CONGRESS APPROVES AND PRESIDENT SIGNS FIRST FEDERAL LAW AFFIRMATIVELY TO PROTECT LGBT INDIVIDUALS

Although Congress has approved some laws in the past that were seen as advancing the gay rights legislative agenda by removing adverse policies, such as its 1990 tacit repeal of the gay immigration ban when it adopted a revised section on medical exclusions that silently dropped “sexual deviation” from the list, history was definitely made on October 22 when the Senate voted 68-29 to approve S.1390, a defense spending bill that included among its provisions the Matthew Shepard Hate Crimes Prevention Act, the first federal enactment affirmatively to protect individuals based on actual or perceived sexual orientation or gender identity. The bill had previously been approved in a stand-alone vote in the House on April 29, by a vote of 249-175, and was approved by the House as part of the same defense spending bill on October 8 by a vote of 281-146.

The measure, which President Barack Obama signed into law on October 28, expands on existing federal hate crimes law to add the categories of gender, sexual orientation, gender identity and disability to the existing categories of race, color, religion and national origin. It provides for the amendment of 18 U.S.C. sec. 249 to add the new categories to the existing U.S. Code provisions on hate crime prevention, and authorizes federal prosecution by the Justice Department, and assistance to states in enforcing their similar hate crimes laws. Since only some states have included sexual orientation and/or gender identity in their hate crimes laws, in states lacking such provisions the federal law will provide the only authorization for direct law enforcement activity.

Hate crimes laws are controversial, with some critics arguing that they grant preferential treatment to certain groups, and threaten freedom of speech and religious freedom by making it possible to prosecute individuals because of their political or religious beliefs opposing particular social groups. Defenders of the laws point out that no “thought crimes” are criminalized by them; rather, they focus on otherwise criminal acts of violence where the victims are particularly targeted because of specified personal characteristics. While speech may be relevant to determining whether a victim was targeted because of their status, the defendant is being prosecuted for the crime, not the speech. Most of the federal action authorized under the law is to assist states in enforcing their own hate crimes statutes.

Some opponents of the measure protested against it being presented to the Senate as a part of the defense appropriations package, since they did not favor the hate crimes provisions but were loath to vote against the military appropriation. But this is a venerable method for presenting controversial methods in the Senate, where the filibuster rules allow determined minorities to prevent floor votes on controversial measures and non-germane amendments are generally allowed to pending legislation, and it is a tactic that has been used by many of the opponents of the hate crimes bill to win enactment of their favored legislative proposals. The measure had already overwhelming passed the House, so its enactment through this strategy in the Senate was hardly a perversion of democracy.

The provisions on sexual orientation and gender identity had been named for Matthew Shepard, the young Wyoming college student who was killed in a homophobic attack a decade ago, and James Byrd, Jr., an African-American man who was the victim of a horrendous hate crime, whose deaths became a rallying point for the passage of federal hate crimes legislation. It was the first item on the list of top legislative priorities on LGBT issues for the Obama Administration. Now that it has been enacted, the next item up on the list is the Employment Non-Discrimination Act (ENDA), which, in its inclusive version including both actual and perceived sexual orientation and gender identity, has wide co-sponsorship in both houses and has received a successful hearing in the relevant House committee. Some pundits were predicting a vote on ENDA in the House before the end of calendar 2009, and enactment during 2010, after which attention would turn to several other pressing matters, including repealing the Defense of Marriage Act and the military Don’t Ask, Don’t Tell policy (to be replaced with a ban on sexual orientation discrimination in the military), spousal benefits for same-sex partners of federal employees, and recognition of committed same-sex couples under the immigration laws. A.S.L.

LESBIAN/GAY LEGAL NEWS

Montana Supreme Court Rules for Lesbian Co-Parent in Custody/Equitable Distribution Dispute

“Sadly, this case represents yet another instance in which fellow Montanans who happen to be lesbian or gay, are forced to battle for their fundamental rights to love who they want, to form intimate associations, to form family relationships, and to have and raise children — all elemental, natural rights that are accorded presumptively and without thought or hesitation, to heterosexuals.” So wrote Justice James C. Nelson in a bold concurrence, while casting a vote alongside five other Justices of the Montana Supreme Court who, on October 6, 2009, affirmed a lower court’s application of a state statute awarding Michelle Kulstad a parental interest over the objection of Barbara Maniaci, her ex-partner and legal parent of two minor adopted children. Kulstad v. Maniaci, 2009 WL 3179441. The Montana Supreme Court also affirmed the lower court’s application of equitable distribution principles to the couple’s jointly-acquired personal and real property.

Maniaci and Kulstad met in late 1995, and within a relatively short amount of time they moved in together. They exchanged rings on March 18, 1996, and wore those rings until the fall of 2006. Although the couple never obtained any formal recognition of their relationship, the two were indisputably partners nonetheless. Maniaci purchased a 4.5 acre tract of land in Montana for $30,000 in July 1995, and spent another $43,214.73 to improve the property that year. She, however, did not have enough money to finish building the house, so Kulstad agreed to move to Montana and contribute her money and labor to help complete the construction of the home. The court noted that Kulstad contributed more money and labor to the construction of the home.
house than Maniaci, even though Kulstad did not share title to the real property. Maniaci, however, assured Kulstad that “the property would be divided equally should their relationship end.” Maniaci also executed a will in 1998 that left the real property to Kulstad.

As Kulstad’s assets dwindled, however, she incurred credit card debt for the benefit of the parties. This included paying to finish the basement office for Maniaci’s chiropractic practice and purchasing malpractice insurance, among other items needed for Maniaci’s practice. Maniaci initially agreed to help pay off Kulstad’s credit card debt, but she failed to do so. When Maniaci received inheritance monies in 2001, she refused to use such funds to pay down Kulstad’s credit cards. Instead she deposited these monies into a separate account to which only she had access. Kulstad eventually filed for bankruptcy in May 2002.

Meanwhile, in mid-February 2001, one of Maniaci’s chiropractic patients, Camilla Eddy, asked Kulstad and Maniaci to adopt her great-grandson, L.M. Eddy believed L.M.’s mother provided inadequate care for the child. In what appears to be a dramatic turn of events left undiscussed by the court, L.M.’s mother eventually relinquished custody to Maniaci and Kulstad. Kulstad and Maniaci thereafter took L.M. to the hospital and entered his name as L.L. Kulstad-Maniaci.

The couple sought legal advice regarding same-sex adoptions. They were advised that under Montana law, only one of them could adopt L.M. The parties decided that Maniaci would be the adoptive parent, that L.M. would call only one of them “mom” and that L.M.’s last name would not be hyphenated. The couple agreed, however, that “they would function equally as parents even though only one of them could adopt L.M.” The social worker that worked on this adoption was fully aware that Kulstad and Maniaci were in a committed relationship, and understood that Kulstad would co-parent and support L.M.

Maniaci decided in 2003 that she wanted to adopt a girl. Although Kulstad initially objected to adopting another child, Maniaci went forward with the adoption. The couple understood that they would each function as parents to the new child. Eventually, Maniaci adopted A.M. from Guatemala.

Kulstad lived with the children and functioned as their parent on a day-to-day basis for the remainder of the relationship. The couple otherwise functioned as any couple would, with Maniaci being the primary care-giver during the day while Kulstad worked outside the home, and Kulstad caring for the children while Maniaci saw chiropractic patients in the basement office of the house in which they lived.

Eventually their relationship took a turn for the worse. On January 19, 2007, Kulstad filed a petition to dissolve the parties’ common law marriage and to equitably distribute the parties’ assets. She further sought an order granting her a parental interest, implementing a parenting plan, and the appointment of a guardian ad litem. Missoula County District Judge Edward P. McLean denied Maniaci’s motion to dismiss, appointed a guardian ad litem, and issued the TRO. Judge McLean later rejected the dissolution petition on the basis that Montana law does not recognize same-sex marriages.

On March 20, 2007, Judge McLean held a hearing to determine whether Kulstad had a parental interest in the minor children under sec. 40-4-228, MCA, whether a parenting plan was warranted and whether the TRO should remain in effect. Section 40-4-228, MCA was enacted in 1999 and provides that “when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3.” Section 40-4-211 (4) (b), MCA, allows a nonparent standing to seek a parental interest of a minor child if the person has established a child-parent relationship.

Judge McLean concluded that Kulstad had established by clear and convincing evidence that a child-parent relationship existed between her and the minor children in accordance with sec. 40-4-211 (4) (b) and (6), MCA. The court determined that an interim parenting plan was in the best interest of the children and kept the TRO in place with the exception that Kulstad could return to the former family home for visitation changes.

After a bench trial on May 22 and 23, 2008, Judge McLean found that Maniaci had failed to present any credible evidence to show that continuing the children’s relationship with Kulstad would not be in their best interest given each child’s attachment disorder. Therefore, the court awarded Kulstad a parental interest in L.M. and A.M. The court further determined that Kulstad would have equal decision-making authority with Maniaci regarding significant matters affecting the children.

Judge McLean also found that Maniaci and Kulstad were domestic and financial partners with long-term commitments. Therefore, the court applied equitable distribution principles to the jointly acquired assets of the couple, noting that Kulstad should be compensated for her significant financial contributions, to avoid unjustly enriching Maniaci. Judge McLean therefore awarded Kulstad a flat monetary payment and title to a Kia Sportage vehicle.

On appeal to the Montana Supreme Court, Maniaci challenged sec. 40-4-228, MCA, arguing that the statute improperly fails to require a court to determine the “fitness” of a natural parent before awarding a nonparent a parental interest based upon the best interests of the child. Maniaci also appealed the factual determinations of the lower court, as well as the equitable distribution of the couple’s property.


Writing for the majority, Justice Brian Morris distinguished the statute in Troxel from the instant case because sec. 40-4-228, MCA requires a showing by the party seeking visitation rights of a pre-existing child-parent relationship. Further, the statute mandates that the parent’s due process rights be balanced with the children’s constitutional rights in determining the best interest of the child. Therefore, the Montana Supreme Court concluded that the more narrowly tailored sec. 40-4-228, MCA would pass muster under the analysis in Troxel.

Maniaci further argued that Kulstad must show Maniaci was an unfit parent before being awarded a parental interest, based upon Polasek. The court rejected this argument because the statute at issue in Polasek, sec. 40-9-102, MCA, a grandparent contact statute, contained different language specifically requiring such showing, as opposed to sec. 40-4-228, which did not. The Montana Supreme Court also noted that Troxel did not reach the issue of whether all nonparental visitation statutes must include a showing of harm or potential harm to the child as a condition precedent to granting visitation, and took that as a sign that such a showing was not in fact required.

The Montana Supreme Court otherwise determined that the lower court’s finding of Kulstad’s parental interest was supported by the credible evidence adduced by the lower court. Justice Morris wrote: “Maniaci cannot rewrite the history of the fact that she and Kulstad lived together for more than 10 years and jointly raised the minor children in the same household”.

The court also affirmed the lower court’s equitable distribution of the couple’s personal and real property. The Montana Supreme Court noted that it had previously approved equitable distribution within the context of unmarried cohabitants. Anderson v. Woodward, 2009 MT 144, 250 Mont. 343.

Justice Jim Rice was the sole dissenter. Justice Rice argued that sec. 40-4-228, MCA was unconstitutional because it impermissibly interfered with a parent’s constitutional right to raise their children. According to Rice, the majority went too far and misconstrued Troxel, because the Supreme Court did not “define the precise scope of the parental due process right in the visitation context.” He writes that the majority deferred to the misguided legislature and failed to exercise its mandate and strike down sec. 40-4-228, MCA as violative of a parent’s due process right.

Justice Rice argues, alternatively, that even if the statute was constitutional, the lower court erred in awarding Kulstad a parental interest. He argues that there was only evidence that Maniaci engaged in conduct contrary to an exclusive child-parent relationship with her children. How-
Voters Confront Gay Partner Issues in Maine and Washington State

This issue of Law Notes goes to press just days before voters in Maine and Washington State will weigh in on legal rights of same-sex partners. In Maine, the so-called “citizen’s veto” process will be tested when the recently enacted law authorizing marriages for same-sex couples is voted up or down. In Washington State, the referendum affords voters an opportunity to support or oppose a newly enacted law expanding the rights of same-sex domestic partners to approximate those of marriage under state law. Confusingly, a yes vote in Maine repeals the same-sex marriage law, while a yes vote in Washington State retains the expanded domestic partnership law. In Washington State, there has been significant litigation over side issues accompanying the referendum, capturing the attention of the U.S. Supreme Court (see below) on the question whether it would violate the 1st Amendment for the state to release the names of those who signed petitions to put R-71 on the ballot. Polling suggests that predicting the results in either state would be foolhardy, but by the time many of our readers receive this newsletter, they will be known. Neither of the enactments has gone into effect, being stayed until they are voted upon. In Tacoma, U.S. District Judge Ronald Leighton rejected a last-minute move by Family PAC, opponents of gay rights, to obtain an “emergency” suspension of a state law banning contributions above $5,000 in the final weeks of a campaign and requiring public identification of many donors. Seattle Times, Oct. 28. A.S.L.

Texas Judge Finds Same-Sex Marriage Bans Unconstitutional While Asserting Jurisdiction Over Divorce Petition

In a surprise move, Texas District Judge Tena Callahan, who was elected to the bench in the 302nd Family District Court in Dallas in 2006, ruled October 1 that a same-sex couple who married in Massachusetts and subsequently move to Dallas can get a divorce from the Texas Family Court. In the Matter of the Marriage of J.B. and H.B., No. DF-09-1074 (302nd Judicial District, Dallas County, Texas, October 1, 2009).

Judge Callahan issued a brief, one-page order, which technically was responding to an attempt by Attorney General Greg Abbott to intervene in the case. Abbott had filed his Intervention a week after the divorce petition was filed last January, arguing that the court did not have jurisdiction to decide the divorce case because of the state’s constitutional and statutory bans on performing or recognizing same-sex marriages.

In her Order, Judge Callahan provided no explanations or legal reasoning, merely asserting that the constitutional and statutory provisions violate “the right to equal protection” and therefore violate “the 14th Amendment of the United States Constitution,” and so, she continued, “the Court FINDS that it has jurisdiction to hear a suit for divorce filed by persons legally married in another jurisdiction and who meet the residency and other prerequisites required to file for divorce in Dallas County, Texas.”

In so ruling, she also ordered that the Attorney General’s Plea to Jurisdiction was denied and that the Intervention he had filed in the case was to be “stricken,” whatever that means. Abbott immediately issued a statement announcing that he was appealing the ruling “to defend the traditional definition of marriage that was approved by Texas voters,” and Governor Rick Perry quickly chimed in, stating: “The laws and constitution of the State of Texas define marriage as an institution involving one man and one woman. Today’s ruling purports to strike down that constitutional definition — despite the fact that it was recently adopted by 75 percent of Texas voters.” Perry added that he believed the ruling is “flawed and should be appealed.”

Contrary to these comments, Judge Callahan prefaced her brief order with the statement that she was ruling “on the limited issue of whether this Court has jurisdiction” to divorce the parties to the action.

J.B. and H.B., who married in Cambridge, Massachusetts, in September 2006, after many years of living together as a couple, subsequently moved to Texas in 2008, residing in Dallas County. They decided the marriage wasn’t work-
if not reversed on appeal, but otherwise have no precedential value. Only appellate courts can issue decisions that are binding on other courts, and only the highest court of a state can issue decisions binding on all the courts of the state, so it will be a while before we can know how important this ruling is. But for now it has created quite a sensation in Texas, to judge by the local media reports. Undoubtedly anticipating how much it would disrupt her day, Judge Callahan arranged to issue the ruling late on Thursday and then took off to attend a full-day meeting today with her clerk, leaving behind a message on her chambers phone asking callers not to leave voicemails. This writer, frustrated at not being able to find the opinion, communicated with attorney Schulte, who sent out a copy together with his papers responding to the A.G.’s intervention, for which we thank him! His papers were the more valuable document for learning about the case, given the cryptic opinion by the judge. A.S.L.

California Appeals Court Revives Sexual Orientation Discrimination Claim by Salesman

In Wiedenmeier v. AWS Convergence Tech., Inc., 2009 WL 3165746 (Cal. App. 2d Dist., Oct. 5, 2009), a California appellate court reversed a trial court ruling that granted summary judgment for defendant company in a sexual orientation discrimination suit brought under the California Fair Employment and Housing Act (FEHA) by a gay and HIV+ former employee. The court centered its holding on whether “the bases for plaintiff’s termination were pretextual, and whether plaintiff submitted evidence raising a triable issue of material fact as to whether his termination was because of discrimination because of his sexual orientation.” The decision provides a rare look into the facts of a sexual orientation discrimination case under California law.

The court examined plaintiff’s circumstantial evidence by way of a three-part test, reasoning that “direct evidence of intentional discrimination is rare, and...such claims must usually be proved circumstantially.” The three parts require: “(1) the complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; and (3) the complainant must prove that this reason was a pretext to mask an illegal motive.” The court held that “[t]he evidence presented by plaintiff, taken as a whole, was sufficient to raise triable issues of material fact that would permit a trier of fact to find by a preponderance that intentional discrimination occurred.

Plaintiff was hired in 2003 to sell web advertising space for defendant company. The company argued that plaintiff had sent inappropriate emails, failed to net bigger clients, and that his job performance was “unsatisfactory.” The supervisor stated that he had no discriminatory intent and that “he was very close to a gay relative, had used a gay nanny for his children, and that his wife’s best friend is a gay man.”

Plaintiff claimed, in contrast, that he was a star employee, and that the timing of the termination, comments made by his supervisor, and lack of warning or discipline for the alleged infractions raised a triable question of discrimination.

Plaintiff had significant success as an employee at defendant company. He was “recognized with the first annual Platinum Club award for being defendant’s top national salesperson” in 2005, and in 2006 won another sales award that netted him a trip to a national meeting in Florida in March. Permitted to bring a guest, plaintiff requested to bring a male friend who shared his room. It was through this, plaintiff believed, that defendant company became aware of his sexual orientation.

In the months following the trip, his supervisor made two comments that caused plaintiff concern. First, at a dinner, the supervisor referred to the actors in a children’s television program as “just a bunch of gay men running around in purple tights.” The second comment took place at a cocktail party. While plaintiff’s supervisors and another person were talking, plaintiff approached them and asked, “Oh, have you guys met? Do you guys know each other?” The supervisor responded and said, “No, we just met each other. We both like titties — something you wouldn’t know much about.” When the plaintiff asked his supervisor if the group would be going out to dinner after the event, he responded, “No, you can leave.” Mere weeks later, plaintiff was fired because — in the words of his supervisor — “we think there are better types to call on blue chip advertisers.” Prior to his termination plaintiff had received neither written nor oral warnings about any problems with his work.

The court held as a result that “[t]his evidence of plaintiff’s raises, accolades, and revenue generation is sufficient to raise a triable issue of material fact disputing defendant’s claim that plaintiff was terminated because of dissatisfaction with his performance. Defendant dismisses this evidence as demonstrating that plaintiff performed well in the past, but did not show present satisfactory performance. Given the very short time frame between the award, the raise, and accolades that plaintiff received in March and April of 2006 and his termination in July 2006, we conclude plaintiff’s evidence raises a triable issue of material fact.”

Daniel Redman

Supreme Court Keeps Washington Petition Names Secret Without Ruling on Odd Constitutional Theory

In a non-explanatory order issued on October 20, the United States Supreme Court decreed that the names of those who signed petitions to put a Washington State referendum on the ballot to repeal the state’s recently-enacted law expanding benefits for registered domestic partners must be kept secret until a final ruling on the merits of the claim that revealing the names would violate the First Amendment. John Doe #1 et al. v. Reed, Washington Secretary of State, No. 09A3556 (Oct. 20, 2009).

Washington enacted a domestic partnership statute a few years ago, which afforded a list of rights and responsibilities to same-sex domestic partners that fell short of full state law equality with marital partners. Earlier this year, the legislature approved and the governor signed a law that was intended to provide domestic partners substantial equivalence under state law to marital partners. Opponents of the law, led by a group calling itself Protect Marriage Washington, collected sufficient signatures to put a repeal referendum on the ballot, which stayed implementation of the law pending the vote on November 3.

Under Washington State’s Public Records Act, state officials were prepared to release the names of those who signed the petitions at the request of several groups, but Protect Marriage Washington went to court on behalf of some “John Doe” petition signers, seeking to keep the names confidential. They argued that revealing the names could subject the signers to persecution by same-sex marriage advocates, and persuaded federal district judge Benjamin Settle that this would violate the First Amendment by “chilling” political speech. The district judge bought the argument, at least to the extent of ordering preliminary injunctive relief on September 10, an action that requires the court to find that the plaintiffs are likely to succeed on the merits and that failing to issue the preliminary injunction will cause irreparable injury to the plaintiffs. The plaintiffs argued that a release of the names can’t be undone, so they had to be kept secret until the case was ultimately decided.

The state appealed to the U.S. Court of Appeals for the 9th Circuit, which issued a brief order on October 15 reversing the district judge and ordering release of the names. The 9th Circuit panel did not explain its reasoning, indicating it would issue a full opinion later. The Protect Marriage group immediately petitioned the Supreme Court to have the 9th Circuit’s order stayed, and the Supreme Court voted 8-1, Justice John Paul Stevens dissenting, to stay the 9th Circuit’s order and keep the District Court’s preliminary injunction in effect “pending the timely filing and disposition of a petition for a writ of certiorari.” The Court indicated that if it did not ultimately grant review in the case, the 9th Circuit’s order could go into effect, but that if it granted review, the preliminary injunction would continue until the Supreme Court could decide the case.

Either way, of course, this means the names will not be released before the election on November 3, so Protect Marriage Washington has at least an interim victory and will avert the distraction from the campaign of having the names of petition signers publicized.
Protect Marriage’s theory of the case proposes that democracy can only function if people are free to express their views anonymously through non-disclosed petitions and secret ballot votes. This theory should disturb “originalists,” since the idea of secret balloting was not widely accepted in the late 18th century when the First Amendment was adopted. During the early period of our country’s history, before the invention of voting machines, elections were very public affairs. People would gather at polling places to observe the proceedings, voters would publicly declare their preferences, and everyone was taking notes and keeping score. It was only later in our history that the idea of secret ballot voting caught on.

Protect Marriage’s case would take that one step further, finding First Amendment protection for voter identity to an extent that would override the contrary trend towards transparency evidenced by the adoption of Public Record Laws such as Washington State’s. Perhaps taking it even one step further, they would argue the unconstitutionality of federal and state laws that make the names of donors readily available on state and federal web sites. Since their main argument is based on the reported harassment suffered by some prominent financial donors to California Proposition 8 last year — continuing in the form of organized boycott efforts against the Manchester hotels in San Diego, for example — its logic would extend to ending such donor disclosures, which would severely undermine attempts to let the public know who is behind public policy referenda.

This one bears close watching, A.S.L.

New York Court Finds “Exceptional Circumstances” Support Trans Dad’s Custody Petition

Does a female-to-male transsexual have standing to petition for custody of a child born to his former wife through donor insemination? In K.B. v. J.R., 2009 WL 3337592 (N.Y.Sup., Kings County, Oct. 14, 2009), Justice Esther M. Morgenstern of the New York Supreme Court, Kings County, has answered that question affirmatively.

The Petitioner, identified in the decision only as KB, was born a woman but has lived as a man since the age of 15. Though KB has received hormone treatments, he has not undergone gender reassignment surgery and is legally still a woman. KB and the Respondent, identified as JR, began living together in early 1998, and after Petitioner changed his name from Cassandra to KB in July of that year, the couple obtained a marriage license. To do so, both parties fraudulently represented that KB was biologically male.

In 1999, the couple decided to conceive a child through donor insemination. KB and JR jointly selected a sperm donor “whose characteristics and interests” matched those of the Petitioner, and in 2001 KB signed a consent form for JR to be inseminated. After three treatments, JR gave birth to a premature child whom the couple named KB Jr.

The current action arose after May 2006, when the relationship soured and the parties became estranged. Both JR and KB filed petitions for custody of KB Jr., with KB pointing to the fact that JR left the child with the petitioner when she left the marital home. Because of KB Jr.’s premature birth, he apparently requires a number of medical considerations. Each of the parties insisted that the other had not looked after those needs, with JR accusing KB of feeding KB Jr. dairy products that aggravate the child’s asthma. Additionally, allegations of abuse by both JR and KB, against each other and against the child, went back and forth, but the court ultimately found KB’s version of events more credible. KB was awarded temporary custody of the child for safety reasons.

KB petitioned for full custody of KB Jr., and JR moved to dismiss the petition, claiming that KB had no standing. The Respondent argues that KB is a biological stranger, unrelated to the child, who could never have been legally married to the child’s mother because of New York’s ban on same-sex marriage. The Petitioner contends that the doctrine of equitable estoppel should prevent JR from claiming that KB was not the legal parent of KB Jr.

Equitable estoppel is essentially a doctrine of fairness, which bars a party from claiming a fact that is contradicted by the party’s earlier actions. Applied in this case, KB is arguing that because JR acted as if KB was the child’s father, she should not now be able to argue that KB is not. Although the court ultimately agreed with KB’s reasoning, equitable estoppel as it relates to the actions of the parents alone cannot confer standing on a biological stranger who seeks custody or visitation. So the opinion by Justice Morgenstern must rely on additional factors in determining KB’s standing.

New York has traditionally found that non-biological parents can’t claim custody of a child over the objection of the child’s natural parents unless a court finds “extraordinary circumstances” that would drastically affect the welfare of the child. The bar is set extremely high, because it is generally accepted that the court should not be in the business of taking children away from their parents just because they find that someone else might be a better guardian.

Morgenstern’s decision focuses on the fact that the child has bonded with KB as a father, and, she writes, “an abrupt termination of the father-son relationship...would put the child in a situation where his welfare could be affected drastically.” The court notes that security and stability “are vital to the successful personality development of a child,” and “where a natural parent affirmatively brought about or acquiesced in the creation of a secure, stable and continuing parent-child relationship with a third party who has become the psychological parent there comes a point where the ‘rebuttable presumption’ which, absent such a change, is employed to favor the natural parent disappears.”

The court notes that in addition to the strong bond between the child and the petitioner, alleged abuses by JR, as well as JR’s voluntary abdication of physical custody and parenting responsibility collectively amount to sufficient exceptional circumstances.

With JR unable to challenge KB’s standing, the case is remanded to determine custody of KB Jr.

Stephen Woods

Federal Court Dismisses Claim of Discrimination Based on Homosexuality, Distinguishing Discrimination Based on Effeminacy

A longtime municipal worker in the small town of San German, in southwestern Puerto Rico, was mercilessly harassed by coworkers. In order to protect him, his supervisors transferred him to a job he did not want. Even at the new job, homophobes hounded him. He sued his employer, but the federal district court dismissed his civil rights suit because the alleged discrimination was based on sexual orientation, which is not federally prohibited. If he had alleged that his failure to conform to masculine sex stereotypes incited the discrimination, he might have had a shot, said the court. Ayala-Sepulveda v. Municipality of San German, 2009 WL 3199861 (D. P.R. Sept. 30, 2009).

Luis Aik Ayala-Sepulveda worked for the municipality of San German for five years in various positions. In 2005 he was promoted to a position in the local emergency management office. In 2006, while he was taking a rescue course, his coworkers started ridiculing him. The harassment got worse after Luis had a 3-month affair with a coworker, Jose J. Rodriguez-Vega, in late 2007. Jose, who had been convicted of domestic violence, started harassing and threatening Luis. In early 2008, Luis complained to a supervisor, who tried to provide some protection. Jose’s threats did not stop, and another coworker, Pablo Miranda-Santa, began harassing Luis.

The solution offered by Luis’s supervisor and the town’s mayor was to transfer Luis to the municipal cemetery. Luis refused such a transfer on the ground that the harassers, and not the victim, caused the problem, and should suffer consequences. The mayor, however, stated that he believed Luis’s homosexuality was the problem, and insisted on a transfer. Luis started treatment for anxiety and panic attacks.

In May 2008, Luis filed a complaint with the state personnel office, which began an investigation. The mayor then transferred Luis to the town finance department as an accounting clerk. Meanwhile, Luis continued to suffer ridicule from his former coworkers at the emergency services department. In August 2008, Luis filed a complaint with the federal Equal Employment Opportunity Commission (EEOC) alleging discrimina-
tion based on sex and gender stereotyping under Title VII of the Civil Rights Act of 1964. He also alleged unlawful reprisals for bringing the complaint.

The EEOC dismissed the action. He then, in May 2009, filed the complaint in federal court, adding an allegation of violation of his right to due process and equal protection. The federal court, acting on a motion to dismiss, had to decide whether Luis stated a cause of action under Title VII for which relief could be granted.

Thus, he must state that the discrimination was based on sex, which is illegal under federal law, and not based on sexual orientation, which is not illegal. District Judge Gustavo A. Gelpi held that Luis had failed to make a proper allegation. All of the specific incidents raised in the complaint were based on Luis’s homosexuality, not on his failure to fit into masculine gender stereotypes, which would bring the case within the ambit of federal civil rights law. Although Luis did allege that the discrimination was based on his failure to seem sufficiently masculine, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”


Judge Gelpi also held that the claim based on retaliation could not stand. Courts allow a cause of action for retaliation when one complains of a violation of civil rights laws, and his or her supervisors retaliate for raising the complaint. However, the plaintiff must have a “reasonable belief that there is a Title VII violation.” Petitti v. New England Tel. & Tel. Co., 909 E2d 231 (1st Cir. 1990). Luis’s belief could not, according to the court, be “objectively reasonable since his complaint was founded entirely on sexual orientation, which is not a protected activity.”

Thus, Judge Gelpi dismissed the Title VII cause of action in its entirety.

In his complaint based on due process, Luis alleged that officials acting under color of state law deprived him of federally protected rights. Luis cited First Circuit cases that had held that the due process clause “protects government employees who possess property interests in continued public employment.” A government employee can only be fired if there is good cause and the employee is afforded some sort of hearing. However, the courts recognize a property interest only in continued government employment, not in continuing to perform particular functions, held the court. Since Luis was not terminated, but rather was transferred, he was not deprived of his right to continued employment. The court held that his due process rights were not violated, and dismissed Luis’s complaint. Alan J. Jacobs

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### N.Y. Appellate Term Panel Rejects Medical Substantiation Requirement for Trans Name Change

A panel of the Appellate Term of the New York Supreme Court in New York County has unanimously reversed a decision from February 2009 by Civil Court Judge Manuel J. Mendez that sought to impose a medical substantiation requirement before granting a name-change sought by a transsexual applicant. At the same time, the court cautioned in its October 21 ruling in *In the Matter of the Application of Winn-Ritzenberg*, No. 09-227, NYLJ, Oct. 27, 2009, p. 26, col. 1 (N.Y.Sup.Ct., App. Term, N.Y. Co.), that the name change did not signify a determination as to legal change of gender.

Leah Yuri Winn-Ritzenberg, having concluded that his gender identity was male, wanted to change his first name to Olin, and sought assistance from the Name Change Project of the Transgender Legal Defense & Education Fund, which filed a petition on Winn-Ritzenberg’s behalf in the New York City Civil Court, where it was assigned to Judge Mendez. Volunteer attorneys Brenna Devaney, Benjamin Edwards, Daniel Gonen and Janson Mao worked on the case. In an opinion that stirred outrage and consternation in the transgender community, Judge Mendez denied the petition, opinion that the court could not allow somebody born female to take up a male name without medical proof. The petition had been filed without such proof, on the understanding that New York Law freely allows people to change their names.

Decisions by the Civil Court are appealed to the Appellate Term of the Supreme Court, an intermediate appellate bench made up of designated trial court judges, whose decisions can be appealed in turn to the Appellate Division of the Supreme Court. TLDEF appealed on behalf of Winn-Ritzenberg, with amicus assistance from Lambda Legal and cooperating attorneys at Debevoise & Plimpton. Daniel Gonen argued the appeal.

The Appellate Term panel consisted of Justices Douglas E. McKeon, presiding, Martin Schoenfeld and Martin Shulman. They unanimously reversed Judge Mendez. “We exercise our discretion under CPLR 5704(b) and grant the transgendered petitioner’s application for a name change corresponding with petitioner’s male gender identity,” wrote the panel in a per curiam opinion. “In the absence of evidence of fraud, misrepresentation, or interference with the rights of others, the name change petition should have been granted.”

“There is no sound basis in law or policy to engraft upon the statutory provisions an additional requirement that a transgendered petitioner present medical substantiation for the desired name change,” the court continued. “Apart from the prevention of fraud or interference with the rights of others, there is no reason — and no legal basis — for courts to appoint themselves the guardians of orthodoxy in such matters,” the court commented, citing a prior ruling, *Matter of Guido*, 1 Misc. 3d 825, 828 [2003].

However, “in granting petitioner’s application,” the court concluded, “we do not address the separate issue of whether petitioner has changed gender for legal purposes.” This parting shot signals an unfinished debate among the courts about what would be necessary to recognize an individual’s change of identity as having legal significance in those instances where the law takes account of gender, such as the right to marry in most states, including at the time of writing New York. Many courts insist that only after a full gender transition including surgical alteration can an individual change his or her legal sex, which is a matter of considerable controversy among legal scholars and transgender rights advocates. A.S.L.

### Discovery Dispute May Delay Trial in Prop 8 Case

A dispute about a discovery demand in the pending federal lawsuit challenging the constitutionality of California Proposition 8 may delay the trial in the case, which has been scheduled to begin in January. Although on October 25 U.S. District Judge Vaughn R. Walker denied a motion to stay discovery while lawyers representing the Official Proponents of Proposition 8 ask the U.S. Court of Appeals for the 9th Circuit to reverse Walker’s October 1 ruling that they have no First Amendment right to refuse to turn over internal communications from the Proposition 8 referendum campaign, they are likely to seek a stay from the 9th Circuit. Walker’s original ruling on the discovery request is reported as *Perry v. Schwarzenegger*, 2009 WL 3234131 (N.D.Cal.).

*Perry v. Schwarzenegger* was filed last spring by star appellate attorneys Ted Olson and David Boies on behalf of two California same-sex couples who want to marry in their state of residence but cannot do so as a result of the passage of Proposition 8 in November 2008. Proposition 8 placed into the California Constitution a new section stating that only a marriage between one man and one woman will be “valid or recognized in California.” Its enactment put an end to new same-sex marriages in California, although the state Supreme Court ruled that marriages contracted prior to that enactment remained valid. Gay political groups in California are divided over whether to seek repeal of Prop 8 by initiative in 2010 or 2012, but one group has filed papers seeking a 2010 initiative.

The original named defendants in the lawsuit include Governor Arnold Schwarzenegger and Attorney General Gerry Brown in their official capacities as state officers, but since both of those officials declined to defend the constitutionality of the measure (and Brown actually argued before the California Supreme Court that it was unconstitutional), Judge Walker allowed the Proposition 8
Official Proponents to intervene as parties in the case to defend Proposition 8.

The theory of the lawsuit is that Proposition 8 violates the Equal Protection Clause of the 14th Amendment of the U.S. Constitution because it was intended to and did adopt a discriminatory policy about access to and recognition of marriages in California. During the discovery phase of the case, the plaintiffs are seeking to uncover evidence supporting their argument that Proposition 8 had a discriminatory purpose. Among their discovery requests to the Proposition 8 Proponents is a demand for “all versions of any documents that constitute communicating relating to Proposition 8, between you and any third party, including, without limitation, members of the public or the media.”

The Proponents objected to this demand, claiming that the information sought is privileged from discovery under the First Amendment and that the discovery demand is overly broad and burdensome. They point to instances where supporters of Proposition 8 were subjected to harassment and business boycotts, and claim that turning over the requested information would lead to more of the same. They argue that exposing all of these communications to the light of day could have a deterrent effect on future political speech and activity. In their new motion, filed with the court on October 8, they also suggest that it is inappropriate to force them to reveal their internal deliberations on a winning strategy in light of current political developments, stating that the concerns they have expressed “are especially salient where, as here, the losing side of a hard-fought referendum campaign seeks complete disclosure of the successful campaign strategy of the winning side, and it does so while preparing for a political ‘rematch.’”

Responding to these arguments, the plaintiffs pointed out that the names of all financial donors to the Proposition 8 campaign were required to be reported to state authorities and were subsequently posted on an open government website, so they were not demanding donor lists or information. Furthermore, political consultants to the Prop 8 proponents had actually published an article detailing their winning campaign strategy, so that was hardly a confidential secret. The communications the plaintiffs are now seeking are documents that would shed light on the motivations of those who proposed and sought to pass the measure, which could be useful in trying to prove that Prop 8 was proposed and pushed for discriminatory reasons.

Judge Walker decided the First Amendment issue against the Proponents, finding that what the Plaintiffs were seeking was potentially relevant to the lawsuit, but he agreed with the Proponents that the discovery request was too broad and burdensome. He ordered that the plaintiffs quickly refine their request to focus on the types of materials that are likely to lead to relevant evidence in the case.

Walker described as “general areas of appropriate inquiry” such things as “(1) communications by and among proponents and their agents (at a minimum, Schubert Flint Public Affairs [the outfit that handled the advertising campaign for Prop 8] concerning campaign strategy and (2) communications by and among proponents and their agents concerning messages to be conveyed to voters, without regard to whether the voters or voter groups were viewed as likely supporters or opponents or undecided about Prop 8 and without regard to whether the messages were actually disseminated or merely contemplated. In addition, communications by and among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com’s treasurer and executive committee, among others, would appear likely to lead to discovery of admissible evidence.”

The plaintiffs quickly redrafted their discovery request to meet the court’s guidelines, prompting the Proponents to file their appeal to the 9th Circuit and their motion before Judge Walker to stay his discovery order pending the appeal. They pointed out that once something has been disclosed, and can’t be “undisclosed,” so they would suffer irreparable injury to their First Amendment rights if the 9th Circuit accepted their argument after they had been forced to comply with Walker’s order. They reiterated their view that being forced to disclose the type of material being sought “will cause future initiative proponents to censor their speech with campaign volunteers, donors, supports, and agents, for fear that their communications will be publicly disclosed in future litigation” and that “it will silence initiative supporters who want to remain anonymous.” This last point picks up on a winning argument in a recent lawsuit in Washington State concerning whether the names of petition signers for the initiative to repeal the latest amendments to Washington’s domestic partnership law should be made public.

Judge Walker rejected the request for a stay on October 23. According to a report in the San Francisco Chronicle on Oct. 26, Walker found that the Proponents had failed to show that disclosure of the material sought in the revised discovery request would either violate freedom of speech or subject any parties to harassment. “It simply does not appear likely that proponents will prevail on the merits of their appeal,” he wrote. A.S.L.

Back to Square one for California DOMA Challenge

The Associated Press reported late in August that U.S. District Judge David O. Carter granted the federal government’s motion to dismiss the pending lawsuit of Smelt v. United States (U.S.Dist.Ct., Central Dist. Calif., Aug. 24, 2009) on the ground that the court lacked jurisdiction to hear the case. We had prepared an article about the decision based on the newspaper report, but it somehow did not find its way into our September issue.

The lawsuit claimed that the federal Defense of Marriage Act is unconstitutional, reciting a litany of constitutional provisions. Judge Carter reportedly accepted the government’s argument that because the case was originally filed in state court, it must be dismissed on the ground that the state court has no jurisdiction to hear suits against the federal government seeking declarations that federal statutes are unconstitutional. (The case ended up before Judge Carter because the federal government’s response to the filing of the complaint was to remove the case to federal court, then to move to dismiss it.) Of course, the federal court would have jurisdiction over such a claim as an original matter, and Judge Carter pointed out as much, indicating that the dismissal was without prejudice to the plaintiffs’ right to re-file the case as a federal lawsuit. This means that, at most, there would be a delay rather than an abandonment of the case, because Richard Gilbert, the plaintiffs’ lawyer, announced that the suit would be re-filed in federal court.

Gilbert represents Arthur Smelt and Christopher Hammer, a longtime couple who originally filed a federal suit challenging the constitutionality of DOMA many years ago. That suit came to grief when the U.S. Court of Appeals for the 9th Circuit ruled that they lacked standing to challenge DOMA because they were not married when that lawsuit was undertaken.

DOMA has two operative provisions: Section 2 says that no state is obligated to give full faith and credit to same-sex marriages performed in other states. Since the couple was not then married, this provision did not adversely affect them in any way. Section 3 says that the federal government will not treat same-sex couples as married for any purpose, even if they are legally married under the law of a state. (When DOMA was passed in 1996, no state permitted same-sex couples to marry, so this was entirely hypothetical.) Since the Smelt-Hammer couple was not married, again, the court said they were not adversely affected by the law. In order to have standing in federal court, a plaintiff must present a real case or controversy, not a hypothetical case. Thus, court said that only a married couple could challenge DOMA.

In May 2008, the California Supreme Court ruled that same-sex couples had a right to marry under the California constitution. The ruling went into effect in June 2008, and over the summer of 2008 Smelt and Hammer got married. Then the public narrowly voted in November 2008 to amend the California Constitution to end the right of same-sex couples to marry there. A legal challenge was filed to this amendment (Proposition 8), but it was upheld by the California Supreme Court. However, that court said that Prop 8 was not retroactive, and that the marriages that took place during the period June-November 2008 remained valid. Thus, for
purposes of California law, Smelt and Hammer are validly married.

They filed their new lawsuit in December 2008, claiming that as a married couple they were entitled to challenge the constitutionality of DOMA. But they filed their lawsuit in state court, because the federal court was unwilling to waive the normal filing fees and the couple, who are disabled and have limited resources, did not want to pay the federal court fees.

One wonders what their attorney, Richard Gilbert, was thinking in filing in state court. State courts do not have jurisdiction over claims against the federal government, which has only waived its sovereign immunity in specific kinds of cases to be heard in the federal court system. The Justice Department removed the case to federal court and then moved to dismiss it on jurisdictional grounds, also making the argument (unnecessary and, unfortunately, quite provocative) that DOMA is constitutional. Their brief in support of the motion was so provocative on the merits that it threatened to alienate gay supporters of the Obama Administration. The President renounced the most offensive arguments in that brief at a Gay Pride reception at the White House, and when the government filed its much toned-down reply brief to the plaintiffs’ responsive brief on the motion, the White House issued a statement reiterating the President's commitment to repeal DOMA.

This dismissal is merely a speed-bump, since clearly the federal district court would have jurisdiction over a case filed directly in that court. Furthermore, at the very least it should be possible for Smelt and Hammer to file a suit that appropriately alleges some deprivation of rights under federal law attributable to Section 3 of DOMA. (In support of its dismissal motion, the Justice Department argued that an alternative ground for finding lack of standing was the failure to allege in the complaint with any particularity that Smelt and Hammer had actually been adversely affected by DOMA.) It might be more difficult for them to assert a claim against Section 8, which does not have any real operative force and is purely symbolic, as the states have always had the right to refuse to recognize marriages that violate their public policy, so if Smelt and Hammer were to travel to another state and demand some form of recognition, Section 8 of DOMA would not be the reason they are turned down, although an intellectually lazy government official or court might well purport to rely on it. A.S.L.

5th Circuit Divided Over Same-Sex Harassment Case

A panel of the U.S. Court of Appeals for the 5th Circuit voted 2-1 to affirm a decision by the U.S. District Court for the Eastern District of Louisiana to grant summary judgment to the employer on Title VII sex discrimination and retaliation claims brought by a female employee complaining about sexual harassment by a female co-worker. Love v. Motiva Enterprises, 2009 WL 3334610 (Oct. 16, 2009) (not select for publication). The majority concluded, in a per curiam order signed by Circuit Judges Reavley and Smith, that Connie M. Love had failed to show that the alleged harasser was a “homosexual,” and thus could not meet the first test established by Oncale for same-sex harassment cases. It also concluded that disciplinary actions taken by the employer were apparently justified by the plaintiff’s poor job performance.

The record showed that the co-worker inflicted the plaintiff with numerous insults related to her physical appearance, especially her weight. There was also unwanted touching, and the use of derogatory language. The plaintiff offered hearsay evidence concerning the harasser’s sexual orientation, but the court determined that the evidence, even if believed, would not be conclusive on the point. The court never went on to consider whether the conduct was severe and pervasive enough to meet the high bar set by Title VII precedent for actionable harassment and hostile environment.

Dissenting, Circuit Judge James L. Dennis argued that the court erred in upholding a summary judgment when, in his view, the plaintiff had adduced sufficient evidence to create a factual question requiring resolution at trial. Plaintiff’s evidence showed a mixed of insulting and erotically tinged conduct by the harasser, especially after plaintiff returned to work after surgery being much slimmed down. While Judge Dennis agreed with the disposition of the retaliation claim, he concluded that plaintiff should have been allowed to proceed to trial on her sex discrimination and hostile environment claims, finding that the majority had misconstrued Oncale to require a plaintiff in such a case to show that the harasser sexually desired the plaintiff. Dennis labeled this interpretation a “faulty premise that an abuser must focus on his victim in a desirous or lustful way,” continuing: “Whether it is Sirey’s clearly sexually motivated advances such as, for example, the rubbing of her private parts on Love’s body or her insults and put-downs such as ‘sorry excuse for a woman,’ ‘fat cow,’ ‘bitch,’ ‘failure as a woman,’ ‘useless as a woman,’ and ‘[y]ou think that’s a body you have,’ they were all aimed at Love as a woman, i.e., ‘because of sex.’ For this reason alone, I believe that Love has established a submissible case that Sirey abused her ‘because of sex.’”

In a footnote, Dennis charges the majority with ignoring “that love-hate relationships, for example, are quite common and well documented,” so the majority’s insistence that this could not be a sexual harassment case because the harasser’s comments were laced with insults embraced an undesirably narrow understanding of the situations covered by Title VII.

Dennis also believed that Love’s allegations were sufficient for a hostile environment case, commented, “There is no doubt that Sirey’s advances were subjectively offensive to Love and would have been found to be objectively offensive by a reasonable person in her shoes; as the majority correctly states, Sirey’s conduct was also ‘horrifying’; various of Sirey’s verbal assaults were ‘threatening’; and there is significant evidence to create at least a factual issue as to whether the harassment interfered with Love’s work performance. Accordingly, Love has demonstrated that there is a genuine dispute as to the material issue of whether she was subjected to a hostile work environment.” A.S.L.

Gay Whistle-Blower Strikes Out in Discrimination Claim Against Wal-Mart


Henderson and his same-sex domestic partner, who both worked for Wal-Mart, moved to Las Vegas in June 2006. Henderson got into trouble on the job for truthfully reporting, in response to questioning, that a male management official was believed to have a sexual relationship with a female subordinate, in violation of Wal-Mart’s company policies on fraternization. Shortly after he reported this matter, he requested permission from his immediate supervisor to leave his shift early because he had just learned his partner had been unfaithful to him and he had to attend to certain family business. He received permission and clocked out early, but when he showed up the next day, he was told he was terminated for leaving his shift early without proper permission. It seems Wal-Mart does not authorize low-level supervisors to allow employees to leave early, and Henderson had not sought permission from a salaried management employee as required by company rules, thus leaving his shift understaffed.

Henderson sued in federal court, claiming unlawful retaliation in violation of Title VII and appending a state law sexual orientation discrimination claim. On this claim, he asserted that he was treated differently from straight employees, in that they were freely given leave to deal with family matters, but he was terminated for taking time for that purpose after obtaining permission. Judge Pro found that Henderson had not made sufficient allegations to meet the pleading requirement of showing he was treated differently from similarly situated employees because of his sexual orientation. While he alleged vaguely that straight employees were treated differently from him, the only concrete example he gave involved a member of management who was allowed to leave early to handle a family matter, and Judge Pro opined that Henderson, a non-managerial employee, could not maintain that he was similarly situated to a management employee in this regard.
Further, wrote Pro, “Even if Henderson has demonstrated a prima facie case, he has not shown that Wal-Mart’s real reason for terminating him was discriminatory. Wal-Mart’s proffered legitimate, non-discriminatory reason for Henderson’s termination was his failure to seek or obtain permission to leave work from a salaried manager. Wal-Mart stresses that salaried managers have authority that hourly managers do not, and that [the manager who gave Henderson permission to leave early] was an hourly manager, not authorized to allow employees to leave work early.” Wal-Mart characterized what Henderson had done as “walking off the job.” “A mere refutation of the employer’s legitimate reason is insufficient,” insisted Pro, “It is not enough for the plaintiff to prove that the asserted reason is false, the plaintiff must show that it is both false and that discrimination was the real reason,” who concluded that Henderson had not shown that his sexual orientation was the real reason for his discharge. A.S.L.

DOMA and Pre-Trial Discovery

If a private company sues a former employee in federal court under diversity jurisdiction, and that former employee is a lesbian who married her partner in Canada in 2005, and the lawsuit is brought in the District of Iowa with an understanding that Iowa law will apply under the doctrine of Erie Railroad v. Tompkins, and Iowa has permitted and recognized same-sex marriages since last fall, can the defendant’s same-sex spouse claim spousal immunity when summoned to a pre-trial deposition? Guessing from hints in somewhat vague newspaper reports, this may be the question facing a federal court in Arena USA v. Stevens, now pending in the U.S. District Court in Des Moines. Phyllis Stevens is accused of embezzling funds from the company for use in her political activities as a gay rights activist, and plaintiffs seek to depose her wife, Marla. Marla is resisting on spousal immunity grounds, but there is a question whether the marriage will be recognized for that purpose by the federal court in light of the Defense of Marriage Act, which provides that for all purposes of federal law only different-sex couples can be considered to be married. However, under the Federal Rules of Evidence (Rule 501), federal courts in diversity cases are supposed to follow state common law rules concerning privileges. Nobody’s sure what the outcome will be on this, but it provides an interesting illustration of the potentially far-reaching effects of DOMA. One suspects that this is not one of the effects flagged for Congress when a study was conducted in 1996 as DOMA was pending to see what federal laws would be affected, since the study consisted of doing a full-text word search in the U.S. code, which might not have turned this issue up. A.S.L.

Federal Civil Litigation Notes

Supreme Court — The Supreme Court denied a petition for certiorari in Liberty Counsel v. The Florida Bar Board of Governors, 12 So.3d 183 (Fla., 2009), cert. denied, No. 09-276 (Oct. 13, 2009). The Florida Supreme Court had ruled that the State Bar did not violate the constitutional rights of members who disagreed of gay adoptions when it allowed its Family Law Section to file an amicus brief in a pending case challenging the state’s statutory ban on adoption of children by gay adults. The Florida court premised its ruling on the fact that the Family Law Section is a voluntary membership section, and its amicus brief activities are not supported by compulsory membership dues, Florida is a unified bar jurisdiction where all practicing lawyers are required to pay dues to the State Bar, but nobody is required to be a member of a Section of the bar.

11th Circuit — Florida — In Beta Upsilon Chi Upsilon Chapter v. Machen, 2009 WL 3429591 (11th Cir., Oct. 27, 2009), the court ruled that a suit by a Christian fraternity against the University of Florida for refusing to extend official recognition because the chapter’s membership rules violated the University’s non-discrimination policy — which includes sexual orientation — became moot when the University backed down in the face of the lawsuit and amended its non-discrimination policy to make an exception for organizations “whose primary purpose is religious.” The district court had denied a motion for preliminary injunctive relief against the university, concluding that the University’s denial of registration had not violated the group’s rights of free speech or expressive association, finding that unregistered student groups were free to associate and speak, just without the imprimatur of university recognition. Under the amended policy, there is no barrier to the group registering as an official student organization, while continuing to formally exclude homosexuals and atheists from membership.

California — An openly-gay police officer who was denied a promotion to the Position of Commander after an interview with the mayor suffered summary judgment of his sexual orientation and discrimination charges in Smolinski v. City of Pacific Grove, 2009 WL 3353327 (N.D.Cal., Oct. 16, 2009). The short opinion by District Judge Ronald A. Whyte asserts that plaintiff failed to allege a prima facie case of hostile environment harassment, or that the denial of promotion was tied in any way to his sexual orientation. While the court conceded that plaintiff had been subjected to anti-gay comments by co-workers, it did not consider the evidence sufficient to suggest that the workplace had been intolerably polluted. The court also rejected emotional distress claims, and a claim that a former police chief had tortiously interfered with the promotion process by giving a negative recommendation against the plaintiff’s promotion to the mayor. Plaintiff also unsuccess-fully charged procedural irregularities, claiming that prior applicants for similar promotions had not been required to have a personal interview with the mayor, who made the decision not to promote him. The court noted that the official who made the decision against promotion the plaintiff had alleged without contradiction that when he made the decision he didn’t know that plaintiff was gay.

California — U.S. District Judge Barry Ted Moskowitz (S.D.Calif.) has denied a motion to dismiss a federal civil rights claim that a pattern and custom of anti-gay bias among San Diego Port District employees resulted in the death of Alan Hirschfield, who died of a gunshot wound in the back from District Officer Clyde Williams. Hirschfield v. San Diego Unified Port District, 2009 WL 3248101 (Oct. 8, 2009). As briefly summarized by the court, Steven “either jumped or fell from a cruise ship into the San Diego Bay” on July 19, 2008. Officer Williams and another officer, Wayne Schmidt, “pulled Steven into their patrol boat. Some sort of struggle ensued, the facts of which are in dispute. At some point, Officer Schmidt deployed a taser against Steven, and Officer Williams shot Steven in the back, resulting in Steven’s death.” Plaintiffs, apparently Steven’s parents, brought a 42 USC 1983 action against Williams, and state law assault and battery, negligence and wrongful death allegations against Williams, Schmidt, and the Port District. In pursuit of their claims against the District, they alleged the existence of “District policies, procedures, customs, and practices which promoted (1) use of excessive and unreasonable force against individuals, particularly individuals perceived to be gay; (2) the unnecessary use of tasers; (3) violations of the constitutional rights of individuals believe to be gay; (4) concealment of evidence of police misconduct; and (5) fabrication of police reports and or providing false statements in police reports and during the investigation of police misconduct.” In moving to dismiss this part of the case, the District argued that they are “inflammatory and conclusory” and that no facts were alleged establishing a “causal link between Defendants’ actions and any policies or customs of the Port District.” Judge Moskowitz found that 9th Circuit precedent supports allowing such claims to survive a dismissal motion, citing to Karim-Panahi v. Los Angeles Police Dept., 839 F2d 621 (9th Cir. 1988). We wonder whether the 9th Circuit might reconsider Karim-Panahi in an appeal of this case, in light of the recent infamous Iqbal ruling which seems to have significantly tightened up pleading standards for federal civil litigation.

Michigan — A sign of the past: In Williams v. Costco Wholesale Corporation, 2009 WL 3335296 (E.D. Mich., Oct. 15, 2009), U.S. District Judge Sean Cox ruled that an HIV + employment discrimination plaintiff was not a person with a “disability” under the statute when his physician testified that his viral load and T-cell
numbers were good and he had no AIDS-related symptoms, and thus a claim under the Americans with Disabilities Act would be decided against him. The operative facts predate the recent ADA amendments under which HIV infection would be presumptively covered.

**New Jersey** — An openly gay state prison inmate who alleged that he was raped by two other inmates and then subjected to discriminatory treatment by prison officials may pursue various aspects of his federal suit under 42 USC sec. 1983, ruled District Judge Faith Hochberg in executing the mandated judicial review of complaints failed by inmates alleging violations of their constitutional rights. *Thrower v. Alvies*, 2009 WL 3245918 (D.N.J., Oct. 7, 2009). The inmate complaints that although he was provided with medical care reasonably promptly, he was then deprived of medication that had been given to him to prevent secondary infection, as a result of which he developed an anal rash that required additional treatment, and that prison officials took no steps to find and punish his assailants. An investigator sent to interview him instead insulted him, and prison officials turned away his complaints by stating that as an openly gay prisoner he probably enjoyed being raped. When his family members approached a government official seeking an investigation of his treatment, they were treated flippantly. Perhaps, no surprise that this story unfolds in Hudson County Correctional Center... Judge Hochberg found that the pro se plaintiff had managed to meet the stringent pleading requirements recently set by the Supreme Court in its recent controversial ruling in *Iqbal v. Ashcroft*, 556 U.S. 691 (2009), and would be allowed to pursue his claim under the 8th Amendment for deprivation of medical care and retaliation for engaging in the protected activity of seeking redress through the system by complaining about his treatment.

**New York** — In *Lueck v. Progressive Insurance, Inc.*, 2009 WL 3429794 (W.D.N.Y., Oct. 19, 2009), District Judge Michael A. Telesca granted a motion to dismiss a hostile environment workplace complaint that seems based almost entirely on an offensive email sent around the office by a member of the employer's management team, depicting plaintiff as a gay man watching gay porn on-line. “The case law makes clear that the sending of a single offensive e-mail does not create a hostile work environment,” wrote Judge Telesca. A single e-mail cannot by itself show that the workplace is permeated with hostility. The court also dismissed claims under §1981, finding no allegation of race discrimination in the case, and negligence and negligent infliction of emotional distress claims, finding such claims against an employer are preempted by the Workers Compensation law.

**Tennessee** — A gay Tennessee man suffered dismissal of his suit claiming he had been subjected to unlawful sexual orientation discrimination by his employer and his union in violation of Title VII of the Civil Rights Act of 1964 and the Labor Relations Management Act. *Gilbert v. Country Music Association, Inc.*, 2009 WL 3156698 (M.D.Tenn., Sept. 29, 2009). Gilbert claimed to have suffered anti-gay slurs and discriminatory on-the-job treatment, as well as discrimination from the Local Union in its operation of the hiring hall under which he sought employment as a union member. Judge William J. Haynes, Jr., found that binding 6th Circuit precedent required dismissal of the sexual orientation claim under Title VII, which has been held not to apply to cases of sexual orientation discrimination as such. In addition, he noted, Gilbert had not exhausted internal union remedies, which are preclusive to his claims against the union. The record showed that Gilbert’s internal union grievance was still pending in the internal appeal process when he filed his federal complaint. He had recently received a “right to sue” letter from the EEOC, which had not yet been received when he filed his initial complaint. Gilbert had asked for permission to file an amended complaint, but given the state of Title VII law and the pending of the internal grievance, this would be futile at best. The mythology that Title VII protects gay people persists — and is even perpetuated by public officials who opposed gay rights laws by saying that existing law provides adequate protection — but federal district courts are generally not taken in by the mythology.

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**State Civil Litigation Notes**

**California** — *Estrella v. Delhi Community Center*, 2009 WL 3359194 (Cal.App., 4th Dist., Oct. 20, 2009) reports on new developments in ongoing litigation rooted in what had been previously determined in an unpublished decision to be a cored sexual relationship between a married woman executive director of a non-profit and an openly-gay non-citizen subordinate who was dependent on the employer to maintain her green card and legal status in the U.S. In this opinion, the court affirms the trial court’s order dismissing the plaintiff’s wrongful termination/sexual harassment/emotional distress action against the employer, as a sanction for discovery abuse.

**Missouri** — Missouri Lawyers Media reported Oct. 26 that the city of St. Louis had paid $80,000 to settle a lawsuit brought by a missionary group in response to a police threat to arrest two missionaries who persist in distributing Gospel tracts at a St. Louis gay pride festival in 2007. The missionaries claimed a violation of their First Amendment rights, in a lawsuit filed in April 2008 in the U.S. District Court, seeking damages and injunctive relief. Federal District Judge Henry E. Autrey had entered a preliminary injunction to allow the group to distribute its literature at the 2008 PrideFest, and the parties agreed to making it a permanent injunction, subsequent to which the St. Louis Board of Aldermen repealed the ordinance under which the arrest threats were made. The settlement bars the city from re-enacting a ban on distributing literature in public places. The ACLU represented the missionaries.

**New Jersey** — A lesbian employee charging retaliation and hostile environment discrimination on the basis of sexual orientation in violation of the New Jersey Law Against Discrimination suffered affirmance of an adverse summary judgment ruling premised on the statute of limitations announced by the Appellate Division on October 19. *Stahl v. State of New Jersey Department of Human Services*, 2009 WL 3429795. The court rejected appellant’s claim that the continuing humiliation she suffered after being transferred to an inferior position in response to her complaints about discriminatory treatment resulted in a continuing violation, or that the state’s inadequate investigation of her charges continued into the two year period prior to her filing of a complaint. The court observed that there was New Jersey Appellate precedent directly on point rejecting a continuing violation argument based on the continuing effects of a discriminatory transfer.

**Oregon** — In *English v. Public Employees Retirement Board*, 216 Ore.3d 342 (Or Ct. App., Sept. 2, 2009), the court remanded to the Board (PERB) for reconsideration the Board’s refusal to allow two retired public employees who have terminated their relationships with their same-sex domestic partners to exercise an option to change their beneficiary designations under the retirement plan so as to cancel their former domestic partners’ entitlement to receive a benefit after the retired employee’s death (and, coincidentally, to increase the monthly retirement benefit paid to the employee during their lifetime). PERB took the position that the retired employees could not make the change because the statute allows such a change in only three circumstances: (1) that the option be exercised within 60 days of receiving retirement benefits; (2) that the option be exercised upon the death of the designated beneficiary, or (3) that the option be exercised upon divorce of the beneficiary from the employee. In both cases, the employees had retired and begun to receive benefits for a few years before their relationships with their long-time domestic partners ended, and then they sought to remove the beneficiaries so that they could receive a full retirement benefit. (When a beneficiary is named for entitlement to survivor benefits, the employee receives a smaller monthly benefit while alive.) PERB also argued that it could not allow these beneficiary changes because it might endanger the plan’s qualified tax status under the federal Internal Revenue Code. An administrative judge had ruled that PERB’s action violated the equality requirements of the Oregon constitution, but PERB refused to comply with the ruling so the case went to court. The court found that PERB had failed to find that denying this change was required to maintain the plan’s tax status, merely that it had suggested this might be the case, and noted that under the statute PERB was only mandated to take actions that are re-
required to preserve the tax status, so a remand was necessary for PERB to reconsider its position, taking into account the requirement that upon a finding that a policy violates the state constitution, the agency is supposed to make a decision consistent with what the legislature would have intended, and the legislature has, in general, mandated equal benefits rights for same-sex domestic partners of public employees.

Criminal Litigation Notes

Massachusetts — Provincetown is generally seen as a gay-friendly secure place to vacation, but the Cape Cod Times (Oct. 9) reports that Eric Patten, 20, has pled guilty to assaulting two young lesbians over Memorial Day weekend, the first recorded hate crime in the town in more than ten years. Patten was sentenced to 30 days jail time and several years of probation, and will do the jail time in the Barnstable County Correctional Facility. The incident in question occurred about 1 am on May 23, when pedestrians alerted police, who arrived on Commercial Street near the Post Office to apprehend Patten punching one woman on the ground, while the woman’s female friend had Patten in a headlock. According to the police investigation, Patten had accosted the women on the street, asking if they were faggots and then initiating physical violence. He resisted arrest and had to be pepper sprayed to subdue him on the scene. Patten claimed in court to have no memory of the assault, and apologized to the women. His attorney characterized him as a “troubled young man.”

Virginia — Rejecting a petition for a writ of habeas corpus from a Virginia inmate convicted of “carnal knowledge of a minor,” U.S. District Judge Gerald Bruce Lee held in MacDonald v. Johnson, 2009 WL 3254444 (E.D.Va., Oct. 9, 2009), that Lawrence v. Texas did not override Virginia’s laws criminalizing sex between adults and minors. In this case, plaintiff, a man in his 40s, was convicted of having sex with two teenage girls, ages 16 and 17. Although girls of those ages might be considered adults under the laws of some states for purposes of consent to sex, they are considered minors under Virginia law. Since Lawrence does not apply to sex involving minors, wrote the court, the statute is not unconstitutional as applied to the petitioner.

Wisconsin — The 7th Circuit denied an appeal from a ruling by Chief Judge Charles N. Clevert, Jr., of the Eastern District of Wisconsin, rejecting a petition for habeas corpus from Larry George, who was convicted on two counts of second degree sexual assault by use of force and one count of false imprisonment. At trial, prosecutors offered testimony that George had abducted a heterosexual man and forced him to perform oral sex on George. After unsuccessfully exhausting his state court appeals, George sought habeas corpus, claiming ineffective assistance of counsel. It seems that his lawyer had failed to cross-examine the victim on the issue of the victim’s sexual orientation. During direct examination by the prosecutor, the victim was asked about his sexual orientation and said he was heterosexual. George claims that his defense attorney had information that could contradict that assertion, but failed to question the victim about it. The court expressed some bafflement about the relevance of contradicting that testimony, since George’s defense was not based on a consent argument. The entire story of what happened as revealed by Circuit Judge Tinder in the opinion is complex. See George v. Smith, 2009 WL 3428834 (7th Cir., Oct. 27, 2009).

Legislative Notes

Federal — The Commission on Military Justice, a body created by the National Institute of Military Justice and the American Bar Association to study and report on the state of U.S. military justice, has issued its second report. Like the first report, issued in 2001, the new Cox Commission report, issued on October 20, calls for repeal of Article 125 of the Uniform Code of Military Justice, the sodomy law governing the armed forces. The Commission points out that the law as written is of questionable constitutionality in light of Lawrence v. Texas, the 2003 U.S. Supreme Court ruling striking down the Texas Homosexual Conduct Law, and that recent amendments to the UCMJ provisions on rape and other UCMJ provisions should take care of maintaining criminal penalties on sexual misconduct involving lack of consent, adultery or minors. In other words, says the Commission, there is no sense keeping on the books a law whose constitutional applications are covered by other provisions, and which is not generally and should not ever be enforced against consenting adults who conduct their activities in private. The report is available in pdf file format on the NIMJ website, under the link for Cox Commission, named for the chair, Honorable Walter T. Cox, III, Senior Judge of the U.S. Court of Appeals for the Armed Forces.

Florida — The Tallahassee Democrat (Oct. 29) reported that the Tallahassee, Florida, City Commission voted unanimously to include same-sex and domestic partnerships in the employee benefits policy for city workers. “Significant others”
who meet the requirements can be covered regardless of gender or sexual orientation. Employees will be required to provide some proof of their relationship, such as joint rental leases or a mortgage and joint bank accounts. At the same time, the Commission voted to include sexual orientation and gender identity in the city’s anti-discrimination and anti-harassment policies.

**Law & Society Notes**

**Federal — Military Policy** — Former Congressman John McHugh, a New York upstate Republican who is now serving as Secretary of the Army in the Obama Administration, told the Army Times in an article published Oct. 25, that there were no reasons to fear that major difficulties could result from lifting the ban on gay soldiers, and that when a change of policy took place, it would be implemented by the Army command. "The Army has a big history of taking on similar issues," he said, with "predictions of doom and gloom that did not play out," according to a Reuters summary of the interview published on Oct. 26.

**Federal — Immigration Policy** — Attorney General Eric Holder failed to act on an asylum request on behalf of Genesio Oliveira, a gay Brazilian who was married in Massachusetts to U.S. citizen Tim Coco. In 2002 Oliveira’s request for asylum in the U.S. was denied. He subsequently married Coco when same-sex marriage became available in Massachusetts, but the federal government does not recognize the men as being spouses due to the Defense of Marriage Act, an unconstitutional statute whose repeal was a campaign promise by Barack Obama, a promise he has reiterated in public several times since taking office but has not done anything public to advance beyond talking. Oliveira was deported to Brazil, and the men have had to live apart. A petition for asylum on a compassionate basis was pending with the Attorney General, but the deadline for ruling on it passed with no word from the Justice Department, according to media reports on Oct 27.

**Federal — Health & Human Services** — The U.S. Department of Health & Human Services announced on Oct 22 that it will be creating a national resource center to assist communities in providing services and support to LGBT elders. The LGBT Center is intended to provide resources to social services agencies to assist them in providing appropriate services to a target population with which they may not be familiar, and also to assist LGBT organizations in connecting with available services. The Administration on Aging will award a single Resource Center grant at about $250,000 annually to fund a non-profit organization to create and administer the Center. HHS will publicize the grant application process through its website.

**Federal — Housing Policy** — The U.S. Department of Housing and Urban Development announced on Oct. 21 that it will be proposing rules to ensure that LGBT applicants and same-sex couples are not excluded from participation in federally subsidized housing programs. Among other things, the proposed rule will clarify that programs for “families” include families consisting of same-sex partners, and will require grantees to comply with all state and local laws that forbid discrimination based on sexual orientation and/or gender identity, as well as requiring that FHA-insured mortgage loan decisions be made based on credit-worthiness and not engage in categorical exclusions of sexual minorities. At present, the Fair Housing Act does not prohibit discrimination based on sexual orientation or gender identity, and legislative efforts at the federal level to address anti-gay and anti-transsexual discrimination have been concentrated on the narrowly-focused Employment Non-Discrimination Act. The Oct. 21 announcement by HUD Secretary Shaun Donovan of this proposed rule-making signals the importance of adding Fair Housing Act amendments to the LGBT federal legislative agenda.

**Alabama** — The University of Alabama at Birmingham will extend health insurance benefits to same-sex partners of its employees effective January 1. Enrollment has already been open for faculty and staff to enroll their partners in medical, dental and vision plans. The administration indicated that the measure was designed in part to help the school compete with other major medical schools in recruiting faculty, since many of the top medical schools are affiliated with universities that provide such benefits.

**Hope College, Holland MI** — We’re a college, don’t bother us with differing points of view, seems to be the attitude of administrators at Christian-identified Hope College who barred Academy Award-winning screenwriter Dustin Lance Black from participating in a college roundtable on sexuality, to which he had been invited by students. The English Department had also invited Black to speak to a screenwriting class. But College officials disinvited Black from the roundtable, the Dean of Students stating that strongly-opinionated speakers don’t further academic discourse. Pardon us for having a point of view! Holland Sentinel, Oct. 24.

**Virginia** — Republican gubernatorial candidate Bob McDonnell announced on Oct. 13 that if he was elected, he would no renew the executive order issued by prior governors Mark Warner and Tim Kaine mandating non-discrimination on the basis of sexual orientation for state job applicants. McDonnell insisted that there would be no discrimination in his administration, but he believes that for the governor to adopt such a policy without legislative authority violates separation of powers. He also insisted that he had not discriminated on this basis during his service as state Attorney General. McDonnell’s Democratic opponent, State Senator Creigh Deeds, was a sponsor of a bill that would have added sexual orientation to the state’s civil rights law. Lynchburg News & Advance, Oct. 14.

**International Notes**

**Brazil** — The Supreme Justice Tribunal, Brazil’s second highest appellate court, ruled on Oct. 15 that transsexuals who have undergone gender reassignment surgery are entitled to change their name and the gender indication on their birth certificates. A lower court had ruled that the data entered on a birth certificate is “immutable” and cannot be changed to reflect later developments in a person’s life, as it is a historical record from the time of birth, and that someone’s “appearance” does not supersede these facts at birth. But the appellate court found this to be contradictory with the state’s policy of providing free gender reassignment surgery. The National Health System only recently added gender reassignment services to the list of covered procedures.

**Colombia** — An appellate court in Pereira, Colombia, ruled in Girardo v. Alzate that when same-sex couples split up, the former partners are entitled to an equal distribution of belongings, the same as married opposite-sex partners. The case was an application of a ruling last January by the Colombian Supreme court on equal legal rights for same-sex couples, according to a recent blog posting, and overturned a trial judge decision. Julio Girardo’s attorney, Fabio Girardo Sanz, said the ruling set a national precedent and could apply in other regions, according to a report on Oct. 13 in El Tiempo that was summarized on an English-language blog. Although the state does not yet afford civil unions or marriages for same-sex couples, the courts have been using equality principles on a case-by-case basis to deal with legal issues arising from same-sex relationships.

**European Community** — The European Court of Human Rights has announced that the First Section of the Court will hear oral arguments on January 14 on the admissibility and merits of a case coming from Austria concerning the right of same-sex couples to marry. Although the Court has already pronounced itself on the rights of transsexuals regarding marriage, a ruling that led the U.K. to adopt its Gender Recognition Act, it has not previously made a direct ruling on same-sex marriages. The application on behalf of Horst Schalk and Johan Kopf, Austrians who were denied permission to marry when they applied in Vienna in 2002, asserts a violation of Articles 12 and 14 of the European Convention on Human Rights. As the decision to review rulings by national courts is discretionary, the scheduling of this hearing sends a hopeful signal that recent developments have led the Court to consider whether it is time to strike out on new ground. The European Court is famous for waiting until a consensus has begun to emerge among member states before identifying “new rights” under the Convention. Now that several countries in Europe allow same-sex marriage or an equivalent status
AIDS & RELATED LEGAL NOTES

Discharged HIV+ Bank Employee May Pursue Suit against JP Morgan Chase

U.S. District Judge Jeffrey S. White ruled in Halsey v. JP Morgan Chase Bank, 2009 WL 3353459 (N.D.Cal., Oct. 16, 2009), on summary judgment motions in a case involving a bank account executive who was discharged just days after he informed his supervisor that he was HIV+. Judge White found that James Halsey had alleged a prima facie case of disability discrimination under California law, but granted summary judgment on his sexual orientation discrimination claim, accepting at face value the employer’s argument that the supervisor who made the discharge decision did not know that Halsey was gay when he made the decision, and expressed surprise at the news.

Chase Bank hired Halsey as a new account executive in May 2006 and put him into a training program. Halsey was receiving good reviews for his work, and was outperforming other newly-hired account executives, but ran into trouble when his supervisor noted that he seemed to be dozing off during training programs. Halsey’s immediate response was that this could be the result of his having had several long airplane flights just prior to the training meeting. But on reflection, he realized it was probably due to his new HIV-meds, and confirmed this with his doctor. Then Halsey informed his supervisor, through an email, that he was HIV+ and that new medications he was taking could affect his energy level, quoting his doctor to that effect.

Receiving this news coincided with a complete change in the supervisor’s behavior to Halsey. Halsey had previously been invited to dine that night with the supervisor and some other employees, but when he showed up at the appointed place and time, nobody was to be found and nobody was answering their cell phones. Halsey later learned that the supervisor had changed the time and location without notifying him and had instructed all those present to turn off their cell phones. In the following days, the supervisor shunned contact with Halsey or looked away from him when contact was inevitable. After consulting with Human Resources, the supervisor discharged Halsey, relying mainly on his having dozed off during a training session. After Halsey was dismissed, he also revealed to the supervisor that he was gay.

In moving for summary judgment, Chase argued that it could discharge an employee who fell asleep on the job, citing several cases to that effect, although none was a 9th Circuit decision. Judge White found the cases from other circuits to be distinguishable. There is a substantial body of case law supporting employers in discrimination cases where they discharged employees who fell asleep on the job, but those cases mainly concerned situations where falling asleep presented an immediate safety risk, usually because the em-
employee’s job involved operating equipment that could be dangerous if not properly attended. In this case, wrote White, the issue was really whether JP Morgan Chase could have accommodated Halsey’s disability, which could be held to incorporate the drowsiness caused by his HIV meds. White noted the failure of Chase to initiate any kind of interactive process with Halsey to determine whether there was a reasonable accommodation. White also noted that Chase’s credibility in the case was strained by the conduct of the supervisor, which could support an inference that he was biased against Halsey due to his HIV status, since Halsey was receiving good reviews and there was no indication that the supervisor had any thought of terminating him until he learned that Halsey was HIV+.

The court refused to grant cross-motions for summary judgment on the claim of failure to engage in reasonable accommodation, finding that material fact issues precluded judgment on those motions. The court did grant summary judgment in favor of the employer on the sexual orientation discrimination claim, as well as on a claim for intentional infliction of emotional distress, finding that California courts have not imposed liability on such claims for personnel actions, saving that tort for the most outrageous conduct.


**State May Be Liable for Exposing Boxing Referee to HIV**

In *Corona v. California*, 2009 WL 3401918 (Cal. App. 4th Dist. Oct. 23, 2009), a boxing referee and his wife appealed a trial court decision dismissing their suit, sustaining the State’s demurrer, and holding that the State could not be held liable for failing to require a boxing license applicant to provide evidence of negative HIV status before granting approval to box.

The trial court held that the licensing power is a discretionary activity, and thus, the State is immune from liability. The 4th District Court of Appeal, in an opinion by Judge Ramirez, reversed the decision of the trial court, holding that state law imposed a duty on the State to require a negative test result before issuing a license.

The facts are straightforward. After officiating at a fight, plaintiff boxing referee received a letter informing him that one of the fighters subsequently had tested positive for HIV, and that the fighter “was licensed and allowed to fight without having the results of the blood tests for detection of HIV.” California Government Code sec. 815.6 provides that a boxer “shall present documentary evidence” of a negative HIV test (among other blood-borne illnesses) before being licensed to box.

The State argued that because the act of sanctioning boxing matches involved the “issuance of a license, permit, approval, or authorization,” the State was immune from liability under California’s Tort Claims Act. The State also claimed that the duty to provide a negative test result fell on the boxer, not on the State. Plaintiffs, in contrast, argued that the State was acting outside its authority when it issued the license because its authority had been made contingent on first obtaining a negative test for HIV.

The court ruled for the plaintiffs, holding that the statute requiring the HIV test “imposes a mandatory duty upon the Commission to refrain from sanctioning a boxer who does not provide a negative HIV test.” Contrary to the state’s argument in favor of absolute licensing immunity, the court held that immunity only covers discretionary actions and not mandatory duties. The court reversed the trial court order and remanded the case, awarding costs to plaintiffs.

Law offices of John Burton represented plaintiffs. Daniel Redman

**AIDS Policy Note: Ryan White Reauthorization and HIV Travel Ban**

At a White House ceremony on October 30, President Barack Obama signed into law the fourth reauthorization of the Ryan White Care Act, a federal statute providing financial assistance to states, localities and individuals coping with the HIV/AIDS epidemic. The Act is named for a young diabetic from Indiana who contracted HIV from his medication and became a national symbol after he encountered discrimination at school and in his community and fought back to advance sound HIV policy. In his remarks prior to signing the bill, the President announced that the final regulation repealing the HIV travel ban would be published on November 2, set to go into effect early in 2010. In the meantime, administrative steps have been taken to suspend the effect of the ban on current U.S. residents who might be subject to deportation or denial of continued legal status in the U.S. due to their HIV status. The President also commented that the Office of National AIDS Policy has been holding hearings around the country and is in the process of drafting a proposed new National HIV/AIDS Policy to get federal government efforts to deal with HIV/AIDS coordinated. The President’s statement suggested that a comprehensive revision of national policy is in the offing, although he did not announce a date by which this assignment will be completed by the Office. A.S.L.

**AIDS Litigation Notes**

**California** — A criminal defendant with AIDS seeking a reduction of sentence bore the burden of presenting evidence about his medical condition and prognosis, ruled the 2nd District Court of Appeal in *People v. Kennedy*, 2009 WL 3284230 (Oct. 14, 2009). In this case, defendant was convicted by a jury of selling a controlled substance, and admitted having committed a prior offense that was a “strike” under California’s three-strike system. He was sentenced to 6 years, a doubling of what the sentence would have been with no prior strike. On appeal, he argued that the court abused its discretion by failing to strike his prior conviction from consideration on the grounds of his health, but his trial attorney had not presented any detailed information in support of this argument, just conclusory statements. The court of appeal rejected the argument that the court had some duty to seek out evidence concerning the defendant’s health before rejecting his motion. “A trial court does not abuse its discretion for failing to consider evidence not before it that the defendant had the prerogative to provide, but failed to do so,” wrote Judge Zelon.

**California** — In an unpublished opinion in *People v. Henry*, 2009 WL 3467498 (Cal. App., 2nd Dist., Oct. 29, 2009), the court of appeal affirmed a six year prison sentence for a cross-dressing HIV+ street hustler who was apprehended after allegedly offering to perform oral sex on an undercover police officer for $10 without revealing that he was HIV+. At trial, evidence was admitted of several prior convictions for the same offense. The defendant contended that he was not prostituting that day, but merely seeking a ride from the officer, and that the prior incidents of prostitution should not have been admitted in evidence. But the court of appeal concluded that the prior incidents were relevant on the question of intent.

**Idaho** — Kanay Mubita is appealing his conviction on 11 counts of exposing others to HIV. While his appeal is pending, he has brought a 42 USC sec. 1983 privacy suit against the Moscow City Police Chief Daniel Weaver, Assistant Chief David Duke, and Officer Paul Kwaitkowski, alleging that his right to privacy was violated by the policy department’s use of confidential HIV-related information from the Health Department. Mubita particularly challenges the plastering of posters about the town publicizing his HIV status, presumably in an attempt to identify more victims and warn members of the public about a sexually active HIV+ man. In *Mubita v. Weaver*, 2009 WL 3426660 (D. Idaho, Oct. 16, 2009), Chief Judge B. Lynn Winnmill refused to intervene in the post-trial stage of Mubita’s criminal case, maintaining a stay on his 1983 action as it relates to the criminal conviction, but Judge Winnmill refused defendants’ request to stay or dismiss the 1983 claim asserted on account of the publicity defendants gave to plaintiff’s HIV status. While the former claims were seen by the court as an “indirect challenge” to the criminal conviction, an impermissible use of 1983, the judge saw no reason not to go forward on the post-trial privacy claims, and refused to dismiss those claims so long as the post-conviction proceedings have not been completed.

**HHS Office for Civil Rights** — The Department of Health and Human Service’s Office for Civil Rights announced a settlement agreement with a
Texas orthopedic surgeon who was charged with violating the Americans With Disabilities Act by refusing to provide treatment to HIV+ patients. The surgeon has agreed to be educated about how to perform surgery safely on HIV+ patients and to refrain from his discriminatory policies. All the materials released by HHS redact the name of the surgeon and any other identifying information. The press release went out on October 27.

Social Security Disability Cases

Colorado — Upholding a denial of disability benefits in Haddock v. Astrue, 2009 WL 3162170 (D. Colo., Sept. 29, 2009), District Judge Philip A. Brimmer found that the ALJ’s conclusion that plaintiff’s HIV infection and Karposi’s sarcoma, a skin cancer associated as an opportunistic infection with the immune suppression resulting from HIV infection, had not rendered the plaintiff unable to work was supported by record evidence, and rejected plaintiff’s claim on appeal that the review tribunal’s rejection of additional evidence was an abuse of discretion. The court determined that the additional evidence would not have changed the conclusion that plaintiff was capable of working.

Kentucky — In Miller v. Astrue, 2009 WL 3161456 (E.D.Ky., Sept. 29, 2009), Chief District Judge Jennifer B. Coffman found that the ALJ had correctly decided not to defer to a treating physician’s opinion that an HIV+ man was too disabled to work, because the opinion was inconsistent with record evidence of the plaintiff’s actual physical activities at the relevant time. The court also noted that the plaintiff’s HIV infection had not resulted in any opportunistic infections, and his other ailments did not cumulatively render him incapable of gainful employment, and so upheld the denial of disability benefits.

New Jersey — In Dye v. Commissioner, 2009 WL 3242078 (D.N.J., Oct. 6, 2009), District Judge Chesler upheld a determination that although the plaintiff did become disabled within the meaning of the statute as of March 24, 2005, he was capable of sedentary work prior to that date, and thus did not become disabled at a time when he was covered under the disability program, even though his HIV diagnosis dated back to 2002. Despite minor misstatements of the record in the ALJ decision, the court found that substantial evidence supported the ALJ’s determination.

Ohio — An HIV+ plaintiff was found by the ALJ to have residual functional capacity to do light work, despite his HIV infection and related depression, and this was affirmed by the appeals council and the district court in Santiago v. Commissioner of Social Security, 2009 WL 3242072 (N.D.Ohio, Sept. 30, 2009).

Pennsylvania — An HIV+ plaintiff lost her appeal of denial of disability benefits in Webster v. Astrue, 2009 WL 3297318 (E.D.Pa., Oct. 14, 2009), the District Judge, Gene E.K. Pratter, approving U.S. Magistrate Elizabeth T. Hey’s conclusion that medical evidence in the record supported the ALJ’s determination that despite her asymptomatic HIV infection, plaintiff was capable of working.

Pennsylvania — In Soto v. Astrue, 2009 WL 3473054 (E.D.Pa., Oct. 23, 2009), District Judge Thomas Golden accepted a report by Magistrate Timothy Rice recommending remand and reconsideration of the HIV+ plaintiff’s application for disability benefits. The Magistrate found that the Social Security ALJ had failed to deal adequately with the opinions of plaintiff’s treating physician.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

The New York City Bar’s Center for CLE is presenting a half-day program on Workplace Issues Affecting Lesbian, Gay, Bisexual, Transgender and Gender Non-Conforming Employees & Their Employers on Friday Nov. 6, from 9 am to noon at the city Bar Association building in midtown Manhattan. The program is sponsored by the Association’s LGBT Rights and Labor & Employment Law committees, and co-sponsored by the LGBT Law Association of Greater New York and the National Association of Women Lawyers. Call 212-382-6663 to register. The program carries 3 credits in professional practice for New York and California lawyers and 2.75 general MCLE credits for Illinois lawyers.

LESBIAN & GAY & RELATED LEGAL ISSUES:


Brant, Emily, Sentencing “Cybersex Offenders”: Individual Offenders Require Individualized Conditions When Courts Restrict their Computer Use and Internet Access, 58 Catholic Univ. L. Rev. 779 (Spring 2009).


Clark, Stephen, Same-Sex But Equal: Reformulating the Miscegenation Analogy, 34 Rutgers L.J. 107 (Fall 2002).


Cowan, Sharon, Looking Back (Towards the Body): Medicalization and the GRA, 18 Social & Legal Studies 247 (June 2009).


Darmer, M.K.B., and Tiffany Chang, Moving Beyond the ‘Immutability Debate’ in the Fight for Equality After Proposition 8, 12 Scholar (St. Mary’s L. Rev. On Minority Issues) 1 (Fall 2009).


Hebert, L. Camille, Transforming Transsexual and Transgender Rights, 125 Wm & Mary L. & Pol’y 442 (Spring 2009).


Infanti, Anthony C., Bringing Sexual Orientation and Gender Identity into the Tax Classroom, 59 J. Legal Educ. 3 (August 2009).


Lyke, Sheldon Bernard, Lawrence As An Eighth Amendment Case: Sodomy and the Evolving Standards of Decency15 Wm & Mary J. Women & L. 633 (Spring 2009).


### Based on Religion and Sexual Orientation, 32 Harv. J. L. & Gender 303 (Summer 2009).


Sharp, Andrew N., Gender Recognition in the UK: A Great Leap Forward, 18 Social & Legal Studies 241 (June 2009).


Skinner, Matthew J., To Harm, To Victimize, and To Destroy: The Ugly Reason Why the Chambers Majority Opinion Was So Right, 72 Alb. L. Rev. 825 (2009) (deconstructing Rhode Island Supreme Court ruling in Chambers v. Ormiston, holding the R.I. Family Court did not have jurisdiction to grant a divorce to a same-sex couple who had married in Massachusetts).


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### Specially Noted:

Symposium on Transgender Law, 30 Women’s Rts. L. Rep. No. 2 (Winter 2009), individual articles noted above.

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### AIDS & RELATED LEGAL ISSUES:


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### EDITOR’S NOTE:

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