6TH CIRCUIT FINDS SCHOOL HAS DUTY UNDER FEDERAL LAW TO RESPOND TO HOMOPHOBIC HARASSMENT

In a recent case of extreme school bullying, culminating in a sexual assault, the U.S. Court of Appeals, 6th Circuit, reversed a District Court's summary judgment ruling in favor of the school district. *Patterson v. Hudson Area Schools*, 2009 WL 22859 (Jan. 6, 2009). Writing for the Sixth Circuit, Judge Karen Nelson Moore held that because the school district had knowledge that its disciplinary measures dealing with the harassment were ineffective, and it continued to use only those measures, the plaintiffs successfully showed a genuine issue of material fact as to whether the school district was deliberately indifferent.

The Pattersons sued the Hudson Area Schools for violating Title IX of the Education Amendments of 1972, alleging that the school had allowed their son, DP, to be the target of years of student-on-student harassment. To establish a prima facie case of student-on-student harassment, the Pattersons were required to establish three elements: (1) that severe, pervasive, and objectively offensive sexual harassment occurred, which deprived DP of educational opportunities, (2) Hudson had actual knowledge of the sexual harassment, and (3) Hudson was deliberately indifferent to the sexual harassment. Judge Lawrence P. Zatkoff, of the Eastern District of Michigan, found that the Pattersons had met their burden with regard to elements one and two. However, he found that, as a matter of law, they failed to establish that Hudson was deliberately indifferent. Thus, on appeal, the only issue was whether there was no material issue of fact as to whether Hudson was deliberately indifferent.

The 6th Circuit's opinion, reversing Judge Zatkoff's summary judgment in favor of Hudson, found that "where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are infective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." Under this reasoning, the 6th Circuit determined that a genuine issue of material fact existed as to whether Hudson acted reasonably under the circumstances. Thus, the court found that a school district cannot, as a matter of law, be shielded from liability if it knows that its responses to harassment are ineffective against persistent harassment. Such issues are better left for a jury to decide.

In addition, the court rejected the notion that a school district is not deliberately indifferent as long as it does something in response to harassment. Rather, even if the school district takes some action, if harassment continues, a jury cannot be precluded from finding that the school district's response was clearly unreasonable under the circumstances.

According to the court's summary of facts in *Patterson*, DP suffered ongoing harassment by students, and teachers, from sixth through ninth grade. Beginning in sixth grade, DP was regularly pushed into lockers, and called names such as "queer," "faggot," "fat," "pig," and "man boobs." He began seeing a psychologist to deal with the anxiety, anger, and sadness engendered by the harassment. In seventh grade, the same type of harassment continued and escalated. In one instance, DP was slapped by a female student, while he was apparently trying to stop her from bullying another student. This lead to further teasing, including a remark from a teacher, Mr. John Redding (in front of a class full of students), asking how DP felt being hit by a girl. Half way through seventh grade, DP wanted to drop out of school. At this point, the principal offered to provide mentoring to DP. However, it appears that the plan was poorly conceived because DP started to be perceived as a troublemaker for being in the principal's office frequently. Eventually, DP became so withdrawn from his classmates that he began eating his lunch alone, in the bathroom, to avoid his peers. Notably, the Pattersons reported several of the incidents to the school, eight of which are specifically listed by the court.

Eventually, the school counselor and a social worker evaluated DP and established that he was emotionally impaired as defined by the Individuals with Disabilities Education Act. This allowed them to develop an individual education program for DP. This program helped DP learn to cope with his peers and it was apparently successful in creating a good environment for DP's eighth-grade year. However, DP's transition to high school the following year brought a return of the bullying and harassment. The Pattersons requested that DP be allowed to continue using the individual education program, even if it meant returning to the middle-school resource room teacher who had been so helpful in the past. The high school principal, Mr. Michael Osborne, refused to allow such a request and also found that the high school's resource room was not the place for DP. Thus, DP did not receive any school-provided support from the high school in his ninth-grade year.

Classmates continued to tease DP throughout the ninth-grade year. On one occasion, when three students were confronted about the teasing, the students were forced to apologize, but no further action was taken. In another instance, a student giving a class presentation had written "[DP] is a fag" on the back of his note cards so that the class could see it while he was presenting. This student was verbally reprimanded, but again no further action was taken. Another student defaced DP's personal property with sexually explicit, homophobic language and drawings. Again there was a verbal warning, but nothing more. The parties seemed to agree that the students who had been verbally reprimanded did not bother DP again.

Toward the end of the school year, unknown students broke into DP's gym locker, urinated on his clothing, and put his shoes in the toilet. They also defaced his locker using shaving cream to write sexually oriented language. A few weeks later, two students placed a "Mr. Clean" poster on his locker in the main hallway (the "Mr. Clean" reference was intended to deride DP for a supposed lack of pubic hair). One of the students was suspended for a day, but only because this was his second school offense. DP's main locker was again vandalized by unknown students who used permanent marker to display homophobic words and pictures both inside and outside the locker. No one was punished for this incident.

The final incident of harassment involved an actual sexual assault upon DP. It began while DP and a teammate on the junior varsity baseball team, LP, were in the locker room after practice. LP stripped naked and forced DP into a corner; LP jumped on DP's shoulders and rubbed his genitals on DP's neck and face. Another student, NH, blocked the exit so DP could not leave. School officials investigated the assault and LP was suspended for the remainder of the year (eight days); NH was only verbally

LESBIAN/GAY LAW NOTES **February 2009**

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

Law Notes on Internet: http://www.nyls.edu/jac

 ISSN 8755–9021

reprimanded. The varsity baseball coach, Mr. Jeremy Beal, held a team meeting after the assault, and told the players that they should "not joke around with guys who can't take a man joke." (Apparently, rubbing your genitals on another's face, without permission, is merely a man joke on the Hudson High School baseball team.) Shockingly, LP was later permitted to attend an annual sports banquet just one week after the assault. Criminal charges were later brought against LP, and he pleaded guilty to disorderly conduct. After the criminal charge, LP was formally expelled from Hudson.

DP was psychologically unable to return to Hudson after the years of harassment and the final incident of sexual assault. He spent his tenth-grade year taking classes provided by Hudson but located at a Catholic elementary school. For eleventh and twelfth grade, he took college placement courses at a local college.

Although DP is clearly no longer in the hands of the Hudson Area Schools, the 6th Circuit's reversal of summary judgment in this case will undoubtedly help victims of school bullying in the future. Schools will always have their bullies, and not every case of bullying will cause severe psychological damage. But when the incidents become so clearly beyond the bounds of decency that they cause psychological impairment and deprive the victim of his educational experience, as in the case of DP, schools must take effective action and take affirmative steps toward eliminating the unreasonable behavior. *Ruth Uselton*

LESBIAN/GAY LEGAL NEWS

Another New York Appellate Department Endorses Recognition of Same-Sex Marriages

Lining up solidly behind last year's ruling by the Appellate Division, 4th Department, that a same-sex marriage of a New York couple validly performed in another jurisdiction would be recognized as a valid marriage in New York, a five-judge panel of the Appellate Division, 3rd Department, based in Albany, ruled on January 22 in *Lewis v. N.Y. State Dep't of Civil Service*, 2009 WL 137504, 2009 N.Y. Slip Op. 00283, against a challenge to the State Civil Service Department's determination to recognize such marriages for purposes of the public employee health insurance program that the Department administers.

The panel divided, 3–2, on the rationale for upholding the Civil Service Department's decision, with a majority voicing total agreement with the 4th Department's ruling in *Martinez v. County of Monroe*, 50 App. Div. 3d 189 (4th Dep't 2008). The minority voted to uphold the decision on the narrower ground that the Civil Service Department could exercise its discretion to treat out-of-state same-sex marriages as the equivalent of the domestic partnerships that are already recognized by the Department for purposes of the health insurance program.

The lawsuit was one of a number that have been brought with the backing of the Alliance Defense Fund, an Arizona-based organization that litigates to advance its religiously-based objections to gay rights in any form. ADF has so far unsuccessfully challenged marriage-recognition in New York in several different lawsuits, including a direct challenge to Governor David Paterson's directive last spring that state agencies should recognize such marriages as valid for purposes of state programs and benefits.

In this newest case, the trial judge, Albany County Supreme Court Justice Thomas J. McNamara, had treated the *Martinez* decision as a binding precedent. See 2008 N.Y. Misc. LEXIS 1623. Under New York's rules of precedent, a decision by one department of the Appellate Division is a state-wide precedent binding on all trial courts so long as it is not contradicted by another panel of the Appellate Division or overruled by the Court of Appeals. Since Monroe County has decided not to seek further appeal in the *Martinez* case, and no contradictory decision has emerged from any other department of the Appellate Division, *Martinez* remains a state-wide precedent, now joined by Lewis.

Of course, *Martinez* was not binding on the *Lewis* appellate panel, which had to determine for itself whether New York law supported the Civil Service Department's action. The court turned first to traditional New York marriage recognition rules, whose modern statement derives from a 1953 decision by the Court of Appeals, *Matter of May*, 305 N.Y. 486. In that case, the Court of Appeals embraced the general rule that marriages valid where they were performed will be recognized in New York with only two exceptions: where the legislature has specifically forbidden recognition of such a marriage by statute, or where recognition of the marriage would be "abhorrent" to the public policy of New York State. The second exception has been narrowly construed to apply to cases of incest or polygamy.

Writing for the *Lewis* majority, Justice Robert S. Rose first rejected the plaintiffs' argument that the marriage recognition rule does not even apply to this case because, by definition, the union of two persons of the same sex cannot be considered a "marriage." "In every case in which the rule has been applied," wrote Rose, "the out-of-state marriage failed to meet New York's definition of a marriage in some respect." He also pointed out that although the Court of Appeals had ruled in 2006 in *Hernandez v. Robles*, 7 N.Y.3d 338, that the N.Y. Domestic Relations Law "limits marriages solemnized in New York to persons of the opposite sex" and stated that this could only be changed through legislation, "it did not hold that same-sex marriages solemnized elsewhere would not be defined as marriages here, and it observed that the Legislature could rationally choose to permit same-sex couples to marry in New York."

Rose also noted that same-sex couples can now marry in Massachusetts and Connecticut, implying that use of the term "marriage" to refer to a legally-united same-sex couple is becoming an accepted part of the definition of the word "marriage."

Having found that the traditional New York marriage recognition rule applies to this case, the rest of the analysis followed quite easily. The New York legislature, unlike those of almost all the other states, has never passed a statute specifically rejecting the recognition of same-sex marriages from other jurisdictions, so the first exception does not apply.

As to the second exception, Rose again emphasized the narrow scope of the "public policy" exception, and said that "an out-of-state same-sex marriage would not fall within that preclusion unless the same-sex spouses were closely related or were more than two in number, situations not under consideration here." Furthermore, he added, "New York's public policy… cannot be said to abhor the recognition of out-of-state same-sex marriages." The growing body of judicial decisions stemming from Martinez in the state trial courts over the past year document an emerging consensus on this point, and Rose pointed out that if the legislature is unhappy about this trend in the cases, it can always pass a statute limiting marriage recognition.

The court also rejected all of the plaintiffs' alternative arguments, finding no violation of separation of powers, and concluding that the Civil Service Department's interpretation of the term "spouse" to include same-sex spouses did not require a formal regulation to take effect.

Justice John A. Lahtinen, writing for himself and Justice Bernard J. Malone, Jr., agreed with the result but argued that it should have been reached on narrower grounds, treating same-sex couples married out-of-state as having the same status as domestic partners for the purposes of the health insurance program. Lahtinen pointed out the potentially far-reaching impact of general marriage recognition, noting that other states had determined the recognition question legislatively, and pointing to the recent 2nd Department decision in *Godfrey v. Spano*, 2008 Westlaw 5413641 (Dec. 30, 2008), which had avoided taking a position on

the underlying question of recognition in the context of upholding a county executive order recognizing same-sex marriages "to the extent permitted by law."

But the majority opinion is the opinion for the court, so there are now two departments out of four that have embraced full legal recognition for same-sex marriages contracted out of state, bolstering — if such were needed — the precedential weight of Martinez in directing the decisions of trial courts throughout the state. It is worth noting, however, that the questions facing the 4th Department in *Martinez* and the 3rd Department in *Lewis* were different in one important respect: the 4th Department was being asked by the plaintiff to compel a governmental entity to recognize a foreign same-sex marriage, while the 3rd Department was being asked by the taxpayer plaintiff to declare that a voluntary decision by a governmental entity to recognize such marriages was invalid. Whether the court should compel a government actor to recognize such a marriage was not a question that the 3rd Department had to confront in its opinion. So far, the 4th Department's *Martinez* decision remains the only appellate ruling in New York holding that government agencies are required to extend such recognition, while the 3rd Department stands for the proposition that they are free to do so voluntarily. (The 2nd Department has managed to avoid deciding this underlying question while disposing of two different cases, *Funderburke* and *Spano*.)

The Alliance Defense Fund announced on January 28 that it was petitioning the Court of Appeals for review of the *Lewis* decision, insisting that it violates the public policy of New York as articulated by the Court of Appeals in *Hernandez*.

The Attorney General's Office defended the Civil Service Department's action, with amicus support from Lambda Legal and the New York Civil Liberties Union. Some usual suspects from the "other side" also weighed in supporting ADF, the National Legal Foundation and the American Center for Law and Justice. A.S.L.

Private Religious School Can Expel Students for Lesbian Relationship

A California appellate court has ruled that a religious high school was free to dismiss two students for having a lesbian affair, because the school is not a "place of public accommodation" covered by the state law banning sexual orientation discrimination. The ruling in *Doe v. California Lutheran High School Association*, 2009 WL 161869 (Cal.App., 4th Dist.), was announced on January 26 in an opinion by Justice Betty Richli.

Students applying to the Catholic Lutheran High School in Wildomar, California, a private religious school affiliated with the Evangelical Lutheran Synod and the Wisconsin Evangelical Lutheran Synod, are required to signify their acceptance of the rules governing the institution, which includes an agreement to conduct themselves according to rules of "Christian Conduct." According to Justice Richli, the school presented evidence about the view of non-marital sex and homosexuality embraced by the religious bodies that sponsor this school. "Lutherans believe that homosexuality is a sin," she wrote. "The School has a policy of refusing admission to homosexual students. Its Christian Conduct' rule provided that a student could be expelled for engaging in immoral or scandalous conduct, whether on or off campus. This would include homosexual conduct."

In this case, a student reported to a teacher that a female classmate had said that she loved another female classmate, without naming any names. The student told the teacher that he would be able to figure out who was involved by looking at the female students' MySpace pages. The teacher reviewed the MySpace pages of his female students and discovered the two students who were subsequently expelled, each of whom had referred to being in love with the other. One of the students identified herself as "bi" and the other as "not sure" under the category of sexual orientation.

The teacher reported to the principal, Pastor Bork, who convened a meeting of the school's Disciplinary Committee, which advised confronting the students and suspending them if they confirmed the truth of this information. Bork questioned each of the girls, they admitted that they loved each other, had hugged and kissed each other, and had told other students that they were lesbians. This earned them a suspension, letters to their parents explaining why they were being suspended — that they had a "bond of intimacy characteristic of a lesbian relationship" — and ultimately their expulsion by vote of the school's board of directors.

The girls sued under California's Unruh Civil Rights Act, which forbids sexual orientation discrimination by places of public accommodation. They also claimed damages for invasion of privacy and false imprisonment — referring to their sequestration in closed rooms for questioning until they were sent home, as well as "outing" them to their parents.

Judge Gloria Trask of Riverside Superior Court granted the school's motion for summary judgment, concluding that it was not a "business enterprise" covered by the Unruh Act, and the plaintiffs appealed.

The Court of Appeal agreed with Judge Trask, finding that private, non-profit schools were generally not considered to be businesses. There was no need to get into the school's alternative freedom of religion argument under the circumstances. Ironically, the main California precedent that the court invoked was a 1998 decision by the California Supreme Court, *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 17 Cal.4th 670 (1998), holding that the Boy Scouts organization in California was not a place of public accommodation, thus rejecting a suit by a gay man who had been excluded under the Scout's anti-gay membership policies.

"Curran is controlling here," wrote Justice Richli. "Just like the Boy Scouts, the School is an expressive social organization whose primary function is the inculcation of values in its youth members.' According to its mission statement, as set for in its student handbook, CLHS exists to glorify God by using his inerrant Word to nurture discipleship in Christ, serving primarily the youth of our WELS and ELS congregations, equipping them for a lifetime of service to their Savior, their homes, churches, vocations and communities.'"

Justice Richli stressed the selective nature of the school's admissions process, which was up-front in informing applicants about the "Christian Conduct" code. Even though the school engaged in some commercial transactions to support its activities, such as selling concessions and t-shirts at athletic events, the court did not consider this a basic activity of the organization.

The court also rejected the privacy and false imprisonment claims, finding them to be very much bound up with the unsuccessful Unruh Act claim. Justice Richli noted that the school had not publicized the reason for expelling the girls, and found that informing their parents was not a violation of the students' privacy. A.S.L.

Minnesota Appeals Court Rejects Public Accommodations Discrimination Claim by Same-Sex Couple

Amy and Sarah Monson, a committed couple raising a child together in Minnesota, recently sought a family membership to the athletic club in their community. The Rochester Athletic Club denied the application, explaining that the family membership was only given to married couples, a legal relationship that is denied to same-sex couples under Minnesota law. The Monsons sued under the Minnesota Human Rights Act, which prohibits discrimination on the basis of sexual orientation in places of public accommodation, alleging both disparate-treatment and disparate-impact discrimination. Failing to survive a motion for summary judgment at the trial level, the Monsons appealed. Judge Randolph W. Peterson, writing for the Minnesota Court of Appeals, affirmed, finding that the Monsons had failed to put forth a prima facie case of disparate treatment and that the disparate-impact theory was only available in the employment discrimination context. *Monson v. Rochester Athletic Club*, 2009 WL 21627 (Jan. 6, 2009).

The disparate-treatment argument largely failed because Judge Peterson and the Monsons disagreed about who could be considered as similarly situated to the Monsons. Peterson agreed with the trial court's premise that the Monsons were similarly situated to an unmarried heterosexual couple. Finding that the Monsons had failed to present any evidence of an unmarried straight couple obtaining a family membership, Peterson found that the Monsons had failed to show any disparate treatment. Interestingly, this ruling was made despite an admission by the athletic club's counsel that a straight couple probably could obtain a membership by lying about their marital status, as the club required no proof of marital status — a ruse unavailable to same-sex couples.

The Monsons felt that they were similarly situated to all heterosexual couples, married or not. Since marriage is something that is only available to straight couples, and the family membership is only available to married couples, the athletic club was being facially discriminatory by predicating family membership rates on a legal status unavailable to Minnesota's same-sex couples. Peterson faulted this line of reasoning, explaining that reference to Minnesota's marriage statute is beyond the scope of the judicial inquiry in a case arising under the Human Rights Act.

Turning to the Monsons' disparate-impact claim, Peterson noted that this legal theory was developed in the context of employment discrimination and has not yet been applied in the public-accommodations arena by either the Minnesota or United States Supreme Courts. As analyzed by federal courts, federal anti-discrimination laws have language that focuses on the effects of discrimination, thereby making disparate-impact arguments cognizable. However, Title II of the Civil Rights Act of 1964 (full and equal enjoyment of public accommodations) contains no similar effects-based language.

Peterson explained that the Minnesota Human Rights Act mimics this scheme. The employment-discrimination provisions cover both discriminatory treatment and the effects of discrimination. The public-accommodations provision, however, "focuses solely on the … provider's conduct" and "does not address the effects of the provider's conduct caused by other factors." Since the Monsons were precluded from using a disparate-impact theory of discrimination under state law, and the Monsons failed to show any disparate treatment, Judge Peterson held that summary judgment was properly entered by the trial court. *Chris Benecke*

No Tax Break for Father of Children Conceived Through Gestational Surrogacy

The United States Tax Court gave an unwelcome Christmas present to William Magdalin, who was appealing the Internal Revenue Service's refusal to allow his medical deduction for expenses incurred in the conception and birth of his two children by gestational surrogacy. The Tax Court ruled in *Magdalin v. Commissioner of Internal Revenue*, T.C. Memo. 2008–293, 2008 Westlaw 5535409 (December 23), in a decision by Judge Robert A. Wherry, Jr., that the expenses were not deductible, since they did not involve treatment of any medical condition suffered by the taxpayer or intended to affect a structure or function of the taxpayer's body.

Judge Wherry's opinion does not go into great detail about the underlying facts, although a passing reference suggests that the case involved a gay man who had previously fathered two children without the use of any reproductive technology in his prior marriage to a woman, and thus who was shown to suffer from no fertility problems that would require medical treatment. The petitioner in this case is a medical doctor licensed to practice in Massachusetts, where he was living at all times relevant to the case. In 2004 and again in 2005, he contracted with women to be gestational surrogates, submitting to implantation of embryos formed from his sperm and donated eggs. Two children resulted from these procedures. Magdalin documented his expenses and took them as medical deductions on his federal tax returns to the extent they exceeded the statutory floor of 7.5 percent of his gross income for each year.

The IRS disallowed the deductions, and Magdalin, representing himself, appealed to the Tax Court. He argued, in essence, that it was unfair that a married couple using gestational surrogacy because of a wife's inability to conceive or bear children could deduct the expenses on their tax return, but that he, an unmarried gay man, could not do the same. He referred to a Private Ruling Letter by the IRS, 2003–18–017 (Jan. 9, 2003), approving such a deduction for a married couple.

Judge Wherry explained that the statutory authorization for medical deductions was limited by its terms for "medical care of the taxpayer, his spouse, or a dependent," and that the deduction is a limited exception to the general rule that taxpayers are not allowed to deduct personal, living or family expenses, and is thus narrowly construed.

Under the Internal Revenue Code, "medical care" refers to money spent "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." In this case, Wherry observed, there was no indication that any of these claimed expenses had anything to do with Magdalin's medical condition, or affected his own body in any way. That made this case totally distinguishable from the married couple using IVF and a gestational surrogate to have a child, since this was a medical treatment for the wife's infertility.

Private Letter Rulings are not citable as precedents in any event, and the Tax Court decided that Magdalin's case was not the occasion to get any further into the issue of medical deductions for married couples using IVF. Instead, the court focused on the statutory definition and its lack of applicability to Magdalin.

Magdalin had tried to raise a claim that failure to allow him the deduction created a constitutional problem. "Petitioner argues that it was his civil right to reproduce," wrote Judge Wherry, "that he should have the freedom to choose the method of reproduction, and that it is sex discrimination to allow women but not men to choose how they will reproduce. While he correctly acknowledges that Internal Revenue Service private letter rulings are not legal precedent,' he refers to Priv. Ltr. Rul. 2003–18–017 (Jan. 9, 2003) to show that the expenses for egg donor, medical and legal costs are deductible medical expenses."

"Although petitioner at times" Wherry concluded, "under the facts and circumstances of his case, it does not rise to that level. Petitioner's gender, marital status, and sexual orientation do not bear on whether he can deduct the expenses at issue. He cannot deduct those expenses because he has no medical condition or defect to which those expenses relate and because they did not affect a structure or function of his body. Expenses incurred in the absence of the requisite underlying medical condition or defect and that do not affect a structure or function of the taxpayer's body are nondeductible personal expenses within the meaning" of the relevant Tax Code provisions.

Magdalin, a doctor (as noted above) who represented himself on this appeal to the Tax Court, could seek judicial review in the federal courts. Attorney Daniel P. Ryan represented the IRS on the appeal. A.S.L.

Federal Court Rejects Transsexual's Sex-Stereotyping Claim Under Title VII

In 2005, Amber Creed was fired for wearing makeup and having hair reach past her collar, characteristics her employer, Family Express, felt were inappropriate for someone born a male. Creed brought suit under Title VII and the Indiana Civil Rights Act for discrimination based on sex. Writing for the court, Chief Judge Robert L. Miller, Jr., of the U.S. District Court for the Northern District of Indiana, granted Family Express's motion for summary judgment, holding that Creed had failed to present sufficient evidence that she was discriminated against because of her sex. *Creed v. Family Ex-*

press Corporation, 2009 Westlaw 35237 (Jan. 5, 2009).

Creed began working at a Family Express store in February of 2005, shortly after being diagnosed with Gender Identity Disorder. Although Creed started her gender transition before being hired by Family Express, she began work dressed in a masculine manner and then went by the name of Christopher. Creed gradually began to grow her hair out and wear makeup, but always wore the company's unisex uniform. Creed claimed that she never received any complaints and that her customers and fellow employees were very supportive.

Family Express, however, claimed that it had received complaints from some customers who were uncomfortable with Creed's appearance. Two directors of Family Express visited the store to speak with Creed, telling her that the store's grooming policy required men to keep their hair short and refrain from wearing jewelry. The directors informed Creed that she was in violation of the written grooming standards, with which Creed herself was not provided when she began her employment. Although Creed informed the directors that she was going through a gender transition, Creed was told that she must present herself as a man in order to retain her employment at Family Express.

Judge Miller discussed the claims under Title VII and the Indiana Civil Rights Act together, noting that the two are considered coextensive in Indiana. After describing the state of law as it relates to sex-stereotyping claims under Title VII, Judge Miller turned to Family Express's grooming policy, holding that its sex-specific guidelines did not violate Title VII. This holding relied on *Jesperson v. Harrah's Operating Company*, a recent Ninth Circuit decision that sanctioned the termination of a female bartender who refused to wear lipstick to work. Judge Miller held that the policy here was similarly nondiscriminatory, as it did not impose a greater burden on either gender.

Judge Miller then turned to Creed's claims of intentional discrimination. As a preliminary matter, Judge Creed determined that Creed "must be considered male for the purposes of Title VII" since Congress had intended Title VII to apply to one's "biological sex." Since Creed did not produce any evidence of a similarly situated female employee who was treated differently under the grooming policy, she would have to otherwise prove that she would not have been fired but for her failure to conform to masculine sex stereotypes.

Creed tried to show impermissible animus by explaining that one of the directors had asked her if "it would kill [her] to appear masculine for eight hours a day" before terminating her employment. Judge Miller, however, held that the remarks were too ambiguous to hold that Family Express fired Creed for failing to match masculine stereotypes — it was equally plausible that Creed was fired, legally, because of her transgender status. Likewise, the timing of Creed's termination (shortly after co-workers noticed her more feminine appearance), was not sufficient alone to show discriminatory animus.

Creed was also unsuccessful in convincing Judge Miller that Family Express's decision to enforce the grooming policy was a pretext for discrimination, as no hard evidence of such pretext was produced. Family Express, however, was able to show that it had terminated employees in the past for failure to conform to the company's grooming policies. Since Judge Miller believed that Creed was unable to show a genuine issue of material fact, he awarded summary judgment to Family Express. *Chris Benecke*

Federal Appeals Court Strikes Down Statute Authorizing Civil Commitment of Sex Offenders

In an apparent case of first impression at the appellate level, a panel of the U.S. Court of Appeals for the 4th Circuit ruled that the Adam Walsh Child Protection and Safety Act,18 U.S.C. sec. 4248, which allows the federal government to place "sexually dangerous" persons into indefinite civil commitment when they have finished serving their prison terms for sexual offenses, is unconstitutional. *United States v. Comstock*, 2009 WL 42476 (January 8, 2009). The ruling, articulated in an opinion by Circuit Judge Diana Gribbon Motz, upheld dismissal of petitions by the government for indefinite civil commitment of five different sex offenders.

The court found that Congress lacks the authority to have enacted the statute. The court pointed out that the states have "long controlled the civil commitment of the mentally ill," and that Congress's attempt to grant the federal government "broad civil commitment authority" raised a substantial federal question because the constitution confers on Congress only authority to legislate on enumerated subjects. The court rejected the argument that the Commerce Clause might authorize such legislation, and the government had only offered up the possibility of Commerce Clause authority in passing. The government's main reliance was on the Necessary and Proper Clause.

The Necessary and Proper Clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution... all... powers vested by this Constitution in the Government of the United States." Rather implausibly, the government argued that the Necessary and Proper Clause is a virtual grant to Congress of power to legislate on any issue that they think rises to the level of national concern, regardless whether it concerns a matter that does not fall logically under any of the enumerated powers.

The government argued that the civil commitment law was related to the government's ability to maintain a federal criminal justice and penal system, but, as Judge Motz pointed out, "The Government cites *no* precedent in support of this novel theory. Instead, the Government relies on a restatement provision setting forth common law principles on the responsibilities of custodians. In essence, the Government argues that because it may constitutionally imprison persons who violate federal criminal law, it can continue to confine such persons — even after they have served their sentences — if it believes them to be sexually dangerous.'"

The court asserted, "This argument must fail… The fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls."

The government has apparently been routinely invoking the Adam Walsh Act in cases where individuals convicted of such offenses as possessing child pornography on their computers were nearing the end of their prison sentences, and seeking orders prior to their release to be able to keep them confined indefinitely on the grounds that they were "sexually dangerous." As such, this was an attempted end-run around the sentencing discretion of federal judges, and the court decided it should not be allowed.

Of course, there is a Catch–22 to this holding, as the court pointed that the states, under their general police powers, could adjudicate charges of sexual dangerousness and subject those found to present such dangers to civil confinement. Not only could states do this, but the federal government could coerce states into doing this by using its spending power to predicate eligibility for federal financial assistance upon state adoption of civil commitment policies for offenders deemed "sexually dangerous." But establishing such a regime directly is beyond the legislative authority of Congress. A.S.L.

Louisiana Appeals Court Rejects Challenge to New Orleans Domestic Partnership Registry

A unanimous three-judge panel of the Louisiana 4th Circuit Court of Appeal has rejected a challenge brought by the Alliance Defense Fund against a New Orleans municipal ordinance that created a domestic partnership registry for the city. The court's January 15 opinion in *Ralph v. City of New Orleans*, 2009 WL 103895, written by Chief Judge Joan Bernard Armstrong, affirmed Trial Judge Nadine M. Ramsey's ruling from a year ago that the city had the legislative authority to adopt the measure, and intimated as well that the ordinance did not violate the state's "Defense of Marriage

Amendment," passed by the voters in 2004, two years after the lawsuit was filed.

The New Orleans City Council unanimously enacted the Domestic Partnership ordinance in July 1993, then amended and re-adopted it in 1999. The ordinance merely establishes a registry in which adult cohabiting couples who are not married, either different-sex or same-sex, can register their relationships with the city. After the ordinance was enacted, the city's Chief Administrative Officer made access to health insurance available to registered domestic partners of city employees. As of 2003 when discovery was being conducted in the case, only ten registered domestic partner couples had applied for insurance benefits, and the evidence indicated a minimal cost of a few hundred dollars a year to provide the insurance coverage.

In 2002, the Alliance Defense Fund filed suit on behalf of a group of New Orleans taxpayers to challenge the Council's authority to enact the ordinance. The suit generated procedural litigation under which lower courts found that the plaintiffs lacked standing to challenge the ordinance, but the state Supreme Court decided that they did have standing and sent the case back to a trial court for a hearing on the merits. The trial court ruled a year ago, rejecting the challenge.

The plaintiffs argued that under the home rule charter and the state constitution, New Orleans was precluded from establishing new legal forms of family relationships. They relied primarily on Article VI, Section 9 of the Louisiana Constitution, which states that "no local governmental subdivision shall … enact an ordinance governing private or civil relationships." So the question for the court was whether the establishment of a domestic partnership registry could be said to be "governing private or civil relationships."

The court decided that the ordinance did not "govern" relationships, but instead merely recognized their existence. Wrote Judge Armstrong, "It is clear from the legislative history of the ordinance that it did not create the concept of domestic partnership, and was intended merely to acknowledge the previous and continuing existence of these arrangements, not to give them any particular legal status by setting forth a set of legal rights and obligations that would flow from the already existing relationships."

The court looked to the dictionary definition of "govern," "to control and direct the making and administration of policy in," and found it inapplicable to this situation. "The ordinance does not control the making and administration of domestic partnerships," she wrote, "it merely provides a mechanism whereby persons may register these partnerships with the City." Armstrong further observed that "private contracts that might form domestic partnerships are not controlled, regulated or directed by the ordinance. The terms and legal effect of these and all other contracts are regulated only by the applicable general laws of the state, city and nation… It would stretch any proffered definitions to find that the registry ordinance governs' private, civil relationships."

Furthermore, the court rejected the plaintiffs' argument that "the registry ordinance would confuse the marital status, rights and benefits accruing to married persons as they drive from Lafayette' to New Orleans." Armstrong observed that the ordinance had no effect on the state statutes dealing with marriage, "creates no obligations between the parties who choose to register, and provides neither an enforcement mechanism nor a cause of action for which redress may be sought in the courts of this state."

Of course, the New Orleans ordinance is of the minimalist registry-only variety. Were the city to try to load up registered domestic partnerships with rights, entitlements, and obligations, similar to those contained in more broadly worded domestic partnership ordinances such as the one enacted by New York City during the 1990s, it might well exceed its legislative authority in light of the constitutional restriction.

The state's Defense of Marriage constitutional amendment was enacted in 2004, two years after this lawsuit was filed, and was never formally made part of the case, but during the argument of this appeal, the plaintiffs argued that it provided an additional basis to strike down the ordinance. Among other things, the Marriage Amendment provides that "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." The court found that the claim of unconstitutionality based on this amendment "was not raised by petition, answer, or exception," was not before the trial court, and was not served on the Attorney General, as required by state procedural rules, and thus was not properly before the court.

The plaintiffs sought to argue that the Marriage Amendment was relevant in showing a public policy of preferring traditional different-sex marriages to any other arrangement. However, in a footnote, the court observed, "When La. Const. Art. XII, sec. 15 defines marriage, it does not speak to a preference; it merely provides that the incidents of marriage are to flow only from marriage as it is defined in that section," thus intimating that even had a challenge based on the amendment been before the court, it would most likely not have been successful.

Since the challengers are represented by a cause organization, it seems likely they will seek to appeal this ruling to the Louisiana Supreme Court. The New Orleans City Attorney's Office defended the ordinance, with Lambda Legal intervening on behalf of some New Orleans domestic partners seeking to protect their rights. A.S.L.

U.S. Asylum Law Requires Same-Sex Partners to Split Up

A panel of the U.S. Court of Appeals for the 9th Circuit dumped an unwelcome post-Christmas message on a gay Indonesian man, Parulian Hasibuan on December 26, when it rejected his attempt to win the right to stay united in America with his same-sex partner. The unanimous panel ruled in *Hasibuan v. Mukasey*, 2008 Westlaw 5396467 (not officially published), that Mr. Hasibuan, who had missed the one-year deadline for filing an asylum petition, and who was found not eligible for withholding of removal or protection under the Convention Against Torture, could not argue that his same-sex partner was a "qualifying relative" to attempt to benefit from the protection accorded spouses of U.S. citizens.

The court's brief memorandum opinion provides few facts, although it is noted in passing that Hasibuan relied on evidence that he had been beaten by his father and suffered two attacks at the hands of others, but the court found that "substantial evidence" (which it did not feel obliged to describe) "supports the BIA's determination that the beatings by Hasibuan's father and the two attacks Hasibuan suffered did not rise to the level of past persecution." (The significance of this ruling is that a finding of past persecution would raise a presumption that the petitioner would encounter future persecution if returned to his home county. The lack of such a finding leaves the petitioner with the burden of proving that such persecution would occur.) The court also found that "Hasibuan has not demonstrated a clear probability of future persecution if he returns to Indonesia," or that he would be tortured there, a prerequisite to protection under the CAT.

As to Hasibuan's attempt to put forth his same-sex relationship as a reason to let him stay in the U.S., the court cited still-prevailing 9th Circuit precedent, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), which held that only parties to heterosexual marriages were "spouses" within the meaning of federal immigration law. The enactment of the Defense of Marriage Act, not mentioned by the court directly, subsequent to *Adams*, would seem to make that ruling a concrete part of American law.

"Because Hasibuan has not asserted that he and his partner are married under state law," wrote the court, "Hasibuan lacks standing to bring a constitutional challenge to the federal definition of spouse… In addition, because Hasibuan does not assert that he attempted to marry his partner, he also lacks standing to challenge California's marriage laws." Thus, the court rejected Hasibuan's claim that the re-

fusal to accord him the same rights as a person married to a U.S. citizen was a violation of his own constitutional rights. The clear implication is that if Hasibuan and his partner had married in a jurisdiction affording such a right (such as California between mid-June and November 5), he would at least have standing to challenge DOMA and its effect on immigration law.

There is no indication on the court's opinion whether Hasibuan was represented by counsel on his appeal. A.S.L.

3rd Circuit Finds No Jurisdiction to Protect Gay Man From Senegal

Sometimes the juxtaposition of a news story and a judicial opinion makes for strange contrasts. News reports during the first week in January that nine men in Senegal had been tried on charges of "conspiracy" and "unnatural acts" and sentenced to eight years in jail as part of an apparent crackdown on homosexuals followed close on a decision by the U.S. Court of Appeals for the 3rd Circuit in *Ndiaye v. Attorney General*, 2008 WL 5397718 (Dec. 29, 2008) (not officially published), rejecting an attempt by a gay man from Senegal to stay in the United States despite his conviction here on drug charges. The court noted that the Immigration Judge had found lacking in the petitioner's case evidence to contradict a State Department Country Report on Senegal indicating homosexuality was not illegal there.

According to the per curiam opinion, the petitioner, a native and citizen of Senegal, came to the U.S. in 1988 as a visitor with a 30–day tourist visa, which he apparently overstayed. According to his testimony, he had figured out that he was gay when he was 14, but did not tell anyone or act on it at that time. In 1973 he married and had seven children. However, at some point he decided he could not keep this secret any longer and told his family he was gay. They shunned him, he left his home and his country, and arrived in the U.S. in 1988. He testified that he never actually engaged in homosexual conduct in Senegal, but since coming to the U.S. he has had two homosexual relationships, and he fears he would be harmed if he returned to Senegal (where, after all, his family knows he is gay and the word would undoubtedly spread).

His problem is that he became involved in drug dealing in the U.S. In 2005, he was convicted in federal court of conspiracy to distribute heroin and possession with intent to distribute, earning him a 70–month prison sentence and bringing him to the attention of immigration authorities, who initiated removal proceedings against him. In response, he attempted to seek asylum, withholding of removal and relief under the Convention Against Torture, claiming fear of persecution on account of his sexual orientation.

Because he is a convicted felon, asylum is not available. Because drug dealing is denominated a "particularly serious crime" under immigration law, withholding of removal is also unavailable. That leaves only the possibility of CAT protection, for which a petitioner must meet the high burden of showing a clear probability that he would be tortured on account of his sexual orientation if deported back to Senegal. In this case, the IJ relied on a 2006 State Department Country Report documenting that there is discrimination against gays in Senegal, but no likelihood of torture. The petitioner argued that homosexuality was illegal in his home country, but the IJ concluded that the Country Report stated the contrary. The IJ noted that despite the sympathetic factors in this case — most importantly that petitioner had resided in the U.S. for 20 years and was 63 years old — there was nothing he could do for him under U.S. law, and the BIA affirmed without a written opinion.

The court agreed with the government's argument that the court lacked jurisdiction to review the IJ's determinations. Because petitioner was convicted of an "aggravated felony," the statute limits the court's jurisdiction to constitutional claims or questions of law. The government argued that the points petitioner was raising on appeal all related to "issues of fact and questions regarding the consideration, interpretation, and weight of the record evidence," not legal or constitutional questions.

The irony in this, of course, is that the 2006 Country Report relied upon by the IJ is clearly out of date concerning conditions for gays in Senegal, if the press reports from early in January 2009 are accurately conveying the situation. The *New York Times*, for example, reports on the rise of anti-gay sentiment in Africa, especially Islamic Africa, commenting that "even in Senegal, one of the most liberal and tolerant countries in Islamic Africa, tensions over homosexuality have been on the rise." Supporting this point, the *Times* noted the arrest last year of a group of men "after a magazine printed photographs of what purported to be a gay wedding," and the recent flight of one of those arrested men, a popular singer, seeking asylum in the U.S. One of the men whose arrests were the subject of the January 9 *Times* story was a prominent gay activist who was working with AIDS organizations to counter the spread of HIV in the "largely clandestine gay community in Senegal." The article also specifically commented that Senegal "has become increasingly intolerant of homosexuality in recent years despite its reputation for liberalism and openness."

Thus, the irony that due to the nature of administrative process and judicial review as constricted by federal immigration statutes, the petitioner in this case cannot present evidence of current conditions to bolster his claim for refugee in the U.S., even though it is current conditions, not those prevailing back in 2006, that he would face upon his return. Something is basically wrong with a system that by its nature relies on outdated information when the individuals subject to the system will be confronted by the current situation. A.S.L.

H2 = Connecticut District Court Denies Bisexual Jamaican Habeas Corpus Relief

The U.S. District Court for the District of Connecticut has rejected, on jurisdictional grounds, a bisexual Jamaican man's application for a writ of Habeas Corpus and his motion to terminate his deportation order, in *Samuels v. INS*, 2008 WL68134 (D. Conn., January 7, 2009).

The petitioner was convicted in 2000 of several serious crimes including sexual assault. While his criminal appeal was pending, the petitioner was issued a Notice to Appear by the INS and charged as being subject to removal from the United States as an aggravated felon under the immigration laws based on a prior assault conviction to which he had pled guilty. Before he was ordered removed by an Immigration Judge, the petitioner had stated that he did not fear persecution or torture in Jamaica. The petitioner appealed to the Board of Immigration Appeals ("BIA"), then claiming that he feared persecution as a bisexual man, but he failed to file a timely brief and his request for an extension to complete his brief reached the BIA after the filing deadline had passed. The BIA denied his appeal without opinion and affirmed the decision of the Immigration Judge.

Although it is unclear why, the petitioner did not file a petition for review with the Court of Appeals for the 2nd Circuit within 30 days of the BIA's decision and is now barred from doing so. Instead, several years later, the petitioner filed an application for a writ of Habeas Corpus with the U.S. District Court in Connecticut, claiming that his right to due process was denied when the BIA refused to give him an extension to submit his brief on appeal, and that he would be at risk of serious injury or death if returned to Jamaica. Speaking for the court, Judge Mark R. Kravitz agreed that the petitioner's contentions "that he will be harmed or killed if he is removed to Jamaica are very serious" and that the court would not "treat them lightly." Judge Kravitz agreed that it seemed "troublesome" that the petitioner was incarcerated at the time he mailed the brief extension request more than a week before the filing deadline and "can hardly be faulted for not having access to overnight courier services that would have guaranteed a timely delivery." He also pointed out that in subsequent litigation, the 2nd Circuit held that the same assault statute that the petitioner had been convicted under is not an aggravated felony under the immigration laws. However, Judge Kravitz held that the District Court did not have jurisdiction over

the petitioner's claims under the laws as set forth by the REAL ID Act of 2005, and that the claims should have been brought to the 2nd Circuit.

Additionally, Judge Kravitz found that he was prohibited from transferring the case to the 2nd Circuit, because that court lost jurisdiction when the petitioner failed to file a timely appeal before it. Accordingly, Judge Kravitz denied the petitioner's application for a writ of Habeas Corpus and the motion to cancel his deportation order, and suggested that the petitioner seek relief by making a motion before the BIA to reopen his case. *Bryan C. Johnson*

NYC Subway Conductor's Homophobic Slur and Assault Leads to Discharge

A divided panel of the New York Appellate Division for the 2nd Department in Brooklyn upheld a decision by the Transit Authority to dismiss a subway conductor who was accused of calling a customer a "faggot" and grabbing him by the neck so hard that he left a red impression of his hand on the customer's neck. A labor arbitrator had concluded that the conductor was guilty as charged, but had ordered his reinstatement without back-pay, and the Transit Authority appealed to uphold the discharge under its policy of "Zero Tolerance" for violence by employees. *N.Y.C. Transit Authority v. Transport Workers Union of America, Local 100*, 2008 WL 5413469, 2008 N.Y. Slip Op. 10631 (N.Y.A.D., 2nd Dept., Dec. 30, 2009).

The decision for the court by Justice Howard Miller did not spell out the details of the incident, but they were described in a January 6 article in the *New York Law Journal*, based on the written opinion by Arbitrator Kinard Lang that was included in court records.

The incident took place at the Main Street Terminal in Flushing, at the end of the No. 7 subway line, on April 14, 2006. The conductor, Jack Grissett, was standing on the platform talking to another TA employee when a customer approached him to ask about express service from that station. Grissett told the customer that there was no express service due to track work, and they got into some sort of argument, during which Grissett allegedly called the customer a "faggot," and thus provoked, the customer uttered some imprecation about the sexuality of Grissett's father, then three years deceased. Grissett then allegedly grabbed the customer by his neck.

The customer complained to the TA, which suspended Grissett, investigated, and decided to dismiss him. A TA superintendent actually saw the reddened hand impression on the customer's neck. Grissett had worked for the TA for 21 years, and had one prior incident on his record involving an assault of a customer, for which he had received a five-day suspension eleven years ago.

The union took the matter to arbitration. Arbitrator Lang found that Grissett had engaged in the alleged conduct, but that discharge was too severe considering the length of his employment with the TA. Lang purported to rely on a provision of the union contract under which the arbitrator could modify a penalty that he found to be "clearly excessive."

The TA appealed, and won a ruling from Supreme Court Justice Bruce M. Balter that the arbitrator had exceeded his authority by ordering the reinstatement. Now it was the union's turn to appeal, arguing to the Appellate Division last January 10 that the contract authorized the arbitrator's action. The Appellate Division panel took almost a year to reach its decision, probably due to the sharp split among its members, two of whom issued a vehement dissenting opinion.

Justice Miller found that in cases where the arbitrator found that the employee had perpetrated an assault, the contract expressly provided that the TA's disciplinary penalty must be upheld unless the arbitrator found it be "clearly excessive in light of the employee's record and past precedent in similar cases," and that this exception to the normal rule of upholding the penalty "will be used rarely and only to prevent a clear injustice."

In this case, wrote Miller, the arbitrator's opinion failed to support his conclusion that the dismissal was "clearly excessive," because it was, in the court's view, consistent with past precedents in which the courts had upheld dismissals of TA employees in cases involving assaults of customers. Furthermore, this was an employee whose record included a past disciplinary suspension for assaulting a customer. Miller noted that the TA cited several such cases in its post-hearing brief to the arbitrator, but the union cited no cases at all, merely arguing in its brief that the penalty was excessive without further explanation. Miller found that dismissing Grissett was not a "clear injustice."

The dissenters, in an opinion by Justice William E. McCarthy, took the position that the court was failing to abide by the requirement of deferring to the arbitrator's judgment about when the contract requirements for overriding a TA penalty had been met. Normally, judicial review of arbitration decisions is narrowly circumscribed, since the parties' agreement to have arbitrators decide their disputes signifies their decision to substitute the arbitrator for the court in determining their rights under the union contract.

However, countering the dissent, Justice Miller pointed out that the contract itself was clear in limiting the arbitrator's discretion, by singling out assaults as violations for which the TA's penalty assessment should normally be upheld, by specifying that departures should be rare, and by requiring reference to precedent. Miller found the arbitrator's attempt to distinguish the precedents in his opinion to be unconvincing.

According to the *Law Journal*'s report, the attorney for the employee, Beth M. Margolis of Gladstein, Reif & Meginniss, was considering petitioning the Court of Appeals to review the case, but such review is up to the discretion of the court. A.S.L.

Family Court Says Same-Sex Spouse Need Not Adopt

On January 6, 2009 a New York family court judge issued a brief but important ruling affirming the parental rights of same-sex spouses married in other jurisdictions. Donna R. S. and her wife, referred to only as Ms. S., were married in Ontario, Canada on July 4, 2007. Ms. S then conceived through intrauterine insemination and Donna began the process of legally adopting the child. The couple underwent a standard pre-adoption home study, and included the favorable results and their marriage license with their application. Deciding the issue in *Matter of Donna S.*, 20009 WL 69341, 2009 Slip Op. 29009 (Family Court, Monroe Co.), Judge Joan S. Kohout granted a win to lesbian couples that seek equal legal status of their children conceived through donor insemination.

While holding that the petitioner was clearly qualified for pre-certification to be an adoptive parent, Judge Kohout stated that such certification was not really necessary. Because of the decision in *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dept. 2008), holding that New York must recognize same-sex marriages validly entered into in other jurisdictions, same-sex spouses are entitled to the same parental rights over children born through donor insemination as heterosexual spouses.

A child born to a married woman is presumed to be the offspring of the woman's husband, but in cases of donor insemination that presumption obviously does not apply. New York provides for this by allowing the couple to sign a consent form indicating that the husband is the child's legal parent. After *Martinez*, this principle must be applied to same-sex couples, placing the non-conceiving spouse in the position traditionally afforded to the husband. Accordingly, rather than jump through the hoops of a formal adoption, Donna and Ms. S. need only sign a consent form and live together with the child for one year before Donna is deemed the child's legal parent. The one-year living requirement may be foregone upon application of a waiver.

This ruling cements the equal parental rights of lesbian couples married outside the state of New York, in stark contrast to a number of a other states that bar same-sex couples from second-parent adoptions. *Stephen E. Woods*

U.S. Tax Court Issues Non-Precedential Opinion on Dependent Deduction

In a case that may involve a lesbian couple with children (the opinion does not make this clear), the U.S. Tax Court ruled on November 4, 2008, in an opinion designated as non-precedential, that a woman could claim the same-sex "friend" who lived with her, as well as the "friend's" grandchildren, who also lived with them, as dependents on her federal income tax return. Partially reversing a decision by the Commissioner of Internal Revenue in *Leonard v. Commissioner*, T.C. Summary Opinion 2008–141 (Docket No. 12719–07S), Judge Dawson emphasized that the taxpayer provided the majority of the financial support for her friend and the friend's grandchildren, as she earned almost $30,000 that year, compared to less than $8,000 that her friend, who did not work, received in disability benefits, and that the children's parents had disclaimed responsibility for supporting them and were not claiming them as dependents. In addition, due to her low income, the friend did not file her own tax return. Given this constellation of facts, the Tax Court found, it was appropriate to allow the taxpayer to claim dependency exemption deductions for them. However, the court disallowed some other incidental deductions which would have required the children to be legal relatives of the taxpayer. A.S.L.

Federal Civil Litigation Notes

U.S. Supreme Court — One man against the world? James E. Pietrangelo, II, has filed a certiorari petition with the Supreme Court, seeking review of the 1st Amendment's decision in *Cook v. Gates*, 528 F3d 42 (June 9, 2008), in which the court agreed with the 9th Circuit that the government's Don't Ask, Don't Tell policy governing service by gay people in the military was subject to Due Process heightened scrutiny, but that it survived such scrutiny based on the legislative history of the measure in light of the practice of deference to the political branches and the military on personnel policy. Pietrangelo, who was one of the co-plaintiffs in *Cook* but separated himself from the others early in the litigation to preserve his right of separate appeal, argues that there is now a split between the 1st and 9th Circuits on the constitutionality of the DADT policy worthy of Supreme Court review. As both circuits have denied reconsideration of the panel decisions or en banc review, the case would be ripe for Supreme Court consideration were it not that the government has not yet sought review of the 9th Circuit ruling, and the advent of the new administration pledged to repeal DADT and replace it with a non-discrimination policy may lead the Court to conclude this is one political hot potato it need not take on. In fact, in one of the dissents from the denial of en banc review in the 9th Circuit, Chief Judge Alex Kozinski argued that granting of en banc review, with the necessary briefing schedule and hearing prior to decision, would have provided some breathing space for the political branches to do their thing and allow the judiciary to avoid having to decide the issue. Peitrangelo is apparently proceeding pro so. His certiorari petition, filed on December 23, can be read at 2008 WL 5451850.

Supreme Court — The Court denied certiorari in *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (Ct. App. 3d Cir., July 22, 2008), cert denied, 2009 WL 129119 (U.S. Jan 21, 2009), thus leaving in place the 3rd Circuit's decision holding unconstitutional the Child Online Protection Act, a federal statute intended to make it difficult for children to access sexually-oriented material on the internet by imposing various regulations and threatened criminal penalties on those who operate on-line sites with sexual content. The court of appeals found that the law, which had been modified several times in response to prior adverse court rulings, still imposes more chill on First Amendment free speech rights than could be justified under existing First Amendment precedents.

2nd Circuit — New York — In a frustratingly terse opinion, a panel of the 2nd Circuit has dismissed a petition by a gay man from Brazil for review of the Board of Immigration Appeals' refusal to reconsider an order denying his petition for asylum or withholding of removal from the U.S. *Beserra-Luis v. Filip*, 2009 WL 197557 (Jan. 29, 2009)(unpublished disposition). The court upheld the BIA's finding that the asylum petition was filed too late and that the petitioner had failed to demonstrate his entitlement to withholding of removal due to fear of persecution on account of his sexual orientation. In the only hint at the factual case, the court wrote: "Although the BIA was not obligated to discuss every piece of evidence in the record, it did specifically note the sexual abuse Beserra-Luis experienced in Brazil (and would be likely to face again) on account of his homosexuality. But the BIA determined that the evidence did not demonstrate that the Brazilian government is unwilling or unable to control the actions of private actors who persecute homosexuals. We cannot say that the record compels a contrary conclusion; accordingly, under the substantial evidence standard the BIA was entitled to conclude that Beserra-Luis was ineligible for cancellation of removal." Lavi S. Soloway of Masliah & Soloway represented the petitioner on this appeal.

9th Circuit — California — In a notably shortwinded memorandum, a 9th Circuit panel rejected a challenge to the Board of Immigration Appeals' denial of relief to an Armenian lesbian who was seeking to remain in the United States. *Karapetyan v. Mukasey*, 2008 WL 5396478 (Dec. 26, 2008)(not officially published). She missed the one-year filing deadline for an asylum claim, and the court rejected her argument that a one-year deadline creates an Equal Protection issue. The Immigration Judge had found that she suffered harassment and employment discrimination on account of her sexual orientation in Armenia, but her only adverse encounter with a government official was to suffer a beating at the hands of extorionate police officers who beat her for refusing to pay bribes to them, and the court noted there was no evidence that this was due to her sexual orientation, thus this persecution did not "count" for purposes of asylum! The court also found no evidence that she would be persecuted or tortured were she forced to return to Armenia.

California — Sore winners? Proponents of Proposition 8 filed suite in the U.S. District Court in Sacramento, seeking an injunction against further disclosure by the State of California of the name and identity of individuals who donated more than $100 in support of Proposition 8. The suit, brought on behalf of the organization self-styled "Protect Marriage," asserts that opponents of Proposition 8 have been disseminating this information on the web, creating danger of harassment or worse against the anti-gay-marriage donors. Ironically, the process under which the state of California requires ballot initiative proponents to file this information about their donors and to make such information public, was itself established by an initiative process. The plaintiffs in the "Protect Marriage" case claim that the disclosure of their donors' identities violates their First Amendment rights by potentially chilling political speech. Of course, their lawsuit does not mention incidents over last summer when some major donor opponents against Prop 8 suffered harassment and attempted business boycotts when their names were publicized as a result of the official publication of their donations. The suit was particularly aimed at stopping the scheduled Jan. 31 publication of donations from the last part of the campaign, when lots of donations were received in the final weeks leading to the vote. *New York Times*, Jan. 19, 2009. But U.S. District Judge Morrison England, ruling from the bench on January 29, denied their request for a preliminary injunction, stating, "If there ever needs to be sunshine on a particular issue, it's a ballot measure." The judge said that the state's interest in making sure that voters know who is behind a ballot initiative outweighs the risk that those opposed to the measure might take lawful steps — such as boycotts and adverse publicity — against a measure's supporters. The plaintiffs vowed to seek relief rom the U.S. Court of Appeals for the 9th Circuit. *San Francisco Chronicle*, Jan. 30.

California — An attempt by four Fresno men who were arrested in a sting operation in the city's Roeding Park in 2002 to hold public officials accountable for violation of their rights hit a road bump on January 26 when U.S. District Judge Lawrence J. O'Neill denied their motion for summary judgment, finding that factual issues would have to be resolved at trial. *Coldwell v. County of Fresno*, 2009 WL 179686 (E.D. Cal.). The plaintiffs claim that their arrests for solicitation and/or lewdness by undercover police violated their rights to due process and privacy and were improper under relevant statutes because there was no offended member of the public present to observe their activities, and as a logical matter the undercover police officers who were seeking to elicit solicitation and lewd acts as part of their sting operation could not serve that function. The lawsuit claims that the officers were not adequately trained on the requisites of a valid public order arrest, and that the operation targeted gay men in violation of the equal protection requirement. The governmental defendant alleged in opposition to the motion that it provided extensive training, that the arrests were proper, and that gay men were not being targeted, contending that undercover police were also sent into the park looking for inappropriate activity in the women's restroom and other areas frequented by women. In light of the factual contest, Judge O'Neill determined that the matter could not be resolved through pretrial motions.

California — In *Doe v. Chastan*, 2008 WL 5423278 (E.D.Calif., Dec. 29, 2008)(not officially published), Magistrate Judge Craig M. Kellison apparently provides in full the narrative complaint filed by transsexual inmate "Jane Doe," which recites a horrific story of Doe's treatment in the all-male prison, including circumstances where she was sexually used by another inmate who may have infected her with HIV, and was subjected to oppressive conduct after prison staff spread word about her HIV+ status through the prison. Kellison then finds that Doe has failed to allege the necessary facts to support an 8th Amendment case, due large to lack of specificity in naming individuals responsible for particular objectionable conduct and linking specific injuries to herself to the acts of specific individuals. The allegations also raise a 1st Amendment claim concerning the allegation that the prison's Appeals Coordinator, growing tired of Doe's complaints, offered a better housing situation in exchange for a promise to stop filing complaints. The magistrate's decision illustrates the futility of pro se efforts by many prisoners who haven't the rudimentary knowledge to know how to frame their complaints in a way that meets 8th Amendment standards. Acknowledging that the narrative could provide a basis for actionable claims, Kellison granted the inmate leave to file an amended complaint rather than dismiss the action outright. Whether Jane Doe will be able to comply and produce the necessary complaint without legal assistance is an open question.

Nevada — Asserting that "homosexuals are not a protected class" under the 14th Amendment, U.S. District Judge Roger L. Hunt approved a magistrate's ruling dismissing a gay inmate's claim that his equal protection rights were violated when he was placed in administrative segregation rather than protective custody after he charged prison officials with having slandered him by labeling him an "aggressive homosexual" in his file and allowing that information to get out in the prison. The inmate argued that this made him vulnerable to attack and subjected him to protection violence, and that other inmates in danger of attack were placed in protective custody, not administrative segregation, which is much more restrictive. Judge Hunt found that the inmate's equal protection claim "is proper only if he can show that Defendants' decision to send him to administrative segregation was not rationally related to a legitimate penological interest," and that he failed to make such a showing, because he had "brought forth no evidence indicating that Defendants were acting for any reason other than a desire to place him in an appropriate facility based on the information before them." The court also concluded that the inmate had been accorded sufficient procedural due process. Ultimately, he was placed in protective custody. *Matthews v. Endel*, 2009 WL 44001 (D. Nev., Jan. 5, 2009).

New York — A lesbian truck driver who was discharged after a sequence of events in which she claims she was falsely accused of misconduct by a customer of the employer and was subjected to discriminatory treatment by the employer and her union (which refused to take her grievance to arbitration) won a ruling from U.S. District Judge David N. Hurd that her simultaneous pursuit of a discrimination claim before the N.Y. State Division of Human Rights for sexual orientation discrimination did not preclude a federal suit under Section 301 of the Labor Management Relations Act for breach of the collective bargaining agreement between the company and her union. *Gorenflo v. Penske Logistics*, 2009 WL 45259 (N.D.N.Y., Jan. 8, 2009). Sharon Gorenflo's federal suit also alleged a breach of the duty of fair representation against the union, but that claim was not at issue on this motion to dismiss, which was filed by the company and various individual defendants. The court found that although the discrimination and breach of contract claims stemmed from the same underlying incidents, they presented distinctly separate legal issues, so that the provision of the N.Y. Human Rights Law limiting the ability of complainants to file simultaneous claims with the Division and the courts did not apply. The federal action does not allege discrimination by the employer, but rather that the employer failed to comply with various requirements of the collective bargaining agreement in dealing with Ms. Gorenflo. The court did find, however, that suit against individual named defendants had to be dismissed, because Section 301 pertains only to suits involving signatories to the collective bargaining agreement, and the only signatories were the company and the union, not individuals.

New York — Some gay people in Rochester suffered dismissal of their attempts to hold the county, the district attorney and the head of the police union accountable for what they considered discriminatory treatment in connection with an incident that occurred on June 1, 2007. *Doe v. Green*, 2009 WL 37179 (W.D.N.Y., Jan. 6, 2009). Early that morning, five friends were walking home from a bar on Monroe Avenue in Rochester when they suffered homophobic verbal harassment from two women and two men who were sitting on the porch of a house they were passing. They kept walking, but the four verbal assailants came off the porch and followed them, then attacked them with kicks, punches, and blows using a metal pipe, according to the allegations of the complaint. Police were called and told everybody to go home, refusing the demands of the victims that they arrest the assailants. The victims began arguing with the officers, and ultimately two of the victims ended up being arrested and charged with petty offenses. They sought redress, claiming that the local government and law enforcement authorities were lax in dealing with anti-gay hate crimes and allegations of discriminatory conduct by police officers, and that a subsequent grand jury inquiry had been effectively thwarted by a conspiracy between the D.A. and the head of the police union, who subsequently endorsed the D.A. for reelection after the jury refused to indict any of the police officers. In this suit, they alleged violations of their constitutional rights and conspiracy. The court found prosecutorial immunity protected the D.A. and the Assistant D.A. who were named defendants, and that the charges against other defendants failed to state a claim. Among other things, District Judge David G. Larimer asserted, "sexual orientation is not a protected category under Section 1985," so the claim of a conspiracy to violate federal constitutional rights under that section would fail. All of the authority Larimer cited on this point consisted of decisions by other federal district courts.

New York — An employer charged with discrimination by a gay former employee has defaulted on liability, according to a ruling by U.S. District Judge Thomas J. McAvoy in *Hurley v. Family Restaurants of Watertown, Inc.*, 2009 WL 152705 (N.D.N.Y., Jan. 21, 2009). Plaintiff Jarrod Hurley claimed that he was subjected to derogatory and offensive comments about his

sexual orientation, and had his hours reduced when he complained, was advised to quit, and suffered further discipline, reduction of hours, and ultimately discharge after filing a charge with the Equal Employment Opportunity Commission. His claim is brought under Title VII of the Civil Rights Act of 1964 (sex discrimination) and the New York State Human Rights Law (sex and sexual orientation discrimination). The court found that defendant was properly served with the complaint, but had failed to respond in any way and thus was defaulted on liability. However, Judge McAvoy observed that Hurley had yet to submit any evidence "substantiating his claimed loss of earnings or damages resulting from emotional distress," and ordered that Hurley file affidavits address to that subject by March 2, 2009, indicating whether he sought an evidentiary hearing on damages. Of course, defendants will also be served with these papers and have an opportunity to respond and request a hearing if they desire one. Attorneys Adam C. Virant and Justin L. Swidler of the Karpf, Karps Law Firm represent Hurley.

Washington — In *Aynes v. Kellogg Sales Company*, 2009 WL 57549 (W.D. Wash., Jan. 8, 2009), District Judge Ronald B. Leighton leaves it unclear whether the plaintiff, who is suing for sex discrimination in connection with her discharge from employment, is a lesbian. The plaintiff alleges sex discrimination in violation of Title VII, and does not state a supplementary state law claim of sexual orientation discrimination, yet the court's recitation of the plaintiff's allegations include the following: "Plaintiff contends that males frequently had similar or worse behavior than herself but were not punished. Her examples include inappropriate communications by House, the use of profanity, Unruh's threatening behavior that wen on for years before punishment, and jokes about Plaintiff's sexual orientation. Furthermore, Plaintiff was held to a higher standard of performance than male zone managers." The court held that the plaintiff had established a genuine issue of material fact on the issue of whether the articulated reason for her discharge was pretextual, and denied the employer's motion for summary judgment. The court also refused to dismiss the plaintiff's retaliation claim, founded on the allegation that she was discharged after she told a management official that she was a victim of an "old boy network" at the company. A.S.L.

State Civil Litigation Notes

California — Attorney General Jerry Brown's filing in December defending Proposition 8 from attack as a constitutional revision or a violation of separation of powers but arguing that the measure should nonetheless be invalidated as an improper attempt to abridge the right of a group defined by a suspect classification to enjoy an unalienable fundamental right, caused a bit of scrambling by the other parties in the pending challenge to the validity of the ballot initiative that was approved by voters on November 4 and took effect the next day. Groups defending Proposition 8 denounced Brown's argument as lacking in any precedent, while the challengers to Proposition 8 sought to assimilate the reasoning of Brown's decision into their own arguments that the measure went beyond the initiative amendment powers of the voters. A flood of additional amicus briefs was filed during January, mainly opposing the validity of Proposition 8. The next major development eagerly awaited is the court's announcement of when and/or whether it will hold oral arguments. The California Supreme Court is accustomed to delaying oral argument until the judges are well along towards deciding the case, due to the short constitutional time frame for issuing opinions after oral argument, but in this case the court had granted an expedited briefing schedule, so it was widely believed that the court would set arguments to take place in March, anticipating an opinion by the end of June. Meanwhile, public meetings were held in California at which the No on 8 Committee took questions and brickbats from the public for their management of the media campaign, and there was widespread speculation that if the court upheld Proposition 8, a serious attempt would be made to place a counter-amendment on the state ballot.

California — The California Supreme Court ruled in *Episcopal Church Cases*, 2009 WL 18700 (Jan. 6, 2009), that dissident groups that separated from the Episcopal Church's national organization in protest of the church's "liberal" views on homosexuality — most vividly symbolized by the Church's action in confirming Gene Robinson, an openly gay man who lives with a same-sex partner, as Bishop of New Hampshire — were not entitled to take with them the real estate and buildings that had been used by their congregations. The court examined the history and structure of the church and determined that the church's real property belonged to the denomination, not the individual congregations.

California — In *Bressler v. City of Los Angeles*, 2009 WL 200242 (Jan. 29, 2009) (not officially published), the California 2nd District Court of Appeal affirmed a jury finding that the plaintiff, a captain in the LA Fire Department, suffered unlawful retaliatory conduct by those in authority in the Department, prematurely ending his career, in part because he complained about racial, sexual and sexual orientation harassment aimed at a lesbian fire-fighter in the Department. The court's lengthy opinion sets out facts gleaned from the trial record in detail, and makes disgusting reading. One suspects that the court designated the opinion as unpublished to save various officials in the Fire Department from embarrassment, but we would suggest that high officials in the L.A. city government should read this decision with care and think about what can be done to root out racism, sexism and homophobia in the LAFD. Certain officials, who roles in persecuting Captain Bressler are set out in detail, should be subjected to disciplinary investigations based on what was found in this case. The jury verdict affirmed by the court of appeal awarded Bressler damages of $1,730,848 under the state's Fair Employment and Housing Code. Perhaps that figure is large enough to get the attention of responsible city officials.

Connecticut — The *Connecticut Law Journal* reported on January 5 about the trial court decision in *O'Connor v. Meyer*, 2008 WL 5481705 (Dec. 5, 2008) (not published in A.2d), a case decided in Superior Court in New Haven by Judge William L. Hadden, Jr., involving a claim by a gay teenage boy that he had been injured by the action of a classmate's parent, who sought a restraining order against him and falsely claimed that he had threatened her daughter. The girl's mother seems to have been delusional on the subject of Zachary O'Connor, who had never dated her daughter or made any threats against her. The court found that the defendant had intended to inflict emotional distress on Zachary by her conduct, and awarded him $15,000 for intentional infliction of emotional distress, $10,000 for libel per se, $10,000 for invasion of privacy by false light, and $13,507 for vexatious litigation. O'Connor also established that he was entitled to punitive damages, which will be set at the costs of litigation minus taxable costs, which will, of course, be taxed.

Illinois — The American Civil Liberties Union filed suit in Cook County Circuit Court on January 27 on behalf of two post-operative transsexuals who were denied a change of the indication of sex on their Illinois birth certificates because their gender-reassignment surgery was performed outside the United States. *Kirk & Rothkopf v. Arnold*. The suit is brought against Damon T. Arnold, the State Registrar of Vital Records, in his official capacity as enforcer of an Illinois statute that authorizes such changes when an Illinois-licensed physician performs the medical procedures. Due to the high costs of such procedures in the United States, which are generally excluded from coverage by both private and public health insurers, some transgender individuals go abroad to secure the procedures. Both plaintiffs in this case had their surgery done in Thailand, where the ultimate cost is much lower, even taking into account the costs of travel and accommodations. The plaintiffs argue that the Vital Records department is misconstruing the statute by requiring that the surgery be done by an Illinois-licensed surgeon and, in the alterna-

tive, if the statute is construed as the defendants contend, it violates the constitutional rights of the plaintiffs to due process and equal protection.*Chicago Sun Times*, Jan. 28; Complaint, available on the aclu.org website as of January 29.

New York — In *Suss v. New York Media Holdings, LLC*, Index No. 106052/08 (N.Y. Sup.Ct., N.Y. Co., Dec. 16, 2008), Justice Marylin G. Diamond ruled that a complaint alleging that *New York Magazine* had defamed and violated the civil rights of a gay male performance artist by publishing a photograph taken after a performance in which the plaintiff had clothed and made himself up to present an androgynous appearance consistent with the show and captioned the photograph in a way to suggest that it pictured a transvestite or transsexual prostitute, had been filed just days too late to comply with the statute of limitations of one year. The picture was in an issue of New York Magazine with a May 7, 2007, cover date, and the suit was filed on April 30, 2008. In support of its motion to dismiss, the defendant submitted affidavits from its chief operating officer and an executive of its distributor claiming that copies of the issue were delivered to newsstands on April 28 and 29, and that the online version was also accessible to readers before April 30, making the complaint untimely. Judge Diamond stated that nothing filed by the plaintiff in opposition to the motion to dismiss actually contradicted the defendant's affidavits on the subject of the publication date, and that the defendant's affidavits were sufficient to justifying dismissing the action as untimely. Plaintiff Ulrich Suss is appealing, arguing that the affidavits unsupported by self-proving documentary evidence were not sufficient to establish the date of publication for purposes of the motion to dismiss. Suss is represented by Patrick J. McAuliffe.

Ohio — The Ohio Supreme Court dismissed an appeal in the case of *In re J.D.F.*, 2008–Ohio–2793, 2008 WL 2350253, appeal dismissed, 120 Ohio St.3d 1453, 898 N.E.2d 968) (table), on December 31, refusing to hear on the merits the argument that the state's anti-gay marriage amendment could have any application to parental custody and visitation matters. Former lesbian partners had made a joint parenting agreement that continued to govern their relationship with their child after the end of their relationship. One of the women wanted out of the agreement, and argued that it was unenforceable due to the marriage amendment. The lower courts rejected the argument, and now the Supreme Court has refused to hear it.

Texas — The *Dallas Morning News* reported on January 23 that one member of a local male couple who were married in 2006 in Massachusetts has filed an action in the Texas District Court in Dallas seeking a divorce from his partner. The men had been together for eleven years, but the petition cites "discord or conflict of personalities" as the reason for seeking a divorce. Another Texas court had previously ruled that the state courts did not have jurisdiction to dissolve civil unions formed in other states. The Texas Attorney General's Office announced that it would intervene in the case to "defend" Texas marriage law by arguing that out-of-state same-sex marriages may not be recognized in a Texas court, not even for the purpose of terminating them. How silly is that? If you don't like same-sex marriages, shouldn't you be eager to dissolve them?? A.S.L.

Criminal Litigation Notes

Kansas — Finding it unlikely that a gay man would have committed aggravated sexual battery on a woman, the Court of Appeals of Kansas set aside his conviction on that ground, while sustaining his conviction on the alternative charge of simple battery and remanding for resentencing. *State of Kansas v. Gehmlich*, 2009 WL 112785 (Jan. 16, 2009) (not officially published in full text). The victim, identified in the per curiam opinion as D.L.M., had gone with some friends to the grand opening of a new Wichita gay nightclub. She stayed really late, drank a lot, and became unruly. When she and her friend went out into the club parking lot, they allegedly saw two men having sex under a light post, and D.L.M. made a derogatory comment to the two men after her partner went back into the club to find his misplaced cellphone. She testified that she was physically assaulted by the two men. A sheriff's deputy responding to a 911 call identified Gehmlich as one of the assailants. "Several witnesses testified that the men's clothing was in disarray and their pants were unfastened and hanging down a bit. At some point, D.L.M.'s dress was pulled almost up to her waist. Various witnesses observed activity that from a distance could have appeared like a sexual assault. The sheriff's deputy broke things up and eventually got things under control. Somebody had recorded part of the incident on a videotape, which was played at trial. Gehmlich was charged with aggravated sexual battery, batter (misdemeanor) and criminal restraint. The jury convicted on all charges, and Gehmlich was sentenced to 34 months on the aggravated sexual battery charge with a concurrent sentence of twelve months for criminal restrain. He was not sentenced on the alternative battery charge. Gehmlich argued on appeal that there was no evidence of sexual motivation in his actions, or of any intent to arousal the sexual desires of the victim, and the appeals court agreed with him, finding that the circumstantial evidence that on superficial consideration would support the verdict was also consistent with facts undermining the verdict, and concluded, "it simply makes no sense to conclude from this evidence that he and his companion, presumably gay men, touched and battered D.L.M. in the middle of a public street in the presence of witnesses with the intent to arouse her sexual desires. And there is certainly no evidence of the intent to arouse the desires of anyone else." Thus, one element of the crime was not supported by the evidence, and conviction on that count "must be vacated."

Massachusetts — The Attorney General's office issued a press release on January 7 publicizing its action of obtaining a civil rights injunction on January 6 from Norfolk Superior Court Judge E. Susan Garsh against a woman who had been harassing a gay neighbor. The injunction prohibits Deborah May from threatening, intimidating, or coercing the victim or anybody else in the Commonwealth of Massachusetts based on their actual or perceived sexual orientation, and requires her to keep her distance from the victim or his family or his place of employment, subject to possible fines and/or imprisonment. The complaint in the case describes a course of harassing conduct by May against her gay neighbor, a fellow tenant in her apartment building.

Minnesota — Former U.S. Senator Larry Craig (R-Utah) has abandoned efforts to overturn his guilty plea to charges of invasion of privacy and solicitation of sexual conduct in a men's restroom at the Minneapolis airport. In *Craig v State of Minnesota*, 2008 WL 5136170 (Minn. App., Dec. 9, 2008) (Not officially published), the court of appeals had rejected his attempt to have the guilty plea set aside. At the time the court ruled, Craig said he would take the case to the Minnesota Supreme Court. Now that his term in the Senate his ended, he is evidently content to fade out of the public eye and avoid the publicity of yet another appeal. *McClatchy Washington Bureau*, Jan. 8.

Virginia — The *New York Times* reported on January 25 that Sharron Diane Crawford Smith, a lesbian who died in January at age 61, had unburdened herself to prosecutors recently by confessing that she had fatally shot two coworkers who had taunted her about her sexual orientation 42 years ago. By the time of her confession, she was mortally iill, but was arrested. The police made the information public four days after her demise. In an interesting wrinkle in the case, it appears that a detective who was aware that Smith had committed the crimes may have disposed of the murder weapon shortly after the crime and falsely told the only informant in the case that Ms. Smith had passed a polygraph test and was innocent. The detective died several years ago.

Washington State — In *State of Washington v. Sou*, 2009 WL 151667 (Wash. App. Div. 1, Jan. 20, 2009) (unpublished opinion), the court upheld the conviction of Monny Sou for second degree assault on a charge involving a gay-bashing incident, but adjusted his sentence to remove a restriction on his use of non-prescription drugs. In the early morning hours

of July 22, 2007, Michael Sullivan and a friend were walking home from a birthday party when he was struck by an unknown assailant on the back of his head, who said "What, are you gay?" When Sullivan turned around and said "Yes," he was "immediately struck in the mouth by a blow that knocked him to the ground unconscious." Neither Sullivan nor his friend saw his assailant, who quickly walked away from the scene but was observed by police officers and arrested nearby. Sou, the assailant, denied various aspects of the incident, but there were other eyewitnesses and he was convicted by a jury and sentenced to 14 months plus 18–36 months on community custody, as a condition of which he was prohibited from consuming non-prescription drugs, although there was no evidence or finding that suggested that his consumption of non-prescription drugs had anything to do with the incident (and no explanation in the court's opinion as to why this restriction was placed by the trial court). Sou argued on appeal that his trial counsel provided ineffective assistance because of the self-defense charge he proposed to submit to the jury, but the court concurred with the state that the error was harmless, since the state of the evidence would not have led to an acquittal on a correct charge. A.S.L.

Legislative Notes

Federal — Late in December, George W. Bush signed into law what he undoubtedly saw primarily as a tax-cutting bill, the Worker, Retiree and Employer Act. The incidental and welcome effect of this new federal law is that it will allow the roll-over of pension accumulations from deceased unmarried individuals to their domestic partners without tax consequences. In the absence of this legislation, the marital exemption from taxation would not be available to same-sex partners, even if they were married under state law, because the federal Defense of Marriage Act would bar recognizing their marriages. Of course, the DOMA does not prevent Congress from creating exceptions to the non-recognition rule.

California — It has become a tradition.... Each January, a bunch of new gay-friendly laws enacted over the past year comes into effect in California. This year, according to information circulated by Equality California, several new such laws took effect. AB 3015 expands the required content of training programs for foster care administrators, foster parents and other caregivers to include how to maintain a safe, unbiased and harassment free school environment. S.B. 1729 requires training of senior care and nursing home staff about unique needs of GLBT seniors. AB 2654 updated more than a dozen anti-discrimination provisions to ensure that the list of prohibited grounds was uniform and included sexual orientation and gender/identity. Over the years, these prohibited grounds of discrimination had been inserted into some existing laws on an ad hoc basis, but the new law was intended to achieve uniformity of coverage.

Florida — Determined to keep their heads in the ground and to keep reiterating unproven arguments, the majority of the Hillsborough County Commissioners voted on January 22 against repealing a policy that the board had adopted in 2004 forbidding county staff from spending any time or money on studying the impact and costs that might occur were the county to adopt a domestic partnership benefit plan. According to the *St. Petersburg Times* (Jan. 23, 2009), the Commission's first openly gay member, Mark Sharpe, had called for a vote on his proposal to repeal the policy, since he wants to push in the Commission for same-sex partner benefits for county workers. Opponents argue it would be too costly, and Sharpe argued that this would be a proper issue for study, but the majority refused to authorize him to involve county employees in any such study. There's nothing quite as unattractive as deliberate ignorance.

Michigan — Faced with sufficient petition signatures to force a repeal referendum, the Kalamazoo City commission repealed a gay rights law that it had passed just a month earlier. The vote to rescind the law was unanimous, reflecting the commissioner's desire to avoid an acrimonious political battle, but council members were planning to consider a revised gay rights measure soon, hoping to meet some of the arguments that proponents of the petition drive had made. *Associated Press*, Jan. 12.

Maine — Maine State Senator Dennis Damon (D-Trenton) has introduced a bill to open up marriage to same-sex couples, and to provide for recognition of same-sex marriages performed in other jurisdictions, while leaving religious institutions free to determine whom they would marry. Governor John Baldacci issued a statement indicating that he has not made up his mind whether he would approve the measure if it passed the legislature, but did not state opposition, indicating he would follow the debate. The governor's statement said, "Unfortunately, there is no question that gay and lesbian people and their families still face discrimination. This debate is extremely personal for many people, and it's an issue that I struggle with trying to find the best path forward… I'm not prepared to say I support gay marriage today, but I will consider what I hear as the Legislature works to find the best way to address discrimination." *Portland Press Herald*, Jan. 24; *US State News*, Jan. 13.

New Mexico — Proponents of legal recognition for unmarried couples are back in the New Mexico legislature pushing for a law that would extent the legal rights of married couples to domestic partners, either same-sex or different-sex. The bill would also provide that those who had legally recognized status in other jurisdictions would be treated as domestic partners in New Mexico. On January 28, the Senate Public Affairs Committee voted 4–5 in support of the measure, which was next scheduled for consideration by the Judiciary Committee. A similar measure had stalled in the previous session of the Senate. Governor Bill Richardson has indicated his support. *Albuquerque Journal*, Jan. 29.

Utah — Gay rights advocates in Utah had hoped that recent debates in the legislature indicated some receptivity to advancing an equality agenda that fell short of marriage. Led by openly-gay State Senator Scott McCoy, they have proposed a series of measures that they call the "Common Ground Initiative," to denote points on which they believed a consensus across party lines could be achieved. But the strategy seemed to fall apart on January 27, when a proposal to allow non-traditional couples access to the state's wrongful death act, the most minimalist of the proposals, failed in the Senate Judiciary Committee on a 4–3 party line vote. Opponents claimed that the measure was a stalking horse for same-sex marriage. McCoy pointed out that Utah has an anti-marriage constitutional amendment, so the passage of a narrowly-focused bill of this sort would not open the door to arguments that the existing marriage law is unconstitutional. *Salt Lake Tribune*, Jan. 28. A.S.L.

Law & Society Notes; Election Notes

U.S. President — *Windy City Times*, a gay community newspaper in President Obama's hometown of Chicago, reported that its old files include statements submitted by Mr. Obama in 1996 when he was running for a state legislative office, responding to questions from gay political groups and the press. Obama stated, in response to a direct question: "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages." Obama backed away from this position when running for the Senate from Illinois in 2004, and again when running for President in 2008, at which time his position was that he was opposed to same-sex marriages but favored civil unions, favored repeal of the Defense of Marriage Act, and opposed the Federal Marriage Amendment. Obama also stated during the campaign that he favored amending federal statutes so as to accord equal treatment to same-sex couples. The *Windy City Times* report was dated January 14, 2009.

U.S. State Department — The new Secretary of State, Hillary Clinton, has received a letter organized by Gays and Lesbians in Foreign Affairs Agencies and signed by 2,000 people, asking that the Foreign Service extend benefits eligibility to same-sex partners. "We believe

that no colleague of ours is a second-class colleague," the letter asserts. At her confirmation hearing, then-Senator Clinton was asked about this issue, and indicated she would study it. Such anti-gay groups as the Alliance Defense Fund and the Family Research Council took their shots against the demand, contending it was an attempt to make an end-run around the Defense of Marriage Act, a statute whose repeal is an agenda item posted by the Obama Administration on the White House website on Inauguration Day.

National — Electoral experience of pro-marriage legislators — Freedom to Marry, a non-profit advocacy group for marriage equality, released a study finding that every state legislator who had voted in favor of opening up marriage to same-sex couples had been re-elected if they sought re-election. The study looked at voting patterns and election results in California (where the legislature has twice approved same-sex marriage bills), New York (where the Assembly approved a same-sex marriage bill), Connecticut (where a legislative committee approved a same-sex marriage bill), and Massachusetts (where legislators voted several times since the *Goodridge* decision on proposed amendments to overrule the decision. Looking at electoral results in 2004, 2006, and 2008, Freedom to Marry found a perfect re-election score for pro-same-sex-marriage incumbents who ran for re-election. In addition, the study showed the legislators whose positions had evolved from opposition to support for same-sex marriage were re-elected after changing their votes.

National — At its Winter 2009 Meeting held in New York on January 14–18, the American Psychological Association approved a position statement calling for repeal of the military "don't ask, don't tell" policy. The statement assertes that the policy is "not germane to any aspect of military effectiveness, including unit cohesion, morale, recruitment or retention." At also asserts that the policy has detrimental effects on individual service members. The full text of the statement can be found on the organization's website: http://www.apsa.org.

Florida — On March 24, Gainesville voters will consider a proposition to repeal a recently-enacted law that added protection against discrimination on the ground of gender identity to the city's human rights ordinance. The group behind the ballot measure, Citizens for Good Public Policy, has been running television advertisements contending that the ordinance would endanger women by allowing men posing as transsexuals to obtain access to public women's restrooms for the purpose of gaining access to vulnerable women. Such a contention is belied by the experience of scores of jurisdictions that have banned gender identity discrimination in public facilities and experienced no such problem. *New York Times*, January 11.

Florida — Seacoast Utility Authority has informed employees that it will be extending family benefits to employees with domestic partners. The Authority provides water and sewer service to Palm Beach Gardens, North Palm Beach, Lake Park, Juno Beach, and unincorporated sections of Palm Beach County, Florida, and has 130 full-time employees. A press release issued December 2 by the Palm Beach County Human Rights Council observed that a third of the 48 public and quasi-public employers in Florida who provide domestic partnership benefits are located in Palm Beach County.

Ohio — A group of religious leaders in Cleveland has fallen short in its attempt to secure sufficient signatures to force a referendum on repealing the city's domestic partnership registry ordinance. According to a news report, 11,000 signatures were needed, but only a few thousand had been collected prior to the statutory deadline. The city council voted 13–7 to create the registry late last year. Those working to secure a referendum vote were upfront about the fact that their opposition was religiously-based. They claim the city counsel is trying to circumvent the 2004 constitutional amendment that bans same-sex marriages and other similar legal statuses such as civil unions. *Cleveland Plain Dealer*, Jan. 8.

Pennsylvania — They never learn.... School boards newly confronted with the question of approving the formation of high school gay-straight alliances still seem not to appreciate the almost unbroken record of litigation success by students seeking the formation of such groups over the determined opposition of retro school boards. Now it's the turn of the Waynesboro Area School District in Pennsylvania. *Public Opinion*, a Chambersburg publication, reported on January 23 that the school board had delayed action on a request to allow such a group to function at the high school, as a result of opposition voiced by community members and some members of the board. Ultimately, the school board will have the choice of allowing the group to form and operate or to spend far beyond what they would like to spend in such financially strained times to defend a lawsuit, since there are several public interest litigation groups that would likely be happy to take on the case.

Portland, Oregon — Gay rights advocates cheered when Samuel Adams was sworn in at the beginning of January as the new mayor of Portland, Oregon, the largest city to have elected an openly-gay mayor. Within weeks, things were in turmoil when Adams, responding to pending publications of an investigative journalistic report, confessed that as a city councillor some years ago he had a brief sexual relationship with a young man who was interning at the city council. Both Adams and the young man, Beau Breedlove, maintained that they refrained from having sex until the intern passed his 18th birthday, although they had some social encounters that included some kisses shortly before Breedlove turned 18, which is the age of consent for sex in Oregon. During his election campaign, Adams had prevailed on the youth to join him in telling the press that they did not have a sexual relationship, in order to quash rumors that were floating about that Adams had sex with an "underage man." The revelation that Adams and the former intern had lied about the relationship led some to call for his resignation, while others called for him to stay in office, noting that he had broken no law and was well qualified to serve as mayor. After a few days of introspection, Adams announced he would try to keep his job. A.S.L.

International Notes

Colombia — Advocate.com and PinkNews both reported on January 29 that Colombia's Constitutional Court, the nation's highest court for questions of constitutional law, had ruled on January 28 that cohabiting same-sex couples are entitled to the same legal rights that are accorded to different-sex couples who are deemed common-law spouses. In common with many countries with a European heritage, Colombia accords recognition and significant rights to adults who cohabit without being legally married, and the court concluded that the constitution's guarantee of equality requires the same treatment for same-sex couples. The case was brought by three organizations, Colombia Diversa (an LGBT rights advocacy group), Dejusticia (a general human rights advocacy group), and The Group for Public Interest rights at the University of the Andes. The decision caps a string of successes by gay litigants achieving particular equality claims over the past few years. Ironically, the word is that gays still suffer police harassment in Colombia, and that the legal establishment is far ahead of Colombian society in general in according equal treatment to gay people. This ruling puts Colombia ahead of the rest of Latin America, with the possible exception of Uruguay, where civil union status has been made available through legislation, in terms of according legal rights to same-sex couples.

European Union — A resolution was approved on January 14 calling on member states to allow marriage or civil unions for same-sex partners, and asks that marriage/civil union recognition across national lines be adopted.

Iceland — Although it was considered a factoid of little significance within the country, the world press was fascinated that the new interim prime minister of Iceland, designated by the ruling Social Democratic Party to serve until national elections in May as a result of the fall of

the incumbent government due to economic concerns, is a lesbian who lives with a same-sex partner. Johanna Sigurdardottir was described in many news reports as the first openly gay individual to be the chief executive of a national government. (An item on the Huffington Post blog mentioned that an openly-gay man, Per-Kristian Foss had served very briefly as acting Prime Minister of Norway in 2002, but somehow the case of Ms. Sigurdardottir was considered different, perhaps because she is considered a candidate to stay in the position of Prime Minister if her party wins the national elections. She had been serving as Social Affairs Minister, and is reportedly highly regarded by the small, close-knit Icelandic polity.

Nigeria — The House of Representatives approved on second reading a bill that would prohibit same-sex marriages, making it a crime for same-sex couples to live together "as husband and wife or for other purposes of same sexual relationship," and also prescribing criminal penalties for those who witness, abet and aid such a relationship. The measure requires third reading passage before it can be considered in the Senate.

Spain — The Spanish Cabinet voted to approve a new military code of conduct that incorporates the obligation of all military personnel not to discriminate on the basis of sexual orientation. The code also imposes an obligation on military personnel to provide fair treatment to prisoners taken in armed conflicts, and to provide special protection to victims in hostile regions where the soldiers are serving. Military personnel are also directed to avoid the maximum number of civilian casualties in any operation they undertake. *El Pais (English-language edition*, Jan. 12.

Spain — The Supreme Court announced on January 28 that an attempt by Roman Catholic bishops and some regional governments controlled by the opposition Popular Party to stimulate a boycott by public schoolchildren of a required civics course that discusses gay rights and same-sex marriage, among other things, was unlawful. The court ruled that parents may not keep their children out of a course on the basis of "conscientious objection" to the subject matter; the state is entitled to mandate attendance and to specify the curriculum. Conversative groups have charged that the Socialist national government is trying to indoctrinate Spanish children with liberal ideologies. *International Herald Tribune*, Jan. 30.

Turkey — The Supreme Court of Appeal ruled January 20 on the appeal by Lambda Istanbul of a government order that required the organization to close its doors, which had been inforced by a local Istanbul court in a May 29, 2008, order, on the ground that the organization's gay rights objectives were contrary to Turkish "moral values and family structure." The Supreme Court's judgment rejects the argument that the reference to LGBT people in the organization's name could be considered "opposition" to Turkish moral values, and also recognized the right of LGBT individuals to form associations in Turkey, according to a January 21 on-line report about the decision by Amnesty International. Amnesty had alerted its members to contact the court in support of Lambda Istanbul's right to exist.

United Kingdom — *The Times* (London, U.K.) Published a summary of the Court of Appeal ruling in *English v. Thomas Sanderson Ltd* (Judgement Dec. 19, 2008) on January 5. The plaintiff alleged he was unlawfully subjected to homophobic harassment at work even though he was not in fact gay. *The Times* succinctly summarized the holding as follows: "Harassment at work on the ground of sexual orientation could occur irrespective of the victim's actual sexual orientation or the tormentors' perception of his orientation." The vote of the panel was 2–1. A.S.L.

Professional Notes

The International Lesbian and Gay Human Rights Commission announced that Cary Alan Johnson, currently the organization's senior Africa specialist resident in Cape Town, will become executive director of the organization on March 1, when Paula Ettelbrick's resignation takes effect. Johnson is a graduate of Sarah Lawrence college, and has a masters degree in international affairs from Columbia University. He will relocate to New York City to take the position of executive director. Johnson is a native of Brooklyn. A.S.L.

AIDS & RELATED LEGAL NOTES

8th Circuit Rejects Asylum/Withholding Petition for HIV+ Kenyan Woman

Ruling on January 28 in *Manani v. Filip*, 2009 WL 187866, the U.S. Court of Appeals for the 8th Circuit found that an HIV+ Kenyan woman who had entered the United States on a tourist visa in the fall of 2001 had delayed too long in filing her asylum petition, and that an Immigration Judge did not err in concluding that she was not entitled to withholding of removal or protection under the Convention Against Torture in light of the record evidence concerning the situation for HIV+ people in the African nation.

The Petitioner's case was complicated by her submission of a forged doctor's letter to substantiate her claims of significant medical complications as an excuse for her filing her papers far beyond the statutory deadlines. The Immigration Judge concluded that she was not a credible witness. There does not seem to be any doubt, however, that she suffers HIV infection, a diagnosis that she did not obtain until 2003, when she had been in the U.S. for several years.

Her principal argument against deportation was that she was a widow whose brothers-in-law were insisting, over her objections, that she submit to marry one of them, and that her daughters be subject to female genital mutilation according to the local custom of the tribe. The court found that she had succeeded in evading their marital demands for several years prior to her leaving for America, and that her daughters had escaped genital mutilation as well by being sent to attend private schools.

On the HIV point, the court found insufficient evidence that HIV+ people suffer official persecution in Kenya, or that treatment is so lacking that sending an HIV+ native back to Kenya could be said to impose the kinds of risks that would justify refugee status in the U.S. Writing for the court, Circuit Judge Raymond W. Gruender observed, "To be sure, HIV is a debilitating and often fatal disease if left untreated. But Manani has not shown a clear probability that the Kenyan government, or private actors that the Kenyan government is unable or unwilling to control, would deliberately deprive her of access to life-saving medical care. Nor has Manani shown that any inadequacies in Kenya's health care system result from an effort to persecute persons diagnosed with HIV. After considering the record as a whole, we conclude that substantial evidence supports the BIA's denial of Manani's application for withholding of removal insofar as it related to her membership in the social group composed of Kenyans who are HIV-positive." A.S.L.

AIDS Litigation Notes

U.S. Supreme Court — The court declined to review the 8th Circuit's decision in *Doe v. Department Of Veterans Affairs*, 519 F.3d 456 (8th Cir. March 7, 2008), 2009 WL 129107 (U.S. Jan 21, 2009,) in which the lower court held that a VA doctor had not violated confidentiality rights or the Privacy Act in speaking about an employee's HIV+ status during a disciplinary meeting where the employee's union representative was present. The employee had voluntarily revealed his HIV status to the doctor in the course of counseling, but claimed he had asked that the information not be revealed to the union representative. BNA *Daily Labor Report* No. 12, AA–2 (Jan. 22, 2009).

California — In *Basque v. Schwartz*, 2009 WL 187920 (E.D. Calif., Jan. 20, 2009), U.S. Magistrate Judge Kimberly J. Mueller rejected the state's argument that the placing of an HIV+ state inmate on parole had mooted his claim that he suffered illegal discrimination while incarcerated because of his HIV status. Magistrate Mueller found that if the parolee could prevail on the merits of his discrimination claim, the court could provide relief that might be useful to him in the future, depending how his period on parole unfolds. The former inmate alleges that he was excluded from a particular program for which he was qualified due to his HIV status, and that successful participation in the program would have earned him credit towards earlier release. The case was filed while he was incarcerated, and he has been litigating the matter for many years.

Georgia — The Court of Appeals of Georgia upheld a trial judge's decision not to dismiss a negligence claim against the University of Georgia concerning failure to warn of the risk of HIV transmission in *Board of Regents v. Canas*, 2009 WL 57576 (Jan. 12, 2009). Canas received medical treatment in January 1985 that included transfusions with blood and blood products, but was not diagnosed with AIDS, at which time he first learned he was HIV+, in April 2001. He promptly notified state authorities of his intention to sue on the theory of failure to warn; i.e., that at some point after his treatment, the hospital had a duty to warn him that he had possibly been exposed to HIV and should seek testing. As a result of the hospital's failure to warn, the theory would go, Canas's HIV infection advanced to full-blown AIDS unnecessarily, since earlier detection accompanied by treatment could have arrested the course of his HIV infection. Georgia did not adopt a torts claim act, arguably waiving sovereign immunity, until 1991. The hospital sought dismissal of the claim on grounds of sovereign immunity, claiming that the incident giving rise to potential liability occurred prior to the 1991 waiver. The court held that Canas's claim accrued when he discovered he was HIV+, after the 1991 waiver. The court also rejected the hospital's argument that Canas's notice of claim was inadequately detailed, finding that many of the necessary details were not known to Canas until the hospital had responded to discovery requests.

Maine — A pro se lawsuit by an inmate with AIDS encountered mixed results on pretrial motions filed with U.S. Magistrate Judge Margaret J. Kravchuck, who produced two decisions in *Leavitt v. Correctional Medical Services, Inc.*, 2009 WL 103549 & 2009 WL 103520 (U.S.Dist.Ct., D. Maine, Jan. 13, 2009). In one ruling, Kravchuck held that the Maine Commissioner of Corrections could not be held liable under the 8th Amendment for the delay of more than a year in providing HIV medications to the inmate, or even personally liable under Title II of the Americans With Disabilities Act, since there was no credible allegation that Commissioner Martin Magnusson was personally aware of the issues prior to receiving a grievance just days before the medication was finally provided to the inmate. However, Magistrate Kravchuck ruled that Magnusson would remain a named defendant in the case in his official capacity, since his motion papers provided no briefing on why the "absence of any subjective awareness on his part about [the inmate's] personal needs would necessarily be dispositive of an official capacity claim" brought under the ADA. The other decision involves the inmate's claims against the prison's administrative coordinator and the prison's warden, both of whom denied grievances that the inmate had filed concerning the failure to provide his medication. This was evidently one of the legion of cases around the country asserting that Correctional Medical Services, which contracts with state prison systems to provide health care to inmates, provides deficient service. Recommending that the court not grant summary judgment to these defendants on the inmate's 8th Amendment claim, she found sufficient allegations that they had been put on notice about the substantial delay in providing medications, that they refused to expedite the grievance, instead denying it, and that the inmates medication continued to be delayed as a consequence. "In light of the seriousness of the condition, HIV, this plodding administrative approach to the grievance process despite over a year's worth of past delay, generates a genuine issue of material fact whether Costigan and Merrill were deliberately indifferent to a serious medical need," she wrote. Judge Kravchuck also found that the inmates ADA claim against these prison officials could proceed, but only with them being treated as defendants in their official capacity. The two opinions add up to a refreshing attempt by a magistrate to help a pro inmate hold accountable prison officials whose dithering deprived him of vital medical treatment for his HIV infection for over a year.

Nevada — Irrational panic over HIV loses a round.... In *Whitmore v. Trushenski*, 2009 WL 77260 (D. Nev., Jan. 8, 2009), U.S. District Judge Larry R. Hicks rejected a constitutional suit by a diabetic state inmate who was briefly housed in a cell together with an HIV+ inmate. Whitmore complained to officials and the Whitmore was moved to a different cell eleven days later. But Whitmore, claiming to be in a panic about the possibility that he may have been exposed to HIV somehow, noting that he tests himself regularly for blood sugar using a kit that punctures his finger to draw a blood drop, alleged a violation of his 8th Amendment rights as well as a violation of federal prison regulations requiring segregation of HIV+ inmates. Judge Hicks refused to play to Whitmore's panic, finding that he had failed to allege a case of deliberate indifference by prison officials to a substantial risk of harm. "That plaintiff believed that he was at risk of contracting AIDS from his cell mate merely by sharing a cell does not mean that plaintiff was subjected to a substantial risk of harm," wrote Judge Hicks. "Plaintiff does not alelge that his cell mate attempted to have sexual contact with him or that the cell mate took any action to purposefully expose plaintiff to the HIV virus [sic]." And, after all, Whitmore was moved relatively quickly after he complained. The court also noted that the regulations mandated segregating HIV+ inmates whose conduct threatens others, and there was no indication in this case that Whitmore's cellmate engaged in such conduct..

New York — Senior U.S. District Judge Neal P. McCurn rejected a motion to dismiss an HIV discrimination claim under the Americans With Disabilities Act and the New York State Human Rights Law in *Estate of Solinsky v. Custodial Maintenance, Inc.*, 2009 WL 37164 (N.D.N.Y., Jan. 6, 2009). Richard Solinsky was diagnosed as HIV+ in 1992. In November 2002, he began working for CMI, received favorable job performance ratings and received raises and promotions until he had reached the position of Operations Manager of the company by the summer of 2006. In August 2006, he sought leave to deal with some ill effects related to his HIV+ status, and first revealed same to one of the owners of the business. He was terminated from employment within weeks but, interestingly, the company did not contest his claim for unemployment benefits. Solinsky sued for violation of the employment discrimination provisions of the ADA, with a supplementary state law claim against the proprietors of the business under the N.Y. Human Rights Law, which allows claims against individuals who aid or abet discrimination by employers. Soon after filing suit, Solinsky died from HIV-related complications and his estate, administered by his wife, was substituted as plaintiff. The defendants moved to dismiss, arguing that the case was moot, trial would be a waste of judicial resources since the plaintiff was not around to testify, and that the proprietors could not be sued as individuals under the ADA. Rejecting the motion, Judge McCurn observed that ADA discrimination claims survive the death of the plaintiff, that the Estate could have a valid damage claim against the company, and that the claim against the individual proprietors was based on the state law, not the ADA. Our favorite line of the opinon: "Ironically, the only waste of judicial resources' here stems not from Plaintiff's complaint, but Defendants' baseless motion." A.S.L.

Social Security Disability Cases

New Jersey — In *Eddie v. Commissioner of Social Security*, 2008 WL 5427903 (D.N.J., Dec. 30, 2008) (unpublished disposition), the court upheld an ALJ's decision to give little weight to an HIV+ plaintiff's doctor's opinion that he was unable to work, because the doctor's written opinion was not supported by his own treatment notes, and included opinions outside his specialty. In particular, the court noted that the doctor was not a psychologist or psychiatrist, yet had opened that the plaintiff would not be able to withstand the stress of work for psychological reasons. In addition, the court noted that the doctor had diagnosed the plaintiff with AIDS wasting syndrome, but that the doctor's treatment file showed the plaintiff's weight to be stable and actually to have increased while under treatment.

Illinois — In *Eggerson v. Astrue*, 581 F.Supp.2d 961 (N.D.Ill., Oct. 2, 2008), plaintiff Dion Eggerson won a rare reversal and remand of the Commissioner's decision to deny disability benefits. District Judge Elaine E. Bucklo found that the ALJ's opinion, which was upheld by the Appeals Council, had failed to discuss some of the relevant medical evidence, and had made factual and credibility findings that seemed inconsistent with the hearing record, in concluding that the HIV+ plaintiff was capable of working at jobs available in the national economy. The testimony showed that due to a condition in his leg that may have been HIV-related, the plaintiff had to sit most of the time with his leg elevated, using a compression pump several times a day to relieve the accumulation of fluid in his leg. He needed a cane to walk even relatively short distances, and testified that he was in constant pain. The ALJ also was totally dismissive about written evidence provided by the physician's assistant who had regular treatment contact with the plaintiff; the court felt that the ALJ should have paid some attention to this evidence, which appeared relevant to the plaintiff's physical ability to work. "On remand," wrote Judge Bucklo, "the ALJ must consider the full range of medical evidence, with due regard for Mr. Verna's opinions [the physician's assistant], and the impact of plaintiff's HIV status and medications with respect to pain and fatigue on his RFC. Mr. Eggerson's case is remanded for proceedings consistent with this opinion." For some reason, the case did not turn up on Westlaw until January 2009. A.S.L.

AIDS Law and Society Notes

Centers for Disease Control & Prevention — Apparently backpedaling from a long-standing position that HIV-infected health care workers may present a risk to patients, the CDC, in its Morbidity and Mortality Weekly Report (January 9, 2009; 57:1413–1415), reports on a study in Israel of an HIV-infected cardiothoracic surgeon which found that not one of 545 patients who had undergone surgery with the subject surgeon had contracted HIV. The authors of the report concluded that the study should motivate public health groups to update their guidelines for the HIV-infected HCWs performing invasive procedures, according to a summary of the report published by Reuters Health on January 8. As a result of the study, Israel's Ministry of Health recommended that the surgeon be allowed to resume his practice with no restrictions, and should not be required to disclose his HIV status to patients provided he adhered to infection control procedures to present exposure of his blood to patients. The report published by CDC concludes: "The data in this and other studies published since the Centers for Disease Control and Prevention Guidelines of 1991, considered together, argue for a very low risk for provider-to-patient HIV transmission in the present era and could form the basis for national and international public health bodies to consider issuing revised guidelines for medical institutions faced with HIV infection in a healthcare worker performing exposure-prone procedures."

New York AIDS Drug Trials Study — A study commissioned by the city and produced by the Vera Institute of Justice, concluded that charges by a freelance journalist that the participation of N.Y.C. foster children in clinical drug trials for HIV/AIDS were inaccurate. The study concluded that no children had died as a result of participation in the study, and that the reason that the majority of the students in the study were minority group members was not because of discrimination by the clinical trials program but because most foster children living with HIV in the city are members of minority groups. The study concluded that city officials with oversight responsibility for foster children had acted in good faith in allowing them to be participants in experimental trials of new HIV-related medications, and that participation was in the interest of the children, many of whom were seriously ill and would have been unlikely to have been able to access the latest in HIV meds were they not enrolled. *New York Times*, January 28, 2009. A.S.L.

International AIDS Notes

Australia — GayNZ.com reported on January 19 that an HIV+ leatherman in Melbourne who bragged to friends that he had staged "conversion parties" at which his goal was to transmit HIV to his guests has been sentenced by County Court Judge David Parsons to 18 years and nine months in prison. Michael Neal, 50, was found guilty on 15 criminal charges, including attempting to infect another with HIV, rape, and procuring sexual penetration by fraud. According to the news report, Judge Parsons said to Neal at the sentencing hearing, "You sought to be your own version of the grim reaper." Parsons also indicated that the sentence was intended to send a message to the community. This was reportedly the first such prosecution in Australia.

Australia — It was reported that an Australian Capitol District Magistrate, John Burns, had sentenced an HIV+ gay escort, Hector Scott, to two months and four days in prison under the ACT Prostitution Control Act, which makes it illegal to work as a sex worker while having a sexually infectious disease. Scarlett Alliance, a sex workers organization, pointed out that there was no evidence that Scott had actually infected anybody, and warned that the prosecution was scaring sex workers from getting HIV screening, for fear of subjecting themselves to prosecution. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conferences

The Global Arc of Justice Conference

The Williams Institute at UCLA Law School, the International Lesbian and Gay Law Association, and the City of West Hollywood are cosponsoring an international LGBT law conference on March 11–14, with a special focus on LGBT law in Latin America. The announced speakers include prominent judges, professors, organizational leaders and practicing attorneys from all over the world. For information about the detailed conference schedule, registration and other particulars, visit the conference website: http://www.law.ucla.edu/WilliamsInstitute/programs/GlobalArcofJustice2009.html

Transgender Law Forum

Touro Law Center on Long Island will be hosting a free CLE program on transgender law, co-sponsored by LeGaL, on February 20. Details of the program and registration information are available on the website of the school's Journal of Race, Gender & Ethnicity, which organized the program. See http://www.tourolaw.edu/JournalRGE/Index.asp.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Alempour, Sanaz, *Judicial Recusal & Disqualification: Is Sexual Orientation a Valid Cause in Florida?*, 32 Nova L. Rev. 609 (Summer 2008).

Bartos, Samuel E., *Letting "Privates" Be Private: Toward a Right of Gender Self-*

Determination, 15 Cardozo J. L. & Gender 67 (2008).

Benson, Christi Jo, *Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society*, 30 Whittier L. Rev. 41 (Fall 2008).

Bilford, Brian J., Harper'*S Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 Standford J. Civ. Rts. & Civ. Lib. 447 (October 2008).

Braverman, Irus, *Loo Law: The Public Washroom as a Hyper-Regulated Place*, 20 Hastings Women's L.J. 45 (Winter 2009).

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Calabresi, Steven G., and Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Texas L. Rev. 7 (Nov. 2008).

Cordray, Margaret Meriwether and Richard, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. Kan. L. Rev. 313 (Jan. 2009).

Cossman, Brenda, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 L. & Contemp. Prob. 153 (Summer 2008).

Cox, Barbara J., *"A Painful Process of Waiting": The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand That "Same-Sex Marriage" Is Not What Same-Sex Couples Are Seeking*, 45 Cal. W. L. Rev. 139 (Fall 2008) (Just marriage, plain and simple, not "same-sex marriage," is what they want).

Currah, Paisley, *Expecting Bodies: The Pregnant Man and Transgender Exclusion from the Employment Non-Discrimination Act*, 36 Women's Studies Q. Nos. 3 & 4 (Fall/winter 2008)

Debele, Gary A., *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N. Dak. L. Rev. 1227 (2007).

Douard, John, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 NYLS L. Rev. 31 (2008/09).

Duncan, William C., *Does the Family Have a Future?*, 83 N. Dak. L. Rev. 1273 (2007).

Ewing, Randall P., Jr., *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine?*, 82 St. John's L. Rev. 1409 (Fall 2008).

Fiser, Harvey L, and Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 Cardozo J. L. & Gender 1 (2008).

Fitschen, Steven W., *Marriage Matters: A Case for a Get-the-Job-Done-right Federal Marriage Amendment*, 83 N. Dak. L. Rev. 1301 (2007).

Foreman, Matt, *Gay is Good*, 32 Nova L. Rev. 557 (Summer 2008).

Gewirtzman, Doni, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. Rich. L. Rev. 623 (Jan. 2009).

Gilmore, Angela, *Incorporating Issues of Sexual Orientation Into a First Year Property Law Course: Relevance and Responsibility*, 32 Nova L. Rev. 595 (Summer 2008).

Goldberg, Suzanne B., *Intuition, Morals, and the Legal Conversation About Gay Rights*, 32 Nova L. Rev. 523 (Summer 2008).

Higdon, Michael J., *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 UC Davis L. Rev. 195 (Nov. 2008).

Hubbard, Ryan M., *How I Learned to Stop Worrying and Love the Communications Decency Act*, 2007 U. Ill. J. L., Tech. & Pol'y 345 (Fall).

Huffman, M. Blake, *Out of Step: Why Pulliam v. Smith Should be Overruled to Hold All North Carolina Parents — Gay and Straight — to the Same Custody Standard*, 87 N.C. L. Rev. 257 (Dec. 2008).

Jacob, Bradley P., Griswold *and the Defense of Traditional Marriage*, 83 N. Dak. L. Rev. 1199 (2007).

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Katyal, Sonia K., *Gay Marriage: Civil Rights Must Be For All*, 31 Nat'l L.J. No. 19 (Jan. 12, 2009).

Koch, Katie, and Richard Bales, *Transgender Employment Discrimination*, 17 UCLA Women's L.J. 243 (Spring 2008).

Koslosky, Daniel Ryan, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N. Dak. L. Rev. 175 (2008).

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Markowitz, Stephanie, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 Cardozo J. L. & Gender 705 (2008).

McCarthy, Brian P., *Trans Employees and Personal Appearance Standards Under Title VII*, 50 Arizona L. Rev. 939 (2008).

McGinley, Ann C., *Creating Masculine Identities: Bullying and Harassment "Because of Sex"*, 79 U. Colo. L. Rev. 1151 (2008).

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Moore, Siji A., *Out of the Fire and Into the Frying Pan: Georgia Legislature's Attempt to Regulate Teen Sex Through the Criminal Justice System*, 52 How. L.J. 197 (Fall 2008).

Moyer, Laura, *Competing Social Movements and Local Political Culture: Voting on Ballot Propositions to Ban Same-Sex Marriage in the U.S. States*, 90 Soc. Sci. Q. 134, 2009 WLNR 792316 (March 1, 2009).

Niedwiecki, Anthony, and William E. Adams, Jr., *Introduction: The Florida Example*, 32 Nova L. Rev. 515 (Summer 2008) (Introduction to Symposium on LGBT Law).

Nuttall, Sean R., *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. Rev. 1282 (Oct. 2008).

O'Hanlon, Stephen, *Justice Kennedy's Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology*, 7 Cardozo Pub. L. Pol'y & Ethics J. 1 (Fall 2008) (argues that the libertarianism inherent in Kennedy's decision in Lawrence v. Texas was cut short in the following partial birth abortion decision).

Pappas, Christine, Jeanette Mendez, and Rebekah Herrick, *The Negative Effects of Populism on Gay and Lesbian Rights*, 90 Soc. Sci. Q. 150, 2009 WLNR 792317 (March 1, 2009).

Perifimos, Cathy, *The Changing Faces of Women's Colleges: Striking a Balance Between Transgender Rights and Women's Colleges' Right to Exclude*, 15 Cardozo J. L. & Gender 141 (2008).

Rao, Radhika, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 Geo. Wash. L. Rev. 1457 (Sept. 2008) (argues that any attempt to restrict access to assisted reproductive technology on the basis of sexual orientation would be unconstitutional).

Recent Cases, *First Amendment — California Supreme Court Holds That Free Exercise of Religion Does Not Give Fertility Doctors Right to Deny Treatment to Lesbians.* — North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court, *189 P.3d 959 (Cal. 2008), 122 Harv. L. Rev. 787 (Dec. 2008).*

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Squatriglia, Heather, *Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 Cardozo J. L. & Gender 793 (2008).

Walker, B. George, *Little to Be Gay About: Few Protections in Florida Against Discrimination Based upon Sexual Orientation*, 32 Nova L. Rev. 633 (Summer 2008).

Warbelow, Sarah, *The Speech Divide: GLBT Students Struggle for Visibility and Safety*, 35 Hum. Rts. (ABA) No. 3, 20 (Summer 2008).

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Weslander, Eric, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry [*Fair Housing Council of San Fernando Valley v. Rommates.com, LLC, *521 F.3d 1157 (9th Cir. 2008)]*, 48 Washburn L. J. 267 (Fall 2008).

Wharton, T. Christopher, *Deserted in Deseret: How Utah's Emancipation Statute Is Saving Polygamist Runaways and Queer Homeless Youths*, 10 J. L. & Fam. Studies 213 (2007).

Wieland, Steven P., *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address Varnum v. Brien*, 94 Iowa L. Rev. 413 (Nov. 2008)(Spectacular timing: *Varnum* was argued Dec. 10, 2007, so this article appears in the Iowa Law Review as the Iowa Supreme Court is pondering its decision).

Wilson, Jennifer S., *Horizontal versus Vertical Compromise in Securing LGBT Civil Rights*, 18 Tex. J. Women & L. No. 1 (2008).

Wiener, Richard L., and Erin Richter, *Symbolic Hate: Intention to Intimidate, Political Ideology, and Group Association*, 32 L. & Hum. Behavior 463 (Dec. 2008).

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Wilson, Sarah Sloan, *Reading', Riting', Rithmetic, and Responsibility: Advocating for the Development of Controlled-Choice Student-Assignment Plans After* Parents Involved, 97 Ky. L. J. 199 (2008–2009).

Woods, Jordan Blair, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. Rev. 489 (Dec. 2008).

Young, Caitlin, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children It Is Trying to Protect*, 34 New Eng. J. Crim. & Civ. Confinement 459 (Summer 2008).

Zuckerman, Jamie L., *Extreme Makeover — Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 Nova L. Rev. 661 (Summer 2008).

Specially Noted:

Symposium, *Thirty Years After Anita Bryant's Crusade: The Continuing Role of Morality in the Development of Legal Rights for Sexual Minorities*, 32 Nova L. Rev. No. 3 (Summer 2008). Individual articles noted above.

Symposium, *Sex Offender Law and Policy*, 6 Ohio St. J. Crim. L. No. 1 (Fall 2008).

In its January 5 issue, *The National Law Journal* documented the substantial pro bono effort of two major law firms — Howard Rice Nemerovski and O'Melveny & Myers — in support of the litigation for the right of same-sex couples to marry in California. R. Acello, *If At First You Don't Succeed, Keep Going*, p. 15. Especially noted were the efforts of HRN attorneys Bobbie Wilson and Amy E. Margolin.

Vol. 83, No. 4 of the North Dakota Law Review appears to be a symposium (not labeled as such) devoted to attacking the attempt by same-sex partners to attain the right to marry. All the articles are listed above.

A coalition of public interest groups collaborated on a document to inform New Yorkers about the current marriage-recognition situation in the state. As reported above, New York courts have ruled that government entities in the state must recognize same-sex marriages validly performed in other jurisdictions under established New York common law marriage recognition doctrine, and that government entities are acting properly within the scope of their authority when they accord such recognition. The document can be accessed at the following URL: http://data.lambdalegal.org/publications/downloads/fs_your-government-respects-your-marriage.pdf.

AIDS & RELATED LEGAL ISSUES:

Chandler, Caitlin L., *At the Margins of the AIDS Response: Young People and AIDS in Sub-Saharan Africa*, 40 N.Y.U. J. Int'l L. & Politics 1079 (Summer 2008).

Francis, Andrew M., and Hugo M. Mialon, *The Optimal Penalty for Sexually Transmitting HIV*, 10 Amer. L. & Econ. Rev. 388 (2008).

George, Erika R., *Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 Cal. L. Rev. 1447 (Dec. 2008).

Kamisar, Yale, *Can* Glucksberg *Survive* Lawrence*? Another Look at the End of Life and Personal Autonomy*, 24 Issues in L. & Med. 95 (Fall 2008).

Larson, Dale, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans With Disabilities Act*, 56 UCLA L. Rev. 451 (Dec. 2008).

Skees, Stephanie, *Thai-ing Up the TRIPS Agreement: Are Compulsory Licenses the Answer to Thailand's AIDS Epidemic?*, XIX Pace Int'l L. Rev. 233 (Fall 2007).

Slobodian, Andrew M., and Katie O'Brien, *The ADA Amendments Act of 2008 and How it Will Change the Workplace*, 34 Emp. Rel. L.J. No. 3, 32 (Winter 2008).

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.