7th CIRCUIT VOTES IN THE T-SHIRT WARS; ALLOWS TEEN TO WEAR ANTI-GAY SLOGAN AT SCHOOL

The U.S. Court of Appeals for the 7th Circuit ruled on April 23 in *Nuxoll v. Indian Prairie School District No. 204*, 2008 Westlaw 1813137, that officials at Neuqua Valley High School in Naperville, Illinois, may not forbid a student who is opposed to homosexuality from wearing the slogan "Be Happy, Not Gay," on his T-shirt. Reversing a decision by District Judge William T. Hart, who had refused to order the school to allow Alexander Nuxoll to exhibit that slogan on his T-shirt during the so-called National Day of Truth that anti-gay activists promote as a counterpoint to the National Day of Silence sponsored by the Gay, Lesbian & Straight Education Network in the nation's high schools, the appeals court found that censoring the slogan would violate Mr. Nuxoll's free speech rights under the First Amendment of the U.S. Constitution.

The court's ruling, explained in an opinion by Circuit Judge Richard Posner, is contrary to rulings by some other federal courts, as this slogan was not original with Mr. Nuxoll and has become a flash point in litigation around the country arising from the clashing Day of Silence and Day of Truth observances.

The school officials in Naperville had adopted a general rule forbidding "derogatory comments," whether spoken or written, "that refer to race, ethnicity, religion, gender, sexual orientation, or disability." Two years ago, when another student tried to wear a T-shirt with the slogan "Be Happy, Not Gay," she was required to ink out the words "not gay" or change her shirt upon threat of discipline. Last year, that student and Nuxoll refrained from exhibiting such a slogan from fear of discipline. The other student graduated last spring, but Nuxoll, a continuing student, filed a lawsuit, seeking a court order to allow him to wear the slogan this year.

According to Judge Posner's summary of the arguments in the case, Nuxoll wants to do more than just wear the T-shirt. He also wants to distribute Bibles at school and instigate conversations about whether homosexuality is appropriate conduct, and he'd like to be able to make stronger statements than "Be Happy, Not Gay" in support of his position.

Nuxoll argued that the school's policy was unconstitutional in light of Supreme Court rulings supporting the right of students to engage in political speech, most prominently the important precedent of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a case involving the refusal of a school district to allow high school students to protest the Vietnam War by wearing black armbands at school as part of a national protest. In that case, the Supreme Court ruled that high school students do have rights of political expression, which could only be censored if the school could show that disruption of the educational program would result from allowing the contested speech.

More recently, in ruling on cases in the ongoing "T-shirt wars" over homosexuality, courts have confronted arguments by school officials that allowing "derogatory" comments about homosexuality at school poisons the atmosphere for gay students, harming them psychologically and interfering with their ability to benefit from the educational program. The 9th Circuit, based in San Francisco, endorsed this argument in a case involving Poway School District that has generated extensive media comment. See *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), vacated as moot, 127 S.Ct. 1484 (2007).

In this new opinion, Judge Posner endorses the same view. After summarizing various court opinions about student speech controversies, he wrote, "we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school – symptoms therefore of substantial disruption – the school can forbid the speech. The rule challenged by the plaintiff appears to satisfy this test. It seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way. It is not as if the school forbade only derogatory comments that refer, say, to religion, a prohibition that would signal a belief that being religious merits special protection. The list of protected characteristics in the rule appears to cover the full spectrum of highly sensitive personal-identity characteristics. And the ban on derogatory words is general. Nuxoll can't say 'homosexuals are going to Hell' (thought he can advocate heterosexuality on religious grounds) and it cannot be said back to him that 'homophobes are closeted homosexuals.'"

Posner acknowledged that Nuxoll's desire to advocate against homosexuality at school could have harmful effects. "He wants to wear T-shirts that make more emphatically negative comments about homosexuality," wrote Posner, "provided only that the comments do not cross the line that separates nonbelligerent negative comments from fighting words, wherever that line may be. He also wants to distribute Bibles to students to provide documentary support for his views about homosexuality."

"We foresee a deterioration in the school's ability to educate its students if negative comments about homosexuality by students like Nuxoll who believe that the Bible is the word of God to be interpreted literally incite negative comments on the Bible by students who believe either that there is no God or that the Bible should be interpreted figuratively. Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning," Posner asserted.

Thus, the court concluded that Nuxoll was not entitled to a preliminary injunction banning all enforcement of the rule, and that he had conceded that he was not entitled to engage in the kind of speech that is characterized by the courts as "fighting words," that is, speech likely to provoke a violent response.

Posner found that strategic concession to be "prudent," commenting that "a heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense. The contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable. Granted, because 18–year-olds can now vote, high-school students should not be raised in an intellectual bubble, which would be the effect of forbidding all discussion of public issues by such students. But Neuqua Valley High School has not tried to do that. It has prohibited only (1) derogatory comments on (2) unalterable or otherwise deeply rooted personal characteristics about which most people, including – perhaps especially including – adolescent schoolchildren, are highly sensitive. People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of

LESBIAN/GAY LAW NOTES **May 2008**

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Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net. Inquire for rates.

LeGaL Homepage: http://www.le-gal.org

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 ISSN 8755–9021

their personal identity – none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being."

"The plaintiff concedes," wrote Posner, "that the most he is entitled to is an injunction that would permit him to stencil 'Be Happy, Not Gay' on his T-shirt on the 'Day of Truth' because forcing deletion of 'Not Gay' stretches the school's derogatory-comments rule too far. We must consider the argument carefully, because the term 'derogatory comments' is unavoidably vague."

Although Nuxoll himself conceded that he intended the slogan to be a negative comment about homosexuality, Posner continued, "'Be Happy, Not Gay' is only tepidly negative; 'derogatory' or 'demeaning' seems too strong a characterization. As one would expect in a school the size of Neuqua Valley High School, there have been incidents of harassment of homosexual students. But it is highly speculative that allowing the plaintiff to wear a T-shirt that says 'Be Happy, Not Gay' would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student's free speech. We are therefore constrained to reverse the district court's order with directions to enter forthwith (the 'Day of Truth' is scheduled for April 28) a preliminary injunction limited however to the application of the school's rule to a T-shirt that recites 'Be Happy, Not Gay.' The school has failed to justify the ban of that legend, though the fuller record that will be compiled in the further proceedings in the case may cast the issue in a different light."

Posner predicted that there would certainly be further proceedings, because "this is cause litigation" and Nuxoll would press on to be allowed to argue more forcefully against homosexuality at school. Actually, the pressing on will be done by Nuxoll's lawyers from the Alliance Defense Fund, an issue-oriented law firm that specializes, among other things, in representing anti-gay students who want to be able to argue against homosexuality at school.

Concurring, Judge Ilana Rovner took exception to Posner's belittling of the significance of high school student speech on political issues. "Youth are often the vanguard of social change," she pointed out, citing the important role of young people in the civil rights movement, the women's right movement, and now through gay-straight alliances in high schools, the gay rights movement. "They have initiated a dialogue in which Nuxoll wishes to participate. The young adults to whom the majority refers as 'kids' and 'children' are either already eligible, or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults, is contrary to the values of the First Amendment."

Although Judge Rovner did not dissent from the court's decision to narrow the scope of its relief to the slogan, while leaving the school's overall rule in place, the tone of her concurrence suggests that Rovner felt that Posner had not really taken seriously enough the free speech issues in the case. Posner's "split-the-baby" decision, allowing the school to maintain its policy while allowing Nuxoll to make his anti-gay T-shirt statement, adds to that impression, although perhaps in the opposite sense from what Rovner intended, since in the context of a heated high school debate, the slogan is clearly intended, as even Posner acknowledges, to communicate a negative message about themselves to gay students. The message may seem "tepid" to a cloistered federal appeals judge, but it did not seem so to the high school officials who have to deal with the fallout from allowing Nuxoll to engage in his advocacy at school.

Posner's conclusion strongly suggests that Alliance Defense Fund will grab the opening presented by this opinion to push the envelope in future cases by seeking to protect anti-gay high school students who want to make more pointed arguments in opposition to the Day of Silence. And as more controversies surrounding the Day of Silence occur around the country, ultimately the issues raised by this case may need to be resolved by the Supreme Court.

This account of the opinion is based on what the court referred to as "released in transcript (with the printed version to follow)" because of the urgency on ruling prior to the Day of Silence/Day of Truth activities. It seems possible to us that some of Posner's remarks about student political speech might be toned down in response to Rovner's objections in the final opinion to be released on this appeal. A.S.L.

LESBIAN/GAY LEGAL NEWS

10th Circuit Finds School Board and Superintendent Immune From Liability for Anti-Gay Discrimination

A unanimous three-judge panel of the U.S. Court of Appeals for the 10th Circuit ruled in *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, 2008 Westlaw 1795068 (April 22), that the constitutional status of anti-gay discrimination remained so unsettled early in 2003 that a Wyoming public school superintendent who was found to have discriminated against two lesbian administrators based on "community notions of morality" was immune from liability. The court also refused to commit itself as to whether the legal point is clearly enough established today to vitiate an immunity defense. Two of the judges on the panel were appointed by George W. Bush, the third by Ronald Reagan.

Kathleen Milligan-Hitt and Kathryn R. Roberts, a lesbian couple who had previously lived in Rock Springs, Wyoming, moved to Sheridan to take up administrative jobs in the public schools there. Both were working on renewable one-year contracts. Milligan-Hitt was assistant principal of a junior high school, and Roberts was principal of a middle school. They both filed suit after their applications for new administrative positions that came open as a result of construction and reorganization in the school district were denied, naming as defendants the school board, the superintendent, and the assistant superintendent.

In May 2002, they had accompanied a school field trip to Montana. When school resumed in the fall, each of them was confronted by the Superintendent of Schools, Craig Dougherty, who related that he had received a complaint from some parents that during the field trip their daughter had seen Milligan-Hitt and Roberts "holding hands and walking into a Victoria's Secret store," according to the court's opinion by Judge Michael W. McConnell. Both women testified that this account was "false," and that Dougherty had stated that it did not "sound like a likely story," but that he discussed it with them because he "wanted to let them known that this had occurred."

"The content of these discussions was disputed at trial," wrote McConnell. "According to Ms. Roberts, Mr. Dougherty called her into her own office (where he was sitting in her chair) and told her about the complaint. After she denied the incident, Mr. Dougherty responded 'that he had called Rock Springs and he knew all about the two of [them].' She testified that he was angry, and that his face was red and his voice slightly raised. Ms. Milligan-Hitt testified to a similar conversation: Mr. Dougherty also told her, 'I called Rock Springs and I know all about you two.' He was angry and red-faced during this version of the conversation as well, and she felt that her 'job could be in jeopardy.' In contrast," continued McConnell, "Mr. Dougherty testified that he was not upset during these conversations, did not mention Rock Springs, and told Ms. Roberts that her sexual orientation 'would never be an issue' so long as he was superintendent."

Judging by the subsequent rulings of the trial judge and the jury verdict, Dougherty's version of events was not found to be credible.

The interviews and hiring decisions for various new administrative positions were made during the first half of 2003. After neither woman was successful in landing the positions she sought, the district did not renew Milligan-Hitt's contract, and Roberts was hired to teach physical education for a year. The two women later moved to Lander, Wyoming, finding work in the public schools there, and filed the lawsuit, claiming to have been the victims of sexual orientation discrimination in violation of the 14th Amendment's Equal Protection Clause.

A series of complicated pre-trial rulings followed by a jury trial resulted in a determination by the trial judge that Dougherty had violated the plaintiffs' constitutional rights, but that Dougherty enjoyed immunity from personal liability because at the time, prior to the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down that state's sodomy law), a reasonable person in Dougherty's position would not know that his conduct was unconstitutional. As part of this ruling, the trial judge concluded that Lawrence had changed the law (after Dougherty's actions) by invalidating "community moral standards" as a justification for anti-gay discrimination by the government.

On the other hand, the jury found that the school district had delegated its decision-making on filling the positions to Dougherty, that he had unconstitutionally discriminated, and that the district should be held liable to the tune of $160,515 in damages. While individual government officials enjoy personal immunity for violations of constitutional law if the basis for their liability was not clearly established when they acted, government entities, such as a school board, do not enjoy such immunity, and may be held liable when they delegate their policy-making function to an individual who discriminates.

Thus, the end result of the trial was that both the judge, in ruling on Dougherty's motion to find him immune from personal liability, and the jury, in ruling on the school board's liability, agreed that Dougherty had violated the plaintiffs' equal protection rights, based on a current understanding of constitutional law, but that Dougherty was not personally liable based on the state of the law early in 2003.

On appeal, the 10th Circuit concluded that the trial judge should not have allowed the case against the school board to go to the jury, finding as a matter of law that the school board had not delegated its hiring decisions to Dougherty and thus could not be held liable based solely on his violation of the plaintiffs' constitutional rights. A government entity is normally not held liable unless it has a policy or practice that violates constitutional rights, and there was no evidence that the Sheridan school board had such a policy. The board can be held liable if it delegates policy-making function to an individual, who then engages in unlawful discrimination.

The trial judge thought that the delegation issue was a factual question for the jury to resolve, but the court of appeals ruled that it was a legal question to be resolved by the court, and that based on the school board's charter and resolutions, it was clear that the board retained final hiring authority, even though it bound itself to consider appointments only of applicants recommended by the superintendent, thus giving him the unreviewable power to deny an application before it reaches the board.

However, the appeals court found that the trial judge had correctly concluded that Dougherty himself enjoyed personal immunity based on the state of the law prior to *Lawrence v. Texas* and, going even further, left some doubt whether Dougherty could be found to have violated the law as it now stands, by stating that "we offer no opinion on whether *Lawrence v. Texas*, decided after the events of this case, clearly established a rule of equal protection relevant here when it overruled *Bowers v. Hardwick*[, 478 U.S.186 (1986)]."

Accepting the finding that Dougherty's opposition to Milligan-Hitt and Roberts was based on community moral disapproval of their lesbian lifestyle, Judge McConnell observed that in *Bowers*, the Supreme Court had treated "moral disapproval" of homosexuality as a rational basis for outlawing "homosexual sodomy." That ruling had in turn been relied upon by the 10th Circuit Court of Appeals in a 1992 case, *Jantz v. Muci*, 976 F.2d 623, which found that a school superintendent enjoyed immunity from liability for rejecting a gay applicant for an administrative position. Since *Jantz* relied on *Bowers*, and since *Bowers* was not overruled until *Lawrence*, the court of appeals found that before *Lawrence* a school superintendent in the 10th Circuit could believe that it there was no constitutional prohibition on disfavoring a gay job applicant on the basis of moral disapproval.

The plaintiffs argued that *Romer v. Evans*, 517 U.S. 620 (1996), which struck down the anti-gay Colorado Amendment 2, signaled that anti-gay discrimination violated the Equal Protection Clause, undermining the *Jantz* precedent. McConnell disagreed, pointing out that even gay legal scholars, whose works he cited in a footnote, had found *Romer* to be a puzzling decision whose import for gay rights under the Equal Protection Clause was unclear. The majority opinion in *Romer* did not mention *Bowers*, although – as McConnell fails to state – Justice Scalia's *Romer* dissent criticized the Court for failing to acknowledge that its holding was inconsistent with *Bowers*. The *Romer* decision did say, however, that animus against gay people could not serve as a "rational basis" for an anti-gay official state policy, so McConnell was taking a rather crabbed view of *Romer*'s impact on the continuing precedential soundness of *Jantz*. *Romer* also cited prior Supreme Court decisions in support of the proposition that *animus* against a group is not a rational justification for government discrimination.

"We do not think *Romer*'s holding was so clear," wrote McConnell, "and do not think it clearly overruled *Jantz*'s holding that municipal officials may sometimes defer to community standards when discriminating on non-suspect grounds." "Community standards" is McConnell's polite way of saying bias against gay people, of course, and compounds the circuit's error in *Jantz*, which in light of *Lawrence*'s retrospective overruling of *Bowers* should be seen as invalid in every respect.

McConnell asserted that the ultimate precedential weight of *Romer* remains undetermined, even after *Lawrence*, which, after all, was not an equal protection ruling. "This is not necessarily to minimize the impact of *Romer*," he wrote; "It is simply to say that *Romer*'s impact on prior precedent was not clear when it was decided. It is possible, as we have noted before, that the decision will ultimately 'represent the embryonic stage' of a major change in doctrine. But officials held personally liable for damages do not have to guess whether that is so before the courts decide it, and *Romer* does not reveal its own scope. Because the constitutional rule at issue was not clearly established for the period relevant to this case, Superintendent Dougherty may not be held personally liable for damages."

The ironic bottom line for the plaintiffs is that although both the trial judge and a jury concluded that Dougherty unconstitutionally discriminated against Milligan-Hitt and Roberts, nobody can be held liable for the discrimination. And, at least in the 10th Circuit, such immunity may persist until such time as the circuit court, or the Supreme Court, makes a more definite ruling about the constitutional status of anti-gay discrimination. By failing to rule on whether the unconstitutionality of Dougherty's conduct is clearly established after *Lawrence*, the 10th Circuit panel violates the Supreme Court's specified method for performing qualified immunity analysis, which involves a two part inquiry: first, determining whether the defendant's conduct could be found unconstitutional under present law, and then asking whether such a conclusion would be clearly established at the time the defendant took the action at issue in the case. The trial judge, following this procedure, found that after *Lawrence* anti-gay discrimination based on community moral views would be unconstitutional. The 10th Circuit, refusing to follow binding Supreme Court precedent, abstained. A.S.L.

9th Circuit Finds On-Line Roommate Service Subject to Fair Housing Laws

A leading online roommate-matching service may not claim immunity under Section 230 of the Communications Decency Act for the potentially discriminatory gender and sexual orientation preferences expressed by its users, according to the United States Court of Appeals for the Ninth Circuit. *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 2008 WL 879293 (9th Cir. Apr. 3, 2008) (en banc). The *en banc* court held by a vote of 8–3, with Chief Judge Alex Kozinski writing, that Roommates.com had contributed to the "development" of the allegedly offending content insofar as the site required users to state their characteristics and their preferences, and facilitated the use of this demographic information to screen potential matches. The court did not reach the issue of whether the use of these preferences actually violated any housing discrimination laws, however, remanding to the district court for further proceedings.

Defendant Roommates.com is an internet-based roommate matching service. Before users may post on the service, they are required to create a profile which, according to the court, required users to disclose their sex, sexual orientation, and whether they would bring children to the household. In addition, users were required by Roommates.com to specify preferences with respect to these same three criteria. The site then allows users to search by these criteria as well as to receive notification by email of new postings that match their criteria.

Plaintiffs, the Fair Housing Councils of the San Fernando Valley and of San Diego, sued Roommates.com, alleging violation of both the federal Fair Housing Act, 42 U.S.C. sec. 3601 *et seq.*, and the California fair housing laws. The FHA prohibits certain forms of housing discrimination based on, inter alia, sex and familial status; the California laws also prohibit discrimination based on, inter alia, sexual orientation and marital status. The councils' claim was, as Judge Kozinski put it, "that Roommates is effectively a housing broker doing online what it may not lawfully do off-line." More specifically, the councils argued that (1) requiring users to state their sex, sexual orientation and family status, as well as preferences with respect to such characteristics, "indicates an intent to discriminate" and causes the users themselves to make a statement that indicates an intent to discriminate; (2) the display of users' preferences on their profiles was discriminatory; and (3) Roommates.com should be held liable for any illegally discriminatory remarks made by users in the free-form "Additional Comments" field optionally filled in by users.

The district court did not reach the issue of whether any of the content on Roommates.com violated either of the two housing discrimination statutes. Rather, the district court accepted Roommates.com's argument that it was immune from liability under section 230 of the Communications Decency Act. CDA sec. 230 provides that "No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. sec. 230(c). This immunity applies only to the extent the service provider is not also itself an "information content provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of" the allegedly offending content. As Kozinski noted, the purpose of CDA sec. 230 was to provide "Good Samaritan" protections to internet service providers who policed their service by removing allegedly offending content, i.e., to overturn those cases that had relied upon such selective removal as a basis for treating the service provider as the publisher of all that remained.

On appeal, the court reversed and remanded. The court did not decide (as the district court did not) whether any of the allegedly offending content actually violated either the FHA or the California housing laws. Judge Kozinski, however, reversed the district court insofar as it held that Roommates.com was entitled to immunity under CDA sec. 230 for the first two types of allegedly discriminatory content — i.e., those preferences and characteristics which the website required users to express in order to access the site. Judge Kozinski reasoned, "The part of the profile that is alleged to offend the [FHA] and state housing discrimination laws — the information about sex, family status and sexual orientation — is provided by subscribers in response to Roommate's questions, which they cannot refuse to answer if they want to use defendant's services. By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not 'create or develop[]' the information 'in whole or in part.'"

This interpretation of the word "develop" led to a lengthy argument with Judge M. Margaret McKeown, writing in dissent. In Judge McKeown's view, it is the users of Roommates.com that are the information content providers; the website, she said, neither "creates" nor "develops" the information merely by providing drop-down menus. All the website does, she wrote, is "merely select[] material for publication," and that this sorting and matching is "no different than that performed by a generic search engine." But Kozinski responded that the difference was the requirement that users provide the allegedly discriminatory information: "When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information." (Judge Kozinski even relied upon a cite to the Wikipedia definition of "content development" — surely one of the few citations to Wikipedia as authority to be found in a federal court opinion.) Roommates.com's search function, in the majority's view, was also different from a generic search engine in that it was "designed to steer users based on discriminatory criteria."

In response to McKeown's complaint that the majority was opening up potentially broad areas of liability for internet services, Kozinski stressed that he was interpreting the word "develop" "as referring not merely to augmenting the content generally, but to materially contributing to its alleged lawfulness." (Statements like this prompted the dissent to take Judge Kozinski to task for what Judge McKeown saw as his "consistent collapse of substantive liability with the issue of immunity.") And according to the majority, "Roommate's connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children."

With respect to the third category of conduct complained of, however — the "Additional Comments" section — Judge Kozinski agreed with the district court that CDA sec. 230 immunity was proper. All the website did was to provide an optional blank slate for users to create content; it neither required users to provide comments nor steered those comments into any allegedly discriminatory categories. Thus, said the court, Roommates.com was not a "developer" of any information in this section , no matter how discriminatory. The court remanded to the district court to determine, in the first instance, whether the actions for which Roommates.com has no sec. 230 immunity in fact are illegal under either the FHA or the California housing laws. *Glenn C. Edwards*

[Editor's Note: Given the potential liability involved, and the interest focused on the case (which drew *amicus* briefs from industry groups concerning about expanded liability for websites), it is likely that the defendants will try to get the Supreme Court to review the case. The dissent charged that the opinion was out of step with decisions by other federal circuit courts, but Judge Kozinski insisted that in fact this was the first federal appellate decision to confront this precise question. A.S.L.]

2nd Circuit Differs from 11th on Whether Gay Ecuadorians Merit Asylum in the U.S.

A March 28 ruling by the federal appeals court in Manhattan on an asylum petition by a gay man from Ecuador gives striking evidence of inconsistency in the law, directly contradicting a September ruling by the federal appeals court in Atlanta. The new 2nd Circuit Court of Appeals ruling, *Illesacas-Dutan v. Mukasey*, 2008 WL 859430 (Summary Order, not officially published), reverses the Board of Immigration Appeals, calling for a new hearing before an Immigration Judge on Juan Carlos Illescas-Dutan's claim that persecution against gay people in Ecuador is bad enough to warrant granting him asylum in the United States. Looking at much the same background evidence, in *Vicuna v. U.S. Attorney General*, 243 Fed.Appx. 559 (11th Cir. Sept. 19, 2007), the 11th Circuit in Atlanta found no reason to question a denial of refugee status to a gay Ecuadorian

The unofficially published 2nd Circuit ruling does not relate the facts of the case, assuming that the parties already know the facts, but the court goes on at some length about the failings of Immigration Judge Steven R. Abrams's opinion. The ruling also takes no notice of the *Vicuna* decision from the 11th Circuit.

"We conclude that remand is appropriate because the IJ's analysis was defective with respect to his denial of Illescas-Dutan's claims based on his fear of persecution and torture inflicted by government actors," wrote the court. "Because the IJ credited Illescas-Dutan's testimony that he was gay and accepted his argument that he belonged to the particular social group of gay Ecuadorians, Illescas-Dutan need only have shown that his fear of future persecution was objectively reasonable" to qualify for asylum. But, the court noted, "The IJ failed to consider parts of the record, which, as Illescas-Dutan argues, corroborated his subjective fear of persecution and provided a reasonable basis for asserting that his fear was objectively reasonable."'

Immigration Judge Abrams was presented with a 2005 State Department Report as well as a report by Amnesty International, which described "campaigns of arrest and detention of gay individuals and resultant instances of ill-treatment and torture, as well as an endemic problem of torture and ill-treatment of individuals in police custody." Despite being presented with such evidence, Judge Abrams denied the petition, stating that there was "nothing" in the background material presented to the judge to support Illescas-Dutan's claim that he objectively feared police violence because he was gay.

"Moreover," wrote the court, "the IJ's failure to consider significant aspects of the record evidence was underscored by his reliance on the existence of a constitutional anti-discrimination provision which multiple reports in the record indicated was ineffective given that gay individuals continued to suffer discrimination from public bodies." Since Abrams had taken note of the constitutional provision, the court felt that he should have considered the evidence in the background material that it had not served to deter police officers from mistreating gay people.

"Insofar as the IJ failed to consider country conditions evidence in the record corroborating Illescas-Dutan's subjective fear of persecution and providing a basis for asserting that such a fear was objectively reasonable, this Court's review of whether Illescas-Dutan sufficiently established his eligibility for asylum is frustrated and remand is appropriate," concluded the court, noting further that the failure to consider that evidence also undermined the IJ's conclusion that Illescas-Dutan did not qualify for withholding of removal or protection under the Convention Against Torture.

By contrast, the 11th Circuit ruling in *Vicuna* set out in detail the petitioner's claims to having been personally harassed and falsely imprisoned by police officers, but credited the Immigration Judge's conclusion that this was mere harassment, not persecution, and that despite background materials (possibly the same State Department and Amnesty International reports?), there was insufficient evidence of official persecution of gay people in Ecuador to merit a grant of asylum.

Ecuador was one of the first nations in the world ton include an express ban on sexual orientation discrimination in its Constitution, but the State Department has documented that this has had little meaning for gay people subjected to persecution by local police forces in that country. As Ecuador has been considering major constitutional revisions recently, there have been calls for repeal of the gay rights provision and for an amendment strictly defining marriage as the union of a different-sex couple.

Sometimes different results in asylum cases are due to differing qualities of representation (or lack of representation) for the petitioners, but studies have shown that Immigration Judges also differ drastically in their receptivity to evidence about official persecution, some giving great weight to evidence that others consider trifling. One study showed that some IJ's deny 80 percent or more of the asylum claims presented to them, while others may grant as great a percentage of claims.

The question whether conditions for gays in Ecuador are bad enough to support an objective fear of persecution for an openly gay man who would be officially deported to that country would seem like the kind of factual question that should receive the same answer no matter where in the U.S. an asylum petition is filed and regardless of which judge (or appeals court) considers the case, but unfortunately our system of decentralized decision-making in which each petitioner has to re-invent the wheel and there seems minimal if any continuing memory in the system concerning prior rulings about applicants from the same country does not provide for that kind of consistency, leaving these factual questions to be settled on a case by case basis. The decisions by many federal circuits to deal with the overload in asylum appeals by going to summary proceedings and non-precedential, unpublished opinions merely exacerbates this problem. A.S.L.

Federal Court Upholds Exclusion of NYC Comptroller's Gay Rights Resolution From Corporate Proxy Statement

U.S. District Judge Gray H. Miller (S.D. Texas) ruled on April 22 in *Apache Corporation v. New York City Employees' Retirement System*, 2008 WL 1821728, that a gay rights shareholder proposal submitted to Apache Corporation by New York City Comptroller William C. Thompson, Jr., the chief trustee of the pension plans for most NYC employees, did not have to be included with the proxy statements Apache mails to its shareholders in advance of corporate meetings.. Thompson's proposal sought to commit the corporation to a wide range of anti-discrimination principles involving sexual orientation and gender identity.

Thompson's predecessors as NYC Comptroller had pioneered the strategy of using the office's weight as manager of the huge city pension funds to influence corporate policies. Under federal securities laws, shareholders may submit proposals to be voted on at a corporation's annual meeting, requesting the elected directors of the corporation to adopt corporate policies. A Securities and Exchange Commission (SEC) regulation, 17 C.F.R. sec. 240.14a–8, defines the scope of shareholder proposals that corporations are obliged to present to their shareholders in the proxy statements they mail out to announce corporate meetings and to solicit shareholder authorizations to vote their shares at the meetings.

The SEC holds that shareholder resolutions need not be included in proxy statements and put to a vote at meetings if they seek to "micromanage" the day to day operation of the company, or to express judgments on matters of routine corporate governance, but shareholders have a right to attempt to influence the corporation's approach to issues of social policy. An attempt by the NYC Comptroller and other institutional investors to influence Cracker Barrel restaurants to reverse their anti-gay employment policies during the 1990s led to a confrontation with the SEC over the right of shareholders to influence corporate employment policies, which was resolved in favor of requiring corporations to include such proposals in their proxy statements.

Thompson's new dispute with Apache, a Texas-based energy company, concerns a more wide-ranging version of the earlier gay rights resolutions. The proposal calls upon the corporation's management to "implement equal employment opportunity policies" based on a list of ten principles "prohibiting discrimination based on sexual orientation and gender identity." The ten principles include the standard employment discrimination concerns, including employee benefits, but also go beyond that to require corporate diversity and sensitivity programs, recognition of employee special interest groups, elimination of negative stereotypes from corporate advertising, marketing, sales of goods and services, and charitable contributions. The list is presented as an example of various things that major corporations have done as part of their efforts to attract and retained LGBT employees.

Thompson submitted the proposal to Apache in October 2007, in time to be considered for the proxy mailing due to go out at the end of March. Apache did not want to include the proposal. Under SEC rules, a corporation that does not want to include a shareholder proposal is required to request a "no-action letter" from the SEC's Division of Corporate Finance. The Division examines the proposal and determines whether it must be included in the proxy mailing. In this case, the Division quickly issued a no-action letter, advising Apache that Division staff would recommend against SEC enforcement action if Apache omitted the proposal, explaining, "There appears to be some basis for your view that Apache may exclude the proposal. We note in particular that some of the principles relate to Apache's ordinary business operations."

Apache then mailed out its proxy statement, omitting the Thompson proposal, on March 31. On April 8, Apache filed suit in the federal district court in Houston as a preemptive strategy, seeking a declaration from the court that Apache had not violated SEC rules. Two days later, Thompson filed suit in federal district court in Manhattan, seeking the opposite ruling, but Judge Colleen McMahon, noting Apache's prior filing, stayed the New York lawsuit, giving Judge Miller in Houston priority to rule on the case.

Miller held a quick hearing and issued his ruling on April 22, supporting Apache. "Undoubtedly, advertising and marketing, sale of goods and services, and charitable contributions are ordinary business matters," Miller wrote. "Yet, the defendants, through the Proposal, seek to have Apache implement equal employment opportunity policies which incorporate anti-discrimination directives based on sexual orientation and gender identity into such activities."

To consider these principles on Thompson's list as "implicating employment discrimination would be a far stretch," Miller opined. "Instead, principles seven through ten aim at discrimination in Apache's business conduct as it relates to advertising, marketing, sales, and charitable contributions. Therefore, because these principles do not implicate the social policy underlying the Proposal, and because the Proposal must be read with all of its parts, the Proposal is properly excludable."

Hedging his bets against a possible reversal on appeal, Miller also analyzed the Proposal under the alternative basis for exclusion: that a shareholder proposal would inappropriately attempt to micro-manage the business. "Shareholders, as a group, are not sufficiently involved in the day-to-day operations of Apache's business to fully appreciate its complex nature," he wrote. "For example, shareholders, as a group, are not positioned to make informed judgments as to the propriety of certain sales and purchases. Similarly, the complex implications stemming from the proposed principle forbidding discrimination in the sale of goods and services based on sexual orientation or gender identity preclude provident judgment on the part of the shareholders. It would be imprudent to effectively cede control over such day-to-day decisions, traditionally within the purview of a company's executives and officers, to the shareholders."

"The aforementioned concerns are enhanced by the principle's implicit requirement that Apache determine whether its customers and suppliers discriminate on the basis of sexual orientation or gender identity. Such an inquiry is impractical and unreasonable, and the determination as to its propriety should properly remain with the company's management."

Thompson's communications director, Jeff Simmons, reacted to the ruling by charging that it "flies in the face of common sense and established precedent" and went on to score political points, proclaiming that "Apache has shown by its fierce resistance to the proposal by the New York City Pension Funds that it does not place a priority either on ensuring that all employees feel respected and secure in their workplace or on benefitting from a skilled, diverse workforce."

Simmons did not indicate whether Thompson will seek to appeal the ruling, or attempt to push forward with his own litigation before Judge McMahon in the New York federal court. A.S.L.

Federal Court Denies Cross-Motions for Summary Judgment in Transgendered Applicant's Title VII Suit

In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 2008 WL 902937 (S.D. Tex Apr.3), the plaintiff, Izza Lopez a/k/a Raul Lopez Jr., a transgendered person, had applied for a position with the defendant, was interviewed, and was hired for the job, pending a background check and drug screening. River Oaks withdrew the job offer based on its assertion that Lopez had "misrepresented" herself as a woman during the interview process. Lopez filed a sex discrimination complaint with the U.S. Equal Employment Commission, which issued her a right to sue letter. Lopez filed her claim in federal court in Houston. At issue in this decision were her motion for partial summary judgment for sex discrimination, and the motion of River Oaks for final summary judgment, based on Lopez's alleged misrepresentation as to her gender. Both motions were denied.

The trial judge, Nancy F. Atlas, stated that Lopez suffers from Gender Identity Disorder, citing materials from the American Psychiatric Association. This was described as "characterized by [a] strong and persistent cross-gender identification" and "[p]ersistent discomfort with [one's] sex or [a] sense of inappropriateness in the gender role of [one's] sex."

Lopez was described as biologically male, but living her life as a woman, and planning to undergo sex reassignment surgery when she is financially able to do so. Lopez applied for a position as a scheduler with River Oaks. This position entails scheduling patient appointments over the phone. While it involved access to private information, there was involvement with medical procedures, and no face-to-face contacts with patients at all.

Lopez listed both her legal name (Raul) and the name by which she was known (Izza) on her job application. She was interviewed by the scheduling manager and the director of scheduling. She believed that both had been informed of her transgendered status by friends who worked at River Oaks. She successfully completed her background check and drug screening, and was told she was hired. She terminated her job with her then-current employer, but was subsequently told that the job offer was withdrawn. At Lopez's request, a letter was sent confirming the decision, stating that the employment offer was terminated because of misrepresentation of her gender.

Lopez sued under Title VII of the Civil Rights Act of 1964, alleging discrimination on the basis of sex, specifically, that River Oaks rescinded its job offer because she failed to conform with traditional gender stereotypes, and that she was discriminated against because of her transgendered status. River Oaks countered that it rescinded the job offer because of the misrepresentation as to her gender, but also suggested that Lopez failed to raise a viable legal claim, as there is no Title VII protection for transgendered individuals under either of Lopez's theories.

Judge Atlas noted that Title VII provides that "[i]t shall be an unlawful employment practice to discriminate against any individual … because of the individual's sex," and that, through

case law, the contours of Title VII's prohibition have been defined to include discrimination against individuals who fail to conform with traditional gender stereotypes. She said that litigants have relied upon broad language in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for the proposition that Title VII protects transgendered individuals, who, by dressing and behaving as members of the opposite sex, failed to conform to other's views of how men and women should look and act. Though Judge Atlas said that lower courts have reached divergent conclusions on the issue, she ruled that Lopez had pled and developed facts in support of a claim that River Oaks had discriminated against her, not because she was transgendered, but because she failed to comport with the notions of certain River Oaks employees as to how a male should look.

The question now became whether sufficient evidence was presented to demonstrate that the job offer was rescinded on impermissible grounds. Judge Atlas ruled that there was enough evidence presented for the case to go forward to trial, but not enough to demonstrate that the job offer was rescinded on a discriminatory basis, as a matter of law. Lopez argued that the rescission of the job offer was based on animus towards people who do not conform to gender stereotypes, while River Oaks argued that the animus was towards people who lied in the application process.

The judge ruled that as both positions rely on interpretations of intent, and thus, on the facts of this case, neither position could prevail on a motion for summary judgment. This is despite the judge's conclusion that Lopez made no effort to conceal gender identity on her job application, that Lopez listed references known to management of River Oaks who knew of Lopez's status, and that one of the managers involved in the decision believed that transgendered people were inherently deceptive.

While Judge Atlas denied Lopez's motion for summary judgment, she made it clear that the claim of River Oaks that the job offer was rescinded based on non-discriminatory grounds would be difficult to prove at trial. *Steven Kolodny*

[After this opinion was issued, the judge referred the parties to mediation, where a settlement was worked out, according to an April 25 report in the *Houston Chronicle*. Lambda Legal, representing Izza Lopez, announced that the case "has been resolved to the mutual satisfaction of both parties" but the details have not been made public. A.S.L.]

Biological Sex, Not Gender Identity, Is Appropriate Basis for Prison Housing

The state of Oregon may constitutionally assign prisoners to male-only penitentiaries based on their having male genitalia, even if they have legally changed their sex, states the U.S. District Court for Oregon. The opinion, by Judge Anna J. Brown, also held that prison officials may continue to refer to a transsexual, who had not had a sex change operation, using male pronouns, and that the prisoner had not stated grounds for placement in protective custody. Collateral estoppel prevented the judge from considering the plaintiff's petition for state-financed hormone treatments and a sex-change operation, which Stevens had already fully litigated in Oregon state courts, ruled Judge Brown.*Stevens v. Williams*, 2008 WL 916991 (D. Or. Mar. 17, 2008).

Anny May Stevens is a transsexual serving an 18–year sentence for manslaughter in the Oregon prison system. She formerly was Edward Stevens, and had had her name and gender legally changed in 1994, three years before entering prison. Prison officials assigned Stevens to a male penitentiary because she has not had an operation to make her anatomically female. Officials refer to her using male pronouns. At times, the prison has placed her in protective custody or other highly supervised units in order to keep her from harm, but she is currently in the general male prison population. During her years in prison, Stevens has continually requested and received hearings and interviews to obtain hormone therapy and a sex-change operation, to be addressed as a woman, and to be assigned to women's prison. Prison officials rejected all such requests. They do not generally consider changing one's sex to be medically necessary under their policies, and one's placement and status in a penal facility is determined by whether one is anatomically male or female, not by one's belief that one is male or female. Therefore, the officials consistently rejected Stevens' demands.

Stevens brought an action in Oregon state court in 2002 to obtain hormone treatments and a sex-change operation, but the court denied her petition. Stevens, acting pro se, then brought the present action in federal court under 42 U.S.C. sec. 1982, claiming state violations of her civil rights. Specifically, she claims prison officials violated her rights by (1) failing to consider her as a woman, (2) failing to provide her with medical treatment to complete her transition to a woman, and (3) denying protective custody.

The court, upon the recommendation of Magistrate Judge Janice M. Stewart, denied Stevens' petition in its entirety, and granted the defendants' motion for summary judgment. Certain of Stevens' claims pertained to state law issues not relevant to a determination under section 1983; thus, the court dismissed them without significant discussion. An earlier state court decision had denied Stevens' petition for hormone therapy and a sex change, which collaterally estopped the federal court from determining the issue. Although Stevens raised an interesting issue as to whether a state court dismissal without opinion should preclude a federal court from deciding an issue, the federal court refused to re-hear the medical treatment issue.

Judge Brown did decide the issue whether prison officials violated Stevens' equal protection rights by assigning her to a male-only prison. Judge Brown first noted that transsexuals are not a suspect class, thus, the prison's policies and actions need only have a rational basis to survive constitutional scrutiny. The prison's policy is meant to prevent "heterosexual crimes" and sorting prisoners by their genitalia is rationally related to this goal, hence, the policy is constitutional, held the court. Even if the classification is sex-based and subject to a higher level of scrutiny, the government has shown that it has a bona fide reason for its policy, which serves a substantial government interest, and its assignment of prisoners based on genitalia substantially relates to this interest. Furthermore, found the court, it would be onerously burdensome if the court had to delve into the psychology of each prisoner in determining where to place him or her, and some prisoners are likely to misstate their gender identity in order to be assigned to a prison where they could indulge in heterosexual crimes.

The court could find no constitutional, statutory, or precedential basis for granting Stevens' petition to require the use of female pronouns when referring to her. Even if the court were to construe this claim as one against cruel and unusual punishment, the Ninth Circuit has held that verbal harassment alone does not violate the Eighth Amendment.

Stevens' claim regarding a failure to provide protective custody was construed as an Eighth Amendment claim, but was dismissed because Stevens failed to provide information that would allow prison officials to place her under protection. In other words, the prison would have protected Stevens if she had simply provided the necessary details regarding the threats against her. The court found that she failed to do so, although she had many opportunities during her many discussions with prison officials. To prevail, Stevens would need to prove that her incarceration posed a risk of serious harm and that prison officials were deliberately indifferent to this risk. Stevens could prove neither, held the court.

Health Services Policy. Even though the present case did not decide issues surrounding the medical necessity of sex-change treatments, the case report sets out the policy, which may be of use to practitioners advocating for clients asserting that a sex change is necessary for their health, and should be supplied by a governmentally-run program or institution.

An Oregon state court had previously reviewed the Snake River Correctional Institution's "Health Services Policy" and Stevens'

treatment under the policy. It dismissed Stevens' petition without writing an opinion, but that decision served as the basis for precluding the federal court from re-considering the issue whether a sex change for Stevens was medically necessary.

The Snake River Correctional Institution (SRCI) has a four-tier Health Services Policy to address prisoners' medical conditions: 1. Mandatory Care: Treatment essential to life and health, without which rapid deterioration may be an expected outcome. 2. Necessary Care: Treatment without which the inmate suffers significant risk of either further serious deterioration of the condition or significant reduction of the chance of possible repair after release. 3. Acceptable But Not Necessary Care: Treatment for non-fatal conditions where treatment may improve the quality of life for the patient. Treatment is such circumstances is subject to individual clinical review, and may be approved when considering such factors as the urgency of the need for treatment, the remaining sentence, the prisoner's relative functional disability, and the degree of functional improvement likely to be gained. 4. Limited Medical Value: Treatment that is significantly less likely to be cost-effective or to produce substantial long-term gain. The prison generally does not authorize such treatment.

Gender-identity disorder (GID) and gender reassignment are Level 3 or 4 conditions, which a prison medical panel must assess on an individual basis. If a patient has improved because of pre-incarceration treatment for GID, then a continuation of treatment may be considered. However, the lack of medical evidence that patients improve from such treatments receives serious consideration from the reviewing panel. The panel, considering Stevens case as well as the medical literature, decided that Stevens would not likely improve from such treatment, thus, the prison will not provide it. Rather, the doctors at Snake River are treating Stevens for other mental ailments that were more likely to improve with treatment, such as dysthymia, major depression, and borderline personality disorder. The Oregon state court found such treatment acceptable. *Alan J. Jacobs* @H2 = Kentucky Court of Appeals Declares Void Lesbian Moms' Agreement Establishing Partner As *De Facto* Custodian

On March 28, 2008, the Kentucky Court of Appeals overruled a trial court's order granting joint custody to lesbian partners who planned to raise a child together, despite the fact that both parties signed and agreed to a prior order establishing the non-biological mother as a *de facto* custodian. *Pickelsimer v. Mullins*, 2008 WL 820947 (Ky. App.).

Phyllis Pickelsimer and Arminta Mullins lived together in a committed relationship for five years and decided to parent a child together. The parties agreed that Pickelsimer would undergo donor insemination, but that they would raise the child together. Pickelsimer gave birth to their son in May 2005, but the parties' relationship appears to have been unsteady in the months leading up to and after the birth—due to Mullins' alleged infidelity. They lived together off and on for several months and eventually separated for the last time in February 2006.

According to the record, it appears that the couple never sought legal advice before they had the child — to determine the parental rights and status of Mullins (the non-biological mother). The Court of Appeals noted that it was only after their child's birth that Mullins became concerned that she might not be recognized as a legal parent of the child. Therefore, while the women were still living together, Mullins retained an attorney who petitioned the court to establish her as a *de facto* custodian. The petition stated that Mullins was the primary financial provider and caregiver of the child, and both parties signed the judge's order granting the petition. There was no evidentiary hearing or any other form of evidence presented to the judge, largely because neither party objected to the petition.

After Mullins moved out and the parties officially separated, she continued to have regular visitation with the child, until Pickelsimer stopped Mullins' contact in September 2006. Pickelsimer alleged that Mullins left the child with a male friend of her new girlfriend (who incidentally had allegedly assaulted Mullins' new girlfriend), which was a violation of their verbal agreement never to leave their son in the care of anyone other than family.

Mullins responded by filing a motion requesting joint custody and status as the primary residential custodian. Pickelsimer filed a motion to set aside the original agreement and order establishing Mullins as a *de facto* custodian on the grounds that it was based on a mistake under the Kentucky Rules of Civil Procedure. A domestic relations commissioner (DRC) held a hearing and recommended that the parties be awarded joint custody, and that Pickelsimer be awarded primary residential custody. The DRC determined that the original order was void on the grounds that Mullins failed to qualify as a *de facto* custodian; however, the DRC found that Pickelsimer had waived her superior right to custody in favor of Mullins as a joint custodian. The trial court adopted all of the DRC's recommendations and Pickelsimer appealed.

The Kentucky Court of Appeals agreed with the trial court's finding that Mullins did not qualify as a *de facto* custodian. Under Kentucky law, a *de facto* custodian is "a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and the financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under (3) years of age …" In this case, Pickelsimer established that the information contained in Mullins' petition for status as a *de facto* custodian was false. Mullins had not been the primary financial supporter and the primary caregiver of the child — Pickelsimer, who had no legal counsel at the time, stated that she only agreed to that statement in order to allow Mullins to make health-related decisions regarding their son if she ever became unable to do so.

According to the Court of Appeals opinion by Judge Wine, both parties' testimony indicated that Mullins had never truly provided the primary financial and emotional support for the child, which is required by the statute. The court elaborated by stating that a *de facto* custodian must be a person who actually stands in the place of the natural parent, rather than merely providing support alongside the natural parent. Therefore, although both parties signed the agreement, it was based on falsified information, and as such Mullins failed to establish her status as a *de facto* custodian.

In addition, the Court of Appeals held that Pickelsimer never waived her superior right to custody, which is required in order for a non-parent to seek custody of a child. In order to waive her superior right to custody, Pickelsimer must have been separated from the child and the non-parent must have had to assume all care for the child. To the contrary, the child was always in Pickelsimer's care, and her acquiescence in allowing Mullins to maintain non-parent visitation is not enough to constitute a waiver of her superior right to custody. Arguably, Pickelsimer was not merely allowing non-parent visitation, as the court argues, because she intended to bestow upon Mullins legal decision-making rights over her child. However, the court was apparently swayed by Pickelsimer's argument based on the fact that she was not personally represented by counsel in the earlier proceeding.

Interestingly, the Court of Appeals noted that it is not bound by the parties' original shared-custody agreement, because the welfare of the child is involved — despite the parties' acknowledgement that they both agreed to submit falsified information in order to confer legal status on Mullins as a provider for the child. Therefore, it seems that the Court of Appeals ultimately believed that establishing Mullins as a *de facto* custodian would not be in the best interest of the child. This decision is clearly at odds with the decisions of both the domestic relations commissioner and the trial court, both of which should usually be afforded greater deference on issues of fact. *Ruth Uselton*

3rd Circuit Rejects Asylum for Gay Indonesian

A gay Indonesian man who overstayed his tourist visa, obtained employment in Philadelphia, and then was targeted for deportation by the

Department of Homeland Security, was not entitled to asylum in the United States, according to the opinion by Circuit Judge Hardiman in *Tanumihardja v. Attorney General*, 2008 WL 1748277 (April 17, 2008). The petitioner specified three grounds for seeking asylum, as an ethnic Chinese Catholic who was gay. Although he recounted in his testimony rather impressive examples of threats and harassment suffered by his family at the hands of bigoted Indonesians, the immigration judge was underwhelmed and denied his application. Focusing on the aspects relating to sexual orientation, unfortunately he didn't mention anything relative to this in his initial petition, but then testified at his hearing about three incidents – a friend who was fired from a job for being gay, an angry mob breaking up a gay party in a private home, and an incident involving police rounding up transsexuals who were loitering in an area known to harbor prostitutes, during which a police officer forced a transsexual to fellate him. He also testified, however, at having briefly visited the Indonesian island of Bali, where he did not feel the oppressive anti-gay atmosphere he had sensed elsewhere, although he did not move there because it was too expensive and he had no relatives there. The judge pointed out that he had no relatives in Philadelphia, where living costs were higher than in Bali. Endorsing the Immigration Judge's conclusion that the applicant had failed to establish a well-founded fear of persecution, Judge Hardiman commented: "We also note that [the petitioner] admitted that he felt safe on the Indonesian island of Bali, and the regulations preclude a finding of a 'well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality.' 8 C.F.R. sec. 208.13(b)(2)(ii)." A.S.L.

Salt Lake City Gay Gym Wins License Revocation Appeal

The 14th Street Gym in Salt Lake City, which has operated as a "social club catering to gay males," won a ruling from the Utah Court of Appeals reversing the city's attempt to revoke the gym's business license as a result of patrons engaging in sexual activity on the premises. Reversing a ruling by the 3rd District Court, the unanimous appellate panel found that the gym's operator had not violated the terms of a conditional restoration of its license. *14th Street Gym, Inc. v. Salt Lake City Corporation*, 2008 WL 961942, 2008 UT 127 (April 10, 2008).

The gym, which began operating in 1991, provides full workout facilities for its members. From the court's description, it is genuinely a gym and not a gay bathhouse or sex club. However, the city expressed concern to the owners about "illicit sexual activity" on the premises. In November 2000, the gym agreed to hire additional staff to "monitor the premises and guard against improper conduct," according to the decision by Judge William A. Thorne, Jr. The city tested compliance by sending undercover officers into the club between October 2003 and October 2004. The officers reported observing "various incidents of lewd conduct including masturbation and oral sex," mainly in the steam room. Two citations were issued to individuals for engaging in such activity in plain sight of the undercover officers.

As a result of these incidents, the city sought to revoke the gym's business license. In a January 2005 hearing, the hearing examiner found that there had been at least five instances of illicit sexual activity in violation of city ordinances, and that an employee of the gym "condoned, encouraged, or turned a blind eye towards the lewd conduct." The hearing examiner also found that the gym's ownership had "an opportunity and a duty to know about the lewd conduct occurring at the business." Based on these findings, the examiner ordered that the gym's license be suspended for 90 days, and provisionally for another 270 days, which meant the gym could reopen after the 90 day suspension, but would essentially be on probation for the following nine month period. The order stated that "if any problems arise in the nine (9) months following the first 90–day suspension period, the license will be revoked after a hearing is held and the hearing examiner determines that a violation has occurred."

The gym did not appeal this order. Instead it closed down for the requisite three months. Soon after the reopening, the city sent undercover officers in again, and they "observed two men engaged in oral sex in the steam room." The officers arrested the two men, who each later pled guilty or no contest to the charges. Although a later inspection in January 2006 did not reveal any improper activity, the city initiated a permanent revocation proceeding based on the single incident. The owner of the gym testified to steps he had taken to prevent recurrences of lewd conduct, but the hearing officer decided that one proven violation of the order had occurred and the license should be revoked. The order revoked the license effective March 22, 2006, with the possibility that the gym could apply for a new license after one year.

The gym appealed, both parties moved for summary judgment, and the district court dismissed the gym's appeal, rejecting the argument that the revocation was an arbitrary and capricious action by the hearing officer.

The court of appeals disagreed, finding that the action was arbitrary and capricious. "This case arises in the context of a long history of conflict between the Gym and the City over the degree of privacy and freedom of behavior permitted Gym patrons under City ordinances," commented Judge Thorne. "Undisputedly [sic], there have been multiple incidents of lewd conduct that have occurred on Gym premises over the years, resulting in both criminal charges against the individuals involved and administrative action against the Gym. However, the only issue before us is the propriety of the City's revocation of the Gym's business license based solely on the Gym's purported abrogation of the requirements set forth in the 2005 Order."

The problem for the City was that the order was vague, merely referring to "problems," and that the one incident upon which the City relied did not, in the opinion of the court, necessarily raise the same issue as the incidents that led to the hearing examiner's findings in January 2005. In that earlier hearing, the findings had included that gym staff were aware of, tolerated and condoned illicit activity under circumstances where management knew or should have known this was going on. By contrast, the hearing in March 2006 leading to the license revocation under appeal had not included such findings.

Undercover officers observed two men having oral sex in the steam room, but there was no testimony that any gym staff members were aware of the activity, and presumably the owner's testimony showed that the gym had taken steps to discourage its patrons from engaging in such activities. Short of sending monitors into the steam room, there was not much the gym could do to prevent such conduct taking place.

Thus, Thorne observed, "the actual violations found in the 2005 Order were not lewdness offenses committed by patrons, but offenses *by the Gym* for violations of City ordinances." The ordinances prohibit a business from allowing or permitting certain kinds of "lewd" conduct on their premises. "Because the 2005 Order suspended the Gym's license on the basis of code violations by the Gym, it is reasonable to conclude that revocation of the Gym's provisional license would require the same type of violation – one committed by, or at least attributable to, the Gym or its agents or employees."

However, the 2006 Order was based solely on patron conduct in the steam room, and an isolated instance at that. "While it is possible that these acts could also represent code violations by the Gym if the Gym knew of, should have known of, or condoned the acts, the 2006 Order made no such findings. Nor is there evidence in the record particularly supporting such a conclusion." Consequently, the court found it was "arbitrary and capricious" to find a violation of the gym's provisional license on this basis.

Now patrons of the 14th Street Gym are on notice. Those hot guys who keep their towels tightly wrapped about them in the steam room and want to watch but not touch are probably undercover officers. A.S.L.

Evading the Law at Okeechobee High School

Public school officials, who are supposed to be teaching good citizenship, have decided to model bad citizenship for the students at Okeechobee High School. Even though a U.S. District Judge ruled in favor of the claims of students who wanted to form a Gay-Straight Alliance in several pre-trial rulings, the school hung tough, waiting for the instigators to graduate, and on April 9 their tactics paid off as Judge K. Michael Moore dismissed the case for lack of a viable plaintiff with a viable legal claim. *Gonzalez v. School Board of Okeechobee County* No. 06–14320–CIV-Moore/Lynch (S.D. Fla., April 9, 2008).

The students, represented by the ACLU LGBT Rights Project, filed suit in November 2006, alleging that the school violated their rights by refusing to let the students have an on-campus GSA on the same basis as other student clubs. The federal Equal Access Act requires that any school district that allows noncurricular clubs on campus may not discriminate among such clubs. Schools intent on evading this requirement in order to avoid allowing a gay-straight alliance to function on their campus usually pretend that they don't have noncurricular clubs, but federal district judges have regularly seen through these ruses and found little if any curricular connection for many of the student clubs that these evasive districts allow to operate.

Judge Moore issued several pre-trial rulings in the case: *Gay-Straight Alliance of Okeechobee High School v. School Board*, 477 F. Supp. 2d 1246 (S.D.Fla., March 13, 2007) (holding that the students could sue as an association and had adequately pled a 42 USC sec. 1983 civil rights claim against the school district), 483 F. Supp. 2d 1224 (S.D.Fla., April 6, 2007) (granting preliminary injunction requiring that GSA be allowed to meet at the school pending the outcome of the case); 242 F.R.D. 644 (S.D.Fla., April 25, 2007) (granting protective order concerning identity of GSA members). However, as the case was drawn out, with no trial scheduled to occur until sometime this spring, and with student organizers graduating or drifting away, the school board won an order dismissing the GSA as a named plaintiff when Yasmin Gonzalez, one of the students, was the last remaining plaintiff, and as a graduate of the school, her standing to seek permanent injunctive relief was challenged by the defendants.

On April 8, Judge Moore granted a motion to add Jessica Donaldson, another former student who had been a member of the GSA when the suit was filed, as a named plaintiff, but denied a motion to add Brittany Martin, a current student at Okeechobee High School who wished to participate in a GSA, pointing out that "no allegations have been made that Martin has attempted to gain recognition for the GSA as a student organization at OHS or that she has suffered any injury as a result of such efforts," so Moore concluded that Martin did not meet standing requirements to join the existing law suit.

Furthermore, on April 9, Moore issued another opinion, this time granting the defendant's motion to dismiss the case entirely. Since the only remaining plaintiffs, Gonzalez and Davidson, were no longer students and thus no longer had standing to seek injunctive relief, the case boiled down to their potential damage action. The only claim at this point was for nominal damages, and Moore opined that nominal damages would be available only for violations of due process of law, not for past violations of the Equal Access Act. In the absence of such a claim, Moore found the plaintiffs' claims to be moot, and concluded that the court lacked subject matter jurisdiction and should dismiss the case.

All in all, this is pretty outrageous. A bunch of high school students who had a clear statutory right to form their organization have been stymied by a school board that, despite the court's clear rulings and issuance of a preliminary injunction, determined to fight it out until the student plaintiffs had graduated, and then to get the case dismissed on mootness grounds, trusting that their intransigence would discourage new students from attempting to join the embattled organization. Here is a civics lesson, indeed.

According to an article in the *Palm Beach Post* on April 11, the students' ACLU attorney, Rob Rosenwald, indicated that at this point there are four students at the school who want to have a GSA and, despite the court ruling on the preliminary injunction last year (and the growing list stretching back several years of rulings by federal judges under the Equal Access Act requiring school boards to drop their opposition and allow GSAs to function at their high schools), the principal recently told Brittany Martin that the GSA group could not meet on campus. Back to square one.

Rosenwald filed a motion with the court to revive the case, in light of the new reality; alternatively, he may have to start up a new case with a new set of student plaintiffs. *Palm Beach Post*, April 22. This strikes us as the kind of case where the court should assert continuing jurisdiction on the ground that the issues it raises are capable of recurrence but will evade review due to the temporary student status of the plaintiffs and the procedural methods of delay available to the school board. A.S.L.

Federal Civil Litigation Notes

9th Circuit — Oregon — The U.S. Court of Appeals for the 9th Circuit affirmed a ruling by District Judge Owen M. Panner in *Thomas v. City of Talent*, 2008 WL 833070 (March 26, 2008), rejecting an equal protection challenge by a gay man stemming from his arrest for violating a city ordinance prohibiting "camping" or "dwelling" in a public park. Judge Panner had found that James Thomas had not presented sufficient evidence that either the enactment of the ordinance or Thomas's arrest under it were motivated by "animus toward homosexuals."

6th Circuit — Kentucky — Backing away from its prior decision in *Morrison v. Board of Education of Boyd County*, 507 F.3d 494 (6th Cir., 2007), and reacting to the school board filing a petition for rehearing en banc, a panel of the 6th Circuit has vacated portions of that earlier opinion and issued a new opinion in the case, *Morrison v. Board of Education of Boyd County*, 2008 WL 942047 (April 9, 2008). The new opinion affirms District Judge David Bunning's conclusion that self-proclaimed anti-gay Christian student Timothy Morrison does not have a justiciable claim for damages for having his anti-gay speech stifled at school during the 2004–2005 academic year because of the school's prohibition on students making stigmatizing or insulting comments regarding another student's sexual orientation. Morrison feels called to bear witness publicly about his moral beliefs and to tell other students when their conduct fails to comply with his beliefs. Although the school board subsequently changed its speech policy to minimize First Amendment fallout, nonetheless Morrison demands compensation for having been deterred from speaking out prior to that policy revision. The new amended panel decision concludes that as Morrison's claim at this point is merely for nominal damages, since he could not show any tangible injury, he no longer presents a justiciable injury. After asserting that "this is a case about nothing," Circuit Judge Cook writes for the court, "Where, as here, the process of separating wheat from chaff results in a threshing floor bare of justiciable claims, the case is over." But not for Morrison's determined advocates at the Alliance Defense Fund, which is now the party seeking en banc reconsideration, and not for the ACLU, which is siding with Morrison on this one, taking a firm line against content-based public high school speech codes. ACLU has represented gay students at the school seeking to set up a student group, whose lawsuit prompted the school to adopted the challenged speech code, but now the ACLU is siding with the anti-gay kid whose views the school has stifled. Sharon McGowan, an ACLU LGBT Rights Project attorney, told the Ashland, Kentucky *Daily Independent*, "We agree that Timothy Morrison had his First Amendment rights violated. Our kids had their First amendment rights violated and they wouldn't want that to happen to anyone else. We're on the same side as them on this issue."

Arizona — Wishful thinking? Terry Fowler sued his former employer, Honeywell International, Inc., asserting, among other claims, sex discrimination for refusing to rehire Fowler after had agreed to an early retirement package. *Fowler v. Honeywell International, Inc.*, 2008 WL 1701691 (D. Ariz., April 10, 2008). But Fowler's claim is really for sexual orientation discrimination, as his allegations reveal. Wrote District Judge Stephen M. McNamee, the complaint "asserts a claim for 'sex discrimination,' alleging that 'Plaintiff has been excluded from professinal [sic] class for being a homosexual male." As Title VII was the only statute invoked in support of this claim, Judge McNamee found that no prima facie case had been stated, since sexual orientation discrimination is not "within the purview or prohibitions of Title VII." Honeywell was granted summary judgment on the claim.

California — We find infuriating the occasion decisions by Magistrates or U.S. District Judges suggesting that gay pro se plaintiffs complaining about discriminatory government policies or actions have no cause of action under 42 USC 1983 because "sexual orientation" is not a suspect classification. Such assertions reveal a basic ignorance about how the Equal Protection Clause works, as well as a misinterpretation of existing Supreme Court precedents. Thus, it is rewarding to find the occasional opinion showing a district judge who does understand this aspect of constitutional law, in this case Judge Ronald M. Whyte of the Northern District of California in *O'Haire v. Napa State Hospital*, 2008 WL 906363 (March 31, 2008). O'Haire, committed to the state hospital after being acquitted of criminal charges on an insanity defense, filed a pro se action after exhausting administrative remedies with respect to several different complaints, including that the hospital staff tolerated expressions of heterosexual intimacy but not homosexual intimacy. Rejecting the hospital's motion to dismiss this claim, Whyte noted that "the recognized class of 'homosexual persons or gays and lesbians' is protected from discrimination by the Equal Protection Clause of the Fourteenth Amendment," citing *Romer v. Evans*, 517 U.S. 620, 631–36 (1996), and that as such, even though "homosexuals do not constitute a 'suspect or quasi-suspect class' entitled to heightened equal protection scrutiny," the government must "establish that the discriminatory regulation, policy or practice bears a rational relation to legitimate governmental purposes." In this context, he said, any policy discriminating against gays would "not survive unless it is 'reasonably related to legitimate penological interests.'" Thus, "liberally construed, plaintiff's allegations state a cognizable equal protection claim concerning his sexual orientation." Our only complaint with Judge Whyte's decision is the suspect class citation. His authority is *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), a case that relied primarily on *Bowers v. Hardwick* for its analysis of the suspect class determination. Since *Bowers* was overruled in 2003 in *Lawrence v. Texas*, a case that heavily relied upon it should not longer be relied upon as precedential authority, in our view. The Supreme Court has not yet explicitly articulated a finding on whether sexual orientation is a suspect classification, leaving it open to lower federal courts to analyze the question anew in light of *Romer* and *Lawrence v. Texas*.

California — By contrast to the above, consider the ignorance of U.S. Magistrate Judge Oswald Parada, exhibited in *Clinton v. Director of Corrections*, 2008 WL 1818047 (C.D.Calif., April 18, 2008) (not reported in F.Supp.2d), another pro se prisoner case. Among numerous allegations and specifications, inmate Thomas Clinton alleges as to Correctional Sergeant Giovenetti, that, as summarized by Parada, "he discriminates against homosexual prisoners at California Men's Colony by encouraging hate crimes against them by referring to them with derogatory language, and by making derogatory statements such as 'If I had my way, I would have all [homosexuals] in separate dorms so they would get their asses kicked and would have to roll it up, and go were [sic] their asses belong.' Giovenetti banned Plaintiff from the program office and threatened Plaintiff with administrative segregation if he came to the program office or if he filed an administrative appeal." Responding to defendants' motion to dismiss, inter alia, for failure to state an Equal Protection claim, "Although Plaintiff alleges discrimination against him based on his sexual orientation, he has not shown that homosexuals constitute a "protected class" under the United States Constitution. Thus, the [third amended complaint] fails to state an Equal Protection claim and is subject to dismissal." What arrant nonsense! Plaintiff Clinton is a pro se prisoner who can't be expected to know constitutional magic words or case citations, but any judicial officer who, after *Romer v. Evans* and *Lawrence v. Texas*, feigns ignorance that "homosexuals" are entitled to equal protection of the laws is unfit to wear the robes. Anyone can quibble about the precise precedential holding of *Romer*, but at the very least it holds that sexual orientation discrimination claims are cognizable under the 14th Amendment, and that a government actor must have at least a rational basis for any active discrimination against individuals based on their sexual orientation. In the context of a prison, that means there must be some penalogical justification for treating gay people worse than others similarly situated.

Illinois — Here's a case involving a school administration that should be totally ashamed to show their collective faces in public. In *Doe v. Brimfield Grade School*, 2008 WL 1722225 (C.D.Ill., April 10, 2008), District Judge Joe Billy McDade approved a magistrate's report that rejected an attempt by the school board to get Title IX claims dismissed, in a case where it is alleged the school refused to do anything to protect a young male student who was being subjected to what S&M devotees refer to as "ball torture" at the hands of other male students. According to the complaint brought by the boy's mother, six other male students were subjecting her son to what they called "sac stabbing," consisting of "grabbing, twisting and hitting" the boy's testicles. The school's principal was allegedly made aware of this, but the school failed to take any steps to discipline the students involved or protect the plaintiff's son, and the principal dismissed it as "horseplay." One athletic coach reprimanded the boy for complaining about it, stating that he needed to "stick up for himself." According to the complaint, "As a result of the repeated trauma, [John Doe} suffered significant swelling and pain in his testicles" and had to undergo a surgical procedure to repair the damage. His arrival back at school after surgery was greeted by his harassers with a renewed campaign of "sac stabbing." The school had the chutzpa to argue that this was not sex discrimination in violation of Title IX, despite the numerous published cases now applying Title IX to claims by boys of being harassed and attacked by other male students. The magistrate judge found that the factual allegations could support a "gender stereotyping" case, focusing on comments by school administrator's disparaging the boy's masculinity and criticizing his failure to fight back forcefully to defend himself. Shame!

Kentucky — In the long-running ACLU case of *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 2008 WL 918242 (W.D.Ky., March 31, 2008), District Judge Charles R. Simpson, III, ruled that Alecia M. Pedreira, a lesbian who had been discharged despite a satisfactory work record by the defendant when it learned she was a lesbian, did not have standing to bring an Establishment Clause claim premised on the receipt of state money by the defendant in combination which its enforcement of a religious test for employment. The court also rejected a standing claim by a co-plaintiff, Karen Vance, a California social worker who wished to move to Louisville to be near her parents, but who would be precluded from applying for employment at the state-assisted defendant due to its religiously-motivated anti-gay hiring policy. The opinion presented a complicated analysis of federal standing law. Judge Simpson rejected the argument that Pedreira and Vance could assert taxpayer standing to challenge the provision of state and federal funds to the defendants.

New York — In *Pitbull Productions, Inc. v. Universal Netmedia, Inc.*, 2008 WL 1700196 (S.D.N.Y., April 4, 2008), District Judge Rich-

ard M. Berman granted a motion to vacate default judgment and dismiss for lack of personal jurisdiction in a case where a New York-based producer of gay male pornographic videos sought damages and a permanent injunction against a gay-oriented Florida-based website that was alleged to have posted and distributed downloads of the plaintiff's videos without authorization. The defendant, whose failures to appear had led to a default judgment, alleged that the New York federal district court lacked jurisdiction over it because the website was operated from Florida, and housed on servers outside the U.S. The plaintiff's theory was that New York is the "largest gay market" in the U.S., so defendants must be deriving substantial revenue from New York patrons sufficient to confer long-arm jurisdiction. The defendants showed that their website did not charge for membership and derived no revenue from video downloads, their only revenue deriving from advertising banners placed on the website. Any actual revenue obtained from New York sources was shown to be de minimis. The mere likelihood that many New Yorkers may have been accessing the website and downloading the videos, thus displacing in-New York sales of such videos, was not a basis to confer jurisdiction, according to Judge Berman.

New York — District Judge Sweet refused to grant summary judgment to the employer on a hostile work environment sex discrimination brought by a young Brazilian man, who claims that the manager of the restaurant at which he was working required him to have sex with a gay customer as a condition of his employment if that was necessary to get the customer to accept his apology for calling the customer a "faggot." *Lopes v. Caffe Centrale LLC*, 2008 WL 1752251 (S.D.N.Y., April 16, 2008). According to the plaintiff's allegations, a gay man who regularly patronized the restaurant referred to him as "she," "her," "jungle boy," and "third-world boy" in conversation with other customers, and also "blew kisses at him, blew on his neck, and touched him on his waistline and his genitals." Lopes claims that he complained to the restaurant manager about this conduct, but the manager denies having been alerted to it. At some point, Lopes became fed up and confronted the customer while he was dining with another customer, addressed him as "faggot," and demanded that he stop harassing Lopes. The offended customer complained to the manager, who told Lopes he must apologize and the customer must accept his apology, or he would lose his job. Given the customer's conduct, Lopes asked if he would have to give in to the customer's demand for sex in order to get him to accept the apology, and Lopes claims the manager said, "If that is what it takes him to accept your apology, do it. Do whatever it takes him to accept your apology." The manager denies making these statements. Lopes claims he resigned under the circumstances, and filed state and federal discrimination claims pro se. Judge Sweet found that despite the inartful pleading of the complaint and the lack of factual allegations to back up certain of his claims, Lopes had managed to allege the necessary facts to support a hostile environment sex discrimination claim against the restaurant. Sweet dismissed the individual claim against the manager, however, finding that the discrimination laws do not provide for individual liability by a manager. Among the disputed issues to be decided at trial is mitigation of damages, because Lopes has decided to resume school full-time rather than rejoin the workforce pending the outcome of this case.

West Virginia — Pro se prison inmate litigation is a fertile ground for mechanical jurisprudence by judges, given the procedural minefields that Congress has constructed to try to keep these claims out of the courts. Plausible factual allegations of the most outrageous sort are skirted by the courts when unschooled plaintiffs fail to meet all the precise pleading and exhaustion requirements of federal law. A prime example is *Louis v. Haynes*, 2008 WL 833083 (N.D.W.Va., March 27, 2008), where U.S. District Judge Irene M. Keeley, seizing upon such procedural niceties and partially rejecting the recommendation of a U.S. magistrate, ordered that the entire case be stricken from the court's docket. The essence of Inmate Louis's claim is that he is being forced to prostitute himself in order to get food at the federal prison facility in Bruceton Mills, West Virginia. The prison has no assigned seating in the dining hall, but apparently Louis is an unpopular man. He had been trying to eat standing up at the beverage bar to deal with his seating problems, but an officer ordered him to eat at a particular table, which displeased a group of inmates who allegedly made death threats to Louis if he attempted to sit and eat at that location. Louis alleges that because the prison administration has refused to assign a "neutral" table where he can eat, he has had to resort to "turning tricks" to feed himself. The magistrate thought that despite all the pleading faults and procedural problems that might be raised, the case should not be totally dismissed and the allegations further investigated, but Judge Keeley, determined to clear her docket, disagreed. Perhaps because the facts show that after the complaint was filed, the system transferred Louis to a different lock-up, so his suit at this point is solely for monetary compensation. A.S.L.

State Civil Litigation Notes

Alabama — Circuit Judge John Graham ordered Scottsboro High School to allow Lauren Martin and her girlfriend Chelsea Overstreet to attend the high school prom as a couple. Graham relied on the federal Equal Access Law. *365Gay.com*, March 31.

Georgia — A fast-food restaurant escaped liability for an assault committed by a counterworker on a customer in *Dowdell v. Krystal Company*, 2008 WL 1776990 (Georgia Ct. App., April 21, 2008). According to the opinion by Presiding Judge Blackburn, affirming the trial court's award of summary judgment to the defendant, when a fight broke out between Roderick Shumate, working as a cashier, and Sandy Dowdell, an impatient customer against whom the overworked Shumate spouted a "homosexual epithet" when Dowdell chided him with slowness in serving him, Shumate "abandoned Krystal's business when he engaged in such conduct" and thus Krystal bore no respondeat superior liability for Shumate's acts. Furthermore, the court noted that Krystal had no knowledge of any combative propensities by Shumate, which ruled out premises owner liability or negligent hiring as a cause of action.

Missouri — Here's an unusual issue: Did the trial court in a premises liability case err by admitting evidence of the plaintiff's homosexuality, despite potential prejudicial effect on the jury, when the evidence was offered by the defendant to prove that the plaintiff's injury was not the reason he left his employment? In *Ratcliff v. Sprint Missouri, Inc.*, 2008 WL 842430 (Mo. Ct. App., April 1, 2008), the court ruled that evidence of the plaintiff's homosexuality was relevant, as he had put the issue of why he left his job in play by claiming damages on the basis that the injury he incurred, allegedly through the fault of the defendant, had forced him to quit his job with the Capitol Police. It seems that during discovery the defendant uncovered passages in the plaintiff's diary, written before the accident, in which he indicated he was planning to leave his job by a certain date because he believed he was being discriminated against on account of his sexual orientation. In the relevant diary excerpt, Ratcliff had written: "I am sure Tom and [Maureen] have already figured it out. To[o] bad, because if I had just been treated a little better I would probably stay. People d[o] not stay where they are not wanted. There is also the issue about me being gay. I know that this has always been a thorn in their sides and they would welcome I'm sure to get the fag out of their office." The jury rejected Ratcliff's claim that he was injured due to the telephone company's negligence in failing to block off an area where work was being done on the floor of the building where Ratcliff was assigned, assigning 100% of the fault to Ratcliff, so the issue of why he left his job never came into play in the final verdict. Writing for the Court of Appeals, Judge Patricia Breckenridge rejected Ratcliff's argument that the reason why he left his job was a "minor, hypothetical point at the periphery of the dis-

pute." "Evidence that Mr. Ratcliff believed Capitol Police was trying to force him out because of his homosexuality was relevant as an alternative reason for leaving his employment," wrote the judge. "A party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to. Furthermore, evidence of Mr. Ratcliff's homosexuality was limited to providing an alternative explanation for his leaving his employment. The probative value of the evidence outweighed any prejudicial effect of it."

New Mexico — The state's Human Rights Commission ruled early in April that Elane Photography violated the state's civil rights law when it refused to provide photography services for a same-sex commitment ceremony on religious grounds. Businesses do not have a religious conscience exception to compliance with the ban on discrimination by commercial sellers of goods and services in the state, according to the Commission. The anti-gay advocacy law firm Alliance Defense Fund, defending the photography business, indicated that an appeal to the state courts is contemplated. *Santa Fe New Mexican*, April 12. A.S.L.

Criminal Litigation Notes

Federal — 9th Circuit — U.S. District Judge Andrew J. Guilford erred in only one respect in sentencing a gay man, who had been pimping out a teenage boy through the website rentboy.com, after the man pleaded guilty to transporting child pornography in violation of 18 USC 2252(a)(1). *U.S. v. Stoterau*, 2008 WL 1868997 (April 29, 2008). According to the opinion by Circuit Judge Ikuta, Stoterau, then 26, met his 14–year-old victim at a gay youth support group meeting, subsequently introduced the boy to rentboy.com and devised a scheme to post sexually explicit photos of the boy there, advertising his services as an escort, but listing Stoterau's phone number to deal with potential customers. Stoterau had the boy come to his home, where he made the photographs and uploaded them to rentboy.com. Stoterau would refer the customers to the boy, and the boy would share the fee he earned having sex with the customers with Stoterau. After this had been going on for a short period of time, Immigration officials executing a search warrant at Stoterau's residence seized his computer, found the boy's sexually explicit photos on the hard drive, and ultimately discovered Stoterau's activities. He pled guilty to the one count, but Judge Guilford took the whole range of his activity (and a past criminal record) into account in sentencing him to twelve and a half years in federal prison to be followed by five years of supervised release, during which his activities are to be severely restricted. The appeal contested the length of the sentence and the nature of many of the restrictions. The one slip-up by the trial court was to restrict Stoterau's access to "pornography" without being any more specific than that, a violation of 9th Circuit precedent. Judge Ikuta wrote, "We have previously held in the supervised release context that the word 'pornography,' without more, is too vague to put the defendant on notice of 'what conduct will result in his being returned to prison.' *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002). We explained: 'Reasonable minds can differ greatly about what is encompassed by "pornography." given this inherent vagueness, Gagliardo cannot determine how broadly his condition will extend. Further, we cannot determine whether the condition is otherwise reasonable under 18 U.S.C. sec. 3583(d).'" Consequently, the court vacated that one condition and remanded for Judge Guilford to "impose a condition with greater specificity." However, all other restrictions were upheld, as well as the lengthy sentence, the court finding it was well within the guidelines and that Guilford was not limited to the specified offense to which Stoterau pled guilty in determining an appropriate sentence. (Many of the other conditions of supervised release present interesting issues, but the one mentioned here seemed the most pertinent to *Law Notes* readers.)

Federal — Coast Guard — The Coast Guard Court of Criminal Appeals rejected a challenge by a Coast Guard Academy cadet to sodomy charges filed against him for what he alleges was consensual conduct with a female cadet. The conduct in question directly contravened regulations concerning sexual activity in the Academy buildings. *U.S. v. Smith*, 2008 WL 948260 (April 9, 2008). "The Regulations for the Corps of Cadets includes an Article 4–5–05 entitled Sexual Misconduct," the court explained. Paragraph a.3 thereof prohibits sexual conduct on board military installations, which includes the Academy, even if between consenting cadets. We find that Appellant's conduct, as he testified to it, was outside any protected liberty interest recognized in *Lawrence [v. Texas]*. We note that a holding otherwise would apparently yield the anomalous result that the regulation would be enforceable as to all forms of sexual conduct except sodomy, as the Government pointed out at oral argument," noting that the court had found "no authority suggesting that military regulation of sexual conduct generally may be unconstitutional." The court found that this regulation distinguished the case from other military appeals cases overturning heterosexual sodomy convictions for conduct in military barracks where there was no evidence that a regulation prohibited all sexual activity in the barracks. "We are not aware of any court-martial appellate decision overturning a sodomy conviction based on *Lawrence* when there was a regulation aside from Article 125 UCMJ, prohibiting the behavior," concluded the court. More mechanistic jurisprudence could not be imagined. *Lawrence*, properly construed, arguable protects all private consensual adult sexual conduct, although we note with sorrow that altogether too many courts have failed to see this in a wide variety of cases.

Massachusetts — The office of Massachusetts Attorney General Martha Coakley announced on April 29 that Suffolk Superior Court Judge D. Lloyd Macdonald had issued a permanent civil rights injunction against Justin Tompkins, age 23, and Jonathan Braxton, age 29, who were alleged to have assaulted, threatened, intimidated and coerced gay teenagers on February 4, 2005, at a Dorchester pizza shop. The injunction prohibits the defendants from engaging in such behavior, and subjects them to contempt penalties of up to ten years in state prison for a violation. The injunction also prohibits contact with the victims or their families or anybody who assisted the AG's office in pursuing the case, and remains in effect for five years. *US State News*, April 29.

Massachusetts — The Supreme Judicial Court affirmed the first-degree murder conviction of Derek Glacken in the death of Francis Sullivan, a gay man. *Commonwealth v. Glacken*, 2008 WL 1135008 (April 14, 2008). Glacken claimed that he suffered post-traumatic stress disorder, evoking memories of childhood sexual molestation, when Sullivan made sexual advances, and acting under the compulsion of this had stabbed Sullivan 30 times. Glacken contested the wording of the trial judge's charge to the jury on the issue of self-defense, use of excessive force, and manslaughter. The court found no fault with the trial judge's statement to the jury that it should return a verdict of guilty of manslaughter if it found that "the Commonwealth has proven that the defendant unlawfully killed the deceased using excessive force in self-defense." Glacken unsuccessfully argued that this misled the jury as to its ability to appraise the evidence presented in his defense, by making jurors think they were restricted to considering the evidence presented by the prosecutor. The court observed that while the quoted language might appear misleading when pulled out of context, when considered in the context of the entire charge it would not be misleading to the jury.

New Jersey — The New Jersey Appellate Division ruled in *State v. Whittington*, 2008 WL 1820670 (April 24, 2008), that the trial court had correctly kept from the jury the information that the teenage male victim was gay in a case where the adult male defendant was being tried for sexual assault and endangering the welfare of a minor. The evidence against the defendant, a junior pastor at a church, showed that he had taken advantage of a situation where the victim was sleeping at defendant's house to attempt to initiate sexual activity with the victim, then a

12 year old boy. Defendant claimed that the victim's charges about what happened that night were false, and claimed that evidence of the victim's "homosexuality" would go to the victim's "motivation to bring false allegations against the defendant" and would support the defense that the victim initiated the sexual activity. The trial judge decided after conducting a pretrial hearing to "follow the rape shield statute," so that no mention could be made about the victim's "lifestyle" apart from conduct on the night of the alleged incident. The defendant was convicted on the endangering charge. Backing up the trial court, the per curiam appellate panel wrote the "relevant evidence is defined as either evidence material to proving the source of semen, pregnancy or disease, or as evidence that the victim freely and affirmatively permitted the alleged sexual behavior. NJSA 2C:14–7(c) and (d). Here, the question of whether D.H. was the aggressor is not a relevant factor in the sexual assault of an eleven year-old boy, pursuant to NJSA 2C:14–2(b), or in endangering the welfare of a child, under NJSA 2C:24–4(a). Even if the boy were an acknowledged homosexual at age eleven, the evidence had no probative value in proving who initiated the sexual activity." A.S.L.

Legislative & Administrative Notes

Arizona — The House gave preliminary approval on April 22 to a proposed constitutional amendment to define marriage as solely between one man and one woman, attaching it to an unrelated bill that has already been approved by the Senate. By this device, the proponents hope to be able to send it back to the Senate under rules the preclude tinkering with it through floor amendments. The measure is narrower than one defeated by voters in 2006, which would have also banned civil unions or other arrangements providing benefits to domestic partners. That measure drew heated opposition from the large Arizona retirement community that includes many unmarried couples, some of whom benefit from such programs. *Yuma Sun*, April 22. A previous proposal had been derailed earlier in the session when it was amended on the floor to expand domestic partnership rights, thus losing the support of its firmly anti-gay proponents. *Arizona Republic*, April 3.

Arizona — The governor's Regulatory Review Council voted 4–0 on April 1 to approve a proposal to make health insurance coverage available to the domestic partners of state government employees and retirees, as had been proposed by Governor Janet Napolitano. The council approved a rules change altering the definition of "dependent" to include domestic partners, regardless of whether same sex or different sex. The new coverage rules are expected to take effect on October 1. *Associated Press*, April 1.

Florida — The State Senate's Commerce Committee voted 7–1 to approve a bill that would prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations. The bill had bipartisan support in the committee. Its chances in the full Senate are uncertain, however, but the committee passage was hailed by gay rights activists as a historic step. *Press Release, Palm Beach County Human Rights Council*, April 8. ••• The Pinellas County Commission approved a measure to amend the county's human rights ordinance to cover sexual orientation. The measure also promised a study to consider expanding the ordinance further to encompass gender identity, which resulted in two members voting against the overall resolution. A critic from the Florida Family Association, an organization that is opposed to families headed by same-sex couples, called the vote "a political move to appease a very powerful, secular, progressive political group." If this group is "very powerful" how come Florida still has a statutory ban on adoptions by gay people and a statutory ban on same-sex marriages being performed or recognized in the state, and how come Florida does not have a state law forbidding sexual orientation discrimination? Some power.... *St. Petersburg Times*, April 23.

Florida — At the end of April the legislature finished work on a bill requiring school school district to have a process for reporting and investigating complaints of bullying, mandating counseling for bullies and victims. The legislature avoided controversy over which categories of protection to include in the bill by omitting a list, but statements by the proponents indicated their intent to include coverage for disability, ethnicity, gender identity and sexual orientation. Whether courts will see it that way in the event a particular school district's policies are challenged is an open question. The governor is expected to sign the bill. *Miami Herald*, May 1, 2008.

Louisiana — A proposal to strengthen a vague state law concerning bullying in public schools by specifying categories of protection, including "sexual orientation," was overwhelmingly rejected by a vote of 28–63 in the Louisiana House of Representatives on April 29. One Republican member, Rep. John LaBruzzo, from Metairie, cited opposition to the bill by the Louisiana Family Forum, an organization that believes that beating up gay kids in school reinforces traditional family values. *Baton Rouge Advocate*, April 30. After all, homophobia is a traditional family value, right?

Missouri — The Kansas City, Missouri, City Council voted unanimously on April 3 to enact an ordinance forbidding discrimination on the basis of gender identity in employment, housing and public accommodations. Mayor Mark Funkhouser is a supporter of the measure. The ordinance amends the city's existing civil rights law, which already covers sexual orientation. *BNA Daily Labor Report*, No. 66, April 7, 2008.

New York — The Empire State Pride Agenda reported on April 9 that the New York State Office of Children and Family Services has adopted a policy and guidelines prohibiting discrimination against LGBTQ youth in juvenile justice and other facilities that the agency operates. It is reported that LGBTQ youth in state facilities have encountered harassment and discrimination at times, accompanied by ineffective assistance and protection from the staff of those facilities. The State Assembly has passed a bill addressing the issue, but there is no companion bill in the Senate, where the Republican majority has proved resistant to lobbying on the issue thus far. Filling the vacuum with an administrative policy is a stop-gap measure that may be useful in getting facility staff to take more effective steps to protect LGBTQ youth under their custody and control.

North Carolina — The Medical Care Commission unanimously approved a new rule stating that "a patient has the right to designate visitors who shall receive the same visitation privileges as the patient's immediate family members, regardless of whether the visitors are legally related to the paitient." The rule was adopted in response to petitioning by the Equality NC Foundation, a gay rights group. The Rules Review Commission has also approved the rule, and it was to be effective as of May 1, 2008. The foundation's Executive Direcctor, Ian Palmquist, advised same-sex couples in the state that the rule does not substitute for executing a health care power of attorney, since the rule only covers access, not decision-making. *Q-Notes*, April 22.

Ohio — Franklin County Commissioners voted to formalize an informal policy banning sexual orientation discrimination in county employment. The Commissioners also voted to call on the state legislature to pass a statute banning sexual orientation discrimination in the state. The city of Columbus, which has an ordinance banning sexual orientation discrimination, is situated in Franklin County. *Columbus Dispatch*, April 2. A.S.L.

Law & Society Notes

Arizona — Responding to a renewed drive by conservatives to put an anti-gay-marriage constitutional amendment on the state ballot, State Representative Kyrsten Sinema (D-Phoenix) is circulating a petition to put another proposition on the ballot, which would forbid discrimination on the basis of sexual orientation and gender identity by employers in the state. Sinema, who needs 153,365 valid signatures to put her proposal on the ballot, has indicated that she

will withdraw the proposal if the marriage amendment is also withdrawn. *Arizona Daily Star*, April 6.

California — Opponents of same-sex marriage claim to have obtained sufficient signatures to put a proposed constitutional amendment on the ballot, narrowly focused on banning same-sex marriage in the state. This year, an initiative requires 694,354 valid voters signatures, equal to 8 percent of the votes cast in the last race for governor. The Limit on Marriage Initiative claims to have obtained more than 1.1 million signatures, and submitted its petitions late in April. The California Supreme Court is expected to rule on the pending same-sex marriage cases by June 2, setting up an interesting situation where, for the first time, voters may be taking up this issue in the face of an actual ruling finding that the existing statutory ban on same-sex marriage violates the state constitution. Hypothetical variations on this situation present fascinating analytical problems: What if the Court rules for same-sex marriage, but following the example of Massachusetts, throws the issue back to the legislature for appropriate legislation? Would the legislature do anything while an initiative is pending? Based on the recent past, the California legislature would be expected to enact, for a third time, the proposal to open up marriage to same-sex partners, and this time Gov. Schwarzenegger would have no intellectually respectable reason for vetoing it, especially since he has gone on record as opposing the constitutional amendment. What if, alternatively, the Court finds that the existing marriage law should be construed to allow same-sex marriage, while invalidating the existing specific ban on recognizing such marriages? Would there be a window of opportunity for same-sex couples to marry in California prior to election day, and then be faced with contests about the meaning of their marriages if the measure passes?

California — Wells Fargo held its annual shareholders meeting on April 29 in San Francisco. According to one news report, shareholders rejected a proposal to "implement a neutral sexual orientation discrimination policy." The news report provides no elucidation about the substantive content of the proposal or its purpose. Since Wells Fargo is known as a very gay-affirmative employer, one suspects the proposal was to "cut back" the company's support for its LGBT employees – just a guess. *US Federal News*, April 30.

Kentucky — The General Assembly Permanent Judicial Commission of the Presbyterian Church (USA), sitting in Louisville, Kentucky, issued a decision overturning a lower church court ruling that had sanction the Reverend Jane Adams Spahr for performing same-sex commitment ceremonies for lesbian couples in New York in 2004 and California in 2005. In an order issued on April 29, the Commission stated, "The ceremonies that are the subject of this case were not marriages as the term is defined. These were ceremonies between women, not between a man and a woman. It is not improper for ministers of the Word and Sacrament to perform same sex ceremonies." So the Commission is taking the position that although the denomination's Book of Order defines marriage solely in different-sex terms, there is no prohibition on blessings for same-sex couples that are not denominated as marriages. Rev. Spahr's reaction was to call this a "split" decision. "My concern is that they said I do not do marriages," she told a reporter from the *Lexington Herald-Leader* (April 30). "I did do marriages. What I care about is that you have a happy, healthy relationship. But again to hear that we are separate and unequal is so painful to me. Couples are couples. It was a split decision, a mixed decision." She also stated that she was "grateful" that the Commission "went with the decision of the presbytery that reaffirms my ministry," and indicated that she is meeting with more couples about performing ceremonies. She also said it would "go against my faith" for her to make a clear distinction between marriage and a blessing for a couple when performing such ceremonies.

Ohio — The administration of Kent State University has decided to offer full benefits for same-sex partners of faculty members under its contract with the American Association of University Professors, ending a ten year struggle. A university spokesperson pointed out that four other universities in Ohio were providing the benefits, and that administrators, who had considered the proposal illegal, had been reassured that the passage of a so-called defense of marriage law in 2004 in a voter initiative was not applicable to this benefit plan. *Akron Beacon Journal*, April 3.

Texas — Delegates to the General Conference of the United Methodist Church, begin held in Fort Worth, Texas, voted on April 30 not to change the Church's current position opposing same-sex marriage and treating all homosexual acts as incompatible with Christian teaching. However, to prove that they are not homophobes, the delegates voted overwhelmingly to oppose homophobia. *Fort Worth Star-Telegram*, May 1, 2008. They apparently believe that condemning gay people for expressing their love for each other physically is not homophobia. Many psychologists would disagree with them on that.... The statement that the practice of homosexuality is incompatible with Christian teaching passed 517–416; a proposal that would change the Church's definition of marriage to include same-sex couples failed by a vote of 574–298, and the resolution opposing homophobia and discrimination against lesbians and gay men passed 544–365. So, it's OK to discriminate against lesbian and gay men, except when it's not....

Vermont — In an unheroic struggle to avoid controversy, the Vermont Commissio on Family Recognition and Protection issued its report on April 21, firmly taking no position on the question whether Vermont should amend its marriage law to allow same-sex marriages. Vermont has provided civil unions carrying virtually all the legal rights and responsibilities of marriage since 2000. The bulk of the report is given over to summarizing the testimony submitted by members of the public and various experts, and characterizing and quantifying that testimony. In the end, however, the Commission states that its charges did not include making a "specific recommendation" so it would not do so. However, it did recommend that the state "take seriously the differences between civil marriage and civil union in terms of their practical and legal consequences for Vermont's civil union couples and their families," describing their testimony as "sincere, direct, impassioned, and compelling," but then describing the state's civil union law as a "commitment to the constitutional equality and fairness for these citizens, and Vermont should preserve and protect that commitment." Anyone suffering from whiplash? A.S.L.

European Court of Justice Holds Same-Sex Partners May be Entitled to Survivor's Benefits

The European Court of Justice has ruled that a private pension scheme is required to provide equal treatment to survivors of same-sex partnerships and surviving spouses if, under the laws of the particular European nation, same sex partners are "in a situation comparable to that of a spouse," in *Maruko v. Versorgungsanstalt*, Case C–267/06 (ECJ, Grand Chamber, April 1, 2008).

Maruko's life partner was a theatrical costume designer and had been a member of a theatrical workers union and paid into its pension scheme ("VddB") since 1959. Maruko and his partner registered their partnership shortly after Germany created a life partnership law for same-sex couples, which provided for some, but not all, of the benefits of marriage. A few years later, Germany modified its social security scheme to provide equal benefits for surviving life partners and surviving spouses. Maruko brought suit when he was denied survivor's benefits by VddB after the death of his life partner in 2005. The Bavarian Administrative Court in Munich referred the case to the European Court of Justice to interpret whether European Council Directive 2000/78, establishing a "general framework for equal treatment in employment and occupation," applied in Maruko's case and required VddB to provide him with survivors benefits.

A panel of 13 judges on the court, which rules on questions arising under European Union Law, unanimously held that VddB was subject to Directive 2000/78. The court held that Article 3(3) of the Directive, which exempts State social security or social protection schemes from the equal treatment requirements, did not apply to VddB, because the scheme was financed by the industry and participant contributions, without any financial involvement by the State. The court held, based on prior rulings, that survivor's benefits constitute "pay," and that the equal treatment requirements of the Directive should be applied to VddB.

After concluding that the equal treatment requirements of Directive 2000/78 applied to the VddB, the court discussed whether the equal treatment provision was violated when life partners were denied survivor's benefits but spouses were not. The court held that the Bavarian court must decide whether, under German law, life partnerships are in a "situation comparable to that of spouses." The court held that if the Bavarian court so finds, the survivor's benefit plan's refusal to pay survivor's benefits to a surviving registered partner would constitute direct discrimination on grounds of sexual orientation prohibited by the Directive and would be unlawful.

Finally, the court discussed whether to limit the effect of applying the Directive retroactively in this case. The court found that since there was no evidence suggesting that the "financial balance" of VddB would be disturbed by a retroactive application of the Directive, no time restriction should be imposed and the ruling should be applied retroactively. Accordingly, if the Bavarian court finds that life partnerships are in a situation comparable to that of spouses, the VddB policy of denying survivor's benefits to surviving same-sex life partners will be declared unlawful, and Maruko would be entitled to a full remedy. *Bryan C. Johnson*

Irish High Court Recognizes Family Unit Based on Same-Sex Couple and Child

In a matter of first impression, Justice John Hedigan of the High Court of Ireland (a trial court) has ruled in *J. McD. and P.L. & B.M.*, 2007 No. 26M (April 16, 2008), that a lesbian couple and their child conceived through donor insemination enjoy the right of protection for their family life and status, consistent with European human rights law, and that the gay man who donated the sperm to conceive the child should not be awarded guardianship of the child or granted legally compelled access to the child. Judge Hedigan expressed confidence that the child's mothers would, consistent with their stated intentions, afford the donor some contact with the child voluntarily, as they had used a known sperm donor because they thought it would be preferable for the child to know its biological father at some point.

To preserve confidentiality and simplify his opinion, the Judge discussed the case by assigning letters to the relevant individuals. A is the donor, B the birth mother, C the birth mother's partner, and D the child, a boy now about two years old.

B, a native of Australia, and C, a native of Ireland, met in the U.K., became a couple, and eventually moved to Ireland. They desired to have a child, and prevailed on a gay male friend to be a sperm donor, but his donations did not lead to pregnancy for B. Then they met A, another gay man, in social circumstances, fixed on him as an alternative likely donor, and ultimately reached an agreement with him modeled on the agreement they had previously concluded with their gay male friend. The written agreement, which was not finally signed by the parties until shortly after B became pregnant, specified, among other things, that A would not be a parent, but would be treated like a "favorite uncle" with respect to the child, that B and C were the child's legal parents, that the parents were using a known donor because they thought it preferable that the child ultimately know who its biological father was, and that in the event something happened to B and C, A would be entitled to maintain contact with the child and be consulted about the appointment of a guardian. (This last element was added at A's instigation, and had not been included in the written agreement with B and C's gay male friend.) After B became pregnant, B and C contracted a civil partnership in the U.K. while maintaining their residence in Ireland.

As soon as the child was born, A began acting in ways inconsistent with the parties' written agreement, asserting himself in the situation such that B and C concluded he was thinking of himself as a parent and pushing towards parental rights, so they limited his contact. They planned to go to Australia for an extended visit of a year, and in support of those plans arranged to rent out their house, C giving notice at her job and planning to work in Australia. When A learned of these arrangements, he went to court seeking both to compel them to remain in Ireland with the child and to have himself appointed legal guardian of the child with visitation rights. In preliminarily litigation, the court limited B and C's Australian sojourn to a rather shorter period of a few months, and a court-appointed doctor was commissioned to study the situation and make recommendations. (This preliminary decision involved an appeal to the Supreme Court.)

In the event, the doctor recommended against guardianship for A, as not in the best interest of the child, finding the mothers were excellent parents and that the child had not formed any sort of child-parent bond with A. His forced intrusion into the family constellation was seen by the doctor as a negative prospect for the child. Among other things, the doctor considered that A's reasons for agreeing to be a sperm donor appeared not to have been well thought through, and that he might lose interest in the child in the long run.

Justice Hedigan confronted many legal questions as to which Irish law did not provide firm answers. He concluded, however, that although as the biological progenitor of the child A had a statutory right to petition for guardianship, the standard for ruling on his petition was "the welfare of the infant as the first and paramount consideration," according to Irish statutes. Furthermore, he found that the European Convention on Human Rights was relevant and that European precedents called for recognizing the relationship of B and C as a family, for which respect was required. Given the doctor's recommendations, as against the conclusions of an expert put forward by A who had not actually examined B, C or the child and who was speaking totally hypothetically, the paramount interest of the child would not be advanced, concluded the judge, by appointing A as guardian.

While the written agreement that the parties executed shortly after the insemination was not strictly binding as a contract, it was evidence of the intentions with which the parties engaged in the "project." There was some argument over whether A always intended to be a father to the child, or whether his attitude changed during the course of the project, paternal feelings perhaps unexpectedly emerging as the birth drew near, but in either event the court found that his conduct after the child's birth was contrary to the understanding of the parties and had resulted in a strained relationship between A, B and C, a loss of trust and confidence, such that it would not be in the interest of the child for the court to require A, B and C to remain in the close and frequent contact and interaction that would result from a guardianship appointment.

The 56 page opinion goes into great detail about the procedure of the case and the court's factual findings, as well as thoroughly reviewing Irish and European law that might apply to the situation. Ultimately, the court was striking out on some new ground in default of direct assistance from existing statutes and rulings, which Justice Hedigan acknowledged in his concluding remarks: "I must observe in conclusion that the absence of any provisions in Irish law taking account of the existence of same sex couples and securing their rights under article 8 of the European Convention on Human Rights seems something that calls for urgent consideration by the legislature. Included in this consideration should be the situation where such a couple wish one of them to bear a child. The evidence presented to the Court in this case was that this was something that was happening with greater frequency throughout the world than might have been

thought heretofore. A range of issue arise for consideration: access to fertility facilities, the need for counselling, the rights and likely problems of the parties among themselves, possible succession rights between child and biological father – all are matters that require careful consideration and possible regulation. It is to be hoped that current consider of the position of *de facto* families in Irish law may help to avoid in the future the emotional trauma to which the parties in this case have been subject."

The *Irish Times* reported on April 18 that the Attorney General's office was examining the opinion and might initiate an appeal to the Supreme Court. A.S.L.

Other International Notes

Australia — The federal government announced its intention to tackle the issue of inequality of rights of same-sex couples by introducing a series of measures to address individually the inequality issues under about 100 different national laws, rather than simply address the problem through a civil union or same-sex marriage law. Federal Attorney-General Robert McClelland stated, "The government believes that marriage is between a man and a woman so it won't amend the marriage act. But in all other areas that we've identified the issue of discrimination against same-sex couples, it will be removed. We anticipate that the reforms will all be introduced by the middle of 2009." Human Rights Commissioner Graeme Innes reportedly identified 58 statutes that needed changes, but commented that the government "has broadened the ambit a bit, and looked at some other laws which discrimination," thus producing the figure of about 100 laws to be changed. Rodney Croome, speaking for the Australian Coalition for Equality, criticized this approach, asserting that discrimination would not be eliminated until same-sex couples can marry. "While this is a very important reform in itself and it'll certainly remove many of the more severe disadvantages faced by same sex couples in Australia today," he said, "it's not the end of the matter. Until there's full equality in Australian law, for same and opposite sex couples, discrimination continues, prejudice continues and we can't allow that as a nation. Gay and lesbian Australians will not be fully equal until we are allowed the right to marry the partner of our choice." *Australian Broadcasting Corporation News*, April 30, 2008.

Australia — The New South Wales Anti-Discrimination Tribunal has ordered the Wesley Dalmar Child & Family Care agency to reconsider its policy against placing children in foster care with gay foster parents, finding that the agency's rejection of two gay men as foster parents violated the state's anti-discrimination law. The agency, affiliated with the Uniting Church, tried to claim religious exemption, but the tribunal noted that there were other Uniting Church agencies that had accepted gay applicants as carers for foster children, and rejected the religious exemption claim. *Discrimination Alert*, April 23.

Canada — Beginning May 1, the age of consent for heterosexual sex in Canada goes up from 14 to 16, cutting in half the gap between straight and gay sex in that country, where anal sex is outlawed until age 18. Time for somebody to bring an equality lawsuit? 17 year old gay men are committing a crime if they have anal sex together, but a 17 year old different sex couple are not committing a crime if they have vaginal intercourse. *Toronto Star*, May 1, 2008.

Canada — The Ontario Human Rights Tribunal found that a social services organization called *Christian Horizons* that operates group homes for persons with developmental disabilities had violated the legal rights of a worker who lost her job after she came out as a lesbian. The organization is funded almost entirely by the province's Ministry of Community and Social Services, with a payroll of over $63 million (Canadian), but imposes strict behavioral rules on staff, including bans on adultery, engaging in permarital or gay sex, using pornography, alcohol or tobacco. The plaintiff, Connie Heintz, was described as a "model employee" who lost her job when she admitted to a supervisor, who was inquiring as a result of workplace rumors, that Heintz was a lesbian. The tribunal ordered Christian Horizons to pay $23,000 with interest, including in that amount $5,000 for "the wilful and reckless infliction of mental anguish." The organization will also be required to adopt a non-discrimination policy consistent with Ontario laws and train its staff on compliance. The case has generated considerable press comment in Canada, due to the organization's religious freedom claims viewed in combination with its almost total dependence on public funding. *Waterloo Region Record*, April 24.

Canada — On April 14, the *Toronto Star" related the sad tale of Joaquin Ramirez, one of approximately 160 delegates to an international AIDS conference held in Canada who petitioned for asylum to stay in the country. Most of the delegates were successful, but Canadian authorities rejected the asylum petition from the native of El Salvador, who testified that he was afraid to return to the country because police officers who raped him visited his family and threatened to kill him because he infected them with HIV. Ramirez claims that when the three drunken officers seized him and drove him to a field to rape him, he begged them to use condoms because he was HIV+, but they just laughed and claimed he was lying so they would not rape him. They stole his money and a phone book, leaving him bleeding and bruised. He claims that five months later, a stranger called his sister trying to track him down and threatening to kill Ramirez for infecting him with HIV. The sister also said that some men fitting the description of the police officers have visited her home trying to locate Ramirez, at about the time his application to attend the AIDS conference in Canada was granted. The Refugee Board adjudicator found Ramirez's story not credible, asserting that he had already planned to leave El Salvador before these alleged threats occurred.*

China — The *South China Morning Post* reported on April 18 that Ying Ning, a 33–year-old transsexual, had been given a new identity card specifying female gender, evidently an unusual occurrence. According to the article, "There are believed to be more than 1,000 transsexuals on the mainland, but only Ms. Ying has publicly revealed her new identity." Yes, with an estimated population of more than 1.3 billion people, we suspect that mainland China has more than 1,000 transsexuals. Such perceptive journalism!

Colombia — According to the Blabbeando blog, the Constitutional Court of Columbia has ruled that same-sex partners have the same pension rights as married couples, as a result of a partnership registry system that was previously established in the country. Ironically, while the court has gone ahead to declare these rights, a bill pending in the legislature with similar intent has been blocked by a small group of conservative legislators.

Egypt — On April 9, a court convicted five men of homosexual behavior, under the rubric of "habitual practice of debauchery" under which consensual gay sex is prosecuted in Europe. According to an Associated Press story picked up by U.S. newspapers on April 10, "Homosexuality is not explicitly referred to in Egypt's legal code, but a wide range of laws covering obscenity, prostitution, and debauchery are applied to homosexuals in this conservative country."

Greece — The Greek Justice Ministry has established a working group to analyze legal issues raised by same-sex couples living together and recommend legislation, according to a Greek TV report late in March. This comes after the Greek Commission for Human Rights proposed establishing a civil union registry for same-sex couples that would carry the rights of marriage. Until relatively recently there was no civil marriage in Greece, where all different-sex marriage was either formalized by religious authorities or existed de facto without legal ceremony. The existing civil marriage law enacted in 1982 is gender-neutral, but has consistently been construed by authorities to authorize only different-sex couples to marry. *Novosti*, March 31, 2008.

Iraq — Amidst continuing reports of campaigns against LGBT people in Iraq comes news that somebody from outside the country is trying to help. The Heartland Alliance for Hu-

man Needs & Human Rights, a Chicago-based non-profit that provides assistance with US asylum and immigration issues for LGBT and HIV+ refugees, through its Global Equity Network project, is helping to raise funds for a committee of LGBT Iraqi exiles based in London that is funneling money to LGBT people in Iraq to maintain "safe houses" where endangered LGBT people who are in danger can find refuge. They originally had a rather large network of small safe houses around the country, but lack of funding has caused the network to shrink two two houses, both now drastically overcrowded and in desperate financial straights. Fund-raising efforts are going on quietly in the U.S. and elsewhere. Those interested can check at www.heartlandalliance.com, or send donations directly designated for the LGBT Iraq Project to Heartland Alliance, attn: Sean Casey, 208 S. LaSalle St., Suite 1818, Chicago IL 60604.

Israel — UPI reported on April 25 that Israeli officials, in a change of position, had agreed to the registration of an overseas adoption by a same-sex couple that would include a grant of citizenship to the child. The names of the parties were not revealed in press reports. Two gay men who hold dual U.S.-Israeli citizenship had adopted an 8–year-old Cambodian-born boy in the U.S. in 2000, then returned with him to their home in Israel and sought to have the adoption officially registered, which would have the effect of legally recognizing both of the men as parents of the boy and of granting the boy Israeli citizenship. Government officials at first resisted this request, instead issuing a temporary residence visa to the boy, which has been extended on a year to year basis. Now the registration and citizenship have been granted, "in view of the special circumstances of the case in question and the long time the minor has resided in Israel legally." This report raises interesting questions. Is the decision a one-off, due to the unusual circumstances, or will the government now routinely registered overseas adoptions by Israeli same-sex couples? Does this have the effect, as at least some in Israel are arguing, of state recognition of the couple and child as a family unit or even of an indirect recognition of marriage for same-sex couples? Things are developing piecemeal in Israel, where the courts have required the state to recognize same-sex couples for certain specific purposes, and the Supreme Court required ministerial employees to register same-sex marriages performed in Canada for Israeli nationals. (Registration, said the court, was not official recognition, yet it would affect what is written on the national identification papers of the individual concerning marital status.) To what extent does Israel have de facto same-sex marriage in certain specific circumstances?

Israel – Attorney General Menachem Mazuz has opposed the legal recognition as a parent of a woman who donated her egg to be fertilized with sperm from an anonymous donor and then implanted in her same-sex partner, who subsequently bore a son. The couple were unofficially (so far as the state is concerned) married in a ceremony conducted by a Conservative rabbi, and participated in a joint parenting process with the Health Ministry's approval. But the Interior Ministry refused to register them both as biological parents of the child, and the couple has petitioned the Tel Aviv Family Court to order that they both be recognized as parents. The position of the Justice Ministry, as dictated by the Attorney General, is that because of the anonymous sperm donation, "the applicants must undertake a formal adoption process to be recognized as the child's parents." But the women argue that their right to both be recognized as legal and biological parents of the child, without need for adoption, is a fundamental human right, as one is the genetic progenitor (egg donor) and the other is the birth mother. The women's attorney noted, "In adoption cases the state typically examines whether the applicant is fit to be an adoptive parent. However, since in this case the adoptive parent is also the child's biological parent, can the state make such a determination? Is this not unnecessary meddling by the state in these individuals' lives?" The irony of the A.G.'s position is that the birth mother, who is not genetically related to the child, is automatically acknowledged as his parent, while the other mother, who is the child's genetic progenitor, is not, setting in motion a debate as to whether refusing to recognize the genetic tie in this instance is good or bad as a matter of public policy? *YnetNews.com*, April 6.

Lithuania — The *Baltic Times* (April 8) reports that the European Court of Human Rights has refused to reopen a case against Lithuania that had been brought by an individual seeking sex reassignment surgery. The court had ruled last year that Lithuania's failure to adopt appropriate laws to provide such services rendered it liable to compensate the individual for the expense of going to another country where the procedure could be provided. The ECHR has ruled that the Convention's Article 8, requiring respect for private life, includes a requirement for signatory states bound by the Convention to acknowledge gender identity issues and deal with individuals accordingly.

Nepal — The *Times of India* reported May 1 that a minor communist party has designated Sunil Babu Pant, an openly-gay 35–year-old activist who founded Nepal's first organization dedicated to protecting the rights of sexual minorities, the Blue Diamond Society, to be a representative in the new constituent assembly. The election in Nepal involved voters designating their support for parties, who are allocated seats in the 601–member constituent assembly based on their degree of voter support, and then the parties designate individuals to represent them in the assembly. Pant is reportedly the first openly gay representative in the country's history. The Communist Party of Nepal-United, which designated Pant, won five seats. A party spokesperson, Ganesh Shah, announced the appointment and stated: "We are honoured to send Pant as our representative to the constituent assembly. We hope it will improve the lives of a people who are the most repressed in Nepal, disowned both by society and their own families.

Netherlands — The Equal Treatment Commission has ruled that a municipality could require anybody taking the job of marriage registrar to be willing to perform marriages for same-sex couples. Marriage has been open to same-sex couples in the Netherlands for many years now, although some local officials outside of the major cities are still resistant to performing the ceremonies based on their personal moral objections. The municipality of Langedijk had advertised the position specifying that applicants must be prepared to perform both different-sex and same-sex ceremonies, and was upheld by the Commission, whose rulings on such questions are advisory. At the same time, the Commission also issued an opinion that a feminist magazine may not exclude men from working in editorial positions. *NIS News Bulletin*, April 8.

Philippines — The *Cebu scandal* broke out when somebody on the staff of Cebu Hospital filmed emergency room workers extracting a perfume canister from the rectum of a gay patient and posted the film on YouTube for the "amusement" of the on-line world community. Criminal and administrative charges have been filed against the doctors and nurses who were performing the medical procedure and played a starring role in the video. Justice Secretary Raul Gonzalez also opined that the "callboy" who allegedly inserted the canister in the first place could be held criminally liable for mutilation and possibly other offenses under the Penal Code, if the patient decides to come forward and identify the culprit to authorities. *Manila Times*, April 30.

Russia — Moscow Mayor Yury Luzhkov has again announced that he will have the city government refuse to allow a planned gay rights parade during May. Previous attempts by the mayor to block gay rights activities have met with street demonstrations, international press coverage, and much adverse commentary, but the mayor appears undeterred, according to an April 25 article in the *Moscow Times*.

Singapore — The government has fined MediaCorp TV for broadcasting a show that featured a same-sex couple and their adopted baby. The Media Development Authority, with regulatory authority over broadcasting in the country, said that the episode of a TV series in question "normalises and promotes a gay life-

style" in violation of national broadcast standards. According to an April 25 article in the *Straits Times*, "The Programme Advisory Committee for English Programmes frowned on the episode's depiction of the relationship as an acceptable family unit, and of its airing during family viewing hours." Immediately apologetic, a spokesperson for the television station admitted having "overstepped the line." So we guess that any syndication deal to show *Queer As Folk* (either the U.K. or U.S.A. version) on Singaporean television is but a mere pipedream.

United Kingdom — The Reading Employment Tribunal in Berkshire ordered compensation to a gay security guard who was subjected to sexual harassment by a female colleague who was determined to seduce him and thrust herself upon him – quite literally, according to his testimony that she "wobbled her breasts" on his chest while they were working at Heathrow Airport. The Tribunal found that Allwyn Rondeau was a credible witness, despite the denials of Lucy Chilton, finding that she created an "offensive environment" at work. Finding sexual orientation discrimination, the tribunal next step will be to determine appropriate damages. The *Express* (UK), reporting on the decision on April 19, said that a "leading employment lawyer" speculated that Rondeau might be awarded something in the neighborhood of 30,000 pounds.

United Kingdom — An Employment Tribunal in Liverpool has determined that a transsexual woman who lost her job as a truck driver after beginning to feminize her appearance was the victim of sex discrimination in violation of British law. Military veteran Mike Gaynor obtained the job with Exel, a part of the DHL delivery firm, in October 2006, having obtained the necessary licensure from the Royal Corps of Transport, but began to experience discriminatory treatment at work as she appeared wearing make-up and jewelry. Gaynor is now known as Vikki-Marie. Having quit her job as a driver in response to physical and verbal harassment (constructive discharge), Gaynor has now launched a new business aimed at tackling transgender discrimination. Although her public transition is recent, she began cross-dressing in private two decades ago. *Liverpool Echo*, April 8.

United Kingdom — A step too far....? The Arts Council has run into flack for trying to collect data on sexual orientation as part of its process of providing government financial subsidies to performing arts organizations. Grant applicants are asked to state their sexuality on application forms, and organizations that apply for grants are asked to quantify the percentage of their board members who are bisexual, homosexual, lesbian or have unknown orientations. Sir Ian McKellen, the openly gay actor, ridiculed the Arts Council's requirements as "extraordinary." He said, "It shouldn't be on a form. It's quite inappropriate." Vanessa Redgrave suggested that "'everyone should put down 'trisexual', whoever you are. Britain has become the world's leading population of trisexuals.'" A spokesperson for the Arts Council pointed out that it was not compulsory for applicants to provide this information, "there is always an option to say 'don't know' or 'prefer not to say.'" *Birmingham Post*, April 3.

Uruguay — Uruguay's cohabitation union law, which creates a civil union status for same-sex and opposite-sex couples (who do not wish to marry) went into effect on January 1. On April 17, the first same-sex couple were married in a courtroom ceremony conducted by Judge Estrella Perez. The happy couple was Adrian Figueroa and Juan Moretti, who have lived together for 14 years. Cohabitants wishing this legal status must have lived together for at least five years to qualify. They receive the same legal rights and benefits that are accorded to traditional marriage in Uruguay. *Agence France Presse*, April 17. A.S.L.

AIDS & RELATED LEGAL NOTES

Illinois Supreme Court Affirms Denial of Liability in HIV Fraud Case

On April 3, 2008, the Supreme Court of Illinois ruled on the appeal in *Doe v. Dilling*, 2008 WL 879039, denying an HIV+ plaintiff compensation for injury allegedly caused by her fiancé's parent's misrepresentations to her that their son was not HIV+. Writing for the court, Justice Freeman held that Doe's claims of negligent and fraudulent misrepresentation were not proper outside of a commercial setting. Further, Doe should have been aware that her fiancé's declining health might have been due to AIDS despite any possible contrary information.

Through most of Doe's relationship with Albert Dilling, Albert had been in poor health. Doe asked Albert about his sexual history upon noticing dark spots on Albert's genitals, to which Albert responded, and Doe believed him, that they where just scars from having warts cauterized in his past. Doe and Albert later had unprotected sex in the hopes of having a child. Shortly thereafter, Doe experienced flu-like symptoms while Albert started having spells of dizziness. Doe never went to the doctor, however, as her symptoms soon abated and she assumed she simply had the flu.

The following year, as Albert's health continued to decline, Albert showed Doe a printout of lab results indicating that he had heavy-metal poisoning. Later that same year, Doe met Albert's parents, the defendants in this action, who also told her that Albert had heavy-metal poisoning. Months later, Albert twice injected himself with ozone and was taken to the hospital. As his pain continued to increase, Doe asked Betty Dilling, Albert's mother, whether Albert might have AIDS. Betty denied this. Doe later suggested to Albert's parents that they take Albert to the Mayo Clinic, a suggestion the Dillings rejected due to the expense involved. Albert continued to see doctors whom his father had recommended to him, later receiving a different diagnosis of Lyme disease.

Doe's own health began to decline and Albert's treatment for Lyme disease produced no results. Betty Dilling then told Doe that Albert had had a blood transfusion back in 1979, which Doe admitted she had already learned about from Albert. Doe took Albert to a new doctor, from whom they both learned of Albert's and Doe's HIV+ status. Albert died three weeks later, and Doe began treatment in the following months. Doe alleges that the Dillings misrepresented Albert's HIV status to her, keeping her from learning the truth of his sickness and from seeking treatment for herself in the early stages of her infection.

Conflicting testimony was entered at trial. The Dillings' former son-in-law testified that the Dillings were aware that their son had AIDS but did not want Doe to know about it. The Dillings contested that assertion, maintaining that they had no idea Albert was HIV+ until Doe told them. The trial court awarded Doe $2 million in compensatory damages for fraudulent misrepresentation. The intermediate appellate court vacated the award, holding that Doe had not sufficiently proved all the elements of her claim, most particularly the claim of reasonable reliance on the Dillings' representations. Albert Dilling's father died while the appeal was pending, leaving his estate and Mrs. Dilling as the defendants.

The Illinois Supreme Court affirmed the appellate court, although for different reasons. Justice Freeman, heavily citing *Prosser & Keeton on Torts*, noted that the tort of fraudulent misrepresentation has traditionally been recognized only in a commercial and transactional setting. Fraudulent misrepresentation evolved from the common law action of deceit, which only applied in financial transactions between parties. The tort now is generally considered an economic tort allowing recovery only for pecuniary harm. The Dillings asserted that expanding the tort to social relationships could lead to dire consequences. While the duty to deal honestly is cabined by the scope of a business transaction, there are no easily ascertainable limits in personal settings. The AIDS Legal Council of Chicago filed an amicus brief also

urging the court not to expand the tort, citing conflicts with confidentiality laws protecting informantion about a person's HIV status.

Justice Freeman noted that the only cases within Illinois allowing the tort within a personal setting were for misrepresentations by an adoption agency or by a biological parent to prospective adoptive parents concerning material information about the adoptive child. This narrow exception was permitted because agencies are in the business of facilitating adoptions and are the only party able to provide information of a child's medical history to the adoptive parents for the purpose of assessing the potential risks of adoption. Justice Freeman also noted that when the tort has been allowed in other jurisdictions for transmission of a sexually communicable disease, the action was brought against the person who actually transmitted the disease, and not against that person's parents.

After resolving the controversy at hand, Justice Freeman continued to explain why this particular situation would clearly be inappropriate for fraudulent misrepresentation, stating that Doe could not prove she had justifiably relied upon the statements made by the Dillings. Doe herself was knowledgeable about STDs and well educated and should have been suspicious enough to get herself tested. Doe ignored the obvious signs of Albert's and her own failing health. Further, Doe mostly relied on statements made first by Albert, thus making any alleged statements by the Dillings merely repetitive, and their statements to her occurred after she had engaged in unprotected sex with Albert. Nor could Doe prove that the Dillings had actual knowledge of Albert's HIV status. Justice Kilbride concurred in the result, but took issue with Justice Freeman's "unnecessary" discussion of Doe's reliance. Kilbride believed that the court's ruling was a policy decision based upon the historical application of the tort. Accordingly, the sufficiency of Doe's evidence was irrelevant. Justice Kilbride also noted that the majority failed to give appropriate deference to the jury's factual findings. *Chris Benecke*

Federal Court Affirms 6–Month Sentence for HIV+ Man Caught in Parks Sex Sting

A man caught in a law enforcement "sting operation" in the Wheeler Wildlife Refuge in Alabama won a reversal of his conviction on charges of indecent exposure, but will still have to serve a six-month prison term on charges of public lewdness arising from the same facts, according to an April 15 ruling by U.S. District Judge U.W. Clemon in *U.S. v. Burnett* , 2008 WL 1790276 (N.D. Alabama).

According to Judge Clemon's opinion, Julian B. Burnett was arrested on the Beaverdam Boardwalk after he unzipped his pants, pulled out his penis, started masturbating, and said to plainclothes police officer Greg Blanks, the only other person present, that he was interested in getting a "blow job." The Wildlife Refuge is federal property operated by the U.S. Department of the Interior, whose regulations provide that "any act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge." 50 CFR 27.83.

The U.S. Attorney charged Burnett with two crimes under Alabama law, made applicable by this regulation to conduct in the Wildlife Refuge: indecent exposure and public lewdness. Burnett was tried before a Magistrate Judge, and testified in his own defense, describing how, in his view, Blanks had led him on by nodding and appearing receptive. Among the facts that came out at the trial was that Burnett is HIV+, and this seems to have set off the Magistrate Judge, who didn't believe crucial elements of Burnett's testimony. The Magistrate Judge rejected Burnett's request that the jury be charged on the issue of lack of consent.

Upon Burnett's conviction, the Magistrate sentenced him to 6 months, the highest sentence available, stating, "Mr. Burnett, according to the testimony, solicited oral sex from the officer; he committed perjury by testifying in his own defense; and he knew he was HIV positive, thus, risking the possibility of transmitting the disease to others out there."

Burnett appealed the Magistrate's ruling to the district court. Judge Clemon found that the Magistrate erred on the consent issue. It seems that indecent exposure is classified in Alabama as a sex crime, and the Alabama Penal Code provides that "lack of consent" is an element in all sex crimes. Thus, the failure of the prosecutor to allege lack of consent made the charges legally insufficient, and the indecent exposure conviction had to be tossed out.

However, it seems that public lewdness is not a sex crime in Alabama, but rather an offense against health and morals, and the Penal Code does not make consent an issue in such cases, so the conviction of public lewdness stands.

As to the enhanced sentence, Judge Clemon observed that in the 11th Circuit the standard for review of sentencing is a deferential reasonableness standard. In this case, he wrote, "It is sufficient to note that the trial court included in the sealed transcript of the sentencing hearing (1) that it would use Burnett's HIV status in formulating the sentence and (2) that it had considered the factors under 18 USC sec. 3553(a). The trial court also noted that it considered the fact that Burnett committed perjury when he took the stand in his own defense as well as the seriousness of the sexual offense Burnett was charged with committing – especially with respect to Burnett's HIV status." Clemon pointed out that prior 11th Circuit precedent supports considering the defendant's HIV status in sentencing "when the offense either did or had the potential to communicate the virus to others." Under the circumstances, Clemon found that the sentence was "reasonable."

The result: For committing an offense that usually draws a fine or minimal jail time, Burnett is going to serve 6 months because he is HIV+ and unconvincingly contradicted on the witness stand the plainclothes officer's account of the conduct that led to his arrest. A.S.L.

Federal Court Denies Summary Judgment in Deliberate Indifference HIV Inmate Treatment Case

Usually it's a slam-dunk for the defendants when they move for summary judgment in a pro se case brought by an HIV+ inmate claiming an 8th Amendment violation based on deficiencies in medical treatment. But not in *Hatten v. O'Drain*, 2008 WL 594769 (M.D. Fla., March 4, 2008)(not officially published), in which District Judge Marcia Morales Howard found that former pre-trial detainee Jimmy Derand Hatten had alleged sufficient facts to maintain a 14th Amendment deliberate indifference claim against Lee County Jail medical supervisor Billy O'Drain, an unusual victory.

Hatten was a pre-trial detainee at the Lee County Jail. When he was booked into the jail, Hatten notified jail officials that he had HIV and required his meds. He also provided jail staff with contact information for his doctor, to avoid delays in verifying what he needed to have. Despite his efforts to facilitate this, he was not provided with his meds for a substantial period of time, the exact length of which is uncertain from the record, but seems to be at least a month and possibly several weeks more.

Defendant O'Drain asserted that the delay was attributable to Hatten's doctor failing to respond promptly to the information request from the jail, but Judge Howard found that a jury could conclude, based on the record, that there was delay of at least two weeks even after the doctor's response was received at the jail. O'Drain also disclaimed personal responsibility, noting that respondeat superior doctrine does not apply to such cases, but the court found the record could support imposing supervisory responsibility on O'Drain. O'Drain also contested whether this involved a serious medical condition and whether the delay was of any consequence to Hatten's health, but Judge Howard found that other courts have denominated HIV infection as a serious medical condition, and that Hatten had alleged adverse symptoms that he attributed to the delays in treatment. Hatten also alleged that even when treatment began, he did not receive all the meds he was supposed to get on a consistent basis.

Refusing to grant summary judgment in favor of O'Drain, Judge Howard noted that as a pre-

trial detainee Hatten was bringing his claim under the 14th Amendment Due Process Clause rather than the 8th Amendment (which provides the standard for such claims brought by convicted prisoners serving their sentences), but the case law supports using the same "deliberate indifference" standard in the 14th Amendment context. A.S.L.

Federal Court Allows HIV+ Inmate to Pursue Eighth Amendment Claim Against Prison Health Contractor

U.S. District Judge Sue L. Robinson found that an HIV+ inmate claiming that he was deprived of medical care can assert his 8th Amendment "deliberate indifference" claim against Correctional Medical Services (CMS), the much-criticized for-profit corporation that contracts to provide health care to prison inmates in many jurisdictions. *Carter v. Taylor*, 2008 WL 839204 (D. Del., March 29, 2008). However, Robinson rejected the plaintiff's request to make his case a class action suit, and also found that he had failed to state a claim under the Americans With Disabilities Act (ADA) because, among other things, HIV infection does not necessarily constitute a disability within the meaning of that statute.

According to Robinson's summary of Aaron Carter's pro se complaint, "he alleges that it takes months to see a doctor, he was not permitted to take AIDS medications due to his housing assignment, on one occasion he passed blood and sought medical attention but did not receive it, he is unable to take his medication at prescribed times, and CMS refused to provide him medical services due to his housing assignment." Carter also complained that the double portions of food ordered for him, to counter the wasting effects of his illness, were only provided briefly. Carter asserted his claim against various defendants, the lead named defendant being Delaware's Commissioner of Corrections, and including CMS, the provider of health care at Delaware Correctional Center, as an individual named defendant.

CMS moved to dismiss for failure to state a claim, arguing that its involvement is not specifically alleged as it may not be held liable on a *respondeat superior* theory, that Carter failed to allege an unconstitutional policy or custom against CMS, or that the execution of such a policy caused the constitutional tort that he alleges in his complaint. In other words, CMS filed a rather formulaic dismissal motion on this point, non-responsive to Carter's factual allegations, which earned from Judge Robinson the scorn it deserved.

"The complaint alleges that plaintiff has a chronic condition (i.e., AIDS), that CMS was aware of his medical condition, and that CMS either denied or delayed his medical treatment, as well as treatment to other inmates with chronic care conditions who are housed in SHU or MHU," wrote Robinson. "Liberally construing the complaint, the court finds that, on a motion to dismiss, plaintiff has adequately alleged a deliberate indifference to a serious medical need based upon the policy or custom of CMS with regard to chronic care inmates housed in SHU or MHU. Therefore, the court will deny CMS's motion to dismiss for failure to state a claim."

But the court was unwilling to conclude that a pro se plaintiff would be an adequate class representative in 8th Amendment litigation, so refused to certify a class in this case. As to the ADA claim, Judge Robinson noted preliminarily that under *Bragdon v. Abbott*, 524 U.S. 624 (1998), the authority Carter cited for the proposition that he is an individual with a disability within the meaning of the ADA, "the Supreme Court declined to address the issue of whether an HIV infection is a per se disability under the ADA," and that in the subsequent case of *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Court made clear that a complaint must do more than allege an impairment; the plaintiff must also specify one of his major life activities that is substantially impaired by his HIV infection, and Carter made no such allegations in his pro se complaint.

But, more to the point, Robinson observed that Carter was not complaining that he was singled out for adverse treatment by CMS because he was HIV+. Rather, as his petition for class certification made clear, he was claiming that CMS discriminated generally in the provision of health care services against all the inmates in his housing unit, who had a variety of different medical conditions. Thus, Robinson dismissed the ADA claim asserted against CMS. A.S.L.

AIDS Litigation Notes

Illinois — A recurring phenomenon: HIV+ people who went on disability back in the period before "the cocktail" now face termination of disability benefits as their continuing treatment renders them employable. *Jenkins v. Price Waterhouse Long Term Disability Plan*, 2008 WL 895662 (S.D. Ill., March 31, 2008). Charles Jenkins worked for Price Waterhouse as an accountant from 1989 to 1993, when he went on disability due to complications from HIV infection. At the time, he was determined by the employer's long-term disability insurer, Connecticut General, to be disabled and qualified for benefits, which CG paid out without protest from June 1994 to January 2006. To maintain his eligibility for the benefits, Jenkins had to submit evidence from time to time on his physical condition and ability to work. In 2004, he was examined by a doctor designated by GC who concluded, after conferring with Jenkin's own physician, that it was possible for him to return to work. Jenkins resisted this conclusion. More physical exams with other doctors followed over the course of 2005, and finally CG determined based on the doctor's reports that Jenkins was no longer disabled. He received a letter notifying him of this conclusion in January 2006, and stopped received benefits at the end of that month. He filed an appeal, and a new set of evaluators concluded that he could work at a sedentary level job, resulting in denial of the administrative appeal and his resort to court. Meanwhile, Pricewaterhousecoopers (as his employer now was) terminated his employee status, cutting him loose from benefits eligibility. The court found that the decisions by CG and Pricewaterhousecoopers were not arbitrary and capricious, the standard employed for reviewing decisions by employee benefits plan administrators who are given discretion under plan documents to make such decisions. The medical evidence appeared to support the conclusions, perhaps not surprisingly in light of the general success of treating HIV+ people with protease cocktails.

Michigan — The Michigan Court of Appeals affirmed a conviction of first degree criminal sexual conduct and HIV-positive sexual penetration with an uninformed partner in the case of *People v. Selemogo*, 2008 WL 902287 (April 3, 2008). Kabelo Selemogo, a student at Ferris State University who is a native of Botswana, had a brief dating relationship with the victim, and arrived at her house seeking intercourse. She declined but let him come in, dozed off, and awoke to find him penetrating her. He ejaculated. He is HIV+, did not use a condom, and never told the victim about his HIV status. After his arrest, he acknowledged that he had been diagnosed HIV+ a few years previously. On appeal, he contested the trial court's order that he compensate his appointed attorney, claiming he could not afford to do so, and the court remanded for further inquiry on this. But the court rejected his argument based on a literalistic reading of the statute that he could not be convicted of "using HIV" when his offense consisted of ejaculating infected semen in another person.

Missouri — A pro se action brought by an HIV+ inmate concerning inadequacies in his health care was dismissed by U.S. District Judge Catherine D. Perry in *Grace v. Owens*, 2008 WL 1805377 (E.D.Mo., April 17, 2008). Judge Perry briefly summarizes the facts as follows: "Plaintiff alleges that he has HIV/AIDS and that he has missed several doses of his HIV medications since he has been incarcerated at ERDCC. Plaintiff claims that he disagrees with Matthews and Chastain about which drug cocktail he should be taking. Plaintiff says that he is suffering from stress as a result of missing his medications." Finding that the complaint fails to state a claim because Grace did not allege that a "policy, custom, or official action" of the institution's medical department has "caused

an actionable injury." Grace also failed to allege facts linking any of the named defendants in his complaint to the missed doses of medication. Further, Perry found that the allegations of disagreements about treatment were not actionable, since the standard for imposing liability is deliberate indifference resulting in deprivation of treatment, not mere disagreements about treatment.

New York — Working its way through an intricate process of statutory interpretation of the various iterations of the Ryan White CARE Act, a 2nd Circuit panel concluded that Nassau and Suffolk Counties (Long Island) and various AIDS services providers in those counties were entitled to injunctive relief against the Secretary of Health and Human Services, who had improperly reduced the allocation of federal financial assistance to these counties. *County of Nassau, New York v. Leavitt*, 2008 WL 1836382 (2nd Cir., April 25, 2008). HHS relied upon statistics showing a decline in the number of people living with HIV in the two counties to determine that the allocation of funds should be sharply reduced, but the plaintiffs successfully argued that a careful parsing of the eligibility language in the statute showed that they were still entitled to the heightened level of federal funding for AIDS-related services, based on the statistical records for recent years and provisions intended to help maintain existing services. The full analysis of the court is much too intricate to summarize in this format. Interested readers are referred to Circuit Judge John M. Walker, Jr.'s carefully written opinion.

Tennessee — The negligent failure to release an HIV+ inmate in sufficient time for him to get to a medical appointment outside the prison did not amount to a constitutional violation, in the view of U.S. District Judge J. Ronnie Greer in *Burdine v. Pilliers*, 2008 WL 1859850 (E.D. Tenn., April 23, 2008). "Insofar as lpaintiff's unfulfilled request to see a doctor is concerned," wrote Greer, "he has not described any problems he was having at that time with his HIV-positive condition that necessitated a visit with his doctor. The Eighth Amendment does not require that every request for medical care made by a prisoner be honored. Moreover, plaintiff has presented no allegations of fact from which to infer that defendant Pilliers possessed the requisite state of mind of deliberate indifference. Absent contentions to show that this defendant knew that plaintiff was experiencing adverse symptoms as a consequence of being HIV-positive or that the undescribed symptoms exposed plaintiff to an excessive risk of harm, there is no viable claim of deliberate indifference." Greer also rejected a privacy claim, based on staff members talking about Burdine's health problems in front of other inmates, stating that "although the kind of casual, unjustified disclosure of confidential medical information as is alleged here may well be unprofessional, the plaintiff has not show that he has been deprived of a right, privilege or immunity secured to him by federal law, and his allegations are insufficient to state a claim under Section 1983. Greer based this ruling on two 6th Circuit decisions, one holding that disclosure of medical records does not constitute a breach of a fundamental constitutional right, the other that disclosing an inmate's HIV status to corrections officers does not violate the inmates rights. Of course, neither of these holdings directly supports the conclusion that there is no violation in disclosing this information *to other inmates" or that disclosure of particular information that could subject an inmate to adverse treatment, such as HIV+ status, might enjoy particular protection, as some courts in other circuits have found. This is a pretty lame decision from the point of view of constitutional law. Judge Greer was appointed by George W. Bush, and is thus part of his exalted legacy to the federal bench.*

Tennessee — The Tennessee Court of Criminal Appeals affirmed the conviction of an HIV+ man who raped a woman, transmitting HIV to her, on multiple counts involving aggravated rape and kidnapping, but remanded the case for resentencing due to errors by the trial court in applying a new sentencing law retroactively to conduct predating the law, and reconsideration of whether sentences for some of the counts should be consecutive or concurrent. *State v. Banks*, 2008 WL 1699440 (April 11, 2008).

West Virginia — Accepting a magistrate's report, District Judge Robert C. Chambers found that a symptomatic HIV+ man was not qualified for social security disability benefits in *Yost v. Astrue*, 2008 WL 819334 (S.D.W.Va., March 25, 2008). As is typical in such cases, the administrative judge found that HIV infection is a severe impairment but that under his current treatment regimen the individual retained sufficient physical and mental vitality to perform work. The standard for disability is basically being so impaired that one cannot perform any jobs available in the economy, and with only minor exceptions people with HIV who are receiving treatment are unlikely to meet that standard. These opinions tend to be lengthy and fact-specific, in this case showing that at the most recent hearing before the final decision was rendered at the administrative level, the individual reported having done some light work in his parents' store, that he had been doing some traveling, and that his mood was "okay." Hardly the stuff of which a disability determination is made, although the record is also replete with various physical complaints and impairments that undoubtedly make life complicated and uncomfortable. A.S.L.

International AIDS Notes

Canada — Superior Court Justice Joseph Quinn sentenced Carl Leone, 32, to 18 years in prison after Leone pled guilty to fifteen counts of aggravated sexual assault relating to his having sex with women without telling them he was HIV+. According to a report by *The Canadian Press* (April 4), five of Leone's sex partners have seroconverted. Leone expressed remorse, and the judge refused to designate him as a dangerous offender, which would have led to indefinite imprisonment. There is no indication in the news report about the case that Leone ever misrepresented his HIV status, but merely that he failed to disclose it while engaging in consensual unprotected sex with adults. In other words, the criminal law requires disclosure and does not, apparently, at least in Canada, impose any responsibility on individuals to act prudently to preserve their own health. According to the news report, Leone, who lived in a "sex-drenched, drug-drenched environment," frequented strip clubs and had lots of casual sex. He was told by health workers in 1997 that he was HIV+. He was arrested in 2004.

Thailand — The Thai Red Cross Society, opposing the recommendations of human rights organizations, has determined to maintain a policy against taking blood donations from gay men. The director of the National Blood Centre, Soisaan Pikulsod, stated that a recent study of unused blood donations that had tested HIV+ showed that most of the infected blood was donated by sexually active gay men, according to follow-up interviews. *Bangkok Post*, March 31, 2008. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Announcements

The New York City Bar Association's LGBT Rights Committee is hosting a forum at the bar association on Tuesday, May 13, at 6 pm, titled "Are LGBT Rights 'Civil Rights'?: Intersections and Disconnections in Movements for LGBT, Racial and Ethnic Equality." The speakers include Lynn Cothren, Director of Administration at Girl Scouts USA and former Special Assistant to Coretta Scott King; Prof. Suzanne Goldberg from Columbia Law School; Dr. Marjorie Hill, Executive Director of Gay Men's Health Crisis; Prof. Darren Hutchinson of American University Law School; and Victor

M. Marquez, President of the Hispanic National Bar Associaton. Free registration is recommended on the Association's website: www.nycbar.org/EventsCalendar.

The AIDS Resource Center of Wisconsin is accepting applications for a full-time staff attorney position in its Legal Services Department. The position is based in the Center's Milwaukee Office. For more information, visit the website at www.arcw.org. Cover letters and resumes can be emailed to employment@arcw.org or snail-mailed to Peter M. Kimball, Director, Legal Services Program, AIDS Resource Center of Wisconsin, 820 N. Plankinton Ave., Milwaukee, WI 53203. Review of applications will begin on May 7 and continue until the position is filled. Admission to practice law and to drive in Wisconsin are prerequisites of the job, as is at least one year of legal practice experience. Language skills (the Center has a bilingual clientele, and working knowledge of Spanish or Hmong will be considered a plus) are also relevant.

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Hoi, Michael J., *Substantive Due Process: Sex Toys After Lawrence (Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007)*, 60 Fla. L. Rev. 507 (April 2008).

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The on-line Social Sciences Research Network (SSRN) has added a section titled "Sexuality & the Law Abstracts," providing a convenient internet location where scholars in sexuality and the law can post their manuscripts and finished articles to be accessible for downloading. The editor is Nan D. Hunter, Professor of Law at Brooklyn Law School. The advisory board includes many other significant scholars in the field. Most institutions of higher education purchase group subscriptions to SSRN for their faculty. Individuals can inquire about subscribing at http://www.ssrn.com/subscribe. Because these materials are available only by subscription, normally through academic institutions, we will not generally list individual articles posted to SSRN until they have appeared in published law journals.

The National Center for Transgender Equality has published *Opening the Door to the Inclusion of Transgender People: The Nine Keys to Making Lesbian, Gay, Bisexual and Transgender Organizations Fully Transgender-Inclusive*, a publication geared towards helping LGBT organizations to improve their own inclusiveness. The guide is co-authored by Justin Tanis and Lisa Mottet, and can be downloaded at www.theTaskForce.org or www.nctequality.org.

Coincidence? The Sunday, April 27, 2008, edition of *The New York Times* included two substantial feature articles on same-sex marriages. The cover story of the Sunday Magazine, titled *Young Gay Rites*, by Benoit Denizet-Lewis, provided an extended examination of the phenomenon of 20–something gay men marrying in Massachusetts. A front page article in the Style Section, titled *Through Sickness, Health and Sex Change*, by Tina Kelley, profiled a New Jersey couple, the Brunners, who contracted a traditional different sex marriage but decided to continue their marriage when the husband made the gender transition from male to female, resulting in, as far as they know, New Jersey's only legal same-sex marriage. They testified before the Civil Unions Commission during the hearings concerning the effectiveness (or lack thereof) of the state's civil union law in providing equal rights to same-sex couples.

AIDS & RELATED LEGAL ISSUES:

Anderson, Cheryl L., *Comparative Evidence or Common Experience: When Does "Substantial Limitation" Require Substantial Proof Under the Americans with Disabilities Act?*, 57 Am. U. L. Rev. 409 (Dec. 2007).

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Loftspring, Rachel C., *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda*, 29 U. Pa. J. Int'l L. 243 (Fall 2007).

Zuck, Karen E., *HIV and Medical Privacy: Government Infringement on Prisoners' Constitutional Rights*, 9 U. Pa. J. Const'l L. 1277 (Sept. 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.