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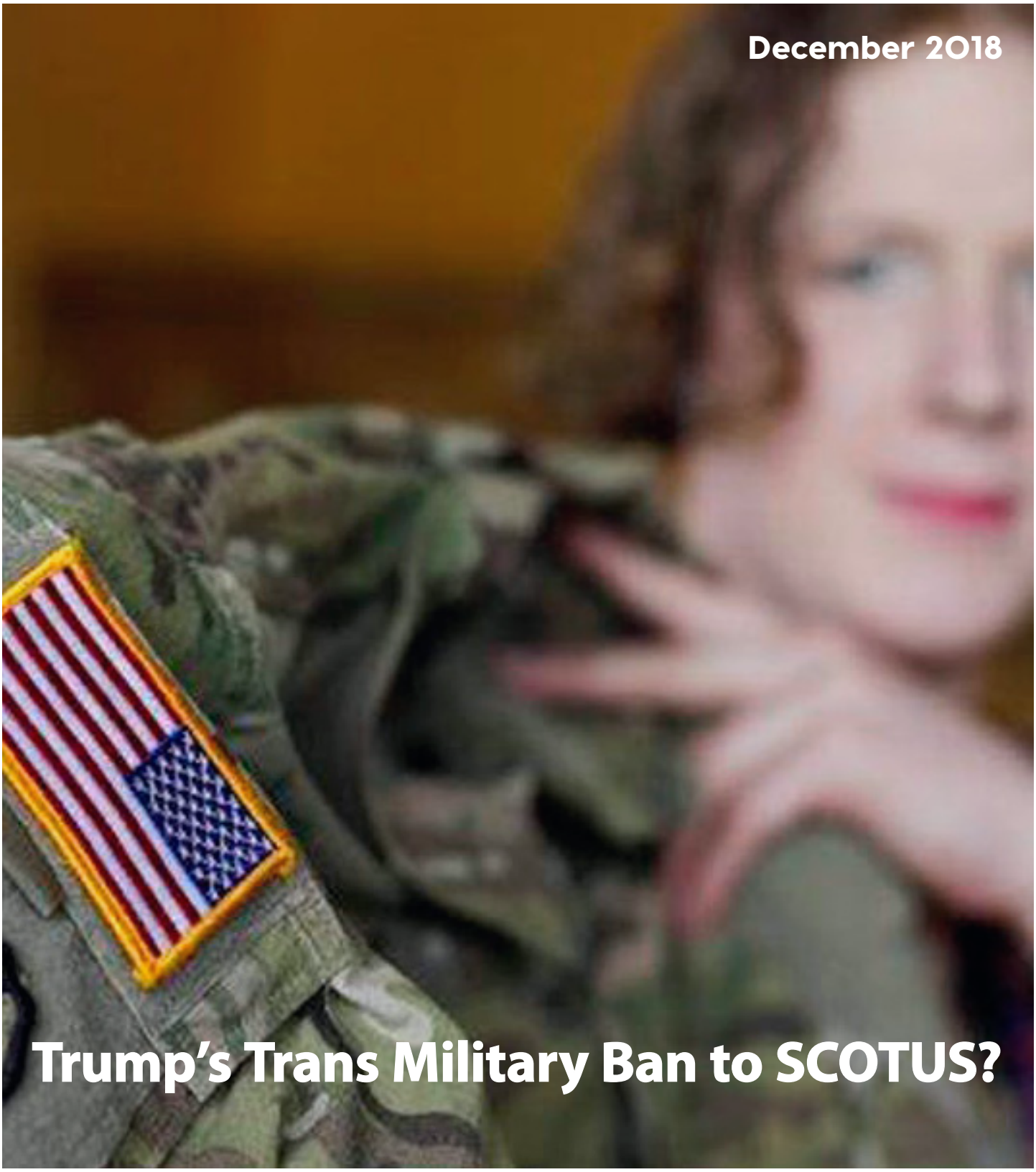
LAW NOTES

December 2018



Trump's Trans Military Ban to SCOTUS?

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LAW NOTES

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Transgender U.S. Army Capt. Jennifer Sim (photo by Matthias Schrader, The Associated Press)

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Trump Administration Urges Supreme Court to Jump the Queue and Intervene in Transgender Military Dispute

By Arthur S. Leonard

With appeals pending in two circuit courts (one already argued in October, the other scheduled for argument in December), the Trump Administration, impatient to begin enforcing a policy limiting military service by transgender people announced by President Donald J. Trump in a series of tweets on July 26, 2017, amplified by a presidential memorandum in August 2017, and made more detailed in an implementation plan released by Defense Secretary Jim Mattis in February 2018, filed three petitions for certiorari in the Supreme Court during the Thanksgiving holiday period, seeking a "writ of certiorari before judgment" timed to bring the matter to a decision before the end of the Court's October 2018 term in June 2019. The Solicitor General's petitions were very open about their strategy of "getting this done" as soon as possible, waiving in advance the right to file a reply to any responsive filing by the respondents and urging the Court to consider these petitions at its January 11, 2019, conference, anticipating that the grant of a petition on that date would make it possible for the case to be argued and decided during the current term of the Court.

The cases are: *Trump v. Karnoski*, No. 18-676 (docketed Nov. 23, 2018), seeking review of the U.S. District Court (W.D. Wash.) order granting a nationwide preliminary injunction in *Karnoski v. Trump*, 2017 WL 6311305, and that court's order striking the government's motion to dissolve the preliminary injunction, 2018 WL 1784464, as to which appeals are pending before the 9th Circuit; *Trump v. Doe 2*, No. 18-677 (docketed Nov. 23, 2018), seeking review of the U.S. District Court (D.D.C.) order granting a nationwide preliminary injunction in *Doe v. Trump*, 275 F. Supp. 3d 167 (2017), and denying the government's motion to dissolve the preliminary injunction, 315 F. Supp. 3d 474 (2018), as to which appeals are pending before the D.C. Circuit; and *Trump v. Stockman*, No. 18-678 (docketed Nov. 23, 2018), seeking review of the U.S. District Court (C.D. Cal.) order granting a nationwide preliminary injunction in *Stockman v. Trump*, 2017 WL 9732572, and denying the government's motion to dissolve the preliminary injunction, 331 F.Supp.3d 990 (2018), as to which appeals are pending before the 9th Circuit.

Filing of these petitions, of course, signaled the S.G.'s pessimism about winning the appeals in the circuit courts, and, even if it won in the 9th and D.C. Circuits, there is still the matter of a nationwide injunction issued last year by District Judge Marvin J. Garbis (D. Md.) in *Stone v. Trump*, 280 F. Supp. 3d 747 (2017), which the 4th Circuit refused to stay, as the government awaits a ruling by District Judge George L. Russell, III, on its subsequent motion to dissolve the injunction. (Judge Garbis retired from active service in June, and the case was reassigned to Judge Russell.) Presumably, as soon as Judge Russell denies that motion – a likelihood signaled by his November 30 ruling rejecting the government's objections to a U.S. Magistrate Judge's rulings on discovery issues (see below) – the S.G. will file a petition for certiorari before judgment in that case as well.)

The S.G. lays out the history of the issue in some detail, of course coloring it to support the government's position. The recitation of the history implies (without saying directly) that Defense Secretary Mattis's decision in June 2017 to delay implementing the part of the policy changed announced a year earlier by Secretary Ash Carter of lifting the ban on transgender people enlisting in the military on July 1, 2017 (which Mattis announced would be deferred to January 1, 2018), and the resulting "study" Mattis ordered to consider the issues stemming from raising the enlistment ban can be considered part of an ongoing study supporting Trump's July 26 tweet, stating that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." In his tweet, Trump said that he was announcing this policy after consulting "My Generals and Experts," although the Administration has rejected all attempts by plaintiffs in the result lawsuits to get disclosure of the identity of these individuals as part of discovery. As a bit of revisionist history, the Justice Department has been taking the position that the tweet itself should not be taken literally, and that Trump was not announcing a total ban on military service by transgender people, even though his subsequent memorandum of August 27 is difficult to interpret as anything other than a total ban. After Mattis submitted his Implementation Plan, Trump issued a new memorandum revoking his August memorandum and any other statements he had made on the subject,

The Solicitor General's petitions were very open about their strategy of "getting this done" as soon as possible, waiving in advance the right to file a reply to any responsive filing by the respondents and urging the Court to consider these petitions . . .

and authorizing Mattis (and the Coast Guard commander) to adopt a policy Mattis deemed appropriate, referring to the policy Mattis had proposed.

Trump's "revocation" of the August 2017 memorandum and the July 2017 tweet and the announcement of Mattis's policy were the basis for the government filing new motions in all four cases seeking to have the preliminary injunctions dissolved, arguing that these injunctions, which were directed at the policy announced in the August 2017 memorandum, were effectively mooted by the February 2018 developments. The memorandum Mattis issued – whose authors were not named on the document and whose identities have also not been disclosed in response to discovery requests – was artfully constructed to attempt to shift the legal analysis and support the government's new argument that the transgender ban is not actually a transgender ban. Instead, the government now argues, the "new" Mattis Implementation Plan focuses on individuals who are diagnosed with "gender dysphoria," whether treated or untreated, a condition whose description in the Diagnostic and Statistical Manual (DSM), 2013 edition, the government quotes and then describes as a "diagnosable mental disorder," arguing that the military should not be required to enlist and deploy individuals who are suffering from a "diagnosable mental disorder," pointing to other diagnosable mental disorders as to which there is no controversy about the Defense Department considering them as disqualifying for military service. In an internally contradictory argument, the government now says it will "grandfather" incumbent service members who have completed gender transition (which necessarily involves having been diagnosed with gender dysphoria, because the standards of care require such a diagnoses as a prerequisite for the provision of medical services of transition) and are now serving in their desired gender, but it will not otherwise allow service by people who have been diagnosed with gender dysphoria. Those people who claim to be transgender but have not been formally diagnosed would be permitted to enlist and serve, provided they are willing to serve consistent with their gender as identified at birth and have no intention to transition while serving.

> "After an extensive process of consultation and review involving senior military officials and other experts, the Secretary of Defense determined that individuals with a history of a medical condition called gender dysphoria should be presumptively disqualified from military service . . . "

In all three cases for which the S.G. filed petitions, the District Judges have pointedly rejected the government's argument that there is no transgender service ban and that the Mattis Implementation Policy is not premised on categorical gender identity discrimination. Allowing transgender people to serve so long as they suppress their gender identity issues and pretend to be cisgender strikes these judges as sophistry, and so it is. All of the judges have held that the ban is subject to at least heightened scrutiny, and Judge Pechman in Seattle has gone further to hold that is it subject to strict scrutiny, having found gender identity to be a suspect classification for equal protection purposes. By arguing that the ban is based on gender dysphoria, a "diagnosable mental disorder," the government seeks to evade this analysis, for surely discrimination because of a mental disorder does not invoke even heightened scrutiny (see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)), thus the ban is not presumptively unconstitutional the government has no burden to justify it. Or so they argue. None of the three district judges accept that argument, and neither does Judge Russell in the course of his recent decision on discovery issues. But they drag it out again and now present it to the Supreme Court.

Of course, to get the Supreme Court to take this case "out of order" – before the circuit courts of appeals have ruled – the S.G. must persuade the Court of the extreme urgency for the government to actually implement Mattis's policy. Writes the S.G. in the *Karnoski* petition: "This case satisfies that standard. It involves an issue of imperative public importance: the authority of the U.S. military to determine who may serve in the Nation's armed forces. After an extensive process of consultation and review involving senior military officials and other experts, the Secretary of Defense determined that individuals with a history of a medical condition called gender dysphoria should be presumptively disqualified from military service, particularly if they have undergone the treatment of gender transition or seek to do so. The district court in this case entered a nationwide preliminary injunction nullifying that exercise of professional military judgment and blocking the implementation of a policy that the Secretary has deemed necessary to 'place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world." (Then quoting from a case in which the Supreme Court said that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1987), in which the Court upheld a

military regulation under which Jewish chaplains were forbidden from wearing yarmulkas while in uniform, a ruling promptly overruled by Congress, which collectively denounced the regulation as applied.)

The S.G.'s argument misrepresents and overstates his case, of course. There is no Supreme Court precedent holding that the Constitution is irrelevant to military regulations. The reference to "an extensive process of consultation and review involving senior military officials and other experts" is disingenuous. There was an extensive process involving senior military officials and other experts – real experts – that led to Secretary Carter's decision to end the existing policy against transgender service in June 2016. There was no such extensive process before Trump's July 26 tweet – which, it has been reported – was responding to threats by House Republicans to block a military appropriations bill with funding for Trump's coveted "Wall" if Trump did not do something to stop the Defense Department from paying for the medical costs of transgender personnel transitioning – and was thus inspired entirely by politics or his August 2017 memorandum. The government, while continuing to try to make a case that Mattis's June 2017 announcement that he was deferring lifting the enlistment ban until January 1, 2018, led to a study that support's Trump's decision is nonsensical, as Trump's tweet was issued just weeks after Mattis's announcement. Furthermore, as all the judges point out, the "study" undertaken in response to Trump's August memorandum was not about whether to ban transgender military service, but rather how to implement the ban that Trump had announced. Furthermore, there are strong suspicions, based on the wording of the supportive memorandum and the sources it cited, that this so-called study was essentially subcontracted to anti-transgender activists and is not the result of any sort of objective study. Finally, of course, there is no evidence presented that the presence of several thousand transgender service members, many now serving openly since July 1, 2016, have had any adverse effect on the military. The most that the *Karnoski* Petition can summon is that the cost to DoD for transgender health care has escalated over the past two years; not surprising, since the military was not spending anything on this until after July 1, 2016, when the possibility of transgender service members being able to transition while serving began, and naturally as some people stepped over to get formal diagnoses and begin the transition process, expenses would mount. What continues to be true, as the RAND Corporation study conducted for Secretary Carter concluded, is that these expenses amount to a trivial percentage of the overall Defense Department spending on health care for uniformed personnel.

The Petition presents as a matter of the greatest urgency obtaining finality on any legal challenge to the "new Mattis policy," so that it can go into effect without further delay. "Absent an immediate grant of certiorari, there is thus little chance of a prompt resolution of the validity of Secretary Mattis's proposed policy," wrote the S.G. "And so long as this or any other injunction remains in place, the military will be forced nationwide to maintain the Carter policy – a policy that the military has concluded poses a threat to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." Yes, as has been universally observed, the U.S. military has fallen into utter disorder as a result of openly transgender people serving for almost two and a half years now – not!

After making his pitch for urgency, the S.G. devotes the last portion of the Petition to arguing that the district court decisions are wrong, claiming that the Mattis policy is consistent with equal protection because it does not discrimination on grounds of gender identity, because military policy decisions are entitled to judicial deference, because the Mattis policy will allow some transgender individuals to serve, because – and this echoes the arguments that Alliance Defending Freedom is making in its cert petition in the Boyertown School District case (see separate story, below) – housing transgender personnel presents privacy issues for cisgender personnel who are required to share living space with them, because of extra health care expenses, and because the district court's wrongly characterized Mattis's policy as essentially the crude ban that Trump announced in his tweet with insubstantial refinements. Disempowering federal courts from issuing nationwide injunctions is another major project of the Trump Administration, so the S.G. devotes a portion of the Petition to contesting the appropriateness of nationwide injunctions in these cases, arguing that under Article III the plaintiffs lack standing to seek such relief, pointing to a case in which the Supreme Court had stayed a nationwide injunction issued by a district court on behalf of a gay military service member contesting his discharge in 1993 by a facial challenge to the anti-gay regulations (*U.S. Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993)), which the S.G. characterizes as "materially indistinguishable" from this case. The Supreme Court in that Order limited the effective of the injunction to the individual plaintiff pending a final ruling on the merits. At the time, of course, during the first year of the Clinton Administration, Congress was convulsed with responding to Clinton's campaign pledge, reiterated after his election, to end the existing "gay ban" resulting in the enactment of the "Don't Ask, Don't Tell" policy.

The Petitions in Doe and Stockman restate the "factual" summary from the Karnoski Petition and urge the Court to grant all three petitions, as there are differences in the composition of the plaintiff groups in each case and differences in the legal analyses of the district courts. ■

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Transgender Military Developments in the Lower Courts

By Arthur S. Leonard

Just one week after the Solicitor General's Petitions in three of the transgender military cases were docketed in the Supreme Court, new decisions were issued on November 30 in two cases, *Stone v. Trump* and *Doe 2 v. Trump*. Both went against the government.

In *Stone v. Trump*, 2018 U.S. Dist. LEXIS 203840, 2018 WL 6305131 (D. Md.), District Judge George L. Russell, III, largely rejected objections that DoJ had filed in response to a Memorandum Opinion and Order by Magistrate Judge A. David Copperthite. See 2018 WL 3866676 (D. Md., Aug. 14, 2018). Judge Cooperthite had rejected the government's request to stay discovery pending the outcome of dispositive motions still pending – perhaps most importantly, the government's motion to dissolve the preliminary injunction on the ground of mootness with its argument that the Mattis policy does not discrimination because of gender identity. The government was arguing that discovery, which it was opposing in general, was premature until there was a final ruling by the district court on the merits of the government's argument that the case should be dismissed. He also had ruled that the "deliberative process privilege," which courts have sometimes invoked to protect the ability of government officials to speak freely during internal policy debates, did not apply to deliberative materials regarding the transgender ban, and he had rejected the government's motion for a protective order to preclude discovery directed to parties other than the president.

In *Doe 2 v. Mattis*, 2018 U.S. Dist. LEXIS 202946 (D.D.C.), District Judge Colleen Kollar-Kotelly, who was the first to issue a preliminary injunction against the ban announced in the August 2017 memorandum on October 30, 2017, denied the government's motion to stay the preliminary injunction pending appeal. The S.G. had apparently already decided to file a cert petition in this case, since in this motion the government asked the court that the stay be granted "pending any potential, future proceedings in the United States Supreme Court" – in effect, a threat to the judge that if she did not stay her injunction, the government would go way over her head to ask the Supreme Court to intervene. Alternatively, the government asked that the nationwide scope of the injunction be stayed, pending the outcome of its appeal to the D.C. Circuit, which was scheduled to be heard on December 10.

> "[R]equiring transgender persons who have not undergone transition to serve in their biological sex forces them to 'suppress the very characteristic that defines them as transgender in the first place . . . the Ban turns on transgender identity – and not on any medical condition . . ."

Turning first to the *Stone* ruling, Judge Russell wrote that the defendants challenged "three aspects" of the Magistrate's Order: certain factual findings, the grant of plaintiffs' motion to compel and a collateral finding of mootness as to their motion for judicial determination of privilege claims, and the partial denial of a protective order. As to the factual findings, Russell rejected the government's arguments that the Magistrate Judge erred in finding that "DoD's Panel of Experts would not have existed by for President Trump's August [sic] 2017 Tweets; the circumstances regarding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy; and the new policy bans transgender persons from military service." By objecting to these findings, the government was, in effect, asking the district court to carry out the same analysis it would be undergoing in deciding the government's pending motion to dissolve the preliminary injunction. Thus, this writer's comment in the story above about Judge Russell's ruling signaling how that motion may ultimately be decided, since he found that the Magistrate Judge's "findings are reasonable."

He noted that the record showed that Mattis convened his "panel of experts" regarding implementation of Trump's policy pronouncement in a document titled "Terms of Reference" that he issued on September 14, 2017, directing the Deputy Secretary of Defense and the Vice Chairmen of the Joint Chiefs of Staff to "convene a Panel of Experts from within DOD to conduct a study to inform the Implementation Plan." Given the timing, it was reasonable to conclude that formation of this panel was in response to Trump's tweets. Further, it was reasonable to conclude that this panel was convened not to study the question whether transgender people should be able to serve but rather, in response to Trump's directive, to propose a policy to implement that ban that Trump had proclaimed.

As to the second objection, Judge Russell found that based on the limited evidence in the record – limited, he was too polite to say, because the government has stonewalled on discovery – it was reasonable to include that the situation involving readiness and deployability "could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy." In other words, the policy declared by Ash Carter in June 2016 after several years of study was based on the finding that allowing transgender people to serve would not compromise

readiness and deployability sufficiently to justify the old exclusionary policy, and nothing in the record suggested any change with regard to that in the year (and three weeks) that transgender people had been serving openly when Trump tweeted his ban. "In order to explain how conditions changed so dramatically between 2016 and 2018," wrote Russell, "Defendants would need to produce additional information about the Panel of Experts that they currently seek to protect under deliberate process privilege."

Finally, and most clearly signaling rejection of the government's argument that the Mattis policy is relevantly "new" by comparison to the policy proclaimed by Trump in the summer of 2017, Judge Russell said the Magistrate Judge's "finding that the Transgender Service Member Ban bans transgender person from military service is reasonable." The argument that the new policy shifts the ban from transgender persons to persons diagnosed with gender dysphoria did not persuade Judge Russell. "Prohibiting transgender persons who have undergone transition clearly discriminates on the basis of transgender identity," he wrote. "Moreover, requiring transgender persons who have not undergone transition to serve in their biological sex forces them to 'suppress the very characteristic that defines them as transgender in the first place,'" he wrote, quoting the district court decision in *Karnoski*. So, as the *Karnoski* court concluded, "the Ban turns on transgender identity – and not on any medical condition . . . "

As to the motion to compel discovery, Russell rejected the government's arguing that this was premature while other motions were pending, insisting that "it is within the Court's discretion to determine whether to stay discovery pending the resolution of dispositive motions," and the Magistrate Judge was acting "well within the bounds of his discretion" to compel discovery, particularly given the interest of this court in moving the case toward a conclusion where 'the parties appear to be very litigious," referring to a Local Court Rule. Moving more particularly to the government's argument that "deliberative process privilege" would bar most of the discovery plaintiffs seek, Russell commented, "Deliberate process privilege is not absolute and courts may balance the 'public interest in nondisclosure with the need for the information as evidence.'" He observed that "some courts have held that the deliberate process privilege does not apply where 'the plaintiff's cause of action is directed at the government's intent.'" That is clearly this case, where the equal protection challenge in the context of heightened scrutiny goes directly to the reasons the government claims to have adopted the policy being challenged – indeed, wrote Russell, "the government's intent is at the heart of the issue in this case." Any application of a "balancing test" between the plaintiffs' need for the information and the government's interest in keeping it secret would weigh in the plaintiffs' favor. The evidence plaintiffs are seeking "may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest." Furthermore, "no alternative evidence on government intent is available to plaintiffs," and such evidence is, as the court said, at the "heart" of this case.

Judge Russell apparently accepts the determination of the other district courts that this is not a "rational basis" case or a case in which deference to the military dictates the outcome. He cites the Karnoski preliminary injunction opinion, holding that "transgender persons are at least a quasi-suspect class," and that "the lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest." Furthermore, he found that the Magistrate Judge's correct conclusion that the deliberate process privilege did not apply in this case mooted the issue whether a particular document that was disclosed by defendants inadvertently (a PowerPoint document that was sent to plaintiffs "in error") was privilege under that doctrine. The court also corrected a misinterpretation of the magistrate's "protective order," which had provided that presidential communications were privileged in this case. Contrary to the government, Judge Russell construed the protective order as covering both communications by the president and communications to the president.

However, noting that many of the discovery issues in this case were argued before the 9th Circuit in the October and would soon be decided by that court, Judge Russell accepted the government's argument that the Magistrate's discovery order should be stayed until the 9th Circuit rules. He found that a stay would promote "judicial economy," noting that the 9th Circuit had temporary stayed the district court's discovery order in that case pending its ruling. Requiring the government to respond to plaintiffs' discovery requests as to the same categories of documents in this case would "impose a burden on defendants by requiring them to disclose deliberate documents that are currently being withheld under a stay in the Ninth Circuit. While granting a stay may burden Plaintiffs by delaying the litigation, the Court has a strong interest in consistency with the parallel proceeding in the Ninth Circuit." Was this written "tongue in cheek"? As long as the preliminary injunction stays in effect, the plaintiffs are probably happy to have the litigation delayed . . . . Which preserves the status quo they are trying to preserve!

In her decision in *Doe 2 v. Mattis*, Judge Kollar-Kotelly notes that the current motion is the third attempt by the government to get her to end the preliminary injunction she issued more than a year ago. She pointed out the government filed an "emergency motion" with the D.C. Circuit after her first injunction, because it did not want to have to allow transgender people to begin applying to join the service on January 1, 2018, but the D.C. Circuit refused to interfere, concluding that "Defendants had not demonstrated that they had a strong

likelihood of success on appeal, that they would face irreparable harm, that the stay would not harm other parties to the proceeding, or that the public interest warranted a stay." See *Doe 1 v. Trump*, 2017 WL 6553389 (D.C. Cir., Dec. 22, 2017). Then the government tried to block discovery with various assertions of privilege, and then urged the court to dissolve the injunction in the light of Trump's revocation of his August 2017 Memorandum and the announcement of the Mattis Implementation Plan, which she found, "in summary form . . . implements the 2017 Presidential Memorandum banning transgender individuals from serving in the military." Her ensuing discussion indicates her rejection of the government's argument that the Mattis policy was a material change; "the plan effectively implements such a ban by targeting proxies for transgender status, such as 'gender dysphoria' and 'gender transition,' and by requiring all service members to serve 'in their biological sex.'" She was not buying it, finding no "material difference" difference. Thus, "the need for the preliminary injunction remained unchanged."

Subsequently, she wrote, "The parties' discover has been consistently plagued by disputes and delays. Plaintiffs completed briefing their motion to compel discovery and Defendants their motions for protective orders on November 13, 2018. Eight days later, Defendants filed this motion [on November 21, the same date the S.G. announced submission of the cert Petition to the Supreme Court], again attempting to stay the Court's preliminary injunction." Apparently, the three-strike rule applies in this case. "Despite the lack of material changes to the factual record," wrote the judge, "Defendants are again attempting to rid themselves of the Court's preliminary injunction. And, the court cannot help but question why Defendants have, again, decided to challenge the Court's preliminary injunction at this point in the litigation. The preliminary injunction has been in place for more than a year. Yet, Defendants present no evidence that the Court's preliminary injunction maintaining the status quo of allowing transgender individuals to serve in the military has harmed military readiness." So, why this sudden urgency? Well, she wrote, maybe it's because they announced the filing of a cert petition. "But," she wrote, "that petition would seem to have no bearing on Defendants' decision to file this motion, which is, after all, their third bite at the apple in this Court. If Defendants are eager to rid themselves of the Court's preliminary injunction, Defendants should note that motions such as this one serve to slow litigation and only increase the time which Defendants must wait for the Court's final decision on the merits."

Then she turns to reviewing the tests for preliminary injunction yet again. She found the government's argument that it is likely to success on the merits in this case lacking merit, since she has already rejected the same arguments in her prior rulings. Her discussion on this issue channels the ruling on similar arguments by the *Karnoski* court. She said that her original analysis of the issues was not changed by the issuance of the Mattis Implementation Plan. "As the Court has previously explained," she wrote, "the ban on military service by transgender individuals likely violates Plaintiffs' Fifth Amendment rights based on a number of factors, 'including the sheer breadth of the exclusion . . . ., the unusual circumstances surround the President's announcement of [the exclusion], the fact that the reasons given for [the exclusion] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself.' Accordingly, the Court is not persuaded by Defendants' claim that they are likely to succeed on the merits of their appeal because Plaintiffs' constitutional challenges lack merit."

As to the government's challenge to the "nationwide scope" of the preliminary injunction, the court was unconvinced by the government's arguments. "Here," she wrote, "Plaintiffs were injured by a rule of broad applicability, so the Court acted properly in granting systemwide relief, even if that relief has the consequence of protecting the rights of other transgender individuals not before the Court." She distinguished the *Meinhold* case, so heavily relied upon by the government, pointing out that it was brought by one gay man who had been discharged and sought reinstatement, so an injunction "applying only to him was sufficient." Furthermore, she wrote, "In fact, a nationwide preliminary injunction is the only way to address fully Plaintiffs' constitutional injury," as they would suffer dignitary harms of constitutional dimension even if a narrowed injunction protected the individual plaintiffs from implementation of the policy. The opinion continues at some length rebutting the relevance of various cases cited by the government to support its argument that nationwide relief was not appropriate in this case.

As to the government's argument that the injunction was causing irreparable harm to the military, she wrote: "Considering the amount of forethought, research, and planning that went into preparing for the accession and retention of transgender individuals" – referring to the lengthy period of study undertaken by DoD during the Obama Administration, culminating in Secretary Carter's announcement in June 2016 – "the Court concludes that Defendants will not face irreparable harm by following a plan that was developed by the military itself. The apparent lack of harm that Defendants have faced from the Court's preliminary injunction maintaining the status quo over the last year buttresses the Court's conclusion that Defendants are unlikely to face irreparable harm if the status quo continues until the Court has reached a final decision on the merits." She also noted the odd situation that could occur if the injunction was lifted: Implementation of the Mattis plan would lead to discharging transgender service members while the case is pending. If ultimately, the court rules against the government on the merits, all of those discharged service members could have lawsuits against the military, forcing them to allow re-enlistment. "The Court finds

that the need for security and stasis in the composition of the military is especially salient given that our country is facing an extended period of war and requires the service of a great number of men and women who will volunteer to make the sacrifices required to serve their country."

Furthermore, it is clear that staying the injunction would irreparably harm the plaintiffs, and the judge rejected the argument that the public interest supports letting the Mattis plan go into effect. "Without supporting evidence," she wrote, "Defendants' bare assertion that the court's injunction poses a threat to military readiness is insufficient to overcome the public interest in ensuring that the government does not engage in unconstitutional and discriminatory conduct," and she quoted the D.C. Circuit's language in refusing to order a stay almost a year ago. "Absent corroborating evidence, the Court is not prepared to find that allowing Plaintiffs to voluntarily serve and defend their country, while this country faces a prolonged period of warfare, is against the public interest." So, for a third time, Judge Kollar-Kotelly rejected a motion by the government to let the transgender ban go into effect while the litigation continues.

As noted in the lead story above, the soonest that the Supreme Court is likely to weigh in on the S.G.'s Petitions is January 11, barring some attempt by the S.G. to get the Court to abandon their usual year-end holiday shutdown and convene an emergency session for the purpose of departing from their precedents and treating a non-emergency as an emergency because of pleading from the political branches of government to let military discharge hundreds of people who are faithfully doing their duty and upholding their oaths of office. (Dare one speculate that all of these actions by the S.G. and the Justice Department have everything to do with the political obsessions of the president and his loyal servants, the Acting Attorney General and the Solicitor General, and nothing to do with the merits or the law? There, we said it . . . .) ■

ADF Asks Supreme Court to Reverse 3rd Circuit's Rejection of Challenge to School's Trans-Positive Facilities Policy

By Arthur S. Leonard

On November 21 the Supreme Court docketed a petition filed by Alliance Defending Freedom (ADF) on behalf of anonymous plaintiffs who are challenging the Boyertown (Pennsylvania) Area School District's policy allowing transgender students to use restroom and locker room facilities consistent with their gender identity. *Doe v. Boyertown Area School District*, No. 18-658, seeking review of 897 F. 3d 515 & 517 (2018), and 276 F. Supp. 3d 324 (in which the district court denied the plaintiffs' motion for a preliminary injunction against the policy pending a ruling on the merits).

The Petition poses two questions to the Court. First, assuming students have a "constitutionally protected privacy interest in their partially clothed bodies, whether a public school has a compelling interest in authorizing students who believe themselves to be members of the opposite sex to use locker rooms and restrooms reserved exclusively for the opposite sex, and whether such a policy is narrowly tailored" – which looks like a compound question that incorporates contested factual assertions about gender identity – and, second, whether the school's policy "constructively denies access to locker room and restroom facilities under Title IX 'on the basis of sex.'"

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Numerous federal district courts have construed this provision, in cases brought by transgender students, as requiring schools to allow transgender students to use facilities consistent with their gender identities, many explicitly rejecting the argument that a school could satisfy its non-discrimination duty by making separate single-user facilities available for transgender students. After the first wave of litigation over this issue had begun producing transgender-affirmative rulings, ADF began to bring affirmative litigation, seeking to establish that Title IX cut in the opposite direction, arguing that allowing transgender students to use facilities consistent with their gender identity worked an invasion of privacy against cisgender students, who did not want to share these facilities with student whom they considered to be of the opposite sex, and who were being "constructively" denied facilities to which they had a right of access.

The Petition neatly skirts the question whether Title IX can be construed to forbid gender identity discrimination by instead framing the issue as one of the privacy rights of cisgender students. The Supreme Court has yet to pronounce on this issue, having avoided the question by canceling the scheduled argument in Gavin Grimm's case against the Gloucester, Pennsylvania, school district after the Trump Administration withdrew a "guidance" on Title IX compliance that had been issued by the Obama Administration, within weeks after Trump took office. The Court could avoid the question here as well by focusing narrowly on rights of cisgender students, although it would then have to confront whether "subjecting" them to the occasional presence of transgender students in their common facilities would raise constitutional privacy issues, or would deny them their statutory rights under Title IX, and this would bring the Court roundabout to the question whether the government has a compelling policy interest to provide equal access rights to transgender

students – a point hotly contested by ADF and its allies on the Christian right.

ADF's position states the "facts" in an adversarial fashion, as one might expect, characterizing the Obama Administration's guidance as an "extraordinary Dear Colleague letter to the nation's schools." In response to that letter, Boyertown Area School District adopted a policy consistent with the guidance. Signaling its religiously-based denial that transgender identity is other than a "belief" held by individuals, ADF characterized the policy as follows: "It authorized some transgender students to use locker rooms and restrooms based on their beliefs about their gender rather than their biological sex." ADF notes that the policy was adopted without formally notifying students or parents, and "the first Petitioners learned of it was when, while undressed in the locker room, they realized they were in the presence of a student of the opposite sex. Embarrassed and confused, Petitioner Joel Doe went to school officials, and the officials said to try and act 'natural.' Joel Doe was marked down in gym class for failing to change his clothes, and he eventually felt forced to leave the school entirely."

This led to the lawsuit by "Joel Doe" and his parents and some other students in furtherance of ADF's litigation strategy to demolish the school's trans-supportive policy as unconstitutional. ADF sought a preliminary injunction, which was denied, and appealed to the 3rd Circuit, which affirmed the denial of pre-trial injunctive relief. The 3rd Circuit, while acknowledging the privacy interests of cisgender students, upheld the policy – which it subjected to "strict scrutiny" – because it "served a compelling interest – preventing discrimination against transgender students – and was narrowly tailored to that interest." Playing what it undoubtedly deems its trump card (no pun intended), ADF argues: "Forcing a teenager to share a locker room or restroom with a member of the opposite sex can cause embarrassment and distress, particularly for students who have been victims of sexual assault." (There is no specific allegation in the Petition that "Joel Doe" or any of the other plaintiffs has been a victim of sexual assault.)

ADF's argument is that protecting the privacy rights of cisgender students requires the school to have transgender students use either the facilities for members of their "biological sex" or to provide them with and restrict them to single-user gender-neutral facilities. They reject the notion that a school could meet the constitutional standard by making a single-user gender-neutral facility available to those cisgender students who want to avoid being present in a restroom or locker room while a transgender student is also present – an option that the 3rd Circuit had mentioned. After all, why should the "normal" majority who don't entertain spurious beliefs about their gender suffer any imposition? (ADF doesn't actually say that, but it is the flavor of their argument.)

ADF rejects the 3rd Circuit's conclusion that the "presence of a transgender student in a locker room should not be objectively offensive to a reasonable person." As far as ADF is concerned, their clients are reasonable people who were embarrassed "by the presence of opposite-sex students in the locker room," to such a degree that Joel "felt compelled to leave the school entirely." ADF found a "former student who identified as the opposite sex" who testified to having used "an individual facility from 7th through 11th grades" who "suffered no bullying or discrimination" and "even recommended the use of single-user facilities to other students who believed themselves to be of the opposite sex. In other words, the student with gender dysphoria commended the very course of action that maximizes privacy protections." As if the experience of one transgender student who attended the school before the adoption of the current policy provoked this lawsuit and who was able to avoid trouble by resorting to a single-user facility "makes their case.") Argued ADF, "The Third Circuit distorted the law by requiring Petitioners to view sex and gender through its prism and making Petitioners' privacy rights entirely contingent on the beliefs of other students about their own gender. Because the court of appeals' opinion gives legal cover for other schools to maintain or promulgate identical policies that similarly violate student privacy, certiorari is warranted."

"The Third Circuit distorted the law by requiring Petitioners to view sex and gender through its prism and making Petitioners' privacy rights entirely contingent on the beliefs of other students about their own gender. Because the court of appeals' opinion gives legal cover for other schools to maintain or promulgate identical policies that similarly violate student privacy, certiorari is warranted."

The Petition fervently argues that it should be granted because of the severe criticisms it voices about the 3rd Circuit's handling of the case up to this point – which, recall, involves just the denial of a preliminary injunction, which is being challenged through an interlocutory appeal. The Petition insists that the 3rd Circuit's ruling turns constitutional analysis upside down, misapplying precedents and allowing the subjective beliefs of some students about their gender identity to outweigh the precious constitutional privacy rights of the cisgender majority of their fellow students. "While this court

need not define what 'sex' means in all contexts," wrote ADF, "it can and should say that it is not reasonable for a student's privacy rights to change based on what someone else believes about their own gender." The Petition insists that "clarity and direction from this Court are needed to prevent further watering-down of the strict-scrutiny test that this Court and other circuits routinely apply protection fundamental rights like one's bodily privacy, and to give courts, litigants, and school districts guidance on walking the sensitive line between providing proper support to students experiencing gender dysphoria and protecting the privacy of other students."

Insisting that the case raise "pure questions of law," the Petition argues there is no need to await a final ruling on the merits. The Court should dispose of this issue by ruling on an interlocutory appeal from the denial of a preliminary injunction, accepting ADF's argumentative statement of the facts.

At Respondent's request, time to respond to this Petition has been extended by the Court to January 22, 2019, and presumably ADF will want to reply, so the Court will not conference this case until February, which means that if cert is granted, the case would most likely be argued during the October 2019 Term.

ADF's legal team is led by John J. Bursch, a former Michigan Solicitor General who was retained by the state to defend its ban on same-sex marriage in the Supreme Court in *Obergefell v. Hodges*, in which Michigan was one of the four respondent states attempting to defend the 6th Circuit's ruling. They lost, of course. Other lawyers on the team are Kristen K. Waggoner, David A. Cortman and Christiana M. Holcomb of ADF's Washington office, and Gary S. McCaleb of ADF's Arizona office in Scottsdale. Also joining as local counsel are Cathy R. Gordon of Litchfield Cavo LLP, Pittsburgh, and Randall L. Wenger, Jeremy L. Samek, and Curtis Schuber of Independence Law Center, Harrisburg. ■

European Court Rules Against Russia for Human Rights Violations by Refusing to Allow LGBT Public Events, But Fails to Put Any Teeth in Its Decision

By Vito John Marzano

A unanimous seven-member Chamber of the European Court of Human Rights ruled on November 27, 2018, that Russia had violated Article 11 (right to freedom of assembly), Article 13 (right to effective remedy), and Article 14 (right not to be discriminated against) of the European Convention on Human Rights ("the Convention") on account of the ban imposed by authorities against public LGBT events and for a lack of effective remedies in that respect. Seven Russian nationals filed 51 complaints for denials and lack of effective remedy spanning six years. The court consolidated the applications into *Alekseyev and Others v. Russia*, nos.14988/09 and 50 others (Nov. 27, 2018).

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Although not argued by the Russian government, the court spent most of the decision discussing the admissibility requirement enumerated in Article 35 § 1 of the Convention. For review, an applicant must, among other things, exhaust all domestic remedies and seek review within six months of a final decision. However, where circumstances establish that exhaustion of domestic remedies is futile from the onset, such as a case where no real redress is available, then the applicant must petition the court within six months from when he or she knows of the determination. Noting its prior decision in *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/99, 21 October 2010, the court acknowledged that Russian law imposes a time limit by which organizers must supply notice of a public event, but no such requirement exists for authorities to issue a decision. Accordingly, the post-hoc nature of the judicial review process could not provide adequate redress as it always occurred after the planned date. Hence, the six-month clock commenced when the applicants received the initial determination, not when the domestic courts affirmed the determination. Of the 51 applications submitted, 44 were dismissed on admissibility grounds.

Turning to the remaining seven applications, the court determined that the matter before it had no material difference from the October 2010 case referenced above, even noting that the applicants adopted the arguments previously advanced. (See the November 2010 edition of LGBT Law Notes for a review of that matter.). As such, in finding that Russia violated the applicants' rights under the Convention, the court declined to engage an in-depth discussion on the current matter.

To briefly summarize, the prior decision concluded that Russian authorities violated Article 11 protections on the freedom of assembly when it proscribed LGBT rallies. The government had argued that that such a ban served the public interest as it would prevent a public disturbance that would result from counter-demonstrators. In rejecting this argument, the court noted that the government had not even attempted to procure adequate arrangement to avoid such a disturbance. Further, mere societal disapproval cannot furnish legitimate grounds to ban LGBT public events. Similarly, moral condemnation did not justify discrimination. Thus predicating the ban on such condemnation breached Article 14. Additionally, the absence of a requirement for the authorities to render a determination prior to the planned event date constituted the absence of an effective remedy in violation of Article 13.

In a concurring opinion, one judge excepted to the brevity of the court's analysis. According to Judge Dmitry Dedov, the court's previous rejection of the arguments concerning public safety were ill-conceived, as such concerns proved to be true in *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015. Further, the court declined to address the fundamental rights and freedoms of parents and their children affected by the public debate on sexual orientation in *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017. Hence, he contended, the case law suggests that promotion of homosexual relationships, especially to minors, could be considered an issue for public debate. In order to achieve compromise and harmony, Judge Dedov reasons, the right to create a family that differs from the traditional notion of a union between a man and a woman should be vindicated and promoted as a starting-point for protecting all other needs that arise in relation to any family member. Thus, he voted with the majority because some of the applicants sought to protect their right to create a family, not for those who sought to promote sexual relationships.

In any event, under Article 46 of the Convention, implementation of the court's decision generally lies with the State. The court noted that the issue remains recurring and required long-term, sustained efforts to adopt measures to overcome issues related to freedom of assembly and prohibition of discrimination. It then concluded that the finding of violations of the aforementioned articles constituted per se just satisfaction for the non-pecuniary damages sustained by the applicants under Article 14. To this Judge Helen Keller partially dissented. She argued that the court erred in not awarding non-pecuniary damages, as such would incentivize Russia to correct the situation. Merely finding that violations occurred and awarding costs would not have the impact to force Russia to remedy its ongoing, systematic breach of the Convention. This presents an interesting concept; how can the court enforce its judgment if there lacks any real repercussion for the offending State? That is to ask, without putting teeth in its decision, why would Russia bother to comply?

The court appended to its decision a table setting out the 51 applications with description details. The full text and table can be found on the court's website. ■

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Caribbean Court of Justice Strikes Down Guyana's Colonial Era Law Against Cross-Dressing

By Vito John Marzano

On November 13, 2018, a unanimous five-justice panel of the Caribbean Court of Justice ("CCJ") declared unconstitutional a colonial-era statute in Guyana that criminalized cross-dressing for an "improper purpose." In *McEwan v. Attorney General of Guyana*, [2018] CCJ 30 (AJ), the CCJ struck from the laws of Guyana section 153 (1) (xlvii) of the Summary Jurisdiction (Offenses) Act, holding that it was unconstitutionally void and violated the right to equality and non-discrimination and right to freedom of expression as guaranteed by the Constitution of Guyana.

When exercising its appellate jurisdiction, the CCJ sits as the highest court for, among three others, Guyana, a function previously held by the Judicial Committee of the British Privy Council. As an aside for U.S. readers, the CCJ follows the custom of other high courts of the British Commonwealth in that a single opinion rarely encompasses the whole of the Court's decision. Rather, each justice may include their own analysis and reasoning even when concurring with their colleagues.

The opinion authored by A. Saunders, President of the CCJ, and joined by Justices J. Wit and D. Barrow, provides the following factual and procedural background of the case. On the same night in February 2009, police in the Guyanese Capital arrested appellants Quincy McEwan, Seon Clarke, Joseph Fraser, and Seyon Persaud, who all identify as transgender, in two incidents. They remained in the cell for the weekend uninformed of any arrest or charges. Police denied Fraser's requests to make a statement, speak with legal counsel, obtain treatment, or make a phone call.

On the following Monday, the four

appeared before a magistrate court and first learned of being charged with, among other things, wearing female attire in public for an improper purpose. They pleaded guilty to that charge (the others were subsequently dropped). At sentencing, the magistrate instructed them to go to church and give their lives to Jesus Christ, and he informed them that they were men not women and were confused about their sexuality. Subsequent to sentencing, they spoke with representatives from appellant Society Against Sexual Orientation Discrimination ("SASOD"), a local human rights organization working to eradicate homophobia in Guyana and throughout the Caribbean.

The four individuals did not appeal their convictions but commenced constitutional proceedings in the High Court alleging, among other things, that section 153 (1) (xlvii) was unconstitutional for vagueness, uncertainty, irrationality, and discrimination. The High Court concluded that the statute did not criminalize cross-dressing per se, but only when done for an improper purpose. The judge also concluded that the magistrate's comments were, at best, "proselytizing," and not a hindrance to the freedoms of thought or religion. The Court of Appeal affirmed, and plaintiffs appealed to the CCJ.

To evaluate the statute's original purpose, Justice Saunders elaborated on its historical context. Section 153 was enacted in 1893 as part of a group of anti-vagrancy laws in the post-emancipation period in the Caribbean and United States. These laws sought to regulate and control former slaves and, in places like Guyana, newly indentured laborers, by curtailing mobility and keeping them closer to plantations. In order to use legal coercion as a tool to maintain a cheap source of labor, these statutes empowered police to arrest people merely on suspicion that they were an "other" outside of the norms of that time. The issue, as Justice Saunders describes, is whether section 153 (1) (xlvii), which concerns cross-dressing in public for an improper purpose, should remain on Guyana's statute books.

Before addressing the merits, the CCJ needed to consider the Savings Law Clause under Article 152 of the Constitution, which effectively shields pre-Independence statutes from constitutional scrutiny. Savings Law Clauses, found in the constitutions of other Caribbean countries, sought to secure an orderly transition from colonial rule to independence. But as Justice Saunders notes, Guyana, having achieved independence over 50 years ago, can hardly be considered still transitioning.

The conventional wisdom that these clauses protect pre-Independence statutes from scrutiny, especially when faced with an issue of fundamental human rights, undermines the concepts of constitutional supremacy and judicial review, as the CCJ recently acknowledged in *Nervais v. the Queen* and *Severin v. the Queen*, [2018] CCJ 19 (AJ). There, the CCJ held in a case concerning the savings clause in the Constitution of Barbados, that courts must read a constitution as a whole, and where, as here, one part would hinder the fundamental rights of a citizen, the court must emphasize those rights absent some overriding public interest. Justice Saunders concluded that the savings clause did not protect section 153 (1) (xlvii) for the following reasons.

First, in narrowly construing the savings clause to mitigate the potential devastating impact it would have on fundamental rights, the fact that the Legislature amended the statute (often to increase punishment) after independence rendered it a post-Independence statute subject to judicial review. Second, the clause only applied to Articles 138 to 149 of the Constitution. The appellants also challenged the statute under Articles 149A to 149J, which were added to the Constitution in 2003, making them numerically and temporally distinct from Article 149 and outside of the scope of the savings clause. Third, Article 39 (2) of the Constitution mandates courts to pay due regard to the country's international obligations, and thus a savings clause cannot save a statue that will put Guyana's domestic law on a collision course with international norms. Finally, Section 7(1) of the Constitution Act requires that pre-Independence laws "shall be construed with such modifications . . . as may be necessary to bring them into conformity with this Act." As explained in *Nervais*, a modification clause and a savings clause must be read together to bring pre-Independence law into conformity with the Constitution.

Turning to the merits of the appellants' challenge, Article 149 (1) protects the people of Guyana from discrimination. Article 149D (1) guarantees that "[t]he State will not deny any person equality before the law or equal protection and benefit of the law." The State may, however, restrict fundamental rights in order to protect, among others things, public order and public morality, provided that such a law "pursue[s] some pressing objective and be rationally connected to that objective[;]" provided that the effects of such law is proportional to its purpose.

Justice Saunders reasoned that "[a]t its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy. There is a marked linked between gender equality, self-determination and the limits placed on self-determination by gender stereotypes." As such, he concluded that "the expression of a person's gender identity forms a part of their right to dignity. Recognition of this gender identity must be given constitutional protection." Further, while people of different sexualities practice cross-dressing, section 153 (1) (xlvii) disproportionately impacts transgender individuals, particularly those who identify as female, and it infringes on their personal autonomy. It reinforces gender stereotyping by stigmatizing those who do not conform to traditional gender clothing. The foregoing established that the statute violated the appellants' constitutional guarantees to equality and non-discrimination.

Regarding the freedom of expression protected under Article 146, the lower courts concluded that no violation occurred because the statute did not actually proscribe cross-dressing, only

doing so for an improper purpose. While Article 146 also permits limiting the freedom of expression for issues like public order or public morality, a person's attire is inextricably connected with the expression of his or her gender identity, autonomy, and individual liberty. Such attire constitutes an expressive statement that poses no threat to society as to justify section 153 (1) (xlvii).

Tackling the argument of the statute's vagueness, Justice Saunders noted that "improper purpose" is not defined, and that a cross-dressing person has no clue or guidance as to which conduct would fall within that provision. Justice Saunders rejected the argument advanced in defense of the statute that the charges given after the arrest inform the individual what constituted "improper purpose" because an individual requires advance notice of what is and what is not illegal. As stated, "[t]he fact that no one can say with certainty what an 'improper purpose' is or what male or female looks like[] leaves transgender[] persons in particular great uncertainty as to what is and is not allowed." As the law is hopelessly vague, it must be struck down as unconstitutional.

Justice W. Anderson added to this discussion by reasoning that section 153 (1) (xlvii) purports to criminalize intentions or a persons' state of mind. The Solicitor General had argued that an improper purpose would be a person who wears the clothing of the opposite gender to commit a robbery. But Justice Anderson found this unpersuasive. In such a circumstance, the robbery itself would be sufficient grounds for criminal liability. If the person changed their mind prior to committing the robbery, imposing criminal liability for cross-dressing would be tantamount to thought crime. As such, the speculative nature of this statute renders it unconstitutional for vagueness.

Justice M. Rajnauth-Lee also elaborated on the vagueness issue. She noted that vague criminal statutes violate the right to the protection of the law guaranteed under Articles 40 and 144. Penal statutes must provide fair notice of the prohibited conduct and must define a criminal offense with clarity that ordinary people can understand. They cannot supply law enforcement with the ability to arbitrarily enforce that statue by use of subjective morals or values.

Next, Justice Saunders rejected the argument that SASOD did not have standing. SASOD's mandate to vindicate the rights of LGBTQI people meant it had a real and genuine interest in the outcome of this case as it would apply to any member in the future that SASOD seeks to protect. In constitutional challenges, courts should afford standing liberally. Finally, with respect to the magistrate's comments, section 144 of the Constitution promises a fair hearing by an impartial tribunal to all persons facing criminal charges. The magistrate's comments justified the appellants' beliefs that, in their case, that promise was not realized.

In his separate judgment, Justice Barrow elaborated further on the law's historical context. Its purpose followed the "Poor Laws" of the Victorian era – to keep the lower classes under control. These laws did not purport to promote fairness, social justice, or equality. Justice Barrow also addressed the Solicitor General's argument that the judiciary must not engage in judicial lawmaking. He turned this question around – the executive is not obligated to defend every law, especially where an aggrieved person has the right to make the challenge. The government should have acknowledged that this law had passed its "sell-by date" and served no social and legal purpose.

The foregoing strongly suggests that the CCJ will use its authority to vindicate the rights of LGBTQI people. The extent to which, however, remains unknown, especially considering the hostility faced by LGBTQI people in the region, as the CCJ noted throughout its decision. The CCJ reminds us that the concepts of gender and attire as we understand them today differ greatly from yesterday. This brings to mind a comment at the end of the movie *To Wong Foo Thanks For Everything, Julie Newmar*, "I can tell you one thing about them founding fathers of America. They sure had fabulous wigs." ■

11th Circuit Holds That Jailing Cisgender Woman in Male Facility States a Constitutional Claim

By William J. Rold

The use of male plaintiffs for test cases in the development of sex discrimination law by now-Supreme Court Justice Ruth Bader Ginsburg is the stuff of legend. This case has some terrific dicta about safety concerns when a cisgender woman is jailed in a male facility, but whether it is a harbinger for safety protections for transgender women incarcerated with men remains to be seen. The panel of the U. S. Court of Appeals for the Eleventh Circuit – opinion by Senior Circuit Judge Frank M. Hull, for himself, Chief Circuit Judge Ed Carnes, and Circuit Judge Robin S. Rosenbaum – voted not to publish their decision, although the District Court opinion is reported at 255 F.Supp.3d 1222 (S.D. Fla., 2017).

In *De Veloz v. Miami-Dade County*, 2018 U.S. APP. LEXIS 32960, 2018 WL 6131780 (11th Cir., November 21, 2018), the 11th Circuit reverses a dismissal for failure to state a claim and finds that a fifty-year-old woman had a constitutional Eighth Amendment claim for deliberate indifference to her safety when medical staff assigned her to the men's wing of the jail, where she remained, taunted but not otherwise physically harmed, for about nine hours. Plaintiff Fior Pichardo De Veloz is a prominent lawyer and elected official in her native Dominican Republic, who was arrested upon arrival at the Miami airport on an outstanding federal warrant, after she flew to visit her daughter, who was about to give birth.

The warrant identified her as female, which was confirmed when she was strip searched (including her vaginal cavity). She was placed in the women's wing of the jail, but she was taken to the medical unit later that night complaining of symptoms of high blood pressure. In the

medical unit, a nurse (Kamara Harris) and a doctor (Fredesvindo Rodriguez-Garcia) reclassified her as transgender and biologically male, since she was taking estrogen. According to the opinion, Harris falsely said De Veloz had male genitalia and Rodriguez-Garcia did not examine her genitalia (writing "deferred" in the part of her chart notes under "genito-urinary"). De Veloz protested and told Harris that she was a woman taking estrogen to alleviate symptoms of menopause. Rodroguez-Garcia admitted that he did not ask De Veloz why she was taking hormones, because "it was a difficult question to ask."

Despite her female presentation and contrary evidence, Harris and Rodriguez-Garcia directed that De Veloz' records be changed to indicate male gender, and that she be housed in the male wing of the jail. Officers (also sued) resisted at first – because their strip search revealed a vagina – complaining to their supervisors; but they were directed to comply with the medical determination.

The opinion presents almost an hourly account of De Veloz' experience during her two days at the jail and her nine hours in the male unit. She said she was verbally harassed by other inmates. She was terrified and urinated on herself. She was moved to a cell near the officers' pod. De Veloz' family became involved and convinced jail officials to conduct a second strip search at the men's jail, after which De Veloz was reassigned back to the women's facility, whereupon she was released to the U.S. Marshal.

De Veloz sued for damages for violations of her civil rights and for state law claims of PTSD, marital instability, ridicule, humiliation and professional decline. U. S. District Judge Cecilia M. Altonaga dismissed the federal claims on qualified immunity grounds and declined to hear the pendent state claims. The circuit court reversed on the federal protection from harm claim and remanded. The opinion on appeal concerns only qualified immunity for the conduct of Harris and Rodriguez-Garcia [the "medical defendants"]; apparently De Veloz did not press the finding below that qualified immunity was available to the officers who acceded to medical directives.

The opinion first addresses whether a constitutional right was violated, finding the case presented conditions of confinement issues under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), even though medical defendants are usually sued for deliberate indifference to serious medical needs under *Estelle v. Gamble*, 429 U.S. 97 (1976). The two-step process under either is basically the same: was there an objectively serious risk (of harm or bad medical outcome); and were the defendants subjectively deliberately indifferent to it.

Remarkably, the court states the risk in conclusory terms: "[P]lacing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female's future health or safety . . . . It is abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered . . . . [A] prisoner has a right, secured by the Eighth Amendment, to be reasonably protected from constant threat of violence and sexual assault by her fellow inmates." [Internal quotes and cites omitted.]

On the second arm, the medical defendants argued that they lacked "subjective" indifference to the fact that De Veloz was a woman or to the risks posed for her in a male unit. The court ruled that the medical defendants could not "hide behind an excuse" if the risk would have been "obvious" to anyone. This includes ignoring or refusing to verify risks regarding information known to them, including that "reclassifying her as male would send her to the male jail population where her safety and life would be at risk." The court equates the medical defendants' state of mind to "willful blindness."

Whew! Without minimizing De Veloz' ordeal in any way, this writer cannot but compare the scores of cases involving transgender women who endured: months or years of sexual harassment; sexual assaults and rapes (a single rape itself frequently not being found actionable); and deterioration in mental state to the point of self-harm – all because they presented as a woman and were forced to live in prison with men – and all without stating a constitutional violation. If De Veloz had identical presentation but also a penis and testicles, would the court have reversed? Would the risk analysis have been different? Why?

Having found the violation of a constitutional right, the court then turns to the second question on qualified immunity: whether the right was clearly established. The court found no materially similar case on point from the Supreme Court or the Eleventh Circuit; and no clearly established legal principle that should govern. Instead, the court turns to a "narrow" third category of qualified immunity exception: what it calls legal principles having "obvious clarity," sufficient to give fair warning of the illegality without the need for precedent on point. It cites *United States v. Lanier*, 520 U.S. 259, 271 (1997) (holding qualified immunity "obviously" inapplicable to civil rights case on behalf of court employees raped by a state judge in his chambers and analogizing to welfare officials selling foster children into slavery – both without specific civil rights case precedent). The court also cites *Vinyard v. Wilson*, 311 F.3d 1340, 1350-2 (11th Cir. 2002) (denying qualified immunity to officer who stopped police vehicle and pepper sprayed restrained and cuffed prisoner in backseat of car, since "it must have been 'obvious' to a reasonable police officer that the pertinent conduct given the circumstances must have been unconstitutional at the time").

Applying this "obvious clarity" defense to a claim of qualified immunity here, the court concludes: "[E]very reasonable prison officer and medical personnel would have known that wrongfully misclassifying a biological female as a male inmate and placing that female in the male population of a detention facility was unlawful. The conduct at issue here lies so obviously at the very core of what the Eighth Amendment prohibits, that the unlawfulness of placing a female

detainee within the male population was readily apparent to any prison officer or medical personnel in the shoes of Nurse Harris and Dr. Rodriguez-Garcia."

This decision can be criticized for adopting an elastic standard that is syllogistic: "obvious clarity" exists where conduct is "so obviously" at the core of the law that the unlawfulness is "readily apparent." Nevertheless, the decision seems to go out of its way to recognize a violation of a constitutional right in the danger to cisgender female inmates from being placed in a male cellblock and to reject qualified immunity to a claim for damages if this occurs (even for a very brief time). The ruling could have extraordinary ramifications for the rights of transgender inmates. It is but a small jump to argue that transgender inmates face the same "obvious" risk and should have the same defense against qualified immunity.

That is certainly not what is happening now in the federal trial courts; and the decision for this cisgender plaintiff, like those for Justice Ginsburg's male plaintiffs, trumpets this point. Perhaps that it why the court of appeals' opinion begins in bold letters: "DO NOT PUBLISH" – although it is a fully reasoned and signed panel decision issued after oral argument. Under F.R.A.P. 32.1 it can still be cited, but it will not appear in F.3d. It is unclear whether it can be used to argue the law is "clearly established" for qualified immunity purposes in other cases or even if it is binding precedent in the Eleventh Circuit. *Cf. United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018) (binding precedents in successive habeas corpus petitions are "published decisions").

De Veloz is represented by the law firms of Jay M. Levy, PA, and Greenspoon Marder, LLP, Miami; and Chavez & De Leon, PA, North Miami. ■

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

Federal Judge Screens Out Civil Rights Case of Bisexual Inmate Seeking Post-Traumatic Stress Treatment after Two Rapes; Rules Appeal "Frivolous"

By William J. Rold

Senior U.S. District Judge James Dale Todd, appointed by President Reagan, just doesn't get it. The civil rights case of pro se bisexual inmate Chase Edward Lucas lasted just five days in his court in *Lucas v. Chalk*, 2018 WL 5622290 (W.D. Tenn., October 30, 2018). Lucas sued the mental health director of his prison, Allen Chalk, for refusing him counselling after he experienced two rapes. According to the Complaint, Lucas went to Chalk to seek "possible 'counseling' and relief of my anxiety of being raped twice" in the Tennessee prison system. According to the Complaint, Chalk told Lucas that he was "lying" because his case was found "unsubstantiated" and then said: "You are bisexual anyway. You probably enjoyed it." Lucas sued for violation of his rights under the Eighth Amendment and the Equal Protection Clause for sexual orientation bias.

Judge Todd spends most of his opinion reciting boilerplate law on civil rights, and the remainder of it largely misapplying it. Since the case was dismissed on screening without leave to amend, it is not possible to know what exactly happened. Lucas sought health care treatment for PTSD, which is a serious need under the DSM and the Eighth Amendment. Chalk dismissed the request out of hand, in a mocking way. The "record" does not say who allegedly raped Lucas (other inmates or staff) or why his claim was "unsubstantiated." [In this writer's experience – and in that of any experienced federal judge – correction officials' finding an inmate complaint "unsubstantiated" is an unreliable predictor of whether a federal civil rights violation has occurred.]

Judge Todd does not address Lucas' right to health care under the Eighth Amendment as enunciated in *Estelle v. Gamble*, 429 U.S. 97 (1976) (passim) and its thousands of applications over the last 42 years. It is simply ignored.

Instead, Judge Todd focuses on whether Chalk's use of language (not his denial of services) violated Lucas' Eighth Amendment rights. He finds that inappropriate comments or biased slurs are not actionable under the Eighth Amendment. [String cite of Sixth Circuit cases omitted]. Judge Todd then cites cases involving protection from harm – *Farmer v. Brennan,* 511 U.S. 825, 834 (1994) (assault); and *Helling v. McKinney,* 509 U.S. 25, 32 (1993)(environmental tobacco smoke) – noting that Chalk's remarks did not objectively endanger Lucas and that Chalk did not have the subjective deliberate indifference to Lucas' risk of harm.

This harm analysis begs the actual risk and deliberate indifference: the objective serious consequences of untreated PTSD and Chalk's subjective indifference to them. Lucas' need for professional mental health evaluation does not turn on whether his allegations were "substantiated" in another forum or even whether he is delusional – which itself may present a serious need for mental health treatment. PTSD does not depend on a defendant being convicted for the triggering event; it is a diagnosis of the presenting patient and what is triggering him. While nearly anything can happen in a prison, it is nearly impossible to imagine a mental health director saying to a straight woman who seeks counselling for a rape that she must have enjoyed it because she is heterosexual.

This brings us to Equal Protection. Judge Todd never frames the Equal

Protection issue. He says that there is no allegation that Lucas was treated "differently" because of his sexual orientation, writing: "Lucas alleges only that Chalk made offensive comments about his sexuality." In fact, Lucas wrote: "Chalk said this out of bias towards the bi-sexual, gay community. He implied that because I'm bi-sexual I must be 'lieing' and he implied and said that I liked and deserved it." If one reads the Complaint (as it must be read) with all favorable inferences in Lucas' favor, including what he could amend to allege for clarification, he plainly states an Equal Protection allegation that he was denied health care because of his sexual orientation.

The question, then, is whether the allegation is or could be cognizable in the Sixth Circuit. The Sixth Circuit has repeatedly resisted calling sexual orientation a quasi-suspect class or applying intermediate scrutiny to such claims – see *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) – but it did hold very recently that transgender discrimination can violate Title VII. *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018). [As of this writing, there is a petition for certiorari pending in this case, which the Trump Administration's Solicitor General has asked the Court to deny]. It is difficult, however, to see how Chalk's reaction to Lucas' request for treatment can survive even rational basis scrutiny. Perhaps it is one where the Sixth Circuit could see its way clear to apply a little "bite" to rational basis on these facts.

Judge Todd next errs in ruling that the Prison Litigation Reform Act's ["PLRA"] requirement of physical injury as a predicate before damages can be awarded to an inmate for mental distress prevents Lucas from requesting damages in this case. While it is true that there is no allegation that Chalk caused the rapes, the PLRA was amended in the Violence Against Woman Act renewal of 2013 to modify the PLRA "physical injury" provision to allow damages for inmates suffering from mental distress where there is physical injury or "the commission of a sexual act" (emphasis added). Judge Todd quotes the PLRA as amended without any indication that he understands the significance of the 2013 amendment, which was added specifically to address mental distress arising from sexual misconduct in the "custodial setting" and to over-rule prior interpretations of the PLRA that did not permit recovery for PTSD arising from sexual victimization in prison – the very circumstances alleged before him. P.L. 113-4, § 1101(a), 127 Stat. 54, 134 (March 9, 2013) (now codified at 42 U.S.C. § 1997e(e)).

Judge Todd departs from Sixth Circuit precedent holding that a district court should grant a prisoner leave to amend a complaint before *sua sponte* dismissal under the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013), relying primarily on First Circuit decisions that permits dismissal where it is "crystal clear" that the deficiencies in the complaint "cannot be cured" and other decisions from the Third and Tenth Circuits addressing complaints that "cannot be salvaged" or where amendment would be "futile." [Citations omitted]. This is not the case here, where the Complaint should survive screening on its own, and it surely can be improved by adding some meat to its bones, particularly on the facts, Lucas' medical needs, and the Equal Protection claim.

In a footnote, Judge Todd rejects any applicability of the Prison Rape Elimination Act, 42 U.S.C. § 15601 et seq. ["PREA"], because it does not create a cause of action enforceable by prisoners. While this is the usual holding, its dismissive treatment overlooks the way in which the passage of PREA has been used by Courts to evaluate "contemporary standards of decency" in the prisons. See, e.g., *Crawford v. Cuomo*, 796 F.3d 252, 259-60 (2d Cir. 2015) (broadening liability for staff sexual misconduct in prisons partly in light of PREA, which (after noting its unanimous passage by Congress) it called the "clearest and most reliable objective evidence of contemporary values" (internal quotation omitted). Other courts have found PREA germane to discovery of policy compliance and defendants' states of mind, and they have based First Amendment claims on retaliation for filing PREA complaints. [Citations omitted in the interest of space.]

PTSD does not depend on a defendant being convicted for the triggering event; it is a diagnosis of the presenting patient and what is triggering him. While nearly anything can happen in a prison, it is nearly impossible to imagine a mental health director saying to a straight woman who seeks counselling for a rape that she must have enjoyed it because she is heterosexual.

Judge Todd certified that any appeal attempted by Lucas would not be taken in good faith for in forma pauperis purposes, but he allowed an application to be made to pay an appeal fee in installments. He also assessed one strike under the PLRA. Under the circumstances, these steps seem abusively stern, since his *sua sponte* dismissal with prejudice already departed from regular order in the Sixth Circuit.

Judgment was entered on Judge Todd's decision on November 1, 2018. The record, such as it is, can be found at 18-cv-01211-JDT (W.D. Tenn.). There are only nine ECF entries. Lucas is receiving pro bono assistance on appeal. ■

Federal District Court Refuses to Dismiss Transgender Performance Artist's Constitutional Challenge to Chicago Ordinance Banning Performances Involving Nudity in Establishments Licensed to Sell Liquor

By Arthur S. Leonard

Bea Sullivan-Knoff's lawsuit challenging the constitutionality of Section 4-60-140(d) of the Chicago Municipal Code, which restricts performances involving nudity in establishments licensed to sell liquor, has largely survived the City's motion to dismiss in a ruling issued by U.S. District Judge Andrea R. Wood on November 12 in *Sullivan-Knoff v. City of Chicago*, 2018 WL 5921321, 2018 U.S. Dist. LEXIS 192723 (N.D. Ill.). Suing the City and Mayor Rahm Emanuel pursuant to 42 USC Sec. 1983, Sullivan-Knoff claims that the ordinance violates the Equal Protection and Due Process Clauses of the 14th Amendment and the First Amendment's protection for freedom of speech.

Sullivan-Knoff identifies herself as a 23-year-old queer and transgender woman. She holds a B.A. degree from Northwestern University in Theater with a focus on Playwriting and Gender and Sexuality Studies. She has performed at various venues across Chicago, some of which hold liquor licenses. Her performances often involve exposing her body, which she does "to reclaim her body in the face of legislation and discrimination directed against transgender bodies, to make herself vulnerable, and to create an impactful experience for the audience," according to the allegations of her complaint. Judge Wood relates Sullivan-Knoff's description of her performances, and her allegation that she has been prevented from performing a piece that involves some bodily exposure on various occasions due to the Ordinance. When she has performed it, she has feared legal repercussions against herself and the establishment where she was performing, and she remains concerned about the possibility of legal repercussions against her and establishments where she seeks to perform in the future. Thus, she clearly has standing to bring this lawsuit. But the city is not challenging her standing, but rather the plausibility of her constitutional claims.

As to the Equal Protection claim, the plaintiff focuses on a particular part of the ordinance, which forbids the exposure of the female breast but not the male breast. Sullivan-Knoff argues that this is facially discriminatory on the basis of sex . . .

As to the Equal Protection claim, the plaintiff focuses on a particular part of the ordinance, which forbids the exposure of the female breast but not the male breast. Sullivan-Knoff argues that this is facially discriminatory on the basis of sex, and thus is subject to a heightened scrutiny challenge. Judge Wood, citing Supreme Court precedent, notes that sex-based discrimination is prohibited unless the government provides an "exceedingly persuasive justification" for it, or at least shows that it substantially advances an important government interest, which "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

The City's defense is the "secondary effects" rationale, the idea that establishments that provide topless female dancing are associated with harmful secondary effects such as heightened criminal activity and violence. "The differential treatment about which Sullivan-Knoff complains is premised on the notion that female breasts are sexual in nature in a way that male breasts are not," wrote Wood. "Defendants cite cases that appeal to societal convention in substantiating this proposition." But, for purposes of a motion to dismiss, this is not enough. "This Court," wrote Judge Wood, "heeds the guidance from the United States Supreme Court holding that Defendants may not rely on overbroad generalizations about the nature of females and males, and that any differences identified may not denigrate or artificially constrain either sex. Defendants' justification for the Ordinance relies upon the assumption that females have a heightened capacity to arouse sexual desire when exposing their breasts as compared to males – and based on this, the Ordinance limits females in a way that it does not limit males. But Defendants' claim about female and male breasts might in fact be an overbroad generalization about the sexual capacity of males and females. Of course, the Court does not deny that there are differences between female and male breasts – specifically, female breasts can nourish children while male breasts cannot." (The judge then cites an article titled "Anatomy & Physiology of the Breast" from a medical website!) "Nevertheless, the relevant difference here concerning the heightened sexual nature of female breasts might just be a product of society's sexual objectification of women. Or it could be that the identified difference is rooted in something more fundamental about the

nature of females and males that grounds a constitutionally proper justification for the Ordinance. At this nascent stage of the case (and on the slim record before the Court), the Court cannot say that Defendants' justification withstands the intermediate scrutiny applicable to the sex-based distinction in the Ordinance. Accordingly, Defendants' motion to dismiss must be denied." The judge suggests that some discovery will be necessary "to explore whether, how, and to what extent the exposure of female breasts – as opposed to male breasts – creates a sexual environment, and whether, how, and to what extent this legitimates the differential treatment of females and males under the Ordinance." One hopes that discovery will be comprehensive and deeply probing, and will not overlook the erotic effect that exposed male breasts may have for a gay male audience, whose members may find little if any titillation in seeing female breasts exposed . . . Generalizations, indeed! (And we were disappointed that Judge Wood never mentioned the possibility that exposed male breasts may have erotic allure for gay and bisexual men, as well as some heterosexual women.)

As to the First Amendment claim, Judge Wood cites Supreme Court precedent treating nude dancing as coming within the sphere of expressive conduct protected by the freedom of speech. Once again, the City grounds its defense in the "secondary effects" argument – that the Ordinance does not target expressive conduct because of its content, but rather because of the harmful effects it may have in the vicinity. The court's response is, essentially, that the City will have the opportunity to prove this at trial. "Secondary effects" is a defense against a claim that throws the evidentiary burden on the state, because this is a regulation of expressive conduct.

Finally, as to Due Process, Judge Wood found that Sullivan-Knoff had alleged a plausible procedural due process claim of vagueness. Indeed, the plaintiff professes puzzlement. As a transgender woman, designated male at birth, does she possess female breasts or male breasts? And, speaking more generally, how would the ordinance apply to transgender performers who identity with either, both, or neither sex? Because the Ordinance touches on conduct that "falls within the ambit of the First Amendment," it "must rigorously provide guidance to regulated parties (so that they know what is required of them) and to those enforcing the law (so that they do not act in an arbitrary or discriminatory manner). This eventuates in a fascinating paragraph in Judge Wood's opinion, explaining Sullivan-Knoff's questioning of the meaning of the Ordinance in its application to her and other transgender performers. To just pull a sentence out of context, consider: "For example, is 'a trans man who has not had a medical procedure to remove biological female breasts but is legally a male' bound by the Ordinance?" Then consider the variations on this question. "At a minimum," wrote Judge Wood, "these questions pose serious concerns in the abstract, as nothing in the text of the Ordinance provides a clear answer." The City objected to being confronted with "hypothetical situations," but Wood pointed out that, in light of the plaintiff's gender identity, this is not merely a hypothetical case. In denying the motion to dismiss, she again emphasized that that parties will have an opportunity in discovery to explore "whether the Ordinance is vague." On the other hand, Judge Wood found that Sullivan-Knoff's allegations did not support a substantive due process claim, as plaintiff did not cite any authority holding that limits on public nudity implicate substantive due process liberty interests.

Sullivan-Knoff had also asserted claims under the Illinois Constitution paralleling her federal claims. Those survived the motion to dismiss to the same extent as the federal constitutional claims. Plaintiff conceded that she had not administratively exhausted her claims under the state's anti-discrimination law, so those claims were dismissed.

Plaintiff is represented by Mary Johanna Grieb, Shiller Preyar Law Office, Chicago, in what may turn out to be the nudity case of the century! ■

Kentucky Appellate Court Rejects Lesbian Co-Parent Custody/Visitation Claim, Reversing Family Court

By Arthur S. Leonard

Adopting a narrow construction of the Kentucky Supreme Court's historic same-sex co-parent ruling, *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), a three-judge panel of the Court of Appeals of Kentucky, ruling on November 30, reversed a decision by Jefferson Circuit Court Judge Deana D. McDonald, and ruled that Teri Whitehouse, the former union partner of Tammie Delaney, is not entitled to joint custody and parenting time with a child born to Delaney during the women's relationship. From comments in concurring opinions, it seems clear that this Kentucky Court of Appeals panel deems the U.S. Supreme Court's marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to require a bright-line test, under which it will be extremely difficult for unmarried partners to claim parental rights. The opinion confirms the fears of some critics of the marriage equality movement who predicted that achieving same-sex marriage could undermine the interests of LGBT parents who chose not to marry.

The case is *Delaney v. Whitehouse*, 2018 WL 6266774, 2018 Ky. App. Unpub. LEXIS 844 (Ky. Ct. App., Nov. 30, 2018). The court designated the opinion as "not to be published," which means it is not supposed to be cited and argued as precedent for any other case, although Kentucky court rules say that an "unpublished" decision may be cited for consideration by a court if there is no published opinion that would adequately address the issue before the court. The whole idea of "unpublished" decisions is archaic, of course, when such opinions are released and published in full text in on-line legal services such as Westlaw, Lexis, and

Bloomberg Law, and readily available to practicing lawyers and the courts.

The opinion for the panel by Judge Robert G. Johnson (whose term expired after he wrote the opinion but before it was released by the court) accepts Judge McDonald's factual findings, but disputes their legal significance. McDonald found that the parties were in a romantic relationship and participated jointly in the decision to have a child, including the insemination process. "The parties treated each other as equal partners and clearly intended to create a parent-like relationship" between Whitehead and the child, found Judge McDonald, who also found that "they held themselves out as the parents of this child since before conception. They engaged in the process of selecting a [sperm] donor together, they attended appointments prior to insemination together, [Whitehouse] was present for the birth, and she has been known to the child as Momma. The parties participated in a union ceremony, after the birth of the child, and they held themselves out as a family unit with friends and family."

Judge McDonald referred to *Mullins v. Picklesimer*, finding that some factual distinctions between the cases were not significant enough to compel a different result, and concluded that Whitehead met her burden of establishing under *Mullins* that Delaney had waived her "superior right to custody" as the biological mother, and thus had conferred standing on Whitehouse to seek joint custody and parenting time after the parties' relationship terminated.

The Appellate Court disagreed. Johnson found that in *Mullins*, a case decided by the closely divided state supreme court voting 4-3, the court stated that "legal waiver 'is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon.'" Also, he noted, the Kentucky Supreme Court "emphasized that although there need not be a written or formal waiver, 'statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof.'"

"While it is indisputable that some of the factors set out in *Mullins* are present in this case," wrote Johnson, "we are persuaded that those factors fall short of the clear and convincing proof required to establish waiver. It seems clear that both parties agreed to artificial insemination for the purpose of having a child, that both parties shared parenting responsibilities to some extent, and that for a relatively short period of time they held themselves out as a family unit. However, 'no specific set of factors must be present in order to find there has been a waiver.'" The court in *Mullins* found "a myriad of factors" supporting waiver, including that the women in that case gave their child a hyphenated last name, which was placed on the birth certificate, that they made a formal written agreement bestowing custody rights on the co-parent, and that even after the parties separated, they continued to share custody for a period of five months. "In contrast," wrote Johnson, "Delaney and Whitehouse made no efforts to formalize the custody status of the child at any point and the child bore only Delaney's name. Although the parties did participate in a union ceremony after the child was born, that was not a legally cognizable marriage ceremony. Neither did the parties attempt to formalize their relationship after the decision of the United State Supreme Court in *Obergefell v. Hodges*." (One of the concurring judges noted that *Obergefell* was decided about a month after the parties had their union ceremony.)

"It is also telling," Johnson wrote, "that the family court found that the parties intended to create a 'parent-like' relationship between Whitehouse and the child, not that Delaney specifically intended to confer parental rights on Whitehouse. Finally, upon the deterioration of her relationship with Whitehouse, Delaney did not allow Whitehouse to continue to participate in parenting responsibilities with the child," pointing out that the *Mullins* court had specifically pointed to the continued five months of shared parenting in that case as tending to show that the co-parent was more than merely a friend or caretaker.

"Because we reverse the trial court's finding that Whitehouse had standing to seek custody and parenting time with Delaney," wrote Johnson, "we need not address the family court's best-interests analysis." This, of course, demonstrates clearly the inhumanity of the court's decision. The trial court, in a ruling as to which the Appellate Court finds no reason to question that court's factual findings, deems totally irrelevant the trial court's conclusion that it is in the best interest of this child to order joint custody and parenting time. This is to be totally ignored, and a situation that is *not* in the best interest of the child is to be perpetuated, mainly because, as Johnson intimated and as the concurring judges made clear, these women did not formally marry when the opportunity created by *Obergefell* presented itself.

Concurring Judge Glenn Acree urged that the Kentucky Supreme Court reconsider *Mullins* in light of *Obergefell*, arguing that because same-sex couples can marry, there is no longer any need for Kentucky law to recognize parental rights in unmarried co-parents. "*Obergefell* changed everything for same-sex relationships," wrote Acree. "Necessarily, it changed how we assess whether a parent has partially waived her constitutional right to raise her child, partial waiver being the theory invented in *Mullin*. This case is an illustration." He noted that *Obergefell* was decided within thirty days of the parties' non-legal union ceremony, so "they had the right and opportunity to legally marry. They chose not to do so. Considering the Supreme Court's emphasis in *Obergefell* on the importance of the marital relationship, legal significance must be given to a decision not to marry. Electing not to marry when the opportunity is available should be deemed to fully contradict all allegations by anyone seeking rights to another person's child based on the *Mullins* partial waiver theory. Otherwise, marriage means far less than *Obergefell* indicates."

Judge Acree goes on to quote Justice Anthony Kennedy's flowery description of marriage, stating that this "sentiment permeates the opinion and uplifts the institution of marriage as few opinions have. In my view, it is not an insincere capitulation to social pressure. The opinion signals new the judiciary's recognition of the majesty of marriage." Acree advocates a bright line test

based on *Obergefell*, leaving out in the cold all unmarried same-sex partners, regardless of the quality or depth of their relationship with the child. He argued that failure to adopt such a bright line test "will invite other individuals, and even groups, whether they cohabit with a biological or adoptive parent or not, to claim the partial waiver *Mullins* invented." And, as his parting shot, he wrote, "Although 'it takes a village' is a catchy cant, the nucleus of a *family* is not made up of loose threads of casual affection. It is a tightly woven fabric of unifying love amongst two parents and their children.

Concurring, Judge Gene Smallwood, Jr., joined with Acree in encouraging the Kentucky Supreme Court to "revisit" the *Mullins* decision and overrule it, asserting that the dissenting opinion in *Mullins* had "proven true" and, quoting from a dissenting opinion in another case, wrote, "*Mullins* was decided as it was because of, and as a way of avoiding the pre-*Obergefell* prohibitions" on same-sex marriage. "The conceived basis for the court's opinion in *Mullins* no longer exists," he insisted, urging that the state's high court "reaffirm all prior precedence on this issue and return the legal standing of parenthood to the safe mooring of the law as guaranteed by the Supreme Court of the United States in *Troxel v. Granville*, 530 U.S. 57 (2000)." *Troxel* held unconstitutional a state law that allowed third parties, such as grandparents, to seek visitation rights with children over the protest of their biological parents, affirming strong constitutional protection for the right of legal parents to exclude other adults from contact with their children. Many state courts have distinguished *Troxel* from cases involving same-sex parent presenting facts similar to those in this case of *Delaney v. Whitehead*.

Teri Whitehouse is represented by Hugh W. Barrow of Louisville. Tammie Delaney is represented by Louis P. Winner and Kristin M. Birkhold, also of Louisville. One would anticipate an appeal to the Kentucky Supreme Court, and the case cries out for LGBT rights movement participation, since an overruling of *Mullins* could endanger the parental rights of numerous unmarried co-parents in Kentucky. ■

Illinois Appellate Court Declines to Resolve New Transgender Locker Room Access Controversy at Palatine High School as Plaintiff Graduated Before the Appeal of the Court's Denial of a Preliminary Injunction was Decided

By Arthur S. Leonard

The Appellate Court of Illinois dismissed a transgender Palatine High School student's interlocutory appeal from a January 25, 2018, order by Judge Thomas R. Allen of the Cook County Circuit Court, denying the student's motion for a preliminary injunction against any restriction on her use of the girls' locker room during her last semester in high school. *Maday v. Township High School District 211*, 2018 Il. App (1st) 180294, 2018 WL 6314280, 2018 Ill. App. LEXIS 904 (Nov. 30, 2018).

The District took the position that so long as it allowed Maday to use the girls' locker room with limited restrictions, it was compliant with Illinois's anti-discrimination law.

As the sentence above implies, plaintiff Nova Maday graduated at the end of the spring term, and the defendant argued that the appeal was moot as a result, with which the Appellate Court agreed. The litigation is complicated by the intervention of a group calling itself Students and Parents for Privacy (SPP), which objected even to the restricted access that the school was providing to Maday and other transgender students to locker rooms consistent with their gender identity. Judge Allen had denied SPP's own motion for a preliminary injunction, in which SPP sought to compel the District to deny all access by transgender students to facilities consistent with their gender identity.

The case began on September 8, 2016, when Maday's mother filed a discrimination charge on her behalf with the Illinois Department of Human Rights, which was dismissed by IDHR a year later upon evidence that the school was letting Maday use the girls' locker room provided she agreed to change her clothes in an enclosed changing stall within the locker room, of which there were several in addition to open changing areas. Maday then filed suit in state court.

"Other students regularly used the changing stalls to change clothes," wrote Justice Shelvin Louise Marie Hall for the Appellate Court. The District took the position that so long as it allowed Maday to use the girls' locker room with limited restrictions, it was compliant with Illinois's anti-discrimination law. The District argued that all the law required was that it provide her with access to the facility, but Maday argued that the law requires equal (and thus unrestricted) access in all respects. During a hearing on plaintiff's motion for preliminary injunction, "the circuit court inquired of the parties' counsel whether the fact that plaintiff was anatomically male had any relevance to the case. Plaintiff responded that it had zero relevance because the Act does not distinguish or

differentiate on those lines; the district replied that it was a critical factor, and SPP agreed that it was critical." In other words, no unclothed penis shall be seen in the girls' locker room, according to defendant and intervenor!

The circuit court noted that the anti-discrimination statute had been amended on January 1, 2010, to address in more detail the application of the anti-discrimination provision to "places of public accommodation." Prior to amendment, it required "full and equal enjoyment of all facilities, goods, and services . . . " After amendment, it limited the jurisdiction of the Department in enforcing the statute to "the denial of access to facilities, goods, or services," thus removing the reference to "full and equal enjoyment." The circuit court decided that the legislature's change was in accord with defendant's argument, and denied the motion for preliminary injunction, ordering the defendant and SPP to file answers to the complaint.

Maday filed a notice of interlocutory appeal, challenging the circuit court's interpretation of the state law as requiring any less than equal treatment. When the motion was argued before the circuit court, Maday's request was to be able to use the locker room without restrictions during the remainder of her senior year. Now that her senior year is over, the point is moot, argued the district successfully, and the Appellate Court rejected Maday's suggestion that it should address the merits anyway because this is the kind of issue that will recur and the public interest would be served by having an appellate ruling on the merits. The court declined the invitation.

"While plaintiff presents a broad public interest issue in her underlying complaint, the merits of that complaint have not been fully addressed by the trial court," wrote Justice Hall. The court said that reaching the merits on an "undeveloped record" – as the case has not been fully tried – is not necessary. "There is no conflict or disarray in the law, as this is a matter of first impression," wrote Hall. "Indeed, resolution of plaintiff's underlying case on the merits will provide future guidance for public officials, while ruling on the propriety of plaintiff's now moot preliminary injunction motion will not." Responding to Maday's argument that "there may be dozens of transgender students attending schools in the district at any moment" so the underlying question needs to be resolved, Hall responded: "While plaintiff's assertion may be true, it is speculative that other transgender students in the district would file suit and then seek a preliminary injunction based on similar materials facts and allegations."

The court's disposition of the case brought specially concurring opinions from the other two members of the panel. Presiding Justice Mary K. Rochford wrote that the court's refusal to address the merits "does not diminish the importance of the personal interests raised by plaintiff," and, noting the timing of the appellate process and the fact that the appeal was not fully briefed and ready for argument until just twelve days before Maday's scheduled graduation, insisted, "This court's careful consideration of this appeal, therefore, did not result in the matter becoming moot." Justice Jesse Reyes, while agreeing with the court's mootness determination, wrote, "I must disagree with the lead opinion's recitation of the facts in this case. I would limit the discussion to those facts that are strictly relevant to the issue of mootness, which is addressed by this court. Furthermore, I disagree with the lead opinion's inclusion of the description of plaintiff's physicality and find it is irrelevant to the outcome of this appeal." In other words, unless it is absolutely necessary to decide the issue on appeal, this judge's sense of propriety is offended by any mention, even by inference, of the genitalia of any party.

Maday is represented by the ACLU of Illinois. Alliance Defending Freedom and Thomas More Society attorneys represent Students and Parents for Privacy. Sally Scott appeared for the School District to defend the district court's denial of the preliminary injunction and argue that the appeal was moot. ■

District Court Refuses to Dismiss Lesbian Police Officer's Title VII Discrimination and Retaliation Claims

By Chan Tov McNamarah

A town fires its openly lesbian deputy police chief after subjecting her to eight months of both misogynistic and homophobic comments from subordinate and supervising officers. The ex-chief files a Title VII claim asserting discrimination based on sex. In response, the town argues her claim is based on sexual orientation—-which it contends is excluded from Title VII protection. Which party is correct? According to a November 2 decision by Senior U.S. District Judge Norman K. Moon of the Western District of Virginia, the ex-deputy chief is entitled to Title VII protection because she is a gay woman. The decision, *Spencer v. Town of Bedford*, 2018 WL 4474768, 2018 U.S. Dist. LEXIS 188310 (Nov. 2, 2018), produced mixed results on the town's preliminary motion to dismiss, but could be a glimmer of hope in the Fourth Circuit, which has no good precedent covering sexual orientation under Title VII.

The plaintiff, Carla Beels Spencer, served as the Deputy Police Chief of the Town of Bedford's Police Department between January and August 2016. During her tenure Spencer experienced insolence, disrespect, and even sexism and homophobia. Coworkers would often ignore Spencer's directives, stating they did "not want to report to a gay woman." In particular, one of her direct reports, Sergeant Robert Monk, was particularly hostile, openly stating that he applied for Spencer's job and since he was a Christian he should have gotten it. When she brought this and other complaints to the Chief, her grievances were dismissed.

Compounding coworker hostility, the department fostered an atmosphere of sexual inequality. According to Spencer's complaint, the Chief openly showed favoritism to heterosexual male officers, overlooking their infractions while failing to extend the same leniency to female employees. Moreover, although Spencer had education, experience, and working conditions equal or greater than her heterosexual male employees, her salary was considerably less.

These issues came to a head in July 2016, when Spencer was sanctioned for comments she made outside of work hours. On or around July 8, while she and her wife were at a party, they observed several officers in and out of uniform drinking heavily and socializing. Believing that this situation was inappropriate, Spencer decided to leave the event. As she did, she made, "a brief critical comment about the work performance" of one of her subordinate officers to the town's communications director.

The following day, Sergeant Monk—who had previously implied he deserved Spencer's job—filed an administrative complaint alleging that she "had disparaged many members of office personnel after drinking heavily." As a result of Monk's complaint, Spencer became the target of a high level Internal Affairs Investigation, and on August 8 she was confronted with a list of alleged infractions and work performance issues. Though she denied the allegations, Spencer was not given the chance to defend herself or view the documents used as proof against her. Here again she voiced that she was being treated differently from her heterosexual male colleagues. Two days later, on August 11, Spencer was placed on administrative leave, and on the 13th she was formally terminated.

Spencer asserted claims of Title VII discrimination, including disparate treatment, retaliation, and disparate impact, as well as claims of negligent and intentional infliction of emotional distress. In response, the Defendant filed a motion to dismiss all claims, arguing failure to plead sufficient facts.

Judge Moon began his opinion with a quick recitation of the standard of review for a 12(b)(6) motion to dismiss. Then, turning to Spencer's Title VII claim, Moon noted such a claim has four elements: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class.

In her complaint Spencer argued that she was a member of a protected class because Title VII's prohibition on sex-based discrimination encompasses discrimination based on gender and sexual orientation. The Defendant countered that Spencer failed to state a claim because Title VII excludes discrimination based on sexual orientation. To support this argument, they pointed to *Wrightson v. Pizza Hut*, 99 F.3d 138, 143 (4th Cir. 1999) ("Title VII does not afford a cause of action for discrimination based on sexual orientation.").

According to Spencer's complaint, the Chief openly showed favoritism to heterosexual male officers, overlooking their infractions while failing to extend the same leniency to female employees. Moreover, although Spencer had education, experience, and working conditions equal or greater than her heterosexual male employees, her salary was considerably less.

But Judge Moon rejected the Defendant's assertion. In his opinion, the court did not have to decide whether Title VII covered sexual orientation, because "regardless of Title VII's applicability to discrimination based on sexual orientation, Plaintiff has plausibly established that she experienced discrimination because she is a *gay woman*, making her a member of a protected class under Title VII." (emphasis provided). Judge Moon further opined—albeit in a footnote—that the Defendant's support in *Wrightson* had "all the hallmarks of dicta."

Noting that both Spencer's disparate treatment and sex discrimination claims rely on the same legal elements, Judge Moon addressed both as a single claim. Easily finding that Spencer alleged facts that supported a finding of adverse action, differential treatment, and satisfactory job performance, the judge found for Spencer on both claims.

However, he was less convinced examining Spencer's disparate impact claim. There, she was required to demonstrate that a facially neutral employment practice resulted in a pattern of discrimination. For this claim Spencer pointed to Defendant's pay scheme, and asserted that she was not paid the same as her heterosexual male colleagues. But these, reasoned Judge Moon, proved only that Spencer herself faced discrimination, and not that the practices fell more harshly on female employees collectively. Because Spencer had not adequately pleaded discriminatory impact, Defendant's motion to dismiss was granted as to that count.

Spencer's final claim under Title VII was that she faced impermissible retaliation. To establish such a claim, she alleged that her termination on August 12, 2016, was connected to the to the multiple complaints she made to her supervisor about workplace discrimination based on sex. The Defendant responded that Spencer's workplace discrimination complaints were only tied to sexual orientation, and therefore did not qualify as Title VII protected activity.

Judge Moon easily rejected the Defendant's contention. Pointing to

several of Spencer's complaints to her superior, the judge highlighted that she alleged to have been treated with a lack of respect because "she's a woman" and was not seen as one of "the guys." Both, he reasoned, were undoubtedly sex-based. Further, looking at the close temporal proximity between Spencer's second complaint to her superior on August 8, and her termination on August 12, the judge found an inference of causation. As such, the motion to dismiss was denied regarding Title VII impermissible retaliation.

In addition to her claims under Title VII, Spencer also brought two state law claims of intentional and negligent infliction of emotional distress. After establishing the standard for an Intentional Infliction of Emotional Distress (IIED), Judge Moon dismissed the claim, finding that Spencer had not alleged sufficient facts. Specifically, Spencer could not properly support the contention that the Defendant knew its actions would "result in emotional distress so severe that no reasonable person could be expected to endure it," nor that she had in fact suffered severe emotional distress. Moreover, the judge opined that "facts worse than these have been found not to be outrageous as a matter of law."

In a similar vein, the judge also rejected Spencer's Negligent Infliction of Emotional Distress (NIED) claim for failure to plead sufficient facts. Instead of establishing a causal connection between the discrimination she faced at the department and her emotional distress, Judge Moon found that she formulaically recited the elements of an NIED cause of action. For this reason, Defendant's motion to dismiss was granted as to Spencer's NIED claim as well.

Consequently, Defendant's motion to dismiss was granted for Spencer's IIED and NIED claims and Title VII disparate impact claims, but denied as to her claims of retaliation and intentional discrimination. ■

Chan Tov McNamarah is a law student at Cornell Law School (class of 2019).

Upstate New York Village Allegedly Harassed Gay Inn Owners

By Ryan Nelson

In *Weinberg v. Village of Clayton*, 2018 WL 5777292 (Nov. 2, 2018, N.D.N.Y.), Judge Brenda K. Sannes of the U.S. District Court for the Northern District of New York (appointed by President Obama) considered a dispute concerning the historic Upstate New York inn and restaurant on the Canadian border that claims to be the first place where Thousand Islands Dressing was served to the public. Plaintiffs Jaime Weinberg and Bradford Minnick, out gay owners of the Thousand Islands Inn in Clayton, NY (represented by Weinberg who got admitted to the bar during the pendency of this litigation) filed suit individually and on behalf of the Inn against the Village of Clayton, as well as its Mayor, Norma Zimmer; the Board of Trustees; its Code Enforcement Officer, Richard Ingerson; board member, Bruce Beattie; and a business owned by Beattie (all represented by Goldberg Segalla LLP). The Inn owners alleged that the village and its agents prosecuted and harassed them and the Inn due to their sexual orientation and in retaliation for their publically criticizing the village's litigation costs in this matter, thereby violating their equal protection, due process, and free speech rights under the First and Fourteenth Amendments. Defendants moved to dismiss all allegations.

Weinberg begins by alleging that, when he and Minnick were considering buying the Inn, the village and its agents represented to them that the Inn would require only minor modifications to get up to code, whereby it could be inhabited (e.g., lighted exit signs). They purchased the Inn based, in part, on these representations and started to bring the Inn up to code so customers could inhabit it. However, when the Inn started selling food out of its back window in competition with a nearby business owned by board member Beattie, relations between the Inn owners and the village soured. The village's agents allegedly threatened the Inn owners, forcing them to cancel scheduled events at the Inn and to take down a congratulatory banner after Weinberg passed the bar. Eventually, after the Inn's cook slept overnight in the Inn to prep food in advance of the Independence Day holiday, the village declared the Inn unsafe. Yet, code enforcement officer Ingerson "did not provide notice of, or an opportunity to cure, any specific defects, nor did he perform an inspection, nor did he issue a report" in connection with the declaration of unsafety.

Subsequently, the village notified the Inn owners of dozens of alleged fire and safety code violations and demanded that they install a full building sprinkler system within 30 days. To make matters worse, the village served notice of the alleged violations on the Inn owners at 5:00 pm on the Friday before the Labor Day weekend, scheduled the arraignment for the first business day after the holiday, and made all charges and claims retroactive to a year and a half earlier with penalties of up to $1000 per day and threats of incarceration. The Inn owners requested a hearing regarding the declaration of unsafety and these alleged violations, but the village denied their request.

Shortly after the arraignment, a friend of Weinberg's told him that, "[The village agents] do not speak kindly of you, being gay either. At least [Code Enforcement Officer] R[ichard Ingerson]." Moreover, Board Member Beattie allegedly told Weinberg that he added that he previously worked for the IRS and could have given the Inn owners "a really hard time" if he wanted to. Shortly thereafter, the Inn owners fought back by posting the costs of the instant litigation on social media to criticize the village. Seemingly in response, the local paper published an article revealing that Inn's cook was a "gay sex offender." (The Inn owners suspected, but have no proof that, a village agent was the source for the article.) The Inn owners

also complained about the situation at public hearings many times, leading Mayor Zimmer to exclaim to Inn owner Minnick, "Go ahead and rant, Brad. You always loved the stage." At a subsequent meeting, Zimmer ordered the Clayton Police Chief to silence Minnick as he tried to address the Board. Finally, Zimmer accused Minnick of physically abusing Weinberg, triggering an investigation by a social worker, causing distress, and driving Minnick "to the brink of suicide."

With respect to the equal protection claim, Judge Sannes cited the Second Circuit's holding in *Windsor v. United States* for the proposition that "gays and lesbians are a 'quasi-suspect' class, and classifications based on sexual orientation are subject to 'heightened scrutiny.'" (While the U.S. Supreme Court's *Windsor* opinion did not explicitly extend this holding to other circuits, it left it undisturbed in the Second Circuit.) Applying that standard here, the court granted the village's motion to dismiss the equal protection claims against all defendants except Ingerson (i.e., the defendant who is alleged to have made an antigay comment about Inn owner Weinberg) and denied the village's motion as against Ingerson, holding that "[i]t is not unreasonable to infer that Ingerson harbored antigay animus against Weinberg and Minnick."

The court also denied the motion to dismiss due process claims against all defendants, holding that the Inn had plausibly alleged the village's agents had denied the Inn owners a hearing in violation of their procedural due process rights. Finally, regarding the First Amendment claims, the court cited its opinion from earlier this year confirming that the Inn owners had plausibly alleged retaliation for their public speech. In this opinion, however, the court went further, denying the motion to dismiss on additional grounds, holding that the Inn owners had plausibly alleged that the village's silencing of their public comments was impermissible viewpoint discrimination.

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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 – The Court has put off until 2019 deciding whether to consider one or more of three pending petitions posing the question whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination because of sex, should be broadly construed to apply to sexual orientation or gender identity discrimination claims. The Equal Employment Opportunity Commission, charged by Congress with the interpretation and enforcement of Title VII, has taken the position in recent years that both kinds of claims are covered under Title VII. However, as of December 31, the five-member Commission, now down to three confirmed members, one of whose terms expires as of that date, will lose its majority of Democratic appointees and, coincidently, its quorum to conduct business, since its membership on January 1, 2019, will consist of only two Commissioners, a Republican and a Democrat. If President Trump's package of three nominees (including out lesbian Chai Feldblum, a Democrat who was first appointed by President Obama) is eventually confirmed by the Senate, the Commission will have a Republican majority for the first time since the middle of President Obama's first term, and may – as President Trump's newly confirmed Republican majority at the National Labor Relations Board has been doing – decide to reconsider Commission decisions issued during the Obama Administration. Meanwhile, the Solicitor General's position, articulated in its response to the *Harris Funeral Homes* cert petition, opposes the position of the Commission (which it is nominally representing). * * * In the sexual orientation cases, Plaintiff's petition in *Bostock v. Clayton County Board of Commissioners*, No. 17-1618, has been pending since May 25, 2018, and Defendant's petition in *Altitude Express v. Zarda*, No. 17-1623, has been pending since May 29, 2018. In the gender identity case, Defendant's petition in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107, has been pending since July 20, 2018. The sexual orientation cases were originally listed for consideration at the Court's "long conference" at the end of September, but was removed from the agenda after counsel for Petitioners in *Harris Funeral Homes*, Alliance Defending Freedom (ADF), wrote to the Court suggesting that it delay considering the sexual orientation petitions until briefing was completed on the *Harris Funeral Homes* petition, asserting that all three petitions raise essentially the same underlying question of statutory interpretation. Final briefing in *Harris Funeral Homes* was delayed by several extensions sought by the Solicitor General's Office, representing the Respondent, the EEOC. Finally, in October the S.G. filed its response, urging the Court to "hold" the *Harris* petition and focus first on the sexual orientation cases. ADF and the ACLU, representing the complaining party in Harris, filed responses during November, with ADF urging the Court to grant the Harris petition and reverse the 6th Circuit, while the ACLU urged the Court to deny the petition, arguing that the 6th Circuit's decision was consistent with that of several other circuits that have used sex stereotyping analysis to allow gender identity discrimination claims under title VII. Although all three petitions were scheduled for conferences during late November and early December, each time they were removed from the conference list and noted on the Court's docket as "rescheduled." The Court's calendar lists its first 2019 conference for January 4. As of the end of November, there was no indication on the Court's

docket entries for these cases whether they would be taken up in conference on January 4. Petitions granted on January 4 could result in oral arguments and decisions during the Court's current term, provided there are no significant extensions of time granted on the filing of briefs.

U.S. COURT OF APPEALS, 4TH CIRCUIT – Finding that the Board of Immigration Appeals erred by finding that a bisexual man from Benin had failed to establish his entitlement to the presumption of a well-founded fear of persecution if he were removed to his home country, a panel of the 4th Circuit remanded the man's claim for asylum, withholding of removal and protection under the Convention Against Torture (CAT), to "reconsider the question under the proper presumption." *Tairou v. Whitaker*, 2018 WL 6252780, 2018 U.S. App. LEXIS 33621 (Nov. 30, 2018). The petitioner was born in Benin in 1977. Although married to a woman, he testified that in 2007 he developed "affectionate feelings for a man" and "figured out he was a homosexual." In 2008 he met a gay Frenchman through a website, and they developed a romantic relationship. Petitioner disclosed this relationship to his wife and father, who proved understanding. Indeed, his wife confided that she identified as a lesbian! But he went a step too far in being open about this relationship with a cousin, who spread the word in the family, resulting in several horrifying incidents, including death threats and an assault against the petitioner, and police pressure against his French lover, who fled the country. Petitioner's wife and children went into hiding to avoid the threats, and petitioner fled to the U.S. without a visa, arriving at the Washington, D.C. port of entry on March 9, 2014, where an asylum officer found that he had demonstrated a credible fear of persecution or torture as a member of a sexual minority in Benin, and referred his case to an immigration judge. Homeland Security, meanwhile, initiated removal proceedings, claiming he was inadmissible due to his lack of a valid entry document. Petitioner conceded removability before the IJ and pressed his application for asylum, withholding of removal and CAT protection. He submitted evidence that "homosexuality is very unacceptable in Benin" (a small West African republic that was formerly a French colony after its original conquest by Portugal), and that "violent reprisal is a real danger." He also submitted a Canadian government travel advisory that although Benin did not officially outlaw homosexuality, it could lead to arrest under laws such as indecent exposure. At the time, the U.S. State Department position on Benin was that homosexual behavior was discouraged but "neither prosecuted nor persecuted." Of course, this did not reflect petitioner's experience. Although the IJ found him to be credible, his petition was denied, the IJ finding that he had not been subjected to past persecution, and that he did not have a well-founded fear of persecution in Benin. The BIA agreed with the IJ on appeal. Disagreeing, the 4th Circuit concluded that credible death threats against somebody for being in a gay relationship, under 4th Circuit precedents, are sufficient to establish the presumption of a well-founded fear of persecution. Wrote Chief Judge Roger Gregory for the panel, "In concluding *de novo* that [Petitioner] did not suffer persecution in Benin, the BIA reasoned that [Petitioner] suffered no major physical injuries and that he did not claim to have suffered long-term mental harm or problems. The BIA thus concluded that the harm suffered cumulatively by [Petitioner] did not rise to the level of persecution. However, the record indicates that [Petitioner] received multiple death threats that the BIA failed to address. Indeed, the Government conceded at oral argument that [Petitioner] suffered at least 'an implicit death threat' when his cousin brandished a knife after the home invasion. Because [Petitioner] received multiple, explicit threats of death both during and after the village gathering, the BIA's conclusion as to past harm contravenes our express and repeated holding that the 'threat of death' qualifies as persecution." However, the "well-founded fear" presumption is rebuttable, so the case was remanded for the BIA to reconsider the evidence to decide whether the government can rebut the presumption. The Petitioner is represented by John Franklin Hester, Jr., McCoppin & Associates PA, of Cary, North Carolina.

ALASKA – Always looking for an opportunity to fight against LGBT rights, lawyers for Alliance Defending Freedom have filed suit in federal court in Anchorage, seeking an injunction to stop the city from requiring Hope Center, a shelter in Anchorage, to accept transgender women as clients. The city has an ordinance that forbids gender identity discrimination by places of public accommodation, and seeks to apply the ordinance to the shelter. The suit was filed in August, after a transgender woman complained to the city's Equal Rights Commission about being denied services at Hope Center. The case is still under investigation, and the first response by Deputy Municipal Attorney Deitra Ennis, representing defendants in the case, was that the lawsuit is premature, because the Commission has not taken any action against Hope Center. This is a typical preemptive lawsuit by ADF, which represented the baker in *Masterpiece Cakeshop*, and has two cert petitions on file with the U.S. Supreme Court in cases challenging LGBT equality. *Canadian Press*, Nov. 2.

ARIZONA – The Social Security Administration's failure to give full

CIVIL LITIGATION *notes*

play to the *Obergefell* decision in the context of survivor retirement benefits is the target of a lawsuit filed in U.S. District Court on November 20 by Lambda Legal. *Ely v. Berryhill*. Michael Ely and James Taylor were in a committed relationship beginning in 1971, when Ely was 18 and Taylor was 20. They moved from California to Tucson, Arizona, in 1994. Taylor was the primary wage earner while Ely managed their household. They had a commitment ceremony in 2007, but same-sex marriage was neither available nor recognized in Arizona until litigation following the *Windsor* decision produced a district court marriage equality decision that the state decided not to appeal in light of the 9th Circuit's position on other cases taking place at the time. Taylor became deathly ill. Taylor passed away seven months after Arizona began allowing same-sex couples to marry. At the time, the men had been married for six months, but Ely's application for survivor benefits was denied by the Social Security Administration, which insisted on observing its inflexible rule that the couple had to be married at least nine months at the time of death for a spouse to receive benefits. The Social Security statute provides that when a benefits recipient dies, a surviving spouse is entitled to receive monthly benefits at the same rate as the decedent. This would extend to surviving spouses whose own earnings record would not qualify them for benefits, or would qualify them for benefits only at a lower rate because of the amount of payroll tax they had paid. This is the second lawsuit Lambda has filed on behalf of a surviving spouse whose benefits claims were denied under the 9 months rule. The other case, pending the Western District of Washington, is *Thornton v. Berryhill*. Lambda attorneys working on the case include Peter Renn, Tara Borelli, and Karen Loewy, joined by local counsel in Tucson, Brian Clymer and Autumn Menard.

CALIFORNIA – The *Daily Pilot* (Cosa Mesta, California) reported November 27 that San Diego County Superior Court Judge Joel Wohlfiel issued a preliminary injunction blocking a state-approved mobile needle-exchange service from operating in Costa Mesa and three other Orange County cities. Three cities where such exchanges were authorized by the state joined to seek the injunction, arguing public health and safety concerns and that the program would "lead to tens of thousands of dirty needles throughout the county, creating a significant public nuisance with serious risk of injury to the county's residents and water quality." Santa Ana decided not to participate in the lawsuit. There used to be a needle exchange program at the Santa Ana Civic Center, the only one of its kind in the county, but it closed in January when officials denied a permit. The state's Department of Public Health approved an application in July to allow the program to distribute clean needles and other injection supplies in specified areas of the county at limited times in the four cities. Costa Mesa officials argued that the program would attract additional drug users to the community, undermine the recovery of residents in local sober-living homes, and pose safety threats to the public and law enforcement. The judge acknowledged that the state's health department had "presented substantial evidence to support the social utility" of the needle exchange program in preventing the spread of blood-borne viruses such as HIV and Hepatitis C, but also noted "the irony of the precautions OCNEP takes in admonishing its volunteers not to handle the needles and the hazards of needle stick injuries on the one hand and defendants' desire to minimize the harm to plaintiffs' residents . . . who inadvertently encounter syringe litter."

FLORIDA – The 11th Circuit's continued refusal to recognize sexual orientation discrimination claims under Title VII required dismissal of a gay plaintiff's employment discrimination claim, held U.S. District Judge Sheri Polster Chappell in *Gensheimer v. Vision Ace Hardware, LLC*, 2018 WL 6019198, 2018 U.S. Dist. LEXIS 195754 (M.D. Fla., Nov. 16, 2018), but she rejected the employer's motion to dismiss plaintiff's whistleblower claim, and granted leave to amend so that the plaintiff could take another stab at pleading facts that might bring the case within the 11th Circuit's recognition of gender non-conformity claims. Taking the plaintiff's allegations as true for purposes of deciding the motion, Judge Chappell relates that William Gensheimer, a gay man, worked as a Sales Associate for Vision Ace Hardware for two months in 2017. "During his employment," plaintiff alleges, "supervisors treated him differently than heterosexual employees by sending him home for unexplained reasons, publicly reprimanding him, dismissing his requests for help, and giving him shorter breaks than other employees. And Gensheimer's coworkers made sexual jokes and comments that made him feel uncomfortable, such as calling him a 'pansy' and saying things like, 'I don't know how you're not into vagina.'" Gensheimer also claimed that the employer failed to instruct him on the proper handling of chlorine and propane, toxic substances regulated by state and local law, and that after he complained to store management and the HR Director, they "dismissed his concerns, and Gensheimer was terminated soon after." He sues Vision Ace in federal court for "gender-nonconformity" discrimination in violation of Title VII, and brings a claim under the Florida Whistleblower Act. Addressing first the discrimination claim, Judge Chappell wrote: "The 11th Circuit recognizes gender non-conformity claims under Title VII, but not discrimination claims based on sexual orientation," citing *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), but also citing *Price Waterhouse v. Hopkins*, 490 U.S. 228

(1989), on the gender non-conformity point. "The concurring and dissenting opinions in *Evans* highlight the difficulty courts have when distinguishing between actionable gender non-conformity claims and nonactionable sexual orientation claims, which can often overlap. Gensheimer aims for the actionable end of that spectrum by alleging discrimination 'based not on his sexual orientation *per se*, but because his gender identification did not conform to those of Defendant's stereotypical vision of male employees.' Yet the only distinction Gensheimer draws between himself and his coworkers is that they are straight and he is gay. The Court will thus dismiss Count I without prejudice and grant Gensheimer leave to amend." On the Whistleblower Relation claim, the court noted the dispute between courts about whether such claims are adequately pled if plaintiff plausibly alleges a good faith belief of a violation of the law, but said that this dispute need not be resolved on the current motion to dismiss, since Gensheimer "alleged that Vision Act violated federal laws and regulations by not training its employees on proper handling of chlorine and propane." While it might turn out later in the litigation that there was no violation of those laws, it would be time enough then for the court to address the good faith belief standard. "But for now," concluded Judge Chappell, "it is enough under either standard that Gensheimer has plausibly alleged actual violations." Because plaintiff premises his state whistleblower statutory claim on an alleged violation of federal law, the dismissal of his Title VII claim does not remove federal question jurisdiction from the case, which continues in federal court on Court II as Gensheimer attempts to plead sufficient facts under Count I in an amended complaint to meet the 11th Circuit's pleading standards for a gender-nonconformity claim under Title VII. He is represented by Noah E. Storch, Richard Celler Legal PA, Davie, Florida.

MASSACHUSETTS – U.S. District Judge Richard G. Stearns granted the employer's motion for summary judgment on a retaliation claim brought by a gay salesman who was discharged after he had frequently complained about discriminatory treatment because of his sexual orientation by a supervisor. *Hall v. Hayes Management Consulting*, 2018 WL 6171880, 2018 U.S. Dist. LEXIS 199220 (D. Mass., Nov. 26, 2018). As originally filed, Todd Hall's complaint asserted four counts under Title VII and the Massachusetts anti-discrimination statute, but he voluntarily dismissed all but his retaliation claim. Hall began working for Hayes in 2009 as a Senior Sales Executive, and was discharged on January 3, 2017, assertedly for deficient performance. Hall's performance during his early years on the job was untroubled. He alleged that he "consistently ranked among the top three revenue producers in the entire company," but the company showed that he met his annual sales quote only once during that period, in 2011, when he received a very positive performance review. For his first three years at Hayes, he was supervised by the company's president, Peter Butler, to whom he 'came out' as gay in 2012, eliciting the response that "it really didn't matter." However, in the summer of 2012, Shawn DeWane was hired to be Executive Vice President of Sales and Marketing and became Hall's supervisor. Things went downhill for Hall after that. Although he never formally 'came out' to DeWane, he "inferred" from DeWane's hostile attitude and remarks that DeWane knew Hall is gay. The complaint cites various quips and slurs by DeWane in support of Hall's allegations of homophobia. Hall was not shy about complaining to others, including Butler, about his treatment, and other sales staff members also reported to the Human Resources Department that Hall was being mistreated. At the same time, Hall was not meeting his sales quota, even after it was adjusted downward. His continuing complaints about DeWane resulted in Hall being reassigned to report to a different executive, somebody whom Hall characterized as having no experience in sales or marketing. He did not meet his sales quota for the second half of 2016 or that year as a whole. After another encounter with DeWane, in which Hall says DeWane yelled at him, "I am so mother fucking angry with you because you have pushed me into a corner," Hall filed charges with the EEOC (Title VII) and the Massachusetts Commission Against Discrimination on December 12, 2016, alleging sexual orientation discrimination and retaliation under both statutes. The state law claims named DeWane and Peter Butler, as individual defendants, as well as naming the company on both claims. (Title VII does not authorize claims against individual supervisors or executives, just the employer entity. Title VII does not expressly ban sexual orientation discrimination, but the Massachusetts law does.) Butler terminated Hall on the advice of Hall's immediate supervisor and the director of Human Resources, Jodi Narahara. There is no indication that DeWane played any role in the decision to discharge Hall. Ruling on the summary judgment motion on the retaliation claim, Judge Stearns wrote, "That Hall has established a prima facie showing of retaliation is not a matter of great dispute. Hall's internal complaints to Butler and Narahara about his mistreatment by DeWane, his attorney's complaint letters, and the filing of the EEOC and MCAD charges constitute protected activity. Hall also suffered the classical material adverse action: termination. Third, Hall's termination three weeks after filing his EEOC and MCAD complaints is close enough in temporal proximity to permit an inference of a causal connection." But, found Stearns, the defendants had articulated a "legitimate, non-discriminatory business reason for Hall's termination, namely his poor sales performance. In his seven years

working at Hayes, Hall only met his sales quota once . . . That Hayes was within its rights to fire Hall for poor performance cannot be gainsaid." Hall unsuccessfully challenged the way the company measured sales performance, but Stearns found that Hall's performance fell short even under the alternative measure he proposed. Hall tried to make a cat's-paw argument: that DeWane had influenced Butler to fire Hall, but Stearns found two flaws in this argument: Hall's counsel's concession that there was no evidence that any of the three management officials involved in the termination decision had "any animus or bias against Hall," and the lack of any evidence that DeWane was involved in the decision to fire Hall – "only speculation that DeWane could plausibly have orchestrated Hall's downfall because he harbored 'a retaliatory state of mind toward Hall and wanted to punish him.'" Citing cases authorizing summary judgment where the "nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," Stearns concluded that "the only reasonable result is an award of summary judgment to defendants on the remaining claim of state-law retaliation." Hall is represented by Justine H. Brousseau and Nina J. Kimball, of Kimball Brousseau LLP, Boston.

NEW JERSEY – Screening a *pro bono* complaint filed by an HIV-positive gay man under 42 USC 1983, U.S. District Judge John Michael Vazquez found that Russell Fischer had sufficiently pleaded claims of excessive force against police officers who Fischer says subjected him to physical abuse when Fischer was present at Overlook Hospital in Summit, N.J., but that his claims against an individual who seems to be a hospital security guard, not a public employee, could not be asserted under Sec. 1983. *Fischer v. Rimback*, 2018 U.S. Dist. LEXIS 202881 (D.N.J., Nov. 29, 2018). According to Fischer's first amended complaint, he was admitted to the hospital on March 22, 2016, for a severe illness involving a high fever and painful sores. He was discharged two days later, but called the hospital asking for pain medication, and alleges that a nurse asked him to return to the hospital so she could give him the medication. He says that when he returned to the hospital he was told to leave and that he would not receive the mediation. When he persisted, he was approached by two police officers who told him to leave and made "homophobic" remarks to him. Then, one officer "grabbed [Plaintiff] by the shoulders and threw him up face first against a wall, breaking his nose and a tooth." He was escorted out of the hospital, but then returned to use the bathroom. He claims that while he was in the cafeteria, a security guard "sucker punched" him on the back of the head and put him in a chokehold. While he was on the ground, he claims he was hit and kicked by several police officers and continued to be beaten while handcuffed on the ground. He claims he was then taken to jail because a police officer filed a "false criminal complaint" against him for biting the security guard and thus "exposing" him to HIV. Fischer's complaint has four counts, two against the security guard and two against police officers, all premised on civil rights liability under 42 USC Sec. 1983. Judge Marquez granted Fischer's motion to proceed *in forma pauperis*, but has repeatedly denied motions to appoint counsel for him. As noted above, the court finds on screening that only the counts against the police officers can go forward under Sec. 1983, as the alleged facts do suggest constitutional violations, but lacking evidence that the hospital security officer is a public employee, he cannot be sued under Sec. 1983 for a constitutional violation. The court also suggests some lack of specificity in some of the factual allegations concerning the police report about biting. Stating that it is not clear to the court whether Fischer will be able to plausibly allege that the security officer is a state actor, the counts against him are dismissed without prejudice, the court providing Fischer "one additional opportunity to amend his complaint and address this issue."

NEW YORK – The Equal Employment Opportunity Commission announced the settlement of a lawsuit it brought against an Applebee franchise restaurant in Hawthorne, N.Y., on charges that a transgender employee was subjected to harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. *EEOC v. Apple-Metro, Inc. and Hawthorne Apple LLC*, Civil Action No. 1:17-CV-04333 (S.D.N.Y.). In a press release announcing the settlement on November 1, the complaint stated that restaurant staff verbally harassed the employee, a transgender woman, with crude and derogatory references to her gender identity, repeatedly and intentionally referring to her with a male name and male pronouns. Her reports to harassment to management received no effective response; instead, she was fired for complaining. Under a consent decree resolving the lawsuit, the company will pay the complainant $100,000 in lost wages and damages, and is required to revise and redistribute its anti-harassment policies and to provide appropriate training to employees at the Hawthorne restaurant and at Apple-Metro, Inc. which manages 34 Applebee restaurants in New York City, Westchester and Rockland Counties. The defendants are also responsible for reporting any complaints of sex-based discrimination or retaliation made by employees of the Hawthorne restaurant to the EEOC.

NEW YORK – Lambda Legal and the Southern Poverty Law Center have filed a federal Freedom of Information Act

suit against the Department of Justice and the Federal Bureau of Prisons, seeking to compel disclosure of any documentation behind the changes that the Trump Administration has made concerning treatment of transgender inmates in federal prisons. In the final days of the Obama Administration, the Transgender Offender Manual was issued after the Bureau of Justice Statistics documented that a third of transgender federal prisoners have experienced sexual abuse by either staff or other inmates in the prior hear. The Manual was issued specifically to facilitate implementation of the Prison Rape Elimination Act, a federal statute passed by Congress in reaction to the startling statistics about sexual abuse in prisons. But in May, 2018, consistent with its hostility towards transgender individuals, abetted by religious conservatives in Trump's "base" and the Alliance Defending Freedom anti-LGBT law firm, the Administration released changes to the Manual, most importantly providing that gender identity be virtually ignored in prison housing decisions, even though all evidence shows the dangers of failing to protect transgender inmates from sexual assault. With the Administration stonewalling (pardon the pun) the plaintiff's FOIA requests, they have resorted to court. *Southern Poverty Law Center for U.S. Department of Justice, filed 11/20/2018 in the Southern District of New York*.

OHIO – U.S. District Judge Timothy S. Black found that county social workers enjoyed qualified immunity against procedural and substantive due process claims asserted by the parents of a child who claimed a transgender identity and whom country officials were loath to return to the parents after they voluntarily admitted the child to a psychiatric facility operated by a health-care organization called Children's Liberty Township by referral from the county's child welfare agency. *Siefert v. Hamilton County Board of Commissioners*, 2018 WL 6003966, 2018 U.S. Dist. LEXIS 194986 (S.D. Ohio, Nov. 15, 2018). The parents are Joseph and Melissa Siefert, Ohio residents whose child is referred to by the court as Minor Siefert to preserve the child's privacy. Further respecting the child's statement to the parents that the child "considered themselves to be a transgender child," the court avoids using male or female pronouns in referring to the child, throughout the opinion, as Minor Siefert. After informing their parents about their gender identity, Minor Siefert emailed the Hamilton County Jobs and Family Services agency (HCJFS) "that they were experiencing transgender thoughts" and that their parents "were unsupportive and abusive." Rachel Butler, an HCJFS social worker, visited the Siefert home the day the email was received, and asked Mrs. Siefert about conditions in the home. Two days later, the parents took Minor Siefert to Children's Liberty Township "for psychological evaluation regarding suicidal ideations" and the child was ultimately transferred to Children's psychiatry facility, where the plaintiffs went to visit them a few days later and received a "welcome package" that contained the institution's guidelines and policies, including a grievance procedure for handling disagreements with the hospital regarding treatment and discharge of patients. The Sieferts claim that the material they were given did not tell them that the institution's policies allowed their staff to tell parents they could not take their child home if the hospital "found it unsafe for the child." At the heart of the dispute in this case is the judgment by Children's staff, evidently supported by the county agency, that it was unsafe to send Minor Siefert home with the parents at that time, and the parents' insistence that they wanted to bring their child home. An impasse developed extending over several weeks, until Children's agreed to release Minor Siefert to their maternal grandparents' care. Ruling on the defendants' motion to dismiss the parents' 14th amendment Due Process claims, Judge Black found that defendants enjoyed qualified immunity. Judge Black concluded as to procedural due process, "Plaintiffs are unable to meet their burden of demonstrating that County Defendants violated a clearly established constitutional right. The Plaintiffs fail to cite any case law supporting their theory that a social worker violates a parents' procedural due process rights (1) by not seeking a court custody order to prevent parents from removing a child from the hospital or (2) by investigating child abuse allegations while a child is hospitalized." The court found that the parents were not entitled to a hearing on the question whether the hospital must release their child to them against the advice of its medical experts. As to substantive due process, Black wrote: "The Sixth Circuit has instructed courts to be cognizant of the difficult choices that social workers face in determining whether to interfere with the custody rights of parents. If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. The Eighth Circuit provides a helpful explanation for considering qualified immunity for social workers accused of substantive due process violations: 'The need to continually subject the assertion of this abstract substantive due process right to a balancing test which weighs the interest of the parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome.' *Thomason v. SCAN Volunteer Services, Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996)." Judge Black also cited similar statements by other circuit courts. "Here, it is clear that the County Defendants had a compelling

interest in the safety of Minor Siefert. As discussed earlier, County Defendants were presented with allegations that Plaintiffs had abused Minor Siefert, that Minor Siefert was potentially suicidal, and that doctors at Children's had not medically cleared Minor Siefert for discharge. Minor Siefert's continued stay at Children's, with the Plaintiffs being allowed to visit Minor Siefert at the direction of doctors, was a narrowly tailored means of ensuring the safety of the child." And, the court observed, "Plaintiffs have failed to point to any case where social workers were found to have violated parents' substantive due process rights for telling parents that a child should remain hospitalized at a doctor's recommendation." Thus, once again, plaintiffs could not meet their burden of overcoming the qualified immunity enjoyed by government professionals making discretionary decisions within the sphere of their competence. The court also rejected the Siefert's conspiracy claims under federal and state law for the same reasons. The parents are represented by Ted L. Wills of Cincinnati.

OHIO – A gay man seeking to sue for wrongful discharge in Hamilton County, Ohio, is just out of luck. Michael Ganaway filed suit *pro se* in the Court of Common Pleas against his former employer, Marcolin, U.S.A., asserting claims for defamation of character, breach of contract, and wrongful termination on grounds of sexual orientation. The employer, incorporated and headquartered outside Ohio, removed the case to federal court under diversity jurisdiction. *Ganaway v. Marcolin, U.S.A.*, 2018 WL 6048019 (S.D. Ohio, Oct. 29, 2018). Then Ganaway sought to amend his complaint to reduce his damage claim, trying to avoid diversity jurisdiction and get the case remanded back to state court, but the magistrate judge to which the case was referred for a ruling on the motion, Stephanie K. Bowman, found his effort unavailing, in part because of his poor arithmetic, in part because removal is predicated on the claims asserted in the initial complaint filed in the state court. Turning to the merits, the Magistrate found that the defamation claim was invalid, because it was based on the employer's statements to the department that administers unemployment benefits about the reason for Ganaway's discharge, and that is privileged. The breach of contract fell under the weight of Ganaway's status as an at-will employee, and his failure to allege that the discharge fit into any Ohio exception to the at-will rule. Finally, neither Ohio nor federal law expressly bans sexual orientation discrimination, and the 6th Circuit's most recent precedent on point holds that sexual orientation is not covered by the federal sex discrimination law. Ganaway tried to argue that his discharge violated a prohibition on sexual orientation discrimination in the employer's handbook, but, wrote Judge Bowman, "Ohio law, however, holds that employee handbooks are insufficient to create contractual obligations. Additionally, an employee handbook does not create an actionable claim under state or federal law." Magistrate Bowman recommended granting the employer's motion to dismiss and denying the plaintiff's motion to remand the case to state court. Ganaway was given 14 days to file objections to the Report and Recommendation.

PENNSYLVANIA – *Patterson v. Chester Police*, 2018 U.S. Dist. LEXIS 202493 (E.D. Pa. Nov. 29, 2018), is a prime example of why people generally need counsel to represent them in civil rights litigation. Plaintiff LaVelle Patterson, a gay man, is trying to assert a variety of claims against police officers and civilians, but it appears, based on the opinion by Judge Michael M. Baylson dismissing his complaint, that Patterson does not have the knowledge or capacity to frame a viable complaint that complies with the Federal Rules of Civil Procedure and meets federal civil pleading standards. Indeed, Judge Baylson described going out of his way to try to piece together the plaintiff's story, which requires digging into a variety of documents attached to a home-made complaint that falls woefully short of the "short and plain statement showing that the plaintiff is entitled to relief" as required by FRCP 10. Federal civil rights litigation is complicated. As far as one can tell from the opinion, Patterson figured out how to ask to be allowed to proceed In Forma Pauperis (*which was granted*) so he is excused from paying a filing fee, but for whatever reason he did not file a motion for appointment of counsel. He clearly has a story to tell of being mistreated as a gay man by police officers and his landlord and neighbors, but he doesn't have the capacity to articulate the necessary factual allegations to establish who can be sued on which theory. This opinion is so frustrating to read, but it is unfortunately typical of court opinions dismissing *pro se* civil complaints. "In light of Patterson's *pro se* status," wrote the judge, "this dismissal will be without prejudice to his right to file a second amended complaint in the event he can clarify his claims and cure the defects noted above." The court gave him 30 days from November 29 to do so. How he can accomplish this without assistance from somebody well-versed in federal civil rights litigation is questionable.

PENNSYLVANIA – Pleading deficiencies and failure to comply with requirements of administrative process led Chief U.S. District Judge Christopher C. Conner to dismiss all but one of a transgender plaintiff's employment discrimination claims in *McKinney v. Supreme Mid-Atlantic Corp.*, 2018 U.S. Dist. LEXIS 200108, 2018 WL 6182058

(M.D. Pa., Nov. 27, 2018). Counsel for plaintiff are listed in the decision, but one wonders, in light of the pleading deficiencies, whether the complaint was frame and filed in district court *pro se* before the plaintiff obtained counsel? Christian McKinney, a transgender man, began working for Supreme Mid-Atlantic Corp. in February 2016. McKinney is described as "an African-American and Caucasian transgender male who transitioned from female to male." His immediate supervisor was John Shuyler, "a white male." McKinney alleges that beginning in October 2016 he was the victim of severe and pervasive harassment by Shuyler, on the basis of his race, national origin and gender. The court's opinion quotes blatant examples from the complaint, and states that McKinney's complaints to Shuyler about his conduct toward McKinney were met by Shuyler's laughter and no change. However, when McKinney eventually reported an April 3, 2017, confrontation with Shuyler to the Human Resource Department, Shuyler's employment was terminated within a week. McKinney claims he was subsequently constructively discharged, but his complaint provides no details of the circumstances under which he left the company. He sued under Title VII and Section 1981. The only claim that survived the company's motion to dismiss was the Section 1981 discrimination claim, since that statute has no administrative exhaustion requirements. McKinney did file charges with both the EEOC and the Pennsylvania Human Relations Commission. He had received a right-to-sue letter from EEOC but the PHRC investigation was still under way when he filed his lawsuit. The court found the complaint woefully deficient in failing to provide any account of the alleged "constructive discharge," and determined that what remained of the Title VII complaint was a retaliation claim. Even as to that, however, and all of McKinney's statutory claims, they had to be dismissed because McKinney never responded to the EEOC's request that he verify his EEOC charge under oath or affirmation, as required by the statute, and he failed to follow up. Citing 42 USC Sec. 2000e-5(b), the court insisted that this "failure to verify is fatal to McKinney's Title VII claim." Thus, the only claim left in the case is the race/national origin discrimination claim – now purposed solely as a harassment claim – under 42 USC 1981. The complaint lists as McKinney's counsel Derek T. Smith, with Caroline H. Miller and James Patrick Griffin, of Derek Smith Law Group PLLC, Philadelphia.

TEXAS – U.S. Magistrate Judge Andrew W. Austin submitted a "Report and Recommendation" to District Judge Lee Yeakel, recommending that the court grant summary judgment to the employer and dismiss with prejudice a transgender plaintiff's Title VII claims in *Rudkin v. Roger Beasley Imports, Inc.*, 2018 U.S. Dist. LEXIS 203630, 2018 WL 6271995 (W.D. Texas, Nov. 30, 2018). Bradley Rudkin, a transgender man who "presented himself as male at all times relevant to the lawsuit," began working as a salesman for the auto dealership in February 2015, and was discharged on April 25, 2016, upon his supervisor's discovering that he had falsified pay slips for customers to assist them in getting financing to purchase cars. He filed suit in Travis County District Court asserting a Title VII claim and a state law breach of contract claim, and the employer promptly removed the case to federal court, seeking summary judgment. The case did not turn on whether the court would accept the proposition that gender identity discrimination is actionable under Title VII. Rather, Magistrate Austin determined that Rudkin's claim for discriminatory discharge was effectively rebutted by the uncontested evidence that Rudkin had engaged in dischargeable conduct, and the lack of any evidence that any comparator employee who engaged in similar conduct was not discharged. Rudkin sought to reposition his claim as a hostile environment harassment claim, but Magistrate Austin found that the three incidents Rudkin described in the declaration he filed in support of this claim (harassing and "unwelcome" comments, leering, etc.) were not sufficient to meet the pleading requirements for actionable hostile environment, once again assuming hypothetically that a transgender employee could bring such a claim under Title VII. Finally, Austin noted that whatever the merits of Rudkin's breach of contract claim (which asserted that he had not been paid all the compensation owed him at the time of his discharge), once the court dismissed the Title VII claims it could exercise its discretion to decline jurisdiction over the state law claim, thus terminating the lawsuit in federal court. Rudkin has fourteen days to file objections to Austin's Report and Recommendation. Rudkin is represented by Justin P. Nichols of San Antonio.

TEXAS – Judicial formalism triumphs in spades in *Browning v. Lockhart*, 2018 WL 61743117 (Tex. Ct. App., 1st Dist., Houston, Nov. 27, 2018). Vanessa Erin Brown filed a Petition in the 505th District Court in Fort Bend County, seeking a divorce from B. Rose Lockhart, whom she married in New York on June 18, 2012 (almost a year *after* New York enacted same-sex marriage). Lockhart is not a resident of Texas, which is a no-fault divorce jurisdiction. The local judge, David Perwin, denied the Petition, making a docket entry on October 19, 2017, which stated in full: "Petition for Divorce, is denied. Same-Sex Marriage – pre-dating Obergefel [sic], 6/19/12, Court finds that Obergegel [sic] is not retroactive, marriage conducted in

State of NY, Respondent has never lived in Texas. Case Dismissed. NY last marital state. dp" However, Judge Perwin did not take the trouble to sign a judgment that complies with various Texas procedural requirements to constitute an appealable final order. In any event, the question whether *Obergefell v. Hodges* is "retroactive" is irrelevant (although several courts have found that in particular contexts it *is* retroactive, since it declares the existence of a fundamental right under a constitutional provision adopted in 1868). In *Obergefell*, the Supreme Court, ruling on one of the questions presented by the consolidated cases on appeal, squarely and expressly held that states are required to recognize same-sex marriages performed in other states, so a Texas judge in 2017 may not refuse to recognize a currently-valid same-sex marriage that was legally contracted in New York. That the marriage was performed *prior* to the Supreme Court's decision in *Obergefell* is irrelevant to whether it must be recognized by a Texas court now. What is relevant in this docket entry is that the Respondent named in the Divorce Petition "has never lived in Texas," since a quick check of Texas law limits the authority of courts to grant divorces where the Respondent "has never lived in Texas." Browning's petition may have been correctly dismissed by Judge Perwin on jurisdictional grounds, but he should have done the necessary paperwork so that she could appeal his ruling. She did file an appeal, but in this *Per Curiam* opinion issued on November 27, a panel of the Court of Appeals(Judges Higley, Lloyd, and Caughy) dismissed her appeal "for want of jurisdiction," but *not* because her wife never lived in Texas. Rather, said the court in language that sounds Dickensian in its fusty formality and doublespeak, because "a docket entry is not an appealable final order and the clerk's record does not indicate that any appealable order has been signed." And so, there is not yet anything to appeal, under Texas procedural rules, according to this court. But, more to the appoint, the opinion refers to "Appellant's counsel" who reportedly "requested that the district clerk file a supplemental clerk's record," but the result of that request was another docket entry by Judge Perwin – "Record, Sheryl Stapp, Attorney Paul Castillo with Vanessa Browning, No Motion on File, No correction (for a Nunc Pro Tunc) – since there is no order to correct, Order for Nunc Pro Tunc setting is passed – since there is no motion filed requesting hearing, Notice req to Respondent. Dp" – which, of course, does not suffice in the view of the appeals court to satisfy jurisdictional prerequisites. So this poor woman is being sent around in circles by a bunch of formalist, empathy-deficient judges, when what she needs is New York counsel to help her file a petition for divorce and track down her wife for service of process (or so we guess), if her wife is living in New York. These Texas judges need to get over themselves and start acting like the public servants of justice that they are supposed to be, in our humble opinion. Let this woman get unhitched!

VERMONT – The Vermont Supreme Court affirmed a ruling by Chittendon Unit Superior Court Judge Robert A. Mello granting summary judgment in favor of Milton Town School District, which was sued by the estate and parents of a student who committed suicide a year after being subjected to an assault with sexual connotations by fellow members of the Milton High School football team. The plaintiffs claimed that the school was negligent in its supervision of the football team and that because of common knowledge about hazing incidents in high school athletics the school had a heightened duty of care to prevent such incidents, but the court wasn't buying this. *Stopford v. Milton Town School District*, 2018 VT 120, 2018 Vt. LEXIS 199, 2018 WL 6005260 (Nov. 16, 2018). The decedent, Jordan Preavy, transferred to Milton High School from Essex High School for the fall semester of 2011 and immediately joined the football team, attending a team dinner held at the school in August 2011. "During this event," wrote the court, "while the team had congregated on the soccer field and was separated from the adults attending the dinner, a member of the team held Jordan down while another assaulted him with a broomstick by jabbing it at his buttocks through his clothing. Jordan did not tell his parents about the incident nor make a report to the school. In August 2012, Jordan stopped playing football due to a conflict with his lacrosse schedule. On August 28, 2012, he took his own life." A teacher at the school learned about the 2011 assault on Jordan in the spring of 2013 from his son, and reported this to district administrators, who contacted the Chittendon Unit for Special Investigations. In the subsequent investigation, investigators interviewed several past and current members of the team, who described "some football team members' ongoing practices of exposing their genitals to other players, pretending to 'hump' teammates, and shoving their exposed genitals into other players." One student said he had quit the team "so as not to be associated with this behavior," and another student said that he "had always heard about" similar incidents prior to joining the team in 2009. Administrators had some level of awareness, evidently, because in 2010 they had placed the entire football team on "behavioral probation" and the coach had imposed a "Positive Correction Action Plan" after complaints that team members were playing a game called "no homo," in which a student would compliment another student and then immediately state "no homo" to signify that the speaker was not gay. The coach had told the team that there would be "dire consequences" if he heard that they were continuing to play this "game." School officials

claim that after the coach's crackdown, they did not witness or receive reports about the "no homo" game still going on or about any other "incidents of verbal or physical harassment" until the spring of 2013 when the teacher's son told about the August 2011 assault on Jordan Preavy. On these facts, Judge Mello granted summary judgment to the school district, accept its argument that the particular assault on Jordan was not "foreseeable" and thus the district could not be charged with negligence for failing to prevent it. The Supreme Court's opinion by Justice Karen Carroll pointed to a 1983 legislative enactment that specifically provided that only an ordinary duty of care applied to the relationship between school districts and their students, and that "School districts and their employees to not owe their students a duty of immediate supervision at all times and under all circumstances," which the court characterized as "explicit and unambiguous. Where the Legislature has spoken clearly, we do not interfere." The court specifically disagreed with plaintiffs' argument that "the school's discovery that students and football team members played the 'no homo' game in 2009 made the broomstick assault on Jordan foreseeable," asserting that "knowledge that students, including football team members, are making homophobic comments to each other, with no accompanying physical contact, did not put Milton High School on notice, by making it foreseeable, as that term is used in tort law, that two of its students would forcibly assault another." The court cited to a New York case, *Sanzo v. Solvay Union Free School District*, 750 N.Y.S. 2d 252 (2002), in which the N.Y. Appellate Division refused to hold a school liable for a physical assault when its knowledge extended only to verbal taunting. "The verbal conduct associated with the 'no homo' game did not suffice to put Milton High School on notice of the potential for a physical assault," said the court, and an alleged "nationwide epidemic of school hazing and harassment" did not make the assault on Jordan any more foreseeable." The ruling brought a dissent from Justice Beth Robinson, the Supreme Court's only out gay member, who agreed with the court that the applicable standard of care is "one of ordinary care." "But in assessing whether defendants breached that standard," she wrote, "the majority analyzes this case as if plaintiffs are only claiming that defendants had sufficient notice of the risk that Jordan would be assaulted by his teammates to trigger a generalized duty to protect him from this injury. The majority doesn't adequately grapple with plaintiffs' broader argument that defendants failed to establish and administer a hazing prevention and enforcement program that met the applicable standard of care, and that Jordan's injuries resulted from that failure." Insisting that the question whether the standard of care was met was properly for a jury, Robinson argued that summary judgment was granted in error. Chief Justice Paul Reiber joined Robinson's dissent, making the vote to affirm the summary judgment 3-2 on the five-member court.

WEST VIRGINIA – Three men and two women filed a lawsuit against West Virginia state officials (the governor, the attorney general, and Gilmer County clerk) seeking declaratory and injunctive relief against the state's recognition of same-sex marriage, and demanding that the federal district court overrule the Supreme Court's *Obergefell* decision. Longtime careful readers of Law Notes with good recall of arcane trivia will not be surprised that Chris Sevier, the man who has filed numerous suits seeking to marry his laptop computer, is one of the plaintiffs. Neither will anybody be surprised that these plaintiffs proceed *pro se* in *Penkoski v. Justice*, 2018 WL 5862582 (N.D. W. Va., Nov. 9, 2018). District Judge Irene M. Keeley had referred the case to Magistrate Judge Michael J. Aloi, who issued a Report and Recommendation calling for dismissal of the case. The plaintiffs filed objections, which Judge Keeley overrules in this decision, granting the defendants motion to dismiss for lack of standing. In short, the plaintiffs have not suffered any individual cognizable injury from the fact that West Virginia recognizes same-sex marriages. So there! Any lawyer who would file a complaint like this, calling on a federal trial judge to overrule a recent U.S. Supreme Court decision, would be facing Rule 11 sanctions for frivolous litigation.

WISCONSIN – U.S. Magistrate Judge Nancy Joseph denied defense motions to dismiss claims by a gay man who alleged that hostile environment harassment by public employees with authority over him cause him to resign his job, violating his rights under Title VII, the Equal Protection Clause, the Americans with Disabilities Act and the Rehabilitation Act. *Felde v. Milwaukee County*, 2018 U.S. Dist. LEIS 195493, 2018 WL 6033494 (E.D. Wis., Nov. 16, 2018). Douglas Felde was employed as an Airport Maintenance Worker at General Mitchell International Airport. His complaint alleges that coworkers and supervisors regularly bullied, harassed, assaulted and otherwise humiliated him for being gay. Judge Joseph's summary of the allegations says that Felde's complaint "described in detail instances of sexual harassment as well as patterns of sexual harassment and bullying that he alleges occurred over years. Felde alleges that the management and supervisory staff either directly participated in and/or deliberately ignored the anti-gay harassment and bullying against him. Felde also alleges that he was repeatedly denied transfers to accommodate his disability of bipolar disorder and anxiety, which were worsened by the

hostile work environment. Eventually the harassment became so intolerable that Felde resigned." He filed a charge with the EEOC on April 26, 2015, and two years later filed an "intake questionnaire" with the EEOC that the court treated as a subsequent charge, alleging constructive discharge, sexual harassment, retaliation, and failure to accommodate his disability. He filed his initial complaint against the Milwaukee County Department of Public Works, then amended the complaint in response to information that the Department was not a suable entity and the complaint had to be repurposed against the County itself. His 14th Amendment equal protection claim expands beyond the County to individual named defendants whom he identifies as harassers and discriminators. Much of Judge Joseph's opinion is devoted to explaining the distinctions between factual allegations under an equal protection claim and under a Title VII claim, ultimately rejecting the individual-named-defendants' arguments that they could not be sued under the 14th Amendment without a showing that they had supervisory authority over Felde. This might be necessary to hold the County liable under Title VII, but not for 14th Amendment liability, which under 7th Circuit precedent could attach so long as the defendant in question was a public employee acting within the scope of employment when committing the alleged harassing and discriminatory acts. The judge rejected statute of limitations claims by some named defendants, finding that the continuing violation doctrine applied by federal courts in hostile environment harassment cases applied to this situation; so long as some of the alleged misconduct occurred during the limitations period, the court could look back to earlier incidents for evidentiary support of plaintiff's claims. Although the complaint does not assign specific dates to all of the alleged incidents it describes, the court found that there were enough time references in the complaint's narrative to survive a timeliness defense. Having found the first amended complaint sufficient to withstand the dismissal motion, the judge denied plaintiff's motion for leave to file a second amended complaint. Felde is represented by Mary E. Kennelly, of Fox & Fox SC, Monona, WI.

WISCONSIN – As we reported last month, U.S. District Judge William M. Conley ruled in *Boyden v. Conlin*, 2018 WL 4473347, 2018 U.S. Dist. LEXIS 158491 (W.D. Wis., Sept. 18, 2018), that Wisconsin's refusal to cover "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" for its transgender state employees violates the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 and in the Affordable Care Act, as well as the Equal Protection Clause of the 14th Amendment. The state filed a notice of appeal with the U.S. Court of Appeals for the 7th Circuit on November 9. The plaintiffs, now appellees, are represented by the ACLU and Hawks Quindel SC.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – In order to come within the coverage of the domestic violence law, the victim of the crime must be a "spouse or former spouse, a cohabitant or former cohabitant, a fiancé, or someone with whom the offender has or had an engagement or a 'dating relationship,'" writes the 2nd District Court of Appeal in *People v. Padilla*, 2018 WL 6177734, 2018 Cal. App. Unpub. LEXIS 7942 (Nov. 27, 2018), in which Vincent Padilla appeals his conviction by a jury for violating Penal Code 273.5(a). Padilla contested the application of the law in this case, where he assaulted Manuel, a transgender woman, who was the prosecution's principal witness at trial. Manuel testified that Padilla was her "ex-boyfriend" whom she met when they were both locked up in the county jail. Manuel testified that it was a "romantic relationship" that "just happened." As a summary of Manuel's testimony was related by the court: The relationship lasted two weeks, and for a few days they stayed together in the house of one of Padilla's friends. At the end of the relationship, they were "hanging out" together on Western and Melrose Avenues (L.A.) and Padilla "started going off on me and going crazy, and I just couldn't take it so I decided to break up with him," she testified. She told Padilla that "it was over" and started to walk away. Padilla approached her from behind and punched Manuel in the face, hitting her nose. She went to seek help at a nearby convenience store because she was "like bleeding nonstop." Padilla followed her to the store, telling her to be quiet and not to say anything, and when Manuel reached the store, Padilla fled. Police arrived and she told them that her "ex-boyfriend" broke her nose, and she showed them a cellphone photo that was used to identify who was responsible. The court found that on this testimony it could conclude that the domestic violence law applied.

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.

CALIFORNIA – Transgender inmate Tristian Crowder was severely assaulted by another inmate in the prison mess hall, sustaining lacerations from a box cutter to her head, face, neck, ear, and

hand. Her *pro se* complaint says the officer in the mess hall laughed at her and did not intervene. She was forced to walk 35 yards to seek help, while profusely bleeding, whereupon she was cuffed (despite her injuries) and taken to the medical unit. During an interview about the incident, she alleges that she was made to feel the assault was her fault for being transgender and effeminate. Crowder was taken to a local hospital, where she received 14 staples and 63 stitches. She said she was placed in administrative segregation after her discharge from the hospital, and she was denied pain medication and other medical care. Crowder attached hospital records to her complaint that included discharge orders and instructions on wound care, but she alleges that she did not receive aftercare, causing improper healing, continued pain, and the development of keloids (attaching pictures of enlarge, raised scars). Crowder says pain persists untreated and the prison refuses to remove her keloids, saying such treatment is "elective." She sued the warden, two lieutenants, and a sergeant; but (except for one lieutenant who interviewed her) her complaint does not explain why these defendants were named or their individual involvement. Magistrate Judge Dennis M. Cota dismissed her complaint on screening for failure to state a claim in *Crowder v. Fox*, 2018 WL 6068539 (E.D. Calif., November 20, 2018). He identifies possible civil rights claims of failure to protect from harm and denial of medical care. He also writes that Crowder "seems" to be alleging a denial of Equal Protection. All claims are found to suffer from lack of specificity as to the named defendants' involvement in the constitutional violations. In addition, Judge Cota, in dicta, incorrectly applies a rational basis test to the Equal Protection claim, despite Ninth Circuit precedent applying heightened scrutiny to LGBT Equal Protection claims. *See SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 474 (9th Cir., 2014) (applying heightened scrutiny to pre-emptory juror challenges based on sexual orientation). After the dismissal with leave to amend, Crowder obtained counsel, Medina Orthwein, LLP, Oakland. Judge Cota has granted an extension of time to file an amended complaint.

CALIFORNIA – In *In re M.C.*, 2018 Cal. App. Unpub. LEXIS 7913, 2018 WL 6167315 (November 26, 2018), the California 2nd District Court of Appeal affirmed the placement of a transgender male in a women's camp of the California Youth Authority, despite his argument that such placement was contrary to his best interests for treatment of his gender dysphoria. In an unpublished opinion for herself (and for Justice Nora M. Manella and Acting Justice Gary I. Micon, sitting by designation from the Los Angeles County Superior Court), Justice Audrey B. Collins ruled that the decision to reject community placement under supervision and remand M.C. to the Youth Authority was within the discretion of the trial judge, given the severity of the offense (armed robbery), its planning, and the safety of the community. [The decision mentions the "sophistication" of the offense, but this writer notes that the defendants robbed a cell phone store of cash and phones, but they were caught within hours because the phones' GPS tracking was not disabled. Very sophisticated robbers!] M.C. conceded on appeal that the women's Youth Authority Camp could provide "some means of support for its transgender residents" and that placement there was not "tortuous." The court found that M.C. had "forfeited" a constitutional challenge to his placement because it was not raised in the trial court. Presumably, M.C.'s rights while in custody can still be raised in a separate civil rights case that is not a direct appeal of his criminal disposition. M.C. was represented on appeal by appointed counsel.

GEORGIA – U.S. Magistrate Judge Brian K. Epps dismisses transgender inmate Ryan Vincent Gooch's *%pro se%* complaint in *%Gooch v. Tremble%*, 2018 WL 2248750 (S.D. Ga., April 20, 2018), for failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA]. Gooch, although known to be transgender and vulnerable as a prior Prison Rape Elimination Act victim, was moved by defendants to a known dangerous gang unit of this prison, over her protests. She complied to avoid a ticket. Shortly thereafter, she was assaulted and stabbed eleven times while sleeping. The incident and assailant were caught on videotape. Gooch seeks damages and other relief, including barring defendants from employment with the Georgia Department of Corrections. Although the PLRA is an affirmative defense, if failure to exhaust appears on the face of the complaint, the court may dismiss without a formal motion. *%Jones v. Bock%*, 549 U.S. 199, 215 (2007); *%Bingham v. Thomas%*, 654 F.3d 1171, 1175 (11th Cir. 2011). Here, the assault occurred in December of 2017. Gooch admits in his complaint in PACER that his second tier appeal of his grievance is "still pending." [Note: Georgia law requires inmates to start their grievance in ten days; but the third state appeal gives the Commissioner 100 days to act before exhaustion is complete.] Thus, Gooch's charge that defendants were deliberately indifferent to her safety will have to wait. Judge Epps' dismissal is without prejudice.

ILLINOIS – Finally – a transgender prisoner class action in Illinois! After reviewing countless transgender cases in Illinois, particularly in the Southern District, this writer is pleased to write about a class action filed with powerful counsel to address Illinois' transgender inmates' medical needs statewide. The Complaint in *Monroe, et al., v. Rauner*, is at 18-cv-0156 (S.D. Ill); but

no class has as yet been certified. In *Monroe v. Rauner*, 2018 WL 6259248, 2018 U.S. Dist. LEXIS 203410 (S.D. Ill., November 30, 2018), U.S. District Judge David R. Herndon adopted a recommendation from Magistrate Judge Donald G. Wilkerson that Illinois Governor Bruce Rauner (who was recently defeated for re-election) be dismissed as a party defendant. Noting that full injunctive relief (no damages are sought) can be granted against the Illinois Department of Corrections executives (who remain as defendants) and that the allegations against the Governor in setting transgender policy are insufficiently "robust" to withstand a motion to dismiss, Judge Herndon lets the case proceed without him. At this point, the case alleges that Illinois fails to meet the serious medical needs of transgender women. The opinions do not discuss transgender men or the housing placement of transgender inmates of either identification. Eventually the case may implicate the state budget or executive decisions about capital improvements or construction, but it is not at that stage. Magistrate Judge Wilkerson recommended that the Governor be dismissed with prejudice. The plaintiffs appealed the dismissal, and they also argued that any dismissal should be without prejudice. Judge Herndon wrote: "The Court rejects plaintiffs' objections and arguments with the exception that dismissal will be without prejudice instead of with prejudice." Oddly, Judge Herndon then Orders the Governor dismissed with prejudice, but he directs the Clerk to withhold entry of judgment until "the close of the entire case." Meanwhile, discovery proceeds within the agency. The effect of all of this may be that Judge Herndon has, as a practical matter, precluded any budgetary defense that could resurrect the need for the Governor. The class is represented by the Roger Baldwin Foundation of ACLU, Inc., and Kirkland and Ellis, LLP, Chicago.

MASSACHUSETTS – The Massachusetts Court of Appeals (the state's intermediate appellate court) denied post-judgment relief to *pro se* transgender inmate Candace-Jabril S. Africa in *Africa v. Bedard*, 2018 Mass.App. Unpub.LEXIS 815 (November 5, 2018). The *per curiam* opinion by Associate Justices Ariana D. Vuono, Jeffrey C. Kinder, and James Lemire, is "not binding" precedent under Massachusetts rules, although it may be cited. Africa claimed that she was cited with a disciplinary violation after trying to commit suicide. When she was placed on suicide watch, her hajib was forcibly taken from her and she was denied a kosher diet. She also claims that a C-PAP machine she needed to breathe while she slept was denied because its cord posed a risk of self-harm. Although it is not clear, apparently these events transpired over some 4 days. The trial judge dismissed the case as "conclusory" and "vague." Africa did not seek to amend her complaint or file a timely appeal. Almost a year later, she moved to file a late appeal, which was denied. She did not appeal from the denial. Instead, she sought relief from the judgment under Massachusetts Rule 60, which seems from the opinion to track the standards of F.R.C.P. 60(b). The Court of Appeals found that Africa could not use a motion for relief from judgment as a substitute for appeal and that Rule 60 could only be invoked in extraordinary circumstances not present here. The court rejected Africa's argument that the trial judgment should have permitted her to amend her complaint, in part because she did not present a proposed amended complaint for consideration below. The court declines to reach the merits because there is no showing that extraordinary circumstances are present justifying departure from the rules of civil and appellate procedure and the need for finality.

NEVADA – A *pro se* federal lawsuit involving HIV+ prisoner Lance Reberger has apparently been bogged down in discovery disputes since 2015. The crux of the case is that Reberger alleges that he is being denied dispensing of the HIV medications Norvir and Invirase as ordered (twelve hours apart and with food), which the Nevada prison officials refuse to accommodate. In 2016, the court found that Reberger was not barred from filing his case by the three strikes rule of the Prisoner Litigation Reform Act because his medication claim presented imminent danger as an exception to the "three strikes" rule. Now, in *Reberger v. Koehn*, 2018 U.S. Dist. LEXIS 186658 (D. Nev., October 31, 2018), Judge Du rules on a motion by the state to reconsider this ruling, based on presentation of Reberger's medical records and the affidavit of a nurse at an outside hospital that had seen Reberger. Judge Du denies reconsideration. There is no reason proffered for the delay in requesting reconsideration, since the records were not newly discovered evidence. Judge Du also rejected the excuse that the outside provider had a policy against providing affidavits in inmate cases. [Incredible that the state attorney general and the hospital had the chutzpa to try that one before a federal judge!] Finally, Judge Du also found that the records and affidavit did not contradict Reberger's claims of imminent danger, so there was no justification to change the decision on the merits. Other discovery issues are discussed by ECF number, but the takeaway here is the application of the imminent danger exception to the three strikes rule to challenges to failure of timely dispensing of important HIV medication.

MICHIGAN – *Law Notes* previously reported the case of HIV+ inmate John Dorn, who was disciplined, given a higher security classification, and placed in administrative segregation after an interrupted (no ejaculation) "blow job" in a Michigan prison, under regulations

that regarded such conduct as attempted HIV transmission. U. S. District Judge Paul L. Maloney dismissed most of his case in *Dorn v. Michigan Dep't of Corrections,* 2017 U.S. Dist. LEXIS 864, 2017 WL 2436997 (W.D. Mich., June 6, 2017) (Summer 2017 at page 277). Dorn remained in administrative segregation for 21 months, while the other (HIV-) inmate was given 30 days' loss of privileges. Upon motion for reconsideration, Judge Maloney reinstated claims under the federal Rehabilitation Act early in 2018. Dorn has now settled with the state, receiving $150,000 in compensatory damages (including costs and attorneys' fees) and amendment of Michigan policy on reclassifying HIV+ inmates involved in "misconduct." Basically, according to Lambda Legal's press release, Michigan has agreed to stop applying "old science" that was "based on a presumption that did not consider the actual risk of transmission." The settlement contains the new regulations as an attachment. They provide, in part, that medical staff must "certify whether the prisoner's behavior presented a significant risk of HIV transmission" by considering the "risk of the sexual activity at issue and other risk mediation measures, such as medication to achieve a suppressed viral load." This writer could find no explicit reference to barrier protection, such as condoms, as a risk reduction factor to be considered. Michigan agreed to apply the new regulations to Dorn retroactively and to expunge his record. Notably, Michigan also agreed to apply the new regulation to other HIV+ inmates who had their security classifications adversely affected by the old policy. The agreement and new regulations can be found at *Dorn v. Michigan Dep't of Corrections,* 15-cv-359, ECF #88 (W.D. Mich., November 6, 2018). The settlement is not "So Ordered," and the case ends with a voluntary dismissal under F.R.C.P. 41(a)(1)(A)(ii). Judge Maloney closed the case and did not "retain" jurisdiction; but, under the settlement, Dorn (and the state) retain the "right" to file a motion to enforce the terms of the settlement with Judge Maloney. There was no class certification. This raises a question as to what rights, if any, exist to those similarly situated to Dorn, whose cases are to be reviewed and reconsidered under the settlement terms. This question is like one in the *Quine* transgender prisoner settlement in California, where there was no class certification, but the parties agreed that California would revise its regulations and apply them in the future to transgender inmates besides Quine. In that case, U.S. District Judge Jon S. Tigar declined to allow the "other" transgender inmates to intervene, finding them intended but "incidental" beneficiaries of the settlement, in *Quine v. Beard,* 2017 U.S. Dist. LEXIS 148571, 2017 WL 4082411 (N.D. Calif., September 13, 2017), reported in *Law Notes* (October 2017 at page 421). As here, they were apparently mentioned in only one paragraph. Unlike here, however, *Quine* did not specifically involve explicit retroactive application of a new regulation. Judge Tigar later ruled that Quine herself had standing to seek enforcement of the settlement on behalf of the absent "others," since it was part of her bargain in her own settlement. *Quine v. Beard,* 2017 U.S. Dist. LEXIS 169100, 2017 WL 4551480 (N.D. Calif., October 12, 2017), reported in *Law Notes* (November 2017 at page 460). This writer is not aware of a circuit decision specifically on this point. Dorn was ably represented by Lambda Legal and the Michigan Protection and Advocacy Services, Inc.

OHIO – Pro se transgender inmate Dashawn Parker sued the warden of her Ohio prison, complaining that she was being denied her civil rights by withholding of hormone therapy, surgical implants, and gender reassignment surgery, and seeking monetary and injunctive relief in *Parker v. Bowen*, 2018 WL 6267182 (N.D. Ohio, November 30, 2018). U.S. District Judge Benita Y. Pearson dismissed her complaint on screening because she failed to state a claim against the warden or allege that he had any responsibility for her medical treatment. Most of the opinion is boilerplate, but it reaffirms that gender dysphoria is a serious medical need. Parker, however, failed to satisfy the subjective component of an Eighth Amendment claim (deliberate indifference to the serious need) because she did not even suggest that the warden was aware of her medical needs or was personally involved in any treatment decision. A review of Parker's complaint on PACER confirms the legal basis for the dismissal, but the complaint also alleges that "officials" call her a "homosexual" and "mock" her. She threatens suicide as "better" than her current life four times in her short statement of allegations. Judge Pearson does not mention these facts or give Parker a clue how to allege a valid complaint for what are on their face serious, albeit badly plead, allegations – nor does she inform corrections officials that an inmate is suicidal. Of course, the judge has no obligation to contact Corrections, and she cannot be sued for deliberate indifference; but some districts have standing orders directing the clerk of court to inform Corrections if suicidal ideation is plead, regardless of the merits. Judge Pearson merely dismisses without prejudice and informs Parker that any appeal would not be taken in good faith.

TENNESSEE – Gay inmate Jefferey D. Barbee brought a federal civil rights case against another inmate who was harassing him sexually in *Barbee v. Lee*, 2018 WL 6198393 (M.D. Tenn., November 28, 2018). U.S. District Judge William J. Campbell, Jr., dismissed the case in screening for failure to state a cause of action. The other inmate was

the sole defendant; no state officials were sued. "Even assuming that a single day of harassment could satisfy the first prong" of 42 U.S.C. § 1983 – violation of a federal constitutional right – something no other court has held in this writer's experience – Barbee failed to plead state action necessary for a claim under § 1983. *See Nobles v. Brown*, 985 F.2d 235, 238 (6th Cir. 1992) (inmate rapist not liable for violation of § 1983). While Barbee did complain to officials about the harassment, he did not plead their failure to act, nor did he give them time to act prior to filing, since he commenced his lawsuit on the day after complaining.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

EEOC – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – Unless a confirmation deal is working out in the U.S. Senate before the end of December, the Equal Employment Opportunity Commission, which enforces federal employment discrimination laws, will lack a quorum effective January 1, 2019, because only two out of five Senate-confirmed commissioners will remain upon the expiration of Chai Feldblum's term. Feldblum, an "out" lesbian who was initially appointed by President Barack Obama as the first out LGBT person to serve on the EEOC, was reappointed by Obama to a term about to expire. Under the Civil Rights Act, no more than three members of the Commission can belong to the same political party, and as things turn out one of the three current vacancies may not go to a Republican. Under the circumstances, and responding to affirmative comments about her service, President Trump decided to reappoint Feldblum to a new five-year term, together with two Republicans as part of a package presented to the Senate for speedy approval. But some outspokenly homophobic Republican senators have held up the process, refusing to allow the matter to be decided in an unrecorded unanimous consent vote, and Majority Leader Mitch McConnell has not been willing to let the EEOC nominations go through individual consideration and floor debate. The Senate opponents have specifically cited Commissioner Feldblum's key role in getting the EEOC to abandon its past positions and rule affirmatively that Title VII's ban on sex discrimination covers sexual orientation and gender identity discrimination claims. The Trump Administration has been urging the Supreme Court to grant review to cases presenting that issue, asserting that the EEOC's current interpretation of the statute is incorrect. (Trump has surprised his congressional supporters by appointing some out gay people to things, including an ambassador to an important European ally, a federal district judge, and a judge for the 9th Circuit, as well as reappointing Feldblum. Of course, some of these appointments went to gay conservative Republicans . . .)

U.S. OFFICE OF PERSONNEL MANAGEMENT – OPM administers employment policies for the executive branch of the federal government. During the Obama Administration, the Office's website included a Gender Identity Guidance page, describing federal employment policies and, in particular, the obligations of federal agencies in dealing on a non-discriminatory basis with transgender employees. The Trump Administration has revised the Office's website, and removed all references to transgender people, apart from the simple statement from an Obama Executive Order that Trump has not rescinded, that discrimination based on gender identity is prohibited within the Executive Branch. Of course, the EEOC has taken that position as a matter of interpreting provisions of Title VII applicable to federal employment, but the Justice Department is on record as disagreeing with the EEOC's interpretation of the statute, and has said so in a brief filed in the Supreme Court in response to the cert petition in the Harris Funeral Homes case, in which EEOC is a respondent. Removal of the guidance is consistent with the general policy of the Trump Administration to repeal or replace as much of the Obama Administration's handiwork as possible.

FOREIGN TRADE – Some Republican legislators voiced loud protests after media reports that the U.S.-Mexico-Canada trade agreement to be signed by President Trump included a provision obligating the signatories to outlaw sex discrimination and defined that to include sexual orientation and gender identity discrimination. At present, federal law does not expressly ban such discrimination, and these legislators, eager to protect the ability of their business constituents to discriminate, argued that the president had no business signing such a document. However, the final agreement signed by Trump included a provision calling on each of the countries to implement policies that they consider "appropriate to protect workers against employment discrimination on the basis of sex" and, in a footnote, say that U.S. federal hiring policies "are sufficient to fulfil the obligations" on labor rights, and thus "requires no additional action" by the U.S. Of course, U.S. federal hiring policies are governed by an Obama-era executive order, not withdrawn by Trump, prohibiting sexual orientation and gender identity discrimination in the federal service. It is unclear what this combination of language actually means, and it won't become clear until actual cases of discrimination end up in court.

LAW & SOCIETY *notes*

LAW & SOCIETY NOTES

By Arthur S. Leonard

GENERAL ELECTIONS – The general elections held on November 6 prompted national press attention to the growing phenomenon of out LGBT people winning elective office. The roll-call of victorious candidates is too lengthy to include here, but we would note the election of an out gay male governor (Colorado's Jared Polis) for the first time, an out bisexual U.S. Senator from Arizona, enough out Congressional candidates to expand the LGBT caucus from minuscule to "small but noisy" (with ten or more members for the first time), state attorneys general, and many state legislators and judges.

In many jurisdictions, it was the first time an out LGBT person had won office, and in others the first time an out LGBT person had been elected to a particular position. The victories came in some unexpected places, as *Out Smart Magazine* reported on-line on November 7 that five out LGBTQ candidates won election or were re-elected to the Texas House of Representatives. Indeed, the article noted that 14 of the 35 out LGBTQ candidates running for office in Texas were elected, resulting in what will be the largest LGBTQ delegation in the history of the Texas House, more than double its previous size (and some of those elected had ousted entrenched incumbent Republicans). Furthermore, the magazine reported five out gay candidates won judicial office in Harris County; they will join three gay incumbents on the bench in that county. One is the firstly openly LGBT African-American judge in the county's history, and another the first openly HIV-positive elected official in the state.

Among other notable victories was the Wilton Manors, Florida, city commission election, in which out LGBT candidates swept the boards to produce the state of Florida's first all-LGBT city commission. Wilton Manors is a suburb of Ft. Lauderdale. Another significant LGBT first in the south was the election of John Arrowood to the North Carolina Court of Appeals, making him the first out LGBT candidate to win state-wide office in North Carolina. (He had previously served on the court by appointment to fill a vacancy, and then defeated for election, but came back to successfully challenge an incumbent this year.) In Champaign County, Illinois, voters elected the first out-gay sheriff in the state of Illinois. The Kansas House of Representatives will have its first out gay members when it convenes in 2019: two of them, Democrats who defeated Republican incumbents. In Michigan, out lesbian attorney Dana Nessel (Attorney General) was part of a victorious team of three women running for statewide office who defeated Republicans for the three big offices of governor, secretary of state and attorney general.

Democrats picked up 40 seats in the U.S. House of Representatives, which will result in LGBT-friendly legislators taking committee chairs and pushing the LGBT-rights legislative agenda that has been stalled in the chamber since Republicans won a mid-term majority during Obama's first term in 2010. Likely House Speaker Nancy Pelosi stated in October, prior to the election, that the Equality Act, which would amend numerous provisions of federal law to provide protection against discrimination for LGBTQ people, will be at the top of the Democrats' legislative agenda. The House version of the bill had 198 co-sponsors in the current session of Congress, but only two were Republicans, which means almost the entire Democratic membership of the House was on-board. Republicans picked up a few Senate seats, however, and even if the bill passes the House in 2019 with some Republican votes, there is little hope it could even come to the floor in the Senate, much less be passed and signed into law by Donald Trump. But passage in one house would have important symbolic value in advancing the legislative debate.

Also noteworthy was the decision by Massachusetts voters to reject Question 3, which was intended to roll back protection for transgender people in accessing public accommodations in the state. After a hard fought media campaign, about a two-thirds of the voters supported keeping the protections intact.

We would be remiss not to mention the passing of **RAY HILL**, a long-time gay rights activist in Texas who died in a hospice center in Houston on November 24, age 78. His passing brought a lengthy historical obituary in the *Washington Post*, published December 4, recognizing the significance of Hill's activism on a national level. "In 1987," wrote the *Post*, "Mr. Hill successfully took the city of Houston to the U.S. Supreme Court, where he won the right to interrupt police officers on First Amendment grounds. (*See City of Houston v. Hill*, 482 U.S. 451 (1987).] He had been arrested five years earlier for shouting 'Why don't you pick on someone your own size?" while cops confronted his friend." Hill was described in Justice William J. Brennan's opinion for the Court as a "citizen provocateur" and he gloried in the label, printing it on his business cards. He played a leading role in LGBT politics in Houston and Texas, having come out as gay while in high school and never retreating to the closet. His mother, a militant union organizer, expressed relief when he came out. According to Hill's recollection, "She said, 'Well, we notice you dress up more than the other boys in the neighborhood, and we thought you were trying to pretend to be wealthier than we are, and we were afraid you might

grow up to be a Republican. So if you're gay, we can handle that." [Now, there's a potential slogan for LGBT politicians: "Better gay than Republican."] Mr. Hill was credited with being a force behind the establishment of LGBT community centers and the creation of street patrols to combat anti-LGBT hate crimes.

INTERNATIONAL NOTES

By Arthur S. Leonard

ORGANIZATION FOR SECURITY & COOPERATION IN EUROPE – On November 1, the OSCE announced plans for an international fact-finding mission to investigate allegations of anti-gay abuses in Chechnya. Russia has denied news reports and personal testimony of gay people being rounded up by authorities and subjected to torture. Iceland, joined by 15 other countries, issued a statement invoking the OSCE mechanism to establish the mission. The statement details efforts to get Russia to investigate the situation, and concluded that those efforts have not succeeded, according to a Nov. 1 report by the *Washington Blade*. The 57-member OSCE (which includes the United States) was set up during the Cold War as a forum where the U.S. and other member nations could raise human rights and security issues with countries that were part of the then-Soviet bloc, explained the *Blade*. "It now serves as a pan-Atlantic forum for conversations on early warning, conflict prevention, crisis management and post-conflict rehabilitation." The U.S. State Department issued a statement in response: "The Trump Administration has made it clear that we will hold Russia accountable for its malign activities, including its abuses against those within its own borders." Of course, the State Department does not really speak for the President, who has more than once said that he believes Russian President Putin's denials whenever allegations are made about nefarious activity within the Russian Federation.

AUSTRALIA – The parliament in Australia's Northern Territory voted November 28 to change the law such that genders will not be required on birth certificates and transgender people will be able to change the sex listed on their birth certificates without undergoing surgical alteration. The action was intended to align the Territory with the Federal Marriage Act, which was amended by the national government to allow same-sex marriages after a referendum showed overwhelming majority support from the public. Although surgical alteration will not be required, applicants to change sex designations will be asked to have undergone "appropriate medical treatment," most likely psychological. *ABC Premium News, Nov. 28.*

BERMUDA – The Court of Appeal for Bermuda ruled on November 23 that the Domestic Partnership Act 20018, intended by its sponsors to avoid the country becoming a marriage equality jurisdiction, offends the nation's constitution. *Attorney General for Bermuda v. Ferguson*, Civil Appeal Nos. 11 & 12 of 2018. A trial judge, C.J. Kawaley, ruling last June 6, rejected plaintiffs' argument that the measure was passed wholly or in part for impermissible religious reasons, but did find that it offended two sections of the constitution. The Attorney General appealed, and the plaintiffs cross-appealed, continuing to press their point on impermissible religious reasons. Referring to Section 8, the freedom of conscience provision, Judge Baker, President of the tribunal, wrote: "It is true that the draughtsman of the Bermuda Constitution 50 years ago is unlikely to have had same-sex marriage in the forefront of his mind, or indeed in his mind at all, but that is not the point. It was drafted with sufficient flexibility to protect everyone's freedom of conscience in a changing world. Interference with that freedom can be by both positive and negative acts, in this instance by the negative act of preventing same-sex couples having the right to marry." As to Section 12, the anti-discrimination provision, the court found that the issue under this section "turns on the meaning of 'creed,'" an expressly forbidden ground for discrimination by the government. The trial judge had found, according to Judge Baker, that "'creed' broadly corresponded to the beliefs protected by Section 8," continuing: "Although 'creed' is ordinarily associated with religious belief or the absence of a religious belief it can have a wider meaning, in particular a set of opinions or principles on any subject." Thus, the court approved the broader meaning embraced by the trial judge. In its conclusion, the Court of Appeal held, "The revocation provisions in Section 53 of the DPA were passed for a mainly religious purpose to meet the wishes of the PMB," the new governing party that opposed marriage equality on religious grounds. "They are therefore invalid and must be struck down. We dismiss the appeal and uphold the decision of the Chief Justice but on that ground. We uphold the decision of the Chief Justice that there is a breach of section 8 of the Constitution but not his decision on section 12." The court dismissed the Attorney General's appeal and affirmed the trial court's ruling that the DPA offends the constitution, which leaves in place a prior constitutional ruling that same-sex couples are entitled to marry in Bermuda. The government's only remaining option, if it decides not to comply, is to lodge an appeal with the Privy Council in London, which is not expected to be particularly sympathetic in light of the marriage equality laws in the U.K.

INTERNATIONAL *notes*

BOTSWANA – President Mokgweetsi Masisi issued a statement on November 27 condemning anti-LGBT violence, and said that his administration would protect the LGBT minority from discrimination. This would mark quite a turnabout of public policy if effectuated, as Botswana currently outlaws same-sex sexual acts between consenting adults. Early in December, the nation's highest court scheduled arguments to be held in March 2019, challenging the criminal sex laws in question. This policy would mark a break with the general view of central African governments, which tend to be outspokenly homophobic. *Agence de Presse Africaine* (APAnews), Nov. 27.

CANADA – Responding to a shortage of appropriate health care for transgender people in far-Western Canada, the British Columbia government has announced that it will provide reconstructive lower surgery for transgender people. Health Minister Adrian Dix acknowledged that representatives of the community had advocated for several years the urgency of making the "complex surgery" available in the province, as many could not afford to go to Montreal or the United States in order to have the procedures performed. Gender-affirming surgery will become available at Vancouver Coastal Health in 2019, and publicly funded chest and breast surgeries will be made available in Victoria, Burnaby, Kamloops, Kelowna, Port Moody, Prince George, and Vancouver. According to the government, about 100 people a year have been traveling out of the province to get the surgery, and they expect accumulated demand for about 200 hest and breast surgeries to take place in British Columbia during 2019. *Victoria Times Colonist*, Nov. 17.

CANADA – The Attorney General of Canada, Jody Wilson-Raybould, announced that a directive will be issued related to the prosecution of HIV non-disclosure cases, i.e., cases where somebody who is HIV-positive is charged under criminal law for engaging in sexual intercourse without disclosing their HIV status to their partner. A news release from the Department of Justice Canada (Dec. 1) states, "In issuing the Directive, the Government of Canada recognizes the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS." The Department is accepting scientific evidence that HIV-positive people taking medication that reduces their viral load to undetectable levels do not prevent sufficient risk of transmission to justify criminal prosecution for non-disclosure. The new policy stems from a 2012 decision by the Supreme Court of Canada, which said that a disclosure duty extends to activity that poses a "realistic possibility of transmission" and that the most recent scientific evidence on the risks of sexual transmission of HIV should inform this test. The directive "will reflect the most recent scientific evidence related to the risks of sexual transmission of HIV," says the press release, "as reviewed by the Public Health Agency of Canada, as well as the applicable criminal law as clarified by the Supreme Court of Canada." The full text of the release can be found on the Department's website: www.justice.gc.ca/

CHILE – President Sebastian Pinera announced that a new law, approved by Parliament in September, will end discrimination regarding gender identity, as he signed the measure into law on November 28. People over age 14 seeking to change their name and gender on official documents will be able to do so with parental or guardian permission, and those over 18 can do so at a registry office on their own motion. Rolando Jimenez, the leader of the Integration and Homosexual Liberation Movement, said, "Today we are taking a historic leap that will improve the quality of life of the trans population. A basic right, that of identity, is being recognized. It's a right that most of us have from birth but which is taken from the trans population at birth." Jimenez insisted, however, that the law should be extended to children younger than 14, stating that it is an "obvious violation of human rights that we hope will be corrected." Political momentum generated by a popular 2017 Chilean film, "A Fantastic Woman," was credited with helping to get the legislative proposal moving. *Agence France Presse English Wire*, Nov. 28.

COSTA RICA – On November 14, the Supreme Court formally released its judgment, previously announced, giving the government a time limit of 18 months within which to formally extend marriage rights to same-sex couples. The Inter-American Court of Human Rights, which is based in the Costa Rica capital of San Jose, ruled last January that the Inter-American convention requires member nations to allow same-sex couples to marry, responding to a request for a ruling by the Costa Rican government. The Supreme Court subsequently ruled that legislation against same-sex marriage was unconstitutional. Political leaders reacted to the earlier rulings by pledging that action would be taken, but so far inertia prevails. Under the terms of the Supreme Court ruling, marriage equality will go into effect without legislation in 2020 if lawmakers do not take action. *Washington Blade*, Nov. 14.

FRANCE – The Ministry of Health announced on November 27 that the social security system would begin from

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December 10 to reimburse purchases of boxes of condoms bought at pharmacies of they are prescribed by doctors or midwives – effectively making them free for everybody covered by the national health services. Minister of Health Agnes Buzyn described this as a "new step for the prevention of HIV and protection of French people." *Thai News Service*, Nov. 29.

HONG KONG – The Hong Kong parliament narrowly rejected a motion to urge the government to consider granting equal rights to same-sex couples. The 27-24 vote also generated six abstentions. Gay legislator Raymond Chen, who proposed the motion, told the South China Morning Post, "The government keeps avoiding studying policies for homosexual groups. Opponents of this motion have to explain why they reject even such a small step forward. The Hong Kong government has extended some limited recognition, sometimes under pressure of lawsuits. For example, in September, it said it would recognize overseas same-sex partnerships when granting dependent visas, responding to lobbying by global banks and law firms who were having trouble bringing in personnel who were in same-sex relationships. *Thomson Reuters Foundation* (Nov. 22).

MEXICO – Journalist Rex Wockner reported on Nov. 6 that the Mexican Senate had unanimously voted to approve pension and health-care rights for married same-sex couples, with a vote of 110-0. On November 22, he reported that the Mexican Supreme Court has ruled that same-sex couples have a constitutional right to access assisted reproductive technology. The ruling involved a gay male couple from Yucatan state, who sought to have a child through in vitro fertilization using a surrogate; when the child was born, however, the local registry said that only one of the men – the one with a "blood relationship" to the child – could be listed as a father. The First Chamber of the Supreme Court upheld the granting of an amparo (a court order) to compel registration of the child showing two fathers. * * * The *New York Times* (Nov 28) reported about the marriage of a gay Mexican couple at the Residence of the Consul General of Mexico in New York, Diego Gomez Pickering. Daniel Berezowsky and Jaime Chavez Alor were married November 26, with Pickering officiating. In May, they had tried to get a marriage license at the General Consulate of Mexico in New York, as different sex Mexican couples residing in New York can do, but were denied by the Foreign Ministry, which insisted that same-sex marriage is not included in the federal code of Mexico. They challenged the ruling and filed a lawsuit with the civil federal court of Mexico, which issued an amparo (court order) in their favor on October 19. The federal government then granted the marriage license, and the formal ceremony followed.

NIGERIA – The High Court in Abuja dismissed a lawsuit seeking registration of a non-governmental Lesbian Equality and Empowerment Initiative. Justice Nnamdi Dimgba upheld a decision by the Corporate Affairs Commission to refuse to register the group, based on the limitation of the right to be registered under Section 45 of the Laws of Federation, based on concerns about public morality. AllAfrica.com, Nov. 19.

NORTHERN IRELAND – The court of appeal will not decide a pending case concerning marriage equality in Northern Ireland until sometime in 2019, according to a Nov. 21 report by the *Belfast Telegraph*. Following oral argument, Lord Chief Justice Sir Declan Morgan "reserved judgment" on the case. Although the last time a vote was taken in the Northern Ireland Parliament, there was a majority for marriage equality, under the power-sharing agreement prevailing, the measure could be blocked by the Unionist Party, which did so. There has been a stalemate since the last parliamentary election, in which no party gained enough seats to form a government, so the province is acting without its own executive and essential functions are being directed from London. However, the Conservative leadership in the U.K. Parliament has blocked efforts to legislate marriage equality for Northern Ireland, arguing that it is a policy matter for the local legislature, once it finally becomes operational.

SAN MARINO – *Instinct Magazine* reported Nov. 16 that San Marino, described as the world's "oldest republic," has passed law allowing civil unions for same-sex couples. San Marino is described as a "microstate" with only about 33,000 residents on a thin sliver of land on the Italian peninsula. Its Great and General Council voted 40-4 in favor the Regulations of Civil Unions Law, with four abstaining from the vote. The proposed law was pending in the Council since December 2017, and generated a long debate and a 1 a.m. vote. The magazine said it was unclear when the law will go into effect. The article did not specify how civil unions will differ from marriage in terms of legal rights and responsibilities.

SOUTH AFRICA – On November 28 the Parliament approved a bill that will prohibit discrimination against same-sex couples seeking to marry. The Civil Union Amendment Act was amended to end the practice of exempting Department of Home Affairs marriage officers from the duty

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to perform civil unions. A survey had shown that 421 officers out of a total of 1,131 had been exempted under this conscientious exemption provision, making it difficult in some parts of the country to find an authorized officiant to perform marriages. It was pointed out that officers who were willing to officiate same-sex marriages were not "evenly distributed" throughout the country, requiring some people to travel long distances in order to be wed. *Cape Times* (Nov. 29).

TAIWAN – Overwhelming opposition to marriage equality was signaled by Taiwan voters during November, voting on several referendum proposals that were proposed and funded heavily by outside religious interests. *Thomson Reuters Foundation* reported November 26 that more than two-thirds of voters endorsed keeping the traditional definition of marriage consisting of a man and a woman. The nation's highest court had ruled that marriage equality was constitutionally required, but set a dead-line years in the future for the state to comply. In the meanwhile, there has been no serious motion forward by the government to frame, introduce and enact such a measure in the legislature, and lots of talk about some kind of civil union rather than marriage. Some commentators said that the referendum vote is not binding on the legislature or the government, just a sounding of public opinion, since the court decision was premised on an interpretation of the Constitution, which would override contrary statutes. This was announced as the formal opinion of the Judicial Yuan, reported November 29 on-line by *focustaiwan.tw/news*. A Human Rights Watch spokesperson referred to the referendum as just a measuring of public opinion, not an authoritative source of policy. By the end of November, there were reports that the government is working on a "separate law for same-sex unions," in line with the view endorsed by voters that no change should be made to the existing marriage law. *Strait Times*, Nov. 30.

TANZANIA – The U.S. has issued a warning to U.S. nationals in Tanzania to be "cautious" after the nation's commercial capital, Dar es Salaam, announced a "crackdown" on homosexual activity, which is a criminal offense in that country. On Nov. 3, the U.S. Embassy posted an alert on its website, advising U.S. nationals to review their social media profiles and internet footprints. "Remove or protect images and language that may run afoul of Tanzanian laws regarding homosexual practices and explicit sexuality activity," said the alert, which advised anybody detained or arrested as part of the announced crackdown to tell Tanzanian authorities to inform the embassy. The Administrative Chief of the City had announced at the end of October that a special committee would seek to identify and punish homosexuals, prostitutes, and "online fraudsters." *Reuters*, Nov. 4.

THAILAND – A new Life Partnership Bill intended to create a legal status for same-sex couples came in for criticism from some activists who insisted that the LGBT community should not settle for anything short of full marriage equality. Kittinan Thammatath, director of the Rainbow Sky Association of Thailand, stated that the bill would be acceptable only if it adheres to the "marriage principle" and secures the same rights and benefits for LGBTQ people as are given to "straight couples." *The Nation*, Nov. 30.

UNITED KINGDOM – An HIV-positive man who was found guilty of intentionally spreading the virus by having unprotected sex with other men lost his appeal. Daryll Rowe, formerly from Edinburgh, Scotland, who later moved to Brighton, was found guilty of trying to infect ten men and was sentenced to a minimum term of 12 years by Judge Christine Henson at Brighton Crown Court in April, becoming the first man to be convicted of intentionally attempting to spread HIV through sexual transmission. He told the jury that he believed he had been cured by the time he moved to Brighton, "having adopted the practice of drinking his own urine as a treatment, supplemented with natural remedies, including oregano, coconut and olive leaf oils," reported the *Belfast Telegraph* (Nov. 2). Lady Justice Hallett, sitting in a panel with two other judges, said, "We are satisfied that the grounds of appeal are unarguable," reported the *Daily Record* (Glasgow) on November 2. In separate proceedings in Edinburgh last May, Rowe was given an eight-year sentence after pleading guilty at the High Court there to deliberately trying to infect four men with HIV. * * * There are troublesome reports that it is getting more difficult for LGBT refugees to gain asylum in the U.K., said *Thomson Reuters Foundation* in a report published on November 29. "Only 22 percent of claims were approved in 2017, down from 39 percent in 2015," it reported. The Home Office, defending itself, claimed that other categories of asylum claims were down even further by comparison. The problem is that many asylum officers are very skeptical about claims that people are gay and are demanding more evidence than many applicants can summon. Said the report, "Although the 2017 approval rate for gay claims at 22 percent was 10 percent lower than for all types of application, the Home Office said the 'nationality of the applicant typically (proved) a more influential factor than any sexual orientation element.'" The lack of legal counsel for applicants was also blamed as a factor.

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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.

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The key takeaway from this case is that a single alleged antigay statement—in this case, Code Enforcement Officer Ingerson's alleged statement about Weinberg—can be sufficient grounds to take an equal protection claim to trial. (Yet, note that the court deemed the Mayor's statement that one of the Inn owners "always loved the stage" to be insufficient evidence of antigay bias for purposes of the equal protection claim against the Mayor.) We will need to wait and see whether the Inn owners settle with the remaining defendants or convince a jury that the village and/or its agents not only denied them equal protection, but also their due process and free speech rights. ■

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