SAME-SEX COUPLES MARRY IN MASSACHUSETTS

At midnight the morning of May 17, the city clerk opened for business in Cambridge, Massachusetts, and the first marriage applications from same-sex couples were received. By the end of the first historic day of legally-recognized marriages for same-sex partners in the United States, scores of couples had received licenses, and many, having paid a fee to obtain a waiver of the usual three-day waiting period, had their marriages solemnized, some in splendid church or synagogue weddings or city hall ceremonies, others in more private surroundings. According to statistics compiled by Gay & Lesbian Advocates & Defenders and Marriage Equality at the end of the week, as of May 18 approximately 1700 same-sex couples had filed their intentions to seek licenses in 250 communities. But within days, doubts had been raised about the validity of some of those marriages, in which the happy couples were residents from states other than Massachusetts.

The historic marriages were the immediate legacy of the Massachusetts Supreme Judicial Court’s decisions in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Nov. 18, 2003), and Opinions of the Justices to the Senate, 802 N.E.2d 565 (Feb. 3, 2004). When the court issued its opinion in the fall, it gave the state legislature 180 days to take what action it deemed appropriate in light of the ruling. There were many different opinions as to what this meant. To the victorious parties, led by Gay & Lesbian Advocates & Defenders’ Mary Bonauto, who had argued the case, this meant that the legislature had 180 days to do what was necessary to conform Massachusetts law to the reality that beginning on May 17, same-sex partners would be entitled to marry in the state. To some of the opponents, this meant that the legislature had 180 days to figure out how to block such marriages from coming to Massachusetts, by preemptively enacting a civil union law. A majority of the state legislators ultimately took the later view, since instead of spending the time usefully studying how marriages for same-sex partners would require state law revisions and enacting appropriate ones, they devoted substantial time to a series of constitutional convention meetings, culminating in first-round approval of a proposed constitutional amendment that will both ban marriages for persons of the same sex, and establish civil unions, along the lines of those previously established in Vermont. Under Massachussetts’ cumbersome amendment process, the proposed amendment will have to pass another session of the legislature before it can be submitted to the voters, at the earliest in the general election in November 2006.

While the legislature was off on its side show, Governor Mitt Romney was also busy trying to think of ways to stop marriages for same-sex partners, or at least to limit their availability. Romney seized upon an old, virtually dead-letter provision of the state’s marriage laws, enacted in 1913, which provides that persons who are not Massachusetts residents may not be married in Massachusetts if their marriage would be “void” in the state of their residence. (The state had actually instructed clerks years ago not to enforce this provision, which was something of an embarrassment, and on May 19, the state Senate voted 28-3 to add a provision to pending state budget legislation to repeal the offending provision. A proponent of the repeal measure, openly-gay Senator Jarrett Barrios of Cambridge, cited the law’s shameful origins as a racist measure. But House Speaker Thomas M. Finneran said he would block any attempt to make this part of the final budget bill sent to the governor. Finneran objects to including a “controversial” rider in a budget bill, arguing that it should have a separate debate.) Romney took the position that this law meant that same-sex couples resident elsewhere in the U.S. could not enter a marriage in Massachusetts unless they intended to move to the state, and that the clerks who issue marriage licenses should make sure that they issue them only to residents or those swearing their intention to relocate to Massachusetts, at the risk of being subject to criminal prosecution. In at least four communities, there was advance indication that the clerks would issue licenses to out-of-staties in defiance of the governor: Provincetown (where the city council directed the clerk to do so), Somerville, Worcester, and Springfield. In support of his position, Romney sent letters to the 49 other governors and state attorneys general, stating his understanding that such marriages performed in their states would be void, and asking them to advise if the case was otherwise. By this action, Romney was placing his ideological objections above the economic interests of his state, since Province-town and the western Massachusetts vacation communities were anticipating a significant boost in tourist spending this summer from same-sex couples arriving, sometimes with numerous friends and family in tow, to hold their marriage ceremonies.

One who sent contrary advice was N.Y. Attorney General Elliot Spitzer, whose office had issued Informal Opinion No. 2004–1, 2004 WL 551.557 (March 3, 2004), in response to inquiries from several city attorneys seeking advice on whether New York’s Domestic Relations Law allows the issuance of marriage licenses to same-sex partners advised sought in the wake of New Paltz Mayor Jason West’s decision to perform marriages for same-sex partners. At that time, Spitzer advised that New York’s statute did not contemplate marriage licenses for same-sex partners (although such a denial of equal protection raised serious constitutional concerns), but that New York principles of comity should provide for the state to recognize marriages lawfully performed elsewhere, an issue of some significance in light of marriages being performed just across the border in Canada and soon to be performed in Massachusetts. Spitzer responded to Romney’s letter by maintaining that marriages performed for New York residents in Massachusetts would not necessarily be “void” in New York, one of the eleven states that does not have a mini-DOMA or constitutional amendment banning marriages between partners of the same sex.

In Connecticut, another state sharing a common border with Massachusetts, Attorney General Richard Blumenthal opined, according to an Associated Press report of May 17, that Connecticut law does not provide for marriages for same-sex partners, but he declined to take a position on whether such marriages performed in Massachusetts would be recognized in Connecticut. Blumenthal said that the recognition issue was not addressed in state statutes (Connecticut has no DOMA), and for him to take a position would be making law rather than interpreting it, which he saw as beyond the scope of his function. (By contrast, Spitzer was able to take a position based on at least one judicial ruling, Langan v. St. Vincent’s Hospital, 765 N.Y.S.2d 411 (N.Y. Sup. Ct., Nassau County, 2003), appeal pending, App. Div., 2nd Dept., which held that a Vermont civil union should be
In tiny Rhode Island, Attorney General Patrick C. Lynch observed that the courts had not yet determined whether the existing marriage law forbids same-sex partners to marry, and that existing state cases dealt mainly with marriages involving higany, incest or mental incompetence. Lynch opined that “validly performed” marriages from other states would be recognized in Rhode Island, another non-DOMA state, unless they violated the state’s policy, and that it is up to the courts and legislature to decide what that policy is, not the attorney general. New York Times, May 18.

In a bit of last-minute drama, several attempts were made to get the courts to block the Goodridge decision from going into effect. Governor Romney had asked the state attorney general, who opposes such marriages, to apply to the Supreme Judicial Court for a further stay pending the possible 2006 voter approval of the anti-marriage amendment, but was rebuffed by A.G. Thomas F. Reilly, who said that the Goodridge plaintiffs had won their case and there was no legal ground for a further stay. A group of legislators filed their own action with the SJC., arguing that the court should consider anew the question whether it had jurisdiction to decide the case and order the remedy that it had ordered, but were rebuffed without opinion.

Another lawsuit was attempted by a right-wing litigation group, calling itself Liberty Counsel, which filed in federal court, alleging that Massachusetts citizens had been denied the right to a republican form of government, as guaranteed them in the U.S. Constitution, when the Supreme Judicial Court engaged in legislating by defining the meaning of marriage under state statutory law. This action, Largess v. Supreme Judicial Court of the State of Massachusetts, 2004 WL 1068877 (D. Mass.), brought on behalf of a twelve Massachusetts citizens, eleven of them members of the legislature, was rejected on May 13 by U.S. District Judge Joseph L. Tauro, in a brief opinion evidently drafted on very short notice, since it was issued the day after oral argument in a suit filed just days before.

In this case, the attorney general’s office was defending the Supreme Judicial Court, and argued that the federal court lacked jurisdiction of the subject matter, an argument that Tauro rejected. However, he disagreed with the plaintiffs’ contention that the SJC’s action violated the federal Constitution’s Guarantee Clause. He found that the Massachusetts Constitution provided a mechanism by which the legislature could give the courts subject matter jurisdiction over family law questions, and that it had, in fact, done so. “Implicit in that transfer of jurisdiction to the judicial branch is the transfer of authority to define the term marriage, as that term appears in the Massachusetts Constitution,” wrote Tauro. “There can be no question that, if the judicial branch has jurisdiction over all questions involving divorce, alimony, affiliation and annulment, it has the authority to determine whether there has been a valid marriage. And, in order to determine whether there has been a valid marriage, the judicial branch must have the authority to interpret, and if necessary, reinterpret, the term marriage.”

Tauro also rejected the argument that the SJC had usurped legislative authority by defining marriage in order to satisfy its view of the equality requirements imposed by the state constitution. Repeating his view that the SJC “has the authority to interpret, and reinterpret, if necessary, the term marriage as it appears in the Massachusetts Constitution,” Tauro continued, “The SJC’s reformulation of the term marriage in its opinion in the Goodridge case was, therefore, not a legislative act. Rather, it was a legitimate exercise of the court’s authority and responsibility to decide with finality all issues arising under the Massachusetts Constitution.” Tauro also found it significant that the SJC then gave the legislature a 180 day window “to act before entry of judgment.” Tauro concluded that the plaintiffs were unlikely to succeed on the merits, and thus were not entitled to injunctive relief.

An emergency appeal by the plaintiffs to the 1st Circuit gained them no relief, that court rejecting any request for interim relief and indicating that it could hear an appeal from Tauro’s opinion sometime in June. A desperate application to Supreme Court Justice David Souter, Circuit Justice for emergency appeals from the 1st Circuit, was referred by Souter to the full Supreme Court, which refused to get involved. And thus marriages could begin on May 17. After the marriages began taking place, Governor Romney quickly moved to take action on the marriages by out-of-staters, demanding that city clerks send to the governor’s office the documents on all out-of-state couples who had received licenses. Romney referred these to A.G. Reilly, who ordered the clerks to stop issuing licenses to out-of-state same-sex couples, in letters dispatched on May 21. Some complied immediately, including Springfield. In Provincetown, the city council was to consider the matter on Tuesday, the 25th, and the Worcester clerk’s office indicated they were confident that they were doing the right thing under state law by continuing to issue the licenses. In Somerville the clerk wanted to continue issuing licenses, but after a few days the mayor, Joseph A. Curtatone, ordered them stopped “temporarily” while awaiting a response to a letter he sent Reilly, asking whether Reilly’s letter was intended to be a cease-and-desist order and whether the clerk should be quizzing heterosexual license applicants about their residential status and intentions. Reilly had justified his letters as follows: “This is pretty clear. The decision is relevant to residents of Massachusetts and people from other states who come to Massachusetts and intend to reside here; it’s limited to that… So with respect to the law, we will enforce the law.” But Reilly said he would probably not seek to penalize those clerks who had issued licenses prior to receiving his letter.

It seemed certain that the 1913 law’s constitutionality would be drawn into question relatively quickly. It was adopted in response to a proposal by the Commissioners on Uniform State Laws, who were attempting to make marriage laws “uniform” throughout the country at a time when many states (but not Massachussetts) banned marriages between white persons and persons of color. Only half a dozen states responded to the Commissioners’ recommendation by adopting the laws. At the time, the interracial marriage of professional prizefighter Jim Johnson had scandalized many and provoked much public discussion about people traveling to other states to marry in order to avoid miscegenation laws, although contemporary accounts have suggested to some historians now quickly looking into the matter that stopping interracial couples from coming to Massachusetts to marry was but one of several grounds on which legislators stated their support for the law in 1913.

Most of this article is based on stories appearing during the relevant time period in the Boston Globe and the Boston Herald, as well as press releases from GLAD. A.S.L.
insemination and adoption. After numerous unsuccessful attempts at insemination, EG asked KM to donate her egg. KM was unable to bear a child due to uterine problems. As the court explained, EG only asked KM on the condition that KM would be a “real donor,” meaning that EG would be the only legal mother of the children. The women discussed the possibility of a future adoption by KM, but EG said that she wanted to wait at least five years, when the relationship between them would be more stable and permanent. EG noted that a lesbian friend was embroiled in a custody dispute, and insisted that she wanted to avoid such problems, KM agreed to this arrangement, and did not push the issue of legal parenthood.

In February 1995, EG received a copy of the egg donation form from UCSF Medical Center. The women reviewed the forms with each other, and attended a counseling session on February 14, 1995. After meeting with the counselor, KM and EG talked about what they would tell the child born from KM’s donated eggs about his/her parents. They agreed to tell the child eventually that KM was the genetic mother, but agreed that EG would decide when it was appropriate to do so. They also agreed not to tell other people that KM had donated her egg to EG, and would only say that EG was the mother. On March 8, KM went to UCSF for the egg extraction procedure. At the hospital, prior to the procedure, KM was given a copy of the egg donation form to review and sign. After she did so, KM had blood drawn, which was the first step in the egg retrieval procedure. The following month, KM actually underwent the egg extraction process. The eggs were fertilized in vitro with sperm from an anonymous donor, and then four of the resulting embryos were implanted in EG’s uterus. That procedure was successful, and EG became pregnant. She gave birth to twin girls in December 1995.

For the next five years, EG and KM and the twins lived together as a family. KM and EG bought a house together in Marin County, and enrolled the girls in preschool there. KM was listed as a “co-parent” on the girls’ school enrollment forms, and took the children to pediatric appointments along with EG. The women did not reveal to the pediatrician, however, that KM was the genetic mother of the children.

In 1998, the women began to argue about whether or how to tell the girls that they were genetically related to KM. EG insisted that she would never tell them this information, and that she was the girls’ only legal mother. She reiterated that KM had no legal rights to the children without adoption. In 2000, KM pushed the issue of adoption, but EG resisted. The couple also disagreed about relocating to Massachusetts. By March 2001, the couple had separated, and EG filed a notice of termination of the domestic partnership. KM filed a petition to establish a parental relationship with the girls, and sought in part to prevent EG from taking the girls to Massachusetts. The couple decided to try and resolve their differences amicably, and KM voluntarily dismissed the petition in July 2001. In August 2001, EG moved with the girls to Massachusetts, and continued to list KM as a parent on school forms. KM and EG shared the girls’ educational expenses. In February 2002, KM filed a new petition to establish a parental relationship and sought joint custody. In her opposition papers, EG claimed that KM lacked standing to assert parenthood. Pending trial, however, the parties agreed that KM would have visitation rights with the children in Massachusetts.

The trial court found that KM lacked standing to assert parental rights because she had waived any claim to parenthood when she signed the egg donation form. The court also found that the parties had agreed that EG would be the sole legal parent of the children, and nothing about the parties’ arrangement modified that understanding. Accordingly, the trial court ruled that KM did not have standing to assert a claim of parenthood.

The court of appeals affirmed the trial court’s decision. As an initial matter, Justice Simons found that KM had standing because her genetic link to the children meant that she qualified as an “interested person” under the Uniform Parentage Act. Turning to the merits, applying the “intention test” articulated in Johnson v. Calvert, 5 Cal. 4th 84 (1993), the court ruled that EG was the girls’ only legal mother.

The court noted from the outset that, notwithstanding changes in reproductive technology, the Johnson court expressly declined to find that a child can have two natural mothers. Rather, the woman who intended to procreate the child that is, to bring about the birth of a child whom she intended to raise as her own is the natural mother of the child under California law. Working from this premise, the court then applied the Johnson test to the facts before it. The court found two facts in particular to be dispositive of KM’s claims. First, the court noted that KM orally agreed before the children were conceived that EG would be the sole legal parent unless and until KM formally adopted the children. Second, the court emphasized that KM signed a donor consent form in advance of the egg donation procedure in which she expressly waived any parental rights that might have otherwise attached due to her genetic connection to the children born from the egg.

KM raised a number of arguments sounding in contract law to argue that she should not be bound by the donor consent form. Specifically, she asserted as defenses lack of consideration, unconscionability, indefiniteness, and statute of frauds. The court rejected these arguments, however, noting that “the ultimate determination of natural motherhood depends not upon the existence of a binding contract, but rather, as Johnson instructs, upon the woman’s intention to bring about the birth of the child to raise as her own.” The court noted that KM knew up front that EG had wanted to be the sole legal parent of the child(ren), and had been attempting to get pregnant even before the two began their relationship. This knowledge, in the court’s view, established that the parties intended that EG be the one to bring about the birth of the child(ren) to raise as her own.

The court also rejected KM’s attempts to minimize the significance of the donor consent form. KM insisted that she assumed that certain provisions about the waiver of rights would not apply to her because she was in an intimate relationship with the woman who would be receiving her eggs. The court pointed out, however, that KM never objected to the terms of the form, and in fact abided by the terms of the agreement by not disclosing to outsiders or to the girls themselves that she was their genetic mother for many years. Moreover, the trial court specifically found that the relinquishment of parental rights in the donor form was “clear.”

Therefore, despite the existence of conflicting evidence, the appellate court discerned no basis for disturbing the trial court’s factual finding that KM knowingly, voluntarily and intelligently waived her parental rights.

Justice Simons also rejected the argument that the women’s relationship warranted a different legal outcome on the question of custody. Although the evidence demonstrated that the women implicitly agreed to raise together any child formed from KM’s donated eggs, the court agreed with the trial court’s factual finding that only EG intended to be the mother of the child, and that KM had donated her eggs to facilitate procreation of a child for EG. The court specifically did not reach the question of “whether the determination of natural motherhood in a dispute between a genetic mother and the birth mother always compels the selection of one woman to the exclusion of the other or whether a child can, in an appropriate case, have two natural mothers.”

KM insisted that whatever the parties’ intentions might have been at the time of conception, their actions following the birth of the girls manifested a different understanding. But the court rejected the argument that the parties’ intention should be assessed over time and can be modified by conduct subsequent to the conception of the child. The court emphasized that any extension of the inquiry beyond that point would create too much uncertainty. Rather, “[t]he law requires a fixed standard that gives prospective parents some measure of confidence in the legal ramifications of their procreative actions.”

Citing a litany of cases, the court also reaffirmed that the rule that a domestic partner of a child’s natural mother does not qualify as a par-
ent under the UPA simply because that partner has played a parental role in the life of the child. In other words, one’s functional status as co-parent does not translate into legal status as a parent. Furthermore, the court rejected the argument that a natural parent’s decision to allow another person to act as a parent to a child supersedes the natural parent from contesting that person’s attempt to establish legal parenthood.

The court acknowledged that a decision denying KM parental rights would disserve the interests of the girls, who view KM as their mother. Nevertheless, the court insisted that the “best interests of the child” standard, which is used in custody determinations, could play no role in the determination of parentage. “Basing parenthood on a best interests standard,” the court explained, “would put at risk the rights of any natural parent who entered into a relationship and encouraged the formation of parental bonds between the children and the new partner.”

KM, who was represented by the Hersh Family Law Practice in San Francisco, will likely appeal the decision. Shannon Minter and Courtney Joslin from the National Center for Lesbian Rights filed an amicus brief on her behalf. While disputing the trial court’s characterization of the facts, Joslin noted that even those facts “support the conclusion that both [women] actually intended to function as parents to the resulting children. It is this intent that is relevant to the determination under Johnson,” not “intent to be a legal parent.” Such a rule, Joslin insisted, would lead to conflicting and inequitable results in many cases.

_Marriage & Partnership Litigation Notes_

**Federal — Minnesota** — One of the earliest gay marriage litigants has jumped back into the fray. Jack Baker, whose attempt to win a marriage license for himself and Michael McConnell led to the first unsuccessful judicial decision on same-sex marriage, Baker _v._ Nelson, 191 N.W.2d 185 (Minn. 1971), app. dismissed, 409 U.S. 810 (1972), has filed a new lawsuit, according to the Pioneer Press of May 19. It seems that despite their lack of success in the courts back in 1971, Baker and McConnell had obtained a marriage license in Mankato, Minnesota and were married by a Methodist minister. Now Baker and McConnell are suing the Internal Revenue Service in the U.S. District Court in Minnesota, claiming that they should be entitled to file an amended tax return for 2000 as a married couple. Baker and McConnell had originally filed individually, but in 2003, in light of the marriage developments around the country, decided to attempt to file an amended return and claim a refund of $793.28. This March, the I.R.S. ruled that they could not amend, citing the federal Defense of Marriage Act for the point that the federal government does not recognize same-sex marriages for purposes of federal law. An attorney assisting Baker with the lawsuit, Larry Leventhal, told the Pioneer Press that the legal theory of the law suit is due process under the 5th Amendment, and that the plaintiffs are arguing that the Defense of Marriage Act may not be used retroactively to invalidate their 1971 marriage for federal purposes. In addition to demanding the right to file jointly, the plaintiffs seek a declaration from the court that they are full citizens who are lawfully married to each other and entitled to equal treatment with all other married Minnesotans.

**Arizona** — The Arizona Supreme Court announced on May 25 that it will not hear an appeal on the merits in Standhardt _v._ Superior Court, 77 P3d 451 (Az.Ct.App., Oct. 8, 2003), in which a gay male couple is seeking to marry. Don Standhardt and Ted Keltner sought a marriage license shortly after the Supreme Court’s _Lawrence v._ Texas ruling last spring and, upon being turned down, immediately filed a lawsuit, as yet unsuccessfully. In its October 8 ruling, the Arizona appeals court rejected U.S. Supreme Court Justice Antonin Scalia’s dissenting comment in Lawrence that the decision opened up the way for same-sex marriage. The court found the issues quite distinguishable, noting that _Lawrence_ involved a criminal statute (and that the Court’s opinion in Lawrence pointedly observed that the decision was not passing on whether the state must recognize same-sex relationships in any particular manner), and that different policy questions were raised by the marriage issue. The plaintiffs had been urged by gay litigation groups not to file their lawsuit, but their lawyer, Michael Ryan, was eager to proceed.

**California** — The California Supreme Court heard oral arguments on May 25 on the question whether San Francisco Mayor Gavin Newsom had legal authority to direct the issuance of marriage licenses to same-sex partners in his city based on his own interpretation of the requirements of the state and federal constitutions. A ruling from the court normally issues within ninety days after oral argument is held. Particularly implicated in the argument may be a state statute that purports to reserve to the courts the determination of constitutional issues and deprive local officials of invalidating existing laws based on their own readings of the constitution. News reports following the hearing suggested that most of the justices were troubled by the actions of the mayor and the city, but there was significant concern expressed as well about the impact of telling several thousand couples that their marriages are invalid. _Associated Press_, May 26.

**California — San Jose** — In March, the San Jose City Council voted to extend health and dental benefits to the same-sex partners of city employees who were married in San Francisco during the brief period when the clerk’s office there was issuing licenses. In a suit filed on May 13 by the Proposition 22 Legal Defense & Education Fund and the Values Advocacy Council, the plaintiffs argued that this action by the city violated the state marriage law. Jordan Lorence, a senior council for the Alliance Defense Fund, a litigation group that filed the lawsuit on behalf of the two organizations, stated: “Recognizing these attempts to redefine marriage as legal is anarchy and expresses disdain for the rule of law.” Lorence also emphasized that the state Supreme Court had ordered a halt to the San Francisco same-sex marriages pending a ruling on the merits in a separate lawsuit. David Vossbrink, a spokesperson for one of the defendants, Mayor Ron Gonzales, said that only one employee had applied for the coverage, and stated: “This is something that’s fair and equitable for all our employees. We want to treat all of our employees the same.” _San Francisco Chronicle_, May 14.

**Florida** — Controversial Miami lawyer Ellis Rubin filed a second same-sex marriage lawsuit on May 12, this time a federal suit on behalf of four same-sex couples who sought him out after hearing about his earlier state-court suit, representing a large number of co-plaintiffs who were recruited in Miami gay bars. In this suit, Rubin claims that the state’s refusal to issue marriage licenses to same-sex couples, backed up by the federal Defense of Marriage Act (DOMA), violates the federal and state constitutional rights of his clients. Invoking concepts of due process, privacy and liberty, Rubin argues that the state’s current policy renders gay people “second class citizens.” So far, the gay rights litigation groups have pointedly avoided filing their same-sex marriage suits in federal court, or taking on DOMA directly, believing that the sounder strategy has been to sue in state courts, invoking state constitutional guarantees (in many cases worded much more broadly than the federal equal protection clause), and to let DOMA challenges arise in the context of specific controversies involving denial of benefits or non-recognition of marriages performed in other states. But, as with his earlier marriage case, Rubin, a non-gay man who is not affiliated with any of the gay rights litigation groups, is off on his own litigation crusade, avowedly in partial atonement for having been a leader in the anti-gay initiative movement in Florida a generation ago. _Miami Herald_, May 13.

**Louisiana** — New Orleans — A Louisiana state trial judge, Civil District Court Judge Louis DiRosa, rejected a challenge to a New Orleans ordinance that allows same-sex partners of municipal employees to be included in family benefits plans provided by the city, granting a pretrial motion filed by the defendants. The plaintiffs, represented by the right-
wing Alliance Defense Fund, argued that the ordinance was inconsistent with the state’s mini-DOMA. The defendants emphasized that extending a particular benefit is not the equivalent of marriage, and that the plaintiffs lacked taxpayer standing because the domestic partners policy was structured so as to cost no additional money to taxpayers. Johnson v. City of New Orleans, Louisiana Civil District Court (May 17, 2004), Baton Rouge Advocate, May 18.

Maine — The Press Herald reported on May 5 that Maine Superior Court Justice Thomas Humphrey had ruled against a lawsuit challenging Portland’s domestic partnership ordinance. The suit was filed in August 2003 by several married couples who had been recruited as plaintiffs by the American Center for Law & Justice, a right-wing litigation organization dedicated to keeping gays in their place by challenging any law that might protect the civil rights of gay people as equal citizens. In a decision released on May 3, Judge Humphrey found no inconsistency between the local ordinance and the state’s version of the Defense of Marriage Act, which prohibits same-sex marriages being performed in Maine or the recognition of such marriages performed elsewhere. “The ordinance applies to the extension of limited municipal rights and benefits to domestic partners, not to the regulation of marriage per se,” according to Humphrey. “It does not conflict with any of the state’s provisions regarding the licensing or recognition of marriage.” Humphrey found the law to be consistent with other Maine laws and policies that recognize domestic partners for various limited purposes, such as the bill that had recently been adopted by the legislature authorizing a state registry for domestic partners with inheritance rights and the right to control a partner’s remains after death. A Portland lawyer who served as local counsel for the plaintiffs, Stephen Whiting, conceded that the legislature’s action “sort of took the wind out of our sails,” and that an appeal was unlikely given the recent trend of the state legislature.

Massachusetts — In what may be the first lawsuit attempting to vindicate the rights of recently married same-sex couples, a lawsuit was filed on May 21 in Worcester, Massachusetts, by Michelle Charron and Cindy Kalish, who were married earlier in the week, asserting a claim for damages for “loss of consortium” arising from alleged medical malpractice by defendant doctors at the Fallon Clinic, who it is claimed failed to order a biopsy for a lump in Charron’s breast when she brought the symptoms to their attention in December 2002, resulting in a delay in diagnosing cancer that has metastasized and threatens to substantially shorten her lifespan. The suit asserts that as a spouse, Kalish is entitled to compensation for loss of consortium as a result of Charron’s reduced life expectancy. A major question in the case is whether the consortium claim can be asserted now for an act of malpractice that took place before the women were married, but at a time when they had long since been living together as domestic partners, beginning in 1992. Boston Globe, May 22, 2004.

Missouri — In a desperate effort to prevent the notoriously activist state judiciary from ordering marriage licenses for same-sex couples, the Missouri legislature voted to place on the ballot a proposal to amend the state constitution to ban same-sex marriages in the state. Said a proponent of the measure, Rep. Brian Baker, a Belton Republican, “This is not attacking anyone’s lifestyle choices. Marriage is a distinct institution between a man and a woman. This is important for the future of children and families in Missouri.” Of course, Baker did not mean that this was important to protect and enhance the lives of children who are being raised in same-sex couple households, since they are beneath his notice as a traditional values Republican. House Majority Leader Jason Crowell explained: “All Missourians should make that decision, not some activist judge somewhere who does it by judicial fiat like we’ve seen all across this nation.” Some conservatives were disappointed that a more draconian measure, which would forbid giving any legal effect to civil unions, was not approved for the ballot. Kansas City Star, May 15. There was some dispute about whether the referendum should be held in August or November. On May 20, state Attorney General Jay Nixon, a Democrat, filed a suit against Secretary of State Matt Blunt, a Republican, seeking to compel the holding of the vote on August 3, but Circuit Judge Richard Callahan ruled that the secretary of state does not have to set any date at this time because the legislature had not yet forwarded to him the official version of the proposed amendment. Nixon immediately filed an appeal to the state supreme court. According to an Associated Press report of May 21, Republican leaders in the legislature, determined that this should be part of the general election ballot in November in order to draw out more conservative voters for the Congressional and Presidential race, planned to hold up sending the final version of the bill to Blunt until May 28, after the deadline for certifying issues to include on the August ballot, when primary elections will take place for local offices. The local primaries usually draw few voters. On May 21, the Supreme Court sided with the Secretary of State, who will delay certifying the question long enough to ensure that it will be on the general election ballot in November. St. Louis Post-Dispatch, May 22. But the court subsequently announced that oral argument in the matter would be held on June 1. Associated Press, May 25.

New Jersey — On April 13, an amended complaint was filed in Buell v. Clara Maass Medical Center, Essex-L–5144–03, a matter pending in Essex County Superior Court before Judge James Rothschild, adding a loss of consortium claim on behalf of Judith Peterson, the same-sex domestic partner of co-plaintiff Linda Henry. (Henry is one of four employee co-plaintiffs bringing allegations against the employer, and the amendment added loss of consortium claims on behalf of the spouses of the other three employees as well as Peterson’s claim.) Henry claims that she suffered a heart attack attributable to stress generated by sexual harassment in the workplace, and Peterson claims that as Henry’s partner, she should be entitled to compensation for loss of consortium, tagging on to the common law claims asserted in the complaint, including tortious interference with contract and intentional infliction of emotional distress. (Loss of consortium claims may not be part of sex discrimination claims brought under the N.J. Law Against Discrimination, but must be asserted as part of accompanying tort claims.) On April 23, Judge Rothschild accepted the amended complaint, and counsel for the company began researching grounds for a motion to dismiss. Normally, loss of consortium claims are available only to spouses of litigants, but at least one state appellate court in New Mexico has ruled that domestic partners should also be able to claim compensation when an injury inflicted on their partner deprives them of the “consort, companionship, society, affection, services, and support” of their partner. See Lozoya v. Sanchez, 66 E3d 948 (N.M. 2003). New Jersey Law Journal, May 12.

New York — National Review Online reported on May 10 that a lesbian couple united in a Vermont Civil Union but living in Westchester County has filed an action in state court seeking a dissolution of their civil union. The reporter stated that the parties are proceeding anonymously, and details about their relationship or the subjects to be addressed in the dissolution proceeding have not been disclosed. However, the case does present a question of first impression in New York that was answered negatively in Connecticut: whether the state courts have jurisdiction to dissolve a Vermont civil union and, if so, what body of law will be used to determine the details of the dissolution. Obtaining a dissolution in Vermont is a hardship for couples who reside in other states, because there is a residency requirement for invoking the jurisdiction of the Vermont courts over the parties.

North Carolina — Durham County District Judge Craig B. Brown granted Durham County’s motion to dismiss a lawsuit filed by Richard Mullinax and Perry Pike, seeking a license to marry each other. In March, Mullinax and Pike, accompanied by their attorney and a group of
supporters, went to the Durham County Register of Deeds, Willie Covington, and requested a license. When it was refused, they crossed the street and filed suit in the District Court. But Brown accepted the county’s argument that a same-sex couple lacks standing to sue for a marriage license. North Carolina law is gender-specific on marriage. The men vowed to refile their suit in the Superior Court. During the hearing, held on May 10, Judge Brown told the lawyers that he has a “close family member” with an “alternative life style” as well as many gay friends, but that he had concluded that state law has a specific definition of marriage, and he was not free to ignore that and order that a license be issued. *News & Observer*, May 11.

**Pennsylvania** — Some Pennsylvania legislators are so cowed by the idea of same-sex marriages in their state that passing a DOMA was not enough for them. After a gay male couple applied for a marriage license at the Bucks County Courthouse, were turned down, and indicated they were thinking of suing for a license, a group of a dozen legislators joined together to file a declaratory judgment action naming the two men as defendants, seeking judicial affirmation of the state’s DOMA, a statute that forbids the performance or recognition of a same-sex marriage in the state. The attorney for the plaintiffs, Leonard G. Brown III, said, “We want to establish the constitutionality of the law so that the register of wills does not have to issue a marriage license to a same-sex couple.” Brown contends that the gay couple, Robert Seneca and Stephen Stahl, could attempt to get a Bucks County Judge to order the issuance of a license, and they want to preempt any such action. This sounds upside down to us; there is as yet no case or controversy, and one wonders about the need for an affirmative lawsuit to get a declaration that a law is constitutional and the standing of plaintiffs to bring it. Seneca and Stahl indicated that they would wait until after marriages began in Massachusetts before filing a lawsuit. *Patriot News*, May 16.

**Washington State** — Seattle — King County Superior Court Judge Bruce Hilyer granted a motion to dismiss a lawsuit that had been filed against Seattle Mayor Greg Nickels by the American Family Association Center for Law & Policy and Liberty Counsel of Longwood, two out-of-state litigation groups, challenging the city’s action in determining that those of its employees who enter into lawful same-sex marriages in other jurisdictions will be treated as married for purposes of their employee benefits in Seattle. Twelve location residents were the nominal plaintiffs in the lawsuit. According to a May 22 report, Hilyer found that Nickels’ executive order, issued in March, “directing city departments to extend benefits to employees in gay and lesbian marriages, isn’t in conflict with state law and doesn’t violate the city charter.”

said the Associated Press. In April, a portion of the mayor’s order was ratified by the city council in a unanimous vote. A.S.L.

### Marriage & Partnership Legislative Notes

**Federal — Constitutional Amendment** — At House hearings held in mid-May on the proposed Federal Marriage Amendment, Republican witnesses asserted that preventing same-sex marriage was necessary to avoid having the federal government incur billions of dollars in new expenses under various federal benefit programs. Rep. Marilyn Musgrave (Rep. — Colo), chief sponsor of the amendment, argued that “activist judges” in the states should not be allowed to impose new expenses on federal taxpayers. Committee Democrats denounced these arguments, pointing out that gay and lesbian couples are also taxpayers and are, at present, helping to subsidize the benefits of married heterosexuals. “You don’t save money by denying people rights in America,” argued Rep. Barney Frank (D-Mass.), Rep. Bobby Scott (D-Va.) argued that Congress should not be performing “a cost-benefit analysis of civil rights law.” *San Francisco Chronicle*, May 14.

**Alabama** — A proposal to amend the Alabama constitution to prevent the wild-eyed, radical left-wing state judiciary from deciding to recognize same-sex marriages will not be on the ballot November 2, the legislator having concluded its regular session without voting on the proposal. However, its chief proponent, Gerald Allen, a Tuscaloosa Democrat with too much time on his hands, indicated that he would reintroduce it at the first opportunity. Stated an opponent of the proposal, Rep. Alvin Holmes, a Montgomery Democrat, “The State of Alabama doesn’t need to get involved in the personal life or in the bedroom of people.” Associated Press, May 17.

**California** — On May 20, the California State Assembly voted 45–31 in favor of a measure that would amend the state’s Insurance and Health & Safety Codes to bar discrimination against registered domestic partners by insurance providers. A.B. 2208 was introduced by Assemblymember Christine Kehoe of San Diego. The Assembly had previously voted to approve an overhaul of the state’s civil rights laws, incorporating sexual orientation protection (which had been dealt with in a separate statute). • • • Although an Assembly committee has approved legislation proposed by Assemblyman Mark Leno to open up marriage to same-sex couples, Leno announced on May 19 that he was pulling the bill from further consideration in this session, but will reintroduce it next year. A.B. 1967 made history as the first positive proposal to allow marriages by same-sex couples to win approval from a legislative committee in the U.S. Leno decided to pull the bill because his count showed inadequate sup-

port for passage in this session. “The issue has far too much importance to be defeated on the floor,” he told the *San Francisco Chronicle* (May 19). Leno also announced that when the bill is reintroduced, it will be co-sponsored by Assembly Speaker Fabian Nunez.

**Kansas** — On May 1, the Kansas Senate approved a proposed constitutional amendment by a vote of 27–13, exactly the required 2/3 majority. The proposal would amend the state constitution to say that the state only recognizes marriages between one man and one woman, and that the rights and benefits of marriage may not be given to any other kind of domestic relationship, including civil unions. One proponent of the amendment, Republican Senator Bob Lyon of Winchester, said, “Civil law needs to be consistent with biblical law. I don’t think we should sanction immorality.” Thousands of Kansans breathlessly await Senator Lyon’s forthcoming introduction of legislative proposals to revive slavery, require fields to lie fallow and all debts to be cancelled every seven years, and — most importantly — to ban the manufacture and sale of blended fabrics and non-kosher food, so that the state can truly embody biblical precepts in its civil law. *Lawrence Journal-World*, May 2.

**Louisiana** — On May 18, the Louisiana House and Senate each passed a version of a proposed state constitutional amendment to ban same-sex marriages. Each measure had well over the 2/3 majority required, but they differ as to when the matter should be put to the public. The Senate version calls for a special election in December, while the House version wants the vote to take place during the general election in November. Said opponent Rep. Arthur Morrell, a New Orleans Democrat, “As far as I’m concerned this is feel-good legislation for the president of the United States to find an issue to get him re-elected.” The House sponsor argued that it would be less expensive to hold the referendum during the general election, but the Senate sponsor pointed out that there is a scheduled election on September 18 for a variety of purposes, so no additional expense would be incurred. Difference were expressed over whether the proposed amendments would go beyond banning same-sex marriages to endanger existing domestic partnership rights enjoyed by gay municipal employees in New Orleans. *Associated Press*, May 18.

**Maine** — He’s Back!!! Maine Rep. Brian Duprey, a Hampden Republican, whose proposal to amend the state constitution to ban same-sex marriages was rejected last year, has announced that he will try again next year. Although Maine already has a Defense of Marriage Act, Duprey still considers the measure necessary, “I believe too strongly in the institution of marriage to sit back and allow the actions of a few extremist judges to radically change marriage,” he told the *Portland Press*
during his election campaign in 2001, had low residence. Mayor Michael Bloomberg, who proved any particular relationship other than fel- ee’s household, with no need to describe or tending the benefits to a member of the employ- religious organizations, who can comply by ex- original proposal as a face-saving gesture to re- stentions) to approve the Equal Benefits Act, a New York City Council voted 43–5 (with 2 ab- mestic Maine legislation, so the report is uncon- firmed. The report did get the name of the Gov- ernor wrong, so we’re not certain of its provenance. New Hampshire — On May 14, Governor Craig Benson signed into law the newest mini-DOMA, a statute that provides that same-sex marriages performed in other states shall not be recognized in New Hampshire. But this is rather a lesser mini-DOMA, since it does not enshrine in the New Hampshire statutes a new definition of marriage specifically as being between one man and one woman. That had been included in the Senate version, but the House took it out and substituted the establishment of a committee to look into how state laws might be changed to allow civil unions. Thus, this measure is more of a holding pattern to maintain the status quo against the eventuality that same- sex couples married in Massachusetts or else- where might come to New Hampshire seeking recognition for their relationship while the legis- lature has not finished working through where it stands on the issue. One suspects that there is considerable sentiment in New Hampshire to do something similar to Vermont. Associated Press, May 14.

New York — New York City — On May 5, the New York City Council voted 43–5 (with 2 ab- stentions) to approve the Equal Benefits Act, a bill requiring city contractors doing business worth more than $100,000 with the city of New York to provide benefits to domestic partners of their employees on the same basis as benefits are provided to legal spouses. Following the lead of San Francisco, the proponents of the New York bill agreed to modifications of their original proposal as a face-saving gesture to religious organizations, who can comply by extending the benefits to a member of the employee’s household, with no need to describe or prove any particular relationship other than fellow residence. Mayor Michael Bloomberg, who had supported the concept of this legislation during his election campaign in 2001, had promptly disavowed his support, claiming that it was inappropriate for the city to use its procure- ment powers to effect social policy. After the Council vote, Bloomberg released a statement that he would veto the bill. A council at- tempt to override would soon follow, and if sub- stantially all who voted for the bill originally will reiterate the vote, it will pass over the mayor’s veto. There were sounds emanating from city hall suggesting the mayor would seek to have the measure invalidated in the courts if it passed over his veto. This is no idle threat, since such measures are vulnerable to legal att- ack on a variety of theories, not least preemp- tion by the federal Employee Retirement In- come Security Act with respect to any benefits that are subject to federal regulation as “employee benefits plans,” which are statutorily exem- pted from regulation by state or local laws. Although the federal appeals court on the West Coast upheld San Francisco’s partnership benefits ordinance, the U.S. Supreme Court has not spoken on the issue, and a federal court in Maine recently cast doubt on substantial por- tions of a similar law enacted in Portland. More developments await on this issue.

Oregon — The Oregonian reported on May 21 that the Oregon Supreme Court had refused to reconsider its decision clearing the way for signature-gathering to begin on an initiative to ban same-sex marriages in the state. Support- ers of the proposed initiative need to collect 100,840 valid signatures over the space of six weeks. Predictions were that if they succeed, a multi-million dollar media campaign will en- sure. Churches throughout the state were ex- pected to circulate petitions at Sunday services.

Tennessee — On May 6, the Tennessee House of Representatives approved a proposed state constitutional amendment that would define marriage as between “one man and one woman.” the vote was 86–5, with one voting present and one not voting. Chief sponsor Rep. Bill Dunn, a Knoxville Republican, said that the purpose “is to uphold one of the main pillars of our society and that is marriage.” On May 19, the Senate voted 28–1 in favor of the measure. This sets in motion a two-year process, similar to that followed in Massachusetts. If an identi- cally worded measure wins a 2/3 vote in both houses of the legislature next year, it will go on the ballot for voter approval in 2006. The Sen- ate also passed a resolution calling on the U.S. Congress to approve the Federal Marriage Amendment and forward it to the states for rati- fication. The City Paper, Nashville, May 7; The Tennessean, May 20.

Washington State — Tumwater — The City Council here voted on May 18 to support a reso- lution opposing the Federal Marriage Amend- ment. The vote was 6–0 with one abstention. A similar resolution was approved in March by the Olympia City Council. The one member who abstained stated his view that this was an issue that was the proper concern of the state legislature, not the city council. The Olympian, May 19. A.S.L.

Marriage and Partnership Societal Notes

Federal — For the first time, the 9/11 Compensation Fund has awarded compensation to a surviving same-sex partner who was not a testa- mentary beneficiary of a victim. According to a May 6 report by 365Gay.com, Nancy Walsh, who was a passenger in one of the planes that crashed into the World Trade Center, was at first rejected when she applied to the Fund for compen- sation, because Flyzik had not left a will designating her as a beneficiary. She appealed that earlier ruling, represented by Jennifer Levi, formerly a staff attorney for Gay and Lesbian Advocates and Defenders (Boston), and New York attorney Noah Kushlefsky of Kreindl & Kreindler. The amount of the award was not disclosed to the press; it covers Walsh’s son, who was being raised jointly by both women, as well. Previous awards to gay partners have in- volved cases where the surviving partner was designated as a will beneficiary, and thus would have been a potential indirect recipient of dam- ages had the victim’s estate filed a lawsuit. The idea behind the fund was to provide compensa- tion in exchange for binding commitments not to file lawsuits against the airlines whose planes were hijacked on 9/11/2001. GLAD Press Advisory, May 6.

California — Otis Charles, 78, a retired Episcopal bishop, took advantage of the avail- ability of marriage licenses for same-sex part- ners in San Francisco by marryingFelipe Sanchez in April 24 in a ceremony at St. Gregory of Nyssa Episcopal Church in San Francisco, in the presence of several hundred family members and friends. Reacting to this event and an account of it published in the San Francisco Chronicle, Rev. William Swing, the church’s California bishop, declared that Charles is no longer an assisting bishop of the church and may not longer celebrate the sacra- ments there, thus relieving him of the right to performing weddings, baptisms, and other services. However, bishops in the church are ordained for life and unless a formal process is initiated to defrock him, Charles will remain a member of the House of Bishops with the right to vote on matters before the House. Charles came out as gay in 1993, and had previously been in a heterosexual marriage. The dispute with Bishop Swing seems to revolve around no- muncature, as the San Francisco diocese has performed numerous ceremonies for same-sex partners; Swing objects to Charles characterizing his relationship with Paris as a marriage. San Francisco Chronicle, May 11, 2004.

Massachusetts — Anticipating the beginning of marriages by same-sex couples on May 17, Local 103 of the International Brotherhood of
Electrical Workers (IBEW), in Boston, amended its employee benefit plan rules to exclude same-sex married couples from family coverage under health and pension benefit plans. The amendment was achieved by adopting a new definition of the phrase “dependent spouse” to mean “a person of the opposite sex.” The text of the amendment was sent in writing to all union members on May 7. The trustees claim to be free to take this action because ERISA, the federal law regulating employee benefit plans, preempts any state law affecting employee benefits. The question whether ERISA preempts state marriage law may have to be settled in court. Some other unions, including other locals of the IBEW in Massachusetts, criticized the move. Some union activists were very involved in the fight to win the right to marry for same-sex couples, and participated in lobbying the legislature against the proposed constitutional amendment. Other unions are more conservative, and there was speculation that the more conservative union benefit plan administrators may follow Local 103’s lead. Ironically, this move comes at a time when some Massachusetts employers were announcing that they would be discontinuing their domestic partnership benefit plans by the end of the year, since same-sex couples would not be able to access family benefits by marrying.

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Washington Appeals Court Finds Common Law Rights for Lesbian Co-Parent

Although it rejected an argument that a lesbian co-parent should be able to assert parental rights under the Uniform Parentage Act (UPA), a statute in force in many states, the Court of Appeals of the state of Washington ruled May 3 that under Washington’s common law, the lesbian co-parent can be treated as a de facto parent and seek rights of parental recognition, including a right to visitation. In re the Parentage of E.B.; Carvin and Britain, 2004 WL 938361 (Wash. Ct. App.)

The case presents the usual constellation of facts found in parental rights disputes between former lesbian partners, but with an unusual twist. According to her complaint, Sue Ellen Carvin and Page Britain were long-term domestic partners when they decided to have a child. They persuaded a gay male friend, John Auseth, to be their sperm donor, and Britain was inseminated and bore the child, a girl. During the first six years of the child’s life, Carvin claims to have been primary caretaker, as Britain returned to her job and Carvin cut down on her own work, taking the child to doctor’s appointments and later to play and school obligations.

When the relationship deteriorated, at least in part due to Britain’s irritation that she was providing the financial support and Carvin, staying at home with the child, “enjoyed the glory of being a ‘mom,’” Carvin claims. Britain moved out with the child, but agreed that Carvin would continue to play a parental role. As sometimes happens in these situations, Britain gradually cut down Carvin’s contact and finally cut her off entirely. The unusual twist in the case is that after Carvin filed her lawsuit seeking to assert parental rights and re-establish contact with her daughter, Auseth, the gay sperm donor, who was then living in California, gave up his job and moved back to Seattle, where he married Britain and assumed the active role of being the child’s father. (He had not previously met the child before these events.)

Britain then took the step of having the child’s birth certificate changed to indicate that Auseth was the father.

The trial judge found that Carvin had no parent rights under the UPA, and that Washington’s common law provided no basis for her claim to legal rights as a “psychological” or de facto parent. While the court of appeals, in an opinion by Judge Kennedy, agreed that it would be too much of a stretch to interpret the UPA as encompassing such claims by a lesbian co-parent who was not genetically related to the child, it found that the common law of Washington could be developed to take account of the reality of parental relationships that were created when same-sex couples had children through donor insemination.

“Washington courts often have recognized that parent-child bonds form regardless of biology or statutes providing traditional parental rights,” wrote Kennedy, discussing a variety of cases that did not involve same-sex couples. Kennedy also observed that there were earlier Washington court decisions that “have recognized the importance of the psychological bond between a child and a caretaker.” Britain responded to these points by invoking the constitutional rights of biological parents “against unwarranted governmental intrusion into her parenting decisions.” Kennedy responded that Washington courts have recognized two circumstances meriting such interference: where the parent is unfit, or where “the child’s growth and development would be detrimentally affected by placement with an otherwise fit parent.”

In this case, Kennedy found it was appropriate as a matter of developing the common law to extend the second category somewhat to cover this kind of case. “Carvin does not request a determination of co-parentage because Britain is unfit, but rather because she alleges that she is a de facto parent with whom the child is psychologically bonded and that it would be detrimental to [the child’s] growth and development to deprive her of the de facto parenting relationship that was fostered with Britain’s consent and active participation.”

Seeking support for this common law development, Kennedy cited decisions by appellate courts from Wisconsin, Massachusetts, New Jersey, and Pennsylvania, all of which have recognized under similar circumstances that a lesbian co-parent who had participated in planning for a child’s birth and fulfilled a parental role during the child’s early life should be entitled to maintain that parent-child tie, even after their relationship with the child’s birth mother has terminated. The court did not consider it a significant point that Carvin had not formally adopted the child, a step that would have been available under Washington law.

The court noted with approval arguments made by some friend-of-the-court briefs, that courts have been increasingly recognizing that children themselves have a constitutional right of association that could be violated by a court’s failure to recognize the parental bond with a same-sex co-parent. Considering the cases from the other states, Kennedy wrote that the court found them to be “persuasive authority for the existence of a common-law claim of de facto or psychological parenthood. Washington courts also recognize that the importance of familial bonds accrues constitutional protection to the parties involved in judicial determinations of the parent-child relationship, including

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the child, whether the State seeks to terminate a parent-child relationship or to establish one.”

While noting that courts in some other states had refused to recognize such claims by same-sex co-parents, the court characterized those opinions as less persuasive.

At the same time, the court of appeals found that Carvin could also make a claim under Washington’s controversial third-party visitation statute, whose constitutionality was disputed by the U.S. Supreme Court in an important case that involved grandparent visitation claims. In that case, the Supreme Court ruled that it would violate the rights of a parent to order visitation for grandparents over the objections of a fit parent. Kennedy noted significant distinctions between the cases, most importantly that in this case Carvin, with Britain’s cooperation and encouragement, had formed a parental bond and had been the child’s primary caregiver for the early years of the child’s life. In addition, the prior case did not involve an attempt by a parent to cut off all contact by the grandparents, but merely her determination to reduce the contact, which led the grandparents to seek a court order expanding their contact.

Finally, Kennedy noted that a basis for the Supreme Court faulting the statute was the law’s failure to require a finding as to the best interest of the child in a grandparent case. In this case, Carvin will have to prove that it is in the best interest of her daughter to maintain parental contact.

Thus, the court “rehabilitated” the third party visitation statute in this case, for situations that would meet the objections the Supreme Court raised in the prior case.

The court rejected Britain’s demand that Ausethe be recognized as the child’s legal father, noting that he had not actually joined the case as a party or attempted to assert any legal parental claim, and that under the UPA, his status as a sperm donor was not determinative of his status as a father. (The UPA provides that a sperm donor is not automatically treated as a parent.) The court left open the question whether Ausethe might have a right under Washington common law to seek a judicial determination of his parental rights at a later time.

On the other hand, the court found that the child herself is a “necessary party” to a court proceeding to determine who is her legal parent, and for that purpose direct the trial court to appoint a guardian ad litem to represent the child’s interest when the case is returned to the trial court to determine whether Carvin’s claims to parental rights and visitation should be granted. In that proceeding, the central question will be whether it is in the best interest of the child for that parental relationship to be established in law.

The National Center for Lesbian Rights and the Lesbian and Gay Rights Project of the ACLU played major roles in this case, helping to bring to the court’s attention a wide array of decisions and relevant expertise from around the country in support of the extension of state common law to allow co-parents to seek legal recognition of their parental rights. A.S.L.

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**California Appeals Court Finds No Child Support Obligation for Lesbian Co-Parent**

A unanimous three-judge panel of the California Court of Appeal for the Third Appellate District has rejected an attempt by child welfare officials of El Dorado County to force a lesbian co-parent to provide child support for the children of her former partner. Elisa Maria B. v. The Superior Court of El Dorado County, 2004 WL 1119615, 2004 Cal. App. LEXIS 761 (May 20, 2004). The ruling, in an opinion for the court by Presiding Justice Arthur G. Scotland, found that a lesbian co-parent in California who is not a registered domestic partner and has not adopted her partner’s children may not be held responsible for the children’s support.

Elisa and Emily, began living together in 1993 and exchanged rings to symbolize their relationship. Elisa also had the Latin slogan Emily Por Vita (Emily for Life) tattooed on her arm. They had a joint bank account and pooled their resources for household expenses, according to Scotland’s opinion. Both women wanted to experience pregnancy and childbirth, so they went together to a fertility clinic and obtained sperm donations from the same anonymous donor. Elisa became pregnant in 1996 and gave birth to a son in 1997. Emily became pregnant after Elisa and bore twins in 1998. Before the children were born, Emily and Elisa agreed that Emily would stay home to take care of the children and Elisa, who had a larger income, would continue to work to support the family. After the children were born, the women agreed on naming them and gave them hyphenated surnames to combine their own names. They each considered all three children to be their children. However, the year after the twins were born, the relationship went sour.

Although the women had talked with a lawyer about adoption, they had never formalized that process. They separated in November 1999, with Emily and the twins remaining in the house (which Elisa owned), and Elisa promising at that time to provide some ongoing financial support. In May 2001, Elisa informed Emily that she was no longer working full-time and could not afford to continue financial assistance to Emily and the twins. Shortly after, Emily filed for public assistance, and El Dorado County decided to go after Elisa for child support payments.

The County successfully persuaded Superior Court Commissioner Gregory Ward Dwyer to hold Elisa responsible for supporting the twins. Relying on Johnson v. Calvert, 5 Cal.4th 84 (1993), a case involving surrogate parenting, Commissioner Dwyer found that Elisa and Emily had intended for Elisa to be a parent of Emily’s twins, and having acted consistently with that intent, Elisa should be considered a parent under California law and thus have the support obligations of a parent. Alternatively, Dwyer accepted promissory estoppel and equitable estoppel arguments, holding that Elisa could not deny her parental status because of her agreement before the children were born that she would work full-time to support the family while Emily stayed home to take care of the children.

Elisa appealed the ruling, and the court of appeal rejected all of the grounds that the Superior Court had relied upon, reversing its ruling.

Sullivan observed that California courts have consistently rejected the argument that a lesbian co-parent can be considered a legal parent under California’s version of the Uniform Parentage Act, which limits parental status to a birth parent or an adoptive parent. In Johnson v. Calvert, the court was faced with determining parental rights as between the woman whose egg had been fertilized and the surrogate mother who had undergone the pregnancy after embryo implantation and given birth to the child. In that case, the court held that the intention of the parties when the process began was for the surrogate mother to have no parental status, and for the egg donor and her husband to be the legal and actual parents. Under California’s version of the Uniform Parentage Act (UPA), a child can have only one “natural mother” (that is, a mother by birth), and the court held that the intention of the parties dictated that the person who was intended to be the mother and was biologically related to the child as the source of its genetic heritage was the legal mother.

This case, observed Sullivan, was quite different. “Here, Elisa has no genetic consanguinity with the twins, she did not give birth to them, and she has not adopted them. In contrast, Emily conceived the twins by artificial insemination and gave birth to them with the intent of raising them as her own. Accordingly, Emily is the natural mother of the twins a fact that neither she nor Elisa has disputed and Elisa has no legal maternal relationship with the children under the UPA because ‘for any child California law recognizes only one natural mother,’” Sullivan wrote, quoting from Johnson. Furthermore, Sullivan accepted Elisa’s common sense argument that because California law would give her no right to seek custody or visitation, it should impose no obligation of support.

Turning to common law arguments, Sullivan noted that Elisa had never specifically promised Emily prior to her insemination or the twins’ birth that Elisa would support the twins no matter what happened to the women’s relationship. Emily had tried to invoke promissory
Coast Guard Appeals Court Affirms Sodomy Conviction; Defers Challenge to Article 125

In United States v. Abdul-Rahman, 2004 WL 1078122 (U.S. Coast Guard Court of Criminal Appeals, May 14, 2004), the court affirmed the conviction of Shams Abdul-Rahman, a male sailor, on a variety of charges of misconduct while on board a Coast Guard vessel, including one count of sodomy with a female cadet. On appeal, Abdul-Rahman contested the sodomy charge, arguing that Article 125 of the Uniform Code of Military Justice (UCMJ), which forbids sodomy, is unconstitutional in light of the U.S. Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003).

Writing for the court, Chief Judge Baum rejected the argument, ruling that the Coast Guard appeals court is bound by precedent set by the Court of Appeals for the Armed Forces, which has not yet considered the sodomy provision in light of Lawrence, and also because the facts and circumstances of the case were distinguishable from those in Lawrence.

Abdul-Rahman had been charged with eight “specifications” (counts) involving a variety of acts while onboard the Coast Guard Cutter Rush. Some involved “sexually explicit conduct,” one was for possession of alcohol on board vessel, one was for trespass to a women’s berthing section of the vessel, and two were for “indecent acts with another.” Abdul-Rahman pled guilty and was sentenced to confinement for 180 days and a bad conduct discharge, but apparently reserved the right to appeal.

With regard to the sodomy count, Abdul-Rahman argued on appeal that Article 125 of the UCMJ, which forbids private consensual sodomy between adult members of the U.S. Armed Forces, was unconstitutional in light of Lawrence. Amazingly, this court ruled that “notwithstanding decisions of the Supreme Court directly bearing on issues before this court, we are bound to follow precedents set by our higher court, the Court of Appeals for the Armed Forces (CAAF), until such time as that court deems its precedent modified by the Supreme Court.” The CAAF had ruled that Article 125 was constitutional in 1992, in light of Bowers v. Hardwick, a case that was overruled by the Supreme Court, apparently with retroactive effect, in Lawrence. But apparently the U.S. Supreme Court is not the highest court in the land, after all at least, not in the military.

In any event, the court ruled, Lawrence is distinguishable. The Supreme Court emphasized in Lawrence that the case did not involve public conduct, and that the Texas Statute furthered no legitimate state interest that could justify intrusion into the personal and private life of the individual. In contrast, first, Abdul-Rahman stood accused of conduct which occurred in the women’s berthing area of a Coast Guard vessel, a place he was not entitled to be and where other women were present, making it difficult to “find any semblance of privacy, much less implicite privacy interests.” Second, even if the conduct in question were private, the Coast Guard had a legitimate military interest that would justify its intrusion into any sexual acts aboard a Coast Guard vessel, said Baum, without specifying what those interests were. Third, Abdul-Rahman also pled guilty to unlawful entry into that part of the vessel. Fourth, under the record before the court, it was not altogether clear that the conduct in question was not “by force and without consent,” even though Abdul-Rahman ultimately pled guilty to a charge of consensual sex.

Would there be good reason to find Article 125 unconstitutional, at least as applied to consensual, adult sex conducted in a private space? That, the court ruled, was a question for the Court of Appeals for the Armed Forces, but probably not on the facts of this case. Steven Kolodny

Federal Court Denies Injunction in Student Harassment Case

A federal judge has refused to issue a preliminary injunction against a local Iowa school district and a police officer sued by a senior high school student for alleged violations of the student’s rights under the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Title IX of the Education Amendments of 1972. Doe v. Perry Community School District, 2004 WL 965932 (S.D. Iowa, Apr. 29). The student, who claims to have been subjected to more than three years of student harassment on the basis of his perceived sexual orientation, and who, together with one alleged harasser, was arrested and briefly suspended after a May 2003 brawl on school property, sought to enjoin the defendants from “taking any adverse action” against him in response to his “speaking out in the halls of the school in protest against hate-based discrimination or threats.”

District Judge James E. Gritzner concluded that while Doe had demonstrated “some likelihood of success on the merits” of his Title IX claim (in which he alleged that the defendants were deliberately indifferent to his claims of student harassment), he had failed to do so concerning his First Amendment claims at the heart of the requested injunction.

Doe, an 18-year-old senior at Perry High School located in Perry, Iowa, was an active student and a member of the school football and wrestling teams until last year when, because of alleged ongoing harassment by his classmates and demeaning treatment by teachers and administrators due to his perceived sexual orientation, he no longer felt safe at school and decided to complete his education at home. According to Doe, student harassment over the years consisted of persistent name-calling, threats, and occasional physical assaults, including being urinated on by other students in the shower room. Doe claims that school teachers and administrators did not take action in response to his complaints, telling Doe instead to...
“get tougher skin,” “get used to it,” and “grow up.”

One altercation at the heart of Doe’s claims took place on May 8, 2003, at the end of Joe’s junior year. Doe heard that another student had publicly called him a “pussy” and “fucking queer” and had threatened him with violence. Doe reported the incident to Police Officer Jerry Jans (the School Resource Officer) and sought Jans’ advice. Jans allegedly told Doe he could either ignore the threats or confront the other student in public to make the student “look bad.” Doe confronted the student in the hall between classes, following the student as the student walked away reiterating anti-gay epithets and threats of violence. The student eventually pushed Doe, and a scuffle ensued resulting in minor injuries. After two teachers separated the students, they were suspended for three days and arrested for disorderly conduct. The charges against Doe were later dismissed.

Doe and his parents filed discrimination complaints with the school district. The compliance officer who investigated the complaint determined that it was “inconclusive.” (The court found that there were flaws in the investigation of the incident by school administrators, but ruled that these flaws were not relevant to Doe’s motion for a preliminary injunction.)

Doe filed a complaint against the school district and its superintendent; the school principal and associate principal; the City of Perry and Officer Jans, alleging violations of 42 U.S.C. sections 1983, 1985 and 1986 and Title IX. Doe simultaneously filed a motion for a preliminary injunction. After a two-day factual hearing, Judge Gritzner issued a lengthy decision denying Doe’s request for interim injunctive relief.

In casting doubt on Doe’s First Amendment claims, the court concluded that the school took action against Doe in response to anything he said, but in response to what he did: “The Court finds Plaintiff has failed to make the required showing that the disciplinary actions stemming from the May 8 altercation were intended to interfere with his First Amendment rights...[Doe] did more than merely speak out. He was also witnessed pushing his alleged harasser, and in fact Doe himself stated he pushed the other student at least three times, though characterized as in defense. The evidence indicates that the District officials’ response and that of Officer Jans was based on the conduct of fighting, and not as a way to punish Doe for speaking out against harassment or to restrain Doe in the future from speaking out.” Gritzner similarly ruled that Doe failed to demonstrate a likelihood of success on the merits of his state law false arrest claim, since the arrest occurred in response to a fight in which Doe conceded he participated.

Doe’s Equal Protection and Due Process claims fared no better, given the court’s interpretation of the facts. Although the court cited with apparent approval a Seventh Circuit case (Nabozys v. Podlesny, 92 F.3d 446) in which the Court of Appeals found that a school district’s failure to protect a student from student-on-student harassment based on sexual orientation was constitutionally prohibited, Gritzner found the facts of Nabozys to be particularly “outrageous and egregious” and “severe.” By contrast, Gritzner concluded that while “Doe has made credible assertions that he has been subjected to numerous incidents of harassment, threats, and physical assaults over a period of more than three years, the current record is insufficient to find a likelihood of success on the merits of his equal protection claim.”

The court appeared partially persuaded by evidence that unlike in Nabozys, Doe’s school responded to his complaints — by segregating him from the rest of the student body for his own protection. The court credited testimony “that Defendants tried to prevent harm from befalling Doe by limiting his interaction with fellow students to supervised, classroom settings. At some point, Doe was allowed to move between classes at times when the hallways were clear and eat lunch in isolation in order to avoid students that could harass or attack him.”

Under Title IX, a student can state a claim for monetary damages by alleging that the school district intentionally failed to intervene to end harassment against a student — if the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. Judge Gritzner indicated that while Doe has demonstrated some likelihood of success on the merits on this claim, he “may have some difficulty in proving intentional discrimination or deliberate indifference.” Ultimately, the court ruled that the issue was not relevant to the preliminary injunction, which focused on First Amendment issues only.

Gritzner appears to recognize the very real impact harassment has had on Doe, explaining, “The current record supports a conclusion that Plaintiff is suffering harm by not having a safe learning environment at Perry High School and will continue to suffer harm by not feeling sufficiently safe to attend school with his classmates. Doe will be further harmed if he does not participate in the upcoming activities related to graduation.” Nevertheless, in reading the court’s decision, and all the inferences the court seems willing to draw in favor of the defendants, one gets the sense that Judge Gritzner intends to set the bar quite high for Doe to prevail on the merits of his claims.

Robert Montgomery represents Doe. Kirks Quinn represents Perry Community School District. Harry Perkins III represents the City of Perry. Ian Chesir-Teran

Federal Civil Litigation Notes

Federal — 6th Circuit — Ohio — In an unoffically published per curiam opinion, a panel of the U.S. Court of Appeals for the 6th Circuit affirmed the dismissal of sex and perceived disability charges brought by a transsexual person under Title VII and the ADA against a private sector employer, Johnson v. Fresh Mark, Inc., 2004 U.S. App. LEXIS 9997 (May 18, 2004). Selena Johnson is described in the court’s opinion as a “pre-surgical transsexual woman.” Her driver’s license indicates that she is male. She presented herself to Fresh Mark, Inc., as a woman at the time she was hired. When the company received complaints that Johnson was using both the men’s and women’s restrooms, the employer told her she could not return to work without a doctor’s note indicating whether she was male or female and whether there was any reason she should be using the restroom designated for the opposite gender. Johnson went to an attorney, who sent a letter to the employer stating that she was “not entirely male nor entirely female” and that it was most appropriate for her to use either a women’s room or a unisex facility. But the employer decided that the sex indicated on her driver’s license — male — was her legal sex, and directed that she could use only the men’s room. She refused to return to work under such conditions, and was discharged after three days of absence for violating the company’s attendance policy. In her discrimination claim, she relied heavily on the sex-stereotyping theory of sex discrimination derived from the Supreme Court’s decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), but the district court granted the employer’s motion to dismiss, finding that Price Waterhouse was inapplicable to the facts as pleaded in the complaint, and that the ADA specifically excludes “transsexualism” as a disability. The circuit court affirmed without further explanation, referring readers to the district court’s opinion, where the reasons for judgment are “fully articulated.” Of course, the district court’s opinion is unpublished and could not be found on either Westlaw or Lexis.

Federal — California — The National Center for Lesbian Rights reports that U.S. District Judge Phyllis Hamilton (N.D.Cal.) ruled May 3 in a case filed by NCLR that Adoption.com, a website that facilitates adoptions, is subject to the jurisdiction of California law. NCLR filed suit on behalf of a same-sex couples from San Jose, Rich and Michael Butler, who were rebuffed by Adoption.com when they sought to use the service to locate a potential adoptive child. A spokesperson for the company stated that Adoption.com does not allow gay and lesbian couples to use their services. The plaintiffs
argue that this violates California law, forbidding businesses that provide goods and services to the public from discrimination on the basis of sexual orientation. In rejecting the defendants’ motion to dismiss the case, Judge Hamilton wrote, “Here, the burdens posed on defendants — allowing same sex couples to be listed on their websites — do not clearly exceed the benefits, which include providing prospective birth mothers with a greater number of potential adoptive parents from which to choose, possibly leading to a greater likelihood that children will be placed in a stable home.” Trial on the merits is yet to be held in Butler v. Adoption.com.

Federal — Florida — The National Center for Lesbian Rights and Equality Florida have announced a settlement in Youngblood v. Hillsborough County School Board, a case that stemmed from the school’s refusal to allow Nikki Youngblood, then a senior at Robinson High School, to depart from the “dress code” prescribed from the girls in their yearbook portraits. The strict code said that the boys would wear wire jackets and ties, and the girls would wear ultra-feminine scoop neck drape. Nikki preferred to wear a formal shirt and jacket, not the stereotypical feminine garb, and her insistence led to her being excluded from the yearbook. A federal district judge dismissed the case, which was appealed to the 11th Circuit. The Circuit ordered mediation, which at first proved unsuccessful, so the case was restored to the argument calendar and argued before the court. After the argument, the parties agreed to try mediation again, and this time reached a settlement, so the 11th Circuit will not be issuing an opinion. Under the settlement, the school will henceforth allow deviations from the strict dress code for senior portraits in the yearbook.

NCLR staff attorney Karen Doering, who is also a legal consultant for Equality Florida and who represented Youngblood, expressed satisfaction most significantly, that Soliman’s relationship was with somebody over whom he had an on-going supervisory relationship, which the bank found had been abused when he offered to let his girlfriend revise her written work evaluation before it was submitted to upper management. The relationship was first discovered when auditors questioned certain taxi expenses involving the two employees. Soliman’s allegations regarding his supervisor suggest that Soliman felt uncomfortable working with an openly gay man who was somewhat physically demonstrative and a bit intrusive in dealing with a handsomely male subordinate, but Judge Motley found that his description of the supervisor’s conduct did not cross the line into harassment.

Federal — Pennsylvania — Senior U.S. District Judge Herbert Hutton ruled that Sandra L. Knight, a lesbian employee of the National Park Service, should by allowed to pursue sex, disability and retaliation claims against her employer, arising from incidents while she was working at National Historic Park in Philadelphia, the site of Independence Hall and the Liberty Bell. Knight v. Norton, 2004 WL 1146657 (E.D.Pa., May 19, 2004). Hutton ran into problems when the Office of Personnel Management, which was reviewing her background check questionnaire, decided that she had not been truthful with respect to some of the questions. Hutton ended up suffering various consequences to her career without being given any opportunity to respond, which she believed stemmed from her race, sexual orientation, and disability (she suffered from some debilitating conditions, in part due to injuries suffered while serving in the Navy). She added testimony showing some anti-lesbian prejudice, including a comment by a supervisor, referring to her, that “If you let one in, it opens the door for a dozen more.” Although Judge Hutton concluded that the factual allegations failed to support a race discrimination charge, he denied the government’s motion for summary judgment on some of Martin’s claims against the school district as distinct from claims against supervisor Burke, finding that he had not been discharged in violation of the FEHA, although his retaliation claim with respect to job assignments and promotion might have merit.

New York — A panel of the N.Y. Appellate Division, 2nd Dist., ruled on May 10 in Bantum v. American Stock Exchange, 2004 WL 1067575, that a stock broker’s attempt to assert a racial and sexual harassment discrimination claim against another broker under the New York State and City Human Rights Laws is preempted by the federal laws regulating the operation of the securities markets. The court found that when Congress established the Securities and Exchange Commission to enforce the Securities Exchange Act, it intended to confer upon the Commission the sole jurisdiction to oversee the operation of the self-regulating securities exchanges. The court noted that the American Stock Exchange, to which Ms. Bantum originally brought her complaint, had instituted an investigation, but Bantum complained

### State Civil Litigation Notes

**California** — In Martin v. Los Angeles Unified School District, 2004 WL 923182 (Cal. Ct. App., 2nd Dist., April 30, 2004) (unpublished disposition), the court held that in a hostile environment sexual harassment case brought by a male employee based on the actions of a male supervisor, it was not necessary for the plaintiff to prove that the supervisor was gay, and the lower court erred by dismissing his claim based, in part, on the lack of evidence about the supervisor’s sexual orientation. Referring to the supervisor, Judge Aldrich wrote for the court: “Whether Burke was homosexual is irrelevant. ‘A cause of action for sexual harassment in violation of the FEHA may be stated by a member of the same sex as the harasser, whether based on the quid pro quo theory or the hostile environment theory or a hybrid of both theories.’ … The Mogilevsky Court rejected the argument that allowing a cause of action under the FEHA for same gender sexual harassment would ‘make an inquiry into the sexual orientation of the male supervisor an absolute necessity.’ … The court explained, ‘the focus of a cause of action brought pursuant to the FEHA is whether the victim has been subjected to sexual harassment, not what motivated the harasser.’ Given that the harasser’s motivation is irrelevant, the lack of evidence of Burke’s sexual orientation cannot serve as a ground for granting summary judgment here.” The appeals court also disagreed with L.A. Superior Court Judge Malcolm H. Mackey about whether Martin had alleged sufficiently severe and pervasive harassing conduct to state a claim, finding that a reasonable jury could have ruled in his favor. However, the court did uphold summary judgment on some of Martin’s claims against the school district as distinct from claims against supervisor Burke, finding that he had not been discharged in violation of the FEHA, although his retaliation claim with respect to job assignments and promotion might have merit.

**New York** — A panel of the N.Y. Appellate Division, 2nd Dept., ruled on May 10 in Bantum v. American Stock Exchange, 2004 WL 1067575, that a stock broker’s attempt to assert a racial and sexual harassment discrimination claim against another broker under the New York State and City Human Rights Laws is preempted by the federal laws regulating the operation of the securities markets. The court found that when Congress established the Securities and Exchange Commission to enforce the Securities Exchange Act, it intended to confer upon the Commission the sole jurisdiction to oversee the operation of the self-regulating securities exchanges. The court noted that the American Stock Exchange, to which Ms. Bantum originally brought her complaint, had instituted an investigation, but Bantum complained
that the Exchange and its officers had aided and abetted the other broker’s sexual harassment and encouraged retaliatory conduct from other members of the AMEX by failing to conduct a proper and thorough investigation. Too bad, said the court, since the state courts have no jurisdiction to entertain Bantum’s suit under state or local law.

Oregon — In Kerr v. Bradbury, 2004 WL 955830 (Or. Ct. App., May 5, 2004), the court found that a proposed ballot question intended to establish that “sexual orientation shall not be taught in Oregon public schools in a manner that would express approval of, promote or endorse the behaviors of homosexuality or bisexuality” was defective in that it did not include the text of the state’s education statutes as they would read if the proposed amendments were approved by the voters. The court found that state law requires that proposed changes to existing laws be presented to the voters in the appropriate context so they can properly determine whether they want to approve the effect that the question would have on overall law. The opinion for the court by Presiding Justice Landau presents a lengthy history of the Oregon referendum and initiative process that could provide useful reading for anybody seeking to change or preserve existing Oregon laws through that process.

Pennsylvania — Sitting en banc, the Commonwealth Court of Pennsylvania has reversed a decision of the Workers’ Compensation Appeal Board and denied benefits to a miner who claimed to have suffered severe psychiatric injury as a result of unwanted homosexual harassment from a co-worker. RAG (Cyprus) Emerald Resources, L.P. v. Workers’ Compensation Appeal Board (Hopton), 2004 Pa. Commw. LEXIS 404 (May 25, 2004). Ron Hopton is a Vietnam War veteran who claims to have been subject in the service to unwanted sexual attentions from a superior officer that contributed to the post-traumatic stress disorder he suffered after leaving the service. While later working as a miner, he experienced three incidents of “homosexual harassment” at the hands of a co-worker, which led him to suffer severe distress. TheWorkers Compensation Judge who heard the testimony concluded that Hopton made out a good case, finding that the incidents “were not normal joking or merely uncivil behavior but were a course of conduct persisted in and clearly calculated to cause severe emotional distress on the part of the claimant and Mr. Rossi was successful in doing this.” Under Pennsylvania law, a workers comp claim based solely on emotional distress has to be predicated on abnormal working conditions, which the Judge found to be present, as did the Appeal Board. But the Commonwealth Court disagreed, in an opinion by Judge Bernard L. McGinley, who emphasized the “rough and tumble” nature of the mines. Two of the judges dissented, rejecting the proposition that such harassment could or should be considered “normal,” and criticizing the majority for substituting its findings and judgments for the hearing judge and expert appeal board. A.S.L.

2nd Circuit: “White Jewish Gay Male” State Employee Set Forth Discrimination Claim on Which Relief Could Be Granted; Summary Judgment for Supervisors and DMV Overturned

An administrative law judge in the Harlem office of the New York State Department of Motor Vehicles, described by the court as “a white, Jewish gay male,” presented a prima facie case of illegal employment discrimination, so defendant-employers, supervisors, and the DMV should not have been granted summary judgment, according to a decision by the U.S. Court of appeals for the 2nd Circuit, Feingold v. State of New York, 2004 WL 916629 (April 30, 2004). The decision of a three-judge panel is attributed to Judge Fred I. Parker, who died on August 12, 2003, and had completed a substantial portion of the opinion before his death; it is issued “in his memory.”

Although Larry Feingold alleged discrimination based on race, religion, and sexual orientation, the court stated no opinion on his likelihood of success on the merits of the sexual orientation claims. The court’s focus is on the blatant anti-Jewish discrimination, and the less-blantant anti-white discrimination, alleged in the complaint. Nonetheless, the court mentions the sexual orientation of all parties in the suit, if it is known. For example, some of the defendants were: “Judge Kathleen Sullivan, a white, Christian, heterosexual female,” “Sharon Lee-Sang, a black, Christian, heterosexual female; Fernando Tapia, a black, Christian, heterosexual male; Evelyn Walltrous, a black, Christian, heterosexual female”, and Phyllis Isaacs, “a black, Christian, heterosexual female.”

Blatant anti-Jewish behaviors included referring to Feingold by other Jewish-sounding names, such as Feinstein, Goldberg, Silverman, and Feinberg, in a negative tone. Unfavorable remarks about Jewish people were common, and Christian prayer circles were a regular feature of the office. Racial discrimination was evidenced by allegedly divergent treatment given to black and white ALJs: lighter workloads for blacks, better training for blacks, more leniency for lateness and other infractions granted to blacks than to whites, according to Feingold.

According to Feingold, hostile attitudes toward homosexuals also “pervaded the office.” Specifically, Feingold alleged that the words “fag” or “faggot” were used in his presence at least three times, a fellow ALJ advised Feingold not to be too “openly gay,” and another ALJ made at least three hostile references to Feingold’s sexual orientation. After Feingold’s termination, he learned that a clerk referred to him as “that faggot judge” in the public area of the office.

Feingold had complained about his treatment to the overall supervising ALJ, Leon Schulgasser, a “white Jewish male” who worked in the Brooklyn office. After an incident in which, allegedly, Feingold improperly dismissed a case, displayed anger in the hearing room, went to the library where he caused a glass door to break, and went back to the hearing room where he used an expletive while continuing to display anger, Feingold was fired on June 13, 2000, based primarily on Schulgasser’s recommendation, after discussing the matter with Feingold’s supervisors.

The district court found that the incident described above provided a non-discriminatory reason for firing Feingold, that treatment by black colleagues may well have been because they did not like him, rather than because of his race, that anti-gay slurs were merely sporadic, and that Feingold did not show that anti-Semitic remarks interfered with his work. Feingold v. State of New York, 2002 WL 1751098 (S.D.N.Y. July 26, 2002). Therefore, the district court granted summary judgment to the defendants.

The appeals court upheld some of the summary judgments on Feingold’s charges against the state based on Eleventh Amendments grounds. The state had not consented to being sued under 42 U.S.C. §1983, or under the New York City’s discrimination ordinance and, therefore, could not be sued as an entity for damages. However, his allegations of civil rights violations under Title VII of the Civil Rights Act of 1964 did state causes of action for which relief could be granted. The court of appeals, therefore, reversed the district court to allow the case to proceed to trial.

The appeals court, in a de novo review, found significant evidence that, based on Feingold’s race and religion, he had suffered a hostile work environment, discriminatory workload, and wrongful termination. Actions of his coworkers were attributed to his employer, the DMV, because Feingold had informed his supervisors of the problems. Therefore, the DMV was implicated in the unlawful discrimination, and could be sued under Title VII.

The appeals court ruled that a trier of fact could find the non-discriminatory reasons for Feingold’s firing to be a pretext, because other ALJ’s had engaged in similar conduct without being reprimanded, and certainly not terminated.

The appeals court upheld claims against individual defendants under both the city and state human rights laws, and under section 1983. Claims under the First Amendment alleging that Feingold was the victim of retaliation
for speaking up about discriminatory conditions were also allowed to proceed to trial.

Although the decision is not based on anti-gay discrimination, it provides guidance to employment law litigators on the level of evidence needed to state a case that a purported reason for discipline and termination is a mere pretext, and that the true reason is illegally discriminatory.

[Postscript: Two days before this decision was handed down, Larry Feingold was convicted of reckless endangerment for causing a gas explosion in his Stuyvesant Town apartment. The explosion, occurring on Feb. 4, 2003, injured eight people, and blew out the walls and windows of his apartment. Feingold, who had gone on to become an ALJ for the city’s Environmental Control Board, was attempting suicide after his lover left him. At trial, Feingold testified that he was not aware that kitchen gas could cause an explosion. Justice Jeffrey Atlas, who convicted Feingold in a non-jury trial, stated that he would have liked to acquit Feingold because he did not show “depraved indifference,” but that he was bound by precedent to find Feingold guilty. Feingold will lose his law license because of this conviction. He will be sentenced on June 30, 2004.

Source: NYLawyer.com/ Alan J. Jacobs

Illinois Appeals Court Reverses Conviction for Oral Sex Due to Erroneous Admission of Past Crimes Evidence

The Appellate Court of Illinois reversed the conviction and seven year jail sentence imposed on Kevin W. Stanbridge on charges of aggravated criminal sexual abuse, finding that the trial court improperly allowed the state to introduce evidence that a decade prior to the events in question, Stanbridge had been involved in two incidents of attempting to initiate oral sex with 14–year-old boys. In the case at hand, the complaining victim was a 14–year-old boy. People of Illinois v. Stanbridge, 2004 WL 1053001 (Ill. App. 4th Dist., May 4, 2004).

Writing for the court, Justice Cook related that Stanbridge, a divorced truck driver with three children, was friendly with Robert Eddy, the father of J.R.E., age 14. Eddy and his son had visited for extended periods of time with Stanbridge, his wife and children when Stanbridge was still married. On Friday, November 26, 1999, Stanbridge invited Eddy and his son to come to Stanbridge’s house for a barbecue. Later that evening, Stanbridge, Eddy, J.R.E., and an adult friend of Stanbridge were sitting in Stanbridge’s living room, watching a movie. Eddy went to sleep in another room. When J.R.E. began to fall asleep, Stanbridge dragged him into Stanbridge’s bedroom, undressed him and get into bed. J.R.E. claims that he awoke during the night “to the feeling of defendant rubbering his crotch.” J.R.E. testified that he told Stanbridge to stop and “elbowed him in the head.” Stanbridge desisted and J.R.E. drifted back to sleep, but he testified that he awoke later with Stanbridge “performing oral sex on him.” Stanbridge consistently denied that he had any sexual contact with J.R.E.

Prior to the trial before Adams County Circuit Judge Mark Schuering, Stanbridge moved to exclude any evidence of prior incidents, dating from 1981, 1987, and 1989, when he was allegedly to have attempted to initiate oral sex with 14–year-old boys; one of those incidents had actually led to his conviction of criminal sexual abuse. Schuering found that there was significant risk of prejudice and granted Stanbridge’s motion. When the trial began, the state filed its own motion seeking to bar Stanbridge from introducing any evidence “in support of his assertion that he is homosexual”; the motion stemmed from Stanbridge’s statement to a police investigator that he was not a homosexual and was not sexually interested in little boys. The court denied the state’s motion, but cautioned the defense attorney against “opening the door” to this topic. When defense counsel stated during his opening statement that Stanbridge was a veteran and father of three children, and that during the time he had known the Eddy family (the late 1990s) there were “no similar allegations” against him, the state moved to reconsider the rulings on its motions, and the trial judge ruled that the “door had been opened.”

During the trial, the state presented testimony from two young men, recounting the incidents from a decade earlier when they were each 14. According to the opinion by Justice Cook, this was dramatic testimony, upon which the prosecutor built in the closing argument to characterize Stanbridge as a “predator of teenage boys to put it bluntly.” The closing argument dwelt on similarities between the old incidents and the conduct charged in the case. On appeal, Stanbridge, who maintained his innocence of J.R.E.’s charges, asserted that this testimony and argument should not have been allowed.

Reversing his conviction, the appellate panel voted 2–1 in favor of Stanbridge’s argument. The court found that this kind of testimony would be admissible in a case where the identity of the perpetrator was in question, or where the defendant admitted to particular conduct but tried to put an innocent “spin” on it, but that it was improper in this case to suggest to the jury that because Stanbridge had acted in a certain way in the late 1980s, he was likely to have acted the same way a decade later. Such “propensity” testimony, and the closing argument built upon it, was held by the court to be improper in these circumstances.

The court also rejected the idea that the defense counsel’s opening statement had “opened the door” such that the state should be able to introduce this evidence as a corrective. “Contrary to the State’s assertions,” wrote Cook, “defense counsel did not ‘cross the line’ to create an impression of a blemish-free life. In addition, given that the State’s own opening statement had already alluded several times to defendant’s children, and fact that defense counsel described defendant as a father is unremarkable. Nor should counsel’s comment that defendant was a veteran have been used to allow the State to introduce inadmissible evidence.” The court refrained from passing on defendant’s further argument that the issue of sexual orientation was irrelevant because studies show that “heterosexuals are just as likely as homosexuals to abuse children sexually.” The court also found that defense counsel’s opening statement about “no similar allegations” was merely a way of characterizing the nature of the relationship between Stanhope and the Eddy family, and “was not an attempt to portray defendant as having an unblemished past.”

Illinois courts have established that such an attempt would justify admitting prejudicial evidence of older crimes.

The court concluded that “the crux of this case is who should be believed about what happened in defendant’s bedroom. Where the determination of a defendant’s guilt or innocence depends on the credibility of the defendant and the accuser, error is particularly likely to be prejudicial” and that it was likely so in this case, requiring a retrial. The dissenting judge asserted that the Illinois precedents supported the trial court’s ruling, and would have affirmed the jury’s verdict. A.S.L.

Criminal Litigation Notes

New York — Truth is stranger than fiction. In an opinion reminiscent in some respects of Silence of the Lambs, a unanimous four-judge panel of the N.Y. Appellate Division, 3rd Department, upheld the continued confinement in a non-secure psychiatric facility of “Richard S.,” who was convicted of manslaughter in the second degree upon pleading guilty in 1978 to killing a male sex partner, who had been charged with stabbing a 15–year-old boy during a sexual encounter in 1980 (to which he pled not guilty by reason of mental disease or defect), and who had been convicted in another murder of a male sex partner in 1979, the conviction having been reversed on appeal due to evidentiary problems. In the Matter of Richard S., 2004 WL 907961 (April 29, 2004). According to the psychiatric testimony recounted by Justice Robert S. Rose, Richard is afflicted with sexual sadism, a condition which he does not acknowledge and for which he refuses treatment. The state’s experts testified that Richard was adept at presenting himself as charming and reasonable, thus explaining testimony in support of his release from some who have come in contact.
with him in the state institutions to which he has been confined, but at times he has lashed out in a violent manner. In 1997, a licensed psychologist prepared a report relaying that Richard was “having sadistic fantasies during masturbation six or seven times each day, reaching orgasm only when he visualized stabbing his bound male victim to death.” One expert witness testified that, “if released, respondent would present a risk of harm to those in the homosexual sadomasochistic subculture,” especially if he resumed past patterns of substance abuse which seemed to fuel the actualization of his fantasies. The court found the cumulative expert testimony to strongly support the County Court’s refusal to authorize release, contrary to Richard’s argument that he no longer presented any risk to society. Richard S. has been confined in state institutions for the past twenty-two years under a series of detention orders upon completion of his initial six-month period of confinement after the earliest guilty plea.

**Ohio** — In an opinion issued on May 20, the Court of Appeals of Ohio, 8th Appellate District, affirmed a finding by the Common Pleas Court in Cuyahoga County that Francois Budreaux is a “sexual predator” who should remain confined under the sentence of ten to twenty-five years that was imposed on April 7, 1992. *State of Ohio v. Budreaux*, 2004 Ohio App. LEXIS 2263. According to the summary of the record by Judge Anthony O. Calabrese, Jr., Budreaux pled guilty to one rape count of a multi-count indictment that included charges of rape, attempted rape, kidnapping, and furnishing drugs to a minor. His alleged modus operandus, according to the state’s argument at his sexual predator hearing, was that he “1) lured college-aged males to his apartment by disguising his voice as that of a woman, drugged and raped them; 2) was a fugitive from justice for a period of six years following his indictment; 3) pled guilty to the rape count and that a second ten-count indictment was nolled; and 3) used over 30 aliases.” He was nearing the tenth anniversary of his imprisonment when the state’s Department of Rehabilitation and Corrections recommended a sexual predator hearing, apparently preparatory to determining to keep him incarcerated past the point when somebody with his sentence might normally be released on parole. At the hearing, Budreaux’s attorney charged that “the only reason the State wants Mr. Budreaux declared as a sexual predator is because they know him and in his history to be a male prostitute and for him to be a homosexual,” and the attorney also stated, “I would just ask the Court to please not rely on the fact that the State is insisting because of his homosexuality he should be a sexual predator.” Judge Calabrese asserted that these allegations were “wholly unsubstantiated, counterproductive, and insulting,” and noted that the hearing judge had specifically asserted that Budreaux’s sexual orientation was irrelevant, the case turning on expert psychiatric testimony concerning the likelihood of Budreaux re-offending in the manner charged in the indictment. A.S.L.

### Electoral Notes

**New Mexico** — Anti-gay forces seeking to put an initiative on the ballot to repeal the state’s law banning sexual orientation discrimination suffered a setback when Attorney General Patricia Madrid issued an opinion that this issue is not subject to referendum vote. The state constitution specifically excepts from the referendum process “laws providing for the preservation of the public peace, health or safety.” Madrid took the position that the state’s civil rights law, which includes the sexual orientation provision, falls within those categories. A spokesperson for the anti-gay group that was circulating petitions said they would continue to collect signatures, anticipating a lawsuit challenging the A.G.’s opinion. *Albuquerque Journal*, May 15.

**Ohio** — *The Cincinnati Post* reported on May 1 that Citizens to Restore Fairness has collected enough signatures to place on the November ballot a question to repeal Article XII of the City Charter, a measure passed by referendum a decade ago that bars city officials from enacting or enforcing any measure that gives “minority or protected status, quota preference or other preferential treatment” to homosexuals or bisexuals. The measure had been held unconstitutional by a federal district judge, but was revived by the 6th Circuit Court of Appeals, even in the face of a remand from the Supreme Court for reconsideration in light of *Romer v. Evans* (1996). A.S.L.

### Legislative Notes

**Federal** — The Servicemembers Legal Defense Network reports that the FY2005 Defense Authorization Bill may include language intended to trump campus resistance to military recruiters by strengthening the requirements of the so-called Solomon Amendment, a provision in prior Defense spending bills that threatens loss of various kinds of federal funds for educational institutions that bar military recruiters. According to an SLDN bulletin of May 13, the bill includes language requiring that colleges and universities grant military recruiters access “in a manner that is at least equal in quality and scope to the degree of access to campuses and to students that is provided to any other employer.” SLDN has opposed the measure on the grounds that military access is being achieved under Solomon and these more demanding rules are not required. Sen. Edward Kennedy (D-Mass) proposed an amendment that would exempt student aid money from the federal funds subject to these requirements, similar to a measure that was included in prior Defense spending bills through the efforts of Reps. Barney Frank and Tom Campbell.

**California** — The California state assembly voted 48–32, strictly along party lines, to approve AB 2900 on May 17. This bill would standardize over thirty labor and employment discrimination provisions in California law to create consistency with the procedures and remedies of the Fair Employment and Housing Act. Among the statutes to be rationalized and integrated into California civil rights law is the ban on sexual orientation, which had been enacted separately and presented differences in enforcement from the more “traditional” civil rights laws. The bill now goes to the State Senate. *Equality California* press announcement, May 18.

**Ohio** — On May 25, the California Senate voted 22–10 in favor of S.B. 1234, only-lesbian legislator Sheila Kuehl’s proposed Omnibus Hate Crimes Act of 2004, which would consolidate state laws to create a unified definition of a hate crime. *Equality California* press release, May 25.

**California** — Los Altos — The Los Altos High School Gay Straight Alliance asked the local city council to issue a gay pride day proclamation to coincide with their planned gay pride picnic on June 7. Mayor John Moss encouraged them to submit the proposal. But at the council meeting, a counter-proposal to declare a “tolerance day” was passed instead. The Mayor said he changed his position on this issue when he saw religious conservatives in the audience at the council meeting and thought that they would be “upset” by the students’ proposal. The incoming president of the high school group said they would attempt to get a “gay pride” resolution next year. A member of the student group expressed disappointment at the council’s action. Said Alison Tarbell, 18, “Tolerance implies putting up with — not accepting. It’s just not what we wanted.” The only councilman who stated a preference for the students’ proposal, Curtis Cole, said that tolerance did not capture what the students wanted. “I think it lacked the same amount of courage high schoolers were expressing,” he said. *San Jose Mercury News*, May 23, 2004.

**Hawaii** — A bill to ban sexual orientation discrimination in housing died in the state Senate, even though each house of the legislature had separately approved such a measure, according to a May 5 report in the *Honolulu Star-Bulletin*. The Hawaii Christian Coalition lobbied hard to have a religious exemption included in the bill, which was strongly opposed by the Gay and Lesbian Education and Advocacy Foundation. In the end, each house included a somewhat differently worded religious exemption, and compromise between them proved impossible to obtain.

**Kansas** — On May 4, the Kansas House of Representatives fell one vote short of the two
Law & Society Notes

North Carolina — The state Republican Party rejected a request by Log Cabin Republicans to have a booth at the party’s state convention on the weekend of May 22–23. According to state GOP Chairman Ferrell Blount, upon receiving the application for the booth, he visited Log Cabin’s website, noted that they were critical of President Bush and took positions on gay issues opposed to those favored by the state GOP leadership, and concluded that letting the group have such a presence at the state convention would be inappropriate. “It is diametrically opposed to the values of the North Carolina Republican Party,” said Blount. Charlotte Observer, May 20.

Texas — Lago Vista — After People for the American Way sent a letter on behalf of Sherrell Ingram, a Lago Vista high school junior whose attempt to buy tickets to the prom for herself and a girlfriend were turned down, the school district decided to suspend its prom attendance guidelines for the remainder of the year “until the district has an opportunity to further evaluate its role in the sponsorship of school social activities,” according to a letter by the district’s lawyer that appeared in the Austin American-Statesman on May 8. In its letter to the district, PFAW maintained that a policy of refusing to sell prom tickets to same-sex couples violated the school’s obligations under federal funding laws to avoid sex discrimination, and also raised constitutional equal protection issues. Fort Worth Star-Telegram, May 9.

Presbyterian Church (USA) — The permanent judicial commission of the Presbyterian Church (USA) with jurisdiction over congregations in Ohio and Michigan ruled 6–4 that the denomination’s constitution does not forbid ministers from performing marriage ceremonies for same-sex couples. The ruling released on May 3 reverses Rev. Stephen Van Kuiken’s conviction by a lower church court, who performed such a ceremony as pastor of the Mt. Auburn Presbyterian Church in Cincinnati. He was removed as pastor when charges were filed against him. He was the first Presbyterian pastor to be tried on charges of performing weddings for same-sex couples. Van Kuiken was described in news reports as a married heterosexual. He has decided to resign from the church despite this ruling, in order to become pastor of a non-denominational, gay affirming church called The Gathering, made up largely of former Mt. Auburn congregants who decided to leave the church over his dismissal. Associated Press, May 3.

United Methodist Church — The Judicial Council of the United Methodist Church, meeting in Pittsburgh during the church’s general convention, ruled by a 6–3 vote that homosexuality is incompatible with Christian teaching, and that a violation of church law could be cause for removal from church office. The General Convention voted 551–345 to direct the Judicial Council to review the case of Rev. Karen Dammann, a lesbian, who was acquitted in March by a jury of 13 pastors in Bothell, Washington, on charges of violation of church law. Pending the vote in her case, Rev. Dammann had been suspended from active ministry in the church. Associated Press, May 2.

South Dakota — Tom Murphy, 48, a retired military veteran presently serving as a member of the Rapid City City Council, has informed his constituents through the local press that he is beginning the process of transitioning to the female gender, and will be known as Marla. Murphy says that he knew from the age of 18 that he wanted to change his sex, but kept it secret through a 22 year Air Force career, much of it served at Ellsworth Air Force Base near Rapid City. He was appointed to a vacancy on the Council in 2000, and won election in 2001 and 2003. Murphy decided to “come out” about his sexuality after becoming embroiled in the effort to stave off an anti-gay marriage amendment in the current session of the state legislature. He testified at a hearing on the bill and wrote letters to the editor. When another letter published in the local paper expressed hatred of gay people, Murphy decided to go public. Murphy is just starting the process of gender reassignment, which will involve hormone therapy and a period of at least a year of living as a woman before surgery can be performed. He said that for now he will continue to dress in shirt and pants for City Council meetings, but will start dressing increasingly as a woman in his private life. Since coming out in print, Murphy indicated that he has heard mainly supportive comments from friends and neighbors in Rapid City. Associated Press, May 4. A.S.L.

U.K.’s Highest Court Rules Police Refusal to Hire Transsexual Was Sex Discrimination

On May 6, in A. v. Chief Constable of West Yorkshire Police, a 5–judge panel of the United Kingdom’s highest court (the judicial committee of the House of Lords) held unanimously that the refusal of a police force to hire a transsexual woman was contrary to the Sex Discrimination Act 1975.

The police force refused to hire A. in March 1998 because she could not perform the full searching duties of a police constable. Under the Police and Criminal Evidence Act 1984, certain searches could only be performed by a police constable of the same sex as that of the person being searched. Under U.K. law, A. was then, and still is (until the pending Gender Recognition Bill is passed and she takes the appropriate steps to have her acquired gender recognized), legally male. Legally, she could not search a non-transsexual woman. Practically, she could not search a non-transsexual man, who could reasonably object to the search, in the opinion of the chief constable. Although the police force could have exempted her from searches governed by the 1984 Act, this would eventually have required disclosing her transsexual history to her co-workers, which she appeared not to want. The police force therefore concluded that it was a genuine occupational qualification that she be able to search either men or women, and that they could refuse to employ her without violating the 1975 Act. (Lord Bingham suggested that, but for European Community law, this defense would have succeeded.)

The reasoning of Baroness Hale of Richard-

This meant that, being legally female in relation to employment (but not marriage), A. could legally search non-transsexual women, and therefore the genuine occupational qualification exception could not be used to exclude her. Baroness Hale’s reasoning included one troubling piece of obiter dicta that could be cited in cases involving lesbian and gay employees or job applicants. She observed that “it may well be rational to object on similar grounds to being nursed by a trans person of the same sex.”

The fifth judge, Lord Rodgers of Earlsferry, agreed that there had been sex discrimination, but on the basis that, although A. could not legally or practically perform searches, she could have been exempted from searches and could not have objected to her transsexual history being disclosed to co-workers. He said that: “[S]he cannot insist that she be employed in such a way that her transsexuality will be kept confidential in all circumstances, any more than a homosexual or dyslexic officer is entitled to insist that he be employed in such a way that his homosexuality or dyslexia is kept confidential in all circumstances.” If A. had insisted on non-disclosure after being offered the possibility of exemption from performing searches, the police force would have been justified in refusing to employ her. But during these proceedings A. indicated that disclosure of her identity to colleagues on the force as needed would not be offensive to her. *Robert Wintermute*

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**Other International Notes**

**International Olympic Committee** — The International Olympic Committee (IOC) has announced that beginning with the upcoming summer games in Athens, transsexual athletes who have completed two years of post-operative hormone therapy will be treated by the IOC as members of their acquired gender, and will be allowed to compete in that gender. Thus, athletes born male who have transitioned to female through surgery and hormone treatment will be allowed to compete as women in the women’s events. *Associated Press*, May 17.

**Australia** — The national parliament is faced with contradictory proposals on same-sex marriage. MP Michael Organ, a member of the Green Party, introduced a private member’s Bill on May 24 that would remove barriers to marriage between same-sex partners, allow such couples to adopt children and afford access to IVF treatment, employment and health benefits. By contrast, the government of Prime Minister John Howard, a conservative opponent of marriage for same-sex partners, announced on May 25 that it would propose amendments to the Marriage Law to specify that a lawful marriage in Australia could only be performed between a man and a woman. Howard asserted the necessity of doing this because three cases are now pending of same-sex couples seeking recognition in the Family Court for marriages they contracted in Canada. Up to now, the Marriage Law did not address the question, under the assumption that the common law understanding of marriage as a strictly heterosexual institution would govern its interpretation. Tasmanian Liberal Senator Guy Barnett, leader of a group of 30 MP’s in the governing coalition who had been agitating for the amendment, argued that it was essential to reserve to Australia’s own political process the determination of who should marry, and not cede it to Canada or other places that might authorize such marriages. Gay rights groups criticized the move as engineering, with Democrat Senator Brian Greig, who is openly gay, accusing Howard of “aping the reactionary politics of President Bush.” *Brisbane Courier Mail*, May 26.

**Australia** — A former Australian diplomatic employee, William Stuart Brown, committed suicide in a jail in Bali after being sentenced to 13 years in prison on charges of active pedophilia. Australia’s Foreign Minister, Alexander Downer, told the press that Brown had been dismissed from the diplomatic service because of his “in-your-face” homosexuality”, and that he had been suspected of being a “child molester.” Brown had worked at the Australian embassy in Jakarta from 1982 to 1984, and had moved to Indonesia from Canberra eight years ago. The sentence imposed by the court was far longer than that recommended by the prosecution. Downer stated in a radio interview that while employed in the diplomatic service, Brown’s behavior was “a matter of some substantial embarrassment to the Australian embassy,” and expressed approval of Brown’s conviction. While characterizing the long sentence as “savage,” Downer said that it was “not an unreasonable penalty.” *Australian Associated Press General News*, May 12.

**Australia** — In an interesting contrast with recent UK litigation reported above, the Police Academy in Victoria has boasted to the media about being the first in Australia, and probably the world, to recruit successfully a transsexual to become a police officer. The recruit, a male to female individual who is still in the transition process, prefers not to be identified publicly. Administrative arrangements about use of shower and toilet facilities are still to be worked out. Paul Evans, Assistant Commissioner of the Victoria Police Education Department, told ANSA English News Service (May 9) that the force does not discriminate on the basis of gender or sexuality, and that “A person’s gender or sexuality is a personal matter.”

**Canada** — The fate of a proposed national law opening up marriage to same-sex couples may hang in the balance on June 28, the date that has been set for national parliamentary elections. Prime Minister Paul Martin called the general election, even though one was theoretically not necessary for another year, in order to get his own electoral mandate, having been elevated to the office by vote of his party when the previous prime minister stepped down early. The Liberal Party has controlled the parliament for many years, but now faces a coalition of conservative groups in a newly-invigorated Conservative Party. The Liberals are officially committed to legislating for opening up marriage to same-sex partners on a national basis, although Martin is not so committed to this as was his predecessor, Jean Chretien. At present, marriages are available in three provinces due to rulings by the highest provincial appeals courts. The Chretien government had decided not to appeal any of these rulings to the national Supreme Court, instead certifying to that court some questions concerning a proposed federal marriage bill. After assuming office, Martin amended the questions to add one inquiring about whether civil unions in place of marriage would accord with the equality requirements of Canadian constitutional law, signaling the possibility that the Liberals will draw back from legislating for marriage on a national basis. Predictions for the election are that the Liberals, in coalition with the New Democrats, a leftist party, may be able to exercise control, but that the Conservatives are expected to make some gains, and to make the marriage issue an important part of their campaign. About seventy percent of the population lives in the three provinces where marriages are now available. The most recent polling shows that about 43 percent of Canadians support marriage for same-sex partners, with 47 percent opposed, but that almost 60 percent equate homophobia with racism and anti-Semitism as undesirable traits, according to the respected Leger Marketing poll, so the Conservatives will need to figure out a way to temper their anti-marriage campaigning to avoid the appearance of gay-bashing. *365Gay.com*, May 24.
Canada — Canada’s Immigration and Refugee Board, struggling with a large caseload of petitions for asylum from gay people from 75 different countries, seems to be falling back on stereotypes in order to simplify decision-making, according to a May 4 news report about the denial of asylum to Fernando Enrique Rivera, a gay Mexican man. Rivera, who from the newspaper account appears to fit the description “straight-appearing,” whatever that means, was turned down, according to the board member who wrote the opinion, because he was not effeminate. Evidently, the Board concluded that a non-effeminate gay man who is discrete about his sexuality can survive without oppression in Mexico. Rivera, who had lived in Puerto Vallarta where he worked as a statistician for the police department, fled as a result of repeated extortionate threats from police officers directed at him because he was gay. According to a detailed article about the case published in the Globe and Mail, it seems that making asylum decisions for gay Mexicans is no easy task. The Mexican government has taken a more gay-friendly line in recent years, there is evidence that anti-gay bias is more severe in some parts of the country than others, and non-effeminate gay men can presumably get along just fine if they stick to some major cities. The Board expressed the view that Mr. Rivera could live in Mexico City and not be subjected to the kind of oppression he claims to have experienced in his home town. His appeal of the Board’s ruling was rejected by the federal courts, and he faces deportation back to Mexico, having lived in Canada for four years and finding the place much to his liking. In an interview, Rivera pointed out that some gay Mexican men assume an effeminate pose when they go for their asylum interviews in Canada, but that he did not think it was appropriate to misrepresent himself. (In the U.S., asylum case law recognizes the claims of effeminate gay men from Mexico. See Hernandez-Montiel v. Immigration and Naturalization Service, 225 F. 3d 1084 (9th Cir. 2000).)

Ireland — The Equity Tribunal ruled in a decision published on May 19 that the Bridge Hotel, Waterford, had engaged in unlawful sexual orientation discrimination when Martin O’Regan, a former employee of the hotel, was asked to leave the hotel restaurant prior to closing time because he is gay. The hotel had contested the charges, claiming that Mr. O’Regan’s sexual orientation had nothing to do with him being asked to leave, but the Tribunal was convinced otherwise. Reported the Irish Times on May 20: “TheEquality Officer concluded, on the balance of the probabilities, that a member of staff had singled out Mr. O’Regan and had asked him to leave and this request was because he knew the complainant was gay.” This conduct was found to violate the Equal Status Act 2000, and drew a remedy of 1,000 euros in damages for the humiliation and suffering Mr. O’Regan experienced.

Scotland — On May 1, a lesbian couple appeared at the town hall in Alloa to take up the municipality’s offer to perform non-binding marriage ceremonies for same-sex partners. Although the partners could not sign the marriage register, they were presented with a certificate and advised to inform the registrar if they ended their relationship. The women did not want their names publicized, according to Rod Richardson, Clackmannanshire Council’s principal administrative officer. The Herald, May 6.

Slovakia — The BBC, monitoring European television reports, has reported that the Slovak Parliament has approved a law against discrimination that was submitted on behalf of the government by Deputy Prime Minister Pal Csaky. According to the TV report, the law bans discrimination on the basis of race, gender, sexual orientation, religion, or ethnic origin. However, the law was approved with the addition of an amendment proposed by MP Muskova, which “also bans influencing of sexual orientation that contradicts human dignity,” according to the BBC’s somewhat ambiguous translation of the Slovak broadcast.

United Kingdom — The Oxford Union’s members have voted that after the Civil Partnership Bill is enacted, civil partners of members should be entitled to the same life membership privileges now accorded to legal spouses. The change was passed unanimously by the Union’s standing committee. The bill, endorsed by the government and expected to be approved by both houses of the Parliament and receive royal assent, will probably go into effect later in 2004. GMAK, May 19.

Yemen — Reuters reported on May 20 that a Yemeni court had convicted three journalists on May 18 for publishing a report in an Arabic-language newspaper last year that included interviews with men who had been jailed for homosexual conduct. The journalists were found to have violated Yemeni morals and customs by publishing such a report. A.S.L.

Professional Notes

On May 9, the New York Times Magazine supplement included an article by David Garrow hailing Mary Bonauto, a staff attorney at Gay & Lesbian Advocates & Defenders in Boston, as the Thurgood Marshall of the same-sex marriage movement. Bonauto was a key participant in the legal team in Baker v. State, the 1999 Vermont Supreme Court ruling holding that same-sex partners in that state were entitled under the state constitution to all the rights and benefits of marriage, and she was the lead counsel who argued before the Massachusetts Supreme Judicial Court in the landmark 2003 ruling in Goodridge v. State, the first ruling on the merits by the highest court of a state to hold that same-sex partners are entitled to get married. The article recounted the history of the movement for same-sex marriage and the central role that Bonauto and GLAD have played in the recent affirmative successes, while noting that pending cases brought by Lambda Legal, the ACLU Lesbian and Gay Rights Project, and the National Center for Lesbian Rights seek to spread these positive legal developments to many other jurisdictions.

The National Lesbian and Gay Law Association has announced that D’Arcy Kemnitz, of Washington, D.C., will be the organization’s first Executive Director. Ms. Kemnitz has been active as a volunteer with NLGLA and with GAYLAW, the Washington, D.C., lawyers association. For more information about NLGLA activities and the upcoming Lavender Law Conference, in Minneapolis on Sept. 30 through Oct. 2, 2004, please visit the Association’s website at www.nlgl.org.

The City University of New York School of Law awarded an honorary degree to Shannon Minter, the legal director at the National Center for Lesbian Rights (San Francisco), in recognition of his leadership in litigating and educating on issues of sexual minority rights. In addition to directing the legal staff at NCLR, he serves on the board of the Transgender Law and Policy Institute, was a founding board member of the Transgender Law Center and was a founding board member of the San Francisco-area Lesbian & Gay Immigration Rights Task Force. He is also an advisory board member for the International Gay & Lesbian Human Rights Commission and serves on the Legal Committee for the Harry Benjamin International Gender Dysphoria Association, which is recognized as the professional formulator of standards for dealing with transgender issues. Shannon Minter is the author or co-author of numerous law journal articles on sexual minority issues. The ceremony took place on May 21.

The New York County Lawyers Association presented a public service award on May 27 to attorney Matt Foreman, the executive director of the National Gay and Lesbian Task Force. Foreman had previously been associated with Empire State Pride Agenda and the New York City Gay and Lesbian Anti-Violence Project.

Lambda Legal has announced that Alphonso David has joined its legal staff in the New York office. David is a 2000 graduate of Temple University Law School in Philadelphia, where he was on the school’s National Trial Team that won the 1998 NITA Tournament of Champions. He published a law journal note on the Bragdon v. Abbott case, and went on to clerk for U.S. District Judge Clifford Scott Green of the Eastern District of Pennsylvania and to work as corporate counsel for Canyon at Peace Park in Malibu, California.

On May 10, Oregonians voted to retain Rives Kistler as a Justice of their Supreme Court by a
margin approaching 3–2. Kistler is the only openly-gay state Supreme Court Justice in the U.S. Oregonian, May 19.

Know thine enemy. When Boalt Hall Law School’s career services office surveyed firms that interview at the school about their employment policies regarding sexual orientation, two firms provided responses that will put them on the banned list. According to the May 2004 issue of The American Lawyer, Pasadena’s Hahn & Hahn responded that it attaches “significant weight” to an applicant’s sexual orientation, and Tooze Kerr Marshall & Shenker, a Portland, Oregon, firm, responded, “We will not employ perverts or deviants.” One suspects that the firm’s managing partner probably graduated from law school during the McCarthy Era, and we don’t mean Clean Gene.

On the importance of being “out” at work: On May 19, The Recorder published an article by Mike McKee titled “Cultural Revolution: With Many Gay Lawyers on High Court’s Staff, Same-Sex Marriage Hits Close to Home.” McKee speculated that with so many openly-gay lawyers serving on the legal staff of the California Supreme Court, the members of the court were likely to see the issue of same-sex marriage in very personal terms. McKee stated that it is “common knowledge that the Supreme Court, the First District Court of Appeal and the Administrative Office of the Courts — all located within the same complex — employ a large number of gays and lesbians. The chief justice even regularly shows up to shake hands at the yearly dinner of the gay legal group Bay Area Lawyers for Individual Freedom.” Although McKee reported comments by many, including a former member of the Supreme Court, that the justices would try to put aside personal relationships in rendering their decisions, it would be impossible for any member of the court today to say what U.S. Supreme Court Justice Lewis Powell, who cast the deciding vote in Bowers v. Hardwick, said in 1986: that he did not know any gay people (at a time when there were gay employees, including a closeted clerk, working in his chambers at the Supreme Court). McKee also noted that the long lines of applicants for marriage licenses when they were being issued in San Francisco earlier this year were clearly visible from the court building, and that an employee of the court of appeals was honored with a reception after her marriage to her partner. It will be interesting to see whether this court, six of whose seven members are Republicans, will buck the official position of their party when the same-sex marriage case finally comes before them. A.S.L.

AIDS & RELATED LEGAL NOTES

7th Circuit Finds Suspicious Timing of Suspension Not Enough to Ground ADA Discrimination Claim

The coincidence of a suspension imposed immediately after an employee revealed he had AIDS was not in itself enough to sustain a prima facie case of discrimination under the ADA, ruled a 7th Circuit panel in Buie v. Quad/Graphics, Inc., 2004 WL 885726 (April 27, 2004), upholding a summary judgment for the employer granted by Chief Judge Rudolph T. Randa of the U.S. District Court for the Eastern District of Wisconsin. Circuit Judge Daniel Manion wrote for the appellate panel.

Struggling with ill-health due to complications of his HIV infection, Anthony Buie compiled a poor attendance record at Quad/Graphics, Inc. For whatever reason, Buie had not chosen to reveal his HIV-status or AIDS condition to his employer. After having been warned that further absences could cause his termination, he managed to go several weeks without missing work, but then was absent against on September 24 and October 10, 1999. On October 15, Buie called in to his supervisor to say that he was ill and could not come to work. When the supervisor told him that his job was in jeopardy, Buie revealed for the first time that he had AIDS and that his absences were due to that. The supervisor then told him not to return to work. A few days later, Buie met with the company’s employee services manager, who was able to arrange for him to get FMLA leave time for some of the absences, but ultimately a corporate vice president determined that his leave would be considered a disciplinary suspension for excessive absenteeism, and when Buie resumed regular work, he was warned and agreed that any disciplinary infraction could cause his discharge. Subsequently, Buie got into a confrontational situation with a supervisor, and subsequently was found to have threatened a co-worker who had corroborated the supervisor’s account of the confrontation. He was then discharged.

The court of appeals found that as a person with AIDS, Buie was clearly covered by the ADA as a person with a disability, who appeared to be qualified for his job. However, the court found that the employer had credibly alleged that the suspension imposed on Buie was consistent with the poor attendance record he had compiled before the employer was informed that he had AIDS, and the mere coincidence that the suspension was imposed after the employer learned about his illness was not sufficient to support a claim of discriminatory motive in this case.

“Here, temporal proximity is all that Buie relies on under the direct method [of proving discriminatory motive], and it does not create an issue of fact,” wrote Manion. “Even when the record is viewed in Buie’s favor, the undisputed evidence shows that he was on the brink of discharge before anybody at Quad/Graphics knew that he had AIDS. Connell [his supervisor] warned Buie on September 9, 1999, that, if he continued ‘to have attendance problems’ he could be fired. On September 24, October 10, and October 15, Buie nonetheless chose to miss work without excuse and without warning. It was only then, when Buie had every reason to believe that he was on the edge of termination, that he told Connell that he had AIDS… An eleven hour declaration of disability does not insulate an unruly employee from the consequences of his misdeeds. We conclude that, under the direct method, Buie has not created an issue of material fact as to his ADA claim.” The court similarly concluded that indirect methods of proof did not avail Buie, and that his claim of retaliation for seeking FMLA leave was also not credible. Ultimately, it appeared that Buie’s conduct after returning to work from his suspension seems to have weighed heavily in the court’s conclusion that Buie’s discrimination claims did not deserve a trial. A.S.L.

Connecticut Supreme Court Rules HIV Infection Is an Occupational Disease for Corrections Officers Assigned to Emergency Response Unit

The Connecticut Supreme Court ruled on May 11 that exposure to possible HIV infection is a particular hazard of being assigned to the emergency response unit in a state prison, and thus HIV infection should be considered an occupational disease under the state’s Worker’s Compensation Law. Estate of John Doe v. Department of Correction, 2004 WL . The opinion, which drew a concurrence and two dissents to the majority opinion by Justice Flemming L. Norcott, Jr. The chief justice’s concurrence argued that HIV should be considered an occupational disease for all correctional officers, not just those assigned to the emergency response unit, while the dissenters argued that the actual data on HIV transmission in prisons did not support a finding of enhanced risk necessary to consider this an occupational disease.

The decedent was employed as a state corrections officer at the Bridgeport prison from 1986 until 1991. In 1992, he was diagnosed HIV+, and he died as a result of AIDS in 1993. At the time of his death, his estate filed a claim under the Workers Compensation Law, claiming he had contracted HIV in the course of his duties as a prison guard. Normally, a compensation claim must be filed within one year of the
last date of employment, which would make this one way untimely, but the time for filing is extended to three years in the case of occupational diseases. The Worker’s Compensation Commission decided to bifurcate this case and focus first only on whether the claim was timely, before looking into the issue of causation. Based on the statistics showing that exposure to blood splashes had never been documented as the cause of a corrections officer contracting HIV, and that almost all the documented cases of occupationally-related HIV transmission had arisen in health care settings, the Commission concluded that HIV was not an occupational illness.

Disagreeing with this conclusion, Justice Norcott emphasizes statistics showing that about 20% of Connecticut prisoners were estimated to be HIV+, as compared to a fraction of a percent of the non-prison population, as well as data showing that there is more than a de minimus risk that HIV will be transmitted through external exposure, and of course testimony about the duties of the emergency response unit, whose main function is to break up fights and riot situations during which there is a significant possibility that the correctional officers will be exposed to inmate’s blood. Taking these data together, Norcott argued, “the decedent’s HIV infection constitutes an occupational disease because his employment as a correction officer in the emergency response unit was more likely to cause this disease than would other kinds of employment carried on under the same conditions.” To illustrate the point, Norcott observed that a janitor with minimal prisoner contact would be working in the same physical prison environment as the correction officer, but would have a much lower risk of HIV exposure due to the particular requirements and hazards of the job.

As further evidence of this point, Norcott pointed to the special efforts the state has made to provide training for corrections officers on dealing with HIV, issuing protective gear, and adopting precautionary measures, such as informing the officers that they should assume that all inmates are infected and take precautions to protect themselves accordingly. Norcott also noted testimony that any time a corrections officer suffers direct exposure to inmate blood, the officer is offered anti-retroviral therapy to attempt to prevent HIV infection from getting established in his or her body.

Norcott also noted that the court was not ruling on the merits of the claim in this case, just on the appropriate statute of limitations in light of the nature of the claim. Finding that HIV infection is an occupational disease for corrections officers does not mean automatic awarding of compensation benefits; actual exposure and causation must still be shown.

In a concurring opinion, Chief Justice William J. Sullivan argued that all corrections officers, not just those assigned to the emergency unit, face the hazard of unpredictable exposure to inmate blood. He noted that evidence offered in this case (but not yet subject to trial evaluation due to the bifurcation of the case) showed that the decedent had experienced substantial blood exposure while he was assigned as an ordinary corrections officer, not in the emergency response unit, including an incident where he incurred a razor cut while conducting a sweep for contraband in an inmate cell.

Dissenting, Justice Christine Vertefeille argued that the majority had failed to evaluate the scientific evidence properly. In her view, the issue was not whether inmates are HIV+ in greater proportion than those outside the institution, or even whether corrections officers have a heightened risk of exposure to inmate blood. The issue, as it had been seen by the Commission, was whether being a corrections officer exposes the individual to risk of HIV exposure out of the ordinary, and based on the record she found this had not been shown. No corrections officers in the nation up to the date when the expert testimony was presented before the Commission had ever been found to have contracted HIV due to blood splash exposure from an inmate. The only documented cases involved needle-stick injuries suffered by health care personnel in a penal institution. Based on the data, Justice Vertefeille was not convinced that HIV infection was a particular hazard of correction officer work, either normally or in the emergency unit. A.S.L.

AIDS Litigation Notes

**Federal — Louisiana — Duncan v. Secretary of Defense,** 2004 WL 11183000 (E.D. La., May 18, 2004), illustrates the futility of HIV+ service members attempting to vindicate their rights in litigation against the military establishment. According to the allegations in his complaint, Johnny L. Duncan, an African-American Army member, submitted to HIV testing in December 1999 and January 2000 upon activation of his reserve unit but was not informed that he had tested positive, a fact he learned only a few years later when he was diagnosed in April 2002 with “pneumocystis pneumonia,” which District Judge Vance characterized in the opinion as “allegedly an opportunistic infection associated with the final stages of an HIV infection.” (Allegedly? Did this judge sleep through the 1980s?) Of course, had Duncan been properly informed at the time of testing positive, he could have sought treatment and, given the current state of medication in the U.S., most likely staved off progressing to pneumocystis, which is a sign of the immune system collapse that most HIV+ folks with access to medication have been able to avoid since the mid-1990s. In other words, whether the failure to inform him and provide appropriate treatment was negligent or intentional (and he alleged both), it has had serious consequences of a potentially calamitous nature. After his discharge in 2003, Duncan filed this lawsuit, alleging a wide array of claims sounding in tort, invoking constitutional rights, and claiming the military did not even follow its own regulations in this case (in part, he alleged, because of his race). Judge Vance determined, probably correctly in light of the extraordinary barriers that Congress and the Supreme Court have erected in such cases, that all defendants enjoyed immunity from suit and dismissed the case.

**Federal — New York — U.S. District Judge Michael Mukasey (S.D.N.Y.)** granted summary judgment to the defendants, New York State prison health officials, on constitutional claims by an inmate who was falsely labeled HIV+ through a clerical error. **Miner v. New York State Dept. Of Health,** 2004 WL 1152491 (May 24, 2004). Jeffrey Miner, a state prisoner representing himself pro se, alleged that his relationship with his wife and child were severely damaged when his wife was given a letter stating that Miner was HIV+, which he is not. It turned out that a clerical error resulted in the “wrong letter” being given to Miner’s wife when she arrived for a visit with him under the Family Reunion Program. She was supposed to receive a letter recontouring Miner’s positive status for hepatitis C, something she already knew about. Miner claimed that his wife decided to divorce him after being told he was HIV+. When the error was discovered, the doctor in charge signed a letter of apology that was sent to Miner and his wife. Judge Mukasey concluded that Miner failed to state constitutional claims; his suit against the state was barred by immunity, and government officials are not held to individual liability for constitutional torts based on negligent conduct. Since nobody intended to cause harm to Miner, his claims were rejected.

**Georgia — Incredibly, in light of legal developments over the past two decades, some employers continue to discriminate openly against HIV+ workers.** Lambda Legal has filed an ADA suit in Atlanta on behalf of Joey Saavedra, an HIV+ skilled auto glass installer who was dismissed from a new job with Nodak Enterprises, solely based on the company’s articulated fear that his HIV status would be a “direct threat to the safety of others.” **Lambea Legal Press Release,** May 20. Given the rather odd views about HIV transmission exhibited by judges in the 11th Circuit in prior litigation arising under the ADA, it is possible that the employer’s attorneys have given them an accurate reading of how the ADA would be interpreted by that court in this case, involving an employee who handles glass and may suffer nicks and cuts causing bleeding, so depending whether the company is willing to litigate rather than settle, this case might provide a vehicle for...
AIDS Legislative & Policy Notes

**White House Office of National AIDS Policy —** Confounding the predictions of some political pundits, who had opined that the President would not appoint a new director of his Office of National AIDS Policy before the November election, the White House announced on May 12 that Bush has designated Carol J. Thompson, who has been serving as acting director since August 2003, when Bush named Dr. Joseph O’Neill, an openly-gay man who had been director of the office, to be the new deputy coordinator of the Global AIDS Office in the State Department. The speculation was that Bush would not want to appoint an openly-gay person to a visible post during the presidential election campaign. Thompson is not gay, but has been described favorably by AIDS activists. There was also speculation that Christopher Bates, an openly gay official at the Department of Health & Human Services, would be designated as Thompson’s deputy, but an earlier move to that effect did not take place. Washington Blade, May 21.

**CDC Deliberate Undercount of HIV Cases —** Fifteen Democratic members of Congress have written to the CDC to protest its practice of not recording the number of new HIV infections reported from states that use identification numbers rather than names to identify the data. According to the members of Congress, the result is to undercount HIV cases from fourteen states and the District of Columbia, a serious issue because federal policies and the targeting of federal spending may be dictated by the geographical distribution of HIV cases. Among the states whose HIV test results are not being counted in current national statistics are California and Massachusetts, the former having one of the highest counts of HIV cases in the country. According to a May 10 report by 365Gay.com, “AIDS care providers have been pressing the federal government to make the switch” to counting all HIV infections, not just those that are name-identified. The letter, directed to CDC Director Dr. Julie Gerberding, states: “CDC’s refusal to accept and utilize code-based data presents an inaccurate picture of the nation’s epidemic and, in doing so, undermines the national effort to win the battle against HIV/AIDS.” CDC maintains that it is following this policy in the name of accuracy; an individual could go to several different testing centers and be assigned different identification numbers at each one, and thus be counted multiple times, a result said to be less likely if their results are identified by name.

**FDA — Anonymous Sperm Donation Rules —** The U.S. Food and Drug Administration announced on May 20 new federal rules to codify the practice of many fertility clinics and sperm banks of rejecting any donations of semen from gay men who had been sexually active in the previous five years. Lambda Legal criticized the new rules, saying that they “look like they were written in 1982, not 2004,” and that the rules were not based on current scientific knowledge about HIV epidemiology and transmission. Stated Lambda Legal E.D. Kevin Cathcart: “It’s completely illogical to say that a gay monogamous man who practiced safe sex four years ago cannot be a sperm donor, but a heterosexual man who had high-risk unprotected sex 14 months ago can donate his sperm.” Testing procedures routinely used in such settings are adequate to prevent transmission of HIV through infected sperm, Cathcart asserted. Lambda Legal Press Release, May 20.

**Illinois —** The Illinois legislature has approved H.B. 3857, a bill introduced by openly-gay and HIV+ Rep. Larry McKeon, authorizing organ transplants from HIV+ donors to HIV+ recipients under circumstances where the recipient is in imminent danger of death if they do not receive a transplanted organ. The measure was developed to create an exception to existing Illinois law that imposes penalties for transplanting an organ harvested from an HIV+ donor. As of the May 11 365Gay.com report on which this item is based, Governor Blagojevich had not yet decided whether to sign the measure, which passed the House on March 3 and the Senate on May 5. A.S.L.

**World Health Organization Data —** The World Health Organization’s annual report, released in Geneva in mid-May, revealed that AIDS is now the leading single cause of death worldwide for people ages 15–59. According to the WHO, three million people died from AIDS during 2003, and five million people were newly infected with HIV. Director-General Lee Jong Wook called for a sharp increase in distribution of AIDS medications, noting that at present fewer than 7 percent of the six million people living with HIV are receiving any sort of medical treatment. N.Y. Times, May 12.

**Azerbaijan —** According to a story in Azerbaijan Press on May 21, the number of HIV-infected people now counted in the country reached 635 by May 17, of whom all but a handful are citizens of the country. The largest group of those infected, 47.2%, attributed the infection to use of intravenous drugs, and the next highest, 24.2%, to heterosexual transmission. Only 0.5% were attributed to homosexual sex.

**Libya —** Nothing like a little conspiracy theory to bring out the worst in people… A Libyan court sentenced six health care workers to death on May 6 on charges that they had intentionally infected more than 400 Libyan children with HIV. The workers, five Bulgarian nurses and a Palestinian doctor, were arrested in February 1999. They had worked at a hospital in Benghazi. The claim was that the defendants were conducting medical experiments seeking a cure for AIDS and deliberately infected the youths as part of their research. All six pled innocent, and defense experts testified that hygiene problems were the most likely cause for the infections, from which about 22 children have died. Press reports indicated that the defendants have been subjected to torture, including electric shocks, beatings and rape, in order to elicit confessions. Associated Press, May 6. The New York Times reported on May 12 that the International Council of Nurses had appealed to British Prime Minister Tony Blair to intervene on behalf of the defendants with Libya’s leader, Col. Muammar el-Qaddafi, with whom Blair is on good terms after meeting with Qaddafi, with whom Blair is on good terms after meeting with him. March.

**United Kingdom —** The Teesside Crown Court has convicted an HIV+ man from Malawi on three counts of infecting women with HIV by having unprotected sex without disclosing his HIV status to his partners. The defendant, Feston Konzani, will serve a ten year prison sentence and then be deported. He was brought into the country by Christopher Henderson, a political attaché with the British High Commission, who had employed Konzani as a servant in Malawi. Konzani had petitioned for asylum in the U.K., arguing that as a homosexual he was targeted for persecution in Malawi.
Out & Equal Metro New York will present an event to mark the anniversary of Lawrence v. Texas on Wednesday, June 9, 6 to 8 pm, with MetLife hosting at One Madison Avenue, 11th Floor, Conference Room C. The speakers will be Paul Smith, who argued Lawrence v. Texas as a cooperating attorney for Lambda Legal, and Professor Tony Varona of Pace University Law School, formerly general counsel of Human Rights Campaign. RSVP’s to GLBT@Met-Life.com. Note that photo identification is required for admission to the MetLife building. Out & Equal Metro NY’s mission statement is: “To become the NY Metro area education and information resource on LGBT matters in the workplace for local companies and organizations, through their employee resource groups (ERGs), employees and HR professionals.

The Alliance: Gay/Straight Alliance of the N.Y. State Courts and LeGal, will co-sponsor a program at Brooklyn Borough Hall (209 Jor- ralemon Street) on June 10 at 6 pm titled “Same-Sex Marriage: the Role of the Courts in Civil Rights and Social Change.” Speakers include Mayor Jason West of New Paltz, Mayor John Shields of Nyack, former LeGal President Aubrey Lees, Prof. Ruthann Robson of CUNY Law School, Norman Siegel, former director of the NY Civil Liberties Union and counsel to Mayor Shields in his marriage lawsuit, and Su- san Sommers, staff attorney at Lambda Legal. A reception hosted by Borough President Marty Markowitz will follow the presentation. RSVP’s requested to 718–802–3531.

On June 26, Lambda Legal will inaugurate a new Gay Pride Month event in Dallas, Lambda at the Nasher (Nasher Sculpture Center). The event will commemorate the anniversary of the monumental victory in Lawrence v. Texas, and to launch the event, Lambda will present its co-operating attorney in that case, Paul Smith, as keynote speaker. Lambda will also announce its 2004 Courage Award recipient to somebody who has shown particular courage in standing up to advance the rights of the LGBT and HIV/AIDS communities. The event will be held from 7 to 10 pm. For ticket and location information, go to www.LambdaAtTheNasher.org or call 214–219–8585.

A Celebration of 20 Years of Openly Lesbian and Gay Judges in the New York Courts will take place on Monday, June 28, at the New York County Lawyers’ Association, 14 Vesey Street, Manhattan, from 6 to 8 pm. Co-sponsoring or- ganizations, in addition to the County Lawyers’ Association and their LGBT Issues Committee, include the Association of Lesbian and Gay Judges, the Lesbian & Gay Law Association of Greater New York, the LGBT Rights Committee of the Association of the Bar of the City of New York, and The Alliance: The Gay-Straight Alli- ance of the New York State Courts. RSVP requested to 212–353–9118 or le_gal@earth- link.net.

LeGal and the New York County Lawyers As- sociation will present a CLE program on same- sex marriage at the County Lawyers building on Vesey Street on June 30 from 6 to 9 pm. 3 MCLE credits in professional practice are available. Your Law Notes editor, Arthur Leon- ard, will chair and moderate the program with the following speakers: Erica Bell of Weiss, Buell & Bell; N.Y. State Assembly Member Richard Gottfried, Michele Kahn, N.Y. State Demo- cratic Commiteeman Larry Moss, and a representative from the office of Attorney General Eliot Spitzer. The speakers will provide an overview of the legal status of same-sex mar- riage and will specifically focus on questions raised by New York couples who obtain mar- riages elsewhere and then return to New York, seeking to have their marriages recognized for various purposes.

LESGIAN & GAY & RELATED LEGAL ISSUES:


Bix, Brian H., State Interest and Marriage — The Theoretical Perspective, 32 Hofstra L. Rev. 93 (Fall 2003).

Brooks, Kim, and Debra Parkes, Queering Legal Education: A Project of Theoretical Dis- covery, 27 Harv. Women’s L.J. 89 (Spring 2004).

Browning, Don, Critical Familism, Civil So- ciety, and the Law, 32 Hofstra L. Rev. 313 (Fall 2003) (Conference on Marriage, Families, and Democracy).

Buseck, Gary, Civil Marriage For Same-Sex Couples, 38 New Eng. L. Rev. 495 (Spring 2004) (Keynote Address for Symposium by Le- gal Director of Lambda Legal).

Carbado, Devon W., and Donald Weise, The Civil Rights Identity of Bayard Rustin, 82 Texas L. Rev. 1133 (April 2004) (attempts to provide a rounded picture of the life of a major figure in the civil rights movement who happened to be gay).

Demleitner, Nora V., How Much Do Western Democracies Value Family and Marriage?: Im- migration Law’s Conflicted Answers, 32 Hofstra L. Rev. 273 (Fall 2003) (Conference on Marriage, Families, and Democracy).

DiFonzo, James Herbie, Unbundling Mar- riage, 32 Hofstra L. Rev. 31 (Fall 2003) (Con- ference on Marriage, Families, and Democracy).


Failing, Marie A., A Peace Proposal for the Same-Sex Marriage Wars: Restoring the House- hold to Its Proper Place, 10 Wm. & Mary J. Women & L. 195 (Winter 2004).


AIDS & RELATED LEGAL ISSUES:


EDITOR’S NOTE:

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