CALIFORNIA SUPREME COURT PONDS SAME-SEX MARRIAGE

The highest court of the most populous state in the nation held an unusually lengthy argument session on March 4, hearing eight attorneys address the question whether California’s refusal to allow same-sex marriages violates the state’s constitution. As the state already has a Domestic Partnership Law that provides almost all the state law rights and responsibilities of marriage for same-sex couples, the arguments differed from those presented to most of the other state high courts that have considered the same-sex marriage question. In In re Marriage Cases, 49 Cal.Rptr.3d 675, the 1st District Court of Appeal reversed a trial court ruling and found no constitutional violation. The state Supreme Court agreed to review that decision, which involved several consolidated cases. The Court’s normal procedure is to issue a ruling within ninety days of the oral argument.

The only similarly-situated state has been Connecticut, which enacted a Civil Union Law similar in scope of state law rights to the California Domestic Partnership Law. As in the Connecticut, the remaining state constitutional question is whether extending the legal rights of marriage under state law to same-sex partners, using terminology other than marriage, results in sufficient inequality of treatment to violate state constitutional equality and due process guarantees. The legal challenge in Connecticut was argued before that state’s highest court on May 14, 2007, and no decision had been issued as we went to press on Law Notes during the last weekend in March 2008.

Although it is difficult to predict how cases will turn out based on watching oral arguments, since judges sometimes play “devil’s advocate” roles with their questions and it is all too easy to allow wishful thinking to lead one to read things into the tone and frequency of questioning, it appeared that several of the judges were skeptical about the argument that the court should force the issue further by striking down the discriminatory aspects of the state’s marriage law.

California has an unusual history on this issue. The state enacted a minimalist domestic partnership law in 1999, setting up a registration process and conferring a handful of rights on registered same-sex partners. Over the following years a series of amendments were passed, until the most recent enactment went into effect on January 1, 2006, providing that “registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”

Other things were happening as this amendment process went forward. Reacting to the Vermont Supreme Court’s 1999 decision in Baker v. State, 744 A.2d 864, that led to the enactment of the nation’s first Civil Union Act in 2000, opponents of same-sex marriage placed an initiative on the California ballot that year, Proposition 22, approved by more than 60% of the voters, which amended the provision of the state’s marriage code on recognition of out-of-state marriages, to provide that same-sex marriages would not be recognized in California. In addition, opponents of same-sex marriage mounted legal challenges to the successively expanding domestic partnership law, claiming that as it got closer and closer to full spousal rights, it violated Prop 22, which its supporters argued after enactment would ban all same-sex marriages, not just prevent recognition of those performed out of state. California courts rejected all challenges to the Domestic Partnership Law.

Things went further after the Massachusetts Supreme Judicial Court ruled in favor of same-sex marriage in November 2003, in Goodridge v. Department of Public Health, 798 N.E.2d 941, and San Francisco Mayor Gavin Newsom, inspired by that decision and disturbed by President Bush’s endorsement of efforts to preserve the “sanctity” of traditional heterosexual marriage, authorized San Francisco City Clerk to issue marriage licenses to same-sex couples in February 2004. The California Supreme Court invalidated the resulting marriages in Lockyer v. City and County of San Francisco, 95 Cal.4d 459 (Aug, 12, 2004), holding that the mayor lacked authority to abrogate state law, but left open the question whether same-sex couples might have a constitutional right to marry. Several lawsuits were filed raising the question. They were consolidated into one case, in which San Francisco Superior Court Judge Richard Kramer ruled in favor of the plaintiffs, In re Marriage Cases, 2005 WL 583129 (San. Francisco Super. Ct., Mar 14, 2005), only to be reversed by a 2–1 vote in the First District Court of Appeal, cited above.

The lead plaintiff in the case is the City of San Francisco, whose Board of Supervisors voted to authorize a lawsuit. Chief Deputy City Attorney Therese Stewart led off the oral argument on behalf of the city, followed by Shannon Minter, Legal Director at the National Center for Lesbian Rights, who argued on behalf of a group of same-sex couple plaintiffs. Two other attorneys provided shorter arguments in support of their own plaintiff groups of same-sex couples.

Deputy Attorney General Christopher Krueger argued on behalf of the state, representing Attorney General Jerry Brown in his official role of defending the existing state law. In an unusual move, Governor Arnold Schwarzenegger, who vetoed the legislature’s attempts in 2005 and 2007 to amend the marriage law to allow same-sex marriages, hired a separate attorney, Kenneth C. Mennemeier, to argue on behalf of himself and the state officer in charge of administering the registration of marriage records. Finally, attorneys appeared on behalf of two intervening groups, the Proposition 22 Legal Defense and Education Fund, and the California Campaign for Children and Families, who sought to participate in order to make arguments that the state could not logically make because of the extensive recognition and protection it already provides for same-sex families under the DP law and other policies.

The result was a long and wearing argument session extending over more than three hours, but the members of the court seemed actively engaged throughout and appeared to have spent considerable time thinking about the case and exploring the arguments made in the many briefs filed with the court. The California Supreme Court made history shortly after World War II when it became the first state high court to declare laws against interracial marriage to be unconstitutional, issuing an opinion that spoke broadly about a constitutional right for each person to chose a marital partner without the interference of the state. What meaning this old ruling, Perez v. Sharp, might have for the current controversy occupied a central role in the case. Additionally, several judges asked whether the legislature had essentially done all it could do for
same-sex couples by passing the Domestic Partnership Law, in light of the passage of Proposition 22 which, if broadly construed, might disempower the legislature from enacting same-sex marriage without an affirmative referendum vote of the people.

In California, a statute enacted through the initiative process cannot be repealed or replaced by the legislature, although it is subject to constitutional challenge on the same basis as a legislatively-enacted statute. Justice Marvin Baxter suggested several times through his questioning that Proposition 22 may have decided the matter, and that the court should not overrule the people on this question. Justice Ming Chin seemed fixated at times on the notion that any equality requirement of the state constitution would be satisfied by the legislature’s extension to same-sex couples of the equivalent legal rights of marriage under state law, as he asked petitioners’ attorneys to agree that the Domestic Partnership Law represented “substantial progress” towards full equality.

This led to quite a bit of questioning about the significance of words, and whether the dispute was solely semantic. Justice Moreno posed the question whether all that was at stake was “the M word.” Both Stewart and Minter went to significant lengths to persuade the court that more was at stake than mere language, and not just because the federal government will not recognize any legal status for same-sex partners as a result of the 1996 enactment of the Defense of Marriage Act. The court had granted a motion to accept a late filing of the New Jersey Civil Union Review Commission’s interim report, and its conclusion that civil unions in that state had fallen short of providing complete equality of rights came in for some criticism, although the attorneys for the state tried to downplay its significance, arguing that one year after enactment of this new legal structure was hardly sufficient time to reach any conclusions about its ultimate effect.

Chief Justice Ronald George signaled great concern that the court not fall into the same error that the U.S. Supreme Court embraced in 1986 in Bowers v. Hardwick, when it narrowly conceptualized the issue as whether homosexuals have a right to engage in sodomy. In 2003, the Court corrected itself in Lawrence v. Texas, ruling that the appropriate framing of the question was whether the conduct at issue came within the liberty protected by the Due Process Clause of the 14th Amendment. In this case, Chief Justice George repeatedly came back to the argument that these cases are not about a right to same-sex marriage, but rather about the right of same-sex couples to participate in the institution of marriage on the same basis as opposite-sex couples. Under this broader concept, the miscegenation cases provided a much stronger precedent for recognizing the right.

The arguments by the government attorneys strongly pushed the idea that California has a legitimate interest in preserving the traditional meaning of marriage, but even when pressed they found it difficult to articulate more than a respect for history and tradition as justifications for that stance. The attorneys representing the anti-marriage groups fell back on some of the arguments that proved successful in New York, Maryland and Washington State, the illogical contention that the justification for limiting marriage to opposite-sex couples is to channel procreation into a state-supported institution that is the best vehicle for child-rearing. As usual, they asserted that unspecified “studies” showed that children do better when raised in traditional families, a point that is actually refuted by most of the published literature in professional journals, and one attorney argued that enactment of same-sex marriage in the Netherlands had led to a sharp decline in heterosexual marriage, another point that has been decisively refuted in the professional literature. One presumes that citations to all these publications were submitted to the court in the vast array of amicus briefs filed in the case.

The same-sex marriage movement was well represented on this occasion by Stewart and Minter, both of whom engaged in a high level of doctrinal discussion with the justices. If the case is lost, it will not be for lack of effective advocacy, but more likely due to the politics of the issue.

The court webcast the argument live and archived it on the state’s official website, which can be reached through a link on the court’s website. This observer came away believing that the Chief Justice and Justice Joyce Kennard probably the most persistent questioner were strongly leaning towards ruling for same-sex marriage, that Justices Marvin Baxter and Ming Chin, seemed most likely to vote the other way, and that the votes of Justices Carlos Moreno (the only Democratic appointee on the court), Carol Corrigan and Kathryn Mickle Werdegar were “in play.” Justice Werdegar is generally considered one of the more liberal members of the court on social issues, but her questioning was relatively even-handed, and initially seemed more supportive of the state’s position. Justice Moreno probably asked the fewest questions, reflecting skepticism about the arguments of both sides. It is perhaps significant that Justice Werdegar was one of the dissenters in the 2004 decision that declared Proposition 22 null and void the same-sex marriages that were performed in San Francisco on the authority of the mayor.

Most commentators responding to the oral argument suggested that a ruling in favor of same-sex marriage seemed possible, but few were willing to hazard any strong prediction. Meanwhile, opponents of same-sex marriage were busy preparing new constitutional amendment initiatives that they hoped to place on the November 2008 ballot, either to overrule a positive opinion by the court or to forestall future attempts to attain same-sex marriage legislatively if the court ends up affirming the ruling by the court of appeal. A.S.L.

**LESSIAN/GAY LEGAL NEWS**

**Gay Domestic Partners Lose Appeal for Refugee Status in the U.S.**

Two HIV+ gay men from Colombia, now New Jersey domestic partners, lost their appeal to the 3rd Circuit of the denial of their petition for refugee status. The court affirmed a decision by Immigration Judge Mirlande Talal, which had been affirmed by the Board of Immigration Appeals, that they had failed to meet the standard for withholding of removal. *Torres v. Attorney General*, 2008 Westlaw 683930 (3rd Cir., March 14, 2008) (not selected for official publication). The court also found no abuse of discretion in the IJ’s refusal to treat the men as a “family unit.”

Circuit Judge Thomas M. Hardiman’s short opinion barely sketches out the facts of the case. The two Colombian natives entered the U.S. in 1999 on I–94 visas, generally used by students or others who are temporarily entering the country for an extended stay of finite length but not as permanent immigrants. They registered as domestic partners in New Jersey in 2003 when that state’s DP law went into effect (prior to the enactment of the more recent Civil Union Act), but neither man applied for asylum in the U.S. within a year of entry. When their authorized period expired, they applied to the Homeland Security Department for withholding of removal or protection under the Convention Against Torture, alleging that they would be endangered by returning to Colombia.

However, the standard for being treated as a refugee entitled to remain in the United States is very high. For withholding of removal, the petitioner must prove that it is likely they will suffer persecution because of membership in a particular social group in their home country. Since a 1990 ruling by the Board of Immigration Appeals, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), courts have generally accepted that openly gay people are members of a particular social group for this purpose, but as
gay rights has advanced around the world, the number of countries from which a gay person can credibly allege fear of persecution has shrunk, and it appears from this decision that Colombia is not one of them.

Each man testified about having incurred problems in Colombia connected with his sexual orientation. One testified that he was fired from his job when a secretary at his workplace discovered his relationship with his partner. The other testified that he was arrested and briefly detained as a result of a police raid of a disco where he was a patron. Neither of these incidents, however, would qualify as persecution for purposes of refugee law, since persecution requires a serious threat to life or freedom at the hands of the government or forces that the government will not or cannot control. Detailing a prior court decision, Fatin v. U.S., 12 F.3d 1233 (3rd Cir. 1993), the panel noted that the threat of prosecution must be “severe” and “does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” That a particular group is the subject of social ostracism or economic discrimination is not a basis for refugee status under applicable statutes and treaties. In this case, the court observed, the documentary evidence in the record “shows increasing tolerance of homosexuals in Colombia.”

The court noted two facts about gays in Colombia to support its decision about “increasing tolerance.” First, the Colombian military is actually more pro-gay than the U.S. military, since openly gay men are allowed to serve. Additionally, the Colombian Constitutional Court has ruled that teachers could not be dismissed solely due to their sexual orientation. In other words, it appears that the military and legal systems in Colombia respect the rights of gay men, making it difficult for the applicants in this case to credibly allege that they would be endangered on return to Colombia solely on the basis of their sexual orientation.

The court said nothing about their HIV status, suggesting that this may not have played a significant role in their argument. Sometimes applicants have argued that unavailability of the medications they have been taking in the US would endanger their lives, but Judge Hardiman does not mention any such argument in this opinion.

As to the “family unit” issue, the court noted that an IJ has discretion over whether to consolidate proceedings involving family members to promote administrative efficiency, but such cases usually involve derivative claims, where one individual seeks to remain through their relationship with another. There was no derivative claim in this case, and “Appellants’ petitions do not rely exclusively on the same incidents of alleged persecution,” wrote Judge Hardiman. Thus, there was no administrative convenience in holding separate proceedings, and each man was certainly entitled to testify at the other’s hearings. A.S.L.

New York Appellate Division Vacates Trial Court’s Refusal to Recognize Canadian Marriage

The New York Appellate Division, 2nd Department, issued a ruling in Funderburke v. New York State Department of Civil Service, No. 6186/05 (March 25, 2008), granting the defendants’ motion to dismiss the appeal of a decision by the trial court refusing to recognize the plaintiff’s same-sex marriage for purposes of benefits eligibility under a public school employee benefits plan as moot, and granting the appellant’s motion to vacate the decision of the trial court, which is reported as Funderburke v. New York State Department of Civil Services, 13 Misc.3d 284, 822 N.Y.S.2d 393 (N.Y.Sup.Ct. 2006).

The plaintiff, Duke Funderburke, a retired teacher previously employed by Uniondale Union Free School District, legally married his same-sex partner in Ontario in 2004, and then applied for spousal health and dental insurance under the benefits program for retired teachers maintained by the District. The District denied the request, and Funderburke sued both the District and the New York State Department of Civil Service, whose rules govern the benefits plan, as well as various officials. The trial judge, ruling shortly after the New York Court of Appeals’ decision in Hernandez v. Robles, 7 N.Y.2d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006), rejecting a constitutional claim for same-sex marriage, held that New York public policy as declared in Hernandez would preclude recognizing the same-sex marriage, and Funderburke appealed, represented by Lambda Legal.

However, the Civil Service Department subsequently rethought its position, and decided that under New York marriage recognition law it should be recognizing same-sex marriages contracted lawfully in other jurisdictions. While the appeal was pending, the Department and the School District notified Funderburke that his partner could enroll in the programs, and offered coverage for coverage expenses dating back to the date of the original request. The appellees then moved to dismiss the appeal as moot, and, in response, Funderburke moved the court to vacate the trial court’s decision if it determined that the appeal should be dismissed on this ground.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal,” quoted the court from an earlier ruling by the state’s highest court in Matter of Heart Corporation v. Clyne, 50 N.Y.2d 707.

No ruling on the merits in this case would now constitute an inappropriate advisory opinion, because the state’s change of policy on marriage recognition means that the rights of the parties would not be affected by a ruling of the court. So, the court announced it would “dismiss the appeal as academic.”

Turning to Funderburke’s motion, the court noted that when events rendered an appeal “academic,” the appeal is usually just dismissed, but that “vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary ‘in order to prevent a judgment which is unfavorable for mootness from spawning any legal consequences or precedent.’” Finding that in this case “the Supreme Court’s orders could spawn adverse legal consequences for the plaintiff or be used as precedent in future cases, causing confusion of the legal issues in this area of the law,” the court granted Funderburke’s motion to vacate both the trial judge’s original order and a subsequent order that he had issued after a reargument in the case. This is particularly significant because the court cited the 4th Department’s recent decision in Martinez v. County of Monroe, 2008 N.Y. Slip Op 00909 (2008), the first (and so far only) appellate ruling in New York holding that the state would recognize a Canadian same-sex marriage. Although the court offered no comment to elucidate the meaning of this citation, one infer from the context that the 2nd Department sees no reason at this time to cloud the statewide precedential authority of Martinez.

Lambda Legal Senior Counsel Susan L. Sommer is the lead attorney on the case, as co-counsel with attorneys Jeffrey S. Trachtman and Norman C. Simon of Kramer Levin Naftalis & Frankel LLP. A.S.L.

Pennsylvania Commonwealth Court Rules Against Lesbian Partners in Unemployment Benefits Claim

The Commonwealth Court of Pennsylvania ruled 6–1 on March 17 in Procito v. Unemployment Compensation Board of Review, 2008 WL 696393, against Joan Procito’s bid for unemployment benefits to compensate for leaving her job to follow her same-sex domestic partner to Florida. Upholding a decision by the state’s Unemployment Compensation Board of Review, the court seemed to deliberately obfuscate the facts of the case in order to avoid reaching constitutional claims that Procito raised in her appeal, at least according to the criticisms that dissenting Judge Rochelle S. Friedman made against the majority’s view of the case.

The Review Board upheld a ruling by an Unemployment Compensation Referee after a hearing in which Procito and her partner participated from Florida by telephone. Procito testified that her partner had quit her job because job-related stress was having an adverse
effect on her health. The partner had several sons, one of whom, a person with learning disabilities, was about to begin college in Florida, and she decided she should move to Florida with her sons to provide family emotional support for her new colleague. Procito could not afford to maintain two households, and quit her own job to move to Florida with her partner.

Were Procito and her partner married, this scenario could make Procito eligible for unemployment benefits. But the Referee determined that domestic partners do not qualify for the “following the spouse” doctrine that the Pennsylvania courts have developed for such situations. Judge Doris A. Smith-Ribner’s decision for the court relates that “the Referee stated that in order to receive benefits under the Law an individual must be legally married and that a domestic partner is not recognized within the definition” of the law. Thus, the Referee found that Procito had not met the statutory requirement of showing that leaving her job was “due to a necessitous and compelling cause." The Review Board adopted the Referee’s decision, deciding that Procito left her job for “personal reasons,” and denying her benefits.

On appeal to the Commonwealth Court, Procito adopted alternative argument strategies. First, she argued that failing to treat domestic partners the same as spouses for this purpose violated the Pennsylvania constitution’s guarantee of equal protection of the laws. Alternatively, she argued that on the merits her decision to quit her job and move to Florida should not be seen as purely voluntary because of the circumstances, stressing her inability to afford to maintain two homes.

The Referee had taken the position that Procito’s partner’s reasons for leaving her job were irrelevant to Procito’s claim for benefits, since the “following the spouse” rule did not apply, and thus the Referee had sharply limited testimony about those reasons. Procito argued on appeal that in fact those reasons were relevant to determining whether Procito had left her own job for “necessitous and compelling cause,” and that the Board should have sent the case back to a Referee for reconsideration in order to take testimony on this point.

Judge Smith-Ribner seems to have recharacterized the factual findings of the Referee, at least according to the dissenting opinion, Wrote Smith-Ribner, “The case of whether the partner had necessitous and compelling cause to quit is not before the Court, and the mere fact of her separation from employment in Pennsylvania did not constitute reason beyond her control to move to Florida. Once the partner separated from her job, she decided to move to Florida to seek work in a less stressful environment and to be near her son. These admitted facts show that the partner did not originally decide to leave work and move to Florida because the son needed her; and Procito offered no such proof.

Procito testified that the main reason her partner left her job was the ongoing stress, and they then decided to coordinate moving to Florida to a less stressful environment ‘and as an additional reason’ to be closer to the son. The son, however, was an adult starting at a college of his choice… The partner’s decision to relocate to Florida was a matter of personal preference, which would preclude a determination by the Board or this Court that Procito had a necessitous and compelling cause to follow.”

Smith-Ribner asserted that this case was different from a prior ruling in which the court awarded benefits where a single parent had relocated to be nearer a young child with developmental disabilities, and asserted that due to these factual “findings,” the court had no need to address Procito’s constitutional claims.

In a concurring opinion, Judge Dante R. Pellegri, joined by three other judges (representing together a majority of the seven-member panel), after reviewing the history of the court’s treatment of the “following the spouse” doctrine, asserted, “In this case, there is no evidence that Claimant’s domestic situation caused her to leave her employment and relocate to Florida. All evidence indicates that her domestic partner moved to Florida to be with her son in college because she wanted to, not because they needed to. This is clearly a personal choice and not a domestic reason that constitutes a necessitous and compelling reason to justify the award of benefits.”

In a separate concurrence, Judge M. Hannah Leavitt argued that it was up to the legislature to determine whether same-sex couples should be recognized for purposes of unemployment compensation benefits eligibility.

Justice Friedman’s dissent scolded the court for overstepping its role to engage in fact-finding, and for evading the constitutional questions by finding facts beyond those found on the record by the Referee. She observed that the Review Board’s decision, adopting the findings of the Referee, found only four facts on which it based its decision: Procito’s employment record, that Procito “voluntarily resigned” to follow her domestic partner to Florida, that the “partner relocated to Florida to be near her son, who has a learning disability;” and that Procito “resigned her position and relocated to Florida because she was not financially able to maintain two separate households in two states.” The Board made no finding about why Procito’s partner left her job, a point on which the Referee had limited the testimony and made no finding. The Board had stated, based on these four factual findings, that “unfortunately” Procito could not receive benefits because she was not married to her partner. Implicitly, then, the Board had ruled that if Procito was married to her partner, she could have been eligible for benefits based on these facts.

Friedman pointed out that this placed directly in play the question whether failure to give Procito the benefit of the “following the spouse” doctrine violated her constitutional rights. But the court evaded answering this question by implicitly applying the doctrine and finding, apparently contrary to the Board’s reasoning, that Procito could not have qualified under the facts she had proved, even if the doctrine was applied in her case. This violated her due process rights, Friedman argued, because the Referee cut her off from presenting her evidence after ruling that the spouse doctrine did not apply to her.

Forging ahead, Friedman argued that refusing to apply the doctrine to Procito violated her constitutional rights. Friedman noted a fact that the court’s opinion ignored: that Procito’s partner had more than one son, and that Procito, the sons, and the partner formed a family unit of a type that Pennsylvania courts have recognized in other contexts, most notably in those finding an “in loco parentis” relationship between gay people and their partners’ children with whom they live in a common household.

“Inasmuch as our supreme court has recognized the bonds that unite same-sex families,” wrote Friedman, “even without the benefit of legal marriage, it would be absurd to suggest that same-sex families do not experience the same real and substantial pressure that traditional families experience when one parent must relocate due to circumstances beyond his or her control. Here, Claimant presented evidence indicating that her domestic partner has ‘sons,’ not just the special needs son attending college, and that Claimant has been an ‘integral part of the raising of [those] sons.’ Thus, although Claimant cannot be legally married to her domestic partner, I would consider Claimant’s family to be a real family and apply the ‘following the spouse’ doctrine to this case.”

Applying principles of equal protection, under which the state would need a rational justification for treating Procito’s family differently from a marital family, Judge Friedman argued that “the pressures that create necessitous and compelling cause under the ‘following the spouse’ doctrine are real and substantial whether the claimant is married or not. There is simply no difference that would justify dissimilar treatment.”

Procito can seek review for this decision from the Pennsylvania Supreme Court, which has become receptive to LGBT family law claims in recent years, as Judge Friedman pointed out in summarizing the recent family law decisions recognizing families headed by same-sex couples in other contexts.

Philadelphia lawyer Katie R. Eyer represents Procito. A.S.L.
The Court of Appeals of Georgia has reversed the contempt citation against a lesbian mother and her attorney that was issued by an angry state trial judge, after the mother and her attorney had appeared to have defied the judge’s ruling requiring the mother to return the child she was petitioning to adopt to the child’s birth mother. In her March 24 opinion for the unanimous three-judge appeals court in In re: Elizabeth Hadaway, 2008 WL 755959, Chief Judge Anne Elizabeth Barnes found that Elizabeth Hadaway had not intentionally violated the court’s order and reasonably thought that what she was doing was appropriate.

Wilkinson County Superior Court Judge John Lee Parrott had initially responded positively when Elizabeth Hadaway initiated a proceeding in his court to adopt little Emma, whose birth mother decided that she couldn’t care for her and wanted to entrust her to Hadaway. On June 19, 2006, Judge Parrott granted Hadaway’s petition for physical and legal custody, based on a petition prepared by Hadaway’s attorney, Dana Johnson. After the birth mother executed a document surrendering parental rights, Hadaway petitioned to adopt the child.

The Wilkinson County Department of Family and Children’s Services (DFCS) prepared a home study, which mentioned that “Hadaway lived with a female partner with whom she shared a bedroom and contained information about Hadaway and her partner,” wrote Judge Barnes, noting that DFCS had approved “Ms. Hadaway, and her home, for the adoption” of Emma. Despite this positive recommendation, Judge Parrott denied the petition and vacated the grant of custody to Hadaway. Judge Parrott “found fault with Hadaway’s filing for adoption as an individual when the home visitation report contained information about both Hadaway and her partner as if they were adopting as a couple, and for not disclosing that information in the adoption petition.” Apparently, reading the DFCS report was the first Parrott knew that the prospective adoptive parent was a lesbian living with her partner, and this rendered her unfit in his opinion.

Instead of granting the adoption, on January 12, 2007, Parrott ordered that Hadaway return the child to its mother or, in the alternative, to turn it over to the DFCS for foster placement. That same day, Hadaway and Johnson met with the birth mother to return the child. “After Johnson left,” wrote Judge Barnes, “the mother decided that the separation was not in the child’s best interest because the separation from Hadaway resulted in significant distress to the child. Consequently, she asked Hadaway to take physical custody of the child again, and Hadaway did.”

Hadaway quickly removed herself and the child to Bibb County, out of Judge Parrott’s jurisdiction, and had attorney Johnson file a new petition in the Bibb County court, once again seeking custody of Emma. This new petition mentioned that Hadaway had been granted custody in Wilkinson County, but that the custody order had been vacated by that court when it decided the change was not in the child’s best interest.

Judge Parrott was evidently quite perturbed by what he perceived as an end run around his order, and on February 21, granted custody of Emma to the Wilkinson County DFCS, ordering the agency to take custody of the child because the “mother of the child violated an order of the Superior Court of Wilkinson County.” He also ordered Hadaway and Johnson to respond to a criminal contempt charge for “disobeying and resisting” his prior order. Parrott insisted that if Hadaway disagreed with his order, she should have appealed it. He also accused her of failing to reveal “honestly and in good faith to the Bibb Superior Court” about the full nature of the proceedings before Judge Parrott. The judge also suggested that Johnson had violated attorney disciplinary rules by her participation in the Bibb County proceeding.

Hadaway and Johnson did show up in Wilkinson County court to answer the charges. Hadaway related that she had returned the child to its mother, but that the mother insisted on her taking the child back. She also said that the Wilkinson County DFCS advice to her was to “just move,” which was what she had done, and to re-file for custody as long as she disclosed the adoption denial in her court papers. She testified that she had not notified the DFCS of her subsequent actions “because they already knew that the mother did not take the child.” Hadaway apologized to the court “if she did anything wrong.”

Johnson explained to the court that she was not aware of everything that had happened when she drafted the new custody petition for Bibb County. She arranged for the meeting to turn over the child, and she assumed that after she left the meeting, the birth mother was going to take the child back to Florida, that Hadaway had moved to Bibb County, and that Johnson was to file new papers in Bibb County. She had not realized that the mother had given the child back to Hadaway.

Despite this testimony, Parrott found Hadaway and Johnson in contempt, ordered that the child be placed in foster care, and sentenced each of them to ten days in jail or five days and a $500 fine. These punishments were stayed pending the appeal, which was handled for Hadaway by the ACLU. Hadaway and Johnson both argued on appeal that they had not mean to violate the court’s order, had tried to return the child to its birth mother, and had thought what they were doing was in the child’s best interest and on the advice of the Wilkinson County DFCS, which had supported Hadaway’s original adoption petition.

“We find that Hadaway and Johnson’s primary contentions have merit,” wrote Judge Barnes for the appeals court. “The order was directed toward the actions required of the natural mother. It did not address Hadaway’s or Johnson’s obligations. If anyone violated the order, it was the natural mother. Therefore, neither Hadaway nor Johnson should have been found in contempt of that order. Hadaway’s and Johnson’s contention that they did not willfully disobey the court’s order also has merit. To prove a ‘criminal contempt, there must be proof beyond a reasonable doubt, not only that the alleged contemnor violated a court order, but also that he did so willfully,’” Barnes continued, citing prior Georgia cases.

Barnes found there was no evidence here of a willful violation. “The fact that they filed another petition to change custody, rather than file an appeal, does not mean that they willfully violated the order,” concluded Barnes, who also stated that the papers filed in Bibb County did not show that either Hadaway or Johnson had violated any of the specific commands of Judge Parrott’s order. Thus, the contempt ruling was reversed.

The legal wrangling of the adults in this case was most harmful to the one person whose best interest was supposed to be the principal aim of the law, the child Emma, now seven years old. During the controversy with Judge Parrott, Emma had been seized by DFCS and placed in a foster home, but was eventually returned to Hadaway’s custody last May when a DFCS expert determined that she was experiencing emotional trauma due to the separation, having bonded with Hadaway, and the Bibb County court did grant Hadaway’s custody petition. A.S.L.

**Kansas Appeals Court Finds Anti-Gay Bias Infected Criminal Prosecution**

William Blomquist, a 31–year-old resident of Kansas, was recently convicted on various counts amounting to child molestation of a 12–year-old boy with an IQ “in the middle range of mental retardation.” During the trial, the prosecutor spent a large amount of time and effort proving that Blomquist was gay, thereby hoping to create the inference that Blomquist sought sexual gratification from the boy. On February 29, 2008, the Kansas Court of Appeals reversed Blomquist’s conviction. Judge Buser, writing for the majority, found prosecutorial misconduct and cumulative error of such magnitude that a new trial was required. *State v. Blomquist*, 2008 WL 538964.

Only three sentences into presenting his case, the prosecutor framed the charges of child molestation “around the allegation that Wil-
liam was a homosexual.” The prosecutor submitted into evidence journals of Blomquist’s mother, with whom he lived, purporting to show that Blomquist was gay. In addition to the journals, the prosecution entered into evidence transcripts of a sheriff’s interrogation during which Blomquist denied being gay, a “Gays Going Crazy” video found in Blomquist’s bedroom, and a picture of a dildo that was found in Blomquist’s mother’s bedroom. Testimony was developed in which the boy’s mother testified that Blomquist never made any sexual advances on her, despite having the opportunity to do so.

In Kansas, prosecutorial misconduct is a two-pronged analysis, investigating whether the conduct was outside the “considerable latitude” given a prosecutor and whether the transgression constituted plain error. Judge Buser began the analysis by noting that for Blomquist’s sexual orientation to be relevant to the case, the prosecutor had to assume that “a sexual desire for children is among those desires which define a homosexual orientation.” After finding that this assumption was unreasonable, Judge Buser noted the “prejudicial character” of imputing homosexuality to a criminal defendant on these charges. Given that Blomquist’s sexuality was irrelevant to proving the case, the prosecutor had committed misconduct analogous to “appeals to passion, prejudice, and fear.”

Judge Buser then turned to the plain error analysis. The prosecutor’s focus on Blomquist’s sexual orientation was not isolated, but occurred frequently throughout the trial. According to Judge Buser, this demonstrated that the misconduct was “gross and flagrant.” Given that the only relevant evidence against Blomquist was scant and could not be considered “direct and overwhelming,” the prosecutor’s misconduct was not harmless error and a new trial was needed.

The court’s decision to remand was “greatly strengthened” by other errors that took place during trial. An expert child psychologist testified about the boy’s family, although the expert had not actually interviewed the boy. Testimony was also admitted in which the sheriff improperly expressed an opinion on the veracity of Blomquist’s denial of homosexuality during his investigation. Finally, Buser noted that the picture of the dildo found in Blomquist’s mother’s bedroom was irrelevant to the charges against Blomquist. As a result, the court held that the combination of cumulative error and prosecutorial misconduct deprived Blomquist of a fair trial. Chris Benecke

**N.Y. Federal District Court Finds Lesbians’ Equal Protection Claim Against Local Police Too Speculative**

In *Butler v. City of Batavia*, 2008 WL 619164 (March 3, 2008), Judge William M. Skretny of the U.S. District Court for the Western District of New York dismissed an equal protection claim and a first amendment retaliation claim brought by a lesbian couple against officers of the City of Batavia Police Department. The plaintiffs, Stacy Butler and Carol Sojda, alleged that their neighbors, the Magers, intentionally caused them to suffer emotional distress by racing cars in front of their house, making obscene gestures, and committing other acts of extreme and outrageous conduct. These actions were allegedly committed to instill fear and anxiety in the plaintiffs on account of their homosexuality.

The couple further alleged that their complaints to the local police department about this harassment went unheeded, due to sexual orientation discrimination. Their complaint stated that the police refused to respond to their complaints of harassment in retaliation for their complaints to the police about one of their neighbors who is an alleged sex offender living near a school.

The allegations in the plaintiffs’ equal protection claim indicate that a similarly situated heterosexual couple had previously complained about another sex offender living in the neighborhood and the police responded by investigating the allegation. However, when the plaintiffs filed a similar complaint, the police did nothing. Addressing this equal protection claim, Judge Skretny held that although the plaintiffs did show that they had been treated differently, they failed to sufficiently allege that the police officers acted with discriminatory intent. The complaint stated that on two occasions police officers made remarks referencing the plaintiffs’ sexual orientation, however, the court was not satisfied that these remarks were made with discriminatory intent. Therefore, the court held that the plaintiffs’ equal protection claim was too speculative to survive a motion to dismiss.

In the plaintiffs’ claim for First Amendment retaliation, they alleged that the police officers took adverse actions against them (by ignoring their harassment claims) because they complained that a sex offender, their neighbor, was living within one thousand feet of a school. A First Amendment retaliation claim is made up of three elements that plaintiffs must prove: (1) that they have an interest protected by the First Amendment, (2) that the defendant’s actions were motivated by plaintiffs’ exercise of that right, and (3) that the defendant’s actions chilled the exercise of that right. Case law in the Second Circuit further indicates that “Circumstantial evidence of retaliation may be found when defendants are aware that plaintiff has engaged in protected speech and defendants’ challenged behavior closely follows that protected speech” (emphasis added). Curiously, the plaintiffs’ complaint alleged that the police began ignoring their complaints about their neighbors’ harassing conduct in August; two months later, the police allegedly ignored the plaintiffs’ complaints about their neighbor being a sex offender. Therefore, the court held that the plaintiffs’ retaliation claim was fatally flawed because the officers’ alleged adverse conduct (ignoring the harassment claims) started prior to the plaintiffs’ complaints about their neighbor being a sex offender.

Thus, in the court’s view the plaintiffs had failed on both of their federal claims. The plaintiffs also brought a state law claim of intentional infliction of emotional distress against their neighbors for the harassing conduct. This claim was brought in the district court under supplemental jurisdiction, but the court declined to exercise jurisdiction after dismissing the federal claims. Therefore, the plaintiffs may still find some success in a state court if refiling within the statute of limitations is possible. Ruth Uselton

**Federal Civil Litigation Notes**

*Alabama — In Corbitt & Raya v. Home Depot USA, Inc.*, 2008 WL 616057 (S.D. Ala., March 3, 2008), Chief Judge Callie V. Granade granted summary judgment to the defendant employer on claims of hostile environment sexual harassment and retaliation brought by two male former employees complaining about the conduct towards them by a male management official. Both plaintiffs related sexual remarks and conduct, some of it involving improper touching and invitations to engage in sexual activity, over the course of many months. Judge Granade concluded that the allegations fell short of the kind of severe and pervasive conduct that had been held to create a hostile environment in other cases, but that even if the standard were met, the company had the benefit of a clear sexual harassment policy in place, and that the plaintiffs had not invoked the policy or ever directly communicated to the manager involved that they considered his comments and actions unwelcome. However, in turning to supplementary state law claims, while granting summary judgment on claims of assault and battery, outrage, and invasion of privacy, the court decided that the claim of negligent supervision and training was actionable, and so denied the defendants’ motion as to that, leaving open the possibility that plaintiffs may still win some damages for the indignities and annoyance they suffered.

*Connecticut — U.S. District Judge Christopher F. Droney granted summary judgement for defendants in LeVarge v. Preston Board of Edu-
District of Columbia — The mother of a gay man who committed suicide in his solitary isolation cell after being arrested by D.C. police in a traffic stop, interrogated and held incommunicado will be able to pursue some of her claims against the District of Columbia, including on allegations that the interrogating officers played on his sexual orientation while questioning him without giving proper Miranda warnings to frighten him about being placed in general population in prison. In the course of ruling, District Judge Rosemary Collyer dismissed many of the claims against individual named defendants. Powers-Bunce v. District of Columbia, 2008 WL8036440 (D.C., March 27, 2008).

Florida — U.S. District Judge Steven D. Merryday adopted a report and recommendation by Magistrate Judge Thomas G. Wilson, granting summary judgement to Florida prison health care providers who were sued by a transsexual inmate who had been denied hormone therapy. Barnhill v. Cheery, 2008 WL 759322 (M.D. Fla., March 20, 2008). Inmate Jamie Raye Barnhill is being provided with psychological counseling, but the prison medics have refused to prescribe hormone therapy for him. Most prison systems take the position that they will not start an inmate on hormone therapy, but will provide continuing therapy for those who began therapy before entering the system. Barnhill was seeking the benefit of this rule, having previously had such therapy, but through negligence it appears that the doctor initially responsible for his treatment failed to note this fact. Barnhill claims that he has suffered adverse effects from the forced withdrawal from his hormone therapy. Unfortunately for Barnhill, however, medical negligence is not actionable under the 8th Amendment’s cruel and unusual punishment clause, which only comes into play when an inmate can prove “deliberate indifference” to a “serious medical condition.” The court found that because the prison was providing psychological counseling, this standard had not been met.

Missouri — The Associated Press reported on March 17 that a lesbian who married her partner in Massachusetts in 2005 has filed suit in the Missouri 5th Circuit Judicial Court seeking an annulment of the marriage. Charisse Y. Sparks asserts that the court should declare her marriage to Janet Y. Peters-Mauceri-Sparks null and void, since Missouri does not recognize same-sex marriages in any event. The couple moved to Missouri after their marriage took place. Peters-Mauceri-Sparks’ attorney contends that the marriage is legal because Missouri marriage recognition law normally respects marriage that were legal where they were performed.

New York — U.S. District Judge Michael A. Telesca refused to dismiss charges under the Fair Housing Act and the New York State Human Rights Law by a lesbian couple against a landlord who refused to rent them an apartment, in Swinton v. Fazeekas, 2008 WL 723914 (W.D.N.Y., March 14, 2008). Fazeekas bought the two-family house in 1984, and since 1989 has rented out both units in the building. He listed one of the units for rent, and did not specify no pets. Swinton and Robinson began their relationship in July 2004, while Robinson and her young son Jay were living with Robinson’s parents. They began searching for an apartment in Rochester in the fall of 2005 and found Fazeekas’s on-line listing. When they inquired, he asked about the relationships of the parties, and plaintiffs claim they told him they were in a romantic relationship and would share a bedroom, with the child in the other bedroom. Fazeekas claims that he did not understand they were in a romantic relationship. When they saw the apartment, Swinton informed the landlord that they might get a puppy. Fazeekas claims he asked Swinton if she would reconsider on the puppy, but she was determined and would not back down. Swinton and Robinson dispute this. At any event, Fazeekas emailed them that he would not rent them the apartment, stating, inter alia, “My reservations are based on past experience with dogs and I must say that I am also concerned with the added liability of a young child.” By this statement, it appears Fazeekas laid the basis for a family discrimination claim under the FHA, the premise for federal jurisdiction in this case. The Human Rights Law claim alleges sexual orientation discrimination, recounting in support Fazeekas’s inquiry into the plaintiffs’ relationship and asserting that his denial based on the “puppy” issue is pretextual. Fazeekas indicated that he had a problem with a prior tenant who had a puppy and messed up the place. Judge Telesca decided that there were too many contested facts to decide the case as a matter of law, and denied Fazeekas’s motion for summary judgment.

Oklahoma — In Murray v. State of Oklahoma, 2008 WL 740338 (W.D.Okl., March 17, 2008), District Judge Robin J. Caultho dismissed all pending claims in a pro se action brought by a gay man claiming to have suffered discrimination, harassment, and a variety of other complaints. The fellow’s case seems to prove the old adage that a person who represents himself in litigation has a fool for a lawyer. Since neither Oklahoma nor the federal government have any statutes banning sexual orientation discrimination, Murray sued under the Americans With Disabilities Act, which Judge Caultho points out specifically excludes ho-
mosexuality from being treated as a disability for purposes of the statute. He also attempted to state federal equal protection claims, but Judge Cauthorn found that the claims against the governmental defendants lacked sufficient specificity and against private defendants were deficient in not involving state action. As to his 42 USC sec. 1983 conspiracy claims against a private business and some of its employees, Judge Cauthorn claimed to be “unaware of any authority for the proposition that sexual orientation is a classification protected under sec. 1985(3), although numerous courts have taken the contrary view.” This is a rather odd statement, especially when followed by a string citation. We are aware that some courts have taken the position that only conspiracies to deprive individuals of civil rights based on “suspect classifications” are actionable under sec. 1985, and that there is some Supreme Court dicta supporting that view, but it is not an inevitable conclusion in light of Romer v. Evans. In any event, Judge Cauthorn apparently struggled with a hand-written complaint full of conclusory allegations and short of the specifics that are required even under the relatively liberal standards of federal notice pleading, such as tying individual named defendants into particular actions alleged to violate some legal right of the plaintiff. Some of the difficulties of dealing with Murray’s case are illustrated by footnote 4 of the opinion, which states: “In their response, Defendants state that ‘Della Long’ [a named defendant] is actually Golda Long and that the ‘Cluchi Blonde Asst. D.A.’ referenced by Plaintiff in his complaint could not be identified.” (Sigh...)

Oklahoma — In Loudermilk v. Stillwater Milling Co., 2008 WL 687469 (N.D. Okla., March 10, 2008), District Judge Terence Kern denied the employer’s motion for summary judgment on an employee’s claim that the company should be liable for sexual harassment and retaliation based on the conduct of a former supervisor and the employee’s reassignment after the supervisor was terminated based on his complaints, finding material issues of fact precluding judgment on both points. Robert Loudermilk was hired as a warehouse worker when 17 years old, and allegedly endured a year and a half of sexual harassment from the warehouse manager, William Glenn. Loudermilk claimed that from the start of his employment, Glenn “engaged in sexually charged horseplay and made sexual remarks to him,” and that beginning about six months into his employment, Glenn repeatedly pressured Loudermilk for sex, which Loudermilk resisted until he couldn’t stand it anymore and, accompanied by his parents, informed higher management about a year after the importing had begun. Management immediately conducted an investigation and terminated Glenn, but then transferred Loudermilk to another assignment that he considered less desirable, and Loudermilk claims to have encountered adverse comment and behavior from co-workers in his new assignment, including homophobic epithets. The company sought summary judgment on the argument that it had reacted promptly and correctly when informed of the harassment, and that the reassignment was not technically a demotion. The court found that there was a question of fact whether the company had adequately trained its supervisors and adequately publicized its grievance policies concerning sexual harassment, and that there was a genuine factual dispute as to whether a reasonable employee in Loudermilk’s position would consider the transfer sufficiently adverse to constitute legal retaliation. However, the court found that the company could not be held strictly liable for Glenn’s conduct because Loudermilk had not suffered any tangible adverse employment consequence prior to his complaints, and that the alleged sexual harassment by co-workers was not severe enough to itself support a retaliation claim against the company.

Wisconsin — In a truly bizarre case brought by a prison inmate pro se, the court rejected a 42 U.S.C. 1983 civil rights sexual harassment action alleging that the gay inmate was falsely charged with receiving banned heterosexual pornography. The inmate explained that he had not ordered the pictures, “and would have no motivation to do so, because he is homosexual.” The inmate alleges that a female social worker at the prison admitted to sending him the pornography herself, telling him that “she wanted him to have ‘appropriate’ sexual materials and that he needed to exhibit heterosexual behavior.” The inmate also alleges that the social worker gave him contact information for her sister, “so that he could contact her, suggesting she could assist him in walking toward ‘moral correctness.’” He alleges that when he complained about this behavior to the Unit Supervisor, that individual did nothing but accuse him of fabricating his allegations. The court found that the inmate had not stated actionable claims under the statute. Tran v. Kriz, 2008 WL 794546 (E.D. Wis., March 21, 2008). A.S.L.

**New York Trial Court Rejects Challenge to State Agency Recognition of Canadian Same-Sex Marriages**

For the second time in just a few weeks, a New York State trial judge cited the upstate appellate ruling mandating recognition of Canadian same-sex marriages, Martinez v. County of Monroe, 2008 N.Y. Slip Op, 909, in support of its decision in Lewis v. New York State Department of Civil Services, No. 4078-07, N.Y.L.J., 3/18/08, p. 28, col. 1 (March 3, 2008), that the agency administering health benefits for state employees can recognize such marriages.

Albany County Supreme Court Justice Thomas J. McNamara rejected numerous arguments made by the Alliance Defense Fund in its challenge to the extension of health benefits to same-sex spouses of state employees.

McNamara explained that the Civil Service Law authorizes the president of the Civil Service Commission to set up a health insurance plan for state officers and employees. The law authorizes coverage for spouses and dependent children of state employees. In May 2007, the Department’s Employee Benefits Division issued a “revised policy memorandum” stating that it would recognize as spouses any party to a same sex marriage performed in jurisdictions where such marriages are legal.

Suing on behalf of a few taxpayers, Alliance Defense Fund argued that the memorandum violated various state policies, improperly sought to advance one of the governor’s political goals, and was inconsistent with a position that the Department had recently taken in another case, Funderburke v. New York State Department of Civil Service.

In the Funderburke case, a gay retired public school teacher sought to have benefits extended to his male spouse from a Canadian marriage, but the Uniondale Union Free School District refused. The teacher sued both the school district and the Civil Service Department. In opposing the demand for benefits, the Department joined in arguing that because of the 2006 Hernandez decision, same-sex marriages could not be recognized in New York State, regardless of where they were performed. Alliance argued that a doctrine called “judicial estoppel” should apply to prevent the Department from making a contrary argument in this case.

McNamara rejected this argument, writing, “this action is neither the same action as Funderburke nor does it arise from the judgment in Funderburke.” He also rejected the argument that under the doctrine of separation of powers, the administrators of the health benefits plan did not have authority to interpret the word “spouse” used in the law as different from the traditional definition or existing legislative or judicial pronouncements. In other words, the court rejected the contention that the law is invariably static and not subject to rethinking by administrators or courts. In this case, the rethinking mainly had to do with a change of administration. The Patakai Administration opposed recognition of same-sex marriages from elsewhere, while the Spitzer Administration has embraced such recognition, as the 2007 revised policy memorandum showed.

Justice McNamara cited Martinez v. County of Monroe, issued on February 1 by the Appellate Division for the 4th Department, in Rochester. “In the absence of a contrary holding in this Department,” wrote McNamara, “the ruling in Martinez is binding on this court.” In briefly discussing the Martinez case, McNa-
expressly delegated to them by the state legislature.

In this case, the legislative grant of authority states: “Cities and counties are authorized to adopt and enforce ordinances, orders, and resolutions prohibiting all forms of discrimination, including discrimination on the basis of race, color, religion, disability, familial status, or national origin, sex, or age, and to prescribe penalties for violations thereof, such penalties being in addition to the remedial orders and enforcement herein authorized.” Roberson argued that by authorizing localities to prescribe penalties, the legislature was authorizing them to provide for lawsuits to enforce rights under local discrimination ordinances, but Simpson disagreed, since another provision of the state law authorizes a civil suit for those persons “injured by an act in violation of the provisions of” the Kentucky Civil Rights Act. Thus, according to Simpson, had Roberson alleged that defendants violated a provision of the state’s civil rights law, he would be allowed to sue, but the state law does not cover sexual orientation discrimination. According to Simpson, the statutory language would authorize suits under local law only in a situation in which the state and local ordinance “prohibit discrimination on the same basis.” “Even assuming the allegations in Roberson’s complaint are true,” wrote Simpson, “they fail to provide a legal basis for Roberson to obtain relief in this court.”

Simpson provided no suggestion as to how the rights conferred by the local ordinance (beyond those conferred by state law) can be enforced. Perhaps the municipality could construct an administrative procedure to adjudicate violations and impose fines, and then sue on its own behalf to enforce the fines...? The authorization by the legislature to allow the municipal government to extend the reach of its local law beyond the categories contained in the state law and to prescribe penalties for its violation would be meaningless if the rights thus created could not be enforced. Alternatively, of course, Simpson’s holding is absurd and should be appealed. As a federal judge sitting in a diversity case, he is supposed to base his ruling solely on state law, but he cites no controlling state precedent on point, merely a 1970 case stating the general proposition that municipalities are prohibited from exercising powers beyond those delegated, either “expressly or necessarily implied.” One wonders whether a legislature would delegate the power to prescribe a penalty for violation of a municipal ordinance without the necessary implication that some mechanism be available to enforce the penalty.

Turning to the motion to amend, the court found that Kentucky’s public policy exception to the employment at will rule is limited to public policies created by state law. Since Roberson could point only to the local ordinance as a source of public policy in this case, he was out of luck. “Merely because the KCRA authorized Metro Government to enact the Ordinance does not mean that Metro Government’s expression of public policy through the Ordinance becomes Kentucky’s expression of public policy through the KCRA.” Simpson asserted. “Because Kentucky has no public policy prohibiting employment discrimination or retaliation based on sexual orientation, Roberson’s proposed first amended complaint fails to state a claim upon which relief can be granted.”

Roberson is represented by Brent T. Ackerman of Bahe Cook Cantley & Jones PLC of Louisville. A.S.L.

State Civil Litigation Notes

California — On March 4, the California Supreme Court heard oral argument for more than three hours in the consolidated Marriage Cases in which the city of San Francisco and several other private plaintiff groups are seeking a declaration that the state statute limiting marriage to different-sex couples violates the state constitution. The argument was webcast live and archived on the court’s website for later viewing. It was impossible, based on observation of the webcast, for this observer to predict how the case might be decided. The court operates under a rule providing that opinions should be issued within 90 days of the argument, which set expectations for a ruling by early in June.

California — The California Supreme Court ruled in Jones v. The Lodge at Torrey Pines Partnership, 177 B3d 232, 72 Cal. Rptr. 3d 624 (March 3, 2008), that “non-employer individuals” are not personally liable for retaliation in violation of the state’s Fair Employment and Housing Act (FEHA). The plaintiff alleged discrimination on the basis of sexual orientation, harassment, and retaliation against the defendant. After pretrial motions had reduced the scope of the case, it was tried to the jury on a claim for sexual orientation discrimination against the employer, and a claim for retaliation against both the employer and the plaintiff’s supervisor. The jury found for plaintiff on both counts, awarding damages against the supervisor of $155,000. On the appeal, the state’s Supreme Court, following the course it had established in Reno v. Baird, 18 Cal. 4th 640 (1998), that only employers, and not individual supervisors or managers, can be held liable in damages under the state FEHA, extended that ruling to acts of retaliation as well.

Hawaii — After Lambda Legal announced on March 12 that it was filing suit on behalf of a same-sex couple, Joseph O’Leary and Phil Ngo, who had been denied the right to live together in family housing provided for students by the University of Hawaii-Manoa, the University announced that it would figure out a way to accommodate same-sex couples. The Vice
Chancellor for Students described the lawsuit as “surprising and disappointing” because the school was “already working on changing our housing policies to accommodate couples such as the plaintiffs and families in similar situations.” Attorney Clyde Wadsworth, speaking for the plaintiffs, indicated the suit was filed because University officials had been noncommittal about resolving the issue. Actually filing the suit seems to have moved them along at least one step, Honolulu Advertiser, March 12.

Kentucky — InsideHigherEd.com reported March 7 that Franklin Count Circuit Court Judge Roger Crittendon ruled that a state appropriation to the University of the Cumberlands violated the state constitution’s ban on appropriations for “denominational schools.” The University is a Baptist school, and had expelled a student in 2006 for being gay. When the legislature passed the appropriation, the Kentucky Fairness Alliance, the state’s gay rights advocacy group, swung into action, filing a suit arguing that taxpayers should not be funding a religious school. Crittendon ruled that there was “no question” that the money was “a direct payment to a non-public religious school” and that “this type of expenditure is not permitted.” Crittendon distinguished cases that had upheld state appropriations for tuition aid to students attending religious schools. Crittendon mentioned in passing the issue of the gay student’s expulsion, citing it as an example of the kind of “entanglement” between government and religion that the state constitutional prohibition was intended to avoid. See also Lexington Herald-Leader, March 7, and an Associated Press story of the same date.

Michigan — The state’s court of appeals affirmed an order by the Department of Community Health Board of Psychology suspending a gay psychologist’s license for unprofessional conduct as a result of his action of taking a minor patient home with him to spend the night, thus interfering with the boy’s therapeutic relationship with his primary therapists. There is no allegation that the psychologist had sex with the boy, but he was found also to have been negligent in allowing the boy to be exposed to gay pornography in his home. The psychologist argued that the decision was affected by anti-gay bias, suggesting, for example, that the board would not have reached the same conclusion had the boy been exposed to heterosexual pornography, but the court found no evidence of any bias in the application of professional standards in this case. Department of Community Health v. Vandermay, 2008 WL 649802 (March 11, 2008) (not reported in N.W.2d).

New Jersey — In Tutt v. Division of Youth and Family Services, 2008 WL 596176 (N.J. App. Div., March 6, 2008) (not officially published), the court upheld a decision by the Division to removed a child from the plaintiff’s care as a prospective adoptive parent, finding no evidence to support the plaintiff’s contention that the Division’s decision was based on its “perception of his sexual orientation.” The court noted a list of objective deficiencies in the plaintiff’s performance of parental duties while the child was in his care.

Vermont — In an unpublished order, the Vermont Supreme Court announced on March 14 that it would not reconsider the case of Miller-Jenkins v. Miller-Jenkins, in which it had previously ruled that Vermont courts had jurisdiction to determine child custody issues arising from the dissolution of a civil union between two women, even though they were legally Virginia residents at the time they entered into their Vermont civil union, and although they had lived in Vermont for some time after the child was born in Virginia, the birth mother had moved back with the child to Virginia when the women terminated their relationship. The birth mother had filed an action in a Vermont court to dissolve the civil union, thus initiating the first lawsuit to deal with the custody of the child; she subsequently filed suit in Virginia when she disagreed with the visitation order issued by the Vermont court. The litigation has proceeded on parallel tracks in the two state court systems, with both have agreed at the appellate level that under federal and state laws the Vermont court had jurisdiction to issue a visitation order in the case. The Vermont Supreme Court’s refusal to reconsider the matter will likely lead to another certiorari petition to the U.S. Supreme Court, challenging the Vermont court’s reading of the federal anti-kiidnapping statute which it determined to have conferred exclusive jurisdiction on Vermont courts to decide this case, even though the high court has already turned down the case once. (A Virginia intermediate appellate court agreed with that result, reversing a trial court, but that case is on appeal to the Virginia Supreme Court.) Biological mother is represented by Liberty Counsel, a right-wing public interest law firm that routinely opposes gay rights. The other mom, who won her arguments in the Vermont courts, is represented by Gay & Lesbian Advocates & Defenders. See Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006), cert. denied, 127 S.Ct. 2130 (2007); and Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. App. 2006). Boston.com, March 15, 2008.

Wisconsin — Lambda Legal announced a settlement agreement in a suit it brought on behalf of Brett Timmerman, an openly-gay man, against men who subjected him to a bias-related assault. Wisconsin’s hate crime law authorizes private suits for damages against assailants. One of the defendants in Timmerman v. Waite and Urias (Grant County Circuit Court), has agreed to pay an undisclosed sum as a settlement. According to the complaint, Timmerman, then a university student, was about to walk into a sandwich shop when his attackers called him “faggot” and told him to take his “faggot-ass back to Madison,” after which he was slapped, spat upon, and tackled to the ground, resulting in a rupture to his eardrum. James P. Madigan, a Lambda staff attorney in Chicago, was lead counsel in the case, joined by cooperating attorneys Jocelyn Francoeur and Megan Thibert-Ind of McDermott Will & Emery LLP. Lambda Press Advisory, March 24. A.S.L.

**Criminal Litigation Notes**

Federal — 4th Circuit — In Cagle v. Branker, 2008 WL 697691 (4th Cir., March 17, 2008), a unanimous panel affirmed the district court’s denial of a petition for habeas corpus from a man convicted of the murder of a gay man and sentenced to death. According to the opinion by Judge Wilkinson, Richard Cagle and some friends of his girlfriend picked up Dennis House in a gay bar, brought him back to their motel room, decided to “roll a fag,” went with House to his home and robbed and murdered him and his cat. The court rejected Cagle’s claim of ineffective assistance of counsel, absence of a key witness, and failure of the trial judge to properly charge the jury concerning voluntary intoxication as a mitigating factor.

Federal — U.S. Navy-Marine Corps Court of Criminal Appeals — In U.S. v. Williams, 2008 WL 686635 (N.M.Ct. Crim.App., March 13, 2008) (not reported in M.J.), the court upheld the conviction of a gay Navy lieutenant who was apparently a bit indiscreet about his sexual adventures. The scope of the case is well described in Senior Judge Rolph’s lead paragraph: “A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his plea, of one specification of conduct unbecoming an officer and a gentleman for wrongfully using his Government computer and email account to send inappropriate emails to a male enlisted Sailor… Thereafter, and contrary to his pleas, officer members also found the appellant guilty of an additional offense of conduct unbecoming an officer and a gentleman for wrongfully looking at the penis of an enlisted Sailor while in a public restroom and asking him questions regarding his sexual orientation, and of indecent assault upon a male officer assigned onboard the appellant’s ship by touching his genitals with the intent to gratify his sexual desires… The members sentenced appellant to six months confinement, total forfeitures, and dismissal from the naval service.” However, “appellant was found not guilty of a specification alleging conduct unbecoming an officer and a gentleman onboard USS CHUNG-HOON by wrongfully and dishonorably looking into the bathroom stall occupied by a male lieutenant.” It’s like reading a
Victorian novel, isn’t it? Lt. Williams claimed that many of the charged offenses were entirely innocent actions on his part. According to the testimony, “on his first day onboard the USS CHUNG-HOON, Ensign [D] was approached by the appellant, a fellow wardroom member, who engaged him in unusual and disturbing questioning concerning Ensign [D]’s frequency of masturbation and whether Italians have large penises (Ensign [D] is of Italian heritage).” Well, you know already that no good can come of this, and later while napkin in his bunk Ensign D became aware that something was going on in his shorts... apparently a close-quarters investigation of his penis-size by the appellant... We could go on, but why not access the opinion on Westlaw for all the gory details? We’re a family newsletter.

California — The California Court of Appeal, 4th District, found no abuse of discretion in a decision by Orange County Superior Court Judge Patrick Donahue requiring a blind, mentally retarded gay man to register as a sex offender for the rest of his life as a result of his activities in offering consensual oral sex to teenage boys. People v. Martin, 2008 WL 607353 (March 5, 2008) (not officially reported). From the facts recited, it appears that defendant had taken advantage of being in a restroom with teenage boys on a few occasions to offer them oral sex, and they had taken him up on it. His conduct came to light when one boy mentioned this to his father, another blind man who was a friend of the defendant. The father said he would not have brought the matter to the attention of police, had not the defendant told his son that he had previous such encounters with other boys, and the father decided it was necessary to protect the public. While calling it a “difficult case,” the court found that defendant’s conduct did fall within the requirements of the sex offender registration statute, and that the trial judge specifically found that there was a potential for the defendant to “reoffend” given his admitted pattern of conduct. The court rejected the defendant’s argument that registration was unnecessary because he was “easily available for police surveillance.” The court treated the fact that as a registered offender defendant will be “excluded from HUD housing” as an “unfortunate consequence” of his conviction, but not a reason to set aside the registration requirement.

California — Governor Schwarzenegger’s decision to reverse a parole board decision and deny release to a man serving 15 years to life for the murder of his philandering wife was reversed in In re Burdan, 2008 WL 757033 (Cal.App. 3 Dist., March 24, 2008). The Burdans’ marriage was falling apart, and Mr. Burdan discovered that Mrs. Burdan was having an affair with a female co-worker. He decided to commit suicide in her presence, he claims, and borrowed a gun for that purpose, but he was clumsy with the gun, it went off and “accidentally” shot her. He panicked and finished her off with more shots, then intending to kill himself, but the gun was out of bullets. As he fumbled to reload, an off-duty police officer who lived next door, drawn by the noise, intervened and seized the gun. Burdan pled to second degree murder. This all happened in 1983. He began to come up for parole in 1991, and was turned down numerous times by the parole board until it finally decided he qualified a few years ago, but first Gov. Davis and now Gov. Schwarzenegger reversed the board’s decision. The court decided that the governor’s most recent decision was not supported by the statutory factors, as the board had determined that Burdan’s release did not present a serious threat to society at this point, but the governor premised his decision on the enormity of the crime.

Louisiana — In State v. Christian, 2008 WL 787272 (La. Ct. App., 5th Cir., March 25, 2008), the court rejected an appeal of a conviction of second degree murder and a life sentence without benefit of parole. The victim was found lying face down in the grass in a residential yard, with his pants down to his ankles and his shorts/boxers down to his knees, having suffered gunshot wounds to the groin and the head. The defendant admitted having fired the shots, but claimed that he was “provoked by homosexual advances made by the victim which caused him to lose self-control,” and thus would be guilty only of manslaughter, not second degree murder. After reviewing the facts, the court found no evidence to support the argument that this was a heat of passion crime, and rejected the appeal. “After the initial sexual advance, defendant agreed to meet the victim at a different location for the purpose of continuing the sexual encounter,” wrote Judge Clarence F. McManus for the court. “Defendant subsequently obtained a gun and willingly followed the victim to a planned second encounter. He deliberately shot the victim in the groin area to prevent him from engaging in sexual relations with anyone else. Despite the victim dropping to the ground and apologizing, the defendant shot him a second time in the head.” Thus, the court found no merit to the argument that this should have been dealt with as a manslaughter case. A.S.L.

Legislative Notes

Colorado — The Colorado Senate Business, Labor and Technology Committee voted 4-2 on March 19 to approve SB 200, a bill that would ban discrimination in housing, places of public accommodation, consumer credit, labor unions and school enrollment on the basis of sexual orientation. As such, the measure expands upon a simple employment discrimination ban that was enacted in 2007. Denver Post, March 20.

Idaho — The Moscow, Idaho, City Council voted 4-1 to support a resolution extending health insurance benefits to domestic partners of city employees, over a threat by the Idaho Values Alliance to sue the city for violating the state constitution’s ban on same-sex marriage and civil unions.

Kentucky — The House Health and Welfare Committee voted 9-6 against S.B. 112, which would have prevented public universities and other government agencies from providing domestic partnership benefits. The bill was specifically aimed at th Universities of Louisville and Kentucky, both of which adopted such plans in order to be competitive in the faculty recruiting market. The Republican sponsor of the bill, Sen. Vernie McGaha of Russell

20. Larimer County Commissioners voted 2-1 on March 25 to offer same-sex partners of county employees the same health insurance program that is offered to employees’ spouses. The county already provides such benefits for different-sex partners of employees who are in common law marriage relationships. Partners will have to execute affidavits attesting to their committed relationship to qualify. The county’s director of human resources testified that this move would make the county more competitive with private sector employers who offer such benefits. Employees can start enrolling their partners on July 1. Denver Post, March 27.

Connecticut — State legislators in Connecticut have withdrawn a proposed bill to make some fixes in the civil union law and to establish a study commission to document the problems encountered by civil union partners seeking benefits and services. The bill had encountered opposition in the usual anti-gay family quarters, and the sponsors thought they might not have the votes to pass it right away, Senate Andrew MacDonald, an openly-gay representative from Stamford, said removing the bill from the agenda ending the Connecticut Supreme Court’s overdue marriage decision seemed the wiser course. The bill could be revived before the legislative session ends on May 7, or could be rendered superfluous. “People are waiting to see what the Supreme Court does,” he said. Stamford Advocate, March 25.

District of Columbia — The District of Columbia Council has been legislating in a way that recognizes alternative families, both domestic partners registered with the city an unregistered couples who live together in mutually interdependent family units. The most recent such enactment is B17-0197, passed during March 2008, which concerns sick leave to care for family members, and adopts this broad definition of family members. The same concept was used in last year’s enactment, DC Code 16-831, which pertains to custody and child support obligations. Thanks to Prof. Nancy Polikoff for bringing these enactments to our attention.

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Springs, asserted that the legislation was necessary to enforce the state’s constitutional ban on same-sex marriage, and said he’ll reintroduce the measure next year.

**Maryland** — The state Senate has approved a bill that would extend a variety of health-related rights to registered unmarried couples, including medical and funeral decision-making and hospital visitation. The measure was approved 30–17 on March 18 and sent to the House for consideration. The legislation, which is gender neutral, became a priority for LGBT activists in the state after it appeared that a proposal for same-sex marriage or civil unions appeared to lack sufficient support to move forward in this session of the legislature. *Baltimore Sun*, March 19.

**Massachusetts** — Governor Deval Patrick announced his support for a pending bill that would add “gender identity and expression” to the forbidden grounds of discrimination under the state’s Law Against Discrimination and the state’s Hate Crimes Law. The measure received a hearing in the legislature’s Joint Committee on the Judiciary early in March. *Boston Globe*, March 5.

**Pennsylvania** — The Senate Judiciary Committee voted 10–4 on March 19 in support of a proposed constitutional amendment to ban same-sex marriage or the “functional equivalent.” Proponents said the additional language was intended to ban civil unions of that type that have been legalized in other states. Opponents expressed concern that the measure could endanger existing domestic partnership benefits plans provided by some public employers in the state. SB 1250 goes next to the Appropriations Committee, then to the Senate floor. Same-sex marriage is already prohibited in Pennsylvania by statute. In order for a constitutional amendment to be placed on the ballot, it must be approved not only by the current legislature but also by the new legislature that would be elected this November, and then might be on the November 2009 ballot. *Pittsburgh Post-Gazette*, March 19.

**Utah** — Provoked by Salt Lake City’s adoption of a domestic partnership registry on February 5, Republicans in the state legislature introduced a measure to outlaw the registry. After legislative discussion, a substitute was passed by the State Senate, SB299, which in facts ends up protecting the ability of localities to extend benefits to domestic partners of their employees, under different nomenclature. While disclaiming any recognition for domestic partners, the bill says that municipalities can set up a registry for “adulthood relationships of financial dependence or interdependence” and extend benefits “to an unmarried employee’s financially dependent or interdependent adult designee.” The vote was 21–7 in favor of the measure on March 3. *Deseret Morning News*, March 4 & 6. The governor signed the measure into law on March 14, according to the legislature’s website. Salt Lake City Mayor Ralph Becker responded to enactment of the law by announcing that he would recommend to the City Council that it vote to change the name of the domestic partnership registry to “mutual commitment registry” in order to comply with the statute. If the council approved the recommendation on April 1, the new registry can be up and running by April 7. *Deseret Morning News*, March 26.

Washington — The state legislature approved a significant expansion of rights under the state’s recently-enacted Domestic Partnership Law. The measure, H.B. 3104, was signed into law by Governor Christine Gregoire on March 12. The measure takes effect on June 12, 2008. While the measure does not go the full distance of extending all state law rights of marriage to registered domestic partners, the nearly-200-page bill goes a long way towards such equality, addressing a wide range of issues as to which there was agreement by a majority of the legislature that there was no good reason to deny equal treatment to domestic partners. Thus, Washington follows the example of California, where a limited domestic partnership bill passed in 1999 was repeatedly amended until it attained the substance (if not the nomenclature) of a civil union law, over a period of five years from the initial enactment.

West Virginia — Although the state Senate unanimously approved a measure to add sexual orientation to the state’s Human Rights and Fair Housing Act on February 26, the measure was allowed to die in the House of Delegates without coming out of committee. *Dominion Post in Morgantown*, March 10. A.S.L.

### Law & Society Notes

**Federal** — Even if a state allows same-sex marriage, as does Massachusetts, the failure of the federal government to recognize such marriages causes continuing problems. In its March 20 issue, *Bay Windows* reported on difficulties being encountered by married same-sex couples who seek to have passports reissued using their married name, as the State Department reportedly will not accept a Massachusetts marriage license as evidence of the desired surname. The article centered on the plight of Jason Hair-Wynn, who sought a new passport reflecting his current name to be used on a planned trip to Ghana, Africa, this summer to do HIV/AIDS and health education work. He was concerned that he might encounter problems because the surname on his passport varied from all his other identity documents issued by the state of Massachusetts in his new married name. An attorney from GLAD indicated that the organization had received about 50 calls from individuals describing similar problems with the passport office. The State Department informed Hair-Wynn that his marriage certificate could not serve to get his named changed on his passport, but he could get a new passport reflecting his new name if he could provide a certified copy of a court order documenting his name change or if he could provide documentation proving “use” of his desired name for a period of at least five years an impossibility at this point, since marriage has only been available in Massachusetts since May 2004! Our federal tax dollars at work....

Arkansas — The New York Times (March 24) ran a front-page story about Dan Barry about a teenage boy who is being subjected to homophobic harassment in a Fayetteville school, which harassment is not being adequately addressed by school officials, to judge by the story. Although there is no indication that the boy, Billy Wolfe, is gay, he has been labeled as such by his tormentors, including on a Facebook page some boys started titled “Every One That hates Billy Wolfe,” which described its purpose as follows: “There is no reason anyone should bully he’s a little bitch. And a homosexual that NO ONE LIKES.” (The page was removed after the school contacted the parents of the students who were involved, but there is no indication in the article that the school took any action against the students.) Evidently, the lessons of the Naboony case have been forgotten by school administrators...

**Connecticut** — One of the hassles faced by civil union partners in Connecticut (as well as other states) is having to prepare extra tax returns because of the failure of the federal government to recognize civil unions for tax purposes. H&R Block will help, but only for an extra fee not charged to legally married couples, according to a March 25 press release from the ACLU LGBT Rights Project, documenting the experience of civil union partners who attempted to use the tax preparer’s on-line filing service, only to be told that “we don’t support Connecticut Civil Union returns.” The message continued that civil union filers in Connecticut could “work with an H&R Block tax professional” on an individualized basis to complete and file their state return, for an “additional charge” above what is normally charged for the on-line electronic tax filing service. ACLU sent a demand letter on behalf of the couple, Jason Smith and Settimio Pisu, to Alan Bennett, the CEO of H&R Block, pointing out that Connecticut law forbids discrimination by businesses persons due to their sexual orientation or civil union status, and demanding service at the same rates charged to married couples. The letter also demands refunds be sent to other civil union couples who may have used the service and paid more than was charged to married couples. The press release notes that H&R Block provides complete filing service for Massachusetts same-sex married couples at no extra charge, which suggested to us that H&R Block calculated that the number...
of Connecticut civil union couples likely to file with them was deemed by them to be too small by contrast with Massachusetts to justify the cost of devising the necessary software to accommodate their filing situation on-line. However, the ACLU informed us that their client checked on the other civil union and domestic partnership states, and discovered that H&R Block is not providing support for direct on-line filings in those states either. Ironically, a check of the H&R Block corporate website shows that the firm provides domestic partnership benefits for its employees. It was reported in newspaper discussions about this story published March 26 that Turbotax, one of the main competitors with H&R Block for on-line tax filing service, does support civil union partner filings with its software in relevant jurisdictions. The newspaper stories also reported that an H&R Block spokesperson had told reporters that they were studying the problem and wanted to provide the service.

Georgia — A letter from the ACLU LGBT Rights Project prodded the Georgia State Insurance Commission into changing a ruling against a gay man who sought to purchase health insurance through a state plan designed to help people who suddenly lose their insurance coverage. According to a March 4 press advisory from the ACLU, the only qualification for participation in the program is that an individual had lost their health insurance after being insured for the previous 18 months. Jon Lawson applied after he separated from his domestic partner and consequently lost the coverage he had been receiving from his partner’s employer. After he applied and submitted proof as to his prior insurance coverage, he was contacted by the Insurance Commissioner’s office and told that he was ineligible for the program because “The relationship of domestic partner is not considered a family relationship under Georgia law.” After the ACLU sent its letter on January 9, pointing out that under the criteria for eligibility the source of Lawson’s past coverage was irrelevant, the Commissioner’s office sent out a new letter notifying Lawson that he had been accepted for participation in the plan.

Kentucky — The regents of Murray State University voted 7–3, with one abstention, to add “sexual orientation” to the University’s non-discrimination policy. Prior to the vote, Murray State was the only public university in Kentucky that did not provide such protection from discrimination, according to Board Chairman Alan Stout. Paducah Sun, March 1, 2008.

Michigan — Michigan Technological University announced that it was expanding eligibility for health care benefits to include unmarried same-sex and different-sex partners of its staff members. The University’s director of human resources pointed out that because of the institution’s rather remote location in northern Michigan, recruiting faculty and staff and getting them to move there is a major issue. Said the director, “We have lost some very top-level candidates because we didn’t have same-sex or partner benefits or plus-one arrangements in the past. We’re not so hung up on who that person is who’s affecting the decision of that scholar to come up here, but we’re recognizing that that is an important person in the household.” Daily Mining Gazette, March 14, 2008.

Oregon — The world media wasentranced by the story of Thomas Beatie, a resident of Bend, Oregon, who is reportedly more than five months pregnant. The Advocate first broke the story, which then crossed over to the mainstream media late in March. Beatie, a female-to-male transsexual, legally changed his name and sex a decade ago while residing in Hawaii, and is married to a woman. Because she can’t conceive and they wanted to have children, Thomas, who underwent a double mastectomy and began hormone treatments for his gender reassignment but who never had surgery to remove his female reproductive organs, suspended his hormone treatments so he could resume ovulation and become pregnant. Upon the birth of their child, a daughter, Thomas says that he will be the father and Nancy the mother. (The normal presumption is that a child born to a married woman is the legal child of her husband. We wonder if Oregon will apply the analogous presumption in this case and treat Nancy as the legal mother of the child born to her husband…?) In an interview with The Oregonian (March 27), Shannon Minter, legal director of the National Center for Lesbian Rights and himself a female-to-male transsexual, pointed out that Oregon’s law regarding sex changes does not define the surgical procedures necessary to qualify for legal recognition of a sex change, merely stating in general terms that a court “may order a legal change of sex and enter a judgment indicating the change of sex of a person whose sex has been changed by surgical procedure.” In the case of a female-to-male sex change such as Beatie’s, presumably the mastectomies would be sufficient surgery to satisfy the statute. James Perriguey, a Portland attorney who handles sex discrimination cases, told the Oregonian that he handles about ten sex-change cases a year, always includes a surgeon’s letter documenting the sex change, but that he knows of cases where the petition was granted on the basis of a facial reconstruction as the only surgery performed for the sex change.

Ford Boycott — The American Family Association announced March 11 that it was ending a two-year boycott of Ford Motor Company, aimed at pressuring Ford, among other things, to cease donating to groups that support same-sex marriage and advertising in gay publications. AFA claimed that it has been monitoring Ford’s activities for several months and had concluded that the company had met most of its demands. Ford issued a statement insisting that its principles had not changed, but that its steep financial losses in 2007 had caused it to cut back sharply on charitable donations and advertising. Chicago Tribune, March 12. A.S.L.

International Notes

Australia — The Lower House of the Parliament in the state of Victoria voted 54-24 in favor of legislation that would establish a registration system for de facto or same-sex couples, and would extend eligibility for some rights and benefits to registered couples. Herald Sun, March 13.

Brazil — According to a Brazilian newspaper, O Globo, a retired U.S. attorney, Daniel McIntyre, who currently resides in Miami, has been ordered to compensate a young Brazilian man with whom he had a relationship of four years and who he had named to be his representative in business ventures in Brazil. The relationship lasted from 1999 to 2003. McIntyre is married to a woman who lives in Massachusetts. He admits that his relationship with the young man included sex in the beginning, but denies that they were in a stable partnership. The young man has submitted documentation showing that he was named by McIntyre on a joint health benefits plan, and authorized to manage his money and business interests in Brazil. A trial court has ordered McIntyre to turn over to the young man a farm, two autos, two apartments and a house, half interest in a business, and certain sums of money, and McIntyre indicated he would appeal. Thanks to Andres Duque, who posted his summary in English of this news report on his Blabbeando blog and transmitted us a copy.

Canada — As a result of class action litigation over denial of pension payments to surviving same-sex partners, the government was to pay out money to hundreds of class members, who were represented by attorneys working on contingency fees. On February 29, Justice Ellen Macdonald, agreed to an argument made by government lawyers that none of the money paid out from the Canada Pension Plan pursuant to the court’s order could go to the attorneys, since the Plan was limited to paying out money for use as pensions, and prevents such funds from being transferred to or claimed by anyone other than the beneficiaries. The ruling invalidated the retainer agreement between the plaintiff class and the lawyers that had previously been approved in 2004, under which class counsel were to be paid half of certain pension fund arrears. A new hearing has been set for April 29 for legal arguments about how the lawyers are to be compensated. The Star.com, March 21.

Canada — The New Brunswick Human Rights Commission announced that all eight...
provincial health care institutions have agreed to accept same-sex partners as next-of-kin, as a result of discussions stimulated by the filing of a human right complaint by Peter Papoulidis of Fredericton, who protested the refusal of a regional health authority and recognize his same-sex common-law spouse as next of kin. Although same-sex couples can marry in Canada and achieve recognition through that mechanism, there is also a strong tradition (back up by legislation) of respect for common law spouses in Canada. The Canadian Press.

France — The story has been largely ignored by the American press, but 365Gay.com reported on March 17 that gay Paris Mayor Bertrand Delanoë easily won re-election on March 16, and that there is speculation that the Socialist Party may designate him as its candidate to run against President Nicolas Sarkozy in 2012. Delanoë is extremely popular, and Sarkozy’s popularity has plummeted since his election, divorce and remarriage.

Cuba — It was reported by 365Gay.com on March 27 that legislation has been presented to the national legislature that would outlaw discrimination in employment and housing on the basis of sexual orientation or gender identity, and that would recognize same-sex domestic partnerships for many of the rights and responsibilities now applicable to married different-sex couples. In addition, the draft legislation would authorize transsexuals to obtain identity cards showing their desired sex, and would mandate that the government health service cover sex reassignment surgery. The chief champion of the legislation is Mariela Castro, head of the government-funded National Center for Sex Education, who is the daughter of President Raul Castro. During February, Cuba’s Culture Minister, Abel Prieto, announced support for the concept of same-sex marriage. Passage of such legislation would mark a dramatic change in the attitude of the Cuban government, which had long persecuted gay people.

Israel — 365Gay.com reported on March 25 that the Israeli government has granted permission for a gay Palestinian man to move from the West Bank to Tel Aviv so he can be reunited with his same-sex partner. It is highly unusual for Israel to grant Palestinian residents of the West Bank such permission to move. A spokesperson for the Israeli Defense Forces, Peter Lerner, told the press, “We granted a temporary permit to this Palestinian because his lawyer said his life was in danger in his community because of his sexual tendencies.” The names of both men were withheld on grounds of privacy concerns, but Lerner indicated that the men had been in a relationship for eight years. The Interior Ministry had previously denied an application for him to move to Tel Aviv to be with his partner, but he reapplied after receiving death threats from his family learned that he was gay. Security officials questioned the man before a highly placed officer made the decision to allow him to move. The permit from the military is temporary because the Interior Ministry has sole authority to grant long-term residency status. Another ground for granting the permit was that the Palestinian man’s Jewish partner is suffering from a heart condition.

Malaysia — A Malaysian refugee status in Canada was not backed up by Malaysia’s gay rights association on his claim of possible persecution. According to a March 17 article in Malay Mail, Hisham Hussein, chairman of the Pink Triangle Foundation in that country, asserted, “We have not heard of any persecution of homosexuals in Malaysia.” While acknowledging that gay people there may encounter some social difficulties, Hussein observed that this was the same elsewhere. “There are even parts of the United States where people are conservative and known on certain behavior,” he observed. “Of course, we do have laws against sodomy in the country but it’s difficult to understand what exactly this person means by persecution. Persecution seems to give the impression that it’s State-sanctioned actions against someone because of their sexuality. To my knowledge, this doesn’t happen here, unlike countries like Iran for example, where homosexuals are jailed.” Malay chauvinism, or an accurate picture?

Norway — The ruling Labor Party government proposed a bill that would open up full marriage rights to same-sex couples. Norway already has a partnership registration law, under which registered same-sex partners receive many of the same rights as married couples. The new proposal would ensure that children of same-sex couples have two legal parents from birth, and that married same-sex partners will be evaluated as adoptive parents on the same basis as different-sex couples. Although the government has a majority in Parliament, enactment is not ensured since there is some dissent within the party on this issue. Two ministers in the government believe that same-sex couples should not be provided with equal access to state-funded fertility programs. After posten English Web Desk, March 14; Orlando Sentinel, March 15.

Poland — President Lech Kaczynski appropriated without permission a video clip of the Canadian wedding of a couple of gay New Yorkers as part of his propaganda against full adherence by Poland to the European Union’s Lisbon Treaty, under which members must subscribe to the European Charter of Rights, which has been construed to ban sexual orientation discrimination by subscribing states. Ironically, while Kaczynski argues that Poland might be forced to allow same-sex marriages, as of yet the European Human Rights Court has not accepted the argument that same-sex couples are entitled to marry under the Charter, although various cases have been raised on the point.

Spain — Judge Laura Alabau in the province of Alicante denied a marriage application from a British gay couple, the fourth time she has taken such an action. She claimed that a marriage license could not be given because the U.K. does not permit same-sex marriages. According to a report in the March 7 edition of El País, Judge Alabau was fined by a disciplinary committee last year for violating the Judicial Code by denying marriage licenses to same-sex couples.

Sweden — Hans Ytterberg, the Ombudsman for LGBT issues in Sweden, reports that an administrative court of appeal upheld a decision by a lower court that two gay men from Sweden who were married in Canada should be treated in Sweden as registered partners, the status available for same-sex partners in Sweden, rather than as married. The men have petitioned for an appeal of the ruling to the Supreme Administrative Court.

Thailand — The Bangkok Post (March 19) reports that the Thai military plans to amend a regulation to end the offensive labeling of transsexuals during the annual military conscription process. While the Thai military does not plan to end its practice of excluding transsexuals from military service, the would not longer characterize them as ineligible to serve due to a “permanent mental disorder.” The new wording would be the equivalent of “people with illnesses that cannot be cured within 30 days,” a broad deferment group that includes a variety of individuals other than transsexuals. A reported problem with the existing wording is that the certificate that is issued explaining the reason for deferment is then used with job applications, and has placed transsexuals seeking work in a difficult position. A spokesman stated that the revised language was accepted on advice of doctors.

United Kingdom — The British press reported that Alan Duncan, a Conservative Member of Parliament who is shadow business secretary in the party leadership, will become the first Conservative MP to enter into a same-sex civil partnership. David Cameron, the party leader, stated that he was “thrilled” at the news and hoped to attend the ceremony, which will be held over the summer at the Marylebone Registry Office. The happy couple, duncan and James Dunseath, published their announcement in the Court & Social pages of the Daily Telegraph on March 3.

United Kingdom — The magazine The Lawyer reported in its March 17 issue on InterLaw, described as “the first diversity network that aims to connect lesbian, gay, bisexual and transgender networks across all law firms,” which was officially to be launched in London on March 18. The founder of the new network is Daniel Winterfeldt, a corporate partner at Sim-
mons & Simmons, who was inspired by the example of the Interbank LGBT Forum and Tim Hailes, JPMorgan managing director and assistant general counsel. Hailes had written about Interbank in The Lawyer’s issue of 19 March 2007, leading to conversation among many of London’s gay lawyers about starting a similar organization.

United Kingdom — The reluctance of U.K. officials to extend sanctuary to lesbians and gay men from Iran has received considerable adverse comment in the British press and from some legislators. Mehdi Kazemi is a gay Iranian student who came to the U.K. on a student visa to study. He sought asylum when he was notified that authorities back home had hanged his lover after questioning him about his sexual contacts. Kazemi fears that if required to return to Iran, he will be quickly subjected to interrogation, imprisonment, and likely the same fate as his lover. When the Home Office denied him relief, he fled to the Netherlands, hoping he would receive a fairer hearing there, but the local courts concluded that under European law they could not offer asylum to somebody who had been turned down by another European Union country subject to the same asylum laws, and Kazemi was extradited back to the U.K., where the press and MP’s took up his case after a cry was raised by LGBT rights groups, and the government promised to reconsider his case. Strikingly similar in some respects is the case of Pegah Emambakhsh, a lesbian who fled to the U.K. after her girlfriend was arrested and sentenced to death. It seems inexplicable, in light of the documentation by international human rights organizations that Iran executes homosexuals and the treaty and statutory recognition of an obligation to provide asylum to members of social groups who are subject to persecution, that the U.K. will not grant asylum to a gay person who presents evidence that the Iranian authorities are aware of their sexual orientation and will be ready to apprehend them if they are returned to that country. The Independent, March 14. Members of Parliament from both the House of Lords and the Commons have petitioned the government to allow asylum to Kazemi, and a group of Lords are calling for an end to deporting asylum-seekers to Iran, in light of that country’s policy of executing individuals for conduct that would be legal or only a minor offense in the U.K. The Independent, March 28.

United Kingdom — The Times Educational Supplement reported on March 7 that an Employment Tribunal had awarded 9,500 pounds compensation to David Watkins, a gay school teacher who claimed he had been subjected to homophobic harassment by the principal at College Park in Paddington, West London, where he was formerly employed. The governors of the school were also ordered to offer a full written apology to Watkins.

Venezuela — According to an article in the March 5 issue of El Universal, the Supreme Court of Justice of Venezuela ruled on March 4 that the nation’s constitution bars any attempt to legislate for same-sex marriages, even though the constitution prohibits sexual orientation discrimination. According to the court, the constitution’s references to marriage enshrine traditional different-sex marriages as the norm for the nation. The decision drew a lengthy dissenting opinion by Judge Carmen Zuleta de Merchán, accusing the majority of reflecting social and religious prejudices based on false assumptions about same-sex couples, particularly in their role of raising children. She rejected the court’s assertion that same-sex couples could enter into social contracts governing their shared belongings and determining inheritance, and thus did not need the right to marry to receive equal treatment under the constitution. A.S.L.

AIDS & RELATED LEGAL NOTES

Undetectable Viral Load Mitigates Seriousness of HIV Exposure Offense

The court-martial conviction of an HIV+ Coast Guard lieutenant for having unprotected sex with a female captain was upheld by the United States Court of Appeals for the Armed Forces on March 3, 2008. United States v. Upham, 2008 WL 583718. The court affirmed Lieutenant Upham’s conviction for conduct unbecoming and for assault, but also affirmed the decision of the United States Coast Guard Court of Criminal Appeals to disapprove Upham’s conviction for aggravated assault, agreeing with the intermediate appeals court that the military judge had improperly instructed the panel that Upham’s failure to inform his partner about his HIV status necessarily amounted to action likely to produce death or grievous bodily harm.

Lieutenant Christopher Upham had been HIV+ for several years when, by his own admission, he had unprotected vaginal intercourse on two occasions with a Coast Guard captain without informing her of his HIV status. Charged in a general court-martial with conduct unbecoming an officer and a gentleman, 10 U.S.C. sec. 933, and aggravated assault, 10 U.S.C. sec. 928, Upham pled guilty to the conduct unbecoming charge, but contested the aggravated assault count. He acknowledged that he knew of his HIV status and had no justification for failing to inform his partner of that status, and he further acknowledged that he had caused her “great mental anguish.” Upham denied, however, that he had committed assault “with a means likely to produce death or grievous bodily harm,” because his viral load was undetectable and therefore, while not a zero risk of transmission, he believed that he had not exposed the captain to a fatal disease.

The military judge, over the objection of defense counsel, instructed the members of the court martial that, for purposes of aggravated assault, an HIV+ person who engages in unprotected sexual intercourse without informing his partner of his HIV status necessarily has committed an “offensive touching.” In addition, the judge instructed that “a person who willfully and deliberately exposes a person to seminal fluid containing HIV without informing that person of his HIV positive status and without using a condom has acted in a manner likely to produce death or grievous bodily harm.” Both parties waived instruction as to the lesser included offense of assault consummated by conduct unbecoming, but Upham was convicted of aggravated assault.

On appeal, the Coast Guard Court of Criminal Appeals concluded that the military judge’s instructions had improperly taken the issues of “offensive touching” and “means likely to result in death or grievous bodily harm” away from the panel members. The latter error was deemed prejudicial and thus the court vacated the aggravated assault conviction. As to the “offensive touching” instruction, however, the court concluded that the evidence was overwhelming as to this element and thus the instruction was not prejudicial. The court therefore affirmed a conviction for the lesser included charge of assault consummated by a battery, notwithstanding the waiver below by both parties of any instruction on this offense. (The court also affirmed the sentence of dismissal and forfeiture of pay, while reducing Upham’s confinement from 9 months to 4 months.)

On further appeal, the Court of Appeals for the Armed Forces, Chief Judge Andrew S. Effron writing, affirmed in all respects. The government did not challenge the lower appeals court ruling that the judge’s instructions were erroneous, nor that the aggravated assault charge could therefore not be sustained. Upham, however, challenged the conviction for the lesser included offense, arguing that (1) the instructional error of the judge was a structural error requiring per se reversal without testing for harmless error, and that (2) the parties’ waiver of the lesser-included instruction prevented the court from instating such a conviction on appeal. Judge Effron rejected both arguments. Relying on Neder v. United States, 527 U.S. 1 (1999), he held that because the instruction, though erroneous on one of the elements, did
not remove the burden from the government to prove the predicate facts underlying the element of “offensive touching,” it was subject to harmless-error analysis. Judge Effron further found that Lieutenant Upham did not, in fact, contest this element having acknowledged that he had no justification for failing to inform his partner of his status and that his failure to do so had caused her “great mental anguish” and that the evidence to support the element was overwhelming. Thus, he said, the judge’s instructional error was harmless and the panel’s finding could support a conviction for assault. Judge Effron also rejected Upham’s second argument, finding that there was statutory authority for the appeals court to affirm on a lesser-included offense despite the waiver of instruction below. Glenn C. Edwards

Federal Privacy Act Inapplicable to Doctor’s Disclosure of Employee’s HIV Status

In Doe v. Department Of Veterans Affairs, 2008 WL 613128 (8th Cir. March 7), the court of appeals affirmed a ruling that a government doctor did not unlawfully reveal confidential medical information previously disclosed to the doctor by the plaintiff, including his HIV + status, to the plaintiff’s union representative, where the plaintiff invited the representative to attend the meeting. The decision was written by Circuit Judge Diana Murphy.

Doe was employed at the Minneapolis Veterans Administration Medical Center. As part of his hiring process, he revealed his HIV status during a pre-placement medical examination. This disclosure was entered into records in his medical file.

After he was hired, he made use of the center’s medical facilities, including consultation with one of the doctors. One such consultation occurred in September, 2002, when he disclosed his HIV + status to the doctor, who noted it in his medical record. During a follow-up visit in early February 2003, he again mentioned his HIV status to the same doctor, and revealed that he smoked marijuana to increase his appetite. Both items were noted in his medical file. The record indicated that Doe felt that the doctor’s attitude became condescending after he mentioned his marijuana use.

In late February, 2003, Doe, was instructed by his supervisor to see the doctor. He felt so apprehensive about this meeting that he asked his union representative to attend the meeting with him. The meeting had been called by Doe’s supervisor to address issues relating to Doe’s frequent absences. The supervisor did not attend this meeting, but the doctor chose to proceed. During the meeting, the doctor mentioned both the HIV status and the marijuana use. Doe became upset with these disclosures in the presence of his union representative and left, taking the union representative with him. Doe claimed that he had previously instructed the doctor not to mention any medical information to the union representative. The doctor denied this claim.

Doe sued the Department of Veterans Affairs and the doctor, alleging a violation of the Privacy Act of 1974, 5 U.S.C. Sec. 552a, which forbids the disclosure of personal information contained in government files to third parties except with prior approval or when required by law. Doe alleged that the disclosure of the medical information to the union representative without proper consent violated this statute. The doctor was dismissed from the case without prejudice, by stipulation.

The trial court granted the Department of Veterans Affairs’s motion for summary judgment, agreeing that because the doctor learned of Doe’s HIV status and marijuana use from Doe himself, rather than a medical record, the matter was not covered by the Privacy Act. The Court of Appeals relied in large part on a prior 8th Circuit case, Olberding v. U.S. Department of Defense, 709 F.2d 621 (8th Cir.1983), which held that “the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records.” Judge Murphy continued the discussion of Olberding, writing: “(i)n affirming the denial of the claims of an army captain who alleged that officers violated the Privacy Act by disclosing that he had been evaluated by a psychiatrist for mental disorders, we explained that the purpose of the Act ‘is to preclude a system of records from serving as the source of personal information about a person that is then disclosed without the person’s prior consent.’” This court would look no further, ruling that the doctor and not the medical record cited was the source of the disclosed information, and that the Olberding decision could only be overruled by an en banc determination.

Doe’s claim that this case was not ripe for summary determination was rejected because the doctor’s claim that he did not rely on agency records was certain, while Doe’s claim that the doctor had to have relied on agency records was tentative, mere “speculation” in the eyes of the appeals court. Judge Murphy also rejected the argument by Doe and several friends of the court involved with AIDS issues that this position would “chill” dialogue between patients and doctors and inhibit the necessary flow of information to the government. The decision states that, while these public policy concerns may be valid, these parties are inviting the court to rewrite the statute to address their concerns. Murphy stated that this invitation would be “more appropriately be addressed to Congress.” Steven Kolodny

Gay HIV+ Man Suffers Summary Judgment in ADA Case

Judge Melinda Harmon of the U.S. District Court for the Southern District of Texas has dismissed gay and HIV + tax consultant Charles St. John’s claim of disability discrimination and retaliation by his former employers Sirius Solutions LLP (Sirius) and NCI Building Systems Inc. (NCI), in St. John v. NCI Building Systems Inc., 2008 WL 576778 (Feb. 13, 2008).

Sirius employed St. John as a tax consultant and him assigned to a project for NCI. His claim is largely based on the conduct of his Sirius supervisor, who worked with him on the NCI project, and who allegedly disclosed his sexual orientation, HIV + status, and membership in Alcoholics Anonymous (AA) to NCI employees without his consent. St. John complained both to the supervisor and NCI human resources, seemingly made up with the supervisor, and did not make further complaints to human resources. St. John was later removed from the project, prompting this litigation.

Sirius claimed that St. John had been performing poorly on the project, and that he (along with all other Sirius employees) was removed from the project because NCI chose to hire in-house tax consultants. St. John remained employed by Sirius, which offered him a position at another engagement that he turned down because it demanded longer hours (more than 50 per week rather than the 32 he served with NCI). St. John was never placed at an engagement and eventually filed for unemployment, which was denied when Sirius stated that he was still an employee and would be placed if a position became available. St. John left Sirius for a position elsewhere, and brought employment discrimination and retaliation claims against Sirius and NCI under the Americans with Disabilities Act (ADA).

Sirius and NCI moved for summary judgment, which Judge Harmon granted. In explaining the standard for defeating summary judgment, Judge Harmon set out a three-part test established by McDonnell Douglas v. Green; 1) that St. John must allege a prima facie case of discrimination; 2) that Sirius and NCI can overcome the prima facie case with evidence that the adverse action was for a nondiscriminatory reason; and 3) that St. John can rebut a nondiscriminatory reason only with evidence creating a jury question of whether the reason given is pretextual or that his protected characteristic was a motivating factor of the adverse action.

Judge Harmon discussed the employer-employee relationship between St. John and Sirius and NCI, determining that St. John was not an employee of NCI because it did not exercise “complete control” over the scope and nature of his employment. Judge Harmon next determined that as a matter of law, St. John had
failed to demonstrate he was disabled within the meaning of the ADA because he did not prove that his HIV or prior alcoholism was a "physical or mental impairment that substantially limits one or more major life activities" or that he was regarded at Sirius or NCI as having such an impairment. In fact, St. John had admitted during a pre-trial deposition that he did not know whether he was perceived as disabled by anyone at NCI and that he had no evidence to support such an allegation.

In denying St. John’s retaliation claim, Judge Harmon held that St. John had not engaged in “ADA protected activity” because it was not reasonable for him to believe that the “isolated disclosures of his personal information” by his supervisor constituted an "unlawful employment practice." She also held that St. John failed to prove a causal connection between his "protected activity" (complaining to his supervisor and to human resources) and his termination because the “ultimate decision maker” (the officer who terminated St. John’s engagement with NCI) was unaware of the complaints and his supervisor lacked leverage or influence over the officer. Additionally, Harmon pointed out that St. John’s supervisor had been close friends with St. John for over 10 years, had actually recommended him for the NCI placement, and had known his sexual orientation, HIV status, and prior alcoholism, and that it made little sense that the supervisor would “suddenly harbor discriminatory animus less than three months after [securing him] employment.”

Accordingly, as Judge Harmon produced in her analysis of the case an exhaustive list of each element of each claim and how St. John had failed to satisfy any of them, the claims failed as a matter of law and summary judgment was appropriately awarded to Sirius and NCI. The opinion also states that St. John had brought a hostile work environment claim against both defendants, but had dropped it at an earlier stage of the litigation. Bryan Johnson

AIDS Litigation Notes

Federal — 8th Circuit — Pro se prison inmate Troy Lawson lost his appeal to the 8th Circuit in an HIV treatment claim against Correctional Medical Services (CMS), the controversial corporation that is the contract provider of health care to many state prisons, Lawson v. Correctional Medical Services, 2008 WL 659440 (8th Cir., March 13, 2008) (not officially published). Upholding the district court’s grant of summary judgment, the court stated, per curiam, “While the record showed that prescribed antivirals were occasionally not given, Lawson failed to rebut evidence that his HIV status had not worsened, and he offered no evidence showing that the named CMS defendants were the ones who administered medications or that the missed doses were deliberately withheld without appropriate reasons... Even gross negligence is an insufficient basis for an 8th Amendment claim.” The court does not go into what would be appropriate reasons for withholding medication from an HIV+ inmate... It also approved the district judge's decision to refuse Lawson's request for appointed counsel.

Federal — Alabama — Pro se prison inmate David Lee Smith suffered summary judgment of his 8th Amendment suit alleging deliberate indifference of deprivation of treatment for his HIV condition, on grounds that he failed to exhaust administrative remedies. Smith v. McFarland, 2008 WL 606986 (M.D. Alabama, Feb. 29, 2008). Although Smith filed grievances, he failed to appeal the initial denials through the system up to the Sheriff, as required by the institution’s grievance procedure, and thus was knocked out of court. Smith also alleged violations of the Americans With Disabilities Act, and U.S. Magistrate Charles S. Coody’s analysis of this part of the claim is quite inescapable. Smith is protesting denial of treatment, refused to house him in the medical cellblock, and placement in a punishment cellblock. Coody rules that Smith cannot sue under the ADA because he is not a “qualified individual with a disability,” asserting “Smith’s HIV positive status prevents him from demonstrating that he is a ‘qualified individual’ under the terms of the statute.” This seems quite bizarre. What does an HIV+ person have to do to be qualified for treatment for his medical condition? Coody cites as his authority an 11th Circuit decision upholding the exclusion of HIV+ inmates from “any program in which prisoners partici- pate” on the ground that they pose a “significant risk” to other inmates, but surely this ruling has nothing to do with whether an HIV+ inmate is entitled to medical treatment and housing in a medical cellblock if his condition so warrants. Coody hedges his bets by asserting that the ADA claim is also arguably blocked by the failure to exhaust administrative remedies.

Federal — Arkansas — A pro se prison inmate with AIDS prevailed over the Arkansas Attorney General’s Office, defeating a motion to dismiss in Harman v. Bell, 2008 WL 606998 (E.D.Ark., Feb. 29, 2008), in his claim of an 8th Amendment violation in connection with his HIV treatment. According to the report of Magistrate Judge Thomas M. Moore, Judge Thomas Harman has a medical order that he receive three high calorie/high protein meals a day as part of his HIV treatment. Harman alleges that he received meals accordingly while incarcerated in other Arkansas prisons, but upon transfer to East Arkansas Regional Unit, the kitchen staff refused to provide his prescribed breakfast because “EARU has a policy or practice of not providing any prescribed diet in the morning.” Harman claimed that the lack of such a meal in the morning resulted in his vomiting up his medications, losing weight, and otherwise interfering in his medical treatment. The court found he had stated a viable 8th Amendment claim, and that the state’s formulaic motion to dismiss, asserting that he had failed to state claim because he did not explain “how he is harmed and does not allege any substantial risk of serious harm in the future” overlooked clear statements in Harman’s home-made complaint. Harman had also exhausted internal appeals, and knew enough to indicate he was suing defendants in both their individual and official capacities and sought injunctive as well as monetary relief. While observing that the defendants might defeat his claims by presenting evidence to controvert his assertions, the court refused to dismiss his complaint as a matter of law.

Federal — New York — U.S. District Judge John Gleeson (E.D.N.Y.) affirmed a denial of Social Security Disability Benefits to an HIV+ applicant in Cruz v. Astrue, 2008 WL 597194 (March 2, 2008). Gleeson noted the ALJ’s finding that Cruz has suffered no opportunistic infections, has maintained his weight, is responsive to medication and maintains a decent CD4 count, all weighing against finding his HIV infection as supporting an argument that he is unable to work. Cruz suffers from other infirmities as well, but the ALJ concluded that he is capable of performing sedentary work available in the national economy and thus not entitled to disability benefits, a finding for which the court found substantial evidence in the record.

Indiana — The state’s Court of Appeals upheld the conviction on a class C felony battery of corrections officer by body waste charge in Nash v. State, 881 N.E.2d 1060 (Ind. App., March 7, 2008). The court found that record evidence supported the trial court’s conclusion that the appellant, an inmate at New Castle Correctional Facility’s mental health unit, had thrown a cup of his urine and feces at a nurse in the unit, knowing that he was HIV+. A.S.L.

U.S. May Modify Restrictions on International AIDS Money

On March 13 the U.S. Senate Foreign Relations Committee approved a measure to fund U.S. overseas AIDS spending, tripling the allotment for the program and formally lifting the ban on HIV+ people entering the United States that has been part of federal law since 1993. The measure would also ease requirements that a certain proportion of AIDS education money be spent on so-called abstinence education, an extraordinarily hypocritical requirement inserted by legislators who routinely cheat on their spouses, among other things.... The House Foreign Affairs Committee had approved similar legislation a few weeks earlier. However, all bets are off on whether Senate Republicans will
allow the measure to come up for a vote, or whether the President, a relentless supporter of abstinence education (except for his daughters), will veto the measure. A.S.L.

**International AIDS Notes**

Canada — The Winnipeg Free Press (March 7) reports that officials at both Hema-Quebec and Canadian Blood Service had rejected proposals to end the categorical ban on blood donations by gay men. Opponents of the ban cited the changed policy in Australia, where gay men can donate blood if they have abstained from male-to-male sexual contact for at least 12 months, and where making false statements in the blood donation process carries criminal penalties. Experts noted that the tests now used to detect HIV are much more sensitive than those in use when the current policies were adopted in the 1980s. Said Mark Wainberg of the McGill University AIDS Centre at a news conference held in conjunction with the 6th Annual Quebec HIV Symposium, “The tests have moved forward, but the policies of Hema-Quebec and the Canadian Blood Services are in a time warp circa 1983. These current policies discriminate unfairly against gay men.” The Canadian policy is identical to that mandated in the U.S. by the Food and Drug Administration. A.S.L.

**PUBLICATIONS NOTED & ANNOUNCEMENTS**

**Announcements**

The New York City Bar Center for CLE and Legal, GAL are cosponsoring a CLE program on Tuesday, April 15, from 6–8 pm, titled “Culturally Competent Lawyering for At Risk LGBTQ Youth: Advocating Effectively in the Foster-Care & Juvenile Detention Systems.” For details, check the New York City Bar website. 3.0 credits in Professional Practice can be earned towards mandatory CLE requirements in New York for attendance at this course.

The conference of the International Lesbian and Gay Law Association, previously announced for Los Angeles in June 2008, has been postponed to early March 2009.

Whittier Law School will again hold a Summer School on Sexual Orientation and the Law hosted by the University of Amsterdam, The Netherlands. This year’s edition will run from July 8 to August 5, 2008, and will be attended by a mix of U.S. and foreign law students. Classes are conducted in English, and instructors include leading attorneys from the LGBT public interest law firms. For information, see www.law.whittier.edu/centers/sa-netherlands.asp

The Massachusetts Lesbian & Gay Bar Association will hold its 23rd Annual Dinner on Friday, May 9, at the Royal Sonesta Hotel in Cambridge. Award recipients will include Gunner Scott & the Massachusetts Transgender Political Coalition (Kevin Larkin Memorial Award for Public Service), Mark D. Mason, Esq. (MBA Community Service Award), and Vickie L. Henry, Esq. (Gwen Bloomingdale Pioneer Spirit Award). Information at www.mlgb.org.

**LESGN & GAY & RELATED LEGAL ISSUES:**


Brinig, Margaret F., *From Family to Individual and Back Again*, 51 Howard LJ J. 1 (Fall 2007).


Hawkins, Jessica, *My Two Dads: Challenging Gender Stereotypes in Applying California’s Recent Supreme Court Cases to Gay Couples*, 41 Fam. L. Q. 623 (Fall 2007).


Mikochik, Stephen L., *The Supreme Court and the Future of Marriage*, 84 U. Det. Mercy L. Rev. 479 (Summer 2008) (Does Scalia’s dissenting observation in *Lawrence v. Texas* that the Court’s reasoning undermines the constitutionality of laws banning same-sex marriage ring true?).


Mitchell, John B., *Chatting with the Lady in the Grocery Store About Hernandez v. Robles, the New York Same-Sex Marriage Case, 6 Seattle J. For Soc. Just. 255 (Fall/Winter 2007) (hilarious depiction of attempting to explain the absurd reasoning of the New York Court of Appeals to a lay person).


Rutledge, Njeri Mathis, *A Time to Mourn: Balancing the Right of Free Speech Against the...*


Strasser, Mark, Loving Revisionism: On Restricting Marriage and Subverting the Constitution, 51 Howard L.J. 75 (Fall 2007).


Wolfson, Evan, Loving v. Virginia and Mrs. Loving Speak to Us Today, 51 Howard L.J. 187 (Fall 2007).

Specially Noted:


Symposium, The Future of Marriage, 41 Fam. L. Q. No. 3 (Fall 2007).

AIDS & RELATED LEGAL ISSUES:


Yuen, Michelle, HIV Testing of Pregnant Women: Why Present Approaches Fail to Reach the Desired Objective & The Unconsidered Option, 14 Cardozo J. L. & Gender 185 (2007).

EDITOR’S NOTE:

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.