SUPREME COURT SOLICITOUS OF OPPONENTS OF SAME-SEX MARRIAGE

Two developments during January suggest that many members of the United States Supreme Court are susceptible to the argument that opponents of same-sex marriage should be able to keep their opposition shielded from public view for fear of possible harassment. A majority of the Court gave credence to this argument in *Hollingsworth v. Perry*, 2010 WL 105264 (January 13, 2010), in which the Court, voting 5–4, stayed an order by U.S. District Judge Vaughn Walker that the trial in *Perry v. Schwarzenegger*, a case challenging the federal constitutionality of California's anti-same-sex marriage Proposition 8, be video-live-streamed to a handful of federal courtrooms around the country. Just two days later, responding to a similar argument from opponents of the Washington State domestic partnership law, the Court granted certiorari in *Doe #1 v. Reed*, No. 09–559, a case presenting the question whether signatures on petitions seeking to place a question concerning repeal of the law on the ballot must be shielded from disclosure to preserve the 1st Amendment rights of petition signers.

A Supreme Court term that was not expected to present any significant LGBT rights issues has suddenly found the Supreme Court thrust in the middle of LGBT-related legal controversies.

On September 25, 2009, during a pretrial hearing, Judge Walker discussed the issue of broadcasting trial proceedings outside the San Francisco federal courtroom in light of the wide public interest in the case around the country, and asked for comment from the parties. All parties made written submission at that time, only the intervenors, Proponents of Proposition 8, being opposed. The issue was raised again at a hearing on December 16. When the 9th Circuit decided to launch an experimental program under which selected trials might be broadcast and designated the chief judge of each district to select suitable trial, Judge Walker, chief judge of the Northern District of California, set the wheels in motion. This involved a change in existing rules and practice, and Judge Walker announced he would received public comment for a period of a week and would announce his decision before the trial. More than 138,000 comments were submitted, almost all electronically, with only a handful opposed to broadcasting. Judge Walker announced the Friday before the trial that he would authorize live-streaming to a handful of federal district courtrooms around the country and would seek to have the daily videos displayed on youtube.com after each day's session had ended. Technical problems got in the way of the youtube.com part of his plan, but with 9th Circuit approval he was ready to beginning the live transmission when the trial began on January 11.

The Proponents of Proposition 8, however, expressing alarm that their expert witnesses might be deterred from participating were their testimony broadcast, applied to the 9th Circuit to stop the broadcast. When the 9th Circuit refused, they made an emergency application to the Supreme Court, which issued a temporary stay to prevent broadcasting on January 11 and announced that it would hold a conference of the court on Wednesday, January 13. Late in the afternoon on January 13, the Court issued a 17–page per curiam opinion staying the district court's order "pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus.". This was accompanied by a ten-page dissenting opinion by Justice Breyer, joined by Justices Stevens, Ginsburg and Sotomayor.

The per curiam for the Court characterized this as a dispute about proper procedure in changing rules, charging that the district and circuit courts had rushed through a change in the rules in order to broadcast this particular case without adequate attention to the niceties of administrative procedure in rule-making. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves," harrumphed the Court. The Court concluded that "the District Court likely violated a federal statute in revising its local rules," thus justifying the Court's decision to intervene in a trial in this extraordinary way.

The Court's solicitude for the alarm expressed by the Prop 8 proponents emerged in its discussion of the "irreparable harm" part of its analysis, a necessary element for the exercise of discretion to issue such an order in advance of a full consideration and ruling on the merits. After noting the range of witnesses likely to testify, the Court said: "This Court has recognized that witness testimony may be chilled if broadcast." The citation to support this assertion was to a concurring opinion by Justice Harlan in a 1965 decision, not an opinion for the Court. (It is interesting to speculate that anything stated in a concurrence can be later cited as attributable to "this Court.") Then the Court quoted an assertion by Proponents in their motion that some of their witnesses "have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment." These citations were to " 71 news articles detailing incidents of harassment related to people who supported Proposition 8." Here's an ambiguity; does that mean 71 articles about the same few reported incidents, or stories involving 71 different incidents? The Court dismissed the relevance that these were mainly compensated expert witnesses, as opposed to ordinary witnesses, asserting, "There are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country." The Court conveniently overlooked that many of these experts are darlings of the conservative media whose views have been broadcast numerous times, probably to larger audiences than would take the trouble to watch their trial testimony by visiting a courthouse in Brooklyn or Chicago during a weekday to watch live-streaming. (The proposed youtube.com posting was not the subject of this motion.) The Court concluded that the Proponents had adequately demonstrated the threat of harm to their case if it was broadcast, and found that those favoring broadcast had not shown that they would be harmed by limiting live-streaming to within the San Francisco courtroom's overflow room to accommodate those who could not stuff themselves into the main courtroom where the trial was being held.

In concluding, the Court scolded the district court for attempting to "change its rules at the eleventh hour to treat this case differently than other trials in the district," claiming that it ignored the federal statute that sets procedures for changing rules. According to the Court, the District Court's "express purpose was to broadcast a high-profile trial that would include witness testimiony about a contentious issue." and

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this, apparently, was a bad thing. As one might expect, the Court's opinion drew the scorn of most of the mainstream media.

Justice Breyer for the dissenters was withering in his critique of the Court's rationale, finding that the matter should not have been before the Court, that the circuit had been working on revising its rule on broadcasting trials long before the trial date was set for this trial, and that the overwhelming number of public comments submitted suggested that the time given for comment was adequate to determine public opinion.

On the disputed issue of whether allowing the broadcast to go on would harm the Proponents of Proposition 8, wrote Breyer, "I can find no basis for the Court's conclusion that, were the transmission to other courtrooms to take place, the applicants would suffer irreparable harm. Certainly there is no evidence that such harm could arise in this nonjury civil case from the simple fact of transmission itself. By my count, 42 States and two Federal District Courts currently give judges the discretion to broadcast civil nonjury trials. Neither the applicants nor anyone else has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial process],' [citing Chandler v. Florida, 449 U.S. 560 (1981)]. And, in any event, any harm to the parties, including the applicants, is reparable through appeal."

He also pointed out that none of the witnesses involved had themselves asked the Court to set aside the District Court's order. "And that is not surprising," he continued. "All of the witnesses supporting the applicants are already publicly identified with their cause. They are all experts or advocates who have either already appeared on television or internet broadcasts, already toured the State advocating a yes' vote on Proposition 8, or already engaged in extensive public commentary far more likely to make them well known than a closed-circuit broadcast to another federal courthouse." He also noted that national and international media coverage of the trial was expected to be extensive, and would be far more likely to bring the identity of the experts to the public than the live real-time transmission to five federal courthouses, "in all of which taking pictures or retransmissions have been forbidden."

Two days later, the Court granted certiorari to review *Doe #1 v. Reed*, 586 F.3d 671 (9th Cir. 2009), in which the 9th Circuit, reversing District Judge Benjamin H. Settle (W.D.Wash.), held that making public the names of people who signed petitions to put an initiative on the ballot did not violate the 1st Amendment rights of petition signers.

Settle had considered signing a petition to be political speech, and decided that disclosing the names was tantamount to violating the principle of the secret ballot. The 9th Circuit disagreed, pointing out that petition signatures are collected in public and are in that sense not anonymous, that they are collected on sheets with spaces for 20 signatures, so most of those signing can see the signatures of prior signers, and that signers know that their signatures will be subject to scrutiny because the state has to verify legitimacy of signatures to determine whether a measure qualifies for the ballot. Also, since Washington law provided for disclosure of these signatures, no signer could reasonably expect that her signature was going to be kept confidential, and no promise of confidentiality was given when signatures were collected. Given these findings, the court said that Judge Settle had improperly used a strict scrutiny standard by mischaracterizing petition signatures as anonymous speech. The 9th Circuit decided to apply intermediate scrutiny, and found that the state had an important interest in transparency in the petition/initiative process that justified making the signatures public. After identifying various other state interests, none of them content based, the circuit court ordered that the signatures be made public, but the initiative proponents applied to the Supreme Court for an emergency stay, which was granted before the circuit court's order could be implemented.

In the event, Washington voters decisively rejected the opportunity to repeal the domestic partnership amendments that had passed earlier in the year. Nonetheless, the initiative proponents filed for cert, which has now been granted. They made the same familiar, tried arguments about how people would be chilled from signing these petitions if their signatures were made public, thus inhibiting the democratic process, and they seem to have captured the same sympathetic ears from the Supreme Court. Oral argument will likely be held late this spring.

Perry v. Schwarzenegger — The trial on the constitutionality of California Proposition 8 was held before U.S. District Judge Walker in San Francisco beginning on January 11, with testimony concluding on January 27.

The named plaintiffs and numerous academic experts from a variety of relevant disciplines testified on behalf of the plaintiffs, laying a factual groundwork for the contentions that the right to marry is a fundamental right that should not turn on the genders of the participants, that the campaign to enact Proposition 8 was fueled by arguments appealing to inaccurate stereotypes about gay people, that research has uncovered no support for the contention that children are categorically disadvantaged when they are raised in households headed by same-sex couples, and that there is no evidence that allowing same-sex couples to marry would have any demonstrable effect, one way or the other, on the institution of heterosexual marriage or the rate at which the human race continues to reproduce itself. During cross-examination, the defendants attempted to impugn the experts by establishing that the experts were either openly-gay and/or were opposed to Proposition 8. (By this standard, of course, the defendants' experts could have been impugned for being openly non-gay and proponents of Proposition 8, and thus clearly lacking in objectivity, but nobody felt it necessary to make the point.)

The defendants offered only two witnesses, purported "experts" whose qualifications under the standards usually used for evaluating expert testimony were quite debatable, but who were allowed to testify because it was not a jury trial and the judge was obviously ready to discount what they had to say when reaching his conclusions as to the facts of the case. The defendants' main points were to argue that gays are politically powerful in California and thus anti-gay measures should not be subjected to heightened constitutional scrutiny (a point that, if accepted, would end the practice of heightened scrutiny for policies that discriminate based on race and sex), and that for proper development children need to have an intact family headed by a mother and a father. The "expert" on the political power point confessed under cross-examination that his supposed "expertise" derived from reading up on recent gay history in preparation to testify, since he had no credentials as a scholar in the area, and the "expert" on child development, who has no relevant academic training on the subject and exhibited little knowledge of published empirical research, was basically stating his own political views. In a jury trial, both would probably have been denied the right to testify.

Upon conclusion of the testimony, Judge Vaughn Walker gave the parties a deadline to submit post-hearing briefs, and said he would review the record to determine what questions he still needed to have answered. Closing arguments will take place after this post-hearing process has concluded, probably sometime in March. Thus, a decision is unlikely until late in the spring or early summer. The losing side would undoubtedly appeal to the 9th Circuit after attempting through a post-trial motion to get the judge to change his mind. A.S.L.

LESBIAN/GAY LEGAL NEWS

New Jersey Trial Judge Declares Gestational Surrogacy Contract Involving Gay Male Couple Unenforceable

A New Jersey Superior Court Judge ruled on December 23, 2009, that a gestational surrogate who has no genetic relationship to the twin girls she bore by agreement with a gay male couple is the legal mother of the children. The case illustrates the complications that may ensue when same-sex couples seek to have children by involving third parties. We first heard about this case last month through press reports and mentioned it in the January issue of *Law Notes*, but have just come into possession of a copy of the court's unpublished decision in *A.G.R. v. D.R.H. & S.H.*, Docket # FD–09–001838–07 (N.J. Superior Ct., Hudson County, Dec. 23, 2009).

The opinion by Superior Court Judge Francis B. Schultz is vague about some of the dates, so reconstructing the factual history requires some guesswork.

It seems that D.R. and S.H., a gay male couple who reside in New Jersey, registered as domestic partners in that state under the Domestic Partnership Act. They sought to have a child, and D.R.'s sister, A.G.R., volunteered to be a surrogate for them. When it turned out that her own eggs were not suitable for the procedure, eggs were obtained from an anonymous woman. S.H. was the sperm donor. A doctor performed the insemination. A.G.R., D.R. and S.H. entered into written agreements spelling out the rights and obligations of the parties, under which A.G.R. agreed to consent to the termination of any parental rights and the adoption of the child by D.R.

The court also states that D.R. and S.H. were married in California, but does not mention a date, so it seems likely that they were married subsequent to the main events in this case, as same-sex marriage did not become available in California until the spring of 2008. The New Jersey Attorney General's Office during the Corzine Administration (which ended on January 19) took the position that same-sex couples validly married in other states would be treated as civil union partners for purposes of New Jersey law. However, apart from reciting that the men married in California and registered as domestic partners in New Jersey, Judge Schultz never mentions their legal status as partners again in her opinion and apparently placed no weight on that factor in reaching her conclusions.

Twin girls were born on October 4, 2006. A.G.R. visited the girls in the hospital and after they were released to the custody of D.R. and S.H. until January 2007, when their dispute arose. After A.G.R. filed suit seeking a declaration of her legal status as parent of the twins, the court ordered that visitation resume. Since September 2007, A.G.R. has had three full days of parenting time with the twins every week, and D.R. and S.H. have had the twins the other four days.

In her lawsuit, A.G.R. claimed that as birth mother of the twins she was entitled to the legal status of a parent. D.R. and S.H. pointed to the various agreements that were executed, under which A.G.R. had agreed in advance to allow the twins to be adopted by her brother, which necessarily terminated her parental rights. A.G.R. countered that the agreement to give up the twins for adoption was not valid under New Jersey law because of the New Jersey Supreme Court's 1988 decision *In the Matter of Baby M.*, 109 N.J. 396. In that case, the dispute was between a surrogate (who was also the egg donor, and thus genetically related to the child she bore) and the married couple who contracted with her to produce a child for them, using the husband's sperm. Compensation to the surrogate was involved. The New Jersey Supreme Court found the element of compensation objectionable, tantamount to baby-selling prohibited by N.J. law, and also objected to a biological mother consenting to adoption in advance of the birth of the child. Thus, the court held that the surrogacy agreement was invalid and unenforceable as a matter of public policy, and that the child's legal parents were the surrogate mother and the genetic father, giving the surrogate mother the right of visitation after concluding that it was in the best interest of the child to live with its genetic father and his wife.

D.R. and S.H. sought to distinguish *Baby M*, because A.G.R. is not the genetic parent of the twins. They also argued that A.G.R. was a volunteer, not a paid surrogate. Judge Schultz rejected these distinctions as being legally insignificant. Schultz pointed out that the court in the *Baby M* case did not focus on the surrogate's genetic tie to the child, and had relied on various factors apart from compensation in reaching its determination that surrogacy agreements were contrary to public policy in New Jersey.

"It was pointed out in *Baby M* that the Parentage Act was silent as to acknowledging surrogacy agreements and that Court suggested that the silence of the Legislature suggested that the Legislature chose not to recognize surrogacy. If that interpretation of the Legislature's silence is correct, the additional twenty-one years of silence as to surrogacy agreements speaks even louder," wrote Judge Schultz.

"It also was the position of the Court that surrogacy as a whole is bad for women even if in any one particular case the surrogacy agreement is entirely satisfactory to all parties involved. *Baby M* did not find a constitutional right for a surrogate mother to the companionship of her child only because that issue was moot since the surrogacy contract was invalid, and the parental rights were not properly terminated. The Parentage Act gave both the birth mother, because she gave birth to the child, the status of parent as well as the man who contributed the genetic link. This is because the natural mother, may be established by proof of her having given birth to the child,' NJSA 9:17–41(a), and the natural father may be established … on a blood test or genetic test,' NJSA 9:17–41(b)."

"Essentially," the judge continued, "the Supreme Court had no difficulty with surrogacy agreements so long as there was no payment and so long as the surrogate mother is given the right to change her mind. While the *Baby M* decision did not distinguish between gestational' carriers and surrogate' mothers, the Court was well aware of the preservation of sperm and eggs of embryo implantation," procedures which are mentioned in passing in the *Baby M* opinion. In *Baby M*, the New Jersey Supreme Court had also stressed psychological issues, particularly the bonding between a pregnant woman and her expected child, as a factor that counseled against enforcing agreements to terminate parental rights for adoption before the child is born.

Judge Schultz disagreed with the defendants' argument that the lack of a genetic tie between A.G.R. and the twins made the case distinguishable from *Baby M*. "The public policy considerations enumerated above from *Baby M* are far reaching and unrelated to a strict genetic connection," Schultz insisted. "The lack of plaintiff's genetic link to the twins is, under the circumstances, a distinction without a difference significant enough to take the instant matter out of *Baby M*."

Schultz also rejected the significance of California cases holding that the intent of the parties upon entering into a surrogacy arrangement would later be binding when a surrogate changed her mind and sought parental status. Schultz pointed out that California has a different statutory framework and has embraced different public policies from New Jersey. "If the underlying principles in California were consistent with the principles in New Jersey, then the reasoning in the California case upholding the gestational carrier agreement might have been tempting," Schultz wrote. "However, New Jersey's law as expressed in *Baby M* and the California case had so many conflicting underpinnings that this judge sees no reason to follow the California law or that of other jurisdictions for the same reason."

"The parties' intent in voluntarily entering into the surrogacy agreement was of no significance under *Baby M*," wrote Schultz. "This clearly suggests that arguments derived from intent such as detrimental reliance and estoppel would be of no significance either."

Thus, Schultz concluded that A.G.R. was entitled to summary judgment on her claim to be a legal parent of the twins. Schultz declared that the surrogacy agreement was void and could not serve as a basis for terminating A.G.R.'s parental rights or implementing her consent to having the children adopted by her brother. At the same time, Schultz found that S.H. "is the legal father of the twins."

This ruling on the motion does not end matters, since the declaration that A.G.R. and S.H. are the legal parents of the twins leaves open questions of custody. When legal parents are not living together and cannot work out an amicable agreement on custody and visitation, a court will decide these issues based on its determination of what would be in the best interest of the child. Having been declared a legal parent of the twins, A.G.R. is now in an equal position with their legal father, S.H., to contend for custody. The opinion does not indicate whether A.G.R. was seeking to be a custodial parent, or merely seeking to assert parental rights to visitation and a decisional role in the upbringing of the children.

A.G.R. is represented by Harold J. Cassidy. D.R.H. and S.H., the fathers, are represented by Alan S. Modlinger. Daniel A. D'Allessandro served as Law Guardian appointed by the Court to represent the interest of the twins in this lawsuit. A.S.L.

9th Circuit Denies CAT Relief to Gay Honduran Man

The U.S. Court of Appeals for the 9th Circuit affirmed the decision of the Board of Immigration Appeals (BIA) denying a gay Honduran relief under the Convention Against Torture (CAT), in *Solando v. Holder*, 2009 WL 5125759 (9th Cir., Dec. 22. 2009). Under U.S. and International Law, CAT relief is mandatory for any person who can prove that more likely than not they will face torture, either from government or private actors with government's "willful blindness," if returned to their native country. The court stated that it could only reverse the decision of the BIA if substantial evidence in the record compelled a finding that the Petitioner would face torture if returned to Honduras, and failed to state why Petitioner had not raised claims for political asylum or withholding of removal on appeal.

A panel of the court explained that although the Petitioner had "experienced violence at the hands of private actors as a gay youth in Honduras," he could not prove the government of Honduras would acquiesce to such torture since he had not reported it to the police. Further, the court held that since Honduras does not criminalize homosexual acts, and Petitioner was not a "homosexual activist, transsexual, or member of another category of homosexual persons more frequently targeted for violence," the record could not compel a finding that it was more likely than not that he would be tortured if returned.

The court rejected Petitioner's final claim on appeal, that he would be imprisoned as a homosexual and targeted by inmates and denied medical care by prison officials, stating that it was "too speculative." The court's decision came only days after the murder of LGBT activist Walter Trochez and the 16–year-old daughter of journalist Karol Cabrera, which caused the European Union to issue a statement condemning such violence and calling on the Honduran government to "ensure the protection of human rights defenders." *Bryan Johnson*

Federal Court Rejects Transgender Discrimination Claim

On January 13, 2009, Chief Judge McAuliffe of the federal District Court of New Hampshire granted summary judgment to an employer accused of discriminating against a transgender job applicant. *Cook v. PC Connection*, 2010 WL 148369 (D.N.H. Jan 13, 2009). Brianne Cook brought the action under Title VII and state anti-discrimination laws, alleging that PC Connection had denied her application because of her gender and her status as a transsexual. Finding that no material facts were at issue, Judge McAuliffe granted PC Connection's motion for summary judgment.

In 2000, Cook, then using the name she was given at birth, applied for a sales job with PC Connection. That application was denied because Cook had lied on the application and also stated that she really wanted to work in marketing but was simply trying to get her foot in the door. In 2006, Cook applied for another sales position at PC Connections using her current name. On this later application, Cook stated that she had never gone by any other name and had never applied with the company before. Cook also signed an acknowledgment that her application would be denied if it contained false or misleading information. When the company performed a background check on Cook, it discovered that she had indeed applied for a sales position before.

PC Connection then denied her application, again citing a lack of candor and interest in the position.

Following the burden shifting framework of *McDonnell Douglas*, Judge McAuliffe found that PC Connection put forth a legitimate explanation for its actions — that Cook had lied on two different applications and applied for a job she had professed she did not want.

Cook thus had the burden of showing that PC Connection's explanation was mere pretext. The only evidence Cook offered was that an employee of the Company had told her that her application was denied because she had "applied to the company before as a man in 2000." Noting that the statement was ambiguous and actually provided support for the arguments on either side, Judge McAuliffe ruled that a reasonable jury could not find that such scant evidence rose to the level of proof that PC Connection's non-discriminatory explanation was pretext. *Chris Benecke*

Federal Court Applies NY State and City Gay Discrimination Bans Extraterritorially

U.S. District Judge Peter K. Leisure, changing the position he had taken in a prior case, has concluded that a non-resident of New York employed mainly outside the state can contest his discriminatory discharge under the New York State and City Human Rights Laws where the employer, headquartered in New York, made the discriminatory termination decision and communicated it from New York. *Rohn Padmore, Inc. v. LC Play Inc.*, 2010 WL 93109 (S.D.N.Y., Jan. 11, 2010). Thus ruling, Judge Leisure refused to grant summary judgment on jurisdictional grounds to an employer in a diversity case alleging sexual orientation discrimination. However, a final summary judgment on the merits could not be granted, despite the defendant's virtual confession of unlawful motivation, because of ambiguity about the plaintiff's employee status.

The case concerns a decision by Erastus Pratt, the proprietor of the defendant men's fashion company, LC Play, to terminate Ron Padmore, who had been retained by LC Play to do public relations and related chores for them, on a one year written contract. According to an email Pratt sent to Padmore terminating his employment less than six months into the contract, "The models and other people had questions about your sexuality and my company can't afford to [be] attached to no gay shit. How does it look for an mens [sic] clothing line to have a fruit cake as the spokes person [sic], not my company. Sorry dude, but that's just how this business is. Best of luck." Pratt added his name to this message and sent it off on October 12, 2005. Not only was he grammatically inept, but he virtually confessed sexual orientation discrimination in the email.

The irony here is that although he appeared so to Pratt and his models, Padmore asserts in the complaint that he is not gay, that he never told Pratt he was, but that apparently Pratt believed he was gay. Perhaps, like many men in the fashion industry — sorry, here we stereotype a bit — Padmore is so "metrosexual" that the crude sort of person revealed by Pratt's

email would assume Padmore was gay, because he was just so fabulous...

In any event, the email virtually confesses sexual orientation discrimination, and one would assume this to be an open and shut case. But Pratt defended against the discrimination claim on three grounds.

First, he asserted that New York law does not forbid sexual orientation discrimination. Perhaps his law firm hadn't bothered to insert pocket parts into its library books when preparing its summary judgment motion, since New York amended its Human Rights Law to ban discrimination on account of actual or perceived sexual orientation several years earlier, as a quick on-line check would have shown, and the New York City ban dates back to 1986. Upon due consideration, they dropped this defense.

Second, and more seriously, Pratt contended that since Padmore was not a New York resident and apart from occasional visits to the home office actually did most of his work from his Los Angeles residence, where he was located at the time the discharge notice was sent, the New York State and City laws did not apply to his case. And here he initially appeared lucky to have had the case assigned to Judge Leisure, who had issued a decision in a prior case, *Wahlstrom v. Metro-North Commuter Railway*, 89 F.Supp.2d 506 (S.D.N.R. 2000), deciding a claim asserted against the commuter railway alleging a violation of the N.Y. City ordinance, holding that since the plaintiff was not a city resident and the incident giving rise to the claim arose north of the city line, the City Ordinance did not apply, even though Metro-North was headquartered in the city. In that case, Leisure opined, the question was not just where the defendant was headquartered and where its policies were originated, but also where the impact of the alleged discrimination occurred. Various federal trial courts in New York have differed over time about the criteria to be applied in determining whether discrimination by a New York-based business towards a nonresident would be subject to state law, and there is a line of district court opinions agreeing with Leisure that the impact of the decision must be felt in New York for New York law to apply.

Leisure has changed his view, influenced by both a more recent federal district court opinion by one of his colleagues, Judge Rakoff, and also by a U.S. Court of Appeals for the District of Columbia case, *Schuler v. Pricewaterhousecoopers, LLP*, 514 F.3d 1365 (D.C.Cir. 2008), in both of which the courts argued that the better interpretation of the law was that if a discriminatory employment decision is made in New York, New York law should apply to it. This was apparently influenced as well by a recent New York State Appellate Division ruling in *Hoffman v. Parade Publications*, 878 N.Y.S.2d 320 (App.Div. 2009). That case involved an Atlanta-based salesman for the New York-based publication, who made work-related trips from time to time to the N.Y. office. Leisure concluded to follow the newer precedent, and refused to grant summary judgment to the defendant. Instead, he found that Padmore had satisfied the jurisdictional limitations of the New York State and City laws banning sexual orientation discrimination.

However, on Pratt's third defense, Judge Leisure concluded that a jury trial was needed. Pratt contended that Padmore was an independent contractor, not an employee, thus the ban on employment discrimination contained in these statutes would not apply to his case. The parties agreed that the employment discrimination charges hinge crucially on whether Padmore was an employee. Leisure found that there was no clear answer to that question, upon undertaking a careful analysis of the factual allegations submitted in support and opposition to the motion in light of a multifactorial test employed by the federal courts derived from the Supreme Court's decision in *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Part of the problem was that the record at this point is ambiguous as to various facts that would be relevant to this determination, leaving it impossible to determine Padmore's status as a matter of law and requiring a trial to pin down some of the undeterminable factors. Thus, neither side won an ultimate ruling on the merits in this battle of cross-motions.

In other rulings on the motions, Leisure found that Padmore had essentially abandoned his claims concerning copyright and trademark infringement and defamation. A.S.L.

Federal Civil Litigation Notes

Second Circuit — An HIV+ man from the Dominican Republic failed in his attempt to get the Second Circuit to order the Board of Immigration Appeals to reconsider the decision to remove him from the United States based on his criminal status. *De la Cruz v. Holder*, 2010 WL 292690 (Jan. 27, 2010). The court found that the petition did not fall within its jurisdiction to review the merits of the case, which would be limited to constitutional claims and questions of law. In this case, the BIA had approved an Immigration Judge's decision that the petitioner was removable for having committed a criminal offense falling within the category of aggravated felonies mandating removal. Petitioner was arguing that conditions for HIV+ people in the Dominican Republic were bad enough to qualify him for relief under the Convention Against Torture, but he apparently had not raised this at an early enough point in the case and the BIA construed this as an attempt to reopen the case. The court found that what the petitioner was challenging was the BIA's factual findings, which are not subject to judicial review in this context.

Fifth Circuit — In *Jimenez-Lopez v. Holder*, 2009 WL 4798149 (Dec. 14, 2009) (not officially published), a three-judge panel of the U.S. Court of Appeals for the 5th Circuit ruled per curiam that a gay HIV+ man from Mexico was properly found subject to removal because of his multiple convictions on drug crimes. The petitioner argued that the offenses of which he was convicted were merely misdemeanors and thus not serious enough to require his removal, but the court found authority to support the government's argument that multiple state law misdemeanor convictions for possession could be punished as felonies under the federal Controlled Substances Act's recidivism provisions, and thus could be treated as serious enough to warrant removal.

California — U.S. District Judge Oliver W. Wanger refused to grant summary judgment in favor of a school district that is defending a Title IX suit brought on behalf of a male former student at the high school who alleges he was subjected to homophobic attacks and harassment during a summer football camp for students from the school. *Roe v. Gustine Unified School District*, 2009 WL 5184688 (E.D.Cal., Dec. 22, 2009). (Title IX forbids sex discrimination by educational institutions that received federal funds. The essence of the legal claim is that the district responded differently to what happened to him than it would for a female student subjected to such harassment.) The plaintiff claimed that as an incoming freshman attending the summer football camp program, he was subjected to homophobic taunting and physical harassment from a group of upper-class students, including an incident where he was held down while an air-pump was inserted into his rectum and partially inflated. Some of his assailants were subsequently expelled when a coach overheard them talking about what they had done to the plaintiff, express his concerns to district administrators, who then involved the police in an investigation after the fact. The plaintiff brought a variety of federal and state claims against individuals and the school district, almost all of which were dismissed by the court, but the court held that the Title IX claim against the school district remained viable, and was not precluded by a California statute concerning school district immunity for incidents occurring during field trips and other school excursions.

Illinois — An employer may be held to account for allegations that a male supervisor sexually harassed two male employees in violation of Title VII of the Civil Rights Act of 1964, as well as to answer for Illinois common law claims of assault, battery, and infliction of emotional distress, as U.S. District Judge David H. Coar denied motions for summary judgment by the employer in *Benitez v. American Standard*

Circuits, Inc., 2010 WL 64231 (N.D. Ill., Jan. 5, 2010). The groping and unwanted sexual advances alleged appear to fall within the mainstream of what district courts have been willing to find actionable under a sex discrimination hostile environment theory, so plaintiffs' survival of the summary judgment motions should set up the case for a settlement.

U.S. Tax Court — Here's a strange little opinion from the U.S. Tax Court. A man who was civilly committed as a sexually violent predator wanted to form a corporation to advocate for the end of laws against sex between adults and minors, and he wanted the IRS to recognize it as a tax exempt charity. Have fun reading the Tax Court's decision explaining why his corporation did not qualify for this favorable tax treatment in *Mysteryboy Incorporation v. Commissioner*, T.C. Memo. 2010–13, 2010 WL 291758 (Jan. 26, 2010). A.S.L.

Federal Court Rejects Discrimination Claim by Transsexual Inmate Denied Placement in General Population

A transsexual prison inmate in Virginia who was placed in special housing rather than general population in the male prison failed to state an actionable equal protection claim, acccording to U.S. District Judge Samuel G. Wilson, ruling in *Marshall v. VDOC*, 2010 WL 92528 (W.D.Va., Jan. 8, 2010). Wilson described what sounds like a Catch–22 situation, where prison officials who do not take steps to protect transsexual inmates may be subject to suit, and then might be held liable for discrimination if they do take such steps.

According to the complaint, inmate Marshall, a male who had prior to imprisonment taken some steps toward sex change (castration, some cosmetic surgery but not genital removal) and begun taking hormone treatments, was initially placed in a segregated unit when he was transferred to Middle River Regional Jail six weeks after entering the custody of the Virginia Department of Corrections (VDOC). Middle River is a nonVDOC facility, a private prison operated under contract with the state. Marshall claimed that this transfer to a nonVDOC imposed a hardship because it subjected him to higher medical co-pays than he would encounter in the state facilities, but the court found that claim non-actionable. The day after his arrival, Marshall was moved from segregation to a special housing unit. He preferred to be placed in general population, proclaiming that despite the steps he had taken toward sex change, he has "the same equipment that any other male in the Virginia Department of Corrections" has, but was denied this request. His suit alleges a violation of his right to equal protection.

Judge Wilson decided that Marshall was not well-placed to raise an equal protection argument, because he had not alleged that he was treated differently from anybody similarly situated. In Wilson's view, Marshall was not similarly-situated to the male inmates in general population because Marshall has modified his body in various ways and is transsexual.

"It is not a violation of the Equal Protection Clause to house separately from the general population inmates who have undergone sex change procedures, given the special security concerns those inmates present," wrote Wilson. "Indeed, prison officials may be held liable if they are deliberately indifferent to a substantial risk of serious harm created by placing such an inmate in the general population. The courts cannot demand on the one hand that prison officials take appropriate measures to protect inmates by removing them from the general population where they might be harmed and then on the other hand subject those officials to liability for violating the Equal Protection Clause for taking those measures." Wilson insisted that "the facts belie" Marshall's assertion that he has "the same equipmemnt" as the other males in light of the degree to which he transitioned before arriving at the prison.

"The court does not imply that an equal protection claim would be impossible for an inmate who had undergone sex-change procedures," Wilson noted, "only that the facts as alleged do not make out a plausible claim in this case." He added, "To the extent that Marshall may seek to raise a claim that inmates in special housing units are denied opportunities in violation of their right to equal protection of the laws, this dismissal is without prejudice." A.S.L.

State Civil Litigation Notes

California — No big gay-law issues here, just a little human interest. In *In re Marriage of Johns*, 2009 WL 5174028 (Cal.App., 4th Dist., Dec. 31, 2009), the court of appeal affirmed a decision that the marriage between a much-married (and unfortunately not as frequently divorced) woman and her gay ex-husband was void ab initio. It seems that Faye's history showed repeated instances of her not waiting until a divorce was final before marrying a new man, and so it turned out when she married William Johns, who told her up front before they married that he was gay, or, as the court puts it: "he was never a heterosexual." But they "married" nonetheless, even though her divorce from her fourth marriage was not yet final. Evidently she found being "married" to a gay man to be a bit frustrating, since at one point she threatened him with a gun. He soon moved out and thereafter lived with a boyfriend, but no move was made to terminate the marriage for many years. Finally, after William confirmed for himself that Faye's divorce was not final when they had married, he filed an action to have the marriage declared void, which was granted by the trial court and upheld on appeal. The court rejected application of the putative spouse doctrine, finding that Faye had reason to know her divorce was not final when she married William, and also rejecting the application of estoppel against William, finding that he had been in the dark about Faye's actual marital status at the time of the marriage. Interesting reading. Would make a good family law course final exam question.

California — A proposed settlement was filed in Los Angeles County Superior Court on January 26 in a pending class action lawsuit against eHarmony, an online dating service that had refused to accommodate customers seeking same-sex partners. Under the settlement, the company, which admits no wrongdoing, eHarmony agrees to revise its website to make it equally inviting to customers regardless of the gender of the partner they are seeking. Class members will also get some compensation, and their attorneys will reap a fee award which may go as high as $1.3 million. *Law.com*, "Gay Singles Settle eHarmony Class Action," Jan. 27.

District of Columbia — In *Jackson v. District of Columbia Board of Elections and Ethics*, Civ. Action No. 2009 CA 008613 B (D.C. Superior Ct., Jan 14, 2009), Judge Judith N. Macaluso rejected an attempt by anti-same-sex marriage proponents to force a ballot question about same-sex marriage and delay implementation of the recently-enacted District ordinance authorizing such marriages, which will likely go into effect by sometime in March depending on passage of the Congressional review period without any action from that body. The District's Board of Elections had taken the position that the proposed referendum, which would enshrine in District law a restriction of marriage to the union of a man with a woman and would deny recognition to same-sex marriages contracted elsewhere, must be kept from the ballot because it would violate the public policy of the district. Judge Macaluso has produced an intricately reasoned opinion navigating the occasionally murky waters of District law concerning appropriate subject matter for voter initiatives, and concluded that the Board was correct, and that an old district court of appeals ruling rejecting a claim for same-sex marriage was no longer salient because of intervening legislative events. A key finding was that the District's Human Rights Act, which bans sexual orientation discrimination, is incorporated into a prohibition by District statute of initiatives that would violate District law. We had not heard as we went to press whether the plaintiffs will seek to appeal this ruling, but it seems likely, given their strongly-voiced opposition to the District Council's action last year in passing the same-sex marriage recognition bill and then the same-sex marriage authorization bill.

Florida — As a trial court ruling finding that Florida statutory ban on gays adopting kids remains pending on appeal, another trial judge has granted an adoption petition by a lesbian couple, according to a January 28 report in the *Sun Sentinel*. Miami-Dade Circuit Judge Maria Sampedro-Iglesia granted a petition by Vanessa Alenier and Melanie Leon to adopt a one-year-old boy over whom Alenier has had custody since shortly after his birth. The judge stated in her order that there is no rational connection between sexual orientation and the best interests of the child, according to the news report. Her opinion echoed the earlier ruling by her Miami-Dade Circuit Court colleague, Judge Cindy Lederman, in 2008.

Iowa — The Iowa Court of Appeals ruled that state trial courts did not have jurisdiction to consider sexual orientation claims that arose prior to the date when the amendment adding sexual orientation to the state's human rights law took effect. In *Quick v. Emco Enterprises*, 2009 WL 5126144 (Dec. 30, 2009), the plaintiff alleged sexual orientation discrimination in violation of the Des Moines and Iowa anti-discrimination laws, based initially on a complaint he filed with the Des Moines Human Rights Commission in 2004. At that time, the city ordinance prohibited sexual orientation discrimination, but the state law did not. Quick subsequently filed a complaint with the commission in 2005, claiming he had suffered retaliation for filing the earlier complaint. The city commission issued a right-to-sue letter in August 2006. Meanwhile, Quick had filed a complaint with the Iowa Civil Rights Commission, charging sex discrimination, which the employer opposed on the ground that his claim was really sexual orientation discrimination, not sex discrimination. After receiving a right-to-sue letter from the state agency, he filed his suit in state court alleging violations of both statutes. The defendant sought summary judgment on the ground that his state law claim was not a sex discrimination claim, and that the city ordinance could not confer jurisdiction on the state court. After some confusing about a misfiled ruling, the trial court eventually granted summary judgment to the employer, which was affirmed by the court of appeals. Most of the court's opinion was devoted to finding that Quick's appeal of the dismissal was not time-barred. The court did not explain its reasoning for affirming the trial court's jurisdictional ruling.

New York — A unanimous panel of the Appellate Division, 3rd Dept., ruled Dec. 17, 2009, in *Weeks v. New York State Comptroller*, 2009 WL 4842483, that a retired Suffolk County Police Officer who claimed to have been subjected to a "pattern of sexual harassment, homophobic slurs and death threats" after "his coworkers became aware that he had been involved in a homosexual relationship" was not entitled to disability retirement benefits. A hearing officer had determined that he was "not permanently incapacitated from the performance of his duties" as a result of the "disabling psychological injuries" that he claimed to have suffered as a result of this harassment. The State Comptroller upheld the hearing officer's determination, which was affirmed by the Appellate Division panel. The case had boiled down to a battle of the experts. Appellant's expert, a licensed psychologist who had been treating him since 2003, testified that the appellant suffers from "posttraumatic stress disorder and is unfit for duty in Suffolk County law enforcement in any capacity.;" However, he also testified that the Appellant "is a very capable man" and that his inability to perform as a police officers was, according to Justice Mercure writing for the court, "strictly the result of the environment in which he was forced to work." The opposing expert, who testified on behalf of the Retirement System, a board-certified psychologist, concluded that Appellant was "not permanently incapacitated from working as a police officer and that, provided the behavior of his coworkers was addressed and rectified," he could return to working as a police officer in Suffolk County. The court also noted that the appellant had been unsuccessful in a Sec. 1983 case against the employer. The court noted that *both* experts had thus opined that appellant was capable of working as a police officer, and that it was within the Comptroller's discretion to conclude from this testimony that he was not disabled such as to qualify for a disability retirement pension. A.S.L.

Homophobic Statements Are, In Part, Sufficient Evidence to Support Hate Crime Conviction

On January 5, 2010, Michael Kowalyshyn lost a bid to overturn his conviction for intimidation based on homophobic bigotry and bias, along with other related charges. *State v. Kowalyshyn*, 2010 WL 4927 (Conn. App.).

In September 2005, Kowalyshyn and the complaining witness, Scott Beattie, were living in tents in a wooded area behind a museum in Willimantic, CT. On September 12, Kowalyshyn, Beattie and an unidentified gay man consumed alcohol together in a nearby park at midday for about an hour. Afterwards, when Beattie and Kowalyshyn returned to the campsite, Kowalyshyn told Beattie that he did not want "the fucking fags around our campsite".

Later that evening, Kowalyshyn and Beattie continued to drink together. At about 10:15pm, the men began to argue. At some point, Beattie removed some or all of his clothes. The reasoning behind this is unclear based upon the court's record. Kowalyshyn began yelling at Beattie that "he must be a fag" because "[o]nly a fag would take his clothes off in front of another man" and because Beattie had been hanging out with the unidentified gay man earlier that day. Beattie vehemently denied being gay. For the next 15–20 minutes, the two men wrestled and fought one another. According to Beattie, at some point during the fight, Kowalyshyn poured vodka on Beattie and attempted to ignite a handheld lighter but was unable to do so. The fight ended with the following parting words from Kowalyshyn: "[I'll be back to] burn you with gasoline; I'll do it right this time." Beattie couldn't leave the campsite due to his night blindness, but remained awake all night fearing Kowalyshyn's return.

The following morning, Beattie reported the incident to the police. He was interviewed and gave a statement. Kowalyshyn was later arrested by police, and after waiving his *Miranda* rights, made numerous oral and written statements to the police which in essence corroborated Beattie's account of the previous night.

Following a jury trial, Kowalyshyn was convicted of attempt to commit assault in the second degree, threatening in the second degree, reckless endangerment in the second degree, intimidation based on bigotry or bias in the second degree and disorderly conduct. Kowalyshyn was sentenced to eight years imprisonment followed by two years of special parole.

On appeal, Kowalyshyn raised two arguments: [1] that there was insufficient evidence to support his conviction of intimidation based on bigotry or bias in the second degree; and [2] that the court improperly denied his motion to suppress certain statements made following his arrest.

Under C.G.S.A. Section 53a–181k (a), "A person is guilty of intimidation based on bigotry or bias in the second degree when such person maliciously, and *with specific intent to intimidate or harass another person because of the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person*, does any of the following: (1) Causes physical contact with such other person (2) damages, destroys or defaces any real or personal property of such other person, or (3) threatens, by word or act, to do an act described in subdivision (1) or (2) of this subsection, if there is reasonable cause to believe that an act described in subdivision (1) or (2) of this subsection will occur."

Kowalyshyn's first argument was based on the claim that the State failed to prove that Kowalyshyn had the specific intent to intimidate or harass Beattie because of Beattie's actual or perceived sexual orientation. The court rejected this argument, finding sufficient facts to support the jury's verdict. Based upon Kowalyshyn's own statements, replete with disparaging remarks towards homosexuals, a jury could reasonably infer that Kowalyshyn was biased towards homosexuals. Second, Kowalyshyn's statements also supported the inference that he perceived Beattie to be gay. Finally, based upon

Kowalyshyn's statement that he didn't want "fags" at the campsite, testimony that Kowalyshyn attempted to set Beattie on fire and had threatened to burn Beattie's tent down the next day, the jury could conclude that Kowalyshyn acted with intent to harass or intimidate Beattie because of his actual or perceived sexual orientation.

Kowalyshyn's suppression claim was based on the argument that the trial court erred in finding that the police had probable cause to arrest him, and that his statements were fruit of the poisonous tree. The appellate court rejected the theory, finding that Beattie's account was reliable enough to warrant an investigation, and that the police officer's observation of an empty bottle of vodka at the campsite served as sufficient corroboration. *Eric J. Wursthorn*

Civil Unions Coming in Hawaii? Not Quite Yet.

Hawaii was the first state in the United States to enact legislation establishing a legal status for same-sex couples, a Reciprocal Beneficiaries Act that was created in response to the same-sex marriage litigation of the early 1990s. The RBA provided a limited menu of rights, and was not limited to same-sex couples. During January, the state seemed poised to take the broader step of making a civil union status equivalent in many respects to marriage available to both same-sex couples who are denied the right to marry and different-sex couples who have that option but prefer to avoid it. But cowardly Democratic leaders in the state House decided at the eleventh hour that calling a vote was too risky, even though the chamber had approved an earlier version of the bill last spring.

On February 12, 2009, the House passed HB 444, a measure to create civil unions for same-sex couples, and sent it to the Senate, where it failed of passage in its original form. However, consideration of the measure was continued ,as it was amended to make civil unions equally available to same-sex and different-sex couples, and as of May 11, 2009, a decision was reached to carry it over to the 2010 session for further consideration.

On January 22, 2010, the State Senate passed the civil union bill as SD1, an amended version of the House bill, by a vote of 18–7, a margin high enough that it could survive a possible veto by Governor Linda Lingle, a Republican who had not announced a position on the bill prior to the vote but whose opposition was anticipated. A vote in the House on the Senate bill was to be predicated on the leadership's determination whether the measure could achieve a veto-proof majority in that chamber, the thought being that members should not be required to vote on a controversial measure that might be vetoed in an election year if their risky vote would be wasted. Passage of the narrower measure in the House last year was one vote short of a veto-proof majority, and one Democratic supporter was actually absent from the vote, so it was possible the necessary votes could be cobbled together, albeit uncertain that the same margin would be there for the broader Senate bill.

However, during the House session on January 29, according to an *Associated Press* report picked up by several mainland newspapers, the House decided to postpone indefinitely a vote on the measure as it had been amended by the Senate. "Civil union supporters in the crowded House gallery yesterday shouted, Shame on you!' while opponents cheered," wrote the AP. *Boston Globe*, Jan. 30.

Making civil unions available for different-sex couples would actually have made the measure much more of a challenge to traditional marriage, since it would provide a sort of "marriage lite" (one that carries no federal rights or responsibilities, presumably, although the question whether the federal government might recognize a different-sex civil union for some purposes has not really been tested) that might prove popular in the way the French civil solidarity pact has been among young heterosexuals in that country seeking a less constraining alternative to traditional marriage.

Since the drafters' intent was to create an institution that enjoys all the legal incidents of marriage available under state law, the bill is actually quite brief, mainly concerned with defining terms and establishing how civil unions are to be performed, making sure to provide that people authorized to "solemnize" marriages are authorized to provide the same service for civil unions, but are not obliged to do so, and can refuse without penalty. Nothing is said about how civil unions are to be terminated, presumably because the general provisions are easily construed to make the state's laws concerning termination of marriages fully available to civil union partners.

Section 9 of the bill provides that civil union partners "shall have all the same rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who contract, obtain a license, and are solemnized pursuant to chapter 572," the state's marriage law. Section 10 provides that "all unions between two individuals not recognized under section 572–3 [the marriage recognition statute] shall be recognized as civil unions provided that the relationship meets the eligibility requirements of this chapter." And a section added to the original House bill provides: "A party to a civil union shall be included in any definition or use of the terms spouse,' family', immediate family', dependent', next of kin' and other terms that denote the spousal relationship, as those terms are used throughout the law."

The potential adoption of this measure actually seemed to bring things full circle from 1996–97, when a similar proposal was presented to the Hawaii legislature by mainland legal authority Tom Coleman while it was pondering an appropriate legislative response to the same-sex marriage litigation, in which a trial judge had ruled in December 1996 in *Baehr v. Miike* that the exclusion of same-sex couples from marriage created a state constitutional equality violation, and the legislature was contemplating package of a constitutional amendment to disempower the courts from ruling on this subject while legislating some measure of legal rights for same-sex couples. At the time the legislature decided to take the more cautious step of a limited relationship. Now, the at least the Senate was ready to approve the broader measure. Perhaps a bill will actually be enacted after the next round of legislative elections. A.S.L. @H2 = Legislative Notes

Federal — Rep. Jared Polis (D-Colo.), has introduced H.R. 4530, the Student Non-Discrimination Act, intended to create a federal cause of action for the "relentless harassment and discrimination and life-threatening violence" faced by students due to their actual or perceived sexual orientation. The bill would require that no student in public schools be "excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" based on actual or perceived sexual orientation or gender identity, and would prohibit harassment based on these characteristics. It also prohibits discrimination based on the sexual orientation or gender identity of persons with whom a student associates. The bill is modeled after Title IX, a federal statute that uses similar language to address sex discrimination and harassment in public schools, and which has been pressed into action with some success in lawsuits brought on behalf of LGBT students faced with harassment. H.R. 4530 would make such protection more explicit and send a message to reluctant school administrators and boards of education that they can no longer look the other way with impunity when they are informed of such harassment or discrimination. *MetroWeekly*, Jan. 27.

Federal — Rep. Laura Richardson (D-Calif.), has introduced H.R. 2744, the Equal Rights for Health Care Act, a bill that would bar discrimination in Federally-assisted health care services and research programs on the basis of sex, race, color, national origin, sexual orientation, gender identity or disability status. The bill had 10 co-sponsors on introduction, and was referred to the House Energy and Commerce Committee.

Florida — The Leon County charter-review committee has voted 10–3 to recommend that the county's charter be revised to add protec-

tion against sexual orientation discrimination. There was some debate about whether the recommendation should be instead to the county legislature to enact an ordinance, rather than to include this in a charter amendment requiring a vote by the public. *Tallahassee Democrat*, Jan. 29. Although many Florida municipalities and counties now forbid such discrimination, at the statewide level the Republicans have asserted firm control over the governorship and the legislature, blocking any attempt to pass an anti-discrimination law on this basis and resisting efforts to repeal a law banning gay people from adopting children — the only such statute in the nation.

Florida — City commisioners in Miami Beach have revised and upgraded the city's human rights law. The new law adds gender identity to the list of prohibited grounds for discrimination (sexual orientation was added long ago), sets up a new process for dealing with discrimination complaints, establishing a city Human Rights Commission to enforce the measure, and establishes fines for those found guilty of violations. The measure was proposed by openly-gay Commissioner Victor Diaz, Jr., who expressed concern after the passage of anti-gay Amendment 2 to the state constitution might weaken Miami Beach's commitment to domestic partnerships. The result is one of the strongest municipal human rights laws in the country, according to Diaz. *Miami Herald*, Jan. 22.

Florida — City commissioners in South Miami, Florida, gave final approval to a measure that authorizes domestic partner health care coverage and hospital visitation rights for city employees who have unmarried partners, regardless of gender. To receive benefits, employees and their partners must file a domestic partnership declaration with the Miami-Dade Consumer Services Department. The measure received near-unanimous support. *Miami Herald*, Jan. 20.

Indiana — The Indiana Senate voted 38–10 to approve a proposed amendment to the state constitution that would prohibit any legal status for same-sex partners, whether marriage, civil unions, or domestic partnerships. Indiana amendment procedures require a measure to be approved in identical form by both houses of the legislature in successive sessions in order to be placed on the ballot. The Senate has repeatedly approved anti-gay marriage amendments over the last several years, but Democratic leaders in the House have successfully kept the measure from coming to a vote, and expect to be able to do so again. The Indiana courts have already rejected a same-sex marriage lawsuit at the appellate level, but Republican proponents of the amendment point to neighboring Iowa, where the Supreme Court unanimously ruled in favor of a same-sex marriage claim, and argue that the state is in danger of another attempt to get "activist judges" in Indiana (there's an oxymoron if we ever heard one: activist judges in Indiana) to follow their example. *Indianapolis Star*, January 29.

New Jersey — On January 7, the New Jersey Senate rejected a marriage equality bill, thus closing off the legislative route to marriages for same-sex couples in that state for the foreseeable future, since the vote came just a week before Christopher Christie will take office as governor. Christie, a Republican, has stated that he would veto a same-sex marriage bill, which incumbent Democrat Jon Corzine had promised to sign if it was enacted before he left office. However, hopes for same-sex marriage in the state were not extinguished by the vote, since Lambda Legal announced that a new lawsuit would be filed in state court, arguing that the civil union law enacted by the legislature in response to *Lewis v. Harris* failed to fulfill the state constitutional requirement of equality of treatment. A report by the Civil Union Review Commission documents various ways in which civil union couples suffer inferior treatment compared to married couples.

Ohio — On January 5, the Columbus, Ohio, Board of Education voted to add "sexual orientation" and "gender identity or expression" as prohibited grounds for discrimination within the city's public school system. The policy is binding on all faculty, staff and students and applies to all personnel actions and school activities. *Columbus Dispatch*, January 6. A.S.L.

Law & Society Notes

Federal — During his state-of-the-union address to Congress on January 27, President Obama stated, at the tail end of an hour-plus speech, that he would work with Congress during 2010 to repeal the "don't ask don't tell" military policy because it is "the right thing to do." This received a standing ovation from most Democrats in the chamber as well as Defense Secretary Robert Gates (but not the Joint Chiefs of Staff? The TV cameras did not pan to them...), but less than total rapture from activist proponents of ending the ban, who pointed out that the President could have announced that he was using his authority as commander-in-chief during active hostilities to suspend the policy in order to avoid discharging currently serving gay personnel whose contributions to our national defense are vitally needed. In addition, of course, saying he would do it because it is "the right thing to do" is not the same as saying he was also doing it because " it is important for our national security to end a policy that denies us the service of many dedicated and talented individuals at a time of great national need," i.e., that it is *sound policy*, not merely an ethical imperative. Senator Carl Levin had previously announced that hearings would begin on the subject in February, but Rep. Ike Skelton, his House committee chair counterpart, remains publicly opposed to ending the ban, and it is uncertain what the President can and will do to move the issue forward in the House (where it is more likely to pass if it can be pried out of the Committee). Meanwhile, it was announced the day after the President's statement that during the first week of February Secretary of Defense Robert Gates and Joint Chiefs Chairment Admiral Mike Mullen were going to release a Pentagon proposal for gradual implementation of the end of the military ban and present it personally at a hearing before Senator Levin's committee.

Federal — The Obama Administration has added "gender identity" to the list of forbidden grounds for discrimination in federal employment on the website, USAJOBS, that is used to publicize the availability of employment with the federal government. This follows up on prior statements from the Administration that gender identity would be treated as an additional forbidden ground for discrimination by the Administration. BNA *Daily Labor Report*, Jan. 11, 2010.

Federal — Appearing in Tampa, Florida, on January 28 at a ceremony marking the beginning of a major federally-funded high speed rail project, President Obama took audience questions, including one from a student asking the President to expand on his state-of-the-union comment about repealing DADT. Obama responded by reiterating his position and then also stating support for pending legislation to extend federal benefits to same-sex partnerships. "At the federal level," he said, "one of the thing that we're trying to do is to make sure that partnerships are recognized for purposes of benefits," mentioning hospital visitation rights, Social Security and pension benefits. "A lot of companies — on their own, some of the best-run companies — have adopted these same practices," he continued. "I think it's the right thing to do, and it makes sense for us to take a leadership role in ensuring that people are treated the same." *Sun Sentinel*, Jan. 29. Presumably the President was referring to a bill introduced in the House by Rep. Tammy Baldwin that would repeal DOMA and replace it with federal recognition for partners who enter civil unions, domestic partnerships, or marriages under state law. He has yet to state public support for same-sex marriages, however.

Federal — A first for the Obama Administration? The president has appointed Amanda Simpson, a transgender woman, to be the Senior Technical Adviser to the Commerce Department. She most recently served as Deputy Director in Advanced Technology Development for Raytheon, a position in which she transition from male to female. In 2005 she led the successful effort to get Raytheon to add gender identity to its EEO policy, and also waged an unsuccessful campaign for election to the Arizona House of Representatives. According to

press reports, Simpson may be the first transgendered person to receive a presidential appointment. *HuffingtonPost*, Jan. 4, 2010.

New York — This was inadvertently left out of the January issue in the end-of-year rush to get the newsletter done. On December 16, Governor David Paterson came to the New York City LGBT Community Services Center to sign an Executive Order, No. 33, banning discrimination on the basis of gender identity and expression by all executive branch agencies of the New York State government. A bill titled the Gender Identity Non-Discrimination Act (GENDA) has been pending in the legislature for several years, and although it has considerable co-sponsorship has not moved to the floor yet in either chamber. A.S.L.

Portugal's Parliament Approves Change in Marriage Definition

A coalition of left and center-left parties in the Portuguese Parliament voted on January 8 to alter the definition of marriage so as to allow for same-sex marriages. A majority of the legislators opposed a proposal that the issue be put to a national referendum. The leader of the Socialists opined that the legislature already had a mandate from voters on this issue because if was part of the leftist party platforms in the most recent elections. However, a proposal to alter adoption laws to allows adoptions by same-sex couples was unsuccessful, so same-sex marriage in Portugal, as envisioned by the current Parliamentary majority, is not fully equal to marriage between different-sex couples. Final approval is up to the nation's president, a conservative who had not taken a public position at the time of the vote. If finally enacted, the law would bring Portugal in line with its neighbor, Spain, who authorized same-sex marriages several years ago. *New York Times*, on-line edition, January 8. A.S.L.

International Notes

Italy — The *Daily Telegraph* (UK) reported on Jan. 29 that the Italian government is planning to open a prison exclusively for transsexual inmates near the city of Empoli in Tuscany. The small unit is planned to hold up to 30 inmates, and is proposed in response to evidence that transsexual inmates face discrimination in Italian prisons.

Malawi — The international press focused attention on the ongoing trial of Tiwonge Chimbalanga and Steven Monjeza, a same-sex couple who attempted to conduct a traditional union ceremony in public and found themselves under arrest, alelged with violation of Malawi's draconian anti-gay laws. The men were held in prison without bail and claimed that they were subjected to beating and other mistreatment. Responding to international protests about the prosecution, Malawi's Information Minister released a statement claiming that the two men were "clearly breaking the laws of Malawi. As government," continued Leckford Mwanza, "we cannot interfere in the court process. We depend on our Western friends, yes, but we ar a sovereign country." The Associated Press, in reporting these comments, noted that 40 percent of the Malawi government's budget came from foreign donors, and civil rights campaigners are calling on nations that provide financial support to Malawi to exert some influence. The men's lawyer pointed out the contradiction that although the penal code criminalizes homosexual conduct, the Bill of Rights of the nation's new constitution prohibits sexual orientation discrimination, and the lawyer has applied to the chief justice of the nation's Supreme Court for a constitutional review of the penal statute under which the men are being prosecuted. *Washington Post*, Jan. 18.

Mexico — A Mexico City law, passed in December and due to go into effect in March, will authorize performance of same-sex marriages in that municipality. It has drawn the opposition of federal prosecutors, according to a Jan. 27 report in *The Washington Post*, which relates that the federal Attorney General's Office has released a statement claiming that the local law "violates the principle of legality, because it strays from the constitutional principle of protecting the family." The AG's office said it had filed an appeal with the Supreme Court, asking that the local law be voided, because it "strays from the responsibility of the government to place a priority on safeguarding the interests of children." The article noted that the AG had similarly sought Supreme Court action against a Mexico City law legalizing abortion, but that the Supreme Court upheld the locality's authority to pass the law in a 2008 decision.

Philippines — Business World (Jan. 13), reports that the Supreme Court of the Philippines has ordered the Commission on Elections to admit to the official ballot a party-list representing LGBT candidates for the May 10 legislative elections. In a Nov. 11 ruling, the Commission had rejected the group's application on the ground that it advocates "sexual immorality" and "immoral doctrines." The high court issued a temporary restraining order against the Commission, relying upon the Philippines accession to the International Covenant on Civil and Political Rights, which establishes a mandate of non-discrimination in access to the political process.

South Korea — Korea Times reported on Jan. 3 that the Seoul Administrative Court, overturning an adverse ruling by the Justice Ministry, granted refugee status to a gay man from Pakistan, finding that he would be subjected to persecution if deported back to his home country because of the intense anti-gay hostility in that country. The Administrative Court's ruling is subject to review by the Supreme Court before becoming final. (Ironically, at about the time this case was reported, a U.S. court rejected review of denial of refuge to a gay Pakistani in the U.S.)

Turkey — Kaos GL, an LGBT rights organization in Turkey, has reported on-line that the Prime Minister's Public Officials Ethics Committee has drafted a regulation under which the directions to inspectors investigating ethical issues in public institutions will include a mandate of non-discrimination on the basis of sexual orientation. If adopted, this draft would be the first time official policy of any sort in Turkey will include a mandate of non-discrimination on this basis. One of the issues that has delayed Turkey's admission to the European Union has been its failure to adopt policy complying with the EU's requirements concerning sexual orientation discrimination, so the process of attempting to join the Union may be stimulating the government to start adopting policy in this area.

United Kingdom — As an Equality Bill intended to ban anti-gay discrimination works its way through the Parliament, the House of Lords voted down the measure due to arguments that it would inappropriately require the Church of England (and religious institutions in general) to change their policies concerning homosexuality. According to a report in the *Daily Mail* (Jan. 26), "A powerful coalition of bishops and Conservative peers last night voted to maintain the status quo' by 216–178." Various officials of the Church of England have seats in the Lords and thus can seek to form coalitions to thwart legislation that they disapprove on religious grounds. This comes from having an established church.... A.S.L.

Professional Notes

The LeGal Foundation has announced that the recipients of its 2010 Community Vision Awards, to be presented at the annual dinner in New York City on March 18, will be Michael Adams, Executive Director of SAGE (Services & Advocacy for GLBT Elders), and Richard Socarides, Of Counsel to the firm of Brady Klein Weissman LLP. In addition to his leadership at SAGE, Adams is being honored for his outstanding contributions as an LGBT rights attorney and public educator with the ACLU LGBT Rights Project, of which he is a past Associate Director, and Lambda Legal, where he served as Deputy Director and Public Education Director. Socarides has had a distinguished career in private practice representing LGBT clients as well as important public service as a White House Special Assistant to President Clinton and as a staffer for U.S. Senator Tom Harkin (D-Iowa). He has been active in several president campaigns, and is frequently quoted in the press as a knowledgeable commentator

on LGBT public policy issues. Both Adams and Socarides have been listed by Out Magazine as among the 100 most influential gay men and lesbians in the United States.

Our Professional Notes usually relate solely to the legal profession, but the death in New York City on January 29, 2010, of Dr. Bertram H. Schaffner (age 97), should be noted here, because Dr. Schaffner played an important role in getting the American psychiatric profession to change its views about homosexuality and ultimately to embrace openly-gay psychiatrists as an honored part of that profession, steps that influenced the American Bar Association to change its policies and helped to advance the cause of decriminalizing gay sex and enacting anti-discrimination laws. A lengthy paid death notice appeared in the *New York Times* on January 30, but it downplays his achievements in this regard and emphasizes more "mainstream" credentials, such as his military service as a psychiatrist during World War II, his participation at the Nuremberg Trials and subsequent publication of a book that achieved important influence in the process of denazification in Germany after the war, and his important contributions in the arts as a collector and philanthropist. Dr. Schaffner was instrumental in formulating and executing the strategy of getting the American Psychiatric Association to reverse its views and formal policies on homosexuality, took a leading role in organizing LGBT psychiatrists into an effective advocacy force within the profession, for years hosted social and organizational events for LGBT psychiatrists in his home, and took a leading role (this acknowledged in the death notice) in advocating for the mental health needs of people living with HIV and the health care providers who were dealing with the epidemic. He continued to maintain a private practice until shortly before his death.

The National LGBT Bar Association has reported that Donna M. Ryu, an openly-lesbian professor at U.C. Hastings College of Law, has been appointed a U.S. Magistrate Judge for the Northern District of California. An immigrant from Korea, Prof. Ryu and her same-sex partner live with their son in the East Bay. She graduated from U.C. Berkeley Law School, has extensive practice experience prior to her academic clinical career, and has been honored for her achievements by a wide range of professional and civic organizations. A.S.L.

AIDS & RELATED LEGAL NOTES

Day Camp Violated ADA By Refusing Admission to HIV+ Boy

In *Doe v. Deer Mountain Day Camp, Inc.*, 2010 WL 181373 (S.D.N.Y., Jan. 13, 2010), Judge Donald C. Pogue of the U.S. Court of International Trade, sitting in the district court by designated, issued an opinion granting summary judgment for the plaintiffs in a case alleging that the defendant camp had unlawfully discrimination in violation of the Americans With Disabilities Act and the New York State Human Rights Law in denying admission to a youngster who is living with HIV.

"Adam Doe," an adopted child who was born HIV+, has been taking retrovirals for years and has an undetectable level of HIV. On the advice of his HIV doctor, his parents have sought to keep his HIV status confidential and have not notified the school he attends that he is HIV+. He receives medication in the morning and evening and does not bring it to school. He enjoys playing basketball and, at age 10, wanted to attend a basketball day camp program run at the defendant's facility. His mother spoke with the director of the basketball program, telling him that Adam was HIV+ but that the Clinic had said it would be fine for him to participate in the basket ball camp. The director mailed her an application to complete.

In filling out the application, she did not mention Adam's HIV status, because she "felt funny" about how the director had responded to her comments and because her doctor had advised not to disclose it. She asked Adam's regular pediatrician, who was not involved in his HIV treatment, to fill out the necessary medical form for the camp. This doctor, without consulting Adam's HIV doctor, decided after some "agonizing" that he should mention HIV on the medical form, and he would not submit the form unless Mrs. Doe disclosed the issue to the camp administration. He testified later that he was concerned whether the camp followed universal precautions and suggested that they establish formal policies. The operators of the camp had their medical consultant investigate and they decided to deny Adam admission to their facility because they felt they were unable to make reasonable accommodations for Adam. According to testimony by Adam's mother, the co-owner of the camp who called her expressed concern about possible HIV transmission.

Judge Pogue found that Adam, being HIV+, is a person with a disability under the public accommodations provisions of the ADA, and that the camp fell under those provisions. The judge concluded that the summary judgment record supported "the inference that DMDC denied Adam admission because of his disability," and that "Defendants have presented no evidence to raise an issue of fact for trial with regard to DMDC's denial of admission. Defendants insist that other considerations led to their decision to deny Adam admission, such as their concern about the side effects of Adam's medications and his alleged absence at an earlier campg. But Defendants' asserted alternate justifications for denying Adam admission confirm, rather than counteract, Plaintiff's allegations."

Finally, Judge Pogue observed that the Defendants, who were also relying on a "direct threat" defense (i.e., that Adam could be excluded because he represented a direct threat to the health or safety of others), "have not presented the court with evidence of the objective reasonableness of their direct threat determination sufficient to survive summary judgment." He pointed out, "All medical information was readily available to Defendants, and yet Defendants did not attempt to educate themselves beyond asking one doctor. Defendants argue that they were not afforded a reasonable time to conduct an individualized assessment to make a direct threat determination or to provide reasonable accommodation for that threat," hanging their hat on the fact that they did not receive formal notification of Adam's HIV status until late in the week prior to the start of the camp program.

But Judge Pogue placed no weight on this argument, and was particularly dismissive of testimony about potential risk offered by the camp nurse, whose testimony was shown to be contrary to the prevailing views of experts in this filed. "Nurse Gloskin did provide deposition testimony that HIV in stool can survive in swimming pool water and that HIV can be transmitted by blood on a toilet seat. However, while a health care professional, such as a registered nurse like Gloskin, may disagree with the prevailing medical consensus,' she must provide a credible scientific basis for deviating from the accepted norm,'" citing the Supreme Court's decision in *Bragdon v. Abbott*. "Opinions from health care workers do not constitute objective medical evidence absent such a basis," Pogue continued. "Defendants, however, have not supported Gloskin's position with *any* medical evidence. The mere existence of possible' avenues of transmission, presented without a documented showing,' does not create a genuine issue of material fact as to direct threat.'"

Pogue asserted that his conclusion was not altered by the fact that Defendants had less than a week to process this information and make their decision. He pointed out that in this case they had several days to deal with the information, they had doctors available to consult, and that Nurse Gloskin "should have known that Adam did not pose significant' risks to other children," and he lectured the Defendants that their obligation to the safety of other campers "does not excuse Defendants' actions when based on unsubstantiated fears, espeically in the case of a decision partly made by a health care professional with both extensive experience with HIV and several days in which to

confirm her medical opinions and educate other decision makers."

Concluding, Pogue stated his recognition of "the inherent difficulties in this situation. Mrs. Doe, understandably concerned to protect her son from discrimination, was not forthcoming about his condition. It is more than unfortunate that Defendants — faced with what they may have perceived as Mrs. Doe's reticence — may have felt that they lacked the specific information necessary to make a direct threat assessment. But, as a legal matter, Defendants' feelings cannot relieve them of their duty to base a threat determination on objective medical evidence." Judge Pogue found that the issues were identical under federal and state statutes, so granted summary judgement to Doe against the camp under both the ADA and the NYHRL, while reserving judgment about the co-defendant Basketball Academy, the subcontractor that runs the program, since it was not clear from the summary judgment record what role, if any, it played in the decision to deny Adam admission to the program.

The plaintiffs are represented by a team consisting of attorneys from Cleary Gottlieb Steen & Hamilton, the Legal Action Center and the Legal Aid Society of Rockland County. The firm of Rubin, Hay & Gould PC represents the defendants. A.S.L.

AIDS Litigation Notes

Fifth Circuit — A gay man from Pakistan who tested HIV+ in the midst of his removal process from the U.S. struck out in his attempt to get the Fifth Circuit to require the Board of Immigration Appeals to reopen his case. *Ahmed v. Holder*, 2009 WL 4798128 (Dec. 14, 2009) (not officially published). The per curiam ruling noted that the BIA has concluded, based on the State Department's 2008 Human Rights Report, that there was "no observed persecution based on HIV/AIDS status from government services or society in general, and that a slow, positive change was also occurring even though some discrimination remains." The court also rejected Ahmed's claim that he had AIDS, noting that his lab reports only showed that he tested positive for HIV antibodies. Under the arbitrary and capricious standard, the court found that it was not an abuse of discretion for the BIA to refuse to reopen the case. In addition, it found that because Ahmed had not met the short deadline for appealing the BIA's decision rejecting his claim based on homosexuality, that issue was not properly before the court.

Alabama — The Department of Justice announced on Jan. 19 that U.S. District Judge Callie V.S. Granade (S.D.Alabama) had approved a settlement agreement of a lawsuit that DOJ had initiated against Wales West LLC, owner and operator of Wales West RV Resort and Train and Garden Lovers Family Park in Silverhill, Alabama. The complaint alleged that when the operator of the Park learned that guest family's 2–year-old child was HIV+, it banned the entire family from use of common areas of the resort, including swimming pool and shower facilities. The family had been staying there while the father was receiving cancer treatment in nearby Mobile, Alabama. The settlement provides for a $10,000 civil penalty to the government and $36,000 in damages to the affected family, and obligates the resort to adopt appropriate policies and procedures. The case was brought under Title III of the ADA, which bans disability discrimination by places of public accommodation.

California — The cases just keep on coming of trial judges who order HIV tests for criminal convicts without making the factual findings required under the law. In *People v. Palmeno*, 2009 WL 5134875 (Cal.App., 6th Dist., Dec. 29, 2009), the defendant, convicted of lewd conduct on his two young granddaughters, stuck a finger in a vagina. The prosecutor speculated, without any evidence, that the finger might have a cut on it. That was the only evidence in the case concerning the possibility of HIV transmission in the course of the crime, yet the trial judge ordered HIV testing. The court decided to remand the matter back to the trial court "to give the prosecution the opportunity to offer evidence to support such an order." We wonder, in light of years and years of appellate decisions striking down HIV testing orders rendered without sufficient factual findings, whether prosecutors should be given a second bite at the apple on this issue? Competent trial preparation should inform them that they are going to have to come up with evidence at trial of a real vector of HIV transmission in the course of the alleged crime in order to get an enforceable HIV testing order, so why should they get a do-over?

California — In a ruling that might portend some financial relief somewhere down the line for people living with HIV depending on retroviral cocktails, U.S. District Judge Claudia Wilken (N.D.Cal.) has rejected Abbott Laboratories' motion to dismiss a Sherman Act section 2 anti-trust action challenging its action in sharply increasing the wholesale price of Norvir, an essential component drug of many HIV cocktail treatments. *Safeway, Inc. v. Abbott Laboratories*, 2010 WL 147988 (N.D.Cal., January 12, 2010). We can't begin to unravel the complex anti-trust arguments set out by Judge Wilken in her opinion, which go beyond our level of comfort in describing the predatory pricing doctrine and its application to this case. To boil things down to simple terms, it appears that Norvir sharply increased its price after competitors introduced various combination drugs that sharply reduced the amount of Norvir required to boost efficacy against HIV in a protease cocktail. Since the volume of sales of Norvir dropped commensurately, Abbott increased the price of this essential component in order to maintain its revenue stream. The court rejected its argument that this merely reflected the enhanced value of its product, and found that plaintiffs, a group of retailers of prescription drugs, had stated a viable antitrust claim. Expect an appeal, since big bucks are at stake.

New York — A unanimous panel of the N.Y. Appellate Division, 2nd Department, affirmed a decision by Kings County Supreme Court granting summary judgment in favor of a doctor who was charged with malpractice for incorrectly informing a patient that she was HIV+. *Middleton v. Fuks*, 2010 WL 114796 (Jan. 12, 2010). The plaintiff alleged that she suffered emotional distress when the defendant told her that she tested HIV+, based on lab test results that were labeled "indeterminate." She also charged that the doctor improperly informed the state health department that she was HIV+ even though the test result was indeterminate. In support of his motion for summary judgment, the doctor alleged that he had followed acceptable medical practice in such cases when he informed his patient that he had a "high suspicion" that she was HIV+ and referred her to a specialist for further evaluation and treatment. He also alleged that it was the laboratory, not the doctor, that reported the test result to the state. The doctor had merely completed a survey form from the health department that was triggered by the lab's report. In opposition to the motion, the patient submitted an affirmation from a doctor asserting that the defendant had not followed accepted medical practice by telling the patient that she was HIV+, but failed to submit her own statement directly contradicting the doctor's assertion as to what he told her. Supreme Court found the omission by plaintiff to be fatal to her case, concluding there was no triable issue of fact and that the doctor's asserted conduct did not depart from accepted practice. A.S.L.

Social Security Disability Cases

Kentucky — In *Wilkerson v. Astrue*, 2009 WL 5125686 (W.D.Ky., Dec. 21, 2009), Sr. District Judge Edward H. Johnstone remanded the case back to the Social Security Administration, finding that the record lacked substantial evidence to support the denial of disability benefits to an HIV+ plaintiff. The court found that the ALJ gave undue weight to testimony by the agency's expert which conflicted with information in the plaintiff's medical file concerning his fatigue, but that this was not one of those rare cases where the court could make a determination based on a record where "proof of disability is strong and evidence to the contrary is lacking." The remand is so that the record can

be fully developed and all essential factual disputes can be resolved. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Amicus Brief, *Brief of Amici Curiae Asian American Bar Association of the Greater Bay Area & 62 Asian Pacific American Organizations in Support of Respondents Challenging the Marriage Exclusion*, 14 Asian Pacific American L.J. 33 (Fall 2008–Spring 2009).

Bonauto, Mary L., *DOMA Damages Same-Sex Families and Their Children*, 32–WTR Fam. Advoc. 10 (Winter 2010).

Brown, Major Bailey W., III, *Don't Ask, Do Tell: The Implications of 2008 Circuit Court Decisions for the Standard of Constitutional Review Applicable to the Military Homosexual Conduct Policy*, 201 Mil. L. Rev. 184 (Fall 2009) (Army JAG attorney predicts that Supreme Court would uphold DADT against heightened scrutiny, but in a weakened form under which each individual discharge decision would have to be justified with specific evidence that separating the individual gay member is necessary for the purposes articulated in the statute).

Cain, Patricia A., *Contextualizing Varnum v. Brien: A "Moment" in History*, 13 J. Gender Race & Just. 27 (Fall 2009).

Collett, Teresa Stanton, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 Loy. U. Chi. L.J. 327 (Winter 2010).

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Davis, George B., *Personnel Is Policy: Schools, Student Groups, and the Right to Discriminate*, 66 Wash. & Lee L. Rev. 1793 (Fall 2009).

Dub, Danielle, *King and King: Learning to Treat Others Royally Through Diversity Education*, 31 U. La Verne L. Rev. 109 (Nov. 2009)(suggests role for public schools in reducing homophobia through diversity training).

Dubois-Need, Leslie, and Amber Kingery, *Transgendered in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 Alaska L. Rev. 239 (December 2009).

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Flaspohler, Frank, *All Who Live In Love*, 11 Loy. J. Pub. Int. L. 87 (Fall 2009) (Catholic argument in favor of allowing same-sex marriage published in the law review of a Catholic law school).

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Gardina, Jackie, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 Vt. L. Rev. 291 (Winter 2009).

Glazer, Elizabeth M., *Seeing It, Knowing It*, 104 Nw. U. L. Rev. Colloquy 217 (Dec. 6, 2009) (further dialogue about impact of *Lawrence v. Texas* on obscenity laws).

Harvey, Kathryn J., *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce*, 78 Fordham L. Rev. 1379 (Dec. 2009).

Helfland, Michael A., *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. Pa. J. Const'l L. 1 (Oct. 2009).

Hill, John Lawrence, *The Constitutional Status of Morals Legislation*, 98 Ky. L.J. 1 (2009–2010).

Iguchi, Jamie, *Satisfying Lawrence: The Fifth Circuit Strikes Ban on Sex Toy Sales*, 43 U.C. Davis L. Rev. 655 (Dec. 2009).

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

Johnson, Danielle, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 Santa Clara L. Rev. 225 (2010).

Kellman, Bonnie A., *Tinkering With* Tinker*: Protecting the First Amendment in Public Schools*, 85 Notre Dame L. Rev. 367 (Nov. 2009).

Knouse, Jessica, *From Identity Politics to Ideology Politics*, 2009 Utah L. Rev. 749.

Lain, Corinna Barrett, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. Rev. 365 (December 2009).

Leonard, Arthur S., *Exorcising the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 Chi-Kent L. Rev. 519 (2009).

Leonard, Arthur S., *Has a Tipping Point Been Reached in the Quest for Legal Recognition of Same-Sex Relationships?*, 25 Civ. Rts. Lit. & Att'y Fees Ann. Handbook 501 (2009) (author's answer: maybe).

Lindevaldsen, Rena M., *Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 Wm. & Mary J. Women & L. 29 (Fall 2009).

Long, Justin R., *Demosprudence, Interactive Federalism, and Twenty Years of Sheff v. O'Neill*, 42 Conn. L. Rev. 585 (Dec. 2009) (Provocative suggestion that state constitutional decisions, such as the Varnum same-sex marriage decision by the Iowa Supreme Court, may occupy a niche similar to U.S. Supreme Court dissents in their potential impact on federal constitutional development).

Manderino, Chase, *Understanding the Lobbying Efforts of a Church: How Far Is Too Far?*, 2009 Brigham Young Univ. L. Rev. 1049.

Nikas, Luke, *Rethinking the Use of Foreign Law and Public Consensus: The U.S. Supreme Court's Inconsistent Methods for Defining Constitutional Rights*, 13 Lewis & Clark L. Rev. 1007 (Winter 2009).

Olson, Christine L., *Second-Class Families: Interstate Recognition of Queer Adoption*, 43 Fam. L.Q. 161 (Spring 2009) (Schwab Essay Winner).

Orth, John V., *In Re Tenancy by the Entirety — Married Couples, Common Law Marriage, and Same Sex Partners: Orth v. Orth*, 85 N. Dak. L. Rev. 287 (2009).

Quallen, Nicole M., *Damages Under the Privacy Act: Is Emotional Harm "Actual"?*, 88 N.C. L. Rev. 334 (Dec. 2009) (focuses on cases in which Privacy Act violation involved disclosure of pilot's HIV status).

Rosenberg, Gerald N., *Saul Alinsky and the Litigation Campaign to Win the right to Same-Sex Marriage*, 42 John Marshall L. Rev. 643 (Spring 2009) (coupled with: Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 John Marshall L. Rev. 671 (Spring 2009).

Rycroft, Alan, *Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice*, 30 Industrial Law J. (UK) 1431 (July 2009).

Scott, Elizabeth S., *Surrogacy and the Politics of Commodification*, 72 L. & Contemp. Probs. 109 (Summer 2009).

Shapiro, Ilya, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy* (Review of *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty* by Helen J. Knowles, Rowman & Littlefield, 2009), 33 Harv. J. L. & Pub. Pol'y 333 (Winter 2010).

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Stone, Geoffrey R., *Same-Sex Marriage and the Establishment Clause*, 54 Villanova L. Rev. 617 (2009).

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Stychin, Carl F., *Faith in the Future: Sexuality, Religion and the Public Sphere*, 29 Oxford J. Legal Studies 729 (Winter 2009).

Swider, Brandon S., *Judicial Activism v. Judicial Abdication: A Plea for a Return to the Lochner Era Substantive Due Process Methodology*, 84 Chi.-Kent L. Rev. 315 (2009) (argues that Lawrence v. Texas provides a basis for more active judicial review in the area of substantive due process).

Taslitz, Andrew E., *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 Tex. Tech. L. Rev. 419 (Winter 2009) (symposium: In General, Should Excuses Be Complete or Partial? Includes incidental discussion of "homosexual panic" defense).

Thro, William E., and Charles J. Russo, *Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers*, 250 Ed. Law Rep. 497 (Jan. 7, 2010).

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Specially Noted:

Vol. 114, No. 5 (Dec. 2009) of the *American Historical Review* includes a collection of articles exploring various aspects of the subject "transnational sexualities." ••• Symposium: As Iowa Goes, So Goes the Nation: Varnum v. Brien and Its Impact on Marriage Rights for Same-Sex Couples, 13 Journal of Gender, Race & Justice.

AIDS & RELATED LEGAL ISSUES:

Ara, Allison, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 Santa Clara L. Rev. 255 (2010).

Quallen, Nicole M., *Damages Under the Privacy Act: Is Emotional Harm "Actual"?*, 88 N.C.L.Rev. 334 (Dec. 2009) (Should individuals who suffer emotional distress because of violation of their statutory privacy rights by federal agencies be entitled to compensation? Case of HIV+ pilot whose license was revoked due to unlawful sharing of information about his HIV status between federal agencies).

EDITOR'S NOTE:

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