Court Strikes Ban on Gay Ex-Con Partners Contacting Each Other While on Probation

In what the ACLU hailed as a major gay rights victory recognizing the long-term relations between two gay convicts, U.S. District Judge Marvin Katz (E.D. Pa.) ruled after a remand from the Third Circuit that same-sex life partners have a constitutionally protected right to their intimate relationship, which outweighs the need for the federal probation office to keep the two felony convicts from communicating or associating with each other. Judge Katz provided two alternate holdings, one declaring the probationary condition unconstitutional as applied to this case, based on due process and equal protection, and the other holding that the condition violated the relevant statutory provisions. *U.S. v. Roberts and Mangini*, 2007 WL 2221416 (July 31, 2007).

Steven Roberts and Daniel Mangini had been in a committed relationship and lived together for 18 years when they were arrested in December 2003 for possession and sale of methamphetamine. They both pleaded guilty. Mangini received an 18–month sentence plus five years of supervised release, while Roberts received a 30–month sentence plus five years of supervised release. After their respective releases in 2005 and 2006, each was placed under the supervision of Probation Officer John Sanderson. One of the standard conditions of release was that they may not "associate with any person convicted of a felony, unless granted permission to do so by the probation officer." Sanderson would not grant permission for them to associate with each other.

Judge Katz noted the many signifiers of a longstanding and committed relationship between the defendants, for example, the length of time they had been together, their cohabitation, their financial support of each other, their having raised a foster child together, the fact that they were treated by their extended families as a couple and as part of a larger family network. However, because Probation Officer Sanderson believed that Mangini was in a relationship with another man, Sanderson contended that he treated the couple as he would treat former spouses or estranged spouses in similar circumstances, and forbade them from communicating with one another.

The couple made numerous requests to reunite under the conditions of their probation. They did not challenge the probationary condition itself, as described in the standard rule, but only the way that it was applied by the probation officer, who refused to exercise his discretion to allow them to be in contact with each other.

Sanderson, the U.S. Probation Office, and the District Court all turned them down. In early 2007, the couple appealed to the Third Circuit, represented by attorneys under the aegis of the American Civil Liberties Union (ACLU). Under the direction of the Court of Appeals, the parties clarified and stipulated to certain facts, among them, that Mangini and Roberts are committed life partners, that Sanderson was mistaken in concluding that Mangini did not wish to continue the relationship, and that Mangini had developed AIDS. The Court of Appeals held that the District Court had the authority to clarify how the anti-association condition should be applied to Mangini and Roberts, and remanded the case to the District Court to modify or clarify the anti-association condition "in light of the probation office's allegedly unlawful exercise of its discretion in a manner that violates [the relevant statute] and defendants' constitutional rights."

On remand, Judge Katz made numerous findings of fact based on a sympathetic understanding of same-sex committed relationships and the need of a person with AIDS for familial support. He recognized the great hardship that the separation caused for the couple and their daughter (whom the fathers could not both see at the same time). He also recognized that emotional stress may worsen the symptoms of AIDS, and that the separation caused severe emotional stress for Mangini.

The judge noted that the defendants had complied with the terms of their supervision, and appeared to be committed to recover from their drug addiction. In addition, the court observed that the probation officer had not expressed any concern that allowing Roberts and Mangini to associate with each other would make them more likely to engage in further criminal conduct or otherwise violate the terms of the probation.

With these facts in mind, Katz presented two alternate holdings. The first was that the conditions of probation as applied by Probation Officers Sanders violated the statutory limitations on the conditions of supervised release found in 18 U.S.C. secs. 3583(d) and (e)(2).

The second holding was that prohibiting the couple from seeing one another violated due process and equal protection under the U.S. Constitution.

Under 18 U.S.C. sec. 3583(d), a court may order any condition of supervised release that is reasonably related to certain factors set forth by statute, that involves no greater deprivation of liberty than is reasonably necessary, and that is consistent with the policies of the Sentencing Commission. Katz found that the separation was not reasonably related to the statutory factors, and the separation constituted a greater deprivation of liberty than was reasonably necessary. The restriction was unreasonable because Mangini had AIDS, and "his physical and emotional well-being would improve if he were allowed to rebuild his relationship with his life partner." The evidence showed that allowing the couple to associate with each other would also further Roberts' rehabilitation by discouraging him from returning to the criminal conduct that caused the couple's separation.

There appeared to be no further need to deter the defendants from committing further crimes, because they had both resumed relatively normal lives, and had abandoned the drug addiction that had led to their offenses. Thus, there was no supervisory need for the continued separation of Roberts and Mangini, and Judge Katz ordered the U.S. Probation Office to allow them "to associate with each other in person and by telephone and mail (including electronic mail) during their periods of supervised release."

Judge Katz's second, alternative holding was more sweeping. The court held that the defendants had a constitutional right to their "intimate association" under the due process clause of the Fifth Amendment, citing *Lawrence v. Texas*, 539 U.S. 558 (2003). "A condition of supervised release that interferes, facially or as applied, with a constitutionally protected relationship may only be upheld if it is narrowly tailored and directly related to deterring crime and protecting the public," stated the court, citing *United States v. Loy*, 237 F.3d 251, 256 (3d Cir. 2001). Further, the *Loy* test is harder to satisfy than the statutory tests in 18 U.S.C. secs. 3583(d) and (e)(2), stated Judge Katz. The court also found that the probation officer had violated equal protection by refusing to grant the defendants permission to associate with

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each other, while maintaining a policy of granting such permission to similarly situated individuals in other kinds of family relationships (i.e., siblings, parent and child, and spouses). This burden on the defendants' fundamental right to intimate association is subject to heightened scrutiny, said the court, although the unequal treatment accorded to Mangini and Roberts "fails any level of constitutional scrutiny." On this basis, as well as the statutory basis discussed above, the court ordered the U.S. Probation Office to allow the couple to reunite. For further discussion of this case, see the website of the American Civil Liberties Union, www.aclu.org/lgbt/discrim/31171prs20070801.html, a posting dated Aug. 1, 2007. *Alan Jacobs*

LESBIAN/GAY LEGAL NEWS

10th Circuit Finds Oklahoma Statute Barring Recognition of Out-of-State Same-Sex Adoptions Unconstitutional

The U.S. Court of Appeals for the 10th Circuit has declared Section 7502–1.4 of Oklahoma Statutes Title 10, which bars Oklahoma from recognizing an adoption from any other state or foreign jurisdiction by more than one individual of the same sex, to violate the Full Faith and Credit Clause of the Constitution in *Finstuen v. Crutcher*, 2007 WL 2218887 (Aug. 3, 2007).

Three families, represented by Lambda Legal, brought suit against Dr. Mike Crutcher, Commissioner of Health for the Oklahoma State Department of Health ("OSDH"), and the Governor and Attorney General of Oklahoma, seeking to enjoin enforcement of the adoption amendment.

Greg Hampel and Ed Swaya, residents of Washington, jointly adopted a child born in Oklahoma in 2002. As part of the adoption agreement, they agreed to bring their child to Oklahoma to visit her biological mother. The men requested OSDH to issue a birth certificate naming them both as fathers. The Oklahoma Attorney General found that the Full Faith and Credit Clause of the Constitution required Oklahoma to recognize validly issued out-of-state adoption decrees, and issued a new birth certificate, which prompted the state legislature to hastily enact the adoption amendment at issue.

Lucy Doel adopted a child in California in January, 2002. Jennifer Doel adopted the child six months later in California by second parent adoption, and the Doels subsequently moved to Oklahoma. OSDH denied their request for a revised birth certificate that would acknowledge Jennifer Doel as a parent.

Anne Magro gave birth to two children in New Jersey in 1998. In 2000, Heather Finstuen adopted the children in New Jersey as a second parent, and New Jersey subsequently issued new birth certificates naming both women as parents. They moved to Oklahoma.

On cross motions for summary judgment, the district court found that Mr. Hampel and Mr. Swaya lacked standing, but granted summary judgment for the remaining plaintiffs and held that the statute violated the Constitution's Full Faith and Credit, Due Process, and Equal Protection Clauses. OSDH appealed the district court's decision and Mr. Hampel and Mr. Swaya appealed their denial of standing.

Senior Circuit Judge David M. Ebel, speaking for the court, began with a lengthy discussion of standing. He held that because the Hampel-Swaya family lacked an actual injury, but merely speculated situations that could have arisen where failure to recognize them both as parents could cause injury, they failed to satisfy the injury-in-fact requirement for standing.

Similarly, the court held that the Finstuen-Magro family failed to show actual injury. Although Ms. Finstuen stated that her fear of having her parent-child relationship invalidated had caused her to avoid signing forms and that her children had become more clingy, Judge Ebel stated that to meet the injury-in-fact requirement, she must have shown an actual encounter with a public or private official in which her authority as a parent was questioned.

Judge Ebel did, however, find that the Doels had proper standing, because OSDH refused to add Jennifer Doel's name as a parent on their child's birth certificate, and because the Doels described an encounter where they were told by both an ambulance crew and emergency room personnel that only "the mother" could accompany their child. In addition to injury-in-fact, Judge Ebel also found there was a causal connection between the injury and the challenged action. OSDH argued several theories claiming that the denial of the new birth certificate was unrelated to the adoption amendment, but Judge Ebel found them to be without merit.

OSDH also claimed that because they had "conceded" that the adoption provision should not apply to the Doels, the appeal was moot, but the court found that OSDH could not make a promise to issue them a new birth certificat because it did not have the authority to act on behalf of the state in defiance of the statutory ban, explaining that adoption statutes determine rights and responsibilities involving people and issues far beyond OSDH. Judge Ebel also found such a promise to create an issue of separation of powers, stating that it would interfere with the interpretation of law by courts, rather than executive agencies.

After determining that the court had jurisdiction and that the Doels had standing, Judge Ebel proceeded to discuss the merits of the case. He stated that "despite the fact that courts may use different words to refer to final adoption decisions, it is clear that all such decisions are judgments," and that the Full Faith and Credit Clause requires the recognition of a final judgment from any other state. Although it was not directly put forth by OSDH, Judge Ebel held that there was no "public policy exception" to the Full Faith and Credit Clause that would allow Oklahoma to disregard adoptions from other states.

He found that OSDH was incorrect in arguing that by forcing Oklahoma to recognize out-of-state same-sex adoptions, the court would create extra-territorial application of other states' laws in Oklahoma. Judge Ebel explained that OSDH had confused its obligation to give full faith and credit with its authority to apply its own state laws, stating that Oklahoma must merely treat the parent-child relationship created by a valid out-of-state same-sex adoption the same as any other parent-child relationship, and that the laws of other states had no impact on the mechanisms by which Oklahoma enforces adoption orders. Accordingly, Judge Ebel found that the amendment violated the Full Faith and Credit Clause, and that final adoption orders and decrees are entitled to recognition by all other states.

In a brief dissent, Judge Harris L. Hartz stated that, while he mostly agreed with the district court and the majority opinion on the constitutional issues, since ODHS had conceded that they would issue a birth certificate to the Doels, there was no need to discuss the constitutional issues, nor any issue to litigate, and that the appeal should have been denied.

ODHS has subsequently announced it will not be appealing this decision, a decision that Lambda Legal applauded in a statement. Same-sex couples with adopted children can now travel to or live in Oklahoma without fear that their parent-child relationship will cease to exist when they cross state lines. *Bryan Johnson*

2nd Circuit Denies Relief in Gay Chinese Asylum Claim

Federal courts continue to find no fault with the decisions of Immigration Judges and the Board of Immigration Appeals to reject asylum claims from gay men from China. In the latest such ruling, *Lin v. U.S. Attorney General*, 2007 WL 2014047 (2nd Cir., July 12, 2007), by a unanimous panel affirming the BIA, the applicant was unable to present any persuasive evidence that he had been persecuted on account of his sexual orientation in the past, putting the whole burden of his case on the allegation that gay people as a class are subject to persecution in the People's Republic of China. As to this, the court found that he fell quite short.

The panel wrote in its summary order "The IJ determined that, based on background infor-

mation in the record, 'official harassment has declined and the national policy does not sanction punishment of individuals in China because of their sexual orientation.' As such, the IJ concluded that, at most, Lin experienced 'local hostility' and therefore could have avoided any harassment by relocating within China. Substantial evidence supports this finding. According to the 2004 Profile, although there is widespread homophobia in China, 'Chinese law no longer criminalizes homosexual acts or characterizes homosexuality as a psychological ailment.' It further states that '[s]poradic instances of police harassment of homosexual citizens probably reflect traditional social taboos and homophobia rather than systematic official harassment.' Accordingly, there is no error in the IJ's finding that Lin failed to establish eligibility for asylum because he did not supply sufficient evidence to establish an objectively reasonable fear of persecution."

Having fallen short on the asylum claim, of course, Lin had no hope of overcoming the IJ's decision rejecting withholding of removal or protection under the Convention Against Torture. As is common in many of these cases, the court did not go into any detail about the nature of Lin's evidence of past persecution. This ruling is consistent with several other adverse determinations in asylum cases for gay people from China over the last several years. A.S.L.

11th Circuit Denies Gay South American U.S. Refuge

Finding that being beaten by police officers did not provide a sufficient basis for finding a gay man from South America reasonably feared that "his life or freedom would be threatened" if he were forced to return to Bolivia, a panel of the 11th Circuit Court of Appeals affirmed a decision by the Board of Immigration Appeals rejecting the man's application for withholding of removal. Unfortunately, the applicant had waited too long after arriving in the U.S. to file a timely asylum application. *Del Carpio-Diaz v. U.S. Attorney General*, 2007 WL 2302200 (Aug. 14, 2007) (not officially published).

The court's per curiam decision relates that in his application for asylum, the man, who was born and raised in Peru, claimed that "he was mistreated as a child because of his homosexuality, he was sexually abused by an adult at his Catholic middle school, and police detained and abused persons at a dance club where [he] and his boyfriend had been dancing." The court noted that the applicant provided inconsistent details about this dance club incident, asserting in the asylum application that he and his boyfriend escaped from the club after the police arrived and only later learned secondhand what happened to the others there, while at his asylum hearing, he testified that he had been detained and abused by the police on that occasion.

The applicant then claimed that after he moved to Bolivia as an adult, he encountered renewed harassment for being gay. He claimed that he had been discharged from a job for being gay, and that on one occasion two police officers beat him, indicating that they knew he was gay. Finally, he fled to the U.S., arriving in May 2001, but he did not file papers seeking refuge here until 2003. The Immigration Judge determined that his failure to comply with the one-year deadline for asylum applications was not excused by any special circumstances, and he never raised any claim under the Convention Against Torture, a treaty to which the U.S. is a party, so his only hope to stay in the U.S. would be to gain an order withholding removal.

"An alien seeking withholding of removal must show that his life or freedom would be threatened because of a protected ground," explained the court, " such as membership in a particular social group. Therefore, an alien bears the burden of demonstrating that he more-likely-than-not would be persecuted or tortured upon return to his country of nationality." Such a burden can be met by proving past persecution, shifting the burden to the government to show either that conditions had changed in a relevant way in the applicant's home country, or that it would be possible to avoid problems by relocating to a different part of the country.

In this case, although the applicant had submitted a letter from his doctor stating that he was being treated for "stress-related disorders resulting from mistreatment at his workplace," the Immigration Judge focused on the applicant's failure to provide any evidence to corroborate his story about being mistreated in Peru and Bolivia because he was gay. The court noted that uncorroborated evidence that is credible may suffice in some cases, but that in this case, even if his evidence was believed, the court did not believe that it met the standard necessary to entitle him to U.S. refuge. "The record does not compel the conclusion that [he] more-likely-than-not would be persecuted or tortured if returned to Peru or Bolivia," wrote the court, noting that in his appellate brief, the applicant had even stated that his case involved "the absence of physical harm" and was based primarily on testimony about his psychological state.

Sometimes cases such as this can be won based on overwhelming documentary evidence about the adverse conditions for gay people in the home country, but in this case the court mentioned no such documentation concerning Peru or Bolivia. Interestingly, this opinion was issued the day before a constitutional court in Bolivia ruled that the national health service there must provide gender transition surgery for individuals diagnosed as transsexual, based on the constitutional right to health care guaranteed in that country (see below, in International Notes). A.S.L.

Washington Appeals Court Affirms Child Rape Conviction of 13 Year Old

The Washington Court of Appeals upheld a juvenile court adjudication that a 13–year-old boy had committed first-degree child rape under Washington law by engaging in mutual oral sex with an 11– year old male friend staying at his house for a sleepover. *State v. T.J.M.*, 162 P.3d 1175 (Wash. Ct. App., Div. 2, July 24, 2007). Speaking for a unanimous court, Judge J. Robin Hunt upheld the law's lack of availability of a consent defense against equal protection and due process challenges by the minor, noting concerns about criminalizing possible "experimentation" but ultimately deferring such concerns to the legislature.

In June 2005, (then) 13–year old TM invited 11–year old JB and JB's older brother to his house for a sleepover. While the older brother slept in the top bunk, TM crawled into the lower bunk with JB and told JB that he could play with TM's Gameboy if JB first "played a game" with TM. Both boys undressed, and TM began kissing JB on the mouth, prompting a protest from JB that such behavior was "gay." TM again promised JB that he could play with the Gameboy if he complied; TM also threatened to "put his balls up JB's butt" if he did not. TM did not stop as JB requested and eventually put his mouth on JB's genitals; JB reciprocated.

The juvenile court found that TM had committed first-degree child rape, defined under Washington law as "when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). (Oral-genital contact falls within the definition of "sexual intercourse" under Washington law when "done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(1).) Before issuing its verdict, the juvenile court expressed its concern "about a scenario where somebody, if he were to be convicted, gets the label of Child Rape in the First Degree when what we've really got is a situation of sexual experimentation," but nonetheless found TM delinquent. (Although the court noted the ages of TM and JB as 13 and 11, respectively, it was uncontested that TM was more than 24 months older than JB.)

On appeal, TM argued, first, that the unavailability of a consent defense to first-degree child rape, despite the availability of such a defense in cases of adult rape, violated equal protection. Judge Hunt rejected this argument. Applying the rational basis test, which all parties agreed was proper, and following the lead of Division III of the Washington Court of Appeals in

State v. Heming, 90 P.3d 62 (2004) (construing the third-degree child rape statute), the court held that the legislature "has a legitimate interest in protecting younger, more malleable children from unwanted sexual contact with older children." TM did not dispute this holding but argued that when the children were as close in age as he was to JB, the chance that the sexual conduct was not predatory was significant enough to require a fact-based inquiry into consent. Judge Hunt disagreed:

"Although, as the trial court here observed, these circumstances might be childish 'sexual experimentation,' rather than predatory behavior, TM cannot establish the unconstitutionality of a presumably constitutional statute simply by challenging the wisdom of the legislative classification." TM's burden, the court held, was to establish that the classification was purely arbitrary, a burden not met simply because the legislature could have included a requirement for an inquiry into whether the offense was predatory. To the contrary, said Judge Hunt, the legislature had apparently found that children under 12 "are at risk of sexual assaults from older, potentially predatory juveniles as well as from predatory adults," and that the legislature's classification was rationally related to the interest in protecting such children.

Indeed, comments about sexual experimentation notwithstanding, Judge Hunt went on to strongly intimate that even if a particularized inquiry were required, that would not help TM under the circumstances. Noting JB's relative lack of sexual sophistication and maturity — "TM's extra two years of age provided him with more sexual knowledge than JB and some measure of power" — and TM's use of the Gameboy as a means of persuading JB to cooperate, the court stated that TM's actions had "enabled him to obtain a younger, more acquiescent child for sexual experimentation — exactly the type of situation the Legislature seeks to prohibit with the strict age classifications."

TM's due process argument essentially restated his equal protection one, by arguing that the child rape statute created an impermissible "mandatory presumption" that children under the age of 12 cannot consent to sexual intercourse. Because, however, there is no lack-of-consent element to first-degree child rape, Judge Hunt held, "there is no risk that the trier of fact will convict based on an impermissible inference that a child under the age of 12 is incapable of consent." Again following *Heming*, the court held that any after-the-fact inquiry into the victim's ability to consent was "impractical" and reaffirmed that the legislature was within its permissible limits to set clear and precise age limits rather than such a fact-based inquiry.*Glenn C. Edwards*

Woman Who Must Have Known Her Spouse Was No Man Cannot Claim Putative Spouse Status

The California 4th District court of Appeal affirmed a ruling by the San Bernardino County Superior Court that a woman who thought she was married to a man, but later discovered that she was not, could not use the putative spouse doctrine to claim an interest in the family home that had been purchased in her "husband's" name. *In re the Marriage of Joy and John R.*, 2007 WL 2323349 (Aug. 15, 2007) (not officially published). The ruling also upheld Superior Court Judge John M. Pacheco's decision to annul the marriage, but remanded for consideration of a child support order against the former "husband."

Writing for the court, Presiding Justice Manuel Ramirez succinctly described the case this way: "Joy H., also known as Joy R. (hereafter Joy H.), filed this action to annul her 14–year marriage with Tammy C., who also was known as John R. (hereafter Tammy C.) Tammy C presented herself as a male, but was a biological female who had never had a 'sex change.' Because Joy H. believed that she had entered a valid marriage with a man, she contends that she qualified as a putative spouse and had community property interest in the family home, which was purchased in Tammy C.'s name. The trial court granted the annulment pursuant to the parties' stipulation, but rejected Joy. H's argument concerning her interest in the family home."'"

In a footnote, Justice Ramirez explained that the court was going to refer to the parties by "their legal names prior to their union," presumably because the annulment means that the marriage is to be treated as if it never existed. The court mistakenly released to Westlaw two versions of its opinion, one featuring the full names of the parties, the other redacted to show only first names and initials. Presuming the court intended to preserve the confidentiality of the parties and especially their daughter, we will stick with the initials here.

According to the opinion, Joy and Tammy (who presented herself as John) met while both worked for a security company, formed a romantic relationship and lived together for about six months before they married. Joy had been previously married, and Tammy had been living with a former girlfriend. In May 1988, Joy and Tammy obtained a marriage license and had a wedding ceremony attended by family and friends. Tammy was using an identification card with the name John that she had obtained in Arizona. After they married, Tammy informed Joy that Tammy was sterile so they needed to use donor insemination if they wanted to have children. One of their coworkers donated sperm and Joy became pregnant after several attempts at insemination, bearing a daughter in 1989.

"Although the parties had a sexually active relationship," wrote Justice Ramirez, "Joy H. maintained that she did not know that Tammy C. was a biological female. According to Joy H., Tammy C. was self-conscious about her obesity and did not permit Joy H. to touch or look at her during intercourse. Tammy C. used a silicone dildo. At some point, Joy H. found a two-headed dildo in the garage and asked Tammy C. about it. Several months later, Joy H. found another dildo in the garage and again confronted Tammy C. Although Tammy C. initially told Joy H. that she was a male who had a transgender operation, she eventually admitted that she was a biological female who had not had an operation."

The two separated when their daughter was three years old, but reunited after seven weeks when Joy H. decided they should stay together for the child's sake. Eight years into the marriage, they decided to buy a house. The house was purchased in Tammy C.'s name "because Joy H. was receiving welfare and property ownership would have affected her benefits," according to the court, noting that "Joy H. signed an interspousal transfer deed" that was necessary to avoid having the property attributed to her for benefits purposes. After living together in the house for three years, they separated in July 2002.

Shortly after the separation, Joy filed suit seeking a formal end to the marriage on grounds of fraud and incapacity. Joy and Tammy then negotiated an agreement that was submitted to the court, agreeing that their marriage was invalid and should be annulled and agreeing about the custody and visitation arrangements concerning their teenage daughter, but they could not agree on the issue of ownership of the property, Joy arguing that since it was acquired during the marriage she should be entitled to a half-interest under California's community property laws.

The trial judge, John Pacheco, decided that since Joy admitted that she knew Tammy was a woman before they bought the house, she could not have believed that she had a valid marriage at the time it was purchased. The putative spouse doctrine, which Joy was relying upon, is intended to treat somebody as a legal spouse when they could reasonably have believed that they were validly married, even though through some technicality of the law their marriage was invalid.

Approving Judge Pacheco's ruling, Justice Ramirez pointed out that "in order to succeed in claiming putative spouse status, Joy H. must show that a reasonable person would have believed that she was married to a man although her partner was a biological female. It is inconceivable that Joy H. was unaware that Tammy C. was a biological female. They had lived together for about six months prior to marriage. During that time, they regularly engaged in sex-

ual intercourse. Although Joy H. testified that she was unable to see Tammy C.'s genitalia because of the lighting and Tammy C.'s obesity, the court reasonably found that Joy H.'s testimony lacked credibility."

Ramirez pointed out that there was plenty of evidence in the trial record to suggest that Joy's testimony to the court was simply incredible. Among other things, Joy acknowledged that other people referred to her "boyfriend" as Tammy, that paychecks were made out to Tammy, and that during a confrontation with Tammy's former girlfriend, "the former girlfriend informed Joy H. of Tammy C.'s real gender. While Joy H. claims that she rationalized away these obvious clues," continued Ramirez, "this evidence supports the court's finding that Joy H. knew or should have known that Tammy C. was a biological female."

But the point that perhaps clinched it for the court was Joy's testimony about their sexual activity. "Joy H. testified that, during sex with Tammy C., she occasionally grabbed the dildo and assisted Tammy C. with insertion. Joy H. had been married previously for about five years and regularly engaged in sexual intercourse with her former husband. She testified that she could not distinguish the silicone dildo from her former husband's penis. The court found Joy H's testimony to be incredible." After all, no husband stays that hard all the time, right?

Ramirez pointed out that even if the court believed Joy's testimony that she thought she was marrying a man, it was clear that within a few years of the marriage she had figured out that Tammy was not a man, and that they were staying together for their child's sake. "Tammy C. purchased the property in Redlands in 1999, several years after Joy H. allegedly discovered that her sexual partner was a biological female. Therefore, by the time that Tammy C. purchased the house, Joy H. knew that she was not in a valid marriage." Consequently, she could not claim the benefit of the putative spouse doctrine for the purpose of claiming an ownership interest in the property.

However, the court found fault with Judge Pacheco's refusal to consider ordering Tammy C. to pay child support. In light of recent California precedents, although the parties were not spouses, Tammy C. could be considered a de facto parent of the child. Although the parties had not agreed on child support in the stipulation that they submitted to the trial court, it was the court's duty to make sure that the child was adequately supported, so the case was sent back to Judge Pacheco to determine whether Tammy should be required to pay. A.S.L.

Federal Court Refuses to Expand Lambda/ACLU Suit Challenging Wisconsin Prison Policy on Therapy for Transgender Inmates

Ruling on August 7, U.S. District Judge Charles N. Clevert, Jr., rejected an attempt by Lambda Legal and the ACLU to expand their lawsuit challenging Wisconsin's policy of denying hormone therapy to transgender state prison inmates. *Sundstrom v. Frank*, 2007 WL 2303657 (E.D. Wis.).

Wisconsin passed a statute banning the use of either state funds or federal funds passing through the state system to pay for any hormone therapy or sex reassignment surgery for Wisconsin prison inmates, juvenile facility residents or residents in forensic mental health facilities. The measure was to go into effect January 12, 2006. Inmates in the system who were receiving hormone therapy were notified that their therapy would be cut off at that date. Several contacted Lambda or the ACLU, which jointly filed suit in federal court on behalf of five named plaintiffs, seeking an emergency order to keep their hormones flowing, which the court granted. The suit sought a declaration that the statute violated the 8th Amendment rights of the inmates. Federal courts have generally agreed that gender identity disorder is a serious medical condition, and have required that prison systems provide treatment for inmates so affected, although there is not unanimity about what treatment is sufficient to meet the 8th Amendment obligation to provide necessary medical care to inmates. Since prisons do not allow inmates to receive any medication from outside the prison system, they are totally dependent on prison health care for any treatment.

The plaintiffs sought to expand the case beyond the named plaintiffs to a class action representing all transgender inmates in Wisconsin, but the court denied that request on February 16, 2007, finding that it would have expanded the lawsuit to include inmates presenting different individual issues from the named plaintiffs.

In its new motion filed in March, plaintiffs sought to add two more named plaintiffs through an amended complaint, both of whom claim to be transgendered and seeking hormone therapy but who were not receiving such therapy prior to their incarceration, and sought reconsideration of the decision to deny class certification.

Clevert rejected the motions on both accounts, finding that the proposed additional plaintiffs would add new issues to the case that were not "common" to the existing plaintiff group, and that no new evidence or manifest legal errors in the earlier ruling justified a reconsideration. Lambda/ACLU argued, among other things, that the expert testimony necessary to decide its constitutional challenge to the statute would be the same with respect to any challenge by a Wisconsin inmate; judicial economy suggested the appropriateness of consolidating all the potential actions that might be stirred up by the statute into one proceeding, especially as prison inmates in Wisconsin (as in any sizable state) were geographically dispersed and in many cases unable to secure representation for their individual claims, but Clevert refused to bite.

Cole Thaler of Lambda Legal and John Knight of the ACLU Foundation, together with Laurence J. Dupuis of the ACLU of Wisconsin and Erik R. Guenther, a Madison lawyer who is serving as local counsel, represent the plaintiffs. A.S.L.

New Jersey Appellate Division Rejects Joint Tax Filing for Lesbian Couple

A unanimous panel of the New Jersey Appellate Division ruled in *Quarto v. Adams*, 2007 WL 2262736 (Aug. 9, 2007), that the state's Division of Taxation had correctly rejected a request by a lesbian couple married in 2003 in Canada to file a joint New Jersey state tax return covering the 2006 tax year. The appeals court found that the couple's 2003 Canadian marriage was not recognized under New Jersey law until the effective date of the state's Civil Union Law, February 19, 2007.

Roslyn Quarto and Judith Prichason married in Canada in 2003, the year that several provincial courts issued opinions that led, by 2005, to same-sex marriage becoming legal nationwide. In October 2006, the New Jersey Supreme Court ruled unanimously in *Lewis v. Harris*, 188 N.J. 416, that same-sex couples are entitled to all the state law rights and benefits available under civil marriage. However, the court gave the Legislature six months to decide whether to extend marriage equality to gay and lesbian couples or to create an alternative status. By year-end, the Legislature had opted for the alternative status, and the Civil Union Law became effective this February.

Quarto and Prichason, wishing to file jointly as a married couple for their 2006 state tax return, that was due to be filed in April 2007, asked the state tax division whether they could do so, through a letter sent by the New Jersey chapter of the American Civil Liberties Union on behalf of them and other couples married in either Canada or Massachusetts or civilly-united in other states. This in turn led the tax division to ask the attorney general, then Stuart Rabner, for a legal opinion about New Jersey's recognition of out-of-state marriages and marriage-alternatives. Rabner's opinion said that same-sex couples in marriages or civil unions from other jurisdictions would be treated as if they had entered into a New Jersey civil union. But, since civil unions in New Jersey did not begin until February 19, 2007, such recog-

nition of out-of-state unions would begin from that point.

Civilly-united couples in New Jersey are eligible to file joint tax returns, but using Rabner's analysis, the tax division said joint filing for same-sex couples who married out of state was only effective beginning in tax year 2007.

Rabner's opinion differed from those coming from then-Attorney General Eliot Spitzer of New York in 2004 and from Patrick Lynch, Rhode Island's AG, earlier this year. Those officials took the position that their state governments would recognize same-sex marriages contracted elsewhere as marriages, nothing less, noting no express statutory prohibition on such recognition and the strong pull of comity in the area of marriage recognition. Lynch specifically advised state education officials that same-sex spouses of university employees married in Massachusetts should be considered married for purposes of employee benefits programs. Former New York State Comptroller Alan Hevesi cited Spitzer's opinion when his office made a similar determination regarding participants in the state employee pension funds and that decision was later followed by the New York City pension system. New Jersey activists criticized Rabner, who has since become the state's chief justice, complaining that his analysis departed from well-established principles of out-of-state marriage recognition under New Jersey precedents.

When their bid to have their marriage viewed as valid for the 2006 tax year was denied, Quarto and Prichason argued that since it was recognized as a civil union prior to the filing date of April 15 of this year, they nonetheless qualified for 2006 joint filing, but the tax division found that the last day of the tax year — December 31, 2006 -was determinative.

The tax division conceded that Quarto and Prichason and others in similar situations can file jointly next year for their 2007 taxes, but the appeals court noted a remaining technical barrier, since the New Jersey tax code provides that married persons who file separate federal tax returns must also file separate New Jersey tax returns, and same-sex couples married in Canada cannot file jointly with the IRS, due to the federal Defense of Marriage Act. The court mentioned that the state's attorney advised that it is evaluating whether the Civil Union Act, which allows couples entering into such a union to file jointly, had implicitly amended the state tax provision, allowing same-sex married couples to do so as well.

Ironically, Quarto and Prichason would save $411 on their combined 2006 state income tax by filing separately, since a joint filing would bump Prichason's lower annual income into Quarto's higher tax bracket, but clearly they pursued the case out of principal, not economic incentive. A.S.L.

Three LGBT Plaintiffs May Pursue Their Respective Workplace Discrimination Claims

Three employment discrimination cases, involving a lesbian, a gay man, and a transgendered individual, all advanced as a result of court rulings early in August. Two of the cases involved important contested points of law that were resolved in favor of the plaintiff, while the third turned on factual inferences that could be drawn from the plaintiff's complaint. *Creed v. Family Express Corp.*, 2007 WL 2265630 (U.S.Dist.Ct., N.D. Ind., Aug. 3, 2007) (transgender plaintiff); *Williams v. Sun Microsystems, Inc.*, 2007 WL 2254301 (Cal. App. 6th Dist., Aug. 7, 2001) (not officially published) (gay male plaintiff); *Dolan v. Community Medical Center Healthcare System*, 2007 WL 2257663 (U.S.Dist.Ct., M.D. Pa., Aug. 8, 2007) (lesbian plaintiff).

In the first decision, U.S. District Judge Robert L. Miller, Jr., ruled that Amber Creed may pursue her federal sex discrimination claim against Family Express Corporation, which discharged her for failing to comply with the company's dress code. Hired as Christopher Reed in February 2005, Creed consistently dressed in the clothes provided by the company for male sales associates, but gradually modified her grooming to be more feminine as she began the process of gender transition. On December 14, 2005, two management officials called her into a meeting and told her they had received complaints about her appearance. They said that she "could no longer present herself in a feminine manner at work," even though she informed them that she was transgendered and was going through transition. When she refused to adopt more masculine grooming, she was discharged and filed a federal lawsuit, alleging sex discrimination in violation of Title VII of the federal Civil Rights Act.

Indiana is in the 7th Circuit, where the court of appeals ruled in 1984 in *Ulane v. Eastern Airlines*, 742 F.2d 1081, that Title VII, which bans sex discrimination in the workplace, does not protect transsexuals from discrimination. Relying on this precedent, the company moved to dismiss the case. Creed responded that the old precedent was no longer valid, in light of a 1989 U.S. Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228, upholding a Title VII sex discrimination claim for a woman denied a partnership because some of the partners considered her to be inadequately feminine in appearance and behavior to meet their concept of a "lady partner."

Since 1989, several appeals courts have accepted the argument that a gay or transsexual individual who encounters discrimination for failing to comply with gender stereotypes held by the discriminator may sue for sex discrimination under Title VII. The 7th Circuit issued such a ruling in the 1990s in a case involving a teenage boy who wore long hair and an earring and was perceived by co-workers to be gay, *Doe v. City of Belleville*, 119 F.3d 563, but the appeals court has not specifically disavowed its prior ruling that Title VII does not specifically protect transsexuals from discrimination.

Creed alleged alternative theories of discrimination, one relying on her transsexuality, the other on her failure to conform with gender stereotypes. Judge Miller concluded that he would have to dismiss the claim based on transsexuality, because he was bound by *Ulane*, but he rejected the company's motion to dismiss the claim based on gender stereotyping. "From Ms. Creed's allegations in the complaint," wrote Miller, "it can (and for today's purposes, must) reasonably be inferred that Family Express perceived Ms. Creed to be a man while she was employed as a sales associate. That her managers requested she appear more masculine during business hours allows the inference that the managers harbored certain stereotypical perceptions of how men should dress. Ms. Creed's allegations she was terminated after refusing to present herself in a masculine way permits the inference she was terminated as a result of these stereotypical perceptions, rather than simply her gender dysphoria."

In the second case, a panel of the California Court of Appeal reversed a decision by the Santa Clara Superior Court and revived a claim of anti-gay employment discrimination in violation of the state's Fair Employment and Housing Act, which had been filed by Carl Williams, who had been employed as a network engineer by Sun Microsystems. Williams had also sued on a variety of other theories, some of which were dismissed by the trial judge while others were rejected by the jury.

Williams, a gay man, began working for Sun in 1992, achieving a good work record, pay increases and promotions, but the events leading to his quitting under fire began in 2000, he claimed, when his boss Stephen Harpster's supervisor, Lisa Pavey, phoned Harpster from Australia, where she was attending a business meeting, to report a complaint from one of Williams' "team members" that had been raised at a social dinner attended by Pavey, the team member, and another Sun employee. As a result of receiving the phone call, Harpster, who is gay, looked into the complaints about Williams, initiating a chain of events that ultimately led to Williams' quitting. The co-worker complaints themselves had nothing to do with Williams' sexual orientation.

Williams claims that he eventually learned from the third employee who had been at the social luncheon that when Williams' name came up in conversation, Pavey had said, "Oh my God, he's gay," and then related gossip that another employee in Williams' team was "uncomfortable" because Williams had been "coming on to" or "hitting up on" him, and that the mat-

ter was being handled by the Human Resources Department. Williams insists that this was a baseless story, but that it shows that Pavey held stereotypical views of gay men and was biased against him.

At the heart of Williams' discrimination complaint was his argument that Pavey's phone call to Harpster led to Williams eventually losing his job, and thus anti-gay animus tainted the decisions that prompted him to leave, even though Harpster and Pavey's successor as Harpster's boss, who ultimately made the decisions, were not shown to harbor anti-gay animus.

The trial judge had kept this discrimination claim from going to the jury, accepting Sun's argument that it had legitimate reasons for moving against Williams. But the appellate panel, in an opinion by Justice Eugene M. Premo, reversed this decision. "If a jury were to interpret Pavey's comments as reflecting a negative opinion of gay men, the temporal relationship between her remarks and her call to Harpster could raise the inference that the telephone call was motivated by that negative opinion," wrote Premo. "Further, it is undisputed that Pavey's telephone call to Harpster precipitated the investigation that led Harpster to rescind the favorable evaluation he had issued just a few weeks prior to the telephone call and to issue the unfavorable evaluations and compensation decisions that plaintiff challenges here."

"This evidence is sufficient to support a finding that Pavey's telephone call from Australia was a 'but-for' cause of the adverse employment actions. It is also sufficient to allow a reasonable jury to conclude that defendant's legitimate reason for the actions concerns about plaintiff's job performance was pretextual," Premo continued. "Further, although Pavey claims she never made the remarks [the other employee] attributed to her and did not know of plaintiff's sexual orientation until this lawsuit was filed, this too was an issue of fact for the jury. Thus, the trial court erred" in granting the employer's motion and keeping this element of the case from the jury, requiring a new trial for Williams.

The third of the cases is perhaps the most significant, at least for the enforcement of local gay rights laws in cities and counties where there is no state-wide protection against anti-gay workplace discrimination. In this case, U.S. District Judge John E. Jones III ruled that the Scranton, Pennsylvania, non-discrimination ordinance could provided the basis for a federal diversity suit filed by a Virginia woman who claims she was denied employment by Scranton's Community Medical Center after she revealed during the hiring process that she was a lesbian.

Margaret Dolan responded to an advertisement placed by the Medical Center on the website of the Society for Human Resources Management, seeking a vice president for human resources for the Medical Center. Dolan presented her application, which was initially screened by an executive search firm and then forwarded to the Center. Dolan had two interviews with management officials at the Center, during which she evidently scored a hit, as the Center's Senior Vice President of Operations, Barbara Bossi, assured her that an offer would be forthcoming. Dolan had stated her salary and benefits requirements during the interview process, but had indicated that things were negotiable, and at that point the Center had not yet made a salary offer or initiated negotiations on financial terms. At this point in the process, Dolan casually informed Bossi that she was a lesbian.

Several weeks later, Dolan was informed by the search firm that the Center would not be hiring her because they could not meet her salary requirements. Since there had been no negotiations on financial terms, Dolan concluded that the stated reason was a pretext, and she filed a lawsuit in federal court, alleging a violation of Scranton's non-discrimination ordinance, which covers sexual orientation. Dolan invoked the court's diversity jurisdiction, under which federal courts can hear lawsuits between citizens of different states even though no federal legal issue is involved in the case. The Center moved to dismiss the case, claiming that the federal court lacked jurisdiction.

The Center's motion was based on a very literal reading of the Scranton ordinance. In its opening section stating the City Council's purpose for adopting the ordinance, it states that "it is the express intent of this article to guarantee fair and equal treatment under law to all people of the City," and the enforcement provisions state that any person who suffers discrimination can file a complaint in the state Court of Common Pleas, the civil trial court in Pennsylvania. Based on these provisions, the Center argued that Dolan, a Virginia resident, was not protected by the ordinance, and that in any event she could not file suit in federal court because the ordinance only authorized a lawsuit in the state trial court.

Judge Jones rejected both of these points. He found that limiting the ordinance's protection to Scranton residents "would lead to absurd results, such as Scranton businesses being permitted to discriminate against non-residents who enter the city to conduct business," and observed in a footnote, "We think it highly unlikely that the City Council would wish to discourage those living outside of Scranton from supporting the city's economy." Jones also found that the operative provisions of the ordinance did not support the Center's interpretation, since there was a provision stating that the ordinance "shall be construed liberally" and authorizing "any individual" to file a complaint.

Jones also pointed out that a federal court derives its jurisdiction from the Constitution and acts of Congress, and that under the federal system that jurisdiction could not be abridged by a local ordinance specifying where someone can file a lawsuit. Jones cited several examples of federal cases upholding jurisdiction based on the parties being residents of different states, even where the underlying legal claim was based solely on a state law that appeared by its terms to authorize enforcement in the state courts. Such language could not be construed as ousting the federal court from jurisdiction, because the very purpose of diversity jurisdiction was to provide a neutral forum for non-federal claims that might arise between citizens of different states.A.S.L.

Pennsylvania Superior Court Finds Viewing of Child Porn On-Line Violates Possession or Control Statute

A majority of an en banc nine-judge panel of the Pennsylvania Superior Court, reversing a three-judge panel, found that a person who views child porn on their computer has violated the state's criminal ban on the "possession" or "control" of such material, even if he never downloaded it, printed it out, or sent the image to anybody else. *Commonwealth v. Diodoro*, 2007 WL 2390713 (Aug. 23, 2007).

Anthony Diodoro went surfing the internet looking for pictures of adolescent girls and he found plenty of them, including pictures depicting them engaged in sexual activity. Diodoro never paid to access anything, and never affirmatively downloaded anything. Nonetheless, when the police subpoenaed his computer and had it examined by an expert, numerous depictions of adolescent sexual activity were found in the cache files, temporary files that are automatically downloaded when one views an image on-line, and at least thirty of those images were found to violate the state's criminal prohibition on the possession or control of such material.

Diodoro was convicted and sentenced to 9–23 months in jail and 5 years probation. He appealed, arguing that he had not actually possessed or controlled the images, but merely viewed them, and that he was not aware that his computer was automatically creating cache files, which he never made any attempt to access. A three-judge panel of the Superior Court bought his argument by a vote of 2–1 and reversed his conviction. The state petitioned for en banc review, which was granted, resulting in the 7–2 decision.

For the majority, it was an easy case. Regardless whether Diodoro was aware of how his computer worked, when he was done with his on-line viewing sessions, there were copies of some of the images he viewed stored on his computer's hard drive in temporary files that he

could access, if he knew how to do it. Therefore, in a literal sense, he possessed them, wrote Judge Correale F. Stevens for the court, pointing out that his "actions of operating the computer mouse, locating the Web sites, opening the sites, displaying the images on his computer screen, and then closing the sites were affirmative steps and corroborated his interest and intent to exercise influence over, and , thereby, control over the child pornography." Stevens also emphasized that Diodoro could have downloaded, printed out, copied or emailed the images to others, and thus was capable of exercising control when he viewed the images on his computer screen.

Judge Richard Klein, who wrote the majority opinion in the three-judge panel, dissented for himself and Judge John T. Bender, arguing that there was an ambiguity in the statutory language which should be resolved in favor of the defendant, under the general canon of construction that criminal statutes are to be strictly construed. Had the legislature specifically forbidden "viewing" child pornography, Klein would have no problem about convicting Diodoro, but he argued that a person who is unaware of the automatic cache system essentially lacks the state of mind to violate a statute that refers only to possession and control. "If the Legislature fails to keep up with modern technology, it is not our responsibility to correct its oversight," he added. To illustrate his point, Klein drew an analogy involving somebody who physically goes to the Philadelphia Art Museum to view the famous painting of Cezanne's bathers, and one who instead goes to the Museum's website and pulls up the image of the painting. Does either person "possess" or "control" the painting by the mere act of viewing it?

The majority's counter is to construe the statute in line with its purposes and policy justifications. Citing to U.S. Supreme Court authority rejecting 1st Amendment challenges to criminal child porn possession statutes, Stevens pointed out that the policy behind them is to protect children from exploitation by striking at the market. If people can view the stuff on-line with impunity, then the purpose of the statute is being undermined. A.S.L.

Federal Court Rejects Gay Social Workers Suit Against Employer and Union

U.S. District Judge Denny Chin granted motions for summary judgment in *Lewis v. North General Hospital & 1199SEIR United Health Care Workers East*, 2007 WL 2398077 (S.D.N.Y., Aug. 23, 2007), finding no basis for any of the legal claims brought against his former employer by a gay social workers, and no breach of the duty of fair representation by his union for refusing to take his discharge grievance to arbitration.

According to Judge Chin's opinion, Darren Lewis is a "gay African American Man" who was discharged by North General Hospital in January 2006, after he had failed to obtain professional licensing required by his employment contract and had filed a discrimination claim alleging hostile environment sexual harassment by his supervisor, who happens to be a lesbian. Lewis had thrice flunked the written exam required to be a licensed social worker before he was hired by North General. When hired, he signed an agreement requiring him to obtain his license within a year, but he withdrew from a prep course and did not take the examination. He also failed to obtain a temporary license, as he neglected to take the required course on child abuse issues. When things were looking bleak for his retention, he filed a discrimination charge, claiming his lesbian supervisor had "brushed up against him" several times. The hospital investigated the charge and concluded that he had filed it to try to forestall his discharge for failing to secure professional licensure.

Lewis filed suit against the hospital alleging breach of contract, defamation, discrimination and retaliation, and also named the union as a defendant. The union removed the case to federal court, on the premise that the claim against it was in actuality (although not stated in the complaint) an allegation of breach of its duty of fair representation under the National Labor Relations Act, raising a federal question. Both defendants moved for summary judgment.

Judge Chin found that the hospital had a legitimate reason for discharging Lewis, his failure to obtain licensure as required by his contract, and that the sexual harassment charges lacked the necessary factual allegations concerning frequency and severity of objectionable conduct. Given that finding, the retaliation claim fell away, since the court accepted the hospital's explanation that the discharged was motivated by the licensing issue. Under state law, such licensing is now required to employ somebody as a social worker in a professional setting.

Lewis's defamation claims seemed based on negative inferences he was drawing from statements or actions that did not on their face seem to ground a defamation claim, such as his claim that some in the workplace mistakenly assumed he was Muslim, or that one employee was implying he was a child molester by mentioning Michael Jackson in his presence. Chin found that Lewis had failed during his deposition to specify any defamatory statements about him made by the hospital or the union, the defendants in the case, or their agents. And, to the extent the Lewis might be alleging sexual orientation discrimination without specifying such a cause of action in his complaint, Chin noted that such a claim would not be actionable under Title VII, and that Lewis's initial charge with the State Division of Human Rights had effectively fallen out of the case since the Division had dismissed his complaint on the merits, which under the statute precludes retrying the issue in court. A.S.L.

New York Court Rejects "Second Parent Adoption" by Siblings

Oneida County Surrogate Court Judge Randal B. Caldwell rejected an adoption petition filed jointly by a child's recently-divorced natural mother and the mother's brother, who has been living in the family home with the child since last December. *In the Matter of the Adoption of a Child Whose First Name is Garrett*, 2007 WL 2404789, 2007 N.Y. Slip Op. 27343 (Aug. 16, 2007). Relying on *Matter of Jacob*, 86 N.Y.2d 651, in which the Court of Appeals upheld second-parent adoptions by a lesbian couple and an unmarried heterosexual couple, the petitioners had argued that any two adults who are living together and functioning as parents to a child should be able to adopt jointly. The natural father, who upon divorce had signed an advance irrevocable consent to have his child adopted in the future by his ex-wife and an unnamed other male, opposed the adoption.

Judge Caldwell refused to accept the analogy to the situations in *Matter of Jacob*. After describing the adoptive couples who were approved in *Matter of Jacob*, he pointed out, "all of these decisions have been predicated on the rationale that the relationship between the proposed adoptive parents is the functional equivalent of the traditional husband-wife relationship, albeit between same-sex couples or unmarried partners."

Caldwell pointed out that the Appellate Division in the 4th Department, whose decisions are binding on him, had recently reaffirmed the general rule of strict construction of the adoption statute. "We are now asked to further expand the prior holdings to virtually unlimited boundaries," he wrote, "namely to authorize the adoption of a child by a natural parent and another member of that parent's family, namely the brother of the natural mother. This Court finds that the reasoning employed in the prior decisions expanding the right to adopt is simply inapplicable to the present case. In absence of direction by a higher Court that the right to adopt should be extended in this fashion, this Court will dismiss the pending petition." A.S.L.

Magistrate Refuses to Dismiss Anti-Gay Bullying Case

In a written opinion issued on July 6, 2007, U.S. Magistrate Judge William G. Hussmann, Jr., rejected attempts by the Spencer-Owen Community School Corporation in southern Indiana to escape trial on claims that they unlawfully tolerated and failed to take action against the bul-

lying of two middle-school students, a brother and sister, which was alleged homophobic in nature. *Sweiwert v. Spencer-Owen Community School Corporation*, 2007 WL 2020174 (S.D.Ind.).

S.S. and K.S. were students at Owen Valley Middle School. S.S., the brother, was apparently perceived as gay by some of his fellow students, and subjected to verbal and physical harassment, including being kicked by other students in gym class and being called "gay" and "faggot." K.S. was very protective of her brother, and ended up getting in the middle of some of the unpleasantness. S.S. was so shaken by the harassment, which included death threats communicated through third parties, that upon doctor's order he missed several weeks of school. The parents communicated with school authorities numerous times, but the problems both at school and on the school bus continued, and the school authorities were dismissive of their concerns and apparently reluctant to take disciplinary action against students accused of the harassment or teachers who tolerated it. Similarly, the school driver, although informed of the problem, failed to intervene, even when actual fighting broke out. (In one incident, S.S. was provoked into throwing the first punch, and both he and his provoking combatant were briefly suspended from school and involved with the police.)

Suing on behalf of their children, the Sweiwerts alleged violations of the equal protection clause and Title IX of the Education Act (which forbids sex discrimination in schools that receive federal money), as well as claims of breach of contract, negligent entrustment and negligent supervision in connection with events on the school bus, and finally claims of intentional and negligent infliction of emotional distress.

Magistrate Hussmann recommended allowing all the claims to go forward, rejecting the defendants' summary judgment motions, except for the negligent entrustment and intentional infliction of emotional distress claims. Hussmann found that "there was evidence that s.S. was harassed because of his perceived membership in a protected class," i.e., those perceived to be gay. Unlike some of his ignorant colleagues in other districts, Hussmann understands that in light of cases like *Nabozsny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), anti-gay discrimination is actionable under the 14th Amendment, the test being that "a victim of discrimination based on sexual orientation must show that the discriminatory intent was not rationally related to a legitimate state interest." And, analogizing to *Nabozny*, a similar case in a high school setting, Hussmann found that a jury question existed as to whether "all of the harassment is connected or if some of it is associated with some other nondiscriminatory intent."

Drawing analogies from Title VII caselaw, Hussmann found that the Title IX sex discrimination could be maintained in light of the "perceived sexual orientation" aspect of the case, which signalled the possibility that S.S. was being harassed because of failure to conform to gender stereotypes. The breach of contract claim was premised on S.S. and K.S. having third-party beneficiary status to the contract between the school district and the bus company, which imported a duty to provide safe transport conditions to the children. Finally, Hussmann noted that Indiana allows negligent infliction of emotional distress claims without proof of actual physical injury, unlike some other jurisdictions, so this claim could continue based on the evidence submitted concerning the emotional impact of the harassment on S.S., which was severe enough to lead his doctor to recommend his staying out of school for several weeks.

Hussmann concluded that plaintiffs misunderstood and misapplied the negligent entrustment theory, and that there was no evidence that the school district itself intended to cause severe emotional distress to S.S. through its own intentional acts, so those claims had to be dismissed. A.S.L.

7th Circuit Upholds Discharge in Email Harassment Case

The case of *Bernier v. Morningstar, Inc.*, 2007 WL 2033747 (7th Cir. July 17, 2007), demonstrates the importance of adhering to procedures for reporting perceived sexual harassment in the work place, as the court rejected a Title VII challenge to a discharge where the plaintiff undertook self-help in way the painted him as a sexual harasser.

Appellant Todd Bernier, a non-gay employee of Morningstar, Inc., thought he was being harassed by Christopher Davis, a gay co-worker. He thought Davis was expressing sexual interest by staring at him at inappropriate times (including, the record stated, in a men's room on the floor where they both worked). Rather than reporting his concerns to Morningstar's Human Resources department or confronting Davis personally, he sent an anonymous instant message through a little-used internal chat system on Morningstar's computer network, telling Davis to "Stop staring! The guys on the floor don't like it!."

Davis thought that *he* was being harassed on account of his homosexuality, so he reported it to his supervisor. The firm's information technology department was able to trace this message to Bernier's computer. When confronted by a team of managers, Bernier denied that he sent the message. Bernier claimed that he tried to correct this denial, but was dismissed later that same day, before he could find the team leader, who was not at her desk during the interval between the earlier meeting and the dismissal.

The record indicates that Bernier knew that Davis was gay because Davis had previously taken a male date to a company function, and that Bernier felt he was being stared at because he thought Davis was looking at him differently from the way other gay men in that workplace behaved. Bernier did not know, however, that Davis had a "lazy" left eye that would make it appear that he was looking at something when he was not.

After he was dismissed, Bernier filed a complaint with the Equal Employment Opportunity Commission. When his claim was denied, he was given a "right-to-sue" letter and filed a claim in federal court under Title VII. Bernier raised two claims in his complaint: that he was subjected to a pattern of sexual harassment because of Davis's apparent sexual interest in him, and that he was dismissed in retaliation for his complaint concerning Davis's sexual harassment. The trial court rejected both of these claims, granted summary judgment to Morningstar, and Bernier appealed. The Court of Appeals affirmed in an opinion written by Judge Diane P. Wood.

Judge Wood stated that Bernier's sexual harassment theory was that Morningstar subjected him to a hostile workplace environment because of Davis's sexual interest in him. Title VII prohibits discrimination in employment on the basis of sex, which "encompasses sexual harassment that is sufficiently severe or pervasive to alter the employee's terms or conditions of employment," wrote Wood. "In deciding whether sexual harassment has reached the point of affecting terms and conditions of employment, we ask whether the complaining person has been subjected to objectively offensive behavior, whether there is a link between that treatment and his or her protected characteristic (here, sex), and whether the conditions are offensive from a subjective standpoint." Wood pointed out that it is not enough for a complainant seeking to hold an employer liable to show such a pattern of conduct by another employee, but that the complainant must show that the employer was notified of this conduct, and failed to take action to remedy the situation. Bernier conceded that he did not use Morningstar's established procedures for reporting sexual harassment. Rather, in a line of reasoning that Judge Wood called "tortuous," he claimed that when Davis showed the anonymous instant message to the responsible Human Resources person, the Human Resources person should have taken the anonymous instant message as indicating that Bernier thought that Davis was actually sexually harassing him, and that she failed to act to stop Davis. Judge Wood rule that nothing in the instant message "immediately calls sexual harassment to mind," and a message on behalf of "the guys" says "little or noth-

ing about whom the speaker represents or how strong the dislike may be.70

Context was everything here. Early in the opinion, Judge Wood made clear that the case might have turned out far differently had Bernier followed the company's internal procedures for reporting sexual harassment, instead of sending his anonymous message.

Bernier argued that the message he sent to Davis gave the firm constructive notice that Davis was harassing him, that after his initial meeting, at which he lied about the message, the fact that he could not get to the proper party to correct his statement prior to his dismissal amounted to management's purposefully making themselves unavailable and preventing him from making use of the formal complaint process. Judge Wood said that "no rational finder of fact could squeeze that interpretation out of these facts," and that Bernier failed to show that Morningstar had actual or constructive notice of Davis's alleged harassment. Wood went on to state that even had Morningstar been given notice of Davis's alleged harassment of Bernier when Davis reported the anonymous instant message, Bernier lied about being the source, making it impossible for Morningstar to examine his claim.

Bernier's retaliation claim was also rejected. Title VII protects individuals who complain to their employers about sexual harassment from retaliation on that basis. A complainant need not prevail on a sexual harassment complaint to prevail on a retaliation claim. A "direct showing" of retaliation is made if the complainant shows that s/he "engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complains." If the complainant's claim is not rebutted, the complainant is entitled to summary judgment. If the claim is rebutted, the matter proceeds to trial unless the defendant presents non-rebutted evidence that the defendant would have taken the adverse employment action against the plaintiff even if he had no retaliatory motive. In that event the defendant is entitled to summary judgment because it would have been shown that the plaintiff wasn't harmed by an act of retaliation.

In the alternative, an "indirect showing" of retaliations is made if the complainant were to show "that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." If the charge is not rebutted, s/he is entitled to summary judgment. If the defendant were to show unrebutted evidence of "a noninvidious reason for the adverse action," the defendant would prevail. "Otherwise there must be a trial."

In this case, Bernier claimed to be making an indirect showing, but the court ruled that he would not prevail under either theory. The court ruled that he did not make a showing of a good faith effort to communicate his perception that he was being sexually harassed to management, and that the circumstances indicated Morningstar had two non-invidious reasons for termination: his improper use of what was reasonably read as a harassing message thought the firm's communication system, and his lie about the message during the firm's investigation of the matter. *Steve Kolodny*

Federal Civil Litigation Notes

Third Circuit — An employer had a legitimate reason to dismiss an employee who had harassed a gay customer, wrote Judge Marion Trump Barry of the U.S. Court of Appeals for the 3rd Circuit, affirming summary judgment for the employer in *Hutchinson v. Scull*, 2007 WL 2045690 (July 18, 2007). Hutchinson, a Jamaican-American woman in her mid-fifties, worked as head host at a Bennigan's Restaurant in Springfield, NJ. On December 8, 2000, a female customer accused her and another host of staring at the customer and her girlfriend and making inappropriate comments due to their sexual orientation. This was reported to the restaurant manager the next day; he contacted the customer, confirmed what had happened, and decided to terminate the two employees involved. Hutchinson charged race, national origin and age discrimination under Title VII and New Jersey law. Her replacement was an African-American man. The district court, in an opinion approved by the court of appeals, found that Hutchinson had presented no evidence that her race, national origin or age had anything to do with the discharge. Wrote Barry, "Hutchinson does not dispute that the customer complained and that Hutchinson was terminated immediately following the complaint; she merely questions whether the customer should have taken offense." But this didn't matter, according to the District Court. If the employer was acting on a customer complaint, that is a legitimate business reason to take a personnel action. The court also found that the employer had shown a "considerable history of performance problems" with Hutchinson, bolstering the legitimacy of the discharge.

Court of Appeals for Veterans Claims — A Vietnam-era Marine Corps veteran lost in his attempt to get disability benefits that he claimed related back to his period of service during the Vietnam War, August 1965 to February 1968. *Kochock v. Nicholson*, 2007 WL 2120100 (Vet.App., July 19, 2007) (designated for electronic publication only). Koshock received an undesirable discharge due to "sexual perversion." According to the court, this means he was not discharged for private consensual sodomy but rather for aggravated sexual misconduct, although the court does not go into the details. A servicemember who receives such a discharge is disqualified from receiving service-connected disability benefits. Koshock sought to have the record corrected and to qualify for the benefits, claiming that he was suffering from post-traumatic stress disorder that explained his sexual misbehavior. The internal Veterans Administration appeals process rejected his attempt, and was affirmed in this opinion, which is overridden with administrative jargon and says little directly about the merits of the case. In effect, Koshock was arguing that he was temporarily insane and thus should not be held responsible for his misconduct, and the court rejected that argument, apparently at least in part for procedural reasons having to do with it not having been raised appropriately early enough in the process.

Arizona — Randolph D. Wolfson, who campaigned unsuccessful to be elected a justice of the peace in 2006, is contemplating a run for Mohave county Superior Court in 2008, but is concerned about the impact on his other, passionately pursued political goal: to get the people of Arizona to amend their constitution to ban same-sex marriage. According to U.S. District Judge Stephen M. McNamee's opinion in *Wolfson v. Brammer*, 2007 WL 2288024 (D. Ariz., Aug. 8, 2007), Wolfson "regularly gives an in-person presentation in his capacity as a practicing attorney regarding the issue of same-sex marriage and family values." This consists of a PowerPoint presentation about the "moral ramifications" of "normalizing homosexuality" and changing the "traditional definition" of marriage. During the 2006 campaign, Wolfson had corresponded with the state's Judicial Ethics Advisory Committee, concerned about what he could say concerning the anti-marriage referendum while campaigning for judicial office, and responding to their advise removed much of the advocacy material from his presentation. Ultimately the Committee, noting the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, 526 U.S. 765 (2002), opined that some of the restrictions on what judges say contained in the state's judicial ethics code might be unenforceable. In light of his contemplated 2008 campaign, Wolfson filed this action, seeking a declaration as to the unconstitutionality of ethics code provisions that might prevent him from campaigning against same-sex marriage while running for judicial office. Judge McNamee decided that Wolfson had established standing and ripeness, but that it would be prudent for the court to defer deciding this case on the merits. After all, the state might revise its ethical code prior to the election, making any federal court declaration moot.

District of Columbia — In *Scott-Blanton v. Universal City Studios Productions LLP*, 2007 WL 2059117 (D.D.C., July 19, 2007), U.S. District Judge Ricardo M. Urbina rejected a pro se attempt by Janice Scott-Blanton, a novelist, to

restrain distribution of the hit film *Brokeback Mountain*. Scott-Blanton claimed copyright infringement, arguing that elements of her novel about gays and western life were depicted in the movie. The only problem for Scott-Blanton, of course, was that her novel was published shortly before the film was issued in December 2005, but the film was closely based on a short story by Annie Proulx published more than ten years earlier, and the shooting script for the film was finalized well before Scott-Blanton's novel, titled *My Husband is on the Downlow and I Know About It*, was published. She had first attended a screening of *Brokeback* in June 2006, several months after it had been honored with awards by many organizations, noted some similarities to her story, and filed suit a year later. In denying her motion for preliminary injunctive relief, which require immediate removal of the film from the market, Judge Urbina noted that in addition to falling short in showing likelihood of success on the merits of her infringement claim, granting Scott-Blanton's motion "would deprive the public of access to an award-winning film." • • • * In an Aug. 27 ruling, 2007 WL 2412153, Judge Urbina granted the plaintiff's motion to file an amended complaint. Without suggesting that her case had any validity on the merits, Urbina noted that before a complaint is dismissed, federal rules allow the plaintiff to substitute a new complaint. Although a motion to dismiss is pending in the case, Urbina rejected the defendants' argument that the motion should be denied since the entire case is frivolous.

Florida — Regina Higgins, who had been incarcerated in Orange County, claimed to have been subjected to harassment by a lesbian inmate housed with her in the dormitory, Yolena Tolichenko. Higgins complained that the other women in the unit were "loud and disrespectful" and that the correctional officers didn't seem to care, allowing the lesbians to basically dominate the unit. She sued Higgins for damages in federal court, and the case was referred to Magistrate Karla R. Spaulding for screening. Spaulding recommended that the case be dismissed, and District Judge Gregory A. Presnell accepted this recommendation in *Higgins v. Tolichenko*, 2007 WL 2155579 (M.D. Fla., July 25, 2007). Spaulding observed that Higgins did not purport to base her claim on any federal statute or regulation, so there was no federal question jurisdiction alleged, and there was no diversity either. In short, Spaulding didn't think that Higgins' pro se complaint amounted to much of anything. "While she describes a situation that was likely frustrating and embarrassing," wrote Spaulding, "the law generally does not provide a remedy for another's rude behavior." Taking pity on Higgins, however, Spaulding recommended that the complaint be dismissed without prejudice, and devoted a paragraph of her opinion to instructing Higgins in what would have to be included if she were to file an amended complaint.

Maryland — The *Washington Blade* (Aug. 15) reported a settlement in a lawsuit between Kevin-Douglas Olive and the parents of his late partner, Russell Groff, over Groff's burial place. Groff, who died at age 26 from a staph infection that spread through his HIV-compromised system, made a deathbed will and executed burial instructions shortly before his demise on November 23, 2004. At the time, he was estranged from his parents, who did not accept his "lifestyle." Under the instructions, he was to be buried in a Tennessee grave that Groff and Olive and chosen as their joint burial place, with a double headstone. But Lowell and Carolyn Groff, claiming that their son was not competent when he made the will and the instructions, sought to have the will set aside, to get the body exhumed and re-interred in their family plot. Under the terms of the settlement, the Groffs are entitled to the return of some of Russell's personal effects, and there will be separate headstones for each man instead of the joint headstone that had been contemplated in the instructions, but the burial will remain in the jointly-purchased double plot outside of Knoxville. Mark Scurti, an openly gay Baltimore attorney who represented Olive, warned *Blade* readers about the importance of formalizing their legal arrangements, and Olive agreed that the men should have acted earlier so as to deprive Groff's parents of the capacity argument. "There are so many gay couples running around with no legal documents written up whatsoever," said Olive. "It's stupid. Just stupid. It was stupid on our part." The article noted that Olive's legal costs for the case would be more than $5,000, and many people who have read about the case have sent donations to help with the litigation. Olive indicated that if the donations exceeded the litigation costs, the balance would be donated to a gay civil rights organization, most likely Equality Maryland, which is leading the fight for same-sex couples to be able to marry in that state.

New Jersey — The town of Ocean Grove was at one time a church campground, and the real property of the town is still largely owned by the United Methodist Church, although the community includes a large LGBT residential contingent. Which leads to the current source of tension and litigation, now that New Jersey makes civil unions available, and the pavilion on the boardwalk in Ocean Grove is a tempting location for a civil union ceremony. Same-sex couples who were turned down when they sought permission to hold their ceremonies there filed complaints with the state's Division on Civil Rights, claiming sexual orientation discrimination in public accommodations. The town defends on the ground that as UMC property it is exempt from complying with the civil rights law on free exercise of religion grounds. Now a federal lawsuit has been filed, seeking an injunction against the proceedings in the state agency. And the *Newark Star-Ledger*, reporting on the controversy on Aug. 19, noted that no weddings are being allowed on the boardwalk now that the cases are pending. It was later reported that U.S. District Judge Joel Pisano had refused to issue an injunction against the ongoing investigation during a hearing on August 28, but that the Division on Civil Rights had agreed to hold up on its investigation until October 1, the date that Judge Pisano set for the submission of Alliance Defense Fund's motion on behalf of UMC and the state's motion to dismiss the case.

Pennsylvania — U.S. District Judge James Knoll Gardner found that the Equal Employment Opportunity Commission had alleged facts sufficient to survive a motion to dismiss in a sexual stereotyping harassment case involving a male employee perceived to be gay by his co-workers. *EEOC v. Turkey Hill Dairy, Inc.*, 2007 WL 2407095 (E.D. Pa., Aug. 8, 2007). The complaint alleges both sex discrimination and retaliation. The complainant was called the usual homophobic names and was the target of other epithets sufficient to support a claim that he was being persecuted because of nonconformity to typical male gender stereotypes.

Tennessee — An employee of the Tennessee Department of Children's Services was spotted by a police officer entering an adult bookstore with a bunch of co-workers. The officer called an assistant district attorney, who told him to write up a report, which she subsequently had sent to the employee's supervisor, resulting in the employee being confined to his office without pay for some period of time. The employee filed an internal appeal and cleared his name. Then he sued the various police officers, the assistant DA, the police chief and the county, claiming violations of his constitutional rights. In *Lowe v. Clift*, 2007 WL 2112672 (E.D. Tenn., July 19, 2007), U.S. District Judge Curtis L. Collier dismissed the case, finding no constitutional violations. Collier's opinion emphasized that an individual has no privacy interest in the fact that he openly went into an adult book store, and that no privacy interest was violated when a police officer present made a record of that fact and had it transmitted to the employee's public employer. As to procedural due process issues, the court found that the plaintiff was afforded due process; he appealed the discipline and got his record cleared. Consequently, there was no basis for finding either individual public employees or the county liable to Lowe for any damages.

Washington State— In *Bray v. King County*, 2007 WL 2138754 (W.D. Wash., July 22, 2007), U.S. District Judge James L. Robart granted summary judgment to the defendants in a case alleging disability and sexual orientation discrimination brought by Lynne Bray, a

former employee of the King county Department of Transportation's Road Division. There is no real legal analysis in the opinion, as disposition was based on Robart's finding that the undisputed facts showed no evidence that Bray's lesbian orientation had anything to do with her discharge. Much of her trouble seems to have derived from the actions of a former lover, who contacted the Department to say that Ms. Bray was abusing the email system and using her county vehicle for private purposes. A subsequent investigation showed that Bray had heavily used her county email account to send messages including sexual material to the former lover, and had used her county vehicle to visit the former lover in work time. She also had attendance problems, partly due to physical and medical difficulties. The court found that her physical problems did not amount to a legal disability (and that she had never requested an accommodation in any event). A.S.L.

State Civil Litigation Notes

California — Several openly-non-gay San Diego city firefighters who were assigned to participate in the city's gay pride parade as part of the Fire Department contingent have inquired with the state's Department of Fair Employment and Housing, which administers the state's civil rights law, to determine whether they can file a sexual harassment complaint against the city. It seems they felt sexually harassed by lewd comments made to them by apparently gay individuals viewing the parade, as well as nasty comments shouted at them by homophobic protesters, and they believe that the city should be responsible for their emotional upset because they were assigned to participate as part of their job. They are being represented by the Thomas More Law Center, which specializes in promoting Christian values and freedoms through litigation and media attention, according to its website. Evidently, a Christian value attributed to the founder of that religion If thine enemy offend thee, turn the other check unto him seems not to be part of their repertory. *San Diego Union Tribune*, Aug. 7.

California — A San Francisco Superior Court jury ruled in favor of six Folsom State Prison workers who were sued by a transgendered former inmate on the claim that they failed to protect her from being raped by her cellmate. Deliberations about a seventh defendant led to a jury deadlock and a mistrial. Alexis Giraldo, born genitally male, was convicted of a burglary in 2005 and sent to Folsom, where she was housed with a male inmate. She was taking hormones prior to her incarceration, and the California system, like many others, allows such inmates to continue hormone therapy while incarcerated (although it does not provide gender reassignment surgery or provide separate housing for transgender inmates). Giraldo claimed that she warned the guards that her cellmate was becoming abusive but they did not take any steps to protect her. Their defense included allegations that Giraldo had a consensual sexual relationship with her cellmate and that she had not specifically mentioned potential violence to the guards. Seven of the jurors voted to hold the seventh worker responsible for infliction of emotional distress, but California requires the affirmative vote of 9 jurors on a civil jury in order to impose liability. *San Francisco Chronicle*, Aug. 3.

California — Ron Garber, a heterosexual man who says he supports same-sex marriage, is appealing a ruling by Orange County Superior Court Judge Michael Naughton issued in June refusing to relieve Garber of alimony obligations to his ex-wife, Melinda, who has entered into a state law domestic partnership with another woman. Apparently Melinda had already registered her domestic partnership when the Garber divorce was finalized, under terms authorizing alimony payments of $1250 a month for up to five years, terminable earlier if Melinda remarried. Garber argued that the domestic partnership law was supposed to give all the rights of marriage to registered partners, and thus his wife should be considered to have remarried. But Judge Naughton, noting that California law forbids same-sex marriage, concluded that domestic partnership, whatever else it is, is not marriage, and under terms of the agreement Melinda is entitled to keep receiving alimony. In addition to filing the appeal early in August, Garber has failed to make back-payments, and Melinda has filed a contempt proceeding with the court. *Orange County Register*, August 10.

Florida — What part of the phrase "court order" don't they understand? Despite being under a court order to allow a gay-straight alliance to meet at Okeechobee High School pending a final ruling on the merits of a lawsuit challenging the school district refusal to let the group meet, see *Gay-Straight Alliance of Okeechobee High School v. School Board*, 483 F.Supp.2d 1224 (S.D.Fla. 2007), and also 242 F.R.D. 644, 20 Fla. L. Weekly Fed. D 765 (S.D.Fla. 2007) (ruling on discovery in the case), the board was contemplating a new rule banning any "sex-based" or "sexual orientation based" student clubs, on the premise that such allowing such groups to meet would contradict a state law requirement that students be taught sexual abstinence and the benefits of monogamous, heterosexual marriage. The court has already preliminarily determined that a gay-straight alliance is not a "sex-based" club. The board will vote on the proposed rule on September 11. *Ft. Pierce Tribune*, Aug. 15.

Michigan — The state's Supreme Court ruled on July 25 in *Rohde v. Ann Arbor Public Schools*, 2007 WL 2126416, that a group of Ann Arbor tax payers did not have standing to place before the state courts the substantive question whether the school district was in violation of the state's Defense of Marriage Act when it provided domestic partnership benefits to unmarried partners of its employees. According to the Supreme Court, Michigan constitutional standing doctrine requires that plaintiffs suing the school board had to show that they had suffered an "injury in fact" as a result of the action they were challenging. "Plaintiffs admit that their injury is minute and generalized," wrote Chief Justice Taylor for the court. "Thus, it is not a concrete and particularized injury in fact. Indeed, any 'remedy' they might obtain will not confer a financial benefit on them. Moreover, any potential benefit plaintiffs might obtain if they prevailed in this lawsuit would not be any different than that which would be obtained by everyone else in the state. Under such circumstances, they do not have constitutional standing." Four members of the court joined in this opinion. A fifth concurred, concluding that the plaintiffs had not made the constitutionally-required "demand" on the school district that is prerequisite to a suit challenging its action. Another disagreed with the holding, but concurred in the result because other pending litigation will resolve the substantive question of whether the state's DOMA precludes governmental domestic partnership benefits policies.

Michigan — A rather odd lawsuit is pending in the Michigan courts. Peter Hammer, a member of the Wayne State Law School faculty who was denied tenure and reappointment at the University of Michigan, has sued the University in state court alleging that the Law School violated its policy banning sexual orientation discrimination in his case. The tenure committee voted 4–1 to recommend tenure, but the vote in the full faculty was 18–12, a few votes short of the 2/3 majority required under the pertinent operating procedures. There are openly gay and lesbian members of the tenured faculty, some of whom voted against tenure for Hammer based on their view of his scholarship, according to depositions filed by the defendants in support of their motion to dismiss. Hammer, who is openly gay, claims that enough of the no votes were homophobically motivated to make the outcome suspect., contending that he is the first male tenure candidate in the history of the school to be denied tenure. The Law School's immediate response to his suit was to deny that its published non-discrimination policy was legally binding. The policy was published in the context of an overall publication that disclaims any intention to state contractually binding terms. Of course, the adoption of such a policy is required as an aspect of membership in the Association of American Law Schools and compliance with the accreditation standards of the American Bar Association. In addition, Hammer made a promissory estoppel argument

based on representations he said were made to him at the time of his hiring in response to his inquiry about the availability of domestic partnership benefits at the school. Finally, Hammer claimed that by extending his appointment into the 8th year, the school had de facto granted him tenure regardless of the faculty vote. A trial judge has twice rejected the school's theory that the case should be dismissed on the ground that the policy is not binding, and the school took an interlocutory appeal, which required the granting of a motion by the appeals court. In a website maintained by gay students at Wayne State devoted to his lawsuit, Hammer observes that the president of the university, once having learned the nature of the law school's defense, has ordered that it abandon the argument that the policy is not binding, and the matter has been remanded back to the trial court for reconsideration of all aspects of its prior decisions on dismissal, in effect giving the University a third bite of the apple on trying to dispose of the case. The website at which details can be found is http://wayneoutlaws.org/hammer_v_umich/.

New Jersey — A male tenured high school music teacher who was dismissed and lost his teaching license when he admitted to having kissed a male student on the mouth during a counseling meeting was wrongly denied a hearing at which he could present mitigating evidence on the issue of his penalty, according to a ruling by a panel of two judges of the New Jersey Appellate Division in *In the Matter of the Revocation of the Teaching Certificate of Stephen Fox by the State Board of Examiners*, 2007 WL 2428454 (August 2007). Fox was a popular teacher in the New Providence school district. A troubled male student, J.F., was referred to him by the director of the school's Color Guard. According to the court's opinion, "In April 2002, while appellant was working at the school's music library, J.F. came to see him. The two began conversation. Appellant admits that during the conversation, he hugged and kissed J.F. on the mouth. According to appellant, he and J.F. had little to no contact since that one occurrence." At a later time, a man who had been sexually abusing J.F. entered a plea agreement under which he had to identify anybody else who had sexually abused J.F., and he named Fox. Fox admitted under questioning that he had kissed J.F. Disciplinary proceedings were instituted and Fox's teaching license was revoked, leading to termination of his employment. He had sought a hearing to introduce testimonial and character evidence to try to forestall the harsh penalty, but the State Board of Examiners decided that since he was not contesting the charge of misconduct, there was no need for a hearing. On appeal, the court observed that New Jersey statutes provide a right for a hearing before a teaching license is revoked, and remanded the case to the board with instructions to hold a hearing and consider Fox's mitigating evidence.

New Jersey — The divorce case involving gay former Governor James E. McGreevey and Dina Matos McGreevey has been scheduled for trial next May by Union County Superior Court Judge Karen Cassidy, who advised the couple to settle rather than go through the trial. "You folks do not have the money to try this case to conclusion," commented the judge at a hearing on July 31. The main points of contention are custody of the couple's young daughter and the amount of alimony to be paid by Gov. McGreevey. Mrs. McGreevey has claimed that the governor had exposed the child to inappropriate sexually-oriented art, and is reported (by the governor's lawyer) to be demanding substantial alimony payments. According to a report in the *Star-Ledger* on August 1, a permanent alimony award would be unusual in New Jersey for a marriage of this duration, just three and a half years, especially where the ex-wife is well-employed. Mrs. McGreevey is working as executive director of the Columbus Hospital Foundation. Gov. McGreevey has a low-paying part-time teaching position and is planning to enroll at General Theological Seminary in Manhattan this fall to pursue a vocation as an Episcopal priest. He lives with his partner, a wealthy investment banker, and reportedly received substantial earnings from a memoir he published. Mrs. McGreevey also has a book about her experiences as the governor's wife.

New York — New York County Supreme Court Justice Martin Shulman rejected a motion to set aside a jury verdict of almost $1.5 million in a case alleging sexual orientation discrimination by the New York City Police Department. *Sorrenti v. City of New York*, No. 126981.02 (N.Y.Sup.Ct., N.Y.Co., Aug. 16, 2007). Sergeant Robert Sorrenti charged that Inspector James Hall had denied Sorrenti an assignment he sought in the NYPD's Youth Services Section because Hall believed Sorrenti was gay and assumed he would present a risk of molesting the young people served by the program. Two other officers who joined Sorrenti in the suit claimed that Hall and the Department retaliated against them for sticking up for Sorrentini by side-tracking their careers with dead-end assignments that led them to take retirement as soon as they qualified for full pensions. The jury awarded Sorrenti $491.706.00 in compensatory damages assessed against the City, and awarded lost earnings to the other officers in the aggregate amount of almost $1.0 million. Shulman rejected the City's argument that the evidence at trial failed to support the jury's verdict, specifically rejecting the argument that a recent ordinance amending the City's Human Rights Law to mandate a broader definition of retaliation than that applied in federal and state cases could not be applied retroactively to this case. Shulman found that the council intended the amendment to clarify the law rather than change it, and thus as a remedial measure it should be applied retroactively. He found the damage award to Sorrenti to fall well within the range of comparable cases, and rejected a bid to have him recuse himself for bias, pointing out that he had made disputed evidentiary rulings that had favored both sides at different times during the proceedings. The City announced an appeal when the jury verdict was reached last fall, which presumably will proceed now that the post-trial motion has been denied.

Ohio — The Ohio 12th District Court of Appeals affirmed a ruling by the Butler County Court of Common Pleas that a state legislator lacked standing to mount a constitutional attack against Miami University's domestic partnership benefit plan. *Brinkman v. Miami University*, 2007–Ohio–4372 (Aug. 27, 2007). Thomas Brinkman claimed that the continuing partner benefits policy was inconsistent with the recent enactment of the Ohio Marriage Amendment, which prohibits govern bodies from creating a status akin to marriage for unmarried couples. The court's ruling was grounded on several propositions. First, since the University's policy was ultimately to pay for the insurance out of unrestricted donations rather than state tax revenue, Brinkman suffered no injury as a tax-payer and thus lacked standing on that basis. Second, the court found that Brinkman had no interest distinct from any other tax-payer, and that tax-payers do not have standing to challenge any state action merely on the basis that the putative plaintiff is a tax-payer. Only those who are directly adversely affected by the government entity's expenditure would have such standing. Third, the court agreed with the trial court that Brinkman's payment of tuition to the university on behalf of his two young adult children were are students there did not confer standing on him. "Because Brinkman voluntarily makes tuition payments on behalf of his son and daughter," wrote the court, "he remains free to withdraw his financial support if he disagrees with the university's policies." Furthermore, donations rather than tuition revenue pay for the benefits, so the court found no direct interest here. Finally, the court rejected Brinkman's argument that his standing could rest on the "matter of great public interest" at issue in the lawsuit. "Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs," wrote the court. "Indeed, the cases cited by the parties all included requests for relief in mandamus. Even if public-right standing might be available in other contexts, judicial recognition of the doctrine plainly is correlated with the filing of an original action, which the present case is not." Further, the court saw no "pressing need" for resolution of the issues raised by this case, be-

cause it did not see the this as being a "rare and extroardinary" case of great public important. The benefits in question amounted to a fraction of one percent of the university's benefits budget in recent years. Lambda Legal represents intervenors, faculty members who have signed up for domestic partnership benefits for their partners who stand to lose them if the suit is successful on the merits.

Oregon — According to newspaper reports, Multnomah County Circuit Judge Eric J. Bloch ruled on July 13 that the lesbian partner of a woman who gave birth to a child conceived through donor insemination was entitled to be listed as a parent on the birth certificate, in the same way that a husband would be entitled to be listed even though he was not the source of the sperm. Jeana Frazzini sued the state when the birth certificate issued for the baby born to her partner, K.D. Parman, was issued without her name as co-parent. Judge Bloch ruled that failure to recognize Frazzini's parental rights violated the equal protection requirements of the state constitution. Frazzini and Parman were among the small group of couples who were married during the brief period in 2004 when the county was issuing marriage certificates for same-sex couples; these were subsequently declared invalid by the Oregon Supreme Court in the *Li* case. A same-sex marriage opponent, former Republican state senator Marylin Shannon, who is involved with a group seeking repeal of the domestic partnership law that is slated to go into effect on January 1, told *Oregonian* that Frazzini could have adopted the child to achieve the same legal result, or waited until the partnership law goes into effect and registered as Parman's partner. *Oregonian*, July 17.

Texas — Could anyone really make up the facts about what people say in American workplaces today? In *Martinez v. Temple-Inland Forest Products Corp.*, 2007 WL 2045336 (July 18, 2007) (not officially reported), the Texas Court of Appeals affirmed summary judgment for the employer on James Martinez's same-sex harassment suit under the state's law against workplace sex discrimination. Martinez contended that his supervisor called him "coongirl," and persisted in this even after Martinez who referred to himself as a "Puerto Rican coonboy", asked the supervisor to stop. Also, according to the opinion by Chief Justice James T. Worthen, "Thomas told Martinez's coworkers that they could take Martinez out to San Francisco and pimp him out in gay bars there. Martinez stated that Thomas specifically talked about his 'long legs' in that context. Martinez alleged that Thomas continually asked him if he would go to San Francisco with him. Martinez said Thomas increased the frequency of his comments in February 2004 when the city of San Francisco began issuing marriage licenses to homosexual couples." According to the court, both men are "straight," married with children. The court concluded that these allegations did not support a same-sex hostile environment harassment claim, and also found that Martinez's discharge, which apparently precipitated this lawsuit, was supported by legitimate nondiscriminatory reasons involving violation of company rules concerning workplace behavior. A.S.L.

Criminal Litigation Notes

Federal — Military — In *U.S. v. Johns*, 2007 WL 2300965 (Air Force Ct. Crim. App., Aug. 14, 2007) (not reported in M.J.), the court found that an airman who had an affair with the wife of another military member, during which they engaged in consensual oral sex, had been properly convicted of sodomy under art. 125 of the Uniform Code of Military Justice. Airman Johns argued that his conviction was unconstitutional in light of *Lawrence v. Texas* and that he had engaged in oral sex with a consenting adult civilian woman in private (a scenario that when thus described has led to reversals of convictions in some other art. 125 cases) brought the case within the protection of the Due Process Clause. Since other military members were aware of the affair, and the woman was married to an active duty military member, the court found that the trial record provided "more than enough information to determine this conduct was clearly a military matter that affected the military interests of order and discipline." Consequently, under the approach of the Court of Appeals for the Armed Forces in *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), application of art. 125 was not unconstitutional in this case.

Federal — Military — The US Navy-Marine Corps Court of Criminal Appeals upheld the conviction of David R. Mitchell on various charges concerning his abusive relationship with a female service member, whom he coerced into having sex with other men for his amusement, among other charges. The court rejected his attempt to invoke *Lawrence v. Texas* to protect his activity, noting the detrimental effect his conduct would have on military order regardless of the private and possible consensual nature of some of it. *U.S. v. Mitchell*, 2007 WL 2340645 (Aug. 7, 2007).

Federal — D.C. — U.S. District Judge Gladys Kessler rejected an attempt by the notorious "D.C. Madame", Deborah Jeane Palfrey, to get criminal charges against her dismissed on the basis of unconstitutionality of the prostitution laws. *U.S. v. Palfrey*, 2007 WL 2327078 (Aug. 16, 2007). Claiming that all the customers of her business as well as her employees were consenting adults whose activities would be carried out in private, Palfrey contended that under *Lawrence v. Texas*, 539 U.S. 558 (2003), application of federal laws in her case was unconstitutional. "Defendant stretches the holding in *Lawrence* beyond any recognition," wrote Kessler. "In *Lawrence*, the Supreme Court held that laws imposing criminal penalties for private acts of consensual sodomy between adults are inconsistent with the protection of liberty under the Due Process Clause of the 14th Amendment. The Court expressly pointed out that its ruling 'does not involve public conduct or prostitution.' Moreover, the Court in *Lawrence* emphasized that its holding protected private sexual activity in the context of the right to enter and maintain a personal relationship without governmental interference." Characterizing this prosecution as involving "the sale of sexual acts in the commercial marketplace," Judge Kessler found the conduct at issue to be "unquestionably both public and commercial" despite the clandestine nature of the business and the assignations it arranged, and held that it "does not fall within the reasoning of *Lawrence*," requiring rejection of the motion to dismiss. The court also rejected a claim of selective prosecution.

Federal — Missouri — The *St. Louis Post-Dispatch* reported on August 1 that attorney Eric Affholter, former head of the St. Louis Public Defender's Office, pled guilty to charges of having engineered a sham marriage between his boyfriend, Peruvian national Pedro Cerna-Rojas, and Collette Lewis, who was employed as an assistant public defender, in order for Cerna-Rojas to be able to stay in the country legally as the spouse of a U.S. citizen. Cerna-Rojas's student visa was set to expire in 2004, and Affholter cooked up the scheme so that they could remain together. Lewis's boyfriend, attorney Timothy J. O'Leary, a city prosecutor, also participated in the plot, flying with Lewis to Las Vegas where he was an official witness at the wedding on December 20, 2004. After the wedding, they filed papers claiming that Lewis and Cerna-Rojas had consummated the marriage and were living together, when actually each was living with their boyfriend. A news report Aug. 2 on 365Gay.com asserted that the situation came to the attention of authorities when an anonymous tipster called a local television news station. According to the news reports, Cerna-Rojas, who met Affholter when he was lawfully present in the U.S. as a student, has most likely returned to Peru, and the government was not proceeding against Lewis or O'Leary. Affholter faces a sentence range from zero to six months under the federal guidelines. All the attorneys involved lost their jobs as a result of this.

California — On August 9, the California Supreme Court upheld a death penalty conviction in case where the male defendant offered mitigating testimony by psychologists blaming his problems on being raised in a lesbian household tinged with criminality. *People v. DePriest*, 2007 WL 2264441. Timothy DePriest was convicted of killing Hong Thi Nguyen, a young woman of Vietnamese ethnicity, as well

as attempted rape, robbery, and being a felon in possession of a concealable weapon. During the sentencing phase of the case, two psychologists testified about his emotionally disturbed state, which they attributed in part to his childhood experience. He was born to a lesbian mother who was engaged in drug and prostitution activities. They attributed his own confused sexuality to this circumstance and the lack of a father figure. In relating this testimony, the court does not indicate that these experts purported to base their testimony on any published studies or other authoritative sources, and evidently it did not carry much weight with the trial court or the Supreme Court, since the death penalty was ordered and upheld on appeal.

California — In *In re Mario W.*, 2007 WL 2405809 (Aug. 24, 2007) (not officially published), the California 1st District Court of Appeal upheld a determination by the Contra Costa County Superior Court that a gay teenager who had been found guilty of progressively more serious crimes and had absconded several times from various youth facilities, including a home for wayward gay youth should be sent to the Juvenile Justice Division of the state's prison system. Mario pleaded not to be sent to JJD, arguing that the place was infamous for internal mobs beating on those identified as gay, and contended that the court had not given sufficient consideration to his needs as a gay youth in requesting this incarceration. The court of appeal disagreed. Justice Marchiano wrote for the panel, "The court's statements indicate it did not ignore, but duly considered, the evidence that appellant was gay and needed mental health treatment, and that it nevertheless concluded his commitment to the DJJ was appropriate. We are not persuaded that appellant's sexual orientation necessarily precludes a DJJ commitment that is appropriate in all other respects. Nor do we think the juvenile court improperly concluded that appellant would receive adequate mental health treatment at the DJJ. The probation officer testified he had informed the DJJ intake counselor that appellant was taking psychotropic medication and the consultant had indicated to him that the DJJ would assess appellant's mental health needs once he arrived and would provide appropriate treatment. There was no evidence that the DJJ cannot provide mental health treatment to appellant's benefit, beyond a statement elicited from the probation officer that he had "heard" of some controversy regarding the DJJ mental health program. Should the DJJ not provide appellant with treatment consistent with section 734, he is not without a remedy, but may on that ground request a hearing to set aside or modify the order of commitment. (Sec. 779.)

California — Affirming a second degree murder conviction, the California 2nd District Court of Appeal rejected the argument that the defendant received ineffective assistance of counsel because his attorney failed to present expert testimony about "intimate partner battery" as his trial. *People v. Collins*, 2007 WL 2380371 (Aug. 22, 2007) (not officially published). Ladeldrick Collins and Leon Johnson, the victim, had been lovers off and on over several years and shared an apartment "at various times between 2002 and the time of Johnson's death in 2005." Collins had left California in 2003 for about six months, but returned at Johnson's request after Johnson suffered a stroke and needed somebody to care for him. Evidently the relationship was not smooth, and Collins's resentments against Johnson mounted, complicated upon learning that Johnson was HIV+, as was Collins. Finally, a minor spat on February 22, 2005, escalated into Collins beating Johnson to death in the kitchen, Collins later claiming that he "lost it" and had been about to leave when Johnson said to him, "That's why I gave you AIDS, nigger," to which Collins responded with a murderous assault. Collins gave varying accounts of what happened to police investigators and others. The appeal court found, contrary to Collins' allegations on appeal, that the jury was promptly instructed on lesser-included offenses. As to the lack of expert testimony about "intimate partner battery," and Collins's claim on appeal that an expert "could have told the jury that his reactions were consistent with those of a battered intimate partner," the court stated its disagreement, pointing out that Collins and Johnson had not been "partners" in the relevant sense for some considerable period of time. Collins had told police investigators that he was Johnson's caretaker, not his intimate partner. And, the court said that questions about trial counsel's strategy decision were best left to a habeas corpus proceeding, not a direct review of the conviction on the merits.

Illinois — The *Chicago Tribune* (Aug. 16) reported that two teenage girls have pled guilty to misdemeanor disorderly conduct and resisting arrest charges in an incident involving distribution of anti-gay literature targeted at another student in their high school's parking lot. In exchange for the guilty pleas, prosecutors dropped felony hate-crime charges against the two teens. At a sentencing hearing, Circuit Judge Michael Chmiel imposed a sentence of 14 days at McHenry County Jail on the first of the girls to be sentenced, but suspended the sentence as long as she complies with the rules of probation. The girls was sentenced to one year probation and ordered to write a letter of apology. The girls were arrested on May 11 after having distributed about 40 fliers in the student parking lot, which were said to include a photograph of two men kissing, one of whom was identifiable as a student at the school, and also "inflammatory words" about homosexuality. The girl claimed in court that "it was basically a joke" that the girls had taken too far in response to name-calling by one of the boys depicted on the photograph. This is the kind of heavy-handed use of hate crimes laws that builds up political resistence to them.

Kentucky — The Kentucky Supreme Court upheld the murder conviction of Jonathan D. Stark, a gay man convicted by a jury of killing his ex-lover and another man who may have been the ex-lover's current boyfriend, but vacated his sentence of life imprisonment and remanded for a new hearing on sentencing. *Stark v. Commonwealth*, 2007 WL 2404453 (Aug. 23, 2007) (not reported in S.W.3d). The court recounted the physical evidence that led to the identification of the defendant as the killer, including DNA analysis of a cigarette butt found at the scene of the crime, and concluded that the jury could have rationally convicted based on evidence presented at trial. But the court faulted the trial court's refusal to instruct the jury during the penalty phase of the case on the potential impact of "extreme emotional disturbance," in light of psychiatric testimony presented during trial about Stark's fraught emotional state as a result of the break-up that was initiated by the victim, who had been his employer. The court also cautioned the prosecution about making remarks at trial in the jury's presence that suggested the jurors might not be fully responsible for the effect of their verdict, although it found that the remarks that had been made did not, by themselves, create sufficient error to have invalidated the conviction. A.S.L.

Legislative Notes

Florida — On July 23 the Gainesville, Florida, city commissioners voted 5–1 to establish a domestic partnership registry for the city. Unmarried same-sex and different-sex couples who register with the city will gain rights to hospital visitation, participation in a partner's funeral arranagements, and participation in educational decisions for children. The city will recognize the same rights for individuals who are registered domestic partners or civil union partners in other jurisdictions. *Gainesville Sun*, July 24, 2007.

West Virginia — According to the *Charleston Gazette* (Aug. 21), on August 20 the city council in Charleston, West Virginia, approved the addition of sexual orientation to the city's civil rights law, thus making Charleston the first jurisdiction in West Virginia to ban anti-gay discrimination in housing and employment. Mayor Danny Jones, who supported the measure, noted that similar proposals had stalled in the state legislature, and expressed hope that Charleston's example would be followed by other municipalities in the state. The measure's lead sponsor, Councilman Marc Weintraub, indicated that the measure imposed no obligation on the city to provide domestic partnership

benefits, and that religious organizations would not be affected since the law was aimed only at businesses. A.S.L.

Law & Society Notes

Guilty Plea by Senator Craig — Larry Craig, a Republican Senator from Idaho, pled guilty to a disorderly conduct charge several months after being arrested at the Minnesota Airport by an undercover police officer who claimed that Craig had been engaging in the ritual of restroom cruising for sex in the men's room. Craig has a perfect anti-gay voting record in Congress, according to Human Rights Campaign, being an opponent of gay rights legislation and a supporter of such anti-gay measure as the Defense of Marriage Act and the Federal Marriage Amendment. He is married and a father, but has been the subject of rumors about his sexuality for many years, and was "outed" on a blog devoted to exposing closeted politicians with anti-gay voting records, based largely on the testimony of one man who claims to have had sex with Craig but whose full identity is not disclosed on the site. After *Roll Call*, a Capitol Hill newspaper, broke the story on August 27, it became a national media sensation, Craig had to step down as head of the Romney presidential campaign in Utah, and was asked by the Republican leadership in the Senate to step down from a position as ranking Republican on a major committee. Craig, who claims he was not engaged in cruising and made a mistake in pleading guilty without advice of counsel in hopes that the whole matter would go away without becoming public, is up for re-election in 2008. The *Idaho Statesman* had been pursuing the story of Craig's sexuality for more than a year but held up publishing anything until the guilty plea story broke. It's lengthy article on August 28 detailed the various charges leveled against Craig over the years, together with his many denials.

New Jersey Benefits Dispute — Responding to media reports about Lambda Legal's rerpresentation of a truck driver for United Parcel Service who had entered into a New Jersey civil union with his male partner but had been denied spousal health benefits coverage by UPS, Governor Jon Corzine sent a letter to UPS on July 20 urging the company to provide the same benefits for civil union partners that it provides for spouses. "The provision of employee benefits to civil union partners on the same terms as spouses would be more than a symbolic gesture of your company's commitment to eliminating discrimination," Corzine wrote. "Spousal benefits are a key element of the financial and physical well-being of working couples and their children." UPS, like many other N.J. companies, are taking the position that there are not required by the state's Civil Union Law to treat their employees who are civil union partners as if they are married, as the statute only binds the government, not private actors, and federal ERISA preempts any attempt by the state to regulate the administration of non-governmental employee benefits plans. *New York Times*, July 21. It is possible that some company benefits specialists may believe that their plans will lose tax-favored treatment under federal law if they extent benefits to same-sex partners of employees, as a result of the federal Defense of Marriage Act, and there remains controversy as a result of some misguided IRS advice letters that have been floating around the past few years.

California Longshoremen's Pension Benefits — *Inside Bay Area* reported on Aug. 22 that the persistence of Marvin Burrows in seeking pension benefits left by his late partner, longshoreman Bill Swenor, had paid off, as Locals 6 and 17 of the International Longshore and Warehouse Union had renegotiated their contracts to provide such benefits to domestic partners of their members and had agreed to make the benefit retroactive for Burrows, whose partner died suddenly in March 2005 at age 66. The National Center for Lesbian Rights intervened with the union on Burrows' behalf when his claims were rejected on the ground that the pension fund was subject to federal regulation and federal law does not recognize same-sex couples as spouses. Burrows suffered severe financial privation as a result of the loss of his partner, having to move out of their home and to come up with substantial funds for necessary surgery, and desperately needed the pension benefits.

Mormon Church on Homosexuality — Are the Latter-Day Saints changing their tune on homosexuality? Maybe not radically, but press reports in August noted that the church had issued a new publication, titled "God Loveth His Children," in which some of the demonizing tone of prior church pronouncement about homosexuality had been considerably softened. It appeared from the new publication that church leaders have been affected by recent reports of research showing biological factors in human sexual orientation. While continuing to treat homosexual activity as sinful, they counsel people with same-sex attractions not to feel guilt about having such attractions. "Attractions alone do not make you unworthy. If you avoid immoral thoughts and actions, you have not transgressed even if you feel such an attraction." The pamphlet also advises that gay Mormons should forgive themselves for having such inclinations. However, gay observers of the church's position remained critical of the overall message, which included the notion that such attractions might be corrected through prayer and that refraining from homosexual acts is required. *Alameda Times-Star*, Aug. 20.

Presbyterian Church — A regional judicial committee of the Presbyterian Church (USA) voted 6–2 to reverse a lower tribunal's decision and find Reverend Jane Spahr, of San Rafael, California, guilty of violating church law by performing wedding ceremonies for two lesbian couples. Rev. Spahr, 65, who came out publicly as a lesbian in 1978, is the first Presbyterian minister to be subjected to a trial within the church for performing weddings for same-sex couples. The ruling was delivered to lawyers for the parties on Aug. 23. Although Spahr is planning to appeal, she is also retiring from the active ministry as of the beginning of September. *New York Times*, Aug. 25. A.S.L.

Supreme Court of Ireland Upholds Sperm Donor's Injunction Restraining Lesbian Mothers' Temporary Relocation

On July 19, 2007, the Supreme Court of Ireland granted an interlocutory appeal leaving the door open for a sperm donor to assert custody rights over his biological child rights which would essentially place the sperm donor's status equal to or above that of the lesbian mother and her partner. *McD. v. L.*, [2007] I.E.S.C. 28 (Ir.).

Appellants, an Australian woman and her Irish partner, were in a committed, same-sex relationship and planned to start a family in Ireland. They agreed to conceive a child through artificial insemination, with the help of a sperm donor (respondent). After the child was conceived, the parties formalized the arrangement with a signed document stating the parties' interests. The agreement states that the respondent would be recognized as a favorite uncle, and that it would be in the best interests of the child to know his biological father. In addition, the agreement permitted the respondent to visit the child at times mutually convenient to the parties, and it provided that in the event of the biological mother's death, the respondent would maintain contact with the child.

Respondent also offered to provide financial assistance for the birth and day-to-day expenses of raising the child, however, appellants declined these offers. Following the child's birth, the parties regularly visited one another, but within a few months appellants felt that respondent had become too close and requested that the parties observe greater distance and formality in their relationship. Respondent apparently agreed to appellants' request, and only visited the child once per month following their request.

This action ensued when appellants informed respondent that they planned to relocate to Australia for one year in order for the child to form a relationship with the biological mother's family. Respondent brought this action to restrain appellants from relocating and to establish guardianship rights and joint custody of the child. The lower court issued an interim order allowing appellants to vacation in

Australia for approximately six weeks, but required appellants to return to Ireland for a hearing on the merits of respondent's claim. Appellants filed this interlocutory appeal of the lower court's order, and both the High Court and the Supreme Court denied their appeal. A judgment on the substance of the respondent's claim for custody has not yet been issued.

In affirming the lower court's travel restrictions placed on the appellants, the Supreme Court of Ireland displayed confounding support for the rights of a sperm donor, and a disregard for established case law. Family law in Ireland resembles U.S. family law in the early-middle 20th Century, wherein a biological mother has natural rights flowing from her relationship to her child, but a biological father must apply for custodial rights if he is not married to the mother. In other words, the presumption of custody remains firmly with the biological mother of an infant child. Under Ireland's Guardianship of Infants Act of 1964, a biological father has the right to *apply* to be appointed a guardian, but this right does not equate his status with the position of a father married to the mother who is automatically considered a legal guardian.

The Supreme Court recognized that the Guardianship of Infants Act merely gives respondent the right to apply for guardianship, and does not bestow on him any additional rights or any heightened status in relation to the child. However, the Court determined that it was proper to uphold the interlocutory injunction, restraining the appellants from taking the child to Australia, until respondent's application was decided on the merits. Thus, despite having no legal rights in relation to the child, respondent's application in effect trumped the natural and legal rights of the biological mother.

The Supreme Court determined that the paramount issue is the welfare of the child. At the time of the lower court's order, appellants had already rented out their home in Ireland and the non-biological mother had established temporary employment in Australia. The Court noted the burden that would be placed on appellants in awaiting a decision on respondent's custody application, but in balancing the competing interests, Judge Denham stated that "I am guided by the paramount importance of the welfare of the infant, by the young age of the infant, by the fact that a year is a long time in the life of a developing infant, and by the injustice that would be done to the infant if the applicant is ultimately successful in his application."

This conclusion is perplexing in many ways respondent agreed at the outset to nothing more than visitation rights, respondent has no legal connection to the child under Irish law, and the biological mother has sole legal custody of the child. In addition, appellants only planned a temporary, one-year stay in Australia and had already taken significant financial steps to carry out that plan.

The dissenting opinion, authored by Judge Fennelly, notes that the majority's opinion alters the status quo in favor of the respondent rather than the biological mother. In essence, "the rights and relationship of the Applicant to have access to the child will be established as a *fait accompli*, before there is a substantial hearing on the merits." Judge Fennelly also notes that the respondent is not the "father" of the child and cannot be considered within the "scope of any relationship approximating to a family."

The dissent also considered the terms of the parties' agreement: that the respondent was merely a sperm donor, that appellants are the child's parents, that the respondent would not have any responsibility for the upbringing of the child and that the respondent would have no financial obligations to the child. Finally, the dissent argued that the respondent has no legal or constitutional relationship with the child, and that the appellants are only planning a temporary relocation not a permanent removal of residence. Therefore, to allow respondent any right to question appellants' decision to allow the child to know his biological relatives in Australia would require respondent to show a clearly established legal ground to interfere.

The Supreme Court, in upholding the injunction against appellants, created a presumption in favor of the respondent, despite the fact that the Infant Guardianship Act merely gives respondent the *right to apply* for guardianship and nothing more. Ireland does not currently recognize same-sex marriages or civil unions, and this decision clearly demonstrates the Court's reluctance to view lesbian parents as an adequate nuclear family. *Ruth Uselton*

Hong Kong Appeals Court Finds Public Gay Sex Law Unconstitutional

In a unanimous ruling announced on July 17, the Court of Final Appeal of the Hong Kong Special Administrative Region held that Section 118F(1) of the Crimes Ordinance, which, as summarized in one of the opinions, "criminalises homosexual buggery committed otherwise than in private," is unconstitutional under the equality requirements of the Basic Law governing Hong Kong. Upholding the dismissal of a prosecution against two gay men, the court held, in effect, that the government had provided no justification for specifically outlawing homosexual conduct when the analogous conduct is not illegal when committed by heterosexual couples. *Secretary for Justice v. Yau & Lee*, FACC No. 12 of 2006 (July 17, 2007). Trial and intermediate appellate courts had ruled against the government, which appealed to the highest court.

The Hong Kong court follows the British practice whereby there is no designated opinion for the court, but rather each judge writes an opinion or signifies in writing their concurrence with one or more of the other opinions. In this case, several of the judges wrote opinions, but the two most significant aimed at the substantive issues were by Chief Justice Andrew Li and Permanent Judge Kemal Bokhary.

"The prosecutor's allegation against these respondents, both adult men, was that they had, as they subsequently admitted to the police, committed buggery with each other in a car parked in a dark and isolated spot at night," wrote Bokhary. According to Li's opinion, the men had "developed a liaison over the Internet" prior to meeting for sex.

The statute in question provides: "A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for five years." Chief Justice Li noted that this case was the first prosecution under Sec. 118F(1) since its enactment in 1991, presenting a question of first impression for the court. The Hong Kong Basic Law, art. 25, provides that "All Hong Kong residents shall be equal before the law," and art. 39 of the Bill of Rights expands on this general proposition by guaranteeing "to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The court acknowledged that sexual orientation should be included under the rubric of "other status."

The discrimination raised by a statute that was aimed exclusively at homosexual conduct was patent to the judges, and the issue was whether the government could provide a justification for treating homosexual conduct in public more severely than heterosexual conduct. The "common law" tradition of Hong Kong, derived from the long period of British administration, includes an "act outraging public decency" offense that imposes a greater potential penalty than Sec. 118F(1), seven years, but that requires that the conduct have taken place in circumstances where at least two non-consenting members of the public would observe it, which would not apply to this case, where the conduct was rather secluded if not strictly speaking private. The government's only proffered justification for the differential treatment was that when the criminal laws were revised to repeal the law against consensual sodomy, the legislature decided to retain a specific offense of male-on-male "buggery" when "not in private" in order to protect public sensibilities, but the court sensibly observed that the fact of legislative enactment is not itself a justification for discrimination.

Interestingly, the Law Reform Commission Report that had recommended revision of the sex crimes laws had proposed the creation of a general offense of "indecent public behavior" that would apply on a non-discriminatory basis, but the legislature rejected that proposal, having the evident intention of creating a specific crime of non-private homosexual buggery that could be prosecuted under circumstances where the common law public outrage prohibition was not satisfied.

Unlike in the United States, where the Supreme Court's Equal Protection jurisprudence has yet to embrace the application of heightened or strict scrutiny to laws that discriminate based on sexual orientation, the Hong Kong court observed that "the burden is on the Government to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified."

In this case, responding to the government's justification argument, Chief Justice Li commented, "In enacting a package of measures to reform the law governing homosexual conduct, the Legislature was entitled to decide whether it is necessary to enact a specific criminal offense to protect the community against sexual conduct in public which outrages public decency. But in legislating for such a specific offense, it cannot do so in a discriminatory way. Section 118F(1) is a discriminatory law. It only criminalises homosexual buggery otherwise than in private but does not criminalise heterosexuals for the same or comparable conduct when there is no genuine need for the different treatment."

Chief Justice Li went on to describe the social harm stemming from such discrimination. "Homosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law."

Added Judge Bukhary, "Section 118F(1) has the effect of targeting a group defined by sexual orientation, namely homosexual men. Approached realistically, it has that effect even though it makes no mention of homosexuality. Indeed, it would have that effect even if it were to use the word 'person' rather than the word 'man.'" Responding to the government's argument that in the absence of this law, the government could not have prosecuted the appellees because the circumstances didn't satisfy the offense of outraging public decency, Bukhary commented that there was a "fatal weakness" in the government's argument. "It attaches importance to punishing persons who engage in sexual activities in public rather than to protecting persons who are outraged by the sight of such activities. Such an argument does not provide a justification for a law that has the effect of targeting a particular group."

Bukhary argued that if law enforcement authorities believe that the protection of the public requires outlawing this kind of conduct, "their proper course is to try to persuade the executive to introduce non-discriminatory legislation for the purpose. And if the executive saw fit to do that, the legislature could then consider the perceived problem in all its aspects remembering always that law is a problem solver while discrimination is a problem and never a solution." A.S.L.

International Notes

Australia — In the June issue, we noted, based on press reports, the recent decision of the Victorian Civil and Administrative Tribunal to grant an exemption from the public accommodation laws to the Peel Hotel, a gay pub in Melbourne that sought to control its door to preserve the gay male atmosphere of the place against intruding straights and lesbians, especially groups of straight women who liked to come to oggle the gay guys and call out insults. We have since seen a copy of the decision, which is available on the Tribunal's website, cited as *Peel Hotel Pty Ltd*, [2007] VCAT 916 (May 24, 2007). Deputy President McKenzie of the Tribunal wrote that the exemption was necessary to prevent discrimination against gay men: "The exemption promotes that objective of the Act which is to promote the recognition and acceptance of everyone's right to equality of opportunity. It seeks to give gay men a space in which they may, without inhibition, meet, socialise and express physical attraction to each other in a non-threatening atmosphere, in a way that heterosexual couples have in mixed sex venues." McKenzie also characterized as "another form of sexuality-based humiliation or discrimination" the situation created by straight groups coming in to watch the gays for entertainment, finding that it "devalues and dehumanises" the gay men.

Australia — The Australian press reported late in August that the federal cabinet had met to discuss proposals for legislation to extend spousal-equivalent rights to same sex couples, and had failed to conclude the discussion, a split having opened up among the conservative ministers. Ultimately, the meeting reportedly left it up to Prime Minister John Howard to decide whether to pursue such legislation, knowing that his party is sharply split on the matter. *Australian*, Aug. 23.

Brazil — Brazil's public health system will begin providing gender-transition service to transsexuals in order to comply with a court order, the Associated Press reported on August 19 based on a statement by the nation's Health Ministry. A panel of federal judges ruled on August 15 that government coverage of the procedure was mandated under a constitutional provision guaranteeing medical care as a basic right. According to the AP report, the 4th Regional court stated in its ruling that "from the biomedical perspective, transsexuality can be described as a sexual identity disturbance where individuals need to change their sexual designation or face serious consequences in their lives, including intense suffering, mutilation and suicide." The Health Ministry said that it would be up to local health officials to decide who qualifies for the procedure, and what priority it will have on the waiting list of operations to be performed. Those desiring the procedure must be at least 21 years old, diagnosed as transsexual, and have no other personality disorders that would present complications. The Ministry also said that at least two years of psychological evaluation would be required prior to surgery, presumably to avoid making irrevocable changes based on an uncertain commitment.

Brazil — Judge Manoel Maximiano Junqueira Filho is under investigation after dismissing a professional soccer star's defamation suit against a television station that reported insinuations that he was gay. Judge Filho stated in his ruling that the star, known as Richarlyson, should go on TV to counter the charges rather than file suit, also commenting that he should quit pro soccer if he was actually gay. "Not that a homosexual can't play soccer," wrote Filho, according to a translation of his remarks in an Associated Press story, "He can, but he must form his own team and federation, setting up matches with those who want to play against him." The judge concluded that it was not "reasonable to accept homosexuals in Brazilian soccer because it would hurt the uniformity present" in team sports, as soccer is a "virile game" and not "homosexual." Filho expressed concern that allowing gays to play professional soccer might lead to affirmative action and quotas of gay players. After a public uproar and the launching of a government investigation of the judge's remarks, he withdrew his opinion and turned the case over to another judge. A spokesperson for a national gay rights group asserted that there were several gay players in the popular national soccer league, but they feared coming out due to anti-gay animosity in society. *Globe and Mail*, Associated Press report, Aug. 15.

Canada — Justice Marion Allen of the British Columbia Supreme Court (a trial court) has ruled in *Chowdhury v. Argenti*, 2007 BC 1207 (August 10, 2007), that plaintiff Reza Chowdhury's past sexual relationship with a closeted longshoreman, Peter Argenti, could not provide the basis for finding the men to have been common law spouses, and thus Chowdhury had no claim against Argenti's estate. That the men

had not cohabitated during the period prior to Argenti's death was the dispositive fact in this decision. Chowdhury had come to British Columbia as a refugee from Bangladesh, and was given asylum in Canada. His sexual preference was for older men. He met Argenti, then married and the father of three daughters, on the street in Vancouver in 1990, when he was 25 and Argenti was 54. They had an on-going affair, even living together briefly after the Argentis divorced, and Argenti contributed to his living expenses throughout their acquaintanceship, employing Chowdhury briefly as a chef in a restaurant Argenti bought and then closed down a few years later. Justice Allen observed that it was clear that the men had a sexual relationship, but that the evidence never amounted to proving a common law spousal relationship. Argenti's will, made in the late 1990s, designated one of his daughters with whom he maintained a close relationship after the divorce as his sole heir. While hospitalized with his final illness from cancer, Argenti executed a document giving title to his real property to his daughter, and the court found that this property passed outside the estate, rejecting Chowdhury's argument that the transfer was the product of undue influence. Although Chowdhury had counsel when he initially filed suit, by the time of trial he had discharged counsel and was representing himself pro se. The decision is sad to read, as it appears that Chowdhury's extended involvement over 15 years with a deeply closeted man left him feeling ill-used and abandoned. According to the court, the Argenti family was shocked to learn subsequent to his death that he had been a closeted "homosexual." Chowdhury was excluded from all dealings with the funeral. Although she found she could not rule in his favor, Justice Allan was not unsympathetic to Chowdhury, stating in the introduction to her opinion, "While it appears that the two men were engaged in a sexual relationship for all or part of that period of time, the question of whether that relationship blossomed into a spousal union and remained that way for the two years preceding Mr. Argenti's death is complicated by the fact that Mr. Argenti apparently insisted that their relationship be kept 'a dead secret.'"

Canada — The Quebec Human Rights Commission has awarded $10,000 (Canadian dollars) in damages to Theo Wouters and Roger Thibault, a gay couple living in the surburb of Pointe Claire, as compensation for harassment by a local teenage boy, the award running against the boy and his father. Wouters and Thibault, retirees, received media attention as the first gay couple in Quebec to form a civil union when that option became available, resulting in harassment by teens. Quebec's victim-compensation agency paid for the installation of video cameras outside their home to help document the harassment by the boy, who threw projectiles at their house. The boy's name was not released because he was a minor at the time of the incidents giving rise to the human rights complaint. *Globe and Mail*, Aug. 1.

China — A jury in the Hong Kong Court of First Instance found Cheung Yau-Kong, 22, guilty of manslaughter for killing a 67–year-old man by bashing in his skull with a flashlight after the man allegedly made a sexual pass at him. The prosecution had brought a murder charge, but the jury evidently found the sexual advance to be a circumstance under which the defendant acted under provocation. The men met to have dinner, then went to the elderly man's apartment where the alleged sexual pass and resulting killing took place. Cheung admitted assaulting the older man during police interrogation, and admitted that his actions caused the death. Cheung had escaped to the mainland, was intercepted by law enforcement officials and returned to Hong Kong for trial. *South China Morning Post*, July 27. The judge, Recorder Andrew Macrae, sentenced the defendant to ten years in prison.

Colombia — United Nations — The opinion of the United Nations Human Rights Committee concerning the right of a gay man from Colombia to inherit his deceased partner's pension, Communication No. 1361/2005, which was issued on March 30, 2007, is now available in English on the Committee's website. Go to http://www.unhchr.ch/tbs/doc.nsf and enter 1361/2005 in the search function. The case involved a 22–year gay male partnership, including seven years of cohabitation. The "author" of the communication to the committee, the surviving partner, who was financial dependent on his deceased partner, applied to the Social Welfare Fund for a transfer of pension rights, which was denied in 1995 on the ground that transfer of a pension to a person of the same sex was not permitted by the law. The Committee found that this violated Colombia's obligations as a signatory of the Covenant on Human rights, Optional Protocol, art. 5, para. 4, as there was no satisfactory justification for excluding same-sex couples from the rights accorded to opposite sex couples. Colombian law recognizes unmarried cohabiting opposite-sex couples as entitled to certain rights, including pension inheritance.

Mexico — Accepting a recommendation by the National Human Rights Commission, the Mexico City prison system has begun allowing conjugal visits for same-sex partners of prisoners. According to an Associated Press report, most Mexican prisons allow conjugal visits for different-sex partners of inmates, and don't inquire closely into the marital status of the visitors. The decision to allow visits was taken in response to a complaint filed by a man identified as Augustin N., who wanted to visit his partner, Ricardo N., an inmate at Santa Martha Acatitla Prison. The Commission ruled that the refusal to allow the visits was discriminatory, and recommended that the visit be allowed. The Commission's jurisdiction derives from a 2003 statute banning sexual orientation discrimination. *Chicago Sun Times*, July 30.

Spain — The General Council of the Judiciary has initiated disciplinary proceedings against Judge Fernando Ferrin Calamita, who had ruled that a lesbian mother must give up custody of her children unless she marries a man. Calamita awarded custody of the children to their biological father. His articulated reason for the ruling was that children raised in a lesbian household may turn out to be gay, that a "homosexual atmosphere is damaging for the young" and that children are entitled to have both a mother and a father. Ironic stuff, considering that Spain is one of a handful of countries that has made marriage available for same-sex couples. Under the terms of the investigation, the judge could be fined if it is found that he used "unnecessary, exaggerated or disrespectful expressions" in his ruling. *El Pais*, July 26 (English language edition).

United Kingdom — Judge Robin Onions of the Shrewsbury Crown Court gave an 8–month suspended sentence to Suzanne Mitchell, who falsely claimed that she was single when she registered under the Civil Partnership Act with Caroline Beddows. The Act provides that a person who is married may not enter into a civil partnership. According to press reports, Mitchell falsely told Beddows that she had divorced her husband. In addition to the suspended sentence, Mitchell must perform 100 hours of community service. The British press had fun with the case, of course, referring to the "lesbian bigamist." This was reportedly the first prosecution for misrepresenting marital status in violation of the Act. *The Times*, Aug. 7.

United Kingdom — According to an Aug. 16 report from *UK Gay New*, a lesbian from Iran named Pegah Emambakhsh, who arrived in the U.K. in 2005 and sought asylum, was on the verge of being deported back to Iran when last minute intervention by a member of the government, Minister of Sport Richard Caborn, led to a stay, at least until August 27. Amazingly, British immigration authorities do not appear to understand the gravity of deporting to Iran an openly-lesbian woman whose asylum petition has been discussed in the British press. According to Emambakhsh, prior to her arrival in the U.K she fled Iran after her same-sex partner was arrested and subsequently tortured and sentenced to death, and her father was tortured to attempt to get him to reveal her whereabouts. It was hoped that the publicity given to the case would lead to a revision of views on the part of immigration officials in the U.K. concerning the dire position of gay people in Iran. What part of the phrase "execution by stoning" don't they understand?

United Kingdom — In what may have been the first sexual orientation discrimination claim to have been filed against the British law firm, the major firm Clifford Chance has reportedly settled a discrimination claim filed by Michael Bryceland, a former partner in the firm's competition practice, who left the first and asserted his claim earlier in the year. Given the compensation level of Clifford Chance partners, there was speculation that the settlement might run to seven figures (in pounds, not dollars). The firm released a terse statement on Aug. 20: "The parties are pleased to confirm that the matter was amicably resolved to the mutual satisfaction of both parties." *Daily Telegraph*, Aug. 21.

United Kingdom — British media reported in mid-July that John Reaney, a gay man from North Wales, had triumphed before an Employment Tribunal on his claim of unlawful discrimination by the Hereford Diocesan Board of Finance. Reaney, presenting sterling qualifications, was blocked for appointment as a youth worker by the Bishop of Hereford, Anthony Priddis, on the ground of his sexual orientation. A date for a remedy hearing was to be set. Reaney testified before the tribunal that he had been questioned by Bishop Priddis about his gay relationships during an interview last year after he had emerged as the most qualified candidate for the job. The Bishop took the position that anybody who engaged in an extra-marital relationship was not fit to be a youth worker under the auspices of the Church of England. The Church does not sanction same-sex marriages, although the U.K. now provides civil partnerships for same-sex couples that carry all the legal rights of marriage. *Birmingham Post*, July 19.

United Nations — The U.N.'s Economic and Social Council has granted consultative status fo two LGBT non-government organizations, The LGBT Coalition from Quebec, Canada, and the Swedish LGBT Rights Federation. This action overruled a negative recommendation from the Council's NGO committee. The consultative status guarantees these organizations access to U.N. meetings and gives them a platform for providing reports to the Council on LGBT issues. A.S.L.

Professional Notes

The National Lesbian & Gay Law Association has presented its Allies for Justice Awards for 2007 to San Francisco Mayor Gavin Newsom and incoming American Bar Association President William H. Neukom. The awards were presented on August 10 at a reception in San Francisco during the ABA annual meeting. Newsom was cited "for his courageous decisions in support of equal legal rights for LGBT couples." Neukom was cited "for his leadership in developing the new ABA Commission on Sexual Orientation and Gender Identity." The NLGLA's annual Lavender Law Conference will be held in Chicago on September 6–9.

The Williams Institute has conferred the 2007 Dukeminier Award for scholarship on LGBT issues to Holning Lau, a Teaching Fellow at the Institute, Suzanne Goldberg, Clinical Professor at Columbia Law School, Angela Harris, Professor at Boalt Hall Law School, and Ariela Dubler, Vice Dean and Professor at Columbia Law School. The articles for which they are being recognized will be reprinted in a special volume by the Williams Institute at UCLA Law School. Check their website for information about obtaining a copy of the journal.

The co-chairs of the NY City Bar Association's LGBT Rights Committee for the 2007-2008 Committee year will be Allen Drexel and Adrienne Mundy-Shephard. A.S.L.

AIDS & RELATED LEGAL NOTES

California Appeals Court Voids HIV Testing Order, Remands for New Findings

Antonio Hernandez, who recently pled no contest to a charge of continuously sexually abusing his step-granddaughter, has successfully challenged a portion of his sentence. Judge Duffy, writing for the Sixth District Court of Appeal in California, ruled that the statutory requirements for mandatory HIV testing were not met and the test could not be imposed on Mr. Hernandez as part of his sentence. In *People v. Hernandez*, 2007 WL 213760 (July 25, 2007), the Court of Appeal held that the trial court lacked sufficient evidence to make the implied finding of probable cause required by California penal law, and returned the case to the trial court in Santa Clara County.

Judge Duffy's decision relied heavily upon the manner in which Hernandez molested his step-granddaughter. According to a social worker's report, the seven-year-old girl had been kissed repeatedly and digitally penetrated on numerous occasions while living with Hernandez. Another report showed that Hernandez had kissed the girl on the mouth, though that report did not specify whether the kiss was open-mouthed. After pleading no contest, Hernandez was sentenced to 12 years in prison and a mandatory HIV test. Hernandez only appealed the testing order.

Judge Duffy began his discussion by noting that, in California, involuntary testing for HIV is strictly limited by statute. Penal Code 1202.1 requires that there be "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV" transferred from Hernandez to his step-granddaughter. Duffy points out that this is an objective standard, requiring a "person of ordinary care and prudence to entertain an honest and strong belief" that such fluid had been transmitted.

In evaluating the specific acts of child molestation carried out by Hernandez, Duffy turned to the only act that had a possibility of transferring bodily fluids kissing. The record showed no evidence that the kisses were open-mouthed. The court refused to affirm the HIV test without positive proof of fluid transfer, citing precedent that "mere speculation that there might have been evidence" is not enough. Although there may have been a possibility that saliva was transferred, the court could not affirm the order for HIV testing unless the prosecutor had offered evidence to that point. With no evidence of saliva transfer, it was improper for the trial court could to find "probable cause" that HIV bearing fluid was transferred.

Although the issues before the court were resolved at this point in the opinion, Duffy went on to say that even if it could be proven that saliva had been transferred between Hernandez and his step-granddaughter, he still would have ruled against the testing order. Duffy favorably cited the CDC's fact sheet on HIV transmission which "categorically" notes that HIV transmission through saliva has never been proven. In effect, Duffy was saying, through dicta, that a reasonable person could not find that saliva is a " bodily fluid capable of transmitting HIV" as a matter of law.

As a remedy, the court noted that the "serious health consequences of an HIV infection" prevented it from simply striking the HIV testing order. The court instead remanded the case for further proceedings at the prosecutor's election to give the prosecutor an opportunity to present further evidence. Given the court's discussion on saliva transfer, it is unlikely that testing will be ordered unless new evidence that was previously unreported by the social workers involved in the case is introduced. *Chris Benecke*

California Appeal Court Rejects Discrimination Claim Involving Prescribed Marijuana Use

In *Cassell v. Walters & Wolf Glass Co.*, 2007 WL 2122643 (Cal. App., 6th Dist., July 25, 2007) (not officially published), plaintiff-appellant Bryan A. Cassell, a member of the glazier's union, had worked for defendant Walters & Wolf Glass Company in the past as an apprentice. He was loaned out to another employer, then rehired in May 2004. Upon rehire, he received a company handbook and was required to take a drug test. He tested positive for marijuana, and the testing company contacted the defendant's safety director, who determined the result may have been due to use of Marinol, a prescription

drug that causes drowsiness. Cassell's employment was terminated, ostensibly for drug use and safety concerns.

Cassell responded to these events by asking the Medical Center where he was being treated to send a copy of his Marinol prescription to a person who heads a program that contracts with the union to provide substance abuse services. The nurse at the Center faxed a copy of his general marijuana authorization, which disclosed that he was HIV+ and authorized to use marijuana under the state's compassionate use statute. The recipient of this did not forward it to the employer.

Cassell sued under the Fair Employment and Housing Act, claiming discrimination based on disability and perceived sexual orientation, and also claiming improper disclosure of his HIV record. The trial court granted summary judgment to the employer, finding credible the employer's contention that they knew nothing of his HIV status, sexual orientation, or marijuana prescription when they discharged him, and had never received any notice about his HIV status to disclose to anybody. The trial judge found that the employer proceeded on a legitimate safety basis. Cassell (or his counsel) made the strategic mistake of not raising the issue of the compassionate use statute and public policy as part of the case at the trial level, but then pushed that theory on appeal. The court of appeal found that the issue was raised too late, and in any event, the employer had legitimate reason to discharge an employee who would be dealing with heavy glass and who was using substances causing drowsiness.

This seems to create a bit of a Catch–22 for the employee, who followed the rules, obtained a prescription for his pot to deal with appetite problems caused by HIV infection that lead to wasting syndrome, and then was discharged before he could get the requisite evidence about his lawful medicinal use of marijuana to the employer's attention. On the other hand, a glass company could have significant concerns about employing a glazier whose acuity may be compromised by the residual effects of off-duty marijuana use. The problem hardly seems solvable through the clumsy mechanism of a disability discrimination lawsuit. A.S.L.

Three-Week Delay in Treatment for HIV Positive Detainee Is Not Deliberate Indifference

On August 16, 2007, former Benton County Detention Center ("BCDC") detainee Scott Richey, who is HIV+, lost his "deliberate indifference" claim against BCDC medical personnel and officials. *Richey v. Mullins*, 2007 WL 2350389 (W. D. Arkansas). U.S. District Judge Jimm Larry Hendren accepted Magistrate Judge James Marschewski's report and recommendation to dismiss Richey's claims after no written objections were made.

The Magistrate held a one-day evidentiary hearing. All of the quotes herein are excerpted from the Magistrate's first person summaries of the testimony. According to Richey, he was arrested on July 17, 2005, after he "ran from the police." After his arrest, he was taken to a hospital for treatment for "open bleeding wounds." According to the hospital's records, he reported he was HIV+ and had Hepatitis C at that time. Richey has been HIV+ since 1990.

Richey was then transferred from the hospital to BCDC. He stated that when he was taken to the BCDC, he was intoxicated at the time and he admitted that he never told anyone at the time of his processing that he was HIV+ or had Hepatits C. Instead, he assumed that the hospital would relay this information to BCDC.

There was no dispute that Richey did not receive his HIV medications from July 17, 2005 through August 11, 2005. However, in controversy was when medical personnel learned that Richey was HIV+. According to Dr. Mullins, former BCDC doctor who treated Richey, he "had no clue" that Richey was HIV+. However, the court noted that "Dr. Mullins did make a notation on the medical chart on July 19th that Richey was HIV positive." In addition, Dr. Mullins admitted that the BCDC received a letter from Richey's treating physician, Dr. McGhee, dated July 29, 2005, which indicated that Richey was HIV +, although it is unclear when Dr. Mullins became aware of Dr. McGhee's July 29, 2005 letter.

Dr. McGhee testified that on July 29, 2005, BCDC contacted her. As a result, she faxed a list of Richey's currently prescribed medications — Sustiva; Zerit, Epivir (HIV medications), Bactrim (to prevent pneumonia and parasites when the subject's T-cells are below 200); Klonopin (anti-anxiety), Wellbutrin (to treat depression) and Sporanox (to treat fungal infections). Dr. McGhee stated that Richey "definitely needed Sustiva, Zerit, Epivir, and Sporanox for HIV."

On August 11, 2005, Dr. Mullins prescribed those medications on Dr. McGhee's list which he deemed medically necessary — Sustiva; Zerit, and Epivir. He chose not to prescribe Sporanox, Klonopin and Wellbutrin. According to Dr. Mullins, "Richey never complained... about not getting his HIV medication or not getting blood tests. [He] saw him eighteen or twenty times. Cost never came into what [he] prescribed." Dr. Mullins also claimed that he never received a complaint from Richey about depression.

While Richey was at BCDC, he continued to develop skin problems, i.e. a severe rash and various sores and lesions. Dr. Mullins tried various medications which were not effective. Eventually, Richey was sent to a dermatologist, Dr. Clifton, who determined Richey had skin cancer.

There was testimony from three BCDC inmates who resided with or knew Richey at the time in question. They all testified that Richey had various sores and/or that they were also provided with inadequate medical care by BCDC.

The Arkansas Department of Correction's records indicated that there were two prior occasions when Richey did not receive his HIV medications for several weeks while incarcerated. Lab results also indicated that in August and October 2004, Richey's T-cell count was 165 and 332, respectively. Richey's viral load in August 2004 was 153,000 and in October it was 30,900. By January 2006, Richey's T-cell count was 428 and his viral load was 6,072. According to Dr. McGhee, in June, Richey's viral load was 14,800 and his T-cell 142.

Richey brought this case alleging deliberate indifference, the 8th Amendment standard for challenging inadequate healthcare for inmates, against Dr. Mullins and Sheriff Ferguson, the chief official of the jail who also developes the policies and procedures regarding health services for the jail. Magistrate Marschewski never addressed the issue of whether Richey's T-cell count and viral load were indicators of any adverse health consequences.

Instead, the Magistrate found there was no evidence of deliberate indifference on Dr. Mullins' part because Richey never explicitly told anyone at BCDC that he was HIV positive. "At most, the evidence shows Dr. Mullins failed to appropriately follow-up and obtain the necessary medical records to verify Richey's HIV status. This does not amount to deliberate indifference."

While Dr. McGhee never saw Richey again after he was incarcerated, her testimony, based on her examinations of him prior to June and his medical records, proved fatal to Richey's claims. She stated that "[t]he lab results show the virus was at least partially suppressed." Dr. McGhee also testified that "[a] three week delay in a patient receiving his HIV medication is not a major problem. It sometimes takes that long to get drugs from companies or get funding for a patient."

The Magistrate also found that Richey failed to establish that the delay in treatment had any effect upon, or had worsened, his medical condition. According to Dr. McGhee, "Richey had a fungus on his skin in June[, for which she] prescribed the Sporanox. ... The fungus can be anywhere from the brain to the skin and goes along with HIV."

The Magistrate described Dr. Mullins' error in failing to prescribe Sporanox as a mistake, stating that this error was "based on [Dr. Mullins'] mistaken belief that [Sporanox] was not related to the treatment of HIV." The Magistrate also found that there was no indication Richey suffered any adverse health consequences as a result of not having Sporanox be-

cause Dr. McGhee testified that his skin cancer was "unrelated to Richey's HIV status and the Sporanox would not have prevented Richey from developing the condition."

Finally, the Magistrate rejected Richey's argument that Dr. Mullins exhibited deliberate indifference for failing to order blood tests to check Richey's T-cell count and viral load on a more frequent basis. While Richey maintained that blood tests should be taken every three months, Dr. McGhee testified that blood tests should be done every three to six months. The blood tests were done in June by Dr. McGhee and done again in December while he was incarcerated at the BCDC.

With respect to his claims against Sheriff Ferguson, Richey argued that the delay in his treatment for HIV was based on the Benton County's alleged policy requiring detainees to pay for their own medical care related to preexisting conditions and/or budget concerns. The Magistrate found that Benton County paid for the medical care of its detainees and that Richey failed to establish that budgetary concerns impacted his treatment.*Eric Wursthorn*

HIV+ Immigration Detainee Dies in Custody After Denial of Medication

According to an Aug. 16 report in *Gay City News* by Andy Humm, a transgendered person with AIDS who was being held by immigration officials at a San Pedro detention center in California for two months died in custody after being denied "critical HIV drugs" despite repeated requests for treatment. The report on the fate of Victoria Arellano does not indicate why she was being held in detention, but noted that she was shackled to the hospital bed when she died. Conditions at the Center are the subject of a lawsuit filed by the ACLU in June. A.S.L.

New York Enacts New Law on HIV Testing of Rape Defendants

Responding to complaints that under existing laws rape victims need to wait until a defendant pleads guilty or is convicted before they can get a court order to learn the defendant's HIV status, the New York State Legislature passed and Governor Eliot Spitzer signed into law an amendment to the criminal procedure law authorizing courts to order confidential HIV testing of persons who have formally been charged with various sex crimes involving sexual intercourse, oral sex or anal sex as a necessary element of the offense. The amendment will be codified as sec. 210.16 of the Criminal Procedure Law. It incorporates by reference the confidentiality requirements of Article 27–F of the Public Health Law, and mandates that the test result be provided to the victim and the defendant but not to the court. A.S.L.

AIDS Litigation Notes

Federal — Arizona — U.S. District Judge Mary H. Murguia granted a substantial award of fees and costs to an employer who had obtained dismissal of all the counts of an HIV+ plaintiffs complaint in *Hoffman v. The Neiman Marcus Group*, 2007 WL 2023473 (D. Ariz., July 11, 2007). Plaintiff Hoffman had been employed as a department manager in a Neiman Marcus store in Boston. He interviewed for a similar position in the company's Scottsdale store, but was not offered the position. He was informed that he could remain in his Boston position, but he quit and moved to Arizona anyway, filing suit against Neiman-Marcus, alleging he was denied the Scottsdale position because he is HIV+. The problem with his case was that there was no evidence that anybody in the Scottsdale store knew about his HIV status, and even few in the Boston store knew. Ultimately Hoffman agreed to dismissal of several counts of his complaint, and the court dismissed the rest in a summary judgment ruling. Then defendant presented a fees and costs award of $102,496.33, much of which was attributable to plaintiff's alleged lack of cooperation during the discovery process. In granting the motion, the court basically concluded that this was a frivolous case. Indeed, taking the facts as related by the court, it appears Hoffman just assumed that because he was HIV+ he had certain legal entitlements under contract and anti-discrimination law, a supreme fallacy.

Federal — Delaware — An HIV+ inmate in the Delaware prison system will be able to continue with his complaint concerning lack of treatment during the early stages of his incarceration, but suffered dismissal of a large part of his suit concerning a later period when the gravamen of his case is disagreement about what treatment is appropriate rather than lack of treatment, according to a July 3, 2007, ruling by District Judge Farnan in *Hoffman v. Danberg*, 2007 WL 2009712 (D. Del.). Additionally, Judge Farnan dismissed many of the named defendants from the case, on the ground that the respondeat superior theory is not available in 8th Amendment litigation, and that collective defendants, such as the entire medical staff of a particular facility, are not appropriate defendants. The case thus narrowed, inmate Michael Kevin Hoffman will have the opportunity to proceed pro se. Finding that he had been doing a reasonably good job of bringing his case so far, the court rejected a request for appointed counsel, and also denied Hoffman's Rule 26 discovery request, observing that inmates representing themselves pro se are not entitled to ordinary discovery. However, the court did note that a subpoena could be issued to a former named defendant, a corrections commissioner, seeking information as discovery.

Federal — D.C. — Juggling various statutes of limitations and filing requirements proved too demanding for the plaintiff in *Kamen v. International Brotherhood of Electrical Workers (IBEW)*, 2007 WL 2319857 (D.D.C., Aug. 15, 2007), resulting in dismissal of all but one of his causes of action. The gay male HIV+ plaintiff claimed that things went sour for him as an international union rep after he was hospitalized with AIDS complications and his employer learned for the first time that he was both gay and HIV+. He was excluded from prior activities, he charges, denied a merited promotion to the union's headquarters, and soon discharged improperly. He filed complaints with various agencies and ultimately in the federal district court, under the Pennsylvania Human Rights Act (disability discrimination), the Employee Retirement Income Security Act (discrimination to prevent payment of benefits), the District of Columbia Human Rights Act (disability and sexual orientation discrimination), and the Americans With Disabilities Act (disability discrimination). According to the ruling by District Judge Rosemary M. Collyer dismissing all but the ADA claim, Kamen's discrimination filing with the EEOC was the only valid one, as he failed to complete the verification box on the form, making it inadequate to toll under the Pennsylvania statute, the D.C. complaint (obviously filed to add in the sexual orientation claim, not actionable in Pennsylvania) was clearly too late, and the ERISA claim missed the deadline that has been set up by the courts in default of a statutory specification.

Federal — Georgia — Unfortunately for prison inmates living with HIV, federal courts generally find that they are not entitled to appropriate treatment, since under prevailing standards incompetent but well-meaning treatment is consider sufficient to meet 8th Amendment requirements. For example, in *Chapple v. Wrobel*, 2007 WL 2345242 (S.D. Ga., Aug. 14, 2007), Chief U.S. District Judge William T. Moore, Jr., commenting that "Plaintiff has a forum for his malpractice claims in the state court system," adopted a report by Magistrate James E. Graham rejecting an 8th Amendment claim based on the inmate's credible allegation that failure of Ware County Jail authorities to provide appropriate medication had resulted in his HIV infection progressing to full-blown AIDS. Although the prison doctor, a named defendant, had examined the inmate and prescribed some medication, the inmate contended that in was "the incorrect type of medication." Indeed, alleged the inmate, the nurse at the Ware Wellness Clinic had told him what the proper medication was, but the doctor refused to provide it. Not an 8th Amendment problem, said Magistrate Graham, since the standard is "deliberate indifference," not negligence. Quoting from prior 11th Circuit caselaw, Graham observed that "The medical care provided to inmates

need not be 'perfect, the best obtainable, or even very good.'" Concluded the magistrate, "Plaintiff received medical care from Defendant. Although this care was arguably not perfect, Plaintiff has failed to allege facts showing Defendant violated his constitutional right to be free from cruel and unusual punishment. At most, Plaintiff has alleged a difference of opinion or medical malpractice, which is insufficient to support a claim that his constitutional rights have been violated." As is typically the case, inmate Chappel was representing himself pro se in this case.

Federal — Louisiana — U.S. Magistrate Judge Karen L. Hayes was notably unsympathetic to complaints by gay state inmates in a pair of reports and recommendations she issued in mid-June, finding both cases frivolous and recommending dismissal. In *Rhine v. Kelley*, 2007 WL 2071821 (W.D.La., June 19, 2007), inmate Chris Rhine complained that when he was transferred to the Caldwell Correctional Center, some corrections officers made comments about his sexual orientation in front of other inmates, and told inmates at the dorm in which he was placed "that a punk was coming in their dorm," as a result of which his reputation was impugned and other inmates in the dorm "tried to mess with him." Hayes found Rhine had not alleged any constitutionally cognizable injury, as the Supreme Court has ruled in *Paul v. Davis*, 424 U.S. 693 (1976) that defamation by a public official is not a constitutional tort and that Rhine had not alleged any specific physical injury. This completely looks past the subtext of Rhine's case: that the guards were setting him up to be sexually assaulted. Evidently Hayes won't consider this to be serious until after Rhine suffers the assault. In the other case, *Robinson v. Morehouse Parish Jail*, 2007 WL 2071819 (W.D.La., June 18, 2007), inmate Vincent Robinson claimed that he suffered various forms of discrimination while incarcerated, including denial of television, telephone, and shower and being placed in administrative segregation because he was gay. He also claims that the guards threatened him with physical harm. Boo-hoo, in effect, said Magistrate Hayes, who did not consider discrimination in prison perks or threats unaccompanied by actual assaults to be a basis for constitutional complaint. Tough love for gays in Louisiana prisons, as far as Hayes is concerned.

Federal — Michigan — U.S. District Judge Victoria A. Roberts previously denied a motion for a writ of habeas corpus filed by Michael Holder, who was convicted in a jury trial of "sexual penetration with an uninformed partner by a person infected with AIDS." In this motion, Holder sought a certificate of appealability so he could bring his case to the court of appeals. Judge Roberts denied the motion, finding that none of Holder's allegations about defects in his trial stood up. In this case, petitioner's female sexual partner was infected with HIV as a result of their intercourse and became pregnant, after which she recanted her prior testimony and claimed that he had disclosed his HIV status to her before engaging in unprotected intercourse. Holder was sentenced to 120–180 months. *Holder v. Palmer*, 2007 WL 2050348 (E.D. Mich., July 16, 2007).

Federal — New York — U.S. District Judge Carol B. Aman approved a magistrate's report in *Orosco v. Long Island Jewish Medical Center"*, 2007 WL 2078300 (E.D.N.Y., July 18, 2007), the effect of which was to deny the plaintiff's motion for a preliminary injunction and to grant summary judgment to the employer on an AIDS-related discrimination claim. The plaintiff asserted that he was regarded as having HIV as a result of a co-worker seeing his wife's medical chart while his wife was a patient in the hospital giving birth to their child. The plaintiff claimed that after that event he took a lot of ribbing as being HIV+, although he was not, and ultimately discharged as a food service worker. The court found no basis for issuing a preliminary injunction, inasmuch as the remedy, if any, for discrimination in this case would consist of financial damages, with or without an order of reinstatement and back-pay. On the merits, the court found no evidence in the record directly supporting the plaintiff's allegations that he was mistreated and discharged because he was perceived to be HIV+. Indeed, the employer had diligently compiled a paper record documenting the plaintiff's short-comings as a worker, meeting the court's requirements for showing a non-discriminatory reason for the discharge. The court also noted, in passing, that the plaintiff had not made any factual allegations concerning how HIV infection would be considered to limit a major life activity of the plaintiff.

Federal — South Carolina — In *Washington v. Garden State Life Insurance Co.*, 2007 WL 2363827 (D. S. C., Aug. 16, 2007), U.S. District Judge Margaret B. Seymour granted summary judgment to the insurance company, ruling that it was entitled to void a $100,000 life insurance policy and refuse to pay out benefits that would otherwise be due upon the death of the insured from untreated HIV infection. The insured tested HIV+ in 1994 and was seen several times by a physician, but did not undertake any treatment at that time. He next showed up at the doctor six years later, in 2000, when his HIV status was confirmed, but he still refused antiretroviral therapy. Early in 2001, he submitted an application to defendant to purchase a $100,000 life insurance policy designating his father, the plaintiff in this case, as beneficiary. On the application, he answered No to the question whether he had ever been diagnosed as having AIDS or a positive test result for "the AIDS virus." The policy was issued, but lapsed due to non-payment of premiums in August 2005. In the meantime, the insured had seen his doctor again several times during 2001 shortly after the policy was issued, but no subsequent records of any medical treatment prior to his death were submitted to the court. He filed an application to reinstate his insurance coverage in December 2005, answering No to the questions whether he had within the past five years consulted a physician for or been diagnosed with any physical impairment or sickness, as well as specifically whether he had been diagnosed with AIDS or tested positive for "the AIDS virus" during that time period. The police was reinstated. The insured died in May 2006 and his father applied for benefits. The insurance company investigated and cancelled the policy on grounds of deceptive application, and the father sued. In granting summary judgment, Judge Seymour noted that South Carolina provides a two-year incontestability period. Had the insured paid his premium to avoid a lapse in coverage during 2005, his father theoretically could have collected the $100,000 benefit, since the policy would have been in effect continuously for more than two years, rendering it incontestable on grounds of deception in the application process. However, with the lapse in coverage, a new contestability period began, and the insurer was privileged to cancel the policy, since it would not have issued the policy had the insured answered the questions on the new application honestly. The court rejected the argument that there is any distinction between "the AIDS virus" and "HIV" for this purpose, commenting, "In the court's view, no reasonable person who had been identified as HIV positive since 1994 would be unaware that the terms 'HIV' and 'the AIDS virus' have been used interchangeably."

California — The 2nd District Court of Appeal revived a discrimination case under the Fair Employment and Housing Act in which a man living with AIDS claims he was unlawfully denied service on a prescription for anti-viral HIV medication at a Walgreen's pharmacy in Los Angeles County. *Fouse v. Shin*, 2007 WL 2353364 (Aug. 20, 2007) (not officially published). According to the per curiam opinion, the pharmacist asked the plaintiff, in the presence of other customers, whether he had cancer or AIDS, pressuring the plaintiff into stating that he had AIDS in order to get the prescription filled. Ultimately, the very upset patient left the store and had the prescription filled elsewhere, and filed suit alleging discrimination based on race, disability and perceived sexual orientation, as well as breach of medical confidentiality, intentional infliction of emotional distress, negligence and fraud. The trial judge granted judgment on all grounds to the defendant. The appeals court revived the discrimination and emotional distress claims. The pharmacist had argued that state Medi-Cal rules required him

to inquire about the plaintiff's diagnosis, as coverage of the anti-retroviral medication was restricted to patients diagnosed with cancer or AIDS, and had moved to dismiss the case using the anti-SLAPP statute, which is intended to dispose of lawsuits that are brought for the purpose of stifling protected speech. Contrary to the trial judge, the appeals judges did not think the anti-SLAPP statute applicable to this situation, and found that plaintiff had alleged a prima facie case under the FEHA. However, it found no violation of the confidentiality laws based on plaintiff's factual allegations.

Massachusetts — In *Doe v. City of Lowell*, 69 Mass. App. Ct. 1113, 2007 WL 2127695 (table) (Mass.App.Ct., July 25, 2007) (unpublished disposition), the appeals court upheld a ruling by the Circuit Court that the John Doe plaintiff, a former Lowell police officer, was entitled to disability benefits under a statute providing for such benefits for police officers injured in the line of duty. Doe suffered a needle-stick injury while apprehending a drug suspect in 1989. He did not undergo HIV testing at that time, but was tested in 1991 and was positive. His condition deteriorated by the turn of the century and in February 2000 he presented the police department with a letter form his doctor stating that he was unable to work due to an undisclosed medical condition. He stopped working and applied for disability pay, which was denied by city, which argued that he had not proved that his HIV infection (which by then had been disclosed) was occupationally related. The city contended that Doe might have been infected through sexual contact. The city's doctor did not diagnose Doe as disabled until November 2003. In the lawsuit, Doe claimed benefits dating back to his doctors February 2000 letter. The trial court concluded that Doe had sufficiently shown that his HIV infection stemmed from the 1989 incident, and awarded benefits as per his demand. The appeals court upheld the liability ruling, but determined that prior to the November 2003 diagnosis, Doe had not adequately documented his disability status, so the decision was amended to start his benefits running from the later date.

Michigan — Confronting a question of first impression in the state, the Michigan Court of Appeals ruled in *People v. Odom*, 2007 WL 2301573 (Aug. 9, 2007), that HIV qualifies as a "harmful biological substance" for purposes of determining criminal liability of an inmate who allegedly spit bloody saliva at a corrections officer. In the per curiam opinion, the court said, "We take judicial notice of the fact that blood is commonly known to be a means of spreading HIV," thus justifying classifying "HIV infected blood" as a "harmful biological substance" for this purpose. "Accordingly, we conclude that there was sufficient evidence to support a score of 20 points for OV 1 because of Odom's exposure of the officer to a 'harmful biological substance' by spitting HIV positive blood on him." Score 20 points for generalized ignorance about HIV transmission at the Michigan Court of Appeals. No need to cite any study showing that HIV is transmitted by spitting, a "common sense belief" held by the appellate judges, which is quite convenient since scientific evidence for that proposition is totally lacking. Taking "judicial notice" of commonly-believed misinformation in determining criminal punishment strikes this observer as constitutionally questionable.

Missouri — The Missouri Court of Appeals ruled that James Wilson is entitled to a new trial on charges of exposing another to HIV, statutory rape and statutory sodomy, because the trial judge barred him from preventing impeachment evidence bearing on the credibility of the victim, his accuser at trial. *State v. Wilson*, 2007 WL 2089277 (Mo.Ct.App., E.D., July 24, 2007). Wilson, who was HIV+, was charged with engaging in sexual intercourse with the 15–year-old daughter of his girlfriend without using a condom or disclosing his HIV status. Wilson denied the particulars of the complaint, and the victim testified. The trial court did not allow testimony concerning the victim's lying about a prior incident surround an auto accident, finding it to dissimilar to have any bearing on this case. The court of appeals disagreed, and remanded for a new trial. The court did find that based on the testimony presented at trial, a reasonable jury could have convicted Wilson on the HIV exposure charge. The victim has not tested positive for HIV, although her mother, Wilson's girlfriend at the time, was HIV+.

New Jersey — An incident in which a sheriff's officer suffered a needlestick injury while searching a suspect, requiring subseuqent testing and monitoring for potential exposure to HIV and hepatitis C (and claimed to have incurred post-traumatic stress disorder), did not entitle the officer to accidental disability retirement benefits, ruled the New Jersey Appellate Division, affirming a decision of an administrative law judge, in *Caminiti v. Board of Trustees, Police and Firemen's Retirement System*, 927 A.2d 560 (N.J. Super. A.D., July 11, 2007). According to Judge Kestin, writing for the court, the decision "called for an analysis of the particular facts involved and an application of the 'traumatic event' standard of N.J.S.A. 43:16A–7 with the gloss provided by the Supreme Court in *Kane v. Board of Trustees*, 100 N.J. 651, 663, 498 A.2d 1252 (1985), and other cases." Based on these authorities, the court affirmed the administrative decision that the risk of injury from a needlestick was a "routine" part of the petitioner's "calling," and thus could not be characterized as a "catastrophic event," as specified by the statute as a prerequisite for these benefits. Caminiti was entitled only to limited abuse of discretion review.

Texas — In an unofficially published opinion, the Court of Appeals of Texas in El Paso affirmed a 75–year prison sentence for an HIV+ man who sexually assaulted the daughter of his girlfriend. The evidence was that sex between them happened on several occasions and that the defendant did not consistently use a condom. (The girlfriend was also HIV+ and they engaged in sex together without using condoms.) The court rejected various grounds of appeal raised by the defendant, including an argument that the state's expert was not qualified to testify on scientific issues concerning HIV transmission. The expert was just a nurse, but the court finessed the question noting the scientific points of her testimony were practically common knowledge. *Henry v. State*, 2007 WL 2405798 (Aug. 23, 2007). A.S.L.

International AIDS Notes

Libya freed five Bulgarian nurses and a Palestinian doctor (who has been awarded and taken Bulgarian citizenship) who had been convicted of intentionally infecting Libyan infants with HIV. There was no direct evidence that the defendants were guilty, and it was generally believed that their trial was totally political. The release to the custody of Bulgaria was brokered by France, represented in person by Cecilia Sarkozy, the wife of the recently elected president of that country. Once having been transferred to the custody of Bulgaria, the six were released, and attention turned to seeking vindication of their honor. *Associated Press*, July 24. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

Equality Advocates Pennsylvania (formerly known as the Center for Lesbian and Gay Civil Rights) has an opening for a part-time attorney in its Employment Rights Project. If adequate funding is secured, there is a possibility that this could become a full-time position in the future, but as of now it would be for 60% of full-time. EAP is a public interest law firm advocating for LGBT rights, and this position would focus on EAP's work in the area of workplace rights for LGBT people. Admission to practice in Pennsylvania courts and 2–5 years of practice experience are prerequisites. For full details about the opening, check the website: www.equalitypa.org. Resumes, writing samples and letters of interest should bd submitted to

Lenore Carpenter, Legal Director, Equality Advocates Pennsylvania, 1211 Chestnut Street, Suite 605, Philadelphia PA 19107, or submitted via fax (215–731–1544) or email (lcarpenter@equalitypa.org).

LESBIAN & GAY & RELATED LEGAL ISSUES:

Abrams, Kerry, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625 (June 2007).

Alasti, Sanaz, *Comparative Study of Cruel & Unusual Punishment for Engaging in Consensual Homosexual Acts (In International Conventions, the United States and Iran)*, 12 Ann. Surv. Int'l & Comp. L. 149 (Spring 2006).

Axel-Lute, Paul, *Selected Bibliography on Same-Sex Marriage*, 59 Rutgers L. Rev. 413 (Winter 2007).

Avery, Dianne, and Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 Duke J. Gender L. & Pol'y 13 (January 2007).

Basiak, John F., Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 Whittier L. Rev. 861 (Spring 2007).

Baskin, Sienna, *Deviant Dreams:* Extreme Associates *and the Case for Porn*, 10 N.Y.C. L. Rev. 155 (Winter 2006).

Blaszczak, Michelle, *You and Me and Baby Makes Three: Custody Rights for Same-Sex Parents in the State of Michigan*, 52 Wayne L. Rev. 1223 (Fall 2006).

Bohl, Joan Catherine, *Gay Marriage in Rhode Island: A Big Issue in a Small State*, 12 Roger Williams U. L. Rev. 291 (Winter 2007).

Bonauto, Mary, *Ending Marriage Discrimination: A Work in Progress*, 40 Suffolk U. L. Rev. 813 (2007).

Byrn, Mary Patricia, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA Women's L.J. 163 (Winter/Spring 2007) (includes critical discussion of provisions affecting LGBT families).

Chemerinsky, Erwin, *Rediscovering Brandeis's Right to Privacy*, 45 Brandeis L.J. 643 (Summer 2007).

Clarkson, Michael, and Ronald S. Allen, *Same-Sex Marriage and Civil Unions: 'Til State Borders Do Us Part?*, 36 The Brief (ABA), No. 3 (Spring 2007), at 54.

Coenen, Dan T., *The Future of Footnote Four*, 41 Ga. L. Rev. 797 (Spring 2007) (speculation about the future direction of Equal Protection doctrine).

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Coontz, Phyllis, and Anne Stahl, *Revisiting Anti-Prostitution Sanctions: An Argument for Changing Policy*, 43 Crim. L. Bulletin 297 (May/June 2007).

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Daniel-McCarter, Caitlin, *Homophobia Through the First Amendment: A Critique of* Fair v. Rumsfeld, 10 N.Y.C. L. Rev. 199 (Winter 2006).

De Armas, Marcel, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 Am. U. J. Gender Soc. Pol'y & L. 743 (2007).

Dent, George W., Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 Ky. L.J. 553 (2006–2007).

Dorocak, John R., *Same Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 Ohio Northern U. L. Rev. 19 (2007).

Duncan, William C., *Constitutions and Marriage*, 6 Whittier J. Child & fam. Advoc. 331 (Spring 2007).

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Eichner, Maxine, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 Harv. J. L. & Gender 25 (Winter 2007).

Eidelson, Benjamin M., *A Penumbra Overlooked: The Free Exercise Clause and* Lawrence v. Texas, 30 Harv. J. L. & Gender 203 (Winter 2007).

Equal Treatment of Same-sex Couples in English Family Law?, 37 Family L. (UK) 413 (May 2007).

Fu, Jesse, *The Researcher's Second Laboratory: Protecting Our Children from Social Surveys in Public Schools in Light of* Fields v. Palmdale School District, 80 S. Cal. L. Rev. 589 (March 2007).

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Gilden, Andrew, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 Mich. J. Gender & L. 237 (2007).

Goldfarb, Sally F., *Granting Same-Sex Couples "Full Rights and Benefits" of Marriage: Easier Said Than Done*, 59 Rutgers L. Rev. 281 (Winter 1007).

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Hammer, Brendan J., *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 Depaul L. Rev. 1065 (Spring 2007) (argues *Lawrence* should be extended to protect consensual adult incest).

Hanuszczak, Michael L., and Janet J. Dougherty, *2005–206 Survey of New York Law*, 57 Syracuse L. Rev. 1219 (2007) (includes comment on New York same-sex marriage case, Hernandez v. Robles [2006]).

Herald, Marybeth, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U. S. F. L. Rev. 299 (Winter 2007).

Kaye, Judith S., *State Constitutional Law and the State High Courts in the 21st Century*, 70 Albany L. Rev. 825 (2007) (keynote for a Symposium issue on state constitutional law, judicial selection, and initiatives and referenda).

Lubow, Adam, *"… Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law*, 16–WTR J. Affordable Housing & Community Dev. L. 144 (Winter 2007).

Lytton, Timothy D., *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 Conn. L. Rev. 809 (Feb. 2007).

Malanga, Christian A., *Expressive Association Student Organizations' Right to Discriminate: A Look at Public Law Schools' Nondiscrimination Policies and Their Application to Christian Legal Society Student Chapters*, 29 W. New Eng. L. Rev. 757 (2007).

McMurry, Glen R., *An Unconstitutional Death: The Oregon Death With Dignity Act's Prohibition Against Self-Administered Lethal Injection*, 32 U. Dayton L. Rev. 441 (Spring 2007).

Mullaly, Michael T., *" 'Til Death Do Them Part?": Assessing the Permanence of Goodridge*, 27 B.C. Third World L.J. 499 (Spring 2007).

Mutz, Larry, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 Women's Rts. L. Rep. 69 (Spring 2006).

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Olsen-Acre, Haley K., *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 Mich. J. Gender & L. 207 (2007).

Ortega, Francisco J., *Taking a Closer Step Toward Equality: Domestic Partner Benefits for Same-Sex Couples and the University of Wisconsin System*, 6 Whittier J. Child & Fam. Advoc. 463 (Spring 2007).

Palumbo, Michael J., *How Solomon and His Army of Military Recruiters Destroyed Academic Superfree Speech But In Turn Saved Academic Freedom*, 33 Ohio Northern U. L. Rev. 199 (2007).

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Richards, Jared, *Turning a Blind Eye to Unmarried Cohabitants: A Look at How Utah Laws Affect Traditional Protections*, 2007 Utah L. Rev. 215.

Russo, Charles J., *Same-Sex Marriage and Public School Curricula: Preserving Parental*

Rights to Direct the Education of Their Children, 32 U. Dayton L. Rev. 361 (Spring 2007).

Russo, Charles J., and William E. Thro, *The Constitutional Rights of Politically Incorrect Groups:* Christian Legal Society v. Walker *as an Illustration*, 33 J. Coll. & Univ. L. 361 (2007).

Samar, Vincent J., *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 Mont. L. Rev. 335 (Summer 2007).

Sanger, Carol, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 Harv. J. L. & Gender 67 (Winter 2007).

Sclar, Diana, *New Jersey Same-Sex Relationships and the Conflict of Laws*, 59 Rutgers L. Rev. 351 (Winter 2007).

Stone, Allison J., *"Sisters Are Doin' It for Themselves!" Why the Parental Rights of Registered Domestic Partners Must Trump the Parental Rights of Their Known Sperm Donors in California*, 41 U.S.F. L. Rev. 505 (Winter 2007).

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Upchurch, Angela K., *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 Conn. L. Rev. 2107 (July 2007).

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Williams, Claire, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. Legal Aspects Sport 253 (Summer 2007).

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Zeidan, Sami, *The Limits of Queer Theory in LGBT Litigation and the International Human Rights Discourse*, 14 Willamette J. Int'l L. & Disp. Resol. 73 (2006).

Specially Noted:

A profile on the National Lesbian & Gay Law Association by its executive director, D'Arcy Kemnitz, appears in the April/May issue of the ABA's magazine for solo and small firm practitioners, GPSOLO, at page 40.

The Social Science Research Network provides a venue for scholars to post papers that have not appeared in formal publication as part of a Working Papers Series. We have not systematically posted references to papers posted in the SSRN, because the full text may be unobtainable for many of our readers, but we wanted to note a new posting by Anthony C. Infanti, who writes on tax issues concerning same-sex partners, titled "Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers. The paper has been assigned the ID in the system of 1005445, and is retrievable using the keywords duty, tax system, zealous advocacy, ethics, lesbian, gay, homosexual, and deconstruction.

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Paris, Lissa J., *Employee Benefits Issues and The Americans with Disabilities Act*, 53 Practical Lawyer No. 3, 37 (June 2007).

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Sarelin, Alessandra Lundstrom, *Human Rights-Based Approaches to Development Cooperation, HIV/AIDS, and Food Security*, 29 Hum. Rts. Q. 460 (May 2007).

Tulin, Leah J., *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 95 Georgetown L.J. 1979 (Aug. 2007).

EDITOR'S NOTE:

Correction: In the Summer 2007 issue, a story about a decision emanating from Southern Australia was mistakenly headlined as coming from South Africa. We were off by a few thousand miles, unfortunately. • • • All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.