3RD CIRCUIT RULES THAT GAY PLAINTIFFS CAN BRING SEXUAL STEREOTYPING CLAIMS UNDER TITLE VII

A unanimous panel of the U.S. Court of Appeals for the 3rd Circuit has ruled that a plaintiff's sexual orientation is not the basis for rejecting his claim that he has been subjected to unlawful sex discrimination under Title VII because of his failure to conform to the gender stereotypes held by his employer. Partially reversing a summary judgment that had been awarded to the employer by U.S. District Judge Terrence F. McVerry, the circuit panel found that there was enough ambiguity as to whether the plaintiff suffered discrimination based on his effeminacy or because of his homosexuality to require that his case be sent to trial before a fact-finder. *Prowel v. Wise Business Forms, Inc.*, 2009 WL 2634646 (Aug. 28, 2009).

Brian Prowel began working for Wise in 1991, and was laid off, ostensibly due to lack of work, on December 13, 2004. Prowel claimed that his effeminate mannerisms and demeanor, and the ways in which his personal presentation differed from the typical blue collar male workers in the Wise plant, gave rise to name-calling and other harassment against him, and led to his discharge when he made an issue of it. Other workers referred to him as "Princess" and "Rosebud," and one co-worker in particular repeatedly called him "faggot" to his face. On entering the plant one day, Prowel overheard a co-worker stating that the coworker hated Prowel and "They should shoot all the fags." His complaints to supervisors generally went unredressed, although his complaint about homophobic graffiti directed against him in a men's room did lead the company to repaint the men's room. Prowel testified that he is a gay man (surprise, surprise, given the rainbow sticker he had on his car), and that harassment escalated after somebody "outed" him at work by putting a newspaper clipping of a "man-seeking-man" personals ad on his workstation, with a note that read "Why don't you give him a call, big boy." Prowel complained about this to supervision, but the culprit was never identified. Prowel testified that he became so emotionally upset by the constant harassment that he would pull over to the side of the road when driving to work in order to vomit before reaching the plant.

After he was let go, Prowel filed a suit under Title VII and the Pennsylvania Human Rights Law, alleging he was a victim of sex and religious discrimination, and also of retaliation for his numerous complaints about the harassment he suffered. The trial judge decided that this was really a sexual orientation discrimination claim trying to pose as a sex or religious discrimination claim, and granted the company's motion for summary judgment, relying on the circuit's precedent of *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001), which held that sexual orientation discrimination claims were not cognizable under Title VII. But the court of appeals panel found that *Bibby* was distinguishable, because the gay plaintiff in that case presented no evidence of gender non-conformity having anything to do with the workplace harassment he experienced, and Judge Thomas Hardiman, writing for the panel, referred back to the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, holding that discrimination due a worker's gender non-conformity could be actionable under Title VII. The problem in any particular case, wrote Hardiman, is figuring out where to draw the line between sexual orientation discrimination and sex discrimination due to gender non-conformity.

"Like our decision in *Bibby*," wrote Hardiman, "the Supreme Court's decision in *Price Waterhouse* provides the applicable legal framework, but does not resolve this case. Unlike in *Price Waterhouse* — where Hopkins's sexual orientation was not an issue — here there is no dispute that Prowel is homosexual. The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both. As this appeal demonstrates, the line between sexual orientation discrimination and discrimination because of sex' can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis — viewing the facts and inferences in favor of Prowel — leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury."

The problem in this case is that there are allegations in the record supporting both theories. There are comments and actions clearly responding to the way in which Prowel presented himself — i.e., expressed his gender — and there are comments and actions suggesting blatant homophobia. The district court focused on the homophobia evidence, but, wrote Hardiman, "this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.… Because both scenarios are plausible, the case presents a question of fact for the jury and is not appropriate for summary judgment."

The court rejected Wise's argument that this theory could result in every sexual orientation discrimination claim being actionable under Title VII, despite the lack of congressional intent to ban sexual orientation discrimination in that statute, commenting, "Wise cannot persuasively argue that *because* Prowel is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee — regardless of his or her sexual orientation — marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred because of sex,' the case is not appropriate for summary judgment."

However, the court of appeals agreed with the district court that Wise was entitled to summary judgment on Prowel's religious discrimination claim. Prowel argued that the discrimination against him was motivated by his failure to conform to his employer's religious beliefs, citing the familiar Biblical verse "that a man shall not lay with another man." Prowel also admitted in response to the statement of undisputed material facts submitted by Wise, that "the only way in which [he] failed to conform to his co-workers' religious beliefs was by virtue of his status as a gay man." Prowel also explained the harassment against him as follows: "I am a gay male, which status several of my co-workers considered to be contrary to being a good Christian."

But to the court, this sounded more like sexual orientation than religious discrimination, and "we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against

LESBIAN/GAY LAW NOTES **September 2009**

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because of religion' merely by virtue of his homosexuality."

Hardiman explained the difference between the sex discrimination claim and the religious discrimination in relation to Prowel's sexual orientation. "In sum, the same principle that requires Prowel's gender stereotyping claim to be submitted to the jury requires that his religious harassment claim fail at this stage," Hardiman wrote. "Prowel's gender stereotyping claim is not limited to, or coextensive with, a claim of sexual orientation harassment. Accordingly, the jury will have to determine the basis of the harassment. By contrast, Prowel's religious harassment claim is based entirely upon his status as a gay man. Because Prowel's claim was a repackaged claim for sexual orientation discrimination — which is not cognizable under Title VII — we hold that the District court did not err in granting Wise summary judgment on that claim."

The court also found that Prowel's retaliation claim was derivation of his sex discrimination claim. For the same reason that the court revived the sex discrimination claim in this ruling, it also revived the retalation claim to be considered on remand.

Katie R. Eyer of Salmanson Goldshaw argued the appeal for Prowel, assisted in the representation by Corey S. Davis of Equality Advocates Pennsylvania and Pittsburgh attorney Timothy P. O'Brien. The Western Pennsylvania Office of the Women's Law Project also submitted an amicus brief in support of the appeal. A.S.L.

LESBIAN/GAY LEGAL NEWS

10th Circuit Affirms Reversal of Asylum Claim by Gay Brazilian

In a unanimous three-judge panel ruling first issued on July 31 and amended on August 14 , the U.S. Court of Appeals for the 10th Circuit has affirmed a decision by a single member of the Board of Immigration Appeals (BIA) to reverse a grant of asylum by an Immigration Judge to a gay Brazilian man who was apprehended attempting to enter the U.S. unlawfully in 2004. Ruling in *M.H. v. Holder*, 2009 WL 2569390 (not selected for publication in F.3d), the court concurred with the BIA that State Department reports show that the Brazilian government is making efforts to combat homophobia and that legislation protects gays in Brazil from discrimination, supporting a conclusion that M.H. had failed to establish a reasonable fear of persecution if he is removed to his home country. Judge Terrence L. O'Brien wrote the opinion for the court.

Because M.H. is being returned to Brazil, where he fears persecution on account of his sexual orientation and gender presentation, we will follow our practice of referring to him solely by initials, even though the unpublished court opinion uses his full name, so that this account will not come up on Internet searches using his name.

The hearing record before the Immigration Judge consisted of lengthy testimony by M.H., State Department reports on human rights conditions in Brazil from 2002 to 2004, and various pieces of documentary evidence, such as newspaper articles and reports of non-governmental human rights organizations concerning the situation for sexual minorities in Brazil.

M.H. testified to a difficult childhood and adolescence due to his marked effeminacy, claiming he was mistreated by classmates, neighbors, and family members, subjected to name-calling and harassment. He was never, however, subjected to serious violence. He claimed that he was ridiculed by military personnel when he went to register for military service as required by law, but he was rejected for service due to a history of childhood rheumatic fever. He also testified that he was frequently ridiculed and harassed while using public transit to get to his job. He claimed that a boyfriend had broken up with him for fear of being identified as homosexual, and that a friend had told him about gay men being murdered, which led him to flee Brazil and to try to enter the United States.

The State Department country reports on Brazil indicated that there was severe social prejudice against homosexuals, who were subjected to harassment and discrimination, but that there were federal and state laws against such discrimination and that the legislature had recently overridden a presidential veto of a domestic partnership benefits bill. The State Department also reported that a Brazilian federal human rights agency had launched a program to combat homophobia in Brazil. The country reports also indicated that gay men were being killed in Brazil. The 2004 country report attributed to the Ministry of Health the statistic that 180 gay men had been killed in Brazil during the prior year.

The Immigration Judge found M.H.'s testimony credible, and granted his asylum petition, but, inexplicably, without making any express finding in his written opinion that M.H. had been subjected to persecution in the past, which would have presumptively qualified him for asylum, or that M.H. had a reasonable fear of persecution if returned to Brazil.

As Judge O'Brien described the IJ's opinion, "From the documentary exhibits, the IJ decided that even though Brazil is making some progress ... homosexuals still in that particular country have problems.' They are subject to persecution by other individuals' and the government hasn't done a lot in the past.' In the IJ's view, when you are with a group of people that are like you in large number, you are okay, but I think once you go [to] your separate city and so forth, that there are problems in Brazil, and the Court has read those articles indicating that Brazil is one of the worst countries in the world for this particular problem.' Although the IJ recounted M.H.'s testimony and found it credible, he did not make specific findings on past persecution or the probability of future persecution. One might infer, however, he found the presence of past persecution, a reasonable fear of future persecution, or both." The Department of Homeland Security appealed the IJ's decision.

On the merits, O'Brien wrote, the BIA decision was supported by the record. "The record indicates that M.H. relied mostly on childhood events and the cumulative effects of discrimination and harassment by diverse individuals in his adulthood," wrote O'Brien. "The most troubling incidents occurred before [his] homosexuality was apparent to others and without any connection to action or inaction by the government or entities or individuals it is unable or unwilling to control. He testified credibly as to the bleak nature of his life in Brazil and is deserving of sympathy. But other than childhood beatings' at the hands of other children, he related no instance of violence directed toward him because of his sexual preference."

"Nor is there evidence of credible threats to his safety or well being," O'Brien continued. "Moreover, there is no evidence the unpleasantness he experienced came from the government or individuals or entities it was unable or unwilling to control. The isolated failure of teachers to respond adequately to childhood bullying (particularly if the problems were not called to their attention) or one police officer's failure to respond appropriately to improper sexual conduct is not necessarily sufficient to show persecution' even when accompanied by evidence of general intolerance of homosexuals in Brazil, particularly when the State Department reports government policies and efforts to restrain such attitudes."

Finding that although the BIA opinion was "terse," it gave reasons for its conclusions, the court held that it would not "disturb" the BIA's finding that M.H. had not proven past persecution or a reasonable fear of future persecution. Addressing specifically the evidence that 180

gay men had been killed in one year, the court minimized its effect, as follows: "The unvarnished fact that 180 homosexuals were killed in one year is not remarkable in a country of over 180 million, particularly when the report does not identify the killings as murder, contains no mention of the reason for the killings or any description of the perpetrators (by type, not by name). The reader is left to speculate — were they homophobic killings or were they motivated by other factors (jilted lovers, drug dealing, prostitution, etc.) and only coincidently involved homosexuals?"

"The record does not demonstrate that the BIA wrongly rejected M.H.'s claim," O'Brien concluded. "It is fair to infer, even from its cryptic remarks, that the BIA put the killings of homosexuals in context, considering the diverse area and population of Brazil; the ambiguity surrounding the killings; and the lingering problems affecting the human rights of many citizens, not just homosexuals. Further, the report describes governmental efforts to combat violence, curb homophobia, and promote nondiscrimination."

In other words, as difficult as things may have appeared to an "effeminate" gay man in Brazil in 2004, when M.H. sought to escape and find a new life as an openly-gay man in the United States, they were not bad enough to warrant a grant of asylum, at least by the standards for findings of persecution that are used in the U.S. asylum process. The court's opinion demonstrates, yet again, that under prevailing interpretations of current asylum law, refuge is unlikely to be granted in the United States for foreign nationals whose governments have disavowed anti-gay policies and have undertaken affirmative efforts to protect gay rights through legislation and educational programs, even though those efforts may not yet have fully translated into the social sphere where gay people may continue to encounter discrimination and harassment. A.S.L.

6th Circuit Rejects Religious Discrimination Claim by Discharged Lesbian Employee

The U.S. Court of Appeals for the 6th Circuit has ruled that a lesbian who was fired from her job at the Kentucky Baptist Homes for Children (KBHC) because of the employer's religiously-based disapproval of homosexuality may not maintain a claim of employment discrimination on the basis of religion. Affirming a grant of summary judgment to the employer in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 2009 WL 2707226 (Aug. 31, 2009), the court held that Alicia Pedreira had not pled facts that placed in question whether she was discharged for her religious beliefs, and that another lesbian who claimed to have been deterred from applying to work for the defendant because of its well-known anti-gay hiring policies did not have standing to bring a religious discrimination claim, either.

In an earlier phase of this long running case (Pedreira was discharged in 1998), the courts had rejected the idea that Pedreira's discharge violated the Equal Protection Clause of the 14th Amendment of the federal constitution, refusing to accept the theory that heavy state funding of KBHC would render it subject to the constitutional constraints placed on state actors.

However, in the other prong of this consolidated case, the court of appeals reversed the trial court's decision to reject a taxpayer Establishment Clause challenge to the continued funding of the KBHC by the state of Kentucky, finding that the plaintiffs had standing as state taxpayers to contest the state's continued financial support for the defendant's religious activities. Studies show that KBHC deliberately permeates its services to children with Christian doctrine, leaving it open to the charge that it uses taxpayer money to proselytize for religion.

Circuit Judge Julia Smith Gibbons wrote the opinion for the court. Americans United for Separation of Church and State and various projects of the ACLU participated in the case on behalf of Pedreira and other plaintiffs.

Pedreira had been a successful family specialist working with children at KBHC's Spring Meadows Children's Home when she was discharged after being discovered by management to be a lesbian. Pedreira was not "out" on the job, but she was "out" in her personal life, allowing a picture of herself with her female partner attending an AIDS fundraising event to be displayed at an exhibit at the Kentucky State Fair. Some managers from KBHC saw the photograph at the Fair exhibition. The termination notice to Pedreira stated that she was discharged "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." After the discharge, KBHC announced as its official policy that "it is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

Thus, it was clear from the outset of this case that KBHC adopted its anti-gay employment policy for religious reasons. Pedreira reasoned that since her own religious beliefs did not agree with those of KBHC, their dismissal of her was discrimination on the basis of religion, a prohibited form of discrimination under both Title VII of the Civil Rights Act of 1964 and the Kentucky Civil Rights Act.

Judge Gibbons observed that in a prior ruling, the 6th Circuit held that the prohibition on religious discrimination has been interpreted "to preclude employers from discriminating against an employee because of the employee's religion as well as because the employee fails to comply with the *employer's* religion… Seizing on this latter interpretation, Pedreira argues that living openly as a lesbian constitutes not complying with her employer's religion. Pedreira claims that she was terminated because she does not hold KBHC's religious belief that homosexuality is sinful."

But the court refused to accept this analysis of the situation, insisting that KBHC fired Pedreira "on account of her sexuality," but that "Pedreira has not explained how this constitutes discrimination based on *religion*." Judge Gibbons asserted that Pedreira had not "alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC." Quoting from the same earlier 6th Circuit decision, Gibbons insists that the burden was on Pedreira to show "that it was the *religious* aspect of her conduct that motivated her employer's actions." And, said Gibbons, "Pedreira does not allege that her sexual orientation is premised on her religious beliefs or lack thereof, nor does she state whether she accepts or rejects Baptist beliefs. While there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has failed to state a claim upon which relief could be granted.'"

This strikes the writer as double-talk. KBHC made it very clear that the discharge was motivated by religion, when it told Pedreira that it found her "homosexual lifestyle" to be "contrary" to the establishment's "core values" and subsequently issued a policy statement asserting that its anti-gay personnel policy was necessary to "stay true to our Christian values." Pedreira clearly alleged that she was discharged because her employer considered her to be living a sinful lifestyle that failed to conform to the employer's religious values, with which Pedreira disagreed. How much more direct could she be in this circumstance? And how could it be any clearer that this discharge was all about religion?

In a separate part of the opinion, the court of appeals said that the trial judge had misapplied a recent Supreme Court ruling about federal taxpayer standing to the state taxpayer aspects of this case. According to Judge Gibbons, the plaintiffs in this case pointed to specific Kentucky appropriations to KBHC, made with knowledge of KBHC's religious proselytizing among the children sent to its care, and the court found that such identification of specific appropriations conferred standing on the state taxpayers.

Another contested issue was that the trial court had refused to allow any evidence about the discharge of Pedreira to be considered in connection with the Establishment Clause part of the case. Gibbons stated that evidence about Pedreira's discharge and KBHC's employment practices would be relevant and admissible, as

"courts routinely look to employment policies to shed light on the sectarian nature of an institution for purposes of the Establishment Clause." Thus, on remand to the trial court for further consideration of the constitutional challenge to state funding of KBHC, evidence of Pedreira's discharge may be used to help prove that KBHC is a pervasively religious institution which the state should not be using taxpayer money to fund. A.S.L.

Third Circuit Revives Ocean Grove First Amendment Case

A unanimous panel of the U.S. Court of Appeals for the 3rd Circuit ruled in an unpublished decision in *Ocean Grove Camp Meeting Association v. Vespa-Papaleo*, 2009 WL 2048914 (July 15, 2009), that U.S. District Judge Joel A. Pisano had correctly applied the *Younger v. Harris* federal abstention doctrine in dismissing a challenge by the Ocean Grove (NJ) Camp Meeting Association to an investigation by the New Jersey Division on Civil Rights of two discrimination complaints filed by lesbian couples who had been denied use of the Ocean Grove Boardwalk Pavilion for their civil union ceremonies. However, the court ruled that Judge Pisano should have retained jurisdiction of the case to consider Ocean Grove's request for a declaratory judgment concerning its rights regarding all the property in the town apart from the Boardwalk Pavilion.

The Ocean Grove Association is a Christian ministry dating from the 19th century which purchased a large area along the Jersey shore to establish its own religious colony, called Ocean Grove. The Association still owns the land that the community of Ocean Grove is situated upon, and performs the functions of a local government, although the community is no longer solely made up of Association members. Included in that property is a seaside boardwalk that includes a Pavilion that is used by the Association for various religious activities and is also used by residents of the community for a variety of other events. There is evidence that different-sex weddings have taken place there with the Association's permission. After New Jersey enacted its Civil Union Act, two lesbian couples sought to hold their civil union ceremonies in the Pavilion, but they were turned down by the local authorities on the ground that "the requested use was inconsistent with the Association's religious beliefs," according to the opinion for the court of appeals by Judge Michael Chagares.

The two couples — Harriet Bernstein and Luisa Paster, and Janice Moore and Emily Sonnessa — filed complaints with the New Jersey Division on Civil Rights, the agency that enforces the state's Law Against Discrimination, which bans sexual orientation discrimination in places of public accommodation. There are plenty of meaty legal issues floating around in that case, including whether the Boardwalk Pavilion is a place of public accommodation or exempt as a religious facility, and whether the Association's Free Exercise Rights can prevail, especially when the Association had been a long-time recipient of tax benefits that were premised on the boardwalk and related facilities being open to public use. [While this case has been pending, N.J. authorities withdrew certain tax benefits on the ground that the Association violated the requirement of making the facility available to the public without discrimination.]

But that's not what this July 15 ruling is about. As soon as the complaints were filed, but before the Division launched its investigation, the Association rushed into federal district court, filing a lawsuit claiming that its First Amendment rights were being violated, and seeking an immediate preliminary injunction to block the Division's investigation until the federal court could rule on the merits of the first Amendment free exercise claim. Judge Pisano rejected the demand for injunctive relief and dismissed the case, relying on *Younger v. Harris* abstention. (*Younger v. Harris*, 401 U.S. 37 [1971], established criteria for federal courts to determine whether it is appropriate to abstain from deciding cases where state judicial proceedings are under way involving the same parties and issues.)

Judge Pisano concluded that the Division's investigative process was part of a judicial proceeding, and that the Ocean Grove Association could raise its constitutional claims within that proceeding, so no resort to federal court was needed. The Court of Appeals agreed with that conclusion, so far as it concerned the proceedings before the State Division on Civil Rights.

However, it seems that the Association's federal complaint went further than that, asking as well for the court to determine the Association's Free Exercise of Religion rights with regard to all of its Ocean Grove property. After all, in the future same-sex couples might also ask to hold civil union (or eventually wedding) ceremonies in other places within the community, including the chapel or other parts of the boardwalk. The Court of Appeals agreed with the Association that *Younger v. Harris* abstention was only appropriate regarding the Boardwalk Pavilion matter pending before the N.J. State Division, and that the case should be returned to Judge Pisano to proceed on the question of the Association's First Amendment free exercise rights concerning the rest of its property in Ocean Grove.

So, it is possible that there will a federal district court determination, after all, about whether the Ocean Grove Association, as owner of a municipality, is bound to comply with the N.J. Law Against Discrimination, and since this will involve construing the 1st Amendment Free Exercise of Religion rights of the Association, it could certainly have an effect on the ultimate outcome of the Boardwalk Pavilion cases pending in the state forum, regardless of Judge Pisano's having dismissed the federal case so far as it concerns the Boardwalk Pavilion. A.S.L.

Keeping Kansas Safe for Toto?

We couldn't resist this headline. The question confronting the Kansas Court of Appeals in *State v. Coman*, 2009 WL 2633688 (Aug. 28, 2009), is whether a man found guilty of bestiality with his ex-girlfriend's dog must be required to register as a sex offender. In a divided ruling, the court held 2–1 that the registration requirement applies, the dissenter arguing that so ruling makes a nullity of a legislative decision to specifically exclude bestiality from the list of "sexually violent" offenses that subject a perpetrator to the registration requirement.

In relating the story of the case, we can do no better than the laconic recitation offered by Judge Henry W. Greene, Jr., in his opinion for the court. "Upon entering her garage to access the freezer, the complaining witness reported seeing her ex-boyfriend [Joshua] Coman lying on the floor of the garage with his pants and underwear down around his ankles, his shirt pulled up, and her female Rottweiler lying beside him. When she turned on the light, Coman moved his hips away from the dog and quickly pulled his pants up. Coman then said he loved the dog, Yodi, and he told the witness, "I don't expect you to understand, but I had to see her one more time." When police arrived, a pat-down revealed Coman's penis remained erect and he had a bottle of personal lubricant in his left front pocket. Coman denied having intercourse with the dog, but he admitted that he tongue-kissed her and digitally penetrated her. A search of Coman's cell phone revealed several photos of dogs and one video clip of a man engaging in sexual intercourse with a canine."

This story raises so many interesting questions, but we should not speculate about them here. (OK, we can't resist asking whether Coman had been hanging out with this woman in order to get at her dog?) The ultimate issue on appeal was whether the trial court, having convicted him of violating the Kansas sodomy law, which specifically outlaws sexual contact between man and beast, was authorized to impose a requirement that he register with the state as a dangerous sex offender, in addition to sentencing him to six months in stir and requiring him to undergo psychiatric counseling.

The statute provides that somebody guilty of a "sexually violent" offense may be required to register, and provides a list of fourteen categories of such offenses. One of them references the sodomy law, but excludes the first section — which pertains to gay adult sex and bestial-

ity — while including the other sections, which cover sex involving children. At the end of the 14–item list is a catch-all provision concerning other offenses that are "sexually motivated."

The majority of the court ruled that the legislature's exclusion of bestiality from the 14 item list did not necessarily mean that bestiality could not provide the basis for imposing the registration requirement, because the catch-all provision indicated the legislature was giving discretion to the courts to impose the requirement for any offense that was sexually motivated. In this case, Coman, who pled guilty to the charges against him, admitted under oath that his motivation for getting down with Yodi was sexual. Q.E.D., according to Judge Greene.

Dissenting Judge Steve Leben refused to go along with this reasoning. He argued that the legislature's decision to exclude bestiality from the 14–item list while specifically including some other offenses covered by the sodomy law was rendered meaningless by the court's decision, since the majority's interpretation of the catch-all provision would sweep in virtually all cases of bestiality. A better way to reconcile the provisions would be to see the catch-all as applying to other offenses not related to those on the 14–item list. We suspect that former U.S. Senator Rick Santorum (R-Pa.), would approve of this decision, given his reported concern about the dangers to society of "man on dog" sex. But seriously, folks, requiring Coman to register will give fair warning to dog owners to protect their pets from his unwanted sexual attentions, and also to tell their kids to forget about wearing those dog costumes on Hallowe'en… A.S.L.

Oregon Appellate Court Adopts Progressive Interpretation of Donor Insemination Statute in Custody Dispute Between Lesbian Former Partners

A lesbian who had separated from her partner challenged the constitutionality of two Oregon statutes: one that creates a presumption that a husband is the father of a child born to his wife, so long as the spouses are not separated; and another that gives a husband parental rights over a child born as a result of his wife's artificial insemination, so long at the husband consented to the insemination. An Oregon appellate court deemed the former statute constitutional and inapplicable to lesbian couples, but held the latter statute unconstitutional unless it extends to give parental rights to a same-sex domestic partner of an artificially inseminated woman. Thus, the statute was upheld, but judicially amended to apply under circumstances such as those presented here. *Shineovich and Kemp*, 230 Or. App. 670, 2009 WL 2032113 (Or. App. July 15, 2009).

The appeal by the woman cut off from her partner's children was argued by Mark Johnson of Johnson and Lechman-Su of Portland, Oregon, with amicus briefs from the American Civil Liberties Union, ACLU Foundation of Oregon, Inc., and Basic Rights Oregon. Murphy McGrew of Lake Oswego, Oregon, represented the birth mother.

Sondra Lee Shineovich and Sarah Elizabeth Kemp had a 10–year relationship during which Kemp was artificially inseminated and bore two children. Shineovich alleges that she consented to the insemination. Around the time of the birth of their first child, the couple was married in Multnomah County, but the marriage was later declared void when the courts determined that the county did not have authority to issue marriage licenses to same-sex couples.

After the couple's separation, Shineovich sued for a declaration of parental rights. The lower court dismissed her suit for failure to state a claim, and only cursorily discussed the constitutionality of the statutes. Shineovich appealed, contending that laws that extend parental rights to husbands must be read to extend such rights to same-sex partners of women who give birth during their partnership.

One statute challenged by Shineovich, Or. Rev. Stat. Section 109.070(1), created a presumption that a husband was the parent of his wife's child, but only if he was not impotent or sterile at the time of the conception. (The provision regarding impotency or sterility was removed from the statute in 2007, after the events precipitating this action.) The court held that because this statute relates only to biological paternity, and specifically applies only to people capable of fertilizing a woman's egg, it could not, even if it were phrased in gender-neutral terminology, grant parental rights to a woman; it is not possible for a woman to fertilize the egg of another woman. Thus, the lesbian partner of a birth mother is in the same position, under this statute, as an impotent or sterile man. Since the presumption equally excludes any man or woman incapable of fertilizing an egg, the statute is not unconstitutionally discriminatory, according to the court.

The second statute challenged by Shineovich is quite different. Under Or. Rev. Stat. Section 109.243, the relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband is viewed as the same as if the child had been naturally and legitimately conceived by the mother and the mother's husband, so long as the husband consented to the performance of artificial insemination. Thus, the statute gives a status to "husbands" that is not available to other similarly situated persons. Under Oregon law, therefore, a woman partnered with another woman cannot be a "husband," or any other type of spouse, thus, the statute privileges men and discriminates against women. Further, homosexuals are a suspect class under Oregon jurisprudence, and laws that disfavor a suspect class are only justifiable if there is a genuine difference between that class and other persons granted some sort of privilege or immunity. Thus, the court found the latter statute to contravene the equal protection clause of Oregon's constitution.

The appeals court also considered the section of the Oregon Constitution that prohibits legal recognition of same-sex marriage . Unlike such provisions in other states' constitutions, Oregon's constitution does not prevent marital-type benefits from being extended to same-sex partners. (The court compared the provisions in Georgia, Ohio, and Utah.) Definitions of marriage from both legal and non-legal sources do not indicate that "marriage," in and of itself, encompasses any particular benefits. Thus, it is not unconstitutional under the marriage amendment to extend statutory privileges to same-sex partners on the basis of unequal treatment of women or homosexuals. Such an extension does not impinge on prerogatives integral to the concept of "marriage."

Under the rules of statutory interpretation recognized in Oregon, if a statute is defective because of under-inclusion, there exist two remedial alternatives: a court may either (1) declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or (2) extend the coverage of the statute to include those who are aggrieved by exclusion. In order to decide which path to choose, the court sought to determine which course would further the legislative objective. The objective of the statute was, according to the court, to protect children conceived by artificial insemination from being denied the right to support by the mother's husband or to inherit from the husband. Invalidating the statute would undermine that purpose, and might nullify the legal parent-child relationship of any such child and the mother's husband.

"On the other hand," said the court, "extending the statute's coverage to include the children of mothers in same-sex relationships advances the legislative objective by providing the same protection for a greater number of children." Thus, "the appropriate remedy is to extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination."

Under the first statute, the appellate court ordered the trial court to enter a judgment declaring that Shineovich is not the legal parent of Kemp's children, because she is not biologically capable of being the genetic parent of Kemp's children.

Under the second statute, however, the trial court, on remand, must treat Shineovich the same as it would treat a mother's husband. Note, however, that the latter statute includes an element of consent. Thus, Kemp alleged that Shineovich could not prove that she "con-

sented" to the artificial insemination because no writing evidenced such consent. The court held that writing is not essential to show consent, and the lack of a writing does not foreclose a claim. On the other hand, on remand, Shineovich must prove that she in fact consented to the insemination. Whether she consented is a factual issue appropriate for determination by the trier of fact. *(Note: The appeals court also rejected an attempt to dismiss this suit on jurisdictional grounds, namely, that the petitioner must name the state as a party whenever a state statute's constitutionality is challenged in an action for declaratory relief.) Alan J. Jacobs*

North Carolina Appeals Court Rejects Challenge to Second-Parent Adoption, Affirming Co-Parent Custody and Visitation Award

The Court of Appeals of North Carolina ruled on August 18 that a second-parent adoption was not void, even though its legality might have been questioned in a direct appeal of the adoption order, and thus could not be challenged in a subsequent dispute over custody and visitation between former same-sex partners. The court affirmed a decision by Judge Lillian B. Jordan of New Hanover County District Court granting joint legal custody and awarding liberal visitation rights to the adoptive parent in *Boseman v. Jarrell*, 2009 WL 2601629.

The parties, Julia Catherine Boseman and Melissa Ann Jarrell, began their relationship in 1998, living together as domestic partners, and "from the beginning, the two discussed their desire to have a child," according to the appeals court opinion by Judge Wanda G. Bryant. Jarrell gave birth to their son, conceived through donor insemination, in October 2002. In May 2005, Jarrell filed a motion with the Durham County District Court Clerk for a "Waiver of Statutory Provisions by Biological Mother." In the motion, Jarrell requested that the court waive the requirement that a biological mother's parental rights be terminated if the child was adopted. A Durham County judge granted the motion and ruled in favor of adoption of the child by Boseman, so that both women would be legal parents of their son.

However, over the next two years the women spent more and more time apart, not so surprising when one considers Boseman's developing political career as an openly lesbian state senator. (Boseman was first elected in 2004 and is now serving her third term in the North Carolina Senate.). "Despite Jarrell's acknowledgment that Boseman is a very good parent who love[d] [the child]' and whom the child loved in return," wrote Bryant, "Jarrell limited Boseman's contact with the child." Boseman then turned to court, filing suit in New Hanover County District Court seeking joint custody, requesting that Jarrell retain primary custody and that Boseman have "liberal and extensive visitation." Boseman relied, of course, on the fact that as an adoptive parent she would have all the rights of a legal parent to custody and care of her child.

Jarrell responded with the argument that the adoption should not count in this forum because, she argued, North Carolina's adoption statute does not authorize adoption by same-sex partners, and seizing upon the alleged refusal of the state's Department of Health and Human Services "to index the non-stepparent adoption decree on this State's permanent retention system," Jarrell argued that the adoption was void from its inception, and Boseman should not be entitled to seek custody or visitation with the child.

The trial judge took the position that the New Hanover County District Court lacked jurisdiction to entertain any attack on the adoption, which had been approved by a judge in Durham County, and proceeded on the merits to find that joint custody and visitation rights for Boseman were in the best interest of the child. Jarrell appealed.

The Court of Appeals rejected Judge Jordan's conclusion that she did not have jurisdiction to inquire into the validity of the adoption, but concluded nonetheless that the adoption was not void. According to the Court of Appeals, once an adoption decree is granted by a court having proper jurisdiction over the parties and the subject matter, it can only be subjected to judicial review in a direct appeal of the adoption decree. Collateral attack in a subsequent proceeding is not allowed. Thus, the adoption is not void, although it might have been voidable. Thus, the Court of Appeals did not directly pass judgment on the device of the motion for waiver as a means of getting around the structure of the North Carolina adoption statute to accommodate a second-parent adoption, unfortunately. On the other hand, departing from the view taken by courts in some other jurisdictions that have refused to grant second parent adoptions on the ground that adoption statutes must be strictly construed as being in derogation of common law, this court took the view that ultimately the purpose of the adoption statute is to provide for the best interest of the child, and to that end this adoption was consistent with the purposes of the statute.

Judge Bryant seized upon the arguments that Jarrell had made in her waiver motion, pointing out that the purpose of the provision terminating parental rights was to protect the child's former parent against any legal responsibilities or claims, and thus appropriate for waiver by the biologial mother, and noting further that "Jarrell herself makes this point in her motion for waiver to the adoption court where she notes that the waiver will avail the minor of additional health and governmental benefits, as well as provide stability and a legal framework for resolving any disputes regarding custody or visitation that may arise after the adoption.'" It was strange that now Jarrell should be arguing that the adoption should not serve that very purpose. "This is exactly the end achieved by the adoption in this case," wrote Bryant. "Following unforeseen circumstances, namely the end of the parties' domestic partnership, the minor's interests, both financial and emotional, are protected. Because of the adoption here, the minor will still be entitled to the support and care of the two adults who have acted as his parents and they will both remain fully obligated to his welfare."

The court found that this result was consistent with the primary purpose of the adoption statute. These parties planned the conception and birth of the child, Bryant noted, and had both acted in a parental capacity. Bryant observed that the adoption statute itself provides that the needs of minor adoptees should be "primary70 in relation to the rights of any adults, and that the statute itself provides for liberal construction "to promote its underlying purposes and policies."

The court treated as irrelevant the fact that the litigants are a former same-sex couple, indicating that the same result would arise were they an unmarried different-sex couple. "While acknowledging that such issues are matters of great public interest and of personal significance to Boseman and Jarrell," she wrote, "we emphasize that the specific nature of the parties' relationship or marital status was not relevant to resolution of the instant appeal. The same result would have been reached had the parties been an unmarried heterosexual couple. While Chapter 48 does not specifically address same-sex adoptions, these statutes do make clear that a wide range of adoptions are contemplated and permitted, so long as they protect the minor's needs, interests, and rights.'" Is this an intimation that the court would look favorably on second-parent adoption petitions without the need for a waiver petition?

Having decided that the adoption should be treated as valid, the court upheld the trial court's conclusion that Boseman had standing to pursue custody. Bryant observed that "the trial court's other conclusions, namely that Boseman is a parent of the child based on the adoption decree and that both Boseman and Jarrell are fit and proper persons for custody of the child, fully support its custody award." The question remains whether Jarrell will attempt to appeal this unanimous ruling to the North Carolina Supreme Court. A.S.L.

Texas Appeals Court Issues Adverse Ruling on Co-Parent's Suit Seeking Conservatorship or Adoption

The Court of Appeals of Texas in Dallas issued a ruling Aug. 11 affirming a decision by a trial court in Dallas County rejecting an attempt by a lesbian co-parent to be appointed conservator or to adopt the child born to her former partner through donor insemination. *In the Interest of M.K.S.-V., A Child*, 2009 WL 2437076. The court rejected the plaintiff's claim that her extensive visitation with the child sufficed to create standing for her to seek to be appointed a conservator, and found that the birth mother's adamant refusal to consent was a bar to adoption.

The parties met in the fall of 1997, began living together in 1998, and decided to have a child together. T.S. was inseminated in 2003, and gave birth to M.K.S. in May 2004. T.S. and K.V. "co-parented" until their relationship broke up in August 2005, when T.S. moved out with M.K.S. However, conceding the importance ot "continuity" for M.K.S., T.S. agreed to a liberal visitation schedule for K.V., who continued to play an active role with the child. However, T.S. was upset when K.V. accessed the child's school records without consulting T.S., and cut off her visitation, transfering the child to a different school without consulting K.V. K.V. then filed suit, seeking to be appointed conservator or to adopt the child in a second-parent adoption proceeding.

T.S. challenged K.V.'s standing to be appointed a conservator, and refused to consent to the adoption. K.V. was relying on statutory provisions that allowed an unrelated adult who had a substantial parental relationship to seek appointment as a conservator, but the court found that the arrangement she had with T.S. did not qualify under Texas precedents to confer that status in this case. Furthermore, the court found that T.S.'s refusal to consent was an absolute bar to adoption by K.V. K.V. also made estoppel arguments, contending that she had an agreement with T.S. concerning continued contact with the child, but the court was unwilling to enforce the agreement, either through a breach of contract or estoppel theory.

K.V. is represented by Michelle May O'Neil, and T.S. by Paul Brumley. A.S.L.

Tax Court Rejects Joint Filing Status for Same-Sex Couple

The United States Tax Court ruled on July 13 that millionaire gay activist Charles Merrill could not benefit from joint tax filing status for the tax years 2004 and 2005 because he was not married to his long-term same-sex partner, Kevin Boyle, during those tax years. *Merrill v. Commissioner of Internal Revenue*, T.C. Memo. 2009–166, 2009 WL 2015106.

According to the opinion for the court by Judge Diane L. Kroupa, Merrill had previously been married to Johnson & Johnson heiress Evangeline Johnson Merrill, then began a relationship with Boyle after Evangeline's death. Merrill and Boyle have been partners for more than 18 years, and married in California in 2008.

Merrill never filed tax returns for 2004 and 2005. When the IRS contacted him about the missing returns, he responded that he had not filed as a protest because he should be able to file jointly with his partner but it was not allowed by the IRS. The tax agency prepared forms based on whatever information it had about Merrill's finances and assessed him deficiencies for the years in question. Merrill took the issue to the Tax Court, claiming that in light of his long-term relationship with Boyle, the denial of joint filing status discriminates against same-sex couples in violation of the constitution.

The Tax Court generally does not pass on constitutional questions. In this case, Judge Kroupa pointed out, the Code provides that in order to benefit from joint filing status, one must at least file a return claiming such status, which Merrill had never done, thus his appeal must be dismissed. "We need not address his constitutional claims," she wrote, but then dropped a footnote citing half a dozen prior rulings rejecting constitutional claims brought to challenge the filing status provisions. Of course, a perfectly plausible argument could be made that it is inequitable to treat long-term same-sex couples differently from married couples under tax law, but turning that into a legal claim is tricky since the two don't have the same legal status. However, now that Merrill and Boyle are married, one suspects that they could raise a constitutional claim against any refusal to accept a joint return for their 2008 taxes, should they attempt to file one. A.S.L.

Federal Judge Says Calling Somebody Gay Not Necessarily Harmful to Reputation

U.S. District Judge Denny Chin has ruled in *Stern v. Cosby*, 2009 WL 2460609 (S.D.N.Y., Aug. 12, 2009), that under New York State's defamation law, the court should not presume that falsely calling somebody gay is damaging to that person's reputation. Judge Chin's ruling contradicts several decisions by New York Appellate Division panels and state trial judges, as well as a recent ruling by another judge of the federal district court in New York.

Judge Chin was ruling on motions for summary judgment by author Rita Cosby and publisher Hachette Book Group USA, who are being sued for defamation by attorney Howard K. Stern, the former lawyer for and companion of the late Anna Nicole Smith. Cosby wrote and Hachette published a best-selling book, Blonde Ambition: The Untold Story Behind Anna Nicole Smith's Death, which prominently mentions Stern in ways that he contends have harmed his reputation.

Under the common law of defamation, publishing falsehoods about a person may subject the writer and publisher to liability for injury to the subject's reputation. Because of the First Amendment's protection for freedom of speech, the courts have made it very difficult for plaintiffs to win such cases, especially when the plaintiff can be considered to be a "public figure," somebody whose prominence and involvement in newsworthy activities makings them interesting to the press and the public. The U.S. Supreme Court has ruled that when public figures sue for defamation, they must prove that the alleged defamatory statements were made with "actual malice," a legal term of art meaning that the maker of the statement either knew it was false or published it with reckless disregard as to the truth. Of course, under modern defamation law, only a false statement about the plaintiff can give rise to legal liability. Truth is a complete defense.

In this case, Stern conceded that he would be considered a public figure. His involvement with Smith, a subject of much media interest, had brought media attention to him. Consequently, he would have to surmount the actual malice test in order to win at trial.

Stern's lawsuit itemizes nineteen different statements in the book that he claims to have defamed him. Two of them pertain to homosexuality. As summarized by Judge Chin in his opinion: "Statement 1: Stern and Birkhead had oral sex at a party at a private home in Los Angeles. Smith discovered them, laughed, and later remarked that Stern was gay. Statement 2: Smith, in front of her nannies in the Bahamas, used to regularly watch a video of Stern and Birkhead having sex." Based on these statements, Stern alleges that Cosby and Hachette defamed him by falsely asserting that he was gay, engaged in oral sex with Birkhead, and participated in a sex video with Birkhead that was made available to Smith. Stern asserts that under New York defamation law, such statements are presumed to be harmful to his reputation, entitling him to monetary damages.

Chin rejected this assertion, even though many New York trial and appellate division judges have ruled over many decades that falsely calling somebody gay is presumptively damaging to their reputation. This lawsuit is in federal court under diversity jurisdiction, so the claim is subject to New York defamation law, as determined by the state's highest court, the Court of Appeals. Surprisingly, the New York Court of Appeals has never addressed the question whether falsely imputing homosexuality to a person is defamatory per se. This is surprising because New York is a major media center, and one would expect a substantial amount of litiga-

tion about defamation arising from media activities — newspapers, magazines, books, television and radio and movies, all produced by companies headquartered here and thus subject to New York defamation law. But a thorough review by the court of New York defamation cases shows that only lower courts have dealt with the question. Thus, Judge Chin concluded, his job was to predict what the New York Court of Appeals would do if confronted with this question today, and the lower court opinions were not binding on the court.

"The question, then, is whether the New York Court of Appeals, in 2009, would hold that a statement imputing homosexuality connotes the same degree of shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace' as statements accusing someone of serious criminal conduct, impugning a person in his or her trade or profession, implying that a person has a loathsome disease,' or imputing unchastity to a woman," all circumstances where New York courts have traditionally found per se defamation, wrote Chin. "I conclude that it would not."

"The past few decades have seen a veritable sea change in social attitudes about homosexuality," he continued. "First, and perhaps most importantly, in 2003 the United States Supreme Court, in a sweeping decision, invalidated laws criminalizing intimate homosexual conduct, holding that such laws violate the Fourteenth Amendment's Due Process Clause. Thus, to the extent that courts previously relied on the criminality of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule, Lawrence [v. Texas] has foreclosed such reliance," he asserted.

"Second," he continued, "in 2009, the current of contemporary public opinion' does not support the notion that New Yorkers view gays and lesbians as shameful or odious. A movement is currently afoot in the state to legalize gay marriage, and according to a recent opinion poll from Quinnipiac University — an independent polling institute — New York State residents support gay marriage 51 to 41 percent, with 8 percent undecided. The same poll found that New York State residents support civil unions 68 to 25 percent. The fact that a majority of New Yorkers supports some sort of government recognition of same-sex relationships belies the notion that these same New Yorkers regard gays and lesbians with public contempt, ridicule, aversion or disgrace.'"

Chin also noted that the New York Court of Appeals, in its 2006 ruling rejecting a claim for same-sex marriage, *Hernandez v. Robles*, had nonetheless, not "given any indication that it perceives widespread disapproval of homosexuality in New York." Although the court rejected the marriage claim, "the plurality opinion clearly recognized, however, that social attitudes toward gay and lesbian New Yorkers had changed dramatically in the past few years, and that the New York legislature could permit same-sex marriage if it chose to. The concurring opinion went even further, and suggested that the New York legislature should take up the issue." Chin found this inconsistent with the traditional grounds for treating imputations of homosexuality as per se defamatory.

In 2008, another judge of the federal district court, Colleen McMahon, had faced the same question in *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F.Supp.2d 520 (S.D.N.Y. 2008), and reached the opposite conclusion from Chin. "Her carefully-considered decision was based largely on the fact that prejudice still exists against gays and lesbians in our society," Judge Chin commented. "While I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful. Moreover, the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals."

Chin rejected Stern's argument that the court was bound by the contrary Appellate Division rulings, pointing out that most of them did not consider the question in any depth, merely citing to earlier rulings, predating the significant factors he had noted in his discussion.

However, while holding that Statements 1 and 2 were not defamatory per se, he held that they were nonetheless "susceptible to a defamatory meaning," not for suggesting that Stern was gay but rather because they depicted him as engaging in oral sex with Birkhead at a party and with participating in a sex video with Birkhead.

"A reasonable jury could find that engaging in oral sex at a party is shameful or contemptible, and the fact that this conduct may not be illegal does not alter this conclusion," wrote Chin. "Moreover, it also appears from the record that, at the time this alleged incident took place in 2005, Smith was dating Birkhead and/or still involved in a relationship with Stern. Thus, to the extent that the Statement implies that Stern was unfaithful to Smith, this would be further reason for a jury to find that the statement is defamatory."

Chin also observed that a jury might find it defamatory to publish that Stern made a sex tape with Birkhead. "This allegation would expose Stern to contempt among most people — even if, arguably, not among the social circles in which he and Smith traveled." In a footnote, Chin rejected "as absurd, Cosby's argument that Statement 2 is not susceptible to a defamatory meaning because sex tapes are commonly made by celebrities, and do not expose those celebrities to contempt."

Thus, Chin refused to dismiss the defamation claim based on these two statements, finding that although there would be no legal presumption that the statements were harmful to Stern's reputation, he would have to prove that he had actually suffered some financial injury attributable to those statements in order to hold Cosby liable for making them.

Chin found that the publisher, Hachette, could not be sued by Stern for defamation because Hachette had reasonably relied on Cosby, an experienced journalist and previously-published author, to get the facts correct in her book, and therefore could not be found to have published falsehoods with "actual malice." Thus the author, Rita Cosby, remains as the sole defendant.

Over all, Chin found that eleven out of the nineteen statements identified in Stern's complaint — including allegations about criminal drug use, pimping, and other sensational charges — could give rise to liability for defamation so that, although he did grant summary judgment to Hachette on all claims and to Crosby on several of the claims, Stern still has a live defamation case against Cosby. A.S.L.

No Medicaid for Sex Changes in New York

The NY State Health Department has a regulation barring the use of state Medicaid funds to cover the cost of gender reassignment and related treatments. There have been several unsuccessful challenges to this over the years. The latest disappointment was rendered by U.S. District Judge Charles J. Siragusa (W.D.N.Y.), in *Ravenwood v. Daines*, 2009 WL 2163105, issued on July 17, 2009. Judge Siragusa did a cut-and-paste opinion, quoting wholesale from a ruling last year by District Judge P. Kevin Castel (S.D.N.Y.), who rejected a similar challenge to the NY Medicaid Regulation, the infamous 18 N.Y.C.R.R. section 505.2(1). This provides that "payment is not available for the care, services, drugs for the purpose of gender reassignment (also known as transsexual surgery) or any care, services, drugs or supplies intended to promote such treatment."

In this case, the plaintiff, born in 1962, was diagnosed as having gender identity disorder (GID) at the unusually early age of 5 years old, and has lived as female since 1967. She has been on Medicaid since 1989 as her source of health care, and SSI and food stamps are her only source of income. (The court opinion does not relate why she is totally reliant on social welfare to fund her existence.) Since 1998, the NY Medicaid program has payed for her hormonal treatment, voice therapy, water pills, medications related to gender reassignment, and mental health care, but they drew the line at paying for surgery and electrolysis, even

though her doctor stated in writing that "sexual reassignment surgery will greatly enhance her overall mental health and well-being."

The lawsuit, in which Ravenwood is represented pro bono by Rochester, NY, attorney Alecia Elston, takes a two-prong approach. One prong is to argue that the state Medicaid regulation violates federal regulations governing the program. The other is to argue that denial of the benefits violates the 14th Amendment's guarantee of equal protection of the laws.

On the former claim, Judge Siragusa basically reproduced, in big block indent quotations, Judge Castel's analysis. Actually, this seems fair since Siragusa states that the plaintiff's briefs seem to be taken from the briefs filed with Judge Castel, and the arguments are the same. Ravenwood tried to distinguish her case by pointing out that the Medicaid program has been paying for her gender identity related treatments of various kinds for many years now, and then just arbitrarily — in her view — drew a line and said "no further." By contrast, the plaintiff in *Casillas* had received hormone therapy at state expense, but none of the other items that Ravenwood has received. Judge Siragusa suggested that this made no difference to the legal analysis.

According to Castel's opinion, as quoted by Siragusa, in order to bring a 42 USC sec. 1983 claim against the state Medicaid program, Ravenwood would have to show that the benefit she is seeking is clearly covered under the federal regulations. The problem is that the federal regulations are rather broadly and a bit ambiguously written. They have their own internal non-discrimination requirements, which Castel construed as requiring that there be no discrimination among needy recipients when it comes to receiving treatments for particular diagnoses, but that discrimination among diagnoses can be made.

Applying this analysis to Ravenwood's claim, it seems that each of the distinct surgical and medical interventions she is seeking might be available to treat other diagnosed conditions, but not to treat GRID. She argues that this constitutes discrimination prohibited by the federal Medicaid regulations, but Castel (and Siragusa) hold that it does not, that Medicaid's non-discrimination requirement says that two people with the same diagnosis are entitled to the same treatment, not that two people with different diagnoses are equally entitled to the same procedure that might be used to address either of the diagnoses. Thus, a Medicaid recipient with breast cancer will be covered for a mastectomy, but a transsexual seeking a mastectomy as part of gender reassignment can be denied coverage for the procedure.

Only where Medicaid clearly establishes an entitlement for a particular benefit would the state be in violation by denying the benefit, and Medicaid does not specifically authorize or require coverage for gender reassignment, point out these NY federal judges, noting in particular that federal Medicaid regulations do not require that the state program cover all medically necessary procedures, and that the federal regulations appear to specifically allow states to ration care by deciding which procedures they will cover.

Turning to the constitutional claim, Judge Siragusa says that Ravenwood is not contending that transsexuals make up a "suspect class" or that there is some fundamental right involved here, thus the 14th Amendment claim is to be decided using the rationality test. Siragusa finds that the explanation provided by the Department of Health when they adopted this regulation suffices for this purpose. When the regulation was proposed and put out for public comment, among the comments submitted in opposition to covering this procedure were those contending that there could be "serious complications" from such surgeries and particularly medical danger from life-long administration of estrogen in order to maintain a feminine appearance. Quoting from Judge Castel's decision, "This provided a more than sufficient rational basis which was related to legitimate government interests — the health of its citizens and the conservation of limited medical resources."

This seems quite paternalistic. It says that a procedure that has been available and used by thousands of transsexuals (male to female) over the past half century since the first recorded sex reassignment cases from the mid–1950s can be excluded from coverage in a regulation adopted in 1998 because the State Health Department received some comments from opponents of the procedure suggesting that there can be "serious complications" and that life-long administration of estrogen is "dangerous." In other words, there are risks involved, as there are in any major surgical procedure and long-term treatment using powerful chemical substances. Presumably transsexuals seeking these procedures are well-advised as to the risks and want to go ahead anyway. (The Harry Benjamin principles for treatment require quite a bit of consultation, counseling, information, and multiple expert medical opinions before anyone is allowed to get these procedures.) But the paternalistic state of New York will step in and say no on public health grounds? That's bizarre.

This should be evaluated based on what is really at stake. This is clearly a political decision about what the state will spend its Medicaid money for, and it is affected by the view — clearly outmoded — that this is a cosmetic procedure that is not medically necessary. Or by a view that "sex changes" are immoral, or are a luxury that the state should not have to spend money for.

But it seems unlikely that reform will be achieved here through a judicial procedure. It is time for the Department of Health to reconsider its regulation in light of current knowledge and current realities. There is half a century of experience with gender reassignment surgery, which should be carefully examined to determine whether there is really a weighty public health reason to deprive transsexuals who don't have independent economic means to obtain these procedures from getting them through the Medicaid program.

And, of course, this raises yet another question about the health care reform now being considered in Congress. Will the minimum acceptable insurance coverage that will be made available to all Americans, through whatever mechanism is adopted — non-profit cooperatives, public plan, expansion of Medicaid/Medicare, whatever — include coverage for gender reassignment for that small segment of our population dealing with GID whose health-care providers believe that their condition will be relieved by gender reassignment procedures? Or will this, like the politically-charged issue of abortion services, fall victim to moralistic politics? A.S.L.

Federal Court Denies Summary Judgment to Both Sides in Controversy About Anti-Gay City Contractor

U.S. District Judge Joan N. Ericksen has denied cross-motions for summary judgment in *Campion, Barrow & Associates of Illinois, Inc. v. City of Minneapolis*, 2009 WL 2486168 (D. Minn., Aug. 11, 2009), in which a psychological consulting firm claims that its First Amendment rights were violated when the city discontinued the firm's consulting relationship with the Minneapolis Police Department (MPD) as a result of public outcry about Michael Campion's affiliation with the Illinois Family Association, an allegedly anti-gay organization.

The Campion firm was retained to provide psychological services for the MPD, including psychological screening of new recruits, after a prior contractor was dismissed amidst allegations (subsequently discredited) of racial bias. When it subsequently came to light that Mr. Campion, the head of the firm, was also a board member of the Illinois Family Institute, an organization that actively opposes legal rights for same-sex partners, gay adoptions, and other forms of gay rights in the family law context, members of the Police Community Relations Council became concerned and urged the City Council to terminate the relationship with Campion. An assistant police chief sent an email to the police chief, writing "this concerns me, we market and pride ourselves as a gay supportive city and police department, it seems like Dr. Campion has different values." Ultimately, the Campion firm was suspended from its functions with the police department, the job was put out to bids, and a competitor was se-

lected, even though it was outbid by Campion to provide the services.

Campion sued, claiming that termination of its relationship with the MPD was improperly premised on Mr. Campion's protected First Amendment activities with IFI. Judge Ericksen found that Campion had made out all the elements for a prima facie case of violation of 1st Amendment rights. The ultimate issue came down to balancing Campion's 1st Amendment rights against the city's need for effective operation of the police department. Ericksen concluded that this could not be resolved on summary judgment, as there were contested factual issues at the heart of the case. There may be a perception among some members of the public that Campion's services will be biased against gays, but the extent of such impression and its possible impact on the operation of the police department needs to be explored further before a ruling on the legal issues can be made. A.S.L.

New York Trial Court Says It Has Jurisdiction to Dissolve a Vermont Civil Union

A New York Supreme Court Justice has ruled that the Supreme Court's general equity powers can be used to dissolve a Vermont civil union. While dismissing the divorce petition filed in *B.S. v. F.B.*, 2009 WL 2195786 (N.Y. Supreme Ct., Westchester County, July 15, 2009), Justice Sam D. Walker stated that the dismissal was without prejudice to the plaintiff's right to file a new complaint seeking a dissolution of the civil union.

The opinion recites that the two women were a long-time same-sex couple residing together in Westchester County. In 1994, they participated in a religious marriage ceremony in New Mexico that had no legal effect there. In 2003, they obtained a civil union in Vermont. More recently, as defendant descended into alcoholism and became abusive to plaintiff, the relationship deteriorated and defendant instituted a civil court proceeding to evict plaintiff from their home, characterizing her as a "tenant at will." Plaintiff obtained a stay of the eviction proceeding, filing an action in Supreme Court alleging that the couple were married and seeking a divorce. Defendant denied that they were legally married, and argued that the Vermont civil union was not valid anyway, pointing to some ambiguous language in the civil union certificate that might be literally construed to mean that the civil union is only valid within Vermont. Defendant argued that since the parties had no legal marriage, the court had no jurisdiction to grant a divorce.

Judge Walker agreed with this last argument, finding that the court's jurisdiction over a divorce action counted on the parties having a legal marriage. But he noted the string of recent cases by lower New York courts recognizing same-sex marriages performed out-of-state, as well as the progress of the marriage equality bill in the state legislature, and asserted that there should be some sort of relief available to the plaintiff.

The court determined that the couple's Vermont civil union appeared to be valid, rejecting the defendant's interpretation of the Vermont civil union certificate as being inconsistent with other aspects of the Civil Union Act, and noting the general understanding that there is no residency requirement for performance of a civil union in Vermont. The language that defendant relieds upon is plausibly interpreted as meaning that the license to perform a civil union only authorizes a ceremony to be performed within the state, and does not mean that the status thus created may not be recognized as valid outside of the state.

The judge acknowledged that he could not treat the Vermont civil union as a marriage, for it is clearly a different legal institution. But that would not necessarily preclude any relief, in his view. "Although plaintiff and defendant reside in New York and do not meet the residency requirements to commence an action in Vermont to dissolve their union, this decision does not conclude plaintiff has no civil New York remedy," wrote Judge Walker. "She must be afforded a legal avenue to accomplish the fair and equitable dissolution of her fractured relationship with defendant."

"The Vermont Family Court has been granted jurisdiction to dissolve a civil union in that state," observed Walker. "Vermont divorces are also heard by the Family Court. See Vermont VSA Title 15 sec. 1206. The parties may have a properly pleaded complaint for dissolution of the civil union heard by the New York State Supreme Court, which possesses the general jurisdiction to hear and decide all equitable civil actions, including actions which may also be heard by the Family Courts. NY Judiciary Law sec. 140–b. Defendant's motion to dismiss is granted without prejudice to plaintiff's right to file a verified complaint for dissolution of the Vermont Civil Union." Judge Walker also extended the stay of the eviction proceeding for an additional period of time to allow plaintiff to file her new petition.

Presumably, in exercising its equitable powers to dissolve a civil union, the Supreme Court might draw on the Divorce Law for principles on division of property, income and other assets to use in dissolving the civil union.

This decision marks a significant advance, since it is apparently the first in which a New York trial judge has asserted that the New York courts can provide a forum for dissolving a civil union formed in another jurisdiction. Presumably Judge Walker would make a similar ruling were the petitioner a member of a New Jersey civil union, and perhaps from the several states that provide equivalent domestic partnerships as well. Of course, there are already some trial court decisions, cited in the opinion, that assert jurisdiction to consider divorce petitions from same-sex couples who were actually married out-of-state. A.S.L.

Repeal of Maine Marriage Law Will Be on the Ballot in November

Opponents of same-sex marriage submitted more than 100,000 petition signatures to the Secretary of State's office on July 31, seeking to place a measure on the November general election ballot to repeal the law passed a few months ago by the legislature, which was scheduled to go into effect in September. The Secretary of State's office confirmed that more than 55,087 of those signatures came from registered voters in Maine, properly signed and witnessed, so the measure will go on the ballot, and will be suspended from going into effect until the result is known. Public opinion polls show that public support for same-sex marriage remains weak in Maine. Maine seems to have been a jurisdiction where the state legislature and governor were rather far out ahead of the rank-and-file voters on this issue, so those seeking to save the law have a big job ahead of them. A.S.L.

Federal Civil Litigation Notes

Supreme Court — Liberty Counsel, having lost their bid in the Florida Supreme Court to block the Florida Bar Family Law Section's amicus brief in the pending challenge to the Florida adoption ban, has filed a certiorari petition in the U.S. Supreme Court on September 1. In the decision below, *Liberty Counsel v. The Florida Bar Board of Governors*, 12 So.3d 183 (Fla., June 4, 2009), Liberty Counsel argued that the 1st Amendment rights of its members who are also members of the Florida Bar were violated when the board of governors voted to allow the Family Law Section to file a brief urging invalidation of the state statutory ban on adoption by gay people. The Florida Bar is a unitary bar, so every lawyer admitted in the state pays compulsory dues, a perfect set-up for a 1st Amendment argument. However, the Board of Governors argued successfully that membership in the Family Law Section is voluntary, so the Section's decision to spend a de minimus amount of money filing an amicus brief did not raise a 1st Amendment issue.

D.C. Circuit — In *Young America's Foundation v. Gates*, No. 08–5366 (July 24, 2009), a unanimous D.C. Circuit panel affirmed the district court's opinion that YAF lacked standing to sue the Defense Department for failing to cut off funding to University of California-Santa Cruz for its alleged violations of the Solomon Amendment. According to Judge Douglas Ginsburg's opinion for the court, military recruiters had difficulties at UC-Santa Cruz be-

cause of student and faculty protests against them during job fairs on campus. As a result, some of their recruiting activities were cancelled. YAF, claiming representation of student members who were denied the opportunity for on-campus interviews as a result, sought to compel Secretary Gates to move against the University's funding. The majority of the panel found no standing, while Senior Circuit Judge Randolph, concurring, would have decided the case, similarly to the district judge, by finding that the Secretary of Defense has unreviewable discretion about whether to invoke the Solomon Amendment, so even a party who might have standing would not be able to obtain judicial review of the secretary's decision not to proceed. The court did point out that the University itself did not bar the military, and invoked its normal disciplinary procedures against demonstrators who may have violated university rules.

9th Circuit — In *Rangel-Fletes v. Holder*, 2009 WL 2358937 (Aug. 3, 2009) (not officially published), the U.S. Court of Appeals for the 3rd Circuit upheld the Board of Immigration Appeals' denial of withholding of removal for a Mexican man, in a brief opinion that does not recite any facts but observes that substantial evidence supports the administrative conclusion that Rangel-Fletes had not established "a clear probability that he would be persecuted based on his sexual orientation upon his return to Mexico.Ä Some important gay asylum precedents were established by refugees from Mexico in the past, but recent developments in that country toward greater rights for LGBT people have made such claims much more difficult.

9th Circuit — In an unpublished decision, the 9th Circuit affirmed a grant of summary judgment in an employment discrimination suit brought by Ed Richards against the City of Seattle, alleging disparate treatment on the basis of sexual orientation. *Richards v. City of Seattle*, 2009 WL 2196895 (July 24, 2009). Unfortunately, the memorandum issued by the court does not lay out the facts, restricting itself to critiquing the failures of specificity in Richards's allegations, and agreeing with the district court that Richards had filed adequately to tie his various workplace travails to his sexual orientation.

11th Circuit — In an unpublished opinion released on August 7, the U.S. Court of Appeals for the 11th Circuit upheld the Board of Immigration Appeals' denial of asylum and withholding of removal in the case of an HIV+ gay man from Venezuela. *Cadenas-Castellano v. U.S. Attorney General*, 2009 WL 2430887. Unfortunately, the brief per curiam opinion from the court's non-argument calendar sheds no light on the factual allegations of the petitioner, merely explaining that he claimed to have established a well-founded fear of persecution if forced to return to Venezuela based on his membership in a particular social group "because he is an HIV infected homosexual who was denied HIV treatment by the Venezuelan government due to his political opinion." Petitioner also claimed that the Immigration Judge "made no finding as to him seeking asylum based on his membership in the HIV homosexual social group." Inexplicably, the opinion does not respond to this part of petitioner's case with any specificity, merely saying that substantial evidence in the record supported the IJ's determination that the petitioner failed to establish past persecution or a well-founded fear of future persecution, and that he had not been arrested, detained, or interrogated by the government, denied employment in the past, or hindered in moving in and out of the country.

11th Circuit — In *Corbitt v. Home Depot USA, Inc.*, 2009 WL 573 F.3d 1223 (July 10, 2009), the 11th Circuit affirmed the district court's holding that a male supervisor's sexually suggestive conduct towards two male employees was not sufficiently severe or pervasive to constitute sex-based hostile environment under Title VII, but that the district court erred in granting summary judgment on the associated retaliation claim, as there were disputed material facts concerning who the decision-makers were and the reasons for various actions taken against the plaintiffs after they had raised problems about their treatment in the workplace.

California — Handing a surprise to LGBT legal groups, U.S. District Judge Vaughn Walker denied the motion by Lambda Legal, National Center for Lesbian Rights, and the ACLU LGBT Rights Project to intervene as co-plaintiffs in *Perry v. Schwarzenegger*, the pending challenging federal constitutional challenge to Proposition 8. However, Judge Walker ruled that the City and County of San Francisco could intervene to present the distinct interests of the municipality. On the side defending Prop 8, the court rejected attempts by various anti-gay groups to intervene, finding that the one intervenor already allowed, representing the proponents of Prop 8, would be sufficient. Intervention on the defense side was necessary because neither Governor Schwarzenegger, the named defendant, nor state Attorney General Gerald Brown are providing an active defense to Proposition 8. Indeed, Brown has opined that it violates the federal constitution, as the plaintiffs allege. Plaintiffs are represented by former U.S. Solicitor General Ted Olsen and prominent appellate litigator David Boies, who were recruited by a new non-profit foundation formed for the specific purpose of challenging Proposition 8 in the courts. Proposition 8, approved by California voters last year, placed in the California Constitution a new provision specifying that only the union of one man and on woman could be considered a marriage in California, overruling the result of the California Supreme Court's decision that same-sex couples were entitled to marry in the state. The California Supreme Court subsequently rejected the argument that Prop 8 had not been validly enacted. Judge Walker has set January 11 as the trial date for the case, and adopted a tight schedule for discovery and pre-trial motions. The *New York Times* published a lengthy article on August 19 by Jo Becker, exploring in depth Ted Olson's involvement in the case, and apparently intended to refute rumors that he had become involved for the purpose of seeing Proposition 8 upheld in the Supreme Court. The article reports that Mr. Olson was the object of some mistrust among movement conservatives within the prior Republican administrations for his abstention from ritualistic gay-bashing, and that he claims to have consistently been supportive of gay rights despite his right-wing movement image and public positions. We'll see....

California — Denying a motion to dismiss, U.S. District Judge Ronald M. Whyte found that a gay inmate of Napa State Hospital had alleged a potentially viable Equal Protection claim based on the hospital's distinction between heterosexuals and homosexuals in allowing sexual intimacy. *O'Haire v. Napa State Hospital*, 2009 WL 2447752 (N.D. Cal., Aug. 7, 2009). "Plaintiff alleges that defendants discriminated against him and other homosexuals housed in Napa State Hospital by permitting heterosexual expressions of intimacy while restraining, permitting restraint or threatening to punish the homosexual expressions of intimacy." Moving to dismiss this claim, the hospital argued that homosexual activity is not a fundamental right and homosexuals are not a suspect class, so the claim should be rejected under the rational basis test, that prisoners have no constitutional right to contact visitation, and that plaintiff had failed to allege that he was being treated differently from others similarly situated. Plaintiff, an inmate of a mental institution proceeding pro se, had not drafted an ideally clear complaint on this point, but Judge Whyte held that under the circumstances the complaint should be broadly construed, and found that a viable equal protection claim had been alleged. Liberally construed, plaintiff's allegations are sufficient to state an equal protection claim on the basis of sexual orientation." The opinion does not go into any further explanation, but it seems likely that the defendant's counsel was relying a small but persistent trend among some lower federal judges to reject gay equal protection claims on the basis that homosexuals are not a "suspect class" without undertaking any serious rationality review, which would require determining whether there is a legitimate penalogical justification for discriminating on the basis of sexual orientation in the specific instance. There were other claims in the lawsuit that were dismissed by the court, not relevant here.

California — District Judge Thelton Henderson granted summary judgment to an employer charged with sexual orientation discrimination in violation of California law, but refused to grant summary judgment on claims by the gay former employee that he had been denied certain compensation due him upon his termination. *Drumm v. Morningstar, Inc.*, 2009 WL 2612311 (N.D. Calif., Aug. 24, 2009). Plaintiff Michael Drumm was discharged by Morningstar, a financial services company, after two major clients on whose accounts he had worked expressed dissatisfaction with his performance and asked that different employees be assigned to their accounts. Drumm, married with children, had been going through the difficult process of coming to terms with his sexual orientation, divorcing, and changing his life, which may have affected the quality of his work performance. He did not do any sort of flamboyant coming out scene at work, rather slowly revealing his situation to others. His direct boss was not told, but he claims she suspected he was gay at the time he was fired. She had access to his email, and he alleged she had discovered his sexual orientation; she claims she did not see emails that would confirm this until after the discharge when she routinely reviewed such emails to make sure that unfinished business was assigned to other employees. Judge Henderson found that the higher corporate executives who made the discharge decision knew nothing about Drumm's sexual orientation, and that the reasons given for the discharge were clearly not pretextual, thus no discrimination claim could stand under the state's Fair Employment and Housing Code. Henderson repeated more than once the evidence showing that in no other case had two clients asked that a Morningstar employee be taken off their accounts due to dissatisfaction with the employee's work, and found this a credible non-discriminatory reason that would trump a prima facie case of discrimination, even were it to be adequately alleged.

Florida — The U.S. District Court has approved a partial settlement in the case of *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, Florida*, under which the school board agrees not to discriminate against the high school GSA and not to retaliate against those who filed and supported the lawsuit brought on the students' behalf by the ACLU of Florida. The school board also agreed to pay $40,000 in court costs and attorneys fees to the plaintiffs. However, the school board was not willing to concede that middle school students should also have a right to have a GSA, so that portion of the case will go to trial. Thus, this case has the potential to extend the public school associational rights of gay teens to a younger age, depending on the outcome of the remaining claims in this lawsuit. U.S. District Judge Henry Lee Adams, Jr., approved the partial settlement on Aug. 7, according to a press advisory by the ACLU of Florida.

Illinois — In *Marcavage v. City of Chicago*, 2009 WL 2143769 (N.D. Ill., July 20, 2009), Senior U.S. District Judge Milton I. Shadur rejected constitutional claims by anti-gay religious protesters who fell afoul of police regulations while attempting to demonstrate against the Gay Games held in Chicago during July 2006. Plaintiffs Michael Marcavage and James and Faith Deferio, volunteers with a group calling itself "Repent America," make it their business to preach against homosexuality at gay community events as part of their calling to spread the Gospel. They normally carry out their activities in Philadelphia, where they have made pests of themselves at numerous LGBT community events, generating some litigation with the city and the police department. When they heard about the Gay Games being held in Chicago, they saw an opportunity to spread their "good news" further, but the Chicago cops wouldn't let them set up where they wanted to be, and through their obstinate refusals to comply with police directives relating to the location of their activities, ended up getting arrested. In rejecting their various constitutional claims, Judge Shadur found that the city and police department were applying content-neutral place-time-and-manner regulations of a type that have been frequently sustained by the federal courts.

Illinois — U.S. District Judge Rebecca R. Pallmayer ruled in *Rabe v. United Airlines*, 2009 WL 2498076 (N.D. Ill, Aug. 14, 2009) (not officially published), that the federal district court did not have jurisdiction over a discrimination claim brought by a discharge lesbian United Airlines flight attendant who is not a U.S. citizen or resident and was hired by United for international flights originating from cities outside the U.S. The fact that United was an American corporation and that the destination of many of plaintiff's flights was to points in the United States was not deemed sufficient to confer jurisdiction under Title VII or the Age Discrimination in Employment Act. (Plaintiff alleged discrimination on the basis of age, national origin — French — and sexual orientation.) Furthermore, the sexual orientation claim, which was brought under the Illinois Human Rights Act, could not be litigated because plaintiff was not employed in Illinois. Even though United did business in that state, the court found, the state's Human Rights Law only applies to individuals employed to work within the state.

New Jersey — In *Blaylock v. Transportation Security Administration*, 2009 WL 2606245 (D.N.J., Aug. 24, 2009), the plaintiff, self-identified as a bisexual Native American man who was working as a security screener at Newark Airport, claimed he was denied a promotion and subsequently was discharged because of his national origin and sexual orientation. District Judge Katharine S. Hayden issued a lengthy opinion with extended quotations from deposition testimony, reaching the conclusion that Blaylock had failed to allege facts sufficient to withstand the summary judgment motion, which she granted for the government. Reading the opinion, Blaylock's characterizations seem questionable. He alleged that he had discovered at some point that he had some Native American ancestry, but he had not been raised on a reservation or had any identity as a Native American prior to this adult discovery, and although there was some conversation about his heritage, mainly with co-workers including other Native Americans, there was really nothing to tie it in to the contested personnel decisions. Similarly as to sexual orientation, Blaylock does not identify as gay and is not attracted to men, but labeled himself bisexual because of some past sexual involvement with male-to-female transsexuals. In any event, after noting that Title VII does not extend to sexual orientation discrimination and that Blaylock had not made any kind of case on gender stereotyping, the court found no basis for his discrimination claims.

New York — A police officer who resigned after 20 years on the force during which he never came out to his co-workers as gay but filed a claim alleging sexual orientation discrimination briefly before his retirement did not state a valid equal protection claim against the city of New York, according to U.S. District Judge Thomas P. Griesa, ruling on August 6 in *Epstein v. City of New York*, 2009 WL 2431489 (S.D.N.Y.), that the city was entitled to judgment on the pleadings. The plaintiff cited various slights and personnel actions that led him to believe he was being discriminated against, but his allegations were far from concrete, and there was no evidence that the relevant actors or management decision makers knew that he was gay. Although he had not come out, "Nonetheless, plaintiff contends that other officers knew that he was gay," wrote Judge Griesa. "This assertion is based purely on conjecture, rather than on admissible evidence that would establish a genuine factual dispute. For instance, plaintiff claims that another gay officer knew that plaintiff was gay because plaintiff would bump into him in a club' occasionally. Plaintiff also states that he attended the pride festival,' and that he said hello' to one or two' officers who were on duty. He does not, however, recall who there officers were, and he concedes that he explained that he was present at the festival because he was accompanying his friends. Plaintiff also states that he was occasionally asked by colleagues whether he was married or had a girlfriend. However, there is no support for his belief that these colleagues inferred from his negative responses that he was gay."

New York — In *Sullivan v. Mohawk Central School District*, filed in the U.S. District Court for the Northern District of New York, the New York Civil Liberties Union claimed that the school district failed to protect a gay student from vicious and relentless harassment at school. The student, who did not conform to masculine stereotypes, was subjected to both verbal and physical harassment. The suit was filed on August 19. In response, the school district agreed to take various measures to protect gay youth in the schools from harassment, and in particular to protect the plaintiff. According to the NYCLU's August 27 press release describing the school board's response to the law suit, school officials were repeatedly made aware of the abuse directed at 14–year-old Jacob, but were "indifferent" until they found themselves defending a lawsuit. Indeed, reading the complaint (available on the NYCLU's website) makes one's blood boil. Who are these professional school administrators who think it's funny to watch gay kids suffer abuse? Where do they get off? (Sorry, these cases make your writer very angry at the gross insensitivity of educated adults who should know better.) The lawsuit is not being withdrawn, announced NYCLU, "until the district addresses the systemic failures that allowed it to ignore Jacob's plight for two years."

Oklahoma — An amended complaint is now on file in *Bishop v. United States*, a case of two lesbian couples challenging both the refusal of Oklahoma to allow or recognize same-sex marriages and the refusal of the federal government to recognize same-sex marriages where they are lawfully performed. One of the couples in the case was married in Canada, and then last year in California. The other has had a religious union ceremony, but was turned down for an Oklahoma marriage license. At an earlier stage, the federal courts cut down the suit a bit on standing and jurisdictional grounds, including dismissing some individual Oklahoma state officials as defendants. *Oklahoma City Journal Record*, Aug. 11.

Oregon — A gay male temporary worker who took a shift off without giving adequate notice because he was being harassed by co-workers does not have a discrimination claim under either Title VII or the Oregon Human Rights Law (which forbids sexual orientation discrimination), ruled U.S. District Judge Ann Aiken in *Dawson v. Entek International*, 2009 WL 2731348 (D. Or., Aug. 26, 2009). Although coworkers called Dawson all kinds of nasty names of the usual homophobic kind, he didn't complain to management until after he had taken off a scheduled shift without giving the one hour advance notice required under the employer's work rules. (Dawson telephoned only 30 minutes before his shift and did not speak with his supervisor, just a fellow worker who happened to pick up the phone.) Although Dawson had been discharged, the company took his complaint seriously, investigating the allegations and issuing warnings to employees who engaged in homophobic speech. The court found that Dawson could not satisfy the requirement to allege facts constituting a prima facie case, as there was no indication that his sex or sexual orientation was the reason for his discharge. The company credibly alleged that they consistently discharge employees who miss a shift without giving the required notice.

Pennsylvania — A state prison inmate's allegation that he suffered discrimination in work assignments because the assigning employee was biased against homosexuals was sufficient to state a claim for violation of the 14th Amendment, ruled District Judge James M. Munley in *DeSavage v. Grove*, 2009 WL 2487110 (M.D.Penna., Aug. 12, 2009), rejecting a magistrate's recommendation to dismiss the claim. On the other hand, finding that inmates do not have a liberty interest in keeping their desired job assignments, Judge Munley accepted the magistrate's recommendation to dismiss the inmate's due process claim.

Tennessee — The Metropolitan Nashville Public Schools and Knox County Schools have reached a settlement agreement with the ACLU in a suit filed May 19 I the Middle District of Tennessee alleging that the schools were improperly blocking on-line access to information about lesbian, gay, bisexual and transgender issues. Under the settlement agreement, the school districts will stop using "filtering software that blocks or otherwise places a barrier to student or faculty access to the LGBT sites." The overly broad filtering swept up not only sexually-related sites but virtually all sites where LGBT-related issues were being reported and discussed. The default setting on the filtering software the schools used automatically blocked access to such sites while apparently allowing access to sites urging LGBT people to undergo "reparative therapy" to curb their homosexual desires, as well as access to so-called "ex-gay ministries." Tennessee law requires public schools to install filtering software to avoid allowing school computers to be used to view obscene materials and pornography.

West Virginia — In *Lawson v. Hall*, 2009 WL 2152078 (S.D. W. Va., July 16, 2009), Senior U.S. District Judge David W. Faber found that a prison inmate could maintain a cause of action for an 8th Amendment violation against a correctional officer who allegedly kneed him in the groin without provocation for no other reason than dislike for his race and perceived sexual orientation. Faber found that case law supported the contention that it was clearly established that the infliction of pain on an inmate with no penological justification may violate the 8th Amendment. A.S.L.

New York Court of Appeals Gives Lambda Legal a Second Crack at Co-Parent Custody Issue

The New York Court of Appeals announced on September 1 that it was granting Lambda Legal's petition for leave to appeal *Debra H. v. Janice R.*, 877 N.Y.S.2d 259 (N.Y.App.Div., 1st Dept., April 9, 2009), which had ruled that a lesbian co-parent may not seek joint custody or visitation with a child she had been raising with her former Vermont civil union partner. The court's action gives Lambda Legal the opportunity to try to persuade the court to overrule its decision in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), a case presenting similar facts in which Lambda Legal had represented the co-parent.

In the case granted review, the plaintiff co-parent claims that the couple planned to have a child together. The child was born about a month after they had gone to Vermont to form a civil union, and two months after they had registered as domestic partners with New York City. Debra "served as a loving and caring parental figure during the first 2–1/2 years of the child's life," according to the Appellate Division's ruling, but she had never legally adopted the child.

After the women ended their relationship, Debra sought a court order granting her joint legal custody and visitation rights, as Janice had cut off her access to the child. Janice presented a somewhat different account to the trial court, claiming that there was no intent for Debra to be a parent of the child, and moved to dismiss the case on standing grounds.

Janice's motion depended on *Alison D.*, in which the court held that a lesbian co-parent, as a "legal stranger" to the child, could not seek custody or visitation, because New York law only authorizes a "parent" to seek custody, and although the statute did not define the term "parent," the court was unwilling to give it an expansive meaning beyond the traditional legal concept. However, the trial judge, Justice Harold Beeler, found that in some later cases the New York courts had allowed non-parents to use equitable estoppel arguments in custody disputes, and reasoned that Debra H. should be allowed the opportunity to try to prove the necessary facts to estop Janice R. from denying her parental status, and so denied Janice R.'s motion. Justice Beeler also found that the women's entry into a Vermont civil union tended to support Debra H's claim that they intended to raise the child together as a family. He ordered that Debra H. be allowed visitation with the child on Sundays until the case could be resolved.

The Appellate Division reversed this determination, ruling that the case remained governed by *Alison D.*., and discounted the effect of the cases that Justice Beeler had relied upon, stating, "our reading of precedent is such that the doctrine of equitable estoppel may not be

invoked where a party lacks standing to assert at least a right to visitation."

In granting Lambda Legal's petition to review the case, the Court of Appeals also stated that Debra H. should be able to continue visitation with the child until the case is finally resolved.

Several other New York trial judges have expressed unhappiness with the *Alison D.* precedent in recent years, trying to find ways around it in order to reach the question whether it would be in the best interest of the child to preserve a relationship with the former same-sex partner of the child's biological parent.

It is difficult to predict what the Court of Appeals will do in this case, or why it granted review. One possibility may be that the court is ready to rethink the issue in light of developments in other states allowing such custody and visitation cases to be heard. Another is that the court, noting the continued attempts by lower court judges to get around its prior ruling, might want to reiterate that lower courts are bound to follow it unless and until the legislature sees fit to amend the custody laws to authorize co-parents to bring such claims.

Although second-parent adoption has become available in New York since the *Alison D.* case was decided, and would automatically confer standing on the co-parent as a legal parent of the child, many same-sex couples unfortunately undertake having children together without setting up the necessary legal framework through adoption to ensure that a court will have jurisdiction to deal with custody and visitation issues in the event their relationship falters while the child is still a minor.

These issues could be resolved much more simply, of course, if same-sex marriage was available in New York. Same-sex marriage has become available in the neighboring states of Vermont, Massachusetts, and Connecticut, but its continued unavailability in New York places a roadblock in the way of same-sex couples seeking equal treatment from the courts. Even the lower New York court decisions extending recognition to the out-of-state marriages of some same-sex couples do not end that question, since the Court of Appeals has also granted leave to appeal some of those cases. A.S.L.

Virginia Appeals Court Rules Against Biological Mother's Former Spouse in Visitation Dispute

In a case that involved a clash between Canadian same-sex marriage and Virginia constitutional repudiation of same-sex marriage, the Court of Appeals of Virginia affirmed a ruling by the Virginia Beach Circuit Court that Hope Damon, who was married in Canada to Christine York, did not have standing to seek visitation with York's child after the women's relationship terminated. *Damon v. York*, 54 Va.App. 544, 2009 WL 2431305 (Aug. 11, 2009). There is no indication in the opinion for the court by Judge D. Arthur Kelsey that York and Damon have ever obtained a divorce.

The child was born to York and her then-husband, Mitchell J. Parker, Jr., in 1996. They divorced in 2000, and the child lived with her mother, the father having visitation. York then began a relationship with Damon, and beginning in October 2002, Damon began to stay regularly overnight in York's home. In 2003, when marriage became available in some Canadian provinces, York and Damon went to Canada and got married. In all, the period when York and Damon were living together with the child in residence lasted about a year and nine months. York's parents claimed that during this time Damon alienated York from her family, alienated the child from her father and both sets of grandparents, and had "falsely reported that the child had a bipolar disorder." The state's Department of Social Services received a complaint that the child, then age 7, was being left home after school without adult supervision, initiated an investigation, and discovered various signs of what it considered to be neglect.

Having learned about the DSS findings, York's mother filed a petition for custody with the Virginia Beach District Court in 2004. That court ordered that there be shared custody between maternal grandmother and the child's father, Mitchell Parker. Parker, York and York's mother were ordered by the court to prevent the child from having any further contact with Damon. Damon respected the court's order and stayed away from the child, and the following year Damon's relationship with York also ended. In 2006, Damon petitioned the juvenile court for a visitation order, claiming that she had a parental relationship with the child. All parties to the 2004 proceeding opposed Damon's petition and, after extensive investigation and hearing, the juvenile court denied her petition on standing grounds, a ruling affirmed in Judge Kelsey's opinion for the court of appeals.

Damon's standing would depend under Virginia law on her establishing that she is a "person with a legitimate interest" under Code section 20–124.1. That section lists a range of relatives who might seek court-ordered visitation of a child and leaves open a catch-all category for other persons with a legitimate interest usually founded on having shown an actual parental relationship with the child. Damon pointed out that she had been married to the child's mother, they lived together, and she performed some parental duties and established a friendly relationship with the child during that period of joint residence. Thus, she contended, she was in a position analogous to a stepparent, and Virginia cases have allowed former step-parents to seek court-ordered visitation with children they were participating in raising while married to the child's legal parent.

But the court rejected this analogy. "Damon's marriage to the child's mother in Canada created neither a family nor a stepparent relationship between Damon and the child," Judge Kelsey asserted. "The marriage was void in all respects' under Virginia law. See Virginia's Marriage Affirmation Act, Code sec. 20–45.3. To be sure, the Virginia Constitution forbids our courts from recognizing any legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.' Va. Const. Art. I, sec. 15–A. Damon, therefore, could not directly or indirectly qualify as having either a familial or stepparent relationship with the child by virtue of Damon's void marriage to the child's mother."

The court was equally dismissive of the contention that Damon might qualify as a former girlfriend of mother who lived with her and the child for 21 months. "The mother testified Damon was, at best, a mere adult presence' in the child's life," Kelsey related. "Damon and the child were friendly together,' the mother explained, but the relationship was not particularly unique.' To be sure, the mother added, the child has as close a relationship with many of my friends at this moment' as she previously had with Damon. I don't see it as being any different than that,' the mother concluded." Damon testified, to the contrary, that she had a much closer relationship, and contended that the trial judge had actually recognized this, but had put undue weight on the fact that Damon had no contact with the child from the time of the 2004 court decree to the present. She argued that by relying on this extended period of no contact, the court was "punishing" her for obeying the 2004 court order by not attempting to see the trial.

Kelsey rejected this argument, finding that the trial court was not "punishing" Damon, but rather taking the facts as they are in factoring them into the legal analysis required by the Code's provision governing standing to seek a visitation order by non-relatives. One of the factors to be examined is whether the person seeking contact has a continuing relationship with the child. Kelsey also mentioned that the child had not expressed an interest in resuming contact with Damon, and found that the trial court could have credited York's testimony over Damon's in reaching the conclusion that although "some sort of familial-type' relationship existed," there was a conflict about whether it role to the level necessary to be considered the "functional equivalent of a stepparent." In such cases of clashing factual contentions, the finding of a trial court based on a full hearing record is unlikely to be reversed on appeal.

Kelsey concluded that as the trial court had determined that Damon was not the functional

equivalent of a former stepparent, she clearly had no standing to seek visitation with the child over the protest of the child's legal parents, emphasizing at the outset of his analysis the constitutional rights of legal parents to control the upbringing of their children without interference. Thus, the court affirmed the trial court's decision to dismiss the petition. A.S.L.

State Civil Litigation Notes

Alabama — This is a difficult one to judge. In *M.B. v. S.B.*, 2009 WL 2414919 (Ala.Civ.App., Aug. 7, 2009) (not yet released for publication), the Court of Civil Appeals reversed a decision by the Jefferson County Juvenile Court to return custody of two young children to their mother, deciding that the mother had failed to meet the Alabama test for modifying a custody decree. The mother was not married to the children's father and had little if any relationship with him. When the mother developed a drug problem, her parents petitioned for and won custody of the children, with visitation allowed to the mother as she tried to get herself straightened out. Mother subsequently brought an action to regain custody, protesting that her parents had interfered with her visitation rights once she began living with a same-sex partner. The trial court found that the mother had straightened out her life, dealt with her drug problem, gotten a job, and that these changed circumstances justified returning custody to her. The appeals court disagreed, noting the Alabama rule that changing a prior custody determination requires a special finding that the benefit to the children of returning them to the custody of their natural parent must be weighed against the disruption of uprooting them from their current living situation. It appears that the children had lived most of their lives with their maternal grandparents, who had done a good job of parenting in the opinion of the court. In these circumstances, the court found that mother had not proved that the benefits of having the children live with her would outweigh the disadvantages of disruption. There is only one mention in the opinion of the mother's sexual orientation and cohabitation in a brief reference to the visitation dispute that led her to seek custody, so it is hard to know whether the mother's sexual orientation and same-sex relationship were a factor for the appeals court in making this decision. The past track record of Alabama courts in dealing with gay parents does not inspire confidence in this result, but the opinion in this case says nothing overtly homophobic, avoiding the issue entirely on its face.

California — In *D.C. v. Harvard-Westlake School*, 2009 WL 2500343 (Cal. Ct. App., 2nd Dist., Aug. 14, 2009), the court of appeal ruled 2–1 that an arbitration panel determining a hate-crimes charge against the school by a student who had been subjected to homophobic harassment and threats on a website maintained by the school could not assess arbitration and attorney fees totaling more than half a million dollars against the plaintiffs after resolving the case on the merits against them. In this case, D.C. was a student at a private high school who achieved some fame and notoriety as a recording artist, attracting disgustingly anti-gay and threatening comments on the school website. (D.C. is assertedly not gay.) Things got so bad that D.C. withdrew from the school and relocated with his family to a different community and school. The school newspaper then wrote a story in which it revealed the family's new address and identified the school to which D.C. had transferred. D.C. and his parents sued the school, which moved to have the matter sent to arbitration, based on the admission agreement that D.C. and his parents had signed, under which all disputes with the school were subject to arbitration, with the prevailing party to be awarded costs and fees. The arbitrators rejected D.C.'s claims and awarded over half a million dollars in costs and fees. The matter ended up back in court, and in this ruling, the court of appeals held that under California precedents, since D.C.'s claim arose from the Hate Crimes Law, costs beyond those that would be involved in a court proceeding could not be awarded against him, and attorneys fees could not awarded to a prevailing defendant.

California — The *Fremont-Newark Argue* reported on July 16 that a settlement had been reached in litigation over the estate of Denice Denton, the openly-lesbian University of California at Santa Cruz Chancellor who committed suicide on June 24, 2006. Denton left behind a same-sex partner, or former partner depending how one characterizes the situation, and an outdated will that doesn't mention the partner. The settlement gives Denton half of a vacation property that the two of them had bought during their partnership. They had moved to California for Denton to take up the positions as Chancellor, and her surviving partner, Gretchen Kalonji, also works for the University in an administrative capacity. The documentation on the vacation property was in Denton's name, but the court was considered likely to approach the settlement. Apart from that, Kalonji will not received anything else from the estate since Denton died leaving a will that disposes of her assets to other relatives.

Indiana — In *Harshman v. Harshman*, 2009 WL 2431938 (Aug. 10, 2009)(unpublished disposition), the Indiana Court of Appeals ruled that Madison Superior Court Judge George Pancol had not abused his discretion when he awarded physical custody of the Harshman's children to Randy rather than Shannon. The evidence showed that Shannon, who worked in a rehabilitation program for criminal convicts, had engaged in sexual relationships with a female coworker and both male and female convicts (in violation of institutional rules), and had set up housekeeping with a female convict with whom she had a homosexual relationship, while still married to Randy. Shannon argued on appeal that Judge Pancol had improperly assigned physical custody to Randy based on her homosexuality. The court agreed that Indiana precedents would forbid making a custody determination based on a parent's homosexuality alone, but pointed out that there were various factual findings tending to support the trial court's decision that it was in the best interests of the children for them to live with their father, not least that the mother was exposing them to her partners with criminal drug records.

Minnesota — The *St. Paul Pioneer Press* and the *Star Tribune* reported on August 14 that the Anoka-Hennepin School District would pay $25,000 to Alex Merritt as compensation for the harassment he endured as a result of insensitive remarks about his sexuality by two teachers during the 2007–2008 academic year (when he was in the 11th grade) which led to taunts and harassment from other students. Things got so bad for Merritt at the school that he had to transfer to another school 25 miles away. The irony is that Merritt is not gay, and was picked upon because of the gender stereotypes indulged by his teachers. The news reports about the case brought angry letters to the editor in the newspapers from residents asking why the district took no action against the teachers. The news reports also indicated that the school had rejected an offer by a local LGBT rights group to help train the teaching staff in implementing the new policy against sexual orientation discrimination that the district agreed to adopt in settlement of the case. Prior to this agreement, the district's policy was that staff members were to refrain from discussing homosexuality "as a normal, valid lifestyle" in health education classes.

New Jersey — The N.J. Appellate Division has affirmed a decision by a trial judge to disqualify counsel for the plaintiff in a case where a member of plaintiff's counsel's law-firm had previously represented the defendant in a sexual orientation employment discrimination claim. *Bixby v. DeAngelis*, 2009 WL 2031022 (July 15, 2009). The court says that there was a "long term relationship between the parties," plaintiff Linda Bixby and defendant Alexander DeAngelis, but that Bixby moved to California in 2005, then filed this complaint in 2007 represented by Francis J. Hartman, of the firm Attorneys Hartman, contending that DeAngelis had been entrusted to hold certain items and cash in trust for Bixby's son, but had refused to return the items and had spent the cash on himself, while telling third parties that he and Bixby were married, which they were not. The

lawsuit sought return of the property and cash and asserted a defamation claim. Defendant was counterclaiming seeking damages for services and return of items he claimed that he had entrusted to the plaintiff. Sounds like a bloody mess. The conflict issue involving the Hartman firm arose after a deposition of defendant when a member of the firm, Katherine Hartman (Francis's wife??) suddenly remembered that she had represented the defendant in prior litigation. She told Francis that she couldn't remember anything confidential from that representation, but upon being reminded of the past representation, the defendant moved to disqualify the firm, alleging that he had confided highly personal information about his sexual orientation to his lawyer in the prior case, and the nature of his relationship with the plaintiff was at issue in this case. The trial court concluded, apparently reluctantly, that there was enough of a relationship between the two cases to justify disqualifying the Hartman firm, and the Appellate Division affirmed, noting that Katherine Hartmen had not presented a sworn statement to the court in opposition to the disqualification motion, the firm relying entirely on a statement by Francis Hartman as to what Katherine said to him about it. Confused? Read the opinion.

Oklahoma — The *Oklahoman* reported on Aug. 27 that Oklahoma County District Judge Barbara Swinton had ordered the reinstatement of Joe Quigley, a public school teacher who was dismissed by Oklahoma City School Board members in a May 2009 vote on the claim that he had repeatedly neglected his duties and failed to follow various school policies. Quigley attached these justifications as pretextual, arguing that the real reason for the dismissal was his repeated advocacy for the rights of LGBT students Judge Swinton believed Quigly, and found a wrongful dismissal.

Washington State — A lesbian plaintiff who won a jury verdict and substantial damages on claims of employment discrimination on the basis of disability and retaliation will have to go through a new trial on damages because a juror did on-line research about the financial condition of the defendant corporation and introduced that evidence into the jury discussion of damages for emotional distress, the Washington Court of Appeals ruled on August 24 in *Sheffield v. Goodyear Tire & Rubber Co.*, 2009 WL 2586619 (not officially published). At the time of the events in question, Melissa Sheffield, an openly lesbian woman who had been a store manager for Goodyear, ran into problems with a new boss who was a blatant homophobe and stated his disapproval of homosexuality. At the same time, Sheffield was dealing with back pain due to a work-related injury. She ended up being demoted from her job and placed involuntarily on medical leave when her doctor would only certify her as fit for part-time work in the sales position to which she was demoted. (She could have worked full-time as a manager.) Ultimately, she was let go as Goodyear claimed it had no work she was physically qualified to do. She argued failure to accommodate her disability, and also retaliation for the claims she made about the homophobic boss. At the time, Washington State had not yet outlawed sexual orientation discrimination, but the city in which she resided, Seattle, had done so. The jury found in Sheffield's favor on both claims, awarding substantial damages including $4 million for emotional distress. It later came out that the lead juror had done internet research and placed the company's financial condition before the jurors when they were discussing damages. The trial judge granted a post-trial motion for a new trial on damages before a new jury. The Court of Appeals upheld that ruling, and rejected Goodyear's argument that the Seattle human rights ordinance was invalid or that the retaliation claim should be rejected because the state did not outlaw sexual orientation discrimination at the time. The court found that Sheffield could reasonably have believed that she was opposing unlawful conduct, in light of the Seattle ordinance, even if it did not apply to the Goodyear facility where she was employed. A.S.L.

Criminal Litigation Notes

California — In *People v. Skeslien*, 2009 WL 2217758 (July 27, 2009) (not officially published), the California 3rd District Court of Appeal reversed the trial court's ruling that a 22–year-old woman who had oral sex with a 15–year-old girl must register as a sex offender for life as part of her penalty. The court of appeal, noting that earlier decisions had set aside sex offender registration requirements for young men who engaged in oral sex with teenage girls on equal protection grounds — since under California law they would not be subject to sex offender registration for engaging in vaginal intercourse with their partners — opined that the fact that in this case both parties were women did not distinguish the cases in a legally relevant way. The state had actually conceded that requiring lifetime registration violated the equal protection clause, so the court of appeals decisions reversing the registration order was in some sense a formality. However, the court did have to review the record to determine whether a remand was necessary for further fact-finding before determining the consensual nature of the case. In the event, it appears that the record supported the conclusion that the younger woman had initiated the contact at the time the defendant was drunk, so there was no need for further proceedings to determine whether the conduct involved inappropriate motivation by the defendant.

California — In *Barton v. Mendoza-Powers*, 2009 WL 2208296 (July 23, 2009), the US District Court for the Eastern District of California denied a petition for writ of habeas corpus to Eddie Barton, who was denied parol at his first opportunity while serving a 20–to-life sentence in the knifing death of John Wear in what sounds from the court's description of the trial evidence as a hate crime. After knifing Wear in the stomach, Barton had reportedly said, "Don't cry, faggot," and there was testimony that he had later bragged about killing a gay man. In turning him down for parole after about 15 years in prison, the Parole Board had noted his disciplinary record in prison, the degree of rehabilitation, as well as the severity of the crime and his lack of adequate understanding of the impact of his crime. The federal court found that there were sufficient grounds for denial of parole to preclude granting the petition for the writ.

Delaware — The Supreme Court of Delaware ruled in *Kelly v. State*, 2009 WL 2634072 (Aug. 27, 2009), that the trial court should have allowed the defendant, a prison inmate convicted of beating up the complaining witness, to cross-examine the complaining witness about the witness's past rape convictions, since the credibility of the defendant's testimony that he was defending himself from what he reasonably anticipated to be a sexual assault by the witness was at stake. According to defendant, the witness had made sexual overtures to him several times, had grabbed his testicles in the showers, and had threatened to make the defendant his "bitch." But when he responded to a physical attack by the witness by beating up the witness, he was prosecuted and the witness was not. (The defendant got the better of that fight.) The trial court decided that questioning the witness about his past rape convictions would be prejudicial, but the state supreme court felt this was reversible error, comment, "Having determined that Kelly should have been allowed to examine Veru about the fact that he had been convicted of rape, the question becomes whether the trial court's error requires reversal. We find that it does. Kelly is a significantly larger man than Veru. Thus, for Kelly's claim of self-defense to be at all credible, the jury would have to accept that Kelly thought Veru was about to sexually assault him. Both Veru and Kelly were convicts, so the jury did not learn much about Kelly's state of mind when it heard how many felonies Veru had committed. The critical fact was Veru's rape conviction, which could explain both the nature and severity of Kelly's response. Because we conclude that Kelly was significantly prejudiced by the exclusion of this evidence, we must reverse for a new trial."

Illinois — What was the jury thinking when it acquitted Joseph Biederman on a charge of murder in the stabbing death of Terrance

Hauser? Biederman admitted stabbing Hauser to death, claiming that Hauser was attempting forcibly to rape him. Hauser's body exhibited 61 stab wounds. The prosecution gambled on obtaining a first degree murder conviction and did not ask the trial judge to charge on lesser offenses, thus making the case all or nothing. An article about the verdict in the *Chicago Tribune* on July 17 suggests that the result is incredible, but understandable due to the jury being instructed that they had only two alternatives, convict on murder 1 or acquit, and Beiderman told a self-defense story convincing to some, implausible to others. (Both men were drunk when they went to Hauser's apartment together from a bar; Biederman claims to have passed out and then awakened to find Hauser holding a sword to his kneck and ordering him to take his clothes off and submit to a sexual act, according to the news report. Biederman's defense counsel, Sam Adam Jr., called it "the most bizarre case I've ever been a part of." The death scene showed no signs of struggle.

New York- The Transgender Legal Defense & Education Network issued a press release on Aug. 18 lauding the decision by N.Y. Supreme Court Justice William Walsh to sentence Dwight R. DeLee, convicted killer of Lateisha Green, a 22–year-old African American transsexual to the maximum term of 25 years in prison. On July 17, a jury convicted DeLee of a charge of manslaughter in the first degree as a hate crime and criminal possession of a weapon. This was announced as the first conviction in New York for committing a hate crime involving the death of a transsexual victim. DeLee was also sentenced to a concurrent term of 3–1/2 to 7 years on the weapons charge.

Ohio — U.S. District Judge Donald C. Nugent approved a recommendation by Magistrate Judge James S. Gallas to reject a petition for habeas corpus filed by Paul D. Lowe, imprisoned by the state of Ohio for "sexual battery," consisting of consensual sex with his 22–year-old step-daughter, who was related to him neither by blood nor adoption. *Lowe v. Swanson*, 2009 WL 2005261 (N.D.Ohio, July 7, 2009). Lowe argued that his conviction was contrary to clearly established federal law under *Lawrence v. Texas*, but Magistrate Gallas disagreed, finding that *Lawrence*, while articulating a liberty interest for adult same-sex couples, had not purported to rule on other types of sexual activity. Noting the extensive literature that has quickly been generated exploring the precedential meaning of the somewhat ambiguous majority opinion in *Lawrence*, the magistrate wrote: "There is no consensus on the legal principle to be derived from *Lawrence v. Texas*. Jurists have made choices on whether *Lawrence* sets out a broad or narrow legal principle in overruling *Bowers v. Hardwick*, but this divergence of opinion alone establishes that there is no clearly established' Federal law on the state's ability to proscribe sexual conduct. If a choice needs to made then it would be more correct to narrowly construe *Lawrence*, so as not to unnecessarily disturb the prohibitions which were not before the Supreme Court in *Lawrence*, such as adultery, prostitution, polygamy, or incest (heterosexual or homosexual). The scrutiny of the Texas anti-sodomy statute in *Lawrence* did not involve similar circumstances of prohibited sexual conduct due to family relationship. Justice Scalia's expansive language in his dissent with reference to adult incest as one of the forms of prohibited sexual conduct which he believed should be reviewed under a rational basis standard, does not lead to the conclusion that the majority's opinion expressed the opposite view and conferred fundamental liberty' status to adult incest."

Texas — In a Dallas case that drew national press attention, a Texas District Court jury imposed a sentence of 75 years on Bobby Singleton who, with an accomplice, attacked a gay man while yelling homophobic slurs and left the victim, Jimmy Dean, with a broken back, facial disfigurement, no sense of smell, and permanent, ongoing pain. The two men punched and stomped Dean at gunpoint, and stole his cigarette lighter, pocket knife and wallet, according to a news report on the sentence by the *Dallas Morning News*, Aug. 28. Prosecutors brought aggravated assault charges against Singleton, and sought a 60 year sentence. Under Texas criminal statutes, a hate crime cannot be charged as such, but evidence of bias can be introduced at the sentencing phase. Singleton will not be eligible for parole until he has served at least 30 years. Testifying during the sentencing phase, conducted after the jury had returned a guilty verdict, he claimed to have sincere remorse for what he had done, and his lawyer argued he should be sentenced to no more than 20 years.

Executive & Legislative Notes

Federal — During July the Senate approved an amendment to the pending Defense Appropriations Bill that would attach the Matthew Shepard Hate Crimes Bill to the measure. The bill adds gender, gender identity, sexual orientation and disability to the list of characteristics covered by the federal Hate Crimes Law, and would increase federal spending to assist states in enforcing the law. The House passed a free-standing version of the bill earlier in the year, and the House version of the Defense Appropriates Bill does not include the Hate Crimes measure, so enactment at this point depends on negotiations in the conference committee. If enacted, the Hate Crimes measure would be the first item on the Obama Administration's LGBT legislative agenda to achieve final enactment.

Federal — An inclusive (covers both sexual orientation and gender identity) version of the Employment Non-Discrimination Act (ENDA) was introduced in the U.S. Senate on August 5. The measure was introduced by Sens. Jeff Merkley (D-Ore.), Susan Collins (R-Maine), Olympia Snowe (R-Maine) and Edward Kennedy (D-Mass.), with 34 original co-sponsors. The main lobbying work now is to pick up an even larger number of co-sponsors from both parties to give the measure momentum. Passage in the House of the version introduced in June is considered possible, but the measure can't come to a vote on the merits in the Senate unless it has enough support to overcome filibustering by Republican die-hards, so wide, bi-partisan co-sponsorship is considered essential to cut off that possibility, especially as it is possible that some "Red State" Democrats may be leery of voting for the measure. This is the first time an inclusive version of ENDA has been introduced in the Senate. An inclusive version was introduced in the House in the last session of Congress, then withdrawn in favor of a version covering only sexual orientation, which was passed by the House. In a story that ran nationally on Aug. 28, the Associated Press reported that an openly-transsexual member of Rep. Barney Frank's staff, Diego Sanchez, who is reportedly the first openly transsexual person to serve as a senior staffer for a member of Congress, has undertaken extensive personal lobbying with members of Congress to support the bill.

Federal — Early in August, the American Bar Association House of Delegates voted at its annual summer meeting to support a resolution calling for the repeal of Section 3 of the Defense of Marriage Act, the provision under which the federal government is forbidden from recognizing lawful same-sex marriages for any purpose. Section 3 of DOMA is the target of lawsuits filed by Gay & Lesbian Advocates & Defenders and the Commonwealth of Massachusetts in the U.S. District Court in Boston, and private plaintiffs in a U.S. District Court in California, where a motion to dismiss by the government is pending, supported by a brief that calls DOMA a "neutral" and "nondiscriminatory" law intended to keep the federal government out of the same-sex marriage controversy, presumably by pretending that the entire phenomenon does not exist — a favorite tactic of Congress, which just a few years earlier passed the "let's pretend" policy on gays in the military, under which everybody knows that gay people are serving but everybody is supposed to pretend that they are not so long as gay personnel stay deeply in the closet. Congress loves to play "let's pretend," especially, but not exclusively, where gay people are concerned. President Obama, a self-described "fierce advocate" for LGBT rights, claims to be working for repeal of DOMA.

Federal — The House Oversight and Government Reform Subcommittee on the Federal

Workforce, Postal Service and the District of Columbia voted on July 30 to favorably report out an amended version of the Domestic Partner Benefits and Obligations Act (HR 2517). The party-line vote was 5–3. The bill goes to the full committee next. *BNDA Daily Labor Report*, July 31, 2009.

Federal — U.S. Rep. Lynn Woolsey (D.-Calif.), has introduced H.r. 3047, which would amend and expand the Family and Medical Leave Act in various ways. Among other things, the bill would recognize same-sex couples for various purposes, including federal employee benefit eligibility

Federal Military Policy — For the first time, Senate Armed Service Committee will hold hearings on the "don't ask, don't tell" policy, at the instigation of New York Senator Kirsten Gillibrand, who is advocating for repeal of the policy and its replacement with a non-discrimination policy. The committee chair, Sen. Carl Levin (D-Mich.) has not yet committed to a specific date for the hearing, but indicates it will be held sometime in the fall. Gillibrand had proposed an amendment to the Defense Appropriations bill that would have suspended funding for enforcement of the policy, but withdrew it in the face of a possible Republican filibuster. Political observers have suggested that Gillibrand's position on this issue is dictated by her concerns for winning renomination on the Democratic line, after being appointed earlier this year by the unpopular Governor David Paterson to replace Sen. Hillary Clinton, who resigned to become Secretary of State in the Obama Administration. Gillibrand did not co-sponsor legislative proposals to repeal DADT when she was a member of the House. *Newsday*, July 28.

Alaska — Anchorage Mayor Dan Sullivan vetoed an ordinance that would have banned sexual orientation discrimination. The mayor claimed that despite over 20 hours of public hearings and extensive debate, he was unpersuaded that there was evidence of sufficient anti-gay discrimination in Anchorage to justify passing the measure, and noted that most of the comment he had received since the measure was passed had urged him to veto it. The ordinance had passed the city's Assembly on a vote of 7–4. Eight votes would be needed to override the veto, so that seemed unlikely as we went to press. One of the members who had voted no said that she might be persuaded to vote for a sexual orientation discrimination ordinance if certain changes were made to ensure that businesses did not have to provide special facilities, such as unisex bathrooms. Proponents claimed that the measure did not require such facilities. The Anchorage Assembly has frequently passed gay rights measures, only to have them vetoed or repealed. According to report published on August 18 in the *Anchorage Daily News*, the Assembly approved gay rights laws in 1975 and 1976 but both were vetoed by George Sullivan, the current mayor's father. In 1993, the Assembly passed a measure limited to city employment, which was enacted over Mayor Tom Fink's veto but then repealed by a subsequently elected Assembly. The Assembly has three weeks to attempt an override before the measure dies. As of the beginning of September, no vote had been taken on an override.

Delaware — On August 11, Governor Jack Markell rescinded prior non-discrimination executive orders, replacing them with EO 8 of his administration, which reiterates the state's commitment to non-discrimination in its operations, including with regard to sexual orientation and gender identity, and providing for mechanisms to administer these policies within the state government. The full text can be found on the Governor's website. By including gender identity in his revised order, Markell goes beyond the recently enacted amendment to the state's anti-discrimination law, which added sexual orientation but *not* gender identity to the prohibited grounds for employment discrimination in the state. ••• On July 6, Delaware put into effect a new law providing for the status of de facto parent, effectively overruling recent case law that had refused to recognize that concept in the context of a lesbian co-parent custody petition. Under the statute, codified as Section 8–201 in Title 13 of the state's statutory provisions, the legislature has embodied the legal analysis that courts in some other jurisdictions have crafted to determine when a non-marital partner of a birth parent should be treated as a parent of her partner's child. Under this statute, a person adjudged a de facto parent has all the rights of a legal parent and would be able to seek custody and visitation in the event of a breakup. Thus, instead of being distracted by issues of definition and standing, the court could proceed directly to what should be the central issue in the case, but is often never reached due to these technical issues: the best interest of the child.

District of Columbia — The District has enacted the Domestic Partnership Judicial Determination of Parentage Act of 2009, Bill 18–66, which took effect on July 18. The bill provides that when certain consent formalities are met, the child born to the same-sex spouse or domestic partner of an individual will be the legal child of that individual. This bill makes the District of Columbia the first jurisdiction in the U.S. to provide by statute that children of same-sex couples will have two parents from birth. The second will be New Mexico, which passed the same statute (it has been recommended as a model law by the ABA) to go into effect January 1, 2010. The D.C. bill also creates a presumption that a child born to a woman who is in a registered domestic partnership is the legal child of her domestic partner; this is the norm in the many states that now allow same-sex marriages, civil unions, or domestic partnerships affording the legal rights of marriage under state law. *NCLR Press Advisory*, July 21.

Goshen, Indiana — The Goshen City Council voted 4–3 on Aug. 18 to amend the city's Human Relations Commission Act by adding the terms "sexual orientation" and "gender identity" to the list of prohibited grounds for discrimination. This was a first reading vote; to be final the measure must also pass a second reading next month. *Goshen News*, Aug. 19, 2009.

Kalamazoo, Michigan — Opponents of a recently passed gay rights ordinance in Kalamazoo submitted enough signatures to stay its effectiveness and require a repeal measure to be placed on the ballot. The city commission asked the city attorney to draft appropriate language for such a ballot question, while voting to reaffirm its support for the ordinance. *Grand Rapids Press*, Aug. 4. On Aug. 17, the Commission approved a one-sentence ballot question, asking voters whether the city's anti-discrimination ordinance should extend to gender identity and sexual orientation. *Kalamazoo Gazette*, Aug. 18. This will be on the ballot at the general election in November, when voters will also elected new City Commission members and vote on a proposed tax measure.

Maine — The general election ballot in Maine in November will include a measure seeking to block implementation of the marriage equality law that was passed by the legislature and approved by the governor earlier this year. As we go to press, both sides were gearing up for a heavy media and door-to-door campaign, as voters on opposite sides of the country (see Washington State, below) may simultaneously be asked to vote on whether their LGBT neighbors should be denied rights under state law, an obnoxious process.

New York — The New York State Senate adjourned for the summer without voting on the Marriage Equality Bill that had previously passed the Assembly. However, Governor David Paterson indicated that he would be calling a special session of the Senate to address unfinished business in September, and was hopeful that the bill, which would authorize marriage licenses for same-sex couples, would come up for a vote. Openly-gay State Senator Tom Duane told the *Washington Blade* (September 3) that if the bill came up for a vote, he expected it to pass with bipartisan support. The Senate is now divided 32–30 Democratic, but several Democratic members have announced opposition to the measure. No Republican has yet publicly announced support, but Duane has stated his belief that several Republicans will vote for it — enough to put it over the top.

Ohio — The *Cleveland Plain Dealer* reported in an editorial on August 2 that hopes are high for passage of a state law banning dis-

crimination on the basis of sexual orientation and gender identity this fall. The newspaper reported that a floor vote on the bill is a high priority for House Speaker Armond Budish, and that amendments to the original proposal limiting the scope of the measure have drawn Republican support. (Republicans control the State Senate, so only a bi-partisan measure can pass.) Among the amendments is one exempting from coverage employers with fewer than 15 employees, which would limit the reach of the lawyer to those employers who would be covered by the federal civil rights act. Most state discrimination laws apply to smaller employers who are not subject to the federal law.

Akron, Ohio — Mayor Don Plusquellic issued executive orders adding sexual orientation, gender identity, ancestry, and military status to the forbidden grounds of discrimination by the city government in Akron. The Akron school district had added sexual orientation to its nondiscrimination policy in March. Several of the city's union contracts already covered sexual orientation discrimination. *Akron Beacon Journal*, July 18.

Bowling Green, Ohio — The Bowling Green, Ohio, City Council voted 7–0 on Aug. 17 to amend the city's fair housing ordinance to add sexual orientation to the list of forbidden grounds for discrimination, and voted 6–1 in favor of an accompanying ordinance outlawing sexual orientation discrimination in employment, business, public accommodations and public education. Opponents have threatened to institute a repeal referendum, according to a report in the *Toledo Blade* on Aug. 18.

Silverton, Oregon — We were unaware that city councils have jurisdiction to make fashion statements, but then any legal issues involving sexual minorities are liable to result in strange jurisprudence. KATU.com reported that the city council in Silverton, Oregon, passed a resolution censuring the mayor, Stu Rasmussen, a transsexual, for fulfilling a public speaking engagement while wearing a sexually ambiguous outfit. According to the Aug. 4 news report, Rasmussen wore an "open-back bathing suit, mini skirt and high heels" when addressing a group of young people for a non-profit organization. Complaints about his appearance were directed to the Council, which furiously debated before passing the censure resolution, which essentially states that they disapproved of the Mayor's appearance thus garbed on that occasion. We hope Congress is not going to start passing resolutions approving or disapproving of what high federal officials wear…

Fort Worth, Texas — The City Manager's Diversity Task Force voted unanimously on Aug. 27 to recommend that the city embrace benefits equality for domestic partners of its employees. The City Manager has asked the City Attorney to advise on how such a measure can be implement. The Task Force has also voted to endorse a proposal to amend the city's anti-discrimination ordinance to prohibit gender identity discrimination within the city. The existing ordinance already prohibits sexual orientation discrimination. *U.S. Federal News*, Sept. 2.

Utah — Governor Gary Herbert told a press conference on Aug. 27 that he is opposed to pending legislative proposals to ban sexual orientation discrimination. His reaon? He doesn't think such a statutory ban is needed. He says he is opposed to sexual orientation discrimination, but he doesn't want to create new "protected classes" and that a law should not be necessary to tell people to do "the right thing." Yet somehow he cannot bring himself to call for the repeal of the state's law banning sex and race discrimination. He specifically rejected any attempt to equate sexual orientation discrimination with those other types, and warned about slippery slopes and the possibility that the legislature would be called to ban discrimination against blue-eyed blondes. The fellow seems a pleasant enough idiot. — *Salt Lake Tribune*, Aug. 28.

Vermont — The law authorizing same-sex marriages went into effect on September 1, but there was no stampede by same-sex couples to marry. Locals noted the difference from 2000, when the Civil Union Act went into effect. At that time, no U.S. state provided a legal status approaching marriage for same-sex couples, so here was pent-up demand and a rush of civil union ceremonies, many involving out-of-state couples. By contrast, Vermont is now one of several states, two bordering Vermont (Connecticut and Massachusetts), in which same-sex marriage is now available without residency, and so the potential "market" is pretty much limited to locals, especially as same-sex marriage will also become available in New Hampshire soon and possibly Maine as well, depending on referendum results. Also, because the bill was enacted by legislative super-majorities over the governor's veto, it is politically popular and it seems unlikely that there will be any attempt to remove it by initiative, so there is no great urgency for those locals who are contemplating marriage to rush to get it done.

Washington State — September began with a certification by the state that sufficient signatures were submitted to put Referendum 71 on the ballot, seeking to overturn the most recent amendments expanding the state's Domestic Partnership Law. The amendments, completing the task of expanding rights covered by domestic partnership to closely equate to state law marriage rights, were blocked from going into effect in July as opponents qualified to circulate petitions. Then at the end of August state officials announced that the opponents had submitted sufficient valid signatures to put Referendum 71 on the ballot, but supporters of the new law filed their own lawsuit, contending that state officials were improperly overlooking various legal requirements for validating signatures and thus counting invalid signatures towards the total. (One of the arguments is about signatures from people who had not validly registered to vote when they signed the petitions, but subsequently registered. That can't be a huge number, but the number of signatures counted by authorities as valid was not sufficiently over the required threshold to make such a challenge frivolous. Technically, those signatures should not have been counted, according to the new lawsuit. Another challenge focuses on signature pages that were not properly signed by the signature-gatherers.) The contention was that if the rules were strictly followed, the petition campaign would be found to have fallen short. A hearing on that claim was scheudled to be held on September 2. That's how close the numbers are at this point. In addition, a lawsuit is pending in federal court by the proponents of the measure, seeking to depublish the list of financial contributors to the referendum effort, claiming that allowing their names to be public would expose them to danger. A state agency had rejected that argument, which was to receive a court hearing on September 3 Stay tuned for developments. *Seattle Times & Associated Press*, August 31 & Sept. 1, 2009. A.S.L.

Law & Society Notes

Presidential Medal of Freedom — On August 16, President Barack Obama bestowed the Presidential Medal of Freedom on openly-lesbian tennis star Billie Jean King and, posthumously, on Harvey Milk, who was among the early openly-gay elected officials in the United States, serving on the San Francisco Board of Supervisors, when he was assassinated by a fellow member of the Board. This is claimed to be the first time that the Presidential Medal of Freedom has been bestowed on openly-gay people. Award of the medal is within the sole discretion of the president. We're still waiting to see the Harvey Milk commemorative postage stamp…

Naval Murder — Hate Crime or Not? — On June 30, a gay sailor, August Provost, was murdered while on duty, shot to death. Within days, military authorities had arrested Jonathan Campos on suspicion of murder in the case. Although various parties expressed suspicion that this had been a hate crime, Naval investigators insisted that there was no evidence of that, no evidence that Campos knew Provost was gay, and plenty of evidence that Campos, who had a string of arrests on his record, was on a crime spree. The mystery may never be solved, because Campos was found comatose in his cell on July 31, his mouth stuffed with toilet paper, an apparent suicide. Naval authorities indi-

cated the investigation into the murder of Provost would continue. Provost's family, indicating that he had complained to them about anti-gay harassment from fellow Navy members, persisted in their suspicions that this was a hate crime.

American Psychological Association — The American Psychological Association (APA) adopted a resolution at its annual meeting in Toronto on August 5, calling on mental health professionals to eschew any attempts to "change" sexual orientation in their patients. After a thorough review of the research literature, a committee had recommended the resolution that was approved, having concluded that so called reparative therapy does not work.

Washington Referendum Controversy — While the Secretary of State's Office proceeded with verifying petition signatures calling for a referendum to repeal the state's recently passed amendments expanding the Domestic Partnership Law to cover virtually all the rights of marriage, Washington Families Standing Together, an organization that opposed the referendum, filed suit in King County challenging the way in which the signatures were being evaluated. WFST charged that the Secretary had illegally directed that signatures be counted as valid even if the signer was not a registered voter at the time he or she signed the petition but registered later and thus would be considered a qualified voter were the referendum to be held. They also charged that the Secretary was not insisting on strict compliance with a statutory requirement that each signature gatherer sign declarations that they personally circulated the petitions and that signatures were valid to the best of their knowledge. If WFST succeeds in its suit, the expected announcement that the proponents of the referendum submitted sufficient signatures to get on the ballot would be forestalled. A hearing was set before Judge Julie Spector for the first week of September. Meanwhile, the state's Public Disclosure Commission rejected a demand by proponents of the referendum that the identities of donors to their campaign be kept secret. Washington State law requires that donations be reported and made public on the state's website. The proponents argued that donors might be subjected to retaliation and political pressure if their names were made public. *Seattle Post-Intelligencer*, Aug. 28.

Academic Dust-Up — New York University Law School extended an invitation to Thio Liann, a law professor at the National University of Singapore, to come for a semester as a guest professor to offer a human rights law course, and she accepted. This caused an uproar at NYU, when some students discovered (did the faculty not know this?) That in her other role as a member of Singapore's Parliament, she had been a vocal opponent of LGBT rights, specifically opposing the repeal of the Victorian-era sodomy law — the same statute recently declared unconstitutional in its Indian incarnation by the High Court in Delhi. In her speech opposing repeal, Prof. Thio referred to homosexuality as a "gender identity disorder" and described anal sex as being akin to "shoving a straw up your nose to drink." Although the LGBT student group at NYU did no call for rescission of the appointment, they provided plenty of negative publicity for it, many students signed petitions against the appointment as individuals, and enrollment in the course turned out to be low, Prof. Thio received confrontational emails from NYU students, and ultimately she decided not to come.

Lutheran Ordination — The Evangelical Lutheran Church in America has voted to allow non-celibate gay people to be ordained and serve as pastors and church leaders. The measure was passed at a church convention by a vote of 559–451, and may spark some leaders and congregations to attempt to withdraw from the church. *New York Times*, Aug. 22.

Federal Express — The BNA Daily Labor Report, 136 DLR A–21 (July 20, 2009), reports that FedEx has added "gender identity" to its companywide antidiscrimination policy. The company decided to revise its policy in response to a written request from a group of shareholders.

Fort Worth, Texas — Following up on investigations of a controversial gay bar raid conducted jointly by Texas Alcoholic Beverage Commission agents and local police officers, the Commission announced on Aug. 28 that it had discharged two agents who took part in the raid as well as their supervisor. Christopher Aller and Jason Chapman were terminated over their part in the Rainbow Lounge raid, effective Aug. 28, and the discharge of their supervisor, Terry Parsons, will be effective September 2. During the raid, several bar patrons were roughed up by the agents, one badly enough to have sustained permanent injuries requiring hospitalization. The Commission determined that the agents violated numerous Commission policies in the course of the raid. It announced that it was disciplining several other supervisors as well, and was committing to doing training with agents about how to properly handle the situation when agents are checking an establishment for possible violations of regulatory rules. *Fort Worth Star-Telegram*, Aug. 29. A.S.L.

International Notes

United Nations — The UN Economic and Social Council has granted consultative status to the Brazilian Federation of LGBT Groups, which is the first LGBT organization from the Southern Hemisphere to be gratned such status. This status gives the organization access to participation in deliberations of the Council. The NGO committee of the Council had recommended against granting the status, but the full council rejected the recommendation and granted consultative status by a vote of 25–12, with 13 abstentions. Among the other groups awaiting future approval for such status are the International Lesbian and Gay Human Rights Commission.

Albania — In a bold and surprising move, Prime Minister Sali Berisha stated on July 30 that the government will propose a same-sex marriage bill to the Parliament. Berisha's government is committed to taking the steps necessary to be accepted as a member of the European Union. Observers predicted that the measure will face stiff opposition in the Parliament, as Muslim, Christian Orthodox and Catholic religious leaders unanimously condemned the measure and accused Berisha of proposing it to distract critics from continuing charges that the June national elections were "rigged." *Reuters*, Aug. 1.

Australia — Prime Minister Kevin Rudd stood fast during the Labor Party's annual conference against attempts by more liberal members of the party to push for a national same-sex marriage or civil union bill. Rudd maintains that it is sufficient to remove discriminatory provisions of law on a case by case basis, but that marriage should be reserved to different-sex couples, and civil unions are not an acceptable alternative.

Australia — The *Sydney Daily Telegraph* reported on July 20 that the Family Court has awarded a lesbian access to the three-year-old child of her former partner, over the partner's protest, finding that she was a "significant person in the child's life." The names of the parties are not given in the newspaper article. This writer felt a strong sense of irony writing this item, having just finished writing the note above on the Virginia Court of Appeals decision in *Damon v. York*, holding exactly the opposite, on facts in which Damon and York had a Canadian same-sex marriage while the parties in this Australian case had no legal relationship and were merely living together as partners at the time the child was born through donor insemination. Interesting contrast, indeed!

Croatia — The European Committee of Social Rights, which has monitoring responsibility for state compliance with the European Social Charter, has condemned the school curriculum in Croatia for reinforcing demeaning stereotypes about gay people rather than providing appropriate educational materials.

Germany — The Federal Constitutional Court rejected an application from a district court to strike down the step-parent adoption rights of same-sex couples. According to a report posted in English to the internet by Dr. Helmut Graupner of Vienna, "The Court emphasizes in its decision that biological parenthood does not enjoy constitutional supremacy over social parenthood. Both have to be treated

on the same footing. The preference of parental rights vs. rights of other persons (concerning a child), which preference the Court in its case law constantly emphasizes, is not dependent on the gender constellation of the parents." The Court announced its decision on August 10 in the case of *B v. L.*.

Israel — A masked gunman entered the basement meeting room at the LGBT Center in Tel Aviv on August 1 and began firing a weapon, killing two young people on the spot and wounding more than a dozen others, some seriously. The event was considered the most serious anti-gay attack ever staged in Israel, and drew shocked and outraged statements even from right-wing politicans and fundamentalist religious leaders. Some gay rights advocates immediately cited the anti-gay provocations of the right-wing, religious parties as a contributor to anti-gay sentiment in the country and called for it to cease. An impromptu demonstration after the shootings was followed by a larger demonstration on Aug. 2, and demonstrations in sympathy were held in many locations around the world over the following week, mainly on Wednesday Aug. 5. The shooter, whose identity and specific motivation were unknown, successfully fled the scene, triggering an intense police manhunt that had not borne fruit as of.....

Lithuania — The International Gay and Lesbian Human Rights Commission reports that Lithuania adopted a homophobic censorship law on July 14, titled "Law on the Protection of Minors Against Detrimental Effects of Public Information." According to IGLHRC, the new law "outlaws the distribution of information about sexual orientation through any medium to which children have access." The law may be interpreted to ban any kind of affirming discussion of gay lives in the public schools, for example. The billl was approved over the president's veto by a vote of 87–6 with 25 abstentions, and will go into effect in March 2010 unless it is blocked by a constitutional challenge. *IGLHRC* press advisory, July 15.

Portugal — The Constitutional Court ruled on July 31 that the constitution, which forbids sexual orientation discrimination, does not require the country to allow same-sex couples to marry. Ruling on an appeal by Teresa Pires and Helena Paixao, who were denied a marriage license in Lisbon in 2006, the court divided 3–2 on the question, and the plaintiffs said they would bring their discrimination claim before the European Court of Human Rights. Now that five countries in the European Union allow same-sex marriages, there might be enough momentum to persuade the European Court to take the "next step" and rule that respect for private life and the guarantee of equal rights to all citizens of countries that are parties to the European Convention on Human Rights requires opening up marriage to same-sex partners. (The European court pays attention to such historical trends in fleshing out the meaning of the broadly phrased guarantees of the Convention.) Portuguese activists responded to the decision by calling on the Parliament to take up the issue, which had been put off as premature by the ruling Socialist Party most recently. *Associated Press*, July 31.

Romania — Even as one provision of the nation's legal code prohibits sexual orientation discrimination, other provisions recently signed into law by President Traian Basescu mandate anti-gay discrimination on a wide variety of subjects, including prohibiting same-sex marriages, adoptions by same-sex couples, and a restrictive definition of "family" that excludes same-sex partners. There is also a ban on recognizing legal status for same-sex partners lawfully united in other countries, according to a report on Rex Wockner's international bulletin.

Spain — Magistrate Judge Silvia Lopez Meja has ruled that the Austrian transport company Gartner KB had engaged in unlawful discriminatory conduct in violation of Spanish law concerning two gay employees in the company's Barcelona office. An executive of the company had stated in an email, which came to light when a co-worker discovered a printout of the email left in a photocopy machine, that the gay workers should be discharged, commenting "I have had the pleasure of reading the filthy content of their private emails, and they have to disappear whatever the cost." Magistrate Mega said that the content of the email could be characterized as criminal under Spanish law, commenting: "To say that a work colleague is homosexual is not abusive, but to say that a colleague is ill and seek their sacking for that reason is." *El Pais (English language version)*, Aug. 18.

United Kingdom — The *Sun* reported on July 31 that a transsexual migrant seeking a sex-change operation had won a long-running battle to remain in the U.K. According to the news report, the anonymous asylum seeker claimed he would be prosecuted if sent home to Pakistan, and asserted that prior denials of asylum had violated his human rights.

United Kingdom — The *Sunday Times* reported on July 19 that a lesbian couple had won the right to have the National Health Service pay for their in vitro fertilization procedure after a lengthy legal battle. Their primary care trust initially refused to fund the procedure because they were a same-sex couple. One of the women suffered a medical condition that is a common cause of infertility. Beginning in October, according to the news report, local trusts may no longer deny such coverage on the ground of the child's "need for a father." Same-sex couples will be required to show they can offer "supportive parenting" in order to qualify for the coverage.

Uruguay — Wire services reported on Aug. 28 that the nation's Chamber of Representatives had voted 40–13 (with many members from the 99–seat chamber absent) to approve a measure allowing same-sex couples to adopt children. The Senate had approved an earlier version of the bill, but still needs to vote on the version that passed the Chamber because it contains some modifications. If the bill, which is supported by President Tabare Vazquez's Broad Front Coalition, is enacted, it will make Uruguay the first Latin American nation to approve such adoptions. The government had previously approved a civil union bill, and ended the country's ban on gay people serving in the military. On gay issues, Uruguay is not more progressive on the national level than the United States. *Los Angeles Times*, Aug. 28. A.S.L.

Professional Notes

Ohio — Governor Ted Strickland has appointed openly-gay Jerry Larson to be a municipal court judge in Akron, Ohio, to fill a vacancy created by the death of an incumbent judge. Larson has been an attorney for the city in various capacities, most recently as chief assistant city prosecutor. He will have to stand for election to a full term in November.

Pennsylvania — We note the passing of Larry Frankel, openly-gay civil rights crusader who was a longtime legislative director of the Pennsylvania chapter of the ACLU, and had relocated to Washington, D.C., to become state legislative counsel for the ACLU office in that city, in a job that included advising 50 state ACLU offices on national legal policy matters. Frankel apparently collapsed and died while jogging in Rock Creek Park. *Pittsburgh Post-Gazette*, Aug. 31, 2009.

Lambda Legal — Cole Thaler, a staff attorney at Lambda Legal focusing on transgender rights issues for several years, has left to take a position with the Georgia Legal Service Program. Lambda is accepting applications to the fill the position of a staff attorney dealing primarily with transgender issues. Although Thaler was employed in Lambda's Atlanta office, the new staff attorney on transgender issues can be based in Lambda's offices in Atlanta, Dallas or New York depending on the candidate's preference. Those interested in applying for the position can send a resume, writing sample and letter of interest to Jon W. Davidson, Legal Director, attn: Transgender Rights Attorney Position, Lambda Legal, 3325 Wilshire Blvd, Suite 1300, Los Angeles CA 90010. Applications can also be faxed to 213–351–6050, or emailed to jdavidson@lambdalegal.org. Telephone inquiries are

discouraged. Lambda is the nation's first and largest LGBT public interest law firm. A.S.L.

AIDS & RELATED LEGAL NOTES

N.Y. Appellate Division Limits Scope of Disclosure of HIV-Related Patient Information in Medical Malpractice Investigation

A unanimous five-judge panel of the New York Appellate Division, First Department, has ruled that a subpoena seeking the full medical records of nine patients of a doctor being investigated on misconduct allegations by the State Board for Professional Medical Conduct (BPMC) may be complied with, initially, by redacting information identifying the individual patients and other people mentioned in their files, and also redacting any information about their individual sexual practices, in order to balance the privacy concerns of patients protected under New York HIV Confidentiality Law, Public Health Law Article 27–F, with the legitimate investigative needs of the Board. The ruling in *Anonymous v. New York State Department of Health*, 2009 WL 2590085, 2009 N.Y. Slip Op. 06294 (Aug. 25, 2009), is apparently a ruling of first impression, since the court cites no prior authorities and reaches its conclusion by reference solely to statutory language and legislative intent.

The court's memorandum opinion is not attributed to any one of the members of the panel, which was comprised of Presiding Justice Mazzarelli and Justices Sweeny, Nardelli, Freedman and Richter.

According to the opinion, the Board received certain complaints concerning the doctor, who specializes in treating HIV+ patients, sufficient to merit investigation. As part of that investigation, the Board wrote to the doctor, requesting the medical and billing records of nine of his patients. The doctor's lawyer responded with a letter to the Board raising confidentiality concerns and seeking guidance "to assure that he did not act in violation of the Public Health Law," which affords certain confidentiality protections to HIV+ patients. The doctor also contacted his patients, asking if they would authorize release of the records, but none of them consented to release of their records. The Board responded by issuing a subpoena, demanding production of all records of the nine patients. The doctor responded by filing this action, arguing that the Board's request did not fall within any of the exceptions specified in the confidentiality law.

The New York County trial judge, Justice Nicholas Figueroa, ruled in favor of the Board, ordering release of the records. Justice Figueroa took the position, as summarized in the Appellate Division ruling, that "a physician may not invoke patient privacy rights to shield himself from a misconduct investigation," and that the Board had "demonstrated a foundation" for issuing the subpoena by submitting the complaints it had received to the court for in camera inspection.

While the Appellate Division agreed that the Board has a right to subpoena evidence relevant to its investigation of the complaints against the doctor, nonetheless it determined that in light of the confidentiality law, the doctor should not be required to release the complete patient records without taking some steps to protection the privacy of his patients. "In recognition of the need for confidentiality in this matter," wrote the Appellate Division panel, "any disclosure order must provide for redactions of material that is not necessary for the conduct of the investigation and must otherwise comply with section 2785(6). At this preliminary stage," the court continued, "the redacted material would include the names and identifying information of the patients whose files are sought (their files can be identified by code), as well as the names and identifying information of other individuals whose names might appear in the file. We caution, however, that the redaction of the names at this stage of the investigation should not be construed to mean the names are to be permanently redacted. There may be a point in the future when the needs, or the results, of the investigation warrant disclosure of certain identities to the OPMC by court order. Respondent also proffers no reason why personal information such as sexual history should be disclosed."

The court noted an "anomaly" in the confidentiality statute, an apparent and unexplained internal contradiction. While imposing various confidentiality standards on court orders to release HIV-related information, the statute also states "service of a subpoena shall not be subject to this subdivision." Does that mean that the confidentiality law is totally preempted by any other statute that confers authority to subpoena records or information? In light of the legislature's concern to protect the confidentiality of HIV patients, the court was not willing to go to that extreme. Indeed, rather in the other direction, the court ordered that "each of the nine patients whose files are being sought shall be given the opportunity before the court to submit any objections to the release of certain information in his or her file, and to request appropriate redactions. In weighing such objections," the Appellate Division concluded, "the court must be mindful to balance the patients' privacy concerns with the nature of the investigation itself, which involves serious allegations."

Due to the same confidentiality concerns, the court did not give any specifics of the charges against the doctor, and also granted the doctor's motion to change the name of the case "to reflect anonymity," a decision that the state did not oppose.

The doctor is represented by attorneys Robert L. Schonfeld and Benjamin Giezhals of the Garden City firm of Moritt Hock Hamroff & Horowitz LLP, and the state is represented by attorney Richard Owen Jackson from the New York State Law Department. Lambda Legal participated in the appeal as amicus curiae, with a brief offered by Thomas W. Ude, Jr. A.S.L.

AIDS Litigation Notes

Federal — The American Civil Liberties Union announced on August 25 that it had reached a settlement with the State Department of its claim that the Department was violating the Americans With Disabilities Act by automatically barring HIV+ people from working under State Department contracts overseas. ACLU filed suit on behalf of a John Doe client against Triple Canopy, a State Department contractor, and the State Department. Doe was just about to graduate from the relevant training program for an overseas posting when he was told that the State Department's policy required the contractor to provide test results showing all employees for overseas postings were negative for HIV. The State Department has persisted in this policy for its own employees as well, until recent rethinking of the policy by the Obama Administration. ACLU argues that these policies violate the ADA when the employees in question are fit for duty, and rejects the State Department's argument that all of its overseas staff must be available for assignment anywhere in the world without regard to the availability of adequate health care for HIV+ people, thus requiring that HIV+ people be considered disqualified for any overseas postings. The Department settled a similar discrimination claim on behalf of a diplomatic staffer earlier this year, and is backing away from the policy.

California — No matter how often it gets litigated, the issue comes up again. California prosecutors pursuing HIV+ men charged with sexual abuse of children demand HIV testing orders, regardless of whether any evidence has been introduced that would support the argument that the defendants had engaged in conduct that could transmit HIV, and California trial judges give the orders, oblivious to statutory requirements. And, yet again, a court of appeal panel has reversed such an order, since the

statute authorizing testing requires that such a finding be made. *People v. Langley*, 2009 WL 2480081 (Cal. Ct. App., 5th Dist., Aug. 15, 2009) (not officially published). The court remanded to give the prosecution an opportunity to seek a hearing for the introduction of evidence necessary to support an HIV testing order. The opinion provides no indication that such evidence exists, and summarizes the probation officer's report to the effect that the conduct in which defendant engaged with his 13–year-old stepdaughter involved various activities that do not appear on their face to present any danger of HIV transmission, unless fondling and kissing have suddenly become high risk activities…

Illinois — In *Montgomery v. Zyck*, 2009 WL 2448566 (S.D.Ill., Aug. 11, 2009), U.S. District Judge G. Patrick Murphy performed the screening function on a complaint brought by an HIV+ federal inmate raising various constitutional claims concerning the conditions of his confinement. Judge Murphy has allowed the inmate to pursue a claim that his constitutional privacy rights were violated when a prison official "knowingly gave his private medical records to another inmate." Montgomery alleges that the inmate then spread information about his HIV+ status to others in the prison, subjecting him to verbal and physical abuse from other inmates, causing emotional and physical injury. Judge Murphy found that inmates do not have an absolute right of privacy, but there must be some legitimate penological interest to justify disclosure of medical information, so the claim here could not be dismissed without further fact-finding. However, Murphy screened out an 8th Amendment claim based on the allegation that defendant deliberately served burnt pasta to the plaintiff, knowing that this would interfere with his taking medication that had to be ingested with food, and refused to let the inmate pursue a vicarious liability claim against the warden for not taking action on his complaints arising from these situations.

Louisiana — It's been going on so long that it may be the *Jarndyce v. Jarndyce* of HIV-transmission-liability litigation. Who would have thought that in 2009 we would be noting a decision (but not, unfortunately, the final decision) in a case stemming from a 1985 blood transfusion. *Reed v. St. Charles General Hospital*, 11 So.3d 1138 (La. App., 4th Cir., May 6, 2009). Judge Paul A. Bonin indicated that the case has been up to the Louisiana Court of Appeals twice before on interlocutory appeals. Joe Reed was a patient at the hospital and contracted HIV from a blood transfusion. Before he found out about his infection, he had infected his wife, Dorothy. Joe died in 1988 from AIDS. The lawsuit was filed around that time. Dorothy died from AIDS in 1995. Their children are now the plaintiffs. Louisiana has a med-mal statute and a Patient Compensation Fund attached to it. A major issue in the case has been whether Dorothy's claims were subject to the med-mal statute, and whether the PCF would be required to pay out for her injuries. There has been a settlement of claims that was approved by the trial court, which would require a payout from the PCF, which appealed. As one can imagine, this is a complicated opinion, made more so by the location, since it is full of Louisiana civil practice terminology that is almost impenetrable for outsiders like your writer. In this brief format, I'll say that the PCF appears to be let off the hook from having to pay out on account of Dorothy, but it seems the case is not over yet, because that upsets the premises on which the settlement was based. Anybody with a great interest in HIV transfusion liability would probably find this opinion interesting.

Maine — An HIV+ state prison inmate who has a lawsuit on file claiming constitutionally inadequate medical care became concerned that the prison might try to transfer him in retaliation for his litigation, so filed a preemptive motion with the federal district court seeking an order barring his transfer. U.S. District Judge John A. Woodcock, Jr., denied the motion in *Leavitt v. Correctional Medical Services, Inc.*, 2009 WL 2426056 (D. Me., Aug. 6, 2009), upon the recommendation of Magistrate Judge Margaret J. Kravchuk. Wrote Kravchuk, "There is no indication in Leavitt's motion, the accompanying affidavit, or the docket activity that he has personally been threatened with any retaliatory transfer or other action that would impede his ability to prosecute his case." Kravchuk did indicate that Leavitt's case "appears to be nonfrivolous," but refused to take judicial notice of "the alleged fact that it is common knowledge that the Department of Correction transfers prisoners as a litigation tactic'," opining that this is not the sort of thing to which judicial notice could be extended. "In the event that Leavitt were actually transferred to another institution in retaliation for this lawsuit and that transfer resulted in his inability to continue the prosecution of his lawsuit, he could refile his motion and the Court would then perhaps have before it an evidentiary basis for a finding of irreparable harm and could issue curative injunctive relief," she wrote. Of course, having filed his motion and drawn this response, Leavitt now has it on the record that the magistrate considers his case to be "nonfrivolous," and has created a situation in which any transfer would appear on its face to be suspect if not supported by a good reason, so he may have accomplished what he was seeking — prevention of any transfer — without having actually won his motion! In addition, the finding that his allegations are not frivolous might encourage the state to come up with a settlement offer that would respond to his allegations about inadequate treatment.

Missouri — U.S. District Judge Nanette K. Laughrey adopted the recommendation of Magistrate Judge William A. Knox to reject a pretrial detainee's argument that his constitutional rights were violated when he was forcibly restrained so that correctional staff could take blood from him for HIV testing over his protest. *Webb v. Smartwood*, 2009 WL 2606237 (W.D.Mo., Aug. 21, 2009). The magistrate's report relates that Webb was found to have engaged with sexual intercourse with another person being held at the same facility, triggering a requirement of Missouri law that he be tested for HIV. The court rejected Webb's argument that forcibly extracting blood from him for this purpose violated his personal liberty under the Due Process Clause of the 14th Amendment, finding that the state had a legitimate reason for needing the information in light of Webb's sexual activities.

New York — U.S. District Judge Paul Crotty granted summary judgment to the defendant in *Kennedy v. Related Management*, 2009 WL 2222530 (S.D.N.Y., July 23, 2009), in which plaintiff, a person living with HIV/AIDS, alleged housing discrimination in violation of the federal Fair Housing Act and the N.Y. Human Rights Law. Judge Crotty fou nd that there was no evidence that plaintiff's HIV status had anything to do with the defendant's rejecting of the application from him and his wife to purchase an apartment in defendant's apartment building. The court noted that evidence in the record showed that there were other persons with AIDS living in the building, and that the defendant's plausible reason for denying plaintiff's application (after an initial approval) was that in the process of verifying his financial information, it discovered that his application was not complete and that he had misrepresented his residence and income in applying for assistance to the NYC Human Resources Administration.

New York — U.S. District Judge Lawrence E. Kahn granted summary judgment in favor of the employer in an HIV discrimination case in *Brown v. 820 River Street, Inc.*, 2009 WL 2461080 (N.D.N.Y., Aug. 10, 2009). The HIV+ African-American plaintiff was hired on a part-time basis as a drug dependency counselor by the non-profit agency. He applied for a promotion to a full-time position and was turned down, the company official telling him that he was not qualified for the position because of his poor performance of his job. He was subsequently discharged. He claimed that everyone at the place knew he was HIV+, but there was no direct information that his HIV+ status was know to the individual who denied his application for promotion or decided to terminate his employment. Judge Kahn found that defendant had failed to make out a prima facie case and, even if he had met that burden, the employer had provided sufficient uncontested

non-discriminatory reasons for denying the promotion and terminating his employment. Kahn recited several incidents described in the motion papers that indicated plaintiff's unsuitability for the position, and found that the plaintiff had made no allegations that would support a conclusion that these reasons for dismissal were pretextual, or that it had anything to do with his race or HIV+ status.

New York — Senior U.S. District Judge Frederic Block dismissed as moot a case that sought to enforce a ceiling on the amount of income that HIV+ individuals receiving housing assistance would have to contribute towards their housing. *Rivers v. Doar*, 2009 WL 2253193 (E.D.N.Y., July 29, 2009). The question whether individuals have a right to sue to enforce statutory rent cap guidelines, which loomed as a major question in the litigation, thus did not have to be decided by the court, because after suit was filed, a change in the state administration in Albany resulted in a change of policy that met the demands plaintiffs had made in their complaint. The Pataki Administration had taken the position that HIV+ housing assistance recipients should dedicate all of their income above $330 a month to housing costs if necessary, to relieve financial pressure on the state. The Spitzer Administration reversed that view, and agreed to reinstatement of the 30% cap that had previously been in effect.

Ohio — In *State v. Eversole*, 2009 WL 1264295 (Ohio Ct. App., 2nd Dist., May 8, 2009), the court affirmed a decision by the Court of Common Pleas approving a revocation of probation of an HIV+ man who was convicted of felonious assault for having sexual intercourse with a partner without disclosing his HIV+ status. On finding that he had violated community control requirements, the court suspended probation even though the man's partner was shown to be aware of his HIV+ status. The court expressed some concern about the severity of the community control requirements, which included getting permission from the probation officer before starting any new sexual relationship (so that the probation officer could determine whether the potential sexual partner was informed about the probationer's HIV status), but found that the requirements were not unenforceable in light of the probationer's past record.

Texas — U.S. District Judge Barbara M.G. Lynn accepted a recommendation by Magistrate Judge Paul D. Stickney to grant a motion for summary judgment on behalf of a staff physician at the Dallas County Jail facing an 8th Amendment suit by an HIV+ inmate. *Brantley v. Pavelka*, 2009 WL 2596612 (N.D.Tex., Aug. 19, 2009). Inmate Brantley claimed that Dr. Pavelka exhibited deliberate indifference to his serious medical condition by stopping his HIV medications. Dr. Pavelka countered that Brantley had not adhered properly to the treatment regiment and she discontinued medication to avoid having him develop a drug resistant strain of HIV. Magistrate Stickney found that Dr. Pavelka was entitled to qualified immunity in this case because her course of treatment "was supported by authoritative published medical research and literature. Thus, it is highly likely that another doctor, under the same circumstances, would have taken the same course of action as Defendant." Thus, the "objective reasonability" of her actions entitles her to qualified immunity from liability. Stickney also concluded that a "deliberate indifference" claim could not be made out against Dr. Pavelka, who, he found had "worked diligently on Plaintiff's behalf to have his medication dispensed in a manner that would allow him to take his medication regularly. But due to Plaintiff's non-adherence by his either refusing to take his medication altogether or by his taking it only sporadically, Defendant rightly discontinued Plaintiff's HIV drug disposition. Defendant's actions were supported by the prevailing authoritative medical opinion; that continuing Plaintiff's medication in the face of his non-adherence would have jeopardized Plaintiff's health. Defendant's actions decreased the risk of harm to Plaintiff. Therefore, contrary to Plaintiff's assertions, Defendant was not deliberately indifferent to Plaintiff's medical needs." The court also rejected a negligence claim based on the same conclusions.

Texas — Here's another one of these misguided cases in which an HIV+ person is railroaded into an enhanced sentence for allegedly spitting at a police officer, on the ground that he is using a "deadly weapon." *Campbell v. State*, 2009 WL 2025344 (Tex. App. — Dallas, July 14, 2009) (not officially published). Saliva is established as a "deadly weapon" in this case based on the expert testimony of Dr. Laura Armas, Clinical Director for the Texas/Oklahoma AIDS Education and Training Center, who testified that there was a theoretical possibility that HIV could be transmitted through spitting. When challenged on cross-examination that there were no known cases of transmission in this manner, she testified that there are "non-published cases" of such transmission, without citing any particular such case. While admitting that she was not personally familiar with any such case, she said that national statistics "cover about two percent of unknown risk factor cases." In other words, this totally incompetent and unsubstantiated evidence was passed for expert testimony in a Texas court, and a jury convicted Mr. Campbell on a deadly weapons charge based on it. Compounding the error was allowing the police officer in question to testify as to his opinion about the risk to him from being exposed to saliva of an HIV+ suspect. The appeals court decided there was no problem with that, because the police officer disclaimed being an expert on HIV transmission before he was allowed to give his opinion under oath on the stand. Unfortunately, such outrages are commonplace in HIV-related criminal prosecutions. Rules of evidence fly out the window. Equally unfortunately, trial counsel for the defendants in such cases usually fail to make sufficient timely objections, so a repeated refrain in the appellate decisions is that defendant failed to preserve the right to challenge various rulings on appeal. That certainly happens in this case. And, most unfortunately, appellate courts see no harm in letting these travesties continue. After all, the upshot is just that an HIV+ defendant has to spend more time in jail than otherwise. No empathy there.... A.S.L.

Social Security Disability Cases

California — In *Stark v. Astrue*, 2009 WL 2566723 (N.D.Cal., Aug. 18, 2009), District Judge Marilyn Hall Patel ordered a remand for further consideration of a disability benefits claim by an HIV+ man, finding that the ALJ had erred in numerous ways in reaching the conclusion that the plaintiff was still capable of working and thus not qualified for benefits. The specifics of the remand allude to the problems with the ALJ's decision: *In this case, remand is appropriate to properly consider Dr. Clague's [plaintiff's treating physician] medical evaluation and the social worker's letter as part of the RFC [residual functional capacity] assessment. Remand, further, is necessary to take the testimony of a vocational expert in determining the type of work, if any, that Stark is capable of performing. Depending on the vocational expert's testimony, the ALJ is instructed to take whatever further action is deemed appropriate and consistent with this decision." The court found that the ALJ had not given due consideration to the medical opinion of Stark's doctor or the professional opinion of his social worker, and had improperly relied on suppositions about the type of work Stark could do without having any testimony from a vocational expert, which was necessary in light of the psychological problems that had been diagnosed. Stark had lost his partner to AIDS, was himself HIV+, and had been unable to work for a substantial period of time due to psychological as well as physical issues, but the ALJ had concluded he could do "unskilled medium work." Amazingly, a vocational expert was present at the hearing but the ALJ did not call upon the expert to provide any testimony.*

Florida — There seems to be a rogue ALJ at work on Social Security Disability claims in the Northern District of Florida, to judge by the decision in *Pretto v. Astrue*, 2009 WL 2424577 (Aug. 5, 2009). Senior District Judge Lacey A. Collier adopted a magistrate decision by Elizabeth M. Timothy, ordering a remand with the acquiescence of the Commissioner, finding the ALJ did an inadequate job in dealing with the

plaintiff's medical condition and records, and furthermore assigning the case to a different ALJ based on the behavior of the ALJ toward the plaintiff. Magistrate Timothy noted that the same ALJ had been singled out in another case in this district for similar deficiencies in conducting hearings. The ALJ is not named in the opinion. In this case, Magistrate Timothy observed in a footnote: "Plaintiff suffers from full blown AIDS,' and the record reflects that she contracted the disease after being unknowingly infected with HIV by her husband. As an example of the ALJ's insensitivity regarding Plaintiff's condition, Plaintiff points tot he ALJ's comment during the administrative hearing that Plaintiff has the gift that never stops giving..."'

Kentucky — In *Hourigan v. Astrue*, 2009 WL 2242619 (W.D.Ky., July 24, 2009), Senior District Judge Edward H. Johnstone vacated a denial of benefits to an HIV+ plaintiff and remanded the case for further proceedings, finding that the ALJ erred in various ways, including apparently giving weight to the manner in which plaintiff acquired his HIV infection in evaluating his credibility (by referring to his "lifestyle of years ago") and drawing conclusions not supported by the hearing record about the amount of work that plaintiff was capable of doing.

New Jersey — When a federal judge remands a disability benefits case to an ALJ with specific instructions concerning additional findings to be made, it would pay for the ALJ to take pains to comply with remand instructions. In *Cocagee v. Commissioner*, 2009 WL 2356875 (D.N.J., July 29, 2009) (not officially published), U.S. District Judge Jose L. Linares remanded the case a second time, pointing out the ALJ's failure on remand to follow the instructions that Judge Linares had given. The court determined that the ALJ still had not given adequate consideration to or explanation for disregarding the opinions expressed by the HIV+ plaintiffs' physicians for believing that she was not able to work, had cited only one or two forms in a voluminous medical record, and had improperly given greater weight to testimony from a "neutral" expert who had never examined or treated the plaintiff. Judge Linares determined that a new remand was necessary to determine whether plaintiff was sufficiently disabled to be entitled to Social Security disability benefits, and instructed the ALJ to do so in compliance with his original 2007 remand order.

New York — U.S. District Judge Dora L. Irrizarry denied a motion by the Commissioner for summary judgement an remanded an HIV-related disability case for further proceedings in *James v. Commissioner of Social Security*, 2009 WL 2496485 (E.D.N.Y., Aug. 14, 2009). While finding that substantial evidence supported the administrative finding that the plaintiff's HIV+ status did not provide the basis for finding physical disability, the court opined that a remand was required because plaintiff had submitted new treating physician evidence concerning psychological disability at the appeals council stage, but that evidence had not been adequately discussed in the resulting decision denying benefits.

New York — In *Hall v. Astrue*, 2009 WL 2366891 (E.D.N.Y., July 31, 2009), U.S. District Judge Nicholas G. Garaufis granted judgement on the pleadings to the Social Security Commissioner, finding no fault with an ALJ's conclusion that the HIV+ plaintiff was not qualified for disability benefits. Judge Garaufis's summary of the evidence shows that although the plaintiff was diagnosed with full-blown AIDS at one point and had wasted down to a very low weight in relation to his height, he had apparently responded robustly to treatment, put on weight, was not suffering from opportunistic infections, had achieved a low viral load and reasonably high T-cell count, and was not found by his doctor to be substantially limited in any activities by virtue of his HIV status.

Texas — In *Cannon v. Astrue*, 2009 WL 2448261 (S.D.Texas, Aug. 6, 2009), the court ordered a remand for reconsideration of the denial of disability benefits to the plaintiff, who had contracted HIV as a minor and was appealing the denial of benefits from both before and after she reached age 18. The court found two critical errors in the ALJ's decision: a failure to take into account evidence of depression suffered by the plaintiff and its impact on her ability to work (including no explicit consideration to evidence offered from her school), and the failure of the ALJ to deal adequately with the medical opinion offered by the plaintiff's treating physician. The ALJ found the doctor's opinion not credible, but did not apply the requisite analysis to explain this decision, merely citing cases that were clearly distinguishable on relevant grounds. A.S.L.

AIDS Law & Policy Notes

Alabama Department of Corrections officials have ended a long-term policy that banned HIV+ inmates from work release programs. According to a news release from the ACLU on August 13, that organization, which has waged a valiant long-term campaign against the ban, the ACLU has been battling this issue in Alabama since 1987.

The U.S. Department of Justice issued a "fact sheet" on July 16, informing state licensing boards and occupational training schools that barring people with HIV from licensed professions such as barbering, massage therapy and home health care assistance violates the Americans With Disabilities Act, as amended in 2008 to make certain that HIV infection is treated as a disability. In a press release dated July 17, Lambda Legal reports that the DOJ action came in response to submissions from AIDS Advocacy Groups documenting that there was a problem around the country of licensing agencies that were considering HIV infection to be disqualifying for these professions, without any evidence that HIV-infected individuals presented any significant risk to those who would be receiving their services. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Abrams, Kathryn, *Barriers and Boundaries: Exploring Emotion in the Law of the Family*, 16 Va. J. Soc. Pol'y & L. 301 (Winter 2009).

Alexandre, Michel, *When Freedom Is Not Free: Investigating the First Amendment's Potential for Providing Protection Against Sexual Profiling in the Public Workplace*, 15 Wm & Mary J. Women & L. 377 (Winter 2009).

Anderson, Bebe J., *Lesbians, Gays, and People Living with HIVP: Facing and Fighting Barriers to Assisted Reproduction*, 15 Cardozo J. L. & Gender 451 (2009).

Archibald, Catherine Jean, *De-Clothing Sex-Based Classifications: Same-Sex Marriage is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. Ky. L. Rev. 1 (2009).

Badgett, M.V. Lee, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (NYU Press, 2009) (book length treatment of research on the impact of same-sex marriage in jurisdictions where it has become possible).

Ball, Carlos A., Introduction, *Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage*, 61 Rutgers L. Rev. 493 (Spring 2009).

Beeler, Jessica L., *Witt v. Department of the Air Force Subjects "Don't Ask, Don't Tell" to Intermediate Scrutiny*, 39 Golden Gate U. L. Rev. 363 (Spring 2009).

Bentele, Ursula, *Mining for Gold: The Constitutional Court of South Africa's Experience With Comparative Constitutional Law*, 37 Ga. J. Int'l & Comp. L. 219 (Winter 2009).

Burrell, Thomas H., *Judicial Regimes and Same-Sex Marriage: Enforcing Judicially Determined Personal Autonomy at the Expense of Majoritarian Democracy*, 35 Ohio N.U.L. Rev. 619 (2009).

Collins, Kristin A, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 Vanderbilt L. Rev. 1085 (May 2009).

Curtis, Michael Kent, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 Wake Forest L. Rev. 431 (2009).

Dane, Perry, *A Holy Secular Institution*, 58 Emory L.J. 1123 (2009) (suggests that the religious and secular are so intertwined in the public conception of marriage that attempts to argue the same-sex marriage case from an entirely secular perspective is inaccurate).

Delgado, Richard, and Jean Stefancic, *Four Observations About Hate Speech*, 44 Wake Forest L. Rev. 353 (2009).

Dubin, Arlene G., and Sheila Agnew, *As the Same-Sex Landscape Evolves Prepare to Serve This New Group of Clients*, NY Law Journal, Aug. 10, 2009, p. 9, col. 5.

Duncan, William C., *Speaking Up For Marriage*, 32 Harv. J. L. & Pub. Pol'y 915 (Summer 2009) (The George W. Bush Administration: A Retrospective)(provides a concise historical narrative on the marriage equality movement, from the perspective of a scholar who supports ex-President Bush's call for the Federal Marriage Amendment and opposes same-sex marriage).

Eichner, Maxine, *School Surveys and Children's Education: The Argument for Shared Authority Between Parents and the State*, 38 J. L. & Educ. 459 (July 2009).

Eskridge, William N., Jr., and John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 Tex. L. Rev. 1273 (June 2009).

Estin, Ann Laquer, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J. L. & Pub. Pol'y 267 (Spring 2009).

Faiaz, Farnaz, *Just Say No?: Redifining the Foundation of Abstinence Education in the United States*, 9 Hous. J. Health L. & Pol'y 97 (Fall 2008).

Gabilondo, Jose, *When God Hates: How Liberal Guilt Lets the New Right Get Away with Murder*, 44 WAke Forest L. Rev. 617 (2009).

Fellmeth, Aaron X., *Nondiscrimination as a Universal Human Right*, 34 Yale J. Int'l L. 588 (Summer 2009).

Flynn, Taylor, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 Temp. Pol. & Civ. Rts. L. Rev. 465 (Spring 2009).

Ford, Michael D., *How Bromfield v. Mukasey Correction Applied U.S. Immigration Law in a Victory for Civil Rights and a Scathing Rebuke of Jamaica's Pervasive Homophobia*, 40 U. Miami Inter-Am. L. Rev. 495 (Spring 2009) (superb student note on LGBT asylum/withholding of removal doctrine).

Frommell, David M., *Pedophiles, Politics, and the Balance of Power: The Fallout From* United States v. Schaefer *and the Erosion of State Authority*, 86 Denver Univ. L. Rev. 1155 (2009).

Fry, Matthew, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 Temp. L. Rev. 545 (Summer 2008).

Gardina, Jackie, *Let the Small Changes Being: President Obama, Executive Power, and "Don't Ask Don't Tell"*, 18 B.U. Pub. Int. L.J. 237 (Spring 2009).

Gavin, Justin, *Deliberate Indifference Under Sec. 1983: Do the Courts Really Care?*, 28 Rev. Of Lit. 953 (Summer 2009).

Gilreath, Shannon, *"Tell Your Faggot Friend He Owes Me $500 For My Broken Hand": Thought on a Substantive Equality Theory of Free Speech*, 44 Wake Forest L. Rev. 557 (Summer 2009).

Griffin, C.J., *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 Rutgers L. Rev. 409 (Winter 2009).

Hertz, Frederick, and Emily Doskow, *Making It Legal: A Guide to Same-Sex Marriage, Domestic Partnerships & Civil Unions* (Berkeley, CA: Nolo Press, 2009).

Hess, Edward, *The rights of Cohabitants: When and How Will the Law be Reformed?*, 39 Fam. L. 405 (May 2009).

Holladay, Jennifer, and Catherine Smith, *A Cautionary Tale: The Obama Coalition, Anti-subordination Principles and Proposition 8*, 2009 Denver Univ. L. Rev. 819 (2009).

Hovey, Jaime E., *Nursing Wounds: Why LGBT Elders Need Protection From Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 Elder L. J. 95 (2009).

Huntington, Clare, *Happy Families? Translating Positive Psychology Into Family Law*, 16 Va. J. Soc. Pol'y & L. 385 (Winter 2009).

Joslin, Courtney G., *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 30 Ohio St. L. J. 563 (2009).

Kohn, Nina A., *Outliving Civil Rights*, 86 Wash. U. L. Rev. 1053 (2009) (critiques impact of elder sexual abuse laws on the sex lives of older persons, among other things).

Kotkin, Minna J., *Diversity and Discrimination: A Look at Complex Bias*, 50 Wm. & Mary L. Rev. 1439 (April 2009).

Lipps, Emily R., Janice M. v. Margaret K.*: Eliminating Same-Sex Parents' Rights to Raise Their Children by Eliminating the De Facto Parent Doctrine*, 68 Md. L. Rev. 691 (2009).

Lise, Anthony M., *Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianist, and Same-Sex Equality*, 12 N.Y. City L. Rev. 129 (Fall 2008).

Lyke, Sheldon Bernard, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 Wm. & Mary J. Women & L. 633 (Spring 2009).

Mahoney, Kathleen, *Hate Speech, Equality, and the State of Canadian Law*44 Wake Forest L. Rev. 321 (2009).

McLaughlin, Julia Halloran, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 Wis. J.L. Gender & Soc'y 145 (Spring 2009).

Melish, Tara J., *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 Yale J. Int'l L. 389 (Summer 2009).

Morant, Blake D., *Equality-Based Perspectives on the Free Speech Norm: Twenty-First Century Considerations — An Introductory Essay*, 44 Wake Forest L. Rev. 315 (2009).

More, Alex, *Coming Out of the Water Closet: The Case Against Sex-Segregated Bathrooms*, 17 Tex. J. Wmn & L. 297 (Spring 2008).

Murray, Melissa, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L. Rev. 1253 (May 2009).

Musgrove, William R., *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. St. Thomas J.L. & Pub. Pol'y 125 (Spring 2008).

Nourse, Victoria F., *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 Cal. L. Rev. 751 (June 2009).

Poirier, Marc R., *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. Rev. 307 (Spring 2008).

Poirier, Marc R., *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 Conn. L. Rev. 1427 (July 2009).

Polikoff, Nancy D., *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 Rutgers L. Rev. 529 (Spring 2009) (Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage).

Pollet, Susan L, *Teens and Sex Offenses: Where Should the Law Draw the Line?*, N.Y.L.J., 8/14/2009, 4–5.

Radu, Mattei Ion, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 Vill. L. Rev. 247 (2009).

Reeves, Anthony R., *Sexual Identity as a Fundamental Human Right*, 15 Buff. Hum. Rts. L. Rev. 215 (2009).

Reichlen, Michele, *Civil Unions Under the Maryland Era: How the Illusion of Equality is an Equal Rights Avoidance*, 38 U. Baltimore L. Sc. 305 (Winter 2009).

Rhein, Jennifer L, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L. J. 165 (2009).

Rose, Katrina C., *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 Temp. Pol. & Civ. Rts. L. Rev. 397 (Spring 2009).

Sacks, Julie, and Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 Albany L. Rev. 147 (2009).

Schleppenbach, John R., *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union., 17 Elder L. J. 31 (2009).*

Spiropoulos, Andrew C., *Just Now Who We Are: A Critique of Common Law Constitutionalism*, 54 Vill. L. Rev. 181 (2009) (describes Lawrence v. Texas as an example of common law constitutionalism at work).

Stein, Edward, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 Rutgers L. Rev. 567 (Spring 2009) (Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage).

Strand, Palma Joy, *Law as Story: A Civic Concept of Law (With Constitutional Illustrations)*, 18 S. Cal. Interdisc. L.J. 603 (Spring 2009).

Strang, Lee J., *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms By Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 Hastings L.J. 927 (May 2009).

Strasser, Mark, *A Little Older, A Little Wiser, and Still Committed*, 61 Rutgers L. Rev. 507 (Spring 2009) (Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage).

Strauss, David A., *The Modernizing Mission of Judicial Review*, 76 U. Chi. L. Rev. 859 (Spring 2009).

Thorson, Louis, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?* 92 Marquette L. Rev. 617 (Spring 2009).

Toro, John C., *The Charade of Tradition-Based Substantive Due Process*, 4 NYU J. L. & Liberty 172 (2009).

Tsesis, Alexander, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 Wake Forest L. Rev. 535.

Turner, J. Lauren, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 Fam. Ct. Rev. 552 (July 2009).

Turnipseed, Terry L., *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance From Incest Prosecution?*, 32 Hamline L. Rev. 95 (Winter 2009) (based on undocumented speculation that there is some sort of trend of adult adoptions of lovers that will bring the incest issue before the Supreme Court).

Valentine, Sarah E., *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 Mich. St. L. Rev. 1053 (Winter 2008).

Walters, Rebecca, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples*, 17 Am. U.J. Gender Soc. Pol'y & L. 521 (2009).

Weithorn, Lois A., *Can A Subsequent Change in Law Void a Marriage That Was Valid At Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063 (May 2009) (Note: California Supreme Court ruled after this article went to press that the correct answer to the question was "No.").

Woods, Jordan Blair, *Don't Tap, Don't Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. Gender Race & Just. 545 (Spring 2009).

Specially Noted:

Westlaw now has the text of 9th Circuit Chief Judge Alex Kozinski's ruling on the sexual orientation discrimination grievance brought by a lesbian court employee whose same-sex spouse was being denied employee benefits coverage. See In the Matter of Karen Golinski, 2009 WL 2222884 (9th Cir., Jan. 13, 2009) (not officially published). This was an internal grievance ruling, not a ruling on the merits by a full panel of the court. Nonetheless, by one of its more conservative members.

Nolo Press has published a comprehensive guide to legal representation for same-sex couples involved with marriage, domestic partnerships or civil unions, by the leading California practitioner, Frederick Hertz and Emily Doskow. Especially valuable is that they will make available free legal updates to the information in the book through the publisher's website, Nolo.com. Given the extraordinary pace of change in this field, that is an important feature.

Symposium, Intersections of Transgender Lives and the Law, Vol. 18, Temple Political and Civil Rights Law Review (Spring 2009).

AIDS & RELATED LEGAL ISSUES:

Anderson, Bebe J., *Lesbians, Gays, and People Living with HIVP: Facing and Fighting Barriers to Assisted Reproduction*, 15 Cardozo J. L. & Gender 451 (2009).

Robinson, Russell K., *Racing the Closet*, 61 Stanford L. Rev. 1463 (April 2009) (important examination of HIV in the black community and the "down low" phenomenon).

Sears, Brad, *HIV Discrimination in Health Care Services in Los Angeles County: The Results of Three Testing Studies*, 15 Wash. & L. J. Civ. Rts. Soc. Just. 85 (Fall 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.