MARYLAND HIGH COURT REJECTS SAME-SEX MARRIAGE CLAIM

In a ruling sharply reminiscent of last year's decision by the Washington State Supreme Court, which was similarly sharply divided, the Maryland Court of Appeals, that state's highest court, ruled by a vote of 5–2 in *Conaway v. Deane, 2007 WL 2702132*, on September 18 that the state's denial of the right to marry to same-sex couples does not violate the Maryland constitution. By an even narrower vote, 4–3, the court also implicitly ruled that same-sex couples are not constitutionally entitled to the rights and benefits associated with marriage through some alternative arrangement, such as a civil union.

Writing for a majority of the court, Judge Glenn T. Harrell, Jr., rejected the reasoning that had been adopted in January 2006 by Baltimore Circuit Judge M. Brooke Murdock, who had found that the state's policy violated the Equal Rights Amendment (ERA), Article 46 of the Maryland Constitution. See 2006 WL 148145. The ERA, adopted in 1972, provides: "Equality of rights under the law shall not be abridged or denied because of sex." The Maryland courts have ruled that state laws that discriminate based on sex are subject to strict scrutiny on judicial review, meaning they will only be upheld if they are necessary to achieve a compelling government interest and are narrowly tailored to achieve that interest.

The plaintiffs, nine same-sex couples who had been denied marriage licenses and one gay single man with future marital hopes who were represented by the ACLU Lesbian and Gay Rights Project, argued their case based on the ERA as well as other provisions of the Maryland Constitution guaranteeing equal protection and due process of law, but Circuit Judge Murdock had focused on the ERA, finding that because the right to marry turned on the sex of the parties, the law created a classification based on sex subject to strict scrutiny, and that the state had failed to show that the discrimination was necessary to achieve a compelling interest.

In rejecting this holding, Judge Harrell's decision embraced an interpretation of the ERA that the dissenters claimed was contradictory to its past interpretation by Maryland courts. Harrell reasoned that because the statute equally barred both men and women from marrying partners of the same sex, it was not discriminatory on the basis of sex, pointing to contemporary news reports about the debates at the time of its passage indicating that its proponents were motivated by a desire to end discriminatory treatment of women as compared to men. "Based on our precedents interpreting Article 46, we conclude that the Legislature's and electorate's ultimate goal in putting in place the Maryland ERA was to put men and women on equal ground, and to subject to closer scrutiny any governmental action which singled out for disparate treatment men or women as discrete classes."

Explaining his conclusion that the marriage statute did not violate this non-discrimination requirement, Harrell wrote, "The limitations on marriage effected by Family Law Section 2–201 do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct… To accept Appellees' contention that Family Law section 2–201 discriminates on the basis of sex would be to extend the reach of the ERA beyond the scope intended by the Maryland General Assembly and the State's voters who enacted and ratified, respectively, the amendment."

This brought a sharp rejoinder from Judge Lynne A. Battaglia, whose dissent was joined by Chief Judge Robert M. Bell. Battaglia devoted almost half of her eighty-page dissenting opinion to a thorough review of the past Maryland cases interpreting the ERA, concluding that any statute that classifies people based on their sex is subject to strict scrutiny review. Battaglia and the Chief Judge agreed with Circuit Judge Murdock that strict scrutiny was the appropriate standard here, that the state could not prove a compelling interest, and thus that same-sex couples are entitled to equal marriage rights.

For Judge Harrell, however, this was more properly viewed as a sexual orientation discrimination case and, following the approach that most lower courts have embraced, he concluded that such discrimination invokes only the rationality test, under which legislation is presumed to be constitutional and the burden is on challengers to demonstrate its irrationality. Referring to the recent successes of the gay rights movement in Maryland in getting legislation passed, most notably the law against discrimination, he rejected the content that sexual orientation should be considered a "suspect classification" under which such discrimination would invoke strict scrutiny judicial review. He also rejected the argument that the plaintiffs' claim involved a "fundamental right," arguing that the issue should be evaluated based on the particular claim for same-sex marriage rather than the more general claim that same-sex couples have a right to marry. (If the difference between those two seems a matter of semantics, then welcome to the fantastical world of constitutional argument, in which the outcome can differ based on the level of specificity or generality at which one conducts the analysis.)

Ultimately, Harrell's opinion trod the well-worn path now familiar from adverse marriage decisions in Washington State, Indiana, and New York, focusing on the unquestionable assertion that only different-sex couples can conceive children through sexual intercourse with each other. "The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage," he wrote. "We conclude that there does exist a sufficient link," he asserted, noting that in *Loving v. Virginia*, the U.S. Supreme Court decision from 1967 striking down a criminal prohibition on mixed-race marriage, the Court had referred to marriage as "fundamental to our very existence and survival." "This 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only," he continued, "because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)." (To which one could well respond, so what? These days, children whose presence in the household came about through adoption or reproductive technology in place of 'natural' biological procreation' represent a non-negligible

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Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NYC 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Chris Benecke, Cardozo Law School '08; David Buchanan, Esq., Australia; Glenn Edwards, Esq., NYC; Alan J. Jacobs, Esq., NYC; Bryan Johnson, NYLS '08; Sharon McGowan, Esq., NYC; Tara Scavo, Esq., NYC; Ruth Uselton, NYLS '08; Eric Wursthorn, NYLS '08.

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proportion of all households that include children.

Harrell bolstered his opinion by citations to the prior decisions denying same-sex marriage claims, most of which have emphasized procreation as a central feature of marriage. While Harrell acknowledged statistics showing that the traditional nuclear family was a declining proportion of all families, and that many children are now being raised by same-sex adult partners, as well as the fact that many different-sex couples marry without having children, he nonetheless concluded that "so long as the Legislature has not acted wholly unreasonably in granting recognition to the only relationship capable of bearing children traditionally within the marital unit, we may not 'substitute [our] social and economic beliefs for the judgement of legislative bodies.'"

Harrell ended his 109 page decision by indicating that the opinion "should by no means be read to imply that the General Assembly may not grant and recognize for homosexual persons civil unions or the right to marry a person of the same sex."

Judge Battaglia's dissenting opinion echoed some of the Washington State dissenters, and the partial dissenters on the New Jersey Supreme Court who had argued that state constitutional equality requirements demanded opening up marriage to same-sex partners. "The correspondence between opposite-sex marriage and biological necessity has never been more tenuous that it is today," she wrote. "What has always been an imperfect fit between marriage and procreation is now called into question." She pointed out that the state's procreation arguments had not previously been subjected to strict scrutiny by any appellate court majority, since the past decisions (including the Massachusetts *Goodridge* opinion) had all treated the question as one of rational basis review. While these arguments might satisfy the deferential rational basis test as applied by the Maryland court majority, she argued that they could not survive strict scrutiny, which she argued was the appropriate test under the state ERA.

In his brief separate dissenting opinion, Chief Judge Bell quoted extensively from the 2006 dissenting opinion by New York's Chief Judge, Judith Kaye, in *Hernandez v. Robles*, pointing out the actual irrationality of attempting to justify the exclusion of same-sex couples from marriage by citing the state's interest in bolstering the reproductive activities of different-sex couples. He argued that "it is disingenuous indeed to surmise that the 'possibility of procreation' creates a reasonable relationship in this context. As simply put by Chief Judge Kaye, 'marriage is about much more than producing children,' and yet the majority leaves open gaping questions such as 'how offering only heterosexuals the right to visit a sick loved one in the hospital … conceivably furthers the State's interest in encouraging opposite-sex couples to have children.'"

"The sheer breadth of the benefits appurtenant to marriage that are, pursuant to Family Law section 2–201, made unavailable to same-sex couples renders justification 'impossible to credit,'" he concluded, again quoting Judge Kaye.

Judge Irma S. Raker tried to carve out a middle ground. She argued in her separate opinion that the New Jersey Supreme Court had adopted the appropriate analysis and had come up with the appropriate remedy. Echoing the majority opinion in last year's *Lewis v. Harris* ruling from that state, she argued that the issue of the rights and benefits of marriage should be analyzed separately from the issue of the right to marry as such, and concluded that same-sex couples are constitutionally entitled to the former but not the latter, as she agreed with the Maryland majority on the right-to-marry question.

To get to this point, she conceived of the discrimination at issue as being between similarly situated "committed same-sex couples" and "married opposite-sex couples" at least, similarly situated with respect to the various rights and benefits that are provided by the state through marriage. She could find no rational justification for the state to distinguish between these two classes of couples with respect to such rights and benefits, especially in light of the family law developments in Maryland under which same-sex couples already enjoy a fair number of parental rights as a result of particular court decisions.

"Despite the fact that Maryland provides some rights and benefits in the area of procreation to same-sex couples," she wrote, "the State asserts it has a rational basis for excluding same-sex couples from the *full* benefits of marriage. This is not a rational assertion. There is no doubt that the State has a legitimate interest in promoting procreation and child rearing, but it cannot rationally further this interest by only granting the full rights of marriage to opposite-sex couples when it *already* provides some legal protections regarding procreation and child rearing to same-sex couples. Maryland's equal protection jurisprudence requires that a legislative distinction *reasonably* relate to the achievement of a legitimate State interest. Here, where Maryland has granted *some* rights regarding procreation and child-rearing to same-sex couples, it cannot rationally claim that its interest in providing a stable environment for procreation and child rearing is then actually furthered by the exclusion of same-sex couples from the equal rights and benefits of marriage.'"

Judge Raker found it "striking… that the State's proffered interest — providing a stable environment for procreation and child rearing is actually compromised by denying same-sex families the benefits and rights that flow from marriage. That is, there is not a sufficient link between the State's proffered legitimate interest and the means utilized by the State to further that interest."

The court's opinion, not subject to further review, threw the question of legal recognition for same-sex couples back to the legislature, where there may be some sentiment in favor of civil unions but little interest by the leadership in raising this issue in the election year ahead. The governor, who had previously run for mayor of Baltimore as an avowed supporter of same-sex marriage rights, has since abandoned that position and opportunistically stated his religious objections to same-sex marriage and reservations about civil unions. So the legislative struggle may last a while…. A.S.L.

LESBIAN/GAY LEGAL NEWS

Iowa Trial Courts Rules for Same-Sex Couples in Marriage Case

In a sweeping ruling reminiscent of trial court decisions from Washington State, San Francisco, New York City and Baltimore that have been issued in recent years, Robert B. Hanson, a trial judge in Des Moines, Iowa, ruled in *Varnum v. Brien*, 2007 WL 2468667 (Iowa Dist. Ct., Polk Co., August 30, 2007), that same-sex couples are entitled to marry, and that the state's Defense of Marriage Act, passed in reaction to the Hawaii marriage litigation in the early 1990s, is unconstitutional and must be stricken from the state's statute books.

Judge Hanson issued a stay of his opinion pending an appeal by Polk county, but not until almost 24 hours after issuing his ruling, thus enabling a number of couples to apply for licenses and one lucky couple who had done their homework to accomplish a wedding ceremony on the morning of August 31. (The couple in question found a judge willing to issue an order waiving the three-day waiting period, and minister willing to marry them on his front lawn without any preparation.) Judge Hanson's August 30 order directed the Recorder and Registrar of Polk County to issue marriage licenses to the plaintiff same-sex couples and any other qualified same-sex couples who apply.

Hanson was ruling on a carefully constructed test case brought by Lambda Legal on behalf of

twelve lesbians and gay men, six couples who have lived together for varying periods of time (and some of whom have obtained Vermont civil unions). Some of the couples are raising children. In a novel move, Lambda also included as plaintiffs some children of same-sex couples, claiming that their constitutional rights are violated because the inability of their parents to marry deprives the children of rights and protections associated with having married parents.

While expressing sympathy for the arguments made on behalf of the children, Judge Hanson concluded that there was no precedent for recognizing the standing of children to challenge a statute that prevents their parents from marrying. He did note, of course, that his decision in the case accomplishes what the children are seeking.

Before plunging into the factual findings and analysis, Judge Hanson devoted several pages to explaining why he decided to disregard the opinion testimony of several individuals proposed by the defendants and the plaintiffs as expert witnesses. Hanson took a much more stringent approach to evaluating expert witnesses than has generally been seen in gay rights litigation, including litigation about custody, visitation and adoption as well as the prior marriage cases. He essentially determined to reject testimony that did not appear to be based on legitimate, peer-reviewed scientific research or advanced factual knowledge. Thus, he rejected testimony offered from a religious perspective, which he characterized as being mainly the personal opinion of the expert, or opinion about the impact of marriage upon society from supposed "experts" who had not done any sociological research using scientific methods. Similarly, he rejected testimony from some gay witnesses that struck him as being primarily personal anecdotes rather than the result of systematic research.

On the other hand, he agreed to consider testimony from some gay lawyers about the particular difficulties that their clients encountered in their everyday lives as a result of the lack of ability to marry, as bearing directly upon relevant questions for the court.

The heart of the opinion for many will be the extensive summary of factual findings, based almost entirely on factual assertions as to which the parties were in total agreement. In some instances, Hanson pointed out, the plaintiffs had presented factual assertions that the defendants had not effectively countered, thus leaving them essentially unchallenged. The resulting factual summary reads like a friend-of-the-court brief submitted by a gay rights organization in a marriage case. That is, with the most minor exceptions, nobody well-versed in the scientific literature that supports the competence of gay parents in raising children (which was the main focus of much of the factual record) would find a basis to quarrel with this summary, although it would certainly outrage the so-called family values groups that argue, alluding to numerous studies that they never specify because they don't exist, that children are severely disadvantaged if they don't have a married different-sex couple raising them. The studies they do cite show that children do better raised by a married couple than raised by single parents, a point that is irrelevant to the question of same-sex couple parenting, as Judge Hanson observed.

For a legal analyst, the heart of the opinion is Judge Hanson's explanation of why the factual record compels a legal conclusion that the state's Defense of Marriage Act (DOMA) is unconstitutional. Hanson accepts the argument that the relevant issue under the state constitution's due process clause (which is worded identically to the due process clauses in the 5th and 14th amendments of the federal constitution) is not whether same-sex marriage is a fundamental right, but rather whether same-sex couples have the right to marry, as the right to marry is itself a fundamental right. As such, he concluded that this was a "strict scrutiny" case, in which a heavy burden fell on the state to show that excluding same-sex couples from marriage was necessary to achieve compelling government interests.

The state's DOMA "constitutes the most intrusive means by the State to regulate marriage," he wrote. "This statute is an absolute prohibition on the ability of gay and lesbian individuals to marry a person of their choosing. Accordingly, this statute warrants the application of strict scrutiny." The defendant had proposed five rationales supporting the DOMA: promoting procreation, child rearing by a mother and father in a marriage relationship, promoting stability in opposite-sex relationships, conservation of state and private resources, and promoting the concept or integrity of traditional marriage. Hanson rejected all of these as sufficient justifications to exclude same-sex couples from marrying, stating at the outset that the defendant had failed to show how any of these were compelling state interests, a necessary prerequisite to the analysis.

"The Defendant has cited no evidence that precluding gay and lesbian individuals from marrying other gay and lesbian individuals will promote procreation, will encourage child rearing by mothers and fathers, will promote stability for opposite sex marriages, will conserve resources or will promote heterosexual marriage," he wrote, calling the law "both over and under-inclusive while effectuating none of its purported rationales."

Turning to the alternative argument based on equal protection, the Iowa Constitution actually has a clause much like the Equal Benefits clauses of the Vermont and Massachusetts constitutions, stating: "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Hanson found that the DOMA sets up a sex classification, invoking intermediate scrutiny by the court, under which the burden falls on the defendant to show that the law advances important state interests.

"This Court concludes that the sex-based classification" contained in the DOMA "is not substantially related to an important state interest," wrote Hanson. "First, the Defendant has not sustained his burden of proof that any of the five rationales articulated above [in connection with the due process analysis] are important state interests. The Defendant makes only a cursory statement that, even if this Court applies a greater level of scrutiny than rational basis, the law would meet such a heightened test. Such a statement is not adequate to sustain the heavy burden of proof placed on the Defendant to prove the law's constitutionality."

Furthermore, Hanson asserted, even if one treated these interests as important, there was no evidence that the law advanced any of them. "Regulating two classes of individuals, who happen to be homosexual, based on their sex, has no bearing on any of the goals articulated by the Defendant. The Defendant has produced no evidence indicating that precluding men from marrying other men and women from marrying other women will promote procreation, will encourage child rearing by mothers and fathers, will promote stability for opposite-sex marriage, will conserve resources or will promote heterosexual marriage." Thus Hanson concluded that an equal protection violation had been proven.

Finally, just in case the Iowa Supreme Court were to disagree that this case required strict or heightened scrutiny, Hanson devoted the balance of his opinion to considering whether the DOMA would meet the rational basis test. Under this approach, a statute is presumed to be constitutional and it is up to the plaintiff to demonstrate its lack of constitutionality. Quoting from a 1993 Iowa Supreme Court decision, he described the rational basis approach as follows: "Under the rational basis analysis, a statute is constitutional unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. This is a two-prong test: (1) the statute must serve a legitimate governmental interest; and (2) the means employed by the statute must bear a rational relationship to that governmental interest."

Hanson assumed that the first four interests articulated by the Defendant were legitimate, consolidating them for analysis into essentially two interests: "responsible procreation" and conservation of resources. But he was not willing to treat as legitimate "promoting the con-

cept of fundamental marriage or the integrity of traditional marriage." "In this Court's view," he wrote, "to say one wishes to promote 'the concept of fundamental marriage' or 'to promote the integrity of traditional marriage' by amending a statute to add language saying '[o]nly a marriage between a male and a female is valid,' means simply that one wishes to exclude same-sex couples from entering into that union because that is the way things always have been. More specifically, such unions have never been officially recognized in the past because they were morally unacceptable therefore they won't be so recognized now."

Here was where the U.S. Supreme Court's 2003 sodomy law decision, *Lawrence v. Texas*, entered the analysis. In that case, Justice Anthony Kennedy, writing for the Court, rejected the use of traditional moral judgments to justify invading the rights of individuals, pointing out that if traditional morality was a justification, then the Supreme Court would not have struck down laws against interracial marriage. Hanson also noted Justice Antonin Scalia's comment, in his dissenting opinion, that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."

Turning to the "legitimate state interests," Hanson concluded that none of them were advanced in any way by excluding same-sex couples from marrying. On the issue of resource conservation, the plaintiffs introduced evidence, now abundant as a result of several empirical studies, showing that allowing same-sex marriage saves money for the government, businesses, and the couples who marry, and no evidence to counter this was presented by the Defendant.

On the responsible procreation point, Hanson exclaimed, "This Court has yet to hear any convincing argument as to how excluding same-sex couples from getting married promotes responsible reproduction in general or by different-sex couples in particular. So far as this Court can tell," the Iowa DOMA "operates *only* to harm same-sex couples *and* their children." Hanson's discussion on this point strikingly echoes the dissenting opinion by Chief Judge Judith Kaye in the New York marriage decision from 2006, *Hernandez v. Robles*, pointing out that there is no rational connection between excluding same-sex couples from marriage and affirmatively supporting the marriages of different-sex couples.

"Indeed," Hanson continues, "by excluding all same-sex couples from marriage, the statute actually defeats the purpose of responsible procreation by excluding qualified individuals from marriage. In addition, their exclusion defeats the state's admitted interest in the welfare of *all* of its children, regardless of whether they are parented by different-sex couples, same-sex couples or any other family unit." Hanson found the state's reliance on the peculiar theory first propounded judicially by the Indiana Court of Appeals in *Morrison v. Sadler* in 2005 as ironic, since it embodies a "back-handed compliment" to same-sex couples, arguing that because they cannot procreate accidently, they are inherently more likely to do a good job without state encouragement and thus don't need the right to marry. Hanson found this notion unacceptable, suggesting that even the superior deliberation of same-sex couples in deciding to have children could be enhanced by providing them with the support of marriage rights.

Hanson characterized as "specious at best" the Defendant's argument that "excluding same-sex couples from marriage somehow encourages heterosexual parents or prospective parents to get married," and concluded that "the exclusion of same-sex couples from entering into a marriage bears no discernable relationship to the promotion of responsible procreation by heterosexual couples. The means and the purpose are without question attenuated."

Hanson wound up his decision by asserting that the state's DOMA is "unconstitutional and invalid. Couples, such as Plaintiffs, who are otherwise qualified to marry one another may not be denied licenses to marry or certificates of marriage or in any other way prevented from entering into a civil marriage... by reason of the fact that both persons comprising such a couple are of the same sex." He specified that the statute "must be nullified, severed and stricken from" the state's marriage laws, which "must be read and applied in a gender neutral manner so as to permit same-sex couples to enter into a civil marriage." A.S.L.

Maine High Court Rules Same-Sex Couples Can Adopt Children

The Maine Supreme Judicial Court ruled in *Adoption of M.A. & R.A.*, 2007 ME 123, 2007 WL 2446019 (August 30, 2007), that same-sex couples in that state may jointly adopt children.

The case came down to a problem in statutory interpretation. The same-sex couple, A.C. and M.K., became foster parents of M.A. and R.A. in 2001, the parental rights of the birth parents having been extinguished as a result of a jeopardy order, the causes of which had left the children struggling with post-traumatic stress disorder, reactive attachment disorder, and attention deficit and hyperactivity disorders.

The state's Deartment of Health and Human Services placed the children with A.C. and M.K., who after several years of caring for them wanted to adopt them. A home study report approved them for joint adoption, the guardian ad litem joined the chorus of approval, as did the Department's adoption worker, so the government was consenting and things were moving along. The couple filed adoption petitions in Cumberland County Probate Court, where the court denied the petitions, stating that it did not have jurisdiction, without addressing the merits under the adoption statute.

The Probate Court in Maine has jurisdiction over adoptions, the relevant statute, 9–301 of Title 18–A of the Maine Revised Statutes providing: "A husband and wife jointly or an unmarried person, resident or nonresident of the State, may petition the Probate Court to adopt a person, regardless of age, and to change that person's name." Although the judge did not care to spell it out, the Probate Court apparently construed this to mean that it could only entertain joint adoption petitions from husbands and wives, not from unmarried partners.

The Supreme Court's opinion, by Justice Levy, quickly dispels that notion, saying this is not a question of jurisdiction, as the court had jurisdiction over the parties and the subject matter, but rather a question of statutory interpretation. As to that, he pointed out, the statute does not *prohibit* joint adoptions by same-sex couples, it merely doesn't mention them while saying that single people can adopt. In addition, the Probate Code provides that it should be liberally construed, so a narrow, overly literal reading of the statutory text is not to be embraced. Just as clearly, the unmarried same-sex partners could each adopt one of the children as individuals and then do a second-parent adoption of the other, with the end result that each of the women would be the legal mother of both of the children.

But that would not really make sense. Why should somebody go through a convoluted, time-consuming and expensive process when a single joint adoption petition would cut through the formalities and achieve the state's purpose of providing good homes for children who are wards of the state? The court spends lots of time on semantics and canons of statutory construction, but what it seems to have really come down to was that allowing a joint adoption made sense, was within the broad spirit and goals of the adoption law, and was not specifically prohibited by that law. The court was unwilling to read a negative inference into the express statutory approval for joint adoptions by different-sex married couples.

It didn't hurt matters, of course, that the court was able to cite opinions from several other states adopting a similar approach to adoption statutes with similar wording. Thus, anyone who wants to charge the Maine court with "judicial activism" would be faced by the accurate counter-argument that its approach has become the majority view among courts that have confronted the question whether an adoption statute that doesn't mention joint adoptions by unmarried couples should be construed to forbid such adoptions.

Mary Bonauto of Gay & Lesbian Advocates & Defenders, New England's Boston-based LGBT public interest law firm, represented the parents before the Maine Supreme Judicial Court. GLAD has published a booklet for Maine couples seeking to adopt explaining the impact of the decision and the procedures to be followed. A.S.L.

7th Circuit Remands Gay Liberian Asylum Case

The U.S. Court of Appeals for the 7th Circuit has remanded gay Liberian Dominic Moab's asylum claim to the Board of Immigration Appeals (BIA) for further consideration in *Moab v. Gonzales*, 2007 WL 2669369 (September 13, 2007).

Moab arrived at Chicago's O'Hare International Airport in 2005 without valid documents for entry to the United States and immediately applied for political asylum and withholding of removal. While at the airport, and later in an interview to determine whether he had a "credible fear" of persecution, he claimed that he feared he would be killed because of a familial land dispute and civil war in Liberia. When he later submitted his formal asylum application, he added that he feared persecution on account of his sexual orientation. At his hearing before an Immigration Judge (IJ), he expanded upon his sexual orientation claim and detailed three separate instances where he had been beaten by groups of men for being a homosexual.

When asked why he had not mentioned his homosexuality at the airport or at his credible fear interview, Moab stated "[n]o, because of this homosexual, everywhere I go, people discover that I'm homosexual. It's different, so sometimes I want to keep it, but I can't keep it." The IJ denied Moab's application for asylum and withholding of removal, claiming he was not credible because his initial testimony failed to mention his homosexuality, because he claimed he did not speak English and then later claimed to be fluent in English, and because he had failed to seek asylum in the many countries he had visited during the eight years between leaving Liberia and arriving in the United States. Moab appealed the decision of the IJ. The BIA affirmed the IJ's decision and stated that Moab's claim demonstrated "increased egregiousness" as it developed over time, but the BIA did not expressly consider any of the other grounds on which the IJ had rejected the claim.

Moab petitioned for judicial review. Circuit Judge Kenneth F. Ripple, speaking for a panel of the court, stated the court would only overturn the BIA's decision if the evidence in the record "compels" a contrary conclusion. Judge Ripple stated that records of airport interviews like Moab's that merely paraphrased an alien's statements were "inherently less reliable than a verbatim account or transcript," and defended Moab's failure to mention his homosexuality in his early interviews, specualting that this omission could be explained by several reasons, including "prior interrogation sessions or other coercive experiences in [his] home country."

Judge Ripple also explained that Moab could have feared that stating his homosexuality would cause further persecution as it had in Liberia. Based on prior decisions regarding the unreliability of airport interviews, Judge Ripple held that the BIA's determination that Moab's claim became more "egregious" was not based on substantial evidence, but that Moab had simply added addition harms based on his sexual orientation to his claim as it progressed. Accordingly, Moab's petition for review was granted and his case was remanded to the BIA for "more plenary treatment." *Bryan Johnson*

10th Circuit Rejects Title VII Claim from Transsexual Bus Driver

The U.S. Court of Appeals for the Tenth Circuit recently held that Krystal Etsitty, a transsexual bus driver, did not suffer unlawful discrimination when she was fired for using the women's restroom. *Etsitty v. Utah Transit Authority*, 2007 WL 2274160 (Sept. 20, 2007). Judge Michael Murphy, in affirming the lower court's summary judgment, held that Etsitty failed to raise any issue of material fact as to the Authority's nondiscriminatory motivation for ending her employment.

Krystal Etsitty was hired as an "extra-board operator," which required her to drive a different route nearly every day. Like all operators, Etsitty used public restrooms while driving. Etsitty, who presented as a man when training, was terminated shortly after informing her employer that she was transitioning to a woman, and was using women's restrooms as she began presenting herself as a woman, even though she did not have funds available for gender reassignment surgery. The Utah Transit Authority officials believed that Etsitty's use of female restrooms would expose it to liability, though no actual complaints had been received. The Transit Authority offered to rehire Etsitty after she had undergone surgery and no longer had male genitalia. Etsitty, who could not afford surgery, instituted this case for discrimination in violation of Title VII and the Equal Protection Clause.

Etsitty advanced two arguments in her case. First, she argued, discrimination against transsexuals is literally discrimination because of sex, and therefore transsexuals are a "protected class" under Title VII. Alternatively, she argued that she was discriminated against for failing to conform to sex stereotypes, a practice the Supreme Court held violated Title VII in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Judge Murphy held that Etsitty failed to make a prima facie case as to her first point. In order to prove discrimination, Etsitty had to show that transsexuals are a protected class under Title VII, he asserted. In interpreting the statute, Judge Murphy claimed to be following the "plain language" of Title VII rather than the "primary intent of Congress," finding nothing in the record that supported"the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."

Quoting previous authority from the Seventh Circuit, Judge Murphy wrote that Title VII only prohibits discrimination "against women because they are women and men because they are men." Since Etsitty claimed she was discriminated against *as a transsexual,* rather than as a woman or a man, her discrimination fell outside the protection of Title VII: "Discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." Judge Murphy relied on the "traditional binary conception of sex" and held that transsexuals are not a "protected class" under Title VII.

Etsitty's second argument, that her termination violated Title VII's prohibition against sex stereotyping, was likewise unsuccessful. Sex stereotyping, as interpreted by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), constitutes discrimination against an employee for failing to conform to stereotypical notions of gender. Etsitty claimed that, as a biological male, she was discriminated against for using a female restroom.

Judge Murphy noted that the Sixth Circuit had previously applied a sex-stereotyping analysis to a transsexual firefighter in *Smith v. City of Salem*, 378 F.3d 566 (2004), holding that discrimination against men who appear or act femininely is discrimination that would not have occurred "but for the victim's sex." Judge Murphy refused to hold that choosing which bathroom to use was analytically similar to choosing which gender to dress as.

Rather, Etsitty had to show that she was disadvantaged in a way that she would not be if she were a female. Requiring employees to use a restroom matching their biological sex did not disadvantage men more than women. Accordingly, the Transit Authority's actions did not facially violate Title VII. The Utah Transit Authority claimed that they had fired Etsitty because they were worried about potential liability stemming from her decision to use the women's restroom "despite the fact she still had male genitalia." Because Etsitty was unable to offer any evidence that this motive was a mere pretext for discrimination, Judge Murphy held that the Authority did not engage in sex-stereotyping discrimination. *Chris Benecke*

2nd Circuit Rebuffs Yale Law Profs in Solomon Challenge

A 2nd Circuit federal appeals court panel ruled on September 17 in *Burt v. Gates*, 2007 WL 2694439, that a group consisting of a majority of the Yale Law School faculty did not have a valid First Amendment claim against enforcement of the Solomon Amendment against their law school. The opinion by Circuit Judge Rosemary Pooler found that the U.S. Supreme Court's ruling last year in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), upholding the constitutionality of the Solomon Amendment, most likely precluded all the legal arguments being raised by the Yale profs, but even if it had not directly addressed all those issues, they had to be decided against the professors.

Yale Law School adopted a policy under which military recruiters were effectively banned from the campus because of the Defense Department's refusal to enlist openly gay personnel. When the University was threatened with the loss of substantial federal funds because of this policy, the law faculty voted to allow the military back on campus, but the faculty group got organized to file a constitutional challenge after being informed that the University had decided not to file its own lawsuit.

The Yale faculty were initially successful in their effort, persuading U.S. District Judge Janet C. Hall that the federal government's coercive use of its funding power to compel Yale to allow the military recruiters on the law school campus violated the First Amendment rights of the faculty, which had originally voted to adopt the non-discrimination policy. In effect, she found, the government was coercing the faculty in making academic judgments and setting policy for their institution. See *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Ct. 2005).

After Judge Hall's ruling, the Supreme Court ruled on a lawsuit that was brought by a broad coalition of law schools, legal academics and students, under the organizational name of Forum for Academic and Institutional Rights (FAIR), mounting a direct constitutional challenge to the Solomon Amendment, the federal statute that bars funding (except for financial aid to students) going to any higher education institution that does not provide access to military recruiters equal to that afforded other potential employers of their students. The Supreme Court unanimously reversed a decision by the federal appeals court in Philadelphia, holding that the operation of the Solomon Amendment did not violate the constitutional rights of the law schools and their faculties.

The Yale professors had submitted an amicus brief in the FAIR case, making the same legal arguments that they made in their own lawsuit. Among those arguments were those focusing specifically on the impact on their academic freedom, an aspect of the case that Chief Justice John Roberts did not address directly in his opinion.

After *Rumsefeld v. FAIR*, the question arose whether the Yale professors' lawsuit was moot. They insisted that there remained undecided questions of academic freedom, so the appeal by the government to the federal appeals court in New York, which has jurisdiction over federal cases from Connecticut, was continued and oral arguments were held last March.

Although the case was argued to a panel of three judges, one of the judges who had been assigned to the case, District Judge Colleen McMahon, recused herself after the argument. Since the two remaining judges on the panel, Judge Pooler and Judge Reena Raggi, agreed on the outcome, no judge was appointed to take Judge McMahon's place.

Although the Supreme Court did not specifically address the academic freedom argument, Judge Pooler found that a rejection of that argument was implicit in the Supreme Court's First Amendment ruling. But even if it were not, Judge Pooler concluded that the professors' argument was without merit.

Pooler emphasized that cases in which the Supreme Court has recognized First Amendment protection for the academic freedom of universities and their faculties have focused largely on curricular decisions and decisions about admission of students or grants or denials of tenure, all relating in some way to the "free flow of ideas" on university campuses. "The relationship between barring military recruiters and the free flow of ideas is much more attenuated," she wrote. "The Solomon Amendment places no restriction on the content of teaching, the membership of teachers in organizations, the selection of students, or evaluation or retention of students."

"While requiring universities to grant military recruiters that discriminate in hiring equal access to their campuses and students may incidentally detract from the academic mission of inculcating respect for equal rights," she conceded, "this requirement undermines educational autonomy in a much less direct and more speculative way than do the policies addressed" in the prior Supreme Court cases. "Plaintiffs have identified no authority that suggests to us that the Supreme Court would extend its protection of academic freedom to denying equal access to military recruiters, a practice that it has already defined as conduct" rather than speech in the FAIR case.

The Yale profs also raised the claim that what their school sought to do was to engage in a boycott, a form of speech that has been recognized by the courts as embodying political expression under the First Amendment. But Judge Pooler found that this argument clearly foundered on the shoals of the FAIR decision. "While boycotts motivated by principle certainly enjoy a degree of constitutional protection," she wrote, "the FAIR Court already has rejected the argument that the Solomon Amendment forces the plaintiffs to associate with the military. Logically, then, the plaintiffs also remain free to disassociate themselves from the recruiters by words and deeds. Plaintiffs, therefore, have no First Amendment claim that is not either lacking in merit or that has not already been rejected by the Supreme Court."

Consequently, the appeals court reversed Judge Hall's decision and ordered that she vacate the injunction she had issued barring the Defense Department from enforcing the Solomon Amendment against Yale. A.S.L.

3rd Circuit Denies Asylum to Gay Indonesian

The U.S. Court of Appeals for the 3rd Circuit has denied political asylum, withholding of removal, and protection under the Convention Against Torture (CAT) to gay Indonesian Achmad Jayadi in the unpublished decision *Jayadi v. Attorney General of the United States*, 2007 WL 2453587 (3rd Cir., Aug 30, 2007).

Jayadi claimed he had been persecuted and feared future persecution as an ethnic Chinese Christian homosexual in predominately Muslim Indonesia. An Immigration Judge (IJ) denied his application, and the Board of Immigration Appeals (BIA) affirmed the IJ's decision. On appeal to the 3rd Circuit, Jayadi claimed the IJ had erred in deciding the merits of his case, and that the IJ had a predisposition to hold against him and thus denied him due process of law.

Jayadi claimed that he had not experienced any "negative incidents" in Indonesia due to his sexual orientation, but that he feared going out socially with his partner. He cited several instances where he and his family were harassed, threatened, and attacked on account of their Chinese ethnicity and Catholic faith. Judge A. Wallace Tashima, writing for the court, held that these instances were not sufficient to demonstrate persecution, and were committed "at the hands of non-governmental fellow citizens," and therefore did not amount to persecution by government or by forces the government was unable or unwilling to control.

Judge Tashima also rejected Jayadi's argument that the IJ erred in failing to find a pattern or practice of discrimination against ethnic Chinese, Christians, or homosexuals in Indonesia, finding that the IJ had considered the record and specifically held that no pattern or practice existed.

As to the finding that Jayadi had no well-founded fear of future persecution, Judge Tashima found the IJ's decision was supported by substantial evidence, cited 3rd Circuit precedent holding that "violence against Chinese Christians in Indonesia [is not] sufficiently widespread [to constitute persecu-

tion],” and found that Jayadi failed to prove otherwise. Judge Tashima quickly rejected Jayadi’s claim that the IJ had a predisposition to find against him, stating that the IJ’s conclusions were based on the record and concluding that Jayadi’s right to due process of law had not been violated.

As Jayadi’s claim did not rise to the level required to establish eligibility for asylum, it also did not rise to the higher level required for withholding of removal. Judge Tashima also held that since it was not “more likely than not” that Jayadi would be tortured if returned to Indonesia, he failed to establish eligibility under CAT. Accordingly, Jayadi’s petition for review was denied, and the decision of the IJ will be upheld. *Bryan C. Johnson*

Louisiana Trial Court Displays Entrenched Homophobia

On Sept. 19, 2007, the Louisiana Second Circuit Court of Appeal overruled an unbelievably homophobic trial court opinion, and held that the evidence on the record did not support a modification in the custody arrangement of four children. *Cook v. Cook*, 2007 WL 2713074 (La. Ct. App. 2007). The modification authorized by District Judge Jimmy C. Teat would have penalized a lesbian mother based on absurd assertions that she was “not sufficiently discreet” with her lesbian partner.

Appellant, Christi, and appellee, Porter, were married for approximately thirteen years; the couple had four children and lived in Ringgold, Louisiana (population 1,660). In 2001, the couple separated due to the fact that Christi was in a lesbian relationship with a nineteen-year-old woman, Shannon. Christi filed for divorce and the parties entered into a “joint custody implementation plan” (JCIP). The JCIP provided that the parents would have 50–50 shared custody of the children. The disputed provision of the JCIP, which led to this appeal, is referred to by both the trial and appellate court as the “Shannon clause.” The clause provides that “[n]either parent shall allow Shannon Maloney to be associated with the minor children and thereby not allowing her to live or visit in the home at 2961 Highway 4, Ringgold, Louisiana.”

In 2003, Porter filed a petition to modify the JCIP, and to hold Christi in contempt of court, alleging that Christi had violated the agreement by allowing Shannon to “freely associate” with the children. At this time, the court appointed a mental health counselor to examine the parties and the children. The counselor found that the children should live primarily with Christi, however, he advised that Christi needed a larger house she was living in a trailer at all times during the proceedings. Porter had remained in the larger marital home upon the couple’s divorce.

Months later, the parties entered into a stipulated judgment in which Christi admitted to violating the “Shannon clause,” because Shannon had visited while the children were present. The court imposed a six-month prison sentence, but suspended the sentence on the condition that Christi pay court costs. In addition, the court warned that if Christi should violate the “Shannon clause” again, Porter would be designated as the primary domiciliary parent. Christi refused to sign the judgment, but it appears that she complied with the judgment and paid the court costs to avoid a prison sentence.

In 2005, Porter again filed a motion to hold Christi in contempt and to name him the domiciliary parent. In this new round of allegations, he alleged 18 incidents in which the children were exposed to Shannon in violation of the JCIP. In response, Christi filed motions to have the “Shannon clause” revoked and to name her the primary custodial parent. This time, the parties took their claims to trial.

At trial, Christi “admitted” to being romantically involved with Shannon which at this time meant the women had been in a five-year relationship. Christi testified that Shannon was living in the trailer next door, and would live with Christi while the children were at Porter’s house, but was never present while the children were staying with Christi. Porter argued that allowing Shannon to live next door was a violation of the agreement; in addition, he argued that Christi violated the agreement by allowing Shannon to attend the children’s athletic events. Here the court noted, for no apparent reason (other than obvious homophobia), that Shannon is “described as athletic in build.” Christi testified that although Shannon attended the children’s athletic events, she never sat with or next to the children.

The same mental health “expert” who was appointed to examine the parties in 2003 reiterated that Christi provides a good life for the children, but he added that the children would be harmed if raised in a “homosexual environment.” A particularly unscientific statement he made to the court explained that “a lesbian partner would distort the children’s (especially the girls’) perception of female role models.” Christi brought in her own expert to rebut this testimony, noting that there is no clinical evidence showing that the children would be harmed if raised by a lesbian couple.

Adding to the absurdity, the court accepted the testimony of Pastor Hahler, who acknowledged that Christi took the children to church more often than Porter, but that he believes homosexuality is a sin and that children should not be exposed to it. The court also apparently admitted his hearsay statement that some church members had expressed disapproval of Christi’s “lifestyle” and that her position as a Sunday school teacher was potentially in jeopardy.

Based upon the seemingly inadmissible evidence of the pastor and the questionable “expert” testimony, the trial court determined that subjecting the children to an openly lesbian relationship would be harmful, because it would place them in conflict with the “ordinary morays [sic] of society.” Judge Tate clearly got more than the spelling wrong in this case, because the U.S. Supreme Court, in 1984, ruled that the law cannot directly or indirectly give credence to private biases in determining child custody disputes. *Palmore v. Sidoti*, 466 U.S. 429 (1984). In other words, whether or not Porter, Pastor Hahler, or the entire town disapproves of Christi’s relationship has no bearing on her right to custody of her children.

The appellate court noted that the custody agreement could only be modified if Porter demonstrated that there had been a material change in circumstances and that the modification would be in the best interests of the children. This rule is generally to protect children from unnecessary disruption in their daily lives. According to Judge Moore, the record “overwhelmingly” indicated that there had been no material change in the parties’ circumstances. Additionally, he acknowledged that there was insufficient evidence to support Porter’s allegations that Christi had violated the “Shannon clause.” Finally, the court held that it would be in the best interests of the children to retain the current custody agreement without modification.

The law provides that the “best interests of the child” is the standard by which custody disputes are determined. Therefore, perhaps the most disheartening and rancorous revelation made by the trial court was that despite the fact that Christi “was more responsible for the care and rearing of the children than [Porter] for many reasons,” she was somehow unfit because she is in a lesbian relationship. *Ruth Uselton*

Gay Plaintiff Loses Summary Judgment Motion In Title VII Harassment and Retaliation Action

On September 13, 2007, District Court Judge Terrence F. McVerry granted defendant’s motion for summary judgment on Brian Prowel’s two-count complaint alleging same-sex sexual harassment based on Title VII and the Pennsylvania Human Relations Act. *Prowel v. Wise Business Forms, Inc.*, 2007 WL 2702664 (W. D. Penn.).

From 1991 until he was terminated in December 2004, Prowel worked at Wise, which is located in Butler, Pennsylvania. Prowel, a self-identified gay man, alleged that he was harassed throughout the entire duration of his employment at Wise due to the perception that “he is effeminate, does not meet male stereotypes

and does not conform to his employer's religious beliefs." Prowel further claimed that he was wrongfully terminated from his employment in retaliation for his complaints about the harassment.

Prowel's specific factual allegations portray a particularly abusive work environment. Prowel's co-workers nicknamed him "Princess" and "Rosebud." His co-workers made many comments, such as "Did you see what Rosebud was wearing", "Did you see Rosebud sitting there with his legs crossed, filing his nails", "Look at the way he walks" and "I hate him. They should shoot all the fags."

In addition, the following items were left on Prowel's desk: a photo of "several men with their pants down, holding their penises, with bags on their heads", a pink feathered tiara, and a packet of KY lubricant. Prowel's coworkers also left graffiti in the bathrooms that indicated Prowel had AIDS and was having sex with other men at the plant; none of these claims appear to be true according to the court's decision.

The court also detailed Prowel's allegations supporting his claim for religious harassment: that his co-workers left religious materials on his desk which indicated that Prowel would "burn in hell" because he was gay and encouraged him to "come clean with his Maker." The Human Resources manager at Wise also told "other employees that Prowel did not fit in with the good Christian values of the company."

Wise moved for summary judgment. Prowel opposed this motion, arguing that his claims for Title VII sexual harassment, religious harassment and retaliation should survive. Wise's motion on Prowel's claims under the Pennsylvania Human Relations Act was automatically granted; it is unclear if they met their burden on this motion because Judge McVerry failed to discuss this.

Judge McVerry first discussed Prowel's claim that he was discriminated against because of sex under the theory of gender stereotyping. Judge McVerry claimed that *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d. Cir. 2001), involved essentially the same facts. However, Bibby claimed that only one of his co-workers "regularly engaged in harassment of a sexual nature with violent features against [Bibby]", and no evidence was adduced to support this claim, aside from two incidents of verbal/physical altercations with said co-worker.

Bibby also claimed that supervisors harassed him by "yelling at him, ignoring his reports of problems with machinery, and arbitrarily enforcing rules against him in situations where infractions by other employees would be ignored." He did not assert that there was any sexual component to this harassment, and while Bibby alleged that graffiti of a sexual nature was written in the bathrooms, Bibby failed to substantiate this claim as well.

The Third Circuit found that Bibby alleged he was discriminated against because of his sexual orientation, not because "he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female coworkers." Therefore, Bibby's claim was not cognizable under Title VII.

Judge McVerry determined that "*Bibby* is controlling and the same result must be reached as to Prowel's claim of sexual harassment." Judge McVerry goes on to write that "[w]hen utilized by an avowedly homosexual plaintiff... gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."

Judge McVerry's analysis is wrong on two accounts. First, Bibby's factual allegations are clearly distinguishable from the those of Prowel's.

Moreover, Judge McVerry is wrong on the law. The Third Circuit clearly stated in *Bibby* that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."

Judge McVerry's holding essentially provides that a gay plaintiff could never prevail on a Title VII same-sex sexual discrimination claim for discrimination based on gender stereotypes, while a heterosexual may. Judge McVerry summarily states that "[l]ike other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII'" [citing, but mis-characterizing, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which did not rule on that plaintiff's alleged claim of gender-stereotyping discrimination because plaintiff failed to raise such a claim before the District Court].

Judge McVerry summarily dispatched Prowel's claim for religious harassment. While noting that Title VII "prohibits employers from penalizing an individual's failure to embrace the employer's faith", Judge McVerry ruled that Prowel's claim of religious discrimination was not actionable because "it was indistinguishable from a 'sexual orientation' claim." In a footnote, Judge McVerry added that "[r]eligious expression in the workplace is a complex legal issue involving a balance between the sometimes conflicting rights of co-workers."

As for Prowel's retaliation claim, Judge McVerry noted that "whether Prowel engaged in an activity protected under [Title VII] is a close call," but ultimately found that Prowel could not have a reasonably objective belief that he engaged in protected activity because Title VII does not prohibit harassment or discrimination because of sexual orientation. Judge McVerry's ruling seems particularly goal-oriented, because granting a motion for summary judgment is a drastic remedy that should be withheld where there is any doubt as to the existence of a triable issue.

Judge McVerry's legal analysis is also self-contradictory. While Judge McVerry conceded that even though "Prowel does not have a valid claim under Title VII for sex or religious harassment, he could still prevail on his retaliation claim," he ruled that Prowel cannot prevail on his retaliation claim, since he was discriminated against on the basis of his sexual orientation. Judge McVerry essentially tells employers who retaliate to protect themselves by discriminating on the basis of sexual orientation beforehand. *Eric Wursthorn*

Federal Magistrate Orders Treatment for Transgender Inmate

This summer witnessed two decisions from the District of Idaho that granted an incarcerated transgender plaintiff injunctive relief in the form of treatment for Gender Identity Disorder (GID). On July 27th, Magistrate Judge Mikel H. Williams ordered the Idaho State Board of Corrections to begin supplying Jennifer Ann Spencer (f/k/a Randal Gammet) with feminizing hormones and psychotherapy while her Eighth Amendment claim against the Board was litigated. *Gammet v. Idaho State Bd. of Corrections*, 2007 WL 2186896. Last month, Judge Williams denied the Board's attempt to terminate the preliminary injunction by presenting evidence to impeach Spencer's testimony. 2007 WL 2684750 (Sept. 7, 2007).

Spencer entered the Idaho penal system in 1999. Beforehand, Spencer testified that she lived as a woman and took birth control pills as a form of hormone treatment. After becoming incarcerated, Spencer received various diagnoses from prison doctors and counselors, none for GID. In 2004, shortly after learning that the prison doctors did not believe Spencer had GID, she attempted suicide. One year later, Spencer attempted and succeeded performing self-castration. Over the time of her incarceration, Spencer put in roughly seventy-five requests for treatment for GID, none of which were granted.

Spencer brought suit for Eight Amendment violations based upon the prison's deliberate indifference as to treatment for her GID and hypergonadism (a reduction or absence of hormone secretion form sex organs). Medical experts hired by Spencer for the case testified that Spencer was clearly transgender and needed treatment in the form of hormones and psychotherapy. Spencer filed for a preliminary injunc-

tion to require the prison to follow its treatment protocol for prisoners with GID. In ruling upon the preliminary injunction, Judge Mikel looked for a balance of whether Spencer raised "serious questions going to the merits" and whether the "balance of harm" tipped towards the plaintiff. The greater the hardship on Spencer, the less probability of success Spencer needed to show.

In evaluating Spencer's Eight Amendment claim, Judge Mikel noted that the prison's medical staff failed to re-evaluate Spencer after her suicide attempt and self-castration. The prison staff appeared to have seen that Spencer had significant issues with her gender, but "consciously disregarded" making an adequate diagnosis and giving adequate treatment. The doctors only offered Spencer testosterone in response to her requests for hormones, despite the fact that replacement testosterone might exacerbate Spencer's GID and place her in further discomfort and heighten the risk of suicide. Based upon the facts available and expert testimony, Judge Mikel held that Spencer had shown a "fair chance of success" that her lack of medical treatment violated the Eight Amendment.

Judge Mikel next evaluated the balance of hardships in the case. Although Spencer had submitted expert testimony on the danger of only providing her testosterone, the prison submitted no testimony whatsoever on the impact that any hormone might have on Spencer, nor had it shown any hardship on the prison itself in providing hormone treatment. This alone satisfied Spencer's burden on this point. Judge Mikel went on to note that suicide remained a threat to Spencer should litigation not result in treatment for her GID and that irreversible bone density loss likely started to occur a year and one-half after Spencer's self-castration in 2005. Further, other prisons under the auspices of the Board provided male inmates with female hormones. Based on the overwhelming hardships on Spencer's side, Judge Mikel granted the injunction and ordered the prison toprovide Spencer with female hormone therapy and proper psychotherapy.

The Idaho Board of Corrections responded by filing a motion for reconsideration and termination of the preliminary injunction. On September 7th, Judge Mikel reaffirmed his previous ruling and incorporated a treatment plan for Spencer into a new order.

The Board offered evidence that Spencer did not live as a woman before incarceration and had not taken birth control pills as a form of hormone therapy. Judge Mikel dismissed this "new" evidence, noting that one of the prison's doctors had raised the issue of credibility by claiming Spencer lied and was an attention seeker. Not only had the court been put on notice as to Spencer's credibility, but the preliminary injunction was granted based on Spencer's *current* condition. Spencer's history before the suicide attempt and self-castration had little bearing on the decision.

The Board also attempted to terminate the injunction using the Prison Reform Litigation Act, claiming that a " least intrusive means necessary" balancing was not done when the court ordered relief. Judge Mikel dismissed this claim by noting that the PRLA only offered automatic stays and termination proceedings for *final* injunctive orders. Preliminary orders under the PRLA are already set to expire after 90 days, when the court may renew the order pending trial.

As part of the preliminary injunction, the Board was required to submit an affidavit as to whether they were able to follow the order. The Board claimed that they would be unable to follow the terms of the injunction in regard to treatment. In response, Spencer submitted a treatment plan that consisted of off-site visits to a local physician and psychologist who are familiar with GID and its treatments at the expense of the prison. Judge Mikel approved the plan as satisfying the "needs-narrowness-intrusiveness test" in light of the prison's inability to provide treatment. *Chris Benecke*

Court Upholds Discharge of Gay Activist For Refusal to Remove Sexually Provocative T-Shirt

"Sorry, I Don't Do Girls, Don't Panic." Emblazoned on a t-shirt, that slogan and a busy holiday Wal-Mart in Northern Minnesota proved a lethal combination to Daniel Lussier's employment, after a customer complaint and Lussier's refusal to remove the t-shirt led to his firing. That termination was upheld in an August 28 decision by Judge Ann. D. Montgomery of the United States District Court for the District of Minnesota, against Lussier's claims of sexual orientation discrimination and tortuous interference with contract. *Lussier v. Wal-Mart Stores, Inc.*, 2007 WL 2461932 (D. Minn. Aug. 28, 2007). Judge Armstrong held that the sexual nature of the t-shirt's message justified Wal-Mart's objections, and that Lussier had failed to provide any evidence that these objections, or those of his employer (a nonprofit vocational rehab center), were in fact motivated by Lussier's sexual orientation.

Plaintiff Lussier was employed by the Occupational Development Center (ODC) of Bemidji, Minnesota, a nonprofit organization that provides vocational rehabilitation services for its disabled clients and seeks to place those clients in local businesses. Lussier worked as a job coach, providing his clients with on-site training and supervision. One of Lussier's clients was hired by the Wal-Mart in Bemidji as a cart attendant, and as part of his job coaching responsibilities, Lussier frequently worked on-site with his client at Wal-Mart (with Wal-Mart's permission), mainly in the parking lot, entryway, and front area of the store.

On December 23, 2004, the holiday shopping crowd made the job of keeping up with shopping carts a busy one for both Lussier's client and Lussier himself. Becoming warm due to the physical activity, Lussier removed his jacket that afternoon, revealing a black t-shirt underneath that stated in white letters, "Sorry I Don't Do Girls, Don't Panic." Shortly thereafter, a Wal-Mart manager told Lussier that a customer had complained that the t-shirt "was offensive because of its sexual nature," and asked Lussier to remove or cover up the slogan because it was against Wal-Mart dress policy. Lussier initially refused, stating that he did not work for Wal-Mart and that he had a right to free speech. Shortly after the manager left to speak with another manager, Lussier covered up his shirt.

The Wal-Mart managers then called ODC to report the incident and stated that, because of Lussier's refusal to cooperate, Wal-Mart did not wish Lussier to return as a job coach to the store. Lussier's managers at ODC brought him in to discuss the incident and gave him a formal warning notice that he had violated ODC's policies on rudeness and dress code. The ODC managers informed Lussier that he would be required to apologize to Wal-Mart, and that if he did so, he would be allowed to return, but that if he did not, he would be terminated. Lussier refused, stating his belief that Wal-Mart had discriminated against him for being openly gay. As promised, Lussier was then fired by ODC for refusing to apologize to Wal-Mart.

Lussier filed suit in the District Court against Wal-Mart, claiming (1) that Wal-Mart had tortiously interfered with his employment contract with ODC; and (2) that Wal-Mart had aided and abetted or incited ODC to discriminate against him on account of his sexual orientation, in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.01 *et seq.* Wal-Mart moved for summary judgment on all claims, which Judge Montgomery granted.

The tortious interference claim came down to one issue was Wal-Mart justified in reporting the t-shirt incident to ODC and asking that Lussier not return? (The court assumed, without deciding, that this could amount to an intentional procurement of Lussier's dismissal.) Judge Armstrong held that the record "conclusively shows" that Wal-Mart's conduct was justified. Although Lussier was not a Wal-Mart employee, she found that his job duties and presence at the store were such that customers could reasonably conclude that he was a representative of Wal-Mart, and therefore Wal-Mart was justified in expecting that he wear "appropriate attire" when at the store. Finding his t-shirt "sexually suggestive", Judge Armstrong stated that she would not "sit as [a] super-personnel department" by second-guessing the

judgment of Wal-Mart and ODC that the shirt was inappropriate.

Lussier, however, argued that any justification was defeated by evidence of sexual orientation discrimination on Wal-Mart's part. Much of Lussier's arguments relied on evidence that the Wal-Mart managers had lied about various aspects of the incident, but Judge Armstrong essentially held this evidence to be immaterial, in that there was no dispute about the fact that Lussier had worn an inappropriate (in Wal-Mart's view) t-shirt and had, at least initially, refused a request to cover it up. Lussier also argued that Wal-Mart had treated him differently than it had another ODC job coach about whom a customer complaint had been received a male coach "snuggling" on-site with his girlfriend. Judge Armstrong accepted Wal-Mart's evidence that the snuggling stopped when addressed i.e., that "there is no evidence that the snuggling job coach refused a request that he stop," and therefore Lussier was not similarly situated.

Turning to the MHRA claims, Lussier's claim that Wal-Mart aided and abetted discrimination by ODC foundered on what Judge Armstrong found was a lack of evidence that ODC's actions had been motivated by Lussier's sexual orientation. The court first held that Lussier had provided no direct evidence of discrimination. Lussier argued that ODC had no policy against wearing t-shirts with slogans and that it was the gay message of the t-shirt that led to ODC's actions. Judge Armstrong rejected this framing, however, referring once again to the "sexual nature" of the slogan: "The relevant inquiry for Lussier's disparate treatment argument is not whether ODC permitted employees to wear t-shirts with slogans, but whether ODC allowed heterosexual employees to wear t-shirts with sexual remarks." There was, she said, no evidence on this issue and thus no direct evidence of disparate treatment.

Lussier also raised a potentially more troubling piece of evidence of discriminatory intent: the Wal-Mart manager testified that Lussier's supervisor at ODC, Jeff Molnar, told him at church one day that "he [Molnar] was shocked Lussier was freely expressing he was a homosexual because Molnar thought Lussier, as a former member of the [church], believed homosexuality was wrong." Judge Armstrong dismissed this evidence summarily, holding that there was no evidence that what she characterized as Molnar's "surprise at Lussier's homosexuality" had influenced his decision regarding Lussier.

Finding insufficient direct evidence of discrimination, the judge turned to applying the familiar *McDonnell Douglas* burden-shifting test for discrimination. She first rejected Wal-Mart's contention that Lussier's conduct demonstrated that he was "not qualified" for his job; the test at the *prima facie* stage, she said, was whether the employee met the minimum job qualifications, not whether he had performed his job satisfactorily. Based on the church comments made by Lussier's supervisor, Judge Armstrong assumed, without deciding, that Lussier had established a *prima facie* case of discrimination.

The judge rejected, however, Lussier's arguments that ODC's stated reasons for firing him his violation of ODC policy and refusal to apologize to Wal-Mart were pretextual, largely for the reasons previously discussed with respect to Wal-Mart's justification. Lussier did, however, make one additional argument: that given Lussier's previously stated belief that Wal-Mart had complained about the t-shirt because of its openly gay statement, Molnar knew that insisting upon an apology would be an "insurmountable barrier" for Lussier and that Molnar made this demand solely to give him an excuse to fire Lussier. Judge Armstrong deflected this argument by stating that requiring an apology was "within the bounds of … discretionary business judgment," which she would not "second-guess." Therefore, Lussier could not, she held, show that ODC's reasons were pretextual, thus precluding any claim of sexual orientation discrimination on ODC's part and vitiating the claim of Wal-Mart's aiding and abetting that discrimination. As for Lussier's claim that Wal-Mart had attempted to incite ODC to discriminate against him, Judge Armstrong held that this claim was nearly identical to Lussier's tortious interference claim and, for largely the same reasons, also held in Wal-Mart's favor. She accordingly granted summary judgment to Wal-Mart on all claims. *Glenn C. Edwards*

Indiana Appeals Court Affirms Forty Year Sentence for "Butchering" HIV-Positive Gay Man

A unanimous Indiana Court of Appeals panel upheld a forty year prison term for Shawntrell Norington, who pled guilty to voluntary manslaughter charges in the 2003 murder of Roderick Shreve, an HIV-positive gay man, after they had sex. In the same September 10 ruling, the court also upheld additional prison time for Norington's guilty pleas to other offenses, totaling 60 years. *Norington v. State*, 2007 WL 2582172 (Table).

According to the opinion for the court by Judge Cale J. Bradford, Norington "met with Shreve" on September 3, 2003, at a time when Norington was already wanted on a robbery and weapons charge stemming from his July 3, 2003, hold-up at a liquor store. "The two returned to Shreve's home [in Indianapolis] "where they engaged in sexual relations." After doing the deed, Shreve "revealed to Norington that he was HIV positive."

"Upon learning this information," wrote Bradford, "Norington became enraged. He responded by beating and stabbing Shreve multiple times with such force that at some point he broke a knife off in Shreve's body, grabbed another knife, and continued stabbing and slashing, ultimately causing Shreve's death." Either later that day or the next day, Norington returned to Shreve's house with a friend, breaking in and stealing "Shreve's property, including two motor vehicles, a wallet and its contents, a safe, and a telephone."

Norington was promptly apprehended, and charged on September 11, 2003, just a week later, with murder, felony murder, robbery, burglary and theft. Norington agreed to a plea bargain on April 21, 2004, admitting to robbery on the liquor-store charge and felony burglary and voluntary manslaughter on the charges stemming from his encounter with Shreve. The plea agreement did not cover sentencing.

On May 12, 2004, Marion Superior Court Judge Grant Hawkins held a sentencing hearing. In arguing about the appropriate sentence, the prosecutor urged that Norington's "butchery" of Shreve was an aggravating factor meriting a much longer sentence than would normally be imposed for voluntary manslaughter, a "heat of passion" charge applied to cases where the murderer was provoked by the victim's conduct. The liquor store robbery also involved aggravating factors, as Norington had pulled a gun on the clerk and shouted curses at her as she emptied the cash register of its paltry contents of $5.92. Norington also had prior theft and weapons convictions on his record.

Judge Hawkins imposed a sentence of twelve years on the robbery conviction, eight years for the burglary of Shreve's possessions, and forty years for the manslaughter conviction, the sentences to be served consecutively, amounting to sixty years total.

Acknowledging that Norington was only 19 when the crimes were committed, that he was probably intoxicated at the time, had a troubled childhood and had saved the state the expense of prosecution by pleading guilty, nonetheless Judge Hawkins found aggravating factors to outweigh the mitigating ones. On the issue of the manslaughter conviction, he commented, addressing the prosecutor: "This is going to be hard to explain, and it might not even stand up on appeal, rage is a component of voluntary manslaughter and the reason the State entered the plea is, I guess, because your survey of those with whom you consult convinced you that telling the jury that this man killed another man after a sexual encounter, and after the other man said oh, by the way, I'm HIV positive, a jury might have agreed that this was voluntary manslaughter instead of murder, and I think that's a wise decision on your part."

"But even though that sudden heat, that rage, that anger is a factor that reduces murder down to voluntary manslaughter, there are times when the rage just reaches totally unacceptable

dimensions," he continued. "In this case he stabbed a man until he ran out of knives. He broke a knife off in the man, grabbed another knife and kept on stabbing him. That, I think, is what leads to [the prosecutor's] butchery comment and so adopting that description for the reasons I've stated I find that there's an aggravating fact that the prior criminal record and the butchery are an aggravating factor that outweigh the mitigating factors."

On appeal, Norington argued that Judge Hawkins had erroneously attributed aggravating weight to the "butchery" aspect of the case, which was itself a factor in the crime of voluntary manslaughter. That is, he argued, it was the rage with which he acted under the provocation of learning that the man with whom he had just had sex was HIV positive that had justified letting him plead to voluntary manslaughter rather than the original murder charge, and so the same rage could not be used after the plea to give him, in effect, the kind of sentence that would be imposed for that original murder charge.

The standard for judicial review of a sentence is abuse of discretion. In this case, the Court of Appeals found that Judge Hawkins had not committed an abuse of discretion by taking the "butchery" aspect of the case into account as an aggravating factor. "While 'sudden heat' may constitute an element of the crime of voluntary manslaughter," wrote Appeals Judge Bradford, "we are not convinced that 'butchering' a victim by stabbing him numerous times, breaking off a knife in his body, and then finding another knife to continue stabbing him with, is contemplated by 'sudden heat.' We find no error in the trial court's determination that the brutality of these particularized circumstances merited aggravating weight."

Norington has not managed to stay out of trouble in prison. A local newspaper, the *Herald Bulletin*, reported on July 2 of this year that he was spotted in the Pendleton Correctional Facility visiting room receiving a bag of marijuana and a contraband cell-phone from a woman who was visiting him. The news report noted that Norington would not be eligible for release until June 2036, according to a source at the Indiana Department of Correction. A.S.L.

New York Trial Judge Upholds Comptroller's Recognition of Same-Sex Marriages

The New York Supreme Court for Albany County recently ruled that the state's Comptroller could recognize foreign same-sex marriages for the purpose of dispensing benefits from the state's public employee retirement system. *Godfrey v. Hevesi*, Index No. 5896–06, RJI No. 01–06–086862 (Sept. 5, 2007). Justice McNamara held that the Comptroller's policy decision was not contrary to New York law, despite recent court decisions against certain types of recognition for same-sex unions.

In October of 2004, the Comptroller of New York State announced that based on the principle of comity, the Retirement System would recognize legal same-sex marriages performed in another jurisdiction. This announcement was in response to a state employee who had planned on marrying his same-sex partner in Canada. Since that announcement, the Court of Appeals has ruled that the New York Constitution does not compel recognition of same-sex marriage. *Hernandez v. Robles, 7 N.Y.3d 338 (2006). The Appellate Division had also ruled that a same-sex partner could not recover as a "surviving spouse" under the wrongful death statute, where the couple had previously entered into a civil union in Vermont. Langan v. St. Vincent's Hospital*, 25 A.D.3d 90 (2d Dept. 2005). The Alliance Defense Fund, an organization in Arizona that specializes in mounting legal challenges to policies recognizing same-sex partners, then asked the Comptroller whether he intended to change his policy. The Comptroller responded that he would continue to recognize same-sex marriages. This lawsuit by citizen-taxpayers of New York State represented by Alliance followed, claiming that the Comptroller's actions resulted in the illegal expenditure of state funds.

New York State law gives the Comptroller exclusive authority to determine beneficiaries of the Retirement System. Justice McNamara notes that New York has long applied comity to marriage, with the exceptions of a positive legislative prohibition against such marriages or marriages involving polygamy and incest. The Comptroller's decision determined that these marriages, legally created in another jurisdiction, would not be inconsistent with New York law. Justice McNamara, noting that New York has no "defense-of-marriage" act, agreed with the Comptroller's "policy" determination.

Justice McNamara next analyzed the recent case law, holding neither of the two cases cited above compelled the Comptroller to act differently. *Hernandez* did not concern recognition of out-of-jurisdiction marriages and accordingly has no bearing on the present case. Moreover, *Langan* concerned a couple who entered into a civil union in Vermont. As that case likewise did not concern the recognition of a foreign same-sex marriage, it is similarly without sway in the present action. As such, Justice McNamara declared that the Comptroller's policy was legal and not contrary to law. *Chris Benecke*

N.Y. Federal Court Dismisses Most of Gay Discrimination Suit

Gay plaintiff Daniel Riscili's discrimination suit against his former employer, Gibson Guitar Company, foundered on the shoals of federal pleading requirements in a July 10 ruling by U.S. District Judge Richard J. Holwell. *Riscili v. Gibson Guitar Corp.*, 2007 WL 20555 (S.D.N.Y.). Although Riscili filed his statutory claims based on New York City's Human Rights Law, which was amended by the city in 2005 to make clear that courts should not adhere to federal law precedents in interpreting the city law, Judge Holwell relied on federal precedents to dismiss Riscili's discrimination and harassment complaints, never mentioning the revisions to the city law in his opinion.

While it is unclear at this early stage after its passage whether a completely independent interpretation of the city law would have led to a different outcome in these rulings, that would seem to have been the intent of city council members who advocated for a more protective approach under the city law. The 2005 amendments were passed, among other things, specifically to overrule certain federal court interpretations of the city law.

According to Holwell's account of Riscili's complaint, Riscili was working for a company that Gibson Guitar purchased in 2001. Riscili claims to have been the victim of unspecified anti-gay harassment at the hands of another Gibson employee, Lou Vito, at a company event that took place in April 2003. After this event, Riscili alleges, anti-gay workplace harassment against him, again not specifically described in the complaint, increased, affecting his ability to do his job properly. According to Riscili, this deterioration in his work performance led to his discharge, "without cause," in July 2003. Riscili claims that he complained to management about Vito's conduct and other anti-gay harassment, but "little or nothing was done."

Riscili advance five legal theories in the complaint he filed in federal court against Gibson Guitar. The first three were based on the New York City Human Rights Law, alleging sexual orientation discrimination, anti-gay harassment, and retaliation. The retaliation claim, the only one of Riscili's claims to survive the employer's motion to dismiss, alleged that he suffered adverse employment consequences, and ultimately discharge, after having complained about discrimination and harassment to his employer. Judge Holwell found these allegations sufficient to reject the employer's dismissal motion. In addition to the statutory claims, Riscili demanded damages for intentional infliction of emotional distress and negligent hiring and training of Vito.

It is possible that Judge Holwell felt that the 2005 amendments to the Human Rights Law were irrelevant because all the incidents on which this case is based occurred in 2003, but he never mentioned the amendments in his decision, not even to include a footnote explaining why he was relying on federal precedents to interpret the city law.

Relying on decisions by the federal appeals court in New York and the U.S. Supreme Court,

Holwell found that the plaintiff's complaint would need much more specific factual allegations than Riscili provided. Holwell insisted that it was not sufficient for Riscili to state that he was harassed by Vito, complained to management, suffered increased harassment from co-workers, and ultimately was fired when his work deteriorated. Without spelling out in great detail what Riscili would have had to say in order for his complaint to survive, Holwell noted the lack of specific descriptions of what co-workers did or said that Riscili claimed to be discriminatory or harassing.

In addition, under federal precedents, a discharge from employment is generally not unlawful if it is warranted by the employee's poor job performance. In this case, Riscili apparently believed that his job performance deteriorated because of the adverse effect on him of the continuing harassment and the employer's failure to do anything about it, but Holwell faulted him for not clearly articulating this theory in his complaint, and explained that Riscili had failed to offer anything that directly countered the fact that he was fired when his work deteriorated.

Seeking damages for intentional infliction of emotional distress is quite difficult under New York Law, so it is not surprising that Riscili suffered dismissal of this claim. New York courts require allegations of outrageous misconduct by the defendant. In this case, the defendant is the company, and although one might think that failing to take any action when faced with complaints of harassment by co-workers is outrageous, New York courts are looking for something much more severe. If the actual conduct of the co-workers was sufficiently outrageous, Riscili might better have sued them directly.

As to the negligent hiring and training claim, Riscili ran up against the barrier of the Workers Compensation Law, which generally bars any negligence claims by employees against their employers for injuries arising out of their employment. If Riscili can prove that he suffered injuries from his employer's negligence, the place to take his claim is the Workers Compensation agency. The claim of negligent hiring and training is usually more successful when brought by a customer who has been injured due to negligent job performance by an employee.

Judge Holwell's ruling sends an important message to LGBT people who encounter workplace discrimination from co-workers and want to sue their employers. Keeping a detailed diary of workplace incidents, and then putting as many of those facts as possible into the complaint would be necessary under prevailing federal standards. Whether such standards would ultimately apply to cases governed by the 2005 amendments to the city Human Rights Law remains an open question, but why risk a dismissal of the case for lack of specificity in the complaint? A.S.L.

Washington Appeals Court Rejects Challenge to Seattle Executive Order

The Court of Appeals of Washington, Division 1, ruled in *Leskovar v. Nickels*, 2007 WL 2696724 (September 17, 2007), that Seattle's mayor had not violated the state constitution when he issued an executive order recognizing same-sex marriages contracted in other jurisdictions for purposes of the city's employee benefits program.

In March 2004, Mayor Gregory Nickels issued an executive order titled "City Recognition of Valid Marriage Licenses," which ordered that "all City Departments recognize the same sex marriages of City employees in the same manner as they currently recognize opposite sex marriages of City employees for purposes of granting employee benefits and other benefits ordinarily received in the course of employment."

Nickels' order was a pragmatic reaction to the fact that beginning in the summer of 2003 it was a relatively simple matter for same-sex couples from Seattle to take a quick trip north to Vancouver and get married, as the British Columbia Court of Appeals had ordered the province to issue marriage licenses to same-sex couples. Once validly married same-sex couples began asking to have their marriages recognized for city benefits purposes, the city had to have a policy.

But Nickels' policy did not sit well with some city residents opposed to same sex marriage, living in a state that had passed a Defense of Marriage Act that provided that marriage in the state of Washington could only occur between a man and a woman, so a lawsuit was filed challenging the policy. King County Superior Court Judge Bruce W. Hilyer granted the city's motion to dismiss the case, and the plaintiffs appealed. A unanimous three-judge panel affirmed Judge Hilyer's decision, in an opinion written by Judge Ronald E. Cox.

The plaintiffs made two different legal arguments. First, they argued that the city could not recognize foreign same-sex marriages, because the issue of marriage itself is preempted as a matter of state law. The court observed that under the home rule provisions of the Washington Constitution, major cities like Seattle are authorized to adopt city charters for their governance providing broad legislative and executive powers to the city government, and these powers included the establishment and regulation of benefits for city employees.

The court pointed out that the state's Supreme Court has previously addressed this question in a slightly different set of circumstances when it rejected a challenge to the city of Vancouver's decision to establish a domestic partnership benefit plan for its employees. In *Heinsma v. City of Vancouver*, 29 P.3d 709, the court decisively rejected the argument that the city was preempted from recognizing same-sex partnerships for this purpose, holding that it was within the authority of the city to set the terms of employment for its workers in order to attract qualified applicants.

The plaintiffs' potentially stronger argument was to attack the Seattle executive order based on the state's Defense of Marriage Act, which was upheld against constitutional challenge last year when the Washington Supreme Court rejected a same-sex marriage lawsuit by a vote of 5–4. In this case, the plaintiff argued that Mayor Nickels' order "gives legal effect to same-sex marriage, which is expressly prohibited by the legislature."

Judge Cox pointed out that in the Vancouver benefits case, the state Supreme Court had specifically rejected the argument that providing partner benefits to city employees violated the state's Defense of Marriage Act. "The court noted that extending benefits to domestic partners does not transform the relationship into a legal marriage," wrote Cox. "Here, the executive order extending benefits to city employees in same-sex marriages in the same manner as other city employees determines who is eligible for employee benefits. Nowhere does the order purport to give legal effect to same-sex marriages." The court saw no conflict between the mayor's order and any provision of state law.

The plaintiffs had tried to rely on a recent ruling by the Michigan Court of Appeals, *National Pride at Work v. Governor of Michigan*, 732 N.W.2d 139 (2007), which held that providing domestic partner benefits to public employees in that state violated the state's anti-gay marriage amendment. But Cox noted that the Michigan amendment went much further than Washington's DOMA, since it provided that different-sex marriage "shall be the only agreement recognized as a marriage or similar union for any purpose," whereas the Washington enactment merely defined marriage without expressly prohibiting the state from extending other forms of recognition to same-sex partners.

"We recognize that the executive order contains language to which [the plaintiff] objects and on which much of the arguments are based," Cox commented, pointing to the "Whereas" clauses that come at the beginning of the executive order and proclaim support for marriage equality regardless of sexual orientation, but he accepted the city's argument characterizing this language as "aspirational views that do not affect the operative portions of the order that define who is entitled to employee benefits." Despite all the pro-gay rhetoric, as a practical matter all that the order does is to extend domestic partnership benefits to those city employees whose proof of partnership consists of a marriage contracted in another jurisdiction.

As Seattle already had a domestic partnership benefits program in place, this just meant there was one more way to document one's partnership for benefits purposes.

Theoretically, the plaintiffs could attempt to appeal this ruling to the state supreme court, but the appeals court shows convincingly that the high court's prior decision on domestic partnership benefits in the city of Vancouver effectively rejects the main arguments that the plaintiffs made in this case. A.S.L.

Gay Ecuadoran Strikes Out on Asylum Claim

On September 19, the U.S. Court of Appeals for the 11th Circuit rejected a petition for asylum, withholding of removal and relief under the Convention Against Torture from a gay Ecuadoran. *Vicuna v. U.S. Attorney General*, 2007 WL 2713014.

The applicant "asserted that he lived in Biblian, Ecuador, and that he is homosexual," relates the per curiam opinion for the three-judge panel. He "contended that, after a rumor was spread in Biblian that he was homosexual, he was detained by local police for three hours and during this detention, he was beaten and forced to clean cells." He was not charged with any crime and was allowed to leave the police station. He also testified that "a few months later, he was walking home from a sports event when the police against stopped him. According to [the petitioner], the police asked him if he was 'prostituting' himself and kicked him." He then escaped. The opinion does not relate how he came to the U.S.

The Immigration Judge decided that this harassment "did not rise to the level of persecution" and that the petitioner had "failed to establish a well-founded fear of future persecution throughout Ecaudor." The BIA affirmed, explaining that he "did not show a pattern or practice of persecution against homosexuals in Ecuador or that he could not safely relocate within Ecuador."

The 11th Circuit panel essentially rubberstamped this ruling. In a footnote, the court said that the petitioner did not argue in his initial brief that he had suffered past persecution, so this argument "is abandoned." The court added that the record would not have compelled reversal of the IJ's conclusion anyway.

On the merits, the court affirmed, commenting: "Although [the applicant] provided documentary evidence that homosexuals can be mistreated in Ecuador, [he] admitted that he did not try to relocate to another part of Ecuador before he left for the United States. [He] has not demonstrated that he could not avoid persecution by relocating within Ecuador and he also has failed to show a pattern or practice of persecution against homosexuals throughout Ecuador." Consequently, he was not entitled to asylum, withholding of removal or protection under the Convention against Torture. A.S.L.

Gay Plaintiff Loses Michigan Sex Discrimination Case

U.S. District Judge George C. Steeh granted summary judgment to the employer in *Myers v. Office Depot, Inc.*, 2007 WL 2325078 (E.D. Mich., Aug. 14, 2007), in which a gay man who had worked for Office Depot for several years was discharged when he failed to attend a meeting that had been arranged to discuss assigning him to a different supervisor after he had complained about being harassed by his supervisor. Although the case turned in part on the fact that Michigan and federal law do not prohibit sexual orientation discrimination by private sector employers, it seems to have turned more heavily on poor communication between management officials and the gay plaintiff.

Scott Myers began working at Office Depot's Plymouth, Michigan, office on September 11, 2002. He was openly gay at work. His problems apparently began early in 2005 when the company held its "yearly kickoff event to motivate its sales people" in Orlando, Florida. A group of Plymouth sales staff, including Myers, were sent to this event. One evening, the Plymouth group went to a bar and heavy drinking ensued, during which Myers had an "intense conversation" with Ron Sorey, a co-worker. Then, according to Myers, he went to the men's room. Another co-worker who was there told Myers to go into a stall, where Sorey "grabbed me and tried to kiss me." Myers rushed from the men's room and avoided further contact with Sorey.

In September 2005, Myers' supervisor was demoted and Sorey was appointed in his place. From that time, Myers alleges, Sorey tried to get Myers to quit his job, putting him into a Performance Improvement Process (PIP) and asking him whether the job was the "right fit" for him. Myers complained to Human Resources about his treatment by Sorey, and an investigation was initiated. Higher level management decided to offer Myers a change of supervisor and he was invited to a meeting to discuss the result of the investigation, at which this proposal was to be made to him, but a dispute broke out when Myers asked to bring a third party with him to the meeting, because he feared a confrontation with Sorey, who he felt had been abusive to him in prior meetings, especially when Myers raised the Florida incident. Myers was warned he would be terminated if he did not attend the meeting on October 28, 2005, but he failed to show up and received his discharge notification promptly.

Myers sued on claims of hostile work environment, quid pro quo harassment, and retaliation. Judge Steeh undertook an extensive analysis of the case law on same-sex harassment and determined that Myers could not make out a claim based on a single incident involving an attempted kiss by a drunken co-worker. Under *Oncale*, reasoned Steeh, the hostile environment theory would not work without evidence of pervasive harassment, and a quid pro quo theory (demand of sex for favors) wouldn't work with a co-worker, even if he subsequently became the plaintiff's supervisor, and especially in the absence of evidence that Sorey was gay and acting out of sexual desire when he sought the kiss. The court also rejected the retaliation claim, finding no evidence to suggest that the discharge was due to Myers' complaints to the Human Resources Department, despite its close proximity in time.

Ultimately, it was too clear that Myers was specifically warned that he had to attend the meeting if he was to keep his job for the court to conclude that the discharge was for some other reason. But it is frustrating to read the court's fact summary and see that, at least according to Myers' factual allegations, he was caught in an untenable situation when his very presence at the office constantly reminded Sorey, his new supervisor, of Sorey's drunken mistake in the Orlando restaurant men's room and made their supervisor-employee relationship untenable. The Human Resources Department of Office Depot failed to intervene effectively on Myers' initial complaint and his lost job is the result. A.S.L.

Federal Civil Litigation Notes

Fifth Circuit — In a terse summary calendar disposition in *Byfield v. Attorney General*, 2007 WL 2228366 (Aug. 3, 2007), a panel of the U.S. Court of Appeals for the 5th Circuit rejected a gay man from Jamaica's appeal from a denial of relief under the Convention Against Torture. Unfortunately, the applicant was proceeding pro se, and the brief opinion says nothing about the factual record that was made in his case. In seeking the aid of the 5th Circuit, he alleged that the Immigration Judge and the BIA had refused to consider the evidence supporting his claim that he would be tortured or killed because of his sexual orientation if he is deported to Jamaica. The court noted that he had conceded removability on the basis that he had committed a criminal offense listed in the statute as grounds for deportation of an alien resident in the U.S. The court said it would construe his appeal as raising a due process question and then, without addressing Byfield's contention that the IJ and BIA refused to consider the evidence he proffered, asserted that he "received the process that was due" and rejected his appeal.

Ninth Circuit — A panel ruled on September 5 that the Chandler, Arizona, police department did not violate the First Amendment rights of Police Officer Ronald Dible when it discharged him after discovering he was running a

sexually-oriented website featuring his wife, Megan. *Dible v. City of Chandler*, 2007 WL 2482147. Relying on *City of San Diego v. Roe*, 543 U.S. 77 (2004), in which the Supreme Court upheld the dismissal of a police officer who was selling a video of himself stripping out of a police uniform and masturbating on the internet, a majority of the court held that the impact of Dible's activities on morale in the Police Department, as well as conjectures about the impact his activities would have on recruitment of new officers and relationships with the public, justified the discharge. In a concurring opinion, Judge Canby disagreed with the First Amendment analysis, finding Dible's activities constituted protected speech, but that the discharge was otherwise justified by his dishonest response to police investigators looking into the issue after the Department learned about his activities. Judge Fernandez wrote for the majority of the panel on the First Amendment issue.

Ninth Circuit — A unanimous panel ruled on September 26 in *John v. City of El Monte*, 2007 WL 2781904, that a police officer had not violated the constitutional rights of a veteran school teacher when he arrested her on charges of sexually molesting a ten year old female student. The child's mother had expressed concern to law enforcement officials that her daughter was being inappropriately touched at school. A police officer interviewed the girl at the police station, as well as reviewing a note written by another student identifying the teacher as a "lesbian" and a "perv", concluded he had cause to arrest her, and did so, leading her out of the school building in handcuffs. The prosecutors determined they did not have an adequate case for prosecution and dismissed charges. The teacher sued, claiming her arrest violated her 4th Amendment rights because probable cause was lacking. The trial court denied a motion for summary judgement filed by the police officer, but the 9th Circuit panel reversed, disagreeing with the trial court that the officer lacked, as a matter of law, a sufficient basis to arrest the teacher.

California — Pointing out that Title VII does not forbid sexual orientation discrimination and concluding, with no discussion, that the gay plaintiff was foreclosed from suing on that ground, U.S. District Judge William Alsup granted the federal employer's motion to dismiss a wrongful discharge and discrimination case against the U.S. Department of Veterans Affairs in *Chrisanthis v. Nicholson*, 2007 WL 2782860 (N.D. Cal., Sept. 25, 2007). The court does not go into the particulars of Chrisanthis's sexual orientation discrimination claim.

Louisiana — In *Harris v. H2O Spa and Salon*, 2007 WL 2571937 (E.D. La., Aug. 31, 2007), U.S. District Judge Helen G. Berrigan dismissed various discrimination claims brought by Marshall Harris, a gay HIV+ man, against various management officials of his former employer, finding that statutory discrimination claims under federal and state law can only be brought against the corporate employer, not the individual officials. Judge Berrigan also dismissed a defamation claim, finding that although the statements made about him by management officials might be harmful to his reputation, nonetheless truth was a defense and he did not deny the truth of the statements that he was gay and HIV+. However, the discrimination claim against the company itself was not challenged on this motion to dismiss, and Berrigan also refused to dismiss a claim for intentional infliction of emotional distress, finding that Harris had sufficiently alleged a pattern of conduct intended to inflict emotional distress on him. She also granted Harris leave to replead a negligence claim, finding that for purposes of notice pleading his factual allegations, if fleshed out a bit more, might meet pleading requirements under a Louisiana civil code provision he invoked to seek to hold the company liable for various actions of company officials that created a hostile environment on the basis of sex. This is, by the way, a case of a beauty salon charged with discriminating against a gay man they hired to be their receptionist, perhaps on the basis of his religion as well as sexual orientation. The basis for the Title VII claim is that Harris was denied opportunities for advancement afforded to women in the company, assertedly because a management official felt that "women finish hair better than men."

Massachusetts — In *Partners Healthcare System, Inc. v. Sullivan*, 2007 WL 2230720 (D. Mass., July 31, 2007), District Judge Joseph Tauro order that the Massachusetts Commission Against Discrimination cease any investigation into whether the plaintiff was violating the state's anti-discrimination laws by extending eligibility for certain benefits to same-sex partners of employees but excluding similarly-situated opposite-sex partners from such coverage. The plaintiffs had argued that ERISA preemption divests the MCAD from jurisdiction to investigate its employee benefits plans. MCAD had argued that the practice it was investigating arguably violated Title VII of the Civil Rights Act of 1964, and thus its investigation would not be preempted because ERISA does not preempt Title VII, but Judge Tauro was not buying into this argument, not least because he rejected the contention that Title VII might apply to this situation. He did note, however, that MCAD could continue to investigate the plaintiff with respect to any employee benefits not subject to ERISA.

Ohio — U.S. District Judge Marbley granted summary judgment to the employer in *Collins v. Ohio Department of Job and Family Services*, 2007 WL 2783661 (S.D. Ohio, Sept. 24, 2007), an employment discrimination case in which the plaintiff, an African-American man charging discrimination based on race, gender, religion, age and disability, was fired after an incident in which he was charged with harassment by a gay co-worker. As related by the judge, "The event that precipitated Plaintiff's termination occurred in January 2004. In the course of an email exchange regarding the settlement of his twenty-day suspension, Collins made an offensive remark to his co-worker Michael Douglas allegedly regarding Douglas' sexual orientation. Collins wrote, 'you [Douglas] really should take the log out of your own eye before judging me. There's nothing more arrogant (or reprobate) than to live a lifestyle contrary to the Word, so openly, and then play gospel music all day.'" Collins claimed that Douglas was forced by superiors to "bring charges against Collins" based on the email. Douglas was himself in disciplinary status, was encourage by his supervisor to file the complaint, and did so, alleged Collins, out of fear for his own job. But the court didn't accept this, finding that a discharge precipitated by this incident was for a non-discriminatory purpose, and that Collins failed to show it was pretextual. The court labelled as speculation Collins' uncorroborated testimony that Douglas was pressured to file the complaint by a supervisor who wanted to get rid of Collins in order to promote a white woman into his position.

Tennessee — In *Shell v. J.J.B. Hilliard*, 2007 WL 2220411 (E.D. Tenn., July 27, 2007), U.S. District Judge Thomas W. Phillips denied motion by the defendant employer to grant summary judgment against a male former employee, Michael W. Shell, suing under Title VII on a sexual harassment hostile environment claim based on a pattern of sexually harassing conduct by a male co-worker. Shell alleged a long list of factually specific incidents in which he claims that co-worker Stan Shelton created an intolerable environment through constant comments, insinuations, and pranks seeking to create the impression that Shell was gay and embarrass Shell in various situations. Shell also alleged that he had complained to supervisors, but no effective action had been taken to curb Shelton's antics, the working situation becoming so uncomfortable for Shell that he took to working more out of his home rather than come to the office and ultimately resigned in disgust. Phillips rejected the defendants' argument that this was merely 'joking' behavior and not severe or pervasive enough to alter terms and conditions of employment, and concluded that "a reasonable jury could find that Shell was subjected to a sexually hostile work environment at Hilliard Lyons and that the company was aware of Shelton's conduct, but failed to take prompt and effective corrective action." Interestingly, there is no discussion of Shelton's sexual orientation, and the court never expressly engages in the kind of analysis that some other district courts have used to reject

such claims on grounds that homophobic harassment is not actionable. Could it be because Shell is avowedly "straight" and the federal judge could empathize with a straight man being put in the position of a noisome co-worker who subjects him to unrelenting sexual teasing? The court did, however, grant summary judgment on a supplementary claim under the Tennessee Human Rights Act, finding it time-barred, and also rejected a contract claim based on the company's published Code of Ethics, since it contained a disclaimer stating that it should not be "construed to imply an employment contract between you and PNC," PNC being the parent company of Hilliard Lyons. A.S.L.

State Civil Litigation Notes

California — A unanimous panel of the California Court of Appeal, 4th District, upheld a decision by Orange County Superior Court Judge David T. McEachen to dismiss a lawsuit filed by an anti-gay member of St. Andrew's Presbyterian Church in Newport Beach, seeking to compel the church to let the membership vote on his resolution requiring the church to condemn those Presbyterian churches that are ordaining openly-gay ministers.*Jensen v. Huffman*, 2007 WL 2433117 (Aug. 29, 2007)(not reported in Cal. Rptr. 3d). In response to arguments that the courts had no jurisdiction over ecclesiastical matters, plaintiff Paul Jensen had amended his original complaint to make it sound entirely like a dispute between a membership corporation and one of its members over procedural issues, but Judge McEachen had pierced the veil and read the amended complaint in the light of the first complaint. The court of appeal, in a decision by Justice O'Leary, affirmed, finding, among other things, that a church member is not entitled by law to have a list of the email addresses of other members or to personally examine the detailed financial records of the church, including the expense accounts of ministers.

Florida — Rejecting a decision by Monroe County Circuit Judge Richard Payne that a lesbian mother should be given residential custody of her kids and allowed to move to Virginia with her same-sex partner, the 3rd District Court of Appeal ruled in *Paskiewicz v. Paskiewicz*, 2007 WL 2780902 (Sept. 26, 2007), that the basic prerequisite for a modification of custody had not been met, in that there was no change of material circumstances that would trigger the authority of the court to weigh the best interests of the children in restructuring the original custody agreement. The only change, noted the court, was Mrs. Paskiewicz's desire to relocate and take the children with her, and this, by itself, could not stand under Florida law as a basis to reopen a custody determination. In this case, both parents and their families had continuing contact with the children, and the contact of the father and his family would have been considerably lessened in the event of a move. It does not appear that the mother's sexual orientation or relationship with her partner were relevant factors to the decision.

Iowa — Settlement of a human rights complaint by a lesbian couple against the Des Moines YMCA for refusing to give them a family membership seemed to have been achieved, when the YMCA's insistence that the settlement agreement have a confidentiality provision encountered resistence from the complainants. "We're not going to be gagged on this," insisted Sandra Patton-Imani. The Human Rights Commission had found that the Y's refusal violated the city's human rights law. The Y had agreed to settle the case by extending its definition of family to include same-sex couples, but had backed off on a proposal to give the women a free lifetime membership or to provide seed money for legal aid funds to handle legal issues for LGBT families. *Des Moines Register*, Aug. 7.

Michigan — Rejecting without any discussion the ex-husband's argument that custody of his minor daughter should be changed from his ex-wife to him because, inter alia, she was "attempting to impose a lesbian lifestyle on the child," the Michigan Court of Appeals affirmed a ruling upholding the trial court's order rejecting a change of custody in *Dumm v. Brodbeck*, 2007 WL 2458429 (Aug. 28, 2007) (unpublished disposition). The brief per curiam opinion focuses on the lack of admissible evidence in support of ex-husband's claims.

Maine — The *Boston Globe* reported on Sept. 19 that the Maine Human Rights Commission has, for the first time since the state's gay rights law went into effect, made a finding of reasonable grounds to support a discrimination claim against a landlord who rescinded a rental agreement after learning that the same-sex couple who rented the property were gay. The reasonable grounds decision had not been posted on the Commission's website as of September 26.

Michigan — In *Edwards v. 17th District Court*, 2007 WL 2192637 (July 31, 2007), the Court of Appeals of Michigan affirmed a summary disposition against the plaintiff on a same-sex harassment hostile environment claim, finding that the harassment, not described in any detail in the per curiam opinion, was not motivated by the plaintiff's sex. "Here," wrote the court, "plaintiff admits that much of the harassment was intended to humiliate him for working in a nontraditional male role. Although plaintiff testified that he believed that Bruce made sexual advances toward him, there is no evidence that any of the harassers were homosexual. Therefore, plaintiff has failed to establish that he was subjected to harassment on the basis of sex." The court noted that harassment based on actual or perceived sexual orientation is not, as such, actionable under the state's civil rights law, which does not include sexual orientation. The court also concluded that the requirements for a same-sex harassment suit under the U.S. Supreme Court's *Oncale* decision had not been met. "There is no allegation that plaintiff's harassers acted out of sexual desire. Nor is there an allegation that there was general hostility toward men in the workplace."

Michigan — In *Hammer v. Board of Regents of the University of Michigan*, No. 04–241 MK, now pending before the Michigan Court of Claims, Professor Peter J. Hammer, formerly of the University of Michigan Law School and now teaching at Wayne State, is charging that his sexual orientation (gay) had something to do with his denial of tenure by Michigan, and that this violates the school's published policy against sexual orientation discrimination. The school's initial argument was that its non-discrimination policy, although published, was not legally binding or enforceable in a breach of contract action. Amazingly, in light of the requirements of accrediting agencies (the American Bar Association) and membership associations (the Association of American Law Schools), which require accredited schools to have such non-discrimination policies, the university's attorneys, evidently arguing based on older case law refusing to incorporate corporate personnel policies in the individual contract of employment by a unilateral contract theory, argued in essence that the non-discrimination policy was just another bit of company propaganda published to make people feel good, but had no relevance to any legal claim. Perhaps they are correct, speaking strictly as a matter of employment contract law, but that argument seemed beside the point to those who heard of it. A professional commitment of accredited law schools is to ban sexual orientation discrimination. On appeals and remand for rehearing, the University suddenly woke up to its responsibilities and withdrew the unenforceability argument, now relegated to arguing that the tenure denial was justified on grounds of academic evaluation of Mr. Hammer's published legal scholarship. ••• Students at Wayne State Law School have established a website where documents concerning Prof. Hammer's case can be found, http://wayneoutlaws.org/hammer_v_umich.

New York — In *Ms. H v. Ms. L*, 2007 WL 2128837 (N.Y. Fam. Ct., Nassau Co., July 18, 2007), Judge Stacy D. Bennett found that the former lesbian partner of a birth mother could have standing to seek custody of the child born through donor insemination while they were living together, where the petitioner had established a de facto parental relationship with the child. The birth mother, who was supportive of

the petition, testified that the petitioner "did what a husband would do for a wife during her pregnancy," and that the birth mother went back to work after giving birth while the petitioner took care of the child. After their relationship ended, the birth mother moved to a homeless shelter, leaving the child in her former partner's care until she found suitable living quarters. A dispute about financial support issues for the child led to the intervention of police when Petitioner would not allow the birth mother to take the child with her; the NYC Administration for Children's Services then removed the child and placed it with a foster family in Columbia County. Petitioner sought to regain custody of the child, but there were doubts about her standing to do so. Citing *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, Judge Bennett wrote, "In extraordinary circumstances, such as abandonment, and neglect, the best interest of the child test is sparked, and non-biological parents may be issued standing to seek custody of the minor... Here, the testimony of both Petitioner and Respondent (the birth mother) support a finding that the Petitioner demonstrated a prima facie basis for establishing standing... Notwithstanding that pursuant to statute, the Petitioner is a 'biological stranger' to the child, the court finds extraordinary circumstances exist which maintain a sound basis for standing here." The court ordered that the matter be transferred to the Columbia County Family Court for a determination whether it would be in the best interest of the child to give Petitioner custody, as opposed to leaving the child with the foster family as a ward of the county social services agency.

Ohio — In *In the Matter of T.B. and J.B., Alleged Dependent Children*, 2007 — Ohio — 5037, 2007 WL 2781274 (Ohio App., 7th Dist., September 19, 2007), the court affirmed a decision by the Mahoning County Juvenile Court terminating the shared parenting agreement between a gay father and his ex-wife over their two sons, awarding residential custody to the ex-wife. The father's sexual orientation appears to have had nothing to do with the court's decision, to judge by the lengthy opinion by Judge Vukovich. The decision turned mainly on the father's misconduct in falsely accusing the mother of sexually abusing the children, or so found the court. A.S.L.

Criminal Litigation Notes

Federal — Military Appeals — In *U.S. v. Habian*, 2007 WL 2736097 (U.S. Navy-Marine Corps Ct. Crim. App., September 18, 2007) (not reported in M.J.), the court sustained a general court martial conviction on sodomy charges of a sergeant, rejecting his argument that his conducted was sheltered from prosecution under *Lawrence v. Texas*. According to the court's opinion by Chief Judge Ritter, the sergeant invited a much younger enlisted man to stop over at the sergeant's house for socializing, got him liquored up, and then engaged the stupored young man in mutual oral intercourse and, possibly, anal intercourse. When the youngster came to his senses, he ran to the military police to complain. The sergeant argued that the sex was private and consensual and not on a military base, but the court, adhering to a growing body of precedent, found that this case does not come within the protected sphere of *Lawrence* due to the difference in rank between the men, resulting in a situation where the young corporal could not freely withhold consent to sexual favors demanded by an officer with supervisory authority over him.

California — In *In re Seth R.*, 2007 WL 2677299 (Ct. App., 4th Dist., September 13, 2007) (not officially published), the court of appeal rejected the argument by a gay-basher who was sentenced to ten years in the custody of the Juvenile Justice Division that the sentence violated the terms of his plea bargain. According to the facts related by Justice Aaron, Seth was part of a gang of three who went into San Diego's Balboa Park on July 29 during the Gay Pride Festival and beat up six people while calling their victims "fags" and "faggots." Three of their six victims required hospitalization, one so seriously wounded that every bone in his face was broken and an emergency tracheotomy was necessary to keep him from drowning in his own blood. Seth, who was 15 at the time, pled guilty to assault and hate crime charges on the understanding that allegations under section 707 would be dismissed. Section 707 is used to determine whether the defendant will be tried as an adult or a juvenile. In effect, this was an agreement that Seth would be tried as a juvenile, even though he was over 14 and his offenses were listed as adult offenses. The sentencing judge, former LeGaL member Ted Weathers (who now sits on San Diego Superior Court), finding that Seth had committed offenses listed in Sec. 707, sentenced him to the maximum time in Juvenile custody, until age 25. The court of appeal held that this did not violate the terms of the plea bargain, as Section 707 serves two different purposes deciding whether the defendant is tried as a juvenile, and then deciding whether he is eligible for an extended juvenile sentence based on the seriousness of his crimes. (Ordinarily, a teen sentenced as a juvenile would not be held past age 21.)

California — The First District Court of Appeal upheld a first degree murder conviction of Robert Oldham, Jr., who was convicted of shooting to death Andre Jackson, a gay man. Oldham was sentenced to 50 years to life in prison for the crime. *People v. Oldham*, 2007 WL 2698314 (Sept. 17, 2007) (not reported in Cal. Rptr. 3d). According to the opinion by Judge Richman, Oldham and friends frequently harassed gay men in their neighborhood, including Jackson and his partner. Jackson's partner was not one to back down from harassment, and got into a fight with Oldham, in which Jackson's partner "whooped" Oldham badly. Oldham responded to this by going home to get a gun, coming back to confront Jackson's partner, and killing Jackson when he wouldn't allow Oldham to enter the apartment to get at his partner. The main focus of the appeal was Oldham's argument that the prosecutor had argued incorrect theories to the jury concerning premeditation and deliberation. Oldham contended this was a heat of passion crime and he should not have been convicted on a first degree charge. The court rejected his criticisms of the way the trial was conducted.

Colorado — A lesbian couple was arrested in Denver on September 24 for staging a sit-in at the city clerk's office when they were denied a marriage license. Sheila Schroeder and Kate Burns were led away in handcuffs, according to a Sept. 24 report in the *Rocky Mountain News*. They had stated they would not leave until they were given a license, and were charged with trespassing.

Massachusetts — After a lengthy delay, the Berkshire County District Attorney's Office has filed an appeal of the June 2006 decision by Superior Court Judge Francis R. Fecteau that had overturned the 1985 conviction of Bernard Baran, a gay man who had been charged with molesting five children at a day care center where he had worked in Pittsfield. Baran has consistently denied the charges. Baran had been sentenced to five concurrent life sentences, despite lack of evidence of any physical or psychological harm to his alleged victims and only the most tainted of evidence of his guilt. Judge Fecteau's decision was based on a variety of factors, not least evidence that the DA's office coached the young children as witnesses in ways that today would be consider coercive, casting doubt on the reliability of their testimony. (Several of the children later recanted their testimony.) Fecteau also took note that Baran's attorney had no prior experience defending this kind of case and had not taken elementary steps to preserve his client's rights. Baran was convicted amidst the wave of hysteria in the mid–1980s over charges of sexual abuse in child care facilities. As a gay teenage man without substantial financial resources in a conservative rural part of the state, Baran was in a poor position to defend himself against such charges. Nonetheless, the prosecutor's office refuses to accept the possibility that he was wrongly convicted, and argues that Judge Fecteau's decision was based too much on inferences and surmise, and placed too much reliance on the recently discovered unedited videotapes of interviews of the children, which had not been made available at the time of the trial for use in cross-examination by the de-

fense and had been "lost" for almost twenty years. *Berkshire Eagle*, September 2.

Minnesota — The American Civil Liberties Union's Lesbian & Gay Rights Project and the ACLU Foundation of Minnesota have filed an amicus brief with the Hennepin County District Court in support of Senator Larry Craig's effort to withdraw his guilty plea to a charge of disorderly conduct under Minn. Stat. Sec. 609.72(1)(3). *State of Minnesota v. Craig*, Case No. 07043231 (Minn. 4th Dist. Ct.). Senator Craig was charged as a result of being apprehended on June 26, 2007, by an undercover police officer in a men's room in the Minneapolis Airport, engaging in conduct typical of "cruising for sex" in such venues, and pled guilty to the charge a few months later without formally retaining legal counsel. Senator Craig announced, when the story came to light, that he would resign his Senate seat unless the court agreed to let him withdraw his guilty plea and seek dismissal of the charges. Much of the media comment about the case has focused on the rank hypocrisy of Sen. Craig, a conservative Republican with a perfect record of opposing and voting against gay rights, but whose arrest seemed to confirm rumors that he regularly sought sex from men in public restrooms. The ACLU amicus brief notes that in the past the Minnesota Supreme Court had ruled that the statutory provision in question would be unconstitutional except for a case involving "fighting words," and provides an analysis of the facts recited in the Arrest Report, concluding that Sen. Craig's expressive conduct (he was not arrested for any statements) would not come within the fighting words doctrine. Thus, argues the ACLU, application of the statute to his conduct as described in clearly unconstitutional. The brief also notes that experts on law enforcement have opined that posting signs and placing uniformed officers in restrooms are a more effective way of deterring such conduct than is using undercover police stings; the latter strategy is more about disproportionately persecuting gay men and relatively ineffective in cutting down on objectionable behavior. Hennepin County Districct Judge Charles Porter heard arguments on the motion on Wednesday, September 26, but expressed skepticism from the bench. Porter indicated a ruling may come as early as the first week of October. Meanwhile, Craig put on hold his resignation from the Senate, pending the court's ruling. He has already indicated he will not stand for re-election next year. *Washington Post*, September 27. Story to be continued....

New York — The gay community's attention is focused on the ongoing trial of John Fox, Anthony Fortunato and Ilya Shurov, charged with a collection of hate crimes in the death of Michael Sandy, a gay man whom they had targeted for robbery. Ruling on a pretrial motion on August 2, Justice Jill Konviser (N.Y. Supreme Ct., Kings Co.), rejected the defendants' argument that the potential sentence enhancements provided by the Hate Crimes Law should not apply in the absence of evidence that the defendants were motivated by homophobia in their actions. *People v. Fox*, 2007 WL 2231389. The indictment charges that the defendants selected Mr. Sandy for their crime because they believed a gay person would be less likely to fight back or to seek assistance of law enforcement, so they set up an assignation with him at a place known as a gay cruising spot after spotting him in a gay chat room on the internet, lured him with promises of sex, and then sought to rob him, leading to an assault and a chase onto the Belt Parkway, where Sandy was hit by a car and died as a result of his injuries. The NY Hate Crimes statute applies if a victim is selected because of his sexual orientation. Justice Konviser ruled that this means the issue of motivation is not whether the defendants are homophobic or anti-gay, but rather whether they selected their victim because of his sexual orientation. She found that the indictment here is "consistent with the intent of the Legislature as manifested by the plain language" of the statute. The defendants argued that the court should construe the statutory language in light of the legislative findings, which focused on the problems of bias, prejudice and hatred. Rejecting this argument, Konviser wrote, "had the Legislature wanted to require that a hate crime be based on something more than just the intentional selection of the victim because of a particular attribute, it could have done so." She also rejected the defendants' argument that because their only intent was to obtain money and drugs, and not to injure the defendant because of his sexual orientation, they could not be charged with hate crimes. She also rejected a claim that the statute was unconstitutionally vague, at least as related to this prosecution, noting that the plain meaning of the statute clearly applied to their case.

Texas — Bitterman v. State of Texas, 2007 WL 2462018 (Tex. Ct. App., Austin, August 28, 2007) (not reported in S.W.3d), illustrates a tale of obsession resulting in the conviction of a teacher for sexual assault of a student. Bitterman, an instructor at the American Preparatory Institute at Central Texas College in Killeen, had a 16–year-old male student called M.E. in the opinion by Justice Diane Henson, with whom he became hopelessly infatuated. According to the court's narration of the facts shown at trial, Bitterman relentlessly pursued the young man, resulting in numerous visits in Bitterman's home where he performed oral sex on M.E. and showed him gay pornography. From this account, it sounds like M.E. ran hot and cold on the continuing relationship with Bitterman, which came to an end when M.E.'s mother discovered a Christmas card from Bitterman to M.E. with a written message that led her to believe that there was a sexual relationship. M.E.'s mother contacted the police, and M.E. related to a police officer some details about the relationship and signed a written statement leading to Bitterman's indictment and conviction on sexual assault charges. During the punishment phase, the prosecution introduced samples of pornography found in Bitterman's home, including naked depictions of underage men. A jury sentenced him to the maximum statutory penalty, twenty years imprisonment and a $10,000 fine. On appeal, he argued that the introduction of the pornography evidence was improperly inflammatory, but the court rejected this argument, Judge Henson writing, "While the potential prejudice that the admitted pictures could cause is high, the potential *unfair* prejudice of admitting pictures is marginal at best because the pictures merely show the commission of the extraneous offense [of possession of child pornography]. The trial court was thus well within the zone of reasonable disagreement when it decided that the unfair prejudice did not substantially outweigh the probative value. We hold then that the admission of the photographs was not an abuse of discretion and overrule Bitterman's point of error." The court did agree with Bitterman that some of the conditions of his eventual parole ordered by the court went beyond its jurisdiction, but that this could be cured on the whole by converting them from orders to recommendations to the parole board.

Texas — In *Higgins v. Quarterman*, 2007 WL 2695279 (N.D. Texas, Sept. 14, 2007), U.S. District Judge Mary Lou Robinson accepted a magistrate's recommendation to deny a writ of habeas corpus petition filed by Higgins, who was convicted of murdering Juan Pacheco. Higgins' defense argument was that old standby; he went home with Pacheco from a bar, Pacheco came on to him sexually, and he hit Pacheco over the head with a dumbbell weight in self-defense. The jury did not believe this, perhaps because in addition to knocking Pacheco out cold, Higgins then tied him up and began to rob his apartment. Higgins argued that he didn't intend to kill the victim, merely incapacitate him from sexually assaulting Higgins. Higgins claims his constitutional rights were violated because his attorney was not allowed to introduce evidence to show that Pacheco had engaged in "sexually aggrressive" homosexual conduct in the past. The magistrate found that the proposed evidence was "inadmissible hearsay," and was not, in any event, relevant to defendant's claims of self-defense, since they did not involve assaults. The magistrate also discounted Higgins' argument that the evidence was relevant to a "heat of passion" defense. Wrote Magistrate Averitte, "Even assuming, solely for argument sake, that the trial court erred in not allowing evidence of the victim's alleged specific instances of conduct, such error

did not prejudice petitioner or render petitioner's entire trial fundamentally unfair. Petitioner has not shown how such evidence would have assisted in his defense. The purported specific instances of conduct evidence excluded during trial related only to the victim's propensity for homosexual behavior and did not, in any way, justify petitioner in killing or assaulting the victim. Such statements would not have established that, at the time of the homicide in this case, petitioner reasonably believed deadly force was immediately necessary, and that a reasonable person in petitioner's situation would not have retreated." A.S.L.

Legislative Notes

U.S. Congress — The Senate voted on September 27 to approve an amendment to the Defense Appropriations Bill that would "widen federal jurisdiction over hate crimes and... extend protection to people victimized because of sexual orientation, disability, gender or gender identity," reported the *New York Times* (Sept. 28). The federal government's authority in these cases would be standby; that is, federal prosecutors would be empowered to act if state or local prosecutors failed to do so. The House passed a similar bill in May, and would presumably acquiesce to its attachment to the Defense bill. The Senate approved the measure by a margin barely large enough to overcome the usual Republican filibuster against anything gay-affirmative, but the margin in the House was slighter. Proponents hoped that attaching the measure to the Defense bill would insulate it from a veto, but a White House spokesperson reiterated their opposition to the measure on the day of the vote.

A House committee approved the proposed Employment Non-Discrimination Act (ENDA), which would ban workplace discrimination on the basis of sexual orientation and gender identity, but some Democratic leaders in the House, among them lead sponsor Rep. Barney Frank, the openly-gay representative from Massachusetts, moved late in September to remove gender identity from the bill before submitting it to a full vote on the floor, out of fear that the measure would not attract enough support for passage if it were included. Leading LGBT political groups that have accepted the importance of including gender identity in the bill began a campaign to lobby supporters of the measure to resist this revision. Passage of the bill in the House is seen as mainly symbolic at this point, since the Republican minority in the Senate is unlikely to allow the measure to come to a vote in that chamber, and nobody expects the President to approve ENDA if it were to pass. In that case, the symbolism of omitting gender identity sends a stark message, and some activists argue that it is better that the bill go down to defeat than that its supporters be split by this omission. Passage in the House is seen as part of a longer-term strategy against the day when the measure has attained such overwhelming political support that it can pass the Senate and House by veto-proof majorities (or the day when the White House is occupied by a President who would sign it with enthusiasm). • • • The "controversy" over the inclusion of gender identity in the federal bill seems a bit antiquated, as its inclusion has become routine in similar state-level legislation over the past few years. On the other hand, the federal legislature has consistently been slower than local and state bodies to respond affirmatively to needs of sexual minorities in the United States.

Congress Daily reported on September 6 that the House Agriculture Appropriations Subcommittee will include an examination of the Food and Drug Administration's requirement that men who have sex with men be excluded from donating blood as part of oversight hearings on the subject of blood safety. Rep. Sam Farr (D-Calif.) raised the issue with subcommittee chair Rosa DeLauro (D-Conn.) in response to a complaint from a gay constituent who had been denied the right to participate in a blood drive. In its most recent consideration of this issue, the FDA's scientific advisory panel voted narrowly in favor of retaining the current policy, which was established in the 1980s shortly after it was confirmed that AIDS could be spread through blood transfusions, but before there were effective treatments for HIV infection. Some now argue that the cost/benefit calculus upon which the original policy was predicated has become obsolete as a result of almost twenty years of scientific developments.

Colorado — The Colorado Springs city government has added sexual orientation to its municipal non-discrimination policy, bringing it in line with a recently passed state law. While city officials called this a common procedure, it was significant for putting an end to a lengthy debate, begun in 1991 when the city's Human Relations Commission (a body that no longer exists) recommended adding sexual orientation to the municipal anti-bias law. *Colorado Springs Gazette*, Aug. 29.

Florida — After debate inflamed by the incendiary anti-gay public statements of Mayor Jim Naugle, the Fort Lauderdale City Commission approved a resolution affirming the city's support for "diversity of all groups." The resolution acknowledges that the city has a diverse population of "varying races, ethnicities, religions and sexual orientations." The mayor has claimed that he is not anti-gay but rather pro-family, and that his remarks are intended to promote the city as a tourist destination for families. It has long been a tourist destination for gay vacationers. *South Florida Sun-Sentinel*, Sept. 6.

Law & Society Notes

U.S. National News — Human Rights Campaign announced that 195 U.S. companies achieved a perfect score on the organization's index of indicators of fair treatment for LGBT employees. The six annual Corporate Equality Index was released on September 17. This marked an increase of 57 companies over the previous survey year, and marks a 41 percent increase from 2006 to 2008. The first edition of the survey in 2002 found only 13 companies had a perfect score. The survey asks companies to report on their policies relevant to sexual minorities, and surveyors undertake research about companies that do not respond to the surveys in order to achieve as complete a picture as possible. *BNA Daily Labor Report*, No. 181, September 19, 2007.

Military Policy — Loose lips sink.... careers in the military? General Peter Pace, outgoing chair of the Joint Chiefs of Staff, persists in spouting his religious beliefs about homosexuality, this time at a Senate hearing on September 26, when he said he was trying to clarify his views on gays in the military, which got him in hot water earlier in the year. "Are there wonderful Americans who happen to be homosexual serving in the military?" he asked rhetorically. "Yes," he answered himself, continuing that "we should respect those who want to serve the nation but not through the law of the land, condone activity that, in my upbringing, is counter to God's law." Proving, perhaps, that religious heterosexual couples should not be trusted to raise children, since studies show that kids raised by lesbian couples turn out more tolerant and fair-minded than the average? Pace said he would support changing military policies "to continue to allow the homosexual community to contribute to the nation without condoning what I believe to be activity whether it to be heterosexual or homosexual that in my upbringing is not right." Confirming again the verbal limitations of military logic as well as military justice. At least when it comes to understanding the First Amendment and its bearing on military personnel policy... *Associated Press*, Sept. 27.

Episcopal Church — The U.S. Episcopal Bishops held their national meeting in New Orleans. Mainstream media reported that they refused to back away from their gay-affirmative position on ordination and ceremonies for same-sex partners (*Associated Press*, Sept. 25), but gay media reported that they persisted in their decision to "exercise restraint" by avoiding anything so provocative as installing any more openly-gay bishops or formally approving a prayer service for use to bless same-sex couples, and so this as backing away from outright support for their gay members (*365Gay.com*). While the church leaders refused to comply with demands initiated by conservative dissenters, they also signaled their hope to keep

the Anglican Communion intact and to take the wind out of the sails of those church conservatives agitating to create a separate entity more in tune with the traditional rejection of homosexuality.

California — The National Center for Lesbian Rights announced that its client Marvin Burrows had prevailed in his effort to get the Industrial Employers and Distributors Association and Warehouse Union to recognize his long-term partnership with William Swenor, a union member who passed away in March 2005. Burrows had been denied the survivors' pension that spouses of union members receive as a matter of course, even though the couple were registered as California domestic partners and had married each other during the brief period of opportunity in San Francisco early in 2004. A combination of the internal appeal of denial of benefits and a visible lobbying campaign by Burrows led the union to agree to change its policy, retroactive to March 1, 2005, making Burrows eligible for benefits. NCLR Press Release, Aug. 22.

California — Various municipalities have passed resolutions supporting the passage of same-sex marriage legislation and/or urging the governor to sign the bill that passed both houses of the legislature, or authorizing filing of amicus briefs with the California Supreme Court in the pending marriage cases. It appeared that San Diego would not be among them, as the Republican Mayor, Jerry Sanders, was an announced opponent of same-sex marriage and was expected to veto the resolution, which had passed the city council after intense struggle. In a dramatic turnaround, apparently influenced heavily by his regard for his lesbian daughter and her partner, Sanders announced at a tearful press conference on Sept. 19 that he would sign the resolution. "I have decided to lead with my heart to do what I think is right and to take a stand on behalf of equality and social justice," he announced. Expressly rejecting the concept of "separate but equal," he stated, "I have close family members and friends who are members of the gay and lesbian community. These folks include my daughter Lisa and her partner, as well as members of my personal staff. I want for them the same thing that we all want for our loved ones for each of them to find a mate whom they love deeply and who loves them back; someone with whom they can grow old together and share life's wondrous adventures. And I want their relationships to be protected equally under the law. In the end, I could not look any of them in the face and tell them that their relationships — their very lives were any less meaningful than the marriage that I share with my wife Rana." The resolution instructs the city attorney to file an amicus brief in support of same-sex marriage in the pending state Supreme Court litigation. A transcript of Sanders' remarks can be found on his website.

Colorado — Colorado got its first openly gay male legislature when Governor Bill Ritter appointed Mark Ferrandino to fill out the unexpired term of Denver representative Mike Cerbo, who had resigned to become director of the Colorado AFL-CIO. A special vacancy committee of what the *Rocky Mountain News* characterized as "party activists and local elected Democrats had voted overwhelmingly in favor of Ferrandino, age 30, treasurer of the state Democratic Party as well as former co-chair of Colorado Stonewall Democrats. He will resign his party posts to take up the appointment to the state House of Representatives. The state's first openly lesbian legislator, Senator Jennifer Veiga, also representing a Denver district, was elected to the House of Representatives in 1996 and subsequently elected to the upper house. *Rocky Mountain News*, Sept. 21.

Illinois — After months of controversy and a threatened lawsuit by the ACLU, the school board in Rockton, Illinois, voted on Sept. 19 to allow a gay-straight alliance to meet on the campus of the city's high school. The club was first proposed by students last May. Despite warnings from the school board's attorney that a refusal to allow it to meet would not be defensible in the courts, the board's committee on extra-curricular activities recommended that the students' proposal be rejected. The vote in favor of letting the club meet was 5–2. *ACLU Press Release*, Sept. 20.

Kansas — Governor Kathleen Sebelius signed Executive Order 07–24 on August 31, 2007, mandating that "all state entities under my jurisdiction" have a "strong program prohibiting discrimination and harassment on account of race, color, gender, sexual orientation, gender identity, religion, national origin, ancestry, age, military or veteran status, or disability status."

New Jersey — In the continuing dispute over the refusal of the Ocean Grove Camp Meeting Association to allow civil union ceremonies to be conducted in the Pavilion at Ocean Grove, a location where different-sex weddings have taken place, the State's Department of Environmental Protection has weighed in by refusing to extend a property tax exemption that the Association enjoyed for the Pavilion. According to a September 15 letter issued by Commissioner Lisa P. Jackson, one of the requirements for exemption is that the privately owned property be "open to all persons on an equal basis" so that it is in the public interest to grant the exemption. However, the DEP's action is less coercive than one might have expected, since it renewed the exemption for other Ocean Grove property owned by the Association, just carving out the Pavilion and its immediate surroundings for denial of the exemption. *Green Acres Tax Exemption Program*, NJSA 545–3.63 et seq., Application # 1334–05–1401, *Ocean Grove Camp Meeting Association*, Neptune Township, Monmouth County (September 15, 2007). This prompted talk of an appeal by gay rights groups, seeking an end to the exemption for all of the Association's property in Ocean Grove. *Assocaited Press*, Sept. 18. A.S.L.

Australian Gay High Court Judge Denied Pension for Partner

Australia's longest serving and also only openly gay male judge Justice Michael Kirby, has been denied pension rights for his partner. The spouses of married heterosexual judges who die receive a large proportion of their partner's pension. Justice Kirby sits on Australia's peak court, the High Court of Australia. His partner has been with him for all the 35 years Justice Kirby has served as a judge at state and federal level. Justice Kirby's personal plea to the Australian government for his partner to receive the same pension rights as those of other judges was rejected in July. Subsequently, the Labor Party opposition moved an amendment to the Judges' Pensions Act to permit all judges' partners to receive their partners' pension. This too was rejected. The only prospect for change now is if the Labor Party wins the federal election, due before the end of the year. The Labor Party has promised to implement the (Australian) Human Rights and Equal Opportunity Commission report, *Same Sex: Same Entitlements*, which recommends the amendment of 58 pieces of federal legislation to eliminate discrimination against homosexuals including the Judges' Pensions Act. *David Buchanan SC*

Other International Notes

Australia — Despite some demands from within his own party to do something about granting same-sex couples the same legal rights as de facto heterosexual couples (who have a certain legal status under national law), Prime Minister John Howard decided not to advance any legislation along these lines. Religious lobbyists have been working hard to block any attempt by the Howard Government to combine with the Labor Party opposition on this issue. There was a heated discussion in the cabinet during August, with moderates supporting something like civil unions for same-sex partners and conservatives arguing against, noting especially the potential expenses in social security payments if same-sex partners become entitled to spousal benefits. Ultimately, the cabinet was too divided to reach a consensus and left the decision to Howard, who is no friend of the Australian gay community. *Australian*, Sept. 13.

Australia — We previously reported on the conviction of Andre Chad Parenzee earlier this year by a South Australia Supreme Court jury on charges of endangering life by having unprotected sex with three women. The HIV+ Paren-

zee is an HIV denialist, claiming that the virus does not cause AIDS. After his attempts to appeal his conviction proved futile, he was sentenced by Justice John Sulan to five years without parole, back-dated to January of last year to reflect his period of confinement to date. The Court of Appeal had rejected his argument that the trial judge erred by excluding alternative theories about the cause of AIDS from the trial. *Sydney Morning Herald*, Sept. 27.

Australia — The *Courier Mail* reported on Aug. 30 that a transsexual had lost a federal court appeal to have her birth certificate changed from male to female, on the ground that she was and remained married. Under the law in Victoria, where in common with all of Australia at this time same-sex marriage is not recognized, married persons may not have their sex designation altered on their birth certificates, regardless of having completed sex reassignment surgery.

Canada — Statistics Canada, the nation's census agency, reported that same-sex unions were growing at five times the rate of different-sex unions. Approximately 45,300 couples reported as same-sex in the 2006 census, upr from 34,200 in 2001, before same-sex marriage became legal in Canada. This was a 33 percent increase, while during the same time period the number of different-sex couples counted by the census increased only six percent. Of those 45,300 couples, 7,465 reported themselves as having married. Since a search of municipal records by the group Canadians for Equal Marriage showed that 12,438 marriage licenses have been granted to same-sex couples, perhaps the difference can be accounted for by the foreign couples who have come to Canada and marry, but who would not, of course, be counted in the census of Canadian residents. According to Statistics Canada, 0.6 percent of couples counted by the census are same-sex couples. There was controversy about how the census forms inquired about marriage, and revisions are in prospect before the next census is taken.

Canada — The cabinet of the provincial government of Nova Scotia approved regulatory changes that allow same-sex couples to exercise the same rights as different-sex couples regarding registering both parents of a child in the birth-registration process. The action came after a complaint from a married lesbian couple from Halifax who were denied the right to have both parents listed on their child's birth certificate. *Kitchener Record*, Sept. 21.

Iraq — According to a lengthy investigative article published in the *Los Angeles Times* on Aug. 5, life for gay people in Iraq has turned quite difficult since the U.S.-led invasion ended the regime of Saddam Hussein. Gay individuals interviewed by reporter Molly Hennessy-Fiske for her article titled "Since invasion, gays in Iraq lead lives of constant fear," indicated that under the prior regime they had been able to go to dance clubs and exchange information on gay blogs and online chat rooms. Now, the contending religious militant forces, both Sunni and Shi'ite, have targeted gays for attack, driving them underground. The conditions described in this article would surely suffice to qualify any gay refugee from Iraq for asylum under international protocols.

Malaysia — An Islamic Court in the central state of Malacca voided a marriage that had been performed by a mosque official, finding that the couple were two women. "According to [the wife's] statement, she had never seen or touched her husband's private parts and had taken him to be a man all along and that she felt good and satisfied together (with her partner)," wrote Judge Che Suafi Che Husin in the court's ruling. "This is astounding and illogical, it is abnormal to go through life as husband and wife as such." The couple was given 14 days to appeal. Malaysia does not provide any legal recognition for same-sex couples, and bans sex reassignment surgery for transsexuals. *AAP*, September 6.

Nigeria — The BBC reported in August that eighteen Nigerian men had been imprisoned on charges of cross-dressing while attending a "gay wedding" in Bauchi, a town in northern Nigeria subject to strict Muslim Sharia rule, where the death penalty by stoning is mandated for sodomy. The August 10 report said that Sharia Judge Malam Tanimu had ordered the men remanded to prison after they were arraigned before him. According to the BBC report, more than a dozen Nigerian Muslims have been sentenced to death by stoning for sexual offences, some involving homosexuality, but none of the sentences were carried out, all being reversed on appeal or commuted to prison terms as a result of pressures by human rights groups. The Nigerian parliament is considering a bill introduced by a former president of the country that would ban all gay rights organizations.

Singapore — Amidst a lengthy and contentious debate being waged in the media over the degree to which Singapore should adopt a modern, Western-style attitude towards homosexuality, the government has proposed to reform the sodomy law but only respecting different sex couples, according to a September 17 report on 365Gay.com. As part of the first overhaul of the penal code in nearly a quarter of a century, the proposal would repeal the crime of "carnal intercourse against the order of nature," which dates from British colonial times. However, the proposal would leave in place the prohibition of "gross indecency" between men, which has a maximum penalty of two years in jail. This does not go as far as the founder of the modern state recommends. Local media reports that Lee Kuan Yew has called for decriminalization of gay sex, on the ground that homosexuality is genetic. Gay rights groups are concerned about another part of the proposal, which would broaden laws against "unlawful assembly" in ways that might stifle their ability to hold public problems and mount political protests. • • • Reflecting the continued official hostility towards gays, the government banned a gay rights forum that was to be held in Singapore because of the planned participation of Douglas Sanders, a professor emeritus in law at the University of British Columbia who is also affiliated with Thailand's Chulalongkorn University. A spokesperson for the Home Ministry announced that Sanders' visa had been rejected, from the view that a Westerner should not be allowed to lecture on the topic of homosexuality in Singapore. "Our laws are an expression and reflection of the values of our society," read the official statement. "The discourse over a domestic issue such as the laws that govern homosexuality in Singapore must be reserved for Singaporeans... foreigners should refrain from interfering." An organizer of the event said that the government had misconceived Sanders' proposed role, as he was to speak about international trends, not about the legal situation in Singapore. *Associated Press*, August 3.

South America — The International Gay and Lesbian Human Rights Commission reported on Aug. 30 that the human rights committee of the Southern Common Market, an economic association of South American countries, had issued a declaration to recognize and promote an end to discrimination against sexual and gender minorities by the member countries. The declaration calls for family recognition, nondiscrimination policies, and public education about sexual minorities. Should the proposal be ratified by the full organization, it could lead to sweeping changes in law and policy in South America. *IGLHRC News Release*, Aug. 30.

Spain — Same-sex marriage is legal in Spain but they forgot to tell the Navy, unfortunately. According to a report in *El Pais* (English language edition) on Sept. 26, Corporal Pedro Rodriguez married Naima Pedreiras, a transsexual, in July, but his commanding officer refused to give him the usual leave time, claiming that it was not a "real wedding." Instead of giving him leave, his superior subjected him to verbal abuse and assigned him demeaning tasks below his rank. Rodriguez reported the incident to law enforcement authorities and is seeking a transfer within the armed forces to avoid having to return to a hostile environment. Commented his spouse, "The Navy is still stuck in the times of Franco."

United Kingdom — An international outcry ensued when the Home Office denied asylum to Pegah Emambakhsh, a lesbian from Iran. Homosexual conduct is a serious crime in Iran that invokes the death penalty, but an immigration hearing panel decided that Emambakhsh had

not established she would be subject to persecution of returned to Iran! After the U.K. government was embarrassed by a very public offer from the Italian government to consider granting her asylum there, the Home Office decided to reconsider the case and let Emambakhsh out of detention pending its decision. So it appears that U.S. immigration officials are not the only ones capable of making bizarre decisions in gay asylum cases. (We refer, for example, to decision to deny asylum to gay applicants from Zimbabwe!)

United Kingdom — A turnabout story. Former HSBC senior banker Peter Lewis has ultimately lost his entire sexual orientation discrimination case. Although Lewis was initially partially successful before an employment tribunal on his claim that HSBC dealt with him improperly after an employee complained he had misbehaved in the men's room, the tribunal was ordered to reconsider the case by an appeals court, and the new tribunal said on September 14: "The judgment of the tribunal is that the claimant's complaints are not well-founded and are accordingly dismissed." An explanatory decision will be released by the tribunal at a later date, according to a September 15 report in *Financial Times*. A.S.L.

Professional Notes

North Carolina Governor Mike Easley has appointed an openly gay attorney, John Arrowood, to be a judge of the state's Court of Appeals, an intermediate appellate court. Under the state's process, the governor fills vacancies by appointment, and the judges must subsequently stand for election for a full eight-year term. Arrowood will be on the ballot in November 2008, after a year on the court. "Judges ought to be honest about who they are," Arrowood said to the Associated Press, "and this is who I am, so I'm not going to hide it."

The Honorable Paul Feinman, an Acting Supreme Court Justice in New York County and a long-time member of LeGaL, was nominated by the New York County Democratic Judicial Convention on September 24 for an open seat on the New York Supreme Court in New York County. If elected, Justice Feinman will become the first openly gay man to be elected to that bench since the late Richard Failla in 1988. In the interim, there have been several openly-lesbian judges elected to that court. When Democratic judicial candidates appear on the general election ballot in Manhattan, they are normally elected.

Professor William Rubenstein, author of a leading textbook on sexual orientation and the law, former director of the ACLU's LGBT & AIDS Rights Projects, and a longtime faculty member at UCLA Law School, where he helped to found the Williams Project on sexuality and law, accepted an invitation to take a tenured faculty position at Harvard Law School, beginning this Fall 2007 semester. In its official announcement of the appointment, Harvard Law stressed Rubenstein's leadership as a scholar in the field of class action law suits and his teaching interest in Civil Procedure.

Aubrey Sarvis, a lawyer who is a military veteran and has had a long career as an attorney in the private sector and a leading Congressional staff member, has been named executive director of Servicemembers Legal Defense Network, effective October 1, 2007. His gay movement credentials include past service on the board of the Gay and Lesbian Victory Fund, and he has had extensive experience working with the Democratic National Committee and the campaigns of several leading Democrats, including Presidents Carter and Clinton, Vice President Gore, and several senators.

Rocky Mountain News reported on September 18 that Governor Bill Ritter had announced the appointment of David Brett Woods to the District Court, making him the first openly-gay lawyer to be appointed to that bench. An openly lesbian judge, Denver County Court Judge Mary Celeste, has been serving since 2000. The District Court has superior jurisdiction over the County Court. Woods is a former prosecutor who has served as a relief judge in the Aurora Municipal court since 2006, and as a magistrate in Denver county Court since 2001.

The Transgender Law Center announced the hiring of its first Executive Director, Masen Davis, and Legal Director, Kristina Wertz. The organization, which is five years old, is dedicated to transforming California into a state where everyone can succeed regardless of their gender identity. Davis's prior position was Director of Development for the United Way of Greater Los Angeles. Wertz, a Brooklyn Law School alumnus, has had a civil rights litigation practice in San Francisco for several years. Details about the organization can be found at transgenderlawcenter.org. A.S.L.

AIDS & RELATED LEGAL NOTES

HIV+ Haitian Wins New Hearing on Convention Against Torture Claim

In *Jean-Pierre v. U.S. Attorney General*, 2007 WL 2712108 (11th Cir., September 19, 2007), a Haitian man with AIDS who is subject to deportation from the U.S. because of his three drug convictions won a new hearing before the Board of Immigration Appeals (BIA), a unanimous panel of the 11th Circuit finding that the BIA (and the Immigration Judge) had failed to decide the crucial legal issue of his case. The petitioner is seeking refuge in the U.S. under the Convention Against Torture (CAT), under which the U.S. has committed itself to give refuge to individuals who would more likely than not face torture if deported to their home country.

The petitioner entered the U.S. in 1992 on a temporary visa and overstayed. Residing in Florida, he was convicted on drug offenses in 1995, 1997 and 2004. While he was serving time in a Florida jail on the third conviction, the Homeland Security Department began removal proceedings against him. There is no doubt that he is deportable due to his criminal record, so his only hope for refuge in the U.S. is the Convention Against Torture.

The petitioner introduced evidence showing that under Haitian government policy, he would be immediately sent to prison for an indefinite term and that in light of his medical condition, it was highly likely that he would be subjected to physical torture by prison guards. The basis for this assertion is a somewhat complicated chain of reasoning. The petitioner has full-blown AIDS and has already suffered consequences of toxoplasmosis, an opportunistic infection that can cause mental instability if not kept in check. All evidence indicates he would not receive treatment for this in a Haitian prison, and that his resulting abnormalities of behavior would provoke the guards to various depredations that would likely cause his death after intense suffering. Indeed, both the Immigration Judge (IJ) and the BIA seemed to credit his description of potential events, yet they denied relief.

The IJ, taking a very literal interpretation of the protections under the CAT, focused on the requirement of proof that "the Haitian government deliberately creates and maintains those conditions as a means of torturing inmates," referring to the substandard conditions generally in Haitian prisons and more or less ignoring the specific chain of reasoning advanced on behalf of the petitioner. The IJ accepted the argument that there was no evidence that the Haitian government specifically targets people with AIDS for torture in prison, or that this impoverished country provides substandard housing and healthcare in prisons specifically in order to torture prisoners. The BIA endorsed this ruling, relying on past 11th Circuit decisions that had denied relief to Haitian petitioners who had argued that sending them back to Haitian prisons would subject them to torture because of the substandard conditions in those prisons.

The 11th Circuit panel concluded that the BIA had really missed the point of the case and its past precedents. The past cases had all rejected claims based on the general argument that sending an HIV+ person to a Haitian prison would subject them to inferior health care and squalid living conditions. But in this

case, it wasn't just that there were substandard conditions in the Haitian prisons, but rather that because of the petitioner's particular medical condition, it was highly likely that he would attract the kind of retaliation from the guards for "acting out" that was well-documented to include physical assaults and mistreatment that clearly met the definition of torture — and, after all, this would be at the hands of the guards, government agents, acting intentionally. The court concluded, however, that the matter would have to be remanded to the BIA for reconsideration rather than being disposed of by the court, since the BIA was entitled to first crack at the legal issues as reframed by the court, since neither it nor the judge had confronted the hard question whether this chain of reasoning, totally uncontradicted by the government's attorneys, would result in torture within the meaning of the CAT, thus entitling the petitioner to U.S. refuge.

A significant part of the opinion focused on the court's jurisdiction to consider the case. The BIA had argued that under the REAL ID Act, this case was not subject to judicial review since what was at issue was a quarrel with the IJ and BIA's factual findings. Disagreeing with this narrow view of the case, the court found that questions of law remain open for review under the REAL ID Act, and that the question whether the undisputed facts constituted a likelihood of being subjected to torture was a question of a legal standard. There is really no dispute about the facts here, just about the legal effect of those facts.

This opinion is horrific to read, and it is dismaying to see how the IJ and the BIA handled this case. Indeed, the court was itself dismayed, beginning its opinion with a quote from Supreme Court Justice Felix Frankfurter (from *Watts v. Indiana*, 338 U.S. 49, 52 [1949]), to the effect that "'when it comes to torture, 'there comes a point where this Court should not be ignorant as judges of what we know as men.'" When a court begins this type of case with such a quote, one knows right off that what follows will not be pretty, and the description of what prison guards in Haiti have been documented as doing to prisons who "act out," whether due to medical complications or orneriness, is really awful. A.S.L.

AIDS Litigation Notes

Federal — 3rd Circuit — In *Cruz v. Commissioner of Social Security*, 2007 WL 2197050 (Aug. 1, 2007) (not officially published), a 3rd Circuit panel affirmed a decision to deny disability benefits to an HIV+ plaintiff whose essential argument was that depression stemming from his HIV infection and drop in T-cell count was disabling. As is usual for this type of case, the court reviewed in some detail the plaintiff's medical record and the analytical method the ALJ used to determine that he was not qualified for disability benefits. These cases are difficult to read and understand for anybody who is not involved in the system of administering these benefits, since the lengthy recitations of medical problems would lead most people to conclude that the plaintiff is in pretty poor shape and shouldn't have to work. However, there are detailed regulations specifying the degree of disability required to qualify for benefits, and apparently the ordinary side effects of HIV and its medications these days do not necessarily result in sufficient disabling effects to qualify an individual for SSI disability benefits, the standard for which is basically an inability to engage in any gainful employment for which the individual is qualified in jobs available in the national economy. One can conclude that Congress has been unduly parsimonious in making the benefits available, but the ALJs, review bodies, and federal courts are bound by the statutory requirements.

Federal — 7th Circuit — A unanimous panel concluded that an HIV+ prisoner's privacy rights were not violated when guards accompanied him to medical appointments and heard his medical condition discussed. *Simpson v. Joseph*, 2007 WL 2768908 (Sept. 20, 2007) (not selected for publication in F.3d). Upholding the prison's refusal to let inmates meet privately with health care personnel, the court observed that the defendants "submitted competent evidence… that a guard escort could deter both segregation inmates from attacking medical personnel and immediately react to any such attack, while a guard standing outside the door would be hard-pressed to do either. Simpson disagreed, but he provided no evidence (on top of his disagreement) to put the issue in dispute." The court found that posting the guards outside the room, even if there were a window in the door for observation, could put medical personnel at excessive risk of attack. The court noted the deference that is normally accorded to prison authorities on security issues.

Federal — 11th Circuit — In *Battle v Astrue*, 2007 WL 2193546 (Aug. 1, 2007) (not officially published), an 11th Circuit panel issued a lengthy per curiam ruling upholding a decision by the Social Security Administration to deny disability benefits to the plaintiff, an HIV+ man with borderline intelligence, basically illiterate and suffering a variety of ills, based on an administrative law judge's conclusion that he was still capable of working. The court's opinion recites in detail the medical history of the plaintiff, disputed points in the hearing before the ALJ, and the analytical method used by the ALJ to reach his conclusion. The basic focus was on the plaintiff's mental limitations rather than his HIV status.

Federal — California — In *Lemos v. Alderwoods Group, Inc.*, 2007 WL 2254363 (E.D. Calif., Aug. 3, 2007), U.S. District Judge Oliver W. Wanger found that the court had jurisdiction to issue a declaratory judgment sought by John Lemos, a person living with HIV/AIDS, that his former employer was obligated to continue paying him $1,000 a month under an alleged contract in settlement of certain torts and contract claims, even after the sale of the company. However, Wanger found that the resolution of certain factual issues precluded a judgment on motion. The undisputed facts are that "Lemos was formerly employed by Whitehurst-Muller, Terry & Gremin until 1987, when he became ill and disabled. Lemos was diagnosed with HIV/AIDS and was not expected to live long. On or about Feb ruary 6, 19898, Whitehurst-Muller and Lemos orally agreed that Lemos would not sue Whitehurst-Muller for employment-related torts and contract claims which existed at that time, and Whitehurst-Muller would pay Lemos $1,000 per month for the rest of his life. Whitehurst-Muller paid Lemos $1,000 per month until it was sold to Alderwoods. Since it bought Whitehurst-Muller, Alderwoods has paid, and continues to pay, Lemos $1,000 per month. In a letter dated April 22, 2004, Alderwoods confirmed its obligation, acknowledging that it had been 'paying Mr. Lemos $1,000 per month for life under the terms of a long-term disability agreement.'" The dispute arises from Alderwoods' sale of its business to Service Corporation International, and Lemos's allegation that an Alderwoods representative had telephoned to say that once the sale closed the payments would stop because SCI had no reason to pay. Lemos ran into court seeking a declaratory judgment. Disputed at this point are whether any payment duty arises from a contract or a long-term disability plan subject to ERISA, and whether the telephone call has any significance, since the court has not received any evidence about the authority of the caller to make the statement. Alderwoods, arguing unsuccessfully to have the case dismissed, said that it acknowledged its obligation and was continuing to pay monthly. All motions for summary judgment were denied, "based on material issues of disputed fact whether Alderwoods or Service International will continue to honor the life payment contract."

Federal — Michigan — In *Graves v. Lange*, 2007 WL 2773527 (E.D. Mich., Sept. 21, 2007), the court rejected an 8th Amendment claim by an HIV+ state prison inmate. The claim was based on the inmate's contention that his supply of high protein snack pack and some other medications should not have been discontinued just because he had stopped taking his HIV medications. The nurse at the prison was following the directions that the supplements would accompany the treatment. The court notes that under prevailing 8th Amendment standards, only deliberate indifference to a serious medical condition, not differences of

opinion about the course of treatment, would suffice to make out a valid claim.

Louisiana — A panel of the First Circuit Court of Appeal of Louisiana voted 2–1 to affirm a decision by the Workers Compensation Board to deny further benefits to the respondent, a former phlebotomist who claimed to have become permanently psychologically disabled after suffering a needle-stick injury while drawing blood from an AIDS patient in the plaintiff's hospital. *Our Lady of the Lake Regional Medical Center v. Matthews*, 2007 WL 2782340 (Sept. 26, 2007). The respondent did not contract HIV infection, but suffered a severe emotional reaction, and the Comp Board approved benefits that ran for several years. Finally, the employer petitioned the Workers compensation Commission to determine if respondent had recovered sufficiently to find she was no longer disabled as a result of the needle-stick injury. The case was complicated by the traumatic events experienced by the respondent in the years leading up to the needlestick, including a rape, two auto accidents, the pregnancy of her young teenage daughter, and various other upsetting things. The Commission ruled that she was no longer entitled to benefits. The dissenter in the appeal court found that the record evidence showed that the needlestick injury had permanently exacerbated the pre-existing mental problems she was experiencing. The majority found that the commission could reasonably conclude, based on the record, that the needlestick injury caused temporary exacerbation of respondent's emotional problems, but that they were mostly attributable to prior events rather than the work-related injury. A.S.L.

AIDS Law & Society Notes

To judge by the infrequency with which the mainstream media reports on AIDS in the U.S., one would think the epidemic is gone, or at least under control, in this country. But then a startling new statistic propels AIDS back into the news and we confront the awful fact that slackening prevention efforts may have an awful cost: during September, New York City Health Department officials reported the startling statistic that the number of new HIV diagnoses among young men and teenage boys who have sex with men has taken a startling upwards jump. In 2001, 374 gay men under 30 were diagnosed HIV+ in New York City, while in 2006 the number of those diagnosed was 499. Even more startling, the number of gay teens diagnosed with AIDS doubled in that time, from 41 in 2001 to 87 in 2006. Commenting on the numbers, City Health Commissioner Thomas Frieden observed, "A generartion of men is growing up having not seen their friends die of AIDS, and maybe having the impression that HIV is not such a terrible infection." *New York Daily News*, Sept. 12. A.S.L.

International AIDS Notes

China — The *China Daily* reported on Sept. 20 that gay college students in Beijing are now being offered small cash bonuses and free medical treatment in exchange for participating in a voluntary program of HIV testing and counseling. According to the report, more than 100 gay university students had registered for the program on-line. The program is touted as part of a national effort to create connections between gay community organizations and hospitals. Gay "consultants" have been hired to do the counseling, on the theory that gay students are likely to be more comfortable talking about sexual practices with a gay counselor. According to the same report, there are 19 centers in Beijing where individuals can obtain free HIV testing and counseling. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

National Employment Law Project — The National Employment Law Project, based in New York, is seeking an Executive Director. NELP is an organization that advocates for low-wage workers, the poor, the unemployed and other groups that face significant barriers to employment and government systems of support. Applications are due by October 19. For full details, consult the NELP website at: http://www.nelp.org/about/contact/jobs/ed_job.cfm. NELP's postal address is 80 Maiden Lane, Suite 509, New York, NY 10038.

Conferences & Colloquia

Fordham Conference on Forty Years of Loving — Fordham University will host a symposium on Friday, November 2 titled *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century*. The symposium will mark the 40th anniversary of the case in which the U.S. Supreme Court declared laws against miscegenation to be unconstitutional under the 14th Amendment. The program runs from 9 am to 5 pm at the law school, 140 W. 62nd Street. Attendance is free to members of the public. Those seeking CLE credit and wishing to lunch must register and pay a fee of $95. Those not seeking CLE credit but still desiring to eat lunch on site will be charged $20. Check the website for details, including hardship applications: http://law.fordham.edu/cle.htm. Announced speakers include several prominent scholars on LGBT rights.

Hofstra Law School is presenting a colloquium on law & sexuality that will comprise a series of nine lectures spaced over the course of the academic year. The program began with an inaugural address on October 1 by University of Chicago Law Professor Mary Anne Case. Other speakers will include Elizabeth Glazer (Oct. 29), Zachary Kramer (Nov. 5), Clifford J. Rosky (Jan. 28), Tiffany Graham (Feb. 20), Susan Schmeiser (Feb. 27), Russell Robinson (March 3), Dale Carpenter (April 7), and Dean Spade (April 28). All of the speakers have taught and/or written on sexuality and law topics and have proposed interesting ways of thinking about these issues. These will be lunchtime programs at the law school. For full details, check out http://law.hofstra.edu/sexualitycolloquium.

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Gaffney-Rhys, Ruth, *Siblings and Civil Partnerships*, June [2007] Int'l Fam. L. 84.

Gallo, Katrina, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 33 Ohio Northern U. L. Rev. 715 (2007) (case note).

Gans, David H., *The Unitary Fourteenth Amendment*, 56 Emory L.J. 907 (2007).

Glazer, Elizabeth M., *When Obscenity Discriminates*, Hofstra Univ. Legal Studies Research Paper No. 07–30 (SSRN.com/abstracts=1016215) (posted Sept. 20, 2007).

Grayzel, Ronald, *Duty of School Boards Expanded: Decisions Require Supervision of Dismissed Students and Protection From Bullying*, N.J.L.J., Aug. 31, 2007.

Hammer, Brendan J., *Tainted Love: What the Seventh Circuit Got Wrong in* Muth v. Frank, 56 DePaul L. Rev. 1065 (Spring 2007) (Argues 7th Circuit erred in failing to use Lawrence v. Texas to strike down application of state incest law in case of consenting adults).

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Law, Sylvia A., *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 Stan. J. Civ. Rts. & Civ. Liberties 1 (Feb. 2007) (supports legitimacy of San Francisco mayor's decision to have city clerk issue marriage licenses to same-sex couples in February 2004 based on his interpretation of the constitution).

Loudon-Brown, Mark, *"They Set Him on a Path Where He's Bound to Get Ill": Why Sex Offender Residency Restrictions Should be Abandoned*, 62 N.Y.U. Ann. Survey Amer. L. 795 (2007).

Lyons, Edward C., *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 Cleveland State L. Rev. 157 (2007) (analytical discussion of substantive due process).

McAllister, Stephen R., *Funeral Picketing Laws and Free Speech*, 55 Univ. Kans. L. Rev. 575 (April 2007).

Mertz, Elizabeth, *Translating Science Into Family Law: An Overview*, 56 DePaul L. Rev. 799 (Spring 2007) (Introduction to symposium on Family Relationships, Biology, and the Law. Substantial section critiquing paper delivered by Lynn Wardle, published as part of this symposium [see below], as being an advocacy brief rather than a dispassionate review of the science relevant to the debate on same-sex marriage. Notes and briefly discusses other papers delivered at the symposium on same-sex marriage that did not eventuate in fully-developed articles published with the symposium.)

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Powell, Russell, *Catharine MacKinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni Jurisprudence*, 8 Georgetown J. Gender & L. 1 (2007).

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Sund, Lars-Goran, *The Rights of the Child as Legally Protected Interests*, 14 Int'l J. Children's Rts 327 (2006).

Tamayo, Yvonne A., *"I Just Can't Handle It": The Case of Hernandez v. Robles*, 28 Women's Rts. L. Rep. 61 (Spring/Summer 2007).

Turner, William B., *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 Wis. Women's L.J. 91 (Spring 2007).

Walters, Mark, *Sexual Orientation in the European Union: The Framework Directive and the Continuing Influence of the European Parliament*, 8 Int'l J. Discrim. & L. 263 (2007).

Wardle, Lynn D., *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 Cap. U. L. Rev. 413 (Winter 2006) (if he doesn't like same-sex marriage, you can just imagine what he thinks of this stuff!!).

Wardle, Lynn D., *The Biological Causes and Consequences of Homosexual Behavior and*

Their Relevance for Family Law Policies, 56 DePaul L. Rev. 997 (Spring 2007) (Part of interdisciplinary symposium on Family Relationships, Biology and the Law).

Zubaty, Rebecca R., *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. Rev. 1413 (June 2007).

Specially Noted:

Vol. 42, No. 2 (Summer 2007) of the Harvard Civil Right-Civil Liberties Law Review includes a collection of articles titled "Conversation: Residency Restrictions on Sex Offenders."

AIDS & RELATED LEGAL ISSUES:

Fairchild, Amy L., and Ava Alkon, *Back to the Future? Diabetes, HIV, and the Boundaries of Public Health*, 32 J. Health Politics, Pol'y & L. 561 (Aug. 2007).

Odunsi, S.B., & A.O. Nwafor, *Medical Confidentiality: Right of HIV/AIDS Patient and the Third Party Interest*, 16 Lesotho L. J. 249 (2006).

Rajkumar, Rahul, *A Human Rights Approach to Routine Provider-Initiated HIV Testing*, 7 Yale J. Health Pol'y, L. & Ethics 319 (Summer 2007).

EDITOR'S NOTE:

We mislaid a folder of materials intended for the September issue, which explains why some articles in this issue discuss decisions and developments that occurred during the summer prior to the publication of the September issue. ••• 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.