

# L G B T LAW NOTES



December 2019

**New York Takes on Trump's  
Religious Refusal Rule**

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# New York Federal Judge Vacates Trump Administration “Conscience” Regulation

By Arthur S. Leonard

U.S. District Judge Paul A. Engelmayer issued an extraordinarily lengthy opinion on November 6, concluding that a regulation adopted by the Trump Administration’s Department of Health and Human Services (HHS) intended to protect from discrimination employees in the health care industry who refused to provide services because of their religious beliefs is invalid on three bases: violation of the Administrative Procedure Act, violation of the constitutional separation of powers, and violation of the Constitution’s Spending Clause. The case is *State of New York v. U.S. Department of Health and Human Services*, 2019 WL 5781789, 2019 U.S. Dist. LEXIS 193207 (S.D.N.Y.).

Judge Engelmayer’s ruling was just the first of several, as federal courts around the country followed suit. On November 8, Judge Stanley A. Bastian of the Eastern District of Washington ruled from the bench that the Conscience Rule is invalid, promising to issue an opinion later. And on November 19, Judge William Alsup of the Northern District of California issued an opinion in *City and Country of San Francisco v. Azar*, focusing entirely on the APA, finding that HHS did not have authority to issue a legally binding rule on this subject, and writing: “On the merits, this order holds that the new rule sets forth new definitions of statutory terms that conflict with the statutes themselves – expansive definitions that would upset the balance drawn by Congress between protecting conscientious objectors versus facilitating the uninterrupted provision of health care to Americans.” Judge Alsup concluded that because his order vacates the rule, which he notes was already vacated by Judge Engelmayer in New York, there was no need for him to address the plaintiffs’ constitutional arguments.

The lawsuit was brought by a coalition of states, cities, Planned

Parenthood, and a Family Planning and Reproductive Health services organization, that stood to lose substantial federal funding for their programs if they were found to violate the regulation, which imposed substantial compliance requirements on them. They argued that the measure violated the First Amendment’s prohibition on an “establishment of religion.” But Judge Engelmayer, rejecting a “facial” Establishment Clause challenge, instead premised his ruling on other arguments by the plaintiffs, asserting violations of the Administrative Procedure Act (APA) and the Spending Clause and Separation of Powers requirements of the Constitution.

Judge Engelmayer summarized the Rule, which was adopted on May 21 (84 Fed. Reg. 23,170 – codified at 45 C.F.R. pt. 88), originally set to go into effect on July 22, to “interpret and provide for the implementation of more than 30 statutory provisions that recognize the right of an individual or entity to abstain from participation in medical procedures, programs, services, or research activities on account of a religious or moral objection.” The statutory provisions, usually added to particular laws as amendments offered by legislators during congressional consideration of the bills, are usually referred to as “conscience provisions.” After this lawsuit was filed, HHS agreed to delay the effective date of the regulation until November 22, so it has never actually gone into effect and will not go into effect any time soon unless the government obtains a stay of Judge Engelmayer’s opinion pending an appeal.

Most of the conscience provisions are intended to protect employees who refuse to participate in performing abortions, sterilizations, or assisted suicides, but some go further, extending to any medical practice or procedure, and theoretically could protect

employees who refuse to provide services to LGBTQ people due to religious or moral objections. While some of the provisions were aimed specifically at licensed health care professional employees who actually perform such procedures, others could theoretically apply to any employee – such as an orderly, an ambulance driver, or anybody else employed in a supportive or administrative role – whose religious or moral beliefs would be compromised by providing the service in question.

In addition to describing the various statutory conscience provisions, Judge Engelmayer noted a provision in Title VII of the Civil Rights Act of 1964, which requires employers to make a “reasonable accommodation” to the religious practices or beliefs of employees, with the test of reasonableness being whether the accommodation would impose an undue hardship on the employer. The Supreme Court has traditionally interpreted this provision to require employers to bear no more than a “de minimus” expense to accommodate religious objectors.

The George W. Bush administration promulgated a conscience regulation late in 2008 that was to take effect on the first day of the Obama Administration, but a legal challenge was filed and although “much of the rule” did take effect while the litigation continued, many contentious provisions were never rigorously enforced and HHS rescinded much of that Rule in 2011.

After taking office, President Trump issued an executive order titled “Promoting Free Speech and Religious Liberty,” which directed the Attorney General to “issue guidance interpreting religious liberty protections in federal law” and generally stating that the federal government should protect religious freedom to the extent possible under the Constitution. On October 6, 2017, Attorney General Jeff Sessions

issued a memorandum proclaiming that under the 1<sup>st</sup> Amendment's Free Exercise Clause, an individual has "the right to perform or abstain from performing certain physical acts in accordance with one's beliefs," mentioning many of the statutory conscience provisions. HHS then proceeded to issue a notice of proposed rule-making to translate Sessions' memorandum into written regulations, publishing its "final rule" on May 21, 2019.

Judge Engelmayer found that the 2019 Rule "substantially expands" on the 2008 Rule, applying to more than 30 conscience provisions (where the 2008 Rule applied to only three of them). He includes a detailed description of the Rule, including its very broad definition of which employees and entities are covered, a very broad definition of what counts as "discrimination," and detailed procedures that employers in the health care field are supposed to follow to ensure that employees know about their rights to object or abstain, including requirements to certify their compliance with the Rule as a condition of receiving funding under federal programs, such as Medicare. The stated intent of the Rules is to go as far as the Constitution and statutes allow in protecting those who object to doing their job because of religious, moral or ethical objections to particular procedures or practices by holding the loss of funding over employers who fail to accommodate religious objectors to the extent spelled out in the Rule.

The plaintiffs advanced five constitutional arguments against the rule. They first argued that it violates the Establishment Clause, by forcing recipients of federal funds to "conform their business practices to the religious practices of their employees, imposing an absolute duty to accommodate such practices," going far beyond the existing accommodation duty under Title VII of the Civil Rights Act. Second, they argued it violates the Spending Clause because the threat to withhold all federal funding for is "unconstitutionally coercive" and because the conditions it imposes are "ambiguous, retroactive, not reasonably related to the purpose of HHS's programs under which the funds

are provided, and thus unconstitutional." They argued that the Rule violates the constitutional separation of powers by, among other things, empowering the executive branch to unconstitutionally impound funds that Congress has appropriated. They also made two Fifth Amendment arguments: void for vagueness as a result of ambiguities and inconsistencies with other federal laws, inviting arbitrary enforcement; and violating the due process rights of patients to privacy and liberty, in particular by interfering with patients' ability to obtain abortions and other procedures to which some health care workers object.

Judge Engelmayer rejected the government's argument that the rule was merely a "housekeeping" measure intended to consolidate enforcement of the various statutory conscience provisions by centralizing enforcement in HHS's Office of Civil Rights and to standardize definitions and requirements that varied among the thirty statutes. Instead, he found, the Rule made substantive changes in the law.

"On this threshold dispute," wrote the judge, "there is a definite answer. Although the 2019 Rule has housekeeping features, plaintiffs' description of it as largely substantive – and, indeed, in key respects transformative – is correct. And HHS's characterization of the Rule as solely ministerial cannot be taken seriously." He noted that the government had actually abandoned this position during oral argument. "Whether or not the rule was properly adopted," he wrote, it "unavoidably would shape the primary conduct of participants through the health care industry. It would upend the legal status quo with respect to the circumstances and manner in which conscience objections must be accommodated. And the maximum penalty the Rule authorizes for a violation of the Conscience Provisions – the termination of all of a recipient's HHS funding, from whatever program derived – is new, too."

Supporting this conclusion, Judge Engelmayer explained how the rule vastly expanded employers' religious accommodation requirements under Title VII of the Civil Rights Act,

how it substantially broadened the definition of "protected activities" of religious objectors, down to the level of protecting a receptionist who might refuse to schedule a patient for a procedure to which the receptionist has ethical objections. Unlike the statutory conscience provisions, he noted, the Rule would "for the first time" permit "abstention from activities ancillary to a medical procedure, including ones that occur on days other than that of the procedure." It also extended the definition of "covered entities" from health care providers to pharmacists and medical laboratories, and significantly expands the financial exposure of covered entities by authorizing draconian cut-offs of funding.

Judge Engelmayer decided the Rule is not a facial violation of the Establishment Clause, which would require finding that all of its provisions are unconstitutional in all their potential applications, but he acknowledged that it could be challenged "as applied" to particular situations – a test that might never arise because of his action in declaring the Rule invalid on other grounds.

First, the judge found that HHS did not comply with the requirements of the Administrative Procedure Act governing the adoption of regulations, by going beyond the limits of rulemaking authority. Agencies must base their rules and regulations on statutory policy decisions expressed by Congress, and cannot engage in legislating beyond those policy decisions. The judge found that in this Rule HHS went over the line into legislation, especially noting the way the Rule expanded definitions, covered entities, enforcement authority, and penalties. He found that HHS did not have authority under the APA to make all of these substantive legal changes without specific authorization in the statutes.

The sheer scale of the Rule's potential impact played a large part in the decision. The judge found that the Rule "puts in jeopardy billions of dollars in federal health care funds. In fiscal year 2018, for example," he wrote, "the State Plaintiffs received \$200 billion in federal health care

funding. New York alone received \$46.9 billion. The Provider Plaintiffs similarly received hundreds of millions in funding from HHS.” He also noted the political significance of the Rule, as it took positions beyond those actually taken by Congress on such controversial issues as abortion and assisted suicide.

“In a case involving economic consequences and political dynamics on such a scale,” wrote the judge, “the Supreme Court teaches that ‘we expect Congress to speak clearly’ were it to delegate rulemaking authority . . . Far from speaking clearly here, in none of the three statutes at issue did Congress give any indication that it intended to subcontract the process of legal standard-setting to an administrative agency in particular, or HHS in particularly,” noting that the three principal statutes with Conscience Provisions don’t even mention HHS. And, the judge rejected the government’s contention that such a delegation was “implicit” in the enactment of those conscience provisions. He noted that the Supreme Court had rejected a similar “implicit delegation” argument in connection with its interpretation of Title VII’s accommodation provisions and the attempts by the EEOC to interpret them.

He also concluded that HHS did not act in accordance with law in promulgating the rule, having taken shortcuts (rather typical of the Trump Administration) in skirting the detailed procedures set out in the APA. The two most important flaws the court found were establishing rules that conflict with Title VII, and rules conflicting with the Emergency Medical Treatment and Labor Act (EMTLA), by purporting to authorize employees with religious objections to withhold services in emergency situations. The judge found that two basic Title VII concepts that the Rule “overrides” are key components of the specific language Congress adopted in 1972 amendments to Title VII “to address workplace religious objections.” An agency cannot displace express statutory provisions by adopting a contrary rule. Similarly, he noted that EMTLA “does not include any exception for religious or

moral refusals to provide emergency care” and courts had declined to “read in” exceptions to that statute’s mandates, but the HHS Rule “applies in emergency-care situations,” purporting to create a “conscience exception” in a law that does not have one.

Also, turning to the APA’s substantive requirements, an agency that is adopting a rule that changes the law is required to document the need for such a change. In this case, HHS just lied, claiming that there had been a substantial increase in complaints by health care employees about being forced to perform objectionable procedures or being disciplined for refusing to do so. “In fact, upon the Court’s review of the complaints on which HHS relies,” wrote Engelmayer, “virtually none address the Conscience Provisions at all, let alone indicate a deficiency in the agency’s enforcement capabilities as to these laws. And HHS, in this litigation, admitted that only a tiny fraction of the complaints that its Rule invoked as support were even relevant to the Conscience Provisions. A Court ‘cannot ignore the disconnect between the decision made and the explanations given,’” he wrote, quoting from Chief Justice John Roberts’ opinion in June striking down the Trump Administration’s attempt to add citizenship questions to the 2020 Census Forms. In that case, the Supreme Court found evidence that the Administration wanted to add the questions for political purposes, but prompted the Justice Department to come up with a phony justification invoking data needs to enforce the Voting Rights Act, even though experts in the Census Bureau warned that adding the questions would make the Census count less accurate by deterring non-citizens resident in the U.S. from participating. He pointed out that the large majority of religiously-connected complaints received by HHS had to do with vaccinations, “which HHS admits fall outside the scope of the Conscience Provisions and the Rule.”

He also found unconvincing other explanations offered by HHS, and was especially critical of ways in which the Final Rule differed from the Rule as it

was originally proposed and published for public comment concerning the definition of “discrimination.” The judge concluded, in sum, that failed procedures in adopting the Rule under the APA were sufficient to invoke the court’s authority to declare the rule invalid and order it to be “vacated.”

But there was more, because the judge also found constitutional violations both of separation of powers and the Spending Clause.

Judge Engelmayer focused on the Rule’s remedial provision authorizing the termination of all HHS funding to an entity found to have violated the Rule, finding that this had not been authorized by Congress. Thus, its adoption was a serious violation of the separation of powers. He agreed with plaintiffs that the Rule “is inconsistent with the separation of powers because it allows HHS to withhold congressionally-appropriated federal funds to an extent that neither the [statutory] Conscience Provisions nor any other statute authorizes. By claiming the power to do so, plaintiffs argue, HHS arrogates to itself, an executive agency, a power the Constitution allocates uniquely to Congress.”

Responding to this argument, the judge pointed out that an agency “must exercise its delegated spending authority consistent with specific congressional grant” and that an “agency may not withhold funds in a manner, or to an extent, unauthorized by Congress.” Thus, the remedial provision of the Rule exceeds the agency’s authority.

Furthermore, he found other violations specifically routed in the Supreme Court’s interpretation of the Spending Clause. He noted four principles relevant to this case: “conditions based on the receipt of federal funds must be set out unambiguously,” the “financial inducement offered by Congress” must not be “impermissibly coercive,” the conditions must relate “to the federal interest in the project and to the overall objective thereof,” and “the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.” Judge Engelmayer found it clear that the Rule violated at

least the first two of these principles, pointing to specific ambiguities and internal contradictions in the Rule. And the draconian forfeiture of all funding as a remedy for a violation of the Rule was “impermissibly coercive.”

Finally, he concluded that the faults he had detected merited an order to the agency to vacate the Rule. He pointed out that it has long been “standard practice under the APA” for a court to order that a rule be vacated when the court determines that “agency regulations are unlawful.” He quoted a Supreme Court opinion on point, stating that “regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory minimum found in that Act.” The APA itself says that a court shall “hold unlawful and set aside agency action, findings and conclusions” that the court finds to be “arbitrary and capricious, not in accordance with law, in excess of statutory authority, unconstitutional, or made without observance of procedures required by law.”

The judge rejected the government’s suggestion that he could go through the Rule stripping out objectionable parts and letting the rest go into effect, commenting that “the APA violations that the Court has found . . . are numerous, fundamental, and far-reaching. The Court’s finding that HHS lacked substantive rule-making authority as to three of the five principal Conscience Provisions nullifies the heart of the Rule as to these statutes. The Court’s finding that the agency acted contrary to two major existing laws (Title VII and EMTALA) vitiates substantive definitions in the Rule affecting health care employment and emergency contexts. The Court’s finding that HHS failed to give proper notice of the definition it adopted of “discriminate or discrimination” voids that central dimension of the Rule.” Letting a few selected provisions go into effect would “ignore the big picture: that the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors.”

He also rejected HHS’s suggestion,

common to Trump Administration arguments when courts are finding its executive actions invalid, that his order should be limited in effect to the Southern District of New York, or just to the named plaintiffs in the case, pointing out that this would lead to a proliferation of litigation around the country “to assure that such a Rule was never applied,” finding plenty of precedential support for this position in prior court of appeals opinions supporting trial court orders to vacate unlawfully promulgated rules.

“The Conscience Provisions recognize and protect undeniably important rights,” wrote Engelmayer. “The Court’s decision today leaves HHS at liberty to consider and promulgate rules governing these provisions. In the future, however, the agency must do so within the confines of the APA and the Constitution.” ■

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



## 11th Circuit Finds Transgender Woman from Honduras Ineligible for Relief from CAT Relief Based on Improved Country Conditions

*By Bryan Xenitelis*

The U.S. Court of Appeals for the 11th Circuit held that due to a conviction of concealing a dangerous weapon, a transgender woman from Honduras was ineligible for both asylum and withholding of removal, and has upheld on the merits the denial of her claim for relief under the Convention Against Torture (CAT), in *Cazares-Zandre v. U.S. Attorney General*, 2019 WL5617643, 2019 U.S. App. LEXIS 32563 (11th Cir., October 31, 2019). The CAT ruling emphasized recent developments in Honduras that the court considered more important than the record of violence against transgender people there.

Petitioner, who lived as an openly gay man throughout her childhood in Honduras, described a childhood filled with “severe mistreatment,” including being bullied by classmates, neighbors, and her father. She had a sexual relationship with a 19-year-old man when she was 11, and was threatened and abused on numerous occasions. When she was 17, she “decided her life was unbearable and fled to the United States,” where she began her gender transition and supported herself as a sex worker.

During her time in the United States, Petitioner was arrested, charged, and convicted of numerous crimes, including cocaine possession, theft, prostitution, and assault on a custodial officer. In April 2015, following an argument in a restaurant in which Petitioner “reached into her purse and pulled out a kitchen knife . . . and made death threats while pointing the



knife” and subsequently had several violent encounters with the arresting officers, she was charged with several crimes but eventually convicted only of “concealing a dangerous weapon.”

Petitioner was placed into removal proceedings, where she sought asylum, withholding of removal, and CAT relief. At issue before the Immigration Judge was whether Petitioner’s conviction for concealing a dangerous weapon excluded her from asylum and/or withholding as a “particularly serious crime.” The Immigration Judge ruled the offense to be particularly serious based in part on consideration of a police incident report alleging the factual circumstances that led to the conviction. The Immigration Judge further held Petitioner ineligible for CAT relief, ruling Petitioner had not met her burdens of proving more likely than not she would be tortured or killed and that the torture would be by the government or with governmental acquiescence.

Petitioner appealed to the Board of Immigration Appeals (BIA), which affirmed the Immigration Judge’s decision. Petitioner also filed a motion to reconsider, which was denied. Petitioner timely filed a Petition for Review in the Court of Appeals, on both the affirmance of the Immigration Judge’s decision and the denial of the motion to reconsider.

In a *per curiam* decision, an 11th Circuit panel assessed first whether they had jurisdiction over the asylum and withholding claims, noting that they had by statute no jurisdiction over the discretionary determination made below, and that the only reviewable matters were questions of law. While both asylum and withholding of removal cannot be granted to a person convicted of a “particularly serious crime,” each statute has a different definition for that term of art. The Board in a 2007 precedent decision set forth a framework for both statutes which states that: “[if] the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime

determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.”

Petitioner had argued that her conviction was not particularly serious. She disagreed with the interpretation of the withholding statute, which another jurisdiction held only to exclude for “aggravated felonies.” The 11<sup>th</sup> Circuit panel disagreed with her interpretation and deferred to the BIA’s 2007 decision framework. To the extent that Petitioner argued that the Board had failed to follow its own rules under the 2007 decision, the panel ruled that the Immigration Judge and Board properly followed that framework to determine that the elements of the conviction “potentially bring it within the ambit of a particularly serious crime,” noting that “unsurprisingly, given the number of people [Petitioner] injured and endangered at the Maryland restaurant, the [Immigration Judge and Board] concluded the crime was particularly serious.” Having found no jurisdiction over the claims and rejecting Petitioner’s questions of law, the panel dismissed the petition in this respect.

With respect to Petitioner’s CAT claim, the panel noted that she must show both: 1) “that she herself is more likely than not to endure ‘severe pain or suffering,’” and 2) “that it is more likely than not that ‘a public official or other person acting in an official capacity’ will inflict, instigate, or acquiesce in” the pain or suffering. The panel noted that “the record shows that members of the LGBT community in Honduras, including [Petitioner], have been subjected to horrible violence at the hands of civilians and government officials alike.” However, the panel noted record evidence showing that the situation for LGBT individuals has improved, including a recently-enacted hate crime law to protect LGBT individuals, prosecution of the perpetrators accused of killing LGBT individuals, training of police to protect members of the LGBT community, and an increased number of officers devoted to investigating these crimes. Finding the standard of review to be the “substantial evidence test,” the panel

held that the record “does not compel reversal,” and denied the petition in this respect.

Finally, the panel considered the Board’s denial of Petitioner’s motion to reconsider and disagreed with Petitioner’s argument that the decision was “so terse that it denied her due process,” finding that the decision showed “reasoned consideration” of Petitioner’s arguments. Finally, the panel dismissed Petitioner’s arguments that two cases relied on below had been abrogated by a U.S. Supreme Court decision stating that “to the extent [the Board] relied on those cases, it did so for particular portions of their reasoning, not their invalidated holdings.” Accordingly, the petition was dismissed in part and denied in part.

The Petitioner is represented by Kristie-Ann Padron of Catholic Charities Legal Services, ADOM, Miami, FL. ■

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



# 6th Circuit Refuses to Grant Asylum Application to Gay Albanian Refugee

By Filip Cukovic

On November 4, the U.S. Court of Appeals for the 6th Circuit affirmed the decision of the Board of Immigration Appeals (BIA) a denying a gay Albanian man's application for asylum and protection under the United Nations Convention Against Torture (CAT). The three-judge panel, which consisted of Judges Clay, Donald, and Larsen, held that the denial of plaintiff's asylum claim was supported by substantial evidence and that the circumstances regarding LGBTQ rights in Albania had improved to the point that the asylum-seeker is not justified in fearing future persecution on the basis of his sexuality. *Kapllaj v. Barr*, 2019 U.S. App. LEXIS 33020.

The Petitioner is a 23-year-old native and citizen of Albania. He entered the United States in 2013. In December of that year, the government began removal proceedings against him, and he conceded that he was removable. To prevent removal, he applied for asylum, withholding of removal, and protection under the CAT. He asserted that he feared returning to Albania because he had been persecuted there for being gay.

In 2015, an Immigration Judge (IJ) held a hearing at which Kapllaj testified about his past persecution, and his cousin testified that popular negative attitudes towards gay persons had not changed in Albania. Although the IJ found both Petitioner and his cousin credible – a finding which created a presumption that he had a well-founded fear of future persecution that would entitle him to asylum – the IJ denied the asylum application on the basis that the government had shown that conditions in Albania had changed, citing, in part, a 2016 State Department Country Report. The IJ held that Petitioner no longer had a well-founded fear of persecution, and the BIA dismissed his appeal. He then petitioned the 6th Circuit for review of the BIA's order, arguing that the BIA erred in holding: (1) that he did not have a well-founded fear of future persecution;

and (2) that he did not prove that he was eligible for withholding of removal.

In a relatively short Order, the 6th Circuit panel begins by acknowledging that the court will review the BIA's decision under a deferential level of scrutiny. The court then proceeds to list the number of cases and statutes which authorize the federal government to grant asylum to anyone who qualifies as a "refugee." For purposes of asylum applications, a "refugee" is a person "who is unable or unwilling to return to . . . [his] country [of nationality] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (*See* 8 U.S.C. § 1158(b)). Furthermore, if an asylum applicant establishes that he has suffered past persecution, it is presumed that he has a well-founded fear of future persecution. However, the government may rebut that presumption by showing, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality.

The Petitioner argued that the BIA and IJ's changed-circumstances determination was erroneous, but the 6th Circuit disagreed. In efforts to justify its decision that circumstances regarding LGBTQ rights have changed for the better in Albania, the court relied on the State Department reports showing "several improvements" in Albania's treatment of the LGBTQ community, including: the opening of a shelter for LGBTI individuals who have been evicted from their homes, the training of police officers to treat LGBTI individuals more professionally, the 2013 inclusion of crimes against LGBTI individuals as hate crimes, the 2015 adoption of a National Plan of Action for better enforcement of the laws to protect the LGBTI community, and a safe gay pride parade.

The Petitioner attempted to get around these findings by rightly pointing out that although the laws have changed for the better, the enforcement of such anti-discrimination laws remains "generally weak," quoting the IJ's opinion in his brief. Although the court acknowledged that the enforcement of the cited laws is questionable, the court focused on the fact that the government of Albania recently issued orders for establishing a body to implement an action plan to better enforce the antidiscrimination laws. In the court's views, the circumstances have sufficiently changed for the better so that Petitioner no longer had a well-founded fear of persecution if he returned back to Albania.

The court also dismissed Petitioner's claim for withholding of removal, on the basis that an application seeking withholding of deportation faces a more stringent burden of proof than one for asylum. This decision should be of great importance to our readers, because it signals the court's unwillingness to grant an asylum application to applicants who are citizens of the countries that have anti-discrimination laws on the books, but who are unfortunate to have governments and politicians who are unwilling to execute such laws fully and properly, thus exalting form over substance.

The opinion mentions that Petitioner was represented by counsel but does not include counsel's name in its opinion. ■

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





# Illinois Federal District Judge Remands Board of Immigration Appeals' Decision Involving the Denial of a Married Same-Sex Couple's I-130 Petition

By David Escoto

The U.S. District Court for the Northern District Illinois, Eastern Division, granted a motion for summary judgment in favor of the plaintiff in a case stemming from the denial of a Form I-130 Petition for Alien Relative to the spouse of a U.S. citizen. Thomas Valdivia, Jr., filed the Form I-130 on behalf of his husband, Radu Chelerean, a citizen of Romania. The U.S. Citizenship and Immigration Services (USCIS) denied Valdivia's petition because of Chelerean's prior marriage to a woman, said by USCIS to have been "a sham" entered into for immigration purposes. A Form I-130 cannot be approved if the beneficiary has ever sought immigration benefits based on a marriage entered into for the purpose of evading immigration laws. The Board of Immigration Appeals (BIA) upheld the denial of the I-130. *Valdivia v. Barr*, 2019 U.S. Dist. LEXIS 191616, 2019 WL 5725439 (Nov. 5, 2019).

In this case, President Donald J. Trump's first out gay judicial nominee, U.S. District Judge Mary Rowland, ruled against the prior BIA decisions, finding that there was no substantial and probative evidence to conclude that Chelerean's previous marriage was a "sham."

On February 4, 2006, Chelerean married Nina Garcia, a U.S. citizen. The two met about one month prior on December 31, 2005, at a New Year's Eve party. On August 24, 2006, Garcia filed an I-130 on Chelerean's behalf. Chelerean and Garcia, accompanied by their attorney, were interviewed at the USCIS Chicago Field office on November 14, 2006. About three years later, in July 2009, the agency filed a Notice of Intent to Deny Garcia's petition. The petition was formally denied in September 2009. In February 2011, the BIA dismissed Garcia's appeal. On September 12, 2011, Chelerean and Garcia divorced, and their Judgment for Dissolution of

Marriage stated that they "lived separate and apart as of March 15, 2007."

Four years later, on May 17, 2015, Chelerean and Valdivia got married. Valdivia filed an I-130 petition on September 6, 2016, followed by an interview at the USCIS Chicago Field office on January 12, 2017. Valdivia and Chelerean received a Notice of Intent to Deny. In response, Chelerean submitted an affidavit discussing his two marriages. Regarding Chelerean's relationship with Garcia, Valdivia stated that the reasons behind Chelerean not having much evidence of a financially comingled life with Garcia stemmed from their young age, immaturity, and financial insecurity. As to his marriage with Valdivia, Chelerean noted in a statement to the USCIS that "he grew up in a conservative Christian orthodox family that treated homosexuality as a sin." Chelerean said his upbringing delayed his journey to live authentically as a gay man and took "a lot longer than it takes other gay men these days." On March 29, 2017, the USCIS Director denied Valdivia's petition.

The USCIS Director found that Valdivia's I-130 petition was prohibited under Section 204(c) of the Immigration and Nationality Act, which prohibits approval of an I-130 if the beneficiary has ever previously sought immigration benefits based on a marriage entered into for the purpose of evading immigration laws. The Director noted the September 2009 denial of Garcia's I-130 petition, which concluded that "Garcia and Chelerean did not demonstrate by a preponderance of the evidence that their marriage was entered into in good faith."

Valdivia unsuccessfully appealed to the BIA, which dismissed the appeal on December 14, 2017. The BIA agreed with the USCIS Director that there was substantial and probative evidence which supports the finding that the beneficiary's prior marriage was

entered into for immigration purposes. Specifically, the BIA explained that the 2009 denial of the I-130 based on the lack of evidence of a shared life together, such as the lack of comingled financial assets, suggested that Garcia married Chelerean to provide him with immigration benefits. The BIA concluded the prior record is substantial and probative evidence of Chelerean's prior marriage fraud.

The critical question, in this case, is whether a reasonable person could find support for the BIA's 2017 determination that there was substantial and probative evidence of a sham marriage between Chelerean and Garcia.

In answering this question, the court first looked at the burden-shifting imposed on the parties. The court noted that multiple courts in this district have stated that "a finding of fraud requires more than a finding that a couple failed to prove their marriage is *bona fide*." The government must point to substantial and probative evidence that the marriage is *fraudulent* before the burden shifts to a petitioner to show otherwise. Further, affirmative evidence must create more than a "reasonable inference" of fraud. In reviewing the record, the court finds that it cannot conclude that substantial evidence supported the BIA's decision, therefore never meeting the government's their burden of identifying substantial and probative evidence of a fraudulent marriage.

In arguing that the BIA reached an independent conclusion that Garcia and Chelerean engaged in marriage fraud, Defendants fail to identify any evidence that the BIA relied on to reach that conclusion. Further, in reviewing the BIA's decision, the court cannot identify any such evidence. Specifically, the record does not create any nexus between how Garcia's failure to present evidence of a "shared life together" showed that there was substantial and

probative evidence of marriage fraud at the time of the marriage. The BIA themselves stated that the 2009 denial only “suggested” Garcia married Chelerean for immigration benefits. However, Defendants jumped to the conclusion that the “suggestion” was affirmative evidence that creates more than a reasonable inference of fraud without explaining how.

Defendants relied on the facts that Chelerean and Garcia married within a month of meeting and then resumed living apart the following year, to support the argument that the couple had failed to meet its burden of proof to establish a *bona fide* marriage. The court noted that all of these arguments focus on whether Chelerean and Garcia proved their marriage was *bona fide*, which is separate from a determination that their marriage was *fraudulent*. The court acknowledged that the BIA has stressed an intrinsic difference between a fraudulent marriage and a marriage that is “nonviable or nonsubsisting.” Notably, at the time that Garcia and Chelerean married in 2006, the record does not demonstrate any facts that would transform their marriage from nonviable to fraudulent.

Defendants also attempt to defend the administrative decision on new grounds that were nowhere in the original decision. Specifically, Defendants were trying to challenge Valdivia’s credibility by arguing that his 2017 affidavit, submitted to the agency in support of the validity of the 2009 Chelerean-Garcia marriage, did not explain his account of 2007 events. The court dismissed this argument, noting that Defendants do not explain how Valdivia’s disclosure that he and Chelerean fell in love *after* Garcia and Chelerean separated is substantial and probative evidence that Garcia and Chelerean engaged in marriage fraud at the time when they married. The USCIS and BIA did not base their decision on Valdivia’s failure to disclose this information, so the Defendants were precluded from defending the administrative decision on those grounds before the district court.

The cases that Defendants rely on to support their argument have one thing

in common: at least one of the spouses admitted that the marriage was entered into for immigration purposes. A spouse admitting that they received payment to marry someone for immigration benefits tends to be demonstrable evidence of marriage fraud. Unlike the cases relied upon, Garcia never indicated that she was paid to marry Chelerean, family and friends never indicated they were aware of any scam or unaware of the marriage, and neither spouse ever admitted the purpose of the marriage was for immigration purposes.

In reviewing the 2009 petition denial, the court determined that despite not meeting their burden to satisfy the I-130 petition at that time, the USCIS Director did not make an affirmative finding of marriage fraud supported by substantial and probative evidence. Absent the requisite level of evidence, the court finds that denying Valdivia’s I-130 was not required by Section 204(c).

It is not explicit in the text of this case, but Defendants’ arguments seem to imply that because Chelerean is now in a same-sex marriage, his first marriage to Garcia must have been fraudulent. The undertones of this argument are not surprising, given the current administration. Despite being appointed by President Trump and the Administration’s track record on both immigration and LGBTQ issues, Judge Mary Rowland’s decision here creates some optimism that there are some Trump-appointed judges who hopefully will continue to see the judiciary as an apolitical branch of government.

Valdivia and Chelerean are represented by Noelia Rodriguez-Quinones and Nancy Marcia Vizer of Nancy M. Vizer, P.C. Attorney General William Barr, substituting former Attorney General Jefferson B. Sessions, III, along with the U.S. Citizenship and Immigration Services and the U.S. Department of Homeland Security, are represented by Craig Arthur Oswald from the United States Attorney’s Office, Northern District of Illinois – Chicago. ■

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

## New York Federal Court Rules on Contested Admissibility of HIV-Expert’s Testimony in Public Accommodations Discrimination Case

*By Wendy Bicovny*

On November 4, U.S. District Judge Analisa Torres overruled objections by Defendants, Emmanuel O. Asare, M.D. and Springfield Medical Aesthetic P.C. d/b/a Advanced Cosmetic Surgery of New York, to the testimony of a court-appointed expert, Dr. Timothy Wilkin, M.D., M.P.H., in favor the government and Mark Milano, who intervened as a co-plaintiff with the government, in an HIV-discrimination case concerning denial of medical services. *United States v. Asare*, 2019 U.S. Dist. LEXIS 191062, 2019 WL 5693477 (S.D.N.Y.). The complaint alleges that a plastic surgeon in New York violated the Americans with Disabilities Act (ADA) by screening out and denying services to persons living with HIV. Of critical importance to *Law Notes* readers is how the expert witness provides the back-up for the argument that HIV infection alone is not an appropriate basis for denying services.

After a bench trial, Defendants moved to strike the testimony of plaintiffs’ expert, Charles Flexner, M.D. ECF. The court then determined that a neutral expert was needed and ordered the parties to submit (a) a joint letter identifying their agreed-upon expert, along with a curriculum vitae, and (b) a list of the issues about which the [e]xpert shall opine. When the parties submitted their joint letter, they identified three potential experts, and agreed that the expert would opine on: 1) universal precautions; 2) HIV testing, including its use prior to surgery, the duties and obligations associated with obtaining consent to HIV testing in New York

State, and the standard of care for the use of HIV testing in New York State; 3) the care and treatment of individuals living with HIV, including whether they are appropriate candidates for surgery; 4) whether knowledge of HIV-status is necessary prior to performing surgery; and 5) whether Defendants' HIV testing practices are consistent with universal precautions, the standards associated with HIV testing, and the standards associated with the care and treatment of individuals living with HIV. From the three potential experts, the court selected Dr. Wilkin as the neutral expert.

Judge Torres overruled the first of defendants' objections to Dr. Wilkin's testimony regarding Milano, because Dr. Wilkin's testimony may "help the [court] to understand the evidence or to determine a fact in issue." In an earlier opinion, the court granted summary judgment on the issue of liability with respect to intervening Plaintiff Mark Milano, one of the individuals who sought Dr. Asare's services for treatment of gynecomastia. At his deposition, Dr. Wilkin summarized the opinions he set forth in his expert report. This included his "understanding" and "opinion" concerning the case of Milano.

The Defendants argued that Dr. Wilkin's testimony concerning Milano should be stricken in its entirety because, they contended, the testimony exceeded the scope of Dr. Wilkin's "mandate" and "the subjects identified by the parties for Dr. Wilkin to consider," and because the court had already decided the liability issues with respect to Milano. The government contended that the testimony should not be stricken because "it is within the scope of his expertise and properly considered in the context of Defendants' treatment of individuals with HIV, and the Court agrees," wrote the judge.

First, Dr. Wilkin's testimony falls squarely within his mandate. Dr. Wilkin was to "prepare a report, sit for a deposition, and testify at trial concerning all subjects raised in Dr. Flexner's testimony." At trial, Dr. Flexner's testimony concerned "issues surrounding performing HIV testing on patients in advance of surgery,"

which included: "when the previous standard practice of testing all patients for HIV prior to surgery changed due to the adoption of so-called universal precautions, when HIV testing of surgical patients would be medically indicated, and the legal requirements for obtaining consent from HIV patients prior to testing."

Dr. Wilkin testified as to Defendants' standard approach when dealing with patients with non-HIV medical conditions who sought elective surgery, and his understanding that patients with HIV would be "treated the same way." Dr. Wilkin opined that Dr. Asare did not operate within the standard of care with respect to Milano's HIV infection. Judge Torres noted that this testimony concerns subjects raised in Dr. Flexner's testimony, namely, "issues surrounding performing HIV testing on patients in advance of surgery." This would be true even if Dr. Flexner had not explicitly referenced Milano.

Second, Defendants' argument that Dr. Wilkin's testimony extends beyond the subjects identified by the parties also fails. The parties explicitly agreed that Dr. Wilkin would provide opinions regarding, *inter alia*, "[t]he care and treatment of individuals living with HIV, including whether they are appropriate candidates for surgery." This is precisely what he did.

Last, Dr. Wilkin's testimony with respect to Milano is still relevant and admissible notwithstanding the court's ruling on liability. Although not germane to the issue of Milano's damages, the testimony is relevant to the government's case. The court agrees with the government that "defendants' practice vis-à-vis individuals living with HIV is a central issue in this case, and Dr. Wilkin's testimony" regarding Milano "is probative of how Defendants treat individuals living with HIV."

Next, Judge Torres rejected Defendants' argument that Wilkin's testimony be stricken because he is not qualified to offer this opinion as he "has no medical training in cosmetic or plastic surgery," and his expert report did not indicate that he consulted any secondary sources related to this topic. Dr. Wilkin was also asked to

opine on "HIV testing, including its use prior to surgery, the duties and obligations associated with obtaining consent to HIV testing in New York State, and the standard of care for the use of HIV testing in New York State." With respect to this topic, Dr. Wilkin testified that he does not think that "universal testing for HIV prior to elective surgery or minor elective surgery is a routine approach" and "it is unusual for a surgeon to universally test his patients prior to surgery." Moreover, he stated that he thinks "it's unusual that Dr. Asare would test broadly for HIV; in other words, it's unusual for him to test all of his patients prior to surgery, but the idea of a broad application of HIV testing is within the general approach for the HIV epidemic in the U.S." According to defendants, the "upshot" of this testimony "appears to be that [Dr. Wilkin] believes Dr. Asare violated the medical standard of care with respect to preoperative HIV testing, by performing HIV testing on J.G. and S.V."

As an initial matter, the court found that Dr. Wilkin was qualified to offer an opinion on this topic when it appointed Dr. Wilkin as the court's expert. This was after the parties had already agreed that Dr. Wilkin would opine on "HIV testing, including its use prior to surgery" and "[w]hether knowledge of HIV-status is necessary prior to performing surgery." Nevertheless, the court addresses defendants' arguments on the merits and holds that Dr. Wilkin is qualified to offer an opinion on the medical standard for preoperative HIV testing of surgical patients. Dr. Wilkin is a board-certified internal medicine and infectious diseases physician, and an associate professor at Weill Medical College of Cornell University. He is a primary care provider for patients living with HIV. His current focus and specialty is in HIV care and treatment at Weill's Center for Special Studies. Furthermore, Dr. Wilkin has experience performing minor surgical procedures on patients. Moreover, Dr. Wilkin's testimony concerns HIV testing protocols prior to surgery; protocols Dr. Wilkin would be familiar with through his work as a primary care physician



(PCP). As a PCP for patients living with HIV, Dr. Wilkin is the primary point of contact for other medical professionals who offer services to individuals with HIV. Throughout Dr. Wilkin's deposition, he described the frequent communication and coordination that takes place between a surgeon and a patient's PCP. Given the role of PCPs in the preoperative context, and because Dr. Wilkin's testimony concerns a preoperative matter, Dr. Wilkin is distinguishable from the expert whose testimony was excluded in a case relied on by defendants, where a regulatory expert sought to testify about whether a specific clinical procedure could cause certain types of perforations. Dr. Wilkin's testimony is admissible because his experience is "closely related to the subject matter in question" and courts in the Second Circuit "generally will not exclude expert testimony" in such cases.

The defendants may argue in their post-trial briefing that Dr. Wilkin's testimony should be afforded less weight, because assertions that an expert witness lacks certain educational or other experiential background "go to the weight, not the admissibility, of [the] testimony."

Judge Torres next overruled defendants' objection to Dr. Wilkin's opinion that "'Dr. Asare violated New York State law regarding HIV testing' based on J.G. and S.V. '[g]iving' similar accounts of being tested for HIV infection without their knowledge.'" They moved to strike this testimony because "Dr. Wilkin is making specific factual findings — about whether Dr. Asare in fact complied with the requirements of New York State law regarding HIV testing — based on his own impressions of the disputed evidence." The government argued that Dr. Wilkin did not make any "factual findings." Rather, Dr. Wilkin provided an opinion "contingent on certain factual findings." In other words, Dr. Wilkin's opinion is premised on the assumption that certain facts are true, based on his review of the trial testimony. Judge Torres explained that there is nothing improper about Dr.

Wilkin forming an opinion contingent on certain facts being true, since experts regularly provide opinions based on facts they assume to be true. Dr. Wilkin was specifically asked to provide an opinion as to "HIV testing, including its use prior to surgery, the duties and obligations associated with obtaining consent to HIV testing in New York State, and the standard of care for the use of HIV testing in New York State." Dr. Wilkin reviewed New York state law, his own experience, and the trial testimony, assuming certain facts to be true, in order to (1) discern the proper standard of care in New York and (2) provide an opinion as to whether Defendants' practices met or fell short of that standard of care.

Although the doctor's testimony is *admissible*, the court is free to ignore it should the court determine that the facts assumed by Dr. Wilkin are not true.

Lastly, Judge Torres overruled defendants' objection to Dr. Wilkin's testimony that "'Dr. Asare used HIV status alone as a determinant from conducting surgery'" on the ground that Dr. Wilkin has made "specific factual findings based on his own impressions of the disputed evidence." For the reasons discussed above, Dr. Wilkin is allowed to provide an opinion based on his review of the record and assuming certain facts to be true.

Defendants also argued that Dr. Wilkin's testimony is "baseless," because he contradicted himself by testifying that "it was reasonable for Dr. Asare to postpone S.V.'s surgery based on his lab results." This, however, is not a reason to deem Dr. Wilkin's testimony inadmissible, but rather, a potential reason to afford less weight to Dr. Wilkin's testimony that "Dr. Asare used HIV status alone as a determinant from conducting surgery. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. ■

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## Pennsylvania Federal District Court Decides That Fewer Factors Provides More Protection in Ruling on Transgender Plaintiff's Anonymity Motion

*By Corey L. Gibbs*

A transgender man brought claims of discrimination based on his gender identity and moved to proceed anonymously. The claims were against his former employer, the Pennsylvania Department of Corrections, and individuals, which include former supervisors and coworkers. U.S. District Judge Matthew W. Brann conditionally granted the Plaintiff's motion to proceed anonymously. The Plaintiff is now John Doe, but the Defendants can move to have the order revisited. *Doe v. Pa. Dep't of Corr.*, 2019 U.S. List. LEXIS 189748 (M.D. Pa., Nov. 1, 2019).

According to Federal Rule of Civil Procedure 10(a), "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties." However, courts have allowed plaintiffs to proceed pseudonymously under certain circumstances. Judge Brann quoted from *Doe v. Megless*: "Examples of areas where courts have allowed pseudonyms include cases involving 'abortion, birth control, transsexuality[sic], mental illness, welfare rights of illegitimate children, AIDS, and homosexuality.'" 654 F.3d 404 (3<sup>rd</sup> Cir. 2011). The judge then turned to a balancing test adopted in *Doe v. Megless*.

The balancing test required the trial court to evaluate six factors in favor of anonymity and three facts disfavoring

anonymity. *Doe v. Megless* referred to these factors as *nonexhaustive*, which meant that there could be even more factors to consider. Judge Brann called the *Megless* factors “hopelessly imprecise and redundant.” He remarked, “While appropriate in some circumstances, the flaws of multifactor balancing tests are well documented—even well-crafted multifactor tests can be difficult to apply, difficult to predict, and invite needless litigation.” The judge showed how four of the nine factors to be considered are hardly distinguishable from one another and practically one factor split four ways.

After criticizing the lengthy multifactor test from *Megless*, Judge Brann focused on whether the Plaintiff risked severe harm by proceeding under his real name, and, if so, did the risk outweigh the public interest in knowing the Plaintiff’s identity. The judge believed that these two questions were “the heart of the inquiry.” Judge Brann also pointed to previous court decisions. He stated, “Courts have long recognized that the harms arising from disclosing a person’s transgender status are among those that make protection by pseudonym appropriate.” Even the court in *Doe v. Megless* transsexuality” as grounds for allowing the Plaintiff to remain anonymous in pleadings and court papers.

The judge considered his two questions. First, the Plaintiff faced harms. His status as a transgender man was a secret, which was only revealed when legally required. Second, the Plaintiff was not a public figure. Therefore, the public interest in exposing the Plaintiff’s identity was comparatively low. Judge Brann stated, “Because the Plaintiff [faced] a significant risk of severe harm to his privacy, and the public interest in knowing his identity [did] not outweigh that risk, I conditionally [granted] the Plaintiff’s motion to proceed under the pseudonym ‘John Doe.’” The judge gave the Defendants the right to revisit this issue later if new information arises making Plaintiff’s name relevant.

Judge Brann took a complex nine factor balancing test that courts have

been using and molded it into a simpler two factor balancing test. He refined the test in order to create predictability and end needless litigation, which a nine-factor balancing test invited. The judge protected John Doe’s identity and made it easier for future complaints to be made anonymously.

John Doe is represented by Justin Frederick Robinette and the Law Offices of Eric A. Shore, P.C., Philadelphia. The Pennsylvania Department of Corrections, Superintendent Thomas McGinley, Deputy Superintendent Edward Braumbauch, Victor Mirarchi, Sgt. Leonard, Lt. Peters, Sgt. Batiuk, and Lieutenant Procopio were represented by Alexander Thomas Korn from the Office of Attorney General, Harrisburg, PA. ■

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



## Idaho and Corizon Continue to Resist Providing Transgender Prisoner’s Sex Confirmation Surgery

*By William J. Rold*

In what is reminiscent of massive resistance to school integration in some states in the 1950’s and 60’s, Idaho corrections officials and Corizon, Inc., continue to resist provision of gender confirmation surgery to transgender prisoner Adree Edmo. The Ninth Circuit affirmed an injunction for same in *Edmo v. Corizon*, 2019 WL 3978329 (9<sup>th</sup> Cir., 8/23/19), and it indicated it would not be inclined to grant further stays. Defendants petitioned for rehearing *en banc*. U. S. District Judge B. Lynn Winmill issued a further order about pre-surgical procedures on October 24, 2019. Defendants appealed that.

On November 8, 2019, defendants asked Judge Winmill to stay his October order. In *Edmo v. Idaho DOC*, 2019 U.S. Dist. LEXIS 195017 (D. Idaho, Nov. 8, 2019), he denied the stay; but he ordered another hearing for November 20, 2019, because defendants said the October order was “unclear,” including how to handle removal of Edmo’s pubic hair.

On November 20, 2019, the Ninth Circuit dismissed the appeal of the October order for lack of jurisdiction. It wrote in *Edmo v. Corizon*, 2019 U.S. App. LEXIS 34763 (9<sup>th</sup> Cir. Nov. 20, 2019), that the October order was not a new injunction (or the modification of an old one) but merely an interpretation of a pre-existing injunction for which there was no interlocutory appeal, citing *Cunningham v. David Special Commitment Center*, 159 F.3d 1035, 1037 (9<sup>th</sup> Cir. 1998). This decision was entered over defendants’ objections that they needed more time to brief their request for jurisdiction over their request for an emergency stay.

That same day, Judge Winmill held his hearing and ruled that Edmo's pubic hair issues must be addressed through laser surgery by November 26, 2019. Absent some further mishigas about calibration of the laser or kerf of the surgical blades, Edmo should commence pre-surgical procedures before Thanksgiving.

The Transgender Center of Philadelphia reports that gender reassignment surgery (bottom) averages \$30,000, and takes about five hours of surgical time, with anticipated hospital stay up to three days. This litigation is likely to cost seven digits before it is over, but state corrections departments do not make business decisions on such issues.

Corizon, Inc., is another matter. It convinced the Ninth Circuit that it should be dismissed as a defendant, arguing that it had no transgender policies of its own and need not be enjoined. (The Circuit kept one of Corizon's doctors in the case, because he was personally involved in denying Edmo care.) Corizon corporate cannot seem to take "good-bye" for an answer, instead lending its name to the petition for rehearing and seriatim motions for stays. This may prompt the Circuit to revisit Corizon's interest in the outcome; and it will make for a sound motion to move against Corizon corporate for attorneys' fees to the extent it has prolonged the proceedings. ■

*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.*



## 5th Circuit Loops Through Scenario of Statutory Prohibition of Transgender Discrimination Under Title VII, Yet Relies On Biased Precedent To Grant Summary Judgment Against Transgender Plaintiff

*By Wendy Bicovery*

U.S. District Court Judge Terry A. Doughty granted summary judgment to defendants against the sexual orientation discrimination claim under Title VII by Jasmine V. Wilson, a transgender woman whose employment was terminated. *Wilson v. New Wendy's, Inc.*, 2019 U.S. Dist. LEXIS 202670, 2019 WL 6247823 (W.D. La., Monroe Division, November 22, 2019). Judge Doughty dismissed Wilson's claims based on his conclusions that (i) Title VII does not cover transgender status, (ii) Individual managers are not liable under Title VII; and (iii) Wilson has not alleged any actionable behavior on the part of her former employer.

Between July 7 and September 23, 2016, Ne Wen, Inc., employed Wilson as a Shift Manager in various of its Louisiana restaurants. Her complaint specified several occasions when she claimed that employees she supervised did not respect her authority and when she disagreed with how the company was run. She alleged that she performed the duties of Shift Manager at four different locations. Her immediate supervisor was Rebecca Fuller, whom she named as an individual defendant. The District Manager was Angela Brunner. Tamika LNU was a Store Manager.

Wilson alleged that during her employment she was disrespected and subjected to the use of foul language by the crewmembers she supervised. As Shift Manager, she said she initiated termination procedures for employees who violated company policy, but Brunner would void the terminations and allowed the employees to return to work. Wilson further added that she was allegedly terminated for insubordination because of an altercation between Store

Manager Tamika and herself. However, when she reported the altercations and insubordination towards herself by crewmembers, no action was taken, and they were returned to work. Her employment was terminated on September 23, 2016 by Brunner.

In response, the Defendants contended that Wilson had abandoned her job in 2016. Further, they claimed, when it became evident that Wilson had quit her employment, efforts were made to contact Wilson to try and get her to return to work, but she did not return the phone calls. Wilson, on the other hand, contended that she was terminated and that Defendants did not attempt to rehire her.

During Wilson's employment, Ne Wen, Inc. had in place a policy prohibiting illegal harassment, including a method of making complaints. However, argued the Defendants, Wilson never employed the methods available to complain of discrimination because of race, color, sex, or of transgender status.

Judge Doughty first had to address whether Title VII's prohibition against sex discrimination includes discrimination based on transgender status. He explained that although Title VII prohibits discrimination or harassment based on race, color, religion, and sex, the statute does not expressly prohibit discrimination based upon transgender status. Under binding Fifth Circuit precedent in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), the court expressly held that Title VII does not prohibit discrimination because of sexual orientation. Judge Doughty detailed a recent 2019 case dealing with a job applicant who was a transgender woman, where the Fifth Circuit stated that *Blum* remains



binding precedent in this circuit to this day. Therefore, the Fifth Circuit has reaffirmed its prior holding that Title VII does not prohibit discrimination based on sexual orientation and did so in a case involving a transgender woman. For this reason alone, Judge Doughty held, defendants are entitled to summary judgment dismissing Wilson's claim, even though *Blum*, on which this precedent is assertedly based, did not involve a gender identity discrimination claim.

Next, Judge Doughty explained that even if *Blum* were overturned, Wilson's claim failed for additional reasons.

First, Fifth Circuit precedent is clear that individual employees are not subject to personal liability under Title VII. Specifically, defendants James R. Fuller, Jr.; Rebecca Fuller; and David Burkett argued that they are not personally liable to Wilson under Title VII because they were never "employers" of Wilson. James R. Fuller, Jr., and Rebecca Fuller assert they were employees or managers, but the actual employer was Ne Wen, Inc. David Burkett asserted he is an attorney who represented Ne Wen, Inc., and served as its registered agent for service of process.

Judge Doughty continued in his analysis stating that, under certain circumstances, an immediate supervisor may be considered an agent and therefore an employer. Under Title VII, a supervisor faces liability solely in her official, not individual, capacity. Thus, a Title VII suit against a supervisor, who is not an employer in her own right, is actually a suit against the employing corporation. However, Wilson has alleged no facts that would impose personal liability on these individual Defendants. Therefore, on this basis the defendants Fuller and Burkett were entitled to summary judgment dismissing Wilson's claims against them.

Next, Judge Doughty rejected Wilson's claim of sex discrimination. Again, for purposes of discussion, he assumed *arguendo* that *Blum* was no longer a binding precedent, and that Title VII recognizes claims of discrimination based on transgender

status. He explained that Wilson's claim has no merit because she has failed to present sufficient evidence to support a *prima facie* case of discrimination for several reasons.

The judge analyzed circumstantial evidence under the four requirements of the McDonnell Douglas framework: (1) that Wilson belonged to a protected class; (2) that she applied for and was qualified for the position; (3) that she was rejected despite being qualified; and (4) that others similarly qualified but outside the protected class were treated more favorably. Ultimately, Judge Doughty found that Wilson failed the third and fourth prongs because she did not present evidence that she suffered an adverse employment action by her employer, nor that any non-transgender employees were treated better than her.

Granting defendants' motion for summary judgment, Judge Doughty reiterated that defendants have produced summary judgment evidence to show that Wilson abandoned her job, and that, after it became apparent that Wilson had quit, defendants made numerous attempts to have her return to work. In response, Wilson has produced no direct evidence that she was actually terminated, or that she suffered adverse treatment because of her status, other than her conclusory and speculative allegations.

Given her *pro se* status, Judge Doughty further considered whether Wilson might assert a hostile work environment claim. To make out a *prima facie* case of hostile work environment, Wilson must demonstrate that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of her employment; and (5) her employer knew or should have known of the alleged harassment and failed to take prompt remedial action.

Judge Doughty held Wilson's claim was fatally flawed for failure to prove at least three of the essential elements. Specifically, Wilson offered nothing to show that (1) she was subjected to unwelcome harassment based on her

sexual identity. Her opposition is a recounting of several occasions when she claims that employees under her supervision did not respect her authority and numerous occasions where she disagreed with how the company was being run; (2) the alleged harassment affected a term, condition, or privilege of her employment. Title VII protects employees from conduct that is severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive. Wilson asserts that she was terminated for "insubordination" because of an altercation between herself and a store manager. Thus, there is no genuine issue of material fact that the terms of Wilson's employment were not affected by the alleged harassment; and (3) her employer knew or should have known of any alleged harassment and failed to take prompt remedial action to address and correct the alleged harassing behavior. Here, Wilson never formally complained of illegal discrimination, only what she perceived as mean treatment and insubordination from her staff.

To nail the coffin on Wilson's Title VII, Judge Doughty added that Wilson's complaints primarily concern her subordinates, not her managers, and explained that under two Supreme Court holdings, if an employer has an effective complaint mechanism and the employee refuses or fails to utilize such, the employer is not liable on the basis of *respondeat superior*. He reiterated that Wilson did not file any complaints about illegal harassment. When she complained about her job situation, she was immediately granted an accommodation to let her work at a restaurant closer to her home. Even after she resigned her employment by abandoning her job, her employer reached out to her to try and get her back to work. ■

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[Editor's Note: This case illustrates yet again the plight of LGBTQ employees within the geographical scope of the 5<sup>th</sup> Circuit who cannot call upon Title VII to protect them from employment discrimination when they work for

companies outside the city limits of the larger municipalities that cover sexual orientation or gender identity in their local laws. The continued refusal by the 5<sup>th</sup> Circuit to follow the lead of the 2<sup>nd</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Circuits to recognize such claims as a form of sex discrimination, combined with the lack of state law protections in Texas, Louisiana, and Mississippi, reinforces the importance of amending Title VII, especially considering the possibility that the Supreme Court's eventual ruling in a trio of cases argued in October may override the recent gains in other circuits. Of course, the case also illustrates the perils of *pro se* litigation under Title VII. – *Arthur S. Leonard*]



## Christian School's Suit to Remain in Maryland Scholarship Program Survives Motion to Dismiss

*By Arthur S. Leonard*

U.S. District Judge Stephanie A. Gallagher has denied a motion by Maryland's Superintendent of Education and the Advisory Board to a special state scholarship program to support students attending private schools, to dismiss a lawsuit by Bethel Ministries, Inc., a Pentecostal Christian Church that operates a private school – Bethel Christian Academy – which was informed that its students would no longer be qualified to receive scholarship aid because of the school's policies on sexual orientation and gender identity. *Bethel Ministries, Inc. v. Salmon*, 2019 WL 6034988, 2019 U.S. Dist. LEXIS 197264 (D. Md., Nov. 14, 2019). The court found that the plaintiff has alleged plausible claims under the 1<sup>st</sup> and 14<sup>th</sup> Amendments if the court takes as true (which it must for purposes of deciding the motion) Bethel's allegation that it does not discriminate in admissions based on sexual orientation, and thus is not in violation of the terms of the scholarship program.

Bethel's religious beliefs are summarized in its Parent/Student Handbook, which includes a statement of nondiscrimination that refers to race, color, national and ethnic origin, as prohibited grounds of discrimination by the institution, but does not mention sexual orientation or gender identity. The Handbook then states: "It should be noted, however, that Bethel Christian Academy supports the biblical view of marriage defined as a covenant between one man and one woman, and that God immutably bestows gender upon each person at birth as male or female to reflect his image . . . faculty, staff, and student conduct is expected to align with this view." Bethel alleges that it does not consider sexual orientation in the admissions process, which is based on competitive examinations, evaluation of past grades, and a pre-enrollment interview. Once students

are admitted, they are all expected to adhere to the school's policy prohibiting any communication of a sexual nature and any harassment, physical contact, or public displays of affection. In effect, all students are expected to act as if they are asexual for the duration of their attendance at Bethel Christian Academy, regardless of their sexual orientation.

Maryland adopted a program titled "Broadening Options and Opportunities for Students Today" in 2006. This is referred to as the BOOST program. The idea was to provide scholarship assistance for students to attend non-public schools in the state. Students who are eligible for the state's free or reduced-price lunch program may apply for scholarships, which may be used only at private schools that meet eligibility standards, including the school signing an assurance that it "will not discriminate in student admissions on the basis of race, color, national origin, or sexual orientation." The nondiscrimination requirement states that a school is not required "to adopt any rule, regulation, or policy that conflicts with its religious or moral teachings." This appears contradictory on its face, since it means that religious schools of a conservative bent are in effect required not to discriminate in admissions based on sexual orientation and to certify that this is their policy, while at the same time being free to profess disapproval of homosexual attraction and conduct on religious grounds.

When the BOOST program was established, Bethel signed the necessary assurance and began participating, enrolling 17 BOOST scholarship students for the 2016-2017 academic year and 18 such students for the 2017-2018 year. In the fall of 2017, the state Education Department (MSDE) began "investigating participating schools to verify their compliance with the nondiscrimination requirement." MSDE

requested that Bethel send a copy of its written policies, reviewed the Parent/Student Handbook, noted the Handbook's nondiscrimination policy and the policy statement on marriage and gender identity, and asked Bethel how its statements on marriage and biological sex were consistent with the school's written assurance that it does not discriminate in admissions based on sexual orientation. The response, in a letter dated March 13, 2018, was that the school does not consider sexual orientation in admissions, and that all students are forbidden to engage in sexual conduct, regardless of their sexual orientation (i.e., equal treatment). In the ensuing correspondence, Bethel has never wavered from its insistence that it does not discriminate in admissions and is in full compliance with BOOST standards.

The Advisory Board to the BOOST program held a public meeting on May 3, 2018, to discuss the Bethel situation, during which a member of the board "made several derisive comments about Bethel and its views," according to Judge Gallagher's summary of the Complaint. "For example, he described the school's view of marriage as 'problematic' and suggested that its policy on biological sex violated the nondiscrimination provision." MDSE requested more information from the school, which replied in a letter stating, again as summarized by Judge Gallagher, that "any student who can meet its academic standards is welcome to join the community, regardless of religious beliefs, same-sex attraction, beliefs about marriage, or beliefs about sexual morality." At its June 21, 2018, meeting, the Advisory Board went into closed session for the first time in three years, following which the Board voted to exclude Bethel from the BOOST program. On the same day, however, it found two other "Christian Academy" schools to be eligible for the program, "even though both schools shared Bethel's beliefs and policies on marriage and sexual conduct."

MSDE notified Bethel on December 12, 2018, that it was disqualified from BOOST for the 2018-2019 and 2019-2020 academic years. The letter

demanded repayment of \$102,600, for the years Bethel had participated in the program. As a result, six scholarship students had to drop out of Bethel at mid-year, and several other families "were left scrambling to find alternate sources of financial aid."

Bethel, represented by attorneys affiliated with Alliance Defending Freedom, filed suit in federal court on June 24, 2019, under 42 USC sec. 1983, naming as defendants the state's Superintendent of Education, Karen B. Salmon, and the seven members of the BOOST Advisory Board, all in their official capacities, claiming violations of the 1<sup>st</sup> and 14<sup>th</sup> Amendments. Bethel is not challenging the terms of the BOOST program, including the nondiscrimination in admissions requirement. Rather, it challenges its disqualification from the program. The defendants moved to dismiss the case.

"Bethel has plausibly alleged that Defendants violated several of its First and Fourteenth Amendment rights in the course of deeming the school ineligible for BOOST," wrote Judge Gallagher. She pointed out that the nondiscrimination requirement in the legislation refers *only* to admissions policies, and Bethel has consistently maintained – and alleges in its Complaint – that it does not take sexual orientation into account in making admissions decisions. "In fact," she wrote, "Defendants have not identified any student that Bethel has discriminated against in admissions based on an applicant's sexual orientation." Plaintiffs thus plausibly alleged that because their admissions policies are in compliance, their disqualification must be motivated by something else: the school's religious affiliation. "In other words, it is plausible that the Advisory Board, in determining that Bethel violated the nondiscrimination provision, unjustly conflated the school's religious beliefs with discriminatory behavior," they argue. "This possibility is evinced by the Advisory Board's decision to consider Bethel's eligibility in a closed session, a maneuver that Bethel alleges was a departure from normal procedures."

In addition to a potential Free Exercise violation, the court found a plausible equal protection violation, in that two

similarly-situated Christian Academies were deemed to be in compliance with BOOST requirements, even though all three schools have similar beliefs and policies on marriage and sexual conduct. Thus, Bethel alleges that the defendants treated its school differently "without any justification."

In ruling on a motion to dismiss, the court is supposed to take as true the plaintiff's factual allegations, so the court "must reasonably infer that Bethel has complied with the nondiscrimination provision" that the defendants are supposed to be enforcing. This leaves the logical conclusion that the school was thrown out of the program because of its religious beliefs and policies, not because of any discrimination in admissions. However, in a footnote, Judge Gallagher wrote: "It is not obvious at this stage whether Defendants discriminated against Bethel and, if so, whether any such discrimination was based on religion or on a different characteristic. Thus, it is unclear whether strict scrutiny or rational basis review would apply. However, Bethel has made its required showing at this stage, regardless of the level of scrutiny."

When she issued this decision, Judge Gallagher had been on the bench barely two months, having been appointed by President Trump and recently confirmed by the Senate. Before drawing any conclusions about her based on this, we note that she was originally nominated for the district court by President Obama, having served for several years as a U.S. Magistrate Judge. Her confirmation was blocked by the Republican-controlled Senate as part of their effort to prevent President Obama from filling vacancies in anticipation of the possible election of a Republican president in 2016. President Trump decided to renew the Gallagher nomination, and eventually she was confirmed after considerable delay, given Senate Republicans' resistance to confirming anybody who had been nominated by Obama. Unlike most Trump appointees, however, she was ultimately passed without any significant opposition in the Senate Judiciary Committee and her nomination was approved by the Senate on unanimous consent. ■



# Pennsylvania Superior Court Holds Transgender “Same-Sex Spouse” of Birth Mother Has Standing in Child Dependency Proceeding

By Arthur S. Leonard

The Superior Court of Pennsylvania, an intermediate appellate court confronting a question of first impression, held that the same-sex spouse of a woman is entitled to the “paternal presumption” under Pennsylvania law. An interesting wrinkle in this case is that the “same-sex spouse” identifies as male and is referred to as “he” throughout the court’s opinion, consistent with the preference of the parties. *In the Interest of A.M., A Minor; Appeal of P.M.-T., Non-Biological Parent*, 2019 WL 6122806, 2019 Pa. Super. LEXIS 1162, 2019 PA Super 344 (Nov. 19, 2019).

P.M.-T. and Mother were legally married in Allegheny County on February 20, 2015. Mother had two children from a previous relationship who were adjudicated dependent and placed with their maternal grandmother on January 10, 2017. Six months later, Mother gave birth to A.M. on July 21, 2017, and P.M.-T. was named as “father” on the birth certificate. (The court’s opinion by Judge Jack Anthony Panella does not make clear when P.M.-T. transitioned, but refers to the parties’ “same-sex marriage,” so we are assuming it was sometime after the marriage but before the birth of A.M.) After A.M. was born, the Allegheny County Office of Children, Youth and Families obtained an Emergency Protective Custody Order for A.M., who was placed along with her half-siblings, with the maternal grandmother and a guardian ad litem (GAL) was appointed to represent A.M.’s interest.

An adjudicatory hearing was set for August 22, 2017, at the Family Court. P.M.-T. and Mother were both at that hearing, and mother raised the issue of P.M.-T.’s standing to participate as a party. She informed the court that she and P.M.-T. were “same-sex” spouses and that P.M.-T. was listed as the father on A.M.’s birth certificate and should

be regarded as the child’s legal parent. The court “continued” the hearing but directed the parties to brief the court on P.M.-T.’s status at a continued hearing scheduled for October 11. At that hearing, P.M.-T. requested to be recognized as the child’s father and granted standing. The court “deferred” decision on the point, appointing separate counsel for P.M.-T. to assist with presenting argument on his status, adjudicated A.M. as dependent “as to Mother” based on Mother’s stipulation that the child should not be in her care “until she made further progress on her reunification goals, which included domestic violence services.” Evidently, P.M.-T. and Mother were not living together at the time.

P.M.-T. did not show up at a dispositional hearing on November 14, and Mother explained that P.M.-T. had been “missing” for a week and she intended to separate from him because their relationship “was hindering her progress toward regaining custody of her children.” The court did not make a ruling on P.M.-T.’s parental status in his absence, but ordered that A.M. remain with her grandparent. A permanency review hearing was scheduled for February 21, which P.M.-T. attended, but the matter was continued without a decision on custody and a new hearing was held on April 9, with P.M.-T. present once again. The parties offered argument on whether the parental presumption applied to a same-sex spouse when the Mother gave birth during the marriage. The trial judge found that Mother and P.M.-T. were married, intended to remain married, and intended to re-establish a household together at some point. But on June 9, 2018, the judge issued an order denying P.M.-T.’s standing, asserting that the marriage was not “intact” and thus P.M.-T. would not have standing regardless whether it was a same-sex or different-sex marriage.

P.M.-T. appealed, and the Superior Court reversed, finding that the presumption of paternity does apply to this situation. “The doctrine presumes that if a woman gives birth during her marriage, her spouse is the other parent to that child. The policy underlying the presumption of paternity is the preservation of marriages, and the presumption will only be applied where that policy is advanced by its application.”

“Here,” found the Superior Court, “P.M.-T. and Mother were legally married when Child was conceived as well as when she was born. According to both P.M.-T. and Mother, P.M.-T. is listed as the father on Child’s birth certificate, and P.M.-T. informed the trial court that he wanted to be recognized as the father and wanted to participate in Child’s dependency proceedings. P.M.-T. and Mother remained married and intended to remain married at the time P.M.-T.’s party status was being challenged. There is no third party challenge to the parentage of child. Given these circumstances, we conclude the trial court should have applied the presumption of paternity to P.M.-T.”

The trial court erred, wrote Judge Panella, by placing undue weight on the “disappearance” of P.M.-T. on November 14 and Mother’s statement that “she essentially viewed her relationship with him as over.” His subsequent reappearance and assertion of his parentage of claim countered the trial judge’s conclusion, however. “It is readily apparent from the record that the marriage between P.M.-T. and Mother is riddled with challenges and difficulties,” wrote the judge. “Under our case law, though, the existence of troubles in a marriage – even one as serious and disturbing as domestic violence – does not mean that such a marriage is not intact for purposes of determining the applicability of the presumption of paternity.”

The GAL had opposed recognizing P.M.-T. as a parent, saying that the apparent separation of the parties at the time of the November 14 hearing meant the marriage was not intact. The court rejected that argument. “While it is true that Mother was uncertain of P.M.-T.’s whereabouts at one point and expressed an intent to separate from him, there is no evidence that she followed through on that intention as the two appeared together at the subsequent hearings on February 21 and April 9, 2018. The record reveals that at time, P.M.-T. and Mother remained married, intended to remain married, and were working, however imperfectly, to address the issues in their family that needed to be remedied.” Indeed, the court quoted from the April 9 Permanency Review Order, in which the Family Court Judge stated that the parties “currently intend to remain married.”

While the court acknowledged that the state of the marriage was “relevant to the separate and distinct matters related to Child’s adjudication and placement,” it found that the issue of standing could be straightforwardly determined by applying the existing paternity doctrine and noting that the marriage was in effect when the child was born and when the family court was considering dependency and placement issues. The court noted cases from several other jurisdictions holding that it was appropriate to apply the paternity presumption, as the court insisted on calling it instead of using the parties’ preferred nomenclature of the gender-neutral “parental presumption” in order to be consistent with Pennsylvania case law. “Same-sex marriages are legal in Pennsylvania and must be ‘afforded the same rights and protections as opposite-sex marriages,” wrote the court, quoting from *In re Estate of Carter*, 159 A.3d 970 (Pa. Super. 2017). “We therefore have no difficulty in holding that the presumption of paternity is equally as applicable to same-sex marriages as it is to opposite-sex marriages. In doing so, we join other states that have held similarly.” Thus, the trial court should have allowed P.M.-T. to participate as a parent in the proceedings.

However, the court rejected P.M.-T.’ argument that the GAL should not have been allowed to participate as a party on the standing issue. The court noted a statutory requirement that a GAL be appointed to represent the child’s interest, and could find no statutory basis to hold that there was an exception to the GAL’s role in participating in a proceeding to determine the standing of a person claiming to be a parent of the child.

We can’t conclude this account without noting the interesting nomenclature issue here. P.M.-T. was identified as female at birth, and at some point began to identify as male. The court does not specify when P.M.-T. transitioned regarding his gender presentation. If it was before the marriage, then by rights it should not be considered a “same-sex” marriage. If the parties and the court are referring to P.M.-T as “he” and P.M.-T. was identified as the “father” on the birth certificate, not as “other parent” or “Parent 2”, why is the court treating P.M.-T. as a “same-sex” spouse. But perhaps this is not a crucial point, since the upshot of the court’s ruling is that the paternity presumption applies, regardless of the sex/gender of the Mother’s spouse, so the question of whether the state formally recognizes P.M.-T. as a man or as a woman is not relevant to the standing issue.

Lowell E. Burket, Pittsburgh, represented P.M.-T., Stephanie B. Pawloski, Pittsburgh, represented Mother; Benjamin N. Zuckerman, Pittsburgh, represented the grandmother, and Darnel B. Long, Pittsburgh, for Office of Children, Youth, and Families, represented the GAL. ■



## Federal Court Denied Untimely Request to Produce an Individual for a Neuropsychological Evaluation in Competency Dispute

By Corey L. Gibbs

Herardo Dionicio Martinez commenced a lawsuit against the County of Fresno and Anita Harper for discrimination based on his sexual orientation. Harper, then the Deputy Public Guardian in Fresno County, was appointed a limited conservator of Robert Camarillo. She placed Mr. Camarillo in a group home, and she accused Martinez of being abusive to Mr. Camarillo, with whom he claimed to have had a same-sex relationship for several years. Martinez requested that the court order County officials to consent to a mental evaluation of Robert Camarillo, whose competency to consent to a relationship with Martinez was questioned by the conservator. U.S. Magistrate Judge Barbara A. McAuliffe denied his request, finding that Martinez missed the deadline to make such a request and did not show *good cause* for a modification of the discovery schedule to accommodate his request. *Martinez v. City of Fresno*, U.S. Dist. LEXIS 130176 (E.D. Calif., Nov. 18, 2019).

The court issued a Scheduling Conference Order on September 5, 2018. This order set the initial discovery deadlines. Judge McAuliffe stated, “The Scheduling Order also explicitly stated that a party’s ‘failure to have a discovery dispute heard sufficiently in advance of the discovery cutoff may result in denial of the motion as untimely.’”

Martinez sought a modification of the schedule on June 14, 2019, due to conflicting matters. On July 8, 2019, the parties modified the Scheduling Order. The new deadline for expert disclosure

became July 31, 2019. The deadline for supplemental expert disclosure became August 17, 2019. The deadline for non-expert discovery cutoff became August 23, 2019. The deadline for the expert discovery cutoff became September 26, 2019. On October 18, 2019, Martinez filed a motion to order the County to consent to an evaluation of Mr. Camarillo by a neuropsychologist or qualified psychiatrist.

While Martinez sought to have Mr. Camarillo evaluated by a local psychiatrist whom his counsel had hired, the Defendants had already conducted a neuropsychological evaluation of Mr. Camarillo by Dr. Glidden on July 13, 2018. That evaluation concluded that Mr. Camarillo did not have the requisite capacity needed to consent to a sexual relationship at the time. The evaluation also referred to Martinez as, “A person who is not [Mr. Camarillo’s] peer.” Martinez believed that the Defendants would use this evaluation to persuade the jury to reject his claim. The Defendants provided the report to the Plaintiff’s former counsel on September 26, 2018.

On July 12, 2019, Martinez’s counsel informed the Defendants’ counsel that Dr. Bhandari would perform a mental evaluation. The evaluation was to be scheduled before all of the discovery cutoff dates. However, the Defendants rebuffed the evaluation, asserting that there was no *good cause* for a new examination, and refusing to give permission for Camarillo to be examined by Dr. Bhandari. Following efforts to resolve the dispute, the parties failed to file a Joint Statement re Discovery Dispute Concerning Mental Examination of Conservatee, which they had prepared in August 2019. Defendants opposed Martinez’s request for an examination and argued that he did not demonstrate *good cause* to compel an examination under Rule 35 of the Federal Rules of Civil Procedure.

Rule 35 provides, “The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.”

Martinez claimed that Dr. Glidden’s evaluation put Mr. Camarillo’s mental condition at issue. “The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.” Fed. R. Civ. P. 35(a)(1). Martinez requested the court to order Defendants to produce Mr. Camarillo for an examination. “The order: may be made only on motion for *good cause* and on notice to all parties and the person to be examined; and must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.” Fed. R. Civ. P. 35(a)(2). Defendants claimed that Martinez did not demonstrate *good cause*. The court stated that Martinez had not shown *good cause* for modifying the Scheduling Conference Order.

Aside from the issue of *good cause* addressed in Rule 35(a)(2), the rule did not specify deadlines for conducting medical examinations. First, Judge McAuliffe addressed the split in district courts regarding proper timing. Then, she turned to multiple cases within the Eastern District of California that addressed this issue. The courts held that, “A Rule 35 examination is properly part of expert discovery.” In Martinez’s case, the time schedule for expert discovery expired on September 26, 2019. Judge McAuliffe stated: “Because Plaintiff did not move to compel Defendant County of Fresno to permit Mr. Camarillo’s examination until October 15, 2019, several weeks after expiration of the expert discovery deadline, the Court [finds] the motion untimely.” The court found that Martinez’s counsel had been sent a copy of the first doctor’s report more than a year earlier, which gave Martinez plenty of time to request a new examination within the discovery schedule.

Procedural rules could make or break a case. Martinez claimed that the report by Dr. Glidden would sway jurors against him. He had an extension of the initial Scheduling Conference Order and over a year to make a request for a Rule 35 examination. Martinez squandered his opportunity to have a report that may have shed a more

favorable light on him. The deadlines provided by courts and rules of procedure ensured that litigation would not perpetually continue. The parties agreed to abide by certain deadlines, and Judge McAuliffe stuck by those deadlines. To stray away from the agreed upon dates would be unfair to the Defendants, she found, who abided by the deadlines.

Herardo Dionicio Martinez is now represented by Hadi Ty Kharazi of Yarra, Kharazi & Clason. He was not Martinez’s counsel a year earlier when Dr. Glidden’s report was sent, so it is possible that the time problem is an artifact of change of counsel. County of Fresno and Anita Harper are represented by Michelle Pepper and Bruce James Berger of Stammer, McKnight, Barnaum & Bailey. ■





# Third Circuit Denies Qualified Immunity for Prolonged Holding of Inmate in “Dry Cell” but Grants it over Dissent for Conditions of Induced Diarrhea and Human Waste

By William J. Rold

Pennsylvania prisoner Briaheen Thomas was thrown into a “dry cell” after a visiting room officer believed he had ingested contraband hidden in an M&M. Thomas’ clothing was taken from him, and he was given a thin smock. The cell had no bedding, running water, or working toilet (which was drained of standing water). The cell was brightly illuminated constantly. “To expedite his release from the cell, Thomas was offered laxatives.”

Writing for himself and Circuit Judges Patty Schwartz (Obama) and Joseph A. Greenaway, Jr. (Obama), Circuit Judge David J. Porter (Trump) found in *Thomas v. Tice*, 2019 WL 5884162, 2019 U.S. App. LEXIS 33684 (3d Cir., Nov. 12, 2019), that the committee members who oversaw confinement in the “dry cell” were not entitled to summary judgment for the last part of the time that Thomas spent in the “dry cell,” as described below. They were granted summary judgment, however, for the first five days, despite the conditions, by Judges Porter and Schwartz. Judge Greenaway would have presented the entire time in the cell for a jury to consider. U. S. Magistrate Judge Joseph F. Saporito (2018 WL 1278586) and U.S. District Judge Matthew W. Brann, Jr., of the Middle District of Pennsylvania (2018 WL 1251831), also wrote on these issues.

On the second day in the “dry cell,” Thomas was x-rayed, which showed no foreign bodies in his alimentary tract. Over the next three days, Thomas had twelve bowel movements. Thomas had no toilet paper or wipes, and he was not allowed to wash himself – or even his hands before eating. His waste accumulated where he was, cuffed to a bed rail on a dirty mattress.

On the fourth or fifth day, a review committee (the defendants, including an associate warden) extended Thomas’ stay in the “dry cell” for another five

days. The committee met on Thomas’ extension and interviewed him just outside his cell door, which had a window through which he was constantly observed by security staff. They did not state a reason for the extension (although Pennsylvania regulations required one), and they could not remember the events during discovery. Thomas spent ten days in the “dry cell,” and he was not permitted to change his smock. The committee insisted they knew nothing about conditions in the “dry cell” beyond the door – apparently, not even noticing the odor.

The Third Circuit unanimously found a jury question on the defendants’ liability for violation of Thomas’ civil rights once they decided to let him remain in the “dry cell” (i.e., for the last five days). The majority granted summary judgment to the defendants for the period before the defendants’ decision, because there was no evidence that they were involved in placing Thomas in the cell or in fostering the conditions in the cell.

The allegations in this case are very similar to those in the “dry cell” in the United States Penitentiary at Lewisburg, that precluded summary judgment after 29 hours of confinement in *Young v. Quinlan*, 960 F.2d 351, 363 (3d Cir. 1992). Young was HIV-positive, he was put in “dry cell” as punishment for flooding his own cell (to set an example), and the conditions were slightly better – a shorter time, and he was given a blanket and not cuffed. Both sides of the divided Third Circuit parse Young to support their positions. In this writer’s view, however, Young is largely undermined by the majority – and the editors at WestLaw “red flag” Young whenever it is cited.

In Young, the defendants who were sent to trial were the unit supervisor and the line officers. The head of the federal Bureau of Prisons (Quinlan)

and Lewisburg’s warden and associate warden were granted summary judgment, because they did not know that Young was ever in the “dry cell.” That argument would not apply here, where the defendants interviewed Thomas while he was in the cell.

The majority say that Young nevertheless should be distinguished because it applied a “knew or should have known” state of mind standard, when *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), requires proof of subjective knowledge. Yet, Farmer allows the inference of subjective knowledge if the risks are “obvious.” 511 U.S. at 841-4. The Third Circuit’s view of “subjective” knowledge already included “obvious” evidence, even before the Farmer refinement. *Monmouth County Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).

Judge Greenaway’s concurrence makes a different point: that the defendants are wrong by trying to distinguish Young on the basis that Young was HIV-positive and Thomas is not. While he correctly points out that Young found the plaintiff’s HIV status to be aggravated by conditions already found unconstitutional, the majority never made this point. It is odd for a judge to write separately to respond not to the majority but to an argument by a party that the majority did not adopt. This suggests that this decision bounced around a bit in Chambers in the ten months between oral argument and issuance of the opinions.

During this interim, the Third Circuit decided *Mammana v. Fed. Bureau of Prisons*, 934 F.3d 368, 370, 374 (3d Cir. 2019), by a panel including Judge Schwartz. Judge Greenaway writes that he is unable to distinguish *Mammana* from this case, since *Mammana* was confined for four days in a strip cell without bedding or clothing and under constant illumination – and the Court

found a claim was stated against the lieutenant and officers on the unit.

It is difficult to accept that the defendants here truly did not know about the conditions in the “dry cell,” given their duties and proximity – or that their knowledge was not a jury question. If they truly did not know, then how did they violate Thomas’ liberty interests or impose cruel and unusual punishment by allowing him to remain in what they did not know were “atypical or significant” hardships under *Sandin v. Conner*, 515 U.S. 472, 480 (1995)? Perhaps the holding is a compromise between a full trial and a full summary judgment, but there seems to be a problem with this argument.

A final word is appropriate. Pennsylvania’s submissions about the risks of swallowed contraband (and the hiding of drugs in bagged candy) are sealed. There is reference in the opinions only to their “legitimate” security interest without discussion of exaggeration or alternatives. Many prisons permit books and magazines to be received only from the publishers. Many others do not permit visitors to bring bagged candy or other food items into the institution, restricting consumables to those bought in the commissary or vending areas or shipped commercially. This writer questions whether this case is really only about the risks posed by a fake M&M – or if it also includes an ingredient that is about terrorizing inmates and their visitors.

Thomas was represented on the appeal by James P. Davy, of the Pennsylvania Institutional Law Project, Philadelphia. ■



## Discovery Wars Continue in Transgender Military Litigation

By Arthur S. Leonard

U.S. District Judge Marsha Pechman issued a new opinion in *Karnoski v. Trump*, 2019 WL 6130826, 2019 U.S. Dist. LEXIS 200954 (W.D. Wash.) on November 19, 2019, again addressing the problem of discovery as the case proceeds. This is one of four pending lawsuits challenging the Trump Administration’s policy against transgender military service.

After briefly recapping some of the main points of the litigation since the case was filed in 2017, Judge Pechman addresses the particular concerns that have bogged down the discovery process. The Administration insists that a substantial portion of the information demanded by Plaintiffs is covered by “deliberative process privilege” and should not be disclosed. The problem is figuring out what is privileged and what is not, and what is relevant and what is not.

As discovery arguments have proceeded in several of the pending cases, the focus of discovery appears to have narrowed to the period between the Trump White House memorandum of August 2017 and the adoption of the so-called Mattis Plan pursuant to the President’s memorandum of March 23, 2018, in which Trump “withdrew” his July 2017 tweet announcing a total ban and the August 2017 White House Memorandum, and authorized then-Secretary of Defense Mattis to put into effect the policy described in his February 2018 submission to the President, which was based on a report allegedly prepared for him by a “panel of experts” laboring during the interim period.

Since the main theory of challenging the Mattis plan is Equal Protection and Supreme Court precedent limits Equal Protection claims to intentional discrimination, the motivation behind the Mattis Plan, the reasons for its provisions and the basis for its adoption, are now the central focus of discovery. The Plaintiffs are particularly interested in

information about the “Panel of Experts” whose identity was not disclosed and whose sources of information have not been revealed in any great detail. The plaintiffs have demanded a wide array of material relevant to that.

“To date,” wrote Judge Pechman, “Defendants have asserted deliberative process privilege as a basis for withholding or redacting more than 50,000 responsive documents, and as the sole basis for withholding or redacting approximately 35,000 responsive documents. In the instant motion, Plaintiffs again seek to compel documents withheld under the deliberative process privilege, suggesting nine broad categories, meant to encompass the 68 Requests for Production” [which were made earlier in the discovery process], “through which the Court can evaluate the withheld documents.” The 9<sup>th</sup> Circuit has rejected her prior discovery order as to broadly conceived to deal with potentially legitimate privilege claims by the government. The latest Order is intended to deal with that problem.

Judge Pechman felt stymied by the form in which the Defendants were responding, dumping huge quantities of unsorted documents rather than responding directly to the categories of information requested by the Plaintiffs. She found that the Defendants’ claim to privilege “over 35,000 responsive documents” was “a volume that prevents the Court from evaluating documents on an individual basis. Further, the Court cannot evaluate Defendants’ privilege assertions by individual Requests for Production because Defendants produced documents as kept in the ordinary course of business, without responding to individual Requests. Finally, Plaintiffs suggest the Court should evaluate privilege assertions based on nine overarching categories of documents meant to encompass all 68 Requests for Production, but, as Defendants note, these proposed

categories are too broad to be meaningful.” What to do?

The court, apparently after much thought, ordered the following: “1) Defendants must produce their complete list of custodians and search terms within seven (7) days of the date of this Order; 2) Plaintiffs shall provide Defendants with a list of Requests for Production, sorted by order of priority, within ten (10) days of the date of this Order. Plaintiffs may also provide Defendants with a list of additional custodians and search terms. Plaintiffs are encouraged to coordinate with counsel in the other active cases concerning the Ban, in order to consolidate and prioritize the Requests for Production; 3) Once the Plaintiffs have provided their list of Requests for Production by order of priority, the Government must begin responding to each Request, consulting with Plaintiff to apply additional search terms or search additional custodians.”

In earlier discovery requests, the plaintiffs had sought to get background information related to the Carter Policy (i.e., the policy adopted by the Obama Administration in June 2016 that lifted the traditional ban on transgender service). “Whether Defendants may assert the privilege over documents related to the Carter Policy remains an open question that the Court will address upon a motion by the Plaintiffs,” wrote Pechman.

Meanwhile, “In December, the Parties and the Court will begin reviewing Defendants’ privilege assertions by individual Requests for Production, beginning with the first five prioritized Requests. Because the Defendants’ current production does not permit Plaintiffs or the Court to assess Defendants’ privilege claims, after Plaintiffs have provided Defendants with a list of Requests for Production ordered by priority, Defendants are ORDERED to begin responding to each Request. On December 10, 2019, at 4 pm, the Parties will meet with the Court to begin assessing Defendants’ privilege claims by individual Requests for production.”

A check of the court’s on-line docket on November 29 did not indicate any attempt by the government to appeal

this order to the 9th Circuit or to seek a stay pending appeal. The Trump Administration’s strategy in discovery appears calculated to string things out as long as possible. Thus, it remains possible that if Trump is defeated for re-election, his successor may take office with these cases still pending and no merits ruling having been issued in any of the cases, making it possible for the next president to partially moot the issue by ordering a resumption of the Carter Policy adopted by the Obama Administration. However, that would still leave claims by individual transgender individuals whose careers were disrupted by the Defense Department’s *de facto* response to Trump’s tweets and 2017 Memorandum, by the April 2018 implementation of the Mattis Plan, and by application to individuals of inequitable policies concerning enlistment and/or continued service from fall 2017 onwards. This entire sorry mess may not just disappear with a change of administration. And if Trump is re-elected, these cases may well grind on for years longer, since the parties are likely to appeal any adverse ruling.

The list of counsel for the parties in the Lexis print of the November 19 decision takes up about 1-1/2 pages, so will not be reproduced here, other than to say that plaintiffs lead attorneys come from Lambda Legal and various law firms acting as cooperating attorneys, as well as local counsel, as well as several amicus parties, including several states concerned about the impact of the transgender ban on the operation of their National Guard units. ■



## Art Teacher’s 14th Amendment Lawsuit against Mansfield, Texas, School District & Superintendent Survives Dismissal Motion

By Arthur S. Leonard

U.S. District Judge Sam A. Lindsay ruled on November 21 that Stacy Bailey, a public school art teacher who has asserted 14<sup>th</sup> Amendment claims against her employer, may continue to litigate against the school district on a municipal liability theory and against the school superintendent in his personal capacity, as the court rejected the superintendent’s qualified immunity defense, finding that the right to equal protection and due process of gay public employees is “clearly established.” *Bailey v. Mansfield Independent School District*, 2019 WL 6216669, 2019 U.S. Dist. LEXIS 202470 (N.D. Tex., Dallas Division, Nov. 21, 2019).

Stacy Bailey’s case received media attention when the Mansfield School District, allegedly with the approval of the Board of Trustees and Superintendent Jim Vaszauskas, made the strategically erroneous decision to issue a lengthy press release seeking to justify its actions with respect Bailey, an out lesbian who had been employed as an elementary school art teacher for a decade, twice being honored as “Teacher of the Year,” explaining why it suspended her. The suspension was sparked by a complaint received from one parent that Bailey was promoting a “homosexual agenda” to her students by mentioning and showing a picture of her same-sex partner (whom she has since married) and commenting about the same-sex partner of a famous artist whose work was being discussed. This first parental complaint arose in August 2017.



As described in her amended complaint, Bailey's conduct was no different from that of heterosexual teachers who had photos of and mentioned their spouses/partners or mentioned historically documented facts about people relevant to the lessons they were teaching. When Bailey refused a request on September 8 from the District's Human Resources Director, Dr. Cantu, to sign a statement acknowledging that she had shown sexually inappropriate images to children, she refused, stating: "This is discrimination. This is wrong and it might even be illegal. I'm not signing it." Later that day, Bailey was placed on administrative leave for eight months – effectively, the remainder of that school year. About two months later, she was asked to resign, but she refused. At a meeting with Dr. Cantu and the district's attorney, she was accused of having an "agenda," which she denied, indicating that she was ready to go back to work at the elementary school where she had taught for a decade. However, in January 2018, the district indicated it might not renew her contract at the end of the school year. The word went out to her many supporters among the parents of her students, and they began to show up at school board meetings, urging her reinstatement, because she was an outstanding teacher. She alleged that this was "embarrassing" for the school district and for Superintendent Vaszauskas, thus prompting the press release issued on March 27, 2018.

The press release insisted repeatedly that the district did *not* place Bailey on leave because she had submitted a proposal for the district to adopt a formal policy banning sexual orientation or gender identity discrimination. Rather, the district insisted that it had received "complaints from parents about Ms. Bailey discussing her sexual orientation with elementary-aged students." (Bailey alleges that there were just two complaints from the same parent.) Then, the release asserted, "Ms. Bailey refused to follow administration's directions regarding age-appropriate conversations with students," insisting that "this situation"

was "a matter of parents having certain rights pertaining to the topics to which their children are exposed and the District's right and responsibility to ensure age-appropriate instruction." Notably, Bailey did not discuss sex with the students. She showed a picture of her same-sex partner as part of the annual welcome-back to school session with her incoming classes, and she mentioned that an artist whose work was being discussed had a same-sex partner.

The press release "generated significant public outcry and press about Bailey's employment situation, including public discussions about her sexual orientation and employment status, as well as criticism of Mansfield I.S.D." At the board meeting at which it was issued, "a number of parents and students stressed that Bailey was a good teacher and should be brought back to the classroom."

According to the Complaint, as summarized by Judge Lindsay, "Mansfield I.S.D.'s Board of Trustees was taken aback by the public response in support of Bailey and responded by withdrawing plans to end Bailey's employment and instead began taking steps to make her employment intolerable in hopes that she would quit, which she did not." She sent a letter on April 4 asking to be allowed to return to the elementary school where she had been teaching. Although the Board voted later that month to renew her contract, it did not allow her to return to that school. Instead, she was assigned to teach at a high school despite her lack of experience teaching at the high school level. The complaint alleges that "this position was more onerous and damaged Bailey's career as an educator." She noted larger class sizes, a significant increase in her workload, and having to develop "an entirely new curriculum for class suitable to high school students."

Once she was told she would be teaching at the high school, Bailey applied with several other Texas school districts for elementary school art teaching positions, but was unsuccessful. She noted that

every application seeking job history information asked whether the applicant had ever been placed on administrative leave. She truthfully answered the question and claims that is why she was disqualified from any of those positions. She describes having suffered emotional distress as a result. She notes in her Complaint that although the Texas Association of School Boards model anti-discrimination policy includes sexual orientation, the Mansfield school board did not act on her request to include sexual orientation in its policy.

Bailey filed her federal complaint on May 8, 2018, after her contract had been renewed with the determination that she would not be allowed to return to teach at the elementary school. The Defendants moved to dismiss, claiming various pleading deficiencies, and Bailey promptly filed an amended complaint intended to cure those deficiencies. Then the Board filed a new motion to dismiss, which is the subject of this ruling.

Bailey was lucky in her assignment of a judge for the case. The Northern District of Texas is notorious for have some extremely conservative judges, but the luck of the wheel gave her Judge Lindsay, the former Dallas City Attorney who was appointed by President Bill Clinton and was the first African-American judge to sit in the U.S. District Court in Dallas.

Part of her Complaint was that by taking action against her for including a photo of her same-sex partner (and fiancé) in her welcome presentation to her class, the school district was burdening her constitutional right to marry. Noting that she had subsequently married, the court decided to grant the motion to dismiss this part of her claim.

However, the court concluded that the factual allegations of the Complaint were sufficient to ground a municipal liability claim against the school district under the due process and equal protection clauses of the 14<sup>th</sup> Amendment, which is binding on them as a governmental body. The district, of course, made the tired old argument that because neither the 5<sup>th</sup> Circuit nor the

Supreme Court has designated sexual orientation as a suspect classification, her Equal Protection claim should be dismissed. No dice after *Romer v. Evans* (1996). Clearly, a government employer must have a rational basis for taking action against an employee because of her sexual orientation.

Judge Lindsay found the factual allegations sufficient to support the claim that Bailey was subjected to adverse action because of her sexual orientation, without being afforded procedural due process, possibly on the basis of just one parent complaining about a relatively innocuous picture and a passing reference to an artist's same-sex partner in an art lesson. Here is where the District's decision to issue the press release came back to bite it. Municipal liability requires alleging an unconstitutional policy, not just an individual decision involving a particular employee. Judge Lindsay wrote that the press release could be found to represent a statement of school district policy, supporting Bailey's claim that the District improperly delegated to one complaining parent the ability to wreck a highly respected teacher's career.

Writing in rejection of the Board's attempt to dismiss the equal protection claim, Judge Lindsay wrote: "On the face of the pleadings, which includes the Mansfield I.S.D. Press Release, there is no job-related justification for placing Bailey on an eight-month administrative leave and then not allowing her to return as an elementary school teacher at Charlotte Anderson Elementary School. Further, the court concludes that Mansfield I.S.D. has failed to argue persuasively how Bailey's sexual orientation bears any rational relationship to her competency as an elementary school teacher, or her job performance as an elementary school teacher – a position she held for more than ten years during which time she was considered exemplary and even voted as 'Teacher of the Year' twice. Until the time a parent complained about her sexual orientation, she taught at Charlotte Anderson Elementary School without incident."

"Based on the pleadings," he continued, "the court reasonably draws the inference that Mansfield I.S.D.'s decision to place her on administrative leave for eight months and then not permit her to resume her job teaching art to elementary school students was based on her sexual orientation and a desire to appease complaining parents in the community operating on the basis of outdated stereotypes about homosexuals. Absent some rational relationship to a legitimate governmental interest or her job performance, a decision to place Bailey on administration leave and then transfer her because of her sexual orientation runs afoul of the Fourteenth Amendment's equal protection guarantee."

Furthermore, he wrote, "public officials cannot avoid their constitutional duty by 'bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held,'" quoting from *Palmore v. Sidoti*, 466 U.S. 429 (1984), continuing: "Because a community's animus towards homosexuals can never serve as a legitimate basis for state action, actions based on that animus violate the Equal Protection Clause."

The judge emphasize that in deciding a motion to dismiss, he was not deciding the merits. "At the motion-to-dismiss stage, the court simply concludes that Bailey's pleadings plausibly state a claim for the violation of a clearly established constitutional right."

For the same reason, Judge Lindsay rejected Superintendent Vauszauskas's qualified immunity claim. Public officials can be held personally liable for violating a "clearly established constitutional right." And Lindsay concluded that the Press Release was sufficient, at the pleading stage, to support a municipal liability claim, as it seemed to state various policy declarations, such as that any mention of same-sex partners was not "age-appropriate" for elementary school students, although mention of different-sex partners is apparently just fine. Based on the allegations of the Complaint and the court's reading of the Press Release, "the court can

reasonably infer that Mansfield I.S.D.'s Board of Trustees issued or approved a policy that intentionally discriminated against Bailey based on her sexual orientation."

The judge concluded that in light of these findings, Bailey's claim was not rendered deficient by failing to allege expressly that the district had acted with "deliberate indifference" to her constitutional rights, an element that has been mentioned in some other municipal liability cases.

Judge Lindsay did conclude, however, that Dr. Cantu, the HR director, should be dismissed from the case in terms of individual liability, as she had no role in deciding to suspend Bailey or to bar her from teaching at the elementary school.

In addition to her federal claims, Bailey asserted claims under the Texas Constitution's equal protection provision and its equal rights amendment (sex discrimination) which the District sought to have dismissed. Judge Lindsay stated that the reasoning supporting his municipal liability rulings on the 14<sup>th</sup> Amendment claims applied equally in this context, so he refused to dismiss the state law claims.

Bailey's response to the motion to dismiss included a request for leave to file a second amended complaint, but did not attach a proposed amended complaint. Denying this motion, Lindsay found that the facts and reasoning underlying his decision to dismiss the right to marry claim and the individual liability claim against Dr. Cantu were not curable by an amended complaint, and requiring Dr. Cantu to litigate another motion to dismiss would "defeat the purpose behind qualified immunity."

A reasonable reading of Judge Lindsay's opinion should persuade the defendants that that settlement talks are in order, so the ball is now in the Mansfield school board's court. Do they want board members and the superintendent to be deposed under oath about why they took the actions they took in this matter? Do they want to have to pay the district's law firm to litigate a summary judgment motion

after discovery, considering how strong the judge's opinion on the motion to dismiss was against them on their legal arguments?

Stacy Bailey is represented by Jason C. N. Smith of Fort Worth, whose responsive pleadings on the motion appear to have done a very thorough job of documenting that the right to equal protection of the laws most decisively does extend to gay people under both 5<sup>th</sup> Circuit and Supreme Court precedent. The Mansfield I.S.D. and individual defendants are represented by Thomas E. Myers and Kevin C. Smith of Brackett & Ellis, also of Fort Worth. ■



## HIV-Positive Plaintiff Survives Motion to Dismiss His ADA and FMLA Lawsuits

*By Arthur S. Leonard*

U.S. District Judge Timothy L. Brooks denied an employer's motion to dismiss claims under the Americans with Disabilities Act and the Family & Medical Leave Act by an employee who had not disclosed his HIV-status to his employer until shortly before he was told that he had been terminated for failing to contact the employer about why he was missing from work. *Davis v. Golden Partners, Inc.*, 2019 WL 5929270, 2019 U.S. Dist. LEXIS 195763 (W.D. Arkansas, Nov. 12, 2019).

Jimmy Davis, who had been diagnosed HIV-positive in 2002, started working with Golden Partners, a corporate franchise of several Golden Corral restaurants in Arkansas and Missouri, as a server, but by mid-2017, was selected to enroll in the company's management training program. He had never disclosed his HIV-status, which was controlled through medication, to the company. His supervisor at the management training program was Jon Fritchey. Davis scheduled a vacation from Monday, September 4, 2017, until Wednesday, September 13, 2017, and the company agreed to work around his planned vacation to facilitate his enrollment in the management training program. He was scheduled to return to work at the Golden Corral restaurant in Tulsa on Thursday, September 14. According to Judge Brooks' summary of the factual allegations in the complaint, Davis sent a text message to Fritchey shortly after his vacation began, stating that it had been impacted by Hurricane Irma and asking if he could return to work early on September 11. Fritchey sent a return text saying "Yes, I'll adjust your schedule." Davis never responded to this text, or to several other text messages that Fritchey sent to him over the ensuing days, including several sent when Davis did not show up to work on the 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> or 14<sup>th</sup>.

Fritchey claimed that when he hadn't heard back from Davis by the time he was originally supposed to come back from vacation, he decided to terminate Davis, noting the company's rule concerning contacting the company if an employee would not be reporting for his shift. But, Fritchey claimed, he did not want to terminate Davis by text or email, so he tried to contact him again on Friday the 15<sup>th</sup>.

That morning, Fritchey sent an email to the payroll department, stating: "Jimmy took a few days off starting 9/3/17. We assume he is not coming back. He has basically disappeared. So no more pay. I will term him in all pay this weekend." Fritchey then emailed the security department to deactivate Davis's security code, and sent Davis the following text message: "Really need to hear from you. If you just decided that this was not what you want, which would really surprise me. If something has happened, you need to let me know. I'm sure we can figure this out." In deposition testimony, Fritchey testified that Davis had been terminated for "about two and a half hours" when he sent that text. A few hours later Davis finally responded, resulting in an exchange of messages that culminated that evening, when Davis revealed that he had been HIV-positive since 2002, had been on medication since then and "after 17 years they had to change my medication." The result was that he was "totally messed up" as a result of the new medication, had been sick, trying to take care of his mother, dealing with various complications in his life. "I've already lost everyone around me pretty much as it is," he wrote. "Yes I want to keep my job it's all I have but I need to get right with what's going on inside my body first. I've been telling everyone else anything just so I don't let them into my personal issues."

In his deposition, Davis testified



that he his adverse reaction to his new medications made him so sick that he had been unable to return phone calls and text message, which explained the period of several days when he did not respond to Fritchey's emails. He did concede under questioning that he understood his responsibility to inform the company if he was not going to report for work.

Judge Brooks noted that it was undisputed that until Davis revealed his medical situation in a message to Fritchey on the evening of the 15<sup>th</sup>, he had never informed anybody at the company about his medical condition. According to Fritchey's deposition, after he received Davis's "disclosure," he thought: "Oh shit, this is going to go south." Fritchey stopped responding to Davis's text messages, at first of his own accord, and then in response to an instruction from the HR department. On September 18, Fritchey and Davis connected by phone and Davis was informed he had been terminated the morning of the 15<sup>th</sup>, although he was not formally deactivated from the company's management training program until Monday, the 18<sup>th</sup>. Fritchey testified that this delay was because the training center was closed on the weekend.

The Employee Handbook in evidence indicates that "failure to report to work without calling in . . . will result in disciplinary action up to and including dismissal." But it also states that the company must provide unpaid leave for any of the following reasons: for a serious health condition that makes the Co-worker unable to perform his/her job. Neither Fritchey nor his boss had consulted the Employee Handbook about Davis's right to medical leave. Davis noted that the Handbook contains no mention of the ADA, and does not include any form for requesting leave.

Davi filed a charge with the EEOC shortly after his termination, alleging discrimination against him because of his sex and disability, subsequently filing his complaint under the ADA, the Arkansas Civil Rights Act (which also covers disability discrimination), and the Family and Medical Leave Act.

After discovery, the company moved for summary judgment.

In denying the company's motion, Judge Brooks determined that there were material fact issues concerning several key elements of Davis's case, including whether his termination took place before or after he notified the company of his HIV-status, whether the company's articulated reason for the termination – his failure to call in over a period of several days when he was supposed to report for work – was a pretext for discrimination, and whether his rights had been violated under the FMLA, which also turns on the contested issue of whether he had informed the company of his medical complications before or after he was terminated. Central to the issue is the position of the 8<sup>th</sup> Circuit that the critical time for a termination, in terms of accruing a claim, is when the employee is informed of the termination. Although the company contends that a decision was made to terminate Davis on Thursday, before it had learned of his HIV-related issues, this was not communicated to him until after he had informed Fritchey about that condition on Friday evening, and he was not formally removed from the management training program until after the weekend. Furthermore, the text Fritchey sent him Friday morning did not communicate a termination, but instead a concern about why Davis had been out of touch and said "I'm sure we can figure this out," which suggests that no final discharge decision had been made.

Davis is represented by Kristin L. Pawlik, of Keith, Miller, Butler, Schneider & Pawlik, PLLC, Rogers, AR.

Judge Brooks is one of those rare Obama judicial appointees during his second term who received Senate confirmation (in 2014) – indeed, unanimous confirmation, since Brooks apparently had the support of both of Arkansas's U.S. Senators at the time, one Republican and one Democrat, and was filling a two-year old vacancy resulting from his predecessor taking senior status. ■



# CIVIL LITIGATION *notes*

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## CIVIL LITIGATION NOTES

By Arthur S. Leonard,  
Wendy Bicovny,  
and Cristell Fortune

*Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School, Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City, and Cristell Fortune is an Associate Attorney at Schulte Roth & Zabel LLP's New York office.*

### U.S. COURT OF APPEALS, 2ND CIRCUIT

— A three-judge motion panel of the 2<sup>nd</sup> Circuit, consisting of Circuit Judges Jose A. Cabranes and Reena Raggi and District Judge Edward R. Korman (sitting by designation), has granted a motion by New Hope Family Services, Inc., a Catholic agency, for a preliminary injunction against Sheila J. Poole, in her official capacity as Acting Commissioner of the New York Office of Children and Family Services, who has been demanding that New Hope certify compliance with a state regulation that requires adoption and foster care agencies not to discriminate because of sexual orientation, gender identity or expression, or marital status” in the provision of services. The motion was granted on November 4. In response to Commissioner Poole’s earlier threat of suspending New Hope’s license for refusal to certify compliance with the rule, New Hope filed suit, represented by Roger G. Brooks of Alliance Defending Freedom, an Arizona-based anti-LGBTQ litigation organization, seeking a declaration that the state’s demand was unconstitutional. New Hope lost that case before the U.S. District Court, *New Hope Family Services v. Poole*, 387 F.Supp.3d 194 (N.D.N.Y., 2019), and is appealing to the 2<sup>nd</sup> Circuit. It argues that under the Free Exercise Clause of the First Amendment, it can refuse to provide the services to same-sex and unmarried

individuals, based on its religious belief that children must be placed in households headed by a married heterosexual couple. New Hope says if any such couple or individual were to seek its services, it would refer them to an agency that would be willing to assist them, and that it has not been approached by any same-sex couples seeking its services. The issue arose out of compliance action by the agency, not based on a complaint. New Hope argued that if it did not receive injunctive relief pending its appeal on the merits, it would be forced to terminate its services – including ongoing services to couples with whom it had placed children and ongoing processing of existing applications. In granting the motion for preliminary relief, the panel explained that it was difficult to predict how a merits panel would treat the 1<sup>st</sup> Amendment argument, noting that litigation over this issue has produced diverse results in other courts and there is no direct Supreme Court or 2<sup>nd</sup> Circuit precedent on point, although, as the court notes, there is a general rule that valid state laws of general application must be complied with despite an individual’s religious objections. The court found weightier the argument that the agency would suffer irreparable injury were it put to the burden of certifying compliance with the regulatory rule or suspending its operations, and that suspending its operations would disrupt ongoing services and decrease the availability of services to the detriment of children needing placements. While granting the motion, the court laced it with conditions, including that New Hope not accept any new prospective adoptive parents for adoption services while the injunction is in effect, and provide the agency with “a list naming each applicant to be an adoptive parent and each approved adoptive parent.” The Order makes clear that New Hope can continue to provide services to existing clients and to make placements to

approved adoptive applicants who had applied before the current controversy arose. The court also ordered that the appeal remain with this panel, and set argument on the merits for November 13. *Arthur S. Leonard*

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### U.S. COURT OF APPEALS, 3RD CIRCUIT

— *Pro se* employment discrimination claims frequently crash and burn on procedural grounds, not least because persons without legal training or experience may have little concept of how to frame a complaint or comply with statutory deadlines. This appears to be the case with *Valentin v. Manpower Group Solutions*, 2019 U.S. App. LEXIS 35566, 2019 WL 6357301 (3<sup>rd</sup> Cir. per curiam, Nov. 27, 2019). Jonathan Valentin was hired to be a Customer Service Representative by Manpower Group Solutions “on or about” July 20, 2015. In a charge he filed with the EEOC, he alleged that “on the first day of training, his co-workers and instructors harassed him about his sexual orientation. He stated that on July 21 he asked to speak with the instructors about the harassment, that an instructor told him to go home and said he would try to change his training location, and that Manpower’s Business Manager later told him that his employment was terminated.” Thus, the date of the alleged discrimination was on or about July 21, 2015. His charge with the EEOC, date-stamped October 27, 2016, resulted in a right-to-sue letter to him, stating that the agency was unable to conclude that there was a statutory violation. He filed suit in federal court, asserting federal and state claims of discrimination due to race, national origin, and sex, claiming that Manpower terminated his employment, failed to stop harassment against him, retaliated against him, and defamed him. Manpower moved to dismiss for failure to state a claim and for a more definite statement, and argued that the Title VII claims must be dismissed as untimely. When Valentin did not respond to the

# CIVIL LITIGATION *notes*

motion, the District Court ordered him to show cause why the motion should not be granted as unopposed. He then filed “a compilation of documents” including an “amended complaint” and his filings and correspondence with the Pennsylvania Human Relations Commission and the EEOC. He claimed to have complied with “the EEOC’s statute of limitations.” Presumably, he met the requirement, included in the EEOC’s standard text of a right-to-sue letter, that he must file his federal court complaint within 90 days of receiving the letter. But this was not really responsive to Manpower’s timeliness argument. Under Title VII, a plaintiff must file his charge with the EEOC within 300 days of the occurrence of the discrimination, but he waited well over a year after his employment at Manpower had ended to file his EEOC charge, so it was clearly untimely. The district court had granted Manpower’s dismissal motion, but ordered Valentin to file a proper amended complaint addressing the timeliness issue, cautioning that he had to actually write a complaint, not just offer copies of his correspondence. Valentin’s response to the Court’s order was clearly deficient, and the court granted Manpower’s renewed motion to dismiss the Title VII claim for failure to timely exhaust his administrative remedies, with the district court then declining to exercise supplemental jurisdiction over his state law claims (some of which might have been timely standing on their own). Valentin made a variety of arguments in support of timeliness. In his appeal to the 3<sup>rd</sup> Circuit, he emphasized that EEOC had taken four months investigating his charge before sending him the right-to-sue letter rather than dismissing his charge outright, but, said the court, “Valentin’s arguments are unclear and inadequately developed and he has not shown that the District Court erred. In addition, his argument based on the EEOC’s investigation is waived because he did not raise it below in his response

to the District Court’s show cause order or his Response to Amended Defense.” The district court’s dismissal was affirmed. *Arthur S. Leonard*

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## U.S. COURT OF APPEALS, 4TH CIRCUIT

– Liberty Counsel, an anti-LGBT litigation group, announced that it has filed its opening brief in an appeal of *Doyle v. Hogan*, 2019 WL 4573382, 2019 U.S. Dist. LEXIS 160709 (D. Md., Sept. 20, 2019), in which U.S. District Judge Deborah Chasanow dismissed a lawsuit challenging Maryland’s ban on licensed practitioners performing conversion therapy on minors. In a disingenuous statement in its press release issued on Nov. 26, Liberty Counsel stated that “Judge Deborah Chasanow acknowledged the Supreme court overturned both original cases that upheld similar counseling bans, but then refused to apply the precedent.” What happened was that in an unrelated case in which the lower courts had relied on two federal circuit court opinions rejecting bans to conversion therapy using the concept of “professional speech” as being subject to state regulation, Justice Clarence Thomas had written for the Court majority that there was no such category as “professional speech” in the 1<sup>st</sup> Amendment jurisprudence of the Supreme Court, although he acknowledged that here might be cases in which states could justify regulating certain speech by licensed professionals using the doctrine developed in speech cases. Reporting services subsequently flagged the pertinent court of appeals decisions as “abrogated,” but the Supreme Court does not “overturn” decisions apart from the case it is deciding, and in those conversion therapy cases certiorari petitions had been denied. In any event, it seems likely that if Liberty Counsel does not win a 4th Circuit reversal in *Doyle v. Hogan*, it will seek Supreme Court review, and the 4<sup>th</sup> Circuit’s consideration of this appeal will provide as opportunity for the circuit to take

a position on this contentious issue. Judge Chasanow had corrected noted in her decision that Justice Thomas’s statements did not mandate a particular outcome in the case before her, rather requiring that she apply a somewhat different mode of analysis than that used in the prior decisions from other circuits. *Arthur S. Leonard*

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## U.S. COURT OF APPEALS, 9TH CIRCUIT

– A 9th Circuit panel issued a *per curiam* panel decision on November 6 in *Gonzalez-Gomez v. Barr*, 2019 U.S. App. LEXIS 33198, 2019 WL 5787986, dismissing in part and denying in part a petition for review of the Board of Immigration Appeals’ (BIA) order, which had dismissed a Guatemalan lesbian’s appeal from the Immigration Judge’s (IJ) decision denying her application for withholding of removal. The panel agreed with the government that substantial evidence supported the BIA’s determination that Gonzalez-Gomez failed to demonstrate an objectively reasonable fear of future persecution on account of her membership in the particular social group “lesbians in Guatemala with masculine appearance and sexual identities.” Further, the panel said that even assuming that Gonzalez-Gomez’s mother and uncle harmed her when she was a child because of her sexual identity, neither of them lives in Guatemala today. Also, the panel stated that Gonzalez-Gomez failed to show “a systematic ‘pattern or practice’ of persecution against the group to which [she] belongs” in Guatemala. Additionally, the record evidence showed that the Guatemalan government has made significant progress in recent years to protect LGBTQ rights. Moreover, the panel stated that substantial evidence also supported the BIA’s determination that Gonzalez-Gomez failed to demonstrate a nexus between the harm she experienced and her membership in the particular social



# CIVIL LITIGATION *notes*

group “the Gonzalez-Gomez family.” Lastly, the panel determined that since Gonzalez-Gomez failed to exhaust her claim before the BIA that the IJ erred by disregarding findings made by a different immigration judge in removal proceedings involving her mother and sister, the panel lacked jurisdiction to consider it, and therefore dismissed that claim. *Wendy Bicovery*

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## U.S. COURT OF APPEALS, 9TH CIRCUIT

– In a brief unpublished decision, a 9<sup>th</sup> Circuit panel denied a petition by a gay, HIV-positive man from El Salvador to review a decision by the Board of Immigration Appeals (BIA) to deny him relief against removal under the Convention against Torture (CAT). *Cativo v. Barr*, 2019 WL 6249314 (Nov. 22, 2019). The standard for relief is whether the petitioner, as a member of a distinct social group, “would face any particular threat of torture beyond that of which all citizens of [El Salvador] are at risk” if he were removed to his home country. The court noted that petitioner did not claim to have been a victim of violence while in El Salvador; although he was the victim of a robbery attempt there, he was not injured, “and it does not appear that his family was specifically targeted during that attempt,” according to his testimony at an immigration court hearing. The petitioner sought to rely entirely on “generalized country conditions evidence about discrimination against LGBT community and people with HIV/AIDS,” wrote the court. “Although the BIA acknowledged evidence of violence against gay individuals in El Salvador,” continued the court, “it held that this evidence did not ‘establish a sufficient level of gross, flagrant, or mass violations of human rights such that deferral of removal should be granted.’ Nothing in the record belies this determination,” the court concluded. Petitioner argued to the court that access to HIV-related medications was an issue, but, the

court pointed out, petitioner “does not challenge before this court the BIA’s conclusion that ‘there is no evidence of a specific or deliberate intent to deprive him of [HIV] medication,’ so any such challenge is forfeited.” Cativo is represented by Jerry Shapiro, Encino, CA. *Arthur S. Leonard*

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## U.S. COURT OF APPEALS, 9TH CIRCUIT

– A unanimous panel rejected an appeal by a transgender Honduran from the Board of Immigration Appeals (BIA) ruling upholding an Immigration Judge (IJ) final order of removal. *Mendez v. Barr*, 2019 WL 6307237, 2019 U.S. Dist. LEXIS 35254 (Nov. 25, 2019). The court upheld the finding that the most severe harm she suffered occurred before she identified as transgender, and that the many adversities to which she testified were “instances” of “discrimination or harassment,” but “do not rise to the level of persecution, either individual or in aggregate.” The odd thing is that the court recounts her allegation of being assaulted by police “while resisting a search of herself and other sex workers she believed to be unlawful, and that police hit her with a stick and pulled and dislocated her arm while breaking up an LGBTI rights march that Petitioner helped organize,” but then went on to say that “an applicant must show the persecutor is the government or persons or groups the government is unable or unwilling to control” – surprising because other courts have found that when police officers are persecuting people, that constitutes persecution by the government. But the main focus of the opinion was the court’s conclusion that petitioner was not targeted because of her gender identity but rather for other reasons, such as her account of being threatened by sex work clients or gang members over territorial issues. The court also found that some of her factual assertions were being raised for the first time at the appellate level,

and thus were not administratively exhausted and not thus not within the jurisdiction of the reviewing court. As to her expressed fears as a transgender woman about returning to Honduras in connection with her claim for relief under the Convention Against Torture, the court said: “Petitioner stated a general fear of gangs and homophobic individuals. Petitioner has now shown it is ‘more likely than not’ she would be tortured by the government or the government would ‘consciously close their eyes to the [torture]’ of Petitioner by others.” C’mon, this is Honduras we are talking about! Mendez is represented by Keren Zwick, National Immigrant Justice Center, Chicago, IL; Andrew Barr, Cooley LLP, Broomfield, CO, and Armon Orion, Cooley LLP, San Diego, CA. *Arthur S. Leonard*

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## U.S. COURT OF APPEALS, 9TH CIRCUIT

– In *Douglas v. Barr*, 2019 U.S. App. LEXIS 35593, 2019 WL 6358784 (Nov. 27, 2019), a 9<sup>th</sup> Circuit panel denied a petition by a gay native and citizen of Guyana for review of a denial of relief from removal by the Board of Immigration Appeals (BIA). The petitioner was found to have falsified his application for permanent residency in the U.S., and was convicted in 1994 for conspiracy to distribute and possess with intent to distribute cocaine base. The Immigration Judge and the BIA found that these facts made him removable and ineligible for withholding of removal, leaving protection under the Convention against Torture (CAT) his only hope to avoid deportation. The 9<sup>th</sup> Circuit panel found no abuse of discretion by the BIA as to these findings, supported by the record. It also stated: “Substantial evidence supports the agency’s denial of relief under the CAT, where Douglas failed to show it was more likely than not, he would face torture in Guyana by or with the acquiescence of the government in Guyana. Douglas’s contention that the

# CIVIL LITIGATION *notes*

agency ignored or mischaracterized evidence or applied the wrong legal standard, is not supported by the record.” The court does not discuss in any detail the record evidence concerning the situation for gay men in Guyana. Quick internet research shows that Guyana still has a criminal sodomy law on the books that authorizes up to life imprisonment, but efforts at repeal are ongoing and expected to be successful in light of jurisprudence affecting Guyana by the Pan American Court of Human Rights and the announced positions of major political parties, the main opposition coming from religious groups. Similarly, there is support from many political leaders for efforts to make sexual orientation discrimination illegal, and on-the-ground reports suggest that the sodomy law is effectively a dead letter when it comes to private consensual sex. On the other hand, there is still much social and economic discrimination against gay people, but that doesn’t count under the CAT, which is primarily aimed at situations involving the infliction of serious physical injury or death on somebody by or with the acquiescence of the government. As is frequently the case, the petitioner is representing himself *pro se*, and it is rare for a *pro se* alien to win relief in an appeal from the BIA. *Arthur S. Leonard*

**CALIFORNIA** – This one was frustrating to read. Herardo Dionicio Martinez is suing Fresno County and its now-retired Deputy Public Guardian, Anita Harper, claiming interference with his relationship with Robert Camarillo, who was placed under conservatorship and removed to a group home. *Martinez v. County of Fresno*, 2019 WL 6117739, 2019 U.S. Dist. LEXIS 199671 (E.D. Calif., Nov. 18, 2019). The case was filed in Superior Court alleging both 14<sup>th</sup> Amendment and state law claims, and it was removed by the County to federal court. Prior to Harper’s appointment

as limited conservator of Camarillo in 2013, Martinez and Camarillo had a “social and romantic same-sex relationship,” according to Martinez’s complaint. This relationship continued until sometime in the summer of 2016, “when Defendant Harper allegedly interfered with the relationship by accusing Plaintiff of being abusive toward Mr. Camarillo, when there was no evidence of any such abuse,” according to the court’s summary of the complaint. “Defendant Harper’s interference with the relationship reportedly began after Plaintiff made grievances in 2015 against the group home where Defendant Harper placed Mr. Camarillo.” Martinez claims discrimination and interference in his relationship because it is a same-sex relationship. The instant ruling concerns a demand by Martinez that Camarillo undergo a psychological examination by a doctor designated by him, having learned that defendants had Camarillo examined by a doctor who is set to testify that Camarillo does not have the capacity to consent to a same-sex relationship. What is frustrating about reading the opinion is that somebody was asleep at the switch, either Martinez’s original counsel or his current counsel, and did not seek an order to compel this examination until well after the deadline that the court had set for the conclusion of discovery. Such an examination would be considered part of the discovery process. The court found that Martinez’s prior counsel was informed of the doctor’s examination and the report made by the doctor well over a year before the final discovery deadline, but there was too much delay regarding the request to allow Camarillo to be examined by Martinez’s designated doctor. Defendants took the position that there was no need for a second examination and refused to permit it, also refusing to engage in the court’s informal dispute resolution procedure for discovery disputes. Had Martinez filed a motion to compel promptly on

being informed that defendants would not cooperate without being ordered to do so by the court, it would have been timely. Somebody fell down on the job, and it is possible (although Magistrate Judge Barbara A. McAuliffe’s decision does not provide the necessary detail) that Martinez’s change of counsel in midstream had something to do with this. Martinez’s current counsel is Hadi Ty Kharazi, of Yarra, Kharazi & Clason, Fresno, CA. *Arthur S. Leonard*

**DELAWARE** – In *Gregory vs. University of Delaware*, 2019 U.S. Dist. LEXIS 194334, 2019 WL 5865595 (D. Del., Nov. 8, 2019), the court granted the University of Delaware’s (UD) motion for summary judgment against Bonnie J. Kenny and Cindy Gregory, a married lesbian couple who sued for age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), and sexual discrimination under the Delaware Discrimination in Employment Act, which expressly covers sexual orientation discrimination. On the federal claim, the court concluded that the plaintiffs failed to show that the reasons provided for terminating their employment were pretexts and therefore the court granted the motion for summary judgment, even though it found they had made out a prima facie case of age discrimination. The court avoided ruling on the state claim because UD’s defense to the ADEA claim would also serve as a defense to the sexual orientation claim. Kenny was the head coach of UD’s women’s volleyball team and Gregory was the team’s associate head coach. In May 2016, UD hired a new athletic director who became the recipient of numerous complaints and allegations of misconduct against Kenny and Gregory. The athletic director also witnessed incidents of the coaches being aggressive towards the players. The coaches were offered the choice to resign or to be investigated. Upon their refusal to resign, UD conducted

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a survey of the volleyball team players, the results of which lead the athletic director not to investigate the complaint but to simply terminate the couple without stating a reason. At the time of their termination, Kenny and Gregory were 55 and 56 respectively. They were replaced by a male and a female coach, ages 28 and 39 respectively. Regarding the ADEA claim, the court decided that UD provided sufficient reasons for their actions. The court ruled that the plaintiffs could not show that the reasons were mere pretexts and that the athletic coach had a discriminatory motive for terminating them. The court also found it unnecessary for the plaintiff to evaluate whether the plaintiffs had state a prima facie case of sexual orientation discrimination, because UD's defense would still be applicable. *Arthur S. Leonard*

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**DISTRICT OF COLUMBIA** – Senior U.S. District Judge Royce C. Lamberth has awarded \$178,448.91 in fees and costs to the Mattachine Society of Washington, D.C., in connection with its litigation against the government's summary judgment motion in Mattachine's ongoing Freedom of Information Act (FOIA) litigation against the Federal Bureau of Investigation (FBI) seeking to uncover the full extent of discriminatory federal personnel actions committed under Executive Order 10450, issued in 1953 by President Dwight Eisenhower, which gave federal agencies authority to investigate and terminate federal employees "on suspicion of homosexuality." *Mattachine Society of Washington v. United States Department of Justice*, 2019 U.S. Dist. LEXIS 206463 (D.D.C., Nov. 27, 2019). The plaintiff is among the oldest continuously operating LGBT rights organizations in the United States, and was instrumental in early litigation challenging federal personnel policies against gay people. The present case, filed in 2013, sought to compel the FBI

to respond to a FOIA request for all documents relating to enforcement of the EO. The FBI produced 861 pages and withheld 846 pages, with much information redacted from the pages produced. Then the government moved for summary judgment, claiming it had conducted an adequate search and produced all responsive, non-privileged documents, so the case should be ended. Mattachine contested this claim in a cross-motion, arguing that the search was inadequate and certain documents were improperly redacted. Among other things, the unredacted portions of the documents did not mention the names of several key actors in the enforcement of the EO, such as Warren Burger, then a lawyer in the Justice Department, who subsequently became a D.C. Circuit judge and was appointed Chief Justice of the U.S. Supreme Court by President Nixon. In 2017, the court granted in part and denied in part the government's motion, wrote Judge Lamberth, "finding that three search terms used were inadequate and that certain documents were improperly redacted." Mattachine then filed the fee motion that is the subject matter of this decision, seeking attorneys' fees and costs incurred in litigation the motion. The FBI opposed the motion, claiming that Mattachine "did not fully prevail at the summary judgment stage" and that the amount demanded was excessive. Judge Lamberth observed that Mattachine did not have to prevail as to all its claims to win fees and costs, because it "substantially prevailed" at the s.j. stage. "The Court ordered the FBI to revise its redactions and create an index for cross-referencing persons listed in responsive documents. It is true that after conducting *in camera* review of the redacted documents, some of the FBI's redactions were found to be proper. The Court, however, did not need to find that every single redaction was improper in order for Mattachine to be entitled to fees, as FOIA's requirement is not that a complainant prevailed on 100% of

the issues presented – FOIA requires only that a complainant 'substantially prevailed.' That is precisely what happened here," the judge stated, also pointing out that "the Court took serious issue with the FBI's argument about additional search terms being unduly burdensome. The Court's Order noted that the government's arguments 'strained credulity' and were 'suspicious at best, and malicious at worst.' In the face of such strong language," he observed, "it is difficult to conclude that Mattachine did not 'substantially prevail.'" Mattachine had proffered three established methods for computing the fee award, producing three different figures, and strategically requested the middle one, while the FBI argued that if fees were to be awarded, the amount should be the lowest one. Its argument was doomed, because the middle method was one that had been approved by the D.C. Circuit in comparable cases. Also, the court pointed out some of the nonsense in the government's arguments. The firm of McDermott Will & Emery handled the case *pro bono* for the plaintiffs, with partners and associates from their New York and Washington offices participating. A large part of the work involved combing through the hundreds of pages of documents produced by the FBI in order to argue effectively that the response to the FOIA request was incomplete and insufficient. The court pointed out that some of the government's arguments that partners rather than associates should have done particular parts of the work were self-defeating: that would have produced a higher fee award because the court takes account of normal billing rates for partners and associates in determining the appropriate amount. That MW&E was doing the work *pro bono* does not mean that there cannot be a fee award. In such cases, the law firm would normally donate the fee award to the not-for-profit client or an appropriate charity. The court found that the essential elements of justification for



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a fee award were all present, and gave Mattachine the amount it requested, noted above. Although Judge Lamberth, who was appointed to the court by President Ronald Reagan in 1987, took senior status in 2015 and moved to San Antonio, where he occasionally sits with the local federal district court, he has retained a continuing interest in this long-running lawsuit. *Wendy Bicovery*

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**FLORIDA** – In *Quintero v. Publix Super Markets, Inc.*, 2019 WL 273394, 2019 U.S. Dist. LEXIS 204072 (S.D. Fla., Nov. 25, 2019), U.S. District Judge Darrin P. Gayles refused to grant summary judgment to the employer on a Title VII retaliation claim by Guillermo Quintero, who alleges that he was discharged because he repeatedly refused requests by HR staff that he make statements and give testimony favorable to the company in connection with an EEOC investigation of a sexual orientation discrimination charge by another employee. Quintero was hired as a part time employee in a Publix supermarket in 2013 and by February 2017 had been promoted to be an Assistant Meat Manager. During the hiring process, he filled out an application that asked where he had ever “committed a crime, been convicted of a crime, plead ‘guilty’ or ‘no contest’ to a crime, spent time in jail or prison, or had adjudication withheld by a court on a crime (besides a minor traffic citation)?” He answered “Yes. Will explain at interview.” He did have a criminal history, having pled guilty in 1995 to a first degree attempted murder charge for which he served five years in prison. Also, in 2002 he was charged with misdemeanor battery. One wonders why he was asked these questions on the form, when it seems that nobody raised these issues in his hiring interview. At any rate, he continued to have good performance ratings as an employee until he was discharged. In 2014, he was “drawn into a dispute over the circumstances

surrounding a co-worker’s termination. The co-worker, Juan Pastran, filed an EEOC complaint and then a lawsuit claiming sexual orientation discrimination in violation of Title VII and local law. A Publix HR investigator met with Quintero to discuss Pastran’s allegations. Quintero claims she asked him to provide a statement for the EEOC investigation rebutting Pastran’s charges and saying that Quintero was not aware of any sexual harassment that Pastran experienced, and that she also asked if he would provide similar testimony in court. He refused “because he believed that Pastran’s treatment amounted to unlawful discrimination, and he claims he believed providing false testimony would be illegal. Publix contests his account. Quintero claims a second HR investigator made a similar request and that he again refused. Early in 2017, Publix received a complaint from a boyfriend of Quintero’s ex-wife, claiming that Quintero had assaulted him, had a violent temper, and a criminal record. This set off an HR investigation anew by a corporate Retail Associate Relationship Specialist. Quintero claims that during a meeting with this specialist and his store manager, there was some discussion of his criminal record and the alleged assault, but that the meeting ultimately focused on Pastran’s lawsuit and a renewed request that he sign a prepared statement about Pastran’s treatment while he was employed at Publix. Again, Quintero asserts, he refused because the statement he was presented to sign was “false.” At the end of the investigation, the Relationship Specialist recommended that the district manager discharge Quintero. The district manager was allegedly unaware of Pastran’s lawsuit or Quintero’s refusal to HR requests for him to make statements and provide testimony. Purportedly, the discharge was about the alleged assault and the criminal record. Quintero succeeded in beating back a summary judgment motion on the retaliation claim, using the cat’s paw

theory, which would attribute the HR Specialist’s motivation to the manager who discharged him. The court found that, at least for purposes of an s.j. motion, there were disputed material facts and, if Quintero’s assertions were believed, he would fulfill the elements of a retaliation claim under Title VII. “First,” wrote Judge Gayles, “a genuine issue of material fact exists as to whether Publix asked or directed Quintero to make a false statement and, if so, whether Quintero voices his opposition to doing so. Quintero’s refusal would constitute protected opposition to an unlawful employment practice.” Untangling the contending versions of the meeting with the HR specialist will depend on credibility determinations at trial. The court also found “a genuine issue of material fact exists as to whether Publix retaliated against Quintero for refusing to provide a false statement,” which is where the cat’s paw theory, described in a footnote, comes in. Finally, there is a material fact issue regarding whether the reasons cited for Quintero’s discharge are pretextual, the court noting that factual allegations concerning Publix’s past practices and Quintero’s work record, including his recent promotion to a managing position, created a possibility of pretext here. Quintero is represented by Ruben Marin Saenz and Ilona M. Demenina of Saenz & Andersn PLLC, Aventura, FL; Yadhira Ramirez-Toro, of Hallandale Beach, FL; and Harris Seth Nizel of Hollywood FL. *Arthur S. Leonard*

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**FLORIDA** – Terre Johnson, who describes himself as a “47-year-old African-American male who is homeless, gay, and HIV-positive,” brought suit against Orlando Mayor Buddy Dyer, Police Chief John Mina, and Office James Wilson of the Orlando Police Department, after he was allegedly arrested “based on false allegations” for battery and aggravated battery of Officer Wilson during a street

# CIVIL LITIGATION *notes*

confrontation initiated by Wilson and then acquitted on all charges by a jury. *Johnson v. Dyer*, 2019 U.S. Dist. LEXIS 205750, 2019 WL 6340889 (M.D. Fla., Orlando Div., Nov. 27, 2019). Dyer and Mina moved to dismiss the claims against them. According to the opinion by U.S. District Judge Roy B. Dalton, Jr., Johnson alleges he was just sitting on a street curb with some friends in Orlando when Wilson approached them, accusing Johnson of “having ‘his feet in the street’ and then proceeded to ‘jump around making monkey movements while he taunted and mocked Johnson’s manner of speech and dialect’ and falsely alleged Johnson violated the law ‘in order to taunt and berate him for his inability to pay any civil fine for those violations.’” Johnson tried to walk away but claimed he was tackled from behind by Wilson who “began brutally smashing his face into the ground and beating him while he tried to defend himself.” Johnson was arrested and charged with batter and aggravated battery on Wilson and resisting arrest. As noted above, the jury acquitted him on all counts and he filed this six-count federal suit: Count 1 – 42 USC 1983 against Office Wilson in his individual capacity for excessive use of force; Count 2 – 42 USC 1983 against Dyer and Mina in their official capacity on the excessive force claim; Count 3 – 42 USC 1983 against Office Wilson in his individual capacity for false arrest and imprisonment; Counts 4, 5, 6 – state-law tort claims against all defendants for assault, battery and false imprisonment. This opinion addresses only the motions by Dyer and Mina to dismiss all claims against them. First Judge Dalton clarified that the official capacity claims against Dyer and Mina should be treated as municipal liability claims against the City of Orlando, as there were no factual allegations in the complaint tying these individuals to the alleged wrongs. As to municipal liability, Judge Dalton found that the complaint lacked the specific allegations necessary to make a municipal liability

claim, discussing what was missing in detail, and granting dismissal without prejudice so that Johnson can file an amended complaint to supply the missing factual pleadings. However, he found that Florida law confers immunity to such officials as Dyer and Mina from individual tort liability by city employees where the factual allegations show that the employee was acting outside the scope of employment or in bad faith. Here, Dalton found that the allegations concerning Wilson’s conduct could be argued to support a finding of bad faith by Officer Wilson with regard to some but not all of his actions, so the court denied the motion to dismiss the state law claims. Further development of the facts will be necessary to determine whether Dyer and Mina enjoy an immunity defense as to those. The essence of Johnson’s case against Dyer and Mina is to allege that there is a city policy of harassing homeless people through the actions of the police department but, the court points out, the complaint does not identify a specific policy statement by the city to attack or provide a factual basis for alleging deficient training or management of the police department. Thus, the bottom line is that Count 2 against the city officials is dismissed without prejudice, and the motion to dismiss is denied as to Counts 4, 5, and 6. The opinion does not mention whether Office Wilson has filed a motion to dismiss and, as noted above, this decision concerns only the defenses of Mayor Dyer and Police Chief Mina. Johnson is represented by Natalie A. Jackson of Sanford, FL. *Arthur S. Leonard*

**FLORIDA** – A gay, HIV-positive flight attendant suffered summary judgment and closure of his Americans with Disabilities Act (ADA) lawsuit in *Morano v. Allegiant Air, LLC*, 2019 U.S. Dist. LEXIS 205988, 2019 WL 6340085 (S.D. Fla., Nov. 27, 2019). U.S. District Judge Roy K. Altman’s decision

turned heavily on the fact that the flight attendant had violated an important work rule for which the airline had terminated several flight attendants: a ban on using personal cellphones during take-off, landing and flying of the plane, which was documented by a photograph of him using the phone at a prohibited time. The court concluded from the summary judgment record that the relevant personnel decision-maker had determined to terminate the plaintiff without knowing that he was HIV-positive. The plaintiff had not disclosed this fact on his employment application, and he testified in his deposition that he did not reveal it because he did not believe his HIV-status to be a disability, and the form asked if he had a disability that would prevent him from doing the job for which he was applying (which is the approved form of such a pre-employment inquiry under the ADA). The plaintiff claimed that his same-sex partner had told the plaintiff’s supervisor that the plaintiff was HIV-positive, and he speculated, without any evidence, that she must have related this information to others, but the only documented time when he disclosed his HIV-status to his employer was in an email that he sent *after* the decision to terminate him had been taken but before the decision was communicated to him. Under the circumstances, the court found that he could not meet the requirement under the ADA to show that his disability (HIV infection) was the reason for his termination, and that in any event the airline had a legitimate non-discriminatory reason for its action: the serious rule violation. In addition to granting the summary judgment motion, Judge Altman instructed the clerk of the court to close the case, and indicated that an order of final judgment would be entered. Judge Altman was nominated by President Trump in 2018, barely more than a decade after graduating from law school after a career as an Assistant U.S. Attorney and a brief period as a law firm partner. He was cleared on a

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party-line vote by the Senate Judiciary Committee, but did not come to the floor of the Senate before the end of the 2018 session. He was renominated early in 2019, confirmed by the Senate (66-33) and took his seat on April 9. The plaintiff is represented by George William Castrataro Fort Lauderdale FL. *Arthur S. Leonard*

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**INDIANA** – Hamilton County Superior Court Judge Michael Casati granted summary judgment motions filed by attorneys for four cities and the state of Indiana in a lawsuit filed by the Indiana Family Institute, Indiana Family Action, and American Family Association. The plaintiffs claimed that amendments to the state's Religious Freedom Restoration Act that provide that defendants in discrimination cases may not raise their religious beliefs as a defense to discrimination are unconstitutional. The court did not rule on the merits, finding that the plaintiffs had no standing or "ripe" claims. The amendments were passed after then-Governor Mike Pence signed the measure into law, sparking complaints that the state was authorizing employers to discriminate against LGBT people based on the employers' religious beliefs. Although Indiana's state anti-discrimination law does not cover sexual orientation or gender identity claims, several municipalities have ordinances on point, and there were arguments – which persuaded the legislature – that employers should not be able to rely on the new RFRA to discriminate in violation of these local laws. *Arthur S. Leonard*

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**KENTUCKY** – Chief U.S. District Judge Danny C. Reeves (E.D. Ky.) granted injunctive relief to the Singapore Ministry of Health, which was seeking to protect the confidentiality of HIV-related information that Mikhy K. Farrera Brochez had managed to take from Singapore and was selectively

leaking. *Singapore Ministry of Health v. Brochez*, 2019 U.S. Dist. LEXIS 205215, 2019 WL 6332136 (Nov 25, 2019). Why is this being litigated in Kentucky? Therein lies a tale . . . According to Judge Reeves' opinion, Brochez, an American citizen, lived in Singapore between 2008 and 2018 and was involved in a relationship with Ler Teck Siang, a local doctor who headed the National Public Health Unit of the Ministry of Health (MOH) from March 2012 to May 2013, during which time Ler was one of "a very limited number of individuals who had access to MOH's Human Immunodeficiency Virus Registry (HIV Registry)." This contained confidential information of about 14,200 people diagnosed with HIV, including identifying information, treatment information and the like. "Brochez obtained the HIV Registry, likely as a result of Ler's mishandling of the information," wrote Reeves, "and began disclosing its contents to others by 2016. He served 28 months in a Singapore prison for fraud and drug-related offenses and was deported in 2018, returning to the U.S. In the U.S., "he continued to share the ill-gotten information . . . with various people, the press, and United States agencies." In addition to the Registry, he obtained and disclosed lists of HIV+ individuals scheduled for medical check-ups in Singapore's Changi Prison complex. MOH sued him in February 2019, and simultaneously he was prosecuted and convicted in a July trial in Lexington on charges arising from his disclosure activities, sentenced to concurrent terms of 24 months on two different counts. MOH filed for summary judgement and a permanent injunction to get Brochez to "delete, remove, and/or return all confidential information" and to "make no attempts to access or disclose it in the future." MOH also sought judgment on its invasion-of-privacy claim. Brochez did not respond to the motion. Judge Reeves found a public policy reason to ground the grant

of summary judgement and injunctive relief in Kentucky's HIV confidentiality law, which restricts disclosure of HIV testing results. He also noted MOH's important policy concerns, particularly the concern that its public health goals in Singapore will be undercut to the extent that people will fear disclosure of their HIV-related information, thus incentivizing them to avoid contact with public health officials, publicly provided HIV testing and the like. "In addition to reputational harm," wrote Reeves, "MOH has incurred economic harm as it has attempted to minimize the effects of Brochez's actions," which the court found to be "intentional" based on his public statements. The court found that his conduct "would be highly offensive to a reasonable person," a finding essential to a common law "disclosure of private facts" tort claim. The court also found that all the elements necessary to ground injunctive relief were present as well, and that the public interest would be served by issuing a permanent injunction. "First and foremost," wrote the judge, "the individuals whose private health information is at risk need assurance that their information will not be subject to further unauthorized disclosure. MOH has strong public policies that include educating groups at risk for HIV, determining who may have exposed to HIV and asking them to get tested, and providing medical care to HIV patients. Put simply, if the public cannot trust that MOH is able to keep their health information confidential, MOH will be less able to achieve these important goals." The court granted a sweeping, details permanent injunction, including directives of specific actions that Brochez must perform no later than 30 days after his release from federal detention, where he now resides. *Arthur S. Leonard*

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**LOUISIANA** – In *Wilson v. Ochsner Clinic Foundation*, 2019 WL 5693109, 2019 U.S. Dist. LEXIS 190584 (E.D.



# CIVIL LITIGATION *notes*

La., Nov. 4, 2019), U.S. District Judge Carl J. Barbier granted Ochsner Clinic Foundation's motion to dismiss claims for false imprisonment, negligent and intentional infliction of emotional distress, and violation of Louisiana Employment Discrimination Law by plaintiff Stanley Wilson. Wilson was a housekeeper with Ochsner's Environmental Services and then became an employee of ABM industries Inc. (ABM) when the company took over housekeeping duties at Ochsner. During his time at ABM, plaintiff alleges that he endured several harassment and discriminatory workplace incidents surrounding his sexuality and mental health, which he reported to several supervisors who took no action to correct his co-worker's behavior. Further, in June 2018, plaintiff attempted to voice-text a co-worker. However, instead of sending "I'm looking at the sky in the parking garage, about to walk inside, just looking around", the phone misunderstood and instead sent "I just want to die, in the parking garage, about to walk inside, just looking down." Plaintiff was then escorted by a supervisor to the psychiatric clinic despite his explanations, and was forced to sign paperwork admitting himself into the Ochsner psychiatric department to avoid issues that would arise from his non-cooperation. Plaintiff was found non-committable on the following day and returned to work. Following this incident, he was the victim of rumors regarding his "suicide attempt" and experienced a series of increasingly escalated incidents with his co-workers and supervisors. Wilson filed his false imprisonment and emotional distress claims against Ochsner and ABM on August 27, 2019. Judge Barbier found that a false imprisonment claim against qualified healthcare providers fell under the jurisdiction of the Louisiana Medical Malpractice Act. Malpractice claims must be brought before an administrative medical review panel before a plaintiff can sue. Accordingly,

the court dismissed without prejudice Wilson's claim for false imprisonment for failing to exhaust the requisite state administrative remedies. *Cristell Fortune*.

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**MISSOURI** – The Missouri Court of Appeals (Western District) affirmed a ruling by Clay County Circuit Judge Shane T. Alexander that proceeds from the sale of residential property held in joint tenancy by a long-time lesbian couple who were splitting up should be divided evenly between them, even though one of the women, who sold her prior residence and contributed a substantial share of the down-payment for the new one, claimed that she was entitled to a credit in that amount before proceeds were divided. *Umland v. Graham*, 2019 WL 6119640, 2019 Mo. App. LEXIS 1820 (Nov. 19, 2019). What is striking about the opinion by Judge Gary D. Witt is the matter-of-fact way in which it treats the long-time couple (who raised a child together, among other things) as the equivalent of a married couple, even though they never married. "From the fall of 1995 until at least January 2016, they committed themselves to live together as a married couple, including to emotionally and financially support one another, living together through retirement until death. This included a proposal and exchange of rings, although, at the time, the State of Missouri did not allow same-sex couples to marry." The court took note particularly of the joint bank account they established, into which both of their paychecks were deposited each month and out of which joint household expenses, including mortgage payments, were made until Graham closed the account when the women split up. Judge Witt commented that factual findings by the trial judge that were based on credibility determinations were not generally subject to review; thus, the court would accept the trial judge's conclusion that when Graham

used \$50,000 of the proceeds from the sale of their prior residence, of which she was sole owner, to make the down payment on the new residence, there was donative intent. (This point was contested with conflicting evidence at trial, which Judge Alexander had resolved in Umland's favor.) Similarly regarding a Home Equity Line of Credit that the women took out when Umland was laid off and they needed funding for her to start some business ventures that eventually were unsuccessful; since the women took out the line of credit as joint obligors, it was not solely Umland's responsibility to pay it off. The court's ruling rested heavily on the presumption that when real property is bought in joint tenancy, each of the parties has an undivided half interest, unless the deed allocates things otherwise. Umland is represented by Thomas C. Capps, Liberty MO; Graham by R. Gregory Harrison, North Kansas City MO. *Arthur S. Leonard*

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**NEW MEXICO** – In *Aguilar v. McAleenan*, 2019 U.S. Dist. LEXIS 194935, 2019 WL 5864821 (D. N.M., Nov. 8, 2019), U.S. Magistrate Judge Stephan M. Vidmar recommended that a petition for a writ of *habeas corpus* by an alien transgender woman be denied. The petitioner fled from abuse due to her identity. She presented herself at the U.S.-Mexico border and requested asylum. Originally released from custody on an Order of Release on Recognizance, she was subsequently arrested for prostitution, transferred to ICE, and has since then been detained as an alien seeking admission into the United States. In May 2018, an immigration judge denied her asylum claim and ordered her removed. Kelly appealed the removal to the 10<sup>th</sup> Circuit Court of Appeals. That court granted her motion to stay her removal and the court's decision on her appeal is still pending. The petitioner also filed for a writ of *habeas corpus* on May 3, 2019,

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arguing that her continued detention violates her due process rights. In response, the government argued (and the judge agrees) that because she is an arriving alien who has not been yet been legally admitted to the United States, she has no statutory or Fifth Amendment right to a bond hearing or immediate release. The magistrate judge found that the liberties provided by the Constitution are not applicable to aliens seeking admission into the country. Relying on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953), the judge concluded that the petitioner's procedural-due-process rights were not violated, because her detention was proper under the relevant statutes. The judge also concluded that any substantive-due-process claim that she could have raised was waived because she has failed to sufficiently brief the issue. *Cristell Fortune*.

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**PENNSYLVANIA** – On November 1, U.S. District Judge Matthew W. Brann conditionally granted a motion by a transgender man bringing claims of discrimination on the basis of his gender identity against his former employer to be allowed to proceed anonymously. “John Doe” sues the Pennsylvania Department of Corrections, as well as former supervisors and coworkers in their individual capacities. The judge granted the motion because “Doe” faced a significant risk of severe harm to his privacy, and the public interest in knowing his identity as the plaintiff did not outweigh that risk. Judge Brann further ordered that should information come to light that would justify the court revisiting this ruling, Defendants may raise it at a later date. *Doe v. Pa. Dep’t of Corr.* 2019 U.S. Dist. LEXIS 189748 \*; 2019 WL 5683437 (M.D. Pa.). Brann reviewed in detail the multi-factorial analysis adopted by the U.S. Court of Appeals for the 3rd Circuit in *Doe v. Megless*, 654 F.3d 404 (2011) (called the *Megless* factors). Brann explained

that following the *Megless* factors is unwieldy, noting that the inclusion of so many factors flattens the seeming importance of each, and obscures the heart of the inquiry: Does the Plaintiff risk severe harm by proceeding under his or her real name? And, if so, is this risk outweighed by a particularly strong public interest in knowing the Plaintiff’s identity? Brann explained that the *Megless* factors may assist by providing a compendium of possible considerations, but that the court would focus on these two questions. Brann emphasized that courts have long recognized that the harms arising from disclosing a person’s transgender status are among those that make protection by pseudonym appropriate. As litigation around transgender issues has increased, so too have more courts permitted transgender plaintiffs to proceed pseudonymously. The Third Circuit in *Megless* specifically listed this as an area where courts have allowed pseudonyms. As the U.S. Court of Appeals for the 2nd Circuit has succinctly summarized, “[T]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.” Brann stated that the Plaintiff in the case at bar faces these harms. Litigating under his real name would out his transgender status to the world. He avers that up to this day he has kept his transgender status a closely guarded secret, disclosing it only as necessary to comply with legal requirements. Divulging it in connection with this complaint, which alleges harassment arising from intensely personal subject matter, poses a particularly high risk of severely compromising the privacy the Plaintiff has labored to preserve. The public interest in knowing the Plaintiff’s identity is relatively low. He is not a public figure. Brann further noted that the plaintiff makes a limited request, moving only to have his name and address concealed. This means that, unlike in a sealed proceeding, the public

will have access to everything else in the proceedings as they would in a typical case. Given that, Brann also said that the public interest in monitoring the courts would not be not greatly harmed. There is no risk of prejudice to the opposing parties because the Plaintiff has agreed to fully participate in discovery and depositions. Lastly, neither the public nor the parties have a strong interest in publicly revealing the Plaintiff’s name. *Wendy Bicovery*

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**TEXAS** – U.S. District Judge Brantley Starr denied a recusal motion by plaintiff Valerie Jackson, a transgender woman, in her pending 42 USC 1983 discrimination case against various Dallas County employees and agents. *Jackson v. Valdez*, 2019 WL 6250779 (N.D. Texas, Nov. 22, 2019). The recusal motion focuses on Judge Starr’s prior employment as a Texas deputy attorney general, during which he represented the state in various proceedings and appeared in various public fora, advocating the position of the attorney general in controversies concerning same-sex marriage and gay and transgender rights. Among those was “participating” in an A.G. Opinion asserting that the Fort Worth School District violated state law by adopting the policy for transgender student rights in conformity with a policy announced by the Obama Administration, and stating in a panel discussion that county clerks had a right to refuse to issue marriage licenses to same-sex couples after the *Obergefell* decision was announced. The motion also relied on evidence from Starr’s confirmation process after he was nominated by Donald Trump to the district court. Starr allegedly gave non-responsive answers to question raised in light of his work representing Texas in LGBTQ-related cases, generally asserting that he would follow the law. Jackson argued that the legal arguments advanced by Starr in his role as an advocate for the state

# CRIMINAL LITIGATION *notes*

show that he is biased or prejudiced against Jackson “as a member of the transgender community asserting my constitutional rights.” “Jackson attempts to support this claim with examples of this judge’s legal advocacy in the course and scope of his prior employment with the state of Texas, including litigation, panel discussions, and press releases,” wrote Starr, who proceeded to quote at length from the Motion as to specific allegations. He then asserted that the positions he took on behalf of his client, the state, should not be attributed to him personally, that Jackson had mischaracterized some of them, and that he had made clear in his confirmation hearing testimony that he would faithfully apply the precedents of the 5<sup>th</sup> Circuit and the Supreme Court, including the *Obergefell* decision (as to which he was specifically asked, in light of his “participation” in an A.G. Opinion issued in response to the *Obergefell* decision that asserted that the *Obergefell* opinion did not mean that that county clerks with religious objections to issuing marriage licenses to same-sex couples had no constitutional religious liberty rights). He described the A.G. Opinion as an “accurate prediction of court rulings,” citing the 5<sup>th</sup> Circuit’s *DeLeon* decision – rather peculiarly, in light of his quotation from *DeLeon* in a footnote where the court warned that *Obergefell* “is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court.” Starr also contended that Jackson’s motion mischaracterized the positions he had argued on behalf of the state as evidence of personal bias or hostility to LGBT people and their rights, arguing that he was merely advancing the position taken by his employer and making plausible legal arguments. As President Trump has succeeded in placing more than 150 people on the federal bench, many of whose confirmations were opposed by civil rights groups (including

LGBTQ rights groups) based on their past advocacy against the interests of LGBTQ people, the question whether these judges would have the sensitivity to recuse themselves from deciding LGBTQ rights cases is pressing. The standard for recusal under 28 USC 455(a) is whether “the reasonable man, were he to know all the circumstances, would harbor doubts about the judge’s impartiality.” But the judge clings to the 5<sup>th</sup> Circuit’s gloss on this in *U.S. v. Jordan*, 49 F.3d 152 (1995), where, Starr comments, “The Fifth Circuit adds that a court ought to consider ‘how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.’” And, by implication, he seems to suggest that LGBTQ litigants appearing before Trump appointees who were vetted by the Federalist Society (in which Starr’s membership is noted in his Wikipedia bio) and the Heritage Foundation, and in many some cases worked on institutions (such as the Texas Attorney General’s Office under present a recent occupants), can be considered “hypersensitive, cynical, and suspicious” if they think these judges are likely to be biased against LGBTQ rights. *Arthur S. Leonard*

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## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard*

**FLORIDA** – The Supreme Court of Florida rejected as untimely an attempt by a death row inmate to have a previous waiver of post-conviction proceedings and counsel based on an assertion of newly-discovered evidence: her gender dysphoria diagnosis. *Rodgers v. State of Florida*, 2019 WL 6204938, 2019 Fla. LEXIS 1981 (Nov. 21, 2019). The per curiam opinion by the court does not indicate the underlying charge on which Rodgers was convicted and sentenced to death. The court’s refusal to consider the current appeal on the merits turns on

its finding that although the diagnosis may not have been known at the relevant time to be considered newly-discovered evidence, the symptoms that led to the diagnosis were known. The court wrote, “As detailed in Justice Pariente’s concurring in result opinion in *Rodgers IV*, the record conclusively establishes that Rodgers’ symptoms that are now attributed to gender dysphoria (e.g., severe depression self-mutilation, reported suicidality) were known to the courts that accepted and affirmed the validity of Rodgers’ plea and waivers. The medical community’s subsequent assignment of a name to the cause of known symptoms is not newly discovered evidence, but even assuming that it could be, the record conclusively established that Rodgers failed to diligently pursue this claim. As explained above, Rodgers became aware of the gender dysphoria diagnosis sometime between February 2016 and January 2017 and alleged that gender dysphoria caused incompetency in a January 2017 successive postconviction motion, but waited until December 2018 to raise a newly discovered evidence claim predicated upon gender dysphoria.” The court held that this felt short of the “due diligence” required of a convict seeking to make a newly-discovered evidence claim, referring back to this language from *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008): “To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence.” Jenna Rodgers is represented on this motion by Terri L. Backhus, Chief, and Kimberly Sharkey, Attorney, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee.

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**ILLINOIS** – Unsurprisingly, courts continue to reject constitutional challenges to laws criminalizing



# CRIMINAL LITIGATION *notes*

prostitution. In *People v. Conroy*, 2019 IL App. (2d) 180693, 29 Ill. App. LEXIS 889 (App. Ct. Ill., 2<sup>nd</sup> Dist., Nov. 12, 2019), the appellant argued that Sec. 11-14(a) of the Illinois Criminal Code is unconstitutional, contending that adults have a fundamental substantive due process right to engage in private, consensual sexual activity, without governmental intervention or fear of criminal liability. Sherry J. Conroy was convicted in a bench trial by DuPage County Circuit Judge Alexander F. McGimpsey, who had rejected her motion to dismiss the charges on grounds of unconstitutionality, and sentenced her to 12 months' court supervision, ordering her to pay court costs and to undergo STD testing (including for HIV). On direct appeal, the Appellate Court insisted that there is no constitutional right to the commercial sale of sex. The court pointed out that a different appellate court panel had rejected such an argument in 2004 in *People v. Williams*, 349 Ill. App 3d 273, where the appellant sought to build on the Supreme Court's ruling in *Lawrence v. Texas* (2003), in which that Court found that same-sex couples had a due process liberty interest in private consensual sexual activity, in an opinion that noted that the case before the Court did not involve prostitution. Writing for the court in this case, Judge Michael Burke rejected the appellant's suggestion that the court, taking note of the Supreme Court's disclaimer in *Lawrence* of addressing the issue of prostitution, embark on a *de novo* consideration of whether the state has a rational basis to criminalize private, consensual commercial sex. "Unless and until the Supreme Court chooses to extend constitutional protection to prostitution," wrote Burke, "we decline to depart from *Lawrence* and *Williams* and the distinction they draw between commercial and non-commercial sex." The court declined the appellant's suggestion that it explore the public policy justifications for criminalizing

prostitution, commenting: "Courts are ill-equipped to determine what public policy should be, so establishing public policy is the function of the legislature, not the courts. Simply put, public-policy concerns are not a basis for ruling a statute unconstitutional." The court expressly refused to abandon the "conventional constitutional analysis" of its existing case law. The court's opinion does not identify counsel for appellant.

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**NEW YORK** – In *Gilbert v. Dell Technologies, Inc.*, 2019 WL 5887355 (S.D.N.Y.), a transgender woman sought to assert various claims against her employer under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law, claiming she was subjected to a hostile work environment because of her sex or sex stereotyping, including gender, gender expression, gender identity, and gender transition "in that she is a transgender woman," wrote U.S. District Judge John G. Koeltl. The employer responded to the complaint by moving to compel the plaintiff to arbitrate her claims and to dismiss, or in the alternative, to stay the proceedings. Concluding that the plaintiff had entered into an arbitration agreement with the employer, but that not all the remedies she might obtain under the relevant statutes might be in the jurisdiction of the arbitrator, the court directed the parties to proceed to arbitration on the issues of liability and damages. "Nonarbitrable claims seeking reinstatement, and other claims for declaratory and injunctive relief, are stayed pending the conclusion of the arbitration," wrote Judge Koeltl, directing the clerk to close the docket number. The plaintiff is represented by LeGal Board Member Jillian T. Weiss.

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**PENNSYLVANIA** – In *Commonwealth v. Drummond*, 2019 Pa. Super. Unpub. LEXIS 4294 (Nov. 15, 2019), the Superior Court of Pennsylvania (an

intermediate appellate court), affirmed the jury conviction of Rasheem James Drummond on charges of robbery and possession of a firearm without a license. This account of the facts comes from the Superior Court opinion by Judge Jack Anthony Panella. Drummond and his victim, Cheng You, a graduate student at Penn State, met on the gay dating site Grindr, exchanged messages for several weeks, then agreed to meet. Mr. You drove from State College to Harrisburg to meet Drummond at a Rite Aid that had been designated as a meeting place by Drummond. Drummond had asked You to bring \$60 to split the cost of a hotel room if they decided they wanted to "get it on." The meeting went well and they went to two possible hotels, but Drummond found both of the hotels they went to were too expensive, so You decided to go home. Drummond gave back \$30 to You, saying that he would return the rest after You drove Drummond home. When they arrived at Drummond's address, Drummond went into his residence, then returned to the car where You was waiting for his money. Drummond climbed into the passenger seat, aimed a gun at You, and demanded the remainder of his cash and his cell phone. After You surrendered these things, Drummond left the car and started running away. You gave chase to recover his phone, which he needed for directions to his home in State College, but when he approached, Drummond hit him in his head with the pistol and fled. An observant bystander phoned 911, police arrived, and apprehended Drummond. Drummond contested his competency to stand trial. The trial judge rejected the competency evaluator's conclusion that Drummond was incompetent to stand trial because he was "not able to participate in his defense." The trial judge stated that, to the contrary, Drummond was "manipulative in order to receive what he wanted and made conscious choices to act the way in which he did." This was borne out by Drummond's frequent

# PRISONER LITIGATION *notes*

changes of counsel before and during trial. The trial court denied all of Drummond's post-conviction motions, and the Superior Court found no error by the trial court in any of its rulings, finding many of them derived from the trial judge's decisions regarding competency and substitution of counsel.

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**PENNSYLVANIA** – The Superior Court upheld the conviction of Marcus Jones on charges of attempted murder, aggravated assault, robbery and theft for his brutal attack on a transgender woman and theft of her purse after he had beaten her unconscious. *Commonwealth v. Jones*, 2019 WL 5966206 (Nov. 13, 2019). The entire incident was captured on a surveillance camera, which confirmed many of the statements Jones made to a police detective after he had been given Miranda warnings and had waived the right to call a lawyer, and had agreed to speak to the detective. Jones claimed that he “snapped” and responded violently after discovering that the woman he had approached for sex had male genitalia, and thus he could not be convicted of attempted murder because he did not have a premeditated intent to kill the victim. Despite having this confession on the record, the police detective obtained blood samples from the site and Jones's footwear which matched the blood of the victim to make a positive identification. Mason also challenged his robbery conviction, contending that the state failed to prove intent and that the evidence showed that his taking the victim's purse was “an afterthought.” Jones had contested his competence to stand trial in the first instance, but the trial court determined that despite his low IQ (69) his behavior in meeting with the detective and in court showed he was competent to participate in his defense, understood the charges against him, and was competent to waive a jury trial. The victim was severely injured, having been stomped on the head until unconscious, severely bleeding, and

sustained permanent injuries. The victim required hospitalization and extensive rehabilitation which has not restored her to anywhere near her prior state of health. The Superior Court rejected all of Jones' arguments on appeal and affirmed the trial court's imposition of a prison sentence of 13 to 26 years on the attempted murder charge, followed by ten years of probation on the robbery charge. The court merged the convictions of aggravated assault and theft by unlawful taking into the prison sentence for attempted murder. Trial counsel sought and obtained the trial court's permission to withdraw from further representation after advising Jones of his appellate rights. Jones filed a pro se motion to appeal, and Lee Mandel was appointed as counsel to represent him on appeal. The court noted in a footnote: “We note that while represented by counsel, Appellant inundated the trial court and this court with a multitude of pro se filings and correspondence,” and it appears that Jones was continually dissatisfied with the efforts of his appointed counsel.

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## 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.*

**ALABAMA** – “What we have here is a failure to communicate,” said the Florida prisoner gang captain as he whipped Paul Newman in “Cool Hand Luke” (Warner Brothers 1967). The same could be said for what happened to *pro se* prisoner Rodney Alverson after he was placed in a Behavior Modification dorm because of an “alleged homosexual act with another prisoner.” U.S. Magistrate Judge Charles S. Coody recommended dismissal of all of Alverson's claims in *Alverson v. Dunn*, 2019 U.S. Dist.

LEXIS 192893 (M.D. Ala., Nov. 5, 2019). The very long opinion, which focuses on conditions in the Behavior Unit, does not directly address Alverson's sexual orientation or his disciplinary charges. Alverson claimed that he was forced to sleep without a mattress for several days, which aggravated his back condition, that he was denied treatment for his back pain, and that officers used excessive force against him. Judge Coody finds that denial of a mattress for a few days is not actionable. In any event, Alverson does not allege he requested a mattress. Alverson also received constitutionally adequate medical care. He was seen repeatedly by staff, given pain medicine and muscle balm, and had x-rays, which showed osteoarthritic changes. With respect to his excessive force claim, Judge Coody found that Alverson refused to leave the mess hall, so force was necessary. As to ramming Alverson's head into a file cabinet, Judge Moody adopts in effect a “things happen during a legal use of force” standard and says that slamming “against a wall” was not excessive when occurring during a “takedown.” Judge Coody writes that the “alleged ramming of the plaintiff's head into a locker cage appeared to be caused by the configuration of the stair well and thus was unintentional.” This appears wrong. Although he purported to apply the standard for excessive force under *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (querying whether force was necessary based on need to restore order or excessive based on gratuitous intent to cause harm), there is no recognition of the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which differentiated between the decision to initiate force (measured by the officers' subjective intent) and the *quantum* of force (to be measured by an objective standard). Under *Kingsley*, there appears to be a jury question on the objection analysis of the quantum of force – and whether it was objectively necessary to slam this gay inmate with a back injury into a cabinet to restore order.

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**ARIZONA** – Senior U.S. District Judge David G. Campbell allows *pro se* gay inmate Dino Bennetti to proceed on deliberate indifference to his safety claims in *Bennetti v. Ryan*, 2019 U.S. Dist. LEXIS 206115, 2019 WL 6340095 (D. Ariz., Nov. 27, 2019). Bennetti originally filed in Arizona Superior Court, but defendants removed to federal court. He claims that he requested protection repeatedly because of threats and name-calling, including “faggot sex offender.” Bennetti was moved several times, but he was not given “protection,” according to the Complaint. On one of the moves he was returned to the housing pod where inmates who had previously assaulted him were living. He claims he was “extorted to perform sex acts in the yard.” He says that he was told to “stop being a coward and go handle your issue” and that he could not be moved again unless he “refused to house,” in which case he would be placed in administrative segregation. Eventually, this is what happened. In the “refusal to house” pod, Bennetti says he was assaulted and raped. Judge Campbell allows Bennetti to proceed against five defendants (a sergeant, a lieutenant, and three deputy wardens) on Eighth Amendment protection from harm claims. Claims against an officer for verbal harassment are dismissed as not actionable under *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9<sup>th</sup> Cir. 2000). Bennetti also tried to raise claims under the First and Fourteenth Amendments for retaliation and for forcing him into administrative segregation to obtain protection. Judge Campbell finds that Bennetti alleges insufficient facts to establish a First Amendment claim under *Hines v. Gomez*, 108 F.3d 265, 267 (9<sup>th</sup> Cir. 1997). Moreover, the conditions of administrative segregation are not a sufficiently “atypical and significant hardship” to satisfy *Sandin v. Connor*, 515 U.S. 472, 486 (1995). Therefore, there has been no “punishment” for seeking protection. The substantive

claims of failure to protect are going forward, however, including the rape in administrative segregation, which will be difficult to explain.

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**CALIFORNIA** – This is the second reporting about “potty watch” in an American prison in this issue of *Law Notes*. See also, article about “Dry Cell” Confinement in Pennsylvania. This case – *Smith v. Gonzales*, 2019 WL 6050964 (E.D. Calif., Nov. 15, 2019) – is notable in that homophobic slurs were uttered not by staff but by the inmate against officers. *Pro se* inmate, Larry Smith (sexual orientation not specified), stated that he refused to bend over and spread his buttocks for a body cavity search by “homosexual officers.” Officers initially told Smith that he would be put on “potty watch” if he did not comply, and he apparently told them to “go ahead,” because he would not participate in a “homosexual game.” A sergeant, however, directed officers to “take him down” and they forcibly administered the cavity search. Smith alleges excessive force, including bystander liability, and failure to protect. He also charges defendants with falsification of records about the incident, which occurred over six years ago. U.S. Magistrate Judge Gary S. Austin, ruling on a motion for summary judgment on failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA], allows the claims to proceed against most of the defendants. Analysis of this 12,000-plus word treatise on California grievance exhaustion under the PLRA, exceptions to it, procedural handling of defective (or partially defective) grievances, and special rules when grievances allege sexual misconduct by staff – separately handled for eight grievances – is beyond the scope of this report. California practitioners who face PLRA exhaustion defenses, particularly when sexual harassment or misconduct is involved, should take note of this decision.

**CALIFORNIA** – Transgender prisoner Michael Rodriguez, *pro se*, alleges that correctional and medical defendants failed to treat her gender dysphoria and violated her privacy by allowing “confidential information to be used to disparage and ridicule [her] and to have plaintiff physically harmed.” In *Rodriguez v. Foss*, 2019 U.S. Dist. LEXIS 206448, 2019 WL 63415567 (N.D. Calif., Nov. 27, 2019), U.S. District Judge Haywood S. Gilliam, Jr., dismissed Rodriguez’ claims without prejudice and with guidance about filing an amended complaint. Two points are notable. First, the Ninth Circuit’s omnibus opinion about transgender prisoner care in *Edmo v. Corizon*, 935 F.3d 757, 785 (9<sup>th</sup> Cir. 2019), is clearly establishing law in the district courts about a gateway to care for transgender prisoners. Secondly, inmate privacy law has a long way to go. Here, Judge Gilliam writes that he does not understand how the allegations state a claim under the Fourteenth Amendment, and he does not address Rodriguez’ privacy allegations. In *Seaton v. Mayberg*, 610 F.3d 530 (9<sup>th</sup> Cir. 2010 (*passim*)), the Ninth Circuit wrote exhaustively about inmates’ privacy interests under the Due Process Clause of the Fourteenth Amendment, eventually finding that the state interests superseded them as applied to disclosure of confidential information in civil commitment proceedings involving sexually violent predators. Here, the balancing may result in a different outcome. See *id.* at 539 (emphasizing state’s interest in societal protection from this group). In this writer’s view, Judge Gilliam should not have skipped over this issue, because Rodriguez may take the hint and decide to omit it from her amended pleading.

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**CALIFORNIA** – *Pro se* prisoner Elvis Venable alleges that a prison doctor groped his penis (through clothing) and tried to seduce him into letting the doctor perform oral sex in *Venable v.*



# PRISONER LITIGATION *notes*

*Patel*, 2019 U.S. Dist. LEXIS 204518, 2019 WL 6307678 (E.D. Calif., Nov. 25, 2019). Venable testified in his deposition that he refused the solicitation. U.S. Magistrate Judge Barbara A. McAuliffe grants the doctor partial summary judgment. The Prison Litigation Reform Act [PLRA], 42 U.S.C. § 1997e(e), precludes damages for mental and emotional injury without a prior showing of physical injury or a “sexual act,” as defined in the criminal code, 18 U.S.C. § 2246. Judge McAuliffe found that the touching here was not a physical injury because it was *de minimus* and not a “sexual act,” because of the statutory definition. “Sexual act” has a specified meaning under § 2246(2) that does not include touching “through the clothing,” which may be covered by § 2246(3) (“sexual conduct” intended to “abuse, humiliate, harass, degrade, arouse, or gratify”). Only a “sexual act,” however (and not “sexual conduct”), is an exception to the mental and emotional damages prohibition under the PLRA. Judge McAuliffe relies on a criminal case – *United States v. Haywood*, 359 F.3d 631, 641 (3d Cir. 2004) – that predates the PLRA amendments, that allowed distress damages for “sexual acts,” as part of the renewal of the Violence Against Women Act of 2013. She also relies on two other district court decisions, *Morris v. Taylor*, 2018 WL 4057493, at \*3 (N.D. Cal. Aug. 23, 2018), and *Schmidt v. Idaho Dep’t of Corr.*, 2016 WL 617409, at \*3-\*4 (D. Idaho Feb. 16, 2016). [Note: Both of these district court cases eventually settled for undisclosed amounts.] Judge McAuliffe permits Venable to continue to litigate for compensatory, punitive and nominal damages based on his Eighth Amendment claim itself. *Compare Paris v. Herring*, 2019 U.S. Dist. LEXIS 205964 (M.D. Fla., Nov. 27, 2019), this issue of *Law Notes*. In *Paris*, the court denied damages for the constitutional tort itself. The *Paris* court also denied nominal damages because they had not been pled. Here,

Judge McAuliffe wrote that a “*pro se* complaint should be liberally construed to request nominal damages where [it] fails to request them,” citing *Allah v. Al-Hafeez*, , 226 F.3d 247, 251 (3d Cir. 2000). The California attorney general is representing defendant Patel.

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**CALIFORNIA** – Maxine M. Solomon is a transgender woman incarcerated in the California Women’s Facility. The reported screening of Solomon’s *pro se* complaint in *Solomon v. Torres*, 2019 U.S. Dist. LEXIS 206462, 2019 WL 6340250 (E.D. Calif., Nov. 27, 2019), by U.S. Magistrate Judge Barbara A. McAuliffe, is Judge McAuliffe’s third screening of the pleadings. There is only one primary defendant (an Officer Torres) who has never been served. In her initial Complaint, Solomon alleged that Torres filed false misbehavior charges against her and another inmate on July 22, 2017, accusing them of refusing to change cells as ordered. Judge McAuliffe said that false charges were not actionable by themselves under 42 USC § 1983 and granted leave to amend. Solomon elaborated in her First Amended Complaint, alleging that Torres was transphobic and homophobic, that he targeted Solomon and the other inmate because they were lovers, that she had an audiotape on which Torres admitted that the charges were fake, and that Torres was a threat to all transgender and gay inmates. Judge McAuliffe screened again and said that false charges were not actionable and that Solomon failed to allege that Torres acted against her as a member of a protected class. She granted leave to amend again, and Solomon filed a Second Amended Complaint, elaborating on Torres’ animus but omitting some of the details about the false charges found in the First Amended Complaint. She alleged, in part, that Torres wrote the false charges “just because” of Solomon’s sexual orientation and gender identity. Judge McAuliffe now

recommends that the case be dismissed with prejudice because the allegations are too conclusory and “do not support an Equal Protection claim against Defendant Torres.” Judge McAuliffe relies on *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir.1998) – wherein the plaintiff’s allegations are almost incomprehensible (but have something to do with a “brass slip” and \$5.00). *Barren* is a Summary Order that (in this writer’s experience) would never be published in F.3d today. (At the time, the Prison Litigation Reform Act was just over a year old, and the Circuit affirmed a district court’s dismissal without service.) On Equal Protection, Judge McAuliffe’s authority is even shakier. She cites the thirty-two-year-old Ninth Circuit case of *Hernandez v. Johnston*, 833 F.2d 1316, 1319 (9th Cir. 1987), saying in a parenthetical: “independent right to accurate prison record has not been recognized.” This is misleading. What that court said was “we do not reach the question.” More recently, the Circuit has held that disciplining gay prisoners for showing affection in the visiting room states an Equal Protection claim. *Whitman v. Arizona*, 298 F.3d 1134, 1136-7 (9th Cir. 2002). See *Johnson v. Johnson*, 385 F.3d 503, 531 (5th Cir. 2004) (no Equal Protection rational basis for denying gay inmates same protection from harm as other inmates; allegation of “animus toward non-aggressive gay men” is sufficient at pleading stage); see also, *Davis v. Prison Health Services*, 679 F.3d 433, 439 (6th Cir. 2012) (although no right to prison job, cannot refuse job based on sexual orientation); *Santiago v. Miles*, 774 F.Supp. 775 (W.D.N.Y. 1991) (*passim*) (race discrimination in prison housing, jobs, and discipline). The treatment of this case seems unfortunate, because, in this writer’s view, Solomon stated a claim in her First Amended Complaint. The adjustment of a transgender women in a women’s prison and her treatment by staff warrants more attention than has been given here. If Torres is a bigot,

# PRISONER LITIGATION *notes*

these federal court allegations will not reach correctional officials or attorneys.

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**COLORADO** – Seven transgender women state prisoners filed a class action lawsuit in Denver County District Court in Colorado challenging their conditions of confinement. The suit, *Raven v. Polis*, was announced in a press release November 23, 2019, by King & Greisen, LLP (Denver) and the Transgender Law Center (Oakland, California). The lawsuit claims that the Colorado Department of Correction has discriminated against transgender women based on their gender identity and that these women have been subjected to unsafe situations, including severe sexual harassment, physical violence, and rape. The lawsuit says that there are around 170 transgender women in Colorado prisons. The lawsuit does not address incarcerated transgender men. The lawsuit relies on the Colorado Constitutional provisions regarding cruel and unusual punishment and sex equality, as well as statutory protection for people with disabilities, C.R.S. §§ 24-34-601, *et seq.* There are no federal claims. Lead named defendant Colorado Governor Jared Polis is the nation's out gay male Governor, although Oregon's Kate Brown identifies as bisexual. Attorney Paula Greisen said in the press release that counsel has “worked hard with CDOC to implement some changes . . . , but the vast majority of transgender women in Colorado's prisons are not protected.” The lawsuit describes systemic inadequacies in medical and mental health care (although Colorado allows many class members hormones and feminizing items), in search procedures, and in housing assignments (including forcing transgender women to live in male settings). The case alleges pervasively unsafe environments where sexual assault, intimidation, and trafficking occur frequently, as well as deficiencies in training and supervision of staff. The case seeks injunctive relief and class-wide damages.

**DELAWARE** – This is a screening of an amended complaint filed by transgender inmate Kamilla Denise London, *pro se*. Earlier, U.S. District Judge Maryellen Noreika allowed London to proceed on a single count of First Amendment retaliation against an officer (Brent Evans) for allegedly writing a misbehavior report against her after she complained about transgender treatment. “Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under § 1983.” *White v. Napoleon*, 897 F.2d 103, 111-12 (3d Cir. 1990). The claim is for retaliation, not for writing the ticket, *per se*. In *London v. Evans*, 2019 WL 5726983 (D. Del., Nov. 5, 2019), Judge Noreika allows this same cause of action to proceed but rejects any amended or further claims. A second disciplinary ticket is at issue. On appeal of the first ticket (the alleged retaliation by Evans), London won – her disciplinary confinement amounting to five days. The second ticket arose after an argument between London and officers about which pronouns should be used when addressing her. London was charged with sexual misconduct. She had been in administrative segregation for perhaps ninety days when the amended complaint was filed. The amended complaint does not state the outcome of the second ticket or the result of any appeal. Again, Judge Noreika finds that filing of false disciplinary charges does not constitute a claim under § 1983 so long as the inmate was granted a hearing and an opportunity to rebut the charges. *Crosby v. Piazza*, 465 F. App'x 168, 172 (3d Cir. 2012), citing *Smith v. Mensinger*, 293 F.3d 641, 653-54 (3d Cir. 2002). She also does not find that London's confinement has been sufficiently “atypical or significant” to involve due process protections under *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974), citing *Sandin v. Conner*, 515 U.S. 472, 480 (1995). See *Alford v. Laquise*, 604 F. App'x 93 (3d Cir. 2015) (90 days

of disciplinary detention not enough); *Griffin v. Vaughan*, 112 F.3d 703, 708 (3d Cir. 1997) (15 months administrative segregation not enough). The second complaint is too conclusory to state a plausible claim of retaliation on the second ticket – so it is dismissed entirely. Judge Noreika also dismissed claims under the Americans with Disabilities Act, finding neither discrimination nor violation of a duty to accommodate. She notes, but declines to rule on, the issue of “whether gender dysphoria falls into the ADA's categorical exclusions.”

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**FLORIDA** – *Pro se* HIV-positive prisoner Rhondel Paris sued a nurse and several officers for violation of his privacy and excessive force in *Paris v. Herring*, 2019 U.S. Dist. LEXIS 205964, 2019 WL 6340970 (M.D. Fla., Nov. 27, 2019). U.S. District Judge Marcia Morales Howard dismisses the claims against the nurse. The events occurred in July of 2018, when Paris went to emergency sick call. He was seen by the nurse (with whom he had some unpleasant history). According to the Complaint, officers asked the nurse if Paris was HIV-positive. She refused to say, but she gestured in the affirmative, which Paris protested. The nurse then accused Paris of calling her a “bitch,” after which the officers beat him up. Interestingly, all defendants have private counsel. The nurse moved to dismiss, and Judge Howard only discusses her motion on privacy grounds – not her role, if any, in provoking the officers to violence. Paris sought damages for the “combined amount of one hundred thousand dollars” against all defendants. He did not divide his demand into compensatory, punitive, or nominal damages. First, the judge finds that under 11<sup>th</sup> Circuit cases there is no implied cause of action for damages under HIPAA. She then turns to a constitutional right to privacy claim under the Fourteenth Amendment, finding a “residual” right to privacy for prisoners under *Harris v. Thigpen*,

# PRISONER LITIGATION *notes*

941 F.2d 1495, 1513 (11th Cir. 1991) (Alabama HIV class action). Separating the privacy claims from the excessive force claims, however, Paris does not meet the “physical injury” requirement of the Prison Litigation Reform Act [PLRA], because the disclosure of his HIV status did not cause physical injury. In *Brooks v. Powell*, 800 F.3d 1295, 1307-8 (11th Cir. 2015), the court found that compensatory and punitive damages were not available under the PLRA if the physical injury requirement is not met. [Note: Some circuits allow compensatory and/or punitive damages for the constitutional tort itself.] Judge Howard’s dismissal is without prejudice to Paris’ refiling against the nurse if he is ever released from prison and no longer bound by the PLRA. [Florida has a four-year statute of limitations for § 1983 claims.] All circuits (including the Eleventh Circuit in *Brooks*) allow “nominal” damages for the constitutional tort, even if they do not permit other damages. Here, however, Paris is out of luck again, because he did not seek nominal damages in his Complaint, either specifically or by including a request for general relief (e.g., “such other relief as the Court deems appropriate,” or like language). This last point seems harsh to this writer in a *pro se* case. The plaintiff in *Brooks* pled nominal damages and general relief, but the Circuit did not say this was necessary. Paris did not characterize his collective damages here; Judge Howard did. Moreover, in *Aref v. Lynch*, 833 F.3d 242, 267 (D.C. Cir. 2016), the court upheld an alternative basis for nominal damages, even if not pled, in the directive of F.R.C.P. 54(c), which provides in part: “Every [non-default] judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” In oral argument before the Supreme Court on mootness in the Second Amendment gun regulation case, *New York State Rifle & Pistol Ass’n, Inc., v. City of New York*, No. 18-280 (Dec. 2, 2019),

the Court spent some time considering whether F.R.C.P. 54(c) can save the case from mootness after New York repealed the challenged regulation. To do so, the Court would have to imply a damages claim that was not pled. If the questions are any indication, the usual liberal/conservative split among justices is flipped on this point, with Justices Ginsburg and Sotomayor suggesting mootness and no implied damages, and Justices Alito and Gorsuch hinting the opposite. Paris’s case will continue against the officers without the nurse.

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**ILLINOIS** – It is surprising that there are not more of these suits. *Pro se* transgender inmate Gregory Barnes seeks to marry another inmate, citing the twin precedents of *Turner v. Safley*, 482 U.S. 78, 94-100 (1987), and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). U.S. District Judge Staci M. Yandle allows the action to proceed in *Barnes v. Lawrence*, 2019 U.S. Dist. LEXIS 199390, 2019 WL 6117724 (S.D. Ill., Nov. 18, 2019). Illinois officials denied Barnes permission to marry, quoting them as saying to consider “my request like a disease, and to keep it to myself until I get out of prison.” Barnes and his intended were also attacked in the barber shop, separated, transferred, and put in segregation. According to the complaint, the pair were told they would not meet again until they were “both in hell.” Judge Yandle allowed Barnes to proceed on four counts: Fourteenth Amendment right to marry; First Amendment retaliation; Eighth Amendment safety claim for orchestrating the attack; and Equal Protection claim for discrimination. Judge Yandle finds that prisoners’ right to marry without regard to sexual orientation or gender is an open question in the Seventh Circuit, citing *Riker v. Lemmon*, 798 F.3d 546, 551 (7th Cir. 2015). *Riker* reversed summary judgment for Indiana prison officials on the point because there were disputed

facts about whether the state had a legitimate penological justification for the denial under balancing required by *Turner v. Safley*, 482 U.S. 78, 90 (1987). Barnes’ complaint met all of the elements of First Amendment retaliation for attempting to exercise a constitutional right and petition the government to state a claim under *Hawkins v. Mitchell*, 756 F.3d 983, 996 (7th Cir. 2014). The claim that Barnes and partner were “set up” in the barbershop and elsewhere states an Eighth Amendment cause of action against line defendants, but not against supervisors – as to whom the allegations of causation are too tenuous. Judge Yandle likens the claim to “calculated harassment unrelated to prison needs” under *King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015) (citing *Hudson v. Palmer*, 468 U.S. 517, 530 (1984)). Barnes’ Equal Protection claim of discrimination based on transgender status may proceed under both class-based animus and class-of-one theories. Barnes’ motion to appoint counsel is denied “at least for now.” Judge Yandle also denied preliminary injunctive relief because the inmates were transferred from the prisons controlled by the named defendants. This is one to follow.

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**MISSOURI** – Having given *pro se* plaintiff one chance to amend the Complaint, U.S. District Judge Audrey G. Fleissig dismisses the second complaint of Dwayne Robison in *Robison v. Sanderson*, 2019 U.S. Dist. LEXIS 199205, 2019 WL 6115198 (E.D. Mo., Nov. 18, 2019). Robison has three claims: (1) transphobic and homophobic slurs; (2) denial of a cellmate; (3) and false accusations of being a child molester. Judge Fleissig finds that the slurs are not actionable. She further rules that confinement in a single cell is not punishment under *Sandin v. Conner*, 515 U.S. 472, 484 (1995), even if remarks are made that Robison just wants a cellmate for sex. While accusations to prison population that an

# PRISONER LITIGATION *notes*

inmate is a child molester can place the target in danger, Robison fails to plead any danger or risk of it.

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**NORTH CAROLINA** – Plaintiff Casey L. Jones, a/k/a Stephanie Hess, is a transgender female who has an order from a South Carolina Family Court “granting her a gender change from male to female.” She is married to Todd M. Hess, and they are proceeding as joint plaintiffs, *pro se*, in *Jones v. Union County Sheriff’s Office*, 2019 U.S. Dist. LEXIS 190588, 2019 WL 5692753 (W.D.N.C., Nov. 4, 2019). Stephanie has a mental health and substance abuse history; and the couple, marital discord. One night (of many in 2018), the police were summoned to their residence. The police charged each with assaulting the other and arrested them, taking them to the Union County (greater Charlotte) Jail. They were processed separately, but each sues for the way they were treated, based on Stephanie’s gender identity. U.S. District Judge Kenneth D. Bell dismisses all claims. Once at the jail, Stephanie was placed in solitary, in neither the women’s nor the men’s housing. The couple were both subjected to verbal ridicule. Stephanie does not complain about the conditions of “solitary,” except to argue that she should have been housed in the women’s quarters. Criminal charges were eventually dismissed as to both plaintiffs. Judge Bell focuses almost entirely on Equal Protection under *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (rational basis scrutiny). He notes that this scrutiny is required of sexual orientation and gender identity claims of prisoners by *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002), which applied balancing under *Turner v. Safley*, 482 U.S. 78, 89-92 (1987), which test survived *Romer v. Evans*, 517 U.S. 620, 631-2 (1996). Here, the court’s task was easier because the sheriff stipulated: (1) Stephanie was not placed with the jail’s female population

because she is transgender; and (2) that she is nevertheless similarly situated to cisgender female detainees for equal protection purposes. Judge Bell accepted this stipulation for purposes of the case, without endorsing it, saying his ruling therefore had nothing to do with the jail’s transgender policies in general. “The controlling issue before the Court is therefore whether the Sheriff Defendants’ assumed disparate treatment of Jones can be justified under the applicable level of ‘rational’ scrutiny, in the specific context of the operation of a prison.” With the question narrowly framed, Judge Bell found that legitimate penological interests favored the solitary confinement. “However, the considerable deference given to prison officials does not absolve them from their obligation to choose their path thoughtfully and respectfully, with due regard for the constitutional rights of those prisoners. See *De’Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013).” Todd alleged that he was harassed because he is a straight man married to a transgender female. Judge Bell found that Todd had “not plausibly alleged” how he was, in fact, treated differently than “any similarly situated person, regardless of marital status and/or the gender or sexual orientation of either partner.” Advocates should be on the lookout for the Equal Protection trick that succeeded here. This is classic obfuscation of Equal Protection by clever class framing. Stephanie was not, in fact, treated similarly to all cisgender women – who remain in congregate housing unless they pose a specific danger to other cisgender women in population.

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**PENNSYLVANIA** – Gay and transgender *pro se* inmate Daniel A. Kloss has been litigating various claims against Pennsylvania correctional officials since 2015. Kloss is also disabled, uses a wheelchair, and has been assigned other inmates (“pushers”) to wheel her

to meals, visits, medical appointments, etc. She became romantically involved with one of her “pushers” (Butler). Kloss and Butler asked for permission to marry, which was denied for security reasons. The inmates were separated, and officials began to accuse Kloss of extorting Butler and being a “super-predator.” Most of Kloss’ claims were dismissed in an earlier opinion. Now, in *Kloss v. SCI Albion*, 2019 U.S. Dist. LEXIS 190922 (W.D. Pa., Nov. 1, 2019), U.S. Magistrate Judge Richard A. Lanzillo recommends dismissal of the remaining ones. He begins by stating that Kloss did not file any papers in opposition to the defendants’ motion for summary judgment. Judge Lanzillo finds this failure to be “fatal” – the merits recommendations that follow are *dicta*. Kloss’ claim of defamation is not actionable under § 1983. *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 401 (3d Cir. 2000), citing *Paul v. Davis*, 424 U.S. 693, 712 (1976). Judge Lanzillo analyzes Kloss’ claims of gender or sexual orientation discrimination under a standard Equal Protection test, modified to balance the state’s interests in the prison setting under *DeHart v. Horn*, 227 F.3d 47, 61 (3d Cir. 2000). He declines to frame the class to compare Kloss and Butler (as members of the LGBT community) with straight inmates. Rather, he focuses on the fact that the separation of Kloss and Butler was based on Kloss’ unique medical needs and the desire for a “pusher” with whom Kloss was not romantically involved and the fact that Butler “felt coerced into the arrangement with Plaintiff” – an allegation Kloss did not dispute. The state’s interest was heightened by rulings that prisoners do not have the right to choose their cellmates. *Murray v. Bledsoe*, 650 F.3d 246, 247 (3d Cir. 2011). Judge Lanzillo also rejects Kloss’s claims that force used against him by officers was both discriminatory and excessive. A videotape did not support these allegations, allowing summary



# PRISONER LITIGATION *notes*

judgment under *Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

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**PENNSYLVANIA** – The sole issue in this case is whether *pro se* transgender federal prisoner Michael Lee Gordon should have her *in forma pauperis* status revoked under the “three strikes” rule of the Prison Litigation Reform Act [PLRA]. U.S. District Judge Malachy E. Mannion revokes it in *Gordon v. Buebendorf*, 2019 U.S. Dist. LEXIS 194866, 2019 WL 5864477 (M.D. Pa., Nov. 8, 2019). Gordon’s primary claim is that she was raped by her cellmate a few days after she requested to be housed with him. Gordon is plaintiff in some 83 civil actions and 62 appeals, and she does not contest that she has accumulated more than three strikes. Instead, she argues that her safety issues place her in “imminent danger” of physical harm under the PLRA’s exception to the three strikes rule in 28 U.S.C. §1915(g). Judge Mannion does not accept the argument. Gordon requested the cellmate, and he was moved after the rape. Judge Mannion finds that the danger must be current. Here, either the rape had not yet happened and Gordon was in housing that she requested, or the rape had occurred and the assailant had been moved, as of the time of filing the lawsuit. Unfortunately, Gordon is not likely to find much refuge in the federal courts because of her litigation history.

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**PENNSYLVANIA** – A vendor for the Pennsylvania DOC suffered a data breach that revealed personal information, including social security numbers, for over 13,000 inmates, including *pro se* plaintiff Darren Eades in *Eades v. Wetzek*, 2019 WL 6255214 (M.D. Pa., Nov. 22, 2019). U.S. District Judge Yvette Kane granted defendants’ motion to dismiss. Eades alleged that he was not notified about the breach for over three months and that his data could have been used to create false records

about him. He sought declaratory and injunctive relief and damages. Eades does not allege that his identity was “stolen.” This case apparently does not involve medical information, although most cases cited about inmate privacy concern confidential medical information such as HIV status. Judge Kane first finds that, while inmates have some right to privacy in their medical information – citing *Doe v. Delia*, 257 F.3d 309, 317 (3d Cir. 2001) – the contours are not clearly defined. She also cites *Jefferson v. Hussain*, 2016 WL 1255731 (E.D.Pa., Mar. 31, 2016), which made an exhaustive effort to refine inmate medical privacy but ultimately concluded that officials were entitled to qualified immunity. Here, no controlling case holds that Corrections’ release of private information to a third party vendor violates inmates’ constitutional rights. Without lengthy discussion, Judge Kane likewise finds qualified immunity applies. She does not explain why declaratory relief is implicitly denied by the dismissal. Eades also sued under the federal Fair Credit Reporting Act, but Judge Kane found that it did not cover these circumstances. Under qualified immunity analysis, there are two questions: whether the right was violated and whether it was clearly established. In *Pearson v. Callahan*, 555 U.S. 223 (2009) (*passim*), the Supreme Court said unanimously that lower courts may address either question first. Thus, as here, when the court addresses “clearly established” first, there is no need to rule on whether the right exists. Judge Kane avoided this question, as did the District Judge in *Jefferson*. Unfortunately, this means that the law cannot progress until someone addresses the right itself. The vendor whose data was breached here was “Accreditation Audit Risk-Management Security, LLC,” which Pennsylvania DOC hired to help it with management of its paperwork and due diligence incident to becoming accredited. Does anyone else see an irony here?

**WASHINGTON** – U.S. District Judge Ronald B. Leighton grants summary judgment on qualified immunity to all defendants in *Santiago v. Gage*, 2019 WL 6052492, 2019 U.S. Dist. LEXIS 198693 (W.D. Wash., Nov. 15, 2019), a damages case about delays in hormone treatment for *pro se* transgender prisoner Marco Santiago. The decision adopts in part and declines to accept in part the report of U.S. Magistrate Judge J. Richard Creatura, who recommended that two of the defendants answer at trial for damages, although Santiago is now receiving the hormones she requested. Both judges balkanized the delays prior to receipt of hormones into various segments over two years – such as initial presentation, self-harm, consideration by the DOC “Committee” and its approval, prescribing of the medicine, and actual receipt of same. At issue in the decisions is a period of about 3½ months of delay after the green light from the “Committee” and the writing of the hormone prescription by the treating providers. During this last delay, providers requested another endocrinology evaluation because of concern about lab tests – even though the “Committee” had already considered similar lab results. Judge Creatura wrote that the providers who wanted another endocrine evaluation should have deferred to their superiors on the “Committee,” inasmuch as this was required by Washington’s procedures. Judge Leighton disagreed, writing that Washington’s procedures (or failures to adhere to them) do not fix standards for deliberate indifference and that, in any event, the law was not settled to establish clearly how long of a delay in transgender hormone evaluation would violate the Eighth Amendment. For the last proposition he cited the Seventh Circuit’s grant of qualified immunity on hormone delay in *Mitchell v. Kallas*, 895 F.3d 492, 500 (7th Cir. 2018), noting that the delay in that case was much longer. There was no evidence here from which a jury could

# LEGISLATIVE / LAW & SOCIETY *notes*

find ulterior motive or departure from “prudent practice.” In this writer’s view, it is unlikely at present that the federal courts are going to make doctors answer in potential damages for ordering more blood work for transgender patients, even if it takes additional time. The bright spot in *Mitchell v. Kallas* is that, while qualified immunity was granted, the court condemned the delays: “That is not to say that this delay cannot be criticized. Far from it. The lack of any sense of urgency, or even of the need for prompt follow-through, is quite disturbing.” 895 F.3d at 501. This could set the stage for a possible damages case on clearly established law in the future.

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## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**KENTUCKY** – The northern Kentucky town of Bellevue (population 5,772) has become the 15<sup>th</sup> local government to adopt a Fairness Ordinance that prohibits discrimination in employment, housing, and public accommodations, because of sexual orientation or gender identity. This is the fifth such enactment in 2019. A state legislature fairness bill to accomplish the same goals statewide was first introduced 19 years ago. The current version of the bill is co-sponsored by almost a quarter of the legislature. *Fairness Campaign Press Release*, Nov. 13.

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**NEW JERSEY** – On Transgender Day of Remembrance, November 20, N.J. Attorney General Gurbir S. Grewal issued a news release announcing three steps he was taking to protect transgender people in New Jersey. First, he was issuing Attorney General Directive 2019-3, titled “LGBTQ Equality Directive,” instructing state agencies about interactions with transgender people, intended especially

to guarantee “safety and dignity in their encounters with law enforcement, regardless of their sexual orientation, gender identity, or gender expression.” Second, he announced a new public awareness campaign by the Division on Civil Rights to “protect the rights of lesbian, gay, bisexual, transgender, questioning or intersex individuals under the New Jersey Law Against Discrimination.” Third, he announced an expanded policy by the Juvenile Justice Commission regarding LGBTQ+ juveniles. These announcements were made in conjunction with the release of a report by the Transgender Equality Task Force with recommendations for action by the state government.

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**NEW YORK** – On November 20, Transgender Day of Remembrance, Governor Andrew Cuomo directed the Department of Financial Services to propose “new actions to further protect access to health insurance for transgender and gender non-conforming individuals,” and directed the Division of Human Rights to “develop a GENDA public awareness campaign that would launch in January for the one-year anniversary of the signing of that landmark legislation” (i.e., the Gender Identity Non-Discrimination Act, which added gender identity or expression to the state’s Human Rights Law). *Governor’s Press Release*, Nov. 20.

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**TEXAS** – The State Commission on Judicial Conduct has concluded that Justice of the Peace Dianne Hensley violated ethical rules applicable to the state’s judiciary by adopting a policy of not officiating same-sex marriages based on her religious beliefs, while continuing to officiate different-sex marriages. The Commission pointed to the requirement for judges to act in ways that “do not cast reasonable doubt on the judge’s capacity to act impartially.” The public warning issued

to Judge Hensley on November 12 was announced publicly on December 2. The “public warning” is a “mid-level rebuke,” according to a report by *www.statesman.com* (Dec. 2), “below a reprimand but above an admonition.” The news report suggested that the Commission’s announcement will add fuel to the fire in Texas over attempts by (mainly Republican) legislators to enact measures that would give public servants the right to refuse to perform functions of their job that conflict with their religious beliefs. Several measures along those lines have been introduced in the legislature over the past few years, many with the endorsement of the governor and attorney general, but so far none has been enacted.

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**UTAH** – Stymied by the legislature, the administration of Governor Gary Herbert, a Republican, is moving forward to adopt a regulatory rule that will ban the practice of conversion therapy by licensed therapists. The Mormon Church, which holds heavy political sway in the state, abandoned opposition to the adoption of the rule after changes were made to the proposal to ensure that church leaders and members who are therapists will be allowed to provide spiritual counseling unimpeded. The proposed rule will be opened to public comment for thirty days beginning December 15, and could go into effect as early as January 22, according to an Associated Press report from November 27.

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

**THE U.S. COMMISSION ON CIVIL RIGHTS**, an independent non-partisan advisory committee established under federal law, has issued a 621-page report titled “Are Civil Rights a Reality?” This is a highly critical

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look at the Trump Administration's civil rights enforcement record and policies in the area of civil rights. The report is particularly critical of the Administration's reversal of direction on the LGBTQ rights initiatives of the Obama Administration. The Report states that despite the "extraordinary volume" of civil rights complaints filed during the first two years of the Trump Administration, the agencies charged with enforcement of federal civil rights law "generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed." This conclusion is not surprising, since Trump's annual budget proposals have always included cuts to the budgets of civil rights enforcement agencies, and although Congress customarily refuses to go along with the recommended cuts, funding remains flat despite inflation, resulting in understaffing. Also, as the Report notes, areas in which the Obama Administration was engaged in aggressive enforcement of LGBTQ rights have been basically abandoned, in light of the Justice Department's reversal on the issue of coverage of sexual orientation and gender identity discrimination claims under federal sex discrimination laws. This leaves only residual executive order jurisdiction over federal sector and contractor claims, where there is also a notable lack of active enforcement. The Trump Administration has ramped up enforcement of religious liberty claims, however, which in some cases involve defending the rights of religious objectors to refuse to comply with anti-discrimination laws.

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**VICTORY FUND** – The LGBT Victory Fund reported that November's elections resulted in the highest number of its endorsed out-LGBT candidates winning their races than in any prior "off year" elections: 80. There were

still a dozen races too close to call when they issued their press release the morning after the November 5 voting. The winners included four mayors, five state legislators, 70 local government officials, and one judge. 74 of the 80 ran as Democrats, one as a Republican, one as an Independent, and four as unaffiliated. Significantly, 32 of the winners were running in states that are consider low-equality or negative-equality based on the legal situation for LGBT rights in the state. \* \* \* Of course, the Victory Fund does not endorse in every race in which an out LGBT candidate is running, saving their financial support for the races they deem winnable. LGBTnation.com reported on November 6 that 144 out candidates had won their races, with a total of 382 known out LGBT candidates actually running for office.

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**IOWA** – Adolfo Martinez was found guilty of a hate crime, third-degree harassment, and being a habitual offender, after he was prosecuted for tearing down and burning an LGBTQ flag flying at a church in Ames, Iowa. Martinez told a radio interviewer that his action was taken because he "opposes homosexuality." A jury convicted him. The date for sentencing had not been set when the *Associated Press* reported the jury verdict on Nov. 6.

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**MISSOURI** – The *St. Louis Post-Dispatch* (Nov. 25) reported that delegates attending the annual convocation of the Episcopal Diocese of Missouri had elected an out gay man of color, Rev. Deon K. Johnson, to be the new Bishop of their diocese. Rev. Johnson received 113 votes out of the 164 cast by clergy and lay delegates. He will assume the bishopric in the spring of 2020 when the current bishop has announced he will retire. Rev. Johnson is rector of St. Paul's Episcopal Church in Brighton, Michigan, near Detroit.

He is married to Jhovanny Osorio, and they have two children. Rev. Johnson emigrated from Barbados to New York when he was 14, subsequently graduating from General Theological Seminary of the Episcopal church. He is the first black man to be elected Bishop of an Episcopal Church diocese in the United States.

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**MICHIGAN** – Judge Sara Smolenski, Chief Judge of Michigan's 63<sup>rd</sup> District Court, and Linda, her long-time partner whom she married after marriage equality came to Michigan, are parishioners at St. Stephen Roman Catholic Church. Judge Smolenski made public that she received a telephone call on November 23 from Rev. Scott Nolan, the young priest who was recently put in charge of that church, asking that she and her partner not come forward for holy communion during church services. She says that he told her, "It was good to see you in church on Sunday. Because you and Linda are married in the state of Michigan, I'd like you to respect the church and not come to communion." In an article about the incident, *cnn.com* (Nov. 30) reported that communion practices vary from parish to parish, but that, for example, a Catholic Church in South Carolina had denied communion to former Vice President Joe Biden, a Roman Catholic, due to his support for marriage equality and reproductive freedom. In a subsequent television interview, Rev. Nolan said that denying communion to Judge Smolenski was "painful" to him, "a cause of great sadness in my own life as a priest," but he felt that he had to do it. The Diocese of Grand Rapids issued a statement backing up his action. While acknowledging Smolenski's "service and generosity to the community" (including a substantial donation to the building fund used to refurbish the church), it quoted a line from Pope Francis's *"Amoris Letitia"*: "Those who approach the Body and Blood of

# INTERNATIONAL *notes*

Christ may not wound that same Body by creating scandalous distinctions and divisions among its members.” It strikes us as ironic that the scandal-ridden R.C. Church would accuse a married lesbian couple who are long-time members of the church of “creating scandalous distinctions and divisions” merely by participating in communion at a service. We believe the Founder of that church had something to say about those who cast the first stone . . . .

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**RECUSAL? UNLIKELY.** After a photo surfaced showing Supreme Court Justices Samuel Alito and Brett Kavanaugh in Brian Brown, leader of the anti-LGBT organization National Organization for Marriage (which would more correctly be called National Organization Against Marriage Equality), some called for the two justices to recuse themselves from sitting in LGBT-related cases pending before the Court. Fat chance! If Alito and Kavanaugh recused from the pending Title VII cases, a four-member majority of the court might rule in favor of LGBT rights. Supreme Court justices are not subject to the Judicial Ethics rules adopted for the federal judiciary, and have total discretion over whether to recuse, the only recourse for abuse of that discretion being impeachment and removal by Congress.

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## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**LATIN AMERICA** – On November 19, *SouthFloridaGayNews.com* reported on a gathering in Bogota, Colombia, of forty human rights lawyers from across Latin America to launch a new organization – Red Litigio LGBT. This network will coordinate activity and share information to promote LGBT rights in thirteen Latin American countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador,

Honduras, Mexico, Panama, Paraguay, Peru, and Venezuela. The state of LGBT rights varies drastically across the thirteen countries, some of which have marriage equality and ban sexual orientation and gender identity discrimination, some which are at the opposite end of the policy spectrum with much work to be done. This initiative was conceived by four organizations: Colombia Diversa, Promsex, Cattrachas, and Dejusticia, and was provided with financial and logistical support by ARCUS, the Ford Foundation, and the Open Society Foundation.

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**ARMENIA** – Armenia does not have marriage equality. Its constitution defines marriage as a union between “a woman and a man.” But a conservative party introduced a measure to amend the Family Code to expressly ban “same-sex and transgender marriages.” The parliament rejected consideration of the bill, as well as a proposal to amend the Family Code to prohibit homosexuals from adopting children. Members of the ruling My Step alliance said existing provision were adequate to deal with these issues, and claimed that the right-wing opposition party, Prosperous Armenia Party (BHK) had proposed the measures to “create a scandal.” *Radio Free Europe/Radio Liberty*, Nov. 12.

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**AUSTRALIA** – In reaction to the national referendum that ushered in marriage equality in Australia, Prime Minister Scott Morrison promised that the federal government would adopt legislation protecting freedom of religion and banning discrimination against people because of their religious beliefs. That promise has hung fire for quite a while, at late in November the P.M. announced that plans to outlaw religious discrimination were being pushed back yet again in 2020. According to a press report, “The delay follows a high-powered intervention

from religious leaders, including Mr. Morrison’s Pentecostal movement, who threatened to withdraw support for the contentious religious discrimination bill unless greater freedoms were granted to Australians of faith.” The bill had been announced for introduction in Parliament in October, then before the end of 2019. But Morrison’s latest announcement was that a second draft will be released for “consultation soon.” A first draft was released in August and drew about 6,000 written comments, many from religious groups claiming that the proposed law would “diminish the religious freedom of faith groups in Australia.” On the other hand, LGBT groups were also critical of the bill, saying that it would open the door to discrimination against LGBT people. Some commentators suggested that this was “friendless legislation” and that it may never come to a vote. *www.smh.com.au*, Nov. 30.

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**CANADA** – The *Canadian Press* reported on November 8 that a human rights adjudicator had ordered the Manitoba government to start offering non-binary sex designations on birth certificates, to pay \$50,000 (Canadian) to a transgender individual who wanted an X designation on their birth certified but were denied. The Manitoba Vital Statistics Agency insisted that all birth certificates have but two options – male or female – under provincial law. The adjudicator found the government’s position to be discriminatory, and said nothing in the law prevented the agency from adding a third option. Adjudicator Dan Manning wrote: “Gender identity is a part of our concept of selfhood. The director’s practice to not allow non-binary designations of sex designation and only permit male or female designations was effectively the government refusing to acknowledge T.A.’s agency and personhood.” The province was given 180 days to start offering non-binary sex designations



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on birth certificates and 60 days to pay compensation to T.A., but the adjudicator refused to award exemplary damages on top of that, finding that there was no evidence of malice – this was just bureaucracy at work.

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**CAYMAN ISLANDS** – The Court of Appeal of the Cayman Islands issued a decision on November 7 in CICA No. 9 of 2019, overruling a decision by Chief Justice Anthony Smellie that had “legalized” same-sex marriage there. However, the court ordered the government to move “expeditiously” to provide Chanetelle Day and Vickie Bodden Bush, the couple who had sued for the right to marry, with a legal status equivalent to marriage in order to satisfy the equality requirements of the Constitution. The court accepted the argument that it “must interpret the Constitutional Law of the Cayman Islands and that part of it which deals with citizens’ rights, in a broad and purposive way. It is incumbent upon it when doing so to have regard, among other things, to societal changes. However, in doing so, it is not open to the court simply to ignore or put on one side what the provisions clearly say.” The court noted that the European Court of Human Rights has refused to order its signatory countries to adopt marriage equality, finding that the equality requirement of the European Human Rights Convention, to which the Cayman’s mother country, the U.K., is a signatory, is satisfied by providing a civil status equivalent to marriage for same-sex couples. The court distinguished the U.S. *Obergefell* decision by pointing out that the U.S. Constitution, unlike the Caymans Constitution, does not specify a definition of marriage, instead embracing open-textured guarantees of liberty and equality. The court noted that the referendum approving the Cayman Constitution, including its definition of marriage, passed in 2009 with 62% of the vote. Thus, the court concluded,

since the Constitution defines marriage “between a man and a woman,” this wording “precludes same-sex marriage.” The court argued, “Had the Cayman Islands chosen to adopt a free-standing non-discrimination provision, the decisions of other jurisdictions would plainly have been highly material,” but the decision by the Cayman people to approve a specific definition renders jurisprudence from other countries less relevant. However, the court affirmed the argument that the government is obligated to provide same-sex couples with an alternative legal structure “with legal status functionally equivalent to marriage.”

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**CHINA** – The national government is reviewing the country’s civil code, which includes laws on marriage and family. Proponents of LGBT rights encourage a campaign for marriage equality supports to submit written comments during the public comment period that ended on November 29. Nearly 200,000 people submitted comments urging that the marriage laws be reformed to allow for same-sex marriages. Although existing laws do not expressly ban same-sex marriages, the code does defined marriage as a union of one man and one woman, and same-sex marriages of Chinese nationals performed elsewhere have not been accorded recognition by the government. *South China Morning Post*, Dec. 1. \* \* \* A gay homeowner in Hong Kong has applied for judicial review for recognition of his marriage in the context of homeowner rights under the Home Ownership Scheme. Edgar Ng Hon-lam purchased an apartment under that Scheme, hoping to live with his husband confident that his husband could continue to occupy the home should something happen to Ng. The men married in London in 2017, and had a “blessing service” at a church in Hong-Kong, where local law does not contemplate legal same-sex marriages. Because both the Intestates

Estates Ordinance and the Inheritance (Provision for Family and Dependents) Ordinance define “husband” as the spouse of a woman, which means that a person in a same-sex marriage cannot ensure that their spouse inherits their estate in the absence of a valid will or other estate planning, and that a surviving civil partner or same-sex spouse would not be entitled to first priority in obtain a grant to the administration of their husband’s estate or to acquire the premises in which they lived with the deceased at the time of death. Ng is seeking a declaration from the courts that the exclusion of protection for his husband’s spousal rights violates the anti-discrimination provisions in Hong Kong’s “Basic Law.” *South China Morning Post*, Nov. 29.

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**COOK ISLANDS** – Two years ago, reported *Cook Island News* on Nov. 3, the parliamentary select committee working on a penal law revision had removed “indecent acts between men” and “sodomy” from the draft Crimes bill. On November 2, those clauses were reinstated in the draft by the committee after heavy lobbying from church leaders. “In fact,” says the article, “in an unintended consequence of moves to make legislation gender-neutral, the anticipated effect of the bill will be to also criminalize sex between women, as well as between men.” The penalty will be up to five year’ in prison. One legislator insisted that people engaging in consensual activity in private were unlikely to be punished, but the effect of the measure is “probably a deterrent to people to come out in the open.” The Crimes Bill is expected to be taken up by Parliament in February.

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**HUNGARY** – The Pest County Consumer Protection Department fined Coca-Cola for a short-term poster campaign depicting same-sex couples consuming the company’s product. The Department

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claims that Coca-Cola violated a section of the Advertising Act, which states that advertisements that may damage the physical, mental, emotional, or moral development of children and adolescents are not allowed. Of course, it follows that seeing two men or two women enjoying Cokes while smiling at each other will scar youngsters for life. But only in Hungary . . . ? *Hungarytoday.hu* (Oct. 15).

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**INDONESIA** – The Medan State Administrative Court rejected a lawsuit against the Rector of North Sumatra University by a group of students who were dismissed from the editorial board of a student news website after they published on the website a short story “touching on lesbian, bisexual, gay and transgender issues.” The presiding judge said that the story “had caused controversy for containing pornography and LGBT content,” according to a Nov. 16 article in the *Jakarta Post*. The judge found the rector’s decision to be “justifiable” and said the students had not conducted themselves in accord with the University’s values. In addition to rejecting the lawsuit, the court directed the student plaintiffs to pay \$22.50 in court fees, pointing out that they had two weeks to file an appeal of the dismissal of their case.

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**JAPAN** – The Moka Branch of the Utsonomiya District Court broke new ground in the ongoing marriage equality struggle in Japan on September 18 when it awarded damages of 1.1 million yen (approximately \$10,200) to a woman who filed a lawsuit against her female partner and her partner’s new lover. The plaintiff and her partner were legally married in the United States, but Japan does not officially recognize same-sex marriages contracted elsewhere. After marrying the couple had returned to Japan to live. The plaintiff said, “Our relationship was destroyed due

to my partner’s act of infidelity.” Japanese courts recognize a cause of action, almost entirely abandoned in American jurisdictions, for damages for the victim of an adulterous spouse. Judge Yosuke Nakahata stated in his opinion: “(A plaintiff) is entitled to have legal protection similar to that of (heterosexual) common-law couples if they are truly a couple.” Article 24 of Japan’s Constitution states that “Marriage shall be based only on the mutual consent of both sexes,” which is generally taken to mean that only different-sex couples can marry. But, wrote Judge Nakahata, “When the Constitution was established, there was no assumption that same-sex couples would get married. (The phrase ‘both sexes’) does not mean same-sex couples are denied.” The court implicitly rejected the government’s argument that Article 24 “does not assume same-sex marriages.” However, a Supreme Court decision dating back to 1958 recognized a relationship “similar to marriage” for heterosexual couples, and precedents support allowing individuals in such “common-law marriages” to seek damages in cases of adultery. Judge Nakahata wrote, “It is hard to declare that the marriage relationship should be restricted to a man and a woman,” noted that some local governments in Japan have established certification procedures for same-sex couples for various purposes, and continued, “There is an urgent necessity to grant a certain level of protection to same-sex couples.” Last February, 13 same-sex couples filed lawsuits in five different district courts seeking a declaration that the government’s interpretation of Article 24 is wrong. This new ruling adds new arguments in support of marriage equality in Japan, which now may just be a matter of time. [www.asahi.com](http://www.asahi.com), Sept. 19.

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**MEXICO** – The Supreme Court of Justice has issued a “jurisprudence”

on transgender document changes on November 21, stating, according to journalist Rex Wockner, San Diego-based, who closely monitors LGBT law developments in Mexico, that making a change in official documents to reflect gender transition should be a simple administrative process at the local civil registry that does not require the participation of a court. Although this ruling is not binding in the sense that it automatically overrides local laws and procedures, it nonetheless means that if any transgender person encounters resistance from a local civil registry, they can go to a court which is obliged to follow the “jurisprudence” and issue an order in favor of an administrative process at the civil registry.

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**SOUTH KOREA** – On November 13, Gagoonet, an LGBT rights group, held a press conference to announce the filing of 1,056 complaints with the country’s Human Rights Commission contending that the lack of marriage equality for same-sex couples is a human rights violation. They named the president, the prime minister, the heads of ministries, the chairperson of the National Assembly, and the heads of local government as Respondents in their complaints, urging the adoption of a gender-neutral marriage law and to improve policies related to healthcare, pensions, housing, and workplace benefits for same-sex couples. *Liverpool Tab*, Nov. 13.

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**THAILAND** – A lesbian couple has filed a petition in the Constitutional Court, arguing that limiting the right to marry to different sex couples violates the country’s Basic Law. The petition was submitted on November 22, drafted by the Foundation for SOGI Rights and Justice. An advisor from the foundation told the *Straits Times* (November 22), “The Thai Constitution guarantees our birth rights of having a family and

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descendants. It also protects us citizens against discrimination of all kinds, including gender.”

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**UGANDA** – The *Associated Press* reported on Nov. 12 that police in Uganda had arrested 67 people in a “raid” on a gay-friendly bar, charging them with “common nuisance,” a charge for which they could face up to a year in jail. All were remanded to prison without bail. However, a human rights lawyer said that police had released 50 other people after the raid. Police suggested that some of those arrested were guilty of drug possession. LGBT rights supporters claimed the raid was an attempt to prevent LGBT people from congregating in a public place. \* \* \* *Voice of America* followed up with a report that Ugandan police confirmed that they had arrested 120 people “suspected to have been using narcotics” at The Ram Bar.

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**UNITED KINGDOM** – The *Times of London* reported on November 16 that an Employment Appeals Tribunal upheld an award of damages to Matthew Aplin, a 42-year-old out gay man who was discharged from a position as a primary school head teacher when administrators of Tywyn School in Sandfields, West Glamorgan, learned that Aplin had sex with two seventeen-year-old men. The age of consent for gay sex in the U.K. is 16. Aplin met his two sexual partners on Grindr. Police and council officials determined that no criminal offence had been committed, but the school’s governors decided to discharge him. Aplin challenged the decision before resigning, and then filed a claim of unfair dismissal and sexual orientation discrimination with an Employment Tribunal, which ruled in his favor last March, but the school appealed. The Appeals Tribunal upheld the unfair dismissal finding, but rejected the claim of sexual orientation discrimination, finding that the termination decision

was motivated by the age rather than the gender of Aplin’s sexual partners. However, it upheld the award of damages, although it reduced the amount awarded by the first instance tribunal which had focused on the attitude reflected in the school’s investigating officer’s report, “which were hostile to Mr. April” rather than being objective and factual. \* \* \* With marriage equality set to go into effect in February 2020 as a result of a measure passed by the U.K. legislature earlier in 2019 conditional on there not being a functional government in effect in Northern Ireland, where a political deadlock among contending parties has prevented the formation of a government with a local parliamentary majority, *The Guardian* reported on Nov. 14 that a legal controversy is brewing over reports that gay couples who are already in civil partnership may not be afforded marital recognition immediately. Under the partnership law, a civil partnership cannot be dissolved within the first two years after its formation, and then only on specified grounds of separation, unreasonable behavior or desertion. This means that recently partnered same-sex couples who wish to take advantage of the right to marry and can’t do so if they are in civil union face a significant barrier to marrying. Presumably, those who want to marry will not be able to dissolve their civil unions, even if they wait the necessary two years, unless some sort of legislative or bureaucratic fix is devised for this problem.

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**ZAMBIA** – International human rights activists expressed outrage at a 15-year prison sentence imposed on a gay Zambia couple who are in a consensual long-term relationship for “crimes against the order of nature.” The men were arrested and prosecuted after their housekeeper reported observing them engaging in intimate conduct in their home. U.S. Ambassador Daniel Foote issued a public statement denouncing the sentence: “I was personally horrified

to read yesterday about the sentencing of two men, who had a consensual relationship, which hurt absolutely no one. Decisions like this oppressive sentencing do untold damage to Zambia’s international reputation by demonstrating that human rights in Zambia [are] not a universal guarantee.” Foote, a career diplomatic, subsequently received death threats. Gay sex is illegal in most African countries, but the criminal laws are rarely enforced against individuals who engaged in private consensual activity. Zambia’s crime against nature law dates from British colonial rule. The country’s constitution identified it as a “Christian” country, and a spokesperson for the ministry of information responded to press inquiries, stating, “This is the will of the Zambian people, we have to be with the people by abiding by the law.” Some countries have imposed criminal penalties on people “suspected” of engaging in gay sex because of their patronage of particular establishments are attendance at all-male parties. In some countries, men suspected of engaging in gay sex are subjected to humiliating and invasive rectal examinations to determine whether they have engaged in anal sex. Rightsafrica.com, Nov. 29.

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**ZIMBABWE** – The *Washington Blade* reported on November 18: “A judge in Zimbabwe on Nov. 14 issued a landmark ruling in favor of a transgender woman who filed a lawsuit over the abuse she suffered after her arrest for using a women’s restroom.” Police in Bulawayo arrested Rikki Nathanson after she used a women’s restroom in a hotel, and she was detained in jail for three days, and, according to the Southern African Litigation Center, which represented her, she was “forced to undergo invasive and humiliating medical/physical examination and asked to remove her clothes in front of five male police officers in order to ‘verify her gender’” while in custody. The judge awarded her

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\$400,000 in damages on her claims of “unlawful arrest, malicious prosecution, and emotional distress.” A local Zimbabwe law firm represented her in the action. Since her arrest, she fled to the U.S., where she was granted asylum because of the persecution she suffered in Zimbabwe.

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## PROFESSIONAL NOTES

*By Arthur S. Leonard*

Press reports in November indicated that the **NATIONAL CENTER FOR TRANSGENDER EQUALITY** (NCTE) had sharply reduced its staff with buyouts, beginning November with 23 full-time staffers and ending the month with seven. An independent union filed an unfair labor practice charge, alleging that the buyouts were intended to defeat a staff unionizing campaign – a charge that the leadership of the organization denied. There were reports that staff members had been seeking salary increases without success. Individuals who left the organization refused to speak to the press. NCTE Board Chair Rachel See issued a statement, asserting that the Board and management of the organization “have developed a plan to strengthen transparency and trust among our staff, and to create a workplace where everyone feels respected and valued. I’m sad that some staffers won’t be staying with NCTE because of their individual circumstances.” We hesitate to characterize what is going on at NCTE without access to more complete facts, but the sharp reduction in staff size is concerning at a time when the Trump Administration’s war on transgender rights is proceeding on multiple fronts and is likely to be an important issue in the federal elections next year.

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On February 15, the **AMERICAN BAR ASSOCIATION’S COMMISSION ON SEXUAL ORIENTATION AND**

**GENDER IDENTITY** will honor three LGBT rights activists with its 8<sup>th</sup> Annual Stonewall Award during the ABA Midyear Meeting in Austin, Texas. Those being honored include: **JAMES J.S. HOLMES**, a partner at Clyde & Co. in Los Angeles, who helped create the commission and chaired it from 2012-15. He has been an active pro bono lawyer for the HIV and AIDS Legal Services Alliance; **CARMELYN P. MALALIS**, Chair of the NYC Human Rights Commission and past chair of the New York City Bar’s LGBT rights committee, who worked as an advocate for LGBT rights at the law firm of Outten & Golden prior to her appointment to the Commission; **CHASE STRANGIO**, a staff attorney at the ACLU LGBT & HIV Project in New York, where he actively litigates for LGBT rights.

## 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](mailto:info@le-gal.org).





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1. Bennett, Merav, Standing for Statues but Not For Statutes? An Argument for Purely Stigmatic Harm Standing Under the Establishment Clause, 86 U. Chi. L. Rev. 1563 (Oct. 2019).
2. Black, Ann, Casting the First Stone: The Significance of Brunei Darussalam's Syariah Penal Code Order for LGBT Bruneians, 20 Australian J. Asian L., No. 1, Article 18 (2019).
3. Carbado, Devon W., and Kimberle W. Crenshaw, An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection, 129 Yale L.J. Forum 108 (Nov. 6, 2019).
4. Cobb, Jennifer, and Myra McKenzie-Harris, "And Justice for All" . . . Maybe: Transgender Employee Rights in America, 34 ABA J. Lab. & Emp. L. 91 (2019).
5. Drake, Angela K., and Charlotte R. Burgess-Mundwiler, Military Sexual Trauma: A Current Analysis of Disability Claims Adjudication under Veterans Benefits Law, 84 Mo. L. Rev. 661 (Summer 2019) (A surprisingly high percentage of reported sexual assaults within the military involve male-on-male assault. The authors provide a guide through the maze of the Veterans Benefits system for those representing victims of military sexual trauma.)
6. Farber, Felicia, Harassment in an Online World: Sexting, Cyberbullying and Cyber-Harassment, 320-OCT N.J. Law. 30 (Oct. 2019).
7. Frankel, Allison, Pushed Out and Locking In: The Catch-22 for New York's Disabled, Homeless, Sex-Offender Registrants, 129 Yale L.J. Forum 279 (Nov. 25, 2019).
8. Galbraith, Jean (ed.), Trump Administration Takes Domestic and International Measures to Restrict Asylum, 113 Am. J. Int'l L. 833 (Oct. 2019).
9. Gersen, Jeannie Suk, Sex Lex Machina: Intimacy and Artificial Intelligence, 119 Colum. L. Rev. 1793 (Nov. 2019) (Sex robots and the law!).
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11. Higdon, Michael J., The Quasi-Parent Conundrum, 90 U. Colo. L. Rev. 941 (Fall 2019).
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13. Manheim, Lisa, and Kathryn A. Watts, Reviewing Presidential Orders, 86 U. Chi. L. Rev. 1743 (Nov. 2019) (taking litigation against Trump's executive actions, such as the transgender military service ban, discusses the need for a framework for judicial review of unilateral presidential policy-making).
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19. Radics, George Baylon, #Ready4Repeal? Viewing s 377A of the Singaporean Penal Code Through the Lens of Legal Actors and Artists, 20 Australian J. Asian L., No. 1, Article 16 (2019).
20. Samar, Vincent J., Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity, 47 Hastings Const. L.Q. 83 (Fall 2019).
21. Schaerr, Gene, and Michael Worley, The "Third Party Harm Rule": Law or Wishful Thinking?, 17 Geo. J. L. & Pub. Pol'y 629 (Summer 2019) (Schaerr represents Harris Funeral Homes in the Supreme Court Title VII transgender discrimination case, and is associated with Alliance Defending Freedom, whose litigation agenda involves establishing religious exemptions from compliance with anti-discrimination laws).
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24. Sorkin, Anton, "Them": Bridging Divides Between Distant Neighbors After Masterpiece Cakeshop, 54 U.S.F. L. Rev. 117 (2019) (The author, a Regent University Law School graduate who interned at Alliance Defending Freedom while a student, urges that "both sides" in the religious liberty vs. LGBT anti-discrimination struggle, calm down and try to find common ground.)
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