human

resources manager, Ana Marie Mesina, spoke to Kohl about this. Kohl denied the allegations, but when Mesina learned about the Hailey incident, she requested documentation about the nurses' termination. The documentation was never provided.

A year later, Mesina received another complaint about Kohl's conduct but did not conduct an investigation. It was not until receiving a third complaint that Mesina issued a verbal warning to Kohl. In July 2010, the hospital demanded that MPHS remove Kohl because he created a hostile work environment. MPHS did not think that his conduct presented any harassment issues. However, the hospital insisted that Kohl be removed from his position under the terms of their contract. MPHS subsequently removed him.

Alexander, Hellmannsberger, and Harris filed administrative complaints for gender and sexual orientation discrimination and retaliation with the Department of Fair Employment and Housing (DFEH). The complaint named the hospital, Kohl, and Anthony Pace as possible defendants. In a second set of complaints, the nurses added MCA as another potential defendant. However, the nurses failed to name MPHS, Kohl's actual employer, in the complaints. When the DFEH closed their complaints, the nurses requested right-to-sue notices. The nurses were given one year within the notice to file a civil action.

The nurses subsequently filed a civil action against the hospital and MCA on November 19, 2009. The nurses included eight causes of action, including sexual harassment, sexual orientation discrimination, failure to investigate, negligent supervision, and retaliation. Specifically, the nurses alleged that "the hospital permitted Kohl to create a hostile work environment by flaunting his LGBT lifestyle, making sexual references, and giving preferential treatment to male employees, and the hospital retaliated against them when they complained." On May 21, 2010, the nurses amended the civil complaint to include MPHS as a defendant. However, the nurses never filed any administrative complaint against MPHS.

At trial, Alexander testified to instances where Kohl made explicit references to his sex life and another instance where Kohl told Alexander her new haircut "made her look like a dyke." Hellmannsberger, a heterosexual male, testified that Kohl treated men with more respect than women. He further testified to several occasions where Kohl would reassign women to less desirable shifts and units to accommodate male friends. Hellmannsberger went on to testify that once he heard Kohl say he was upset at two Filipina nurses and "tired of the Filipino mafia." Harris's deposition, read a trial, testified to an instance when she asked Kohl if Pace had any relevant experience for his position. Kohl responded, "No, not really, but he has a nice ass."

Other nurses testified to instances when Kohl said that the three nurses were terminated because "they committed patient abuse and were going to jail." A nurse also testified about a memo posted at the nurse station telling nurses that they could not go to HR. However, although the memo bore the MCA logo, the nurse could not identify when the memo was posted, who posted it, and how long the memo was posted. No witness ever produced the memo at trial.

The hospital and MPHS maintain that they have zero-tolerance policies for sexual harassment and sexual orientation discrimination. The nurses provided three letters the hospital received in May 2009 to refute this argument. All three letters are dated after the nurses were terminated. The first letter stated the hospital was a hostile work environment and that Kohl encouraged the environment by showing favoritism towards the male employees and discussing his sex life openly. The second letter alleges another instance where Kohl "basically outed two of the physicians," complaining that they should be more active in marketing and participate in the Gay Pride Festival. The third letter reiterated the allegations in the prior two letters. All three letters were anonymously written.

The court gave a limiting instruction to the jury to use the letters to prove notice, but not as proof of the truthfulness of the facts in them. On August 19, 2016, the jury found against the hospital and MCA on all causes of action. The jury found against MPHS on the Fair Employment and Housing Act (FEHA) causes of action and the common law causes of action for negligent supervision and retaliation. The jury awarded damages totaling $4,734,973, and the court entered judgment accordingly.

On appeal, MPHS challenged the judgment, arguing that the plaintiffs failed to exhaust their administrative remedies with respect to the FEHA claims, and that there was insufficient evidence to support the negligent supervision claim.

MPHS, the company that employed Kohl and was not named in the initial FEHA complaint, argued that because plaintiffs failed to exhaust administrative remedies, MPHS was not liable as a matter of law. The court agreed with this argument. The plaintiffs tried to counter this argument by suggesting the court carve out an equitable exception because MPHS had actual notice of the complaint and an opportunity to participate in the administrative process. However, the court notes that under the authority cited by the plaintiffs, the failure to name MPHS in the FEHA complaint is fatal to their ability to bring a civil action against them.

Further, the plaintiffs alleged that MPHS's employer status was neither known or reasonably discoverable to them within the year of their right-to-sue notices. The plaintiffs contended that MPHS employees mistakenly referred to themselves as MCA employees, including Kohl himself. However, the court found this indicates a misconception about the identity of Kohl's employer and fails to show how the plaintiffs could not have cleared this up through reasonable and timely efforts.

Regarding the negligent supervision cause of action, MPHS argued that no evidence suggested that they were aware of Kohl's behavior and the hostile work environment before the plaintiffs were terminated, so they could not be liable for negligence. The court agreed with this argument. Alexander complained

about Kohl to Taves and Martin, both employees of the hospital, but there is no evidence that either one of them ever communicated the complaint to MPHS. The plaintiffs attempted to counter this argument by alleging that "MPHS's ignorance was engineered." The piece of evidence used to establish this counterargument was the memo posted at the nurse station. However, no one ever produced the memo at trial, and the employees' recollection of the memo was vague and lacked the level of specificity needed to establish a reason for MPHS to believe Kohl was unfit for his position.

In addition, Community Hospital also appealed the jury award based on the inadmissibility of the evidence presented at trial. Several pieces of evidence were admitted stating that the names of the plaintiffs were eventually cleared. Community Hospital argued that the trial court erroneously admitted these pieces of evidence because the references can only be to the prior criminal proceedings. As noted by the court, "a judgment of acquittal in a criminal case is not competent evidence in a subsequent civil action to prove the innocence of the accused." Here, the plaintiffs do not give the name of any other agency that may have cleared their name, leading the court to conclude that the multiple references to having "a cleared name" could only refer to the criminal proceedings. Therefore, the court erred in allowing the references to "a cleared name," while at the same time limiting Community Hospital from establishing probable cause for the criminal charges.

Further, Community Hospital argued that the three anonymous letters were inadmissible hearsay. The three letters were out-of-court statements and could not be considered for the truth of anything stated in them. The letters could not be proffered to prove Kohl created a hostile work environment, that employees were afraid to complain, or that the hospital failed to investigate credible allegations of harassment. The only reason that the letters should be admitted under hearsay rules would be to prove the hospital received notice of Kohl's unfitness for his position. However, the letters were received after plaintiffs' termination and, therefore, were irrelevant.

Despite having other witnesses to provide testimony, plaintiffs heavily relied on the letters at trial. Even the witnesses that did provide testimony were heavily questioned about those letters. The court concluded that the jury's reliance on the letters had its intended effect of swaying the jury. Limiting instructions can only go so far to cure the error.

The court also found insufficient evidence for Hellmannsberger's harassment and wrongful termination claims. Hellmannsberger, a heterosexual male, failed to show that Kohl targeted him. To have an actionable sexual harassment claim under FEHA, an employee must demonstrate "the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of their employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." The court concluded that as a matter of law, Hellmannsberger's testimony of an instance of referring to Filipina nurses as "mafia," and an indeterminate number of occasions of Kohl replacing female nurses with male employees ("some gay, some not") fails to "establish widespread sexual favoritism so severe" to alter Hellmannsberger's working conditions.

Community Hospital also contended that there was no substantial evidence to support the negligent supervision claim. The plaintiffs allege Kohl's history of sexual harassment and Alexander's complaints about Kohl's favoritism for gay employees put Community Hospital on prior notice of Kohl's conduct. The evidence that Alexander reported Kohl berated her in his office may have put the hospital on constructive notice, but not prior constructive notice. Further, the only event occurring after the report was Alexander's termination. The court agrees with Community Hospital that the negligent supervision claim is unsupported by the evidence.

The court also finds that the jury improperly awarded damages for the economic and non-economic damages suffered after the plaintiffs were fired from College Hospital. The damages from the discharge from Community Hospital ceased once the plaintiffs found subsequent comparable employment at College Hospital for a year. The court concludes that the state's decision to prosecute the nurses caused the discharge from College Hospital, not their discharge from Community Hospital.

The court looks at the totality of the errors and concludes that the combined errors caused an unfair trial. The evidence presented, such as the post-termination complaints or the fact that plaintiffs had their "name cleared," signaled improper messages to the jury about the hospital's liability. The court finds this unfair and concludes that the jury would have reached a different result without them. The court reversed the judgment as to MPHS and Community Hospital. The trial court was directed to order a new trial as to claims for sexual harassment, sexual orientation discrimination, failure to investigate and prevent harassment and discrimination, retaliation, and wrongful termination in violation of public policy. The court entered judgment in favor of MPHS and Community Hospital on the other claims.

Community Hospital is represented by Raul L. Martinez, Gary M. Lape, John L. Barber, and Laura J. Anson of Lewis Brisbois Bisgaard & Smith LLP. MPHA and MCA are represented by Jason R. Litt and Bradley S. Pauley of Horvitz & Levy LLP and Don Willenburg of Gordon & Rees LLP. Plaintiffs are represented by Maryann P. Gallagher, Shawn M. Dantzler, Douglas G. Benedon, and Gerald M. Serlin.■

David Escoto is a law student at New York Law School (class of 2021).

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

U.S. SUPREME COURT – Invoking the Supreme Court's original jurisdiction over controversies between states, the State of Texas filed a Motion for Leave to File a Bill of Complaint, Bill of Complaint, and Brief in Support, for a lawsuit in the Supreme Court against the State of California, challenging the constitutionality of a 2016 California law that bans state-funded travel to states with discriminatory laws, such as a Texas law approving allowing adoption and foster care agencies to refuse to make placements on religious grounds, which was intended to let agencies with religious affiliations to refuse to work with same-sex couples seeking to adopt or foster children. Texas Attorney General Ken Paxton stated: "California is attempting to punish Texans for respecting the right of conscience for foster care and adoption providers."

U.S. COURT OF APPEALS, 3RD CIRCUIT – The court found in a non-precedential decision that it lacked jurisdiction to entertain a petition by a gay man from Jamaica to review an order of the Board of Immigration Appeals, which had denied his motion to reopen his case or to reconsider its prior decisions. *Ricketts v. Attorney General*, 2020 U.S. App. LEXIS 3370, 2020 WL 549761 (Feb. 4, 2020). The petitioner claimed that he was a U.S. citizen, born in Brooklyn, but an Immigration Judge found that he was a Jamaican citizen and he was removed to Jamaica in 2000 because of his criminal record in the U.S., having been convicted of several federal offenses in the U.S. District Court in Manhattan in 1995. "He eventually returned to the U.S. and filed several motions to reopen and/or reconsider, based on his claim of U.S. citizenship." Ultimately, the 2nd Circuit resolved the citizenship question against him, reaffirming that he is a Jamaican citizen. Now he is seeking to avoid removal again to Jamaica, citing the extreme hostility to gay people in that country. At this point, the 3rd Circuit determined that the time has long since passed for Ricketts to raise these issues. "Even if Ricketts were not subjected to a reinstated removal order," wrote the court, "we would lack jurisdiction to consider his claim that the agency should have reopened proceedings because he met the burden of showing changed country conditions." The court found that he failed to raise any colorable legal or constitutional issues, so it lacked jurisdiction to review any of several motions he has on file with the court.

U.S. COURT OF APPEALS, 5TH CIRCUIT – There was a little flurry of Twitter excitement, then surfacing in the legal press, over a footnote by Circuit Judge James Ho in *S.O. v. Hinds City School District*, 2020 U.S. App. LEXIS 3792, 2020 WL 595971 (February 7). A mother, suing on behalf of her 12-year-old son, seeks damages against the school district and various school officials, including Assistant Principal Tommy Brumfield, in connection with a search of the boy. Mother claims Brumfield violated the 4th Amendment by sticking his hand in the boy's pocket after a teacher apprehended the youth selling "contraband candy." In her original complaint, S.O. alleged that Brumfield had "grabbed her son's genitalia," in response to which the district court (S.D. Miss.) denied a motion by Brumfield for qualified immunity. But, wrote Judge Ho, "undisputed record evidence later demonstrated that, at most, Brumfield had only searched the boy's pocket and did not grab his genitals," as a result of which the district court changed course and granted Brumfield qualified immunity from personal liability. "On appeal," wrote Ho, "S.O. complains that the district court misunderstood her earlier argument. She contends that she never claimed that Brumfield grabbed her son's genitalia – only that Brumfield unreasonably searched his pockets. But accepting her contention as true, it only means that the district court should have granted qualified immunity to Brumfield even earlier. On the face of the appeal, then, it is patently obvious that there is no relief to which S.O. is entitled." What raised eyebrows was the footnote, in which Ho, speaking only for himself – not the other two judges on the panel – indicated that he would have "directed S.O.'s counsel to explain why she should not be sanctioned for filing a frivolous appeal – if not also for 'conduct unbecoming a member of the bar.'" The basis for this remark is a quote from counsel's opening brief – "Brumfield was touching around in minors [sic] pocket, making minor believe the Defendant was gay" – and her reply brief, asserting that the boy, B.O., "believed that Brumfield was gay, making the touch of the minor's privacy area that more offensive." Commented Judge Ho: "That is circular logic: Brumfield searched B.O.'s pockets, so he must be gay - and because he is gay, he shouldn't have searched B.O.'s pockets. And the demonstrable failure of counsel's logic makes one wonder why counsel bothers to bring up sexual orientation at all. It should go without saying that members of the bar are expected to engage in legal argument – not prejudice." This struck some observers as out of character, in light of Ho's opinions for the 5th Circuit rejecting the claim that sexual orientation or gender identity discrimination could be actionable under Title VII and upholding Texas's categorical denial of gender confirmation surgery to a transgender prison inmate on the specious ground that there is not "universal" acceptance

among "experts" of the necessity or efficacy of such surgery in treating gender dysphoria. Score one point for one of Trump's most retrograde court of appeals appointments.

U.S. COURT OF APPEALS, 9TH CIRCUIT – The 9th Circuit denied a petition by a Chinese transgender woman for review of a decision by the Board of Immigration Appeals to reopen her removal proceedings. *Chen Li v. Barr*, 2020 WL 589195, 2020 U.S. App. LEXIS 3962 (Feb. 6, 2020). Although the main ground for denying the petition had to do with timeliness of the petition, the court said that "substantial evidence supports the BIA's alternate conclusion that Li did not establish prima facie eligibility for the relief she seeks. A petition may seek asylum based on past persecution or a well-founded fear of future persecution because of her membership in the class of "gay men with female sexual identities" under the 9th Circuit's precedent of *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (2000). "Though Li fits within this particular social group," wrote the court, "the evidence Li submitted of past harassment on account of her perceived gender identity, while disturbing, does not rise to the extreme level of persecution, and she submitted no evidence to support a fear of future persecution. Li also did not submit evidence that it was more likely than not that she will be tortured based on her status if she is returned to China, as the [Convention against Torture] requires." The court also held that it lacked jurisdiction to review Li's asylum claim because she did not submit a timely petition to the court after the BIA dismissed her appeal. The petitioner is represented by Patrick Felix Valdez, Valdez Law Firm APC, Inglewood, CA.

COLORADO – U.S. District Judge R. Brooke Jackson denied a motion by a Nebraska corporation to dismiss an Americans with Disabilities Act claim against it by an HIV-positive employee whom it had discharged on grounds of improper venue because the claim was brought in the U.S. District Court in Colorado when the employee's contract specified that Nebraska law would govern the employment agreement and that the "exclusive venue" for any claims arising out of the agreement would be in Douglas County, Nebraska. *Buhrman v. Aureus Medical Group*, 2020 WL 533736, 2020 U.S. Dist. LEXIS 20467 (D. Colo., Feb. 3, 2020). Dustin Burhman is a nurse licensed in the states of Ohio, Colorado, Alaska, and California. He was hired by Aureus as a "travel nurse" who could be assigned contract jobs in any of the states where he is licensed. From June to September 2018, he was working for Aureus as a travel nurse at a medical center in Colorado. He is HIV positive, has been under a doctor's care since he was diagnosed, and his viral load is undetectable due to his medical treatment. In his complaint, he alleges that he did not work in a position where his HIV would affect patients, staff or others, since he was not involved in exposure-prone medical procedures. In July 2018, he suffered a workplace injury, was placed on medical leave, and was authorized to receive workers compensation medical services. This required him to sign a release so Aureus could obtain his medical records. On obtaining the records, Aureus learned that he was HIV positive. At that time, Aureus had been working with him on a new travel placement to Alaska, which was formalized in a written contract on July 29, 2018, but the next day Aureus sent him medical forms to be filled out by him and by his doctor. The doctor filled out her form explaining that there were no concerns about his HIV affecting others. On returning from a vacation, Buhrman filled out his own forms. He alleges that Aureus's Operations Manager told him that so long as he completed the forms, his HIV status would not affect his employment. He flew to Seattle on the way to Alaska after sending in the form to Aureus, but on arrival in Seattle the Account Manager called and told him that his employment had been terminated because he had "misrepresented himself" and that Aureus had a "zero tolerance policy for this." When Buhrman asked about how he had misrepresented himself, the Account Manager told him that he did not know because the information was "confidential." Buhrman filed a discrimination charge under the Americans with Disabilities Act (ADA) and ultimately filed this lawsuit in federal court in Colorado, alleging violation of the ADA, wrongful termination in violation of Colorado public policy, and breach of contract. Aureus sought to transfer the case to the U.S. District Court in Nebraska, citing the forum selection clause in the employment contract. Buhrman then filed an amended complaint, dropping the Colorado state law claims, leaving only the ADA claim in the case, and opposed the motion to transfer. Aureas objected, labelling this tactic as "artful pleading" and "gamesmanship." Nonetheless, Judge Jackson found, the amended complaint rests entirely on the federal statute and thus does not arising out of the contract, so the forum selection provision in the contract is rendered irrelevant to the court's jurisdiction. "The alleged discrimination occurred during the employment relationship," wrote the judge, "and I will assume for present purposes that signing Aureus's standard form contract was a condition of his employment. That does not mean that the ADA claim 'arose out of' the Agreement, and I conclude that it did not. In my view, this conclusion is reinforced by the invocation of Nebraska law in the same sentence [of the contract]. Nebraska law governs the agreement, but it has no application to a federal discrimination claim." Buhrman's "artful pleaders" are Igor Raykin and Michael Jeffrey Nolt, of

CIVIL LITIGATION *notes*

Kishinevsky & Raykin, LLC, Aurora, CO. Judge Jackson was appointed to the District Court by President Barack Obama.

FLORIDA – U.S. District Judge Cecilia M. Altonaga granted American Airlines' motion to dismiss a multi-count discrimination claim by Warren R. Coleman, II, an HIV-positive African American man who was employed for many years by American as a flight attendant. *Coleman v. American Airlines, Inc.*, 2020 U.S. Dist. LEXIS 24564 (S.D. Fla., Feb. 11, 2020). In 1996, Coleman "voluntarily admitted he had a substance abuse problem with cocaine and sought medical attention" through American. In November 1996, he signed an agreement for conditional reinstatement that required him to successfully complete a rehabilitation program and conditioned his reinstatement on his written agreement to refrain entirely from using alcohol or drugs during his employment with American. As part of the agreement, he signed an undated letter of resignation that waived any right to bring a claim against American, which could be invoked by American in case he violated the terms of his reinstatement. More than twenty years later, Coleman, still an American flight attendant, attended a marketing seminar offered by American "to increase diversity awareness" that was held at a Miami-area hotel. Coleman and the other participants were not required to wear their company uniforms or display any company identification. During the seminar's lunch break, Coleman went with three other participants to the hotel bar where they each consumed a beer and Coleman picked up the tab. After the seminar recessed for the afternoon, Coleman and another participant went back to the bar and Coleman had another beer. Coleman paid for drinks for himself and two other participants and returned to the seminar. Several American employees consumed beer during the seminar breaks. Word got back to American about Coleman's beer consumption and American invoked the resignation letter, terminating his employment In this lawsuit, he claims that American had changed its policy in 2018 and no longer required employees who went through rehabilitation for substance abuse to signed such undated letters of resignation, thus rending his letter void. He claimed that other employees with drinking problems who went through rehabilitation were not discharged. He also pointed out that he was the only American employee at the seminar who was terminated for drinking, although many others also had drinks during the breaks. His lawsuit alleged violations of Title VII (race), the Age Discrimination in Employment Act (he is well over 40), and the Americans with Disabilities Act (his HIV status), as well as the Florida Civil Rights Act and the County Human Rights Act, unlawful termination on account of his HIV status under a Florida statute, and disability-based discrimination under Florida law. Granting the motion to dismiss, Judge Altonaga rejected Coleman's argument that American's 2018 policy change retroactively invalidated his resignation letter, and found as a fatal flaw his failure to allege any similarly-situated comparator employee who was treated differently from him. "Plaintiff admits to consuming alcohol despite the Reinstatement Agreement's clear proscription he not do so," wrote the judge, finding that the allegations of the complaint did not "contain enough factual allegations demonstrating either directly or indirectly Defendant's actions were discriminatory. The court rejected Coleman's argument that "discovery" would provide "ample examples" of inconsistent action by American as a means of defeating the motion to dismiss, and found no direct allegation that American's "current drug/alcohol policy altered or revised his Resignation Agreement," or that the new policy applied retroactively to employees like Coleman who were performing under a previously-executed resignation agreement governing drug/alcohol use. Coleman is represented by Richard Lee Ruben, Miami. Judge Altonaga was appointed to the District Court by President George W. Bush.

INDIANA – U.S. District Judge Tanya Walton Pratt granted a motion to dismiss a Due Process claim asserted against Terry Stigdon, Director of the Indiana Department of Child Services (DCS), by Harry Kevin Wade, who was discharged as a counselor by Lifeline Youth and Family Services, a private agency, after LYFS was notified by DCS that "Wade could have no further contact with DCS clients." This communication was sent on January 25, 2018, one week after Wade declined a request by a DCS caseworker that Wade begin to provide "family centered therapy" to a family with a transgender child. Wade informed the caseworker that "his personal background and beliefs as a Christian minister could serve to harm the therapeutic process because, as a Christian minister, his exposure to transgender individuals was non-existent, and his only frame of reference for such conditions was religious in nature." The only reason stated by DCS in its communication to LYFS was "DCS has become dissatisfied with the services provided by Mr. Wade." Shortly thereafter, LYFS terminated Wade. Wade's suit against DCS asserts Due Process and First Amendment claims against Stigdon in her official capacity as well as against several employees of DCS, including Stigdon, in their personal capacities. Wade alleges that DCS officials knew that the "vast majority of Lifeline's referrals came from DCS," so Wade would necessarily lose his job if he was not allowed to have contact with DCS clients. He asserts that the loss of his job constitutes a deprivation of property without Due Process, as he did not receive any sort

of hearing or opportunity to contest this action. Defendants moved to dismiss the Due Process claim, on the ground that as a private sector employee, Wade had no property right in his job and could not assert a Due Process claim against DCS for loss of his job. Wade did not file a formal response to the motion, which Judge Pratt treated as a concession that DCS's argument is correct, and agrees that this is so. "Although the 14th Amendment protects property rights," she wrote, "it does not create them. Instead, property rights 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." She pointed out that the right Wade sought to assert "applies only to public employees." Wade was not an employee of DCS, and thus has no property right to assert against DCS. While the Due Process claim is dismissed, the 1st Amendment claim remains pending against defendants. Although the court does not specify this, we assume Wade is claiming that DCS's action violated his right to Free Exercise of Religion. *Wade v. Stigdon*, 2020 WL 819681, 2020 U.S. Dist. LEXIS 27967 (S.D. Indiana, Feb. 19, 2020). Judge Pratt was appointed to the District Court by President Barack Obama.

MICHIGAN – U.S. District Judge Mark A. Goldsmith granted a motion for summary judgment by the City of Detroit, ruling against a transgender employee's hostile environment and retaliation claims under Title VII of the Civil Rights Act of 1964, in *Doe v. City of Detroit,* 2020 WL 815442, 2020 U.S. Dist. LEXIS 27752 (E.D. Mich., Feb. 19, 2020). The conclusion one draws from Judge Goldsmith's opinion is that the plaintiff's strategy in opposition to the City's motion – insisting that the factual allegations speak for themselves without describing a legal theory for the case – was ill-conceived. To the judge, it was not enough to lay out the plaintiff's alleged facts without articulating a legal argument to counter the City's arguments. In this case, the "Jane Doe" employee, the City's Assistant Director of Grant Management, transitioned on the job, with the knowledge and support of supervisors and managers, but to the evidence discomfort of at least one co-worker. At Doe's suggestion, while she was out on medical leave for gender affirmation surgery there was an hour-long informational meeting with her co-workers, cluing them in on what was going on and explaining the City's non-discrimination policy. Despite this, one grammatically-challenged co-worker directed some very offensive and crudely written notes to Doe, as well as leaving a gift basket on her desk with a sex toy, and defacing her office name-plate by writing "Mr." over her name. Quite offensive, and there was even a suspicion as to "who done it" since one co-worker had filed two complaints objecting to Doe's manner of dress during and after the transition, although Doe was not in violation of any office dress policy. However, the agency's investigation upon Doe's filing of a complaint failed to determine who the offender was, and there was some delay in responding to her request that a lock be placed on her office door. The lock was finally placed after Doe received another note, apparently provoked by her filing a police report, stating: "You were warned! Now I will show you better than I can tell you. GOD HAVE MERCY ON YOUR SOUL!!" Doe then filed an EEOC hostile environment complaint. When an opportunity for a promotion occurred the following year, Doe applied but was not awarded the promotion. She then added a retaliation claim to her EEOC charge. However, Judge Goldsmith found that the steps taken by the agency in response to Doe's complaints were adequate to shelter it from any hostile environment liability for this co-worker's behavior, and that Doe had not presented any coherent argument as to how the decision promote somebody other than her for the position she sought was in response to her filing the EEOC charge during the prior year, or even constituted the kind of materially adverse action sufficient to trigger liability for retaliation. Doe is represented by Carol A. Laughbam, of Sterling Attorneys at Law, P.C., Bloomfield Hills, MI. Judge Goldsmith was appointed to the District Court by President Barack Obama.

MISSOURI – A *pro se* transgender plaintiff got almost everything wrong in her complaint of hostile environment sexual harassment and retaliation, and suffered dismissal without prejudice by U.S. District Judge Audrey G. Fleissig in *Hoskins v. Millett*, 2020 U.S. Dist. LEXIS 25937, 2020 WL 758962 (E.D. Mo., Feb. 14, 2020). For one thing, the only defendant named in Corey Laron Hoskins, Jr.'s, Title VII complaint is Doug Charles Millett, her former supervisor at an Amazon distribution center. Within the 8th Circuit, and with few exceptions elsewhere in the United States, federal courts agree that an individual supervisor cannot be sued for employment discrimination under Title VII. Only the "employer" – i.e., the business – is prohibited from discriminating. Secondly, the 8th Circuit has set an excruciatingly high bar for a finding of hostile environment sexual harassment, as recounted by Judge Fleissig, and clearly Hoskins' factual allegations come nowhere near meeting that test. In applying the Supreme Court's "severe or pervasive" test, the Circuit has rejected hostile environment claims based on facts that strike this writer as fairly outrageous – the type that get people discharged and banned from their careers by social convention in these days of #metoo – and in this case Hoskins recited no facts falling within the small sphere of actionable sexual

harassment allowed within that circuit. Furthermore, in terms of her retaliation claim, the court found that she failed to allege facts that would constitute a "materially adverse employment action," the formulation most recently approved by the Supreme Court for such cases. The only substantive point on which Hoskins achieved a favorable ruling was on the contested question whether a hostile environment because of the individual's gender identity is covered by Title VII. While noting that the Supreme Court is pondering the question whether gender identity discrimination violates the ban on discrimination "because of sex," Fleissig observed that the 8th Circuit has, in *Tovar v. Essentia Health*, 857 F.3d 771 (2017), at least "assumed for purposes of this appeal that the prohibition on sex based discrimination in Title VII . . . encompasses protection for transgender individuals," citing an earlier decision in *Hunter v. United Parcel Service, Inc*., 697 F. 3d 697 (8th Cir. 2012), so this action was not dismissed on that ground. "However," wrote the judge, "to the extent that plaintiff seeks to state a discrimination or hostile environment claim based on her transgender status under Title VII, this claim fails to state a claim for lack of factual support. Plaintiff provides absolutely no factual allegations of discrimination or harassment based on being transgender. Plaintiff does not describe any conversations she had with anyone about her appearance or gender at work. Plaintiff does not allege a single occurrence or consequence that resulted from being a transgender individual. Plaintiff does not allege a single factual situation in her complaint that mentions or is relevant to her transgender status. Plaintiff must plead more than legal conclusions; plaintiff must plead factual content such that the Court can draw a reasonable inference of disparate treatment based on transgender status in order to state a claim. Plaintiff has not done so here." The court cites the Supreme Court's civil pleading decision, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) on this point. Iqbal's factual pleading requirements are the frequent cause of *pro se* plaintiffs suffering dismissal, despite the strong possibility that they have experienced actionable discrimination, because they have no concept of how to frame a civil complaint for federal court. And federal district judges tend to be disinclined to connect the dots that somebody familiar with the way a transgender worker experiences the workplace might do to ground a finding of potentially unlawful discrimination. However, in dismissing such *pro se* claims, federal judges usually give the plaintiff a chance to come back for a second round by dismissing "without prejudice," although Judge Fleissig does not set a deadline for the filing of an amended complaint, as some judges do in such cases. She does certify that an appeal from this dismissal "would not be taken in good faith" and orders the clerk not to issue process upon defendant Millet because he is "not suable" under Title VII. The court does grant Hoskins's motion for leave to proceed *in forma pauperis*, so she won't have to pay a fee to file an amended complaint, but the court rejects her motion for appointment of counsel as "moot" in light of the dismissal. However, any attempt by Hoskins to file an amended complaint without assistance of counsel might well be a waste of her time. Judge Fleissig was appointed to the District Court by President Barack Obama.

MISSOURI – Law360 reported on February 11 that St. Louis County, Missouri, has settled a sexual orientation discrimination lawsuit brought by police officer Keith Wildhaber in the county's Circuit Court, alleging violations of the Missouri Human Rights Act. A jury had awarded $19.9 million in damages, allocating about $12 million for Wildhaber's sex discrimination claim and $8 million for a retaliation claim arising from the county police department's reaction to his filing of complaints with anti-discrimination agencies. Rather than face an appeal of the verdict, Wildhaber agreed to a $10 million settlement, that was approved by Judge David Vincent on February 11, in an order setting aside the original trial judgment. At the heart of the case was Wildhaber's allegation that he was denied numerous promotions for which he was qualified because he is gay.

NEW YORK – U.S. Magistrate Judge Judith C. McCarthy issued a Report and Recommendation to District Judge Nelson S. Roman, recommending granting a motion by a transgender woman for judgment on the pleadings and remand of an adverse determination by the Social Security Administration concerning her application for SSI disability benefits. *Romero v. Saul*, 2020 U.S. Dist. LEXIS 20622 (S.D.N.Y., Feb. 3, 2020). The plaintiff, identified male at birth but living as a woman, provided evidence of a range of psychiatric and emotional disorders on top of her gender identity issued, and had been fired from a series of jobs. She received therapy from several different practitioners, offering a range of opinions about her capability of working. In addition to occasional food stamps and welfare payments, she was scraping up enough money to meet living expenses by doing sex work and occasional babysitting for a friend. The ALJ assigned her case referred the matter to several health care professionals for opinions, but ultimately discounted many of their conclusions. The record did not contain live testimony from the vocational expert; rather, the ALJ submitted hypotheticals to the expert, whose responses were put in the record. In the end, the ALJ's decision that the petitioner was *not* disabled rested on what the Magistrate Judge found to be a very flawed attempt by the ALJ to estimate the petitioner's income from sex work, which led to

the ALJ's mistaken conclusion that she earned enough annually to disqualify her for disability benefits by engaging in "gainful employment." Furthermore, the ALJ placed little weight on her principal treating physician's conclusions, and virtually no weight to the comments of various counselors who had dealt with her over the years. Given the mess depicted in this record, one gets the impression that the ALJ had trouble dealing with a transgender applicant for disability benefits who exhibited a variety of mental and emotional problems that had, in the past, made it difficult for her to maintain a regular paying job. The lengthy opinion by the Magistrate Judge is too long and detailed to summarize in full here, but is certainly worth the attention of readers with a particular interest in the subject matter. The Petitioner is represented by Ann Pegg Biddle of the Urban Justice Center, New York. It is clear to this reader that without assistance of counsel, petitioner would have been unable to navigate the system to this stage.

OHIO – Has a public university professor suffered a violation of his constitutional rights when he received a written warning from his employer for refusing to properly gender a transgender student in his classes? No, rules U.S. District Judge Susan J. Dlott in adopting the recommendation of Magistrate Judge Karen L. Litkovitz (*see* 2019 WL 4222598) to dismiss all of the professor's federal claims and decline to assert jurisdiction over supplemental Ohio state constitutional and contract claims in *Meriwether v. Trustees of Shawnee State University*, 2020 U.S. Dist. LEXIS 24674, 2020 WL 704615 (S.D. Ohio, Feb. 12, 2020). Professor Nicholas K. Meriwether, in the Philosophy Department of Shawnee State, balked at calling the student either Mr. or Ms. (as was his usual custom in addressing students by their last names), so just called the student by their last name while calling on other students using the gendered honorific. The student complained, and the University issued a warning letter to Meriwether, invoking its non-discrimination policy. He sued asserting nine causes of action, premised on the First Amendment and the Due Process and Equal Protection Clauses of the 14th Amendment, as well as the Ohio Constitution's protection for the rights of conscience and free exercise of religion and breach of his employment contract (presumably invoking academic freedom policies of the university). According to Judge Dlott, "This case involves the complicated overlap of issues concerning transgender identity, civility in public discourse, academic freedom, and the First Amendment rights to free speech and free exercise of religion." After itemizing Meriwether's claims, noting the intervention of the student in question – "Jane Doe" – and the organization Sexuality and Gender Acceptance, represented by National Center for Lesbian Rights and attorneys from Gerhardstein & Branch Co., LPA (Cincinnati) and Jenner & Block LLP (Washington), and the referral to Magistrate Judge Litkovitz for a Report and Recommendation, Judge Dlott explained her ruling briefly: "The Court concludes that Meriwether failed to state a claim for violation of his rights under the United States Constitution. His speech – the manner by which he addressed a transgender student – was not protected under the First Amendment. Further, he did not plead facts sufficient to state a claim for a violation of his right to free exercise of religion, for a departure from religious neutrality in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), or for a violation of his rights to due process or equal protection." Professor Meriwether is represented by – you guessed it! – attorneys affiliated with Alliance Defending Freedom (ADF), also known hereabout as "Alliance Defending the Freedom to Discriminate Against LGBTQ People as a Matter of Constitutional Right," which is one of that organization's principal focuses. Part of ADF's mission is to try to build on the Supreme Court's "neutrality" holding in *Masterpiece Cakeshop* to essentially neuter government entities from protecting LGBTQ people from discrimination by persons or entities with religious objections to according non-discriminatory treatment. Expect an appeal to the 6th Circuit. Judge Dlott was appointed to the District Court by President Bill Clinton.

SOUTH CAROLINA – The 4th Circuit has not recognized sexual orientation discrimination claims as actionable under Title VII of the Civil Rights Act of 1964, so lesbian plaintiff Shannon R. Bennett, formerly Director of Nursing at Wilson Senior Care for three months, was left to argue that her dismissal was either due to her sex or was retaliation for her complaints about how the management of the Center was treating her, in order to pursue her Title VII claim. Unfortunately, U.S. Chief District Judge R. Bryan Harwell granted the Center's motion for summary judgment in *Bennett v. Wilson Senior Care, Inc.*, 2020 WL 633741, 2020 U.S. Dist. LEXIS 22932 (D. S.C., Feb. 11, 2020). A sudden opening in the Director of Nursing Position led Dennis Lofe, CEO of the Center, to hire Bennett to work starting on July 14, 2014. Judge Harwell describes Bennett in the Factual Background second of his opinion as a "homosexual female," and it is not clear whether she was "out" in the hiring process. According to her complaint and evidence introduced to support and oppose the motion for summary judgment, Lofe decided to hire her due to her work experience, and she left her former employment at Lofe's request. She was hired subject to a three-month probationary period, and was terminated at the end of this period, on October 10, 2014. Bennett alleges that Tyler Lofe, Dennis's son, who was Executive Director of the Center, took

a dislike to her and was conducting close surveillance on her, and that soon after she started working "she began hearing negative comments about her lifestyle and choice of dress." She also claimed that "upper management began plundering her office." She says that she complained to Tyler Lofe and to Lula Wallace, the Human Resources Director, about how she was being treated. There is a dispute about whether she was warned about complaints concerning how she was performing her duties. She asserted that her discharge came as a surprise, but management employees swore in affidavits that deficiency problems and ways to improve her performance were provided to her without satisfactory result. She applied for unemployment benefits, which were granted by the state's Department of Employment and Workforce, whose decision "indicated no evidence of improper actions connected with Bennett's work." She filed charges with the South Carolina Human Affairs agency as well as the EEOC, alleging discrimination because of sex and retaliation, supplying a narrative focusing on hostility to her sexual orientation. The EEOC concluded that she was fired because of her sexual orientation, and issued her a right to sue letter, leading to this lawsuit. In a prior ruling, the court dismissed her claims for sexual orientation discrimination (as the 4th Circuit, unlike the EEOC, does not recognize such claims under Title VII, as noted above), hostile environment due to sexual orientation, or wrongful discharge, and referred to Magistrate Judge Thomas E. Rogers, III, the question of a preliminary ruling on summary judgment on her sex discrimination and retaliation claims. Judge Rogers recommended granting the employer's motion. After concluding that Judge Rogers had properly rejected the Center's argument that Bennett failed to exhaust her sex discrimination claim administratively (an odd argument to make, since she checked off the "sex" box on the EEOC charge form), Judge Harwell nonetheless concluded that Rogers had correctly recommended granting the summary judgment motion. Reading his extended discussion, this reader reflected that a sophisticated employer guided by knowledgeable employment discrimination counsel can undoubtedly find a way to win a motion for summary judgment on a discriminatory discharge claim by a probationary employee. Thus, the court took at face value affidavits from various Center management officials, all of whose continued employment depends upon supporting the Center's official reason for the discharge, that Bennett's performance suggested that she was not a "good fit" for the position of Director of Nursing for "nondiscriminatory" reasons that they enumerated in their affidavits. The cherry on the cake was that the position was then filled by another woman, thus blunting the notion that Bennett's sex was a reason for her discharge. (Indeed, the EEOC found that the reason for the discharge was her sexual orientation.) In objecting to Rogers' finding that Bennett had not provided evidence that male comparators at the Center was treated differently from her, Bennett pointed out that all the departmental directors at the Center were female, so there were no similarly situated male comparators. Judge Harwell counted this as evidence that the employer did not discriminate because of sex! Bennett argued that the question of whether her performance merited discharge was a matter of factual dispute precluding summary judgment. The court disagreed, even though one would have thought that dueling depositions and affidavits would have raised issues of credibility that should not be determined on a paper record without live testimony before the court. Be that as it may, had the court decided to sit on this case until after the Supreme Court rules in *Bostock* or *Zarda* later this term, perhaps the outcome would have been different, given the EEOC's findings and the possibility, however remote, that the Supreme Court will rule that sexual orientation claims are covered under Title VII. In the meantime, one can reasonably be suspicious about this ruling in light of the rulings by the unemployment benefits system and the EEOC, which do not support the court's conclusion that the employer established non-discriminatory employment-related reasons for the discharge. Injustice was probably done here. Perhaps an appeal to the 4th Circuit may bear fruit. Judge Harwell was appointed to the District Court by President George W. Bush in 2004. Bennett is represented by Phoebe A. Clark of Wukela Law Firm, Florence, S.C.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – The 2nd District Court of Appeal upheld a hate crime verdict against Shehadeh Khalil Issa, who was convicted by a jury of stabbing his wife to death and then a few days later using a rifle to kill his bisexual son, Amir (Rocky) Issa. *People v. Issa*, 2020 Cal. App. Unpub. LEXIS 1171 (February 20, 2020). Although there was no eyewitness testimony to the two murders, the evidence as to Issa's murder of his wife – whose body was found in the family house days after the murder, after police broke into the locked house – was overwhelming, including confirmatory DNA evidence from blood at the scene and the physical impossibility of the murderer having been anybody else, in light of the lock system that the defendant had on his house, which made his own theory that the bisexual son had killed the mother physically impossible. Rocky, who lived in a separate apartment behind the house, was one of five adult children, the other four of whom all offered testimony corroborating the physically and emotionally abusive way the defendant

treated his wife and children, and providing great detail about his hatred for his bisexual son, which expressed itself in threatening statements including the possibility of murder. The opinion for the court by Justice Thomas Willhite, Jr., is quite explicit in recounting the testimony, and is so gruesome that it is not surprising that the court designated the opinion as "not to be published in the official reports." Part of Issa's argument on appeal was that he did not receive a fair trail because the trial court would not let defense counsel spin out before the jury a theory that the mother was killed by Rocky. Not only was this physically impossible, since Rocky did not have access to the house due to the lock system that Issa had installed, but it was inconsistent with all the other testimony in the case. "The argument that Rocky was culpable in his mother's death was speculative and without evidentiary support," wrote Willhite, and "the evidence of defendant's guilt was overwhelming." As to the evidence supporting the hate crimes count, the court wrote: "When defendant learned Rocky was bisexual in 2008, defendant's attitude toward Rocky drastically changed. Defendant no longer referred to Rocky as a son, but referred to him as a disgrace and an embarrassment. In his own testimony at trial, defendant admitted he found it troublesome and disrespectful that Rocky dated and brought men to the rental unit. Victor [a brother of Rocky] described defendant's verbal abuse of Rocky as 'constant for years, almost like perseverating over this one issue. It was really disturbing, because sometimes the language wasn't just, you know, I don't like my son being gay but like he deserved to die.' Defendant and Victor had 'many, many' conversations about Rocky's sexual orientation in which defendant referred to Rocky as 'faggot and whore of Babylon and scum of the earth and he should be castrated.' Hellen [Rocky's sister] also heard defendant refer to Rocky as a 'cocksucking whore' and 'sissy.'" At one time, "Hellen overheard defendant threaten Rabihah [his wife] that he was going to 'cut you and your son up bit by bit, piece by piece. He said, I'm going to split you in half . . . I'm going to burn you and your cocksucking whore son in the house. I'm going to burn the house down with you and your cocksucking whore son in it.'" Issa claimed that shooting Rocky was a case of mistaken identity, but the court found that implausible in the circumstances. Superior Court Judge Daniel V. Feldstern sentenced Issa to "an overall term of two life sentences without the possibility of parole, plus a consecutive term of 26 years to life," which was upheld on appeal.

CALIFORNIA – The 4th District Court of Appeal agreed with defendant Felipe Reyes-Cruz that Orange County Superior Court Judge Lance Jensen improperly ordered Reyes-Cruz to submit to HIV testing after he was convicted of several counts of sexually molesting a little girl, when there was no evidence in the record "that conduct occurred that would have exposed L.R. to blood or bodily fluids." *People v. Reyes-Cruz*, 2020 Cal. App. Unpub. LEXI 989, 2020 WL 634413 (Feb. 11, 2020). The court found that this issue was not moot "despite the fact that testing may already have occurred." The trial judge did not make the necessary statutory probable cause finding to ground such a testing order, and, wrote Justice Eileen C. Moore, "we cannot find substantial evidence to support an implied probable cause determination," ruling out as "speculative" the Attorney General's argument that "if he had a cut on his finger, then L.R. was potentially exposed to any HIV virus he might have. Notably, after the touchings, L.R. felt a need to go to the bathroom and wipe herself off." The remedy approved by California courts for such an unsupported HIV testing order is to remand the case to the trial court "to determine whether the prosecution has any additional evidence that would constitute probable cause."

FLORIDA – Thomas Keelan was convicted by a jury in 2013 of using an instrumentality of commerce (cellphone and computer) to "knowingly persuade, induce, or entice a minor to engage in illegal sexual activity." The minor, J.S., was a 15-year-old student at the school where Keelan, then in his 50s, was a teacher. J.S. was "cutting" classes. Keelan reached out to J.S. and "offered words of comfort and encouraged J.S. to call or text him whenever he felt the urge to cut. At Keelan's suggestion, they began meeting each other during the school lunch hour to play chess in Keelan's classroom and discuss J.S.'s emerging identity issues." (This is quoted from the 11th Circuit's decision, rejecting Keelan's direct appeal of his conviction; *see U.S. v. Keelan*, 786 F. 3d 865 (11th Cir. 2015).) You know where this is going. Eventually Keelan and J.S. were meeting in hotel rooms for sex. J.S.'s parents figured out that something was going on, and sent him to a wilderness camp in Georgia and a "residential treatment center" in Texas to straighten him out. After that, J.S. decided to cooperate with law enforcement agents and, a few months before his 18th birthday, helped them bait a trap for Keelan through phone contact. Keelan rented a hotel room for them to meet for sex. On the way to the hotel, Keelan stopped at an adult store to buy sex toys, while being surveilled by law enforcement agents. He was arrested when he arrived at the hotel, convicted by a jury, and sentenced to 200 months (over 16 years) in prison. At trial, his counsel had tried to make out an entrapment defense and sought to cross-examine J.S. extensively on his sexual activities with men, but the trial judge ruled out much of the evidence the defense sought to provide in support of its argument that J.S. was the aggressor,

not Keelan. On the other hand, the trial court rejected defendants' objections to much of the prosecution's evidence. Defense counsel argued that essentially nothing should be admitted unless it directly related to communications between Keelan and J.S., but was unsuccessful at keeping out extensive evidence about the sexual activities of Keelan and J.S. After the 11th Circuit affirmed the conviction, Keelan filed this petition for *habeas corpus*, making claims of ineffective assistance of counsel and denial of due process, all of which were rejected in this Report and Recommendation by Magistrate Judge Jonathan Goodman, who observed that defense counsel actually objected to the things that Keelan now alleged that he failed to object to, and that the issues Keelan sought to explore in the denied cross-examination of J.S. did not go to the central issue of the case: Keelan's motivations. The R&R now goes to District Judge Jose E. Martinez. *Keelan v. U.S.*, 2020 U.S. Dist. LEXIS 24595 (S.D. Fla., Feb. 11, 2020). Keelan is represented on the habeas petition by Thomas Patrick Petruzzi, of Miami.

VIRGINIA – The U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that Texas could not penalize private consensual gay sex between adults, does not extend to invalidate Virginia's law against incest, ruled the Court of Appeals of Virginia in *Ferguson v. Commonwealth*, 2020 WL 889427, in which Michael Ferguson appeals his conviction for having sex with his 18-year-old stepdaughter. Ferguson argued that it was inconsistent with *Lawrence*, and the Virginia Supreme Court's post-*Lawrence* decision in *Martin v. Ziherl*, 269 Va. 35 (2005), for the state to apply the incest law to a situation where the adult parties are not related by blood. In effect, he had moved the trial court to dismiss the indictment on the ground that the incest statute did not apply to what he had done. Rejecting this argument in his appeal of his conviction from a guilty plea in the Pittsylvania Circuit Court, Judge Randolph A. Beales noted that Ferguson had not "assigned error" on this issue in the trial court, despite his understanding during the plea colloquy that he was "waiving all except his right to challenge the motion to dismiss the indictment that the Court just ruled on the constitutionality," quoting the transcript of the plea colloquy. "Therefore," wrote Judge Beales, "because Ferguson did not condition his guilty plea on the basis that he be permitted to appeal the trial court's decision that the statute criminalized his conduct, we cannot reach that argument on appeal." Thus, the only thing he could argue on appeal was that the statute was unconstitutional as applied to him, because the "liberty interest" identified in *Lawrence* and *Ziherl* "encompasses his right to have sexual intercourse with his eighteen-year-old stepdaughter." The court decisively rejected this proposition, pointing out that in *Lawrence* "the Supreme Court was careful to note that *Lawrence* was a case involving 'two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle' and that the case did not 'involve minors, . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused . . . [or] public conduct or prostitution." In this case, said the court, the relationship of stepfather and stepdaughter fell into the category of "relationships where consent might not easily be refused," so the state could treat this as nonconsensual and not constitutionally protected conduct. Ferguson is represented by Michael A. Nicholas of Daniel, Medley & Kirby, P.C., Danville.

WISCONSIN – In *State of Wisconsin v. Dudas*, 2020 Wisc. App. LEXIS 72, 2020 WL 770083 (Wis. App., Feb. 18, 2020), the Wisconsin 3rd District Court of Appeals rejected an appeal by David G. Dudas of a jury verdict convicting him of thirty counts of various offenses, rejecting his argument that prosecuting his conduct of engaging in BDSM sex with his wife violated constitutional protection under *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court recognized a Due Process right of adult same-sex couples to engage in consensual sex. Dudas's argument was that his wife and he had a relationship in which they frequently engaged in consensual BDSM that included oral and anal sex and various other activities typical of BDSM sex. His wife testified to the contrary concerning the issue of consent. The evidence included numerous DVDs that Dudas had made of their sexual encounters over many years. They were so graphic and violent that jurors begged not to be subjected to more after viewing several. Analyzing Dudas's claim that the state's prosecution of him was unconstitutional, the court's *per curiam* opinion stated: "In *Lawrence*, the Supreme Court held the personal liberty guaranteed by the due process clauses of the Fifth and Fourteenth Amendments prevented criminalizing the conduct of consenting adults engaging in 'sexual practices common to a homosexual lifestyle.' The Court's analysis relied heavily on the fact that engaging in sexual behavior – 'the most private human conduct' – in one's home – 'the most private of places' – is generally 'within the liberty of persons to choose without being punished as criminals.' The Court noted, however, that its holding did not constitute an absolute prohibition on the ability of the State or a court to set boundaries on sexual conduct. Indeed, the Court explicitly stated that where 'injury to a person or abuse of an institution the law protects' is at issue, regulation is permissible." Dudas was prosecuted under Wis. Stat. Sec. 940.235(1), which criminalizes suffocation and strangulation, focusing

on filmed scenes in which Dudas's wife performed oral sex on him at extreme length inducing choking and fainting. "Unlike in *Lawrence*," wrote the court, "the conduct at issue in this case – and that is regulated by Wis. Stat. Sec. 940.235(1) – clearly involves persons who 'might be injured.' As the State notes, and Dudas fails to refute, strangulation is inherently dangerous because when a person is strangled 'unconsciousness may occur within seconds and death within minutes.' See Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26(3) Crim. Just. 32, 33 (Fall 2011). Consequently, *Lawrence* does not support an argument that [the statute] infringes upon a constitutional right, regardless of whether ten percent of the population engaged in consensual BDSM sex." The 10 percent figure came from an expert who testified on behalf of the defense. "In addition to its misplaced reliance on *Lawrence*, we note that the underlying premise of Dudas' argument as to why the State's prosecution of him infringed upon his right to engage in consensual BDSM sex is flawed. Specifically, Dads frames his prosecution as a case where consensual fellatio has been criminalized. But [the statute] does not prohibit consensual BDSM sex. Rather, it prohibits a person from 'intentionally impeding the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.' . . . That is, and as [the pattern jury instruction] explained to the jury, it prohibits a person from acting with the purpose to impede another's breathing or being aware that his or her conduct is practically certain to do so. As such, we agree with the State that it did not prosecute Dudas for engaging in consensual BDSM sex; it prosecuted him for intentionally impeding Jane's breathing by forcing her to keep his penis and fingers in her throat until she gagged and vomited, by putting his hand around her neck, and by forcing a pillow over her head." The court also rejected arguments that the statutes used to prosecute Dudas were vague and overbroad, or that the trial court had improperly impeded his defense by limiting his ability to cross-exam Jane on issue of consent, or to challenge her testimony that aspects of their conduct were not consensual. The court held that it was within the trial judge's discretion to exclude such cross-examination. Dudas was found to have waived his right to raise some of these issues on appeal by failing to lay an appropriate groundwork through objections and motions during the trial. The opinion addresses many more issues than we can summarize here, so we refer readers to the court's detailed opinion for more information. The opinion was designated as not to be published, and does not list counsel for Dudas on either Lexis or Westlaw.

PRISONER LITIGATION NOTES

By 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.

ARIZONA - Angel Goff, a transgender prisoner in an Arizona state prison, was subjected to body searches that became increasingly intrusive, literally at the "hands of" defendant officer Ramirez, while in the custody of the Arizona Department of Corrections. In an unsigned "not for publication" memorandum opinion by a panel consisting of Circuit Judges Consuelo Callahan (Geo. Bush), Bridget Bade (Trump) and U.S. District Judge Stephen R. Bough (W.D. Mo, by designation), the 9th Circuit Court of Appeals affirmed U. S. District Judge Joseph Tuchi's denial of a motion to dismiss. *Goff v. Ramirez*, 2020 WL 735701 (9th Cir., Feb. 13, 2020). Goff sued under both Arizona law and 42 U.S.C. § 1983. First addressing state law, the Court of Appeals discusses A.R.S. § 31-201.01(F), which turns into claims against the state all tort actions against corrections employees for incidents occurring "within the scope of their duties." Here, the complaint describes Ramirez "grabbing Ms. Goff's breasts and other body parts during 'pat downs' and forcing himself against her for his own sexual pleasure and forcing Ms. Goff to perform oral sex on him," as being "outside the scope of [his] legal duty as a corrections officer." That certainly sounds right, but the cited cases do not support the premise. The first one, *In re Estate of Lamparella*, 109 P.3d 959, 964 (Ariz. Ct. App. 2005), concerns community property and the construction of a separation agreement. The second case, *Howland v. State*, 818 P.2d 1169, 1173 (Ariz. Ct. App. 1991), is a prisoner case; but its analysis deals with notice of claims issues, not "scope of duties." A more recent unpublished case, *Tucker v. Verrett*, 117-cv-00192 (D. Ariz., June 6, 2018), dismissed all state claims, writing that A.R.S. § 31-201.01(L) required that state inmate claims be for "serious physical injury," defined as risking death or causing "serious disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ." A.R.S. § 31-201.01(N)(2). The Court of Appeals decision is on sounder ground under § 1983, which considers whether the officer's actions are protected by qualified immunity. "The allegations that Ramirez grabbed Goff's breasts and other body parts during non-routine 'pat downs,' forced himself against her for his own sexual pleasure, and that during each encounter Ramirez's conduct grew more 'aggressive and violent' are sufficient to state a claim that Ramirez violated Goff's Eighth Amendment rights under *Schwenk v. Hartford*, 204 F.3d 1187, 1197-98 (9th Cir. 2000)," wrote the court. "A reasonable correction officer would have known that his actions were

unlawful" under the Constitution. *White v. Pauly*, 137 S. Ct. 548, 551 (2017). When the case is remanded for further proceedings without immunity, Goff may also argue that Ramirez' actions violated the Fourth Amendment's prohibition against unreasonable searches, citing *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001). In this writer's view, but for the sloppy work on the state law claims this decision warranted publication as precedent.

CALIFORNIA – *Pro se* transgender inmate Jason McClain is at "high risk" for attack. She has security orders that she is not to be transported in contact with other inmates. Nevertheless, two officers and a sergeant drove her on a bus with other inmates without confining her in the single inmate cubicle on the bus. When the bus made an interim stop to pick up more inmates, the sergeant and one officer left the bus, leaving a third officer alone to "watch." He then left his post, leaving the inmates alone on the bus with McClain. At this point, according to the opinion by U. S. Magistrate Judge Barbara A. McAuliffe, another inmate was able to "slip out of his handcuffs and waist chain restraints" and attack McClain around the throat with the chain, causing her to stop breathing. The defendant officers eventually brought the situation under control. McClain sued all three in *McClain v. Schoo,* 2020 U.S. Dist. LEXIS 18128, 2020 WL 550666 (E.D. Calif., February 3, 2020), and Judge McAuliffe allowed McClain to proceed on her protection from harm claim under *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994). Judge McAuliffe recommended that McClain's allegation that the officers interfered with her medical evaluation after the attempted strangling be dismissed for failure to state a claim. She wrote: "According to the allegations in the complaint, Plaintiff received prompt medical attention after the attack. Plaintiff's assertions that any such treatment was negligent are not sufficient to support an Eighth Amendment claim. Additionally, Plaintiff's mere disagreement with the form of treatment also is not sufficient to support an Eighth Amendment claim." Judge McAuliffe *mischaracterizes* McClain's allegations. McClain wrote: "The three defendants named herein attempted to cover-up Plaintiff incident by not allowing Plaintiff to be fully assessed, and medically evaluated by the medical staff . . . ." She further stated that, after the "inadequate" evaluation, the officers escorted her back to the bus. McClain does not mention "negligence" or "disagreement." Included with the Complaint are two medical "Injury to Inmate" reports from that morning. One report form says that McClain was escorted by one of the defendant officers; the other report form says that McClain was escorted by a different defendant officer. The reports are 30 minutes apart, and they show different injuries. They both have "no comment" (quotes in original) for the inmate "statement" about the incident, and they both recite: "pt. to be taken . . . for further eval." It is unclear whether Judge McAuliffe noticed this before recommending dismissal of claims that the officers interfered with proper medical evaluation.

ILLINOIS – Plaintiff, Deon Hampton, is transgender, and prior to this ruling was a prisoner in the custody of the Illinois Department of Corrections. She was released from custody last summer, with no evidence that she is likely to return. In *Hampton v. Baldwin,* 2020 U.S. Dist. LEXIS 20181 (S.D. Ill., Feb. 6, 2020), U.S. District Judge Nancy J. Rosenstengel finds that her declaratory and injunctive claims are moot as a result of her release, citing *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir.2012) and other 7th Circuit decisions. Hampton also sued individual defendants for damages on various claims. The following will be allowed to proceed: (1) Eighth Amendment claims of deliberate indifference to her safety because of her vulnerability to abuse and sexual assault; (2) Eighth Amendment claim for placing Hampton in segregation, "thereby exacerbating her serious mental health problems"; (3) Eighth Amendment claim of excessive force; (4) state tort claim of intentional infliction of emotional distress, and (5) claim under the Illinois Hate Crimes Act that corrections officers assaulted her because of her gender and sexual orientation. On the last point, the Illinois Hate Crimes Act provides specifically for a civil action for compensatory and punitive damages and attorneys' fees, "independent" of any criminal prosecution. The Illinois Attorney General can also commence a civil action for the victim in the name "of the People." Hampton is represented by the MacArthur Justice Center, Chicago, and the Uptown People's Law Center.

LOUISIANA – Last Fall, *Law Notes* covered U.S. District Judge Brian A. Jackson's granting of a TRO prohibiting prison officials at the Louisiana State Penitentiary (The Farm) from cutting the hair of transgender inmate Robert Clark. *Clark v. LeBlanc,* 2019 U.S. Dist. LEXIS 176781 (M.D. La., Oct. 10, 2019), reported November 2019 at page 51. Clark won the TRO *pro se*. Now, in *Clark v. LeBlanc,* 2020 WL 738543 (M.D. La., Feb. 13, 2020), Judge Jackson denies her a preliminary injunction. She sought orders requiring defendants to: (1) provide her with medically necessary treatment for her gender dysphoria; (2) allow her to express her female gender through grooming, pronouns, and dress, allow the purchase of female canteen products, and allow Plaintiff to alter her appearance in order to appear female; (3) remove cameras from the toilet and shower areas of the dorm; (4) not force Plaintiff to expose her breast or genital areas to inmates or male staff; (5) only allow female staff to strip search her; investigate and take proper actions

with regards to PREA violations; and (6) not retaliate against Plaintiff for seeking legal redress. Judge Jackson observed that this relief is basically what Clark is seeking after trial, and he declines to order it under the guise of a preliminary injunction, citing *Shanks v. City of Dallas, Texas*, 752 F.2d 1092, 1096 (5th Cir. 1985). It is notable that, between the haircut TRO and now, the defendants have arrayed four lawyers against Clark, including a Baton Rouge law firm. They have filed affidavits and thousands of pages of documents, and the state has hired an outside endocrinologist to manage Clark's treatment. They presented all of this, including management by the endocrinologist, in opposition to a preliminary injunction. Judge Jackson wrote: "Having reviewed the record, the Court is satisfied that Plaintiff is now being offered viable options to address her claims," noting that The Farm's treating mental health supervisor conceded that "counseling alone is no longer effective." Since the litigation will continue to "evaluate Plaintiff's claims on the merits, there is no substantial threat of irreparable injury." Although she remains *pro se*, Clark seems to have found a "hands on" judge.

NORTH CAROLINA – This is the second time *pro se* transgender prisoner Jennifer Ann Jasmaine has been before Chief U.S. District Judge Frank D. Whitney. Judge Whitney dismissed the earlier case – *Jasmaine v. Aaron,* 2019 U.S. Dist. LEXIS 168587 (W.D.N.C., Sept. 30, 2019), reported in *Law Notes* (October 2019 at page 47) – which alleged protection from harm claims – because she had been transferred, she had not alleged a sexual assault, and she had only expressed fear for the future. Now, in *Jasmaine v. Pitts,* 2020 U.S. Dist. LEXIS 18186, 2020 WL 534918 (W.D.N.C., Feb. 3, 2020), Jasmaine alleges that she was raped in her new prison, after officials left her unprotected in the "back of the pod" and created a transphobic, hostile atmosphere where the rape was more likely to occur. Jasmaine alleges that each defendant was "aware" of her fears about her housing prior to her rape, which Judge Whitney minimizes: "beyond the rape itself, Plaintiff does not allege any other injuries." He allows her to proceed on a protection from harm claim under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), but he rejects theories under "conditions of confinement," "harassment and hostile environment," and "totality of conditions." He balkanizes these claims. On "conditions," he writes: "Regarding this claim, Plaintiff alleges that Defendants had knowledge of a risk to Plaintiff and were deliberately indifferent in allowing Plaintiff to be raped by another inmate. Plaintiff has not alleged an extreme deprivation contemplated by this type of claim." On the allegations of staff hostility, he says "Plaintiff identifies no injury related to the alleged hostile environment or harassment." On "totality": "Plaintiff has not alleged, nor can the Court infer, that these conditions combined to produce the deprivation of a single human need such that Plaintiff has stated an *Eighth Amendment* claim based on the 'totality of conditions.'" Judge Whitney's failure to see, for purposes of screening, that staff was green-lighting sexual assault on a transgender inmate by their housing decisions and their behavior in front of the other inmates in the pod, is unfortunate. It remains to be seen whether he will allow Jasmaine to obtain discovery of these issues under the rubric of protection from harm. This writer disagrees that the atmosphere can be separated from the assault for Eighth Amendment purposes, at least at the screening stage.

OHIO – This long opinion about HIV medication for *pro se* inmate DeMarco Armstead is interesting for its analysis about gaps in medication and for the unusual bookkeeping relief it orders. In *Armstead v. Baldwin,* 2020 U.S. Dist. LEXIS 22476; 2020 WL 613934 (S.D. Ohio, Feb. 10, 2020), U.S. District Judge Sarah D. Morrison denied preliminary injunctive relief, but she ordered defendants to submit to the court written bi-weekly proof that Armstead was receiving his HIV medication as prescribed. The medication at issue is Stribild, which has package instructions to take with food and not to miss a dose. The jail's medication administration records show that compliance rate ranged from 85% to nearly 95%, the higher rate occurring more recently. Judge Morrison judicially notices a British publication saying that 95% compliance is necessary for the drug to be effective. Armstead says that his HIV viral load was undetectable upon admission to the jail, but it became (and remains) detectable because of the lapses in administration of Stribild. Defendants offered a variety of reasons for non-administration, including instances of the medicine being "out of stock," Armstead's refusals and "no shows," and missing medication records. Judge Morrison finds that the provision of medication *most of the time* does not shield a defendant from liability for the times it was not provided, if deliberate indifference is shown, citing *Adkins v. Morgan Cty.*, 2020 U.S. App. LEXIS 859, 2020 WL 113910, at *3 (6th Cir. Jan. 8, 2020). Armstead also did not need to prove "intentional" denial of the medication. Moreover, there was no issue about whether his need for the medication was continuing, so medical judgment was not involved, as in *Rhinehart v. Scutt*, 509 F. App'x 510, 511 (6th Cir. 2013). Judge Morrison found 19 days missing from the medication administration records, and she drew "an adverse inference" from this lack of evidence, writing: "Defendants cannot ask the Court to pick and choose which aspects of their records to trust," citing *Digital Filing Sys., LLC v. Aditya Int'l*,

323 F. App'x 407, 418 (6th Cir. 2009). She questions whether Armstead actually "refused" on days when this is claimed, finding "doubt in the credibility of these drug administration records." Judge Morrison also questions alleged "no shows," writing that "the nurse cannot just pass by Mr. Armstead's cell without making any effort to rouse or otherwise assist him" when he is lethargic. If Armstead refused when fasting for Ramadan, defendants should have accommodated him under 42 U.S.C. § 2000cc-1(a) ["Religious Land Use and Institutionalized Persons Act"]. Judge Morrison finds that there is no need to show that any individual defendant violated Armstead's rights, so long as "*any* of the Medical Defendants has." [Emphasis by the court.] Any injunctive relief will apply to all of them, particularly since Armstead "does not have a single medical provider." There is a corporate defendant in the case (NaphCare), which argued that it was only liable if a policy or procedure caused the constitutional violation. Judge Morrison wrote: "NaphCare cites no cases to support this claim, and the Court is skeptical that it is correct." The court is most likely wrong. *See Perry v. Corizon Health, Inc*., 2018 U.S. App. LEXIS 15621, 2018 WL 3006334, at *1 (6th Cir. June 8, 2018), citing *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) ("A private contractor is liable under § 1983 only when execution of the private contractor's policy or custom inflicts the alleged injury.") Having said all this, Judge Morrison finds that Armstead stated a constitutional violation but that he was not entitled to preliminary relief because, in light of the improvement in the administration of the medication, there is currently a weaker showing on the likelihood of prevailing on the merits. There is good language about irreparable injury from denial of HIV medication doses, but the risk has gone down – although "there is a very real risk that additional missed doses would make the risk of irreparable harm potentially catastrophic." On balance, preliminary relief is denied with leave to seek it if problems recur. In the meantime, Judge Morrison orders defendants to provide bi-weekly medication reports to the court, with detailed explanations of any missed dosages. Judge Morrison sends the case back to the magistrate judge with the request that she consider appointing counsel.

OKLAHOMA – The Plaintiff, Miss Glenn A. Porter, is a transgender prisoner, who has been in Oklahoma custody since 1999, in four different prisons. In *Porter v. Crow,* 2020 U.S. Dist. LEXIS 22561, 2020 WL 620284 (N.D. Okla., Feb. 10, 2020), Chief U.S. District Judge John E. Dowdell permits her to proceed on various claims relating to her incarceration. Porter was initially diagnosed while an inmate with gender dysphoria, and she received hormones and feminizing items, including underwear. Later, when she came under the care of a different staff psychologist, her diagnosis was changed because this individual concluded that she was "masquerading as a female." Her hormones were abruptly stopped, causing a violent bodily reaction. She was also raped after she was placed in housing settings that did not protect her. Judge Dowdell sets forth the facts as to each correctional facility in detail, noting that the staff psychologist who withdrew the gender dysphoria diagnosis relied upon Porter's history of operating "heavy equipment" and her interest in "science" as disqualifying factors, which Judge Dowdell found "not grounded in any fact or statistic." Porter's efforts to obtain hormones again have been unsuccessful over the last two years. Judge Dowdell allows Porter to proceed against Oklahoma officials in their official capacities, if they have the authority to provide her current treatment, citing *Will v. Michigan Dept. of State,* 491 U.S. 58, 71 (1989); *Muscogee Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). He rejects Porter's equal protection claim based on gender identity, which challenged defendants' "failing to provide her with appropriate undergarments, writing her up for changing at her bunk, housing her in an open male bunk, and otherwise failing to recognize [her] as female." He treated this as a "class of one" claim, writing: "[N]one of Plaintiff's allegations plausibly suggests that other inmates like Plaintiff—namely, inmates who were identified as male at birth, who identify as female, who have female breasts, and who are incarcerated at an all-male facility in an open dorm—are provided female undergarments, are not housed in all-male open dorms, or are allowed to change their shirts at their assigned bunks without disciplinary action." The judge's framing of the comparison for equal protection purposes thus begs the pertinent question of whether women who are born women are treated differently from women who were identified as men at birth. Judge Dowdell allows Porter to proceed on a claim of deliberate indifference to her health, finding her medical need to be serious regardless whether her gender dysphoria diagnosis was properly withdrawn, citing *Oakleaf v. Martinez*, 297 F. Supp. 3d 1221, 1224 (D. N.M. 2018). He found that the staff psychologist "recklessly disregarded her need for continued treatment by concluding, after an incomplete and biased evaluation, that Plaintiff does not have gender dysphoria." Not only may Porter proceed against those still in a position to reinstate hormones, but she may also continue for damages against those who withdrew them, because there is a "reasonable expectation that discovery will reveal evidence" of unconstitutional conduct. On the claim of failure to protect, Judge Dowdell finds sufficient evidence to allow Porter to proceed on the sexual assaults, based on allegations that she was raped/assaulted *three* times, including once by

her cellmate. Again, the court "finds the facts alleged in the [Complaint] . . . raise a reasonable expectation that discovery will reveal evidence" of unconstitutional acts or omissions. Judge Dowdell then denies qualified immunity to all damages defendants, finding that the law in the Tenth Circuit (at least as to hormones) deprives them of a good faith basis for the denials here, citing *Lamb v. Norwood*, 899 F.3d 1159, 1162-63 (10th Cir. 2018); and *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). This qualified immunity ruling is without prejudice as to what factual discovery may show. Finally, while denying a preliminary injunction on the papers, Judge Dowdell orders a prompt hearing as to whether Porter's hormones should be reinstated. Porter is represented by Doerner Saunders Daniel & Anderson LLP (Tulsa).

PENNSYLVANIA – This prolix opinion by U.S. District Judge Sylvia H. Rambo loses the forest for the trees. *Pro se* plaintiff Mark-Alonzo Williams is black and gay. He alleges that is frequently assaulted sexually (or threatened with it) and that defendants failed to protect him, exacerbating his risk by transferring him repeatedly to institutions where he had "separation" orders from other aggressive inmates. In *Williams v. Wetzel,* 2020 U.S. Dist. LEXIS 20105, 2020 WL 583983 (M.D. Pa., Feb. 6, 2020), Judge Rambo denies him all relief, granting summary judgment for defendants, who range from the Secretary of Corrections to line officers. The opinion addresses at length whether Williams' transfers were retaliatory and which of the named defendants were individually responsible for conditions leading to sexual assaults after transfer. The nub – why was Williams, a known victim, repeatedly transferred to institutions with known aggressors about whom he had separation orders? – is not addressed. One such transfer could be negligence – four times is evidence of a breakdown of the "system" – and Judge Rambo does not explain why there is not a claim for deliberate indifference against the Secretary of Corrections' management of the system. When Judge Rambo turns to the first assault by an inmate named Bader, she finds insufficient evidence that defendants were aware of the risk That Bader posed to Williams. The facts stated in the opinion, however, indicate that Williams had shown a "death threat" from Bader directed at him, and that Bader was released to population while Williams was still present in a different cellblock. Judge Rambo found that Williams had not shown that defendants disregarded the risk that Bader would go to Williams' cellblock to assault him. Yet, circumstantial evidence of an obvious risk is enough to raise a jury question under *Farmer v. Brennan,* 511 U.S. 825, 842 (1994). Judge Rambo treats all of the "incidents at other prisons" together, writing that there is not enough evidence to show that defendants knew Williams was being placed at risk, citing *Bracey v. Pa. Dep't of Corr.*, 571 F. App'x 75, 79 n.3 (3d Cir. 2014); and *Fortune v. Bitner*, 285 F. App'x 947, 950 (3d Cir. 2008). Yet, in *Bracey,* "there was no prior tension between [plaintiff] and his assailants"; and, in *Fortune,* there was no evidence that defendants had authority over the inmate's transfers. Neither explanation exists here, where the inmates were flagged to be separated and executives of the department are defendants. Judge Rambo also grants summary judgment to defendants on Williams' claim that he was denied equal protection based on his race and sexual orientation. He alleges that the combination of the two subjected him to increased discrimination. Judge Rambo recognizes that official actions based on race are subject to heightened scrutiny, but she does nothing with the point (other than to say that there is no evidence of discrimination). As to sexual orientation, Judge Rambo finds "no suspect class" and treats the claim under "class of one theory" per *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). There is no citation to Supreme Court equal protection scrutiny in cases involving sexual orientation. *See Romer v. Evans,* 517 U.S. 620, 623, 632-34 (1996) (invalidating Colorado constitutional provision forbidding LGBT civil rights protections as a violation of the Equal Protection Clause). Here, there was evidence that Williams was "outed" to the inmates on his cellblock prior to the assault, and that he (not Bader) was transferred after the assault. Although the Third Circuit has recognized a privacy interest in sexual orientation – *Sterling v. Borough of Minersville,* 232 F.3d 190, 196 (3d Cir. 2000) – Judge Rambo holds that this does not apply unless the plaintiff shows that he kept his sexual orientation private, citing *Abdullah v. Fetrow,* 2007 WL 2844960 at *13 (M.D. Pa., Sept. 26, 2007). In *Abdullah,* however, the court noted in the next passage that the disclosure was made in a routine manner unaccompanied by any evidence of sexual orientation animus. While Williams' equal protection claim may not be as strong as his protection from harm claim, both seem to have been mishandled by the judge.

TEXAS – This is an odd one. Plaintiff Valerie Jackson was born male, but she has "legally changed her gender," according to U.S. Magistrate Judge Irma Carrillo Ramirez. Jackson was twice booked into the Dallas County Jail and forced to display her genitalia to facilitate a housing decision. She sued the sheriff, deputy sheriffs, and Dallas County in *Jackson v. Valdez,* 2020 WL 869792 (N.D. Tex., Feb. 20, 2020). Defendants filed a motion for Jackson to be ordered to file a reply complaint under F.R.C.P. 7(a)(7), which Judge Ramirez granted, as to personal involvement and qualified immunity. This seems to be a feature of Fifth Circuit practice under *Schultea v. Wood,* 47 F.3d 1427, 1433 (5th Cir. 1995), *reaffirmed Johnson*

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v. Halstead, 916 F.3d 410, 416 (5th Cir. 2019) ("When the defendant asserts qualified immunity, the court can order the plaintiff to submit a reply, refuting the immunity claim with factual detail and particularity"). It is odd that the defendants sought an order providing plaintiff a chance to improve her pleadings. The Supreme Court has twice reversed the Fifth Circuit on heightened pleading requirements in civil rights cases. In *Leatherman v. Tarrant County,* 507 U.S. 163, 164 (1992), the court rejected heightened pleadings generally in § 1983 cases, reserving question as to whether more detailed pleadings could be required on the issue of qualified immunity. Later, the Court reversed in a unanimous *per curiam* opinion in *Johnson v. Shelby County, Miss.,* 579 U.S. 10, 135 S.Ct. 346, 347 (2014), when the Fifth Circuit tried to apply qualified immunity and heightened pleadings to a municipal defendant – such as Dallas County here. Notably, the Prison Rape Elimination Act forbids the very conduct here: "The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status." 28 C.F.R. § 115.15(e). With counsel, Jackson may be able to state her claim more specifically. She is represented by Scott H. Palmer, PC, Addison, Texas.

TEXAS – Ronnie Robert Molina, *pro se,* is a gay inmate with a mental health history, who has had numerous incarcerations. In *Molina v. Wise County,* 2020 WL 758723 (N.D. Texas, February 14, 2020), U. S. District Judge Mark T. Pittman granted summary judgment against him on claims that defendant jail officials were deliberately indifference to his safety in connection with sexual harassment and sexual assault by another inmate. Judge Pittman grants summary judgment on qualified immunity grounds. Qualified immunity applies if the law is unsettled or if there are no material factual issues about whether the settled law has been violated. The court can proceed with either analysis first – *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) – and Judge Pittman elects to address the second prong. He finds no triable issue on whether the standards of *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), were violated. *Farmer* requires both a serious risk of harm and deliberate indifference by defendants (correctional officers) to that risk in order to impose 8th Amendment liability. Judge Pittman finds a serious risk here, based on Molina's allegations of prior sexual assault by his assailant and continuous harassment, demanding sex. The aggressor inmate choked Molina, demanded oral sex, and masturbated on him prior to the sexual assault that is the subject on the lawsuit. Molina reported all of this to the defendant officers. Judge Pittman found that they were nevertheless not deliberately indifferent to the risk because: (1) Molina did not allege that they acted "intentionally and wantonly" to encourage the assault; and (2) Molina is a "serial complainer of being a victim of inmate-on-inmate sexual harassment." Neither reason is justified by the law. For the "intentionally and wantonly" standard, Judge Pittman relies on a pre-*Farmer* Fifth Circuit case involving alleged denial of medical care, when the record showed that the plaintiff had received attentive and comprehensive treatment. *Johnson v. Treen,* 759 F.2d 1236, 1238 (5th Cir. 1985). The instant case is not medical and Molina's complaints about safety risk were not addressed, other than one of the defendants suggesting that Molina protect himself. Judge Pittman also quotes a Seventh Circuit case – *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997) – in which the court wrote that the "fact that an inmate sought and was denied protective custody is not dispositive of the fact that prison officials were therefore deliberately indifferent to his safety." This is out of context. The defendants in *Lewis* responded, and they separated plaintiff from his assailant prior to the assault. The court noted: "Had the defendants in this case simply refused to do anything, Lewis' case might survive summary judgment. But the record speaks otherwise. They transferred Lewis to a different area in the prison . . . ." Finally, on this point, Judge Pittman cites *Daniels v. Williams,* 474 U.S. 327, 332 (1986), holding that a prisoner who fell down a stairway did not state a claim for deliberate indifference because officials failed to abate a hazard on the steps. This reliance on the Supreme Court's declination to constitutionalize prisoners' slip and fall cases was too much even for the editors of Westlaw, who marked the citation with bold "?" In short, *Farmer* requires more than negligence but less than the intentional standard demanded here. On Molina's supposedly being a "serial complainer" about sexual assault, this goes to his credibility, not to any issue properly before the court on summary judgment, because it is for the jury to determine which of the contested facts they will believe. It is certainly plausible to this writer that a gay prisoner with a mental health history could be a "serial" victim of sexual assault. Judge Pitman is a member of the Federalist Society. He was appointed to the District Court by President Trump last August.

VIRGINIA – Transgender plaintiff Zamal'iah Asia-Unique Carter-el sues after being strip searched by a male sergeant, as part of a routine quarterly search of all prisoners and cells, in *Carter-el v. Boyer,* 2020 WL 939289 (E.D. Va., Feb. 25, 2020). U.S. District Judge T.S. Ellis grants summary judgment to defendant on the merits and on qualified immunity. The search at issue was conducted in semi-privacy and without touching the plaintiff. Carter-el's complaint states that she has had some feminizing surgery and identifies as transgender. Her commitment papers say she is male, and she is incarcerated

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at a male facility. The defendant sergeant moved for summary judgment and his counsel sent a notice to Carter-el, as required by *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir. 1975), advising her of the consequences of summary judgment and of the filing of affidavits and papers under penalty of perjury. Carter-el wrote to the court that she did not understand the *Roseboro* notice or know what she was supposed to do. A "law clerk," writing on E.D. Va. court letterhead, responded that Carter-el was "not required to respond to the defendant's motion" and that if she did not respond, "defendant's motion will be decided solely based on what has been filed in the case so far." Carter-el did not respond, and Judge Ellis did not consider her Complaint or Amended Complaint in opposition to summary judgment, because they were "unverified." The official communication from the court "law clerk" in response to Carter-el's inquiry about what to do did not inform her that what she had filed "so far" would not be considered because it was not verified. In fact, a lay reader could reasonably conclude that it would be considered. Carter-el did not file opposition to summary judgment. Judge Ellis refused to consider the allegations about Carter-el's transgender presentation and "pre/post-surgery," citing *Higgins v. Scherr,* 837 F.2d 155, 157 (4th Cir. 1988). (*Higgins* actually reversed summary judgment, noting – in a case with counsel – that the district judge in dismissing had given too much weight to the fact that the complaint was unverified. The sequence here – involving the "law clerk," reliance on *Higgins,* the *pro se* plaintiff, and what is likely Carter-el's obvious presentation to the defendant – seems outrageous. On the merits, Judge Ellis concludes that no cross-gender search occurred because Carter-el is legally male; and she was searched by a male. The problem is simply defined away once the pleadings are not considered. The search also was conducted under circumstances that minimized exposure of Carter-el to nudity in front of other inmates, and it did not involve touching. Thus, there was no constitutional violation. Regulations of the Prison Rape Elimination Act, disapproving cross-gender searches absent exigent circumstances (*see* 28 C.F.R. § 115.15), are not implicated because the search was not "cross-gender" according to Judge Ellis, and PREA "does not endow litigants with any private cause of action or rights to enforce." For similar reasons, the sergeant is entitled to qualified immunity. This discussion adds little. Judge Ellis refers to Carter-el throughout the opinion with feminine pronouns, because, he writes, "it is appropriate . . . because that is how she identifies."

WISCONSIN – A correction officer (Kollmann) allegedly disclosed *pro se* plaintiff Derek Arthur Tabbert's HIV status to other inmates at Wisconsin's Green Bay prison in *Tabbert v. Kollmann,* 2020 WL 886184 (E.D. Wisc., Feb. 24, 2020). U.S. District Judge William C. Griesbach allows Tabbert to proceed past screening on a medical privacy claim, citing *Doe v. Delie,* 257 F.3d 309 (3d Cir. 2000); and *Powell v. Schriver,* 175 F.3d 107 (2d Cir. 1999). Both cases deal at length with inmate medical privacy, which Judge Griesbach finds protects against "unjustified" medical disclosures, which are sufficiently plead here.

WISCONSIN – *Pro se* prisoner Brandon Bradley, Sr., sued prison officers who allegedly beat her severely (twice) while she was cuffed. This occurred after she was returned from the hospital following a drug overdose and after she had flooded her cell on each occasion. Bradley also protests putting her in a "kilt" following the first beating, since she is transgender. In *Bradley v. Beahm,* 2020 U.S. Dist. LEXIS 23239, 2020 WL 686164 (E.D. Wisc., February 1, 2020), U.S. District Judge William C. Griesbach permits Bradley to proceed on an excessive force claim against the officers under *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). Judge Griesbach does not address the "kilt" claim. It is unclear from the opinion (or from the Complaint in PACER), whether the officers had transphobic or anti-trans animus – or whether they allegedly beat Bradley for causing "trouble." Either would state a claim, since defendants could not argue that they had a legitimate need to restore order when the inmate was already cuffed. Judge Griesbach denies counsel without prejudice. The opinion discusses an "informal arrangement" between the Clerk of Court and the Wisconsin Department of Justice for service of process that seems well worth emulating.

WISCONSIN – Prisoner Ricardo Glover had a radical prostatectomy that left him with erectile dysfunction. According to a urologist, he required Cialis – a medicine not on the prison formulary (pharmacy inventory) – in order to prevent permanent impotency. He sued after his application for an exception for him to receive the non-formulary drug was disapproved. The U.S. District Judge Lynn Adelman (E.D.Wisc.) dismissed his case for multiple reasons: erectile dysfunction is not a serious medical need, he had failed to sue a Dr. Holzmacher (whom discovery showed had denied the exception – the other defendants not being personally involved in the decision), he was not similarly situated for equal protection purposes to transgender inmates whose off-formulary medication needs were met, and his release mooted his injunctive claims. He appealed *pro se,* and the Seventh Circuit appointed counsel. In *Glover v. Carr,* 2020 U.S. App. LEXIS 3580 (7th Cir., Feb. 6, 2020), the Court of Appeals – in an opinion by Ilana D. Rovner (G.H.W.

Bush), for herself and for Circuit Judges Joel M. Flaum (Reagan) and David F. Hamilton (Clinton) – reversed in part and remanded. The 7th Circuit panel held that Glover should have been permitted to amend his complaint. The medical need was serious under applicable standards. *See Estate of Clark*, 865 F.3d 544, 553 (7th Cir. 2017) (for qualified immunity purposes, duty to treat "need not be litigated and then established disease by disease or injury by injury"); *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011) (refusing to provide prescribed medication or heed specialist's advice can violate Eighth Amendment); *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) (serious medical need includes one that has been diagnosed by a physician as requiring treatment or one which could result in further significant injury if left untreated). Leave should have been granted to name Dr. Holzmacher, unless he had qualified immunity. There is at least one case granting qualified immunity on a erectile dysfunction claim – *Michtavi v. Scism*, 808 F.3d 203, 206-07 (3d Cir. 2015) – but the court is not sure it is correct and is unwilling to resolve qualified immunity on appeal, since it is personal to the not-yet-named defendant and should be addressed on remand in the first instance. The answer to the question "is not so obvious" is that an amendment adding Dr. Holzmacher would be futile. Responding to the defendants' argument that inmates have no right to sexual potency and that the state has an interest in preventing sexual activity in prison, the court observes (without deciding) that treatment for Glover needed to be timely if he was to be cured and that he was about to be (and now is) released from custody. While Glover's injunctive claims are moot, his damages claim – for being rendered permanently impotent – is not. The court does not elaborate on the equal protection claim raised below. Except for the remand for Dr. Holzmacher, Judge Adelman's decision is affirmed in all "other" respects. Glover was represented by Jones Day (New York and San Francisco).

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

ALABAMA – On February 26, the Alabama House Health Committee and the Senate Health Committee both approved bills that would prohibit health care providers from prescribing hormones to or performing surgery on minors for the purpose of gender transition. According to a report from *usnews.com*, Lead House sponsor Wes Allen said "that children who struggle with their gender identity should receive mental health counseling and not medications or surgeries that cause physical changes." Doctors who violate the law could be charged with felonies for providing prohibited services to anybody under the age of 19. Teachers, principals and school counselors "would be charged with a misdemeanor if they don't tell parents their child identifies as transgender" under these bills. The sponsors of the bill said that "current science on gender issues" is "unsettling." The purpose of the bill is said to be to protect "vulnerable" children from getting medical procedures or medications with "uncertain long-term effects." It does not appear that anybody in the Alabama legislature is able to protect transgender youth from the meddling of state legislators whose expertise on these subjects is questionable. Human Rights Campaign's Alabama State Director, Carmarion D. Anderson, issued a statement condemning the bill. There is also a bill pending in the legislature that would prohibit public schools from allowing transgender students to participate on sports teams that do not match the gender on their birth certificates.

CONNECTICUT – The Department of Motor Vehicles has dropped the requirement for medical documentation to update gender markers on IDs, making the process accessible to transgender people whose transition does not include gender affirmation surgery.

KENTUCKY – The City of Cold Spring has become the 19th municipality in Kentucky to pass a Fairness Ordinance that adds sexual orientation and gender identity to the prohibited grounds of discrimination in employment, housing and public accommodations within the city. Cold Spring is the third locality to pass such legislation this year, following Fort Thomas and Woodford County, according to a press release dated February 24 from the Fairness Campaign. The state legislature, dominated by representatives of rural areas, has not yet agreed to pass such legislation statewide. The first bill to enact such protection statewide was filed twenty years ago and has never come to a vote in the legislature. Governor Andy Beshaer, a Democrat, has called for passage of the statewide Fairness Law as well as a ban on "conversion therapy."

PENNSYLVANIA – Allegheny County Council voted 13-2 to ban conversion therapy performed on LGBTQ youth within the county on February 11. *Pittsburgh City Paper.*

VIRGINIA – The Virginia Values Act, which prohibits discrimination because of sexual orientation or gender identity, had passed both houses of the legislature by February 26 and was sent to Governor Ralph Northam, who had pledge to sign it.

WASHINGTON – Washington state has joined the nine other jurisdictions that have taken legislative action against

the use of the "homosexual panic" defense by those charged with homicide against LGBT individuals. The measure is named after Nikki Kuhnhausen, a transgender teen who was murdered in 2019. The man charged with her murder is awaiting trial on homicide charges. The Associate Press article reporting on passage of the bill stated that it was not known whether he would try to use the panic defense. The prosecution claims that the man strangled Kuhnhausen after learning that she was transgender.

LAW & SOCIETY NOTES

By Arthur S. Leonard

LGBTQ NATION reported on February 10 that a new peer-reviewed study "may have found genetic differences relating to gender identity and brain development." The study, published in Scientific Reports (https://www.nature.com/articles/s41598-019-53500-y) involving sequencing DNA of 17 transgender women, 13 transgender men, and 88 cisgender people and comparing them, looking for variations in the DNA of transgender people not present in cisgender people. They found 21 very rare variants in genes that were common among the transgender people but not the cisgender people. The study authors said that they were not looking for, and did not find, a "transgender gene." Most human traits result from the interaction of many genes. "Rather than being tied to variation within a single gene," says the study, "an individual's gender identity is more likely the result of a complex interplay between multiple genes as well as environmental and societal factors."

INTERNATIONAL NOTES

By Arthur S. Leonard

CROATIA – The Constitutional Court of Croatia ruled favorably on an appeal by Mladen Kozic and Ivo Segota, who are seeking to be foster parents. The court decided that same-sex couples in Croatia (which does not allow same-sex couples to marry) have the right to be foster parents. The Court found that the exclusion of same-sex couples from the foster care system was discriminatory and unconstitutional, ordering the lowers courts, social welfare centers, and other decision-making bodies in the foster care system not to exclude applicants based on their life partnership status, according to a report posted to the internet on February 7 by Forrest Stilin and distributed by the International Lesbian & Gay Association. Although the court did not strike down statutory provisions that the defendants relied upon to deny the two men's application, the court found that the relevant authorities are obliged by constitutional equality guarantees to interpret the statutes in such a way as to recognize the right to equal treatment of the couple. Daniel Martinovic, Coordinator of "Rainbow Families," a group representing the interests of same-sex couples, issued a statement characterizing the importance of the decision: "The decision recognizes and prevents discrimination against life partners in the future and does what politicians in Croatia have not accomplished for years. This is a positive leap forward for the equality for all citizens of the Republic of Croatia, regardless of their sexual orientation or gender identity. The LGBT community has once against fought for its rights alone, persistently and together. Our courage and insistence on a fairer society can hopefully be a milestone for other marginalized groups in our society.

INDIA – Building on Supreme Court rulings striking down the law against gay sex and recognizing the gender status of transgender individuals, a same-sex couple in India has launched an action in Kerala State for a writ requiring the government to allow same-sex couples to marry. The matter is being taken seriously by the trial judge, who directly requested the national government to file a response to the Petition. The Petition, a draft of which has been circulating on the internet, harvests very useful quotations from prior decisions by the nation's highest court, including a passage stating that the right of privacy recognized in the Constitution extends to marriage, and stating: "Personal choices governing a way of life are intrinsic to privacy." India is the second most populous nation on earth, after China, so achievement of marriage equality there would be a major step forward on the world stage for marriage equality. But we caution that the judicial process moves quite slowly in India. Although an affirmative ruling by the Kerala High Court would have national effect, since there is no contradictory appellate ruling on the books, a likely government appeal and the usual slow pace of deliberation in the Supreme Court *could* mean that it will be years until there is a final decision in this case.

ISRAEL – The High Court of Justice ruled on February 27 that the law excluding same-sex couples from access to surrogacy is discriminatory and violates the rights to equality and to parent children. The case took ten years from filing to a decision by the court. The Court held that the government must present to the court an "egalitarian arrangement" to deal with the surrogacy issue within one year. In default of that, the court will write a judgment imposing a remedy. The court made clear that any revision of the law on surrogacy may not exclude men/same-sex couples from access to the procedure. Thanks to Prof. Aeyal Gross of Tel Aviv University for providing an explanation of the decision, which was issued in Hebrew by the court.

PROFESSIONAL *notes*

MAURITANIA – Under the mistaken belief that a same-sex marriage was being celebrated, police arrested several men for "committing indecent acts" and "inciting debauchery" based on a video that circulated on social media showing the men at some sort of a celebration at a restaurant. Although it turned out to be a birthday party rather than a wedding, the men were nonetheless convicted on the charges and all sentenced to two years in prison. A woman also received a one-year suspended sentence for being present at the event. A police report stated that the men had "confessed that they are homosexuals" under interrogation. Article 308 of the country's penal code prohibits homosexual conduct between adults, with a death sentence for males, although nobody has been sentenced to death under the law for several years. An appeal was promptly filed, pointing to Mauritania's ratification of the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights, which requires ratifying countries to protect freedom of expression without regard to sexual orientation or gender identity. *Human Rights Watch – hrw.org/news*.

MEXICO – Rex Wockner reported on February 9 that Baja California brought in marriage equality by an administrative decision by the executive branch and the Civil Registry state director, citing the Supreme Court of Mexico's 2015 marriage equality decision.

SWITZERLAND – On February 9 voters approved a measure that will make it illegal to discriminate against people because of their sexual orientation, the Associated Press reported. The parliament approved adding sexual orientation to the country's anti-discrimination law, but opponents gathered enough signatures to force a referendum vote. The vote to approve the law received 63% support, and 23 out of the 26 Swiss cantons produced majority support for the measure. The existing law prohibited discrimination only on grounds of race or religion. The addition of sexual orientation does not include discrimination because of gender identity.

PROFESSIONAL NOTES

By Arthur S. Leonard

We sadly note the death of the **HONORABLE DEBORAH BATTS**, 72, a Senior U.S. District Judge in the Southern District of New York, the first "out" LGBT federal district judge. Judge Batts was nominated for the district court by President Bill Clinton on the recommendation of U.S. Senator Daniel Patrick Moynihan. At the time, she was a professor at Fordham University Law School in Manhattan and a member of the N.Y. City Bar Association's Special Committee on Lesbians and Gay Men in the Legal Profession. She was not "out" when she joined the Committee at the invitation of your Editor, who was co-chair of the Committee and was tasked by the Bar Association with finding some non-LGBT people to be members of the Committee. She "came out" in the course of her committee membership and the confirmation process on her judicial nomination. Judge Batts took the bench in 1994 and took senior status in 2012. She presided over several notable trials, including the criminal trial of Al-Qaida member Mamdouh Mahmud Salim and a defamation lawsuit against television controversialist Bill O'Reilly. At the time of her death, she had been scheduled to preside at a criminal trial of lawyer Michael Avenatti on charges of theft from clients. She was an alumna of Harvard Law School, which honored her by accepting an official portrait painted by noted artist Simmie Knox (who painted the official White House portrait of President Clinton), commissioned and paid for by LGBT alumni of the Law School, which is prominently displayed in the Law School. Prior to joining the Fordham faculty, she had been a federal prosecutor in the Southern District of New York and previously engaged in private practice. She was a special associate counsel for New York City's Department of Investigation in 1990-91 and a commissioner of the New York Law Revision Commission in 1990-94. She is survived by her wife, Dr. Gwen Lois Zornberg.

President Donald J. Trump announced by tweet on February 19 that he had designated **RICHARD GRENELL** to become Acting Director of National Intelligence, a cabinet-level position. Grenell, who will simultaneously continue serving as Ambassador to Germany, is the highest-ranking out gay man in federal service. He will be in charge of overseeing U.S. intelligence agencies and advising the president and the national security advisor on measures related to national security. Critics noted that, in common with many Trump Administration high-level appointments, Grenell had no discernible qualifications for the position other than pronounced loyalty to the president. On February 28, Trump announced that he would formally nominate U.S. Representative John Ratcliffe for the position. This is a controversial nomination, since Ratcliffe also has few, if any, discernible qualifications for the position. Until Ratcliffe is confirmed by the usually-rubber-stamp Republican Senate, Grenell can continue to serve as Acting Director.

PUBLICATIONS NOTED

1. Bishin, Benjamin G., Thomas J. Hayers, Matthew B. Incantalupo, and Charles Anthony Smith, Elite Mobilization: A Theory Explaining Opposition to Gay Rights, 54 Law & Soc'y Rev. 233 (March 2020).
2. Brown, Elizabeth, Inara Scott, and Eric Yordy, R. Corps: When Should Corporate Values Receive Religious Protection?, 17 Berkeley Bus. L.J. 91 (2020).
3. Cahn, Naomi, and Kim Kamina, Adapt Old Strategies to Fit New Family Arrangements, 47 EST. PLAN. 30 (Jan. 2020).
4. Fan, Jennifer S., Woke Capital: The Role of Corporations in Social Movements, 9 Harv. Bus. L. Rev. 441 (Spring 2019) (Case studies include examination of corporate role in advancing LGBT rights through adoption of policies and amicus briefs in landmark cases).
5. Garry, Patrick M., The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation, 65 Wayne L. Rev. 279 (Winter 2020).
6. Goldscheid, Julie, Sexual Assault by Federal Actors, #METOO, and Civil Rights, 94 Wash. L. Rev. 1639 (Dec. 2019) (calls for more attention to workplace assault on LGBT employees).
7. Matsumura, Kaiponanea T., The Integrity of Marriage, 61 Wm & Mary L. Rev. 453 (2019).
8. Mazzone, Jason, and Stephen Rushin, State Attorneys General as Agents of Police Reform, 69 Duke L.J. 999 (February 2020) (notes role of attorneys general in securing formal policing policies respecting LGBTQ members of the public).
9. Oliva, Jennifer D., and Balena E. Beety, Regulating Bite Mark Evidence: Lesbian Vampires and Other Myths of Forensic Odontology, 94 Wash. L. Rev. 1769 (Dec. 2019) (before seeing this article, we were unaware that "lesbian vampire mythology" was giving rise to wrongful convictions based on "expert" testimony about bite mark evidence in criminal trials).
10. Parker John B., Paving a Path Between the Campus and the Chapel: A Revised Section 510(c)(3) Standard for Determining Tax Exemptions, 69 Emory L.J. 321 (2019) (Should religiously-affiliated educational institutions be permitted prized 501(c)(3) status under Internal Revenue Code if they violate public policy by allowing discrimination because of sexual orientation or gender identity due to religious doctrine? The author thinks not, and proposed a theoretical model.).
11. Prol, Thomas, Why NJ Needs a Law Banning the Gay-Trans 'Panic' Murder Defense, 226 N.J.L.J. No. 7, p. 8 (Feb. 17, 2020).
12. Robinson, Russell K., Justice Kennedy's White Nationalism, 53 U.C. Davis L. Rev. No. 2 (2019) (critical scrutiny of Kennedy's last LGBT-related opinion for the Court, *Masterpiece Cakeshop*).
13. Taub, Stephanie N., *NY v. HHS* and the Challenge of Protecting Conscience Rights in Healthcare, 21 Federalist Soc'y Rev. 10 (Feb. 10, 2020) ("protecting conscience rights in healthcare" includes, of course, allowing persons with religions objections to providing health care to LGBTQ people to avoid doing so despite the anti-discrimination requirements of the Affordable Care Act).
14. Velte, Kyle C., Straightwashing the Census, 61 B.C. L. Rev. 69 (Jan. 2020).
15. Waggoner, Kristen K., Mastering *Masterpiece*, 68 Cath. U. L. Rev. 699 (Fall 2019) (Alliance Defending Freedom staff attorney channels the organization's briefing in *Arlene's Flowers* to argue for a robust free speech and religious freedom exemption for providers of weddings goods and services from having to comply with publication accommodations laws, repudiating Washington Supreme Court's reaffirmance of liability in *Arlene's Flowers*).
16. Wojcik, Mark E., Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity, 40 N. Ill. U. L. Rev. 1 (Fall 2019).

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers. All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor via e-mail to info@le-gal.org.