The Connecticut Supreme Court finally ended a protracted period of suspense that began on May 14, 2007, when Kerrigan v. Commissioner of Public Health, 2008 WL 4530885 was argued, announcing on October 10, 2008, that it had voted 4–3 in favor of the claim that same-sex couples have the same right to marry under the state’s constitution as different-sex couples. The official release date of the opinion is October 28. Justice Richard N. Palmer, writing for the court, found that the state’s 2005 Civil Union Act, which provides same-sex couples with access to all the state-law rights of married different-sex couples, failed the state constitution’s requirement of equal protection of the laws.

Although immediately stating her opposition to the decision, with having even read it, Governor Jodi Rell indicated she would not make an effort to overturn it, and it seemed likely that the legislature would pass implementing legislation rather than propose a constitutional amendment against same-sex marriage, given the politics of the state. A quick telephone poll over the weekend following the early release of the decision showed a majority of the public in support of the ruling. At the end of October, the Connecticut press was speculating that the decision would go into effect by about November 10, as the state had moved quickly to print up the necessary new forms and distribute them to the counties, and the trial court was expected to get the case on remand and issue its implementing order relatively quickly in default of any appeal by the state.

Connecticut places a question on the ballot every twenty years asking voters whether they desire a constitutional convention to consider modifications to the state’s constitution, and by coincidence that question is this year’s ballot. Most of the support for holding a convention has come from conservatives, including those opposed to same-sex marriage. However, news reports indicated that if the voters supported a convention, it would be convened at the direction of the legislature, its member needing a 2/3 vote of the legislature for appointment, so it appears unlikely that such a convention would be stacked with extremists pursuing a radical anti-marriage agenda. As a result, some were hailing the Connecticut result as completely “safe” from reversal or overruling, although the more cautious were awaiting the result of the ballot question before going that far.

Connecticut has no residency requirement or waiting period requirement for marriage, so out-of-state same-sex couples who have not yet taken advantage of the recent Massachusetts enactment opening up same-sex marriage there to non-residents may consider Connecticut a viable alternative. Licenses are usually issued promptly in response to an application, and license-holders then have 65 days to have a ceremony performed. The court did not specifically address when its ruling will go into effect. Presumably, the court’s remand to the trial court will take place on October 28, with directions to grant summary judgment to the plaintiffs, but that will still leave open the issue of implementation, and at this writing it was not clear whether the ruling would go into effect immediately upon granting the motion.

Connecticut thus becomes the third state in which the highest court has ruled in favor of a same-sex marriage claim, following Massachusetts in 2003 and California earlier this year. Courts in Vermont and New Jersey had also found a constitutional violation in the state’s denial of the benefits of marriage to same-sex couples, but left it to the state legislatures to remedy the constitutional defect, resulting in the passage of civil union laws in both states. A commission established under the New Jersey law has issued a report pointing out the ways in which civil unions in that state have failed to create an equal status to marriage for same-sex couples there, and Governor Jon Corzine had indicated willingness to return to the issue after this fall’s election. There has also been some agitation for the Vermont legislature to expand the state’s Civil Union Act, the first in the nation, into equal marriage status for same-sex couples. As this is written, the Nov. 4 elections are a few days off, so we don’t yet know the fate of California Proposition 8, which, if passed, would block further same-sex marriages in that state and leave a perplexing question as to the status of marriages that have been performed since the high court’s opinion last spring. The wording of Proposition 8, if construed literally, would suggest that those marriages become null and void in California, but Attorney General Jerry Brown has opined that those marriages would remain valid.

The Connecticut court faced a question similar to that confronted in California, where the legislature had also establish a legal status, which they called domestic partnership, that provided near-parity in state legal rights. Although the Connecticut court did not go as far as the California court in constructing a constitutional theory for requiring the state to go all the way to marriage, it did break new constitutional ground for Connecticut. (The California court found sexual orientation to be a suspect classification, and the right of same-sex couples to marry to be a fundamental right, and thus concluded that strict scrutiny should be applied to the state’s statute banning same-sex marriages.)

The Kerrigan case was originally filed by Gay & Lesbian Advocates & Defenders, the Boston-based public interest law firm, on behalf of eight same-sex couples whose applications for marriage licenses had been denied. At the time, GLAD had recently achieved its triumphant victory in Massachusetts and was seeking to build on that victory in a neighboring state where attempts to achieve legal recognition for same-sex couples had not gotten very far in the legislature. Many state and national organizations joined in support of the litigation through amicus briefs and various other forms of assistance to the plaintiffs. GLAD’s Bennett Klein was lead counsel on the case.

Filing of the suit, however, helped to spur the legislature on to the adoption of a Civil Union Act, making Connecticut the first state to adopt such a law without being ordered to take action by a state high court ruling, although in California the progress towards a broad domestic partnership law had similarly proceeded without the spur of a court order. (Since then, Oregon has passed a similar law without a court order.) After the civil union law was passed, the State of Connecticut moved for summary judgment in the marriage case, arguing that passage of civil unions had cured any possible constitutional defect.

This argument persuaded the trial judge, who granted the state’s motion for summary judgment, concluding that whatever difference there was between civil unions and marriage was not significant enough to raise a constitutional claim.

Every judge on the seven-member court disagreed with that initial proposition. The major-
ity and the three dissenting justices all agreed on this one point: that civil unions and marriage are different things, because marriage is more than just a bundle of legal rights. Marriage, as they all recognized, is a social institution of long standing that has meaning and social status beyond the concrete legal rights and responsibilities associated with it. Thus, all the judges agreed that the plaintiffs had raised a valid constitutional question.

The main disagreement was over the appropriate standard by which the court would evaluate this constitutional challenge. The most demanding level of judicial review is strict scrutiny, under which a law that abridges a fundamental right or disadvantages people based on a suspect classification is presumed to be unconstitutional unless the state can show a compelling need for the law that can only be achieved through the challenged policy. The least demanding level of judicial review is rationality review, where the right at stake is not deemed fundamental, or the law does not embrace a suspect classification. This mode of judicial review presumes the constitutionality of the law and places on the challenger the burden to show that there is no rational basis for it. In some cases, courts have recognized a level of review intermediate between these two, where important individual interests are at stake or where the law disadvantages based on a classification that might be called quasi-suspect. In these cases, the burden of justification is placed on the government to show that the challenged law advances some important state interest and does so better than any less discriminatory alternative. The court’s decision of which level of review to use plays a major role in the outcome of a case for obvious reasons.

In the California marriage cases, the court decided that the marriage law’s exclusion of same-sex couples discriminated regarding a fundamental right the right to marry and involved a suspect classification sexual orientation. As a result, it fell under strict scrutiny and the state’s arguments in support of the law were unavailing.

The Connecticut court was not willing to go that far, but the majority concluded that the law does discriminate on the basis of sexual orientation, and that gay people should be regarded as a quasi-suspect class under the state’s constitution, thus putting the burden on the state to justify excluding them from the right to marry.

Unlike the federal constitution, the Connecticut Constitution names specific characteristics as part of its equal protection provision, which includes sex but not sexual orientation, and the court was not willing to adopt the argument, which the California Supreme Court found appealing, that this was also an instance of sex discrimination. However, the court noted that its own past decisions had suggested that the existence of such an enumeration did not preclude the existence of intermediate categories, quasi-suspect classifications, since the constitution also made clear that the guarantee of equal protection extends to every person.

Justice Palmer carefully examined each of the various factors that the U.S. Supreme Court has used in identifying quasi-suspect classes under the federal Equal Protection Clause. Federal decisions would not be binding in construing the state constitution, but might be persuasive. There was general agreement among all the Connecticut justices that of most important four factors that the U.S. Supreme Court has invoked, gay people would qualify on three of them: a history of invidious discrimination against the class, that the characteristic in question is not relevant to a person’s ability to participate in society, and that the characteristic in question is either immutable or so fundamental to personal identity that the government could not insist on the individual trying to change it. Where the dispute came was on the question of political power. The Supreme Court has sometimes indicated that groups who are unable to protect their interests in the legislative process due to lack of political power may need the assistance of the courts through judicial review, justifying a higher level of scrutiny for laws that disadvantage them.

On this point, the dissenters argued that gay people actually have lots of political clout in Connecticut. After all, Connecticut was one of the earlier states to reform its sodomy law, and over the past several decades Connecticut has passed a broad gay rights law, has legislated to allow second-parent adoptions, and has passed the civil union law. Clearly, in the dissenters’ view, these legislative victories would have been impossible had gay people been unable to form the political alliances necessary to advance their interests. Dissenting Judge David M. Borden also noted that a same-sex marriage bill had been introduced in the legislature to great fanfare, had achieved significant cosponsorship, and had even been approved in committee, but had not been subjected to floor votes in the legislature yet for a variety of reasons.

To Borden and the other dissenters, Justices Christine S. Vertefeuille and Peter T. Zarella, gay political power in Connecticut was too far advanced to hold that gay people needed special protection of the courts as a “politically powerless” class.

However, the majority of the court concluded otherwise. Justice Palmer pointed out that the neither the U.S. Supreme Court nor the Connecticut Supreme Court had invariably insisted that all four factors must be presented to justify treating a particular group as needing judicial protection from discrimination. Indeed, he noted, it was clear from recent U.S. Supreme Court decisions that the current political power of particular groups was not a determinative factor. In recent cases, for example, the Supreme Court has found that race remains a suspect classification, even though some racial minorities have achieved substantial political power in this country, and that sex remains a suspect classification, even though women constitute a majority of the electorate and have made steady gains in placing their issues at the head of the legislative agenda. Indeed, in so-called “reverse discrimination” cases, the Supreme Court has used strict scrutiny to evaluate race discrimination claims by white plaintiffs, even though it would be hard to justify treating white people as a group as politically disadvantaged in the U.S. In such cases, the Court finds that “race” is the kind of characteristic that has been treated as a basis for discrimination in the past, has no necessary correlation with ability to participate in society, and is for purposes of analysis immutable, and that’s enough.

Palmer found an analogy of gay people and women to be appropriate for purposes of this analysis. Although the Connecticut Constitution expressly makes sex a suspect classification, the U.S. Supreme Court has refused to go that far under the federal constitution, instead using its multi-factor test to deem sex a quasi-suspect classification invoking intermediate scrutiny. Women, even more than gay people, have substantial political power, as shown by federal laws prohibiting sex discrimination and mandating equal pay for equal work regardless of sex, but women suffer from a history of discriminatory treatment by the state, usually based on stereotypes about the group. Gay people undoubtedly have less political power than women and satisfy the other tests.

Having concluded that intermediate or heightened scrutiny applies, the court put the burden on the state to justify having made available state law rights but denied the status of marriage. The court accepted the plaintiffs’ argument that civil unions are a lesser status than marriage, as civil unions are merely a bundle of legal rights and responsibilities, while marriage is a long-standing social institution. Indeed, noting the long history of discrimination against gay people in our society, the court majority saw the creation of a separate status (that included a declaration that only a man and a woman could marry) as a clear indication of inferior status.

Since the state had disclaimed any reliance on the bizarre “channeling procreation” theory that has won favor in some other state high courts that have rejected same-sex marriage claims (New York, Maryland, Washington State, for example), the court found only two justifications in the state’s argument: an interest in maintaining uniformity with the marriage laws of other states, and an interest in preserving the long-standing traditional definition of
The court found both of these justifications lacking.

As to the former, Palmer wrote, the state had not explained why it was important to maintain uniformity. Clearly, such uniformity is breaking down, as neighboring Massachusetts and California (at least for now), as well as some foreign countries, have same-sex marriage. But, in addition, while acknowledging that a desire for uniformity might provide a rational basis for the distinction in treatment between same-sex and different-sex couples, Palmer found that under intermediate scrutiny the state had a burden to show why it was important, and had not done so.

As to the interest in preserving the traditional definition of marriage, Palmer dismissed this without great effort, pointing out that it was a way of saying that discrimination is insulated from challenge just because it is longstanding, a point not deemed worth much refutation.

Justice Borden’s dissent, joined by Justice Vertefeuille, focused primarily on the political power point, although he had differences with other parts of the majority decision, including the court’s conclusion, in the absence of any real proof at least in his view that civil unions would turn out in the long run to be of lesser status than marriages. Justice Zarella, by contrast, differed with the majority on virtually every point, to the extent of reviving, in behalf of the state, the channeling procreation argument. An essential element of the court’s equal protection analysis was the assertion that same-sex and different-sex couples are similarly situated with respect to the right at issue, a point the majority embraced based on its view that marriage was not just about procreation or necessarily about procreation. Zarella argued that marriage was, at its base, all about procreation, which he deemed the main justification for the state recognizing and buttressing this institution. If procreation is so central, then same-sex and different-sex couples are not similarly situated, in his view, because the former cannot procreate through sex. Thus, for purposes of analysis, he implicitly rejects as irrelevant the significant plurality of same-sex couples who create new children through reproductive technology and then raise them in a family headed by a same-sex couple. Once a child is born, the public policy reasons for marriage that relate to child-rearing would appear the same for same-sex and different-sex couples, a point SSM opponents rarely acknowledge.

All of the dissenters expressed concerns about the court preempting the political process by constitutionalizing a right to same-sex marriage, with Borden emphasizing his view that the political process was just chugging along toward same-sex marriage in any event, so he saw no need for the court to rush in and finish the task. Justice Palmer’s rejoinder was to point out that the marriage bill had been pulled off the floor of the legislature without a vote due to many legislators stating they were not ready to vote on the issue. He also noted that at the time when the U.S. Supreme Court decided to treat sex as a quasi-suspect classification, there were arguments that the pending Equal Rights Amendment to the federal constitution, which had been approved by Congress overwhelmingly and sent to the states for ratification, would take care of the problem of sex discrimination, obviating the need to interpret the Equal Protection Clause to provide special judicial protection for women, but in the event the ERA fell short of the necessary states for ratification. (Some have argued, of course, that the ERA’s sails, giving cover to those who argued it was not needed because the Court had granted women the necessary protection.)

On October 28, the day the court’s opinion officially went into effect, Connecticut Attorney General Richard Blumenthal issued several opinion letters, directed to the Comptroller, the Department of Public Health, and the state’s Revenue Services, responding to various questions concerning implementation of the decision. The A.G. opined that the court’s decision did not affect the status of existing civil unions, but that civil union partners who wished to marry were not required to formally dissolve their civil unions before marrying. He indicated that civil union partners will continue to be eligible for all benefits guaranteed under civil unions after the change in the marriage law goes into effect. He announced that Connecticut would continue to recognize the validity of out-of-state civil unions, and would now also recognize the validity of out-of-state same-sex marriages. Same-sex marriage partners will be entitled to the same tax treatment as other married couples and parties to civil unions. The age restrictions for marriage in Connecticut law will continue to apply to same-sex marriages.

Blumenthal also stated that although justices of the peace are not required to perform marriages, if they do so it must be on a non-discriminatory basis. Blumenthal stated his expectation that the case would be remanded to the Superior Court and the necessary implementing orders would be issued quickly enough so that same-sex marriages could begin during the week of November 10.

A.S.L.

**LESBIAN/GAY LEGAL NEWS**

**7th Circuit Denies Asylum to Gay Jordanian**

The U.S. Court of Appeals for the 7th Circuit has denied asylum to a gay man from Jordan, in Janem v. Mukasey, 2008 WL 4466216 (7th Circuit, Oct. 3, 2008). The petitioner, an ethnic Palestinian, moved to Jordan with his family when he turned 18. He attended university in Jordan and obtained a degree in pharmacy. In 2002, he entered the United States on a visitor visa, overstayed, and eventually applied for asylum, withholding of removal, and protection under the Convention Against Torture, claiming that he would be subjected to an account of his homosexuality if he were returned. Before an immigration judge, the petitioner testified that his family had endured several anonymous phone calls from individuals claiming that he had “gone on the wrong path and that [he] had to go back to the basics, to ... [his] religion,” and that he had been assaulted after he was spotted kissing a male friend. The petitioner claimed that his attackers beat him on the head, poured gasoline on his body, and threatened to burn him alive with a lighter. Although he was urged to file a police report by the university security officers who rescued him from further assault, the petitioner testified that he did not want to because he felt it would cause a scandal. After hearing his testimony, the immigration judge suggested that the petitioner submit more evidence of persecution against homosexuals in Jordan and to hire an expert witness to testify on his behalf, and adjourned the case for 11 months. When the petitioner returned to continue his case, he claimed he could not afford an expert witness and provided no other evidence in support of his claims. In fact, the only evidence he submitted was a report from the British embassy in Jordan claiming that homosexuality is illegal in Jordan. The immigration judge found that, even assuming all of the petitioner’s testimony was credible and that homosexuality was illegal in Jordan, the petitioner would not face persecution if returned, and denied his case. The Board of Immigration Appeals affirmed the denial without opinion, and the case reached the 7th Circuit. Circuit Judge Kenneth F. Ripple, speaking for a panel of the court, held that even if the his testimony was credible, the petitioner had failed to satisfy his burden of proof because he failed to prove with any credible evidence that homosexuality is illegal in Jordan, or that any abuse he suffered was on account of government, rather than private, actors, pointing out that he was rescued by university security and urged to file a police report. Additionally, Judge Ripple was unimpressed by the fact that petitioner was unable to find a copy of the alleged Jordanian law against homosexuality in the 11 months between hearings. Accordingly, the petition for review was denied and the petition likely faces removal to Jordan. Bryan C. Johnson
The U.S. Court of Appeals for the 1st Circuit has remanded a gay Indonesian doctor’s asylum case to the Board of Immigration Appeals (BIA) to clarify the legal standard for evaluating economic persecution, in *Kadri v. Mukasey*, 2008 WL 4398717 (1st Circuit, Sept. 30, 2008).

The petitioner, a medical doctor from Indonesia, entered the United States in 2002 and filed a timely asylum application, stating that he was homosexual and was seeking asylum based on his inability to earn a living as a doctor in Indonesia.

He testified that in 1999, he was fired from a clinic where he worked because the owner could not “tolerate [his homosexual] behavior.” In 2001, the hospital where he practiced asked him about rumors that he was homosexual. After refusing to answer, the petitioner was verbally assaulted by a patient, who yelled repeatedly in a crowded emergency room: “Get out, faggot, and don’t touch my son.” Subsequently, the hospital asked him to resign. When he refused to quit, the petitioner earned only a meager base salary because no patients were assigned to him for care. The petitioner filed a lawsuit against the hospital which he eventually dropped because he felt he was being “tortured mentally” by the judge who demanded to know whether he was homosexual. The petitioner also testified that because the medical community in Indonesia was so small, the rumors that he was homosexual would follow him anywhere in the country, and that he would be unable to find work as a doctor.

An asylum officer referred the petitioner’s case to an Immigration Judge, who found his testimony credible and granted him asylum based on the economic persecution he had suffered. The decision was appealed by the Department of Homeland Security to the BIA, where, in a 2-to-1 decision, the petitioner’s grant of asylum was reversed. The BIA majority held that “the economic deprivations [the petitioner] suffered as a result of his sexual orientation ... do not amount to persecution.” The dissent would have remanded the case to clarify the legal standard used for evaluating economic persecution.

The petitioner appealed the reversal to the 1st Circuit. Circuit Judge Juan R. Torruella, speaking for a panel of the court, held that although economic persecution may be a valid basis for asylum, the standard for evaluating economic persecution was unclear due to disagreements between several Federal Circuits and the BIA. Judge Torruella noted that a recent BIA case had articulated a new standard: “[Nonphysical] harm or suffering ... such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life” may rise to the level of persecution. In light of that case and the confusion surrounding the legal standard that was applied to the petitioner’s case by the Immigration Judge, the petitioner’s case was remanded to the BIA to evaluate his claim of economic persecution under the recently articulated standard. Accordingly, the court made no findings of whether the petitioner actually suffered persecution or whether the standard set forth by the BIA was a correct interpretation of the immigration statutes, and he will have the opportunity to have those issues heard on remand. *Bryan Johnson*

9th Circuit Denies Asylum to Gay Man from Guatemala

A divided 9th Circuit Court of Appeals panel has affirmed the Board of Immigration Appeals’ decision to refuse asylum to a gay Guatemalan man, on the ground that he wrecked his credibility by fabricating his original petition for asylum in 1992, *Martinez v. Mukasey*, 2008 Westlaw 4459090 (Oct. 6, 2008). Circuit Judge Stephen Trott wrote for the court, with Judge Harry Pregerson dissenting.

The man fled Guatemala late in 1991 and filed his timely asylum petition in 1992 shortly after arriving in the U.S., claiming that he had been threatened with violence by the government as the leader of a dissent student group at the University of San Carlos. When this story was rejected as a basis for asylum, he changed his story and claimed that he had been persecuted for being gay and was seeking asylum based on his sexual orientation. What had significantly changed between the filing of his first asylum petition and his assertion of the new basis for asylum was that the Clinton Administration had taken office and Attorney General Janet Reno had adopted as precedential an asylum rule that gay people could be considered a “particular social group” for purposes of analyzing political asylum claims. This had been followed by some well-publicized cases granting asylum to gay refugees. See, e.g., *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005), cited by Judge Pregerson in his dissent.

The man’s assertion of this new claim was seen as totally undermining his credibility, regardless of its merit, because it showed up his original petition as false. Judge Trott wrote that the IJ and the BIA were justified in doubting the petitioner’s credibility as a result of this change of position. Furthermore, he pointed out that the man’s request to be allowed “voluntary departure” rather than to be forcibly deported by the government depended on his establishing that he was a person of good moral character who could be trusted to leave on his own with no need to be detained prior to deportation. Given these conclusions about his credibility based on his false testimony, the court was unwilling to grant this request.

Federal Court Rejects Civil Rights Claims by Transsexual Inmate


According to the complaint filed by Alexis Kaashaun Bell, who identifies as male-to-female transsexual, Bell was subjected to unnecessary strip searches in public view, accompanied by vulgar and degrading comments and, in one instance, being “tapped and rubbed” on the buttocks with a flashlight by a prison deputy. Bell filed complaints, which were allegedly ignored, or at least not responded to by prison officials, and sought injunctive relief. Bell has since been transferred to a different facility after conviction.

Judge Wu rejected the claim that the First Amendment right to petition the government includes a right to have grievances responded to. According to Judge Wu, a government entity can ignore and refuse to respond to citizen grievances without violating the right of petition.

After pointing out that vicarious liability does not exist in the context of prisons, absent evidence that the higher-ups who are named in a lawsuit have some actual operation connection with the rank-and-file workers accused of harassment, or knew or had reason to know that their subordinates are likely to commit acts that would violate the constitutional rights of detainees, Judge Wu concluded that prison higher-ups could not be held responsible for what the offending deputy may have done.

The judge also found no allegations that the county had some sort of policy of oppressing transgender prisoners through strip searching,
Lambda Legal successfully defended a $300,000 verdict awarded by a San Diego, California, Superior Court jury to two former students from Poway High School who suffered severe anti-gay harassment that school officials failed to redress. A unanimous three-judge panel of California’s 4th District Court of Appeal found that the evidence introduced at trial was sufficient to support the jury’s verdict, and that an erroneous jury instruction by the trial judge did not require setting the verdict aside. Donovan v. Poway Unified School District, 2008 Westlaw, 4531590 (October 10, 2008).

Plaintiffs Megan Donovan and Joseph Rammell encountered such frequent and severe harassment while attending the school during the period 2000–2003, going beyond vicious name-calling to threats of violence, assaults, and property damage, that the school district did not even try to argue that the harassment they suffered was not severe and pervasive. Indeed, the problem was so severe, and the failure of school officials to act was so discouraging, that both plaintiffs enrolled in a special program that allowed them to complete their senior years through home study rather than have to face the harassment for an additional year. The district contended that it should be relieved of liability because its response did not constitute “deliberate indifference” to the harassment.

The court found plenty of evidence to support the jury’s conclusion that the officials were deliberately indifferent. There was evidence that both plaintiffs had brought the problem to the attention of the principal, Scott Fisher, and the assistant principal, Ed Giles, many times, that they had submitted formal written complaints, but that the usual procedures of investigation and imposing sanctions on offending students was apparently not followed. Things got no better after they complained, not even temporarily.

The dispute on appeal went to the appropriate standard to be applied in construing a California statute that prohibits sexual orientation discrimination in schools that receive state funding, and whether individual students can sue for damages when they suffer sexual orientation discrimination in the form of harassment by fellow students. The plaintiffs had argued at trial that the standard to be applied should be drawn by analogy from the Fair Employment and Housing Code, which also bans sexual orientation discrimination, but the defendants argued that the school should not be held liable unless the “deliberate indifference” standard a constitutional standard was met. The trial judge agreed with the plaintiffs, and charged the jury using the FEHC standard on the statutory claim. However, the trial judge used the “deliberate indifference” standard to charge on the constitutional equal protection claim. The jury found for the plaintiffs on both claims.

The appeals court agreed with the defendants on the state law standard, but that was a pyrrhic victory for them, because the jury also found that the school officials had violated the students’ constitutional equal protection rights through their deliberate indifference to the harassment. Thus, the court found, even though it agreed with the defendants that the “deliberate indifference” standard was the correct one for the state law claim, the jury’s finding on the constitutional claim established that the standard had also been met for the statutory claim.

In order to subject the school district to liability under the statutory claim, the court had to make the additional finding that the principal and assistant principal were “appropriate officials” to deal with such situations, whose actions should be legally binding on the school district. The court concluded that the disciplinary authority and responsibility of those officials were sufficient to meet this requirement.

The plaintiffs had also named the superintendent of schools as a defendant, but he had been dismissed from the case, as the trial court quickly determined that he played no individual role in responding to student harassment complaints.

On broader questions of liability, the court looked to Title IX of the federal Secondary Education Amendments Act, which prohibits sex discrimination by schools that receive federal funding. Federal courts have concluded that students can bring sexual harassment claims under this statute, but it has not yet been established that sexual orientation harassment claims would also be covered by the federal statute. The state law has similar language to describe the obligation of schools to prevent discrimination, but it also includes sexual orientation as a specific category. The California court decided to apply principles developed under Title IX to establish standards of proof and liability under the state law, noting that the California law contained several categories of discrimination not covered by the federal law, but sought to achieve similar aims.

As to the right to sue for damages, the court looked to federal Title IX again, and found that federal courts had found an implied right to sue for damages, even though a literal reading of the statute might indicate that the failure of a school district to prevent discrimination would subject it only to the possibility of losing federal funding. The court was persuaded by federal decisions that had concluded that limiting the remedy to possible loss of funding would not be an effective way to achieve the statutory purpose.

There was also a dispute on appeal about the attorney fees awarded to the plaintiffs, which amounted to more than $400,000, an amount greater than the actual damages they were awarded. The court reviewed the time records of Lambda’s attorneys working on the case and concluded that they worked out to an hourly rate on the low side of reasonable and were appropriately documented. In addition, due to the complexities of the case, the trial judge had applied a small “multiplier” to the hourly rate, which the appeals court also found to be appropriate within the discretion given to the courts to compensate plaintiff attorneys in civil rights cases.

Lambda Legal Staff Attorney Brian Chase, based in the organization’s Western Regional Office in Los Angeles, is the organization’s lead attorney on the case. Lambda Legal’s Deputy Legal Director Hayley Gorenberg and co-counsel Paula S. Rosenstein and Bridget J. Wilson of the law firm Rosenstein, Wilson & Dean, P. L. C. in San Diego, join him on the case.

Federal Court Denies Habeas Corpus on Gay Voir Dire Claim

U.S. District Judge Frank R. Zapata, reiterating his denial of a petition for habeas corpus in response to a motion to amend or alter his prior judgment, rejected the argument that the petitioner’s state court trial was unconstitutionally tainted because the trial court refused to allow the potential jurors to be subjected to voir dire questioning to determine whether they were biased against gay people. Kemp v. Schriro, 2008 WL 4418164 (D. Ariz., Sept. 29, 2008). The court’s opinion does not indicate the nature of the crime for which the petitioner was being prosecuted.

Thomas Kemp claimed that the trial court committed a clear constitutional error by not allowing his counsel to screen jurors for homophobia. Judge Zapata noted that the Supreme Court has never held that the voir dire process must address anti-gay bias by potential jurors. Indeed, he asserted, although the Court has ruled in favor of voir dire on racial bias issues, such voir dire would not be automatic just because the defendant was a member of a racial minority group. According to Zapata’s reading of the case law, voir dire on race would be required only in cases where the issue of race was particularly implicated in the case.
Kemp had argued that such focused voir dire is mandated “on a case by case basis to circumstances where bias could be directed by a juror against a criminal defendant who is a member of a suspect class.” Zapata asserted in response to this argument that “homosexuals have not been defined as members of a suspect class,” noting the failure of the Court to use that term in *Romer v. Evans* and *Lawrence v. Texas*, as recently explicated by the 1st Circuit in *Cook v. Gates*, 528 F.3d 42 (2008).

On the other point, Kemp observed, “Here, there were no special circumstances of the type presented in *Ham v. South Carolina*, 409 U.S. 524 (1973) mandating voir dire on the issue of bias. Petitioner does not allege that the matters at issue in his trial involved allegations of [homosexual] prejudice: neither the Government’s case nor his defense involved any such allegations.” *Rosales-Lopez*, 451 U.S. at 192. Instead, he asserts that evidence of his homosexuality alone was sufficient to mandate voir dire on the issue of bias. This assertion is contrary to *Ham’s* requirement that special circumstances must exist before voir dire is constitutionally compelled.” A.S.L.

New York Trial Judge Rules That Lesbian Co-Parent Can Seek Custody and Visitation Rights

New York County Supreme Court Justice Harold B. Beeler has allowed NY Court of Appeals Chief Judge Judith Kaye’s dissent in the 1991 case of *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), to guide his steps in ruling that a woman should have a hearing to attempt to establish that she is a de facto parent of the child born to her former same-sex domestic partner, who was also her New York City registered domestic partner and her Vermont civil union partner. *Debra H. v. Janice R.*, NYLJ, 10/9/2008, p. 26, col. 1 (Sup.Ct., N.Y. Co.).

In what he characterized as a case of first impression, Justice Beeler found that the parties’ entry into a Vermont Civil Union at the time that one of the women was pregnant “is strong evidence of the parties’ intention to create familial bonds for their and [the child’s] benefit.”

Beeler’s October 2 decision followed in the wake of a ruling last spring by New York County Supreme Court Justice Laura Drager, in a case involving a lesbian couple married in Canada, who were seeking a divorce and a ruling on parenting issues for their child. Justice Drager found that the court should recognize the same-sex marriage for purposes of applying New York State laws governing divorce and child custody. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup.Ct., N.Y. Co., 2008).

In *Debra H.*, the petitioner and the respondent, Janice R., offer sharply different interpretations of the facts surrounding the conception and birth of M.R. in December 2003, and their respective roles during M.R.’s life up to the time that Janice, the birth mother, cut off Debra’s contact with the child in May 2008. Debra filed her lawsuit shortly after the cut-off, seeking joint legal and physical custody, parenting time and restoration of telephone contact with M.R., as well as appointment of an attorney to represent the child’s interests in this proceeding between the parents.

The main barrier to letting the case go forward is the state high court’s decision in *Alison D.*, a precedent theoretically binding on all New York trial courts. In last spring’s decision, Justice Drager found that the Canadian same-sex marriage made the non-biological mother a parent, and thus eligible to be considered for custody and visitation rights. In *Debra H.*, the parties had registered as NYC domestic partners and Vermont civil union partners, but were not married, although same-sex marriage became available in some parts of Canada as early as spring 2003. Justice Beeler determined to employ equitable powers, if the facts upon further hearing so warrant, to determine what is in the best interest of the child. Whether such a decision would withstand appeal is an open question.

Debra’s petition to the court paints a detailed picture of a couple intending to create a family together, asserting her full participation in the decision to have a child, in assisting her partner through the pregnancy, and in parenting the child after it was born. In her response opposing the petition, Janice argues that Debra has misrepresented the nature of the relationship and magnified her role in the child’s life. Among other things, Janice contends that she agreed to the domestic partnership and civil union to placate her partner, but not with the intention of creating a legal family. These contested facts would have to be considered at the hearing, but for purposes of deciding whether the court has jurisdiction over the case, the question is whether Debra’s allegations are sufficient to raise a legal claim under New York domestic relations law.

The Court of Appeals ruled in *Alison D.* that a lesbian co-parent who had not adopted her partner’s child was a “legal stranger” to the child, who had no standing to seek visitation rights under the Domestic Relations Law, which limits such standing to “parents.” In her dissent, Judge Kaye argued that the term “parent,” not specifically defined in the statute, should be broadly interpreted by the court to reflect the reality alternative families in New York, in order to achieve the overall goal of the statute to make custody and visitation decisions in the best interest of the child.

A few years after *Alison D.*, the Court of Appeals approved second-parent adoptions under the state’s adoption statute, so that same-sex couples who want to be able to access the custody and visitation statute in case their relationship terminates can do so by securing a legal relationship with their children for the non-biological parent. Debra had suggested adopting M.R., but somehow the parties never got around to it, and Debra claims that Janice, who is a lawyer, had assured her that adoption was not necessary because Janice “would never take M.R. away from her” and Debra, trusting her partner, decided not to pursue it further.

Stating his agreement with Judge Kaye’s dissenting argument, Justice Beeler premised his decision on numerous cases where courts have used the concept of “estoppel,” by which a party is precluded from denying the reality of a situation that they have helped to create. In family law cases, for example, estoppel has been used to require somebody who has been acting in the role of a parent to provide child support payments, and in some other states estoppel has been used to prevent a biological mother from denying that her same-sex partner had fulfilled the role of a parent to her child.

If Debra’s allegations are proven at the hearing, Beeler found, they would show that she was in fact a parent of M.R., and should be entitled to continue in a parental role if that is in the best interest of the child. Beeler forecast a series of two hearings, the first to determine whether Debra’s allegations are true, and the second to take evidence about whether it would be in the best interest of M.R. for the court to order that Debra be allowed to continue to play a parental role in the child’s life. In the meantime, Beller continued in effect a temporary order that he had issued allowing visitation several times a week between Debra and M.R., with a third adult present at all times.

Bonnie Rabin of Cohen Hennessey Bienstock & Rabin represents Debra H. A.S.L.

Queens, NY, Surrogate Expresses Doubts About Status of Canadian Same-Sex Marriage

Faced with conflicting information about the marital status of a gay decedent, Queens County Surrogate Robert Nahman issued an order in *Will of Alan Zwerling*, 2008 N.Y. Misc. LEXIS 5651, 240 N.Y.L.J. 49 (published in NYLJ Sept. 9, 2008), that Zwerling’s parents be joined as parties in the case, against the possibility that he would ultimately be determined to have died as an unmarried person.

We published a story about this case in the October issue of *Law Notes*, basing our article on what we could deduce from the court’s cryptic opinion. Since then, a communication from counsel for the estate has clarified the facts for us, producing a rather different story.

Alan Zwerling and Martin Orrego, New York residents, were married in Ontario, Canada, on July 12, 2007. After the wedding, they used the names Alan Orrego-Zwerling and Martin Orrego-Zwerling. However, Martin Orrego subsequently left Alan for another man and asked
for a divorce. A divorce proceeding was filed in Queens County and Alan revised his will to name his brother, also named Martin, as sole beneficiary. Then Alan died. His other brother, Andrew, from whom he had been estranged at the time of the wedding, notified the medical examiner of the death, and told the medical examiner that Alan was unmarried, so the death certificate identifies him as unmarried. Martin Orrego executed a Waiver of Notice and Consent to the probate of Alan’s new will, which disinherited him, and this was filed together with the Probate Petition, which correctly identified Alan as married and attached a copy of the Canadian marriage certificate. The Surrogate was thus faced with discrepant information as to which death certificate and the probate petition, but Andrew Zwerling executed an affidavit, submitted to the court, explaining the discrepancy.

Thus, the Surrogate was facing the following situation: A probate petition was filed identifying the decedent as married, accompanied by a will that left everything to the decedent’s brother, and by a waiver of rights and consent to probate of the disinheriting will by the surviving spouse, but the death certificate identified the decedent as unmarried, and was accompanied by an affidavit from the decedent’s other brother explaining why the death certificate read that way. The Surrogate, noting that the filing also included an affidavit of heirship indicating that Alan’s parents were alive, wrote: Ordinarily, where a decedent is survived by a spouse, the decedent’s parents are not parties to the probate proceeding (see EPTL 4–1.1). It appears, however, that the validity of same-sex marriages has not been definitely determined by the Appellate Division of the Supreme Court of New York, Second Department (see Funderburke v. New York State Dept of Civ. Serv., 49 AD3d 809 [2008]). In order to ensure that the decedee in this proceeding is final and not subject to a subsequent jurisdictional attack, the Court finds that the parents of the decedent are necessary parties (see EPTL 312). Accordingly, the petitioner is directed to obtain in personam jurisdiction over the parents of the decedent.”

Upon receiving the court’s order, counsel for the estate obtained a Waiver of Notice and Consent signed by Alan Zwerling’s parents, which was filed with the court, and Letters Testamentary were issued, which will allow only the substantial probate asset of the estate, a house that was purchased as tenants-in-common by Zwerling and Martin Orrego prior to marriage, to be sold, with the proceeds appropriately distributed between Orrego and Alan’s testamentary beneficiary, Martin Zwerling.

The changed facts don’t change our main concern expressed about the court’s opinion. Martinez v. County of Monroe, 850 N.Y.2d 740 (4th Dept. 2008), is a statewide precedent, applicable in Queens as well as everywhere else in the state, until such time as another department of the Appellate Division weighs in contrarily, or the Court of Appeals rules on the question. Which means that the lack of a “definitive” determination on same-sex marriage recognition by the 2nd Department is irrelevant. Funderburke intimates that the 2nd Department may agree with Martinez, as the court vacated the contrary ruling by the trial court as moot and expressed concern that not vacating the lower court decision would create confusion on the question of marriage recognition. Consequently, there was no need for Surrogate Nahman to require joinder of Alan Zwerling’s parents, as he died a married (albeit separated) man, and his spouse’s Waiver should have been sufficient to clear the way for issuance of Letters Testamentary and settlement of the estate.

Thanks to LeGaL member Peggy Brady of Brady Klein & Weissman for clarifying the situation. A.S.L.

NY Trial Judge Dismisses Lawsuit Between Fire Island Pines Businessmen

Acting New York Supreme Court Justice Marilyn Shafer has dismissed a lawsuit brought by prominent Fire Island Pines entrepreneur Eric von Kuersteiner against rival businessman Mark Schrader, whose company provides internet service to the heavily gay Long Island resort community. Von Kuersteiner v. Schrader, No. 100089/08 (N.Y.Supreme Ct., N.Y. Co., Oct. 14, 2008). Von Kuersteiner sought to hold Schrader liable for derogatory comments about von Kuersteiner that were posted on a blog that Schrader had established as an online community forum for Pines residents. Justice Shafer found that a federal statute provided immunity for Schrader, and that in any event the comments could not be the basis of a defamation suit against the anonymous posters, because they could all be characterized as opinions protected by the First Amendment. Shafer’s opinion was published in the New York Law Journal on October 29.

Von Kuersteiner reportedly bought out the interest in several Pines businesses in 2004 from John B. Whyte, who had established a small business district comprising the Botel (a small hotel), a nightclub called The Pavilion, a grocery, a restaurant and some other shops. The New York Times’ Long Island edition reported in May 2004 that Von Kuersteiner was planning a major renovation and upgrading of the various businesses to “make the downtown... more of a meeting place.”

Mark Schrader, co-owner of Pines Pantry and Internet Service, a rival grocery business, established a blog in the spring of 2007, named pavillion.blog (named after Von Kuersteiner’s nightclub, with an altered spelling), to provide an outlet for Pines residents to “post their thoughts, opinions and comments.” Schrader would remove posts that he found “inappropriate,” but Von Kuersteiner evidently felt that Schrader had left up too many posts that were critical of him and his businesses.

Justice Shafer’s opinion does not specify when Von Kuersteiner filed his lawsuit, but reports that Schrader deleted the entire blog on December 15, 2007, ending its operation at that time. Von Kuersteiner sued Schrader for defamation, contending that blog postings improperly attacked himself and his business. “These postings,” wrote Shafer, “accuse him of, inter alia, watering down the drinks served in his bars; having an illegal septic system which created a bad smell; being unsuccessful and losing money; treating employees badly; not having a women’s restroom; selling spoiled food; screwing’ a former commercial tenant out of his gym equipment; and having as a stated goal’ to get rid of all straights, all women, all children and all folks over 40.”

Schrader, moving to dismiss the case, filed an affidavit stating that he did not alter any statements that were posted on his blog, although he read everything and deleted anything he believed to be “inappropriate or obscene.” He swore that he was not the author of any of the posts about which Von Kuersteiner had complained.

In addition to seeking damages from Schrader, Von Kuersteiner also wanted the court to help him obtain the identity of the anonymous posters by ordering a deposition of a representative of Blog.com, which had hosted Pavillion.blog and might be able to identify the posters from its records.

Turning first to the question of Schrader’s liability, Justice Shafer found that he was shielded by a provision of the Communications Decency Act, 47 U.S.C. sec. 230(a)(b), a federal statute that protects internet service providers from liability for what third parties post on their websites, even if they exercise some editorial discretion to delete or block particular posts. Justice Shafer found that courts had unanimously interpreted the Act to bar any lawsuit against an internet service provider that was not itself generating the objectionable content.

A recent federal appeals decision from California found an exception to that immunity in the case of a roommate service that prompted users to provide discriminatory information for their postings, but upheld the general rule that somebody who merely provides a vehicle for others to express their views would not be held to be a publisher, as that term has been used in the law of defamation.

Turning to Von Kuersteiner’s discovery request, Justice Shafer found that the law on discovery of internet users’ identities for this purpose has focused on whether the postings in question would give rise to liability for their authors. In this case, she noted, the settled law
in New York is that “expressions of an opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.”

“When the less than 40 statements complained of are read within the context of the entire 300 postings of the blog, it is clear that they could not be interpreted as anything other than the opinions of the authors,” wrote Shafer. Von Kuersteiner himself describes the blog as an “Internet discussion board/blog on which participants [could] post comments about social life in the Fire Island Pines community.” The blog is a forum of shared opinions on everything from Von Kuersteiner’s baseball cap to his architecture to the music played by the dj to the Bush administration to the passing of the good old days. They form a dialogue in which there are rebuttals and refutations in response to previous posts. The complaint sifts through the posts in an attempt to isolate statements which seem to be assertions of fact. However, within the context of the blog, no reasonable person would interpret the comments as anything but the authors’ opinion.”

Shafer dismissed the lawsuit, and denied Von Kuersteiner’s request for discovery of the identities of those who posted the negative comments on the blog. A.S.L.

**Baltimore Judge Orders Visitation for Lesbian Co-Parent**

Finding that “exceptional circumstances” had been established in the case of a lesbian co-parent seeking visitation with the child borne by her former partner during their relationship, Baltimore Circuit Judge Lawrence R. Daniels ruled on October 7 that Larissa S. should be granted visitation rights. However, Judge Daniels denied visitation with the child’s younger sibling, conceived while the women were together but born after they had separated. *Larissa S. v. Melissa B.*, Civil Case No. 03–C–07–005XX8 (Maryland Cir. Ct., Baltimore Co., Oct. 7, 2008).

Daniels ruled from the bench and issued a brief, non-explanatory order, but the *Maryland Daily Record*, a legal newspaper, reported on October 7 that the decision may be the first of its kind in Maryland since the state’s highest court ruled in May that Maryland law does not recognize the doctrine of de facto parent, under which courts in some other states have recognized family ties between same-sex partners who raised children together to the extent of allowing co-parents to seek visitation after the parents have ended their relationship.

In this case, Larissa S. and Melissa B. were in a relationship when Melissa had sex with a man in order to become pregnant. According to Larissa’s testimony, the two women discussed having and raising a child together and chose the man “because he shared Larissa’s Hispanic heritage,” reports the *Daily Record*. Melissa, on the other hand, contended that having the child was her decision, not a joint decision. The child was born in 2001, and Melissa was pregnant again, but by the time her second child was born in 2003, the women had ended their relationship.

Judge Daniels ruled after a 2006 trial that Larissa was a de facto parent of the child, based on evidence of her extensive parental involvement and psychological bonding with the little boy. However, at that time he denied visitation rights, finding that Larissa had no such relationship with the other child, and that visitation might damage the sibling relationship between the children. On appeal, the intermediate appellate court affirmed Daniels’ ruling that Larissa was a de facto parent, but rejected the rationale for denying visitation rights with the older child. However, that ruling became untenable when the state’s highest court ruled in May 2008 that the state does not recognize the de facto parent doctrine.

In that case, *Janice M. v. Margaret K.*, 948 A.2d 73 (Ct. of App. Md., 2008), the court insisted that only in “exceptional circumstances” could a court order that a biological parent allow an unrelated person to have visitation with her child. The case was returned to Judge Daniels’ court to determine whether Larissa could qualify for visitation under this more demanding standard.

Daniels concluded that exceptional circumstances existed, but refrained from spelling those circumstances out in his written order. According to the *Daily Record* account, Daniels stated at the hearing that he concluded that Larissa was involved with “all aspects of parenting,” including selecting the child’s name, feeding him and toilet training him. The child referred to Larissa as “mommy.”

Daniels found that exceptional circumstances did not exist with the younger child, with whom Larissa had had occasional contact.

Daniels ordered that the older child receive “reunification therapy with the assistance of a mental health professional” before visitation can resume, and indicated he would appoint an “independent neutral health professional to conduct reunification therapy.”

The *Daily Record* reported that Alyson D. Meiselman represents Larissa and Steven L. Tiedemann represents Melissa. Tiedemann indicated that he would file an appeal and seek a stay of the visitation order. Meiselman expressed regret to the *Daily Record* that visitation would not resume immediately, and that a stay would delay it further, prolonging the separation of her client from the child with whom she had formed a parental bond. A.S.L.

**Another N.Y. Court Finds Jurisdiction for Same-Sex Divorce Case**

Ruling on October 14 in *C.M. v. C.C.*, 2008 WL 4602300, 2008 N.Y. Slip Op. 28398 (N.Y. Supreme Ct., N.Y. Co.), Justice Rosalyn H. Richter found that the court has jurisdiction to rule on a divorce petition involving a same-sex couple who were married in Massachusetts in 2005. Under the statewide intermediate appellate precedent of *Martinez v. County of Monroe*, 50 App.Div.3d 189 (4th Dept, 2008), trial courts in New York are to recognize same-sex marriages that were lawfully contracted in other jurisdictions.

In this case, however, Justice Richter faced a slightly different wrinkle from a prior New York County trial court ruling in *Beth R. v. Donna M.*, 19 Misc.3d 724 (N.Y. Co. 2008), in which the court found jurisdiction over a divorce proceeding for a same-sex couple married in Canada. There was at least some initial doubt whether the Massachusetts marriage could qualify as valid at the time and place when it was contracted, because an old Massachusetts statute (enacted in 1913) prohibited the issuance of licenses to couples whose marriages would not be valid in their state of residence.

Relying on his construction of that 1913 statute, then-Governor Mitt Romney ordered Massachusetts county clerks not to issue marriage licenses to out-of-state couples after the *Goodridge* decision went into effect on May 17, 2004. Gay & Lesbian Advocates & Defenders promptly filed suit on behalf of several out-of-state couples, challenging the constitutionality of the statute. In 2006, the Massachusetts Supreme Judicial Court rejected the constitutional challenge, in *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350 (2006), holding that the N.Y. Division of Public Health, 446 Mass. 350 (2006), holding that the N.Y. Department of Public Health, 446 Mass. 350 (2006), held that the N.Y. Domestic Relations Law did not authorize same-sex marriages and that the state constitution did not provide a right to marry for same-sex couples. Then the Massachusetts trial judge ruled that as a consequence of *Hernandez*, same-sex couples from New York were prohibited from marrying, but that prior to the decision in *Hernandez*, it could not be said that New York law affirmatively prohibited such marriages. *Cote-Whitacre v. Dept. of Public Health*, 2007 Mass. Super. LEXIS 149 (2007). Having reviewed this history, Justice Richter concluded that the 2005 marriage of the parties before her was “valid” in Massachusetts when it was per...
formed, and thus should be recognized by the court for purposes of jurisdiction over their divorce proceeding.

One potentially difficult question was dodged by the fact that the parties had secured a second-parent adoption of their children, obviating the problem that under New York law the non-biological mother would not have standing in a custody/visitation action. This saved Justice Richter from having to determine whether the recognized Massachusetts marriage would give the non-biological mother standing in that regard.

Justice Richter concluded that the rules of full faith and credit and comity were intended to ensure that parties married in another state could enforce their civil marriage contract in New York and there was “no reason to carve out a unique exception for the parties here simply because they are of the same gender or because of their sexual orientation.”

Justice Richter is a long-time member of LegalAid and one of the handful of openly gay elected judges in New York State. A.S.L.

Federal Civil Litigation Notes

Supreme Court — The U.S. Supreme Court denied certiorari in Parker v. Hurley, 2008 WL 1926813 (Oct. 6, 2008), in which some parents in Lexington, Massachusetts, had claimed that the school district violated their First Amendment rights by failing to give parents prior notice when books involving gay issues were to be included in reading lists given to students. The 1st Circuit decision rejecting their claim is reported at 514 F.3d 87 (2008).


California — In Boecken v. Gallo Glass Company, 2008 WL 4470759 (E.D. Cal., Sept. 30, 2008), U.S. District Judge Oliver W. Wangen granted summary judgment to the employer in a combined Family & Medical Leave Act (FMLA) and sexual orientation discrimination case. Plaintiff Larry Boecken had been granted FMLA leave time to care for his ailing grandmother, who lived with him. A supervisor became suspicious that he may have been using the leave for other purposes. Rumors were rife at the plant that Boecken and another male employee were romantically involved. Following up the suspicions, the supervisor request surveillance of Boecken during his leave time. Detectives documented that he did not drive home from the plant, instead going to a park and engaging in conduct that might be construed as cruising for sex. On at least one occasion, the other male employee left work at the same time and met up with Boecken in the park. Detectives also concluded that Boecken did not finally get home until more than two hours after leaving the plant on these occasions. He was discharged for abusing FMLA leave. He maintained he was not abusing leave, and that he was actual the target of sexual orientation discrimination. The company denied that those who made the decision to discharge him knew anything about his sexual orientation. The court concluded that the company was entitled to summary judgment on the federal FMLA and state discrimination charges, finding that there was no evidence of pretext, that the activity in which Boecken was engaged, whether innocent recreational activity or other, was not “taking care” of his grandmother, and thus no within the authorizing of family and medical leave. The court also found no basis for concluding that Boecken’s actual or perceived sexual orientation was the cause of his discharge, or a motivation for putting him under surveillance.

California — In Clinton v. Marshall, 2008 WL 4384192 (C.D. Cal., Aug. 27, 2008) (not reported in E.Supp.2d), U.S. Magistrate Judge Osvald Parada rejected a pro se 8th Amendment claim by Thomas Clinton, a gay state prison inmate, who claimed that “he was subjected to verbal harassment” by a corrections officer and fellow inmates “as a result of Plaintiff’s sexual orientation,” and that a corrections officer had encouraged “other inmates to act violently towards particularly vulnerable inmates” like Clinton. Clinton claimed that he had filed a grievance, but it was destroyed before it could be processed. He also alleged that another named defendant had obstructed him from filling grievances, and that other prison officials had failed to provide a system for receiving and appropriately processing grievances. Judge Parada found that verbal harassment had been found insufficient to constitute a deprivation of constitutional rights, but that the allegation that one named defendant was inciting violence might be actionable. However, problems with the exhaustion of remedies and the form of the complaint led to its dismissal.

New York — A female employee who was suspended for sexually harassing her supervisor and then reinstated in a different location brought a pro se Title VII claim of discrimination on the basis of sexual orientation and gender stereotyping, but suffered dismissal of her complaint by the district court, Kiley v. American Society for the Prevention of Cruelty to Animals, 2008 WL 4442468 (2nd Cir., Oct. 2, 2008). Of course, it is well established in the federal courts that sexual orientation claims, as such, are not actionable under Title VII, which forbids sex discrimination. Many circuits have now accepted the gender stereotyping argument, i.e., that an employee who encounters discrimination due to failure to conform to gender stereotypes held by the employer may bring a sex discrimination claim, but the court found that Kiley’s allegations were insufficient to state such a claim. Indeed, to the court it appeared that she was attempting to bootstrap a sexual orientation discrimination claim into a Title VII case by making conclusory allegations about gender stereotyping. The court’s opinion tends to reinforce the common sense view that staying out of federal court is the best course for gay discrimination litigants if they reside in states that ban sexual orientation discrimination. Unfortunately, the court’s decision does not include any dates in its fact summary, so we can’t tell whether the events recounted in the complaint occurred before New York amended its Human Rights Act to add sexual orientation, but if the incidents described in the opinion took place in New York City, the plaintiff could have sued in state court under the city’s sexual orientation discrimination ban. The complex interaction of federal, state and local law is more than one could expect a pro se litigant to master. Ms. Kiley could have used competent counsel to steer her to the best court for her case.

New York — U.S. Magistrate Judge Theodore H. Katz has ruled that Mark Aguiar, an openly gay principal appellate attorney for the Appellate Term of New York State Supreme Court in the First Department, is stuck with the verbal settlement agreement of his case claiming sexual orientation discrimination in the promotion process among the staff of that court, even though attempts to reduce the settlement to a written agreement were stymied, according to Aguiar, due to the defendants’ insistence on additional terms that were not part of the verbal agreement. Aguiar v. State of New York, 2008 WL 4386761 (S.D.N.Y., Sept. 25, 2008). The parties had reached a verbal agreement after a lengthy negotiation session, the notes of which were read into the record in the presence of the judge. The judge decided that this agreement should be binding, despite Aguiar’s insistence that the case go forward as a result of the failure to reach a written agreement. The judge found that there had not been any agreement between the parties that a settlement was contingent on reducing the agreement to written terms. Ohio — In a state that lacks a law forbidding sexual orientation discrimination, those with a discrimination claim outside a major city are stuck trying to fit their claim under Title VII of the Civil Rights Act of 1964, which is frequently a losing strategy. For example, see Taylor v. H.B. Fuller Co., 2008 WL 4647690 (S.D.Oh., Western Div., October 20, 2008), in which Judge Michael R. Barrett, rejecting the plaintiff’s contention that his case fits into the “gender non-conformity” theory that has gained ground in some federal courts, decided that this was really a sexual orientation discrimination case. From that follows the well-settled consensus
among the federal courts that Title VII’s ban on sex discrimination does not broadly encompass claims of discrimination due to anti-gay animus. “In the case at hand,” wrote Barrett, “the question then becomes was Taylor discriminated and/or harassed because of his sex. Was it because he failed to act masculine enough and thus, entitled to Title VII protection? Although the harassment was deplorable, unfortunately, the answer is no.” Barrett quoted circuit cases concluding that allowing the gender nonconformity theory to take on an expansive reach to encompass sexual orientation discrimination claims would constitute an inappropriate judicial amendment to Title VII. This case helps to show why passage of the Employment Non-Discrimination Act (ENDA) would not be merely symbolic. Although a majority of the country’s workplaces are now covered by sexual orientation non-discrimination policies by virtue of state or local law, there remain enormous gaps, including large swaths of suburbia and the large rural areas in states such as Pennsylvania, Ohio, Georgia and Texas, where there is no protection against such discrimination, and where it is most needed.

Texas — U.S. Magistrate Judge Nancy Stein Nowak refused to dismiss a Title VII sex and race discrimination claim brought by Ramsey Trevino, a transsexual, against Center for Health Care Services, a state agency. Trevino v. Center for Health Care Services, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008). The defendant, citing a long list of old federal circuit cases, argued that Title VII does not prohibit discrimination against transsexuals, and also sought to rely on a Texas Court of Appeals ruling, Littleton v. Prange, that has no relationship to employment discrimination. Judge Nowak pointed out that a Texas state law ruling was irrelevant to a Title VII claim, and that Ramsey was suing for discrimination based on race and gender, not gender identity, thus the cited federal precedents were also irrelevant. A.S.L.

State Civil Litigation Notes

California — In Woods v. Sheavy, 2008 WL 4560832 (Cal.App., 3rd Dist., Oct. 14, 2008), the court ruled that state domestic violence programs that provided services and benefits solely to battered women violate the equal protection requirements of the California constitution. The action was brought by four men and the daughter of one, each of whom found themselves in need of services. For example, one plaintiff suffered physical violence at the hands of his wife, who used weapons and other objects to assault him. The man sought assistance from a domestic violence project, but by the terms of its state funding it could only provide service to women. Another plaintiff was being stalked by a former girlfriend, who threatened violence and had given him a black eye. After he was turned down for assistance by a state-funded domestic violence center, he suffered a stabbing attack from the stalker, who was arrested and charged with domestic assault. Despite this, she has continued to harass him, smashed the windshield on his car, stole his license plates, and left a suspicious package in the car. The court found that reasons advanced by the state for focusing its domestic violence money on women were not sufficient to justify a program that discriminates on the basis of sex, which is a suspect classification in California. The state argued that men are not similarly situated to women with respect to domestic violence, because proportionately more women are victims and they tend to suffer more severe injuries. But the court found this a false comparison, the proper question being whether men who suffered from domestic violence were similarly situated with women who suffered from domestic violence. The court found that the gender classification was not necessary to further a compelling state interest, and ordered that the state follow a gender neutral rule in dispensing funds to support domestic violence programs. However, the court rejected a concurrent challenge to a state program providing for inmate mothers intended to make it possible for them to maintain contact with their children while incarcerated, finding that this raised different issues and that the state had a sufficient justification for the program. The court’s ruling is significant for gay male Californians, since domestic violence is an issue in the gay community, but the California programs provided no funding targeted to any male victims of domestic violence.

California — In M.R. v. Superior Court, 2008 WL 4630440 (Cal.App., 1st Dist., Oct. 22, 2008) (not officially reported), the court rejected a claim that a man who engages in cross-dressing had suffered court bias as a contestant in a beauty pageant contest.

California — San Diego Superior Court Judge Michael Anello ruled that four city firefighters who were assigned to attend the annual Gay Pride Parade had not suffered an unconstitutional deprivation of their first amendment rights. San Diego Union-Tribune, Oct. 11, 2008.

Connecticut — Consistency is all, evidently, to Judge John D. Boland of the Connecticut Superior Court. In prior litigation, Boland had rejected a petition to require the state health department to list as parents on a birth certificate both the biological father of a child born to a gestational surrogate and the father’s same-sex partner. Now, in Caird v. Sewell, 2008 WL 4739459 (Oct. 3, 2008) (not reported in A.2d), Boland has applied the same logic to reject a demand that the biological father’s wife be listed on the birth certificate, when she was not the source of the egg used to create the child who was gestated by the surrogate. Boland’s view is that only a biological parent is entitled to be listed on the birth certificate, but that anyone else must go through an adoption process in order to become a legal parent.

Georgia — In a rather oblique opinion released on October 6, the Georgia Supreme Court refused to set aside the result of an election on the ground that a transgender candidate participated as a candidate in her preferred gender. Fuller v. Thomas, 2008 WL 4452364. Political opponents of Michelle Bruce, an incumbent Riverdale council member, claimed that voters were misled into thinking the candidate, born Michael Bruce, was a woman, and challenged the outcome of the election. They also charged some other irregularities. Without providing any reasoned explanation, the court succinctly stated that “None of these alleged irregularities is specific enough to cast doubt on the results of the election.”

New Jersey — In Migliorino & McCall v. Glassco, 2008 WL 4648452 (N.J. App. Div., Oct. 10, 2008) (not reported in A.2d), the N.J. Appellate Division affirmed a ruling by the Passaic County Superior Court that a retired gay school board employee had agreed to a complete settlement of his claim for partner benefits for his domestic partner/spouse, but remanded for reconsideration of the appellants’ demand for attorneys fees and costs. Roy Migliorino and Reginald McCall had an ongoing dispute with the Paterson school board over Migliorino’s application for spousal or partnership benefits for McCall, which the board stoutly resisted, resulting in this lawsuit. Finally, after the N.J. Supreme Court’s decision in Lewis and the enactment of the Civil Union Act, followed by Migliorino’s retirement from active service with the school district, the state, a codefendant in the case, stepped in and settled on the ground that the state would recognize Migliorino’s spouse (the men had since married in Massachusetts) and provide coverage for him under a state plan. Migliorino subsequently argued that the settlement was prospectively only, and that he still had a claim for the costs of providing health insurance coverage for his spouse during the pendency of the dispute. The school district moved to have the case dismissed as moot, based on the settlement. Agreeing with the school district that the settlement was intended to dispose of the entirety of Migliorino’s claims, the trial judge dismissed the case and, since there had been no verdict, found that Migliorino was not a “prevailing party” entitled to fees and costs. Rejecting this conclusion, per curiam, the appellate court stated that the motion judge “erred in ruling without considering the
“catalyst theory” approach to the determination whether a litigation is a “prevailing party” that, because the matter had settled, plaintiffs had not satisfied the “prevailing party” standard… Several potential statutory and common law bases exist here for plaintiff’s counsel fee and costs award request. The trial court should have considered each by the “catalyst theory” standard rather than rejecting them for the reason stated.” Patrick C. English argued the case for Migliorino and McCall.

New York — LGAL members Michele Kahn and Carol L. Buell have issued a joint press release, announcing that they had been able to obtain “what is believed to be the first actual divorce decree issued to a same-sex couple in New York who were married in Canada (or any other jurisdiction that recognizes same sex marriage).” Kahn and Buell each represented one of the spouses in the divorce proceeding, which was uncontested. Since it was uncontested and there was no dispute about jurisdiction, there is no actual court opinion to report.

The case is Henning-Dyson v. Henning-Dyson, N.Y. Supreme Court, Kings County, Index No. 14940/07. The Judgment of Divorce and Findings of Fact and Conclusions of Law in the unpublished opinion were signed by a Special Referee, after the entire proceedings were submitted on paper. According to the press release, “there can be little doubt that anyone reading the papers submitted to Court would have to know this was a same-sex couple.” Kahn and Buell announced the result, with the consent of their clients, so that others might be able to point to this ruling if they encounter clerks elsewhere in New York who balk at accepting divorce papers from a married same-sex couple. The attorneys can be contacted at the following addresses: Michele Kahn — mk@kahngoldberg.com. Carol Buell — cbuell@wbblaw.com.A.S.L.

Criminal Litigation Notes

District of Columbia — The District of Columbia Court of Appeals affirmed the conviction on first-degree assault charges of a corrections officer who was charged with forcing a transsexual prison inmate to perform oral sex on him and ejaculated in the inmate’s mouth. White v. United States, 2008 WL 45811663 (D.C.Ct.App., Oct. 16, 2008). Among other things, White complained on appeal of the trial judge’s decision to make an upwards departure in sentencing, based on the determination that White knew or should have known of the inmate’s transgender status, “which, the court reasoned, constituted a reduced physical capacity,” an aggravating factor under sentencing guidelines. The appeals court decided that since the sentencing guidelines were “entirely voluntary” and sentencing was up to the discretion of the trial judge, it did not need to consider whether transgender status signifies “reduced physical capacity.” The court also found that the record evidence was sufficient to support the trial court’s conclusion that White had forced the inmate to have oral sex, contrary to his story that he had been masturbating in the presence of the inmate, who must have retrieved the paper containing his semen for later use against him in an assault charge.

Indiana — We reported in the July issue of Law Notes on the Indiana Court of Appeals’ unpublished decision in McMaster v. State, in which the court upheld a public indecency conviction of a gay man, rejecting his defensive argument that he had been entrapped by a plain clothes police officer in a public park. At the same time, we noted, the court had overturned a conviction on a battery charge premised on the defendant having groped the police officer, finding that it was impermissibly duplicative since the same evidence went to the public indecency conviction. The state was unhappy about this, and asked the court to reconsider. In McMaster v. State, 2008 WL 4408299 (Sept. 30, 2008), another unpublished decisions, the court changed its mind and held there was no double jeopardy issue and the battery conviction could stand. The court bowed to the state’s argument that at the trial the prosecutor had taken great care to argue that the defendant’s groping of himself supported the public indecency charge and his groping of the police officer supported the battery charge. “We presume that the trial court bore the State’s closing statement in mind and did not consider the evidence of McMaster grabbing Office Blake’s genitals as proof of both offenses,” wrote Judge Najam. “In light of the State’s careful parsing of evidence in its closing statement, we conclude that there is not a reasonable possibility that the trial court used the evidence that McMaster grabbed Officer Blake to convict McMaster of both public indecency and battery. As a result, we grant rehearing to vacate our memorandum decision to the extent we held that double jeopardy bars McMaster’s convictions for both public indecency and battery and vacated McMaster’s battery conviction, and we affirm the trial court’s judgment of conviction and sentence.” Since the trial judge issued separate sentences for the two convictions that were to be served concurrently, and the public indecency sentence was longer, the court held that reinstating the battery sentence did not require it to “revisit” McMaster’s appeal of the sentence.

Massachusetts — The local gay community in Lowell, Mass., was outraged when Judge James Lemire sentenced three young roughs who had beaten up a transsexual man on the street to probation rather than any jail time. The prosecutor had requested at least a year in jail for each of the defendants. Middlesex County District Attorney Gerry Leone, reacting to the verdicts, stated: “The victim in this case suffered a terrible experience as he was violently attacked by these defendants who were clearly motivated by their intolerance of his sexual orientation. We will absolutely not tolerate those who act based on hatred and set upon others because of who they are.” The case had been a local cause celebre, generating a massive protest march and rally shortly after the attack. The Sun, Lowell, Mass., Oct. 1, 2008.

New York — Ruling sua sponte based on its “interest of justice” jurisdiction, the N.Y. Appellate Division, 2nd Dept., reversed a conviction of assault in the first degree and assault in the first degree as a hate crime of Steven Pomie, who was charged with causing “severe and life-altering injuries” to the complainant, who Pomie had identified to onlookers as “gay.” The evidence showed that Pomie had told witnesses that the complainant had made “a flirtatious comment to him” Pomie gave the complainant one last forceful kick to the head before leaving the scene, but was later apprehended. The court found that based on the evidence in the record the jury could not convict on the first degree charge, and sent the case for a new trial on second degree assault and assault as a hate crime charges. People v. Pomie, 2008 WL 4491341, 2008 N.Y. Slip Op. 07692 (Oct. 6, 2008). The trial court had erred in its response to a jury question about whether it could find that the defendant guilty of depraved indifference to human life if it found that all of his acts were intentional. The appellate court observed that the court of appeals had set a more stringent standard for a depraved indifference finding necessary to conviction on the first degree charge.

Tennessee — In State v. Flannel, 2008 WL 4613829 (Tenn. Ct. Crim. App., Oct. 13, 2008), the court of criminal appeals upheld a life sentence for for Leon Flannel, who murdered David Cooper, a gay man, in cold blood. According to the court’s summary of the evidence, Flannel, who claims to be non-gay, was out drinking with Cooper and they ended up back at Cooper’s house. Cooper attempted to initiate oral sex, but Flannel stopped him and pretended to fall asleep. When Cooper actually felt asleep, Flannel took Cooper’s gun, awakened Cooper and demanded money, then shot Cooper repeatedly in the head, killing him, took various things from the apartment and left it otherwise in good order. Cooper’s body was discovered about a week later, when his father, alarmed when he tried to call repeatedly and got a message that the answering machine was full, traveled from Alabama to Memphis and prevailed on police to go into the apartment with him using a spare key that he had. Evidence incriminating the defendant was found at the scene and there was little doubt that he did the crime, but at trial he argued, among other things, that his crime was not premeditated but rather was committed in self-defense under the
strong provocation of an unwanted sexual advance. The appeals court found that the facts did not support this argument, but rather that Flannel had intended to rob Cooper and later bragged to his girlfriend that he had intentionally killed Cooper. A.S.L.

Legislative Notes

California — At the end of September, Gov. Schwarzenegger signed into law a bill mandating that foster parents and others who have responsibility for foster children obtain training about school anti-harassment policies so they can properly advise their charges about available remedies for being bullied. The legislation was inspired by the case of Larry King, who was shot point-blank in the head by a troubled fellow classmate who was disturbed about King being openly gay and openly affectionate toward him. King was a foster child. Ventura County Star, Oct. 1.

Florida — The Orlando City Council voted on October 6 to provide domestic partner benefits to same-sex partners of city employees. The Orlando Sentinel noted that although some municipalities in other parts of the state had adopted such programs, this was a first for central Florida. The newspaper expressed concern, however, about the failure of the city to extend benefits to unmarried heterosexual couples, pointing out that Broward County, Miami Beach, Key West, and West Palm Beach had adopted broader domestic partnership programs. A.S.L.

Law & Society Notes

The March of Science — Several scientific publications reported in October about a new study from the Karolinska University Brain Institute: “Cerebral responses to putative pheromones and objects of sexual attraction were recently found to differ between homo- and heterosexual subjects,” reported the Institute. “Although this observation may merely mirror perceptual differences, it raises the intriguing question as to whether certain sexually dimorphic features in the brain may differ between individuals of the same sex but different sexual orientation.” In other words, more suggestive evidence that there is a physical basis for varying sexual orientation.

Roman Catholic Church — Numerous media sources reported on October 31 that the Vatican has issued new guidelines for screening applicants for the priesthood, including psychological testing intended to detect gay men and prevent them from joining. The new guidelines state that if psychological tests indicate that an applicant has “deep-seated homosexual tendencies,” his training should be “interrupted.” Psychological testing is also recommended to determine whether the applicant is capable of sustaining a celibate life. It is up to the rectors of the seminaries whether to adopt this testing regime. Church leaders stressed that recent sex scandals involving priests initiating sex with boys prompted a revision of prior guidelines.

Asylum — The New York Times reported on October 6 about a gay man from Senegal who had been awarded asylum in the United States in July, based on a determination that he faced persecution in Senegal due to his sexual orientation. This was an unusual case where refugee status was granted before the asylee arrived in the United States. Pape Mbaye fled Senegal after a local magazine published photographs of what it claimed was a gay wedding party organized by Mbaye, who then fled the country after being “harassed by the police, attacked by armed mobs, driven from his home, maligned in the national media and forced to live on the run across West Africa.” The Times recounts the dramatic story of Mbaye’s odyssey from country to country until finally with the assistance of Human Rights Watch he was able to find temporary shelter in Ghana and seek refugee status at the American Embassy in Accra. Even in Ghana, Mbaye suffered an assault by Senegalese expatriates who discovered his presence in the country, helping him to make his case that he was not safe anywhere in West Africa. He was granted refugee status on July 31, and flew to New York a few weeks later, receiving a Social Security card and a work permit.

Arkansas — The state’s Human Service Department announced on October 9 that it would repeal a rule banning gay people and single people from being foster parents. Governor Mike Beebe had stated his support for ending the ban. The so-called Family Council of Arkansas called a press conference the next day, accusing the Department of Human Services of having a “gay agenda.” The ban had been instituted in 2005 by prior leadership of the department, but the new director of the division that supervises foster care services was an opponent of the ban and worked for its repeal. Arkansas Democrat-Gazette, Oct. 11.

Florida — The ACLU of Florida announced that Heather Gillman, plaintiff in an ACLU lawsuit against her high school principle for discrimination against gay students, would receive the Hugh M. Hefner First Amendment Award, for “her fearlessness in speaking out on behalf of the rights of gay students.” The award was bestowed at an October 21 ceremony in Washington, at which Ms. Gillman received a $10,000 award that will use to pursue her higher education. ACLU Press Advisory, Oct. 20.

Massachusetts — An attempt by an organization called MassResistance to secure sufficient signatures for a ballot question to overturn this summer’s repeal of an old law restricting the issuance of marriage licenses to couples whose marriage would be prohibited in their home state has fallen short. According to an October 31 report in Bay Windows, a local community newspaper, the organization had only collected about a third of the necessary signatures by the statutory deadline to get items on this November’s ballot, about 10,500 out of the 33,297 that were needed. This tends to confirm public opinion polling which shows that both same-sex marriage and allowing out-of-staters to participate in that process in Massachusetts have both become reasonably popular with the general public.

Minnesota — One of the earliest openly gay elected officials in the country, Allan Spear, who began serving in the Minnesota legislature in the early 1970s and served as president of the state senate beginning in 1993, has passed away following complications of heart surgery. He was the first openly gay man to serve in a state legislature in the U.S., and in his first year as senate president achieved the long-sought goal of having the state enact a ban against sexual orientation discrimination. St. Paul Pioneer Press, Oct. 13. A.S.L.

International Notes

Austria — What was evidently known to many but not spoken of openly came to the surface after Joerg Haider, a married, very “macho” right-wing political leader, died in a traffic accident. First the press reported that Haider had been drinking in a gay bar before setting out on his fatal ride, then the initial successor to Haider’s party leadership position, Stefan Petzner, outed himself as Haider’s “boyfriend” and was quickly replaced at the head of the right-wing nationalist party. At the time of his death, Haider was serving as governor of the Austrian province of Carinthia. A political science professor told the press, “It has been an open secret for years that Haider was gay, and most Austrians would have preferred for it to remain a secret. People are trying to turn Haider into a saint, and are quickly forgetting that he was a right-wing xenophobe.” A spokesman for a gay rights group observed, “Haider could be having sex in front of the cameras with a man, and Austrians would pretend not to see it. I am surprised that it has not been greeted as a bigger deal, but that is because people are still in denial.” International Herald Tribune, Oct. 24.

Kyrgyzstan — Human Rights Watch issued a news release on October 6 announcing a 49-page report on persecution of gay people in Kyrgyzstan, a former Soviet Republic in Central Asia. HRW pointed out that the U.S. and the Vatican had taken steps to make sure that a program in the country aimed at combating hate crimes did not include sexual orientation. It also documented that among the Kyrgyz people, rape is the prescribed cure for lesbianism. The
report should be most useful to any gay people who manage to escape from that country and seek asylum in the U.S., unless, of course, they find themselves in front of one of the Bush era Justice Department appointees who believe that virtually nobody should be granted asylum.

Norway — Bishops of the Church of Norway, the nation’s dominant denomination, announced that the church would not perform same-sex weddings when the law authorizing such unions goes into effect in January. Although pastors will be permitted to offer prayers for gay couples, they will not be allowed to bless their union in a formal ceremony.

Portugal — The Portuguese Parliament voted overwhelmingly to reject two draft laws that would have legalized same-sex marriage and allowed same-sex couples to adopt children. The October 10 vote was supported by the Federalist Society judge appointed by George W. Bush, Diane S. Sykes, who was along for the ride with the Reagan appointee, Ann Claire Williams, an appointee of Bill Clinton. Senior Judge Michael Kanne, a Democrat, wrote one of the most ridiculous HIV/AIDS discrimination decisions we’ve ever had to read in *Equal Employment Opportunity Commission v. Lee’s Log Cabin, Inc.*, 2008 WL 4459236 (7th Cir., Oct. 6, 2008), drawing a scathing dissent from Judge Ann Claire Williams, an appointee of Bill Clinton, Senior Judge Michael Kanne, a Reagan appointee, was along for the ride with Sykes.

The case involved Korrin Krause Stewart, who was denied employment as a waitress by Lee’s Log Cabin, Inc. When Stewart heard nothing back from her application, she responded to a question that her restriction was “temporary,” that her restriction was “temporary,” and that her lack of waitress experience was indeed to consider that the HIV/AIDS epidemic has gone on so long that there are people born HIV+ who are now adult discrimination plaintiffs in employment cases). She was not diagnosed as HIV+ until she was fourteen years old, and shortly after testing positive she was discharged from a job at Quality Foods when they found out she had AIDS, and initiated legal action against them, resulting in some local newspaper publicity when the case was settled in her favor. Then she responded to a waitress ad placed by Log Cabin. When she filled out the job application, she responded to a question about any physical restrictions, noting that she had a lifting restriction of ten pounds, and answering “no” to the question whether accommodations could be made to allow her to perform all required job duties. She claims that she told the assistant manager, who took her application, that her restriction was “temporary,” but he denies being told that.

When Stewart heard nothing back from her application for a month, she went back to the restaurant, at which time the assistant manager told her that the owner, who made hiring decisions, was out of town. The manager asked if “she was the girl from Quality Foods” who had been mentioned in the newspaper, and she confirmed that. She noticed that somebody had written “HIV+” on her application form, and the manager later acknowledged that he had written that. The owner subsequently reviewed the application, discussed the HIV notation with the manager, and decided not to hire Stewart, purportedly because of the weight-lifting restriction and her lack of waitress experience. According to the EEOC’s subsequent investigation, at that time the restaurant employed two waitresses who had been hired with no prior experience, and one who could not lift heavy objects over her head.

EOCC brought suit against Log Cabin, asserting in the complaint that Log Cabin discriminated against Stewart based on her HIV status. Log Cabin filed a motion for summary judgment after discovery was concluded, claiming that Stewart was not a person with a disability under the ADA. EEOC responded with affidavits from Stewart and her physician discussing how AIDS had limited her activities.

**AIDS & RELATED LEGAL NOTES**

_Nobel Prize in Medicine for Discoverers of HIV_

Sweden’s Karolinska Institute has awarded the 2008 Nobel Prize in Medicine to Dr. Françoise Barre-Sinoussi and Dr. Luc Montagnier for their work in isolating and identifying Human Immunodeficiency Virus (HIV), the virus that has been identified as the infectious agent associated with Acquired Immunodeficiency Syndrome (AIDS). Montagnier and a research team from the Pasteur Institute in France published an article in May 1983 in *Science*, describing the virus found in the body of a patient who had died from AIDS. Subsequently, confirmation of HIV's role was developed in several different laboratories, including that of Dr. Robert Gallo, then employed by the National Institute of Health in the United States. Gallo had loudly claimed credit for the discovery, calling the virus HTLV-III to associate it with other viruses of a similar type that he had discovered. A dispute arose as to priority in the discovery, but ultimately it was agreed that Montagnier’s team, including Barre-Sinoussi, were the first to identify the virus and suggest its association with AIDS. The Mirror, Oct. 6, 2008.

*7th Circuit Issues Ridiculous HIV/AIDS Discrimination Decision*

A right-wing Federalist Society judge appointed by George W. Bush, Diane S. Sykes, wrote one of the most ridiculous HIV/AIDS discrimination decisions we’ve ever had to read in *Equal Employment Opportunity Commission v. Lee’s Log Cabin, Inc.*, 2008 WL 4459236 (7th Cir., Oct. 6, 2008), drawing a scathing dissent from Judge Ann Claire Williams, an appointee of Bill Clinton, Senior Judge Michael Kanne, a Reagan appointee, was along for the ride with Sykes.

The case involved Korrin Krause Stewart, who was denied employment as a waitress by Lee’s Log Cabin Restaurant in Wausau, Wisconsin. Stewart was born HIV+ (it is sobering indeed to consider that the HIV/AIDS epidemic has gone on so long that there are people born HIV+ who are now adult discrimination plaintiffs in employment cases). She was not diagnosed as HIV+ until she was fourteen years old, and shortly after testing positive she was discharged from a job at Quality Foods when they found out she had AIDS, and initiated legal action against them, resulting in some local newspaper publicity when the case was settled in her favor. Then she responded to a waitress ad placed by Log Cabin. When she filled out the job application, she responded to a question about any physical restrictions, noting that she had a lifting restriction of ten pounds, and answering “no” to the question whether accommodations could be made to allow her to perform all required job duties. She claims that she told the assistant manager, who took her application, that her restriction was “temporary,” but he denies being told that.

When Stewart heard nothing back from her application for a month, she went back to the restaurant, at which time the assistant manager told her that the owner, who made hiring decisions, was out of town. The manager asked if “she was the girl from Quality Foods” who had been mentioned in the newspaper, and she confirmed that. She noticed that somebody had written “HIV+” on her application form, and the manager later acknowledged that he had written that. The owner subsequently reviewed the application, discussed the HIV notation with the manager, and decided not to hire Stewart, purportedly because of the weight-lifting restriction and her lack of waitress experience. According to the EEOC’s subsequent investigation, at that time the restaurant employed two waitresses who had been hired with no prior experience, and one who could not lift heavy objects over her head.

EOCC brought suit against Log Cabin, asserting in the complaint that Log Cabin discriminated against Stewart based on her HIV status. Log Cabin filed a motion for summary judgment after discovery was concluded, claiming that Stewart was not a person with a disability under the ADA. EEOC responded with affidavits from Stewart and her physician discussing how AIDS had limited her activities.
and this was the first time in the case that AIDS was specifically mentioned. The district judge reacted to this by charging that the EEOC was trying to shift the basis of the case from HIV discrimination to AIDS discrimination, which in the eyes of the district judge were two different things. The district judge, Barbara Crabb (W.D. Wisc.), said that evidence about the impact of AIDS was irrelevant, because the complaint was HIV discrimination. Since the EEOC’s evidence in opposition to the motion did not address limitations imposed by HIV, in Judge Crabb’s view, she decided there was no evidence before her on that point, and granted summary judgment to Log Cabin.

Amazingly, the 7th Circuit affirmed, Judge Sykes agreeing with the district court that HIV and AIDS are conceptually two different things, and the affidavit testimony about how AIDS had affected Stewart was not relevant and could be rejected by the district court. This brought a scathing dissent from Judge Williams, who pointed out that throughout the relevant time period Stewart had AIDS. Of course, it appears that Log Cabin knew that Stewart was HIV+, but perhaps did not know that she had AIDS, which may explain why the EEOC conceptualized the case as HIV discrimination in its complaint. (ADA case law suggests that the plaintiff must establish that the defendant knew about the plaintiff’s disabling condition in order to meet the burden of proving that the plaintiff suffered discrimination because of that condition.) But, as Williams points out, the fact that Stewart has AIDS is not inconsistent with the fact that she is HIV+. Indeed, if she were not HIV+, she would not have AIDS, and the limitations imposed on her are due to her HIV infection in the context of AIDS, thus the evidence is completely relevant to prove the point that she is a person with a disability.

In any event, Judge Sykes found that Stewart failed to prove in her opposition papers to the motion for summary judgment that she was a person with a disability. In addition, the court found that the company could find her not qualified for the position based on the lifting restriction, so even if she was a person with a disability, she would not be protected under the ADA.

Judge Williams read the riot act to the majority in her dissent, pointing out that drawing a categorical distinction between HIV infection and AIDS for purposes of the ADA did not make sense. HIV causes AIDS. The impairments associated with AIDS are due to the effect of HIV in the body. She noted that if the CDC had decided to refer to full-blown AIDS as stage 5 HIV infection, which it was in light of the full explanation by the CDC of its classification of the disease, then the nomenclature problem disappears. She also argued against the court’s handling of the weight-lifting issue, pointing out that there was a factual dispute as to whether Stewart informed the manager that her restriction was temporary, and thus that part of the case should not be resolved through a summary judgment ruling as a matter of law.

The one saving grace in all this is that the 7th Circuit’s decision may not have a long-term damaging effect as precedent, since the ADA amendments enacted over the summer, going into effect in January 2009, are intended to change the way courts determine whether a plaintiff is a person with a disability for purposes of the statute. Under the amendments, it is unlikely that an HIV+ individual who encounters discrimination will fail to qualify either as an individual with a disability, or as an individual who is regarded as having a disability, and the focus of attention under the statute should shift to whether the individual is qualified for the job for which they have applied.

A biographical entry on Judge Sykes in Wikipedia suggests that she has been mentioned as a possible Supreme Court nominee by President Bush and would be on the list were the next opening to come during a McCain Administration. One shudders. A.S.L.

**Georgia Appeals Court Upholds Recklessness Conviction of HIV+ Woman**

In *Ginn v. State*, 2008 WL 4402253 (Sept. 30, 2009), the Court of Appeals of Georgia affirmed the conviction of a woman who was charged with failing to disclose that she was living with HIV to her partner before engaging in intercourse with him. Such conduct, under Georgia law, is a felony.

Evidence presented at trial supported contrary inferences. Some witnesses, including the defendant herself, testified that her partner clearly knew Ginn was living with HIV throughout the period that they were intimate. In support of this, she and other witnesses testified that her HIV status was revealed in a front page story in the local newspaper prior to the commencement of her relationship with the complainant, although the court mentions no testimony that the complainant had read the article. Other witnesses testified that Ginn never informed her partner of her HIV status and even lied to conceal it.

At the outset of its analysis, the court stated that the standard of review on appeal from a conviction is such that “evidence must be viewed in the light most favorable to the verdict.” The court further explained that its evaluation of the appeal could not involve credibility determinations or re-weighing of evidence; instead, as the Court made clear, the jury’s verdict would be upheld as long as it was supported by some competent evidence.

Offering its cursory statement that there was evidence in the record to support the jury’s determination of the case, the court affirmed the defendant’s conviction. Unfortunately, because Georgia has a recidivist statute and because the defendant had a prior criminal record, she is currently facing a staggering sentence of eight years in prison for her alleged crime. Alvin Lee

**Adverse Conditions in Jamaica Justify Withholding of Removal for HIV+ Woman**

A New York City-based Immigration Judge has decided that conditions are so bad for women suffering late-stage HIV infection in Jamaica that a Jamaican-born felon should be allowed to remain in the United States. Judge Alan Page issued his ruling on September 18, in a case where the Justice Department was seeking to have the woman deported back to her birthplace, which she left as an infant and had no immediate family members residing, as a result of some drug possession convictions. In the Matter of Jane Doe.

The decision was heavily based on expert testimony by Dr. Farley Cleghorn concerning the situation confronting people living with HIV in Jamaica. Cleghorn, currently head of The Futures Group, a private company that contracts with U.S. government agencies to implement health programs overseas, testified in great detail about the enormous deficiencies in treatment for HIV in Jamaica, and the intense hostility that HIV-positive people encounter there. The depth and detail of his testimony, which was evidently not shaken to any significant degree on cross-examination, appeared to impress Judge Page, who essentially adopted Dr. Cleghorn’s description of the situation in Jamaica as his finding on the issue of conditions in the country.

In this case, Homeland Security instituted proceedings to deport the Respondent due to her criminal record. She was born in Jamaica but was brought to the U.S. in 1968 as a very young child with her sister to join her parents, who were already here. She grew up in the Bronx and has continued to live in the U.S., with only one brief visit to Jamaica in the intervening time. She is still a citizen of Jamaica, but has no immediate family there. Her father still lives in the Bronx and her mother has died. The respondent, age about 44, testified that her HIV infection had advanced to clinical AIDS, with physical symptoms. She was first diagnosed HIV-positive in 2000, but did not receive any treatment for her HIV until she was put into detention by Homeland Security as a result of her drug-related criminal record last year.

Because of her criminal record, which includes several convictions of possession of controlled substances, she is subject to deportation under federal immigration laws and not qualified to seek asylum or cancellation of removal. However, Judge Page determined that she was eligible for “withholding of removal,” a status that would allow her to remain in the United States because of the severe difficulties she
would encounter if forced to return to Jamaica. The judge concluded that it is unlikely she would be able to connect with appropriate treatment there, and given her AIDS diagnosis the results for her would be catastrophic.

Page found that “women in the late stages of an HIV infection are highly visible to persecutors and other members of Jamaican society. According to Dr. Cleghorn, persons suffering from late stage HIV exhibit a number of visible symptoms. Further, in his written statement, the doctor indicates that Jamaicans recognize these symptoms as relating to AIDS. The latest U.S. State Department report shows that Jamaican society stigmatizes persons suffering from HIV and subjects them to discrimination.” He also noted that health care workers in Jamaica, employed by the government, “do not respect the confidentiality of their HIV patients and often deliberately reveal their diagnosis to members of the public.”

Page concluded that “it is likely the Respondent will be physically harmed if she is returned to Jamaica.” He also notes that there is routine violence against gay people in Jamaica. Although the opinion does not indicate that the Respondent is a lesbian, it seems that Jamaicans equate AIDS with homosexuality, and Amnesty International has documented that women with HIV “have been driven from their homes and had their homes burned down.” An AIDS support group in Jamaica reports that “it regularly receives reports that its clients face brutal violence, including stabbing and beatings,” and, as it may seem, considering the sexual transmission of HIV, it seems that HIV-positive women are stereotyped as sex workers and at high risk for rape and other acts of sexual violence in Jamaica.

Page also noted that the intensity of discrimination against people with HIV in Jamaica creates a “significant likelihood that the Respondent will suffer economic persecution,” and that it is unlikely that she could obtain “legitimate employment” there. Finally, he noted, there is evidence that people with HIV are shunned by health care workers, resulting in inadequate care and dramatically shortened life expectancy. Dr. Cleghorn testified that “when people with AIDS are admitted to the hospital, they are often simply left to die,” and a Human Rights Watch report indicates that “some AIDS sufferers are denied treatment altogether.”

Given this kind of record, and the evidence that the government was unable or unwilling to protect people with late-stage HIV infection from persecution, Page concluded that the Respondent had met the stringent test for showing eligibility for withholding of removal, despite her criminal record. Sunita Patel of the Legal Aid Society successfully represented the Respondent in battling the deportation effort in the Immigration Court, but there is the possibility that the government will seek to appeal this ruling to the Board of Immigration Appeals, a body that is noteworthy for its stinginess in approving withholding of removal for felons. A.S.L.

6th Circuit Upholds Denial of Asylum to HIV+ Man from Mali

A panel of the U.S. Court of Appeals for the 6th Circuit ruled on September 25 that decisions by an Immigration Judge and the Board of Immigration Appeals to deny asylum to an HIV+ man from Mali were supported by “reasonable, substantial and probative evidence on the record” and thus denied the man’s petition for review. Ramdane v. Mukasey, 2008 WL 4428627 (Sept. 25, 2008). The court also rejected the petitioner’s request to be allowed to depart voluntarily rather than being officially deported.

The petitioner was born in Mali in 1964, and is the son of a tribal chief. He claims that during the course of a rebellion the army killed his father and brother, imprisoned him and another brother, and subjected him to torture. He claims his brother died as a result of mistreatment in prison. He claimed that he was temporarily released from prison for medical treatment as a result of a bribe being paid by a friend of his father. Upon his release, he fled the country, arriving in the U.S. in March 2000 on a B-1 non-immigrant visa, and promptly submitting an application for asylum. While it was pending, he married a U.S. citizen, with whom he quickly had a child. He claims, however, that the marriage was rocky, his spouse was abusive, and was quickly headed to divorce. He discovered shortly after his marriage that he was HIV+, and he believes he was infected by his wife, because doctors “told him that he has an American and not an African HIV strain.”

Homeland Security sought to remove him from the U.S. in 2003, while his wife was pregnant and shortly before his son was born. While this action was pending, petitioner filed an amended asylum application, relying for the first time on his HIV status, claiming that he would encounter persecution in Mali as an HIV+ man, and be unable to obtain adequate medical treatment.

The hearing on the merits before the Immigration Judge did not occur until 2006. The IJ, finding severe credibility problems with petitioner’s testimony and lack of solid documentary evidence about persecution of HIV+ people in Mali, denied his petitions and ordered him removed to Mali. In affirming the IJ, the Board of Immigration Appeals noted that although there was evidence that HIV+ people suffered difficulties in Mali, there was no evidence that members of a social group comprising HIV+ people were subjected to persecution as such, and there was evidence that the government provided free health care in Mali. The State Department Country Report on Mali gives no indication of persecution of HIV+ people or deprivation of medical care for them, according to the court.

The other aspect of petitioner’s case, his claim that he was a battered spouse, seems to have doomed his entire case, since the IJ concluded that his stories about being physically persecuted by his wife were incredible. It seems that petitioner is a tall, strong-looking man, and his wife is very short, leading the IJ to conclude that petitioner’s claims about being afraid of his wife were nonsensical. This seems to have totally undermined his credibility in the eyes of the judge, and the BIA and the court followed along the same line on credibility.

The court found that the IJ had concluded that petitioner would encounter “some hardship” as an HIV+ person in Mali, but not persecution to the degree necessary to give him refugee status in the U.S. Due to the adverse credibility determinations, the IJ, the BIA and the court concurred that the petitioner failed to establish the good moral character necessary to justify allowing him to make his own arrangements to return to his native country, so the petition for cancellation of removal was also denied. A.S.L.

Indefinite Civil Commitment Ordered for HIV+ Schizophrenic Man

The Court of Appeals of Minnesota has upheld the indeterminate civil commitment to a secure facility of David Kendall Renz, a mentally ill HIV-positive man who has tested positive for syphilis, gonorrhea and chlamydia, sexually transmitted diseases, and who has admitted that he had engaged in sex without informing his partners about his HIV status. The court reached this ruling despite the lack of any identified victim who has actually been infected by Renz. The October 28 opinion for the court by Judge Renee L. Worke does not indicate the gender of Renz’s sexual partners. In The Matter of the Civil Commitment of David Kendall Renz, 2008 WL 4706962 (not reported in N.W.2d).

Under Minnesota law, there is a significant difference between being civilly committed as mentally ill and being civilly committed as mentally ill and dangerous, as was the case with Renz. Civil commitment for mental illness is limited to 12 months, and the individual is sent to the “least restrictive treatment program” available. A person who is committed as mentally ill and dangerous is sent to a “secure facility” and the commitment may be indefinite, meaning that it will only end upon a determination that the individual no longer presents a danger to others.

Renz had previously been civilly committed as mentally ill, from May 1998 through June 1999, from October 2000 through October
from March 2003 until July 2003, and then from April 2005 until October 2006, but, as the trial court noted, his behavior regarding treatment for HIV had been inconsistent. His treating psychiatrist testified that he was “schizoaffective,” did not understand the nature of HIV infection, and was casual about taking medications, evidently believing that he had cured himself because he was asymptomatic. He had admitted to his doctors that he was engaging in unprotected sex. As a result of these admissions, he was tested for venereal diseases, and when he tested positive, doctors and law enforcement officials drew the obviously conclusion that his admissions were true, since at least two of the diseases he had contracted are only spread through intimate unprotected sexual contact.

Having found that Renz was engaging in sexual activity that can transmit HIV, the court decided that he was dangerous, even thought no identified victim has been located. The trial court found that there was “clear and convincing evidence” that he “deliberately engaged in unprotected sexual activity with others even though he has been diagnosed with HIV and, thus, has engaged in an overt act causing or attempting to cause serious physical harm to another” regardless of intent or the outcome of the action.” When questioned, Renz freely admitted that he had engaged in unprotected sex, “at times without disclosing his HIV diagnosis to his sexual partners.”

Renz was not prosecuted, even though his conduct might be characterized as criminal were he not mentally ill, but rather subjected to civil commitment. The court drew an analogy between his conduct and the act of “a mentally ill person who fires a shotgun at another or drives a vehicle into a crowd of people at 100 m.p.h.” A court-appointed medical examiner, having interviewed Renz, testified that it was “pretty clear” that Renz has unprotected sex, because he said that “it would be impossible to use protection all the time.” This doctor also opined that Renz did not appreciate the need for consistently taking his HIV medication because he believed he had cured himself.

Renz’s own treating physician concurred, testifying that he had treated Renz for sexually transmitted diseases, from which he drew the conclusion that Renz was engaging in unprotected sex. Another court-appointed doctor testified that if Renz were released back into the community, he would likely be “sexually active in a way that puts him at higher exposure for engaging in reckless sexual behavior, in part due to his psychiatric state.” This doctor testified that Renz had admitted to him having had five or six sexual partners in the previous year. Renz’s psychiatrist testified that he did not seem to understand HIV infection and how it is transmitted. He also testified, somewhat confusingly, that Renz had told him that he told his sexual partners that he has the infection and if they do not care then he does not use protection, but evaluating the accuracy of statements is difficult due to Renz’s schizophrenia.

The court of appeals concluded that in light of all this medical testimony, the trial court “did not err” in concluding that Renz met the requirement for civil commitment as mentally ill and dangerous. The lack of an identified victim was not a bar to the determination, in light of the obvious inferences about Renz’s conduct to be drawn from his admissions and his venereal infections

AIDS Litigation Notes

California — U.S. District Judge Susan Illston found that Reliance Standard Life Insurance Company did not abuse its discretion as an ERISA plan administrator when it rejected a claim for disability benefits by a recently-discharged HIV+ employee. Fenberg v. Cowden Automotive Long Term Disability Plan, 2008 WL 4559732 (N.D. Cal., Oct. 11, 2008).

Fenberg was discharged by Cowden Automotive in February 2002, for not “following company policies.” At that time, he had been HIV+ for seven or eight years. After his termination, he applied for long-term disability benefits under the company’s plan, administered by Reliance. Reliance denied the benefits, taking the position that he was not disabled when he was discharged by the company. Fenberg claimed that he had been suffering from HIV-related depression, which led to the behavior that caused his discharge. Fenberg’s doctor’s records are contradictory on the point. The district court granted summary judgment to Fenberg, but the company appealed and won a remand from the 9th Circuit, which instructed the court to apply an abuse of discretion standard in reviewing Reliance’s decision to deny benefits. Then the Supreme Court decided Metropolitan Life Ins. Co. V. Glenn, 128 S.Ct. 2343 (2008), resolving a circuit split on the question of how to review ERISA plan administrator decisions when the administrator had a conflict of interest because it was also the insurer and could benefit from decisions to deny claims. Judge Illston devoted part of her opinion to determining the appropriate standard to apply in light of the fact that Reliance had not taken all the steps necessary to insulate its claims decision-makers from the insurance part of the business, and had not strictly followed all of its own procedures in Fenberg’s case. She concluded that a very skeptical version of the abuse of discretion standard should apply. Nonetheless, she concluded, under this standard, that there was no abuse of discretion, since it was reasonable for Reliance to conclude, based on the record, that Fenberg’s disability, if any, post-dated his termination from work, and thus he was not eligible for long-term disability benefits at the time his HIV-related depression was diagnosed.

Delaware — State corrections officials could not be held liable under the 8th Amendment for the death in custody of Louis W. Chance, Jr., an HIV+ state prison inmate who expired from cryptococcal meningitis, ruled U.S. District Judge Sue L. Robinson in Estate of Chance v. First Correctional Medical Inc., 2008 WL 4410141 (D. Del., Sept. 30, 2008). Chance’s mother and son, pointed administrators of his estate, alleged that the medical care he received from a contractor, First Correctional Medical Inc., was so severely deficient as to constitute cruel and unusual punishment. Their suit named as defendants FCM and some of its staff members, and two state corrections officials, Stanley Taylor (the Commissioner) and Joyce Talley (the Bureau Chief for the Bureau of Management Services) with oversight responsibility for the correctional system. There was a settlement involving FCM and its staff members, leaving Taylor and Talley to move for summary judgment. The problem, of course, is that the bar is set very high for 8th Amendment liability of government officials.

The plaintiffs would have to show deliberate indifference by the officials involved, and, as Judge Robinson pointed out, negligent oversight by prison administrators of the work of licensed medical care providers does not equate to “deliberate indifference.” In this case, neither of the remaining defendants had played any individual rule in the care provided to Chance, and they denied under oath that there was any program to deny or delay care for inmates in order to save money, as the plaintiffs charged in this case. Judge Robinson also noted that although the plaintiffs provided expert testimony that the care offered Chance could be characterized as grossly-negligent, the expert offered no opinion about the actions or conduct of the two remaining defendants. Although there was a federal Department of Justice investigation that was severely critical of the provision of health care in the Delaware prison system, Robinson held that it could not be considered in this case “in light of the specific caveat that the agreement between the State of Delaware and the DOJ may not be used as evidence of liability in any other legal proceeding.” In other words, here is yet another opinion illustrating that the 8th Amendment provides no real protection against grossly incompetent medical care for inmates with HIV or any other serious medical condition, and since inmates are not a powerful political constituency, it is unlikely that legislation would be enacted providing a right to competent medical care for inmates.

Louisiana — U.S. District Judge Richard T. Haik denied a petition for a writ of habeas corpus filed by Dr. Richard Schmidt, who had been convicted of attempted second degree murder
in a plot to inject his former girlfriend with HIV+ blood obtained from a patient. Haik’s brief judgment in *Schmidt v. Hubert*, 2008 WL 4491467 (W.D. La., Oct. 6, 2008), is accompanied by a very lengthy report and recommendation by U.S. Magistrate Judge C. Michael Hill, going over all the legal points in the case in excruciating detail, which will not emulate here.

**New York — The Appellate Division, 2nd Department, affirmed a ruling by the Court of Claims, dismissing a negligent infliction of emotional distress claim filed by a surgical patient who was advised to undergo HIV testing because blood from a prior trauma patient had been found in the “respiratory component” of the ventilator used during her surgery, and the prior patient had died before he could be asked for consent to test his blood for HIV antibodies. *Siegrist v. State of New York*, 2008 WL 4593263 (Oct. 14, 2008). The court pointed out that it is now well-established under New York law that a claimant in such a case who has repeatedly tested negative for HIV must demonstrate that “due to the negligence of another party, the claimant was exposed to HIV through a scientifically-accepted method of transmission and the source of the allegedly transmitted blood or fluid was HIV positive.” In this case, there was no evidence that the source of the blood was HIV+.

**Pennsylvania In White v. Austra**, 2008 WL 4488922 (W.D.Pa., Oct. 2, 2008), U.S. District Judge Arthur J. Schwab sustained a decision by the Social Security Administration that the HIV+ plaintiff was not sufficiently impaired to qualify for disability insurance benefits. The plaintiff had testified in the administrative process to various disabling physical symptoms, which he characterized as “seasonal,” leading the judge to state that “his own testimony does not establish that his inability to work satisfied (or may be expected to satisfy) the statutory durational requirement.” The court found that the plaintiff’s arguments about the disabling effect of his HIV infection were too generalized, and in fact that record evidence supported the conclusion that the plaintiff was essentially asymptomatic for HIV, suffering some mild side-effects from medication. The court upheld the AJ’s determination that the plaintiff was capable of performing work “at the light exertional level,” which is disqualifying for disability benefits.

**Rhode Island — Chief District Judge Mary M. Lisi (D. R.I.) Has affirmed the decision of the Commissioner of Social Security to deny disability benefits to Cesar Portorreal, an HIV+ man. *Portorreal v. Astrae*, 2008 WL 4681636 (Oct. 21, 2008), Judge Lisi, affirming U.S. Magistrate Judge David L. Martin, found that Portorreal’s HIV infection had not been actually disabling within the meaning of the law. The opinion goes on at great length about another claim by Portorreal, concerning his mental condition, and that seems to have borne most of the burden on this case.

**South Carolina — An state inmate’s constitutional rights were not violated when he was housed in the same cell with an HIV+ inmate. There was no evidence that the HIV+ inmate engaged in any behavior that would put the plaintiff in danger from HIV infection. U.S. Magistrate Judge Bruce H. Hendricks wrote that the absence of any allegation of physical injury was significant, and concluded that failure to segregate HIV+ inmates from uninfected inmates “does not constitute cruel and unusual punishment” for the uninfected inmate, a victory unless we consider that an HIV+ inmate may encounter particular obstacles being housed in proximity to uninfected prisoners, especially after being “outed” to other prisoners as the person with AIDS on the floor. *McCoy v. Misle*, 2008 WL 4646924 (D.S.C., Sept. 29, 2008). • • • To similar effect, U.S. District Judge R. Bryan Harwell ruled in *Aiken v. Cottingham*, 2008 WL 4449952 (D.S.C., Sept. 26, 2008), that placing an inmate in the same exercise yard with HIV+ inmates did not raise an 8th Amendment issue. “Courts, including this District Court, have consistently held that a prisoner’s confinement in proximity to carriers of the AIDS virus does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment,” wrote Harwell.

**South Carolina — U.S. District Judge Henry Floyd ruled in *Davis v. Greenwood County Detention Center*, 2008 WL 4489744 (D.S.C., Sept. 30, 2008), that the defendants had not violated an HIV+ pre-trial detainee’s constitutional right to privacy by housing him in a special unit because of his HIV status. Floyd noted 4th Circuit precedent upholding the segregation of HIV+ inmates, and rejected the contention that pre-trial detainees would necessarily have greater rights under the 14th Amendment than convicted prisoners have under the 8th Amendment. He found that the practice of segregating HIV+ detainees “is reasonably related to a legitimate governmental objective,” and thus does not rise to the level of “punishment,” which would be unconstitutional in advance of an adjudication of guilt. Floyd pointed out that the Davis was not alleging that prison officials had improperly disclosed his HIV status to anybody, merely that people would draw inferences about him based on his housing situation. Further, the court noted that institutional defendants are not subject to suit under 42 USC sec. 1983, and the pro se plaintiff had not named an individual defendant responsible for the housing decision.

**Tennessee — The Court of Criminal Appeals of Tennessee rejected an “ineffective assistance of counsel” claim by an HIV+ man who pled guilty on advice of counsel to nine counts of criminal exposure to HIV and three counts of statutory rape, resulting in an effective sentence of seventeen years. *Jones v. State*, 2008 WL 4735403 (Oct. 29, 2008). There was no dispute that Martin Charles Jones had engaged in unprotected sex with several different women, and had infected one of them with HIV. Jones sought to present a defense based on the idea that he was “in denial” about his HIV status, and thus should not be held culpable for his acts. But after the opening of the trial went badly, and before the state could put on actual victims as witnesses, his counsel prevailed on him to plead rather than to have sentencing take place after such evidence was put in the record. Jones claims his counsel told him that his sentence would be shorter than what the judge imposed, but counsel denied having thus advised Jones. Rejecting the ineffective assistance of counsel claim, the court detailed counsel’s extensive preparation for the case and the extensive discussions that led to Jones’ decision to plead guilty. It seems clear from the court’s recitation that Jones was likely to have drawn a longer sentence had he been convicted at trial. A.S.L.

**PUBLICATIONS NOTED & ANNOUNCEMENTS**

The LeGaL Foundation and Columbia Outlaws are co-sponsoring a full-day conference, “LGBTQ Law 2008: Where Do We Go From Here?” on November 15 at Columbia Law School. Information about the conference schedule and registration material is available on the LeGaL website, www.le-gal.org. Speakers and panels will cover such topics as marriage rights, immigration, domestic violence, transgender rights, and youth/homelessness. A special break-out session will consider the plight of gay Iraqis, and there will be a special plenary session to consider the impact of the 2008 election results on LGBTQ rights.

Touro Law Center’s online Journal of Race, Gender & Ethnicity will hold a symposium on transgender law on Friday, February 20, at the Touro Law Center in Islip, Long Island, N.Y. The journal will publish a symposium issue based on papers presented, and is soliciting proposals of 500 to 1000 words, which should be emailed to Professor Meredith R. Miller, at mmiller@tourolaw.edu, and copied to Jeanine Farino at jeanine-farino@tourolaw.edu. Deadline for proposals is December 16. Please include full contact information in the email.

The Williams Institute at UCLA Law School and the International Lesbian & Gay Law Asso-
ciation will co-sponsor an international conference, “The Global Arc of Justice: Sexual Orientation Law Around the World,” in Los Angeles and West Hollywood, California, from March 11–14, w009. The deadline for submitting panel proposals is Saturday November 15. For information, visit the ILGLA website: www.ciglaw.org. Submissions should be sent to Randy Bunnao, at bunnao@law.ucla.edu.

MOVEMENT POSITIONS

Equality Advocates Pennsylvania is seeking a new Executive Director. Formerly known as the Center for Lesbian & Gay Civil Rights, EAP advocates for LGBT rights through litigation and other advocacy work. The organization is headquartered in Philadelphia, and offers a competitive salary commensurate with experience, full employee benefits, and “family-friendly work environment.” Prior executive experience in the non-profit sector is strongly preferred. For full details about the position, check the organization’s website: www.equalitypa.org, or contact Pamela Leland at peland@equalitypa.org.

The International Lesbian and Gay Human Rights Commission (ILGHRC) is conducting an Executive Director search, as Paula Ettelbrick has announced that she is stepping down from that position. ILGHRC has the global mission of securing full human rights for those who face discrimination and persecution because of their sexual orientation, gender identity, or sexual/gender expression. The organization is headquartered in New York, with offices in Argentina and South Africa. Substantive knowledge in the field of human rights and related fields and a pertinent graduate degree are key credentials for this position. November 30 is the deadline to submit a cover letter, updated resume and list of 3 professional references. More information can be found on the organization’s website: www.iglhrc.org. Submissions to EDSearch08@iglhrc.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:


Bogen, David S., Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally, 56 Drake L. Rev. 1051 (Summer 2008) (suggests that U.S. accession to international human rights treaties should be construed to make protection of those rights one of the privileges or immunities of U.S. citizens that cannot be abridged by the states).


Curtis, Michael Kent, The Fourteenth Amendment: Recalling What the Court Forgot, 56 Drake L. Rev. 911 (Summer 2008).

Farber, Daniel A., Constitutional Cadenzas, 56 Drake L. Rev. 833 (Summer 2008) (includes discussion of Lawrence v. Texas).

Galvin, Richard, Legal Moralism and the U.S. Supreme Court, 14 Legal Theory 91 (June 2008).

Garner, Daniel R., Open Attendance The First Amendment Implications of Fighting Discrimination Against Homosexuals in Law School Student Organizations, 52 St. Louis Univ. L.J. 1249 (Summer 2008).


Handschu, Barbara, and Mary Kay Kisthardt, Same-Sex Adoption Issues, 31 Nat’l L.J. No. 9 (Oct. 27, 2008).

Hatami, Sheila, and David Zwerin, Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena, 25 Hofstra Lab. & Emp. L. J. 311 (Fall 2007).


Kelly, Meaghan, Lock Them Up And Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany 203 (Summer 2008) (the article is accompanied by a publication of the text of the proposed model law, beginning at page 171).


Sugarman, Stephen D., What is a “Family”? Conflicting Messages from Our Public Programs, 42 Fam. L. Q. 231 (Summer 2008).


Vitiello, Michael, Punishing Sex Offenders: When Good Intentions Go Bad, 30 Arizona St. L. J. 561 (Summer 2008).

Wilets, James D., A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other In-
AIDS & RELATED LEGAL ISSUES:


Moore, Thomas A., and Matthew Gaier, Update on AIDS-Phobia Claims, NYLJ, 10/7/2008, p. 3 (focus on NY law in light of recent NY Court of Appeals ruling in Ornstein rejecting the 6-month cap on damages that had been established by lower courts in New York during the 1990s).


Zounes, Sherryl S., Positive Movement: Revisiting the HIV Exclusion to Legal Immigration, 22 Georgetown Imm. L. J. 529 (Spring 2008).

EDITOR’S NOTE:

Corrections — In the October 2008 issue, an error resulted in the omission of a headline, which obscured the beginning of our article about Will of Alan Zwerling, 2008 N.Y. Misc. LEXIS 5651, a decision by Queens County, N.Y., Surrogate Judge Robert Nahman concerning the probate of the will of a man in a same-sex marriage. The article begins immediately after an article headed: Federal Judge Refuses to Dismiss Constitutional Challenge to Policy Restricting What Trans Student Could Wear at High School Prom. We have subsequently been contacted about that case by Peggy Brady, a LeGaL member who represents the estate. It seems that the cryptic opinion gave us an incorrect view of the facts, so a new article appears above with a more complete and accurate account of the case.

Also in October, we reported on a decision denying disability benefits to a gay HIV + man in Nieves v. Astrue, 2008 WL 42779955 (D. Colo., Sept. 16, 2008), in which District Judge Blackburn was harshly critical of the Social Security ALJ for a decision that the federal judge described as flawed with extensive and pervasive error, and possibly anti-gay bias. We then erroneously suggested that the recent revelations about the politicizing of ALJ appointments in the Immigration area were evident in this case as well. We have been informed that the process for ALJ selection by the Social Security Administration is a merit-based system in which the Justice Department, which selects Immigration ALJs, plays no role, and that Social Security ALJs make up the overwhelming number of federal ALJs, far outnumbering the Immigration Judges. Our apologies to the Social Security ALJ corps, but we are still concerned about Judge Blackburn’s observations about the unnamed ALJ in the Nieves case, and the apparent lack of any system for correcting ALJ bias apart from judicial review of individual cases.

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.