LGBT LAW NOTES

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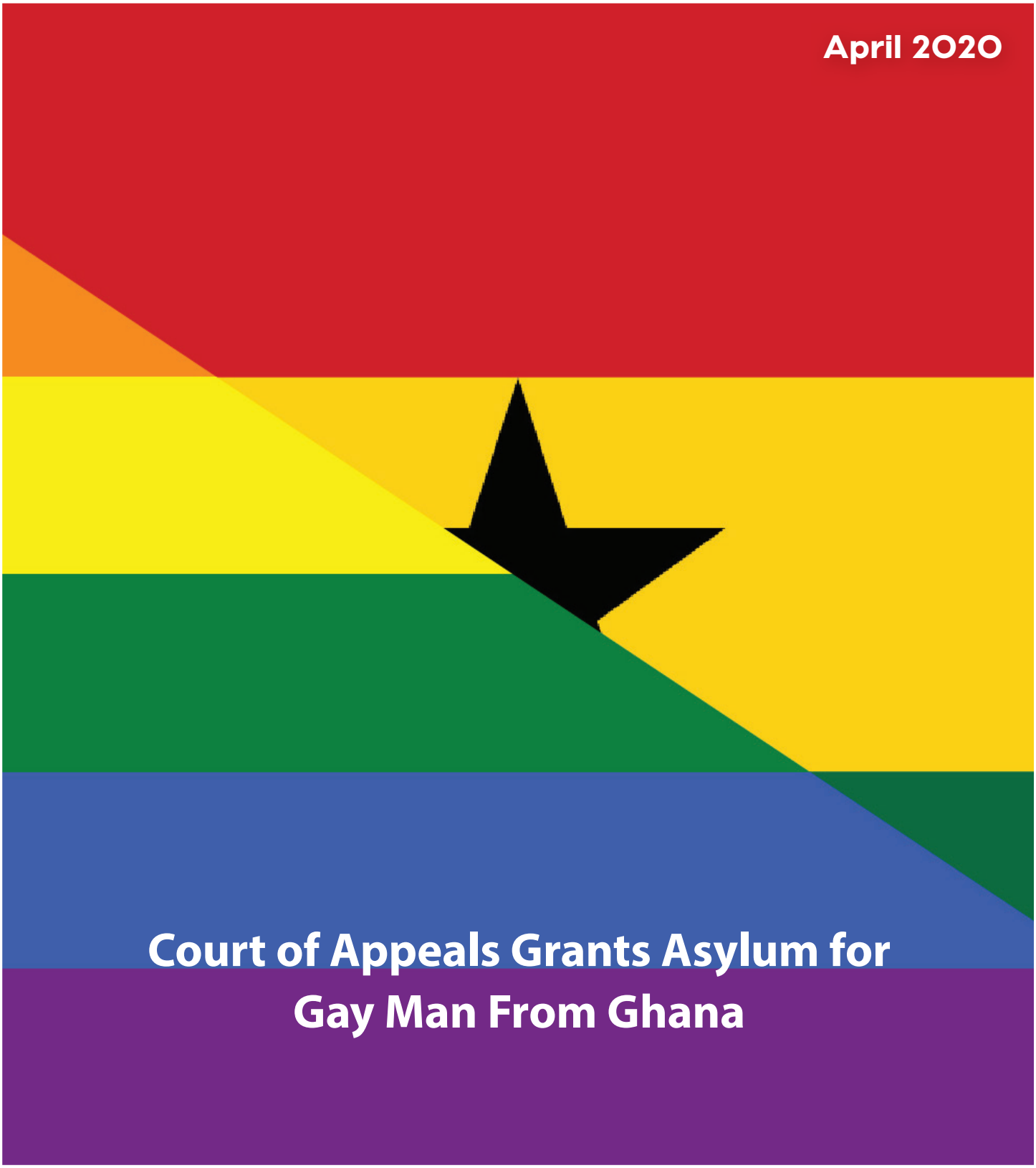

Court of Appeals Grants Asylum for Gay Man From Ghana

L G B T
LAW NOTES

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EXECUTIVE SUMMARY

3rd Circuit Court of Appeals Orders Asylum for Gay Man from Ghana

By Arthur S. Leonard

A unanimous three-judge panel of the U.S. Court of Appeals for the 3rd Circuit granted a petition by Adamu Sumaila, a gay man from Ghana, for asylum in the United States, reversing decisions by the Board of Immigration Appeals (BIA), which had affirmed an Immigration Judge (IJ) decision denying Sumaila's application. Circuit Judge Luis Felipe Restrepo wrote the opinion in *Sumaila v. Attorney General of the United States*, 2020 WL 1527070 (3rd Cir., March 31, 2020), which is noteworthy for being outspokenly critical of the administrative decision-making in this case.

Although the IJ did not conclude that Sumaila's account of what happened to him that caused him to flee Ghana was not credible, the court found that the IJ's conclusion that Sumaila had not suffered persecution severe enough make him presumptively qualified for asylum was not supported by the record, and furthermore that both the IJ and the BIA had failed to apply the appropriate standard based on 3rd Circuit case law for determining whether Sumaila met the high evidentiary bar of establishing his right to protection under U.S. refugee law.

The court particularly singled out "the instructors and students from the Immigration Law Clinic at West Virginia University College of Law for their skillful *pro bono* representation of the petitioner in this appeal." Counsel listed on the opinion representing Sumaila were Adrian N. Roe, the instructor, and Paige Beddow and Scott A. Cain, the students, who were admitted pursuant to Third Circuit LAR 46.3. The opinion indicates that the students actually argued the appeal before the court.

Sumaila testified to a harrowing experience, as Judge Restrepo summarizes his testimony in the opinion. He was born and raised in Accra, Ghana's capital, and "first realized he was gay" at age 14 when he shared an "intimate encounter with another boy," Inusah, whom he met at school. Over the next twelve years the two boys continued their relationship but kept it hidden because, Sumaila believed, such a relationship was "not acceptable." "He could not speak to his family about his feelings," wrote Restrepo, "because he worried that, as Muslims, they would disapprove of his sexual orientation or, even worse, that his father would kill him."

"When Sumaila was twenty-six years old, his anxieties materialized into a harsh reality," wrote the judge. "One morning in January 2016, his father unexpectedly entered Sumaila's bedroom at the break of dawn and discovered Sumaila having sex with Inusah. His father went into a rage and began shouting that 'his son was having sex with another man,' and called on others to 'come, come and witness what my son is up to!' He demanded answers from Sumaila and condemned his actions: 'Why do you engage in homosexuality? You have brought shame to this family and I will make sure you face the wrath of this evil deed.'"

"Upon hearing this uproar, a crowd of neighbors gathered at Sumaila's house, forming a violent mob. Together with his father, the mob began to beat the two young men with stones, wooden sticks, and iron rods, and dragged them into a courtyard. Some in the mob wanted to report the young men to the police, but others began to argue over how best to punish them: death by burning or beheading. Sumaila believed the death threats were real. He remembers being doused with kerosene, and hearing calls to set him on fire. He also saw someone in the mob brandish a 'cutlass,' a curved sword with a sharp edge like a machete. Fearing that his life was in danger, he managed to escape and ran naked, hurt and bleeding to a friend's house about ten minutes away. Sumaila told his friend about the attack and about his sexual relationship with Inusah. His friend, too, became afraid. He worried that they could both be killed if people found out that Sumaila was hiding there."

Sumaila was "too frightened to call the police" or to "seek medical care," so Sumaila asked his friend to drive him to the neighboring country of Togo. He didn't really feel safe there, either. He contacted his friend, who was able to retrieve Sumail's passport from his home, and Sumaila was able to fly to Ecuador. "Sumaila has heard that his father has publicly disowned him for being gay, that he is still looking for him, and that he intends to kill him if he finds him," wrote Restrepo, and he "still worries about Inusah, his partner of more than ten years. Despite numerous attempts, he has not been able to reconnect with him since that horrific day."

Sumaila eventually made his way across the border into the United States without formal entry papers, and filed an application for asylum. "Sumaila claimed that, after having been violently outed, attacked and threatened by his father and neighbors, he fears that he will be killed or otherwise persecuted in Ghana because he is gay," wrote Restrepo, stating in summary form the basis for Sumaila's petition.

The IJ, though crediting Sumaila's story, decided that it was just a single incident, that Sumaila was not severely enough injured to seek medical care, that he did not report it to the police (thus not giving the government a chance to take action against his father or the mob for assaulting him), and consequently that he did not prove the level of persecution necessary to trigger the presumption that he would be subjected to persecution if he were sent back to Ghana. The IJ also asserted that Sumaila could avoid persecution on being sent back to Ghana by relocating to another part of the country and keeping his homosexuality hidden. The BIA affirmed this opinion.

The court of appeals panel evidently found this treatment of Sumaila's asylum case by both the IJ and the BIA

to be rather astonishing, especially in light of Ghana's criminal law treating homosexual conduct as a crime subject to up to three years in prison, and State Department and other non-governmental human rights orgagnizations' reports about the violence gay people experience in Ghana, including in prison.

The court noted the extensive circuit-level precedent recognizing that persecution on account of sexual orientation can qualify as a ground for asylum under U.S. law, in opinions dating back several decades to the early years of the Clinton Administration. "In rejecting Sumaila's claim, however," wrote the judge, "the IJ found that Sumaila had 'not established that he suffered mistreatment on account of his sexual orientation that rises to the level of persecution.' The BIA affirmed that finding without expressly reviewing the alleged motive of Sumaila's tormentors. We construe the IJ's and the BIA's truncated decisions as rejecting both Sumaila's claim that he was targeted 'on account of' his sexual orientation and that he suffered persecution."

The court reached the contrary conclusion. "Here, there can be no serious dispute that the attack and threats Sumaila suffered were motivated by his sexual orientation," asserted Restrepo. "Sumaila credibly testified that the mob's violent and menacing behavior was instigated by his father's outrage at discovering him having sex with another man and offered evidence that his father explicitly connected this violent response to his disapproval of Sumaila's "homosexuality.' Others in the mob wanted to report Sumaila to the police, further indicating that they were reacting to his same-sex relationship since that is the only conduct that could have conceivably incriminated Sumaila under Ghanaian law. Sumaila thus has demonstrated that he was targeted on account of his membership in a statutorily protected group."

As to whether Sumaila met the test of "persecution" for purposes of U.S. asylum law, the court found that its past precedents supported his claim that a credible threat to his life and liberty because he is gay was sufficient to meet the test. "Crediting Sumaila's testimony as the BIA did, we know that a violent mob beat Sumaila with makeshift weapons and dragged him across the floor from his room to a courtyard, causing him to bleed from his mouth and suffer injuries to his head and back. Sumaila was then threatened with death by burning or beheading, at the same time that he was being doused with kerosene and exposed to a cutlass. In combination with these violent acts of intimidation and his injuries, the death threats were sufficiently 'concrete and menacing' to transform this incident from a 'simple beating' into outright persecution." The court also pointed out that, contrary to the government's argument, the fact that these threats were "unfulfilled" – i.e., that Sumaila managed to escape – did not make them any less significant, in light of the report that his father continued to threaten his life if he returned to Ghana.

"Neither the IJ nor the BIA addressed the significance of these threats under the dispositive case law available at that time, and that omission derailed their analysis," concluded the court. "The IJ focused exclusively on the 'beating,' finding that this incident was not extreme enough to constitute persecution because Sumaila had only been attacked once and he 'did not require medical treatment.'" This was a mischaracterization of the record, the court pointed out, because he credibly testified to serious injuries, stating that he was afraid to seek medical assistance because of the hostility toward gay people.

"The BIA agreed that this 'isolated' incident did not rise to the level of persecution because Sumaila 'was not so injured that he required medical attention and he was able to run to his friend's house, which was some distance away[.]' That analysis was based on a misunderstanding of the law and must be reversed . . . . It is debatable whether the record contains enough evidence to ascertain the full extent of Sumaila's injuries, but our decision need not hinge on the severity of those injuries because this case involves so much more . . . . In short, because the IJ and the BIA accepted Sumaila's testimony as true but then proceeded to misstate and ignore certain relevant aspects of that testimony, and because they committed legal error by finding that a single beating without severe physical injury to Sumaila was dispositive, their determination that his experience did not rise to the level of past persecution must be overturned."

The court also rejected the government's argument that Sumaila's failure to report this incident to the police was "fatal" to his claim. In order to gain asylum, a petitioner has to show that he was subject to persecution by the government or by private forces that the government was unwilling or unable to control. In this case, the government argued that Sumaila's father and the angry mob were not government officials, and Sumaila never sought to get the government involved in dealing with his situation. But for good reason, wrote the court, pointing to the extensive documentation presented by Sumaila's counsel about the situation confronted by gay people in Ghana.

"Here, the record is replete with evidence that Ghanaian law deprives gay men such as Sumaila of any meaningful recourse to government protection and that reporting his incident would have been futile and potentially dangerous," wrote Restrepo. "Ghana criminalizes same-sex male relationships under the guise of 'unnatural carnal knowledge,' defined to include 'sexual intercourse with a person in an unnatural manner or with an animal.' The text of this law – equating same-sex male relationships to sex with an animal – is already a clear indication of the government's official position on gay men. Although the law classifies consensual sex between men as a 'misdemeanor,' the offense is punishable by up to three years in prison. Prosecution and disproportionate punishment based on any of the INA's protected grounds, including sexual orientation, are cognizable forms of persecution, 'even if the law is generally applicable,' and perhaps significantly more, are sufficiently severe to constitute 'persecution' under this Circuit's standard . . . . Had Sumaila reported the beating or threats, he would have outed himself and his partner to the police and, on that basis, he could have been

arrested, prosecuted and incarcerated, compounding the persecution he had already suffered. This fact alone is compelling, if not dispositive, evidence that Sumaila had no meaningful recourse against his father's and the mob's homophobic violence. At best, seeking help from the police would have been counterproductive."

"The record also shows that the Ghanaian government is unable or unwilling to protect LGBTI persons from other forms of mistreatment," Restrepo continued. "For instance, Ghanaian law does not prohibit anti-gay discrimination even though there is a well-documented hostility towards the LGBTI community throughout the country. According to the State Department country report, 'societal discrimination against [LGBTI] individuals' rises to the level of a 'human rights problem,' and discrimination against LGBTI individuals in education and employment is 'widespread.' The report cites data from Ghana's Commission on Human Rights and Administrative Justice, showing that 'men who have sex with men' are among the groups of people who have reported incidents of 'stigma and discrimination,' including breaches of protected health information, blackmail/extortion, harassment/threats, and violence or physical abuse. Amnesty International's country report confirms that LGBTI individuals face 'discrimination, violence and instances of blackmail in the wider community.' Sumaila submitted other evidence echoing these accounts, including a letter from his friend stating that 'authorities in Ghana have minimal concern for gay rights and politicians are always promising electorates of eradicating gays,' as well as a news report evincing anti-gay political rhetoric ahead of the 2016 general elections."

This evidence went not only to implicating the government as a persecuting actor, but also to the issue of Sumaila's reasonable fear of persecution if he were returned to Ghana by the U.S. as a known homosexual person. Besides the matter of his father's continuing threat to find and kill him, there was ample evidence in the record that the only way he would be able to survive in Ghana would be to hide his homosexuality, and asylum law treats that as an important factor.

The IJ and BIA hung their conclusions, in part, on a report (unverified) that there was actually a prosecution going on in Ghana of somebody charged with assaulting a gay man, but there is nothing in the record about how that turned out. "Considering that homophobic violence goes largely unreported because LGBTI persons fear harassment and extortion at the hands of police officers," wrote the court, "one case in which anti-gay violence was supposedly prosecuted is hardly probative of the government's ability or willingness to protect gay men. Because the IJ and the BIA disregarded, mischaracterized and understated evidence favorable to Sumaila, including relevant portions of his testimony and the country reports, 'the BIA succeeded in reaching a conclusion not supported by substantial evidence such that we are compelled to reach a conclusion to the contrary.'"

Having concluded that Sumaila had proved that he was subjected to past persecution, the next step in the court's analysis, focusing on the question whether he had a reasonable fear of persecution if returned to Ghana, would focus on whether the government had rebutted the presumption that he would face persecution in the future. While ordinarily at this point the case would be remanded to the BIA, and subsequently to the IJ, to allow the government a chance to attempt to rebut the presumption, "remand for this purpose is not necessary here, because even without applying the presumption and corresponding burden-shifting framework, the IJ's and the BIA's finding that Sumaila does not have a well-founded fear of future persecution cannot stand on this record," wrote Retrepo.

"The IJ found that, although Sumaila '[had] credibly testified that he subjectively fears persecution if returned to Ghana,' he failed to show that 'a reasonable person would fear the same.' There is no dispute that Sumaila's subjective fear is genuine. Thus, we focus on whether Sumaila's fear of future persecution is objectively reasonable." The court found the IJ's conclusions on this point, affirmed by the BIA, to be "not supported by substantial evidence, because they are based on mischaracterizations, unreasonable inferences, and an incomplete assessment of the record."

"Up until the attack, Sumaila's ability to avoid this sort of homophobic abuse hinged on his ability to dissemble his sexual orientation and keep his sexual relationship with his partner hidden," wrote the court. "No major leap is required to conclude that other gay men like Sumaila are escaping persecution by hiding or suppressing their sexuality as well. Indeed, anti-gay laws such as Ghana's criminalization of sex between men are intended to stigmatize and punish, in effect, to suppress the expression of gay identity and sexuality in society. Secreting his gay identity is not a workable solution for Sumaila. Now that he has been publicly outed by his father, the risk of future persecution at the hands of uncontrolled private actors has increased, as evidenced by his father's success at enlisting neighbors willing to assault and kill Sumaila because he is gay."

"Sumaila is also at a higher risk of being prosecuted and punished, i.e., persecuted by the state, after being outed as a gay man. The Government responds that any future risk of arrest is not persecution because it would be 'arbitrary.' That argument misses the mark. The issue is not arbitrary arrest but state-sanctioned prosecution and punishment on account of a statutorily protected status. In no other context would prosecution and disproportionate punishment based on any of the INA's protected grounds be anything other than persecution. If Sumaila were facing these risks because of his religious beliefs or political opinion, we would not hesitate to find an objectively reasonable fear of future persecution in these circumstances."

"In short," wrote the court, "we hold that Sumaila's objective experience with anti-gay violence, the ongoing threats to his life, Ghana's criminalization of same-sex male relationships and the

widespread unchecked discrimination against LGBTI persons, combine to satisfy the requirement that his fear of persecution be objectively reasonable."

Finally, the court addressed the IJ's bizarre assertion that Sumaila could avoid persecution by staying away from Accra, his hometown, or by hiding his homosexuality. "The IJ found that there was no indication that Sumaila 'would not be safe from his family if he relocated to another part of Ghana.' That finding is based on unreasonable presumptions and a misunderstanding or mischaracterization of relevant evidence. Sumaila has reason to believe his father is still looking for him. Nothing in the record suggests that Sumaila's father cannot travel freely around the country in search of Sumaila. Considering that Ghana's criminalization of same-sex male relationships is country-wide, and that 'widespread' homophobia and anti-gay abuse is a 'human rights problem,' relocation is not an effective option for escaping persecution. Nor is it a reasonable solution," the court continued. "Relocation is not reasonable if it requires a person to 'live in hiding.' To avoid persecution now that he has been outed, Sumaila would have to return to hiding and suppressing his identity and sexuality as a gay man. Tellingly, the IJ's observation, no matter how ill-advised, that Sumaila could avoid persecution and live a 'full life' if he kept 'his homosexuality a secret,' was a tacit admission that suppressing his identity and sexuality as a gay man is the only option Sumaila has to stay safe in Ghana. The notion that one can live a 'full life' while being forced to hide or suppress a core component of one's identity is an oxymoron."

"Because Sumaila suffered past persecution and has a well-founded fear of future persecution on account of his sexual orientation and identity as a gay man, he qualifies as a refugee under the INA. Therefore, we will vacate the BIA's decision and remand for further proceedings consistent with this opinion," concluded the court.

The court supplemented its opinion with a footnote critical of the IJ's performance in this case. "In case the BIA decides to remand to the IJ for any reason, we caution the IJ to exercise greater sensitivity when processing Sumaila's application, as we are troubled by some of the IJ's comments and questions," wrote Restrepo. "In addition to suggesting that Sumaila would be better off hiding his identity as a gay man, the IJ questioned Sumaila in explicit detail about his sexual relations with Inusah, going so far as to ask about sexual positions. It is unclear why that line of questioning would be relevant to Sumaila's claim, but to the extent those questions were intended to establish or test his self-identification as a gay man, they were off base and inappropriate. We urge IJs to heed sensible questioning techniques for all applicants, including LGBTI applicants."

Judge Restrepo, a native of Colombia who became a U.S. citizen in 1993, was appointed to the district court and a few years later to the 3rd Circuit Court of Appeals by President Barack Obama. ■

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

New York Fourth Department Refuses to Extend *Brooke S.B.* to Tri-Custodial Arrangements

By Joseph Meese

The Appellate Division, Fourth Department, issuing twin opinions on March 20, 2020, found, under a narrow interpretation, that while an equitable estoppel argument for a tri-custody arrangement would be a logical extension of *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), Domestic Relations Law § 70 (DRL) precludes a tri-custodial agreement, finding that a child may only have two parents at any given time. Counsel for Tomeka is seeking to appeal this ruling to the Court of Appeals.

In *In re Tomeka N.H v. Jesus R.*, 2020 WL 1314993 (4th Dept. 2020), a biological father, who initially denied parentage when the petitioner entered into a post-conception agreement to raise the child, years later sought to deny standing for the petitioner in opposition to the biological mother, the attorney for the child, and the petitioner. In *In re Wlock v. King*, 2020 WL 1315131 (4th Dept. 2020), the petitioner, after a post-conception agreement with the biological mother, sought custody in an amended petition, when the mother fostered a parent-like relationship with the child for several years and the father supported this through his inaction during and after incarceration. However, despite a Referee's post-trial report supporting a three-parent relationship, Family Court denied standing and the Fourth Department, in a memorandum opinion, affirmed under their holding in *Matter of Tomeka N.H., supra*.

In *Matter of Tomeka N.H.*, the majority opinion, without considering the complexities of same-sex relationships—especially those pre-dating marriage equality—did not approach the issue of whether a post-conception test and

respondent's initial waiver may allow petitioner standing under equitable estoppel, a natural extension of *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), to include a tri-custodial agreement.

The petitioner and the biological mother were engaged to be married in 2009 but never married at the time because New York law then banned same-sex marriage. The couple later separated amicably in 2010; however, they reunited in September of that year, agreeing to raise the child together when the biological mother discovered she was pregnant. The respondent biological father, according to the mother, at the time denied parentage and wanted nothing to do with the child. The petitioner planned for the child's arrival by caring for the mother, attending pre-natal appointments with her, drove the mother to the emergency room when the mother went into labor, and cut the umbilical cord, holding the child immediately after birth.

The child was given both of their last names, hyphenated to represent her two parents. Although the petitioner was the non-adoptive, non-biological parent, she created and continued a parental relationship with the child fostered by the biological mother. The mother and petitioner later separated amicably in 2012 and entered into a co-parenting agreement. Petitioner continued to drive the child to school, attend parent-teacher conferences, teach her to ride a bike and roller-skate, and attend gymnastic lessons. The father, meanwhile, did not have a relationship with the child for the first two years and nine months of her life, even denying parentage in Family Court in 2013, until a paternity test proved that he was the biological father.

The majority opinion, delivered by Justice John V. Centra, affirmed the lower court's ruling and granted the father's motion to deny standing. The court held that because DRL § 70 precludes a tri-custodial agreement, and the child's biological father decided to assert his parental rights when the child was almost three years old, the petitioner did not have standing, and therefore, the question of the best interests of the child were not before the court. The majority further found that *Brook S.B.* did not contemplate a tri-custodial arrangement, relying on a footnote in the decision recognizing that DRL § 70 was limited to two parents.

The dissent by Justice Joanne Winslow, noting that the father effectively consented to the post-conception creation of a parent-child relationship between the petitioner and the mother, found that a tri-custodial agreement is a natural extension of *Brook S.B.*, would be a more equitable approach ,and would take into consideration the best interests and welfare of the child. She emphasized the legislative intent of DRL § 70, "that the courts shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness."

According to Justice Winslow, by concluding that petitioner lacks standing to seek joint custody or visitation of a child whom she has parented for more than seven years, the majority was acting contrary to the spirit and purpose of DRL § 70. In order to extend the rationale of *Brooke S.B.* and avoid inequitable results, § 70 must be read to effectuate the welfare and best interests of children, particularly those children raised in non-traditional families.

Counsel in Tomeka include Christopher D. Thomas, Nixon Peabody LLP, Rochester, and the LGBT Bar Association of Greater New York for the plaintiff-appellant. Maureen N. Polen of Rochesteer was attorney for the child. Gary Muldoon of Kaman Berlove Marafioti Jacobstein & Goldman, LLP, Rochester, was counsel for the father, Jesus R. Amy E. Schwartz-Wallace, of Rochester, was counsel for amicus Empire Justice Center, and Shannon P. Minter, admitted pro hac vice, was counsel for amicus National Center for Lesbian Rights.

Counsel in Wlock were Ryan S. Suser, of Bousquet Holstein PLLC, Syracuse, for the plaintiff-appellant, and William L. Koslosky, of Koslosky & Koslosky, Utica, for the appellee. ■

Joseph Meese is a law student at New York Law School (class of 2022) and Spring Intern at the LGBT Bar Association of New York (LeGaL).

Alaska Federal Court Says Employer's Denial of Insurance Coverage for Sex-Reassignment Surgery Violates Federal Law

By Arthur S. Leonard

A federal district court in Anchorage, Alaska, has ruled that a public employer's health benefits plan violates Title VII of the Civil Rights Act of 1964 because it categorically denies to employees, whether male or female, coverage for the surgical procedures used to effect gender transition. According to the March 6 opinion by Senior U.S. District Judge H. Russel Holland, the employer's exclusion of this coverage is "discriminatory on its face and is direct evidence of sex discrimination." The ruling does not require all employers to provide coverage for gender reassignment surgery, but it requires that they not discriminate because of an employee's sex in deciding which procedures are covered. *Fletcher v. State of Alaska*, No. 1:18-cv-0007-HRH (D. Alaska, March 6, 2020).

Judge Holland's decision has potentially wide application because Title VII applies to all employers with 15 or more employees, including both businesses and government employers at the federal, state and local levels. Although a trial court ruling is not a precedent binding on other courts, Judge Holland's explanation for his ruling may provide a persuasive precedent both for courts confronting similar claims and for employers deciding how to respond to employees seeking such coverage under their employee benefit plans.

Lambda Legal filed suit on behalf of Jennifer Fletcher, who works as a legislative librarian for the State of Alaska. Fletcher is enrolled in AlaskaCare, a self-funded employee health care plan that is administered by Aetna Life Insurance Company.

The Plan "provides benefits for medical services and procedures that are medically necessary and not otherwise excluded from the Plan," according to the State's written responses to discovery questions posed by Fletcher's attorney from Lambda Legal, Tara L. Borelli.

During discovery in this case, the State conceded that for "some" transgender individuals, surgical procedures for gender transition may be "medically necessary," but the plan formally excludes performance of the procedures in question for that purpose. The procedures in question are covered for employees if they are necessary to address a medical issue other than gender transition. None of the procedures at issue in this case are used solely in connection with gender transition.

Fletcher was diagnosed with gender dysphoria in 2014 and began the process of social, legal, and medical transition under professional care, starting hormone therapy that year. By 2016, she and her health care provider agreed that gender transition-related surgery was necessary for her transition. In her complaint, Fletcher claimed that such treatment was "essential" for her "well-being."

In November 2016, Fletcher contacted Aetna to discuss coverage for her surgical treatment, but was told that the Plan did not cover it, and would not in 2017. Although the Plan has since been modified to allow coverage for some aspects of gender transition, hormones and counseling, the express exclusion of surgery continues.

Fletcher's request for coverage spurred the State to study the cost of eliminating this exclusion, for which it engaged a consultant, who advised that the annual increase in claims on the Plan would be $60,000. Although there was internal discussion about this within the State government, no further action was taken to change the Plan to cover surgical transition procedures.

Because AlaskaCare would not cover her surgery, Fletcher obtained her surgery in Thailand, where the procedure is less expensive than if it were performed without insurance coverage in the Unites States. She filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that the Plan's exclusion violates Title VII's ban on discrimination in "terms and conditions of employment" because of an individual's sex. The State's simplistic response was that because the Plan excludes coverage for any surgical procedure for purposes of gender transition, whether the employee involved was identified as male or female at birth, there was no discrimination "because of sex." The EEOC rejected this argument, and issued a finding that the State's policy violates Title VII. On May 17, 2019, the EEOC notified Fletcher that its attempt to "conciliate in this matter" with the State was unsuccessful, authorizing her to file a lawsuit.

Fletcher's complaint alleged that the State discriminated against her because of her "sex" which, she alleged, includes "discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition." This list covered all the bases of different theories that federal courts have used at various times to evaluate Title VII claims by transgender plaintiffs. After discovery, Fletcher moved for summary judgment on the question whether the Plan exclusion violates Title VII, while the State moved for summary judgment to dismiss the entire lawsuit on the merits.

As it turned out, the list of alternative coverage theories in Fletcher's complaint was unnecessary, because Judge Holland concluded that the exclusion was, on its face, discrimination "because of sex."He based this conclusion on the State's concession that all the surgical procedures involved in Fletcher's transition would be covered if they were performed for reasons other than gender transition.

Thus, if Fletcher was identified as female at birth but needed the vaginoplasty procedure for some reason other than transition, she would be covered, and indeed that procedure is employed to deal with some medical conditions experienced by women. Because she was identified as male at birth, however, coverage for the the procedure was denied, because its only purpose for somebody identified as male at birth would be for gender transition. To Judge Holland, this was clearly an exclusion specifically because of the sex of the employee, and one had to go no further into theories of gender nonconformity, gender identity or transgender status in order to bring her claim within the coverage of the statute.

Under Title VII, any "disparate treatment" between men and women regarding a particular term or benefit of employment is illegal unless it can be justified as a "bona fide occupational qualification" (BFOQ) that is "reasonably necessary to the normal operation or essence of an employer's business." In this case, Holland commented, "Defendant has not argued, nor could it, that there is any BFOQ for the disparate treatment at issue here. As such, plaintiff is entitled to summary judgment that defendant violated her rights under Title VII."

While granting Fletcher's motion, the court simultaneously denied the State's summary judgment motion. Still to be determined is the remedy for the violation. As Fletcher has already had the surgical treatment, the court needs to decide what to award for compensation for violation of the statute. In light of the court's decision on the merits of Fletcher's claim, it is likely that the parties will negotiate a settlement on damages.

Judge Holland was appointed to the District Court by President Ronald Reagan and took senior status in 2001.■

North Carolina Federal Court Refuses to Dismiss Challenge to North Carolina's Exclusion of Coverage for Gender Transition from State Employee Medical Plan

By Arthur S. Leonard

On March 11, U.S District Judge Loretta C. Biggs denied the state's motion to dismiss a lawsuit brought by Lambda Legal claiming that the State Health Plan's categorical exclusion of coverage for treatment sought "in conjunction with proposed gender transformation" or "in connection with sex changes or modifications" violates the Equal Protection Clause, Title IX, and Section 1557 of the Affordable Care Act (ACA). *Kadel v. Folwell*, 2020 WL 1169271, 2020 U.S. Dist. LEXIS 42586 (M.D.N.C.). The state university defendants had moved to dismiss the Title IX claim, and the State Health Plan defendants had moved to dismiss the Equal Protection and ACA claims. The plaintiffs are all current or former employees of the university defendants, or dependents of university employees, which were all enrolled in the Plan and are the parents of transgender individuals who have been diagnosed with gender dysphoria and are seeking treatment that is categorically excluded from coverage under the Plan.

The plaintiffs jointly allege that since the 1980s the Health Plan covering employees of the state university and their dependents has denied coverage for medically necessary treatment if the need stems from gender dysphoria, as opposed to some other condition. Thus, a cisgender woman's medically necessary mastectomy would be covered, but a transgender man's mastectomy for purpose of gender transition would not be covered. With the exception of 2017, this exclusionary policy has been in effect. Third party administrators retained by the employers to administer the plans – Blue Cross Blue Shield of North Carolina (claims administrator) and CBS Caremark (pharmaceuticals) – sell this kind of coverage to other employers, this it would be possible for the state to include such coverage using their current administrators, who are experienced in dealing with such claims.

The statutory causes of action (Title IX and ACA) would require the court to conclude that discrimination because of gender identity is covered under the statutory prohibition of sex discrimination, while the constitutional claim would require a finding that gender identity discrimination claims are actionable under the Equal Protection Clause of the 14th Amendment.

Judge Biggs turned first to the statutory claims in her analysis. She first rejected the state university's claim that the suit should not be against them, because the state government dictates the content of their employee benefits plans. She found that the defendants "offer" the plan to plaintiffs, and "participate" (or participated) in its availability. "Indeed," she wrote, "had University Defendants not hired Plaintiffs, they would not have been permitted to enroll in the Plan at all. The Court finds, at this stage, those facts provide a sufficient nexus between the alleged injuries the University Defendants." Also, responding to the University's argument that a ruling against them would not redress the plaintiffs' claims because the defendants are bound by state policy, Biggs wrote that "there are other ways in which a favorable ruling on Plaintiffs' Title IX claim could give them the relief they seek. First, Plaintiffs have asked for – and 'personally would benefit in a tangible way' from – an award of damages." Further, she noted, the university defendants might offer supplemental coverage beyond what the state Plan provides. She also rejected defendant's arguments that since some of the Plaintiffs are not themselves transgender, their injuries are only indirect, because the minor plaintiffs' "only ties" to the university are through their parents' employment. Judge Biggs found that the parents were in this case within the class of plaintiffs protected by Title IX.

Turning to the argument that gender identity claims are not cognizable under Title IX, Biggs took note of the fact that the Supreme Court was considering whether Title VII covers gender identity discrimination claims in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107, which was argued on October 8, 2019, and had not been decided yet. The defendants argued that this case should be put "on hold" until a Supreme Court ruling was issued. "Because courts in this circuit often look to Title VII when construing like terms in Title IX," she noted, "the Supreme Court's decision could potentially impact the viability of the Title IX claim in this case. At this time, however, this Court is left to make its own determination as to whether discrimination 'on the basis of sex' encompasses discrimination on the basis of transgender status," and she noted *Grimm v. Gloucester County School Board*, 302 F. Supp. 3d 730 (E.D. Va. 2018) and *M.A.B. v. Board of Education of Talbot City*, 286 F. Supp. 3d 704 (D. Md. 2918), in which other district courts also within the 4th Circuit have ruled that such claims are covered by Title IX. Biggs wrote that she "agrees with their reasoning and follows it here." She also noted that some other district courts in other circuits have faced similar arguments challenging transgender exclusions under state employee benefit plans, and have ruled against the employing states in those cases.

"University Defendants do not seriously contest that discrimination because of transgender status is discrimination because of sex (although State Defendants do)," she wrote. "Rather, in moving to dismiss for failure to state a claim, they simply rephrase their arguments related to standing. There is no dispute that 'a recipient

of federal funds may be liable in damages under Title IX only for its own misconduct; the parties just disagree over whether University Defendants' conduct is sufficiently implicated in this case." Biggs held that "at this stage" in the litigation, the plaintiffs' allegations concerning the university defendants' role in providing benefits to their employees are sufficient both for standing and for the Title IX claim, and denied the motion to dismiss the Title IX claim.

Turning to the ACA claim, the state defendants argued sovereign immunity. "Section 1557 does not purport to condition a state's acceptance of federal funding on a waiver of sovereign immunity," she wrote. "Nor does any other provision of the ACA. However, in the Civil Rights Remedies Equalization Act of 1986 (CREA), Congress explicitly stated that a state shall not be immune from suit in federal court 'for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal assistance." The 4th Circuit found clear congressional intent to waive the state's sovereign immunity if they accepted money in programs that prohibit discrimination. The state's response was that the lack of mention of gender identity or transgender status in Section 1557 shows that North Carolina did not "knowingly" waive its sovereign immunity with respect to discrimination claims on these bases. Disagreeing, Biggs wrote that the state's potential exposure to such suits should not have been "surprising," because "courts across the country have acknowledged for decades that sex discrimination can encompass discrimination against transgender plaintiffs. Further, as a general matter, 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,'" citing *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1999). She asserted that surely the state would agree that Title IX covers sexual harassment claims, even though the word "harassment" does not appear in the statute. "By the same token, Section 1557 need not include the precise phrasing State Defendants demand to provide sufficient notice of a condition of waiver."

Turning to the constitutional claim, asserted against specific state officials in their official capacity, she found convincing the case law supporting heightened scrutiny for gender identity discrimination claims as being essentially sex discrimination claims. "On its face," she wrote, "the Exclusion bars coverage for 'treatment in conjunction with proposed gender transformation' and 'sex changes or modifications.' The characteristics of sex and gender are directly implicated; it is impossible to refer to the Exclusion without referring to them. State Defendants attempt to frame the Exclusion as one focused on 'medical diagnoses, not . . . gender.' However, the diagnosis at issue – gender dysphoria – only results from a discrepancy between assigned sex and gender identity. In short, the Exclusion facially discriminates on the basis of gender, and heightened scrutiny applies." And, quoting from *United States v. Virginia*, 518 U.S. 515 (1996), she wrote, "A policy that classifies on the basis of gender violates the Equal Protection Clause unless the state can provide an 'exceedingly persuasive justification' for the classification." [Thank-you, Justice Ginsburg!] Judge Biggs found that at this stage in the litigation, "State Defendants have failed to satisfy this demanding standard" and, in fact, "the only justification presented thus far is that the Exclusion 'saves money.' Under ordinary rational basis review, that could potentially be enough to thwart Plaintiffs' claim. However, when heightened scrutiny applies, 'a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens,'" quoting from *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

Next, Judge Biggs rejected the state defendants' argument as a ground for dismissal the plaintiffs' failure to join the Health Plan's Board of Trustees as a required party, as they would have to vote to make any change in the Plan that would be required to repeal the Exclusion. She found that the state defendants "share primary responsibility for the operation and administration of the Plan" so an award of declaratory, injunctive and monetary remedies against them would "give plaintiffs all the relief they seek."

Finally, rejecting defendants' request that the action be stayed pending the Supreme Court's ruling in Harris Funeral Homes, Judge Biggs pointed out that "the potential harm to Plaintiffs resulting from even a mild delay is significant, as they will continue to be denied healthcare coverage for medically necessary procedures. In contrast, the 'harm' to Defendants of not staying this case appears to be nothing more than the inconvenience of having to begin discovery." This is obvious. Since discovery hasn't begun yet, there is no chance this case would be ready for a motion for summary judgment for many months, and the Supreme Court will likely rule in Harris by the end of June. "Judicial economy is, of course, a consideration," wrote Biggs. However, this case is in its infancy, and it may be months before a decision issued in Harris – a substantial delay for those seeking to vindicate their civil rights. Given the ongoing harm to Plaintiffs and Defendants' failure to present 'clear and convincing circumstances' outweighing that harm, this Court declines to exercise its discretion to stay the proceedings."

Thus, pending motions to dismiss are all denied. As of the end of March, the defendants had not petitioned the 4th Circuit for a stay.

Counsel for plaintiffs include Deepika H. Ravi, of Harris, Wiltshire & Grannis LLP, Washington, DC; Meredith T. Brown and Tara L. Borelli, Lambda Legal Defense And Education Fund, Inc., Atlanta, GA; Noah E. Lewis, of Transgender Legal Defense & Education Fund, Inc.; Omar F. Gonzalez-Pagan, Lambda Legal Defense And Education Fund, Inc., New York, NY; and Amy E. Richardson, Wiltshire & Grannis LLP, Raleigh, NC (local counsel). Judge Biggs was appointed to the District Court by President Barack Obama in 2014. ■

Ohio Appeals Court Holds Misgendering Defendant During Trial is Not Grounds for Reversal

By Arthur S. Leonard

Jason Ray Cantrill, who identifies as a transgender woman, was on trial in the Lucas County, Ohio, Court of Common Pleas on charges stemming from her participation in several burglaries, defended by appointed counsel. She presented herself as a woman throughout the trial in terms of her dress and grooming. The jury convicted her on all but one weapons count, and the court sentenced her to cumulative sentences of 26 years. On appeal to the Ohio 6th District Court of Appeals in *State of Ohio v. Cantrill*, 2020-Ohio-1235, 2020 WL 1528013, 2020 Ohio App. LEXIS 1166 (March 31, 2020), her first Assignment of Error was that throughout the trial the prosecutor and the judge had, from time to time, misgendered her (i.e., used male pronouns and the word "Mr." to refer to her), which she claimed was a structural defect that required setting aside the sentence.

Judge Gene A. Zmuda's opinion goes into the issue of Cantrill's gender identity at some length, quoting from the *voir dire* questioning by prosecution and defense counsel, both of whom referred to the issue and questioned whether jurors could be fair and impartial knowing that defendant was a transgender woman. One juror who had implied some doubt was removed. The prosecutor made clear at the beginning of the trial that he intended to address and refer to Cantrill as a woman and apologized in advance should he slip and inadvertently refer to her as a man. The court quoted his statement in full:

Earlier we talked about the subject of the defendant. The defendant has requested that at this trial she be referred to using female pronouns. I'm going to do my best to honor that request and respect that. If at some point during the trial I mistakenly refer to the defendant by a male pronoun, I apologize to the defendant, I apologize to you, the jury. I'm going to do my best. You might hear some evidence from witnesses. They might use different ways to refer to the defendant. We'll try to make clear during the course of the trial that they're speaking about the person who's seated at the defense table.

Cantrill premised her gender identity discrimination argument mainly on the Supreme Court's *Batson* decision and the 9th Circuit's ruling in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir.2014), where the 9th Circuit extended Batson (which involved the prosecution unconstitutionally using peremptory challenges to avoid seating Black jurors in a case with a Black defendant) to hold that excluding a potential juror using a peremptory challenge because he was gay could be grounds for setting aside a verdict. Cantrill argued that misgendering her during the trial was analogous to using a peremptory to remove a gay or transgender juror, a structural flaw that would justify reversing the guilty verdict. The court of appeals noted that the question whether gender identity discrimination is sex discrimination is pending before the Supreme Court, but in a different context (i.e., Title VII, in the *Harris Funeral Home v. EEOC* appeal).

Judge Zmuda wrote that Cantrill had not persuasively shown that inadvertent misgendering of her occasionally during the trial was the type of error that would justify rejecting the jury's verdict. "Cantrill's reasoning contains large gaps, with little to link her claim of unlawful discrimination, normally asserted in a civil proceeding, to the rights guaranteed in a criminal proceeding," wrote Zmuda. "Her reference to *SmithKline* as extending *Batson*, furthermore, does little to bring the concept into better focus, as the issue in *Batson*, or even *SmithKline*, had nothing to do with allegations of discrimination against a party *during* the proceeding . . . . In this instance, Cantrill invokes *Batson* as a talisman, without any reasoning to extend the law beyond jury selection, arguing instead that misgendering resulted in a structural error because *Batson* violations constitute structural error. What is missing in Cantrill's argument, however, is a clear articulation of the exact, legal right she believes is implicated, vis-à-vis *Batson*. Furthermore, Cantrill does not assert that the state or the trial court acted in any discriminatory manner to exclude certain members of the venire from jury service."

Judge Zmuda also referred to the 5th Circuit's decision in *United States v. Varner*, 948 F.3d 250 (5th Cir.2020), an egregiously offensive panel decision that rejected a transgender litigant's request to be referred to by her preferred pronouns in the litigation. The 5th Circuit panel majority said that no legal authority compelled the court to honor such a request, but a strong dissenting opinion stated that this did not mean that the court could not honor the litigant's request as a matter of dignity. "We agree with the dissent's view, that using an individual's preferred pronouns demonstrates respect for that person's dignity, regardless of what the law may require or prohibit," wrote Judge Zmuda. "There is no place in our judicial system for malice, disparagement, or intentional disrespect toward any party, witness, or victim, and this includes improper treatment arising from a bias toward a transgender person."

Nonetheless, the court found that the misgendering in this case did not constitute the kind of structural error that could justify setting aside the jury's verdict. "Cantrill does not argue conduct arising from any overt bias, however," wrote Zmuda. "At best, she argues conduct that was careless or thoughtless, claiming the cumulative result of misgendering created structural error. While it is conceivable that misgendering might be so overt, malicious, and calculating that it prevents a fair trial, Cantrill fails to demonstrate that this is that case. Even

if we acknowledged that the attorneys and trial court acted carelessly or thoughtlessly in misgendering Cantrill, more than careless or thoughtless treatment is required to create structural error."

Cantrill's second assignment of error contended that her appointed defense counsel, who also occasionally misgendered her during trial, had rendered ineffective assistance. The court of appeals rejected this contention as well, Zmuda writing that "although trial counsel was careless in inconsistently using her preferred pronouns, and failed to correct himself or others when they misgendered Cantrill, the misgendering did not deprive Cantrill of any constitutional right. Because Cantrill relies on a finding of structural error to demonstrate prejudice, and does not otherwise identify any resulting prejudice to support her claim of ineffective assistance of counsel, her argument regarding ineffective assistance arising from misgendering is without merit."

The court also rejected Cantrill's attempt to get it to make "new law" on the subject of prosecutorial conduct based on the prosecutor's misgendering of her, once again emphasizing that it was not intentional and that the prosecutor apologized in advance should he slip up in this regard. The court also rejected several other assignments of error and affirmed the trial court's sentence.

Cantrill was represented on this appeal by Karin L. Coble. ■

Indiana Court of Appeals Admonishes Trial Court for Misgendering a Petitioner and Failing to Apply the Proper Legal Standard on His Name/Gender Change Petition

By Corey L. Gibbs

R.E., a transgender man, sought to change his name on government documents and the gender marker on a birth certificate. Initially he sought to accomplish this task *pro se*. However, the trial judge, Newton Circuit Judge Jeryl F. Leach, continuously rejected R.E.'s efforts by claiming that his documents were inadmissible. R.E. sought counsel, and the case was appealed. On appeal the Court of Appeals of Indiana found that: the trial court used an erroneous legal standard for determining the petition; the trial court unreasonably refused to seal the records; and the trial court treated R.E. inappropriately. The court reversed the trial court's decision and remanded the case with instructions that R.E.'s petition be granted. *In the Matter of the Name and Gender Changer of R.E.*, 2020 WL 1173967; 2020 Ind. App. LEXIS 98 (March 12, 2020).

R.E. was identified as female at birth, but he came to identify as male. At the time of his first hearing, he had been transitioning for over two years but publicly representing himself as male for three years. He filed a Verified Petition for Change of Name and Gender in the trial court. He asserted his awareness of violence towards the transgender community, and he requested to waive publication of his name change and seal the record.

During the February 2019 trial, he presented the judge with percentages and information regarding the discrimination that trans individuals face. R.E. even cited an earlier decision by the Court of Appeals of Indiana in support of his petition. He pleaded with the judge to seal the record. However, the judge stated, "Considering what evidence I do have in front of me, I don't believe you have shown enough for me to grant the request you are asking for." R.E.'s initial request failed.

He published a notice of his petition. The court held a second hearing in June 2019 regarding his Verified Petition for Change of Name and Gender. R.E. relied on medical records to show that he was treated by a physician. However, the court refused to accept the documents when the physician mailed them directly to the court. R.E. did not receive notice of the court's rejection.

R.E. filed a verified statement with the court and attached both a statement from his physician and an affirmation from the physician. He requested that the trial court inform him if the submissions would not be admissible at a July hearing. One week later, the trial court responded that the documents would not be admissible. After the July hearing, R.E. obtained counsel, and the court continued the hearing to October.

At the October hearing, R.E.'s counsel sought to seal the records and moved for the court to grant the petition for a change of name and gender. The judge proceeded to berate R.E.'s counsel, disregarded the Court of Appeals' prior decision, and intentionally misgendered R.E. The counsel for R.E. responded to the court, "[I]t sounds like what you are saying, under your view of gender and sex, you shouldn't be able to get a name change without proving you are biologically the sex you are seeking to change to, which I understand is a common view, but it's not the legal view." The court refused to seal the record and denied the petition for a change of name and gender.

On appeal, the Court of Appeals of Indiana found that the trial court used an erroneous legal standard for determining the petition. The law in Indiana simply requires that R.E. make the petition in good faith. The trial court required medical evidence of a physical change to R.E.'s body, which is contrary to the law. The court reversed the trial

court's decision and remanded it with instructions to grant R.E.'s petition.

The court also found that the trial court unreasonably refused to seal the records. Writing for the court, Judge Edward Najam, Jr., stated that the court's precedent, relied upon by the petitioner, is unambiguous. The trial court was even informed of the relevant case law. R.E.'s testimony of the risks he faced was sufficient to support sealing the record. The trial court's judgment was reversed, and remanded with instructions to keep the case sealed.

Finally, Judge Najam wrote that the trial court treated R.E. inappropriately, listing some of the grievances and stating: "The trial court acted contrary to law when it did not apply the proper legal standards to R.E.'s petition, forced R.E. to publish notice in a newspaper and out himself as a transgender person, and, instead of ruling on a simple petition in a timely manner, dragged out that petition through four proceedings over the better part of [a] year." The court also noted the trial court's continued use of the incorrect pronoun, along with the use of the word "it" to refer to the petitioner. The court declared that all parties deserve to be treated with dignity and respect.

International Transgender Day of Visibility was on March 31. While we reflect on the importance of being visible, we must remember that visibility is not an option for everyone, yet. This case highlights the fear the appellant had. As we celebrate those that are *out* publicly, we must continue to protect those that are not and respect their choices with regard to being *out*. The trial court sought to make that decision for R.E., but the Court of Appeals pushed back. Members of the LGBTQ+ community and allies must continue to push back to protect both those seeking visibility and those that do not.

R.E. was represented by Michael R. Limrick of Hoover Hull Turner, LLP; Kathleen Cullum of Indiana Legal Services, Inc. (Indianapolis); and Megan Stuart of Indian Legal Services, Inc. (Bloomington). ■

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

Superior Court of Pennsylvania Denies Same-Sex Common Law Marriage in Divorce Action, Noting Failure to Meet Heavy Burden of Proof

By David Escoto

On March 9, 2019, the Superior Court of Pennsylvania upheld a trial court decision that a couple had not entered into a common law marriage, denying one partner's divorce action. John Dugan appeals the decision by the trial court, insisting that the court erred to weigh the fact that when he entered into a relationship with Joseph Greco, same-sex marriage was illegal. Although the men purchased rings on a vacation to Mexico and lived together, the court affirms that at no time before the legislation abolition of common law marriage in Pennsylvania did the parties have a mutual present intent to marry. *Dugan v. Greco*, 2020 Pa. Super. Unpub. LEXIS 812; 2020 WL 1139061 (Pa. Super. Ct.). The court makes clear that same-sex couples can still validate a common law marriage, but they must satisfy the same heavy burden of proof that heterosexual couples must satisfy.

Dugan and Greco began their relationship online and had their first date on May16, 1998. In August 1998, Dugan and Greco vacationed together to Cancun, Mexico. Dugan purchased a braided silver ring for himself at a flea market. Greco liked the ring so much that he ended up buying one for himself. They each wore their ring on their right hand. Greco and Dugan's recollections of the evening after they purchased the rings differ slightly, but both agree they did not exchange the rings or discuss marriage.

Greco testified that the rings purchased in Mexico did not symbolize marriage, but rather served as a reminder of Dugan. Dugan testified that the braided rings symbolized "togetherness." Dugan recalled saying that they were going to put the rings on their right hand because it would signify that "they were different" and not recognized by the law as being able to be married. The couple always celebrated their anniversary as May 16, the day they first met. Dugan says this is because there was no legal recognition of same-sex marriage, but they were nonetheless in a partnership.

In November 1998, the couple moved in together to Greco's home in King of Prussia, Pennsylvania. One year later, the couple purchased property in Phoenixville, Pennsylvania. They hired an architect to build a house and moved in sometime between 2000 and 2001. Dugan testified Greco paid for a majority of the home and that he was not listed as a debtor on the mortgage because of his bad credit. Greco purchased vehicles for the couple and put both of their names on the titles. They appeared on each other's car insurance policies. Greco testified that he helped Dugan out because Dugan could not afford it on his own.

In 2013, Greco purchased new Tiffany & Co. rings for both of them. The rings were inscribed with their initials, the date they met, and an infinity symbol. They wore the rings on their right hands. In 2014, they purchased a home together for the use of Greco's parents in Phoenixville. On the deed, the couple was signified as grantees with joint tenancy with the right of survivorship. Around the same time, Greco purchased the property adjacent to the couple's home, previously owned by an elderly couple. Greco became the sole titled owner of both properties.

In 2015, Dugan's mother passed away. Dugan helped draft the obituary. In the obituary, Dugan referenced each of his sisters-in-law as "wives of" the brother to whom they were married. However, no such relationship was identified with Greco in the obituary. Dugan was also experiencing a lot of work-related stress. Greco encouraged Dugan to quit his job. To get on Greco's employer-provide health insurance, Greco had to designate Dugan as either a spouse or domestic

partner. Since they were not married but lived together, they needed to provide the proper documentation to show their domestic partnership. Greco added Dugan's name to a savings account as part of the documentation.

At no time, before or after the legalization of same-sex marriage in Pennsylvania, did the couple engage in a formal commitment or marriage ceremony. Greco testified that he wanted to get married, but Dugan said that he did not feel they needed to be married because they "had been living as a married couple." Dugan testified that at that point, they "were definitely on a rocky road," but a marriage certificate was not going to help them. However, when asked whether Dugan had expressed these sentiments, Greco denied it. The couple separated in June 2018.

Dugan filed for divorce on January 9, 2019. In response, on January 29, 2019, Greco filed for a declaratory judgment and dismissal. The trial court granted Greco's petition for declaratory relief and dismissed Dugan's divorce claim. Dugan appeals the trial court's decision.

Pennsylvania abolished common law marriage by statute in 2005. However, if the common law marriage can be established at a point in time before the abolition, Pennsylvania finds it remains valid. This means that Dugan must show through that they had a common law marriage before January 1, 2005. To establish a common law marriage, "an exchange of words in the present tense, spoken with a specific purpose of establishing a marital relationship," must be found. The other way to establish a common law marriage is to rely on the rebuttable presumption of marriage when a party demonstrates constant cohabitation and a general reputation for marriage.

The court turns to *Estate of Carter*, 159 A.3d 970 (Pa Super. 2017), the first time Pennsylvania courts addressed the right for same-sex couples to form a common law marriage post-*Obergefell*, as precedent. In that case, Michael Hunter and Stephen Carter met and began a relationship in 1996. Ten months later, Hunter asked Carter to marry him and gave him a ring. Carter said yes, and two months later, Carter gave Hunter a ring. The couple celebrated the date of the second ring exchange as their anniversary until Carter died in 2013. Hunter sought a declaration of common law marriage. On appeal, the court held that same-sex couples had the same capacity as different-sex couples to enter into common law marriages established before January 1, 2005. Same-sex couples have the same burden of proof in establishing the existence of a common law marriage.

Under this precedent, testimony of specific and particular words is not required, but context matters. A court may not discount that a same-sex couple seeking a declaration of common law marriage formed on or before January 1, 2005, would not have had the legal right to have that union recognized at the time.

Applying this standard to Dugan and Greco, Dugan argues that the purchase of the rings in Mexico established a present intent to form a union as a "forever partnership." The trial court disagreed, and found that there was no evidence of an exchange of words during their trip to suggest a present intent to form a common law marriage. As noted, neither Dugan nor Greco testified that after purchasing the rings in Mexico, they had any discussion regarding an intent to marry. Without evidence of the present intent to marry, the trial court did not find that Dugan met his burden of proof.

On appeal, the Superior Court agreed with the trial court's conclusion, in an opinion by Senior Judge James Gardner Colins. The testimony of both parties did not indicate a mutual consent to the union, wrote Colins. Part of Dugan's argument on appeal was that the trial court failed to take into account that same-sex marriage was illegal for a majority of their relationship when applying the law to a common law marriage. Dugan alleges that the court should not have required proof that the couple used words such as "husband" or "spouse" when referring to their partnership. The standard in Estate of Carter does not require specific words, but does require "words in the present tense designed to ensure the existence of the present intent to marry."

The court finds critical differences between Dugan and Greco's relationship from that in Estate of Carter. Carter proposed marriage with a ring, followed by Hunter's exchange of a ring two months later, and a celebration every year to commemorate the second ring exchange. The evidence there was sufficient to corroborate testimony of words exchanged establishing a "present intent" to marry. In the case of Dugan and Greco, however, the fact that each bought his own distinct ring and celebrated the anniversary of their first date did not suffice to meet Dugan's burden.

Dugan also argued that they should fall under the rebuttable presumption in favor of common law marriage because of their constant cohabitation and a reputation for marriage. However, the court noted that the rebuttable presumption only applies where the parties are not available to testify regarding their present intent to marry. If a party can testify and fails to establish an intent to enter into a marriage contract through the exchange of present tense words, then they have not met the burden required of proving a common law marriage. The testimony weighs heavily against affording a party such a presumption.

In a short concurring opinion, Judge Eugene Strassburger makes clear that the court is not holding that same-sex couples cannot establish common law marriages before the prohibition in 2005, but that in this specific case, Dugan failed to meet his burden of proof. Judge Strassburger again points to Estate of Carter as the precedent allowing validation of pre-2005 common law marriages so long as they meet the burden of proof. The fact that Judge Strassburger wrote separately to emphasize the court's position on protecting a same-sex couple's access to common law marriage is a valiant effort to make sure that this case is not misconstrued to stand for something that it does not.

The court's opinion does not list counsel for the parties. A brief retrieved on Westlaw shows that Greco was represented by Thomas P. McCabe, of O'Donnell, Weiss & Mattei, P.C., Pottstown, PA. ■

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

U.K. Court of Appeal Squashes Non-Gendered Person's Effort to Obtain a Passport with Non-Binary Gender Marking

By Eric J. Wursthorn

On March 10, 2020, the UK Court of Appeal (Civil Division) affirmed a lower court judgment which dismissed a UK citizen's challenge of the government's refusal to issue a passport with an "X" marker in the gender field. The UK citizen in question is Christie Elan-Cane and according to per twitter, Elan-Cane is non-gendered and uses the pronouns per/per/perself. *The Queen and Secretary of State for the Home and Human Rights Watch*, [2020] EWCA Civ 363 (March 10, 2020).

Although assigned to the female gender at birth, Elan-Cane underwent several medical procedures in per 30s to achieve a desired status of "non-gendered." Since 1995, Elan-Cane has sought a UK passport "without the necessity of making a declaration of being either 'male' or female.'" According to the UK Court of Appeals' decision, Elan-Cane would be satisfied with a third box added to the passport application form allowing a person to mark that box with an "X" indicating "gender unspecified". However, Elan-Cane's request for a non-binary gender marking was rejected by Her Majesty's Passport Office "because a declaration of gender was a mandatory requirement" and Elan-Cane was thus issued a passport with the female gender designation.

In 2005, Elan-Cane learned that the United Nations International Civil Aviation Organizsation (sic) permitted member countries to issue passports with either "M," "F," or "X", the latter for gender unspecified. In that vein, both New Zealand and Australia permitted the gender unspecified passport designation in 2005 and 2011, respectively. Undeterred, the UK again rejected Elan-Cane's request for a gender unspecified designation. As of when per appeal was heard, the Court of Appeals acknowledged that eleven countries permit "X" gender designations on passports.

Meanwhile, in 2014, Her Majesty's Passport Office issued a report explaining its policy of refusing to allow an "X" gender designation because: "[t]here is no provision in the passport or on the passport application form for a person to transition from one gender to no gender or to state that they do not identify in either gender. This is in line with UK legislation that recognizes (sic) only the genders Male and Female."

The Passport Office went on to justify its position because there is only one "campaigner" seeking alternate gender designations, presumably Elan-Cane, and otherwise there were "no calls for change from gender representative groups or civil liberties groups." The Passport Office did however acknowledge a petition by the "campaigner" seeking a change in passport gender markings which had garnered 667 signatures.

The Passport's Office report further opined that "recognition of a third gender . . . would be in isolation from the rest of government and society." Finally, the Passport Office report indicated that "altering the passport application process by adding the "X" marker would [cost] in the region of £2 million."

In the present appeal, the government argued that there is notba "positive obligation on the state to provide legal recognition of the many different ways in which individuals may define themselves, and in particular no obligation legally to recognise a non-gendered identity."

The UK Court of Appeals details in its decision, largely written by Lady Justice King, a number of review efforts undertaken by both the Passport Office and the UK Government in general regarding the issue of recognition of non-gender binary persons. Despite such incomplete efforts, Elan-Cane essentially remains in a holding pattern from her initial request made in 1995. Elan-Cane argues in per appeal that "the Government should be compelled to act rather than be permitted to launch a tardy and largely irrelevant review." In turn, the government contends that it is committed to addressing non-binary gender identity issues and has properly chosen to address same "in a coherent and wide-ranging manner rather than the carving out, as a discrete issue, of the position in relation only to passports."

The lower court held on June 22, 2018, that while Elan-Cane's right to respect for private life under Article 8 ECHR was "engaged," that right had not been breached by the Passport Office's binary gender designation requirement and "there was therefore no positive obligation on the Government to provide an "X" marker on passports."

The UK Court of Appeal (Civil Division) upheld the lower court decision, finding that the government was entitled to deference with respect to its choice to implement a coherent policy affording recognition to a non-binary gender across multiple aspects of law and society rather than simply allow a third gender option on passport applications. By way of illustration, Lady Justice King explained that "[i]f an "X" marker is to be added, a decision will need to be made as to who will be entitled to utilise (sic) the new box. . . . the question then arises as to what proof, if any, is to be provided by a non-binary person." Indeed, Lady Justice King noted that the issue of whether there should be gender boxes on passports at all should be addressed. Otherwise, the Court characterized the Passport Office's policy as coherent and non-discriminatory. The court found that the lack of an "X" gender option on UK passports did not, at present, breach Elan-Cane's private life rights because there wasn't a consensus among the Council of Europe's Member States as to non-binary gender recognition.

According to Elan-Cane's twitter, per writes: "Today's ruling was yet one more setback however most definitely not the end of this particularly [and needlessly] drawn out battle. The Supreme Court beckons . . . ." Elan-Cane is represented, on a pro-bono basis, by Narind Singh, Eraldo D'Atri, Anne Collins and Jemima Roe of Clifford Chance LLP and Kate Gallafent QC, Tom Mountford and Gayatri Sarathy of Blackstone Chambers. ■

Eric J. Wursthorn is a Principal Court Attorney for the New York State Unified Court System, Chambers of the Hon. Lynn R. Kotler, J.S.C.

6th Circuit Panel Revives Due Process Suit Against Hospital and County Agency by Parents of Transgender Teen

By Arthur S. Leonard

A 6th Circuit panel revived procedural due process claims asserted against a private psychiatric hospital and a county social welfare agency by the parents of a transgender teen who say their constitutional due process rights were violated when the hospital, in collaboration with county social workers, refused to discharge the teen into the custody of their parents in order to protect the teen. *Siefert v. Hamilton County*, 2020 WL 1023010 (March 3. 2020). District Judge Timothy S. Black (S.D. Ohio) had dismissed their claims, finding that the private hospital was not a state actor bound by the 14th Amendment and that the county officials enjoyed qualified immunity from the parents' claims.

According to the opinion by Senior Circuit Judge Eugene Siler, the teen, referred to throughout the opinion as "Minor Siefert," "was born a girl but identifies now as a transgender boy. Minor Siefert began taking medication and going through therapy in November 2015 after reporting problems with depression, anxiety and suicidal thoughts. After telling his parents about his transgender identity, Minor Siefert emailed Hamilton County Job and Family Services [JFS] claiming his parents were not supportive and their conduct amounted to abuse." JFS sent a social worker to the Siefert's home that same day, and a few days later, "at the behest of their pediatrician," the Sieferts brought Minor Siefert to Cincinnati Children's Hospital Medical Center's psychiatry facility, where they consulted with JFS employees about treatment. During that meeting, a JFS social worker told the Sieferts that the hospital would not send the teen home without JFS's approval, which depended on the social workers "being satisfied that they found the right place for Minor Siefert to go."

On November 22, 2016, Siefert's situation was presented by a hospital doctor to a psychiatrist with Humana Behavioral Health, which was covering Minor Siefert's treatment. "The Humana board-certified psychiatrist concluded that Minor Siefert had 'no acute symptoms that require 24-hour care,' and that Minor Siefert was not a danger to himself or others, was not aggressive, was medically stable and was not manic. So, Humana denied additional coverage," and the next day, Mr. Siefert began calling the hospital's staff members to "exercise his parental right to custody and association with Minor Siefert." This began a month-long struggle between the hospital, the county social workers, and the Sieferts, during which Minor Siefert remained in the hospital. It is not clear from the court's opinion, which is based solely on the factual allegations of the Seifert's complaint, exactly why neither the hospital nor the social workers were willing to release Minor Siefert to the custody of his parents, but the most likely inference is that they had jointly concluded that it was not in Minor Seifert's interest to be released to his parents due to their attitude toward his gender identity and their treatment of him flowing from that.

After several arguments and confrontations, Mr. Siefert contacted Hamilton County Administrator Jeff Aluotto, which led to a meeting at the JFS building at which a JFS official explained that JFS "had to investigate and would prevent parents from having custody or association with their child when doctors or social workers did not approve the child's release." The doctors had made it clear that they did not want to release Minor Siefert to his parents. Indeed, hospital staff were instructed to call security if the Sieferts came to the hospital trying to get him. Finally, on December 20, after a month in the

hospital, Minor Siefert was released to the custody of his grandparents after JFS and the Sieferts entered into a "voluntary safety plan." Then the Sieferts filed this 42 U.SC. 1983 lawsuit against the hospital and the county, claiming a violation of their procedural and substantive due process rights. Judge Black granted a motion to dismiss, as noted above.

In an intricately reasoned opinion by Senior Circuit Judge Eugene Siler, the panel found, contrary to Judge Black, that the collaboration of the hospital staff and JFS in this case was sufficient to apply due process requirements to the hospital, despite its private status, as a "state actor" for purposes of the motion to dismiss. After discovery, a different conclusion might be reached on a likely summary judgment motion by the hospital. The court found that the defendants enjoyed qualified immunity on the substantive due process claim, while stating that for purposes of the dismissal motion, the procedural due process claim could go forward. The procedural due process issue, of course, is whether the parents had a right to a hearing before a neutral decision-maker on the question whether their constitutional right of association with their child could be abridged. Judge Siler cautioned, in this regard, that the court was not expressing a view as to the ultimate disposition on this issue, but just whether a potential constitutional claim had been stated on the face of the complaint. One member of the panel, Circuit Judge Bernice Bouie Donald, dissenting in part, argued that at this stage the Sieferts should also be able to pursue their substantive due process claim.

Judge Siler was appointed to the 6th Circuit by President George H. W. Bush, and took senior status in December 2001, in time for President Bush's son to appoint his successor. Judge Donald was appointed by President Barack Obama. The Seiferts are represented by Ted L. Wills, Cincinnati; Hamilton County and its employees by Andrea B. Neuwirth of the Hamilton County Prosecutor's Office; and the hospital by Jason R. Goldschmidt of Dinsmore & Shohl, LLP, Cincinnati. ■

Federal Judge Certifies Class of Transgender Inmates; Sharpens Preliminary Injunction; Weighs Appointment of Monitor

By William J. Rold

For the last two months, *Law Notes* has covered the putative class action litigation about medical treatment for transgender inmates in the U.S. District Court for the Southern District of Illinois. *See* "Federal Judge Preliminarily Enjoins 'Unqualified' Transgender 'Committee' in Illinois Prison System . . . " (January 2020 at pages 12-13), reporting *Monroe v. Baldwin,* 2019 WL 6918474, 2019 U.S. Dist. LEXIS 217925 (S.D. Ill., Dec. 19, 2010). In February, we reported that the State of Illinois had filed a motion for reconsideration of District Judge Nancy J. Rosenstengel's preliminary injunction. We also reported that no class had yet been certified.

The defendants argued on the reconsideration: (1) that the relief ordered went further than was necessary for the named plaintiffs (who were already receiving hormones); (2) that the relief was not narrowly tailored as required by the Prison Litigation Reform Act [PLRA]; and (3) that the adoption of World Professional Association on Transgender Health [WPATH] standards on care and provider qualifications was error under the Eighth Amendment. See Law Notes (February 2020 at page 30).

Judge Rosenstengel issued a pair of decisions on March 4, 2020. In the first, *Monroe v. Meeks*, 2020 U.S. Dist. LEXIS 37131; 2020 WL 1057890 (S.D. Ill.), she certified a class action under F.R.C.P. 23(b)(2). Over 110 class members in 21 separate facilities satisfies the requirement of numerosity. There are common questions of law and fact, as indicated in the preliminary injunction opinion. The six named plaintiffs are typical of unnamed class members, even though there are variations in their circumstances, and the class is represented by experienced litigators.

Judge Rosenstengel certified the class for declaratory and injunctive relief under subsection (b)(2), and damages claims are excluded. The class consists of "all persons in the custody of IDOC who have requested evaluation or treatment for gender dysphoria."

In the second March 4 opinion, *Monroe v. Meeks*, 2020 U.S. Dist. LEXIS 37128; 2020 WL 1048770 (S.D. Ill.), Judge Rosenstengel reconsidered her preliminary injunction. Agreeing with part of defendants' argument, she vacated the portion of her preliminary injunction ordering hormones for the named plaintiffs, since they are already receiving them. She then reissued the preliminary injunction, modified to ensure access to hormones for the rest of the class and monitoring of all prescribed hormones.

This probably extends the preliminary injunction another ninety days under the PLRA, 18 U.S.C. § 3636(a)(2), which automatically terminates preliminary injunctions after 90 days, absent special action. The judge also lifted her stay on merits discovery and ordered the parties to try to agree on a discovery plan. In reconsidering the preliminary injunction, Judge Rosenstengel found that adoption of WPATH standards is consistent with the Eighth Amendment in terms of general standards of care and of qualifications, particularly since the defendants offered no contrary testimony at the hearing or on reconsideration.

Judge Rosenstengel relied on *Edmo v. Corizon, Inc*. 935 F.3d 757, 769 (9th Cir. 2019). She found "plenty of evidence that IDOC continuously fails to provide adequate treatment to inmates with gender dysphoria, including in the administration of hormone therapy . . . , fails to adequately monitor inmates receiving hormone therapy and properly adjust dosages . . . , [and does] not

monitor approximately twenty-five to fifty percent of inmates at all."

More recently, in *Monroe v. Meeks*, 2020 WL 1316753 (S.D. Ill., Mar. 20, 2020), Judge Rosenstengel assessed IDOC's compliance thus far with the preliminary injunction, responding to the plaintiffs' contention that the defendants "have not taken meaningful steps to comply with the order and the proposed steps offered by the Defendants are insufficient and vague." The plaintiffs requested appointment of a F.R. Evid. 706 court-appointed expert to oversee compliance.

Judge Rosenstengel found that IDOC was complying with "certain aspects" of the preliminary injunctions in terms of revising policies and procedures and consulting with a WPATH expert. She was "not convinced" that IDOC had completely ceased allowing their "Transgender Committee" to make medical decisions, as she had originally ordered in her preliminary injunction. Recognizing that medical decisions may have "security components" requiring "deference," citing *Brown v. Plata*, 563 U.S. 493, 511 (2011), she found that "consulting" with the Committee does not violate the preliminary injunction, so long as the Committee does not make medical decisions or recommendations – including ones involving gender confirmation surgery and social transitioning. This restriction on the functioning of the Committee was based on her finding that none of the members of the Committee were experts regarding medical treatment for gender dysphoria.

But, found the judge, a court-appointed medical expert is not needed at this time to assist in evaluating "complex" medical issues, because compliance with the preliminary injunctions does not require such "complex" determinations, citing *Ledford v. Sullivan*, 105 F.3d 354, 357 (7th Cir. 1997) [other Seventh Circuit decisions omitted]. To the extent that compliance issues remain, they can be referred to a magistrate judge. Upon proper motion, the order "does not prohibit the parties from seeking a special master under Federal Rule of Civil Procedure 53 in the future or as a part of settlement negotiations."

In this writer's view, the defendants' motions may have bought them some time, but they allowed the district judge to correct some procedural problems with the record that will make the preliminary injunction easier to affirm. The plaintiff class is represented by the ACLU Roger Baldwin Foundation; Kirkland & Ellis, LLP (both of Chicago); and Law Offices of Thomas E. Kennedy, III, L.C. (St. Louis). ■

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

Court of Special Appeals of Maryland Rules that a Vermont Civil Union Can Be Dissolved by Judgment of Divorce in Maryland

By Filip Cukovic

Scott Sherman and Martin Rouse are gay men who entered into a civil union in 2003 in the Vermont. Approximately 15 years later, after the couple had become residents of Maryland, Sherman sought a dissolution of the parties' Vermont civil union by filing a complaint in the Circuit Court for Montgomery County seeking, among other relief, an absolute divorce. The circuit court dismissed, in part, Sherman's complaint for divorce, and after the parties resolved all other claims, Sherman appealed. The question presented before the Court of Special Appeals of Maryland was whether a Vermont civil union can be dissolved, under the doctrine of comity, by judgment of divorce in Maryland? On March 2, 2020, Court of Special Appeals of Maryland answered the question affirmatively in *Sherman v. Rouse*, 2020 WL 992623, 2020 Md. App. LEXIS 211.

In 2000, Vermont was among the first states to extend the benefits and protections of marriage to same-sex couples through a system of civil unions. Three years later, in 2003, after years of dating, Sherman and Rouse entered into a civil union in Vermont, where they lived at the time. In the meanwhile, the couple also became parents to two children. At some point after 2003, the family left Vermont and moved to Montgomery County, Maryland, where they now own a home. Sherman and Rouse have remained in a civil union relationship since 2003, but never married each other.

However, in 2018, after more than a decade of being together, Sherman

sought a dissolution of the parties' civil union. He filed a complaint for absolute divorce in the Circuit Court for Montgomery County. In addition to requesting an absolute divorce, Sherman also sought alimony, an equitable distribution of property, a monetary award, child support, and other relief.

Rouse moved to dismiss the complaint and requested a hearing on his motion. He admitted that the circuit court had jurisdiction to make determinations related to child custody and related issues. However, with respect to the request for a divorce, Rouse contended that Sherman failed to state a claim upon which relief can be granted. Rouse argued that a "civil union" is not the equivalent of a "marriage" for purposes of obtaining a divorce and any attendant relief in Maryland. Rouse further argued that because the parties never married, the circuit court should not treat their civil union as a marriage.

To Sherman's disappointment, Rouse initially prevailed, considering that on September 26, 2018, the circuit court granted in part Rouse's motion to dismiss the complaint for failure to state a cause of action for a divorce. The circuit court held that the doctrine of comity permits the court to recognize the Vermont civil union of the parties, but ultimately concluded that "if the right to seek a divorce, and to seek awards of alimony and equitable distribution, are to be extended to individuals joined by civil union, it is a matter for the legislature, not the courts." At the same time, the circuit court held that Sherman could move forward on his claims for custody, child support, and attorney's fees.

Luckily, the parties were able to resolve all issues related to child custody, child support, and division of property without any further court intervention. The single remaining issue that the parties could not resolve was whether under Maryland law – which never recognized civil unions between gay people to begin with – Sherman was allowed to dissolve the parties' civil union that they previously entered into in the state of Vermont. Thus, on May 20, 2019, Sherman filed a second notice of appeal in Court of Special Appeals of Maryland. Almost a year later, on March 2, 2020, Judge Timothy Meredith wrote a decision declaring that under the doctrine of comity, a Vermont civil union can be dissolved by judgment of divorce in Maryland.

In Maryland, "comity" refers to the principle that Maryland courts will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect. For example, prior to the recognition of same-sex marriage by Maryland's legislature, the Maryland Court of Appeals announced in *Port v. Cowan* that, "[u]nder the principles of the doctrine of comity applied in our State, Maryland courts will recognize a valid same-sex marriage from another state for purposes of a domestic divorce action because that marriage is not "repugnant" to this State's public policy". 426 Md. 435, 44 A.3d 970. Further, the *Port* court held: "A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce, according to the applicable statutes, reported cases, and court rules of this State."

Considering the holding and reasoning in Port, it is easy to see why Judge Meredith heavily relied on that case for purposes of resolving the issue of whether a Vermont civil union can be dissolved, under the doctrine of comity, by judgment of divorce in Maryland. First, Judge Meredith recognized that although the holding in *Port* dealt with a same-sex marriage rather than a civil union, part of the court's discussion in *Port* provides support for extending comity to recognize a valid, out-of-state civil union for purposes of granting a Maryland divorce.

Specifically, Judge Meredith recognized that the Court of Appeals previously observed that the State of New York, which prior to enacting a marriage-equality law in 2011 had comity and marriage laws similar to Maryland, recognized foreign same-sex civil unions for purposes of divorce. Furthermore, the court also noted that, in Maryland, the Family Law Article grants jurisdiction to equity courts, i.e., the Circuit Courts, over 'divorce,' without using the term 'marriage.'

After clarifying these principles, Judge Meredith proceeded to analyze Vermont's civil union statute under which Mr. Sherman and Mr. Rouse legally formalized their relationship. With respect to a divorce of parties to a Vermont civil union, the Vermont legislature provided that "[t]he dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage . . . ." 15 V.S.A. § 1206(a). Based on this provision, Judge Meredith concluded that the Vermont Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage.

Furthermore, considering that the state of Maryland has previously declared that the recognition of out-of-state gay marriage is not contrary to the public policy of Maryland, and, in the wake of the Supreme Court's ruling in *Obergefell*, which legalized gay marriage on the national level, Judge Meredith concluded that there could be no good reason as to why the state of Maryland would take a different position with respect to civil unions. Thus, by applying the doctrine of comity, the Court of Special Appeals recognized the spousal relationship of parties to a Vermont civil union, and the court vacated the judgement of the circuit court to the extent that it had dismissed Sherman's complaint for absolute divorce. Furthermore, the Court of Special Appeals ruled that in resolving Sherman's complaint for absolute divorce, the lower court must apply the laws of Maryland that would generally be applicable to residents of Maryland who are married.

Scott Sherman was represented by Miriam H. Sievers and Karen D. Amos from Amos & Muffoletto, LLC. Martin Rouse was represented by Heather R. McCabe and Catherine P. Villareale from McCabe Russell. ■

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

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. COURT OF APPEALS, 7TH CIRCUIT – Circuit Judge Diane S. Sykes, writing for a unanimous 7th Circuit panel, explained why "openly gay" plaintiff Byron Roderick, *pro se*, who quit his job at BRC Rubber and Plastics, properly lost his case on summary judgment before the U.S. District Court in Indianapolis. *Roderick v. BRC Rubber and Plastics*, 2020 U.S. App. LEXIS 6876, 2020 WL 1061787 (March 5, 2020). Roderick claims to have been subjected to a hostile environment, ultimately causing him to quit. He began working in the quality-control department in 1996, and most of the workers knew he was gay. Some heard rumors that he made pornographic films, one such rumor surfacing in 2016. An employee complained to management that Roderick had "sent to the employee's girlfriend a message about making a 'sex video' for money," which Roderick denied having done, stating that "what he did outside of work hours was none of BRC's concern." The department manager, David Laspas, told Roderick "that he represented BRC at all times and that a dispute like this one could affect the workplace." In response, "Roderick promised to block the other employee and his girlfriend from his social-media account." Roderick alleges that Laspas "repeatedly criticized" him over the next few months, and often told him that he needed to improve his performance, reassigned a project away from Roderick, purportedly due to dissatisfaction with his work, and put Roderick on a "performance improvement plan," advising him that "no one had ever successfully completed one of these plans," but Laspas offered to help Roderick succeed. However, Laspas concluded that Roderick had failed the plan, and he demoted him to a lesser position, about which Roderick complained to BRC's owner in a letter implying that Laspas was harassing him. Roderick told an HR manager looking into his complaint that Laspas "treated all BRC's employees poorly." In light of his long tenure, the company offered him a chance to return to his old position, but he declined, to avoid Laspas. When Laspas saw him on the plant floor, he "said Roderick's name out loud – conduct that Roderick considered intimidating." Roderick says he quit because of Laspas's harassment of him. When Roderick sued under Title VII, claiming a hostile work environment, the district court granted summary judgment to the company, finding "no evidence suggested hostility based on sexual orientation." If Roderick could prove harassment, it would not be actionable unless it was because of a forbidden ground under Title VII, including – in the 7th and 2nd Circuits – sexual orientation. The court of appeals agreed with the district court. Judge Sykes dissented in *Hively*, the 7th Circuit's *en banc* ruling finding that Title VII covers sexual orientation claims, and she noted that the issue has been argued before the Supreme Court in another case still awaiting decision. Nonetheless, she wrote, "nothing suggests that Laspas treated Roderick poorly because of his sexual orientation. To the contrary, Roderick admitted to a human-resources manager that Laspas treated everyone poorly. This admission dooms his claim because a hostile work environment is unlawful under Title VII only when the plaintiff is singled out based on a protected characteristic. No 'singling out' occurred here." Furthermore, the courts set a high bar of nasty treatment before they will find an actionable hostile environment, and the court found that bar was not met in this case. Judge Sykes as appointed by George W. Bush.

U.S. COURT OF APPEALS, 11TH CIRCUIT – In *Davis v. Carroll*, 2020 U.S. App. LEXIS 8082, 2020 WL 1230301 (March 13, 2020), an 11th Circuit panel affirmed a ruling by the U.S. District Court for the Middle District of Florida that social workers who arranged for the adoption of J.D.D. at age three by the plaintiff, the child's adoptive father Shane Davis, enjoyed immunity from liability for not having determined that J.D.D. was infected with HIV at birth. Judge Britt C. Grant wrote for the panel. This is actually a rather sad story. J.D.D. was born in April 2000 to a crack addict who was "tragically unfit for parenting," according to the court's opinion, and the hospital filed an abuse report with the Pinellas County Sheriff's Office, which quickly moved to take custody of the child. Despite the mother's criminal history (which included heroin use and prostitution charges), nobody thought to screen the newborn child for HIV. The defendants, two Pinellas County social workers who were charged with handling J.D.D.'s case, arranged to place him with foster parents, who took him to a pediatrician for the usual newborn issues, but the pediatrician didn't test J.D.D. for HIV, either. Then he was adopted by Shane and Patricia Davis at age three. Through all this time he exhibited no symptoms of HIV infection. However, at age 14 he developed oral thrush, tested positive for HIV, was diagnosed with AIDS, and began antiretroviral treatment. The social workers were sued in their individual capacities for violating J.D.D.'s civil rights by not requesting HIV screening, showing "deliberate indifference" to J.D.D.'s serious risk of contracting HIV, and for violating J.D.D.'s right to receive prompt medical assistance under the Medicaid Act. The trial judge found qualified immunity for the social workers. The 11th Circuit agreed with that conclusion, pointing out that the standard of deliberate indifference to a known risk applies here; it is not enough to show negligence

to hold state employees individually liable for their discretionary actions. The court of appeals did not believe that the social workers could be charged with deliberate indifference, when none of the doctors involved in J.D.D.'s care thought to order HIV testing. Furthermore, it appears there was some sloppy paperwork in the Pinellas County Sheriff's Office, since the petition to terminate the birth mother's custody stated, "To the best of the writer's knowledge the mother has no criminal history" and that "neither the mother nor the child has any medical problems or physical abnormalities." In order to charge the social workers with deliberate indifference, there must be evidence that they were aware of the risk and failed to take any action in response to their knowledge. Davis is represented by Roberto Stanziale, Fort Lauderdale, FL. Judge Grant, formerly a justice of the Florida Supreme Court, was appointed to the 11th Circuit by Donald J. Trump.

CALIFORNIA – The federal district court for the Northern District of California (Judge William H. Orrick) will consider a motion by the defenders of Proposition 8 to continue the order sealing the audio tapes of the 2010 trial. The hearing on the motion will take place on June 17. The order to keep the tapes from the public is set to expire in August, the 10th anniversary of the court's decision in *Perry v. Schwarzenegger*, which held that Proposition 8, which amended the California state constitution to define marriage as the union of one man and one woman, violated the 14th Amendment of the U.S. Constitution. The printed transcript of the trial is public, and has been dramatized in public readings. But Dennis Hollingsworth and other proponents of Prop 8, who intervened in the trial to defend it when then-Attorney General Jerry Brown would not, continues to fight to keep the audio tapes from the public. The Proponents appealed the ruling, which was affirmed on other grounds by the 9th Circuit. Upon further appeal, the Supreme Court granted certiorari, but ruled 5-4 that the Proponents did not have standing under Article III of the Constitution to appeal the district court's decision, because they showed no personal harm from that ruling. The result was that the 9th Circuit decision was vacated, the appeal nullified, and the district court's order went into effect at the end of June 2013. When the issue of unsealing the tapes was last considered in 2018, the judge found no reason to keep the tapes secret other than the integrity of the judicial process, given that the order was entered to keep them sealed for ten years from the district court's ruling on the merits. Why are the proponents fighting so hard now? Presumably because the impact of actually hearing the devastating cross-examination of their witnesses would be a massive embarrassment!

CALIFORNIA – An individual files a gender identity discrimination charge against a business with the California Department of Fair Employment and Housing, and the Department subsequently files a lawsuit premised on the individual's charge. The individual intervenes in the lawsuit as co-plaintiff. During discovery, the defendant requests that the individual produce all of her communications with the DFEH related to the defendant, and the individual refuses, claiming attorney-client privilege in an email she sent to DFEH attorneys during their investigation of her charge. The trial court grants the defendant's motion to compel production, the court of appeal affirms, and the individual appeals to the Supreme Court, which transfers the matter back to the court of appeal with directions "to vacate the order denying mandate and to issue an order directing the superior court to show cause why the relief sought in the petition should not be granted." In *Wood v. Superior Court of San Diego County*, 2020 WL 1227322 (Cal. 4th Dist. Ct. App., March 13, 2020), the court of appeal ruled that attorney-client privilege does not attach to communications between the individual complainant and DFEH attorneys investigating her charge, because they are not in an attorney-client relationship with her. That is, the DFEH lawyers are not retained by the individual to represent her; they represent the Department, and during the investigation, as per the Department's own statement to entities accused of discrimination when the Department communicates with them, the Department is an "impartial" investigator, seeking to determine whether the anti-discrimination statute was violated, and are not representing the complainant. As such, communications to the investigating lawyers are clearly not subject to attorney-client privilege. Wood sought to rely on federal precedents concerning communications between individuals and EEOC lawyers, which would support the opposing view, but the court asserted that it was "prohibited" by a California statute from adopting the federal precedents. The court noted that the federal and state laws of privilege relevant to this issue are "somewhat divergent," as the federal privilege rules are an artifact of "federal common law" whereas California has a statutory scheme covering the subject. Judge Patricia Guerrero wrote the opinion for a panel of the 4th District Court of Appeal. The ACLU Foundations of San Diego & Imperial Counties and of Southern California represent the petitioner, Christynne Lili Wrene Wood. The defendant is CFG Jamacha, which operates a Crunch fitness club. The opinion does not describe the specifics of the discrimination claim, but one can infer that the transgender plaintiff alleges that the fitness club refused to allow her to use the women's facilities.

CIVIL LITIGATION *notes*

CONNECTICUT – The U.S. Justice Department filed a notice of interest in a lawsuit pending in federal court in Connecticut, brought by three cisgender women athletes challenging the policy of Connecticut's Interscholastic Athletic Conference to allow transgender women to compete as women in interscholastic public school athletics. Of course, consistent with Trump Administration policy that Title IX's ban on sex discrimination does not extend to gender identity, the Administration supports the plaintiffs, who want the court to order that transgender women be banned from competing in interscholastic sports as women. The ACLU represents some transgender women athletes who have intervened in support of the Conference's policy.

ILLINOIS – On January 29, 2019, Justin "Jussie" Smollet, an African-American out gay actor on the television series *Empire*, reported to the Chicago Police Department that he had been the victim of a homophobic attack by two ski-masked men while walking on the street. On February 15, the police took into custody the brothers Olabinjo and Abimbola Osundairo, supporting actors on *Empire*, for questioning in connection with the Smollet assault. They told the police that the assault was a hoax conceived and directed by Smollet to try to get his employer and the public to appreciate his success as an out gay Black actor, and that they had carried out the attach in accord with Smollet's exact instructions. They testified before a grand jury, which then indicted Smollet on a charge of falsely reporting a crime. Smollet's defense counsel were Tina Glandian and Mark Geragos. Subsequently the state's attorney's office dropped the charges against Smollet. Soon thereafter, Glandian and Geragos made media appearances in which they discussed the case and in particular the role of the Osundairo brothers. The Osundairo brothers filed suit against Glandian and Geragos in U.S. District Court in Chicago, alleging defamation under Illinois law. Defendants filed motions to dismiss and also invoked California's anti-SLAPP statute against the plaintiffs. In a ruling on March 17 in *Osundairo v. Geragos*, 2020 U.S. Dist. LEXIS 46115, 2020 WL 1275001 (N.D. Ill.), District Judge Mary M. Rowland initially found that Geragos' representation of Smollet in the Illinois criminal proceeding was sufficient to establish personal jurisdiction over him, rejecting his claim that as a citizen of another state he was not subject to suit in Illinois. Turning to the merits of the motions, Judge Rowland found that the complaint's allegations failed to specify particular statements by Glandian and Geragos that were *per se* defamatory (and plaintiffs did not allege special damages), except in one respect, a claim of defamation and false light concerning a statement by Glandian during television interviews that the Osundairos may have been wearing "whiteface" when they attacked Smollet. "The Court finds that this statement could fairly impute the crimes of battery and hate crime to the Osundairos. Although Glandian did not specifically say the words 'battery' or 'attack,' considering the context of the statement, it is certainly plausible that Glandian is directly accusing the Osundairos of attacking Smollet. Glandian is asked to explain how it is possible that the Osundairos were Smollet's attackers if Smollet stated his attackers were white. In this context, a plausible interpretation of Glandian's 'whiteface comment' is that she was attempting to dispel the inconsistency in Smollet's story (the attackers had light skin) and bolster her contention that the Osundairos (who are not light skinned) were in fact Smollet's attackers. This statement, read in context, maintains that the Osundairos attacked Smollet and adds the implication that the attack was a hate crime." Having narrowed the surviving claim to the "whiteface comment," Rowland finally focused on defendants' contention that they were shielded by California's anti-SLAPP law, which generally protects speakers about matters of public interest from being sued. The court found that "because Glandian's statement concerning Smollet, a celebrity who had received extensive media coverage regarding the very content of the statement, because the *Today* show is a public forum, Glandian's 'whiteface statement' reasonably falls within the scope of the anti-SLAPP statute's protection. Nevertheless, because Defendants' arguments for dismissal of Plaintiffs' claims are based on legal insufficiency, Plaintiffs are only required to show that the 'whiteface statement' makes out a legally sufficient claim for defamation per se and false light, which as discussed above, it does." Thus, the motion was denied, and the case continues on the claims of defamation per se and false light based on Glandian's "whiteface statement" on the *Today* show. Among the allegations that Judge Rowland found lacking in sufficient specificity to ground a defamation claim was that one of the brothers engaged in homosexual acts with Smollet. The judge found that neither of the defendants had ever stated that specifically, and as long as a non-defamatory inference could be drawn from the statements they did make, their statements were not actionable. Thus, the court did not have to get into the interesting question whether imputing homosexual conduct to a non-gay individual is *per se* defamatory. (There are many 20th century precedents that would say yes to that question, but the trend of more recent caselaw has been to the contrary in several jurisdictions.) Interestingly, given that trial judge assignments are by lot, the case came to the Northern District's out lesbian judge, Mary Rowland, who was appointed by Donald J. Trump. Plaintiffs are represented by five attorneys from three

different Chicago firms. Defendants are represented by Brendan J. Healey and Natalie Anne Harris, of Baron Harris Healey, Chicago.

KANSAS – In *S.E.S. v. Galena Unified School District*, 2020 WL 1166226 (D. Kansas, March 11, 2020), U.S. District Court Judge Daniel D. Crabtree denied a motion for summary judgment by the school district, defending a Title IX suit by the parent of a middle school boy who was tormented by classmates. The plaintiff's theory of the case is gender stereotyping, inasmuch as Kansas is in the 10th Circuit, which has rejected the view that discrimination because of sexual orientation is a form of sex discrimination, but has accepted the argument in past cases that discrimination against a person because of their failure to conform to gender stereotypes may be treated as sex discrimination. In this case, the school district argued that the case is about actual or perceived sexual orientation, not gender nonconformity, but Judge Crabtree found that the evidence submitted in support and in opposition to the motion for summary judgment was such that a jury could rationally conclude that the student, J.M.S., did not conform to gender stereotypes embraced by his teenage classmates. He rejected the school district's argument that "how J.M.S dressed, wore his hair, and behaved are 'not characteristics which can be considered non-masculine in nature sufficient to establish sex-based harassment under Title IX.'" That J.M.S. played sports, had girlfriends, and instigated fights, did not necessarily mean that the harassment he endured was not based on gender stereotypes, especially considering affidavits from several students suggesting that his manner of dress and grooming were reasons why students were calling him homophobic names. The harassment started after he showed up at school with a new hairstyle, and fellow students started in with the "fag" name-calling. The record evidence was also such that a jury could conclude that the district failed to respond adequately to the situation J.M.S. confronted, with testimony showing a rather casual attitude by the school authorities about their obligation to protect students from bullying. There was a good anti-bullying policy on paper, but testimony of school witnesses at depositions showed that it seems not have been enforced with any consistency or formality. After describing the testimony, Judge Crabtree wrote, "On these extensive facts, a reasonable jury could find defendant's response to known harassment was clearly unreasonable in light of the known circumstances. The school district took some action in response to harassment. But, more harassment continued and in a manner where a reasonable jury could find the school district knew that its earlier responses were ineffective to deter the persistent harassment of J.M.S., requiring the school district to do more in light of the circumstances. The summary judgment facts here do not preclude, as a matter of law, a finding of deliberate indifference. In short, defendant has failed to carry the burden imposed by binding case authority." It sounds like it is time for settlement negotiations and some reforms at the Galena Unified School District. Plaintiffs are represented by Arthur A. Benson, II, and Jamie Kathryn Lansford, Law Office of Arthur Benson, II, Kansas City, MO. Judge Crabtee, who wrote the Kansas marriage equality decision, was appointed by President Barack Obama.

LOUISIANA – In *Hills v. Tangipahoa Parish School District*, 2020 U.S. Dist. LEXIS 44775, 2020 WL 1250810 (E.D. La., March 16, 2020), the plaintiff, who worked as a pre-kindergarten teacher's aid at O.W. Dillion Leadership Academy, asserted five causes of action after she quit her job. Ms. Hills was summoned to a meeting with school officials in March 2018 and informed that "a website accused Hills of having HIV." Wrote U.S. District Judge Sarah S. Vance, "Hills responded that while she was not aware of the website, she was aware of the rumor. She said that she believed it was started by her children's father and his girlfriend, who was related to the school's physical education teacher. Hills is not HIV positive." According to Hills, after that meeting "administration and staff" at the school were spreading the rumor, that the principal asked Hill's co-workers whether she had HIV and whether it was affecting her job performance. She claimed that co-workers with whom she previously had a "cordial relationship" began to "ignore and actively avoid her." And, her own children, who attended the school, asked her about it. After a few weeks of this, she claims that the environment at the school was so intolerable to her that she took a leave of absence due to stress, and ultimately quit. She asserted constructive discharge and hostile environment claims under the Americans with Disabilities Act, a violation of the Louisiana Employment Discrimination Law, defamation, public disclosure of embarrassing private facts (breach of contract), and negligent infliction of emotional distress, apparently naming only the school district itself as a defendant, to judge by the caption on the Lexis version of the opinion, which names no individual defendants. The defendant moved for partial summary judgment on the ADA and defamation claims, arguing, among other things, that as Hills is not HIV-positive, she is not an individual with a disability under the ADA. Judge Vance rejected that contention, finding that under the current definition of "being regarded as having such an impairment," one can come within the protection of the ADA regardless of whether one has an actual impairment. However, the court found that Hill's factual allegations were insufficient to

support a hostile environment claim, noting the very high evidentiary bar set by the 5th Circuit for such claims, and that it followed if her allegations would not support a hostile environment claim, they would not support the even more demanding constructive discharge claim. As to the defamation claim, there was no statement emanating from the defendant school district that could be made the basis of a defamation charge, and Hills failed to name any specific individual making a specific statement that be made the basis of a defamation claim. The court did not find that questions posed to her whether she had HIV could be the basis of such a claim. The court does not address whether it will continue to assert jurisdiction over the remaining state law claims, but as the ADA claim presented the only federal question in the case, and the court found the complaint insufficient as to both grounds of liability asserted under that statute, a subsequent motion by the defendant will likely result in dismissal of the case. Counsel for plaintiff are Galen M. Hair and Madison C. Pitre, of Scott, Vicknair, Hair & Checki, New Orleans. Counsel for defendant are Christopher M. Moody and Albert David Giraud, of Moody Law Firm, Hammond. Judge Vance was appointed to the District Court by President Bill Clinton.

LOUISIANA – The Louisiana Supreme Court denied a petition by the birth mother seeking review of the Court of Appeals ruling in *Ferrand v. Ferrand*, 287 So. 3d 150 (Dec. 6, 2019), rehearing denied, Dec. 23, 2019, writ denied, 2020 WL 1140856 (La. Supreme Ct., March 9, 2020). In a custody dispute between the birth mother and the transgender man with whom she was in a relationship when the children were conceived through donor insemination and born, the court of appeals had reversed the trial court's ruling which awarded sole custody to the mother. The court of appeals found that the award of sole custody to the mother "to the exclusion of the former partner" would result in "substantial harm" to the children, and that award of sole custody to the mother would not be in the best interests of the children. Justice Jefferson Davis Hughes, III, dissented from the denial of the writ, indicating he would favor reinstating the trial court's ruling. He argued that "the testimony relied on by the trial court reasonably supports its finding that no substantial harm would be caused to the children by an award of custody to the plaintiff/biological mother and, therefore, Vincent Ferrand failed to bear his burden of proof under La. C.C. art. 133." According to Justice Hughes, the question of best interest of the child does not arise when a person who is neither the natural or adoptive parent of the child contests custody with the birth mother unless it is shown that children would suffer substantial harm by a grant of custody to the mother, and he argues that in this case this has nothing to do with the sex or gender identity of the individual who is neither natural or adoptive parent. He also points out that under Obergefell, if the parties had married, Vincent Ferrand would certainly be able to seek custody, once again regardless of his sex or gender identity.

MARYLAND – U.S. District Judge Paula Xinis granted summary judgment to the employer on a sexual orientation discrimination claim asserted under Title VII by an African-American lesbian postal worker in *Witherspoon v. Brennan*, 2020 WL 1491411 (D. Md., March 26, 2020), but the claim was not dismissed on account of 4th Circuit precedents rejecting sexual orientation claims under Title VII. "Although it remains a live question whether Title VII reaches a sexual-orientation discrimination," wrote Judge Xinis, citing *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (granting certiorari as to whether Title VII applies to sexual orientation discrimination), and *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (same), "the claim fails for a different reason." The reason was quite simple: there was no indication that anybody involved with the decision to discipline and discharge the plaintiff knew that she was a lesbian. Since this was a disparate treatment claim, with Witherspoon alleging that her comparator was not discharged for a similar offense, there must be evidence of discriminatory intent by the decision-maker to survive the motion for summary judgment. On the other hand, Witherspoon survived the motion as to her race discrimination claim.

MICHIGAN – Plaintiff Kristina Garcia, an "openly bisexual woman," sues her employer, Beaumont Health, and a co-worker, Rachel Luca, alleging sexual harassment. *Garcia v. Beaumont Health*, 2020 U.S. Dist. LEXIS 39028 (E.D. Mich., March 6). She asserts that after Luca learned that Garcia is bisexual, she began making sexually harassing comments to Garcia, and, on one occasion, put her hand down Garcia's shirt, pinched Garcia's nipple, and pulled Garcia's breast out of her bra cup! Garcia complained to her supervisor, but obtained no satisfaction, as HR just sat on the complaint while Luca continued her harassing ways. The situation was quite depressing to Garcia, who scheduled a doctor's appointment for depression and sought counseling, then took a period of medical leave, and started taking medicine for depression and anxiety. After she returned from leave, she asked not to work at the same time as Luca, resulting in her getting an inferior assignment. Frustrated with the lack of action by HR, Garcia filed this lawsuit in the U.S. District Court for the Eastern District of Michigan, claiming hostile environment harassment and naming both the company and Luca as defendants. Confronted with the

CIVIL LITIGATION *notes*

argument that a co-worker can't be sued under Title VII, she sought to add a claim under the state's anti-discrimination law, the Elliott-Larsen Civil Rights Act (ELCRA), which District Judge Linda V. Parker granted in part, the bottom line being that Luca is no longer a defendant in the Title VII case, but is a defendant in the state law supplementary claim. It seems that ELCRA includes in its definition of an employer an "individual" without imposing the test under Title VII that the individual be an "agent" of the employer in order to be a defendant, so co-workers can be sued in Michigan sexual harassment discrimination cases. Garcia is represented by Guy L. Sweet and Lisa C. Ward, Okemos, MI. Judge Parker was appointed by President Barack Obama.

MISSISSIPPI – Jermyrion Hutcherson, an African-American man living with HIV, beat back both a motion for summary judgment on his Americans with Disabilities Act (ADA) action against his former employer, Siemens Industry, Inc., and a motion for summary judgment by a former co-worker, Coralee Kelly, whom he sued for intentional infliction of emotional distress, in *Hutcherson v. Siemens Industry*, 2020 WL 1032354 (S.D. Miss., March 3, 2020). The ADA claim was focused on his discharge by Siemens, which cited absenteeism as the reason. Hutcherson told his supervisors that he had a serious medical condition for which he would need intermittent leave under the Family & Medical Leave Act (FMLA), but they told him he would not need FMLA leave since he could call upon his reservoir of paid-time-off (PTO) days. Then, he claims, when he used the PTO days, as the numbers mounted up and without any warning, they discharged him the day he came back from recuperating from a surgical procedure. Hutcherson is *pro se*. One would think he would bring his claim under the FMLA, for denial of leave, but instead he purposed the case as a "failure to accommodate" case under the ADA. Hutcherson never told anybody at the company that he had HIV-infection, and Siemens argued that "because plaintiff admittedly never informed Siemens of his HIV diagnosis, then his disability was not 'known' by Siemens" and so they had no duty to accommodate. Senior District Judge Tom S. Lee rejected this argument, finding that Siemens did not deny that Hutcherson told his supervisors that he had a serious medical condition and, without asking what it was, they offered him an accommodation: use of his PTO days. Siemens came back with the argument that, since they offered the accommodation of the PTO days, they couldn't be liable for failing to accommodate. "But his claim is not that Siemens failed to *agree* to accommodate his disability," wrote Lee, "but rather that it failed to *actually* accommodate his disability because, despite having agreed that he could use accrued PTO to take leave when needed for his medical condition, in the end, it terminated him for taking that leave." The court found that there was no evidence in the record to support Siemens' argument that Hutcherson had abused the PTO days, so its argument to that effect leaves a material disputed fact and Siemens must be denied summary judgment on the ADA claim. Siemens won summary judgment on Hutcherson's race discrimination claim under Title VII because, quite simply, he offered no evidence that his race had anything to do with his discharge. As to the IIED claim against Kelly, the court found that there was sufficient evidence to corroborate Hutcherson's claim that Kelly had deleted emails from his in-box in order to build a case that Hutcherson was neglecting customer communications to deny Kelly's motion to dismiss. Judge Lee was appointed to the court by President Ronald Reagan in 1984.

NEW YORK – On March 31, U.S. District Judge Edgardo Ramos granted a motion to dismiss the complaint in *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review*, 2020 WL 1529311 (S.D.N.Y.) on grounds of standing and failure to state a claim. FASORP is an organization formed for the purpose of bringing legal challenges against affirmative action in higher education. In this case, FASORP alleged that the NYU Law Review takes race, gender, sexual orientation and gender identity into account in selecting new staff members, and asks authors who submit articles to identify their race, gender, and sexual orientation or gender identity as part of the Review's commitment to include underrepresented voices in its content. FASORP also alleges that the Law School takes these factors into account in its faculty hiring decisions. It alleges violations of Title VI and Title IX, federal statutes that ban race and sex discrimination, respectively, by educational institutions that receive federal funds. They also name the U.S. Department of Education as a defendant, as well as Secretary Betsy DeVos (who would undoubtedly be abashed to know that she is being sued as a champion of affirmative action – not!). Judge Ramos concluded that FASORP lacked standing to bring the case, as their generalized challenge to the alleged policies did not include any specific allegation that any of FASORP's members were NYU students who were not invited to join the Law Review, prospective authors of articles whose submissions were rejected, or disappointed faculty applicants. Furthermore, the court found that the alleged policies did not violate any legal rights. (As N.Y.U. is a private university, the complaint lacks constitutional claims, focusing entirely on Title VI and Title IX.)

NORTH CAROLINA – In a ruling granting summary judgment to the employer in *Clark v. FEDEX*

Corporation, 2020 U.S. Dist. LEXIS 44932, 2020 WL 1249381 (W.D.N.C., March 16, 2020), U.S. District Judge Robert J. Conrad, Jr., found that plaintiff's race discrimination claim was effectively countered by the employer's showing that the plaintiff was fired because he violated company policies regarding comments he made about and to gay employees. Although the court found that Clark had alleged a prima facie case of inferred discriminatory intent from various factual allegations, the inference was effectively rebutted by the defendant's "proffered, legitimate, nondiscriminatory reason": Plaintiff was terminated after several employees substantiated the allegation that Plaintiff made extremely inappropriate and disparaging comments about Mr. Ruff, an employee under his supervision, and Mr. Ruff's perceived sexual orientation." When the company received a harassment complaint from Mr. Ruff, the company initiated an investigation that confirmed Clark's remarks about Ruff and other employees concerning their sexual orientation. After the human resources investigator reported what was found, management authorized the investigator to initiate the process of discharging Clark. Judge Conrad found that this was the kind of legitimate reason that would rebut the prima facie case, and that Clark failed to show that it was a pretext for discrimination. "Plaintiff's comparison to supervisors who used profanity, but were not terminated, also fails to create a genuine issue that his termination for violating company policy was pretextual," wrote Judge Conrad. "When this Court weighs Plaintiff's alleged conversations with subordinates involving disparaging remarks about Ruff's and others' purported sexual orientation against the use of profanity by other supervisors, it easily finds that they are not sufficiently comparable to carry Plaintiff's burden to show a genuine issue that Defendant used the violation of company policy as a pretext for racial discrimination." In addition, Clark failed to show that the upper-level management officials who decided to terminate him had anything to do with the alleged discriminatory acts he described as occurring during his tenure at the company.

PENNSYLVANIA – The Superior Court of Pennsylvania has affirmed a ruling by the Court of Common Pleas of Columbia County that the same-sex partner of a birth mother satisfied the requirements of *in loco parentis* status so as to seek shared legal custody of the child that they were raising together prior to the breakup of their relationship. *C.L.A. v. P.K. and G.M.; Appeal of P.K.*, 2020 WL 1245127 (March 16, 2020). This is designated as a non-precedential decision and will not be published in the Atlantic Reporter. Senior Judge John Musmanno wrote for the unanimous three-judge panel. The court did not include a detailed recitation of the facts, incorporating by reference the unpublished trial court decision. But from the issues discussed, it appears that birth mother was pregnant before she and partner began their relationship, but upon the birth of the child the birth mother designated her partner as the other parent on the birth certificate and gave the child her partner's last name, the sperm donor having no interest in parental status. The partners agreed to raise the newborn child together, partner paid expenses for both the birth mother and the child, and partner performed parental duties. There were audio recordings in evidence in which the child expresses his parental affection for the partner, and there is a written expression in evidence by the birth mother of her intent for the partner to "take the child as her own." The birth mother's grounds for contesting partner's claim of *in loco parentis* status included that partner had no part in the child's conception, "pursued another partner and attempted to adopt another child up until one month before the child's birth," and "used her education and background as a social worker to take advantage of mother." Also, the partner "was never listed as guardian or emergency contact on any of the child's executed paperwork," and "never cared for child by herself." Contrary to another one of the mother's allegations, the court found that the partner did participate in medical, religious, speech therapy, and other educational decisions for the child. Upon finding *in loco parentis* status, the trial court appointed a special master to hold a custody hearing, after which the special master filed a report and recommendations that were adopted over the objection of the birth mother, awarding shared legal custody to partner and mother, primary physical custody to mother, and partial physical custody (visitation rights) to partner, in accordance with the parties' schedules. Interestingly, mother only appealed the determination that partner had *in loco parentis* status, apparently willing to accept the substance of the court's order if the Superior Court finds that the trial court correctly determined her former partner's status. The case on appeal boiled down to which prior *in loco parentis* determinations upheld by the Pennsylvania appellate courts in other cases were most closely aligned with the facts in this case, and the Superior Court, without any substantive explanation, found this case to be most like cases that had recognized the *in loco parentis* status, and affirmed the trial court. Neither the opinion nor the docket available on-line identify counsel for the parties.

PENNSYLVANIA – Judge Deborah Kunselman wrote for the Superior Court panel in *C.T. v. A.W.T.*, 2020 WL 1518095, 2020 Pa. Super. Unpub. LEXIS 1093 (March 30, 2020), vacating an order issued by a Philadelphia Common Pleas court judge whose conduct of the hearing in a custody/visitation dispute between lesbian parents can best be

described as bizarre. A.W.T. and C.T. were apparently unmarried domestic partners when their child was born, or at least the record was unclear whether they ever married. Both were recorded as parents on the birth certificate. They subsequently separated under a court order incorporating their agreements on custody and visitation. A.W.T., who had primary custody, subsequently decided that she wanted to relocate with the child from Philadelphia to Virginia, desiring to pursue a new occupation (and coincidentally being located closer to her fiancée). C.T. objected, and the parties ended up in a hearing on A.W.T.'s petition for court approval to relocate with the child and C.T.'s opposition and counterclaim to modify the former agreement to give her more visitation time with the child. From Judge Kunselman's account of the hearing, it was a bit of a mess, with the trial judge interrupting frequently, cutting off A.W.T.'s principal case before all issues could be addressed as the judge had formed the conclusion that A.W.T.'s move was "solely" to be near her fiancée, peremptorily denying A.W.T.'s petition to relocate, shifting the hearing from evidentiary mode on the relocation issue (as to which C.T. never had an opportunity to put in evidence) to what seemed like argument mode on the visitation modification issue, and ultimately granting C.T. a modification of visitation that was a substantial departure from the original agreement without taking any testimonial evidence on the modification issue from either party. In opposing A.W.T.'s appeal of the court's order, C.T.'s characterization of what happened at the hearing struck Judge Kunselman as verging on misleading the court, representing that A.W.T. had consent to the visitation modification when there was no indication of same on the record, just a failure of A.W.T.'s counsel – perhaps stunned by the rapid change of events – to say anything when the judge asked "anything else" and then closed the proceeding. "In our review," wrote Kunselman, "we have discovered a lack of procedural due process. Throughout A.W.T.'s direct examination, the court frequently interjected. A certain level of interaction is entirely appropriate and necessary, especially when the court sits as the finder of fact and must manage the proceedings in the interest of judicial economy. Here, however, the court adopted an increasingly adversarial role." The Superior Court vacated the order on the ground that the proceeding was incomplete, the record bare of evidence on crucial points, so a do-over was necessary. Judge Kunselman noted that A.W.T. had not asked on appeal that the trial judge be recused, so the court could not order same, but commented, "Given our disposition and the fact that the trial court made specific credibility determinations, the court might consider for itself whether it still possesses the ability to be a neutral arbiter of this matter." A.W.T. is represented by Alycia Angel Kinchloe. C.T. is represented by Sarah Rebecca Katz.

PENNSYLVANIA – U.S. District Judge James M. Munley granted a motion by an alumnus of the University of Scranton to be allowed to sue anonymously as "John Doe" in a suit claiming that the University had discriminated against him because of his sexual orientation and gender stereotyping, in violation of the Equal Protection Clause. *Doe v. University of Scranton*, 2020 U.S. Dist. LEXIS 44812, 2020 WL 1244368 (M.D. Pa., March 16, 2020). After noting that the plaintiff had failed to file a certificate required by local rules to indicate whether the defendant had been asked whether they agreed to allow plaintiff to proceed anonymously, and that defendant had not filed a brief in opposition, the general policy of open courts required the court to rule on the motion, even though it was not formally opposed. Judge Munley noted 3rd Circuit precedents setting out factors for courts to consider in deciding whether to allow an anonymous suit. The judge found this an easy issue to resolve, finding that Doe had satisfied all the factors that support allowing anonymity, and none of the contrary factors weighed against him in this case. "The record provides no indication that since initiating this lawsuit plaintiff has waived his claim on anonymity by allowing others to discover his true name," wrote the judge. "Further, the plaintiff has not revealed his sexual orientation to anyone other than his close friends, counsel, past partners, medical providers, counselors, the defendant, the Pennsylvania Human Relations Commission, the Scranton Human Relations Commission and family members." The court found credible Doe's allegation that revealing his name in the litigation could lead to him enduring "additional harassment, which allegedly previously resulted in a physical assault and a threat to murder plaintiff." Supporting this point, the court cited some thirty-year-old district court opinions supporting the proposition that "cases where a party risks public identification as a homosexual also raise privacy concerns that have supported an exception to the general rule of disclosure." We find those precedents rather stale. But, says the court, "In addition to the record containing no indication that the plaintiff's allegations are unfounded, the court is well-aware of the threat of violence that the LGBTQ community can face," thus the plaintiff's reasons on this factor are "compelling." As to public interest concerns, the court finds that other LGBTQ people might be deterred from pursuing discrimination claims if they could not do so anonymously, and that since the University already knows the plaintiff's identity, allowing him to proceed anonymously will not compromise the defendant's ability to conduct discovery in this case. Furthermore, it is possible that Doe will feel compelled to abandon a meritorious case if he cannot proceed anonymously.

The court could not see any ulterior motive by Doe in this regard, and found that there was little particular public interest in revealing his name in court records. And, of course, the defendant did not oppose the motion. Doe is represented by Justin Frederick Robinette, of Law Offices of Eric A. Shore, P.C., Philadelphia.

VIRGINIA – In *Harrison v. Spencer*, 2020 WL 149357 (E.D. Va., March 27), U.S. District Judge Leonie M. Brinkema denied a motion by the defendants to dismiss on standing grounds co-plaintiff Modern Military Association of America (MMMA) from consolidated lawsuits challenging the Defense Department's policy concerning HIV-positive service members. At the time the complaint was filed, the co-plaintiff was OutserveSLDN, which later merged with another organization to become MMMA. The other co-plaintiffs are individual HIV-positive service members whose standing is not in question, so this motion was not dispositive of the litigation, but was potentially dispositive of the scope of remedial action by the court. Defendants, represented by the Department of Justice, argued that OutserveSLDN did not meet either test for organizational standing – direct standing due to an injury incurred as a result of the challenged government policy, or representational standing on behalf of its members. In the complaint, Outserve alleged representational standing, but during discovery it also provided a basis to argue for direct injury standing, and that is what Judge Brinkema focused upon in her decision. She found that under Supreme Court precedent, Outserve had alleged facts sufficient to have direct standing in the case, by asserting that as a result of the Department's policy, this small non-profit public interest group had been flooded with calls from affected service members, diverting its resources from other projects and thus affecting its ability to pursue its organizational mission. The court rejected the defendants' argument that this merely reflected a choice about resource allocation by SLDN and could not qualify as an injury for standing purposes. Having found direct standing, the judge said it was unnecessary for her to evaluate the representational standing claim. The 4th Circuit already upheld Judge Brinkema's refusal to dismiss the case in *Roe v. Dep't of Defense*, 947 F.3d 207 (4th Cir. 2020). The issue of standing had been held in abeyance pending that ruling. Now the case can proceed to a final ruling on the merits with MMMA as a fully participating party. MMMA was represented in opposing the motion by Andrew Ryan Sommer, Greenberg Traurig LLP, McLean, VA, and John Webster Hunter Harding and Laura Joy Cooley, Winston & Strawn LLP, Washington, DC.

WASHINGTON – U.S. District Judge Marsha J. Pechman issued a new opinion and order in *Karnoski v. Trump*, 2020 U.S. Dist. LEXIS 38671 (W.D. Wash.), on March 5. This suit challenges the constitutionality of the version of President Trump's transgender military service ban now in effect, having been filed in 2017 after the ban was announced by President Trump in a series of tweets. Although the Supreme Court stayed preliminary injunctions and allowed the ban to go into effect in April 2019 in a form recommended to the president by then-Secretary of Defense James Mattis in a memorandum and report submitted in February 2018, the litigation continues in four federal district courts, bogged down in discovery whose progress has been impeded by the government's privilege claims in opposition to the plaintiffs' interrogatories and document disclosure demands. *Law Notes* has reported over the last few months on the repeated opinions and orders issued by Judge Pechman, rejecting the government's claim that deliberative process privilege would shield from discovery obviously relevant material on the central issue of the case: whether the government had a sufficient justification for the policy, in light of the court's ruling that heightened scrutiny applies to this Equal Protection claim. In the March 5 order, Judge Pechman directs the government to identify the authors of the Mattis Memorandum and Report and supplement the uninformative information revealed so far in response to interrogatories concerning the sources of information purportedly relied upon in the production of these documents, including identities of those who testified to the Task Force and the content of their testimony. The government has claimed that among the witnesses were transgender military members and officers, but has refused to name them, citing privacy concerns. The court pointed out that protective orders are available, and directed that these individuals be identified by name, subject to an order that only counsel to the plaintiffs will be privy to that information. So many attorneys from LGBT rights organizations and the cooperating attorneys from major firms are representing plaintiffs that the list takes up more space in the slip opinion than the actual text of the judge's opinion. Camilla B. Taylor of Lambda Legal is listed as lead attorney for plaintiffs.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

PENNSYLVANIA – The Superior Court of Pennsylvania affirmed a decision by the Court of Common Pleas (Lancaster County) denying a petition for post-conviction relief filed by Richard E. Lawrence, who had been convicted by a jury on two counts of corruption of a minor, indecent exposure, and unlawful contact with a minor and sentenced to

10-1/2 to 21 years. *Commonwealth v. Lawrence*, 2020 WL 996930 (March 2, 2020). When he was 53, Lawrence initiated a sexual relationship with a 16-year-old boy, E.S. Lawrence worked as a driver for E.S.'s uncle and lived a quarter-mile from E.S.'s house. Wrote Senior Judge James G. Colins for the court, "E.S. would go to Appellant's house to play ping pong and watch movies and television. E.S. had no access to television or movies in his home and had very little knowledge about sex." Lawrence gradually filled in E.S.'s educational gaps, which led to mutual masturbation and oral and anal sex over a period of two years. "All of their sexual encounters occurred when E.S. came to Appellant's house or outdoors at night. Appellant told E.S. not to tell anyone about their sexual activity. E.S. tried to end the relationship after he turned 18, but did not because Appellant kept contacting him and he was afraid that Appellant would come to his house and harm his family if he stopped going over to Appellant's house." The opinion does not relate how this situation came to the attention of prosecutors. E.D. testified at trial "that it didn't feel right and was sort of scary when he saw Appellant's penis the first time." In his petition, Lawrence argued that the statute under which he was convicted was unconstitutionally vague, and that it was improper to prosecute him because the sex with E.S. was consensual and the age of consent for legal sex in Pennsylvania is 16. The court rejected both of his arguments. First, Judge Colins explained that the corruption of minors statute and indecent exposure statute had been sustained against vagueness challenges in the past, even though they did not specify particular sexual acts that might be the basis for a corruption of minors prosecution. Furthermore, he pointed out, Lawrence was not being prosecuted for having sex with E.S. A "minor" for purposes of the corruption and contact statutes is defined as a person under age 18. "The fact that Appellant's sexual activity was consensual deviate sexual intercourse does not convert the offenses of which he was convicted into prohibitions of voluntary deviate sexual intercourse," wrote Colins. "Neither indecent exposure nor unlawful contact with minors predicated on indecent exposure involves proof of any sexual relationship or act of sexual intercourse or deviate sexual intercourse. While Appellant's corruption of a minor convictions were based on his sexual acts with E.S., they were based on the age of the parties and Appellant's initiation of the sexual relationship with a minor, not on the type of sexual intercourse or the gender of the participants . . . Nothing in the trial court's instructions to the jury suggested that Appellant could be convicted based on the same-sex nature of the acts or the type of sex acts that occurred." Further, the court found that Lawrence's contention that he suffered from ineffective assistance of counsel at trial, asserting (without describing them) that the issues that trial counsel failed to raise at trial lacked merit. Lawrence was represented on this appeal by Maryjean Glick, Senior Assistant Public Defender, Lancaster.

PRISONER LITIGATION NOTES

By William J. Rold

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

CALIFORNIA – This is another example of an outrageous delay in screening a *pro se* complaint. Transgender plaintiff Ramon (Mona) Murillo filed her lawsuit alleging civil rights violations in March of 2018. She was granted IFP status the next month. A year later (April 2019), she filed a motion to move her case "forward." In June 2019, she requested permission to serve the defendants; in July 2019, she requested appointment of counsel. Nothing happened until March of 2020, when U.S. Magistrate Judge Jacqueline Chooljian dismissed her case with leave to amend in *Murillo v. Godfrey,* 2020 U.S. Dist. LEXIS 40426, 2020 WL 1139811 (C.D. Calif., Mar. 9, 2020). Murillo sued some sixteen defendants on nine causes of action that overlap and combine multiple incidents – involving denial of access to court, retaliation for filing complaints under the Prison Rape Elimination Act [PREA], excessive force, failure to protect her, and denial of medical care. But her rambling run-on pleading is a poor excuse for this kind of delay. Judge Chooljian (who has been on the case since the IFP) found procedural rules violations in the caption (not naming all defendants, in violation of F.R.C.P. 10), in the body of the complaint (failure to file a short, concise pleading, in violation of F.R.C.P. 8), and in the joinder of multiple incidents (in violation of F.R.C.P. 20). This did not require heavy analysis. As to the failure to state claims, Judge Chooljian separately describes the facts underlying each claim, then states the applicable law, then applies it to each defendant – even though the complaint as a whole is rejected because of the rule violations. She finds that none of the defendants actually denied Murillo access to court, but some of them may have retaliated against her for filing PREA grievances against them. Additionally, several (as many as ten) may have used excessive force or sexually harassed her – adopting the definitions of touching, without penological justification, to gratify or to humiliate, degrade, or demean – under *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020); and *Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir. 2012). Judge Chooljian finds that calling Murillo a "rat" is not an Eighth Amendment violation of her safety because Murillo was not actually put in danger under *Gronquist v. Cunningham,* 747 Fed. App'x 532, 534 (9th Cir. 2018). Murillo's medical care claims include

denial of sex confirmation surgery. Judge Chooljian writes that Murillo failed to show medical necessity, as required by *Edmo v. Corizon, Inc*., 935 F.3d 757, 803 (9th Cir. 2019). Murillo pleaded that officers interfered with her mental health medication. Judge Chooljian does not address this as a separate claim. After two years, Judge Chooljian gives Murillo 14 days to do one of the following: (1) file an amended complaint that cures the defects outlined; (2) voluntarily dismiss without prejudice, or (3) stand on the complaint and risk dismissal of the complaint in its entirety (presumably without leave to amend). Murillo is not advised as to the effect of her choice under the "three strikes" rules of the Prison Litigation Reform Act. That issue is before the Supreme Court this term in *Lomax v. Ortiz-Marquez,* 754 Fed. App'x 756 (10th Cir. 2018), *cert. granted,* 10/18/19, No. 18-8369. *See Law Notes* (November 2019 at pages 6-7).

CONNECTICUT – The Chief federal district court judge in Connecticut, Stefan R. Underhill, is probably best known for his 2010 ruling that cheerleading could not count as a sport for a university's gender equality obligations under Title IX. *Biediger v. Quinnipiac University,* 728 F.Supp.2d 62 (D.Conn. 2010), *aff'd,* 691 F.3d 85 (2d Cir. 2012). For the last seven years, he has presided over six consolidated cases concerning what pictorial publications showing various sexually explicit images may be banned in Connecticut's prisons. The almost-20,000-word opinion easily discusses everything the reader ever thought to want to know about straight male inmate sexuality, fantasy, and masturbation – and much of what might have been left unsaid. Since the censorship does not discriminate on the basis of gender or sexual orientation, the interests of women (as staff) and LGBT's are considered in terms of being targets of straight men's objectification, harassment and victimization. The experts duel about whether pornography incites such behavior or reduces it in *Reynolds v. Cook,* 2020 WL 1140885 (D. Conn., Mar. 9, 2020). This goes on for tens of pages. Perhaps oddly, the one thing about which the experts agree is that restriction of pornography makes it more valuable in the underground inmate barter economy. Judge Underhill sustains the censorship regulations at issue, which ban even such "soft" porn as *Playboy* and could extend to Michaelangelo's *David*. He finds a rational connection with security interests under *Turner v. Safley,* 482 U.S. 78, 89 (1987) – one "unrelated to the suppression of expression" that is "neutral" under *Thornburgh v. Abbott,* 490 U.S. 401, 415-16 (1989). Defendants' argument that reducing sexually explicit pictures reduces violence and aggression is reasonable, "even if I do not find it particularly convincing." Social science provides "moderate," if "conflicting," support, and that is enough. Quoting *Waterman v. Farmer,* 181 F.3d 208, 216-17 (3d Cir. 1999), Judge Underhill writes: "Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful." For similar reasons, the regulations foster a legitimate interest in decreasing a sexually harassing workplace for female staff. Alternatives for expression exist under the regulation, since it does not ban written depictions of sexually explicit behavior. While the prison system could have tried to develop a censorship system restricting access to sexually explicit materials based on the inmates' sexual offense history, it was not required to do so by the First Amendment – and contraband would spread throughout the institutions anyway. Judge Underhill finds that overbreadth and vagueness arguments that may have legitimacy in other First Amendment contexts add little to the analysis required by *Safley* in the prison setting. The exceptions in the censorship for scientific, medical, educational, and artistic images are sufficient on their face, even if an occasional *David* is mistakenly prohibited. Similar restrictions have been upheld. *See* 28 C.F.R. 540.72(b)(3) (federal Bureau of Prisons) [string citations omitted]. Judge Underhill declines to rule on claims under the Connecticut Constitution, holding that the "prospective relief" provision of the Prison Litigation Reform Act prohibits him from entering relief on state constitutional claims, citing *Marcavage v. City of New York*, 689 F. 3d 98, 103 (2nd Cir. 2012); and *Handberry v. Thompson*, 446 F.3d 335, 344-46 (2nd Cir. 2006).

FLORIDA – *Pro se* federal transgender inmate Nathaniel Rodriguez filed papers seeking an emergency order because of her safety, alleging that other inmates were drugging and raping her in *Rodriguez v. Federal Bureau of Prisons*, 2020 WL 1308213 (M.D. Fla., Mar. 19, 2020). Rodriguez said she was in a special housing unit and could not get the forms needed to file properly. U.S. District Judge Philip R. Lammens dismissed the application because Rodriguez did not file a complaint or papers in support of a preliminary injunction. He directed the clerk to send Rodriguez the necessary forms to commence a proper lawsuit. Judge Lammens took another step, however. Per Local Standing Order in the Middle District of Florida, he sent a copy of Rodriguez' allegations to the warden where she is imprisoned. He wrote: "Because the Court has a high number of cases filed by *pro se* prisoners in which the inmate either alleges an imminent risk of physical injury or death, the Court routinely enters orders on an expedited basis (without regard to the legal merits of the motion) directing the Clerk of Court to immediately notify the appropriate prison official(s) of such allegations for whatever action may be deemed appropriate in an effort to

expedite notice." This writer commends such notice, which seems to be an outlier practice in the federal courts.

ILLINOIS – For the last two months, *Law Notes* has covered the putative class action litigation about transgender inmates in the Southern District of Illinois. See "Federal Judge Preliminarily Enjoins 'Unqualified' Transgender 'Committee' in Illinois Prison System . . . " (January 2020 at pages 12-13), reporting *Monroe v. Baldwin*, 2019 WL 6918474, 2019 U.S. Dist. LEXIS 217925 (S.D. Ill., Dec. 19, 2010). In February, we reported that the State of Illinois had filed a motion for reconsideration of Judge Nancy J. Rosenstengel's preliminary injunction; we also noted that no class had yet been certified. The defendants argued on the reconsideration: (1) that the relief ordered went further than was necessary for the named plaintiffs (who were already receiving hormones); (2) that the relief was not narrowly tailored as required by the Prison Litigation Reform Act [PLRA]; and (3) that the adoption of World Professional Association on Transgender Health [WPATH] standards on care and provider qualifications was error under the Constitution. See *Law Notes* (February 2020 at page 30). Now, Judge Rosenstengel issues a pair of decisions on March 4, 2020. First, in *Monroe v. Meeks*, 2020 U.S. Dist. LEXIS 37131; 2020 WL 1057890 (S.D. Ill.), she certifies a class action under F.R.C.P. 23(b)(2). Over 110 class members in 21 facilities satisfies numerosity. There are common questions of law and fact, as indicated in the preliminary injunction opinion. The six named plaintiffs are typical of unnamed class members, even though there are variations in their circumstances. And, the class is represented by experienced litigators. The class is certified for declaratory and injunctive relief under subsection (b)(2), and damages claims are excluded. The class consists of "all persons in the custody of IDOC who have requested evaluation or treatment for gender dysphoria." Next, in *Monroe v. Meeks*, 2020 U.S. Dist. LEXIS 37128, 2020 WL 1048770 (S.D. Ill.), Judge Rosenstengel reconsiders her preliminary injunction. Agreeing with part of defendants' argument, she vacates the portion of her preliminary injunction ordering hormones for the named plaintiffs, since they are already receiving them. She then reissues the preliminary injunction, modified to ensure access to hormones for the class and to monitor all prescribed hormones. This probably extends the preliminary injunction another ninety days under the PLRA – 18 U.S.C. § 3636(a)(2) – which automatically terminates preliminary injunctions after 90 days, absent special action. She also lifts her stay on merits discovery and orders the parties to try to agree on a discovery plan. In reconsidering the preliminary injunction, Judge Rosenstengel finds that adoption of WPATH standards is consistent with the Eighth Amendment here in terms of general standards of care and of qualifications, particularly since the defendants offered no contrary expert testimony at the hearing or on reconsideration. Judge Rosenstengel relies on *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019). She finds that defendants "have provided plenty of evidence that IDOC continuously fails to provide adequate treatment to inmates with gender dysphoria, including in the administration of hormone therapy . . . , fails to adequately monitor inmates receiving hormone therapy and properly adjust dosages . . . , [and] did not monitor approximately twenty-five to fifty percent of inmates at all." In this writer's view, the defendants' motion may have bought them some time, but it allowed the district judge to correct some procedural problems with the record that will make the preliminary injunction easier to affirm. The plaintiff class is represented by the ACLU Roger Baldwin Foundation; Kirkland & Ellis, LLP (both of Chicago); and Law Offices of Thomas E. Kennedy, III, L.C. (St. Louis).

ILLINOIS – Gay *pro se* federal inmate Kenneth Houck sued on various grounds, including discrimination because of sexual orientation in his treatment in a sex offender program at the U. S. Penitentiary at Marion, Illinois. In *Houck v. United States,* 2020 WL 1061105, 2020 U.S. Dist. LEXIS 38130 (S.D. Ill., Mar. 5, 2020), U.S. District Judge J. Phil Gilbert dismissed his case. Houck tried to argue an implied cause of action for violation of his equal protection rights under the Fifth Amendment. He alleged that he was cited for possession of clothed, "non-sexual" pictures of "male models" and that officers taunted him by saying "no fags allowed here." Judge Gilbert found the claim to be an inappropriate attempt to "extend" *Bivens* remedies under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), allowed an implied damages claim for violation of the Fourth Amendment. In *Davis v. Passman*, 442 U.S. 228, 230-31 (1979), the Supreme Court extended implied remedies to an equal protection claim under the Fifth Amendment on behalf of a Congressional employee who claimed gender discrimination. In *Ziglar,* however, the Court stated that any new "extensions" of *Bivens* were subject to special scrutiny – and the lower courts are universally hostile to any such extensions. Here, Judge Gilbert, specifically recognizing that applying *Ziglar* to claims of sexual orientation discrimination would be far-reaching, appointed counsel for Houck. Judge Gilbert vacated the recommendation of U.S. Magistrate Judge Donald G. Wilkerson, and Houck's counsel briefed the issue. Counsel later was permitted to withdraw, and Houck is again *pro se*. Now, Judge Gilbert adopts the

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recommendation of U.S. Magistrate Judge Gilbert C. Sison that the case be dismissed. One of the factors in refusing to extend *Bivens* under *Ziglar* is the presence of other remedies. Judge Gilbert cites without explanation the Prison Rape Elimination Act, 34 U.S.C. §§ 30301-09, as an "alternative avenue." Most courts have found no implied cause of action under PREA.

MARYLAND – U. S. District Judge George J. Hazel wrote a very long opinion in *Canter v. Mamboob,* 2020 WL 1331894 (D. Md., Mar. 23, 2020), concerning the injunctive relief and damage claims of transgender inmate Amber Maree Canter. Canter was diagnosed and received "street" hormones prior to incarceration. Pursuant to a "freeze frame" policy, Maryland correctional officials nevertheless refused diagnostic work-up and hormones at the time of her incarceration, because she was not transgender within Correctional definitions. Canter experienced physical and psychological complications – including breast lumps and leakage, which were attributed to estrogen withdrawal – and she attempted to self-harm at least 18 times. She filed suit *pro se* in 2017. But she was paroled, and the injunctive claims (but not the damage claims) were mooted. Later, Canter was reincarcerated and her saga continued. As Maryland's policies about transgender inmates evolved (and these are detailed at length), Canter was promised evaluations and hormones, which she eventually received in 2019. By then, Judge Hazel had appointed counsel for Canter. Maryland officials began to retaliate against Canter, calling her a "snitch" and telling her they were "tired of answering to the Attorney General's Office" about her complaints. She was reassigned from honor block to segregation, where she was taunted and threatened with sexual violence by officers and other inmates. Her medications were interrupted. Defendants moved to dismiss. Canter moved to amend her complaint to include allegations about outside care while on parole, lack of treatment on return to prison, and retaliation. Judge Hazel grants Canter leave to amend. He also denies the motions to dismiss the injunctive and damage claims. Although at least one defendant may be entitled to dismissal for failure to exhaust administrative remedies under the Prison Litigation Reform Act, factual disputes about whether Canter was prevented from grieving her retaliation prevent disposing of this issue summarily. Injunctive claims are no longer moot, and Canter has stated a claim of unconstitutional supervision and training under *Bayard v. Malone,* 268 F.3d 228, 235 (4th Cir. 2001). As to damages, Maryland's statute of limitations is three years – *Nasim v. Maryland House of Correction,* 64 F.3d 951, 953 (4th Cir. 1995). In addition, the running can be tolled under the continuous conduct rule. "Plaintiff argues persuasively that she has alleged a pattern of widespread deliberate indifference to her medical needs throughout DPSCS and not an isolated incident at one institution . . . . [W]hen a harm has occurred more than once in a continuing series of acts or omissions, a plaintiff under certain circumstances may allege a 'continuing violation' for which the statute of limitations runs anew with each violation." *DePaola v. Clarke*, 884 F.3d 481, 486-7 (4th Cir. 2018). The application of this rule here is notable, because Judge Hazel includes both pre- and post-parole events in his continuing violation account, going back at least as far as 2016. Canter is represented by Ballard Spahr, LLP, Baltimore.

MICHIGAN – Rodriguez Burks, a gay black man, was murdered by his homophobic cellmate (Madden) at the Alger Correctional Facility in Michigan's Upper Peninsula. The personal representative of his estate sued in *Burks v. Eiseman,* 2020 U.S. Dist. LEXIS 43731, 2020 WL 1234935 (W.D. Mich., Mar. 13, 2020). Senior U. S. District Judge Gordon J. Quist dismissed all claims except for Eighth Amendment failure to protect. The dismissed claims included race and sexual orientation discrimination and gross negligence under Michigan tort law. Burks' sexual orientation was "known," as was the homophobia of Madden. Both complained about sharing a cell, and Madden threatened to hurt Burks. The cell assignment counsellor told them: "This is not the Holiday Inn." Madden was subsequently convicted of Burks' murder (a fact Judge Quist relegates to a footnote). After the murder, other inmates corroborated homosexual slurs by some of the defendants and general animus toward blacks and gays. Judge Quist finds the factual allegations insufficient to proceed on race and sexual orientation claims. He says they were pleaded under 42 U.S.C. §_1981 (which covers only race and only inequality in contracting), but he reviews them also under the general civil rights protective statute that includes equal rights, 42 U.S.C. § 1983. Judge Quist finds the racial and homophobic statements were not attributable to all defendants and that even as to the one uttering them, they occurred after the murder and were generalized and not specific to Burks. The holding that anti-gay animus did not play a part for purposes of reviewing the pleading seems thin to this reader – it was the basis of Madden's animus and known to the defendants. Under these circumstances, one can ask: what is the rational basis for not separating the two under *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012) (gay inmate denied community release job)? Judge Quist was not reviewing the matter on summary judgment. On gross negligence, Judge Quist finds defendants' failures may have been a

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"but for" cause of Burks' death and even "a" proximate cause, but Michigan law requires that they be "the" proximate cause. Here, Madden was "the" proximate cause, despite what defendants failed to do. *See* Mich. Comp. Laws § 691.1407(2)(c) (Michigan Tort Liability Act requires "gross negligence that is the proximate cause of the injury"), citing *Ray v. Swager,* 903 N.W.2d 366, 371, 375 (Mich. 2017) ("the" cause is the "most immediate" cause). Judge Quist finds that Michigan courts hold that state prison officials' gross negligence cannot be "the" immediate cause when an inmate commits suicide [citations omitted]. The Eighth Amendment protection from harm claims should be enough for substantial recovery in this case, but the state immunity law seems unfortunate. The analysis of pervasive homophobia also seems dismissive – in *Davis,* the plaintiff only lost a job, not his life. Yet, the Sixth Circuit disapproved a dismissal, writing: "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause," quoting *Stemler v. City of Florence,* 126 F.3d 856, 873-4 (6th Cir. 1997). Burks' estate is represented by Fieger, Fieger, Kenney & Harrington, PC (Southfield, MI).

MICHIGAN – *Pro se* inmate Michael Salami is a transgender female. Her civil rights case raises issues of medical and mental health treatment and protection from other inmates in *Salami v. Rewerts,* 2020 WL 1316510 (W.D. Mich., Mar. 20, 2020). Chief U.S. District Judge Robert J. Jonker allows her to proceed on several claims, while dismissing others. He characterizes her case as follows: "Plaintiff alleges that she has a gender identity disorder (GID), under which she identifies as a highly feminine woman. She dresses as a woman to the extent possible, including making her own panties, wears her hair in pigtails or a ponytail, and speaks in a high voice. Plaintiff alleges that she passed all of her lab tests and signed a treatment contract and waiver of liability . . . ." Nevertheless, Salami alleges that the Michigan "Gender Dysphoria Recommendation Committee" refused her hormones and denied her "entry into the rolls of transgender female prison inmates," to avoid having to consider gender confirmation surgery. She also claims harassment and assault by another inmate [Nacho], who, although moved to another unit, is still at the prison and can reach her through gang contacts. She alleges a brutal assault by a "friend" of Nacho (with a homemade weapon and chemicals thrown into her face), despite her pleas for protection. Judge Jonker dismisses the warden and deputy warden for insufficient personal involvement, since the only allegations against them concern mishandling Salami's grievances. Judge Jonker also dismisses the "Transgender Committee," holding that it is a "subdivision" of the Michigan Department of Correction and therefore entitled to sovereign immunity under the Eleventh Amendment. This is an extraordinary holding. This writer has not seen Eleventh Amendment immunity extended to any Correctional transgender "committee" by any other federal judge. The cases on which Judge Jonkers relies involve the Michigan DOC itself it or the Michigan Board of Parole. *See, e.g., Harrison v. Michigan*, 722 F.3d 768, 771 (6th Cir. 2013) (holding that both the MDOC and its subdivision, the Michigan Parole Board, are entitled to immunity under the Eleventh Amendment). But the Parole Board is created by statute – MCLS §§ 791.231, *et seq.,* not by policy directive, as is the case for the "Transgender Committee." MDOC Policy Directive 04.06.184 ¶ C. This writer is not aware of any authority for a Correction department's investing a committee with sovereign immunity by policy directive. Even if this were possible, the "committee" is composed of people (medical director, mental health director, etc.), who do not have sovereign immunity from deliberate indifference cases. Judge Jonker allows several health provider defendants to remain in the case, including the corporate provider, Corizon. Judge Jonkers also allows Salami's protection from harm case to proceed, but he denies a preliminary injunction, because the DOC's moving of Nacho to another unit makes another assault less "imminent," even if some risk remains – noting that Salami "has not attempted to supplement his complaint with allegations about new instances of assault." The handling of the "Committee" by Judge Jonker immunizes the only defendants with real authority over transgender treatment decisions for Michigan transgender inmates. In a *pro se* case, the *members* of the "Committee" should have been substituted.

MISSOURI – *Pro se* prisoner Dwayne Robison is gay and transgender. She sues to compel Missouri corrections officials to let her live in a double cell. She also says that she is subjected to verbal abuse, in *Robison v. Hovis,* 2020 WL 1158125, 2020 U.S. Dist. LEXIS 41148 (E.D. Mo., Mar. 10, 2020). U.S. District Judge Jean C. Hamilton dismisses the case for failure to state a claim on screening and as frivolous, because it is duplicative of multiple other cases Robison filed that unsuccessfully raise the same issues. Also addressing the merits, Judge Hamilton finds that defendants' keeping Robison "in a single cell fails to state a claim under the Eighth Amendment." A single cell, by itself, does not deprive an inmate of the "minimal civilized measure of life's necessities," quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). While prolonged isolation can have "Eighth Amendment implications" under *Hamner v. Burls*, 937 F. 3d 1171, 1178-79 (8th Cir. 2019). Robison has not shown that her mental health needs were unmet or that her condition has worsened. She also concedes that she

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has yard privileges. A single cell is not an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). The verbal abuse fails to state a claim under *Hopson v. Fredericksen*, 961 F. 2d 1374, 1378 (8th Cir. 1992) (in general, "mere verbal threats made by a state-actor do not constitute a Sec. 1983 claim"). Judge Hamilton does not discuss framing the claim as an equal protection issue, although Robison says she was forced into a single cell because of her sexual presentation.

NEW JERSEY – Gay *pro se* prisoner Samir Thomas allegedly had sex with a guard after the guard did him a favor regarding food during lockdown, which prompted another guard (Oliva) to utter homophobic slurs against Thomas. In *Thomas v. Ortiz,* 2020 WL 1307318 (D.N.J., Mar. 19, 2020), U.S. District Judge Susan D. Wigenton dismissed Thomas' lawsuit alleging violation of his rights by Oliva and failure of a sergeant to protect him from Oliva. Thomas first alleged that defendants violated the Prison Rape Elimination Act [PREA] by refusing to permit him to file a complaint against Oliva. Judge Wigenton ruled that PREA creates no cause of action: "PREA provides no basis for a stand-alone claim, and Plaintiff cannot create such a claim by 'bootstrapping' PREA into a failure to protect claim," citing *Bowens v. Emps. Of the Dep't of Corr.*, 2016 WL 3269580, at *3 (E.D. Pa. June 15, 2016), *aff'd sub nom., Bowens v. Wetzel*, 674 F. App'x 133, 137 * (3d Cir. 2017). Thus, Thomas had to show that Oliva violated his rights in a manner that triggered his right to be protected from harm. It appears that Oliva's conduct consisted only of verbal slurs, without physical assault (or even touching) by anyone. Even if the slurs were actionable, defendants were not bystanders to the comments, because they were not present when the comments were made and had "no realistic opportunity" to intervene, citing *Bistrian v. Levi,* 696 F.3d 352, 371 (3d Cir. 2012).

NEW YORK – Plaintiff, B. Braxton/Obed-Edom, self-identifies as a "gender non-conforming bi-sexual gay male" who uses female pronouns. She brought a *pro se* federal civil rights lawsuit claiming that she endured harassment and assaults when she was denied "transgender housing" at the Manhattan House of Detention. *Law Notes* has covered this case twice, in January and April of 2019, when – in *Braxton v. City of New York,* 2018 U.S. Dist. LEXIS 215168 (S.D.N.Y., December 20, 2018); and *Braxton v. City of New York,* 2019 U.S. Dist. LEXIS 45119 (S.D.N.Y., March 15, 2019) – she was allowed by U.S. District Judge George B. Daniels (adopting the recommendations of U.S. Magistrate Judge Stewart D. Aaron) to proceed with claims against the Commissioner, the Warden, and the Chair of the Board of Corrections. A year later, New York City moved for summary judgment because Braxton had settled with the City on similar claims in state court, received a monetary payment, and signed a general release. Braxton objected on the ground that she lacked capacity to sign a general release when she settled, although she was represented by counsel in the state court proceeding. Judge Aaron recommended that the City be granted summary judgment, because Braxton's evidentiary proffer on capacity was stale. On objections to the recommendation, Judge Daniels accepts Braxton's proffer of current mental health evidence from state prison (that also contained history), even though it was not offered before Judge Aaron. "Because Plaintiff is a *pro se* litigant . . . , this Court is constrained to consider his pleadings liberally, and will consider his evidence, even if filed for the first time in his objections." In *Braxton v. City of New York,* 2020 WL 1303558 (S.D.N.Y., Mar. 19, 2020), Judge Daniels recommits the capacity issue to Judge Aaron to make a new recommendation as to whether Braxton was able to execute the controlling general release at the time she signed it – and also to inquire as to the "circumstances of Plaintiff's counsel's involvement in Plaintiff's signing the [release]."

OHIO – In February, *Law Notes* reported the denial by U.S. District Judge Sarah D. Morrison of preliminary relief to DeMarco Armstead regarding his HIV medication in *Armstead v. Baldwin,* 2020 U.S. Dist. LEXIS 22476; 2020 WL 613934 (S.D. Ohio, Feb. 10, 2020). Judge Morrison also ordered Ohio correctional medical defendants to file bi-weekly reports on dispensing his HIV medication. Now, U.S. Magistrate Judge Kimberly A. Jolson screens Armstead's complaint in *Armstead v. Baldwin,* 2020 WL 1322050 (S.D. Ohio, Mar. 20, 2020). From Judge Jolson's opinion, only a sliver of Armstead's voluminous complaint and filings concerns his HIV care. The rest allege civil rights violations, including excessive force, conditions of confinement, religious freedom, retaliation, access to courts, and due process. Judge Jolson allows Armstead to proceed past screening on these claims, as well as deliberate indifference by NaphCare defendants (corporate provider) to his HIV care and other medical issues. Because defendants have filed possibly dispositive motions to dismiss, Judge Jolson stays discovery until they are resolved in light of the finding that preliminary injunctive relief is not necessary on the medical claims. Armstead apparently has lodged "hundreds of filings" in the case. Therefore, Judge Jolson also restricts Armstead from filing additional applications (with limited exceptions) without leave of court until the motions

to dismiss are resolved and there is a discovery order. Armstead's motion to identify and add a NaphCare defendant (previously named as "Jane Doe") is granted.

WEST VIRGINIA – *Pro se* gay federal prisoner Jesse Russell Simpson brought a *habeas corpus* petition under 28 U.S.C. § 2241, challenging his loss of good time and discrimination based on his sexual orientation, in *Simpson v. Gomez,* 2020 WL 1303892 (N.D. W. Va., Mar. 19, 2020). U.S. District Judge Thomas S. Kleeh adopted almost all the Report and Recommendation of U.S. Magistrate Judge Michael J. Aloi. Simpson alleged violation of the First, Fifth, and Eighth Amendments because of retaliation for his joining a music program "comprised primarily of LGBT inmates." Simpson also alleged loss of good time. Judge Kleeh ruled that Simpson could not raise conditions of confinement claims in a *habeas* action, but he reversed Judge Aloi's recommendation that this dismissal be with prejudice. Judge Kleeh also ruled that Simpson is not entitled to *habeas* relief because he was not actually denied good time. Finally, he directs the Clerk to send Simpson *Bivens* [*v. Six Unknown Agents,* 403 U.S. 388 (1971)] forms to pursue his condition of confinement claims. In this regard, he reprints in its entirety the Northern District of West Virginia *pro se* prisoner *Bivens* forms. They inform the *pro se* inmate about the Prison Litigation Reform Act's "three-strikes" rule that bars a fourth filing where three prior ones have been dismissed "unless the prisoner is under imminent danger of serious physical injury" – 28 U.S.C. § 1915(g) – omitting the language in quotations. They sweepingly inform the inmate that any compensatory damages against a federal officer are subject to seizure before payment to the inmate if any restitution orders are not satisfied – without mentioning that there are First Amendment qualifications to this rule under *Simon & Schuster, Inc. v. NYS Crime Victims Board,* 502 U.S. 105, 123 (1991), or that federal restitution does not apply to all crimes under 18 U.S.C. § 3663A. Finally, the forms do not mention the recent restrictions on the *Bivens* remedy in *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1857 (2017). Judge Kleeh was appointed by President Trump in 2018. Per the N.D.W.Va. website, the local rules containing these forms are dated March 2018.

WISCONSIN – An observant straight Muslim inmate, Rufus West (*pro se*), sued after a transgender male officer observed a strip search of his person in *West v. Kind,* 2020 U.S. Dist. LEXIS 40210, 2020 WL 1139800 (E.D. Wisc., Mar. 9, 2020). Chief U.S. District Judge Pamela Pepper granted defendants summary judgment under both the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) ["RLUIPA"] and the Free Exercise Clause of the First Amendment. West maintained that "Islamic law prohibits . . . exposing his nakedness to anybody, but especially females." West argues that the trans officer was female, despite his presentation, because he was born female. The Prison Rape Elimination Act and its regulations (28 C.F.R. § 115.15) and Wisconsin prison regulations prohibit female officers from routine strip searches of male inmates. (Defendants do not seek to justify the search here as exigent.) Neither federal nor Wisconsin regulations explicitly consider transgender staff with respect to strip searches. Judge Pepper notes that the U.S. Department of Justice has issued an interpretation of federal regulations stating that an "individualized determination" should be made for searches by transgender staff members. The search challenged here apparently occurred only once in some twenty years of West's incarceration and only at one prison, in Green Bay. The RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless "that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000cc-5(7)(A); but "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 862 (2015). Judge Pepper first considers whether West's case is moot because he is no longer at Green Bay. After much consideration, she rules that it is not, because West has been confined at Green Bay three times in his correctional history; and defendants would not assure that he would not be transferred back to Green Bay during the remaining five years of his sentence. Turning to the RLUIPA, Judge Pepper finds that West's religious sincerity is not seriously disputed. She rules, however, that the isolated, single search did not "substantially" burden his free exercise. She compares other cases where the burden was frequent or repeated [citations omitted]. Judge Pepper proceeds in dicta (since she found no burden on free exercise) to address the state's justifications. She writes that compliance with the law protects the rights of transgender staff as a compelling interest. Allowing the transgender male officer to perform strip searches and assigning him to searches like other male officers was the narrowest way to achieve that interest. She also finds compelling interests in penological reasons for deployment of staff and for staff members' privacy from inmate inquiry into their sexual presentation. Judge Pepper analyzes West's Free Exercise Claim separately, noting that, unlike RLUIPA, the First Amendment does not require accommodation of religious exercise as a condition of federal funding, citing *Borzych v. Frank*, 439 F.3d 388, 390

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(7th Cir. 2006). Thus, the result is the same: having failed to succeed on his best argument under the RLUIPA, West also fails under the First Amendment. *Neely-Bey Tarik-El v. Conley*, 912 F.3d 989, 1004 (7th Cir. 2019); *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012). While litigated by a prisoner objecting to a strip search by a transgender officer, this case obviously is significant precedent for protecting the employment rights of transgender officers.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

FEDERAL – U.S. Representative Ro Khanna (D-Calif.) introduced a bill late in February to add a third gender designation to U.S. passports, attempting to put an end to the need for an existing lawsuit challenging the State Department's requirement that all U.S. passports show the individual as either male or female. Rep. Khanna pointed out that 15 states and the District of Columbia already afford their residents a third-gender-designation option on official identification documents, so why not the State Department?

FEDERAL – At the beginning of April the Food & Drug Administration, responding to shortages of blood during the COVID-19 crisis, agreed to reduce from 12 months to 3 months the time that a gay man must be celibate in order to be eligible to donate blood. The FDA's policy adopted in the 1980s once it was established that the virus associated with AIDS, Human Immunodeficiency Virus (HIV), could be transmitted through blood, imposed a lifetime ban on donating blood by any man who had ever had sex with another man. As the process of screening blood for evidence of HIV infection became better and knowledge about the time cycle of formation for detectable antibodies to HIV improved, the FDA moved to allow gay men to donate blood if they had been celibate for a year. Many other jurisdictions have now moved to shorter celibacy periods, with three months being common. But even this requirement has been criticized, some arguing that the common screening tests can detect HIV antibodies by a week after infection.

ARIZONA – On March 3, the House of Representatives passed HB 2706, which would ban transgender girls and women from competing in school sports consistent with their gender identity. The measure was passed with a party line vote by the Republican majority. The measure was sent to the Senate. The measure was intended to overrule a decision by the Arizona Interscholastic Association to allow all students to participate in sports in a way that is consistent with their gender identity.

IDAHO – On March 16, the Senate gave final approval to HB 500, a measure that would bar transgender women and girls from participating in sports consistent with their gender identity, and sent the measure to Governor Brad Little, who signed it on March 30. In the bill's legislative findings, the legislature asserted that physical differences between the "biological" sexes would give an unfair advantage to persons identifying as women but identified at birth as men to compete as women. The bill requires that sports be designated as either male, female, or mixed, and that a person could be required to submit to a physical examination to determine how they would be classified. Although similar legislative proposals have been introduced in other states, and a lawsuit is pending in Connecticut challenging the decision by school authorities to allow transgender women to compete as women in high school sports, the Idaho measure, if signed into law, would be the first state legislation to require that transgender women be excluded from competing in women's sports. * * * HB 500 built upon earlier efforts by Idaho Republicans to demonize transgender people, specifically a bill passed by the Republican-controlled House to prohibit the practice of allowing transgender people to get an amended birth certificate showing the gender with which they identify. The House voted 53-16 to approve the measure, even though a federal court ruling had declared the state's unwillingness to allow such changes as matter of executive branch policy unconstitutional. The measure, which also passed the Senate, was also signed into law by Governor Little on March 30, despite a warning that in light of the prior federal court ruling, which had not been appealed, the Health Department might be subjected to contempt sanctions if it refused to process changes on birth certificates. There were estimates that the state could be committing itself to pay upwards of $1 million in litigation expenses and potential damages. The Idaho ACLU chapter warned that both bills will face renewed challenges in the courts.

IOWA – The House voted unanimously in favor of a bill to end the use of the "gay panic defense" in homicide and serious assault cases.

KENTUCKY – The Fairness Campaign announced on March 10 that the city of Newport, population 15,033, has become the 20th municipality in Kentucky to approve a Fairness Ordinance, which adds sexual orientation and gender identity to discrimination protections in employment, housing, and public accommodations. Newport is the fourth municipality in the state to approve LGBTQ rights in 2020.

LAW & SOCIETY *notes*

MISSISSIPPI – Mississippi Public Broadcasting reported on March 7 that the state Senate Judiciary Committee has approved SB2424, which would conform the state's Hate Crimes Law to federal law by adding, inter alia, sexual orientation and gender identity to the list of victim characteristics that could merit enhanced penalties for violent crimes.

NEW YORK – On April 2, as this issue of *Law Notes* was in preparation, the New York State Legislature included a measure with the new state budget that will end the ban on gestational surrogacy in New York under certain conditions. The measure is titled the Child-Parent Security Act, provides safeguards for the rights of the surrogate, spells out responsibilities for the intended parents, and provides a mechanism for establishing the legal parentage of the child prior to birth. * * * New York Attorney General Letitia James announced a change in policy at the Department of Health's Vital Records division: henceforth, they will let transgender minors correct the sec designation of their birth certificates if they were born in New York State. Previously, the policy had been to reject birth certificate changes for people who had not gone through surgical transition as attested by the doctor's affidavit. Medical professionals generally will not perform gender transition procedures for minors. Now minors can obtain a certified copy of their birth certificate that accurately records their sex consistent with their gender identity without a medical professional's affidavit. Minors age 17 or older can request the corrected birth certificate based on a written affidavit in which they affirm their gender identity. Younger minors need to apply through their parents or legal guardian. The changes came in response to litigation brought by Lambda Legal on behalf of M.H.W., a minor whose request for a corrected birth certificate was rejected.

VIRGINIA – As a result of the 2019 state elections, Virginia Democrats added control of both houses of the legislature to their control of the executive branch, and proponents of LGBT rights lost no time in pursuing a long-delayed state legislative agenda. Summarizing the results as of March 10, *nbcnews.com* reported that the legislature had passed a broad non-discrimination law identifying sexual orientation and gender identity as forbidden grounds of discrimination, a law banning gay conversion therapy for minors (the first such to be passed by a southern state), repealed the unenforceable statutory ban on same-sex marriages, and revised the penal code to make all references to spouses non-gender-specific. The legislature also moved to end a statutory restriction on local governments passing civil rights laws, and a measure ending gender-references in health care coverage decisions, which had stood as a barrier to obtaining certain procedures used for gender transition. In addition, the legislature passed a resolution designating the Transgender Day of Remembrance. The Senate also passed a bill during February requiring the Department of Motor Vehicles to make it possible for nonbinary people to self-identify on driver's licenses. Leading the battle for the LGBTQ-related legislation was Delegate Danica Roem, the state's first openly transgender legislator.

WASHINGTON – On March 5, Governor Inslee signed into law a bill that prohibits the use of the "gay panic defense" in criminal prosecutions. The new statute goes into effect in June.

LAW & SOCIETY NOTES

By Arthur S. Leonard

To the surprise of practically nobody, former U.S. Representative **AARON SCHOCK** (R-IL) came out as gay through a statement on his Instagram site. Schock had been inching out of the closet ever since resigning in disgrace from Congress amidst corruption charges, allowing himself to be photographed in gay venues. Schock's statement admitted that his announcement "will come as no surprise" and that he had been coming out to various people individually (family members and friends) prior to making the announcement. As a member of the House, Schock consistently voted against LGBT rights at every opportunity, earning a 0% rating from Human Rights Campaign, but raised eyebrows by posing shirtless for fitness magazines, leading the press to speculate openly about his sexual orientation. He said that since coming out to family members, he had continued to receive emails urging him to seek conversion therapy. In his statement, Schock sought to rationalize his opposition to marriage equality while in Congress by observing that at the time President Obama was also opposed, although conceding that this did not make it right.

During March the **U.S. DEPARTMENT OF JUSTICE** held an agency-wide training for lawyers about religious liberty "as part of Attorney General William P. Barr's push to prioritize religious freedom cases," reported *The New York Times* (March 13). The *Times* reported that the workshops "prompted concern among some career lawyers that they were being educated on ways to blunt civil rights protections for gay and transgender people." No surprise. Remember during the 2016 presidential campaign when Trump exhibited a Pride Flag, upside down with a leering grin, while claiming he supported LGBT rights? Clearly a sign of the opposite, which has been actualized from the beginning of the administration. Several DOJ lawyers emailed the *Times* to express their concerns and cited the positions DOJ was taking in various lawsuits opposing

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gay rights claims on religious grounds. A DOJ spokesman, responding to questions from the *Times*, "denied that the trainings were meant to marginalize gay, lesbian and transgender people or to promote discrimination in any way, and that nothing in the materials presented did so." Watch what they do, not what they say.

INTERNATIONAL NOTES

By Arthur S. Leonard

ANDORRA – The ruling party in the parliament introduced a bill in March in support of marriage equality. Assuming passage, it would take effect several months later.

BERMUDA – The *Royal Gazette* reported that the government's appeal of a court ruling requiring marriage equality would be heard in the Judicial Committee of the UK Privy Council in December. Bermuda is one of the many Commonwealth countries that use the Privy Council as their final appellate court.

CANADA – Justice Minister David Lametti has added to the government's legislative agenda a bill that would amend the Criminal Code to outlaw the practice of conversion therapy in Canada. The measure goes beyond legislation in some U.S. states and municipalities by prohibiting religious counseling to "change" a person's sexual orientation or gender identity. In the U.S., the 1st Amendment's Free Exercise Clause is generally viewed as a barrier to legislating against such religious counseling, so U.S. bills confine themselves to regulating licensed health care practitioners and allow clergy to go their own way. Some Canadian provinces already ban the practice. *CTVnews.com*.

GHANA – Thomson Reuters reported on March 12 that Ghana's government announced it would not allow a major gathering of western African LGBT activists to take place, after conservative Christian groups protested the planned event and urged the government to deny visas to participants who would be coming from outside Ghana. The conference was scheduled to be held in July, and would be the first such event in West Africa. The focus of the conference was to include strategies on changing discriminatory laws. Ghana is one of the 32 countries in Africa that make same-sex relations a crime, according to the latest tally by the International LGBTI Association. A government spokesman told Thomson Reuters that the government's prohibition of the event was not because of the coronavirus outbreak, but because of its subject matter.

HONG KONG – A court ruled on March 4 that a gay Hong Kong couple who married in Canada in 2018 were entitled to be treated as a family by the Hong Kong Housing Authority and to apply for an affordable apartment on the same basis as opposite-sex couples. Although Hong Kong does not formally allow same-sex marriage, several court rulings in recent years have extended specific rights and protections to same-sex couples who have married elsewhere or can prove an established relationship. *Openlynews.com*

HUNGARY – As litigation is pending challenging the problems transgender people have getting their birth certificates changed to reflect their gender identity, the government of autocrat Viktor Orban has included in an omnibus bill a provision mandating that a person's gender, as registered in a birth certificate, shall be determined by biological sex at birth. The legislative proposal has been criticized by European Union human rights officials. Since the Hungarian parliament voted to give Orban power to rule by decree during the COVID-19 pandemic, there seems little chance of defeating the measure in parliament, so attempting to exert public pressure to remove the provision is the current activist strategy.

JAPAN – *Nippon.com* reported on March 4 that the Tokyo High Court has affirmed a ruling by the Moka branch of Utsunomiya District Court that under the nation's Constitution, same-sex couples who married elsewhere or who live in a quasi-marital relationship are entitled to legal protection for their relationships. The case involved two women who married in the United States. The plaintiff claimed that her relationship with her spouse had collapsed dur to the partner's infidelity and was seeking damages similar to what a married person could seek in such circumstances under Japanese law. The plaintiff's lawyer said that this ruling was the first by a high court in Japan recognizing legal protection for a person in a "de facto marriage with a same sex partners."

RUSSIA – As part of his strategy to change *Russia's Constitution* so as to make it possible for him to continue to dominate the government after his current term as president ends, term-limited *Vladimir Putin* sent a constitutional amendment to the Duma that would provide that marriage in Russia consists of the union of one man and one woman. Although the country's marriage laws do not expressly forbid same-sex marriage, they have been interpreted by the government to do so. Evidently Putin believes that oppose to marriage equality is so widespread that it would help to get the constitutional proposals he is seeking to pass the required public referendum by adding the marriage amendment to the proposal.

PROFESSIONAL *notes*

By the end of March, it appeared that the public referendum would be postponed as a result of the COVID-19 pandemic.

SINGAPORE – The High Court ruled against three new challenges to Section 377, the colonial era sodomy law that was carried over into the criminal code when Singapore achieved independent. Three individual plaintiffs sued and their cases were consolidated for argument. The court was confronted with the argument that India's Supreme Court ultimately ruled that a similar colonial-era sodomy law in that country was unconstitutional, the judge pointing out that Singapore does not have India's written constitution and that the Singapore judiciary does not have the tradition of judicial activism characteristic of the Indian judiciary. The plaintiffs promptly announced that they would appeal the ruling.

UNITED KINGDOM – Activists in the U.K. report that legislative proposals to reform the Gender Recognition Act appear to be on hold in Parliament, due to strong opposition stated by some Conservative M.P.'s. In addition, transgender law reform efforts that were to be taken in the Scottish Parliament also appear to be on hold while the government is totally focused on the coronavirus pandemic.

PROFESSIONAL NOTES

By Arthur S. Leonard

The **LGBT BAR ASSOCIATION OF NEW YORK** reported to its members the loss of long-time Board and Committee member and Legal Clinic volunteer **RICHARD WEBER**, an early victim of the COVID-19 pandemic in New York on March 18. The LeGaL announcement led to coverage in the *The New York Law Journal* on March 19. Weber practiced insurance defense law at Gallo Vitucci Klar LLP in New York. A Seton Hall University Law School graduate, he was 57 years old. Many LeGaL members had last seen him at the Association's annual dinner late in February, and the Law Journal article included tributes to him from LeGaL Executive Director Eric Lesh and President Kristen Prata Browde.

The New York Law Journal also devoted several articles to the medical struggle of **DAVID LAT**, an out gay lawyer who was the founder of the legal blog *Above the Law* and was most recently working as a legal recruiter. Lat posted to Instagram and Facebook about his hospitalization at NYU Langone Health, and the newspaper subsequently reported that he had been placed on a ventilator; then that after several days on the ventilator, his condition had improved sufficiently for him to be moved out of the Intensive Care Unit, as he posted an optimistic missive to Facebook.

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EDITOR'S NOTES

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